SONGS WITHOUT MUSIC:

Aesthetic dimensions of law and justice

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Abstract

Songs Without Music is about the aesthetic dimensions which lie at the heart of law and justice. Aesthetics is the faculty which reacts to the images and sensory input to which we are constantly exposed, and which, by their symbolic associations, significantly influence our values and our society. 'Legal aesthetics' suggests that legal discourse too is fundamentally governed by rhetoric and metaphor, form, images and symbols.

This argument involves three steps. First, an aesthetic methodology, sensitive to the form and imagery of legal texts, can illuminate both the meaning and force of law. Second, an aesthetic epistemology helps illuminate the social values which find expression in law as well as the form they take. Social conflict is not just an argument about reasons; it is also a battleground of symbols. Third, taking aesthetics seriously has normative implications. If we thought that symbolism and imagery were not just failures in law's rationality, but part of its power and humanity, what would the legal system look like? The thesis contrasts a variety of modern legal theories and argues that each show a commitment to particular aesthetic values. I conclude by attempting to conjoin the ideas of legal pluralism with the changing aesthetic tenor of the times, in order to find new approaches to law and new metaphors to vivify them.

These arguments are developed using a range of methodologies of growing significance in legal theory, including semiotics, legal history, literary studies, and postmodern philosophy. At the same time, each chapter focusses on a different case study of legal discourse, including the history of the English statute, capital punishment, illegal drugs, and contemporary legal theory.

The complex interrelationship of meaning and structure is fundamental to the idea of law I propose. By treating a text, legal or otherwise, as merely a sequence of logical propositions, readers miss its formal and symbolic meanings. In the pages that follow, therefore, I attempt to develop my argument by aesthetic as well

as rational means. Music is the focus for this. Each chapter is based on a different musical form, and each uses music as comparison and metaphor. But more than this, in different ways and in different styles, each chapter embodies a complex of aesthetic resonances which relate to the argument the thesis develops. *Songs Without Music* has been designed not only to *talk about* aesthetic meaning, but to embody it.

Résumé

Romances sans musique traite des dimensions esthétiques qui sont au coeur du droit et de la justice. L'esthétique définit l'ensemble de nos réactions aux images et aux sensations auxquelles nous sommes exposés en permanence et qui, par leurs associations symboliques, influencent de manière sensible nos valeurs et notre société. L'esthétique du droit implique que le discours juridique, lui aussi, est fondamentalement régi par la rhétorique, la métaphore, la forme, les images, les symboles.

Ce travail comporte trois volets. En premier lieu, une méthodologie esthétique illuminera le sens et la force du droit. Deuxièmement, une épistémologie esthétique permet de dégager les valeurs sociales qui trouvent leur expression et leur forme dans les lois. Les conflits de société ne se limitent pas à des arguments de raison; ils mettent aussi en jeu une bataille de symboles. Enfin, prise au sérieux, l'esthétique a des implications normatives. À quoi ressemblerait le système juridique si le symbolisme et les images étaient considérés, non comme des défauts dans la rationalité des lois, mais comme une partie intégrante de leur force et de leur valeur humaine? Cette thèse confronte un ensemble de théories juridiques contemporaines et tente de démontrer que chacune révèle une adhésion à des valeurs esthétiques particulières. En conclusion, nous tentons de montrer comment le pluralisme juridique reflète l'évolution de l'esthétique à travers les époques, afin de proposer de nouvelles façons d'aborder le droit et des métaphores originales pour lui donner une nouvelle vigueur.

Ces éléments sont développés en utilisant un éventail de méthodologies d'importance croissante dans le théorie juridique, dont la sémiotique, l'histoire du droit, la critique littéraire et la philosophie post-moderne. Chaque chapitre est consacré à un type de discours juridique, comme l'histoire du droit écrit anglais, la peine capitale, les stupéfiants et la théorie contemporaine du droit.

L'interaction complexe entre sens et structure est fondamentale dans l'optique du droit que nous avançons. En traitant un texte, juridique ou non, comme une simple suite de propositions logiques, le lecteur passe à côté de son sens formel et symbolique.

Dans ce qui suit, nous tentons de développer notre argumentation en suivant des approches aussi bien rationnelles qu'esthétiques. La musique en est le fil conducteur. Chaque chapitre repose sur une forme musicale différente et la musique y figure en tant que comparaison et métaphore. Au-delà, chaque chapitre incarne différemment un spectre de résonances esthétiques ayant trait à l'argumentation développée par la thèse. *Romances sans musique* vise non seulement à parler de l'esthétique, mais aussi à l'exprimer.

Preface

In the beginning was the word, but before the word came the voice, raw and unformed, just a potential to be explored. The idea of many voices—of poly/phony—runs through this work like a refrain, and of the many voices I use to communicate my argument, the most insistent and the most protean, is that of music. This is an opera about law and meaning, but music is its *leitmotif*.

There are at least three aspects to this attempt to use ideas about and the experience of music to convey meaning. The first is structural. Each chapter is structured as a kind of linguistic equivalent of a different musical form, and often of a particular exemplar of it. Each is meant to be, then, a kind of 'Song Without Music'. I am thinking here of the famous *Songs Without Words* of Felix Mendelssohn, who may or may not have been a distant ancestor of mine. Mendelssohn, at any rate, was my father's original surname and perhaps my own secret patronymic.

Chapter 4, to give one example, is organized around Mozart's *Requiem*, and has sections entitled Agnus Dei, Dies Irae, and so on. These sections parallel the organization of a requiem as well as relating to the arguments I make there.

Chapter 1, which is modelled on the C Major *Prelude* of the *Well-Tempered Clavier*, is a more complex example. The chapter evinces a pattern of unfolding and emergence which reflects both the organization of the first Prelude, and the Foucauldian argument about the emergence of modernism which I relate to it. Several shared characteristics of the chapter, the Prelude, and Foucault's interpretation of modernism, will help to draw out these connections. First, that of *unity*, an expression of an aesthetic ideal. Like the Prelude, the chapter is not divided into distinct sections but evolves continually from point to point. Secondly, that of *identity*, an exemplification of modernity's focus on individualism as the unit out of which societies are not so much built as accrete. Just as the Prelude is built on a musical unit or atom of eight notes whose pattern is

constantly repeated throughout the piece, so too the chapter is built of paragraphs each of which is around sixteen lines long. The paragraph is like a children's building block from the very sameness of which infinite structures may be built. Thirdly, that of *duality*, which reflects the dichotomization at the heart of the modernist dilemma: between form and content, self and other, reason and the aesthetic. In the Prelude, the eight-note unit is played twice, identically, in every bar—in fact, as I noted, the idea of a double is of more general significance in the scheme of the *Well-Tempered Clavier*. The chapter, for its part, uses paired paragraphs whose arguments respond to and balance each other. They form bars of two units each, and in twinned lockstep, the chapter thus proceeds. Finally, that of a calculus of gradual changes and shifts—a Foucauldian interaction between identity and duality. The Prelude is not static; it uses the formula of units and bars to build ever bigger structures in a continuing process of expansion and change. In the chapter, too, it is hoped that units form bigger units in a continuing process of exegetical building. The seamless feeling given by the form masks a layered structure of some care, and this structures creates a *form* which both disciplines and speaks to the content of the chapter. It is part of the aesthetic meaning which the chapter seeks to explain.

The second aspect of the use of music as a voice which articulates aesthetic meaning is thematic. The musical forms and compositions which are the focus of each chapter have specific relevance to the arguments developed there. The *Motet,* for example, centres on a comparison between the history of the English motet from 1200-1500 and the history of English legislation over the same period. The same formal and stylistic changes took place in each discipline, suggesting a parallel change in the world view of both. Musical themes are brought to bear very differently in the *Requiem,* the Latin text of which expresses certainty in God's infallible judgment of the dead. This acts in ironic counter-point to the judicial system's failed attempts in the area of capital punishment to replicate such certainty in deciding who will live and who will die. And in the *Quartet,* to give another

example, both the history and musicality of Messiaen's remarkable composition are used to help talk about the dangers of modernism and the paradigm shift to postmodernity which, in legal theory no less than in aesthetics, we are undergoing.

The third way in which music gives voice to meaning is emotional. Each piece of music provides the chapter modelled on it with a distinct character. The *Prelude* attempts to capture the meditative mood of the *Well-Tempered Clavier,* just as the obsessive strains of Rachmaninoff's Rhapsodie infuse the *Theme and Variations,* and a certain reflective whimsy colours the *Quodlibet*. Above all, the interaction of form and feeling demonstrates the way in which meaning outstrips the discursive and the rational.

In each chapter, these aesthetic resonances are developed differently. I leave the reader/listener to bring their own understanding to bear on the development of those resonances, and provide here only elliptical suggestions for the way in which each chapter offers a different character as well as a different structure and content. Music gives the *Prelude* its pace and its style, as well as providing a literal reflection of Bach's structure. In the *Fugue*, music is a metaphor, and a general framework, as well as providing a metaphoric reflection of the polyphonic structure. In the *Motet*, the music of the Renaissance is an exemplification of the argument of the chapter; the history of the motet is used as a metonym to the legal history of the chapter. In the *Requiem*, Mozart's music influences the form of the chapter and at the same time an ironic commentary on its subject; the text of the requiem is used as a synonym to the legal texts of the chapter. In the *Theme & Variations*, the music of Brahms and Rachmaninoff provides stylistic and analytic insight into the argument developed there; musical experience is a conceptual influence on the ideas there advanced. In the *Quartet*, the music of Messiaen and others, provides historical and cultural insight into the history and development of legal theory. In addition, in both the *Quartet* and in the *Quodlibet* which follows, aesthetics is defended as a human value of great importance. Musical experience is

therefore a normative influence on the ideas of legal theory and justice there advanced.

These ideas have developed over several years; parts in some of the chapters have appeared in other published sources, though all have been substantially rewritten for the purposes of this thesis. None of this could have come to fruition without the constant help and support of many people, including my family and friends on three continents. I am especially grateful to the support and enthusiasm of the Law Program in the Research School of Social Sciences, Australian National University, which in 1996 gave me the perfect environment in which to complete this work. But the bulk of my research and writing was done in Montréal over a number of years. My study was funded, and generously so, by a Commonwealth Scholarship from the Government of Canada, where I found the officers of the Canadian Bureau of International Education and the International Council for Canadian Studies, who at different times administered the scheme, to be extraordinarily generous and unfailingly helpful. Study under such conditions was a rare privilege.

In Montréal, my teachers, colleagues and friends in the Faculty of Law at McGill University welcomed me into an intellectual community subtler, more sophisticated, and warmer, than I could possibly have imagined. I am forever in their debt. My supervisors, Professors Margaret A. Somerville and Roderick A. Macdonald, gave me the inestimable gifts of their time and patience, their wisdom and their friendship. I have to single out Rod, who is a supervisor *nonpareil*, and always showed me an interest and engagement above and beyond the call of duty. Appropriately enough, I learnt more than I can say. In return, I note that the scholar who said *tempus edax rerum* obviously had no understanding of memory.

I could not even have conceived of this project without this polyphonous encouragement, for they helped me develop words out of *my* raw and unformed voice. But for the final product of these labours I am entirely culpable. It is rather unorthodox in form and purpose, as is perhaps already apparent. A dissertation is expected to fulfil certain functions, and I am required to note the following provisions laid down by the Faculty of Graduate Studies and Research:

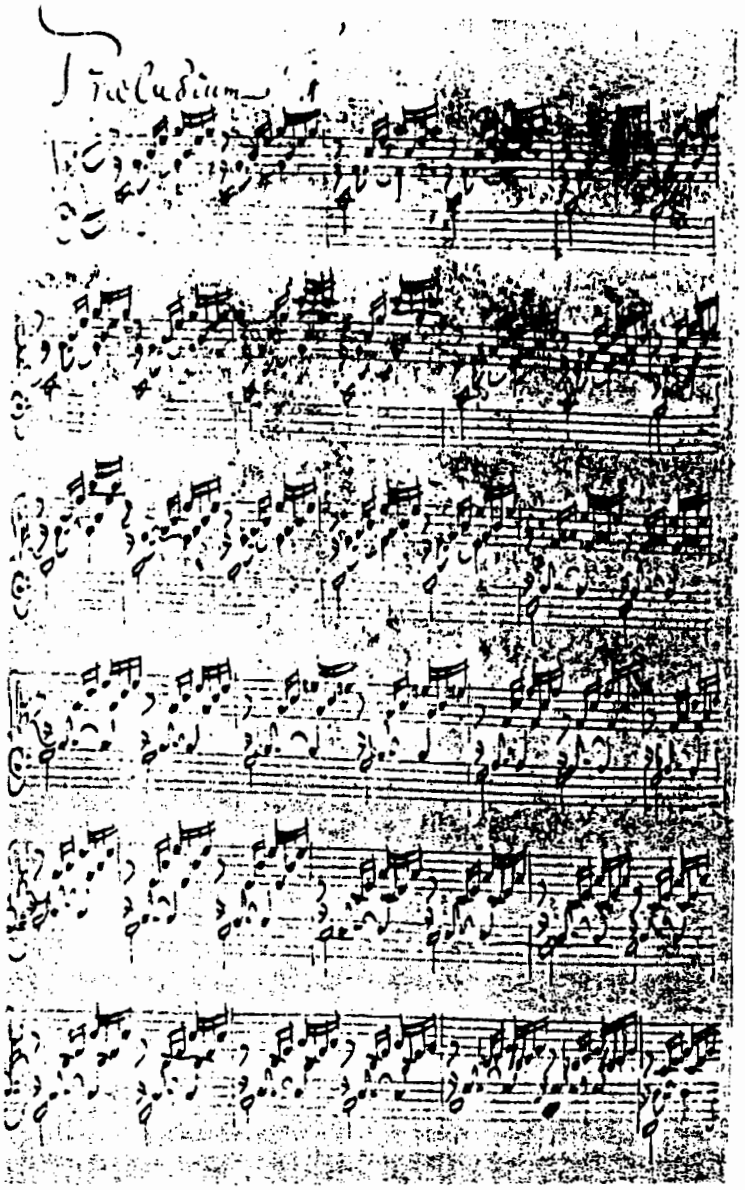
> Candidates have the option of including, as part of the thesis, the text of one or more papers submitted or to be submitted for publication, or the clearly-duplicated text of one or more published papers. These texts must be bound as an integral part of the thesis.
>
> If this option is chosen, connecting texts that provide logical bridges between the different papers are mandatory. The thesis must be written in such a way that it is more than a mere collection of manuscripts; in other words, results of a series of papers must be integrated.
>
> The thesis must still conform to all other requirements of the "Guidelines for Thesis Preparation". The thesis must include: A Table of Contents,. an abstract in English and French, an introduction which clearly states the rationale and objectives of the study, a comprehensive review of the literature, a final conclusion and summary, and a thorough bibliography or reference list.
>
> Additional material must be provided where appropriate (e.g. in appendices) and in sufficient detail to allow a clear and precise judgment to be made of the importance and originality of the research reported in the thesis.
>
> In the case of manuscripts co-authored by the candidate and others, the candidate is required to make an explicit statement in the thesis as to who contributed to such work and to what extent. Supervisors must attest to the accuracy of such statements at the doctoral oral defense. Since the task of the examiners is made more difficult in these cases, it is in the candidate's interest to make perfectly clear the responsibilities of all the authors of the co-authored papers.

Songs Without Music addresses these expectations—the *Fugue* in particular serves, *inter alia,* as both an introduction and a literature review. If it does not do so in predictable ways, that is a consequence of the formal structure and intellectual perspective I have adopted: not just a strength or weakness of my approach, but a necessity. The core of my argument is that aesthetics is a crucial part of how we understand the world. If this is true, then it is important not merely to *talk about* aesthetic meaning in law, but to embody it; to exemplify aesthetics as well as to

explain it. Inspired by writers like Italo Calvino and Douglas Hofstadter, the use of music in this work is only one way in which I attempt to communicate symbolic meaning aesthetically as well as discursively. I say no more by way of explanation: instead, I begin.

Prelude

Senses and Symbols in Aesthetic Experience



The philosophy of aesthetics

Introduction 1—a musical voyage
Introduction 2—an aesthetic voyage
Well-Tempered Clavier 1—rhythm & harmony
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← UNIT
BAR
PHRASE

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Prelude

Senses and Symbols in Aesthetic Experience

The philosophy of aesthetics

Introduction 1—A musical voyage. A recording of this little piece of music is even now to be heard as it flies through deep space aboard the Voyager spacecraft, on a mission in search of other worlds, our frail hurtling embassy to the unknown.[1] A gesture to the galaxy, the regular pattern of sounds which these written signs denote has been chosen to represent something ineffable but eternal about our planet, about a species which happens to inhabit it, about a way in which it expresses itself, about an aspect of its being which finds fulfilment in the expression. A pattern of pitches, unfolding with unhurried inexorability, never quite predictable, never quite surprising; hammers striking keys, a bold sound and sudden decay; the unmistakable interpretation of Glenn Gould at the piano. The piece is the merest gesture of hope amidst the sterile silence of space, and in that it is a perfect counterpoint to the spinning projectile which carries it forward, and out, and away.

Introduction 2—An aesthetic voyage. What is it about those few bars which seems to embody the creative process, that seems not only to have emerged from a transcendent aesthetic sensibility but to generate something of that sensibility in all those who hear it, even if only for the brief period that it hangs in the air? In the pages that follow I explore how our experience as aesthetic beings is an aspect of our understanding of law; how there is a dimension in which aesthetic discourse, and the experiences which underpin it, can enrich and make more complex our often dichotomous understanding of the relationship between legal order and social conflict. Some mapping of the boundaries of that "aesthetic dimension" is called for. This chapter is a Prelude or an Overture, therefore, a laying down of

groundwork and a hint of future themes, in more ways than one. But I wish to begin by discussing the meaning of aesthetics in the more familiar context of art and music. In this voyage, the first Praeludium of Bach's *Well-Tempered Clavier*[2] will serve as a sextant. Its advantages are its beauty, its familiarity, and its simplicity. Let is move, then, away from the specifics of a particular performance, to a consideration of the musical text—although it is undoubtedly Gould's idiosyncratic rendering of that text which traverses the galaxy and which is etched upon my mind.

Well-Tempered Clavier 1—rhythm. Here is music stripped to its essence. There is no melodic line here, nor dynamic structure, nor rhythmic complexity or variety. With the exception of the last four bars, each bar is made up of a single unit or pattern played twice, a succession of sounds following with metronomic regularity one upon the other. And every bar thus formed is like every other bar, each likewise following unremittingly upon its predecessor. The only textual variety is therefore harmonic, and even here there is as little change as possible. The piece is in C Major, the most basic of keys. In every bar the pattern of ascent and descent is identical—five notes form a climbing arpeggio, and the last three notes are then repeated, thus providing an eight note unit which is then repeated without variation.[3] The notes that form this pattern change in each bar, but here too the change is absolutely minimal.[4] Each bar is thus only a fractionally modified version of its neighbours. The effect is of imperceptibly merging harmonies, the aural equivalent of the gently shifting hues of a sunset.

Well-Tempered Clavier 2—structure. Nothing programmatic guides our thoughts away from the pure abstraction of the notes. It is simply called a "prelude", which is to say a beginning or an introduction. It has a number, not a name, and thus takes its place as the first of twenty-four, each in a different key, corresponding to the twenty-four different major and minor keys possible—the

arrangement of the pieces again being so organized that the move from the tonality of one piece to that of the next is as slight as possible.[5] These twenty-four, along with the fugues which are their companion pieces, belong to a book and there are two such books, each arranged identically. There is a multiple symmetry at work here. The unbroken regularity of note pursuing note is paralleled by the unbroken regularity with which prelude and fugue succeeds prelude and fugue. And at the same time, as the repetition or doubling of each unit (which forms each bar) is consumed by a gradually changing harmony (which forms each piece), a gradually changing tonality from piece to piece (which forms the book) is consumed by the repetition or doubling of each book (which forms the whole work).[6]

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Philosophy of aesthetics 1—the dream of certainty. From the standpoint of philosophy, the aesthetic appears as a problem. As a discipline which has been traditionally based on the paramountcy of reason, philosophy has tried not to explain the transformative power of the aesthetic but to domesticate it. Behind this attitude lies philosophy's search for objective and absolute 'right answers' to moral questions, in the shadow of which the relationship of the rational and the non-rational, the faculty of reason and the realm of the aesthetic, has developed.[7] Thus for the Greeks, truth was 'out there' in the universe and discoverable by dint of intellectual reflection.[8] In Plato, art is, at best, an imitation *(mimesis)* of this external truth (so too in Plotinus) and, at its worst, a kind of falsehood or surrender to "feelings and unhealthy cravings". For him, the aesthetic was "the soul's foolish part."[9] And in St Thomas Aquinas, for example, though objective truth has been sacralized, its existence is not yet in question. Aquinas defends metaphor and poetry as Plato does not. God's truth can be discerned—rationally, by the literal Word, or revealed—spiritually, by metaphorical words. But both are means of

access to the *same* objective reality, albeit "veiled", in the latter case, by "sensible imagery".[10]

Philosophy of aesthetics 2—the Enlightenment. The great Enlightenment trend towards scientific rationality made problematic the idea that this truth was 'out there', whether in the structure of the universe or the mind of God. But later philosophers did not abandon their desire to find for truth an objective and absolute home. Rather, they simply transferred the place in which it resided *inwards*, to the newly-autonomous human self, and to the faculty of human reason. It was now the uniquely human discourse of reason which was treated as a window onto an absolute and objective reality.[11] In this context, the danger of the aesthetic lay in its capacity to undermine the promise of reason; its legitimacy, on the contrary, was as a different and subservient mode of apprehending the same rational truths. Thus Kant and Schiller sought to tame "the egoism of taste" by positing the meaning of beauty as a force in accordance with whose inspiration the rationally-imposed call of conscience and duty could be internalized.[12] Beauty was the emotional register in which the voice of reason was not only heard but *felt*—the inner sense that transformed authority to hegemony, force to free conformity, and punishment to discipline.

Beauty and nature 1—as truth. Plato equated truth with reason and wrote of poetry as "the mother of lies". For over two millennia thereafter, art was expected to justify itself to philosophy. Gradually, however, in and after the Enlightenment, while the hegemonic function of the aesthetic remained, its status changed from that of a servant of rationality in the quest for truth to a substitute for it. Not of course that this was an approach without its forebears. Long before the golden age of Greek philosophy, with its valorization of the rational, art was the *traditional* repository of truth claims; in many societies, that remains the case.[13] How could such societies even conceive of the dichotomy of reason and beauty,

when art was everything, and everything was art? If art now began again to assert its authority at the *expense* of reason rather than in its service, it still did so in the search for a source of objective truth and not as a rejection of it. Even David Hume, so sceptical of the power of reason,[14] found himself unable to sustain a thorough-going relativism in the face of compelling beauty.[15] If truth could no longer be derived from the universe, God or reason, it could still be discovered through feeling.[16]

Beauty and nature 2—as objectivity. For the Romantics like Keats, and also in similar terms in Earl of Shaftesbury, "beauty" and "truth" were treated as equivalent. Bosanquet, whose *History of Aesthetics* was long influential, declared axiomatic "the objectivity and necessary historical continuity of the sense of beauty."[17] Following Rousseau, neo-classical and early Romantic texts frequently justify the aesthetic as a way of discerning the truth encoded specifically in nature. Where before, beauty gave voice and vision to the truth of God or the reason of man, it was now interpreted as expressing the truth of *nature*. But notice that art continues to be mimetic of something objectively true for all time and all people.[18] Its claims to a transcendent universal content thus shored up, the aesthetic continued to perform a hegemonic function, rendering power relations 'natural' and therefore beyond argument.[19] After all, remarked the Earl of Shaftesbury, it was "not porters or beggars" whose nudity we would find beautiful, but only "bodies...of the finer sort".[20]

Nietzsche 1—relativity. Certainly there have been voices of dissent from this tradition, in which beauty has been used as the communicative agent—the voice of discovery— in the service of one objective authority after another. Most eloquently, Nietzsche, turning orthodoxy on its head as he did so often, insisted that the time had come for philosophy to justify itself to art. Here at last was a clarion call to battle the hegemony of reason in the construction of values; an

agenda which has been pursued with relentless vigour over the past century.[21] Our faith in the ability of reason or nature to ground objective truth must now be taken to be as shaky as our faith in the ability of God or the universe to do the job. And inasmuch as the philosophy of the aesthetic has often been concerned with the *regulation* of feelings, the achievement of control over emotions and the stifling of the turbulent will, Nietzsche, for one, will have none of it.

Nietzsche 2—certainty. Nietzsche, however, did not surrender his desire for certainty any more than Plato or Kant. He merely transferred the locus of the fulfilment of that desire yet again, to the sense of beauty itself.[22] In Nietzsche, the mimetic aspect of the aesthetic is finally broken: the aesthetic is no longer a mirror which reveals the hand of God or nature. Rather, beauty becomes a means of access to a truth that glows within us. But there is still an assumption that the aesthetic is not contingent, that it has something objective to tell all of us about the world.[23] In Nietzsche's philosophy, moreover—and here he was by no means alone—a monumental ego was at work.[24] When he wrote that "it is only as an *aesthetic phenomenon* that existence and the world are eternally *justified*"[25] he was by no means speaking as a relativist. Nietzsche believed in the universal validity of his *own* perception of beauty. Ironically, Nietzsche is at one with Kant on this point, for Kant too declared that in claiming that something is beautiful we are making a judgment which demands universal assent.[26] Though their visions of the beautiful differ radically, both turned their desire for an objective basis for it into a fundamental principle.

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The objectivity of beauty 1—introduction. The desire for a way to find out the objective truth about the world (born, perhaps, of a fear of uncertainty which often finds expression in a distrust of emotions and the subjective[27]) has underpinned the

philosophy of aesthetics, though its role in the fulfilment of this desire has varied through the ages. Yet surely any attempt to reduce the aesthetic to the status of a dependent variable—a singer in the song of God or reason or nature—must now seem contrived. To some extent this realization gave birth to the modern tradition which we find in Walter Pater, wherein the conjunction of aesthetics with *ideas* or *truth* has been abandoned in favour of a focus on the very *experience* of beauty, and the phenomenology of the feelings it engenders.[28] Grant autonomy to the aesthetic as a discrete "universe of discourse",[29] however, and the Voyager-like quest for certainty in *that* universe is not yet extinguished. From Aristotle on, writers have attempted to establish the objectivity of aesthetics not in terms of other discourses, of logic or of ethics, but in its own terms.[30] Still we are engaged in a quest for something absolute and unchanging, although now we do not wish to know whether an aesthetic judgment is (really) true or (really) right, but whether it is (really) beautiful.

The objectivity of beauty 2—Beardsley. From this perspective, Monroe Beardsley argues that a 'true' judgment of aesthetic merit can be achieved by evaluating an artwork in the light of three variables: those of unity, complexity, and intensity. Put succinctly, the more that a work of art is possessed of these qualities, according to Beardsley, the greater its intrinsic aesthetic value.[31] There is some utility in this analysis; it certainly aids in our appreciation of a work of art to consider these aspects. Beardsley, however, would go further, and argue that these criteria allow us to make a judgment of the work which is not merely a matter of personal preference. This assertion of universally applicable "general canons" or rules is surely wrong. Unity and diversity are *both,* in the appropriate context, virtues, as are differing degrees of complexity and simplicity, intensity or passivity. It all depends on the work and the context.

A critique of objectivity 1—Bach. What of the Prelude? Could anything be *less* complex in design or realization? And yet an extra note, the introduction of another variable, would flaw the experience it creates. Beardsley would argue that its simplicity is compensated for by its great unity and intensity.[32] This grievously misdescribes the experience: its simplicity is not a defect overcome or a disadvantage outweighed—it is the very heart of its magnetic power and beauty, as it is also, perhaps, in some of the paintings of Mark Rothko. We have something of a test case in relation to the Prelude, since the Romantic composer Gounod added a tune to the words of 'Ave Maria' above Bach's harmonic ground, leaving the latter untouched. The unity and intensity of the original are surely unimpaired; all that has been added are various levels of complexity. But as beautiful as the Gounod is, who would suggest that it is therefore *an improvement on* the work of Bach?

A critique of objectivity 2—Mothersill. Faced with the uniqueness of a work of art, no canons can capture the experience or judge the effect of a unique work of art. Beardsley's canons may provide us with a language in which we can describe what we like about something, but they cannot provide us with reasons to guide our judgment beforehand. A "law" or a "principle" of aesthetics would be a proposition, whether universally applicable or only particular to an individual, which would *define* for us what it is about an artwork that makes it aesthetically appealing. Mary Mothersill argues, however, that "nothing I have learned from past experience gives me grounds for saying in advance of a work by Bach...that provided it manifests a particular feature, I will be pleased by it". The merit of a poem or a piece of music is so specific to *it* that nothing we could say about why we like it could help us assess or predict the merit of something else (equally specific).[33] More, the attempt to establish such laws is exactly contrary to that very spirit of art which denies *a priori* rules of construction in favour of the unpredictable synergy of genius.[34]

The sensory element of aesthetics

The aesthetic 1—and art. We must conclude, therefore, that any hope that the aesthetic is a representation of objective truth, or that beauty can itself be defined, cannot be sustained. Let us move, then, from the content of the aesthetic to its *process*. The right question is not what the aesthetic communicates to us, but *how* it does so. As Gadamer and Dewey emphasize, the aesthetic at its heart involves an *experience* or process of sensory perception, whether the subject is an artist or audience.[35] Such a perception is not limited to things which we choose to classify as works of art, or even with things that are beautiful. This distinction between 'aesthetics' and 'art' is crucial. Rather we are dealing with a way of experiencing which always has something in common with how we approach 'art', but is nonetheless present to some degree at every moment of our lives.[36] In fact John Dewey insists that if we wish to understand art, "we must begin with it in the raw." The aesthetic aspect is central to every experience of our lives in which we become involved, through sensory enjoyment, with the communicative power of rituals and objects. *Art as Experience*, John Dewey's book, sums up the pervasive and quotidian nature of the aesthetic.[37]

The aesthetic 2—and creation. The idea of human intention or agency, therefore, is not a necessary element of the aesthetic. We can and do experience a jar or a text-book aesthetically, though they may have been created with nothing but functionality in mind; we hearken to the sounds of a river and gaze with awe at the colours of a sunset, though no human being was responsible for the palette set before us. But in addressing these objects aesthetically, we treat them *as if* they were willed that way. They are treated as if they were created by somebody, though we may know this assumption to be purely notional, or attribute it to the workings of our unconscious mind, or to the mind of God. The relationship of the

artist to her product is to be construed as a metaphor for the nature of the aesthetic, and not a literal truth.

The sensory aesthetic 1—presentational. Once we reject the ideal of an objective or trans-historical content to this experience, with what are we left? Aesthetics is a way of knowing. In the first place, this way is non-discursive, although, unlike a jewel or a painting, it does unfold through time (so, in their own ways, do films, Grecian urns, and the Bayeux Tapestry). There is a narrative here, certainly a structure, but not a discourse of logic or reason. We are not in the realm of the rational, the linguistic, or the literal. This is not to say that art or music has no *meaning* for us—the question of meaning is something to which I will return in due course—but that the mode by which we apprehend this meaning is not through argument. Its meaning comes from its presentation and its form.[38]

The sensory aesthetic 2—emotional. The aesthetic speaks to our senses and not our intellect; it is our emotions and not our logic which are engaged. When we are moved by a piece of music, as grand as opera or as microcosmic as a Bach Prelude, it is the sensory part of us which is addressed, although its power traverses the whole of our being. As Eagleton writes, "aesthetics is born as a discourse of the body", taking its origin from the Greek *aisthesis*, "the whole region of human perception and sensation".[39] *The sense of beauty*, to use the title of a celebrated book by George Santayana, is as physical and emotional as the senses that inform it.[40] The effect of colour and movement and sound on us, the way in which songs or smells evoke the emotional resonance of the past, the power of an image to sway us or persuade us[41]—by understanding the force of this kind of communication we begin to recognize the strength of the aesthetic in all our lives.

Senses and culture 1—vision. Two aspects of the particular sensory priorities of Western culture are worth noting. Firstly, in modern Western society it is vision

which dominates our sensory array. Other cultures set great store by the senses of hearing, of touch, and even of smell as means of access to the 'truth', but for us, 'seeing is believing', we know, but the rest of that old saw ('but touching's the truth') has long been forgotten. This is part and parcel of the linear and discursive turn of the Western mind, for vision is the most abstract and the most logical of the senses.[42] "Sight isolates, sound incorporates," writes Walter Ong. It is because of the hegemony of sight that I have deliberately chosen to begin my analysis with a piece of music.

Senses and culture 2—language. The other cause and effect of the dominance of the discursive and the rational in this culture is to be found in the unprecedented authority attached to the written word. The consequences of this focus on abstract semiotics, itself further abstracted and commodified by the use of alphabetic script, have resounded through the centuries.[43] This is not to say, however, that language has in some way been stripped of its aesthetic element. At first language was but a series of whoops and cries, as presentational in form and emotional in appeal as any dance or daub. Language too appeals not just to the faculty of reason but to the senses. This is the rhetorical element of language, which finds expression in the pervasive use of metaphor, itself often the transposition of an image or a sound. Poetry intensifies the aesthetic and emotive elements of language, but they are to be found in every sentence and every document, a legal text no less than a play by Shakespeare, in the sound of a word and the look of a page and the feel of a book.[44]

The aesthetic object 1—abstract or concrete. More than the experience of a complex of sensations, our aesthetic attention is absorbed by a specific phenomenological object (whether the object in question is a piece of music or a pot)—with the contrary, therefore, to the authority of reason or of will.[45] As Santayana put it, beauty is value *objectified*, that is, experienced as if it were a

quality of a "thing" itself.[46] Aesthetics, says Beardsley, brackets the thing from its surroundings: it places a frame around a picture, covers on a book, a proscenium arch on a stage.[47] In Kant, the object and the subject confront each other in a space entirely purified of function. But against this view of the aesthetic as an abstraction of essences, we find Heidegger, according to whom the aesthetic experience, whatever the object which inspires it, is based upon "the thingness of the thing", upon its material reality.[48] For Heidegger, the thing is not to be purified but grounded—it is not a collection of disembodied Platonic essences, but rather a dweller in our midst. "Much closer to us than all sensations are the things themselves. We hear the door shut in the house and never hear acoustical sensations or even mere sounds".[49] Even abstract forms have this thingly character. Lines—the softness of a curve, the sharpness of a table edge—and colours—the green grass, the blue sky—carry with them a resonance with those objects of our experience which for us epitomize them.[50]

The aesthetic object 2—artwork or equipment. An appreciation of the art in an artwork, according to Heidegger, is *not* then a pure abstraction of shape or line or colour devoid of context, but neither do we thus treat it as a mere piece of equipment. This is a fruitful distinction to make. In equipment or a tool, colour, surface, material and so on "disappear in usefulness"—they are treated merely as means towards a functional end—while in the work of art they remain present for contemplation.[51] This is the distinction between walking and dancing.[52] In between the utilitarian view of objects which requires form to be subservient to function, on the one hand, and the Platonic idea expressed by Beardsley and much favoured by nineteenth century aesthetes, on the other; between these two extremes lies an engagement with the aesthetic object in its quiddity: not simply as a form but not as mere function or context either.

Aesthetics as personhood 1—thesis and antithesis. How can we get closer to the meaning of this paradox? Consider Kant, according to whom human beings are entitled to respect in the light of which they are to be treated purely as ends in themselves and never as means. Slavery or hostage-taking lacks this respect because people are thus treated precisely as if they were pieces of equipment, to be *used.* Now for Hegel it is the free will of the person which is compromised by this disrespect. Human beings have the capacity for agency and are therefore only to be treated as ends, while everything else, necessarily lacking free will, can properly be treated as means. It is, moreover, in the exercise of *our* will over things that our capacity for agency finds self-expression.[53] For Hegel, then, 'things' are that with which we can do what we will, and into which we place our will in every act of creation, or possession, or use. In all these ways we necessarily treat "the thing in its subservience to human preoccupations".[54]

Aesthetics as personhood 2—synthesis. Let us imagine an archaeology of the "thing". For Plato it is the imperfect realization of a perfect form; for Hegel, the passive receptacle of human will. But Heidegger would turn Hegel on his head and interpret *every* thing in terms of its soul. Rather than seeing the thing as an extension of the will, Heidegger treats it as possessed of a self of its own. A pair of shoes, a painting, a jug, are all anthropomorphized in this way—are all treated as possessing a self which by and large we only associate with humans. In Hegel on the contrary, there is a unpleasant anthropocentricism which treats the environment, the land, and all its living things as reducible to human needs. There is a clear conflict of understanding here, which seems to parallel in a significant way the difference between Kant's understanding of personhood and Hegel's of the object. Hegel's harsh perspective stems from the very dichotomy between person and thing which Heidegger seems to reject.

Artists' attitudes 1—the drive to create. As antithetical as these perspectives are, there is a point of synthesis. Is not the notion of placing your will into a thing, artificial as it sounds, true of the experience of the artist? As Heidegger points out, the philosophy of aesthetics—Tolstoy apart—has been largely written from the standpoint of the viewer and has therefore taken on an unnaturally abstract hue. Yet the relationship of the artist to the art-work, though marked by a unique intensity, is surely no different in kind than that of an audience.[55] And is it not true that for the artist, the person and the thing stand together, not apart? The potter at her wheel or the musician in whose hands mute wood or brass begins to speak—their need and their product alike are an externalization of the will. That, after all, is the meaning of *expression:* a transfer of something from inside to out. The drive to create is the desire to convert ourselves and our experience of the world into objectified form.[56] The creative impulse is a combination of solipsism and extroversion, borne of an innermost urge to outlast our Being by converting a fragment of it into a tangible metaphor. And when the song is sung, the quilt made up, the building built, we say that there is 'a little bit of ourselves' in every stanza, stitch or stanchion.

Artists' attitudes 2—an object of respect. In relation to the work of art, Hegel and Heidegger are both right and perhaps a shadow of this truth pervades everything about us. The thingness of the thing lies in its ability to transcend the use or value assigned to it by others, and is a function of the human will it instantiates. But, Hegel to the contrary, a thing, considered as art, is no mere shadow of its author. A creation is indeed a child, albeit a child of the will and not the body. No more than children are they servants or clones of the desire that gave them birth; rather, they come alive and develop a personality of their own. They become imbued with the breath of life. As Kant would say, the work of art is entitled, through the will that endowed it and the life that is in it, to be treated as an end in itself. Concepts such as being faithful to a play, listening to a piece of

music, or treating an antique with respect, all make sense the moment we appreciate that the artwork has attained a quasi-personhood[57] Hegel's understanding of its production together with Heidegger's understanding of its existence combine to require its treatment with something akin to Kant's idea of respect.

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Aesthetic distance 1—philosophy. In the attempt, however, to preserve the idea of form *without* content, or design *without* meaning, Kant, among many others, has argued for the idea of an "aesthetic distance".[58] Again, it was an idea which found a particular resonance in the somewhat ascetic and tubercular sensibilities of the Romantics.[59] Aesthetic appreciation, on this understanding, requires a certain disengagement, in which we discount as much as possible of our own personal circumstances and values and meet the object of our gaze on somehow neutral turf. Schopenhauer, as scared by desire as by will, sought escape in the lustless world of "those admirable Dutch artists" whose pictures of "still *life" provided* him with a "peaceful, still, frame of mind...free from will".[60]

Aesthetic distance 2—music. What of the artist? Undoubtedly a pianist goes through a period in which mind and body have to be focused exclusively on the mechanics of note production. But at some point this conscious decision-making ceases to be necessary, and one can *observe* one's fingers executing the music. The music seems to play itself. There is, to be sure, a kind of distance here that perhaps to some extent supports Kant's notion of a purified, formal space and Schopenhauer's idea of a freedom from the self. We observe the music with a mind devoid of will or desire. This stage of automatism, necessary as it is, is not, however, the end of the experience. The real experience of piano-playing—the real experience of the aesthetic—has no analogy with a pianola, in which the keys

move up and down apart from your volition.[61] There is an important underlying assumption here, according to which the meaning of the aesthetic object is singular, and needs only to be correctly *deciphered*—a sequence of specific notes, played at a certain speed, will tell you all there is to know. The theory of decipherment treats meaning as 'in' the music, and the performer as a person skilled in the art of *extraction*.

Critique of distance 1—relationship. Music is not a code. It is a relationship. There is a dialectic established between performer and composition (and between listener and performance) in which the performer (or listener) becomes *joined* with the music, so that the will or sensibility it expresses becomes indistinguishable from her own. When Aquinas defines as beautiful that of which the apprehension itself *(apprehensio ipsa)* pleases, there is an engagement implied in that word *apprehensio* which should not be taken lightly.[62] Apprehension goes far beyond observation: to apprehend is to detain—to arrest; to fear, as of the unknown; as well as to understand. Perhaps these meanings are all related, and the understanding it describes involves a holding fast of the object, and a fear of its otherness, before finally grappling and overcoming that resistance. Between the work of art on the one hand, and the performer and the audience on the other, there is a synthesis, in which the work has been truly grasped and remade. As each speaks through and with the other, the distinction between the language of the player and the language of the music evaporates. In this relationship, the performer's perspective is not left behind, but is used to inform and transform the music, as it does likewise in return.

Critique of distance 2—hermeneutics. Relationship is the key word—and here we must progress beyond Heidegger's conception of the "thing" as elemental and essentially phenomenological in character.[63] Aesthetic meaning, like the meaning of language, is *never* given or unmediated: it is always a hermeneutic

process of translation and therefore an involved and participatory dynamic.[64] Indeed, this is Hans-Georg Gadamer's central insight, although it applies far beyond the aesthetic: meaning is not found in the dichotomy between subject and object, a dichotomy assumed by Kant and Schiller no less than Heidegger and Beardsley, but in their *relation.* We are not beings in the world in the way that a chair is 'in' the room, but rather as one is in love or in motion.[65]

The cultural and subjective element of aesthetics

Objective interpretation 1—bracketing the self. Thomas Munro explains the aesthetic as a combination of *perception* (the sensory phase) and *apperception*, the interpretative phase involving the "perception of meaning".[66] Whether playing the piano or walking in the mountains, the self is engaged, and our experiences cannot be bracketed or left at home. Now Beardsley, like Kant, insists that in making an assessment of the aesthetic merit of a work of art, it is improper to treat as relevant either the personal associations or memories which become attached to a piece or, on the other hand, the life experiences or politics of the artist.[67] Mothersill likewise argues that the personal and the political have no place in the discourse of the beautiful. For Mothersill, as opposed to Beardsley, beauty is subjective. But she argues that it is a discourse which ought be confined to talking about the pleasures we get in contemplating 'the thing itself', apart altogether from the context, personal or cultural background which envelops it. Thus for Mothersill, only certain aspects of a thing relate to its beauty—its line but not your memories, its colour, not its history. She does not wish to determine what in fact counts as beautiful, but rather to limit the properties in relation to which a claim of beauty can properly be made.[68]

Objective interpretation 2—a critique. Once we appreciate that aesthetics is a way of experiencing things and not just a way of judging them, though the

experience draws forth the judgment, her distinction must fall to the ground. How indeed could we even imagine the parenthetical suspension of aspects of our self in the process of aesthetic judgment?[69] As Santayana has argued, the values which we find expressed in beauty come from *within us* though they are experienced as if they belonged to the object itself.[70] For Mothersill and Beardsley alike there is an altogether too naive and pedantic distinction being drawn between the characteristics of "the object" and the characteristics brought to it by the person contemplating it.[71] Aesthetic experience is never neutral: it is the subjective and personal experience of an object or moment.

The personal object 1—as discourse. Two aspects double and echo the same point: we are concerned to establish the relevance of both the personal history of the observer in this aesthetic process, and the cultural history of the object. First, Mothersill, as we have seen, argues for an objectivity of discourse. Although "associations may enhance or, on the other hand, inhibit delight"[72] these associations are not relevant to an object's *aesthetics*. Undoubtedly, such personal associations are unlikely to be widely shared. My memories of the first time I heard the Bach Prelude hardly constitute a reason for anybody else to appreciate the music.[73] For discursive purposes, then, those aspects of a piece of music shared by a whole audience—its tone, its contours, its structure—even its unity, complexity, and intensity—will be more successful.[74]

The personal object 2—as experience. But this is to confuse what we say about something with how we experience it, and the aesthetic, as I have argued, is to be understood as a *process* of understanding, and therefore ineluctably subjective. My actual experience of the Prelude is absolutely contingent on the memories which I associate with it and while they do not provide reasons for *others* to feel as I do, they are nonetheless potent for that. Text, performance, and interpretation are inextricably linked. As Dewey understood so well, the object is

the raw material of aesthetic experience, but not its sole determinant.[75] Mothersill responds that although personal connotations are inevitable, they are not *aesthetic* criteria. But this is exactly how they are experienced. My memory of that afternoon is indissolubly linked to the way I hear the Prelude and I cannot tell you how much the meditative mood it now creates is a product of one or the other. As the aesthetic synthesizes form and content, particular and universal, it binds subject and object together into a new and greater unity.

The cultural artefact 1—negative connotations. Secondly, neither are the cultural associations or history of the object itself irrelevant to the aesthetic reception of a work. For many Jews, the music of Wagner holds a special place of obloquy. Until recently the Israel Philharmonic refused to play any of his works. The cause of this antipathy is both historical and political, based partly on the realities of Wagner's life and music and partly on the use made of it by the Third Reich. None of this directly impinges on the feeling or beauty of his music had it been written by someone else, and someone who claimed to hate Wagner without ever listening to him could not be said to judging by aesthetic criteria. But for many people this is not the case. When they listen to Wagner, these connotations arise unbidden and imbue the music with a symbolic meaning redolent of authoritarianism and oppression. The music *is* experienced as repulsive or fearsome and though the causes are cultural or political, they are understood in aesthetic terms. They form an ineluctable part of the way in which listening takes place.

The cultural artefact 2—positive connotations. And what of the opposite, where the circumstances of the production and origin of the work of art deepen our appreciation of it? We know the legend of how Mozart came to write his own Requiem,[76] dying in poverty, the pauper's grave agape before him. Do these aspects not add a depth of feeling to our understanding of this work, a certain

melancholy to be sure, but, more, a reminder of the human and concrete reality of the death of each of us which was (it is said) uppermost in Mozart's mind in writing the Requiem and uppermost in ours in dwelling on it? I do not simply mean that these pieces of information about the author or his life and times add to what we get out of the work; but that they are in fact *part* of the work as it presents itself to our senses. Just as Mozart's experiences of life were instantiated in the music he wrote, giving it a specific shape and sound, our reception of those experiences informs how we listen and what he hear. We do not listen with our ears only, but with our minds and with a whole cultural framework which sustains us.

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The cultural reception of a pair of shoes 1—a narrative. Let us consider more closely the interaction of the personal meaning of an object, the cultural background which informs it and the narratives which are told about it; the interpenetration of times, societies, and individuals in the apperceptive aesthetic experience.[77] Take two boots. They are old and encrusted with dirt. Now Van Gogh draws and paints them with a palette rich in the ruddy colours of the earth—"Old Shoes With Laces". Heidegger sees the painting and weaves around it a narrative of particular force in the context of German ideology. He writes of how they embody "the toilsome tread of the worker...the accumulated tenacity of her slow trudge", the earth's "quiet gift of ripening grain and its unexplained self-refusal in the fallow desolation of the wintry field".[78] Clearly the peasant poetry incited by his sensory engagement with those boots is real and moving. To say, as he does, that "the artwork let us know what shoes are in truth" is a perilous claim.[79] His is an *interpretation* drawn forth by apprehension of the aesthetic object and informed by his personal experience and cultural location. The truth-claim that Heidegger makes for his interpretation is only again that conceit by which the

aesthetic has so often been tainted, converting a particular kind of subjective experience into a claim of objective truth.

The cultural reception of a pair of shoes 2—a reflection. Now Meyer Schapiro joins debate, convinced on the contrary that they are Van Gogh's own shoes, and constructs a very different story centred around the hardship of the painter's life. It is a critique written in the aftermath of World War II, and the shadow of Nazi Germany falls over Heidegger's commentary, and indirectly over the painting itself.[80]A generation later, Jacques Derrida enters the fray, denying both their assumptions as to the origin of the work of art. Why do these shoes belong to either the artist or a peasant? Why are they a pair? Why should we assume that they even existed? Derrida uses the discourse about Van Gogh's painting as a way of demonstrating the detachable and contextual nature of meaning, and the way in which truth itself is "hallucinogenic".[81] And at the far end of this discursive chain I stand and gaze at a picture in the Museum of Modern Art—"Old Shoes With Laces". In the looking, these different and historical ways of seeing enrich my aesthetic engagement with the work. The boots now present to me *all* these suggestive symbols and narratives. What makes this interpretation *aesthetic* is the nature of the experience—a sensory response to a particular object approached with openness and respect. At the same time, however, the aesthetic is in no sense objective and though it relates to a particular way of experiencing the object, we cannot circumscribe or prohibit the factors which influence that experience.

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Foucault and the 'thing' 1—botany. Let us place this subjective approach to the meaning of aesthetic experience in a cultural framework, to which I will frequently have recourse. Any aesthetic object, any idea of beauty, is embedded within such a

framework.[82] Its values are themselves constructed by and resistances against that society.[83] According to Foucault, most especially in *The Order of Things*,[84] different periods of time in Western Europe have corresponded to different ways of seeing the world, opening up certain paths of inquiry and foreclosing others. Rather than tracing an evolution in the study of 'economics' during the eighteenth and nineteenth centuries, for example, he sees a radical discontinuity in terms of their project and world-view. And on the contrary, at any one period in history he pursues the epistemic similarities which various disciplines share. Particular branches of knowledge appear as so many tufts of grass and desert blooms, sprouting here and there on a landscape, while beneath the surface, a common soil governs the kind of knowledge that can flourish.

Foucault and the 'thing' 2—archaeology. This is where Foucault's metaphor of "an archaeology of the human sciences" is evocative. Knowledge appears, from our standpoint within its governance, to be organized vertically; but take a cross-section, as an archaeologist does in excavating the layers of a city, and the commonalities in the organization of every aspect of knowledge at that point in time—from economics to natural history to linguistics to art—become evident.[85] Here, then, is a radically different conception to add to our archaeology of "the thing", a side effect of the way in which knowledge is, at different times, organized so that a cat is like a tiger from one perspective, like a dog from another, and rather like a camel-hair brush from another.[86] Heidegger writes of "The Thing"[87] but Foucault only of *The Order of Things*—originally, *Les Mots et les Choses*, an even more relativist statement—since for him reality emerges only in the structure and nomenclature which is imposed upon it by a varying and contingent epistemology.[88] We are engaged, then, in an excavation of the temporal strata of the epistemological ruins of our society.

The epistemological development of modernism 1—Renaissance. According to Foucault, the Classical age, the dawn of modernism, marks a transformation in epistemology from a world view in which knowledge is attained by the exploration of representations, to one in which it is developed by processes of classification. Metaphorically, there is a shift from the idea of the world as a code to that of a table or chart. During the Renaissance, every thing was seen in terms of its resemblance to everything else. The sign of a thing—its look, its shape, its sound—was nowhere treated as random or coincidental but rather as aspects of the essential connection between all things, in a world created by God to bear testimony to His truth. The world was a code which, if properly read, detailed a coherent and at the same time self-referential truth. The practice of medicine was governed by a belief in such hints and connections. The walnut, for example, was thought to be good for the human brain because the two looked somewhat alike and this mere resemblance was treated as a sign of a deeper affinity.[89]

The epistemological development of modernism 2—Classicism. Not so for the Classicists, who began the modernism that still governs our thinking. Here there is a double movement: first towards *distinguishing* things from each other and thus charting relationships in terms of the singular and irreducible differences between them, and secondly towards finding the common building blocks or units on the basis of which these differences could be definitively measured. "This relation to *Order* is as essential to the Classical age as the relation to *Interpretation* was to the Renaissance."[90] The study of wealth, for example, moves from a direct comparison of the value of two disparate things—in the light of which, the question of how to distinguish in advance the relative value of, say, wine and wheat cannot arise—to a precise ordering of their difference in terms of a base unit by which everything within the system may be measured—a *currency*, whether coinage or (in Ricardo) land.[91] Examples could be multiplied. Across the epistemological field, space is made uniform, identity modular, and difference measurable.

Everything can be reduced to a base unit (the building blocks on which difference is built) and compared in terms of it. From a world in which knowledge is discovered through representation and interpreted analogically we approach a world in which it is learnt through ordering and imposed digitally.

Foucault and music 1—musicology. Foucault nowhere discusses the history of music from this perspective, but it is an intriguing possibility. It is only at the dawn of modernism that mean temperament and the incommensurable modes of medieval music gave way to equal temperament and a system built on major and minor scales. The scale system recreated the language of music in *commodity* form, repeatable and interchangeable, in much the same way as hieroglyphics were replaced by a commodified alphabetic script.[92] Equal temperament accomplished this by the institution of the semitone as the base unit of musical exchange, the atom on which all Western musical difference is now built.[93] The semitone is to music as the coin is to economics; and every semitone is equal to every other semitone just as every coin is equal to every other coin. It is this equality of unit which allows keys to be exchanged through transposition and measured through intervals None of this was true before the Classical age.

Foucault and music 2—the Well-Tempered Clavier. Bach's The Well-Tempered Clavier, emerging at the heart of this age, was specifically composed to proclaim, celebrate, and support these changes, its schedule of Preludes and Fugues rising by a uniform semitone at a time and alternating methodically between major and minor keys. Does not the first Prelude of the Well-Tempered Clavier in particular capture this epistemology? A note, uniform and modular, which serves as the unchanging building block for every modulation; a bar, the one succeeding the other in steady progression, creating an order against which differences are played out and can be measured with precision; a key, a building block creating a pattern of geometrically precise change built on the semitone as a base and

unchanging unit. At every level of its being, Bach's Praeludium and the Well-Tempered Clavier embody classification, calibration, the modular construction of meaning and the interplay of identity and difference mapped onto a uniform field or grid. It is the epitome of the period of its creation and of the period, too, of its continuing reception and appreciation. And if we hear it now and marvel at its steady eloquence, is it not in part the echo of the Enlightenment which moves us? The desire for order, the search for patterns, a feeling of the world as composed of units of sameness and movements of difference? The Prelude expresses, to our senses and in presentational form, an *alphabetic semiology* of notes,[94] a *taxonomy* of harmonies, an *economy* of tonalities. And are we not products in our own way of this discipline which has likewise ordered and regulated us, creating of human beings subjects both equal and Well-Tempered.[95] The first Prelude is both a sublime and a subliminal expression of the ideals of modernist order and control.

The symbolic element of aesthetics

The symbolism of the aesthetic 1—introduction. What we learn from such an analysis is a double refrain. First, that the creation and reception of aesthetic forms is contingent and socialized. The Prelude grew out of Bach's culture, just as its iconic status grows out of ours. Secondly, it is impossible to dissociate beauty or the appreciation of form from the question of meaning, even in art as abstract as music, even in music as abstract as Bach, even in Bach as abstract as the Prelude.[96] Aesthetics understood as a way of knowing is therefore the conjunction of two aspects: the sensory force with which we engage something, and the symbolic meanings which attach to it. The heart of the process of aesthetic experience is the union of senses and symbols—of the utterly present and the necessarily absent

(for a symbol, like the imagination, can only work on what is absent[97]). The object is a well of symbols which we apprehend in presentational form.[98]

The symbolism of the aesthetic 2—kinds of symbols. This symbolism will include elements which are deeply embedded in our personal experiences and memories, and others which are cultural and more or less shared. The object becomes a symbol for other symbols, an image of other imagery. As we see and live, we bring to the events around us the affinities and tone that we have come to associate with similar experiences. "The hushed reverberations of these associated feelings" construct an aesthetic reaction to the present.[99] To say otherwise, to insist on the formal qualities of an object of aesthetic contemplation divorced from the symbolic meanings it radiates,[100] is to treat the aesthetic in a way which is strangely weak and placid.[101] For the power of the symbol in all our lives is immense, amply demonstrated in the intensity of feeling which greets activities as diverse as the burning of flags or books or old love letters—symbolic obliterations perpetrated upon symbolic objects. The objectification of the self, the beloved, or values is pervasive, personal and emotional, and any attack upon those objectified forms seems to strike us where we are most vulnerable.

Aesthetic communication 1—incomplete. The aesthetic is a mode of communication, with all the inter-subjectivity, ambiguity, and limitations which that implies.[102] But neither is it *purely* a form of symbolism.[103] This is what has been sometimes termed "the heresy of paraphrase"[104]—the assumption that it is possible to exhaustively decipher the symbolism of an artwork, and thus to prise loose its meaning from its form. But the aesthetic symbol is *bound up* in the object that contains it; they arrive together and stay together.[105] Its focus is on a particular object and on the experience or process of apprehending that object. The aesthetic appeals not to our judgment of truth or logic, but to our senses. It finds expression not in a judgment of goodness or rightness, but rather in a feeling of

attraction or repulsion. Its meaning is imparted uniquely, experienced uniquely, and expressed uniquely. It is exactly because of the uniqueness of the characteristics of the aesthetics as a way of knowing, that it touches depths of our understanding perhaps otherwise not easily seen. One vital way in which meaning and belief comes about is through the ineffable, essential, unbidden aesthetic sense of each and all of us.

Aesthetic communication 2—discourse. The power and influence of the aesthetic is often greeted with dismay because of the ungrounded relativism it seems to imply, a dismay which, from Plato to Voyager, has led the discourse of our culture to objectify it. Postmodernists such as Lyotard, on the one hand, and their critics on the other, have both tended to see the aesthetic as based on nothing more than a kind of "transcendent" intuition, as radically given as the human body: an incorrigible feeling to whose dictates we have no choice but to succumb. The cultural approach to the origin and function of the aesthetic, however, does not treat the aesthetic as non-negotiable, and nor does it require us to treat all aesthetic values as equal.[106] Aesthetic values and understanding are as appropriate a subject of discourse, experience, and change as everything else. To concede, as one so often hears, that there is no room for argument in matters of taste, is facile counsel. The aesthetic, far from transcendent, is immanent in our mutable, inter-subjective lives.

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The pervasive aesthetic 1—Bourdieu. Exactly because the aesthetic is best understood as a way of knowing and of being, it envelops our lives: it affects not just how we view Van Gogh's shoes, but our own. We are always undertaking aesthetic judgments, consciously or otherwise: in how we listen to the traffic as much as how we listen to Bach; in the symbols and imagery conjured up by certain

words or phrases. This, as we have seen, is Dewey's point, but even more so it is an understanding of the pervasive aesthetic most closely aligned to the work of Pierre Bourdieu, according to whom the "bodily hexis" is a kind of corporeal sense or collection of habits of the body, which predisposes our thinking and reproduces power.[107] "The body," says Bourdieu, "is the site of incorporated history".[108] But lest this sounds too determinist, the aesthetic also offers a broad vista for accomplishing profound change. It is central to my work to draw attention to the role of senses and symbols in our lives. But this is not purely an analytic point. People can be changed by appealing to their aesthetic values, and their aesthetic values no less than their political or ethical values can be commented on, argued about, and developed. As aesthetic experience is a way of knowing, so also is it a way of changing.

The pervasive aesthetic—Bach and the law. In short, the aesthetic realm suffuses our engagement with everything about us. It is a union of senses and symbols—a way of seeing and of speaking, and at the same time, a storehouse of symbols—at once a register and a registry. It is part of what it means to be a human being, part of our relationship to the world, part of our inner temperament.[109] And to be *well-tempered* is surely to be attuned to this aspect of ourselves, to think about how it affects us, to be aware of its power, and to explore how it might be harnessed as a force for good. Reason and aesthetics stand thus not in hostile counterpoint but each in their own way are engaged in making of the bare bones of life a human *being*. Nothing remains untouched by the aesthetic temperament—not even that most ostensibly rational of human endeavours, the law. The well-tempered lawyer and theorist must reflect on how our aesthetics interprets the law, on the one hand, and influences it, on the other. And one might even ask whether the law, were it well-tempered, might be changed, might engage differently with the objects and subjects beneath its gaze. These are the questions,

of some perplexity and interest, which will guide me as I embark on a voyage into the aesthetic dimension.

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1 See "Voyager" in F. Girard, dir., *Thirty-two Short Films About Glenn Gould* (Canada, 1993).

2 J.S. Bach, *Das wohltemperierte Klavier, Tiel 1,* BWV 822 (1722).

3 We can describe this pattern of climbing intervals and repetition, performed throughout with rhythmic invariance, in the following mathematical form: [A<B {<C<D<E}x2] x2.

4 Thus: the change from bar 1 to 2 is of a semitone (the top note alone moving), and from 2 to 3 also a semitone (the bass note alone moving); from 3 to 4 there is a change of a tone, each outer part accounting for a semitone; then from 4-5 the top note rises a fourth and in the next bar falls a fifth, while from 6 to 7 there is a change of a diminished fifth (the top note rising a fourth again while the bass note falls a semitone changing the interval from a ninth to a thirteenth or a flat thirteenth.

5 Thus: C Major, C minor, C# Major, C# minor, D Major, D minor... Compare this intellectual conception of tonal distance (based on chromatic majors and tonal minors), which served a necessary function in relation to the specific musical and, one might almost say, political agenda of *The Well-Tempered Clavier*, from the distinctly aural and harmonic understanding of juxtaposition expressed in the design of Chopin's *24 Préludes*, op. 28, and Shostakovitch's *24 Preludes and Fugues*, op. 87 (1950-51), both of which are based on the cycle of fifths and relative minors: C Major, A minor, G Major, E minor... Both of these cycles of compositions are, of course, specifically modelled on Bach.

6 It might be objected here that only the first book of these preludes and fugues is correctly entitled *The Well-Tempered Clavier*, the second being written over twenty years later, BWV 846-869 (1744). The question of Bach's intention need not concern us. The two books together do form a unity and are universally perceived in that light. We do not properly call them *The Well-Tempered Clavier*, but we do speak of "the 48" as a whole. Undoubtedly Bach did not write Prelude I with the second book in mind, but the meaning it has for us is coloured by the structure which has grown up around it.

7 For a recent survey of the problematic of moral objectivity, see B. Williams, *Ethics and the Limits of Philosophy* (Cambridge, Mass.: Harvard University Press, 1985).

8 See Plato, *Republic*, trans. B. Jowett (Oxford: Clarendon, 1921), e.g. the analogies of the sun, the cave, and the line: 306-25. The imagery of an external, abstract, and discoverable Truth pervades all Plato's work.

9 *Ibid.*, at 439d, 442.

10 T. Aquinas, "The nature and Domain of Sacred Doctrine" in H. Adams, ed., *Critical Theory Since Plato* (New York: Harcourt Brace Jovanovich, 1971)at 118; see St. Thomas Aquinas, *Summa Theologiae,* vol. 1, 28 (London: Eyre & Spottiswoode, 1963). See also the extracts from St Augustine and Marsilio Ficino in A. Hofstadter and R. Kuhns, eds., *Philosophies in Art and Beauty: Selected Readings from Plato to Heidegger* (Chicago: University of Chicago Press, 1964). We are far from the idea of metaphor as a means of generating new and not otherwise discernible Truths. See for example the understanding of metaphor in P. Ricoeur, *The Rule of Metaphor: Multi-disciplinary studies of the creation of meaning in language* (Toronto: University of Toronto Press, 1977); J.O. y Gasset, *Phenomenology and Art,* trans. P. Silver (New York: W.W. Norton, 1975); H.-G. Gadamer, *The Relevance of the Beautiful and Other Essays,* trans. N. Walker (Cambridge: Cambridge University Press, 1986).

11 See I. Kant, *Critique of Judgment,* trans. W. Pluhar (Indianapolis: Hackett, 1987); Hofstadter & Kuhns, *op. cit. supra* n. 10 at 283 *et seq.* See also the discussion of Alexander Baumgarten's *Reflections on Poetry* in T. Eagleton, *The Ideology of the Aesthetic* (Oxford: Blackwell, 1990) at 13-28; and D. Wellbery, *Lessing's Laocoön: Semiotics and Aesthetics in the Age of Reason* (Cambridge, U.K.: Cambridge University Press, 1984).

12 Eagleton, *op. cit. supra* n. 11 at 15 *et seq.*; F. Schiller, *On the Aesthetic Education of Man,* trans. E. Wilkinson (Oxford: Clarendon Press, 1967), e.g. at 141-47, 197-215, for example, envisages the "play-drive" as a freely chosen "real and active determinability" (at XX.4), in which the rational in humanity is not cast aside but experienced as an inner voice rather than an external compulsion (e.g. at XXVII.3). In the aesthetic, Schiller sees a *harmonization* of the sensuous with the rational, and desire with necessity (e.g. at IX.7). In aesthetics, wrote Schiller, "universally valid judgments and universally valid actions" become a product of will and "an object of the heart's desire" (at XXIII.5, IX.7); see also Eagleton, *op. cit. supra* n. 11 at 102-119.

There are interesting parallels here with the internalization of State controls through regimes of surveillance, a process of self-disciplining explored in M. Foucault, *Discipline and Punish,* trans. A.M. Sheridan Smith (New York: Vintage Books, 1979); and even with the idea of "the call of conscience" in Heidegger: see A. Rondell, *The Telephone Book: Technology, Schizophrenia, Electric Speech* (Lincoln: University of Nebraska Press, 1989). In Kant, of course, the final transcendence of reason and duty over the senses finds expression in the development of the idea of the "sublime" over and above the idea of "beauty": Eagleton, *op. cit. supra* n. 11 at 70-100.

13 "The Relevance of the Beautiful" in Gadamer, *op. cit. supra* n. 10 at 3; the work of Giambattista Vico (1668-1744) in Adams, *op. cit. supra* n. 10 provides an early exploration of this insight. See also the discussion of art and civilization in J. Dewey, *Art as Experience* (New York: Milton, Balch & Co., 1934)at 326 *et seq.*

14 D. Hume, *Treatise of Human Nature* (Oxford: Oxford University Press, 1978).

15 See "Of the Standard of Taste" in D. Hume, *The Philosophical Works of David Hume* (Boston: Little, Brown and Co., 1854). There is indeed a tension throughout "Of the Standard of Taste" between his claims as to the individuality of taste (e.g. at 251-52) and its objectivity (e.g. at 253-55). As in Kant, Hume has trouble distinguishing between the "natural equality of tastes" and the *feeling* of universality which it provokes. The difficulties experienced by Hume in trying to accommodate these inconsistent positions is discussed in M. Mothersill, *Beauty Restored* (Oxford: Clarendon Press, 1984)at 177-208.

16 John Keats, Percy Shelley, Thomas Carlyle, Ralph Emerson provide a few examples.

17 J. Keats, "Ode on a Grecian Urn"; Earl of Shaftesbury, *Freedom of Wit and Humour*, extracted in Hofstadter & Kuhns, *op. cit. supra* n. 10 at 241; B. Bosanquet, *History of Aesthetics* (London: Allen & Unwin, 1922) at 333, discussed in T. Munro, *The Arts and Their Interrelations* (New York: Liberal Arts Press, 1949) at 170-73.

18 For an early example, see Alexander Pope (1688-1744), *An Essay on Criticism* in Adams, *op. cit. supra* n. 10. Cassirer in *An Essay on Man* likewise sees the connection between aesthetics and the natural world as a continuation of a mimetic understanding: in Plato, art is mimetic of ideas, in Aquinas of God, and in the neo-classicists of nature.

19 See the discussion of the Earl of Shaftesbury and Edmund Burke in Eagleton, *op. cit. supra* n. 11 at 40-61. The question of the ideological functions and utility of aesthetic discourse is, of course, the central theme of Eagleton's book.

20 Extracted in Hofstadter & Kuhns, *op. cit. supra* n. 10 at 274.

21 See, for aspects of the vast project of the critique of rationalism with a particular bearing on the aesthetic, J. Derrida, *The Truth in Painting,* trans. G. Bennington & I. McLeod (Chicago: University of Chicago Press, 1987); M. Heidegger, *Poetry, Language, Thought,* trans. A. Hofstadter (New York: Harper & Row, 1971); F. Nietzsche, *The Birth of Tragedy/The Case of Wagner*, trans. W. Kaufmann (New York: Vintage Books, 1967); F. Nietzsche, *Beyond Good and Evil,* trans. R. Hollingdale (London: Penguin, 1990); F. Nietzsche, *Thus Spake Zarathustra*; J. Derrida, *Grammatology*, (Baltimore: John Hopkins University Press, 1976); M. Foucault, *The Order of Things* (New York: Vintage Books, 1973).

22 Much can be explained if we understand philosophy itself as a battle between contrasting aesthetics: Kant saw beauty in order and the purity of reason, while Nietzsche, in power and force. In Marx there is a remarkably similar understanding of the world as a play of conflicting forces; the difference here too is aesthetic. For Marx, the masses have a nobility and beauty while

Nietzsche on the other hand sees them only as slave-like and impoverished; in Marx class conflict is a stage on the journey towards a utopia of peace and plenty, while for Nietzsche struggle is the life-force itself. It is not their approach but their sympathies which differ: see the discussion of Nietzsche and Marx in Eagleton, *op. cit. supra* n. 11 at 240-44.

23 Thus for Arthur Schopenhauer, for example, "the impetuous and blind striving of will" and the "eternal, free, serene subject of pure knowing" are located at opposite poles (see Hofstadter & Kuhns, *op. cit. supra* n. 10 at 463; see also at 457). Nietzsche would not reject this polarity, only the hierarchy it implies.

24 See the marvellously self-centred *Ecce Homo* in F. Nietzsche, *On the Genealogy of Morals and Ecce Homo,* trans. W. Kaufmann (New York: Vintage Books, 1989), replete with chapter headings such as "Why I Am So Wise", "Why I Am So Clever", and "Why I Write Such Good Books".

25 Nietzsche, *The Birth of Tragedy*, *op. cit. supra* n. 21 . Italics in original.

26 Compare Samuel Taylor Coleridge: "We *declare* an object beautiful, and feel an inward right to *expect* that other should coincide with us. But we feel no right to *demand* it": Adams, *op. cit. supra* n. 10 at 467.

27 See G. Santayana, *The Sense of Beauty* (New York: Dover, 1955) at 3-5.

28 "With this sense of the splendour of our experience and of its awful brevity, gathering all we are into one desperate effort to see and touch, we shall hardly have time to make theories about the things we see and touch.": Walter Pater (1839-94), *Studies in the history of the Renaissance* in Adams, *op. cit. supra* n. 10 at 645. cf. Santayana, *op. cit. supra* n. 27; R. Arnheim, *The Phenomenology of Aesthetic Experience* (Evanston Ill: Northwestern University Press, 1973). This approach, with its emphasis on aesthetics as an expression or invocation of feeling, so typical of the late Romantic spirit, has not of course been without its critics. Anti-Romantics such as Irving Babbitt have seen this approach as a flatulent sentimentality, a mawkish self-indulgence and (along the lines of Plato) even a threat to the search for truth.

29 Ernst Cassirer, *An Essay on Man* in Adams, *op. cit. supra* n. 10 at 994, 998, 1007.

30 See for example the discussion of Pierre Corneille and John Dennis in Adams, *op. cit. supra* n. 10. In the work of Nelson Goodman there is the same systematizing and taxonomic instinct although without the normative implications for value claimed by Beardsley, see *infra.* In Goodman most of all the aesthetic becomes reduced to a question of definition: Goodman, *op. cit. supra* n.8.

31 M. Beardsley, *Aesthetics: Problems in the Philosophy of Criticism* (New York: Harcourt, Brace, & World, 1958)at 190-209, 328-29 discussing these criteria; 456-64 claiming for them a canonical status.

32 *Ibid.*, at 456-70, where similar arguments are made.

33 Mothersill, *op. cit. supra* n. 15 at 96, 108-09, 119-22; see generally "The First Thesis" in *ibid.* at 100-22.

34 See "The Relevance of the Beautiful" in Gadamer, *op. cit. supra* n. 10 at 20-21; Schiller, *op. cit. supra* n. 12.

35 Gadamer, *op. cit. supra* n. 10; Dewey, *op. cit. supra* n. 13; and see V. Kestenbaum, *The Phenomenological Sense of John Dewey* (Atlantic highlands, NJ: Humanities Press, 1977). For further on the primacy of experience as the pre-conceptual fountain of meaning, see also M. Merleau-Ponty, *The Phenomenology of Perception,* trans. C. Smith (London: Routledge & Kegan Paul, 1962). We find antecedents to what appears to be thus an almost phenomenological approach to the sensory experience of life in Kierkegaard, discussed in Eagleton, *op. cit. supra* n. 11 at 173-95.

36 See Introduction to Gadamer, *op. cit. supra* n. 10; see also P. Bourdieu, *Language & Symbolic Power* (Cambridge, Mass.: Harvard University Press, 1991), discussed at greater length *infra.*

37 Dewey, *op. cit. supra* n. 13 at 3-15.

38 For further on the presentational meaning of art, see in particular S.K. Langer, *Philosophy in a New Key* (Cambridge, Mass.: Harvard University Press, 1942, 1978); N. Goodman, *Languages of Art* (Indianapolis: Hackett Publishing, 1976).

39 Eagleton, *op. cit. supra* n. 13. As Munro puts it, "*Aesthetic* experience is directed, more or less continuously, by a group or series of outside sensory stimuli", although this emphasis on the sensory initiation of the aesthetic does not deny the relevance of "association, understanding, imagination, conation, and emotion": T. Munro, *Form and Style in the Arts* (Cleveland & London: Case Western Reserve University, 1970) at 12.

40 Santayana, *op. cit. supra* n. 27 is imbued with this emphasis.

41 For further on the differential force of the senses in various cultures, see D. Howes, ed., *The Varieties of Sensory Experience: A Sourcebook in the Anthropology of the Senses* (Toronto: University of Toronto Press, 1991); D. Howes, "Odour in the Court" [1989-90] border/lines, winter 28.

42 Howes, *ops. cit. supra* n. 41; M. McLuhan, *The Gutenberg Galaxy: The Making of Typographic Man* (New York: Signet, 1969); D. Howes and M. Lalonde, "The History of Sensibilities: Of the Standard of Taste in Mid-Eighteenth Century England and the Circulation of Smells in Post-Revolutionary France" (1991) 16 Dialectical Anthropology 125.

43 See J. Goody, *The Logic of Writing and the Organization of Society* (Cambridge: Cambridge University Press, 1986); I. Illich and B. Sanders, *ABC: The Alphabetization of the Popular Mind* (London: Penguin, 1988);

McLuhan, *op. cit. supra* n. 42; S. Pinker, *The Language Instinct: How the Mind Creates Language* (New York: William Morrow & Co., 1994). On the paradoxical status and hierarchy of writing and speech in the Western philosophical tradition, see Derrida, *op. cit. supra* n. 21; J. Derrida, *The Post Card*, trans. A. Bass (Chicago: University of Chicago Press, 1987); and in P. Kamuf, ed., *A Derrida Reader: Between the Blinds* (New York: Columbia University Press, 1991) at 486-516.

44 See the discussion of Gadamer's aesthetics of language, as sound and as metaphor, in J. Weinsheimer, *Gadamer's Hermeneutics* (New Haven: Yale University Press, 1985), e.g. at 68, 238. Pinker also discusses the "phonetic Symbolism" of words, the way in which, for example, the compressed physical space made by the tongue in forming the short 'i' or 'ee' sound leads to its association with words connoting littleness—mouses *squeak* while elephants *roar* (although, of course, they don't, they trumpet): Pinker, *op. cit. supra* n. 43 at 167-68.

45 See A. Schopenhauer, *The World as Will and Idea,* trans. R. Haldane (London: K. Paul, Trench, Tubner & Co., 1927)extracted in Hofstadter & Kuhns, *op. cit. supra* n. 10, and see the discussion of his work in Eagleton, *op. cit. supra* n. 11 at 153-172. But note that Schopenhauer was equally disturbed by the notion of desire in aesthetic experience and according insisted upon aesthetics as a distanced and neutral phenomenon—see further, *infra*. Schopenhauer understands "Will" as an objective phenomenon and is afraid of its subjective power in a way which differs markedly from the emphasis on the will as a human characteristic in Hegel.

46 Santayana, *op. cit. supra* n. 27 at 28-31.

47 Munro, *op.cit. supra* n. 39 at 15.

48 "The Origin of the Work of Art" in Heidegger, *op. cit. supra* n. 21 at 69.

49 *Ibid.* at 26. Gadamer makes the same point about sound: see Weinsheimer, *op. cit. supra* n. 44 at 94.

I am indebted to Nicholas Horn for pointing out to me the interesting parallels to this in the poetry of Gerard Manley Hopkins, who writes of the "inscape" of things as a discovery of their essence:

> ...Each mortal thing does one thing and the same;
> Deals out that being indoors each one dwells;
> Selves—goes itself; *myself* it speaks and spells,
> Crying, *"What I do is me: for that I came..."*

50 Dewey, *op. cit. supra* n. 13, at 27 *et seq.*, 100-01.

51 "The Origin of the Work of Art" in Heidegger, *op. cit. supra* n. 21 at 65.

52 A contrast made by the French symbolist poet Valéry in Adams, *op. cit. supra* n. 10 at 921.

53 C. Taylor, *Hegel* (Cambridge, U.K.: Cambridge University Press, 1975); G.W.F. Hegel, *Lectures on Aesthetics* in Hofstadter & Kuhns, *op. cit. supra* n. 19 at 379 *et seq.* See also the discussion and expansion of these points in R. Nozick, *Anarchy, State and Utopia* (Totowa: Rowman, 1974); E. Weinrib, "Causation and Wrongdoing" (1987) 63 Chi-Kent L. Rev. 407; E. Weinrib, "'Legal Formalism': On the Immanent Rationality of Law" (1988) 97 Yale L.J. 984; E. Weinrib, "Right and Advantage in Private Law" (1989) 10 Cardozo L. Rev. 1283; E. Weinrib, "The Jurisprudence of Legal Formalism" (1993) 16 Harv. J. L. & Pub. Pol. 583, and see "The World as Artefact" in Eagleton, *op. cit. supra* n. 9 at 120-152.

54 Hegel quoted in A. Hofstadter, "Introduction" to Heidegger, *op. cit. supra* n. 21 at xvii. The consequences of this kind of approach have come under considerable attack in recent years in relation to the implications such a anthropocentric view has for the treatment of animals and the environment.

55 Mothersill too makes this mistake, treating the artist's knowledge as if it were merely technical, and the appreciation of the connoisseur as of a higher order: Mothersill, *op. cit. supra* n. 15 at 287-93. In contrast, see Tolstoy's "What is Art" discussed in T. Munro, *The Arts and Their Interrelations* (New York: Liberal Arts: 1949) at 64 *et seq.*

56 While I have emphasized the broad range over which Hegel's understanding of the thing in this way extends, it is nonetheless true that he particularly had in mind an understanding of art as essentially creative self-expression: Hegel, *op. cit. supra* n. 53 at 79.

57 This is an aspect brought out most strongly in Dewey, *op. cit. supra* n. 13, e.g. at 27-28, 42, wherein he writes of the "vivification" of objects and the objectification even of emotions. See also Kestenbaum, *op. cit. supra* n. 35.

58 I. Kant, *op.cit. supra* n. 11, "First Division, Analytic of the Aesthetical Judgment" is extracted in Hofstadter & Kuhns, *op. cit. supra* n. 10 at 283 *et seq.* Eagleton discusses not only Kant but G.W.F. Hegel and David Hume in this light, and emphasizes the relationship of the idea of distance to the universalization of the aesthetic which I have already elaborated: Eagleton, *op. cit. supra* n. 11, e.g. at 31-40, 70-100. See also the somewhat glib but perspicacious critique of aesthetic distance in Goodman, *op. cit. supra* n.8 at 241; G. Dickie, "The Myth of the Aesthetic Attitude" (1964) 1 Amer. Phil. Q.; Mothersill, *op. cit. supra* n. 15 at 320-22.

59 For further on the way in which tuberculosis—consumption—was given an aesthetic, even glamorous, gloss, in the nineteenth century, especially amongst women, see S. Sontag, *Illness as Metaphor/AIDS and its Metaphors* (New York: Anchor Books, 1990).

60 Schopenhauer, *op. cit. supra* n. 45, and in Hofstadter & Kuhns, *op. cit. supra* n. 10 at 458. We see here a fear of personal will and an objectification of

cosmic "Will" which provides an interesting parallel with the thought of Hegel: see Munro, *The Arts and Their Interrelations, op.cit. supra* n. 55 at 177. Clive Bell likewise declares that "to appreciate a work of art, we need bring with us nothing from life, no knowledge of its ideas and affairs, no familiarity with its emotions" (quoted in Mothersill, *op. cit. supra* n. 15 at 223)—this seems to me near enough to a *reductio ad absurdum* as makes no difference.

61 Gadamer, *op. cit. supra* n. 10 at xv.

62 Discussed in Mothersill, *op. cit. supra* n. 15 at 323-24. For Munro, "Attention is always a focusing of conscious awareness", an approach which clearly connects the idea of addressing the aesthetic object with that of respect: Munro, *op.cit. supra* n. 39 at 69.

63 At the same time, we must guard against a too trite 'perception of phenomenology'. Even Merleau-Ponty insists that "the relationship to the other enters into the very essence of the conscious act", in which "self and world are mutually and reciprocally determinative": Merleau-Ponty, *op. cit. supra* n. 35 quoted in Kestenbaum, *op. cit. supra* n. 35 at 25, 91.

64 Gadamer, *op. cit. supra* n. 9; see also G. Steiner, *After Babel: Aspects of Language and Translation* (Oxford: Oxford University Press, 1992). Gadamer makes the hermeneutic point in relation to aesthetics specifically in *Truth and Method;* see Weinsheimer, *op. cit. supra* n. 44 at 6. Further, the notion of a "fusion of horizons" is key to Gadamer's understanding of the hermeneutic process.

65 From Gadamer, *Truth and Method*, discussed in Weinsheimer, *op. cit. supra* n. 44 at 159-61. The collapse of the subject-object dichotomy in the closely analogous context of game-playing is discussed in *ibid.* at 103.

66 Munro, *op.cit. supra* n. 39 at 20.

67 Beardsley, *op. cit. supra* n. 31 at 52; see also at 534-35.

68 Mothersill, *op. cit. supra* n. 15 at 145-76, 323-66. Thus for Mothersill an appreciation of the colour or line of something can lead to a claim of beauty—although not everyone will agree that the line is in fact beautiful—but an appreciation of the context in which you first saw it, cannot be. Hers is thus an argument which seeks to define the discourse of beauty and not to defend a particular vision of the beautiful.

69 See especially the phenomenological perspective: "On the Concept of Sensation" in Gasset, *op. cit. supra* n. 10 at 106; and see Merleau-Ponty, *op. cit. supra* n. 35.

70 Santayana, *op. cit. supra* n. 27 at 30-31.

71 Thus see Beardsley, *op. cit. supra* n. 31 at 52-53. Kant also, according to Dewey, treated perception as a one-sided phenomenon, as if beauty had only

to be recognized and not constructed. It was his quest for the objective and the rational in beauty which led him to this passive understanding of aesthetic experience: Dewey, *op. cit. supra* n. 13 at 252.

72 *Ibid.*, at 400.

73 Even this is of course not always the case. There are many pieces of music that I immediately associate with those memories and ideas of it which other people have shared with me. These second-hand images have sometimes transformed profoundly my understanding of the piece and greatly enhanced my feeling for it.

74 Here again I overstate the point for the purpose of the argument. The "aesthetic properties" of an artwork are not *inherently* shared by everyone who listens, though they are more likely to be. Even amongst experienced listeners, there may be very different understandings of the tone or structure of a piece, and of course an assessment of the *virtue* of such aspects is entirely subjective.

75 Dewey, *op. cit. supra* n. 13 at 53-67. "It takes the wine press as well as grapes to express juice, and it takes environing and resisting objects as well as internal emotion and impulsion to constitute an *expression* of emotion": *ibid.*, at 64.

76 W.A. Mozart, *Requiem*, K.626 (1791).

77 See Munro, *op.cit. supra* n. 39 at 66-67, for whom the "apperceptive process will tend to spread out along paths of associations", some the result of "previous intense, emotional experience", others from "repetition, learning, and habit", or from the "socially established meanings" of symbols and ideas entrenched in a culture.

78 "The Origin of the Work of Art" in Heidegger, *op. cit. supra* n. 21 at 33-34.

79 *Ibid.*, at 35.

80 See "Restitutions of the Truth in Pointing" from Derrida, *Truth*, *op. cit. supra* n. 21; see also Kamuf, *op. cit. supra* n. 43 at 277-307.

81 *Ibid.* Interestingly, in the context of language, Pinker also suggests that if understanding were too governed by listener expectations rather than sound perception, it would be a "barely controlled hallucination"; he argues for the objectivity of words (though not necessarily of meaning) although even on this limited point he is not entirely convincing: see Pinker, *op.cit. supra* n. 43 at 185-88.

82 The same is surely true of our aesthetic appreciation of nature. It does not simply appear to us as beautiful; rather, when we look at the natural world aesthetically, we impose certain forms and ideas upon it. Far from finding in nature the aspects in art we value, we impose those values upon nature by

looking at it with an artist's eye. Thus it is that, as our values have changed, the aspects and features of the natural world which we have chosen to value have also changed, at time radically. Nature is an artistic construction and not *vice-versa*. Our approach to the idea of 'wilderness' stands as a case in point: see Cassirer in Adams, *op. cit. supra* n. 10 at 1002; Gadamer, *op. cit. supra* n. 9 at 30-31; see also the discussion of Nietzsche in Eagleton, *op. cit. supra* n. 11 at 250.

83 See in particular the introduction to Eagleton, *op. cit. supra* n. 11.

84 Foucault, *Order, op. cit. supra* n. 21.

85 *Ibid.*; see also, for a similar approach to a variety of more specific disciplines (a word which itself implies an inter-connection between knowledge and power which Foucault has been especially at pains to dissect), M. Foucault, *The Use of Pleasure, The History of Sexuality vol. 2,* trans. R. Hurley (New York: Vintage Books, 1986); Foucault, *Discipline* , *op. cit. supra* n. 12; M. Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception,* trans. A.M. Sheridan (New York: Vintage Books, 1975); M. Foucault, *The Care of the Self, The History of Sexuality vol. 3,* trans. Robert Hurley (New York: Random House, 1988).

There has been some development of the connections between species of knowledge, with specific reference to the comparison between law and science, in some other sources, although without any overt discussion of Foucault: see H. Berman, "The Origins of Historical Jurisprudence: Coke, Selden, Hale" (1994) 103 Yale L.J. 1651, at 1721-31; B. Shapiro, *Probability and Certainty in Seventeenth Century England: A Study of the Relationships Between Natural Science, Religion, History, Law, and Literature* (Princeton, NJ: Princeton University Press, 1983); see also R. McRae, "The Unity of the Sciences: Bacon, Descartes, and Leibniz" (1957) 18 J. Hist. Ideas 27.

86 See Foucault's delightful Preface to *The Order of Things*, *op. cit. supra* n. 21 at xiv-xxiv; see also J. Borges, *Other Inquisitions* (New York: Washington Square Press, 1966), at 108.

87 "The Thing", in Heidegger, *op. cit. supra* n. 21 at 165-86.

88 Thus Heidegger (*ibid.,* at 69) writes of "the thing's thingness" and says that "the thing things"; Foucault insists that, on the contrary, it is *we* who give whatever thingly character they possess, and create an order of knowing in which the verb itself is possible. It is only humans which have *be-ing* : Foucault, *Order, op. cit. supra* n. 21 at 92-110.

89 Foucault, *Order, op. cit. supra* n. 21 at 27; generally, see at pp. 3-45. Foucault, *Clinic, op. cit. supra* n. 95.

90 Foucault, *Order, op. cit. supra* n. 21 at 57.

91 See *ibid.* at 166-211. The idea of money as an abstract tool of conversion, whose intrinsic value (its gold or silver content, for example) is unrelated to its value in exchange, awaits this conceptual shift.

92 See Goody, *op. cit. supra* n. 43; Illich, *op. cit. supra* n. 43; McLuhan, *op. cit. supra* n. 42.

93 See *Grove's Dictionary of Music and Musicians, 5th ed.* (London: St. Martin's Press, 1952); L. Lloyd, *Intervals, Scales, and Temperaments* (London: Macdonald & Jane's, 1978); J. Lloink, *The Mathematics of Music* (Baltimore: Gateway Press, 1977); J. Barbour, *Tuning and Temperament: a Historical Survey* (New York: Da Capo Press, 1972).

94 See Foucault, *Order*, *op. cit. supra* n. 21 at 78-120.

95 T. Miller, *The Well Tempered Self: Citizenship, Culture, and the Postmodern Subject* (Baltimore: John Hopkins University Press, 1993).

96 This we see in particular in Santayana, *op. cit. supra* n. 27 who distinguishes between different aspects of beauty, of which the beauty of form is only one. He goes on to speak of "beauty in expression", emphasizing the symbolic effects of the aesthetic, and thus makes an argument similar to the one I am developing here.

97 J. Kristeva, *Proust and the Meaning of Time* (New York: Columbia Univ. Press, 1993), at 53-67.

98 See Langer, *op. cit. supra* n. 38; S. Langer, *Feeling and Form: A Theory of Art* (London: Routledge & Kegan Paul, 1953); Goodman, *op. cit. supra* n. 38.

In Goodman, the symbolic nature of art is particularly explored and its parameters defined. Goodman emphasizes a kind of symbol which he calls 'exemplification', by which he means symbols which do not merely denote their referents but in fact possess them: thus a painting of a blue bird denotes (is a symbol of) a bird (and, we may go on, connotes happiness) but *exemplifies* blueness. The symbolic force of art, for Goodman, arises especially in the ways in which it exemplifies qualities (such as colour, shape, speed, and so on) although he concedes that any symbol which is taken to be possessed by or intrinsic to the artwork becomes "metaphorically exemplified" by it. It would seem, therefore, that although useful from the point of view of definition, these distinctions are not crucial to the argument I make here: see *ibid.*, at 53-86, 252-53 (arguing that there is a tendency towards exemplification in art, but that this is not a "crisp criterion").

99 Santayana, *op. cit. supra* n. 27 at 119.

100 Beardsley, *op. cit. supra* n. 31, appears particularly confused on this point. He concedes the symbolic meaning inherent in art (see e.g. at 289-90) and then proceeds to radically cauterize both the symbolic and the subjective reasons for a work's appeal from the question of aesthetic merit. But if, as

he concedes, the lasting effects of, for example, literature, "take place through the formation of *beliefs*" (at 568), how then is it possible to try and distinguish this force from aesthetic appreciation? Clearly, for spectator or reader, the two are bound together so that in our experience, we cannot distinguish between its "pure aesthetic value" (at 570) and its effect on our lives.

Again, let us consider the question from the point of view of the artist. Surely she is not capable of distinguishing what she means by something from the form in which that meaning is expressed. Can we imagine the creator subjugating her symbolic meaning to an interest in unity or complexity? Not at all: for the artist as for the audience, symbolism and form are bound together. She says what she says in the way that she says it. To speak of the meaning of the art-work, its symbolism, and its effects on our "beliefs" as merely "the side effects of aesthetic objects" (at 570) is nonsensical, for the "magnitude" of the aesthetic experience lies not in its formal qualities alone but in the emotional and life-changing—and therefore meaning-ridden—force it exerts.

101 I say this in implied critique of the thin view of the formative and metaphorical capacities of language expressed in Noam Chomsky, *Syntactic Structures* (Hague: Mouton, 1957) and Pinker, *op. cit. supra* n. 43 at 88, 93-94. The power of the metaphor is indeed shown here in its ability to *generate* thought and transform nonsense into new meaning—"what occurs is a transfer of schema, a migration of concepts...Indeed, a metaphor might be regarded as a calculated category-mistake": Goodman, *op. cit. supra* n. 38 at 73.

102 See Dewey, *op. cit. supra* n. 13 , e.g. at 290; the paradox inherent in the idea of communication—that is its embodiment of the possibility of the failure of communication and the necessity of the imperfection of communication—is explored *inter alia* in J. Derrida, *Grammatology*, *op. cit. supra* n. 13; J. Derrida, "Scribble (writing-power)" (1979) 58 Yale French Studies 117; Derrida, *The Post Card*, *op. cit. supra* n. 43.

Tolstoy in particular has argued for the communicative power of art: but at the same time we need to be cautious inasmuch as this word might imply an over-emphasis on the intent of the artist. When dealing with the aesthetic generally, we are better to say that an object *means* something (for us) rather than that it *communicates* (to us). "In that way, we would not be assuming that the picture is an actual putting out of the artist's own state of mind": see Munro, *op.cit. supra* n. 60 at 79-85.

103 See the critique of Goodman, *op. cit. supra* n. 38, in Mothersill, *op. cit. supra* n. 15 at 7-11.

104 Representative of the school of literary theory called 'New Criticism', see Brooks in Adams, *op. cit. supra* n. 10 at 1032, 36.

105 Santayana, *op. cit. supra* n. 27 at 31.

106 M. Jay, "'The Aesthetic Ideology' as Ideology" (1992) 21 Cult. Crit. 41 presents a more nuanced approach to postmodern aesthetics than that of the critique mounted by Eagleton; and see J. Chytry, *The Aesthetic State* (Berkeley: University of California Press, 1989).

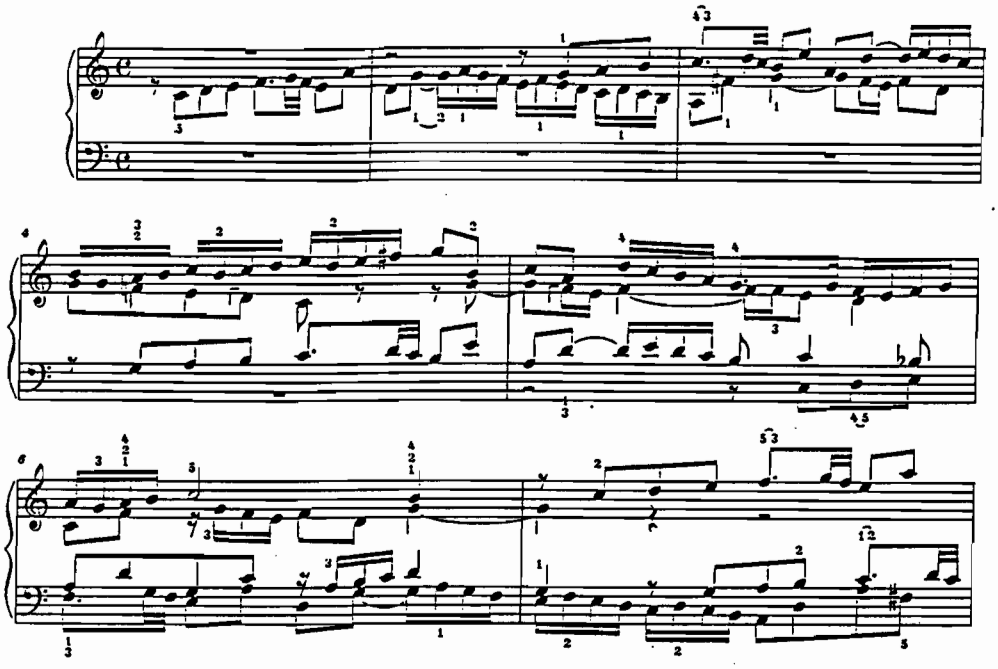
107 See also the somewhat parallel approach to 'habit' in the work of John Dewey discussed in Kestenbaum, *op. cit. supra* n. 35 ; Dewey, *op. cit. supra* n. 13.

108 Bourdieu, *op. cit. supra* n. 36, quoted at 13.

109 It is in Schiller, *op. cit. supra* n. 12, at XXIII.5 that we first find reference to "the aesthetically tempered man." See also Miller, *op. cit. supra* n. 95.

Fugue

An Introduction to the Aesthetic Dimension



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Fugue

An Introduction to the Aesthetic Dimension

I. The fugue as metaphor

For every Prelude there is a Fugue; for every simple theme, a complex and polyphonic development awaits it.[1] If the Prelude represents the leisurely unfolding of an idea, the Fugue expresses a fervent layering of thought. A musician from the Netherlands once said to me that he thought that a fugue was just a malfunctioning canon. Somewhat defensively, I replied that a fugue was no more a kind of malfunctioning canon than the Dutch are a species of malfunctioning Germans. In fact, the fugue is one of the most elaborate and enduring forms of counterpoint. It begins with great simplicity—a single unadulterated line of melody which is nothing more than a fragment—and one by one adds (literal or figurative) voices, each in turn first declaiming and then commenting upon the fragment. The subject is tossed from part to part, from register to register, sometimes merely restated and sometimes varied, each part keeping all the while its individuality. The ideas of a fugue, its subject and those that play against it, are not blended but rather stratified. It represents an intensified use of musical resources, melodically and harmonically, over the prelude which precedes it.[2] It is a more richly textured and intricately faceted articulation of musical ideas.

A fugue then is an experiment: trying out a musical idea with different voices and different tonalities—sung first in the tenor, perhaps, then in turns by alto, soprano, bass—overlapping it with other voices, doubling and halving its speed, reading it back to front or upside down.[3] But there is also something matter of fact about the fugue, which begins with such a clear statement of its subject, and reiterates it so insistently. The theme is, in its variety, at all times recognizable although, unlike the structure of a theme and variations, for example, its different aspects are developed not discursively, but *simultaneously* in different voices.

Perhaps the best way to distinguish the feeling of a prelude and a fugue is that where the prelude is allusive, the fugue is declaratory.

At the same time, a fugue typically breaks up intense statements, by the various voices, of the subject matter, with 'episodes', in which a particular aspect of the subject is explored in more detail. The fugue intersperses the theoretical with the concrete and the general with the particular. Its strength lies in its ability to present a subject—on the one hand to explore it and to present it in a variety of contexts and on the other hand to contrast it with other, balancing and related, ideas—while never attempting to subsume all these different aspects and contrasts into one homogenous line.[4]

This is how the aesthetic dimensions of law and justice (or 'legal aesthetics') will be explored. In introductory form in this chapter and then throughout the songs which follow, I look at my 'subject' from different angles; drawing on a variety of different 'voices' or source materials to explain its meaning; interspersing periods of thematic or theoretical development of the subject with more concrete and illustrative 'episodes'; setting against it other related techniques for the analysis of law which act as counterpoint to the main theme and help us to see what they reveal about each other. The book as a whole is a fugue, and this is the first statement of its themes.

II. The fugal subject

A. The aesthetic dimensions of law

Sensory experience, beauty and form, are powerful influences in our lives, and symbolism imbues this power with meaning. A reaction to the form or beauty of something, no doubt, often arises unbidden from the depths of our being, demanding our assent. So 'the aesthetic' is about way these realms of understanding come to deeply affect us. But the aesthetic also has force because of

the intense web of symbols—some idiosyncratic and some firmly authorized by the cultures to which we belong—which we all carry around within us.

These elements of our aesthetic experience are crucial to our functioning. It would appear that most cases of autism, even amongst those with remarkable ability, involve an absence of exactly these features: there is a lack of aesthetic appreciation, a dulling of emotional affect, and an apparent inability to understand symbolic and conventional meaning. Yet our culture is itself autistic.[5] When Marcel Duchamp put a urinal or a bicycle wheel in an art gallery, the irony was surely double-edged, for it brought into focus not only how we look at 'works of art', but how we fail to look at everything else, how we pigeon-hole and marginalize aesthetic meaning. Once acknowledge that the aesthetic is not a thing to be known but a way of knowing, and it becomes relevant to every corner of our lives.

Form and style, senses and symbols, influence our understanding of the law in a manner all their own. Aesthetics affect the values of our communities, values which are in their turn given form and symbolism within the legal system. In the law, then, we find not only evidence of our beliefs, but traces of the aesthetic concerns that propel them. The converse also holds. The legal system is not merely the passive mirror of a world-view. The law is a kind of discourse whose outlook on the world takes its place as one—frequently privileged—way of interpreting events around us. If we look at a street march as an 'exercise of first amendment rights' we may approve of it, while if we focussed on the substantive issues behind the demonstration we might not.[6] But either way we think of the question in terms of 'freedom of speech' in part because that is how the law approaches the problem. The gaze of the law influences the gaze of us all: it defines a situation in a certain way, and encourages us all to look at it likewise.

To understand to what extent we are in the grip here of legal aesthetics—a way of seeing and constructing the world—requires above all a sensitivity to language, for the law is largely built of words: statutes and cases, jurisprudence and articles, comprise the raw materials of its construction. Laws are intended to have performative effects: they are expected to *do* something.[7] But their meaning as rhetoric, as a *way* of saying, is also important. The gaze of the law—its way of talking about problems and of dividing up the world—influences our interpretation of the world, and we find it revealed in the form and structure of laws and the metaphors and imagery to be found in legal texts. An analysis of these aspects, therefore, will tell us what a particular law or judgment actually means to a community and how it influences them.

Law, values, and aesthetics exist in a mutually constitutive relationship. Aesthetics is not, therefore, an independent variable. Nonetheless, as with all theory, the purpose of its study is to treat it *as if* it were independent, as if its relations to the legal system could be isolated and evaluated. What would an analysis which treated the aesthetic dimension as central to the workings of the law look like? By treating as figure that which is normally ground, new relations and influences can be determined, a new tool of analysis developed, and new understandings explored.

B. Precursors to legal aesthetics

Law about aesthetics

Samuel Johnson remarks that in the service of John Donne's "metaphysical wit...the most heterogeneous ideas are yoked by violence together."[8] There is a difference, however, between a mere yoking together and genuine comparative work. Previous attempts to juxtapose ideas of law and aesthetics have been characterized, by and large, by little self-awareness and certainly by little

appreciation of the complexities of aesthetic experience. The next section surveys and distinguishes some related inter-disciplinary work, as a necessary clearing of the ground for the outline of the aesthetic dimensions of law which follows, and their exploration in the chapters that follow.

In a narrow sense, many writers have dealt with both terms, in discussing, for example, the legal treatment of art and of the body. These we might characterize as engaging in an examination of laws *about* aesthetic issues. Thus the question of damages for visible disfigurement, certainly touches on how the legal system deals with beauty.[9] Neither is this a simple area. We might ask, what aesthetics of the body are embodied in law? How does it look at how we look? Patriarchally, as for example, in those cases in which a woman's beauty and chances of remarriage following the death of her husband have been coolly calculated by the court?[10] Or economically, as for example in cases in which women have received greater damages for injuries to facial or bodily appearance than we might expect if the plaintiff had been a man?[11] Or subjectively, as a question of *self*-esteem? The courts' treatment of such issues reveals not only the traditional instrumental and economic biases of tort law, but an aesthetic: a way of judging the appearance of another, on the one hand, and a way of valuing beauty, on the other. The legal system has developed a certain construction of the body, a construction which expresses the male gaze,[12] turning to object and commodity every thing on which its eye alights like some King Midas.

Law has had to confront the question of beauty in other areas as well, in relation to the copyright of artistic material, for example, or in cases concerning the protection of the environment and freedom from "aesthetic nuisance".[13] Relatedly, Costas Douzinas, Shaun McVeigh, and Ronnie Warrington analysed a court case about the proposed placement of a Henry Moore altar in a seventeenth-century church designed by Christopher Wren. In a case, then, which dealt with the intersection of beauty and religion, the judges attempted to abjure any evaluation of

either, scornfully remarking that "there are hardly any rights or wrongs in matters of aesthetics." Although they purported to decide instead on the solid grounds of semantics (the definition of an altar) and authority (the opinion of experts), the exile of aesthetics from the court of reason fails conspicuously, and the use of that enticing phrase "hardly any" foreshadows the apostasy which follows. The case finally becomes a battle of aesthetic values, between Wren and Moore, classicism and modernism.[14]

In all these instances, however, the question of the relationship of legal judgment to aesthetic judgment is raised simply because the case was *about* art or beauty. The specific subject-matter in dispute seems to force aesthetics upon the law. Furthermore, the question relates to what the law says on or thinks about the subject of aesthetics. There is no exploration of the intrinsic engagement of the discourses of law and aesthetics, of the aesthetic dimension of *all* law.

Law and... aesthetics

One might expect such an exploration within the 'law and literature' movement. But from the rich analyses of J.B. White to more reductive instrumentalism of Richard Posner this has not been the case.[15] Literature has been used as a comparative model in more specific ways, focusing on the form of literature on the one hand (which helps us to think about the nature of language), and its subject matter on the other (which helps us to think about human nature).[16] This distinction between form and subject matter reflects also a difference between two distinct tiers of literary discourse. Literary theory deals with the question of form, and contributes to law a depth of understanding about language and a variety of analyses of the problematic relationship of text and meaning. Works of literature themselves, on the other hand, by their very subject matter present complexities of human conflict which the bipolar interpretations of the legal

system—right and wrong, good and bad, true and false—conceal or ignore at their peril.[17] At times, it is what literature specifically has to say about law that is interpreted for a lawyerly audience, as for example when Albert Camus or Franz Kafka are cited in debates on the malaise of justice.[18] But most often it is simply a work of literature's cultural status, familiar in its resonances yet profound in its implications, which justifies its use as evidence.

Ronald Dworkin is an example of the first tier. He is a writer for whom theories of art and literature have been influential. Dworkin has taken on board the literary criticism of objective meaning, and adopts what could broadly be described as a hermeneutic approach to interpretation.[19] But for Dworkin, literature, as well as informing his appreciation of problems of interpretation, provides him with a useful metaphor. He sees a line of judicial precedents as a narrative: a "chain novel", each chapter of which has a different author. The role of a judge when faced with a new case in the course of this co-operative endeavour is, like that of a "literary critic teasing out the various dimensions of value in a complex play or poem", to read the previous instalments in a way which makes sense of them all (or with most of most of them), and to write a new section in that spirit. Thus the narrative of the law goes on, from precedent to precedent... resembling, it must be said, not so much a novel as a soap opera.[20]

There is no space here to contribute an analysis of a theory which is of considerable complexity, and much glossed.[21] But while Dworkin uses *art* as a metaphor and *literature* as theory, he seems to have no real understanding of the role of aesthetics in either the meaning or production of law. And even on his own terms, there is a striking simplicity to his approach. He argues that our role when confronting a work of art is not to criticize but to make it "the best it can be", to read it as kindly as possible, and that likewise we ought to strive to interpret our legal system in the best possible light.[22] But this misunderstands a hermeneutic approach, which while it admittedly requires us to respect and

tradition to which a work speaks, does not permit us to abandon our critical stance, nor to equate the 'best reading' of something with seeing it in its 'best light'. This is sheer equivocation.[23]

If Dworkin is of the first tier, which considers the theory and not the practice of literature, James Boyd White is of the second. Reading specific literary texts with considerable subtlety, White treats literature as a way of improving our appreciation of law as a rhetoric which attempts to symbolically express and develop the values of a community. For White, law and ideas of justice are means of constructing healing narratives out of people's fractured lives. It is not literature as metaphor which interests White so much as its use as a resource of the truth and power of such narratives.

Here there is a stark contrast to Dworkin, who also describes law as a narrative but does not take the parallel seriously. The only voices in *his* narrative are those of judges, past, present, and mythological; their narration is nothing but a series of propositions about the law, laid out like bottles on a wall; interpretation is a question of consistency of meaning. In White, on the other hand, law's value, like that of literature, does not just lie, for example, in the decision rendered in a particular case, but rather in the complexity and ambiguity of the judgment, and the ways in which judges try to give voice to the interwoven and differing narratives placed before them. Community is formed and advanced not simply by what is said, but by *how* it is said. White insists upon law beyond rationality, language beyond denotation, and the many voices of justice.[24]

Even this approach to law and literature, influential though it is, misses the fundamental role of aesthetics in the construction of both. 'Law' and 'literature' are treated as two separate disciplines with certain aspects in common and certain things to teach each other. To think of literature as a metaphor for law, which is what writers like J.B. White do, is to have predetermined them as separate

disciplines. In the first place, then, there is no understanding of aesthetics as a way of knowing which colours each (and every) field, 'law' as well as 'literature'. The separation which lies at the heart of the law and literature movement treats them as fit subjects for *comparison* but not of *interaction*. Rarely is there any suggestion that law might influence literature, or literature change the law—ideas which become attractive immediately one ceases to treat aesthetics as a thing to be seen and instead look upon it as a way of seeing. One might even suggest that law and literature juxtaposes two nouns, while the aesthetic dimensions of law explore the behaviour of two verbs. In consequence, while law is said to be able to *learn from* literature, the aesthetics of law assumes that a relationship of co-existence, and of inevitable interaction, is already present. 'Law and literature' means law *next to* literature, an argument by analogy or metaphor; 'legal aesthetics', on the other hand, means aesthetics already *in* the law, an argument about the process by which we get legal meaning.

Postmodern legal theory, and postmodernism generally, has been marked by a resurgence of interest in aesthetics.[25] In Costas Douzinas and Ronnie Warrington, *Justice Miscarried: Aesthetics, Ethics, and the Law,* in particular, aesthetics is recognized as a distinct analytic perspective. Here, and in Peter Goodrich's work amongst others, considerable use is made of *works of art* as texts through which to explore legal ideas. Not only poems and plays, but paintings and architecture too are treated as creators of legal meaning, and this approach touches in innovative ways on the manner in which law is communicated through images, icons, and myths. The visual, the architectural, the performative environment of the law all say something about what the law is for, for whom, and how.[26] This move towards the unspoken and *iconic* representation of law marks a significant development in legal thinking, away from a purely linguistic understanding of how law is communicated.

Nevertheless, most of this work remains very much within the nascent field of what we might call "law and art". Even in these cases, Douzinas and Warrington treat art, like literature, as a separate discipline to illuminate the law and not as an independent but intrinsic aspect of it. The same can be said of the new book by Gary Bagnall, *Law as Art.*[27] For despite its title, Bagnall understands law "as" art only for explanatory purposes. Law on this analysis is "best understood as" a performative and creative institution like opera. Other occasional ventures into what we might call "law and music" have taken roughly the same approach.[28] The argument is always by way of analogy. 'Art'—as in the law and literature movement—is in these cases still seen as a metaphor. This is an argument about how we should think about law, rather than about what the law actually means to us, and how it operates. It is this deeper and fuller engagement which the *aesthetic*, as opposed to the artistic, dimension of law proposes.

Ironically, in terms of this idea of engagement, the aesthetic dimension has more in common with the 'law and economics' school.[29] Economics is treated as being actively engaged in the production of legal meaning and not just a disciplinary tool for thinking about it. The relationship between the two fields is treated as a day-to-day reality rather than simply an intellectual comparison. In this tradition, economics is not *like* law—the argument does not proceed by metaphor; it is *part of* what law means and how it develops. This is the distinction I have been trying to draw. But of course if the analytical process of law and economics is in some ways similar to legal aesthetics, its content is most assuredly not. 'Law and economics' assumes human beings to be, fundamentally, rational actors with economic motives. Such an impoverished understanding of human motivation and meaning the idea of an aesthetic dimension specifically rejects. While 'law and literature' has at times a weak understanding of law, 'law and economics' has a far weaker understanding of human beings.[30]

Not that law and economics operates on a purely literal plane. It is in fact an entirely symbolic order, built on that most symbolic of objects, money, through which is accomplished not only the symbolization of goods and exchange, but the sublimation of conflicting values beneath a shared symbol. The economy provides a supposedly neutral field of social discourse which converts dispute into exchange, difference into similarity, and incommensurables into commodities.[31] The law and economics movement, however, is internal to this symbolic language. It adopts it as its own and never attempts to stand outside the order which legitimates it, either to interrogate or to comprehend it. We cannot look here, then, for any analysis of the role or power or the meaning of symbols in the law: law and economics is too thin and uncritical to offer us any purchase on the question.

Law with aesthetics

(a) Implicit

A central theme of the aesthetic dimension is the idea that the form of something is part of its meaning. Formal design or structure—whether of a poem or a statute—is not just the medium through which ideas are expressed, but are themselves possessed of meaning. Form and style are not, then, just the receptacle into which abstract propositions of law are placed, but part of what the law says to us. Indeed, exactly because the form of something is often not on the conscious horizon of its authors, it provides us with a revealing glimpse into that which is accepted uncritically within a legal community. Form is evidence not of legal epistemology, but of its ontology, of legal metaphysics.[32]

In the work of some scholars, there is a sensitivity to this aspect of aesthetic meaning. J.B. White, for example, argues that the form as well as the content of a legal opinion—the narrative design of the case method, the adversarial structure of contrasting voices, the requirement of final judgment—serves as a model of

narrative, through which the voices of the participants are integrated into a common vocabulary, a means of reconciliation.[33] But White nevertheless treats form as a given, as if it were the rhyming scheme or metre of a sonnet, rather than as something possessed of its own contingent meaning. Occasionally, it is true, one finds experiments in form within legal writing: the judgment in *Fisher* v. *Lowe,* for example, was rendered in rhyming couplets.[34] But such cases manifest mere playfulness—or flippancy—of purpose. Doggerel form displays summary judgment and not aesthetic appeal.

Within the academy, rather than on the bench, the use of formal innovation has been pursued more self-consciously. Indeed, it could be said that one of the enduring legacies of Critical Legal Studies, to some extent, and of feminist legal theory in particular, has been its emphasis on personalizing legal writing as a means of opening up issues of subjectivity, and of standpoint. A variety of techniques, such as the incorporation of personal anecdote, history, and confession into the text of legal articles, have served through the medium of form and style to raise these issues.[35] In "Roll Over Beethoven", for example, Peter Gabel and Duncan Kennedy rebel against the form of the élite law review by presenting their article as if it were a dialogue. Such a form suggests informality, tentativeness, and evolution, although it tends also towards pretension, self-indulgence, and that bravura disrespect which the establishment permits its privileged sons.[36]

Again, Rod Macdonald in a range of articles has used the memo form to convey the conjunction of individual personality and written formality in evolving norms of institutional politics; a series of letters to imply intimacy and the importance of human interaction in the enterprise of teaching; and a structure of multiple references, somewhat akin to hypertext, to connote the non-linear nature of thought and implication.[37] In each case form contributes to the meaning of the subject-matter. Neither is this kind of connection entirely new. Peter Teachout convincingly argues that the essays of Lon Fuller, for example, need to be

understood as more than merely concepts strung together using words. There is an integration of form and content here: of an approach that is ethical and practical, with a design which often spirals from a dichotomous beginning to a more complex conclusion where ideas of complementary hold sway, and with a language which uses metaphors carefully, incrementally expanding their compass.[38]

(b) Explicit

The few scholars who have written explicitly on the aesthetics of law, however, have tended either to take an uncritical approach to their subject or to focus on limited aspects of aesthetic theory.[39] In the former category we find, for example, Louis Schwartz, who equates justice and beauty without ever exploring what that might mean. Indeed his overriding concern would seem to be a critique of "flimsy" or "dubious" public policy arguments (that is, distributive justice), which he calls ugly, implemented at the cost of (corrective) justice, which he calls beautiful.[40] The aesthetics of justice remains a nice thought, but nothing more. Mark Kelman, otherwise so opposed to Schwartz, also characterizes views he dislikes as "inelegant" or "numbingly boring", without expanding on why this might matter, and how. Ugliness in such hands is little more than a term of abuse.[41]

For Drucilla Cornell, the aesthetic appears to involve vision and of faith, an appeal to a Dreamtime of origins and a science fiction of utopias.[42] It is a rhetoric which Robin West shares:

> We are not compelled to accept or reject an aesthetic vision of human nature that appears in a novel or in a legal theory...Therefore we must decide not whether the worlds we envision are true or false, right or wrong... We must ask whether the imaginative vision [it] presents is attractive or repulsive, whether it is "true" not to this world, but to our hopes for the world.[43]

Here, our 'aesthetic' vision of the future is treated as a synonym for 'taste', and assumed to be both purely subjective and beyond argument. It is therefore in stark contrast to an approach which focuses instead on its symbolic meaning and analytic potential.

Elsewhere, West hunts the aesthetic quarry with greater vigour. In "Jurisprudence as Narrative", West adopts Northrop Frye's taxonomy of narrative paradigms, in which an author's vision of the future can be categorized as either 'comic' and optimistic or 'tragic' and negative, and the author's method of narration either 'romantic' (writing by comparison with an ideal world) or 'ironic' (writing by comparison with the real world).[44] Mapping these two dimensions, one of vision and one of method, onto the modalities of legal theory, West identifies comedy with liberalism, and tragedy with those forms of statism (such as Hobbes') which treat human conflict as inevitable and to be feared; natural law as romantic and positivism as ironic.[45] I do not intend to undertake an explication of the insights this fruitful piece provides into the debates of legal theory. Modernist legal theory certainly needs to be understood as a conflict of aesthetic visions, a theme further developed in the *Quartet,* for law is not a matter only of logic or ethics, but rather, remains dependent on our hopes for the world and how we situate ourselves within it.

Nevertheless, West is still using a model extracted from one discipline—in fact, from one author—to illuminate another, rather than exploring their interaction. The same can be said of Janice Toran, who adopts Beardsley for her purposes. She argues that procedural reforms are often motivated by a (subconscious) appreciation of Beardsley's canons, by a drive towards simplicity and unity detached from the functional purposes of reform. Her argument is therefore both descriptive, and a warning against making beauty an end in itself.

> Yet the pervasiveness of references to simplicity, and the at least occasional discrepancy between modern procedural visions and reality, suggest that these reformers sometimes tend toward simplicity and simplification [just] because they find it more aesthetically pleasing.[46]

Along with Beardsley, however, Toran treats the aesthetic experience as disinterested, a question of abstract form and structure. In the case of both Toran and West, their confined understanding of aesthetics makes their analysis difficult to extend to other areas.

Toran contrasts Beardsley's canons with the 'subjectivist tradition' which, according to Toran, "makes disagreement on aesthetics impossible".[47] As we have seen, this is a false dichotomy. On the one hand, it has permitted subjectivists like Schwartz to leave their aesthetic values unquestioned altogether, while on the other hand, objectivists such as West and Toran have found themselves confined to a somewhat doctrinaire, though certainly valuable, contribution based on analyses of the aesthetic developed by other writers working in other fields for other purposes. Without expanding beyond the constraints of this dichotomy, a genuine field of legal aesthetics will not emerge.

C. *Analogues to legal aesthetics*

Law and myth

The aesthetic dimension of law is not interdisciplinary but transdisciplinary.[48] It does not compare two separate disciplines but, precisely as it suggests, argues that aesthetics is a dimension of human experience which is to be found in many disciplines, including law. Something close to this is found in the French historian Pierre Legendre, who writes of "the other dimension of law." Here we find law understood as a species of sanctified speech, a collection of founding myths, symbolized in the form of language, by which authority the force of law is legitimated (Derrida makes much the same point).[49] For Legendre then, the

essence of law lies in its status which, through symbolism and metaphor, connotes an understanding of the self and a stabilizing myth of social order. Law takes its place, along with other mythological activities such as "art, poetry, dance, enigma, and music."[50]

This expresses two aspects central to legal aesthetics. The first is that of representation. Legendre sees the idea of the *image* as the essential medium of law's presence: law expresses images of how society ought to operate; and those images are themselves expressed through language—in other words, through an additional layer of imagery that is itself poetic/metaphoric. From its poetry it derives meaning and from its mysticism, authority. This focus on language and imagery entwined, suggests that if we are to understand the meaning of law we must use an aesthetic methodology. The second aspect is that of reflection. According to Legendre, law reflects images derived elsewhere. It mirrors the self, and its authority derives therefore from the image of ourselves it portrays. But Legendre does not seem to recognize the doubleness of this reflection. Law is not just a mirror; it also acts through its language and structure as a *force* of aesthetic creation.

The fundamental problem with Legendre's analysis, however, is that he has the non-lawyer's faith in the *modern myths* of law. He writes as one in mourning for a lost past of legal poesis.

> In place of paradox, poetry and mythologising of the early interpreters of law, in place of the living colour of law, its emblems and rhetoric...ultramodernity pushes at increasing pace towards an unruffled absolutism of certainties dressed in no more pleasing garb than the jargon of bureaucratic objectivity....To remove interpretation and the figurative representation of law while leaving law itself in place, is to leave it in a palace of ruins...[51]

For Legendre, the aesthetic dimension of ancient law has yielded its place to the instrumental rationality of modern law. But do we really think that modern law is without emblems or rhetoric? That there could be such a thing as law (as culture,

as language, as structure) without figurative representation; as legal history without myth? As Peter Fitzpatrick argues, modern Western law has its own mythology about its origins, its destiny, and its rationality. "My seeing myth in terms of modernity," he writes, "does not fit the identification of myth with a world we have lost." It is part of the "white mythology" of the West to characterize its law as being purely logical and without those mythic and mystic elements which exist only in more 'primitive' societies.[52] But let us not believe the myth of the mythless law. The task of legal aesthetics is to explore and reclaim these elements, thought lost by Legendre, from the interstices and margins of the law.

Law and semiotics

Legendre's approach is considerably influenced by semiotics, and here too we find a cognate field. In a number of valuable books and articles Peter Goodrich, in particular, has explored the ways in which the calculated illogicality of legal forms such as the writ and subpoena, and the arcane formulae of legal language in general are possessed of a structural meaning beyond that of the words they use.[53] Thus for Goodrich, a writ, like a sacrament, is "iconic"—what matters is the constant ritual re-enactment of the form, and not its content or purpose. So it is with legal argument generally: it demands a particular form, rigidly controlled, which conveys above all the need for quiescence in the face of authority, and the exclusion of outsiders from its rituals.[54] Even the packaging of legal texts can be seen as symbolic.

> The law reports come in sizeable uniform volumes. They are bound in single and normally dull colours...Each set of reports stretches with bland numerical indifference over seemingly infinite shelving. Each volume is extensive—not to say palimpsestic—in terms of its number of pages and the type of paper used: it is likely to be printed on thin India paper in smaller than average typeface....There is no logic to the list of cases.[55]

On this analysis, it is the feel and look of the lawbooks which has symbolic import. Semiotics is here aesthetics. Indeed we could not have the one without the other. Without the ability to recognize that our understanding of a word (and therefore of a law) extends, far beyond its literal meaning, to a whole realm of subtle connotations, we could not go beyond a rational and instrumentalist account of law; and without the appreciation that words and acts always symbolize other things, in a vast chain of cultural associations and resonances, we could not begin to appreciate how a legal text can have visual, metaphorical, or emotional significance. Both semiotics and aesthetics emphasize the powerful and pervasive influence of symbols in our lives.

I do not wish to subsume the two approaches, however. Legal semiotics has at times been overtaken by a systematizing impulse in which the scientific pretensions of semiotics have held sway. The weakness of this kind of endeavour is that it attempts, in the work of Bernard Jackson, for example, to categorize the symbolism within legal language, perhaps, but not to explain it. The same can be said of some of the works of Roberta Kevelson who has attempted to apply to legal materials the difficult semiotic theories of Charles Peirce, with their complex arrangement of orders and classes of signs.[56] Nevertheless, this is an interior monologue of the law: linguistic signs confront linguistic signs and explain themselves by themselves. "*Semiosis explains itself by itself...* " says Umberto Eco, echoing Peirce on this point. "This continual circularity is the normal condition of signification."[57] In this kind of semiotics, law is not treated as referring to as a creator or mediator of a wider social symbolism, but rather as the repository of a purely internal system of signs.[58]

Neither Kevelson nor Peirce, however, wish to conflate semiotics with aesthetics. Indeed, Peirce freely wrote of the power of aesthetics as the normative basis of the symbolic order. If we want to understand how symbols provide us not only with the connotations of words and events, but with their *value*, Kevelson

argues, we must look to "legal aesthetics," which "concerns the set of values to which the law at any given time refers."[59] There is, then, a recognition here that aesthetics is something separate from semiotics.

In Kevelson and Peirce, the difference is that the aesthetic judges the symbols it perceives. Signs are the raw materials to which the aesthetic sense assigns value. Clearly this will not do, and for three reasons which flow one from the other. In the first place, there is a tendency here to treat the aesthetic as a given and, ironically, a reluctance to acknowledge that aesthetic values, too, have symbolic origins. Peirce would seem to place aesthetics *beyond* the self-referentiality of the semiotic world. The desire to find something objective and neutral in aesthetics, some escape from the circle of signs, thus rears its heads where we might least expect to find it.

Secondly, there is always a sensory element to the aesthetic, a way in which it makes itself felt in the core of our being, which the abstracted language of semiotics does not capture. It is important to recognize the symbolic aspects of an aesthetic experience, but this must not be taken to lessen the immediacy of the sensory reaction. While semiosis develops a way of thinking about the meaning of things, aesthetics captures how we *feel* about them. Undoubtedly, behind a judgment of beauty, for example, there is a symbolic meaning based on cultural associations. But initially there is the feeling, which crowds in upon our senses, immediate and compelling. It is that vital sensory power which the idea of aesthetics also conveys.

Thirdly, semiotics is an analytical *technique*: it suggests a way of deciphering meaning beneath meaning and of reading between the lines. From a methodological standpoint, it is of enormous value in revealing the aesthetic content hidden in the rational, or the imagery of the textual. In the work of Goodrich, in particular, his emphasis on the oral and the visual, on the significance

of form and presentation, and on the role of the symbolic in law demonstrates a powerful appreciation of aesthetic meaning.[60] But there are connections which semiotics, as a technique, cannot make. The idea of aesthetics suggests a theory of human motivation—of the kinds of things which influence our thoughts and lives. It emphasizes the power of feelings, and not simply neutral signs, to drive us on. And, as Kevelson and Peirce recognize, it contains a normative element too, both because it insists on the necessity of addressing aesthetic, as well as rational and ethical, concerns in the mediation of social conflict, and because it implies that our legal systems ought to pay greater respect to recognizably aesthetic values such as empathy, difference, and singularity. All these are parts of the aesthetic dimension which I will pursue in the last two chapters.

Legal aesthetics is a tool of interpretation and categorization, at which point it may find in semiotics an appropriate counter-subject. But at the same time it is epistemological and normative. It stakes a claim not only about the meaning of law, but about why the law is and what the law ought to be. This is why the aesthetic is a transdisciplinary rather than an interdisciplinary endeavour. It is exactly by bringing to the fore certain related aspects of many disciplines such as law and literature, semiotics, and deconstruction, while at the same time bracketing other of their features, that the aesthetic dimension of the law comes into clearer focus.

The aesthetics of legal institutions

To a socio-psychological understanding of aesthetics and a broad comprehension of the law, I have insisted on an exploration which pays attention to their *dynamics*, the living nature of their interaction in the lives of human beings; and, furthermore, to the *mutual* nature of that relationship. Even within this framework, however, I have chosen to concentrate on law understood as a series of

texts and ideas, rather than as the practical process of particular institutions, although this too is undoubtedly an important aspect of law in our society. This section indicates some possible aspects of the aesthetic meaning of the legal process and legal practice, which nevertheless remain undeveloped in this analysis.

The trial, for example, reveals the aesthetic dimension of law as an institution. As I have already mentioned, the architecture of the courthouse, lawyers' dress and language, the sound and even the smell of the court communicate meaning to those brought before it.[61] That is the environment in which a trial takes place. What of its conduct? Any experienced litigator will tell you that cases are won and lost on the presentation of evidence. On the style and structure of legal argument, and the vulnerability or authority or sympathy of witnesses, hang lives and results. *Natanson* v. *Kline,* for example, was a breakthrough case in the development of the law of informed consent. In that case the plaintiff sued for the negligence of her doctors, not in the performance of an operation and diagnosis, but because, it was argued, they had failed to adequately inform her of the risks involved in a particular line of treatment even if performed with due care.[62] But why did this reasoning succeed in Natanson's case where others had failed? She was a young woman, suffering from breast cancer, who emerged from a partial mastectomy seriously disfigured in ways about which she had not been warned. On one level, then, the fact that she was young and female was obviously of importance to her distress at her physical condition, and to that of the jury too. More: the turning point of the case came as she gave her evidence. In open court, she undid the buttons of her blouse and displayed for the jury her bare, scarred breasts.

> The ribs had been destroyed by the radiation and [all that could be done] was to have a layer of skin over the opening. I recall seeing the beat of the heart reflected in the movements of this skin flap.[63]

The revulsion here is three-fold: first, to the shocking sight and undeniable reality of her mutilation, which words alone could never convey; second, to the humiliation which this young woman underwent, reduced firstly from a person to a patient, from a patient to a victim, and finally from victim to exhibit; and third, to the complicity of the jury and the court in this horrifying exhibition. What would one not do to banish the stain of that revulsion—to remove the nausea which that image had instilled in every person present? From the visual impact of that particular body, and the more complicated aesthetics of revulsion it aroused, grew new law.

On another level, Jay Katz argues that cases expanding the liability of the medical profession in the United States, such as *Natanson*, have principally been related to areas in which there have been new and powerful techniques—such as the practice of mastectomy—placed at doctors' disposal.[64] The courts' reaction to this expresses a fear of technology which relates especially to the increased intrusiveness of medical practice and the extent of bodily violation it foreshadows. No-one could doubt that the nineteenth-century surgeon with his saw was a greater terror than the scalpel-wielding physician of modern times; but the scalpel has been given, through the wonders of anaesthesia, an awful freedom which the body cannot resist, and if the body will not fight invasion, then the law will. It may be that it is the imagery of the precision knife and the supine, sheeted, body beneath it which has inspired, out of the stillness of the an-aesthetic, an aesthetic resistance couched in legal form.

Sensory images and symbolism convey meaning, however, not only in terms of the discourse of a particular trial but, more generally, through the legal environment in which the trial takes place. Here we are dealing with the semiotics of forms and institutions; that is, the way in which buildings and practices themselves operate as a system of signs which, although not linguistic in nature, nonetheless impart powerful social messages.[65] Douglas Hay, for example,

discussing judicial practice in England around the time of the French Revolution, emphasizes the aspects of spectacle in the way the court dressed and paraded, the solemnity of the occasion, and the formality of language, all of which buttressed the court's authority and mystery.[66]

The semiotics of the legal environment continues to be of the utmost importance. Macdonald has undertaken a micro-study of the ways in which power is interpreted and used through the allocation of institutional space.[67] More generally, Peter Goodrich amongst others has described in some detail the semiotics of courtroom behaviour, and how it instils alienation and disempowerment both visually and acoustically: through the size and space of the courtroom; through the placement of seats, the isolation of the dock, the looming height of the judges' bench, and their stage-managed entrances and exits; through the visible antiquity of modes of dress and address.[68] Just like the church in the middle ages, architecture, archaism, acoustics, theatre, and costume are all vital ingredients in the concoction of power.[69] A grand cathedral and a cavernous court, the echoing of a Gregorian chant and the resounding clamour of a gavel... mitre and wig, introit and oyez... For millennia, we have been summoned to obey through our pores and our senses.

The trial is typically treated as the heart of law, and the adjudication of the instant case as the central element of its functioning. "The courts are the capitals of law's empire, and judges are its princes," writes Dworkin. It is a sentiment echoed throughout the literature, from positivists to realists to Critical Legal Studies[70] I suggest that this is to some extent aesthetic, because it creates for us, by constant repetition, an image of what we mean when talk of 'the law'. It is not only the nobility of jurisprudence who have been responsible for this image, but the bourgeoisie of television too, of course, feeding us a steady diet of courtroom dramas. If judges are the princes of law's empire, then Perry Mason and L.A. Law

are its merchants, peddling the beneficence of the system to the masses. *Here* is where law takes place, these images say; *here* is where it matters.

Law is too often understood simply as a process of decision-making which occurs at a particular time and in particular places. To resist this, we must descend the courthouse steps. Law is something which takes place *beyond* the courtroom, as a product generated by the interplay of texts and images in the life of a community. Law is the work of many moments and many readers: not simply as a set of institutional machineries, but as an ongoing reality in all our lives. For almost all of us, almost all the time, the law is a field of linguistic symbols, an expression of social values, and a kind of ultimate terminology through which we try and make sense of our lives and of those around us. It is a collection of ideas and rhetoric. This is the heart of law as an experience, and it is to those aspects which the argument for its aesthetic dimension pays most attention.

III. The fugue as architecture

A. Formal structure

Issues of form, presentation, symbolism, and emotion all have their part to play in this argument. At the same time, there is a continuity of approach which suggests the underlying unity of these different facets of the aesthetic. While politics asks us what we can do and ethics what we ought to do, aesthetics enquires into what we see and how we should see. In the five chapters that follow, this enquiry develops in three distinct sections, each of which take a different approach to the aesthetic dimension of law, although they adopt and build upon those that go before. They are, perhaps, *movements* for there is an argument which moves within them and which moves from one section on and out to the next.

Exposition

The first movement, the *Motet,* deals with aesthetics as a methodology. A sensitivity to the use of rhetoric and metaphor, for example, can enrich our understanding of the meaning of law, for the style of a legal judgment contributes to both its weight as precedent, and its meaning.[71] Law is not just a sequence of logical propositions or abstract rules. It is also a collection of symbols and influential metaphors.

So too, although in a very different way, an approach to the text sensitive to its form, its design, and its presentation, by focusing on the aesthetic elements of the legal product, provides the reader with new insights and a fresh interpretative perspective. In particular, the *Motet* takes as a case study the form and language of English legislation from the thirteenth to the sixteenth century, and argues that the changes that such an analysis reveal can tell us about the changing understanding and assumptions of those societies as to the role and power of law. The purpose of aesthetics here, therefore, lies in its ability to help us discern meaning in the law, and to read it with subtlety and imagination. Without such an appreciation, the idea of legal aesthetics will remain an oxymoron.

This approach is resolutely textual in nature. In the first place, it finds meaning in something other than the rational surface and logical structure of law's words. Such a reading helps us to recognize what else is being said, *sotto voce* as it were, in law's margins and metaphors. To some extent this is a visual exercise in the look and shape of written law.[72] But my prime concern at this point is in revealing the ways in which language is used.

To sum up: the first movement treats aesthetics as a way of reading and deriving meaning. It can be characterized as a methodology, its orientation interpretative, its raw materials textual, its tools of analysis linguistic, its purpose to

show what aesthetic analysis reveals about legal materials. It is an exposition of the aesthetic dimension.

Augmentation

The *Requiem,* and the *Theme and Variations,* continue to make use of the expository power of an aesthetic analysis, but in addition they explore the contribution of aesthetics to the wider values to which the law gives voice. Aesthetics here needs to be understood as an epistemology, by which I mean a way in which knowledge and value are created rather than just interpreted. Aesthetics provides us with a way of seeing and judging the world and is therefore a powerful formative influence on the development of legal principles. Therefore the law we often assume to have been the product of political or ethical values, is also a product of aesthetic values.

The aesthetic dimension helps us to explain the language and values which law enshrines. The *Requiem,* for example, is an extended examination of the jurisprudence of capital punishment. The debate over the death penalty is fundamentally aesthetic, and this chapter explores the aesthetic means—the sounds, images, and symbols—by which that debate has been constructed. This is not an argument about legal texts, but about the social context which generates them. And since we are interested in discovering the imagery and symbolism which forms the understandings to which law gives expression, there is an emphasis here on the meaning of visual and, more generally, sensory aesthetic experience. *Theme and Variations,* explores the law relating to 'drugs'. These laws reflect a widely felt reaction to a social problem. But, again, to what extent is this an *aesthetic* response—a reaction to the powerful images associated with 'drug' use, and the kind of symbolic meaning which that imagery has come to represent? A

focus on this dimension of the drug debate throws new light on an old and intractable problem.

To sum up: the second movement treats aesthetics as a way of seeing and a force in the construction of meaning. It is an epistemology, its orientation descriptive, its raw materials contextual, its analysis visual, and its purpose is to illustrate how aesthetic values inform the law. It is an augmentation—a broadening of the horizons of the aesthetic dimension.

Inversion

In the *Quartet* and finally the *Quodlibet,* the argument is to turned around. Aesthetics has a normative or prescriptive as well as a descriptive aspect. An analysis of aesthetics offers not only an understanding of the way it informs the law, but the way it might help to reform the law as well. This normative edge comes in a number of guises. The *Quartet for the End of Time,* argues that legal theories themselves are marked by conflicting aesthetics, which helps us to understand the nature of their disagreements—an analysis which makes use of an aesthetic methodology. But I also critique what these legal theories have in common. In different ways, they are all manifestations of an essentially *modernist* world legal theory, which we need to transcend in particular by developing a vision of the role of law in society which is both critical and pluralist. This potential shift in legal thinking is illustrated with reference to postmodernity in the aesthetics of art, music, and science. There are two reasons to draw on such different spheres of knowledge. Firstly, because it demonstrates how the aesthetic dimensions of different ways of thinking about the world are all bound up together in a transdisciplinary (and not just an interdisciplinary) way. Secondly, because a paradigm shift in theory—legal or otherwise—requires not only an intellectual change but an aesthetic one too.[73] The discourses of reason or justice alone are not

enough to facilitate change: the mind's eye and the heart, bound together in the experience of the aesthetic, must also be won. The *Quartet* therefore characterizes modernist legal theories in terms of their underlying aesthetic, and argues that a new aesthetic is both a natural and a necessary element of legal and social change.

Finally, in the *Quodlibet,* I turn my attention briefly to the normative realm of justice. At the heart of an aesthetic approach lies a number of key concepts including tolerance, empathy, and a respect for difference. Justice is a kind of judgment which is closely related to aesthetics. If we were to take the relationship seriously, if we were to treat the aesthetic dimension as a genuinely important part of law (and society), would our vision of justice be different? These are difficult question and in this final chapter, I do no more than allude to them. They are both processes, and not objects: one cannot, therefore, teach anyone what justice or beauty 'is'. But one can, I think, encourage a way of looking at the world that embodies a commitment to both. Like justice, aesthetics operates as a tension and supplement, even an irritant, within the workings of the law, prompting a direction and a movement. Aesthetics is something we should value in the law, and in the valuing, we may come closer to that elusive ideal of justice.

To sum up: the third movement treats aesthetics as a way of influencing the law. Here perhaps aesthetics can be viewed as a kind of value system implying strategies for accomplishing change, although not of course exclusive ones. It is an ontology, its orientation is normative, its analysis rhetorical, and its purpose is to demonstrate the ways in which aesthetics might help us reform the law. It is an inversion of the aesthetic dimension, treating the aesthetic not as a force directed at the law from outside, but as a force within it. The three sections taken together, then, accomplish a movement from descriptive to prescriptive, from cause to effect, from meaning to value, from methodology to epistemology to ontology, and encompass at various times linguistic, sensory, and rhetorical approaches to

aesthetics. But above all, they represent a movement outward from the law to society, and onward towards the future.

B. Polyphonic texture

Episodes

This argument is developed through a series of case studies. The history of early English legislation, the jurisprudence of capital punishment, drug law and policy, and the aesthetic ideology of modern legal theories—each in turn hold centre stage. These are the episodes of the fugue, which is to say the specific subject areas which the work addresses. The use of this structure reflects the importance of integrating the abstract with the concrete in aesthetic understanding.[74] On one level, then, these episodes are only instances of a broader approach whose relevance is to be found throughout the law. There is always an aesthetic dimension. On another level, however, just as a sculptor must respect the individuality of the surface she is carving and be alive to the unique interaction of material and theme, so too the aesthetic aspect of every issue is subtle and different. The richness of the analysis emerges exactly by appreciating its singularity, the protean as well as the constant elements of images in our lives. The aesthetic is not a kind of alphabet. It is not composed of finite and discrete units which are provided with meaning only in their combination; on the contrary, the meaning of each symbol is invented anew. It is not a commodity but an art-work.[75]

Counter-subjects

Against its subject, every fugue deploys counter-subjects, techniques or disciplines which both thicken the argument and at the same time offer a certain resistance, alternative paths of approach. Some of these techniques have already

been noted—semiotics, for example, and the approach taken by the law and literature movement—but there are many others that capture some of the facets of the aesthetic dimension. Throughout the text, for example, I am critical of the paradigm of law as a purely rational enterprise. Here, deconstruction has been an important influence. In the first place it is the approach *par excellence* attuned to dissecting the complexities and ambiguities in language. Furthermore, deconstruction is above all a method, a way of approaching literature and philosophy which insists that meaning and language can only be understood through a detailed reading attentive to the unique voice, movement, and implications of each individual text.[76] The insistence on an episodic form, on the need for *practice* as well as theory, is therefore a deconstructive move.

By and large, each movement focuses on particular analytic techniques. The first movement is textual in nature and, in addition to its semiotics, is largely historical in its approach, for an appreciation of history is a way of stepping outside the unspoken aesthetic values of the present in order to appreciate, through the insights of strangeness, their continuing importance. The second movement shifts attention from the words of the law to the values behind it and uses a range of disciplines, including semiotics and philosophy, as well as drawing on writing about the specific subject-matter under discussion. The third movement brings us back again to the idea of law, this time from a normative perspective. Here, particular attention is paid to jurisprudence and legal philosophy, searching for their aesthetic underpinnings and prescriptive implications. Finally, the aesthetic approach resists the move, so entrenched in orthodox legal thinking, towards the search for 'right answers' to social problems. This leads to an analysis of legal pluralism: another way of thinking about law, another tradition, and further insight into the aesthetic dimension.

By introducing this eclectic range of techniques to serve as counter-subjects, I mean to resist the claim that legal aesthetics is some supervening or all-

encompassing theory. A dimension is not exclusive or monistic in this way. The purpose of counterpoint, after all—the simultaneous clash and harmony of independent thematic lines—is to explore the compatibility of *different* themes without destroying the meaning or relevance of any of them. This might seem a rather obvious point. Not at all; in neither music nor philosophy has it always predominated. In the nineteenth century, when melody was king, the many extra voices which supported it played an increasingly subservient role: they added texture to the melody but they lost their own shape and identity in the process. The agenda of a piece of music is on this approach set by one idea and the role of every other part is defined in its terms, bit players in the service of a sweeping melodic triumphalism.

It is for this reason that playing the great Romantic works for orchestra or choir—a Mahler symphony, Verdi's *Requiem* or a Wagner opera—gives rise to two contrasting feelings. On the one hand, much of the writing for the inner or lower parts is very boring because it lacks any independent interest. On the other hand, there is a feeling of participating in a mutual endeavour which has but a single purpose and which marches steadfastly towards that goal. There is a sense of belonging which can be quite inspiring: as the century progressed, the musical resources used to achieve this end expand enormously. In choirs of hundreds, in a Brucknerian orchestra with 16 horns and a cast of thousands, independence is exchanged for a musical corporatism and integrity replaced by unity.

Musical history, once again, is merely one indicia of the intellectual spirit of the times.[77] Romanticism in music is but an aesthetic expression of a movement which found expression in philosophy, history, and politics alike. This is the story of modernity rendered aural: of totalizing ideologies which attempt to interpret every aspect of the world according to a master theory in the light of which truth itself is to be revealed. We see this tendency towards grand narratives—single melodic lines—in Marxism as in the ideologies of imperialism and capitalism

which opposed it, in Darwin and in Spencer, Weber and Durkheim. From each perspective, one interpretative element, class or economics, race or gene, is treated as the single lens through which the workings of the world can be completely analysed. Furthermore, there is a song about progress here—about where we have come from and where we are heading—in which we are all just playing our little part.

This is the critique which postmodernity levels at the moderns: the imposition of a fictitious narrative (or melody) upon a 'reality' altogether more fragmented and contradictory; and the insistence on totalizing frameworks all of which have claimed to show the world not only from a different angle, but from the *right* one. In contrast, postmodernism displays an interpretative pluralism: a concern for detail, poly-phony, ambiguity, and contingency.[78] The idea of the fugue captures much of this perspective, as we have seen, and while postmodernism turns out, in this area as in many others, to be decidedly pre-modern in its spirit, the fugue for its part emerges as neither antique nor a curio.

On the other hand, in the most extreme forms of postmodern relativism, *any* theoretical approach distorts the local and contingent nature of complex experience. In Foucault, archivist of the micro-strategies of power, there is a distinct resistance to any kind of analysis which would see patterns of oppression across time. There is simply nothing we can say and do about power from beyond or above its defining embrace.[79] Other postmodern writers similarly despair of the possibility of theoretical distance. From a very different perspective, Stanley Fish argues that our cultural embeddedness makes the very project of "theory" a pointless one. Talking about something, and doing it, are two unrelated activities.[80] The conclusion reached by many recent feminists is surprisingly similar. For moral rather than conceptual reasons, they would argue that abstraction is a harmful activity which drains the colour and meaning from life. Abstract arguments represent a patriarchal mode of reasoning, objectivist and impersonal.[81]

Let us concede the weakness of abstract argument, the importance of grounding theory in something more practical and concrete—it is a caution well taken, as the episodic model of the fugue acknowledges. The distinction between abstraction and reality, however, assumed by all these critiques, is fundamentally flawed. At every level of life, we use abstraction all the time, and without it we would live in a parade of passing sensation in which even the thingly character of objects themselves would remain indistinguishable in the soup of our consciousness.

Abstraction is the stuff of meaning: it is language, it is art, it is ritual. A toddler's drawing is a masterpiece of abstraction. The point is therefore not to try to imagine the possibility of its absence but to acknowledge its incompleteness. We use abstraction on many different levels, and each highlights some kinds of relationships between things while concealing certain others. It is never a question of *abandoning* abstract thinking, but of choosing a tool appropriate to specific circumstances. As Paul de Man wrote, "blindness" and "insight" are correlative. It is only by our blindness to certain features of a situation that our mind is made free to fully explore the implications of other aspects. This simultaneous deception/revelation is both inevitable and necessary.[82]

It is surely the case that we need above all to expand the frameworks we use, to overcome the blindness of theory by multiplying the lenses of insight. What is a framework or a theory but a taxonomy, a means of classifying the world? And can we not, like Foucault, conceive of very different cladistics to our own, different epistemologies, different ontologies, each of which shed their own partial illumination on the dimly-lit world?

> When we establish a considered classification, when we say that a cat and a dog resemble each other less than two greyhounds do, even if both are tame or embalmed, even if both are frenzied, even if both have just broken the water pitcher, what is the ground on which we are able to establish the validity of this classification with complete certainty?[83]

To see further, we need both a variety of forms and structures of interpretation, and a profound suspicion of them all—to get beyond the magnetic force of a single theory and see instead the attractions they each invite.

A theory, then, is not a monolith but a perspective. It need not obliterate its opposition but only contribute to it. And here too in the fugue we find an expression of that pluralism. The symbolism of experiment and perspective which the fragmentary theme embodies we have already noted. At the same time, against the subject in its various guises, there is not a simple and supportive harmony, but the play of *counter-subjects*, each possessed of its own integrity, its own perspective. A fugue is far from concordant: even in the work of Bach, there is a remarkable degree of discord and clash as each part, maintaining its own internal shape and line, proceeds with considerable independence. Against the subject can be heard doubt, destabilization, and alternatives, and in this way the counter-subjects and the episodes of a fugue serve to question and comment on the subject. A fugue is an exploration of a theme, but it provides, as all good writing should, for its own resistance. It is the creative play of dissonance.

Voices

Polyphony, of which the fugue is perhaps the most complex example, means 'many voices', and a fugue typically makes use of three or four separate melodic lines which weave in and out simultaneously. These voices each have their own characteristic range and timbre, high or low, male or female. They are the raw materials from which the subject and counter-subjects are woven, by the exercise of the techniques of polyphonic composition. What voices, then, articulate the relationship of law and aesthetics? From what raw materials are the arguments and case studies of this work fashioned, by the use of those various techniques of legal and critical writing I have outlined? They include legal texts such as statutes and

cases, the writings of jurisprudes and philosophers, and also the analytic literature—sociological, cultural, or historical—particular to the field of each case study. The aesthetic is of universal significance. It follows, therefore, that in accounting for the way in which social or cultural values are formed, transformed, and disputed in legal discourse, we need to listen to a wide variety of voices, and not succumb to legal formalism's hermeneutic aloofness. We can put 'law' in a box no more than we can confine the aesthetic to the innards of a picture frame.[84]

One voice—one raw material of analysis, one characteristic timbre—runs throughout this work, and that is the voice of music. It serves as a metaphor, a point of historical comparison, a frame of reference, a case study, and a constant structural device. In ignoring the formal and symbolic meaning of texts, legal and otherwise, readers are missing a great deal of what they read. This is a central element of the aesthetic dimension, and the voice of music is central in how I demonstrate those points. The very distance between how we think of law and how we think of music adds force to their conjunction.

C. Image

Imagine—not just in the sense of an image or an idea, both visual metaphors, but with your ears too—this fugue in honour of the aesthetic dimensions of law and justice. Several voices, legal and musical, speak the theme, each with its own register and texture. Three movements in the course of which the argument advances in meandering beat, based on a subject, a new perspective and a locus of experimentation. First the subject is simply expounded and then developed, augmented, and inverted with increasing layers of complexity. It is explained through episodes, specific and grounded examples which develop fragments of the subject, and enriched by counter-subjects, alternative disciplines and approaches which each provide harmony and create tension.

This then is the fugue as metaphor, as structure, as image. But finally, the idea of the fugue offers an ideal of harmony and dissonance, richness and complexity. It is an aesthetic template for the promise of law in society. This is the gift of the aesthetic: it can inspire. And it has inspired in me this insistence: that law is not removed from the realm of feeling, imagery, and symbolism; and that this power in the world, which the aesthetic exercises over us all, should be exposed and explored, acknowledged, built upon, and celebrated.

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1 As Wallace emphasizes in discussing the comparison between musical and literary forms, the use of a fugue metaphor is often claimed but rarely explored seriously: R. Wallace, *Jane Austen and Mozart: Classical Equilibrium in FIction and Music* (Athens, Ga.: University of Georgia Press, 1983) at 19. In this chapter, as throughout this work, I intend to develop the musical metaphor with some deliberation.

2 This is true of the preludes and fugues of Johann Sebastian Bach, *Das wohltemperierte Klavier*, BWV 822-845 (1722) and its companion book, BWV 846-869 (1744), such as that in D Major from Book 2 (BWV 850) which is extracted above. But it is equally true of those written by Dmitri Shostakovitch, op. 87 (1950-51), or indeed of the majesterial fugues in the late piano sonatas of Ludwig van Beethoven which to some extent serve a similar structural role. I write of an "intensified use of musical resources" with some care since most often a fugue uses *different* thematic material than its prelude. The feeling of expansiveness, intensity, and growth it conveys is nonetheless unmistakeable.

3 Exposition, stretto, diminution and augmentation are standard devices of the fuguist's art. The 'Crab Fugue' from *The Art of Fugue* uses its theme in reverse, and there are fine examples of inversion in several of the *Toccatas*.

4 See P.R. Teachout, "The Soul of the Fugue: An Essay on Reading Fuller" (1986) 70 Minnesota L. Rev. 1073, e.g. at 1128.

5 Autism is by no means always accompanied by a lack of creativity, and at times there is an extraordinary degree of artistic ability, but this is always intensely focused, as if the whole aesthetic energy of the person were being tightly controlled and directed towards a single point. See certain parts of O. Sacks, *The Man Who Mistook His Wife For A Hat* (London: Picador, 1985), and especially O. Sacks, "An Anthropologist on Mars", (1993-94) 69 *The New Yorker* 106.

6 M. Tushnet, "An Essay on Rights" (1984) 62 Tex. L. Rev. 1363.

7 J.L. Austin, *How to Do Things With Words* (Cambridge, Mass.: Harvard Univ. Press, 1962) and J. Searle, *Speech Acts An Essay in the Philosophy of Language* (London: Cambridge Univ. Press, 1969).

8 Quoted in Wallace, *op. cipt supra* n. 1 at 9. "More than one reckless soul has embarked upon an extended inter-art comparison only to founder on the Scylla of dilettantism or the Charybdis of over-specialization": *ibid.* at 1.

9 See, for example, L. Bender, " A Lawyer's Primer on Feminist Theory and Tort" (1988) 38 J. Leg. Ed. 3; L.M. Finley, "A Break in the Silence: Including Women's Issues in a Torts Course" (1990) 1 Yale Journal of Law and Feminism 41; J. Grbich, "The Body in Legal Theory" (1992) 11 U. Tas. L. Rev. 26.

10 See *Nguyen* v. *Nguyen* (1990), 91 ALR 161; *Young* v. *Woodlands Glenelg* (1979), 85 LSJS 15.

11 See *Del Ponte* v. *Del Ponte*, New South Wales Court of Appeal, 6 Nov. 1987; Finley, *op. cit. supra* n. 9 at 65: but see Grbich, *op. cit. supra* n. 9 at 56.

12 *Ibid.*, esp. at 50-51. Grbich bears no responsibility for the heavy-handed metaphor.

13 *See* for example D. Saunders, "Approaches to the Historical Relations of the Legal and the Aesthetic" (1992) 23 New Lit. Hist. 505; perhaps the richest of these, which uses the analysis of *Rogers* v. *Koon*, 960 F.2d 301 (2d Cir., 1992) to meditate on the conceptual and experiential difference between the mere look and form of art, and its inner strength and meaning, is L. Harmon, "Law, Art, and the Killing Jar" (1994) 79 Iowa L. Rev. 367.

In relation to the aesthetics of the environment, see J. Carter, "They Know It When They See It: Copyright and Aesthetics in the Second Circuit" [1991] St. John's L. Rev. 773; D. Krieger, "The Broad Sweep of Aesthetic Functionality: A Threat to Trademark Protection of Aesthetic Product Features" (1982) 50 Fordham L. Rev. 345; J. Costonis, *Icons and Aliens: Law, Aesthetics, and Environmental Change* (Urbana: University of Illinois Press, 1989); J.C. Smith, "Review Essay: Law, Beauty, and Human Stability: A Rose Is A Rose Is A Rose" [1990] Calif. L. Rev. 787; S. Shrader, "Book Review of *Icons and Aliens: Law, Aesthetics, and Environmental Change*, by John Costonis" (1991) 90 Mich. L. Rev. 1789.

14 *In Re St. Stephen Walbrook* discussed in C. Douzinas*et al.*, "The Alta(e)rs of Law: The Judgment of Legal Aesthetics" (1992) 9 Theory, Culture, and Society 93; C. Douzinas and R. Warrington, *Postmodern Jurisprudence* (London: Routledge, 1991).

15 See J.B. White, *Heracles' Bow: Essays on the Rhetoric and Poetics of Law* (Madison: Wisconsin University Press, 1985); J.B. White, *The Legal Imagination* (Boston: Little, Brown, & Co., 1973); R. Posner, "Law as Literature: A Relation Reargued" (1986) 72 Virg. L. Rev. 1351; R. Posner, *Law and Literature: A Misunderstood Relation* (Cambridge, Mass.: Harvard University Press, 1988). For various critiques of Posner, see J.B. White, "What Can Lawyers Learn from Literature?" (1989) 102 Harv. L. Rev. 2014; D. Pacher, "Aesthetics v. Ideology: The motives Behind Law and Literature" (1990) 14 Columbia-VLA J. of Law and the Arts 587; R. West.

"Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner" (1986) 99 Harv. L. Rev. 384; and see R. Weisberg, "The Law-Literature Enterprise" (1988) 1 Yale J. of Law & the Humanities 1.

16 See the taxonomy of law and literature in Pacher, *op.cit. supra* n. 15. We find a similiar distinction in T.C. Grey, *The Case of Wallace Stevens: Law and the Practice of Poetry* (Cambridge, Mass.: Harvard Univ. Press, 1991) at 22, where he speaks of the justifications of law and literature as either 'psychological' (i.e. related, as I explain it, to what literature shows us about human beings and empathy) or 'linguistic' (i.e. related to how literature illuminates the use and nature of language).

17 Naturally, the distinction is itself a problematic one, and the writings of Derrida and De Man in particular have been dedicated to questioning and crossing the boundaries which delineate literary theory (in the case of De Man) and philosophy (in the case of Derrida) on the one hand, from literature on the other. This is indeed the heart of the contribution of 'literary theory' to law: all genres of writing share the same fundamental problems and concerns; all are creative and recreative, all involve an ambiguous collusion between authors and readers, writing is always rhetorical and meaning always ambiguous: see for example J. Derrida, "Scribble (writing-power)" (1979) 58 Yale French Studies 117; J. Derrida, *Of Grammatology* (Baltimore: John Hopkins University Press, 1976); P. De Man, *Blindness & Insight: Essays in the rhetoric of contemporary criticism* (New York: Oxford University Press, 1971).

18 A. Camus, *The Plague* (New York: Knopf, 1948); F. Kafka, *The Trial* (New York: Schocken Press, 1956); see the review of the debate between Posner and Robin West on the meaning of *The Trial*, discussed in Pacher, *op. cit. supra* n. 15 at 604-06.

19 R. Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap Press, 1986) e.g. at 45-86. For further on the question of hermeneutics, see H-G. Gadamer, *Truth and Method* (New York: Crossroads, 1988); and see also D.C. Hoy, "Interpreting the Law: Hermeneutical and Poststructuralist Perspectives" (1985) 58 S. Cal. L. Rev. 136.

20 Dworkin, *op. cit. supra* n. 19 at 228-29, and generally at 228-38.

21 See, for example, L. Alexander, "Striking Back at the Empire: A Brief Survey of Problems in Dworkin's Theory of Law" (1987) 6 L. & Phil. 419; A. Bottomley*et al.*, "Dworkin; Which Dworkin? Taking Feminism Seriously" (1987) 14 J. Law & Soc. 47; D.C. Hoy, "Dworkin's Constructive Optimism v. Deconstructive Legal Nihilism" (1987) 6 L. & Phil. 321; A. Hunt, ed., *Reading Dworkin Critically* (New York & Oxford: Berg, 1992); A. Hutchinson, *Dwelling on the Threshold: Critical Essays in Modern Legal Thought* (Toronto: Caswell, 1988); J. Raz, "Dworkin: A New Link in the Chain" (1986) 74 Cal. L. Rev. 1103; D. Réaume, "Is Integrity a Virtue?: Dworkin's Theory of Legal Obligation" (1989) 39 U.T.L.J. 38;

C. Silver, "Elmer's Case: A Legal Positivist Replies to Dworkin" (1987) 6 L. & Phil. 381.

22 Dworkin, *op. cit. supra* n. 19 at several places, for example at 229; and see generally 228-38.

23 See also Hoy, "Dworkin's Constructive Optimism" *op. cit. supra* n. 21 esp. at 344-46. Dworkin responds to the harshness of the judicial criticism levelled by CLS in just this way, insisting that a skeptical analysis of law can only hold if "the flawed and contradictory account is the *only one* available" (Italics added). For Dworkin then, it is enough to say of an interpretation that it "may want to show law in its worst rather than its best light", to invalidate it: Dworkin, *op. cit. supra* n. 19 at 274-75.

24 See J.B. White, *Justice as Translation* (Chicago: University of Chicago Press, 1990), and esp. *Legal Imagination*, *op. cit. supra* n. 15 at 56-76, *Heracles' Bow*, *op. cit. supra* n. 15 at 116-32, *Justice as Translation* at 235-67.

25 For general and/or introductory material in a large and growing literature, see A. Hunt, "The Big Fear: Law Confronts Postmodernism" (1990) 35 McGill L.J. 507; A. Cook, "Reflections on Postmodernism" (1992) 26 New England Law Rev. 751; -, "Postmodernism and Law: A Symposium" (1991) 62, No. 3 Colorado L. Rev. 433; G. Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York: New York University Press, 1995); C. Douzinas and R. Warrington, *Postmodern Jurisprudence* (London: Routledge, 1991); C. Douzinas*et al.*, eds., *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent* (London: Routledge, 1994).

26 C. Douzinas, *Justice Miscarried: Ethics, Aesthetics and the Law* (Hemel Hempstead: Harvester Wheatsheaf, 1994). See also P. Goodrich, *Oedipus Lex: Psychoanalysis, History, Law* (Berkeley: University of California Press, 1995); P. Haldar, "In and Out of Court: On Topographies of Law and the Architecture of Court Buildings" (1994) 7 Int. J. for the Semiotics of L. 185; J. Ribner, *Broken Tablets: The Cult of Law in French Art from David to Delacroix* (Berkeley: University of California Press, 1993).

27 G. Bagnall, *Law as Art* (Aldershot: Dartmouth, 1996).

28 S. Levinson and J.M. Balkin, "Law, Music, and Other Performing Arts" (1991) 139 U. Pa. L. Rev. 1597; J. Frank, "Words and Music: Some Remarks on Statutory Interpretation" (1947) 47 Col. L. Rev. 1259.

29 See for celebrated examples, R. Posner, *Economic Analysis of Law* (Boston: Little, Brown, 1972); R. Posner, "A Theory of Negligence" (1972) 1 J. of Leg. Stud. 29; G. Calabresi, *The Costs of Accidents: A Legal and Economic Analysis*; G. Calabresi, "Concerning Cause and the Law of Torts: (1975) 43 U. Chic. L. Rev. 69; R.H. Coase, "The Problem of Social Cost" (1960) 3 J. of L. & Econ. 1.

30 See C. E. Baker, "The Ideology of the Economic Analysis of Law" (1975) 5 J. Phil. Pub. Aff. 3; M. Horwitz, "Law and Economics: Science or Politics?" (1980) 8 Hofstra L. Rev. 905; A. Leff, "Unspeakable Ethics, Unnatural Law" [1979] Duke L.J. 1229.

31 M. Foucault, *The Order of Things* (New York: Vintage Books, 1973) at 166-207.

32 One finds this idea of metaphysics as the pre-understandings of a community in Heidegger: see "The Undermining of Western Rationalism Through the Critique of Metaphysics: Martin Heidegger" in J. Habermas, *The Philosophical Discourse of Modernity*, trans. F. Lawrence (Cambridge, Mass.: MIT Press, 1991) at 131-34.

33 White, *Legal Imagination, op.cit. supra* n. 15 at 762-73; *Heracles' Bow, op.cit. supra* n. 15, *passim* and at 32-53.

34 *Fisher* v. *Lowe*, No. 60732 (Mich.), (1983) 69 *J. Am. Bar Assn.* 436, in C. Stone, *Earth and Other Ethics* (New York: Harper & Row, 1987) at 5.

35 See for celebrated examples C. Gilligan, *In a Different Voice* (Cambridge, Mass.: Harvard University Press, 1982); S. Harding, ed., *Feminism and Methodology* (Bloomington, Ind.: Indiana University Press, 1987); P. Williams, "Alchemical Notes" (1987) 22 Harv. C.R.-C.L. Rev. 1401; P. Williams, *The Alchemy of Race and Rights* (Cambridge, Mass.: Harvard University Press, 1991).

36 D. Kennedy and P. Gabel, "Roll Over Beethoven" (1984) 36 Stan. L. Rev. 1.

37 R. Macdonald, "Office Politics" (1990) 40 U.T.L.J. 419; R. Macdonald, "Academic Questions" (1992) 3 Leg. Ed. Rev. 61; R. Macdonald, "Theses on Access to Justice" (1992) 7 (2) CJLS/RCDS 23.

38 Teachout, *op. cit. supra* n. 4.

39 For a different overview of the same material, see J. Toran, "'Tis a Gift to Be Simple: Aesthetics and Procedural Reform" (1990) 89 Mich. L. Rev. 352, 364 *et seq.*

40 L. Schwartz, "Justice, Expediency, and Beauty" (1987) 136 U. Pa. L. Rev. 141at 151; see also 149, 152-53, 154, 156.

41 Discussed in Toran, *op. cit. supra* n. 39at 364-66.

42 D. Cornell, "Toward a Modern/Postmodern Reconstruction of Ethics" (1985) 133 U. Pa. L. Rev. 291 at 380. There is a clear connection here with what Pacher has characterized as the 'utopian' stream of law and literature, an approach which mines literature for the vistas of the future it opens up: Pacher, *op. cit. supra* n. 15 at 598-99.

43 R. West, "Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory" (1985) 60 N.Y. Univ. L. Rev. 145 at 209-10.

44 *Ibid.* at 148-51. See N. Frye, *An Anatomy of Criticism; Four Essays* (New York: Atheneum, 1965).

45 West, *op. cit. supra* n. 43 at 151-58.

46 Toran, *op. cit. supra* n. 39at 393, and generally, 375 *et seq.*

47 *Ibid.* at 360, and generally at 357 *et seq.*

48 R. Hodge, "Monstrous Knowledge: Doing PhDs in the new humanities" (1995) 2 Aust. Univ. Rev. 35-39.

49 P. Legendre, "The Other Dimension of Law" (1995) 16 Card. L. Rev. 943; "Law's Emotional Body: Image and Aesthetic in the Work of Pierre Legendre", in P. Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld & Nicholson, 1990) at 293 (italics added); see also 271-72 and *passim* 260-96. See also P.Legendre, *Ecrits Juridiques du Moyen Age Occidental* (London: Variorum, 1988); J. Derrida, "Force of Law: The Mystical Foundation of Authority" (1990) 11 Card. L. Rev. 919.

50 In Goodrich, *op. cit. supra* n. 49at 294.

51 *Ibid.* at 295; see also at 276.

52 P. Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992) at 11-12. See also R. Young, *White Mythologies: Writing History and the West* (London: Routledge, 1990); J. Derrida, 'White Mythology' in *Margins of Philosophy*, trans. A. Bass (Chicago: University of Chicago Press, 1982); E. Said, *Orientalism* (London: Routledge & Kegan Paul, 1978).

53 In general, see P. Goodrich, *Reading the Law* (Oxford: Blackwell, 1986); P. Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (Basingstoke, Hamps.: Macmillan, 1987); Goodrich, *op. cit. supra* n. 49; Goodrich, *op. cit. supra* n. 26.

54 See, for example, "Eucharist and Law", "Grammatology", and "The Enchanted Past: A Semiotics of Common Law" in Goodrich, *Languages of Law, op. cit. supra* n. 49.

55 *Ibid.* at 233.

56 B.S. Jackson, *Semiotics and Legal Theory* (London: Routledge & Kegan Paul, 1985); R. Kevelson, "Semiotics and Methods of Legal Inquiry" (1985) 61 Ind. L.J. 355; R. Kevelson, *The Law as a System of Signs* (New York: Plenum Press, 1988).

57 Quoted in R. Benson, "The Semiotic Web of the Law", in R. Kevelson, ed., *Law and Semiotics, Volume 1* (New York: Plenum Press, 1987) at 42-43; and in R. Benson, "How Judges Fool Themselves", in R. Kevelson, ed., *Law and Semiotics, Volume 2* (New York: Plenum Press, 1988) at 39; and see U. Eco, *Semiotics and the Philosophy of Language* (Bloomington: Indiana Univ. Press, 1984).

58 See the critique of legal semiotics in Douzinas & Warrington, *op. cit. supra* n. 14 at 99-100.

59 Quoted in Kevelson, *The Law as a System of Signs*, *op. cit. supra* n. 56; Kevelson, ed., *Law and Semiotics, Volume 2* , *op. cit. supra* n. 57 at 206.

60 Thus Goodrich emphasizes the importance of law not just as an instrumental text, but as something spoken, listened to, and lived: "That is a question of mnemonics and of the aesthetics of law, a question of the oral and of the visual quite as much as it is of the text": Goodrich, *op. cit. supra* n. 49 at 2.

61 Haldar, *op. cit. supra* n. 26; D. Hay, "Property, Authority, and the Criminal Law" in D. Hay*et al.*, ed., *Albion's Fatal Tree: Crime and Society in 18th Century England* (London: Allen Lane, 1977); Goodrich, *ops. cit. supra* n. 53; D. Howes, "Odour in the Court" (1989-90) border/lines winter 28.

62 *Natanson* v. *Kline* (1960), 350 P. 2d 1093 (Cal.); see also *Canterbury* v. *Spence* (1972), 464 F. 2d. 772; *Reibl* v. *Hughes* (1980), 114 D.L.R. 3d 1; D. Manderson, "Following Doctor's Orders: Informed Consent in Australia" (1988) 62 Aust. L. J. 430.

63 J. Katz, *The Silent World of Doctor and Patient* (New York: Free Press, 1984) at 66.

64 Katz, *op. cit. supra* n. 63 at 62-67.

65 D. Preziosi, *The Semiotics of the Built Environment* (Indianapolis: Indiana Univ. Press, 1979).

66 Hay, *op. cit. supra* n. 61; E.P. Thompson, *Whigs and Hunters* (London: Allen Lane, 1975); W. Stevens, "Imagining Justice: Aesthetics and Public Executions in Late Eigtheenth-Century England" (1993) 5 Yale J. of L. & the Humanities 51.

67 R. Macdonald, Office Politics, *op. cit. supra* n. 37.

68 P. Goodrich, "Modalities of Annunciation" in Kevelson, ed., *Law and Semiotics, Volume 2* , *op. cit. supra* n. 57; and see also in Goodrich, *Languages of Law*, *op. cit. supra* n. 49 at 184 *et seq*; Haldar, *op. cit. supra* n. 26.

69 See also "Eucharist and Law" in *ibid.* at 53 *et seq.*

70 Dworkin, *op. cit. supra* n. 19 at 407 and *passim*; see O.W. Holmes, "The Path of the Law" (1897) 10 Harv. L. Rev. 457; H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961); K. Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Chicago: University of Chicago Press, 1962); A. Ruvin, "Does Law Matter? A Judge's Response to the Critical Legal Studies Movement" (1987) 37 J. Leg. Ed. 307. Dworkin, of course, goes not to say "...but not its seers and prophets", a role he sees played by philosopher kings such as himself.

71 P. Gay, *Style in History* (New York: W.W. Norton & Co., 1974) makes cogent arguments for the meaning of style, in a related discipline.

72 See "Eucharist and Law", "Grammatology", and "The Enchanted Past: A Semiotics of Common Law" in Goodrich, *Languages of Law*, *op. cit. supra* n. 49; see also the exploration of the idea of "presentational meaning" in S.K. Langer, *Philosophy in a New Key* (Cambridge, Mass.: Harvard University Press, 1942, 1978); S. Langer, *Feeling and Form: A Theory of Art* (London: Routledge & Kegan Paul, 1953).

73 Cornell, *op. cit. supra* n. 42; West, *op. cit. supra* n. 43 at 209-10.

74 The same argument is made, although in different language, concerning the fusion of theory and practice in the writing of Lon Fuller. According to Teachout, Fuller's approach, which sought a unity of theory and empirical study, reflects an ethical commitment to look beyond "the classic antimonies of jurisprudence" and beyond "the lifeless platitudes" of theory, and reach instead a new unity and interdependence of different levels of understanding: see Teachout, *op. cit. supra* n. 4 at 1078-79, 1089.

75 See I. Illich and B. Sanders, *ABC: The Alphabetization of the Popular Mind* (London: Penguin, 1988); M. McLuhan, *The Gutenberg Galaxy: The Making of Typographic Man* (New York: Signet, 1969).

76 Derrida in particular has been at pains to emphasize that deconstruction is to be understood as a practice which unfolds a text from within rather than a method or theory imposed from without: see "Letter to a Japanese Friend" in P. Kamuf, ed., *A Derrida Reader: Between the Blinds* (New York: Columbia University Press, 1991) at 270-76. See also M.H. Kramer, *Legal Theory, Political Theory, and Deconstruction* (Bloomington: Indiana University Press, 1991) at 35-36; C. Norris, "Law, Deconstruction, and the Resistance to Theory" (1988) 15 J. L. & Soc. 166 at 169.

77 See in particular J. Attali, *Noise: The Political Economy of Music* (Minneapolis: Minnesota University Press, 1985).

78 See J-F. Lyotard, *The Postmodern Condition: A Report on Knowledge* (Manchester: Manchester Univ. Press, 1984).

79 See Foucault, *op. cit. supra* n. 31; M. Foucault, *Discipline and Punish*, trans. A.M. Sheridan Smith (New York: Vintage Books, 1979); M. Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*

(New York: Pantheon Books, 1980); D.C. Hoy, ed., *Foucault: A Critical Reader* (Oxford: Oxford University Press, 1986).

80 S. Fish, "Dennis Martinez and the Use of Theory" (1987) 96 Yale L.J. 1773 at 1782-83, 1785, and *passim*; and see Moore, *op. cit. supra* n. 85.

81 This argument may be broadly said to include both postmodernist feminists, and that critique of essentialist feminism in which questions of race and other differences amongst women has been explored: see M. Belenky, *Women's Ways of Knowing* (New York: Basic Books, 1986); S. Harding, ed., *Feminism and Methodology* (Bloomington, Ind.: Indiana University Press, 1987); L. Nicholson, ed., *Feminism/Postmodernism* (London: Routledge, 1990); B. Crossman, "The Precarious Unity of Feminist Theory and Practice: The Praxis of Abortion" (1986) 44 U. T. Fac. L. Rev. 86; A. Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 Stan. L. Rev. 581; M. Minow, "Learning to Live with the Dilemma of Difference" (1985) L. & Contemp. Prob. ; L. Alcoff, "Cultural Feminism v. Post-structuralism" (1988) 13 Signs 405; S. Harding & M. Hintikka (Eds.), *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics and Philosophy of Science* (Dordrecht: D. Reidel, 1983); M. Hawkesworth, Knowers, Knowing, Known: Feminist Theory and Claims of Truth" (1989) 14 Signs 533.

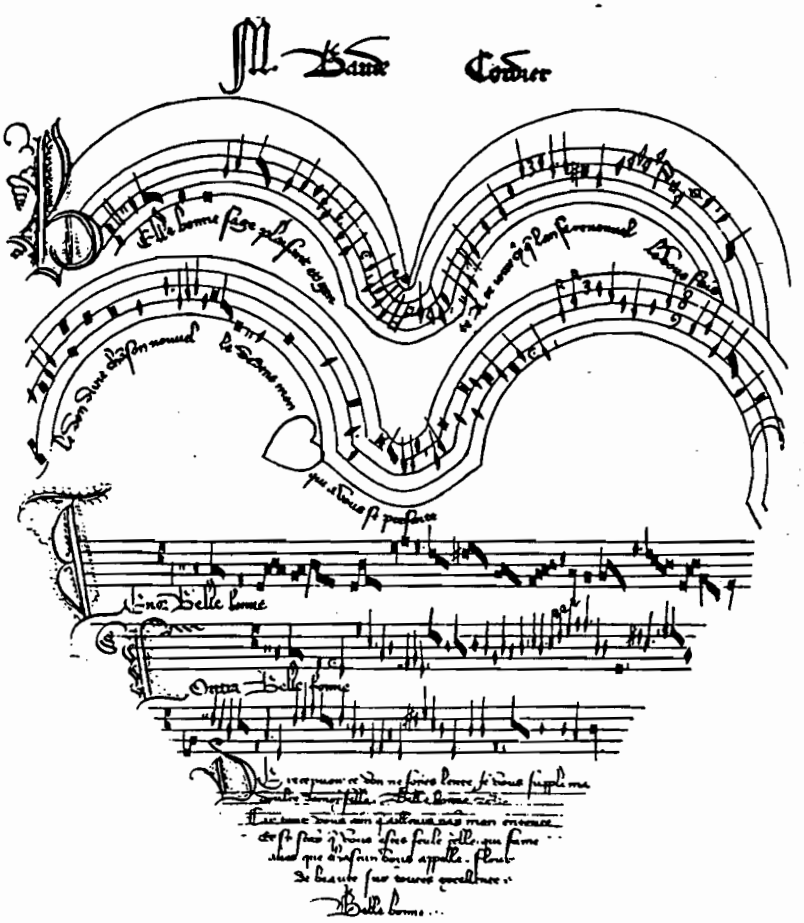
82 De Man, *op. cit. supra* n. 17. See also the critique of postmodern localism in Hunt, *op.cit. supra* n. at 532-39. So also Grey, *op. cit. supra* n. 16 writes that "impassioned prophets turn...a more intense light on certain aspects of experience than will ever be provided by more tolerant and catholic thinkers": at 74.

83 Foucault, *op. cit. supra* n. 31 at xix. See J. Borges, *Other Inquisitions* (New York: Washington Square Press, 1966) at 108; G. Lakoff, *Women, Fire, and Dangerous Things* (Chicago: University of Chicago Press, 1987) at 5-12, 92-104. Lakoff here emphasizes that categories are not objective, scientific, realities, but a human, culturally specific, and embodied construction, 91-117, and *passim*.

84 "Parergon", in J. Derrida, *The Truth in Painting* (Chicago: University of Chicago Press, 1987).

Motet

Statutes and Music—An Aesthetic Methodology



Motet

Statutes and Music—An Aesthetic Methodology

Section 1. Definitions

Motet—a short usually unaccompanied sacred choral composition [ME, fr. OF, diminutive of *mot,* word]

Statute—a written law passed by a legislative body; a book or books containing the statute law [ME, fr. LL *statutum*, set up, establish, fr. *sta-* root of *stare* to stand]

Act—something done; a deed; an action; a written ordinance of a parliament or other legislative body [ME, fr. L *agere,* do]

Polyphony—vocal music etc. in two or more relatively independent parts; counterpoint [Gk *polyphonous*, *poly-*, many, and *phone,* voice][1]

Section 2. An aesthetic methodology

§2(a). Two perspectives on interpretation

Look at the monumental change that has been wrought between the *Magna Carta* or the *Carta Forestae* of Edward I and the prodigious legislation of the Tudors. In language, form, and style, these laws seem almost unrelated; the former as impenetrable and limited in scope as the latter are arrogant of their power and authority. Yet one grew with the utmost gradualness from the other. Listen to the miraculous changes that have been rung between the two-part *organa* and plainsongs of the thirteenth century and the prodigious motets of Thomas Tallis, up to forty vocal lines in mazy coalition. Here, too, there has been so much formal and stylistic development that it is hard to imagine that one is an ornate variation of the other. The languages of law and of music each, then, effected changes in purpose and normativity that an inquiry into aesthetic and semiotic considerations

can reveal. The similarities between these parallel historical transformations suggest that such changes extended far beyond the narrow boundaries of each discipline and implicated every corner of the lives of those who lived in those communities.

This chapter and the next concern the why and how of legal interpretation. Modern readers—and writers too—all too often treat reading as a miner treats the earth. They are insensitive to the environment of the text, its play of light and shadow. In fiction or non-fiction, they search for syllogisms, information that can be extracted and stored, and discard the rest as mere impedimenta. An idea, a fact, and an event are nuggets of meaning; everything else is just a bunch of rocks. The result of this discursive strip-mining is a wasteland in which more has been lost than gained, and much that was always there is never found.

The aesthetic dimension of law is about developing a sensitivity to these hidden truths and treasures, a matter of discerning meaning beneath the literal surface of a text, and can be seen as related to the growing field of legal scholarship which explores legal meaning through the changing metaphors it uses.[2] Furthermore, it is surely not too controversial to say that, in relation to judicial opinions, the style of a judgment influences the way it is interpreted, and the frequency with which it is cited, and therefore its weight as legal precedent. As Richard Weisberg wrote, "Cardozo realized that the form of an opinion actively contributes to its correctness."[3] The next chapter pursues some of these ideas, developing an analysis of ugliness, the body, and symbolism, which sheds light on the meaning of and the values behind the law of capital punishment. The jurisprudence of the death penalty is a case study which illustrates how an aesthetic approach can help us come to terms with what the law says and where it comes from. Furthermore, recognizing the influence of aesthetic perceptions on legal principles which claim to be solely about *reason*, one can appreciate how 'the law' is constructed within a framework of aesthetic influences as well as a moral or

political ones. In all these ways, the aesthetic dimension deepens our understanding of the law by giving readers new tools with which to interpret the meaning of legal texts.

Aesthetics, however, is not just about deepening legal meaning but broadening it. The aesthetic dimension enriches our harmonic resources—it gives us richer tools to assist in the act of interpretation: this is the 'how' of interpretation.[4] But it also expands the melodic range of interpretation—the kind of things legal texts can communicate to you: this is the 'what' of interpretation. This melodic broadening, a second interpretative perspective, serves as the focus of the present chapter. The law is an imperfect mirror of the world beyond its bounds. If we study it carefully, the law reflects back to us aspects of the world which gave it birth. It is no longer just a question of the meaning of legal texts, but of legal contexts. Nothing could be further from a formalist or positivist interpretation of the law, which excludes from consideration and interest all but the text and the allegedly 'legal' values and principles which generated it.[5]

Admittedly the information contained in a law case may be faulty or flawed or partial. It is not, however, the external *information* contained in a legal document which is of interest here, but the way it portrays a world view in relation to which the legal perspective is very valuable. Beyond the subject-matter with which it deals and the principles it states—away from the immediate, performative, and functional aspects of legal writing—a judgment or a statute tells us about the context in which it was developed and the understanding of social relations and legal order which operated to produce it. A legal document, then, reveals what is meant by 'law' and 'order' in the society which gave it birth. It tells us about the role, power, authority, and responsibility attributed to and claimed by legal institutions. These are important legal questions typically assumed by a society, the background and not the figure of legal texts.

§2(b). Statutes and motets

Any attempt to move beyond routine strategies of reading requires development through a practice, for interpretation is an act to be done and not just an idea to be imagined. The body of this chapter deals with early English statutes from the *Magna Carta*[6] (first obtained from King John in 1215 and then confirmed ten years later by Henry III) until the reign of Henry VIII (from 1509). At the dawn of the common law, a statute had not yet achieved its present authoritative status and clarity of form. It took its place alongside a whole range of other techniques of law-making, including the 'common law' system of judicial decision-making, writs, plea rolls, charters, Year Books, and so on. In fact, statutes were not a routine product of government until towards the end of the period I am considering while, on the other hand, the line between statutes and less formal pronouncements remained unclear. Legislation, however, is the most discrete and tangible process of law-making, and the powers behind its generation and control are more overt. By trying to understand the attitude of these law-makers to the meaning and role of the texts they created, we will gain a view of the ways in which those with power saw the role of the law. How, I wish to ask, can we look at these particular legal documents? How do they appear to look at us? How did their authors look at the world?

In making these historical inquiries, I am particularly interested in changing ideas of normativity and the law. Why does law exert a normative authority over its citizens—why, in other words, do we obey the law? For John Austin, first amongst English legal positivists, the answer is coercion: it is from the threat of harm that our duty to obey arises. "Being liable to evil from you if I comply not with a wish which you signify...I lie under a *duty* to obey it".[7] Indeed both Austin's model of the legal system and H.L.A. Hart's hypothetical discussion of

the formative period of legal order seem to be based on just this understanding of 'primitive' English law as a matter of force.[8] Superficially, the earliest English statutes, assembled in the 1786 edition of the *Statutes at Large,* bear out this conception. According to the editor, Owen Ruffhead, early English statutes seem "rather to be Provisions extorted by some predominant influence, rather than laws instituted by the concurring Assent of a regular legislature."[9] To support this argument, the author cites many statutes enacted without any formal indication of whether or how they received Parliamentary assent. As late as 1400, one bill apparently became law although it was rejected by the House of Commons.[10] On this reading, Austinian in its implications, the laws of these early times demanded compliance from the community simply because of the force which backed them up and not because, as modern positivists argue, they were the formal and therefore *legitimate* products of a recognized procedure of legislative development.[11]

Retreating from his initial conclusion, however, Ruffhead defends the formal validity of such statutes by insisting that we cannot judge the validity—that is, the communal legitimacy—of a thirteenth century enactment according to the procedural standards of the eighteenth century. Certainly it is true that law-making practice, and Parliament itself, was amorphous and unsettled in the first few hundred years after the Norman invasion. But we must go much further. It is not only *procedure* which changed in all that time. We cannot assume that the meaning and power of law itself was the same then as it is now. To adopt such an assumption would be to indulge in a presentism more grievous than that condemned by Ruffhead, for it would be to judge the meaning of the thirteenth century legal order by the experiences of the twentieth.

What was the purpose of statutes, then, and to whom were they addressed? Who is it that were expected to obey the law, and why? These are the questions I wish to explore in an effort to recapture the radically different understanding of the province of statute and law which moulded and constrained the attitudes of early

English law-makers. In pursuing these questions I trace a shift over a period of 300 years in a wide range of attitudes towards legal purposes and effects, from a medieval to a recognizably modern legal world-view. Statutes, and the word 'statute', have undergone a sea-change by the sixteenth century. This change is frequently presented in terms of the growth of political power and administrative machinery, the ambitions of the Norman invaders gradually being matched by their capacity. Such an administrative-political story, however, is altogether too simple. Rather, we are witnessing nothing short of a change of *consciousness* here, a change in the understanding of the purpose and functions of law and of the relationship of the individual to the forces of legal order.

A paradigm shift in consciousness manifests itself to us through all our senses. It affects how we see and how we hear. After reading Foucault, one should therefore not be surprised to find parallel structural changes in the development of this world-view across surprisingly different 'disciplines'.[12] Take an alternative locus of normativity—the church—and consider one of its most significant means of expression—music. Explore one of the most complex and important forms that musical discourse took—the motet, a form as significant in the development of medieval music as was the statute in the development of medieval law. The word 'motet' is used in England from the fourteenth century to describe any harmonic vocal music written for church use. It derives from the diminutive form of the French *mot*, or word, and although the early motets are quite different from the monophonic chants that preceded them, they share with Gregorian chant a commitment to the priority of the liturgical text. This commitment is honoured in the simplicity of the motet's line and organization, in which the musical interest of the composition never detracts from, overwhelms, or operates independently from the words which it is its duty to convey. The sacred word is paramount.

Jacques Attali and Thomas Levenson have mounted similiar arguments that we can read in the history of music something of the history of the society that

gave it birth. The distinction is that Attali in particular is interested in the political economy of music, its changing mode of production, while I propose to focus on the aesthetic economy of music, its changing mode of communication.[13] The history of Western music resonates with a progression of formal and stylistic changes very similar to those found in the development of the statute, and illustrates the same emergence from a medieval to a modern perspective on the world. Motets have also undergone a sea change by the sixteenth century. By the end of our period of study the motet has begun to give effect to a complexity of polyphonic organization beyond imagining when the first motets were sung. So too, the statute has begun to give effect to a complexity of legal and social organization beyond imagining when the first statutes were enacted. The dramatic evolution in the form and style of the motet, and the remarkable parallels which are evident in the evolution of the state, illustrate the profundity of the changes that were taking places in ideas of normativity, and consequently illustrate the limitations of adopting a purely legal or political explanatory model.

The motet, with its emphasis on words and the form of words, is a metaphor for the focus of this article on statutory words and statutory form. In addition, the motet is a genre of tremendous social and cultural significance that underwent growth and transformation parallel to those changes which affected statutes. Music thus provides an alternative language and a different way of coming to terms with the arguments of this chapter. The changing sound and form of the motet captures and communicates, in a radically different medium, fundamental shifts in the processes of social order. Aesthetic history is in consequence not only a metaphor for the development of the statute but an *homology* of it.

§2(c). Further aspects of aesthetic methodology

The transdisciplinary use of music as a counterpoint to my analysis of the development of the statute is one way in which this chapter develops an aesthetic methodology. But in addition aesthetics influences both the process of this inquiry and its subject.

(i) An aesthetic process

Let us consider aesthetic methodology understood as an analytical process. The legal meaning of a judicial opinion or a statute is influenced not only by rational ideas and legal doctrine but also by aesthetic and formal considerations. Just as we listen to a piece of music with an ear to its form and style, its structure and design, we can learn much about what a law means through a careful evaluation of these same factors. Musical and legal interpretation turn out to have something in common after all.

The use of these factors suggests a *way of reading* in which the text is treated as an elaborate and enlightening sign system in and by itself. Clearly this is an approach much influenced by legal semiotics, from the broad range of tools displayed in Roberta Kevelson's collections to Peter Goodrich's provocative arguments.[14] What are the consequences implied by this way of reading—what interpretative choices are involved in the reading of a legal document, such as a statute, which this approach might suggest?

Aesthetics is very much concerned with the words of a text. Our society is uniquely literary. Other cultures set great store by the senses of hearing, of touch, and even of smell as means of access to the 'truth', but modern Western society has accorded, at least until very recently, an unparalleled and almost exclusive priority to the sense of sight.[15] 'Seeing is believing', runs the old saw, while the rest of the sentence ('but touching's the truth') is now forgotten. Other cultures, moreover, transmit myth and social meaning by non-discursive artistic representation or

through oral tradition, while we inhabit a culture in which the alphabet, writing, and words—abstract, visual, linguistic—predominate. We are, says Marshall McLuhan, "typographic man" and woman. In such a culture, texts occupy a unique cultural position.[16] But an aesthetic approach is not simply an analysis of the 'meaning' or denotation of words. Rather, it is attuned to connotation: to the implications of what words are used and what are not, with the kinds of ways in which language is used, and with the style and grammar of writing. For example, I discuss at some length the tense in which laws are put, contending that such changes imply substantial differences in how the efficacy of the law was understood. In short, aesthetics involves a heightened sensitivity to the ambient, the metaphorical, and the rhetorical effect of the use of language.[17]

Furthermore, if we take the aesthetic priority of the visual in Western society seriously, we must develop an analysis of legal documents which explores not only the connotations of words but the very look of documents themselves.[18] At this point, an aesthetic interpretation is not interested in the *content* of a text (the legal details, for example, of an Act) but in its style and design. A painting, after all, is not simply 'about' its subject-matter: its structure and style also communicate. Indeed, for abstract paintings, there is no other meaning. In this sense, aesthetic appreciation is directed towards form rather than content. The same is true of the aesthetic interpretation of a statute. The formal and structural features of the text, the design of the document—in short, all those elements that go to make up how the concepts in a text are ordered and 'presented'—are tools of an aesthetic analysis which will help us to understand how those who created and recorded the text saw their world and law's place within it. This focus on presentational form is an aspect which echoes with the understanding of aesthetic theory articulated by Monroe Beardsley.[19] The difference, of course, is that for Beardsley the appreciation of formal elements ought to be entirely removed from the contaminants of culture and social value, whereas here they are a mirror of and a

window onto them. Far from being radically removed, the two are radically entwined.

There is a fundamental point to be made here. Aesthetic interpretation relies centrally on our ability to find meaning in the very matters which its authors often took for granted—look, sound, and form.[20] By focusing on the presentation, structure, and style of legal documents rather than just their intended meaning, we approach the world in which they were written through variables which were in general deployed and altered sub-consciously. Form and style reveal to us inadvertently the assumptions and procedures which a society does not question—its ontological pre-understandings, as it were, to give to the question of form a Heideggerian flavour. A focus on these aspects will often tell us more about the collective values of a society than that which is debated and contentious.[21] That which is self-evident is evidence of the self. It is therefore my contention that an analysis of the properties of legal texts *apart* from any consideration of their content except in the most general terms, can, through an enriched appreciation of the way in which the world must have looked to their authors, yield evidence that will help us understand the role of law at different times and in different places.

This is why an aesthetic methodology is developed here by means of an historical example. By dealing with the formative period of English statutes, we are in a position to assess those formal and stylistic features which we might, in the context of our own legislative framework, *ourselves* too easily take for granted. Undoubtedly such an approach is not without implications for contemporary practices. A semiotic and aesthetic interpretation of legislative form can be valuably carried on into the present day, and I later suggest some possible directions for such an analysis. But in order to question the apparently eternal style of the present, one must first develop a sensitivity to the mutability and meaning of form, and distance in time here encourages a distance in view. With the perspective of history, our attention is drawn to the various specific elements of the

language and structure of the modern statutory form as, one by one, we are privy to the processes of their birth and crystallization.

(ii) An aesthetic subject

The idea of aesthetics not only influences the perspective adopted towards statutory texts. It also governs the questions to be asked of those texts. I am interested, as I said above, in coming to understand how legal texts reveal something of the perspective of their various authors on the question of the function and authority of law. The purpose of the analysis is to reclaim how a particular community at a particular time saw the world and the role of law within it. Aesthetics, broadly construed, is the subject as well as the process of my inquiry. The analogy with the interpretation of a painting—encapsulated by words such as seeing, looking, and perspective—may prove helpful. Michael O'Toole, in *A Semiotics of Art,* seeks to understand art by considering not only what a work of art 'represents', but by independently evaluating its 'composition' and 'mood'. 'Mood' here refers to how the painting 'looks at' observers, the ways in which it tries to entice them into its world or, alternatively, exclude them. For example, are there people in the painting? How do they look at us or past us? How is perspective used? These and similar questions all relate to the 'mood' of an artwork and the nature of its gaze.[22]

What a painting 'represents' correspond to the meaning and purpose of a statute, and the painting's 'composition' to a law's form and structure, whose importance an aesthetic approach emphasizes. But can a law have a 'mood'? In other words, does it *gaze* at you? Taken literally, this surely cannot be. But it is my contention that through a legal text we can learn something of the gaze of its authors and, therefore, of their understanding of the purpose and power of law. We see them gazing at the world through the window of the laws they have written.

Furthermore, those who are subject to the law often *experience* law as a gaze upon them. We speak of what 'the law' demands of us and how 'it' controls us. This is not merely a figure of speech but a phenomenon.

Here we are brought back to the work of Michel Foucault, for whom "gaze" *('regard')* was an essential aspect of his theory of power. The way in which the state observes every aspect of the lives of its citizens is a defining characteristic of the modern world. Whereas in the middle ages, to be powerful was to be seen, it is now the case that to be powerful is to *see*—to see everybody, to know their every move and to subject them all to a penetrating and controlling gaze.[23] The common people, who once suffered from their relative 'invisibility', now suffer from a pervasive visibility in the eyes of the state. In consequence, there is an unprecedented degree of control exerted by authority over our lives, no less complete for its asserted benignancy, no less influential for its ubiquity.[24]

To consider the mood or gaze of a statute is to consider what aspects or groups are illuminated by it. First, who does the law address?—upon whom, in other words, does the law's gaze fall? Second, in what capacity?—are those 'captured' in this gaze treated as *agents*, whose role is to carry out the law, as for example where the law is procedural or administrative in character?; as *subjects* who are expected to fit in with the way the law orders the world around them?; or as *objects*, whose behaviour and attitudes the enactment of the law is intended to actually modify, as is, perhaps, our modern understanding of the purpose of the criminal law? Laws thus 'look' at different groups in different ways. The gaze of the statute, the dramatic changes it underwent from the thirteenth to the sixteenth century, and the meaning of those changes in terms of law as a normative order, are the focus of this chapter.

In the analysis that follows centring around issues of normativity, power, and law, the aesthetic dimension therefore fulfils three main functions. It mandates an

interpretative process that sheds insight on the manifold meanings of a text by focusing on the structure and mood of a statute—how these ancient statutes *look* to us. It provides an interpretative direction that concentrates on the ways in which a statute's gaze constructs its audience—how statutes' authors *saw*. And finally, it offers an interpretative parallel by exploring what we can learn from analogous developments in the structure and mood of the motet—how the changing world of the statute was *heard*. These three aspects guide our exploration of ideas of law and normativity and our excursion into the early history of English legislation. The underlying message is not merely an antiquarian one: interpretation is far more complex and multi-dimensional than many legal readers presume. Look. And listen.

Section 3. Statutes and Acts: Polyphony and legislation from the 13th to the 16th Century

§3(a). The 13th century: statutes without norms?

(i)The language of law

Statutes at Large, that great compilation of English enactments, was first published in the late eighteenth century, and is the most accessible historical record of English statutory law. It begins with the famous statutes of the thirteenth century, such as the *Magna Carta* and the *Statute of Westminster,* and proceeds year by year "down to the present day". But although this provides the reader with a familiar tradition and a feeling of continuity, this is misleading. With the opening words of the *Magna Carta,* we enter a legal world very different from our own. Like all statutes prior to 1275, it is written in Latin.[25] Even the word 'statute', then, is a translation, and one should, strictly speaking, write of one *statutum* and several *statuta.* In Latin, then: generally not a spoken language at all, and

strangely confined: the tonal range of early polyphonic writing rarely exceeds six notes within a single line, or a tenth from the lowest part to the highest.[33] There is almost no consciousness of rhythm or harmony as separate musical variables. At every turn, the music is the product of a limited gaze, a secret compact between performers which seems, by its thin, meandering, regular, interwoven lines, thus to exclude non-participants rather than ever to draw them in. This is the sacral and iconic element of music, and one only needs to listen to the cavernous acoustical grandeur of plainchant to appreciate the force of its aesthetic, and its ability to instil obedience not through any direct communication but through spacious mystery. Is not some of this character present in the statutes of the time, too—magisterial, florid, iconic, secret?

Neither statute nor chant demonstrate a normative intent: they are not concerned to communicate ideas or values to a lay audience. Unlike the secular and vernacular love motets which came to occupy French composers by the fourteenth century,[34] the motet in England remained as it was in the beginning, the product of established institutions, using Latin texts for liturgical purposes. Both music and law thus record the discussions of an élite which excluded the common man, not as yet encompassed by their gaze. But at the same time, both early forms convey, by the *fact* of the word or its sound, rather than its meaning, the salutary awe which power inspires. Authority is here, in *statutum* or *organum* alike, not communicated but made manifest.

(ii) The content of laws

If we turn now to the subject matter of thirteenth century statutes, we find further evidence which conforms to an understanding of their limited purpose. The 'common law', as it began to regularize and refine customary law, was normative but not under royal control. *Statuta,* although under direct royal control, were not

primarily normative. They contain few provisions which could be interpreted as establishing general norms of behaviour: mostly, their purpose is either to clarify the procedure for dealing with writs before the King's courts, or to regulate the conduct of the King's officials throughout the country. The mood is often that of a master bringing his unruly agents to heel. So in one 1266 statute, "bailiffs, sheriffs, and other officers" are instructed to "make account to the Treasurer"; this kind of statute was common. *An Ordinance for Ireland* (1288) partakes of the same character, and is a kind of letters patent to the Justice of Ireland, the King's administrator there, setting limits on his personal authority.[35]

Goodrich has emphasized the sacred and iconic nature of Latin texts of the Middle Ages, and argued that they were not functional documents but relics of sovereignty. Statute laws served this function for the illiterate peasantry, as I have noted, but their immediate purpose as the private records of a literate ruling elite were, on the contrary, decidedly administrative and practical. While they may have seemed to *most people* to be "holy mysteries...stored in sacred hiding places"—a characteristic we have already noted with respect to both statutes and chants—that is not the audience to which they were addressed.[36] To that specific audience, statutes were, paradoxically, instructions and not icons.

The non-normativity of *statuta* can be found in both its iconic communal authority, then, and the narrow focus of its contents. *Organa* and early forms of the motet likewise did not attempt to persuade or compel belief: they were not normative agents either. A motet, recall, is 'a little word', an etymology which reflects the prevailing attitude of the time that religious music ought not distract from the holy words it set. This view of the subordinate function of music dominated in the Catholic church at least until the Renaissance, and, to a considerable extent, still governs Orthodox composition. Monophonic writing such as plainchant provides a clear example. For those few who understood it, the words of the liturgy were of primary importance, and music merely the vehicle for

its communication. Consequently, even in at its most melismatic, the line and rhythm of the music closely parallels the words in question. Although florid at times, the musical demands of the composition never take over from the focus on the "little words" it speaks.

What this means is that the persuasive or normative power of Christian ritual was seen to stem from the words and *not* the music. Early polyphonic writing did not attempt to convey the meaning of words in musical form: music was the iconic channel through the words were given voice, but it was not a symbolic language of communication of its own. Rhythm, melody, key, and harmony—music *qua* music—were not yet independent variables imbued with meaning of their own. Furthermore, early English composers made no attempt to relate the text to the music. A motet was an abstract, formal vehicle for the delivery of words, but while it "presented" a text or texts, it did not "project" or express their sentiment.[37] The music itself did not convey value and meaning. It is true that for those who could understand the Latin being sung, the music form may perhaps have served as a channel for its transmission, but even this limited communicative aspect of the motet must not be overstated. Most motets in the thirteenth and fourteenth centuries were polytextual as well as polyphonic: different singers sang not only different musical lines simultaneously, but different texts as well. it is likely, then, that at this point the motet was not even an effective transmitter of the words of the text.[38]

Now admittedly the *Dies Irae* and other 'sequences' of twelfth century Gregorian chant, for the first time, and in a radical break with tradition, attempt to use music's expressive potential to convey the mood and ideas of the words. The 'Day of Wrath' whose sound and beat instil the terror described in the text is an archetype of the persuasive force of music, then and now. But it is not until centuries later, in the part-writing of composers such as Josquin and Tallis, that this idea of a specific relationship between words and music becomes pronounced. At

that point, when music itself is designed to persuade the listener, aurally and emotionally, of the truth of the words it sets—of the mercy of Jesus, the grandeur of the Lord, or the sorrowful peace of the dead—then and only then does *music* begin to exert a normative effect on its listeners. Music has developed from being a *medium* of communication, to a *means* thereof.

In these early days, then, neither English motets nor English statutes attempted to originate norms of right conduct applicable to the community as a whole. On the contrary, many early statutes *confirmed* existing and customary principles of law. *Magna Carta* and *Carta Forestæ* are typical, declaring that "the city of *London* shall have all the old liberties and customs, which it used to have"; that no-one "shall be distrained to make Bridges and Banks, but such as of old time and of right have accustomed to make them"; that the ownership of woods in forests and the practice of the King's Rangers shall be "as it hath been accustomed at the time of the first Coronation of King Henry our Grandfather" (which itself upheld the law as it existed in the time of Edward the Confessor).[39] The reference to keeping things as they were in Henry's grandfather's day is quite common.[40]

The reduction to writing of a custom undoubtedly has some effect, for it reinforces a particular state of affairs and gives official imprimatur to a principle which might previously have existed informally or imprecisely. Moreover, it may frequently restore principles which had been neglected or fallen into abeyance. It is, however, a very different and more limited kind of action than that which we now understand to be the function of legislation. In claiming that this kind of law-making is not normative, at least as we now tend to understand the word in relation to statutes, I mean to emphasize that the reduction to statutory form of existing customs does not itself *generate new* or refined norms or values within a community. Declaratory law is different in both its function and status.

This argument addresses a difference of opinion between Charles McIlwain and Plucknett. McIlwain argues that early statutes affirmed the common law and did not "make" new law, while Thomas Plucknett rejects this distinction and uses the evidence of the time, such as the Year Books, to assert that statutes were seen as instituting "special" or "novel" law. In the first place, the fact that the possibility of the creation of novel law by statute was acknowledged does not detract from the generalized point about the uses of statute law as a whole. In the second place, Plucknett is discussing a period of law-making a century later, by which time a changing attitude to statute law is already evident, as we shall see. A focus on the language of statute law and the attitudes it demonstrates, itself clarifies the important change that was taking place. In fact, in discussing slightly earlier statutes dating from the reign of Edward I (1272-1307), Plucknett concedes that the line between statute and common law was weakly drawn. He suggests that statutes were received not as superior law but as part of the common law. "[T]hose charters and statutes are merely adjuncts to the unwritten common law, and...wholly partake of its nature." The prime function of this written portion of unwritten law was declaratory; as Plucknett says, a statute was "a memorandum about a point of custom".[41]

What was called a *statutum* seems to modern eyes more like a narrative or a history, intended rather to record the events of the court than to alter the law or *(a fortiori)* social behaviour. The statute fulfilled, in other words, a descriptive rather than a prescriptive function. The following statute on bastardy, which dates from 1235, is a good example:

> All the bishops instanted the Lords, that they would consent, that all such as were born afore Matrimony should be legitimate, as well as they that be born after Matrimony... foreasmuch as the Church accepteth such as legitimate. And all Earls and Barons with one voice answered, that they would not change the Law of the Realm, which hitherto have been used and approved.[42]

Undoubtedly the rejection by the Lords of the Bishops' appeal is a way of describing and confirming the current law. But in terms of a twentieth century understanding of what a statute does, *nothing happened.* No law is passed: there is no change to the Law of the Realm. This "statute" is merely the story of a political event. Law, politics, and history are hardly here distinguishable.[43]

The law in early statutes does not presume to generate or define social norms. The normative grounds of the wrong are not be found in legislation. They are rooted instead in popular customary law or noble power. In this sense, *statuta* provide no independent "reasons for actions." Even 'penal' laws demonstrate a non-normative character. In the *Carta Forestæ* (1225), for example, it is written

> No man from henceforth shall lose either Life or Member for killing of our Deer: But if any man be taken, and convict for taking our Venison, he shall make a grievous fine.[44]

Observe that the law did *not* make it an offence to kill royal venison—it nowhere said 'No man shall kill our deer'. The offence (that is, the normative principle) is assumed. The statute only deals with—and, admittedly, substantially amends—the kind of punishment that may be imposed. This statute is typical in this respect, in the way in which it builds on pre-existing normative principles. Another law deals with the penalty for "the ravishment of a ward", but again, does not establish the meaning or wrongfulness of the conduct in the first place.[45] A modern statute, in contrast, invariably begins with a comprehensive statement and definition of the offence and treats the question of penalty as a subsidiary matter. Undoubtedly the wrongfulness of, for example, taking venison or ravishing wards, is a necessary implication of the statute. But implication of wrongfulness did *not* arise from the statute, but from what everybody already knew about what constituted wrong and right conduct.

Those few laws which did establish penalties and punishments are vague and open to the discretion of the judge. While the judge has more power, then, being free to impose any penalty he deems appropriate, the legal system has less power. Providing a *specific* penalty for an offence is almost unheard of. Reading these documents, there is a sense in which one gets the impression that law-makers at this time do not conceive of the concrete application of their laws: they do not imagine the transgression of laws or the punishment of transgressors. This is a detail left for others in their discretion to fill in, just as the improvisational character of music allowed enormous freedom to the individual performer of an *organum* or chant. For modern legislators, of course, the *specific* offence and the *specific* penalty go together: the modern judge, like the modern musician, is subject to far greater constraint. In one way, this is a consequence of the intrusiveness and detail of contemporary laws. But from another angle it reflects how little the King and his advisers in the thirteenth century saw the law as a means of literally enforcing their will on the lives of others. The King's perception of law, outside its application to a close circle of officials, was clouded and unspecific. It is a mistake, then, to conceive of early statutes as an expression of coercive power, when the act of coercion was not envisaged by the power, and was on the contrary left for others to fill in as they saw fit.

The lack of specific penalties was, to be sure, partly a function of the limited reach of the King's power and of the very limited machinery through which laws could in fact be enforced. England was still over 350 years away from a standing army and almost 600 years from a regular police force. A lack of resources, however, was not the only factor that inhibited the establishment of a comprehensive and rational system of penalties and punishment. Systems of penalties were not unknown, having existed in some detail in the codes of the Anglo-Saxon kings. Furthermore, the practical difficulty of a particular course of conduct is never a fully satisfactory explanation for its non-performance. The

possible and the conceivable are inter-related: the former helps define the latter, and the latter propels the former.[46] What is done in a society—and what is left undone—is therefore valuable evidence of how that society thought.

Where statutes do actually intervene to 'change the law', some justification seems to have been required. The *Statute de Marleberge* (1267) was a lengthy *statutum*. As if by way of apology, it began "The Realm of England of late had been disquieted with manifold Troubles and Dissensions; for Reformation whereof Statutes and Law be right necessary..."[47] Yet even here, about 70% of the various "chapters" (that is, sub-divisions of the statute) are either procedural or declaratory of the existing law, or provide limited exceptions to it.[48] Only in a few cases, therefore, does the statute substantively alter customary norms.

In general then, *statuta* are descriptive, not prescriptive: they organize a legal system but do not change the law, and in the main they are addressed to functionaries. For Austin, at least, we are not in the province of jurisprudence at all, since laws that are declaratory, or specific rather than general in application, or to which no sanction applies, are "imperfect" or "improperly termed" laws.[49]

§3(b). The later 13th century: a changing mood

(i) Visibility: the Statute of Westminster

Throughout this analysis, I have purposely used words related to sight, although, as I have noted, this imagery in part reflects only the dominance of the visual in Western culture. The majority of the population were not yet illuminated in the eyes of the powerful, and the application of the law to them was therefore neither important nor even clearly imagined. Legislation was largely seen as a means of communication between the King and those physically connected to him, and the character of laws reflected this narrow and personal gaze. These patterns of law-making continued for many years, but an important sign-post of change

occurs with the enactment of the first *Statute of Westminster* in 1275. Coming across it in the grey and desiccated pages of *Statutes at Large*—how apposite is that word *parch*-ment—one feels a sudden shock at the new tenor of the law, its passion, its determination and its mood. After over half a century of Henry III's dusty rule, King Edward takes command, raising a new voice in the realm.

> And because the State of his Kingdom and of the Holy Church had been evil kept, and the Prelates and religious Persons of the Land grieved many ways, and the People otherwise intreated than they ought to be, and the Peace less kept, and the Laws less used, and the Offenders less punished than they ought to be, by reason whereof the people of the land feared the less to establish...[50]

Here are the beginnings of a change of consciousness with profound legal effects. For the first time, a statute refers not to Archbishops and Bishops, Sheriffs and Bailiffs, not even to "freemen",[51] but to "the People". The substantive clauses of the statute continue in the same spirit:

> First the King willeth and commandeth ...that common Right be done to all, as well Poor as rich, without respect for Persons.[52]

Not only are the words different here, but the language in which they are expressed: the *Statute of Westminster* is the first English statute written in French rather than Latin. As Frederick Maitland noted, it is hardly now possible to write a paragraph of law without using words of French derivation: contract, tort, property, treason, crime, and misdemeanour; parliament, court, judge, juror, plaintiff, and defendant to name but a few.[53] French was, admittedly, the language of the conquering Normans, and not by any means the 'common tongue'. Neither was 'law French' the same thing as 'spoken French', but rather a written language distorted by complex grammatical rules and highly technical legal terminology. It is fair to say that it only *resembled* spoken French, much as cheese whiz resembles hollandaise. Nevertheless, 'law French' was based on and recognizable as a living language; in fact, 'law French' is such a strange construction exactly because, unlike Latin or English, it had no prior history of written use at all.[54] The official

language of parliament becomes, as the French etymology of *parle-ment* implies, a *spoken* language.

What does this change imply? Firstly, as Plucknett suggests, that a powerful class of lay legal specialists has developed, clerks and not clerics, "who understand Latin but are really only fluent in French." But at the same time the use of law French represents an effort to communicate directly with a wider audience, and an attempt to make of law something that was not only written down for those few who could read, but spoken. This was a statute which was clearly intended to become widely known.[55] There is therefore an assumption here that a statute can change behaviour and attitudes and, more, that adequate knowledge of its terms *itself* has this result. In this sense, we are witnessing the very birth of normativity in English statutes—that is, of law understood not only as an administrative tool and icon of power, but as a means of influencing what people do and what they believe to be right. The little words of the law are beginning to be seen as a mind-altering substance.

We may be cynical about whether the King's rhetoric about "the people" really stemmed from a genuine concern for the welfare of the poor, but even the emergence of this language is significant. For the first time the law *sees* the common people, acknowledges that they are subject to the legal system and that their support for it therefore somehow matters. They are now on the horizon of visibility. It is now possible for them to be 'subjects' and 'objects' of statutes: *dramatis personae* in the legal system, and not merely its backdrop. This gaze, beginning to be focused ineluctably upon the whole of humanity, did not prove an unmitigated boon. Without it, however, our modern legal system and our modern understanding of law simply could not be.

Foucault discusses the emergence of *individual visibility* as an instrument of social control in the context of the eighteenth century, but clearly people began to be 'seen' much earlier. Philippe Ariès, for example, records that in and around the thirteenth century, the European view of death began to change. We see the slow individualization of tombs, of wills, of bequests—all these material techniques designed to record the existence and guard the memory of the deceased as an individual and not simply as part of the ebb and flow of the community. In Ariès' words, we pass from an era in which death was "tame" to one in which people were acutely aware of "the death of the self": the emergence of a self-awareness of individuality.[56]

In the arts a similar revolution took place, albeit rather later in the specific case of painting. There is a world of difference between Fra Angelico's flat, introverted imagery, in the middle of the fifteenth century, and the works of Leonardo Da Vinci at the end of it. The difference is, literally, a question of *perspective.* Perspective, given scientific form by Brunelleschi, and in Alberti's *Della pittura* (1436), was not simply a technique which, once 'discovered', enabled painters to reproduce what they saw more accurately than before. It was a revolution in the *way* painters saw. There is a famous picture of Erasmus drawing a landscape with the aid of a lattice grid set in front of his easel and constructed to train the eyes to see segments of space in a new way. A radical perceptual transformation was underway, and much new learning was required to achieve it. It is no coincidence that at about the same time the use of glasses to correct visual impairment became popular. Technology was responding to a new environment in which the sense of sight was increasingly paramount.[57]

An awareness of the individual existence of the viewer was an important part of this new artistic approach. Perspective draws the observer of the painting into the picture, and this is an approach to art that cannot exist unless the painter is specifically conscious of the observer in the first place. The incorporation of

perspective into paintings was remarkable, not just in the way it represented the 'real' world, but in its awareness of an interaction with that world. Leonardo's *Mona Lisa* is as good an example as any: *it looks at you.* In contrast, early medieval art, like early legislation, is absorbed in its own world; you, as an individual observer, do not exist. In the gaze of the art-work, we begin to appreciate the changing gaze of its creators.

It is often said that the world of the Gregorian chant is similarly unpopulated by subjectivity and individualism—that it is *two-dimensional,* because only line of music is heard at any one time. But by 1275, the date of the *Statute of Westminster,* the form of the motet had developed with surprising rapidity towards part differentiation, independent melodic lines, and greater rhythmic variety.[58] Musical notation, too, had developed with some rapidity and inventiveness in England, striving to express not only a standard corpus of rhythmic modes or relationships but also the precise value of each *individual* note. Franco of Cologne's important musical treatise, *Ars musica mensurabilis (circa* 1280), brought coherence to these developments, and its principles soon spread to England.[59] In all these ways the motet shows itself to be not an *improvement* on plainchant, but the product of a different vision entirely: a vision which recognizes the individuality of its participants and its audience. The changing style and form of a composition, like the wording of a statute, reflect the contrasting priorities of its authors. Earlier artists and musicians—and earlier law-makers—were not incompetents, struggling along with techniques and powers inadequate to their tasks and desires; their intentions were different and the product of a different aesthetic.

The *Statute of Westminster* and the developing motet both reflect a new-found awareness of the wider world, and the gaze of each expresses the all-encompassing perspective of their authors. Undoubtedly the statute, lying at the very beginning of this process, signifies, in legal as well as artistic terms, only the

first stirring of a trend. Subsequent statutes frequently revert to Latin, the use of which does not die out altogether until 1324. And of course Latin continues to be used for centuries thereafter in writs, in legal jargon, and, until 1731, as the official language of judicial records.[60] Many of the provisions of the *Statute of Westminster* are still administrative instructions to officials and, in particular, aim to curb their abuses and corruption. But not all provisions are of this kind. A more expansive legislative gaze can elsewhere be detected. Chapter 13 provides that in the case of rape, the King may bring an action if no other action is brought within forty days, and expressly establishes a penalty of at least two year's imprisonment. In contrast to the earlier statute for "ravishment of a ward," enforcement and punishment are here specifically articulated. The law is beginning to be a physical presence in people's lives.

(ii) Normativity: the Statute of Winchester

The statutes in the years following the *Statute of Westminster* remain, in general, products of a limited and administrative gaze. They deal, for example, with the procedure to be followed by a coroner, or declare certain aspects of the law, not to enhance its normative power but "for a perpetual Memory" thereof.[61] Statutes' functions as a declaration and record of the law still seem to outweigh their use as a vehicle of change. The *Statute of Westminster,* however, marks an important beginning, in which law's gaze begins to widen and the purposes ascribed to the law begin to change.

It is a gradual process. By and large, where the law is cognizant of "the people", they are seen more as its subjects than its objects. The second *Statute of Westminster,* written ten years after the first, generally provided for remedies in situations where none previously existed. In this way, the principles of the law were clarified and their use streamlined. This facilitated the community's use of

the legal system, but it did not directly operate on their attitudes. It is in this sense that I mean that people were not yet 'objects' of the law. While the general population were now seen as subjects of the law, there is not yet a common belief in the capacity of the words of the law to somehow change their values or conduct. Rather, procedures and rules were still largely seen as the legal objects to be reformed by the law.

Laws relating to felonies, however, have by this time gained greater prominence in the statute law, and this is precisely the kind of law that treats the community as 'objects' whose social conduct the law can modify. One chapter of the second *Statute of Westminster* is particularly interesting:

> That if a Man from henceforth do ravish a Woman married, Maid, or other, where she did not consent, neither before nor after, he shall have judgment of Life and a Member. And likewise where a man ravisheth a Woman married, Lady, Damosel, or other, with Force, although the consent after, he shall have such Judgment as before is said...[62]

This is the clearest statement so far of the felony of rape. In contrast to the earlier penal provisions discussed above, the text *itself* states and defines the terms of the crime, and provides a specific penalty for its breach. Henceforth, rape is truly a statutory offence.

Significantly, in a statute written in Latin and 34 pages long, these eight lines are in French.[63] Of course, written 'law French' was hardly well understood in semi-literate England. At the same time, however, it reached a wider audience than Latin, and from this wider base the terms of the law could be spread by word of mouth. The striking use of French clearly indicates that law-makers saw this chapter as a different kind of law addressed to a wider public and requiring a more accessible language. We are dealing here with an especially normative provision, and, conscious of this, a special effort has been made to render its terms comprehensible. The idea that a statute should communicate to all people rather than just to certain officials, should effect the conduct of all people, and if

necessary should force their compliance by the threat of punishment, was gaining ground. The system of legislation had begun to take on a recognizably modern form, reflecting an ideal of state control over every aspect of social life.

So too, the musical notation formulated by Franco of Cologne had taken hold in England by the beginning of the fourteenth century. This was a language capable, at last, of defining with precision the absolute duration and pitch of each individual note, a way of writing that differed from its predecessors such as English mensural notation as the alphabet differs from hieroglyphics. It was a system of musical legislation in a recognizably modern form, reflecting an ideal of authorial control over every aspect of performance.

The *Statute of Winchester,* passed at the same time, is again wholly in French, and demonstrates an even stronger commitment to the law as a normative force. Here we find provisions, relating to the apprehension of felons and robbers, which require "people dwelling in the country" to assist in the attaint of offenders or to answer themselves for the damage done.[64] This law is not merely declaratory or procedural: common people are laid under new obligations purely by virtue of the statute; *they* are treated as agents expected to obey and carry out the law.

Three structural features of this provision underscore its normative character. First, a date was set for its entry into force—"Easter next following".[65] This of course is a characteristic that every modern statute possesses, but the year 1285 marks its debut. The second *Statute of Westminster,* made at the same time, is still clearer: "All the said Statutes shall take Effect at the Feast of St. *Michael* next coming..."[66] What does this mean?—that the statute is seen not just as a statement of intent or as a record, but as an *event* with concrete effects. The contrast with the *lack* of direct effect of, for example, the statute on bastardy discussed above, is quite striking. The provision for a statute's entry into force represents a fundamentally new attitude, in which the statute is no longer seen as an inert string

of words, but as a statement of intention to alter events in the future. On the one hand, such a provision represents an increased awareness of the 'real world', and a desire to increase statutes' interaction with it. On the other hand, it represents a new faith in people's capacity to change their behaviour. The relationship of 'law' both to the possibility of 'change' and the scope of the 'world' is being reconstructed here. It is only in this context, that the question of 'when' arises. *When* is this law to change the world? It is the formulation of this novel question that makes entry provisions necessary.

Secondly, the entry into force was postponed.

> That [the provision] shall not incur immediately, but it shall be respited until *Easter* next following, within which Time the King may see how the Country will order themselves, and whether such Felonies and Robberies do cease.[67]

The King evidently believed that the mere threat of the impending statute might change people's conduct. No more normative and instrumental understanding of law could be imagined. The fact of the law, and even the fact of the future law, is expected to have a behavioural effect.

Thirdly, normativity requires communication. Only if the content of the norm is adequately communicated can it influence behaviour and attitudes. Accordingly, the law required

> That Cries shall be solemnly made in all Counties, Hundreds, Markets, Fairs, and all other Places where great Report of People is, so that none shall excuse himself by Ignorance.[68]

This would appear to be a logical extension of the change from Latin to French, from written to spoken. As the *Statute of Westminster* introduced a law that could be spoken as well as read, the *Statute of Winchester* provided for a law that was not only to be spoken, but *heard.* Statute law was becoming increasingly prominent, increasingly vocal, a change which reflected a rapidly growing faith in its capacity to enter people's minds and alter them. In the *Articuli super Cartas* of 1300, the *Magna Carta,* the *Carta Forestæ* and the *Statute of Winchester* are all again

confirmed, with the important addition that they are to be read publicly four times a year by the sheriffs. *De Tallagio non Concedendo* (1306) is to be read in cathedral churches, and those who break its terms excommunicated.[69] The public is now expected to obey the law, and to change their lives accordingly. Given these expectations, ignorance of the law becomes a problem, which the process of public readings was intended to overcome. The law is now more than visible: it is *audible*. Music, on the other hand, benefiting from the development of a comprehensive system of notation, is now more than audible: it is visible.

§3(c). The 14th & 15th century: validity and normativity in the structure of statutes

(i) The form of introduction

We are on the threshold of normativity: but normative laws assume that people on the whole obey the law. We are therefore on the threshold of the jurisprudential question: subjected now to the gaze of the law, on what grounds were people expected to obey it? In rough outline, three broad answers might be given. Nineteenth century positivists in England and the U.S.A., of whom John Austin is the best known, characterized law as commands issued by a political superior. Austin's position is in fact more subtle than is commonly thought. Contrary to the interpretation placed upon his work by some later writers, Austin does not dismiss the relevance of morality to law.[70] Nonetheless, according to Austin, there can be no law without a sanction, and it is from that threat that our duty to obey arises. For Austin, and for Oliver Wendell Holmes and Hans Kelsen amongst later writers, legal obligation is rooted in coercion.[71]

This position has been attacked on a number of different grounds. For instance, natural law theory may be taken to imply that moral conclusions, no less than scientific ones, can be objectively deduced from first principles, whether these

first principles are divinely ordained or (since the Enlightenment) rationally determined. If, as John Finnis argues in *Natural Law and Natural Rights*, it is thus possible to *reason* from largely uncontentious first principles to the solution to moral problems, then each of us has the capacity to discover for ourselves those laws that are morally justifiable and those that are not.[72] Such an approach suggests that we are not required, morally *or* legally, to obey a law which by such a process of objective reason is discovered in fact to be 'immoral'. Reason imposes a greater claim upon us than power.[73]

Somewhere between Austin's coercive legal order and the spectre of untrammelled freedom evoked by the natural law tradition, modern positivists like H.L.A. Hart have sought to ground legal obligation in the authority of legal texts. According to Hart, the fact of a law's existence provides those subject to it with compelling reasons for compliance. Hart lays particular emphasis on the existence of "rules of recognition" that determine the validity of primary rules of obligation. A statute, for example, duly passed by Parliament, is legal and authoritative, and citizens are thereby provided with an adequate reason for following the course of action prescribed therein.[74] On this analysis, it is neither 'truth' nor 'power' that grounds obedience to the law, but the 'validity' of its social sources. Joseph Raz argues even more emphatically for a "sources thesis", arguing that the legitimacy of the formal "sources" of a law, such as a properly enacted statute or an authoritative judicial interpretation, establishes a separate reason to obey the law apart from the justice of its contents.[75] This attitude does characterize the approach of many people to the legal system in which they live; they justify their obedience to law not because of its reasonableness but because of the "systemic validity" of the process by which laws in general are established.[76]

Although there may be a lot of debate surrounding the merits of a particular piece of legislation (both before and after its enactment), the modern statute, *on its face,* presents no justification for the law but the law itself. The Preamble of

modern statutes has become almost an irrelevancy. This approach supports Joseph Raz's thesis: the fact that a piece of legislation has been passed in accordance with correct procedure is taken to provide us with a reason to obey it.

Let us return to the radically different gaze of the second *Statute of Westminster*. From whence derives its normative force?—why were people expected to obey it? The answer is not simple. Many of its chapters follow a two-step process. First, the injustice of the present law is explicitly acknowledged: the law "seemed very hard", "was very hard", "was most hard", and so on. The same phrase is used in other statutes dating from this period.[77] The use of the word 'hard' here is interesting. 'Hard' is a tactile word; it has an immediate presence, a physicality about it in stark contrast to words relating to more abstract senses, such as sight. We see from afar, but we only experience hardness directly, the felt and brute reality of a resisting object. A 'hard' law, therefore, is a law whose injustice is actually felt and not merely observed. The awareness of the legal system as something embedded in, and *touching upon* the whole community thus continued to grow. Indeed, to speak of the 'gaze' of the law is no longer entirely adequate. 'Gaze' is a dispassionate, visual word; here, the legal system is starting not only to see a broader role for itself, but to *feel* it too.

Secondly, the harshness of the present law having been established, the chapters of the *Statute of Westminster, the second,* propose solutions and improvements with the consistent declaration that this is to be the law "from henceforth" *(de cetero* in the original Latin).[78] In contrast to those statutes of Henry III which studiously preserved the law as it had been in his grandfather's day, this approach is future-oriented, and designed to change and correct the deficiencies of the past. This legislation, however, does not rely upon either the Crown's coercive power, nor on the validity attaching to the formal procedures for the statute's enactment, to elicit conformity to the changes that are made. By saying that the previous law was "very hard", a reason is given to accept the new

law. Neither the fact of the statute's passage through parliament, nor the coercive power of the state which stood behind it, guaranteed compliance: people needed reasons to obey the law, which the statute itself endeavoured to supply.

Indeed the structure of these chapters is that of an argument and not a declaration. The normativity of the law stems here at least in part from its appeal to conceptions of justice and reason. The lengthy and emotive introductions to the *Statute de Marlberge* and the *Statute of Westminster, the 1st,* which I have discussed above, provide further evidence for this suggestion. The more weighty a statute's ambitions, the more imposing the flourish of justification which accompanied it. The authors of these normative provisions took an approach somewhat akin to natural law theory, for obedience and respect were here sought through the strength of moral reasoning stated in the legislation itself.[79]

During the thirteenth century, the marshalling of reasons ran through the substantive provisions of a statute like a commentary, melismatic as any *organa*, suggesting once again that the distinction between law, politics, and history remained extremely hazy. Indeed, one way of understanding this early statutory form is as a document which, in the absence of other kinds of authoritative records, combined substantive law and parliamentary debate—reasons and consequences. The style of statutes continued to change, however, gradually shifting from an emphasis on the reasons behind the law to an emphasis on the validating procedures surrounding its enactment. If we jump forward to the second half of the fourteenth century (by which time the use of law French in statutes was uniform), a change is already apparent. The introductory reasons for enactment are now less specific than those in the *Statute of Marlberge* and the *Statute of Westminster.* Furthermore, these reasons are increasingly confined to a structurally discrete part of the statute which we can now recognize as a form of introduction. The statute passed in 1362 begins, "To the Honour and Pleasure of God, and Amendment of the outrageous Grievances and Oppressions done to the People, and in Relief of

their Estate..."[80] A rhetorical flourish like this could hardly serve as a reason justifying any particular part of the statute, which contains a number of unrelated substantive provisions.

In the following years, moreover, the introduction became ever more formal, referring to the way in which the statute was passed rather than to its content or purposes.[81] The formal procedure of the statute's enactment is becoming more important than the reasons for it. By 1407, the form of introduction has become almost standardized, invariably referring to certain definite features, including the date of the Parliament, the presence and concurrence of both Houses of Parliament, and the will of the Crown.

> Because that divers Complaints have been made...in the Parliament holden at *Gloucester* ...the same our Lord the King, willing to remedy the said Complaints, with the Advice and Assent of the Lords Spiritual and Temporal, and at the Instance and Request of the said Commons, hath caused to be ordained and established divers Ordinances and Statutes...[82]

By the middle of the fifteenth century all traces of rhetorical justification had vanished and the introduction had become purely formal.[83]

We have traced the metamorphosis of this structural item from that of a means of establishing the *reasons* for the enactment of a statute, to that of a means of establishing its *validity* or heritage. Each chapter—the substantive units into which a statute is divided—still contains some explanation of the purpose of its enactment, and at times this explanation is grandiloquent and rhetorical, as in this example from 1483:

> The King remembering how the commons of this his Realm, by new and unlawful Invention, and inordinate Covetise, against the law of this Realm, hath been put to great Thraldom and importable Charges and Exactions...to their almost utter destruction...[84]

Nonetheless, the introduction to the statute as a whole had developed a significant and novel character. It now reflected the growing importance of procedure in establishing the authoritative nature of the law, and therefore suggests the slow

triumph of something like Raz's "sources thesis" in the minds of law-makers: that people ought obey the law because of who issued it rather than why it was issued.

(ii) The Act of Parliament

The increase of royal power, and the establishment of clear legislative procedure, reflected the increasing importance of procedural validity in grounding normativity. At the same time, we have seen how the legislative gaze slowly expanded to encompass the commons, and noted that law's purpose began to change from declaratory to imperative, from 'is' to 'ought'. I have described this as a fundamental change in who was 'seen' by the powerful, and in what way; but it also represented a profound change in their view of the capacity of law itself.

In 1461, amidst political turbulence and civil war, Edward IV came to power. It is not surprising, then, to find in the statute of that year a particularly detailed justification of Edward's claim to the Crown as against his rivals, dead and alive. The incorporations, authorizations, and statutes of the "late pretensed Kings", "late in Deed and not in Right, Kings of England" are specifically confirmed.[85] But there is a subtle and more telling change here. The first chapter of this statute confirms not only the "Judicial Acts" of his predecessors, but their "acts and ordinances". There are several other references to "this Act" and "other Acts". Indeed, within a very few years, each chapter would come to be called "An Act..." to achieve a particular purpose.[86]

What does this word 'Act' betoken? Despite the apparent similarity with the "Acts of the Apostles", the two senses are quite distinct. An 'act' is "a thing done; a deed, a performance"[87], and the apostles' 'acts' were clearly deeds or things done: the New Testament text which we call "Acts" is therefore not an act itself, but only a record of those acts or activities done elsewhere. An "Act of Parliament" is very different. Where, one might ask, is the 'act' to which the "Act"

refers? Undoubtedly a judgment or a court's decision is an 'act' in the lay sense, for it has concrete and immediate effects. A chapter of a statute is to a certain extent an 'act' also: the act of writing the law, and of deciding the words to be written, is a deed or thing done. Only in this sense, however, is it either an 'act' itself or a record of the actions of others. The only act is the act of writing. It could be termed a charter, a fiat, a decree, an ordinance, a missive, a treaty, a declaration, a communiqué, a proclamation, a writ... What after all does 'writ' mean but that which is written? Even the word 'statute' derives from the Latin meaning 'to stand'—a statute "stands written".[88] All these words convey the sense in which, above all (and unlike the acts of the Apostles), parliament's acts are comprised of words on paper.

The use of the word "Act" in the technical sense which is now commonplace, however, is confusing and ambiguous: parliament's physical 'act' or 'deed done' is complete once the law is *enacted.* (To ease the confusion, I will use a capital 'A' when using the word 'act' in this legislative sense) But to enshrine an enactment as 'An Act', on the contrary, implies something present and on-going. This suggests that the statute, although written down, is not thought of as something which just "stands" (still). In some way it *continues* to 'act'. The word 'Act' thus translates the statute from marks on paper into energy which continues to operate in the world. It illustrates a world-view in which statutes are gradually being seen not only as statements or historical records of events, but as *acts* with effects of their own, like the expanding ripples of a rock thrown into a pond. Furthermore, in contrast to the earlier understanding of legislation as a declaratory instrument—a *statutum* whose function is to "stand written"—'act' is active. It implies a vigorous engagement with the world, a desire to intrude and change it. An Act is not just a record of the world, but a way of modifying it; it is a vector with direction and velocity.

The Act therefore symbolizes law's vigour, its claim to reality, and its determination to inter–act with the world of things. This is radically different from the passive understanding of law we have largely encountered hitherto. We have not yet, however, reached a particularly sophisticated understanding of the nature of the statute. For there is a sense in which the word 'Act' carries the implication that the mere proclamation of the law can somehow by itself create the new reality it proposes. There is a faith here in some sort of miraculous osmosis between word and world. In the fifteenth century, this naïveté reflected a still-limited gaze which may have led law-makers to assume (in many cases) that just the passing of an Act did the job. They failed, perhaps, to envisage the long process by which a statute comes to have some force and relevance, the human steps of application and enforcement required, and the resistance that might be faced from other people with opposing values and practices.

Here there are connections with certain dubious assumptions of present-day importance: that laws somehow bring themselves to fruition without human assistance, and that laws are in fact successful in changing the world and the people in it. The proposition that 'laws act' sums up both these popular assumptions.[89] They are unsound, since of course the passage of an Act is not the end of the story, but only the beginning of it. For example, the moral entrepreneurs of our own time have often insisted upon the legal prohibition of behaviour (such as drug and alcohol use, or abortion), frequently denying the reality of how people, regardless of the law, choose to live their lives. This insistence suggests a blind faith in the efficacy of law, grounded in the instrumentalist fallacies that we first begin to notice during this formative period. Although flawed, the idea of the 'Act' is therefore important: you cannot believe in the normative power of law unless you assume that laws act in the world. The change from statute to Act therefore represents a crucial development in the trend towards normativity begun earlier.

The structure of written law no less than its language reflected this trend towards greater normativity. The earliest statutes were, as we have seen, narrations of political events. The *statutum*, an historical record of the decisions of a particular session of Parliament, was the fundamental legislative unit, divided into "chapters" merely for the sake of clarity and convenience. By the fifteenth century, a change is noticeable. There are more chapters than ever before, many of which are themselves sub-divided into several articles or sections. Statutes no longer have titles; chapters soon will gain them. At the same time, as we have seen, the introduction to the statute is becoming more formal and less important. By the time of Henry VIII, it had disappeared altogether and been replaced by a similar formula at the beginning of each *chapter*.[90] The chapter is now known as an "act" of Parliament. The statute is merely an omnibus of these Acts, bound together at the end of the regnal year. What we are witnessing here is the demise of the statute as the fundamental unit of legislative structure and its replacement by the chapter.

These structural changes reveal a conceptual shift, for while statutes were distinguished chronologically, each chapter can be distinguished by its purpose. Why was it now seen necessary to divide chapters into sections? Partly because of the details of control with which each law is increasingly concerned, but also because the conceptual unit is now the chapter. The sections all 'belong' within a particular chapter because they are all steps designed to facilitate the same purpose. Law-making had therefore changed from a record of past events (stated in the statute) to an act of present will (captured by the chapter). Law was seen increasingly as purposive—each Act a discrete normative decision intended to achieve a specified end. We can see where this progress will eventually take us. In the twentieth century, the word "statute" has lost its original meaning as the collection of legislation of a particular regnal year, and is treated as synonymous with "Act".[91] Each "statute", understood in this sense, is designed to change the law; it frequently includes hundreds of sections, all of which share at least to some

extent a common purpose. Now, the statute is no longer a history at all. It is the expression of an idea.

We have, in fact, rung down the curtain on the medieval world and entered the Renaissance, an age of unbounded confidence in man's ability to change the world by an act of will. In fifteenth century music, composers such as Ockeghem and, in England, Pycard and Byttering, began to refine the 'canon', a musical form which later reached its apotheosis in the fugue.[92] A canon, though, is more rule-based in nature: the musical statement of one part is copied by other, successive, voices, either exactly or in accordance with pre-determined principles of transmogrification. It is musical *law*, in truth as much as in etymology. Like an Act, a Canon *continues* to enforce its will upon the world. It is a composition subjected to the governance of principles or themes laid down in advance, and with whose terms composer and performers alike must obediently comply. There is, for example, in the formidable *Gloria* of Pycard, a five-part double canon, a heightened clarity of line, and regulation of the form of musical expression—just as we have seen in the Acts of the period a heightened clarity of purpose, and regulation of the form of legal expression.

(iii) Legal subjects

Above all, the fifteenth century is notable for the triumph of *harmony* as a guiding aesthetic principle. Harmony became enriched, principally by the declining use of parallel fifths and the increased use of thirds and sixths, previously considered "imperfect intervals" and held in correspondingly low esteem.[93] The early fifteenth century manuscripts in the Old Hall collection mark with particular prominence this cultural development.[94]

Simultaneous with this harmonic thickening, the consonance of all melodic lines became a crucial task of composition. In the polyphonic music of the fifteenth century, then, each note must be studied and integrated, not only in relation to its own line, but in relation to all the other lines being sung at the same time. The compositional gaze is directed vertically as well as horizontally—directed towards deepening the control exercised over harmony as well as expanding the tonal range of melody. The result is that the sound of Western music changed markedly, from spacious and hollow, to something lush and thick. From the single melodic line of plainchant, or the simple structure and sound of the earliest motets, the field of the composer's gaze has widened vastly in all directions: melodically, rhythmically, harmonically. There is a complexity of musical *consciousness* here, accompanied by an unprecedented complexity of musical organization and control. It is this complexity of writing and hearing which the 'motet' came to represent.

The development of statutory form likewise reflects a heightened complexity to legal consciousness, and an expansion of the depth and breadth of its gaze. The notion that the purpose of the law was to reform, to act, and to provide norms, was well-established by the fifteenth century, and was applied to a vastly wider range of the King's subjects, and over an increasing number of aspects of their lives. Law thus sought to harmonize the behaviour of more citizens in ever more intricate ways. Still, the *way* in which the law strove to harmonize the conduct of the community remained limited. With England's rising mercantile power, for example, there came a barrage of laws controlling trade, import, and the economic conditions of the country: Acts about coins, loans, boats, bread, and wool.[95] By and large, these Acts attempt to change the conditions of the world—people's status, their land, their property, their trade—and only indirectly to influence their beliefs and desires. I do not mean that laws about conditions of trade and relations of production do not affect people's behaviour and ideology. Clearly they do, for

they affect the *context* by which their ability to act is constrained and the environment in which their attitudes are formed, but they do not address them directly. To put it another way, the idea that the law is normative, that its terms control how people think and how they choose to behave—a kind of attitude assumed by modern criminal law and much else beside—conceives of the *mind* as an object which the law can manipulate just as if it were a loaf of bread or a bushel of wheat. This approach, while it has begun to be expressed, has not yet triumphed.

The fifteenth century marks also the emergence of "private Acts", whose purpose is to effect the legal status and entitlements of specific individuals rather than of the public as a whole.[96] Such laws, for example, provide for the divorce or pardon of particular individuals, the settlement of land disputes and the granting of titles to the nobility. In other words, they are a generally welcome involvement in the dealings of named members of the ruling class. This may seem a throwback to much earlier legislation, but nothing could be further from the truth. Certainly the thirteenth century gaze focused on individuals, such as sheriffs and bailiffs, but it saw them as 'agents' carrying out the King's wishes; here, on the contrary, the law is acting as the agents of these individuals, often facilitating *their* desires. This is a trend which was much more pronounced in the nineteenth century, when private Acts dealt with the incorporation of companies, provided authority to build bridges and roads, and so on; in short, when the statute book seemed to be nothing but an agent of capitalism.[97]

In undertaking this enabling function so early, statutory law saw (a very limited class of) its citizens as its 'subjects', whose actions were either circumscribed or facilitated by its terms. In contrast, the law's view of them as 'agents' representing the King lay in the past, and its view of them as 'objects', whose very *desire* for action could be made to conform to the rules of harmony, lay substantially in the future. This integration of each member of society into a whole

community, subject to laws which determined in advance their attitudes to and relationship with each other, constituted the triumph of the harmonic principle in law.

§3(d). The 16th century: validity and power

(i) The structure of the Preamble

As the Wars of the Roses entered their final stages, the language of Acts seemed to reflect a greater consciousness of "the People" on whose behalf each side claimed to be waging bitter war. Perhaps partly in an attempt to establish some popular legitimacy for his rule, the coronation of Richard III in 1483 saw another decisive linguistic change. Then and thereafter Acts of parliament are all written in English. The change from French to English was not as sudden as it might appear. As early as 1362 a statute required that all cases should be pleaded and debated in English, and around the same time, some petitions to parliament began to appear on the roll in English.[98] These were precursors to the dramatic change accomplished a century later.

Now some of the trends we observed in the preceding centuries began to coalesce. The shift from Latin to French to English, for example, was a slow and significant one which represented an increased openness of gaze and a more normative understanding of law. The broadness of the modern legal gaze, that is, its attempt to reach and influence everybody in the community, is directly correlated to a heightened faith in law as an instrument of social change, and a heightened expectation of social conformity. The triumph of this movement is the emergence in our own day of "Plain English", an ideology of writing and style now adopted by virtually all legislative drafters in the English-speaking world.[99] It is an attempt to make statutes more accessible to everyday understanding, and it stems from precisely the belief that the law has a strongly normative effect; that is, that it

really does provide powerful *independent reasons for action* amongst those who (are assumed to) read and know it. "Plain English" insists that the law *will* be effective, if only it is read and understood; and understood if only it is readable. Behind this lies the assumption that the correct audience for a law is the community as a whole, and not the community of lawyers. "Plain English" is in all these ways the apotheosis of the modern gaze and the antithesis of the medieval.

Another theme that we observed over the preceding centuries was the growing importance of Acts' legal validity. The argumentative style of the form of introduction declined, and the formal details of and procedure surrounding statutes' enactment grew in significance. By the time of Henry VII, whose accession to the throne in 1485 put an end to the Wars of the Roses (he being the only claimant left standing), the location of these formalities had moved, so that every Act (i.e., chapter) itself stated that

> It is ordained, established, and enacted by the Advice of the Lords Spiritual and Temporal, and the Commons in the said Parliament assembled, and by Authority of the same...[100]

The chronological statute as a concept of importance had thus been entirely superseded by the purposive Act. By the beginning of the reign of Henry VIII (1509-1547), as noted, the introduction had disappeared altogether from the annual statutes of the Parliament. All that remained was a Preamble to each individual Act which cited the grounds of its formal validity.

The emphasis on the legal validity of a law had not yet, however, entirely eliminated its rhetorical character. Neither the validity of an Act nor even the threat of coercive measures are apparently yet sufficient to instil the habit of obedience. The Preamble, it is true, was now structurally distinct from the 'substantive' clauses of each chapter. It was, furthermore, frequently framed with inverted commas as if it were a recital or a quotation. While such structural devices served to separate 'rhetorical' language from 'real' law in a way that would hardly have made sense even a century earlier, the Preamble nevertheless continued

to provide reasons for the passage of the Act. Admittedly these reasons were becoming less and less important as the question of formal validity took on a conclusory function until, in the present day, the Preamble, understood as a way of justifying a particular enactment, is rare.[101] Nonetheless, in Tudor England, this phase had not yet been reached.

Many of the Tudor Preambles quote a petition submitted by a group seeking Parliament's help. The Act which incorporates the Royal College of Physicians is a well-known example.[102] An Act of 1512 likewise quotes an earlier Act relating to pewterers and concludes with their plea:

> 'Please it therefore your Grace and Wisdom, inasmuch as the said Act is thought good and profitable, that it be ordained, enacted and established by the Lords Spiritual and Temporal, the Commons in this present Parliament assembled, and by the Authority of the same, that the said Act may endure for ever.'[103]

This Act and others like it are interesting for two reasons. First, and strictly speaking, they enact nothing. The Act concludes with an *entreaty* for the Parliament to act and a *plea* that it be so ordained, enacted, and established, but, although we can assume as much from its place in the statute book, there is no positive statement that Parliament acceded to the petition. The development of this strange hybrid form—part Act, part Preamble, part petition—suggests the extent to which law has become facilitative, and corporations and organizations its *subjects.*

Secondly, although the recital of a petition demonstrates that the reasons for a law were still important sources of its power, there is a subtle change here which paradoxically points to the growing importance of law's formal validity. It is instructive to compare these petitions with the early statute on bastardy, which recorded the bishops' "petition" to the Lords.[104] In that case, the fact that the petition was recorded on the statute roll did not alter Parliament's inactivity. Raz, for example, argues that a law's authority derives from the validity of the Parliamentary process, the statute itself being only *evidence* of that constitutive

process.[105] Just because a petition is placed on the roll, therefore, does not mean that it has gone through the Parliamentary *procedure* which entitles it to validity.

In the sixteenth century, however, things were different. For what does it mean that the mere recording of the petition apparently sufficed to create law? It means that everything that appears in the statute book is taken to be "law". Raz to the contrary, the statute book appears here to be iconic of law's validity:[106] the statute was not merely a symbol or insignia of law's authority, but *itself* rendered authoritative and valid everything within it. Law still, I think, has this iconic validity. If we ask, from our contemporary standpoint, the basic question 'why do we obey laws?', one reason stems from the power which written law, and in particular statute law, exerts over many of us. The existence of words in the pages of a statute book seems to demand respect, to endow those words with a certain privileged status.[107] In this way, the pages of a statute are legal icons which convey value and demand obedience simply by being there on the page. It is this kind of validity of which we begin to catch a glimpse in the petitions of the sixteenth century.

(ii) Penalties and power

The changing nature of the Preamble in Tudor England demonstrates in these ways the growing importance of legal validity as the grounds of legal obedience. But at the same time we see the growth of coercion as a means of ensuring obedience. In marked contrast to the position even fifty years earlier, there is in the statutes of Henry VII a consciousness of the importance of penalties in giving people a reason, in an Austinian sense, to obey the law. Each Tudor Act typically provides an offence, and each offence a specific penalty: no longer, if mentioned at all, just "a grievous fine" or "as the trespass requires", but, for example, 6s/8d for

the first offence, 13s/4d for the second offence and 20 shillings for each subsequent offence.[108] There is a *system of coercion* operative here, enforcing obedience.

As I have suggested, this can be characterized as the 'objectification' of the community, the assumption that their very beliefs can be moulded by legislative intervention. There is no inconsistency here with the 'subjectification' of law for which I have contended above. *Both* were gaining strength in the minds of law-makers, although not at the same rate. The statutes of the sixteenth century treat citizens more as legal subjects than as objects; but in comparison with earlier centuries, both these approaches have gained ground. So too, in our own time, law is seen as both the ultimate architect, redesigning the world according to its own blueprint, *and* as the ultimate evangelist, transforming our hearts and minds directly. If the latter, objectifying function of law, is now more prominent, as was the former in the sixteenth century, it is not that our faith in legal architecture is waning—only that our belief in legal evangelism is especially strong.

(iii) The gaze of the Preamble

The legal system was doing two things here: recognizing that laws would be transgressed, and standardizing punishments. An awareness of the power of law, therefore, was accompanied by an awareness that law needs power if it was to be realized. This represented a much more sophisticated imagination, in which the law was conceived as it actually existed. We can see this developing understanding of the relationship of the law to the world in the changing syntax of the Preamble. In the days of Henry VI, the following phraseology was typical:

> The King, by the Advice and Assent of the Lords Spiritual and Temporal, and the Commons of this Realm of *England,* being in the said Parliament, and by Authority of the same Parliament, hath ordained...[109]

The words "hath ordained" are important, for they place the King's will firmly in the past tense. The statute was thus, as we saw in other contexts, an historical

record of an action (the King's decision) which was over and done with. There was no perception of the statute continuing to act in the world.

Soon after, however, we enter an ambiguous period in which the past and present merge. Phrases of the form "it is ordained and established", or "it is enacted, ordained, and established",[110] although they carry something of the past with them, are nevertheless in the present tense. As with the word "Act" itself, which first appeared around this time, there is the implication that the mere description of the King's will (in the past) is by itself enough to change the present. "It is enacted" and "It is established" mean 'It is done'. Just like that. Likewise, these phrases are written in the passive voice. There is, therefore, no sense of agency. The King's will "is enacted", somehow, by itself. The use of the passive voice leaves unexplained the process by which the statute is in fact to be established.

At the same time we begin to find examples securely wedded to the present: "The King...doth ordain, enact, and establish", says one Act of 1483; "the King ordaineth" says another from 1485.[111] Now this appears to be a statement of fact relating to the mind of the King: he ordains this or that to be so. The use of the active voice adds to this impression: it is not just "ordained": the King ordains it. This was an expression of the King's will, then, but still it revealed no awareness of *how* that will was to be put into practice. The old style "it is enacted" implied, as we saw in relation to the word "Act", that the world obeys the abstract word; "The King ordains", although it identifies the person whose intent is at stake, says nothing about how the world responds. It is a document which records a present intention and says nothing about how that intention is to be carried out.

This ambiguity between past and present, word and action, soon dissipated. A petition dating from 1495 began, "Be it ordained and enacted by your Highness..."[112] The words have the character of a wish and a request for someone

("your Highness") to act and for something to be done in the future. "Be it enacted" means 'Let it be enacted'. This form becomes standard in all Acts. The substantive clauses of Acts begin "Be it also enacted", "Be it ordained", "Wherefore be it enacted", "Be it therefore enacted, ordained, and established". By 1523 all Acts simply and uniformly declare "Be it enacted..."[113] This form has come down to the present day virtually unmodified. But what is the image or aesthetic which this phrase conjures up? Does it not still sound like a request—and if so, to whom is it addressed? Let it be enacted *by whom?* There is a clear image of command here: the King on his throne pronounces "Be it enacted"—and orders those around him to satisfy his wishes.

This is no longer a mere floating abstraction. The phrase "be it therefore enacted" is a command instructing others to act to fulfil the will expressed. The phrase suggests an awareness that it is only by this consequent action that the King's vision can be realized. There is a recognition here that laws must *be enacted* by future action. We have moved from present will to future action: in other words, from the present tense into the future. We have also moved from a gaze that looks *at* the world to one that enters physically, practically, *into* it—applying, enforcing, punishing. An effort is being made to transform the world not just by relying on the sheer magic of words, but by muddy, brutal practice. This gaze is decidedly modern in outlook. It leaves the way open, after centuries of intellectual struggle and a gradually changing perception, to the detailed legal control, subjectification, and objectification which we now take for granted.

A gradual increase in the detail of control and depth of gaze has marked the history of statutory from *Magna Carta* to the Tudors. The development of musical form followed a similar trajectory. In Renaissance music, there is a consciousness of effect and an attempt to use music as a species of communication quite unlike the inward rapture of earlier times. The use of musical word-painting typifies this communicative spirit. The *Pie Jesu* or *Agnus Dei* of the Mass writers of the

sixteenth century conveys the idea of mercy by strictly musical as well as linguistic means, utilizing at last the full normative power of the medium. This exploration of normative potential came somewhat later to English music; but even in the compositions of John Taverner or Robert Fayrefaxe, and still more so in the motets of Thomas Tallis (1505-85), there is a rhythmic variety, a differentiation of mood depending on the meaning of the text being set, and a focus on syllabic clarity in the vocalization of its words, in stark contrast to the approach of the ancients.[114] Medieval music, like medieval legislation, existed in its own private space; in the Renaissance, there is a new-found and vivid engagement with the community—a belief that music itself, like the law, can enact and ordain changes in the minds of those who listen.

This expanded musical gaze and function influenced the composer's understanding of the resources at his disposal, too. Modern notation, effectively stabilized around 1400, allowed an infinite subdivision of the beat and therefore an infinite density and complexity of rhythm. At the same time, the tonal as well as the rhythmic range of an individual voice expanded, so that the bass, for example, which had rarely sung below a C, was now pushed down to an F. In England, long in the forefront of broadening the vocal range used in composition, the compass of polyphonic settings, from highest note to lowest, expanded between 1400 and 1500 from about two octaves to three, while the range of an individual vocal part, in the compositions of John Cuk or Walter Frye, for example, now typically extended to a tenth or an eleventh and on occasion a sixteenth.[115]

The changes that took place were not merely technical, but conceptual. We hear in the remarkable and prolific motets of Thomas Tallis an awareness not simply of abstract melodic lines, but that he is dealing with *voices*, each possessed of their own range and character.[116] Consider the note as Tallis must have considered it. It has a temporal dimension, harmonic implications, timbre and character; it is attached to a word, to emotions, to *meaning* as never before.

Realms of opportunity previously unimagined presented themselves to the Tudor and Elizabethan ear. It was an aural gaze (if we can speak of such a thing) that offered a vast expansion in the means, aspects, and functions of musical control. How far removed in depth and complexity is Tallis' magisterial forty-part motet, *Spem in alium,* from the simple two-part *organum* its far-off ancestor. Above all, there is a difference in sonority and feeling here. The beauty of the middle Ages lay in its space, its parallel movement, the simplicity and stark perfection of its harmonies, and the constancy of its rhythm. By the Renaissance, these very factors had become undesirable and even ugly. We have witness a profound shift in perspective and in value, not primarily technological or administrative, but aesthetic.

Section 4. Motets and little words

There is something ironic in focusing so steadfastly on the interpretation of early statutes when the judiciary did not even see statutory interpretation as an appropriate legal function until the end of the fourteenth century. Indeed in 1336, one statute concluded by demanding that the "aforesaid ordinances and statutes" should be kept "without addition, or fraud, by covin, evasion, art, or contrivance, or by the interpretation of the words". Statutory interpretation was a species of fraud.[117]

Yet an aesthetic methodology of statutory interpretation has proven to be a vein rich in the ore of insight. In 300 years of English statutes beginning with the *Magna Carta,* I have traced marked changes in the conceptualization of law, contrasting modern theories of validity (Raz), power (Austin), and reason (natural law), all of which may be advanced as different ways of explaining why it is that people accept an obligation to obey the law. As I have noted, all these ideas have changed, developed, and intermingled over time. Despite these inter-connections,

the relative importance of various elements has varied. I have discussed the decline in reason and rhetoric, its steady replacement by notions of formal validity, and the gradual rise, too, in the value placed on legal coercion. We have seen the role of legislation change from that of a document recording the past to that of an instruction to guide the future, and its tone accordingly change from descriptive to prescriptive. The shift from the use of the word 'statute' to the word 'Act' symbolizes that steady movement.

At the same time, the related idea of legal normativity, with enormous implications as to the power and efficacy of legislation in moulding our lives and minds, gradually gained acceptance. These assumptions, now commonly accepted even by very different jurisprudential schools, were foreign to the earliest statutes. The gradual shift from the use of Latin to French to English might be taken to embody this slow development. I have also related the growing normativity of law *qua* law to the growing normativity of music *qua* music. So persuasive is the language of music now, so ancillary to its meaning are the words it sets—so far removed are we from the original meaning of the motet—that most of those who hear a Latin setting by Tallis have little idea of the meaning of the words, and less interest. Likewise, the written law now claims such a normative force, so assumes popular knowledge of its terms—so far removed are we from the original nature of the statute—that those who question its efficacy are sometimes seen as a trifle perverse.

The purpose of statute law changed along with "the gaze" of law-makers: who was on the King's horizon of visibility, how thoroughly into their lives that gaze penetrated, and whether they were perceived as agents, subjects, or objects. Neither is this phenomenon of changing gaze, changing expectations, and changing normativity limited to the law. In music and in law alike, a gaze which expanded in scope and in intensity was reflected in changing purposes and revealed in changing form and style. This aesthetic methodology could be extended much

further. How, for example, has the history of legislative form and language unfolded over the *last* four hundred years? One might discuss the utilitarianism of nineteenth century Acts (and especially the enormous number of private Acts passed to facilitate industrial expansion) and their construction of the citizen as legal 'subject'. One might look at the explosion of legislation in the last one hundred years and its reconstruction of the citizen as legal 'object'. Again, one might consider factors such as the growing artificiality of legal language in the eighteenth and nineteenth centuries, the emergence of the 'definition section' as a vital and increasingly exhaustive element of Anglo-American statutory law, and the recent emergence of Plain English. What do all these elements say about how law and legislation have been understood, and the values they have embodied? I have suggested some tentative answers at various points, but clearly a far more detailed analysis is possible.

The result of such an analysis would be a new history of the statute. From our present standpoint, the form of modern legislation seems completely 'natural'. That of course is why I have ironically used a similar design as the structure of this chapter: the legislative form which, in its natural habitat, is entirely problematic, is thus foregrounded by being placed in a new environment. Likewise, the revelation of the otherwise invisible has been the purpose of the historical and aesthetic analysis I have undertaken. We expect to see "Acts" written in "plain English" (accompanied by conventions relating to short titles, formal clauses, substantive provisions, the numbering of sections and paragraphs, provisions for entry into force, and so on), forward-looking, purposive, and reformist in nature, designed to change the world and change behaviour. Indeed, a world without such a comprehensive faith in legal control and influence is, for us, virtually unimaginable. But for the one to be unimaginable, the other had first to be imagined. Through an aesthetic argument and an aesthetic exemplification of it—by evaluating the changing look and sounds of various expressions, musical and

legal, of the social order—this chapter has attempted an exposition of some of the history and manifestations of that legal imagination.

Interestingly, Thomas Levenson makes similar points in drawing parallels between the history of science and music at this time.

> In the time of Gregory and the Frankish kings, there was the Word, and the words of Scripture...and a conception of science, any science, especially the science of music [or law], as the elaboration of truths already known... The explosion of musical ideas between the time of Henry and Eleanor and the end of the Middle Ages...hinted at a transformation in the sence of what a science was, what a scientist did [and what a lawyer was and did]. From the study of experience to demonstrate external, eternal truths, music [and law] had becomea too of discovery, of innovation.[118]

Beyond the specific question of legal history, the purpose of this *Motet* has been to introduce the aesthetic dimension of legal texts—on the one hand, as an interpretative tool or process, and on the other hand, as the subject-matter of interpretation. To take the idea of an aesthetic subject first, then, my argument is that one cannot understand the ideas and practices of law-makers in any era without delving into the way they saw the world. This understanding of the importance of aesthetics in the establishment of a world-view has directed my research towards particular aspects of the documents in question. But the process of my inquiry no less than its subject has been aesthetic. I have focused on various aspects of the language, form, and 'gaze' of statutes, rather than, for example, on an analysis of their content. My interest has been in the organization of statutes, for example, and the language of the Preamble. The look and form and style and rhetoric of statutes, therefore, constitutes an important source through which to learn about the general attitude towards law and society in which context specific statutes are enacted.

This chapter has been an adventure in words: their voices, their arrangement, their purpose. The motet, in its finest flowering, embodied an unparalleled depth, breadth, and sophistication, and an quenchable faith in its own force and authority. The statutory form experienced the same intoxicating expansion. We have seen,

then, the power of language and form to both structure and exemplify patterns of thought—whether we are talking about the formal innovations of early modern music, or the parallel developments of early modern legislation. In all these cases and in all these ways, the changing characteristics of the little words of law and of music have much to teach us about the world of its writers and that of its readers. As T.S. Eliot wrote,

> Words move, music moves
> Only in time; but that which is only living
> Can only die. Words, after speech reach
> Into the silence. Only by the form, the pattern
> can words or music reach
> The stillness.[119]

Whereas in this chapter aesthetics has been used to show how our engagement with the legal text explains the world, the next chapter explores how our engagement with the world explains the legal text. I wish to show how thinking about senses and symbols can help us to understand the meaning of legal arguments, and the motivations behind them. In the specific context of the death penalty, this argument moves away from an understanding of aesthetics which is lingual and formal, and towards those aspects of the aesthetic which suggest the influence of the emotional, the visual, and the corporeal on what we believe. From an analysis of a body of texts, we move to the text of the body.

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1 Taken from J. Hawkins & R. Allen, eds., *The Oxford Encylopedic English Dictionary* (Oxford: Clarendon Press, 1991).

2 For a comprehensive overview of this literature, see B.J. Hibbitts, "Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse" (1994) 16 Card. L. Rev. 229. See also H. Bosmajian, *Metaphor and Reason in Judicial Opinions* (Carbondale & Edwardsville: Southern Illinois University Press, 1992).

3 *Ibid.* at 13-17.

4 A process of multi-dimensional enlargement which, as I mention further below, has been underway in Western music for the past 700 years or more.

5 See in particular and the work and discussions relating to Ernest Weinrib: E. Weinrib, "'Legal Formalism': On the Immanent Rationality of Law" (1988) 97 Yale L.J. 984; "The Jurisprudence of Legal Formalism" (1993) 16 Harv. J. L. & Pub. Pol. 583 (and responses published therein); —, "Symposium—Corrective Justice and Formalism" (1992) 77 Iowa L. Rev.. no. 2, 403.

6 9 HEN. III (1225); 20 EDW. I (1292). These materials are readily available in the original and translated in various editions of the *Statutes at Large.* C. Runnington, ed., *Ruffhead's Statutes at Large, vols. 1-10* (London: Eyre & Strahan, 1786), T. Thomlins, ed., *Statutes at Large, vols. 1-10* (London: Eyre & Strahan, 1811) provide different editions and different commentaries. On early translations of the Latin and French statutes, see H. Graham, "Our Tong Maternall Maruellously Amendyd and Augmentyd": The First Englishing and Printing of the Medieval Statutes at Large, 1530-1533", (1965) 13 U.C.L.A. L. Rev. 58.

7 Admittedly he argues that "where there is the *smallest* chance of incurring the *smallest* evil, the expression of a wish amounts to a command". This might suggest that, for Austin, coercion is an analytical and not a sociological necessity of the legal system. In considering the problem that arises when one's understanding of the obligations of "divine law" contradicts the commands of positive law, however, Austin concludes that our duty is to obey whichever provides the greater sanction: "if human commands conflict with the Divine Law, we ought to disobey the command which is enforced by the less powerful sanction". The dictates of morality are of no regard. The duty to obey any law—divine *or* positive—arises from the power that affirms it; the greater the power, the greater the duty, for "it is our interest to choose the smaller and more uncertain evil": J. Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld & Nicholson, 1971 (1834)) at 91, 90, 215 . Further evidence for Austin's understanding of law as a system of power relations is to be found in Lecture I *passim* and esp. at 99.

8 Runnington, *op. cit. supra* n. 6, J. Austin, *op. cit. supra* n. 7, H. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 50-55.

9 Runnington, *op. cit. supra* n. 6 at v.

10 *Ibid. at* v-xiv; 2 HEN. IV, c. 15 (1400).

11 See H.L.A. Hart, *op. cit. supra* n. 8. On this analysis, it is neither 'truth' nor 'power' that grounds obedience to the law, but the 'validity' of its social sources. Joseph Raz argues even more emphatically for a "sources thesis", namely that the legitimacy of the formal "sources" of a law, such as a properly enacted statute or an authoritative judicial interpretation, establishes a separate reason to obey the law apart from the justice of its contents. The laws embedded in such sources are not just *opinions* about what constitutes reasonable behaviour, which subjects are free to weigh up along with opinions of their own and those around them. Raz argues that laws, although informed by those various opinions, are intended to act as a

definitive arbitration between them and, accordingly, to supersede them within the community. Raz therefore suggests that according to the logic of the legal system, the existence of laws constitutes a separate reason for obedience to the matters contained therein: J. Raz, *Authority of Law* (Oxford: Clarendon Press, 1979) at 47-50, 150-53, 233-61. See also J. Raz, "Authority, Law and Morality" (1985) 68 The Monist 295.

12 See, for example, M. Foucault, *The Order of Things* (New York: Vintage Books, 1973).

13 J. Attali, *Noise: The Political Economy of Music,* trans. Brian Massumi (Minneapolis: University of Minnesota Press, 1985); T. Levenson, *Measure for Measure: A Musical History of Science* (New York: Touchstone Books, 1995).

14 For example, R. Kevelson, ed., *Law and Semiotics, vols. 1-3* (New York: Plenum Press, 1987-9); R. Kevelson, "Semiotics and Methods of Legal Inquiry" (1985) 61 Ind. L.J. 355; B.S. Jackson, *Semiotics and Legal Theory*; P. Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld & Nicholson, 1990).

15 See especially Hibbitts, *op. cit. supra* n. 2.

16 For more on the prioritization and acuteness of the senses in different societies, and on the origins, meaning, and implications of Western visuality and the dominance of written language, see D. Howes, ed., *The Varieties of Sensory Experience: A Sourcebook in the Anthropology of the Senses* (Toronto: University of Toronto Press, 1991); J. Goody, *The Logic of Writing and the Organization of Society* (Cambridge: Cambridge University Press, 1986); M. McLuhan, *The Gutenberg Galaxy: The Making of Typographic Man* (New York: Signet, 1969).

17 The distinction between denotation and connotation is discussed in relation to the work of Roland Barthes in Jackson, *op. cit. supra* n. 14 at 22-24.

18 See the discussion of the shape and form of law reports in Goodrich, *op. cit. supra* n. 14 at 233.

19 M. Beardsley, *Aesthetics: Problems in the Philosophy of Criticism* (New York: Harcourt, Brace, & World, 1958).

20 I am greatly influenced by P. Gay, *Style in History* (New York: W.W. Norton & Co., 1974).

21 See Hibbitts, *op. cit. supra* n. 2 at 236.

22 M. O'Toole, *The Language of Displayed Art* (Leicester: Leicester University Press, 1994).

23 It is certainly true that the power of the mass media has in some respects led to a greater visibility amongst the 'powerful' than every before, to the

extent where democratic elections in developed countries are fought almost exclusively through orchestrated images and appearances. This is a different issue; however visible politicians need to be in order to be elected, their power (and *a fortiori* that of bureaucrats, corporate executives and so on) is exercised thereafter, in secret, and through the gaze they bring to bear. It is a mistake to confuse the visibility by which people are granted access to power, with the visibility of powerlessness.

24 See for example Foucault, *op. cit. supra* n. 12; M. Foucault, *Discipline and Punish,* trans. A.M. Sheridan Smith (New York: Vintage Books, 1979); M. Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception,* trans. A.M. Sheridan Smith (New York: Vintage Books, 1975). In *The Birth of the Clinic,* Foucault explores the notion of gaze at this time as an exercise of medical and not political power, but this book more than any of his others explains the power, intrusiveness, and political implications of ways of seeing. As the first sentence explains, "This book is about space, about language, and about death; it is about the act of seeing, the gaze.": *ibid.* at ix.

25 The question of language is an important aspect of this paper. Any further clarification as to the original language of statutes quoted in the text is given in the footnotes. The translations are in all cases those of *Statutes at Large.*

26 See P. Goodrich, "Literacy and the Languages of the Early Common Law", (1987) 14 J. Law & Soc. 422, 424-30, and *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (Basingstoke, Hamps.: Macmillan, 1987) at 21-7.

27 9 HEN. III (1225); 20 EDW. I (1292). The original of this statute, and all statutes quoted in the text from now on until otherwise indicated, is in Latin.

28 9 HEN. III (1225); 28 EDW. I (1300); *Statute of Rutland,* 10 EDW. I (1282); *Statute de Anno et die bissextili,* 21 HEN. III (1236). For other examples of the type "The King to the Justices of his Bench sendeth greeting", see 7 EDW. I Stat. 1 & 2, 13 EDW. I Stat. 4. I have noted the form as late as 7 EDW. II (1313). The distinction between legislative and judicial functions was not clearly distinguished in these early years: see the work of the great 13th century legal writer H. Bracton, *On the Laws and Customs of England vols. 1-4,* ed. by G. Woodbine, trans. S. Thorpe, (Cambridge, Mass: Belknap Press, 1968, 1977), and F. Maitland, ed., *Bracton's Note Books, vol. 1* (London: C.J. Clay, 1889).

29 T.F.T. Plucknett, *Legislation of Edward I* (Oxford: Clarendon Press, 1949) at103-4.; see also T. Plucknett, *Early English Legal Literature* (Cambridge: Cambridge University Press, 1958); T. Plucknett, *Statutes and Their Interpretation in the First Half of the Fourteenth Century* (Cambridge: Cambridge University Press, 1922).

30 D.J. Grout, *A History of Western Music* (New York: W.W. Norton, 1960) at 75-95; D.F. Wilson, *Music of the Middle Ages: Style and Structure* (New York: Schirmer Books, 1990) at 119-29.

31 Grout, *op. cit. supra* n. 30 at 198; P. Lefferts, *The Motet in England in the Fourteenth Century* (Ann Arbor, Mich.: UMI Research Press, 1986) at 117-20.

32 Lefferts, *op. cit. supra* n. 31 at 142; Wilson, *op. cit. supra* n. 30 at 275.

33 *Ibid. at* 240, 284.

34 *Ibid. at* 236; For further on aesthetics and law in medieval France, see P Goodrich, "Law in the Courts of Love" (1996) 48 Stan. L. Rev. 633.

35 *Statute De Scaccario,* 51 HEN. III Stat. 5 (1266); *An Ordinance for Ireland,* 17 EDW. I, cc.1-8 (1289). See also *Statute of Westminster, the 1st,* 3 EDW. I, cc. 24, 26-31 (1275).

36 See Goodrich, *Literacy, op. cit. supra* n. 26 at 430.

37 Lefferts, *op. cit. supra* n. 31 at 155, 187-9; Wilson, *op. cit. supra* n. 30 at 285, 320, 344.

38 F.L. Harrison, *Music in Medieval Britain* (London: Routledge & Kegan Paul, 1958) at 126; Lefferts, *op. cit. supra* n. 31 at 155.

39 *Magna Carta,* 9 HEN. III, cc. 9 & 15 (1225); *Carta Forestæ,* 9 HEN. III c. 4 & 5 (1225).

40 For another example, see *Statute de Marlberge,* 52 HEN. III, c.10 (1267): "the Turn shall be kept as it hath been used in the Times of the King's noble Progenitors". Almost a century later this same phrase was used to confirm the validity of those statutes and, in particular, Charters made in the past: see 36 EDW. III, c. 1 (1362).

41 C.H. McIlwain, *The High Court of Parliament and its Supremacy*(New Haven: Yale University Press, 1934) and *Magna Carta and the Common Law* (1917), discussed in Plucknett, *Statutes, op. cit. supra* n. 29 at 26-31; *Legislation, op. cit. supra* n. 29 at 13-14, 14. See also the similar point made in F. Pollock & F. Maitland, *The History of English Law, vol. 1* (Cambridge: Cambridge Univ. Press, 1895) at 178-80.

42 20 HEN. III, c. 9 (1235).

43 Plucknett, *Statutes, op. cit. supra* n. 29 at 20, says "parliament at this time meant an event rather than an institution".

44 9 HEN. III (1225); 28 EDW. I (1299).

45 20 HEN. III, c. 6 (1235).

46 So too one might argue that the improvisational character of Gregorian chant and early polyphony was a function of the inadequacy of musical notation at the time. But this demonstrates the point, for the *technology* of notation,

while it enhanced the creative control of the composer, was also a response to the felt need for that control. In music clearly, technological breakthrough propelled Western music (until the twentieth century) down a path already well begun.

47 52 HEN. III (1267).

48 *Ibid.* at cc. 3, 5-11, 13-16, 18, 20, 23-24, 26-29. The word "chapter" has changed its meaning over the years, a matter which is discussed below. In the period presently under consideration, the word 'statute' was generally used to describe the document which records all the enactments of a parliamentary session (normally one a year); it is divided into chapters, each of which cover a particular issue or problem. A statute therefore is a historical unit and a chapter a purposive sub-division of it. It is with this distinction in mind that I have used these words in this Article, although it must be conceded that, as with most things, the distinction was nowhere near as clear or systematized in the period about which I am writing. The use of the word "chapter" to divide each statute perhaps hints at a narrative quality to our modern ears. But this is anachronistic, for the association of "chapter" with a *literary* structure is relatively modern. A chapter originally connoted merely a division or heading (from *caput,* head); we still refer to organizations or religions having chapters, meaning branches.

49 Austin, *op. cit. supra* n. 7 at 97-98, 102-03.

50 *Statute of Westminster, the 1st,* 3 EDW. I (1275). The original of this statute, and all statutes quoted in the text from now on unless otherwise indicated, is in French.

51 See *Magna Carta,* 9 HEN. III, cc. 9 & 15.

52 *Statute of Westminster, the 1st,* 3 EDW. I, c. 1 (1275).

53 F. Pollock & F. Maitland, *op. cit. supra* n. 41 at 80-1.

54 See *ibid.* at 82; Goodrich, Literacy, *op. cit. supra* n. 26 at 433-6.

55 Plucknett, *Legislation, op. cit. supra* n. 29 at 81. See also *Statutes, op. cit supra* n. 29 at 11.

56 P. Ariès, *The Hour of Our Death (Homme devant la mort),* trans. H. Weaver, 5-202 (New York: Oxford University Press, 1981). See also C. Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, Mass.: Harvard University Press, 1989).

57 Hibbitts, *op. cit. supra* n. 2 at 249-51.

58 See Grout, *op. cit. supra* n. 30 at 52, 109. Indeed, these display a more complete independence of line than later writing, since there is still little awareness of harmony. Consequently, the melodic lines of the motets of this period are surprisingly dissonant. The emphasis at this time on

individuality in part-writing is also reflected in the use of polytextuality, that is, in which each line sings a different text. The motet is still, then, centred on words and not music.

59 Wilson, *op. cit. supra* n. 30 at 255.

60 See 4 EDW. I, Stats. 1-3 (1276); 4 GEO. II, c. 26 (1731); Pollock & Maitland, *op. cit. supra* n. 41 at 83.

61 *De Officio Cornatoris,* 4 EDW. I Stat. 2 (1276); *Statute of Bigamy,* 4 EDW. I Stat. 3 (1276).

62 *Statute of Westminster the 2nd,* 13 EDW. I Stat. 1, c. 34 (1285).

63 *Ibid.* The rest of c. 34 is in Latin and concerns the lands of women who abscond, and the abduction of nuns. Chapter 49, which prohibits the King's servants from taking land, church, or tenement which is the subject of a legal dispute, is also in French. Lord Coke suggests that this is because the chapter relates to an earlier statute written in French; it has also been suggested that c. 49 belongs to a later statute and was recorded here by mistake: see the footnotes to this statute in Thomlins, *op. cit. supra* n. xx.

64 *Statutum Wynton* (i.e. Winchester), 13 EDW. I Stat. 2, cc. 1-2 (1285).

65 *Ibid.* c. 3.

66 *Statute of Westminster the 2nd,* 13 EDW. I Stat. 1, c. 50. Original in Latin.

67 *Statutum Wynton,* 13 EDW. I Stat. 2, c. 3.

68 *Ibid.* c. 1.

69 *Articuli super Cartas,* 28 EDW. I, cc. 1 & 17 (1300); *De Tallagio non Concedendo,* 34 EDW. I, c. 6 (1306); see also, for example, 7 EDW. I Stat. 1 (1278): "We command you, that ye cause these Things to be read afore you in the said Bench, and there to be enrolled". Originals in Latin.

70 See in particular R. Moles, *Definition and Rule in Legal Theory* (Oxford: Basil Blackwell, 1987) which attempts a resurrection of the work of John Austin, especially from Hart's interpretation of him in Hart, *op. cit. supra* n. 8 at chapters 2-4.

71 *Ibid.*, esp. at 90-3; O. Holmes , "The Path of the Law", (1897) 10 Harv. L. Rev. 457; H. Kelsen, *General Theory of Law and State,* trans. A. Wedberg (New York: Russell & Russell, 1961). See also the discussion of Austin in R. Cotterrell, *The Politics of Jurisprudence* (London: Butterworths, 1989) at 59-67.

72 J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 34-125; see also M. Moore, "A Natural Law Theory of Interpretation" (1985) 58 S. Cal. L. Rev. 277.

73 Finnis tries to subvert this implication, arguing that the obligation to obey the law is *itself* a "relatively weighty" moral obligation.

> Such an ambitious attempt as the law's can only succeed in creating and maintaining order, and a fair order, inasmuch as individuals drastically restrict the occasions on which they trade off their legal obligations against their... conceptions of social good.: J. Finnis, *ibid.,* at 319.

At best we can say, however, that this argument stems from his own desire to safeguard the "Rule of Law" (quaintly capitalized), and his assumption that the legal system basically does nothing more contentious than solve "communities' co-ordination problems"—such as which side of the road to drive on. This complacency is reflected in his assumption that in "normal times...the legal system is by and large just": *ibid.,* at 270-74, 357. Even in his own terms, however, the mere existence of the legal system cannot deny us our freedom to examine whether the laws under which we live are "by and large just", for the "relatively weighty" moral obligation he proposes is dependent upon that premise. At least to this extent and arguably far beyond it, a theory of natural law expects citizens to enquire into not only what the law is, but what justifications support it.

74 Hart, *op. cit. supra* n. 8 at 99-120.

75 Raz, *Authority of Law*, *op. cit. supra* n. 11.

76 *Ibid.,* at 150-53, 233 and see generally 233-61. Certainly, Raz does attempt to place a further limit on this argument. He argues that

> No blind obedience to authority is here implied... This brings into play the dependent reasons, for only if the authority's compliance with them is likely to be better than that of its subjects is its claim to legitimacy justified: *ibid.,* at 299.

The extent of this caveat is unclear. If we are to believe the statements of law-makers, they are invariably in a better position than the rest of us to weigh up conflicting arguments concerning legal questions. In practice, however, one would have cause to doubt whether this is in fact the case. Moreover, Raz also insists that "all authoritative directives should be based, among other factors, on reasons which apply to the subjects of those directives": *Ibid.* Again, it does not take more than a wholesome and average cynicism to argue that there many laws have been passed where the actual reasons for enactment have not borne much relation to the purported reasons put forward to justify them. Are we to investigate the machinations behind every bill and Act before pronouncing upon its authority? This opens up the possibility of a kind of Kantian approach in which not the justice of the law itself but the motivations of the law-maker would be decisive. It is doubtful whether this was Raz's intent.

77 13 EDW. I Stat. 1, cc. 1, 3, 9 (1285) (original in Latin). Similarly but less judgmentally, several provisions simply present the law "hitherto": "hitherto it hath been used in the Realm", "by the law and custom of the Realm hitherto", etc.: *Id.*, cc. 5, 6 and see also cc. 9 and 14. For another example, see *Quia Emptores,* 18 EDW. I (1290).

78 *Ibid.,* as in cc. 7, 10, 18, 19, 23 (thrice), 24, 26, 28-30, 40, 45-7.

79 Much the same argument is made by Plucknett in evaluating judicial interpretation of both the common law and statutes in the reigns of the first three Edwards; judges' willingness to ignore or modify statutes also reflected an assumption that the enacted law was subject to reason and the *ius naturale:* Plucknett, *Statutes, op. cit. supra* n. 29, *passim* and esp. at 25, 49-81; see also the Preface by H.D. Hazeltine at xxiii.

80 36 EDW. III (1362).

81 1 RIC. II (1377) is typical and by no means the first of this kind:

> Know thou, that to the Honour of God and Reverence of Holy Church, for to nourish Peace, Unity, and Concord in all the parts within our Realm of *England*...with the Assent of the Prelates, Dukes, Earls, and Barons of this our Realm at the Instance and especial Request of the Commons of our Realm aforesaid, assembled at our Parliament...

82 9 HEN. IV (1407).

83 3 HEN. VII c.1 is absolutely typical:

> The King our sovereign Lord *Henry,* ...at his Parliament holden at *Westminster* the Ninth Day of November, in the Third Year of his Reign, to the worship of God and Holy Church, and for the common Weal of this his Realm, by the Advice of his Lords Spiritual and Temporal, and the Commons in the present Parliament assembled, and by Authority of the same Parliament, hath ordained and established certain Statutes and Ordinances, in Manner and Form as hereafter ensueth.

84 1 RIC. III, c.2 (1483).

85 1 EDW. IV, c. 1 (1461).

86 *Ibid.,* c. 1(xvii), (xii), (xxii), (xxiv). *Statutes at Large* refers to 3 EDW. IV, c. 2 (1263) as the first statute to use the word "Act" in its title, but this title and others of this period were added by an addition dating from the reign of Henry VIII, by which time the use of the word "Act" to describe a chapter of a statute was indeed conventional. Although less immediately

apparent, 1 EDW. IV, c. 1 is an earlier and genuine reference to "act" in this sense.

It is not the earliest reference: 29 HEN. VI, c. 2 (1450) and 33 HEN. VI, c. 2 (1454) both say "this Act"; but 1 EDW. IV, c. 1 uses the phrase more clearly and frequently. In particular, while the introductory portion of these earlier statutes declare that "Our Sovereign Lord King...hath ordained and established divers *Ordinances and Statutes*", the 1461 statute uses the phrase "*acts* and ordinances" (italics added). This is the significant change.

87 *The Oxford Encylopedic English Dictionary, op. cit. supra* n. 1, Act. (1).

88 See H-G. Gadamer, "On the contribution of poetry to the search for truth", in *The Relevance of the Beautiful and Other Essays,* trans. N. Walker & ed. R. Bernasconi (Cambridge: Cambridge University Press, 1986) at 110.

89 It is of course true that many modern statutes are enacted simply as a way of maintaining the appearance of activity, while there is no intention of actually changing things. This tactic, however, is *only* successful because of the widespread assumption that the passage of a law itself does the trick.

90 The first statute not to have a form of introduction was 7 HEN. VII (1491), but this was exceptional, because it was a plague year. In 1492 the introduction reappears and remains until 1509.

91 While the argument as to the meaning of the changing arrangement of statutes and Acts holds, it must be noted that there is some evidence that in the earlier period, chapters were sometimes in fact called statutes themselves—the last chapter of the *Statute of Westminster, the second* is one example, referring to "omnia predicta statuta". Inconsistency of terminology is hardly surprising at this time, but it is submitted that the conceptual and structural points I am making as to the way in which the organizing principles of legislation changed is not undermined. See Plucknett, *Statutes, op. cit. supra* n. 29 at 11-12.

92 Harrison, *op. cit. supra* n. 38 at 236-40.

93 Interestingly, English composers used these harmonies significantly earlier than their European counterparts.

94 The "faburden" (faux Bourdon), basically an ornamented part in parallel sixths, became an almost routine aspect of three-part writing in fifteenth century England. It was one of the fundamental techniques of musical education at the time: Harrison, *op. cit. supra* n. 38 at 247-49; Lefferts, *op. cit. supra* n. 31 at 90.

95 See for example 3 EDW. IV, cc. 1-5; 4. EDW. IV, cc. 1-10; 7 EDW. IV, cc. 1-3; 8 EDW. IV, cc. 1-2. In these years, typical of the years before and after, over 80% of the acts fall into this character. These are certainly not the first acts dealing with such matters: see for example *Assisa Panis & Cervisiæ,* 51 HEN. III, Stat. 1 (1266) or the *Statute of Money,* 20 EDW. I

Stat. 4 (1291). But in comparison with the administrative nature of the preponderance of 13th century statutes, there is a different emphasis here.

96 It was for a long time thought that private acts began in the reign of Richard III, but this is not so. It is during this slightly earlier time that they become a notable and regular legislative feature, although the private acts of Richard III and then of Henry VII considerably surpass these earlier examples in quantity: see the commentary in Thomlins, *op. cit. supra* n. 6 at 754.

97 Although it deals with this period in U.S. rather than English law, see M. Horwitz, *The Transformation of American Law 1780-1860* (Cambridge, Mass.: Harvard University Press, 1977).

98 36 EDW. III, Stat. 1, c. 15 (1362); see Pollock & Maitland, *op. cit. supra* n. 41 at 85-86. See also Graham, *op. cit. supra* n. 6 at 12.

99 See I. Turnbull, First Parliamentary Counsel in the Australian Office of Parliamentary Counsel in "Clear Legislative Drafting: New Approaches in Australia" (1991) 11 Statute L. Rev. 161; D. Murphy, "Plain English—Principles and Practice" (Conference on Legislative Drafting, Canberra, 1992) [unpublished]. It is ironic that this trend amongst drafters nonetheless remains arcane and customary rather written down and defined.

100 As in 1 HEN. VII, c. 1 (1485). The original of this, and all statutes quoted in the text from now on, is in English.

101 Although some argue that the use of declaratory or hortatory text in legislation, of which the Preamble is one species, is currently experiencing a rejuvenation: see V. Palmer, "The Style of Legislation in the United States: Narrative Norms and Constraining Norms" [1994] Am. J. Comp. L. 15.

102 14 & 15 HEN. VIII, c. 5 (1522); see also 3 HEN. VIII, cc. 11 & 14 (1511).

103 4 HEN. VIII, c. 7 (1512) (refers to 19 HEN. VII, c. 6 (1503); a similar approach in a different circumstance is taken in the case of Richard Strode, 4 HEN. VIII, c. 8 (1512); see also the petition permitting the marriage of the six clerks of the High Court of Chancery, 14 & 15 HEN. VIII, c. 8 (1522).

104 20 HEN. III, c. 9 (1235).

105 See Raz, *Authority, op. cit. supra* n. 11.

106 Goodrich, Literacy, *op. cit. supra* n. 26 at 428 contends that statutes were sacred icons, symbols of authority , and not practical documents in the period after the Norman conquest. But I have argued elsewhere in this paper that, in relation to *statutes* anyway, this is not so. The power of the statute as icon arises along with normativity and not prior to it.

107 Thus see the distinction made by Blackstone between statute law, *lex scripta*, and the common law, *lex non scripta*: W. Blackstone, *Commentaries on the*

Laws of England (Chicago: University of Chicago Press 1979 (1765-69)) at 63.

108 11 HEN. VII, c. 4 (1495). Of the 27 chapters of this statute, 14 establish offences for which 15 penalties are detailed. Only in two cases, cc. 11 & 19, is no penalty set, although the penalty for the infringement of c. 7, concerning riots, is said to be "such a sum of money as shall seem meet".

109 27 HEN. VI (1449).

110 28 HEN. VI (1450), 1 HEN. VII (1485-6).

111 22 EDW. IV, c. 7 (1483), 1 HEN. VII, c. 7 (1485-6).

112 11 HEN. VII, c. 12 (1495).

113 11 HEN. VII, cc. 4 (iv), 12, 14, 15 (1495). "Be it therefore enacted, ordained, and established" was the standard form from 19 HEN. VII (1503); 14 & 15 HEN. VIII, c. 2 (1523).

114 Harrison, *op. cit. supra* n. 38 at 257-63.

115 *Ibid.* at 261-63; Lefferts, *op. cit. supra* n. 31 at 15; Wilson, *op. cit. supra* n. 30 at 284.

116 See Grout, *op. cit. supra* n. 30 at 182-221.

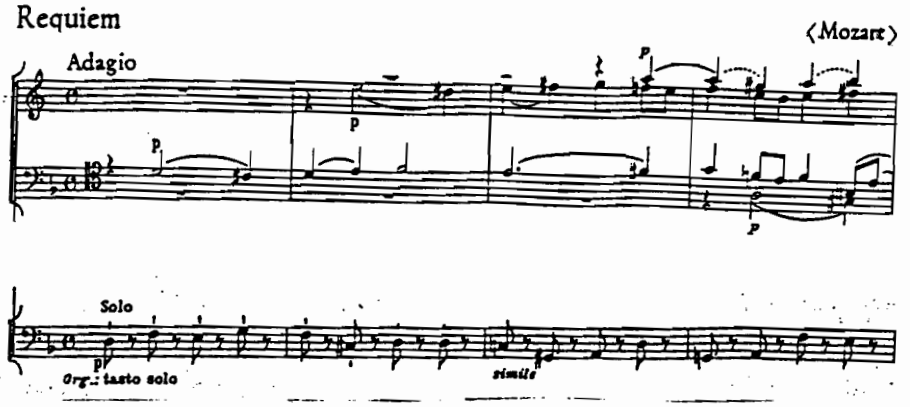
117 10 EDW. III, stat. 3 (1336); see Plucknett, *Statutes*, *op. cit. supra* n. 29 at 164-7.

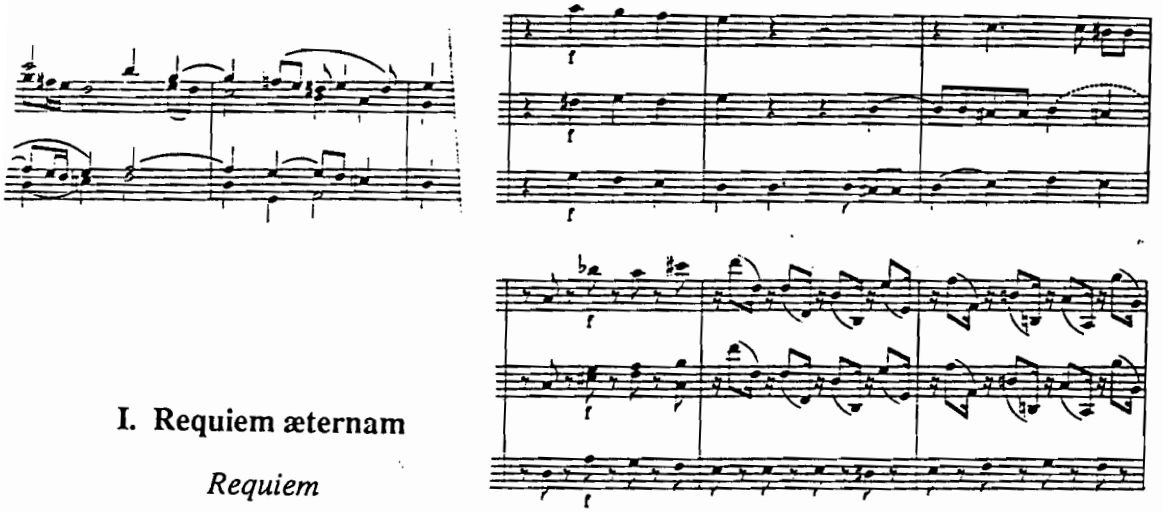
118 Levenson, *op. cit. supra* n. 13 at 68-69.

119 T.S. Eliot, *Burnt Norton,* quoted in Levenson, *op. cit. supra* n. 13 at 70.

Requiem

The Green Death: Aesthetic Interpretations and Influences in the Death Penalty





I. Requiem æternam

Requiem

Et lux perpetua

II. Dies iræ

Quantus tremor est futurus

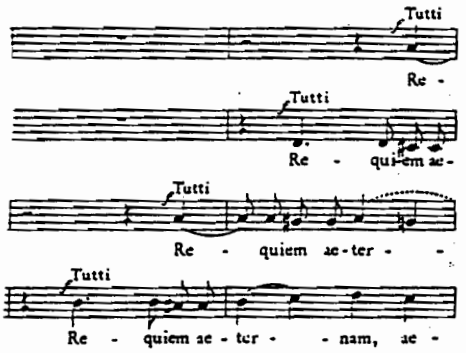
Liber scriptus

Confutatis maledictis

III. Agnus Dei

Isolation and the aesthetics of dying

Objectification and the anaesthetics of watching death



IV. Libera me

Empathetic meaning

Symbolic meaning: From lex talionis to lexicon talionis

Sensory meaning

Requiem

The Green Death: Aesthetic Interpretations & Influences in the Death Penalty

I. Requiem æternam

Requiem æternam dona eis, Domine;
et lux perpetua luceat eis.

Grant them eternal rest, O Lord,
and may light perpetual shine
upon them.

Mozart's *Requiem* begins as it means to go on: solemn, sparse, expressive of the hollowness of spirit which follows the death of a loved one. There is nothing lush about mourning here. Instead there is an empty, shattered sound: a muffled organ, staccato violins barely touching their strings, and a hushed tune, the thin voice of the oboes and the dark tones of basset horns cutting the air.[1] The excruciating beauty of a mass for the dead is its combination of peace and failure, hope and resignation. But in Mozart, irony adds complexity to its meaning for us. A Requiem is an occasional piece. It is written to mourn. But who exactly is being mourned here? Mozart did not write it for the death of a friend, a colleague, or a patron. According to legend, an anonymous stranger commissioned the *Requiem. Habeas corpus!*—but there is no body to produce. A Requiem for the undead, then, it turns against itself, and becomes a mass for Mozart himself, who died while composing it, and even for the *Requiem*, which his death left incomplete, leaving only with fragments.[2] In the final extinguishment of the man and the masterpiece, we perceive a glimmer of the infinite promise of the future which death snuffs out; of the dramatic way in which the plans of the living are cut short by death. Missing an object, the *Requiem* is a mourning for the mourner, a mass for the Mass.

The purpose of this chapter is to explore the failure of the hegemony of reason to effectively control the operation of the legal system. I have not written

this in the form of a comprehensive *proof* of the death of reason—that would be a *post mortem*, and there are many, though hotly contested. A Requiem presumes the fact of death and explores instead the implications of its passing. Insisting on the place of the aesthetic in the meaning and interpretation of the law, these implications are by no means entirely negative. The *Requiem aeternam* of reason is also, as we shall see, the *lux perpetua* which illuminates reason's other.

As in the *Motet,* this chapter applies a methodological approach grounded in aesthetics, to a case study whose centre of gravity, in this chapter, is a number of U.S. judicial opinions on the death penalty. I do not purport to present a comprehensive analysis of the current law which legitimates execution in the United States: in light of the complexity and incoherence of many hundreds of such cases which have been come to the Supreme Court of the past twenty years, such a task would be naïve, or arrogant, or both. The cases I discuss were seminal in the modern development of the jurisprudence of death, and I have chosen them for their paradigmatic style, and because they were historically significant in making acceptable the idea of capital punishment, although in some of their details they have since been overtaken by later developments. I analyze these cases to illustrate two ideas. First, that the meaning of legal texts can be enriched by considering their use of figurative language. This aspect uses aesthetics in the exegesis of legal texts. Secondly, that the legal principles surrounding the death penalty, although they claim to be an exercise in "reason", are in fact profoundly influenced by the carefully constructed aesthetics of the death penalty: the aesthetic dimension of the death penalty is a complex interplay of the sensory imagery which surrounds the experience of execution, and the symbolic meaning which attaches to it. This second aspect uses aesthetics to explore the genesis of legal texts.

The claim to rationality lies at the very heart of our legal system. It is of no more importance than in relation to the question of capital punishment, where

judges claim to be able, by an exercise of reason, to determine who will live and who will die. The *Requiem* as a musical and religious form is also about judgment—about God's ability to separate with certainty the damned and the blessed. It is that terrible exercise of deic reason, the *dies irae,* which the *Requiem* anticipates and reflects on. There is a sense, then, in which the law of capital punishment not only parallels the ultimate reality of death which the *Requiem* evokes, but also mimics its faith in the justice of judgment. But those who sit on the Bench are not Gods. T he literature on the death penalty in the United States demonstrates above all the distance between human judgment and divine. Even human attempts to represent this divine judgment fall short—as the fragmentary Mozart and the mediocre Süssmayr testify—let alone our attempts at its replication.

The structure of the Requiem, and its themes of death and judgment and incompletion, echo through this chapter, throwing light, in particular, on the legal reasoning of death and the death of legal reasoning. The *Requiem aeternam* accomplishes some preliminary work by exploring the myth of legal rationality. The *Dies Irae* discusses, in relation to capital punishment, the failure of legal judgment to achieve its aspirations of rule-bound rationality. It is interpretative and methodological in approach. The *Agnus Dei* focuses on the way in which the death penalty has been organized in the United States, the way in which it allows the sacrificial execution of men and women by the sensory isolation of the condemned and their symbolic objectification by others. In exploring through senses and symbols why a death penalty is even possible, this section moves the argument from text to context, from meaning to cause, from methodology to epistemology, and from law's claim to rationality to the aesthetic dimensions that lie within it and behind it. Finally, I take the *Libera Me* as an expression of the aspiration for transcendence or release. This section, therefore, touches on the normative implications of aesthetics, and how the interpretative arguments I have developed,

might suggest to us ways of releasing ourselves from the current sterile discourse about capital punishment. The question of normativity is further developed in the last two chapters, which the conclusion to the Requiem briefly foreshadows.

But as with Mozart's *Requiem,* one must question the very notion of death here. For where is the body? I have insisted, in response to Pierre Legendre, that rhetoric has never yielded its place to reason in the workings of the law; that to treat seriously the idea of reason as an exclusive interpretative authority and process is to treat as reality that which exists only as myth. Legal rationality—the promise of an objective, rule-bound, certain interpretation of the law—was never alive, and so there is nothing to mourn.[3] Ernest Weinrib, whose theory of legal formalism is grounded in just such a species of rationality, uses the image of the "empty sepulchre" to suggest that, Christ-like, the body of an entirely rational legal order has escaped entombment.[4] On the contrary, the Requiem's empty coffin does not imply the resurrection of the body, but a body that never was.

A. Requiem aeternam

Let us surrender a moment to the mythology of "legal reasoning." There is no gainsaying the beauty of reason, its geometric precision, its symmetry and hope of order.[5] Reason gives us pleasure; it promises us the hilt of a Gordian scythe. In Oliver Wendell Holmes' words, "the logical method and form flatters that longing for certainty and for repose which is in every human mind."[6] The priority accorded to reason is everywhere apparent: in the language of philosophy and the law, and in our common language too. People 'rise above' their emotions and 'put their feelings aside'; the discussion 'falls to an emotional level' and is then 'raised up' again to a 'rational plane'. As Emily Martin concludes, "power, height, rationality and coolness go together on the one hand, and lack of power, low position, emotions and heat go together on the other."[7] But as we have seen, this priority

does not correspond to our experience in the world, nor to the ways in which our decisions are made. Reason cannot provide the ground for our ethics nor the source of our values; it explores consequences rather than determining axioms. Everywhere there is a complexity to human motivation which the discourse of reason excludes.

> Unlike most others who pronounce in the public domain, judges appear to offer, and to deliver, clear and definitive answers. Justice according to law is a coin which, when tossed, does not rest on the rim. It comes down head or tails; it is clear who has won and who has lost. The judge gives his reasons, pronounces the result and withdraws to the chill and distant heights.[8]

In law, we find the paramountcy of reason in its understanding of legitimate language, and of legitimate authority. Language first, for legal interpretation assumes a series of related claims about the objective and logical nature of meaning: the claim that law is a logical structure of rules and regulations which provides determinate results to particular cases; that the words of those rules themselves have a core of unproblematic meaning in the application of which there is little role for judgment or discretion; that judges can, should, and do, apply reason to this interpretative exercise, shorn of personal prejudices and values, bereft of emotion and feeling. One need not cite sources for these propositions; only open up a book of decisions of the appellate court of your choice and see, but H.L.A. Hart's enormously influential *Concept of Law* will stand as a paradigm case.[9]

Next, the concept of legitimate authority. The process of what is called "legal reasoning" relies on the general assumptions of logical thought and the neutrality of language, but it also traces its own unique course using the techniques of precedent. Edward Coke, defending the English legal system in the seventeenth century, wrote

> The common law itself is nothing else but reason which is to be understood [as] an artificial perfection of reason gotten by long study, observation, and experience... No man, out his own private reason, ought to be wiser than the law, which is the perfection of reason.[10]

Now undoubtedly this is a peculiar breed of reasoning. For on what grounds did past decision-makers base *their* inquiry? It would seem that only now are Courts estopped from making value judgments while, on the contrary, their previous value judgments are to be entombed. A game of mirrors, the very issue of subjectivity is avoided by deferring to a supposedly objective interpretation of the subjective judgments of the past.

Just like rationality, an appeal to precedent is an expression of the belief that prior decisions have a singular meaning; that this meaning can be determined as a matter of objective truth and can then simply be 'applied' to later cases; and that the 'right answer' to a legal problem is thus able to be discovered and implemented quite apart from the subjective value system of the interepreter. Precedent attempts to ensure the objectivity of the legal system not by the application of persuasive logic but by instantiation of an authoritative past.

Admittedly this is a caricature; but it is also something of an ideal. In the Requiem, too, there is an image of the *dies irae,* the terrible Day of Judgment in which the infallible judge will come to redeem the righteous and confound the damned, instructed by a "written book" wherein, through unambiguous and truthful language, "whatever is hidden shall be made manifest, and nothing shall remain unavenged." The judgment of the Lord, like the judgment of precedent, is written down, certainly expressed, and perfectly understood. God's ability to read his own writing is not in doubt. But the marks of humans, left to be read by other humans, have proved less legible . The *Requiem* represents an ideal of law and reason impossible of human attainment, and it has been attacked by a wide variety of scholars: from legal realists who insisted on the distinction between what law says

and what law does; from natural lawyers such as Fuller who have argued that the meaning of legal words is a function of the purposes we attribute to it; from hermeneutists and conventionalists as otherwise opposed as Fish and Dworkin, who emphasize the cultural instantiation of the meaning of legal texts.[11] But undoubtedly the most prominent Arian heresy in this regard has come from the group of scholars engaging in Critical Legal Studies. Here we find an almost ritual insistence on the indeterminacy of law: on the subjectivity of legal decision-making, on the impossibility of words ever fully determining meaning, and on the contradictory values to be found in the legal system as a whole.[12] For these writers, then, the words of a legal text must on the one hand rely on certain background and foundational values in order to make sense, while on the other the values of the 'liberal legal system' are themselves internally inconsistent. The consequence of this for CLS is that objective interpretation can never be a question of the simple 'application' of pre-existing rules or standards.[13]

B. Et lux perpetua

We must go beyond law as edifying reason, as legitimate authority, and instead recognize the influence it exerts through its use of discourse and rhetoric. The discursive aspects of law are misunderstood as much by Marxist scholars and legal realists as by positivists, all of whom emphasize the performative and concrete elements of law.[14] Derrida too appears to adopt a rather simplistic understanding of law as a species of mandated force, of state-sanctioned violence. It is surprising to find in Derrida the assumption that law is made and imposed transparently, certainly, and by 'the state'. How are we to respond to his chastisement that "today the police are no longer content to enforce the law...they invent it, they publish ordinances"?—except to insist that every act of interpretation has always been an invention, whether or not is backed up by

ordinances; and that legal interpretation happens in every corner of the social system, whether or not is backed up by ordnance.[15]

An understanding of law as a series of ideas which exist apart from the words in which they are, merely fortuitously, expressed, does not in any way reflect the richness of judgments, their rhetorical language, and their role as part of a complex discourse about the nature of our community, our past, and our future. We read a decision not merely to extract a logical proposition, but to engage with its vision of the world.[16] No analysis, therefore, can hope to capture what law is and what it does, which tries merely to *extract* from it a sequence of logical propositions leading to a conclusion—because... thus... thus... thus... "and so to judgment." Its meaning cannot be abstracted from the mode of its expression. As J.B. White writes,

> We can never "understand" a text completely in the first place and what we do "understand" can really be said only in the original language and in the forms of the original text...[We often imagine] something called the "meaning" of the text that is imagined to exist above, or beyond, or behind its language, when in truth the meaning is in the words as they are uttered in their particular context and nowhere else.[17]

Each decision or statute contains its own rhetorical devices which help us illuminate meaning and motivation. No-one can read the judgments of Lord Denning, for example, without realizing that there is a particular image of beauty which grounds his interpretation of the law. Lord Denning fantasizes about the idealized past of Merrie England. This nostalgia involves a kind of beauty rightly termed by Dennis Klinck "pastoral"; characterized by personal and peaceful relationships, by an accepted and peaceable hierarchy, by an unspoilt landscape and an agrarian economy; and evoked by images of village greens, cricket, and bluebells.[18] An emphasis on the beauty of the countryside and a belief in the importance of its preservation are integral parts of a Denning judgment.[19] When he begins a judgment "It was bluebell time in Kent",[20] this is no faux-ingenuous tug at the heartstrings, inserted for its calculated effect: it is, for Lord Denning, the heart

of the matter, an appeal to the kind of beauty he wishes by his judgment to preserve—against the invasion, in this case, of that new-fangled invention, the motor-car. Undoubtedly there are ideological implications in Denning's sympathies, but his judgments are to be reconciled not in terms of their politics but their aesthetics.

At the same time, as Klinck has so well demonstrated, the legal system as a whole makes repeated use of certain kinds of metaphors: those of the boundary, on the one hand, and of weight and balance, on the other.[21] All this helps to provide us with the *meaning* of a text, as well as governing our response to it, whether or not the author of that text intended to use particular tropes and to evoke certain resonances. As Nietzsche wrote, "tropes are not something that can be added or subtracted from nature at will; they are its truest nature."[22] A metaphor, after all, is not simply the substitution or translation of an idea into new language. It has an emotive and poetic power, certainly, but more than that, it reveals the synergy and tension between the two terms thus forcibly brought together. Metaphor is not just a question of style but of new meaning, created from the interaction between the "literal frame" and the "metaphorical focus", in the process of which our perception of both terms is changed. A metaphor, then, does not merely explain thought but develop it.[23] At the same time, the suggestion of a metaphor is the *beginning* of this process, and not its culmination. The full meaning and implications of a metaphor only begin to take shape *after* language first expresses it, and *through* the continuing interpretation and exploration of that language. A metaphor is a proposition, then, in the sense that it proposes a relationship between two terms before the meaning of that juxtaposition is fully determined: it is a leap of faith, and a gesture of hope in the future enhancement of understanding.

If we are to understand the meaning of legal texts, as a persuasive discourse and a kind of language, and not simply as a collection of abstract reasons leading to a particular consequence, we must be sensitive to its use of metaphor. But the law

of metaphor is a metaphor for law in two other distinct ways. First, and self-evidently, all law *is* metaphorical because, proclamation and fiat to one side, it always works by analogy. Precedent uses past events—legal and social—as analogies for present ones; the principles of statutory interpretation apply past language—legislative and judicial—to present situations. In both cases, the law operates by bringing together two different terms and discovering their sameness and their differences. Secondly, like metaphor, law escapes the control of its author. As the meaning of the metaphor is only provisional at the moment of its writing, so too with the law. Its implications and its effects begin to take shape only after its pronouncement, and its metaphors, poetry, and allusions are part of the meaning it has for us, and part of the effects it has on the world.

The rhetoric of legal rationality—and let us not for a moment forget that the myth of legal objectivity and rationality serves a rhetorical function in the legitimation of the legal system—sets up an ideal of law as the embodiment of reason and would banish reason's other. On the other hand, the critique of reason adopts at times an overly cynical rhetoric. Having laid bare the inconsistencies of legal argument and demonstrated the impossibility of ever grounding the process of judicial decision-making in reason, CLS writing often seems to have assumed that therefore nothing but politics underlies the decisions of the courts.[24] This approach, suggesting as it does a certain covert manipulation by the judiciary in the preservation of its own interests, has led writers such as Ronald Dworkin to respond, somewhat superficially, that judges are not "tyrants."[25] Certainly judges do experience the bonds of reason, no matter how loosely. If one wishes to argue that those bonds are not really there, then one has to think a little harder about what it is that steers decision-making in certain directions. What is reason's "other" which directs our choices between lines of argument?

Our job, then, as legal readers, is to search for those meanings and origins which law suppresses by its insistent rhetoric of rationality. As Goodrich writes,

"rhetoric is the pre-modern form of psychoanalysis... a methodology of symptomatic reading or of interpretation of the unconscious of law".[26] In demonstrating what lies beyond reason, linguistic logic and precedential authority, the practices of deconstruction are a valuable analytical tool.[27] It is an approach sensitive to the ironic and rhetorical connotations of language. It seeks for hidden meanings, intended or unintended, in texts. In particular, it searches for the inherent contradictions which beset all writing. Derrida, for example, finds in the Western philosophical tradition a series of emphatic opposites, one of which is routinely prioritized as the other is degraded: speech-writing, reason-nature, presence-absence, and man-woman constitute some of these pairings. The purpose of deconstruction is to highlight the ways in which these hierarchies are unstable: the subservient tenement, to borrow a concept from the law of property, is a "dangerous supplement" necessary to the very existence of the dominant. Neither is it enough merely to reverse the polarity and argue that the secondary term is 'really' the primary one: each exists in a relationship of mutual necessity and denial vis-à-vis the other. Two terms which appear to exist in a hierarchy of value hover in a relationship of *différance,* each *different* from the other and yet continually having to *defer* to each other for their very meaning.[28] Neither are self-sufficient or anterior. As opposed to the Hegelian dialectic, thesis and antithesis do not blend and resolve, but rather co-exist without resolution, like two planets whose gravitational fields compel them to circle each other eternally, for ever in a state of mutual attraction and repulsion.

Plato sought to banish the poets from his utopian *Republic* which he conceived to be ruled by philosophers, exemplars of rationality and logic. Legal judgments often attempt to accomplish a similar exile. But all language, no matter its discipline or purpose, is richly rhetorical and metaphorical. It is indeed especially in those works most steadfast in their commitment to the discourse of

reason that the "dangerous supplement" of rhetoric unavoidably makes its absence felt.[29]

A deconstructive approach presumes, as I have insisted, that law means much more than it says. It is therefore part of an aesthetic methodology which, by a sensitivity to the imagery of all legal writing, may help to provide us with interpretative insight into the connotations of legal texts. It facilitates a way of reading which looks beyond reason and argument to an exegesis of the aesthetic meaning that is embedded there, and therefore to the genesis of the aesthetic understanding which has been an important influence in its development. The aesthetic dimension of law is there all along, in the text, part of the meaning and force it has for its readers, and a clue to the values which have helped to construct it. These are the propositions which I now seek to illustrate by considering a particular case of the law's claim to be a pillar of reason. Can law establish a rational system to determine life and death? And if it cannot, two further questions arise: what governs the judgment of law, and by what forces has it been constructed?

II. Dies iræ

Dies iræ, dies illa,
Solvet sæclum in favilla...

The day of wrath, that day will
dissolve the world in ashes...

In many countries around the world, those that employ capital punishment as part of their legal armoury and those that do not, the question of its justice and efficacy continues to be a matter of passionate argument. In 1972, the Supreme Court of the United States held that the death penalty as then applied was unconstitutional because its "arbitrary" and "standardless" imposition made it a "unique penalty...wantonly and freakishly imposed."[30] It was this arbitrary character which made the punishment "cruel and unusual" contrary to the Eighth

Amendment. The stay of execution effected by the decision in *Furman's* case, however, was brief.[31] Four years later a series of landmark decisions authorized the use of the death penalty again if certain conditions were met intended to guarantee its rationality.[32] The Court time and again has insisted that in this area of the law, as elsewhere, "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."[33] Neither has this faith in legal rationality been immaterial. Since then, several hundred human beings—almost all of them men, almost all of them young, almost all of them black—have gone to heaven, hell, or oblivion at the hands of the U.S. legal system.[34] More await their turn.

A. Quantus tremor est futurus

Quantus tremor est futurus,
Quando judex est venturus,
Cuncta stricte discussurus!

How great a terror there will be
when the Judge shall come
who will thresh out everything
thoroughly.

Academic literature on the death penalty in the United States demonstrates only the ultimate failure of rationality to resolve a question as contested and as emotional as the legal extinguishment of human life. Stephen Nathanson, for example, insists "that we can *reason* our way through difficult moral questions." "I disagree that the death penalty is a matter to be decided by the gut rather than the head."[35] Nathanson, like his adversaries, clearly believes that a writer or a judge, be his discourse only strict enough, must arrive at the right conclusion. But in the end, his reasoning demonstrates only that arguments from moral desert do not *require* the conclusion that murderers deserve to die. The arguments he considers "do not [logically] justify the death penalty."[36] Such an argument, of course, is conclusive only because he starts from the premise that death penalty advocates are required to prove their case. This assumption is surely based on an intuition about

the intrinsic wrongfulness of the death penalty: the whole idea of a burden of proof stems from a "gut reaction", just as the notion of "beyond reasonable doubt" itself stems from a gut reaction as to the paramount importance of protecting the innocent from unjust punishment.[37]

The promise of certainty which logic proffers leads to a particular focus on the question of deterrence. This appears to be the crux of the debate on capital punishment. Put crudely, deterrence asks whether the existence of the death penalty deters future potential murders more effectively than would a lesser penalty. It is a question of the *differential* efficacy of capital punishment.[38] Here it might seem that we are in the realm of facts and evidence. But this is an illusion which soon evaporates. How can we evaluate the likelihood of murders that have not yet been committed? How can we guess the possible effect of different penalties when the best testimony we have, that of murderers themselves, testifies above all to the failure of deterrence in any guise?

Amongst a plethora of similar studies, Thorsten Sellin's comparative work on the murder rates of different contiguous States, some with and some without capital punishment, provides powerful evidence that the death penalty deters no better than long-term imprisonment.[39] And psychologically it is hard to put it any better than Diodotus, whom Thucydides reported over 2000 years ago:

> Hope also, and cupidity, the one leading and the other following, the one conceiving the attempt and the other suggesting the facility of succeeding, cause the widest ruin, and although invisible agents, are far stronger than the dangers that are seen...In fine, it is impossible to prevent, and only great simplicity can hope to prevent, human nature doing what it has once set its mind upon, by force of law or by any deterrent whatsoever.[40]

Still, statistics can always be marshalled and disputed, and each side has its champions. Both sides seem ready to concede that any certainty of proof is as lacking here as elsewhere.[41] For all that, the debate continues, as if it were the linchpin by which capital punishment stands or falls. Yet remarkably, despite all

this attention, deterrence is a red herring. It is seminal neither for those opposed to the death penalty nor for those in favour of it. Thus Hugo Bedau and Nathanson, both indefatigable opponents of the death penalty, insist that the question is, at heart, about the impossibility of reconciling the process of execution to the idea of human dignity. For Nathanson, even if the death penalty 'saved' a substantial number of lives, the unanswered question of the justice of legally killing a person would remain: we would still be faced with an "anguished choice" in order to justify its use.[42]

How then are we to explain the continuing focus on the question of deterrence when it begs the central questions of dignity and justice? How can an argument come to seem so crucial when, even were those opposed to capital punishment wholly wrong about it, they would not change their minds? Ironically, the answer must be because of the *rhetorical* rather than the logical role of the question of deterrence. Because deterrence is an issue played out on the field of reason with statistical tools, an attack on the validity of deterrence presents the case for abolition in a logical and unemotional light. To focus on this aspect is therefore itself a rhetorical strategy which appeals to the authority of the rational in order to garner legitimacy for a cause nevertheless grounded in more emotional considerations.

Although the question of deterrence is at least as prominent in arguments in favour of capital punishment as in those against it, it is likewise an irrelevancy. That much seems evident from the logic of the argument itself. For if the death penalty is an effective deterrent for murder, why not use it for rape, or robbery, or drug trafficking, or anything at all? After all, the evidence suggests that murder is one of the crimes least likely to be deterred, regardless of the penalty we impose. We would get much more bang for our buck if we imposed the death penalty for traffic violations.

Ernest Van den Haag's approach is revealing. Although he claims to support the use of the death penalty even in cases of drunk driving, and thus to hold to a position based purely on deterrence wherever it is found to work, he is careful to qualify his position.

> I would demand much more conclusive proof of the size of the deterrent effect on drunken driving than is now available even for the effect of the death penalty on murder...[because] I believe the murderer deserves it in any case. ...A year in prison for driving while drunk...would reduce the drunken driving rates as much as it can be reduced.[43]

Van den Haag acknowledges here that punishment above a certain severity has greater costs than benefits. Cost-benefit analysis is the heart of deterrence theory, since there is a point of diminishing return beyond which any additional punishment (such as torture), although it might deter, deters no better (or not sufficiently better) than lesser penalties. Yet while he applies this analysis to drunk driving, he does not do so when it comes to murder. The difference is that for Van den Haag, the murderer's life is already forfeit, and therefore there is *no cost* in killing him. The point of diminishing returns cannot be reached. As Van den Haag agrees, murderers "deserve it in any case." It is not deterrence, then, which determines which criminals ought to be punished by death and which are to be spared, but rather something intrinsic to murder.

Assuming that some limit is prescribed for the use of capital punishment, then, and that we are not going to execute drunks or shoplifters, that limit cannot be derived from the concept of deterrence itself. The same applies to the argument occasionally raised that execution is cheaper than life imprisonment. If this were true (and in all probability it is not) then it would likewise be cheaper to execute robbers and rapists.[44] The argument still does not tell us why murderers as opposed to anybody else are so dispensable. There is something instead about the relationship of the action of killing and the response of execution which is being

asserted, a relationship which is both more important and anterior to the idea of deterrence which masks it.

The masquerade of deterrence can rarely be sustained for long. Van den Haag writes:

> I shall favor the death penalty as long as there is even a slight chance ...as long as there is any chance that by executions we can deter some future murders of future victims. The life of these victims is valuable to me, whereas, in my eyes, the murderer has forfeited his life by taking that of another. That much from the viewpoint of deterrence.[45]

Van den Haag does *not* write that much "from the viewpoint of deterrence." His argument first assumes that the murderers' life is forfeit. But having made that assumption, what purpose does deterrence serve except a rhetorical one? It enables the writer to appear to be engaged in a rational calculation, balancing the "the lives of the innocents" against "the lives of murderers"[46], when in fact the decision has already been made to set the murderer's life at naught and to sacrifice him *just in case* someone is deterred.

Walter Berns also attempts to present a 'rational' argument for deterrence. He relies on Isaac Ehrlich's controversial studies, which claimed that every execution saves eight "innocent lives."[47] From this conclusion, Berns proceeds to a detailed description of a number of particularly dreadful murders, and follows that up by describing the murder committed by Henry Jarrette while on leave from prison.[48] But what purpose is served by these horror stories? The deterrence argument is that the simple fact of the death of a murderer—any murderer—serves as a means to discourage future potential murders. Its purpose is forward-looking not backward-looking: the violence or evil of the condemned man's acts is irrelevant to this calculus since it is too late to deter those particular and tragic deaths. Berns asks us rhetorically whether we value "the life of Henry Jarrette or the lives of his victims."[49] But here too, Berns invites vengeance and not deterrence. He is again addressing actual victims and not future victims, actual

murderers and not future murderers. Indeed, after some thirty pages of discussion, Berns comes to that very conclusion: "the principle of deterrence is incompatible with the principle of just deserts."[50]

Beneath the language of calculation in which arguments for the death penalty are couched lies an intrinsic belief in a special relationship between acts and consequences, between the life he has taken and the life which is taken from him. It is a relationship whose origin stretches back to the *lex talionis,* the Biblical law of punishment.

> Life for life,
> Eye for eye, tooth for tooth, hand for hand, foot for foot,
> Burning for burning, wound for wound, stripe for stripe.[51]

saith the Lord. But this is not a principle. Treated literally, no-one is likely to defend it. An eye for an eye, let alone burning for burning, could scarcely be contemplated. Treated metaphorically, as surely it must be, the *lex talionis* merely establishes that serious crimes should be punished with proportionate severity—it leaves completely open how severe punishment ought to be. Although it can be conceded that the punishment for a crime should reflect the relative degree of social condemnation attached to it, we are no closer to determining what form that punishment should take.[52]

There is a *discussurus* here, but there is nothing *stricte* about it. In the debate on the abolition of the death penalty in Canada in 1976, one honourable member framed the conflicting rhetorical perspectives at issue with admirable simplicity: "Human life is sacred, and...its sacredness must be preserved by depriving of life anyone who deprives another person of life."[53] For those opposed to the death penalty, this is a self-rebutting argument. But for those who support the death penalty, it appeals to an inherent and self-evident truth that can be stated but not explained. The use of rational argument can muddy the waters but it cannot serve as a bridge across them.

B. Liber scriptus

Liber scriptus proferetur,
In quo totem continetur,
Unde mundus judicetur.

A written book will be brought forth
which contains everything
for which the world will be judged.

Let us turn our attention from philosophical to legal texts. The U.S. Supreme Court's resurrection of the death penalty has focused in particular on the meaning of the Eighth Amendment, with its prohibition upon the infliction of "cruel and unusual punishment", and on State legislation seeking to impose the death penalty. The Supreme Court's approach draws our attention to the *legal* formulation of reason—the importance of precedent and the search for rules. Both these ideas stem from the same desire to define in advance the circumstances in which courts can impose the death penalty, and thus to remove the infliction of capital punishment from the arbitrary discretion of the judges. Such an approach reflects a faith in the ability of words—of the Constitution, of prior cases, and of death penalty statutes—to establish definite and objective criteria for decision-making. On the Day of Judgment, we are promised a *liber scriptus*, which will "contain everything by which the world shall be judged."

Jacques Derrida argues that written meaning requires language to be both an accurate reflection of the unique moment of its production, and at the same time, a shared commodity. Any writing will find itself trapped by the conflicting demands for subjective expression and inter-subjective communication.

> In order to function, that is, in order to be legible, a signature must have a repeatable, iterable, imitable form; it must be able to detach itself from the present and singular intention of its production.[54]

This is the paradox of the jurisprudence of death. The Court, torn between the need to find a decision-making process which is both unique to the individual case yet also repeatable and consistent, finds itself faced with an insoluble, and

unavoidable, problem. The question of how to create a *reasonable* system of capital punishment reflects, perhaps, the very impossibility of the quest itself.[55]

In the judgments of those who dissented from the decision in *Furman* v. *Georgia* in 1972, which imposed a moratorium on the death penalty, and who sustained the constitutionality of the death penalty in *Gregg* v. *Georgia* four years later, precedent was a crucial issue.[56] Justice Powell, for example, dissenting in *Furman,* was at pains to recite the previous cases which had held without exception that the death penalty—the "mere extinguishment of life"—"cannot be said to violate the constitutional concept of [cruel and unusual punishment]."[57]

If one believed that the earlier decisions of the Supreme Court somehow embodied an objective assessment of the meaning of cruelty, then such a deferral might be justified. But it is hard to conceive how the concept of "cruelty" could be based on anything other than an aesthetic reaction to the kind of punishment in question. That much is clear from the dissent of Chief Justice Burger. According to some of the majority in *Furman*, a punishment would be "cruel" if it were an unnecessarily severe means to achieve its penological ends.[58] Criticizing this, the Chief Justice discussed a previous ruling which held exile to be cruel and unusual. That decision, he argued,

> grew out of the Court's overwhelming abhorrence of the imposition of the particular penalty for the particular crime; it was making an essentially moral judgment, not a dispassionate assessment of the need for the penalty.[59]

The decisions of the past, then, were far from rational. For the present, however, "[o]ur constitutional inquiry...must be divorced from personal feelings as to the morality and efficacy of the death penalty."[60] Legal reasoning does not replace subjectivity with objective facts; it only places it some time in the past.

Nevertheless, while the dissenting judgments of *Furman* insisted that personal feelings of repulsion or vengeance ought to be subservient to the impartial interpretation of precedent, the voice of the non-rational is continually implicated.

The judgments of Burger, Powell, and Rehnquist clearly manifest a belief in the value of the death penalty, although they would have us believe that their preference was beside the point. Justice Rehnquist mourns that "the Court's judgments today strike down a penalty that our Nation's legislators have thought necessary since our country was founded." Again in dissent in *Woodson* v. *North Carolina,* in which a statute providing for mandatory death penalties was overturned, we find the same rhetoric:

> The plurality's glib rejection of *these* legislative decisions as having little weight...seems to me more an instance of its desire to save the people from themselves...[61]

But of course, the Bill of Rights is inherently anti-majoritarian, designed *expressly* to prevent popular and legislative will overriding the interests of the minority. Whenever the court overturns a piece of legislation it acts to "save the people from themselves." Like the argument from precedent, this argument appears as a cover for the particular values of Justice Rehnquist.

The dissent of Justice Blackmun is more interesting. It is best approached by two paragraphs which bracket his judgment. At the beginning of his dissent in *Furman,* he claims to

> yield to no-one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear, and of moral judgment exercised by finite minds...That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated.[62]

This appears then to be a judgment committed above all to the value of precedent in the legal system, a demonstration, perhaps, of the triumph of legal rationality over a visceral response. He would like to strike down the death penalty; but he cannot.

I am not so sure. At the very end of the dissent, in a most forceful and personal paragraph, he changes his tune.

> Nevertheless, these cases are here because offenses to innocent victims were perpetrated. This fact and the terror that occasioned it, and the fear that stalks the streets of many of our cities today perhaps deserve not to be entirely overlooked. Let us hope that, with the Court's decision, the terror imposed will be forgotten by those upon whom it has been visited, and that our society will reap the hoped-for benefits of magnanimity.[63]

There is here a glimpse of a very different world-view, a feeling that the violence of the cities brings forth the violence of the State. This is not a logical paragraph, and all the more revealing for the imagery it discloses. Note the sarcasm of Justice Blackmun's conclusion, which contrasts the real and brutal danger of the streets with the naïve aspirations of the majority that terror will be "forgotten", a quaint "magnanimity" which is only "hoped-for". Note the mazy language which adds to the feeling of confusion and darkness the paragraph evokes: "offenses to innocent victims were perpetrated. This fact and the terror that occasioned it..." Which fact? occasioned by that? against whom? when? The powerlessness of urban victims, the feeling of being encircled, is intensified by the powerlessness of readers, entrapped by language.

Note above all the passive construction, in which terror is "occasioned" and "imposed" and offences "perpetrated". Again, this suggests a lack of agency which connotes our ignorance and powerlessness in the face of faceless violence; the darkness of causality parallels the darkness of the streets. The active agent in all this is not a specific individual or class of people, but rather "fear": it is fear personified which "stalks the streets," terror, unforgotten, which is stealing our cities. Fear governs Justice Blackmun's response, a fear occasioned by the personification of darkness and lurking menace. What we see in Justice Blackmun's judgment, in fact, is a conflict between feelings of distaste and images of fear. There is considerable uncertainty here, about the justice of his conclusion. But through the trope of prosopopoeia—the personification of a symbolic object—

the face of fear finally triumphs over visceral distaste.[64] Justice Blackmun's judgment emerges as a battle, not of reasons, but of aesthetics.

Nevertheless, in the 1994 case of *Callins* v. *Collins,* Justice Blackmun declared that he would in future hold the death penalty "as it is currently administered" unconstitutional, and since then he has done so in case after case. In the light of his decision in *Furman,* and his consistent support of death penalty legislation for twenty years thereafter, this represents a momentous transformation in his position. The reasons for that reversal I will outline later. Suffice it to say at this stage that it was not jurisprudential arguments against the death penalty which governed his decision, but two factors: on the one hand, his conclusion that a rational and rule-governed system able to "accurately and consistently determine which defendants "deserve to die" was impossible; and on the other hand, a significant change in his aesthetic focus, the transformation of a generalized fear of violence into a more particularized understanding of the sensory reality of capital punishment. Indeed the failure of rationality and the importance of aesthetic knowledge forms the heart of my argument in this chapter. Justice Blackmun demonstrates that, above all through aesthetic engagement, a change of opinion on this issue is possible.

2. Rules and standards

In trying to decide whether the death penalty was in fact "cruel and unusual", the Supreme Court in *Furman* seized on the question of arbitrariness. If some determinate criteria could be established to guide juries and judges in making that ultimate life and death decision—then the law would not be arbitrary and death would not be cruel. Thus Justice Douglas criticized the fact that "no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or twelve." Likewise, Justice Brennan insisted that "the very words "cruel

and unusual punishments" imply condemnation of the arbitrary infliction of severe punishments."[65] The Supreme Court's decision was a demand that the imposition of the death penalty should proceed on rational and objective grounds.

The approach of the Supreme Court demonstrates a great faith in the ability of rational criteria and written rules to provide objective guidelines even to such controverted questions. The 1976 cases sought to give content to this desire for an abstract, prescribed certainty. Nevertheless, the final result of these decisions, which still form the core of the jurisprudence of the death penalty in the U.S.A., merely demonstrated the impossibility of that rationality. *Regardless* of the criteria set down in any statute, the only real question is—should this man die? Legislative 'criteria' allow the decision-maker to allocate their decision to a particular category, but they cannot change the unfettered way in which that decision is made.

Let us consider three death penalty statutes upheld by the Supreme Court in 1976. In Georgia, the statute provides that, following the defendant's conviction for murder, there is a penalty phase. The jury can only impose the death penalty in certain listed circumstances: for example, if murder was committed in the course of a felony or for the purpose of robbery, if the victim was a "peace official", or if the murder was "outrageously and wantonly vile, horrible and inhuman..."[66] But how does this establish "clear and objective standards"? On the one hand, the jury under this statute has complete discretion *not* to impose the death penalty for any reason it chooses. And on the other hand, can it be imagined that a jury, wanting to sentence a particular defendant to death, would find itself unable to do so because of the words of the statute? The reference to "outrageously and wantonly vile" murder, in particular, is bereft of determinate meaning. It must be noted that although this provision passed constitutional muster in 1976, it was later struck down; nonetheless, catch-all provisions which vaguely imply that the murder in question must be particularly bad, remain popular in many jurisdictions.[67]

Neither is there any reason to believe that the words of the statute will actually form the basis of the jury's decision. The jury may decide to impose the death penalty on any grounds it chooses: because, for example, the defendant is a black man and his victim was white. As a matter of legal interpretation, the statute's 'criteria' are broad enough to encompass almost any murder. As a matter of psychology, the criteria do not and cannot constrain the *actual* considerations relied on by the jury either in imposing or refusing to impose the death penalty. Far from forcing juries to act rationally, they merely require them to label their decisions appropriately.

That much appears from the 1983 case of *Zant* v. *Stephens*. At a sentencing trial, the jury cited three statutory aggravating circumstances, at least one of which, it will be recalled, must be present for the death penalty to be imposed. One of these circumstances was that the defendant had "a substantial history of serious assaultive prior convictions", a ground later held by the Georgia Supreme Court to be unconstitutionally vague. The U.S. Court of Appeals, overturning the verdict, concluded that

> even if the jurors believed that the other aggravating circumstances were established, they [might] not have recommended the death penalty but for the decision that the offense was committed by one having a substantial history of serious assaultive criminal convictions, an invalid ground.[68]

Here too the confusion is to assume that non-statutory or even unconstitutional factors are somehow excluded from consideration altogether. As the Georgia and United States Supreme Courts conceded, overruling the Court of Appeals, once a legitimate aggravating circumstance has been 'found' (i.e. the murder has been correctly labelled) the jury's discretion is uncontrolled.[69]

In Florida, the trial judge, acting on the advice of the jury, makes the final decision as to sentence in the case of murder. The statute provides a list of aggravating circumstances, one of which must be established in order to justify the imposition of the death penalty. But again, these criteria, including that the murder

was committed in the course of a felony, by a prisoner, or "was especially heinous, atrocious, or cruel", do not subjugate emotion to reason.[70] Would anyone impose a death penalty for any crime which they did *not* believe to be—for whatever reason—"atrocious"? This is not a criterion: it is a description of the state of mind of someone who desires to see a particular defendant killed.

The statute makes a further attempt to rationalize the imposition of the death penalty. Justice White made much of this distinction:

> Under Florida law, the sentencing judge is *required* to impose the death penalty on all first-degree murderers as to whom the statutory aggravating factors outweigh the mitigating factors. There is good reason to anticipate, then, that as to certain categories of murders, the penalty will...[now] be imposed with regularity.[71]

But there is nothing objective about this. The 'weight' to be given to the specified aggravating factors and unspecified mitigating factors is indeterminate: the sentencing court is entitled to give any weight it likes to any factor. To pretend that this amounts to some sort of constrained discretion is to mistake imagery for logic. The word 'weight' is a useful metaphor which suggests an externally verifiable system of measurement, but this objectivity is an illusion.

In Texas, they do things differently. Both who may live and who will die are subject, it appears, to what appears to be determinate criteria. The death penalty there can only be imposed for murder committed in certain situations, such as felony murder, murder for remuneration, and murder while escaping from lawful custody. There is no category relating to "heinous" or "atrocious" murder. The categories of murder for which the death penalty may be imposed are therefore strictly limited. Furthermore, if the jury then finds three, supposedly factual, "special issues" proven, the most important of which being that the defendant is likely to be "a continuing threat to society", the infliction of the death penalty is mandatory.[72] But this is exactly where the statute's attempt at constraint falls apart. The question of whether the defendant constitutes a continuing threat to

society is nebulous, both as a concept and because the ability to satisfactorily predict future violent conduct is virtually impossible. Indeed, according to the American Psychiatrists' Association's evidence in *Barefoot* v. *Estelle* , it is the "unanimous conclusion of professionals in this field" that only one out of three predictions of future violence is correct.[73] 'Scientific evidence' in this area does distinctly worse than a coin toss.

One might have thought that the conditions for the use of the death penalty in Texas could consequently *never* be satisfied, but the courts have not taken that approach.[74] Rather, in determining if the defendant is a "continuing threat to society", they have resorted to exactly those discretionary judgments ostensibly excluded by the statute. Was the crime brutal—or atrocious—or cruel? Not only do these questions inevitably colour the decision as to which conflicting scientific evidence is to be believed: without hard facts, they become the *only* relevant questions. The more brutal the crime appears and the more monstrous the criminal, the more fearful will be the jury and the more likely to decide that the defendant constitutes a "continuing threat to society." Indeed *Jurek,* of all the cases on capital punishment decided by the Court that year, was sensitive to the facts which gave rise to it. Jurek brutally murdered a ten year old girl. The details of this murder are alluded to more prominently here than in either *Proffitt* or *Gregg.* Justice White even argues that the Texas statute limits capital murder to "a narrowly defined group of the most brutal crimes."[75] Jurek's death is therefore defended because of the "heinous" and "atrocious" nature of his crime even though the Texas statute purports to prevent just that kind of evaluation. In other cases Texas courts have relied upon evidence as disparate as the lack of a rational motive for the crime; the defendant's lack of repentance; the helplessness of the victim; or the mere brutality of the crime.[76] Absent valid scientific evidence, discretionary considerations of this sort are all that remain.

The failure of rules to constrain discretion relates to the question of mitigating as well as aggravating circumstances. In *Penry* v. *Lynagh,* the Supreme Court held that the jury could only provide a "reasoned moral response" as to whether the death penalty should be imposed in Texas if it were provided with jury instructions which expressly permitted the jury to "consider and give effect to [all] mitigating evidence" *regardless* of whether that evidence actually helped them answer one of the "special issue" questions alone before it.[77] In effect the Supreme Court has not just permitted but *required* a jury instruction "that allows the jury to say "no" even when the answer "yes" is supported by uncontradicted evidence." Even the illusion of rule-bound decision-making has in this case proved unpalatable, and the Court has instead insisted that in every capital scheme, decision-makers "must not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record."[78] Those who defend this approach argue that a limited ability to refuse to impose death, such as that established in the original Texas law, encourages in the jury a "moral outrage", and that unguided discretion in relation to mitigation removes a "bias" that will allow "Texas juries to reason more effectively."[79] But this will not do. Mercy is no more a practice of "reason" than outrage. An system which "simply dumps before the jury all sympathetic factors...so that the jury may decide without further guidance" is not based on reason or the constraints of legal rules. With the paradoxical decision in *Penry,* "the Court has come full circle."[80]

On each occasion, the courts' attempt to channel discretion into the furrows of rationality has come undone. The only way out of this dilemma might seem to be the enactment of genuinely 'mandatory' death penalties. Ironically, however, the Supreme Court has expressly ruled that the mandatory imposition of death sentences is unconstitutional. In North Carolina,

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of wilful deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death.[81]

The plurality, striking down this provision in *Woodson*, in fact emphasised the inevitability of indeterminacy. Just as with the Black Acts in nineteenth century England, juries must first enter a verdict of guilty of murder in the first degree for the section to apply, and on this point the statute used only the most nebulous and ambiguous language.[82] The same point was made in *Roberts* v. *Louisiana,* where again one of the grounds on which the mandatory death penalty was struck down was, paradoxically, because "Louisiana juries will [therefore] exercise *too much* discretion."[83]

Perhaps the court envisages a "Goldilocks approach" between the two poles of absolute discretion *(Furman)* and none *(Woodson),* wherein the correct balance between these two aspects is to be found. In Georgia for example, it might be argued that the list of statutory aggravating circumstances provides determinate rules which narrow the class of those eligible for the death penalty, and then allow the jury to exercise a discretion which is limited and guided. Such an approach, however, would ignore what we have seen about the exercise of discretion: it cannot be limited or guided. Capital punishment cases amount to a global judgment of worth and worthlessness. Just as life is an all or nothing proposition—one cannot be partly alive, or alive from time to time—so too the exercise of discretion on this point is effectively uncontrolled. And the Supreme Court, faced with the possibility of eliminating that discretion altogether, refused to do so. Indeed, as we have seen in *Penry*, the Court seems to have insisted that there always be some moment of unguided discretion during jury deliberation. As Justice Scalia describes it, "the sentencer's discretion to impose death must be

closely confined, but the sentencer's discretion not to impose death (to extend mercy) must be unlimited."[84]

The Supreme Court's jurisprudence has struggled to make the death penalty, in Justice O'Connor's words, both "reasoned" and "moral", by subjugating discretionary decision-making to the confinement of rules. But the tension between these two terms has proved irreconcilable. The relationship between the freedom to make a moral choice and the control of reason is one of *différance.* Discretion consumes guidelines. And although freedom is thus the "dangerous supplement" which undermines the aspirations of the rule of law, it is nevertheless a necessary element of justice. This, too, the Court recognized in *Woodson* et al. The very supplement which undermines rules is necessary to their implementation. The courts there insisted that "contemporary standards of decency" require an individualized assessment of the defendant.[85] Without that flexibility, that subjectivity, capital punishment is, according to the Supreme Court, unjust and indecent.

It was the reality of this paradox which finally led to Justice Blackmun's reversal in *Callins* v. *Collins.* After years of supporting the death penalty, in 1994 he declared that "from this day forward, I no longer shall tinker with the machinery of death." Precisely as I have indicated, Justice Blackmun conceded that "both fairness and rationality cannot be achieved in the administration of the death penalty." Any attempt to define in advance the determinants of fairness by way of "procedural rules and verbal formulas" succeeds only, Justice Blackmun argued, in pursuing the problems of arbitrary decision-making "down one hole" only to see them "come to the surface somewhere else, just as virulent and pernicious as they were..."

> Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing.[86]

"It seems," he concludes, "that the decision whether a human being should live or die is so inherently subjective...that it inevitably defies the rationality and consistency required..."[87]

The relationship of discretion and rule is archetypical of the conception of justice in general, which seeks to be both unique and iterable. The essence of discretion is its sensitivity to a unique and changeable context. The incessant rule is iterable—it functions similarly in every different case. We ask of a just legal system both: that it be both reliable and flexible, consistent and individualized. Indeed, as Blackmun has emphasized, "all efforts to strike a *balance* between the two" must fail "because there is a heightened need for both in the administration of death."[88] In this we express the hope of a fragmentary aspiration, for these two elements are unresolvable: each attracts and repulses the other. It is a paradox which gives rise to what has been termed the "impossibility of justice."[89]

C. Confutatis maledictis

Confutatis maledictis
Flammis acribus addictis,
Voca me cum benedictis.

When the damned are confounded,
And consigned to keen flames,
Call me with the blessed.

Furman insisted that "any decision to impose the death penalty [must] be, and appear to be, based on reason rather than caprice or emotion."[90] This is a vain hope. We see, instead, the way in which decisions about death are reduced to an aesthetic response; to the viciousness of the act, and in particular to the image it imprints upon us.

How comes a man to judge whom to call with the blessed, and whom to consign to keen flames—or high voltage, or acrid gas? The damned are, finally, confounded, not by the rational judge and the *liber scriptus* that rules him, but instead under the influence of the emotion of the *dies irae*, the day of wrath. It is a

tension between language and feeling, reason and emotion, which runs throughout the *Requiem.* Although much of its text, like the jurisprudence of the death penalty, the music which gives its voice sounds instead notes of anger and horror. A reading of the death penalty statutes enacted in response to *Furman*, and the cases which have sought to explain them, likewise suggests that beneath the text of reason lies aesthetic responses that govern its interpretation.

In Georgia, the death penalty may be imposed if the murder was "outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Similar provisions apply in Florida and, by implication as we have seen, even to some extent in Texas. §27-2534.1(b)(7) is nothing more or less than a surfeit of imprecise and highly charged phrases whose effect is to provoke the emotions of the reader. Neither can it be said that the latter part of the clause somehow defines the former. The reference to torture, and in particular "depravity of mind", are more inflammatory than explanatory. They amplify and legitimate the passions of an enraged jury. Undoubtedly such criteria invite an emotional judgment. Yet, ironically, the statute also provides for a compulsory review of all death sentences by the Georgia Supreme Court, during which the court must consider, *inter alia,* "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor."[91] One could hardly take this safeguard seriously. Dix, reviewing the decisions of the Georgia Supreme Court, concludes that appellate review is not a meaningful constraint on the discretionary imposition of the death penalty.[92]

In practice, moreover, these criteria have been used with just such flexibility. Never prior to the 1980 case of *Godfrey* v. *Georgia* had the Georgia Supreme Court overturned a jury decision to impose the death penalty, typically choosing simply to accept their assertion as to the depravity and inhumanity of the act. *Godfrey*, attempting to limit the application of the clause, held that the "depravity of mind"

of the defendant must actually *lead to* "torture...or an aggravated battery."[93] This has not, however, led to a substantial change of practice. In *Blake* v. *State* the Supreme Court held that throwing a two-year-old child off a bridge constituted "torture" because death must have caused some pain. So too in *Spinkellink*, a shooting death was characterized as a capital crime because it was "unnecessarily torturous to the victim" even though the victim was actually asleep at the time.[94] As ever, the words which ought to provide guidance prove to be infinitely malleable.

Consider the judgment of Justice Rehnquist in *Godfrey* itself, which, although written in dissent, is typical in style.

> The weapon, a shotgun, is hardly known for the surgical precision with which it perforates its target. The murder scene, in consequence, can only be described in the most unpleasant terms. ...The police eventually found [the defendant's mother-in-law] face down on the floor with a substantial portion of her head missing and her brain, no longer cabined by her skull, protruding for some distance onto the floor. Blood not only covered the floor and table, but dripped from the ceiling as well. ...[H]e succeeded in creating a scene so macabre and revolting that, if anything, "vile", "horrible", and "inhuman" are descriptively inadequate[95]

One could hardly encounter a more graphic description of carnage. But the judge's disgust is not a response to either the suffering of the victims or the immorality of murder. It is rather a reaction based on the chaotic and bloody appearance of the site after death. The very fact that the shotgun does not 'surgically perforate its target', to use the judge's ironic words, would appear to constitute reasons to count its effects as vile and horrible. It is the image of death, and not its reality, nor the suffering of victims, which concerns Justice Rehnquist.

> I should have thought, moreover, that the Georgia court could reasonably have deemed the scene awaiting the investigating police-men as involving "an aggravated battery to the victim[s]."[96]

The judge is not concerned with the experience of the two murdered women but with the "scene" which awaited the arriving policemen. In this passage, *they* are

the "victims" whose sensibilities are subjected to "an aggravated battery"; but they are representatives, too, of those observers, such as the judge and jury, whose sensory response to the graphic nature of the violence done has brought forth the outrage which demands the death penalty.

III. Agnus Dei

Agnus Dei qui tollis peccata mundi;
dona eis requiem.

O Lamb of God, that takest away
the sins of the world;
grant them rest.

I have shown how the attempt to create rules for the application of the death penalty implodes to reveal a core of unfettered discretion. No reasons guide that discretion; no logic compels the choices that are made. It is instead as a sensory response to images of violence and symbols of fear. This analysis has been an exegesis of the text intended to demonstrate how shallow is the claim that law is rational. The question is not, finally, how it is that some defendants come to be sentenced to death while others are sentenced to life. The question is rather how it is ever possible for a fallible human being to make the decision that another human being ought to die. Once we arrogate that right to ourselves *at all*, the question of what constitutes appropriate criteria of choice is secondary. The answer lies in an investigation of the process and system of execution as it actually exists in the United States: a consideration of the sensory experience and symbolic meaning of legal death.[97] By way of a methodology that focuses on these dimensions, I move towards an explanation of the genesis of the jurisprudence of death, the particular aesthetic perspective that makes it possible. The aesthetic dimension of law and justice is here an epistemology, which moves us from legal interpretation to legal motivation.

Let us begin by a comparison with torture. Torture effects and requires the denial of the humanity of the victim. The procedures of torture and the indoctrination of its practitioners and accomplices succeed in this denial by the slow process of objectification, turning the human body into a mere artefact, tool, or instrument. In the days when torture was a normal weapon in the arsenal of the State, this was accomplished publicly: the mutilated bodies of traitors were displayed as if they were statutes or icons on which State power had been inscribed. Their wounds were symbols for which their very bodies had become the mere canvas of dissemination.[98]

Nowadays, torture is practiced covertly. But as Elaine Scarry argues, the same processes of objectification are at work. The human being is still treated as a commodity to be dispensed with or used. The secrecy of torture itself facilitates dehumanization. Victims are isolated, devoid of support, unable even to discern if anyone knows or cares what has happened to them. The experience of pain further intensifies this loneliness. For pain is intrinsically isolating; it withdraws the sufferer into a circumscribed world where only pain truly exists and everything else is experienced as if from a gauzy distance. Stripped of all the necessary resources of identity and community, the victim's room becomes all the world. And this room is a collaborator in their torment: each wall and object itself is an instrument in the infliction of pain until, the world unmade, only pain remains. That accomplishes the complete dehumanization of the victim—and of the torturer too.[99]

The death penalty is possible just as torture is possible. The process of dehumanization in either case involves two elements which I pursue below: objectification and isolation. Both these steps are necessary to turn a human being into a corpse, but their focus differs. With isolation, we are concerned with the sensory experience of the victim, and how it effects their body and self. With objectification, our attention moves to the symbolic meanings appropriated by

perpetrators and collaborators; how, in short, they come to *see* the violence they cause in such a way as to permit it to go on. In this second case, 'anaesthetic' is a more accurate word, a comforting *absence* of feeling. That is exactly what objectification involves: a refusal to feel, and a denial of the sensory experience of another.

In the debate on capital punishment, therefore, two opposing aesthetics confront one another. An aesthetic approach to capital punishment draws attention to the horror and experience of the event. It is not concerned with theories of the efficacy of deterrence but with the sensory experience of death and isolation. Such an approach directly confronts the aesthetics of those who support capital punishment, since their perspective is exactly to objectify the condemned. Death becomes a surgical procedure, a colourless green idea. In an operation, the patient is anaesthetized in order not to feel the pain they would otherwise undergo; here, on the other hand, it is the *'surgeons'* who are anaesthetized in order not to feel the pain they are inflicting.

A. The aesthetics of dying: from being to not being

The process of execution is long drawn out and requires, stage by stage, the most extreme forms of isolation. This isolation serves two related functions. First, it turns the victim from a human being into an object. Secondly, it removes our knowledge of this sensory experience to a safe distance. In this, the death penalty is merely an extreme version of the anaesthetic of death itself. Death is solitary by its very nature. While we must all experience our own death, we cannot know the experience of another's death. Death is also isolated by social construction. We struggle mightily to ignore death and to conceal it. In modern Western civilization in particular, the dying are shunted off and hidden from view. At the very moment when each human being most needs to feel part of a community and a family, they

are most isolated: sent to nursing homes and forgotten; sent to hospitals and processed; sent home and tiptoed past. From a society in which sudden death was abhorred, we have become transformed into a society in which it is desired.[100] Our society cauterizes death.

The death penalty brings these elements of alienation and the denial of feeling to the height of perfection. Capital punishment denies death, as torture denies pain. The structure and environment of death row all insist that the condemned man is not living—on the contrary, bit by bit, they are dying. Indeed, those awaiting capital punishment are known as "dead men"; when they are moved from cell to cell the cry goes up, "dead man coming through."[101]

Death row is an alien environment which alienates the condemned man step by remorseless step from the world of the living. In Alabama, a typical example, 'death row' is deeply embedded within the bowels of the prison. One arrives by a tortuous route: through the gate to the prison compound, through the gate to the prison itself, through the gate that allows one into the internal areas of the prison, through the gate that leads from the main blocks to the isolation unit, through the gate to death row itself, and then finally through the gate that separates each man in his cell. Each gate a barrier with its own sound and protocol; each one requiring a process of unlocking, opening, passing, closing, and locking again. "You got to go some to get in here," says one inmate.[102] To be on death row is to be isolated even from the community of the prison.

The physical isolation communicated by the design of death row is accompanied by emotional alienation.[103] At the very time when a feeling of closeness and connection would be most important, it is prohibited. The cells are stark and lacking in any amenities. All confinement is solitary. Typically, the condemned man is kept in his cell twenty-three and a half hours a day. They exercise, alone, in an outdoor cage for the other thirty minutes. Restrictions on

visits are significantly more severe than with other prisoners. In Alabama, for example, the condemned man is entitled to a single one hour contact visit per month, handcuffed and guarded. Non-contact visits are also limited.

> You have to talk through little pencil holes in the glass. There's no closeness ya know? It's not like touching... I think it puts [family] in a hopeless situation. They sit there and feel like they're isolated, ya know?

There is no communication here; only observation "peculiarly reminiscent of the viewing at a wake."[104] Indeed, the condemned man is constantly watched, night and day. It is a régime reminiscent of Jeremy Bentham's Panoptikon, an 'ideal' prison so designed that every prisoner could be seen from a central guardroom, but no prisoner could see any other. As Foucault so passionately argued, surveillance is an exercise of power which emphasizes the vulnerability of its subjects.[105] To be watched is to be made intensely aware of one's own powerlessness and of one's lack of genuine human contact. Here is all the solitude of a zoo.

As execution day gets closer, the condemned are increasingly removed from the world.[106] Either when a date is announced for their execution, or on the day of their expected death, or both, they are moved to another cell, a 'death cell' or 'silent cell'. The deconstruction of the world has left only one tiny room. Even more isolated than death row, the feeling of imminence which the move conveys is intensified by its location. Typically it is adjacent to and often in sight of the death chamber itself. Human beings now matter little; the move and the physical location of the cell are signs that the condemned man is now merely part of the technology of death. In the hours prior to death, this technology takes over. The dead man changes out of his own clothes and into those determined by the institution as necessary. He is shaved. For an electrocution, his whole head is shaved and also a section of his calf muscle. The diodes will be placed here and smooth skin is preferred. He is fitted with a pair of special pants and, often

enough, an anal plug to ensure that, in the final extremity, he does not behave *inappropriately.* Already, then, he has lost control over his body. He is stoppered, half-way embalmed. Finally, a cap is placed over his head. The dead man has lost his identity and become a faceless instrument for the more efficient conduct of electricity. Like the torture victim and with infinite slowness, he has been stripped of community and of identity, turned from a human being into an object.

Every element of the environment of death row is a sign of isolation which conveys its message aesthetically, in the look and feel of a situation and in the way we react to it; in its objectification of the condemned and our own distance from them. Even colour plays its role. Why is it that across the United States of America so many death chambers—often the gas chamber or electrocution chamber itself, sometimes the death cell—are painted a particularly bilious shade of green?[107] T.S. Eliot writes of "the cold green light of hell", an imagery taken up with great effect in the paintings of Francis Bacon; and in the text for Benjamin Britten's *War Requiem* .

> Out there, we've walked quite friendly up to Death; ...
> ...We've sniffed the green thick odour of his breath[108]

Perhaps the shade of "the little green room," the "chill green solitude of the gas chamber," *is* the colour of nausea. Perhaps, also, the very frequency of its use in this context adds to its associations. Whatever the complex of reasons, the effect of this colour is deeply disturbing. This is not the green of the trees or the sea, but a green invented by human industry. For those outsiders who look at this green, artificiality alienates and overpowers, denying nature, comfort and human warmth. And within this peaceless green, the condemned man finally dies: *observed* from behind a plexiglass screen but alone. Even the colour of his death is as unnatural as possible.

B. The anaesthetics of watching death: from being to object

1. Language

Let us reverse our perspective and consider the language and processes of the defenders of capital punishment. Their aesthetic experience—and ours, in tacet consent—is also controlled. Our distance from the reality of the death penalty begins with the language we use. 'Capital punishment' is a peculiarly removed term. Its origin is by no means abstract. Corporal punishment was inflicted on the body or *corpus,* capital punishment on the head or *capit.* Capital punishment means decapitation. But the phrase now has by and large lost its original connotations. It suggests rather an important or principal punishment than the rolling of heads.

As we have already seen, the language used to defend the death penalty often works to obscure the reality of the condemned man's death. Arguments from deterrence, for example, render invisible the human costs of capital punishment, beneath equations of cost and benefit in which human beings are transformed into probabilities. The theory of deterrence, moreover, is a perfect example of objectification, for the condemned man becomes *used* to prevent the occurrence of future acts. The human body is transformed into a means to advance ends decided upon by the state—in other words, into an object, a tool, and a symbol.[109]

The ultimate end for which the killing of a human being is used, is the preservation of the legal system itself. For Walter Berns (and in Van Den Haag too), the law is the law and to challenge capital punishment is to challenge the law. His on-going diatribe against the rising tide of crime, technical delays in court processes, limits on police powers, "crime without punishment", the decline in religious education, respect for the flag, the proliferation of obscenity, the decline in the role of the family—the list goes on and on—should be understood in this light. As irrelevant as they are to the specific issue of the death penalty, they are

part of a world view in which to oppose the death penalty is to show disrespect for the law, and to oppose the law is to invite anarchy. He writes, for example, of society's presumption "that the laws were just, that they must be obeyed...and that society, for its own good and for the good of the criminals, had every right as well as the duty" to punish.[110]

And here we come to the heart of the aesthetic which drives this objectification. For Berns, the beauty of law lies in its power and terror. No act represents—indeed demonstrates—this awesome power more than the legal infliction of death. No act therefore is more beautiful or more symbolic.

> Capital punishment...serves to remind us of the majesty of the moral order that is embodied in our law and of the terrible consequences of its breach...The law must not be understood to be merely statute that we enact or repeal at our will...Wherever law is regarded as merely statutory, men will soon enough disobey it...The criminal law must possess a dignity far beyond that possessed by mere statutory enactment...the most powerful means we have to give it that dignity is to authorize it to impose the ultimate penalty. The criminal law must be made awful...[111]

The *majesty of the law* is the principal image in this aesthetic. Like the majesty of the church in the middle ages, it is a holy beauty commanding holy awe. The individuals to be sacrificed on the altar of the law are rendered secondary to this aesthetic of power and obedience.

Van den Haag's perception is governed by fear not awe. The death penalty is required, he argues, because 95% of the population would act badly if it were not for the deterrence effect of the law. In this very Hobbesian world-view, "the great mass of people" act not out of a sense of rightness but because they are too cowed to do otherwise. There is no faith in human goodness here; only an overblown confidence in the ability of the law to control people's actions. This attitude applies not only to criminals, but to the poor, "welfare mothers", "Nazis", "Communists", and intellectuals.[112] The usual suspects. Whereas for Berns, the majesty of the law is a thing of beauty, for Van den Haag it is a necessary tyranny.

2. Zoomorphism

(a) Dehumanization

In war and in torture, the enemy is transformed into something sub-human; capital punishment does the same thing. It creates therefore an image, for the purposes of denial, with an important symbolic function. In destroying the humanness of the condemned, he becomes a scapegoat for the rest of us. 'Scapegoat' is hardly strong enough, since the goat chosen to symbolize evil was exiled, while the condemned man is executed.[113] A sacrificial lamb, *agnus dei,* then—provided with a bestial image to ensure we are not killing one of 'us', then slaughtered for the expiation of social violence.

> It would be nice if we could get rid of evil by defining it out of the human species, declaring that anyone who does these horrible things is not human. But it will not work. The capacity of man to do evil, no less than good, is what defines us as human.[114]

There is an ironic parallel here with crime itself, for a murderer frequently "selects a scapegoat for his own painful state of mind", finding someone to blame for his lack of control over his life and feelings. Capital punishment replicates this pattern, representing an attempt to control fear about violence and lawlessness in society by "selecting for death a personification" or symbol of these problems.[115] The murderer may seek to still the rage and rising panic within by lashing out at a target; society does the same.

The very labelling of the condemned man takes away his individuality. Berns, throughout his book, contrasts "the criminal" with "the law-abiding citizen", as if the two were different species. The same processes of labelling and dismissal are apparent in Van den Haag, who declares that "[t]he more I understand some people—Nazis, Communists, criminals (even some others) the less I condone what they have done or are doing."[116] All these groups are, we may presume, discrete

categories—we know one when we see one. And just as *normal* people could never be "Nazis" or "Communists", they could never be "criminals" either.

Deviance labelling also *refashions* the identity of its subject.[117] Writings on the death penalty consistently bestialize criminals. J. Edgar Hoover, a celebrated advocate of this technique, which he used on all his sundry perceived enemies, wrote frequently of the evils perpetrated by "criminal beasts". Although he conceded that convicted murderers rarely offend again, he thought the point irrelevant exactly because the slightest risk of danger was worth killing to avoid when the life you sacrifice is only that of a mad dog or "bestial killers."[118] But it is not only fanatics such as Hoover, Joe McCarthy, or Harry Anslinger in the heyday of American conservatism that engage in this bestializing imagery. "It's genetic. They're animals", said the Chief Justice of the Georgia Supreme Court.[119] The turning of the criminal into a beast is in fact routine. Caryl Chessman, whose celebrated books, written while he languished for over a decade on death row, did not prevent his execution in 1961, makes the point with characteristic irony.

> On the Row at the present time we have, according to no less an authority than the newspapers:
> 1. Two "fiends" and three "monsters"
> 2. One "moon-mad killer"
> 3. One "cold-eyed, cold-blooded leader of a "Mountain Murder Mob"...
> 5. Me
> 6. An assortment of "vicious", "sneering", "leering", "brutal" and "kill-crazy" murderers, plus a former private-eye turned "diabolical" kidnapper.
> As the papers...tell it, we're creatures on the lam from Hell...Here we are, an inhuman assemblage. Or so you are led to believe...
>
> The weirdest factor of all is this: if chance, fate, or circumstance had acquitted or imprisoned the "monsters" presently held on the Row, & had doomed those acquitted or imprisoned, the Row still would hold the same number of monsters.[120]

This zoomorphism serves an aesthetic and an anaesthetic function: it powerfully influences how we see the condemned man and how they are objectified, and thus made impossibly distant from our experience. The

transformation of the condemned man into a beast is nonetheless paradoxical. It is only the *sane* who can be executed. The image of the condemned man seems to point in two directions. On the one hand, everything is done to turn the him into an animal. Yet on the other hand, he must be proved to be sane and responsible for his actions.[121] This double rhetoric reaches a peak in cases of synthetic competence, in which American courts have been called upon to decide the legality of the forced treatment of criminals suffering from schizophrenia, manic depression, or other mental conditions. The purpose of this treatment, principally pursued by intensive drug therapy, has been to induce a state of mental balance long enough for the execution to proceed.

What is it, we might ask, that is inhuman, bestial, yet sane? The answer is, a man *possessed,* a "fiend" (to recall Hoover's language) or a demon. Their very *sanity* adds to their alienness: like Mephistopheles, the more human they appear the more dangerous they are. Condemned men are made into "creatures on the lam from Hell."[122] But perhaps a better understanding of the paradox of madness comes not by attempting to reconcile these Janus-faced images of human and animal, but by recognizing that both operate as strategies of alienation. Condemned men are made into beasts in order to remove all feeling for them. But at the same time they are treated as humans in the most abstract sense—as 'organisms responsible for their actions'—in order to legitimize their punishment. The two techniques co-exist because they operate in different emotional registers. Remove the *human* problem of execution by bestializing the condemned. Remove the *moral* problem of executing by treating them as abstract human beings. The result is a creature too mad to be human and too rational to be an animal. Such a creature does not exist in biology or mythology, but it has been constructed to fulfil the specific requirements of the death penalty. Edward Said has made the same point about the construction, by the West, of the idea of the "Orient", and his argument is of broader significance. For the Orient could not be seen as just the

same as us; but neither could it be treated as incommensurable either, for in that case it could not understood at all: could not be interpreted, categorized, and appropriated. Difference becomes inadequacy, and, as Said discusses, the Orient became the vessel into which the West could deposit its prejudices. The "other" is therefore seen as someone who is different *from* you, as the "Orient" was different *from* Europe, treated as a standard and a norm.[123]

The role of the "other", one might say, is not as an alien but rather as a distorted reflection of oneself. It is a kind of inverted Narcissism, in which we gaze into the pond and see only the image of what we are not. This conversion of sameness *into* recognizable difference characterizes exorcism and scapegoating—the sins of the world, *peccata mundi,* taken away by the death of the other. There is a process of identification, externalization, and banishment at work here. An animal or an alien could not be the receptacle of our violent potentialities, but neither could the death of someone just like us reassure us that these traits had been effectively banished. It is precisely the double dehumanization of the condemned which permits his sacrificial role.

The influence of racial prejudice on the implementation of the death penalty needs to be seen within this understanding of "otherness". Statistical evidence of the Baldus study established that capital punishment falls overwhelmingly upon black people in the United States of America. In particular, a black man found guilty of killing a white person was dramatically more likely to be sentenced to death than a black man who killed another black man, or a white defendant. A white man found guilty of killing a black person was least likely of all these groups to be sent to death row. Despite the facile dismissal of this evidence in *McCleskey* v. *Kemp*,[124] later statistical studies have only confirmed these findings, and in particular emphasized the significance of the race of the victim in determining whether the defendant is put to death or not.[125] Race is a visible sign of difference, and therefore a ready means of distancing oneself from the criminal, proof of his

object status. The turning of man into monster is often a very visual thing. Nothing dehumanizes someone so powerfully as difference. A scar or a cleft palate, "an accent, a limp, a defiant attitude"—above all the colour of one's skin—these physical signs are taken as a metonym for inner difference. The body is the portrait of the soul and difference the visible sign of sin.[126] Racial prejudice is not rational but it is for many people a powerful aesthetic which determines how they see the world and whether they treat a person as 'like' them or not. Once a white man or woman, judge or jury, looks at a defendant and sees not a person but a *black man,* the process of turning them into an objectified other is already well begun.

In *McCleskey* v. *Kemp*, the Supreme Court insisted on treating racial discrimination as if it were a possible instance of the "wanton and freakishly imposed" or "arbitrary and capricious" sentencing prohibited by *Furman,* which declared unconstitutional any system of capital punishment in which being sentenced to die was as random as "being struck by lightning."[127] This was treated as the touchstone of the decision in *McCleskey*, as if the colour of a person's skin is as meaningless as the colour of their hair. It is not; in our society, it continually effects how that person is treated. As the Baldus study so clearly showed, there is nothing "arbitrary" or random about *discrimination*—the words indeed are completely opposite in meaning. Racism is a consistent practice of dehumanization based on visible difference. So it comes as no surprise that black people should be chosen as fodder for the death chamber. It is, on the contrary, exactly what one would expect from a society in which so many people are objectified on the basis of their colour, and from a system the operation of which relies on a process of objectification.

3. Technology

The invisible death of an objectified other constitutes therefore a necessary isolation of the victim and a necessary denial by the collaborators. The technology of execution itself does not merely perpetuate this invisibility, but is a complex symbolic experience which manufactures death not to protect the dignity of the condemned, but to shelter the imagination of the rest of us.

(a) From public to private

Execution is carried out away from the public gaze. It was not always so, of course. Until the mid-nineteenth century, public execution was the norm. Huge crowds gathered, tempted by the spectacle, drawn by the horror, sharing the emotions of the day in sweaty profusion. So common were public sites of punishment that they were landmarks as unexceptional as a church or a bridge.

> By the Gallows and Three Windmills enter the suburbs of York...You pass through Hare Street...and at 13'4 part for Epping Forest, with the gallows to the left....You pass Penmeris Hall, and at 250'4 Hilldraught Mill, both on the left, and ascend a small hill with a gibbet on the right....You leave Frampton, Wilberton, and Sherbeck, all on the right, and by a gibbet on the left, over a stone bridge...[128]

The last public hanging in England was in 1868, although in the U.S.A., Roscoe Jackson was hanged before a crowd in 1937.[129] The covert death has replaced it. Execution normally takes place in the dead of night or by dawn's early light.[130] It takes place in front of a few chosen witnesses. It takes place in a special room given over to the purpose. And above all it takes place away from the prying eyes of the public.

Steven Wilf has argued that the change from public to private execution reflected a changing aesthetic, a shift from "a spectacle designed to bombard the visual senses to one that sought to influence the imagination."[131] But while invisibility may add to our nightmares of execution—that was certainly the

expectation of late eighteenth-century reformers—at the same time it unequivocally removes our understanding the waking reality of the occasion. This change is always seen as progress, but it is not so simple. In England, the real concern with public execution had nothing to do with the dignity of the condemned man. On the contrary, it was the fear of the rabble-rousing behaviour of crowds which motivated reformers. Dickens, and before him Pepys, both witnessed public executions and were disgusted at the spectacle—of the crowds.[132] The lack of respect for death, its use as an occasion for expressions of exuberant life, reflects an old attitude to death, perhaps morbid but also vigorous and earthy, which was itself becoming increasingly marginalized at that time. The condemned man, dragged by cart to Tyburn's Tree, could be the subject of continual abuse—vegetal and verbal—on the way. But he could also be made a hero, cheered onto the scaffold which was also a podium. The dead man's last words, intended to be an occasion for remorse, could also incite anger or pity. And death itself, intended to instil respect for the law, could and did sometimes seem merely an instrument of oppression. It was not so much the lack of respect for the system of punishment or for the condemned man which the middle class bemoaned, but the lack of respect for social order.[133]

The theatrical stage (itself a scaffold) evolved in much the same way. Plays in medieval and renaissance times were normally performed in the round or on the street. It was the occasion not merely of silent observation but of vocal participation and the stage-managers of this pageantry were not fully in control of what happened: meaning took place not just within the framework of the play but in the larger context of an *event* in which the audience were full and active players. Unlike the mummers, they were by no means silent. The emergence of the proscenium arch changed all that, and created a public which was passive and physically distanced, in space and in dimension, from the action. So too the elimination of the public procession to Tyburn's tree in London, and the institution of hangings on a stage erected for the purpose outside the gates of Newgate

prison—and later still the end of public executions altogether—created a context which was much more closely defined and limited by those in power.[134]

The visibility of public execution was thus a two-edged sword. The aesthetics of death aroused by such close proximity are complex and unpredictable, and the anaesthetic of death which replaced it made empathy less likely and removed the *ugliness* of capital punishment—an ugliness of the masses, poverty, danger, and indeterminacy of meaning—to a hidden location. The individual and public death was replaced by death made routine, and as Foucault suggests, the "theatre of power" in which public execution and torture took place replaced by a secret power.[135]

(b) From the axe to the needle

The history of execution over the past hundred years represents the perfection of this isolation. It is the aesthetics of the observer, what they see and feel, and not that of the condemned, which has been of paramount concern. For example, since the nineteenth century, it has become almost invariable for the executioner and the condemned man alike to be covered in a robe and hood.[136] If this procedure had any virtue in the case of death by firing squad, it has none in the case of the gas chamber or the electric chair. There is nothing to see here, and so nothing from which to shield the eyes of the condemned man. For the condemned man, the hood only increases their discomfort, loneliness, and terror.[137] But the hooding of the victim is very helpful for those who are required to watch him die. It protects *them*, first from seeing the pain of death, and secondly from acknowledging the identity of the condemned man. So too the Romans put clown masks on those they threw to the lions.

From decapitation to hanging to electrocution to the gas chamber to lethal injection, the developing technology of capital punishment is often presented as

indicated progress towards a painless death.[138] Perhaps, although there is in fact very little evidence that hanging—or, for that matter, beheading—is any more painful than gas or electricity, while at the same time any method of execution is frequently neither as instant nor as painless as it is often made out to be. In fact the courts have shown little interest in the experience and pain of the death penalty. In the 1947 case of *Francis* v. *Resweber*, Willie Francis, "a colored citizen of Louisiana" had been placed in the "official electric chair of the State of Louisiana." The switch was thrown and a current passed through his body.

> At that very moment, Willie Francis's lips puffed out and his body squirmed and tensed and he jumped so that the chair rocked on the floor. Then the condemned man said: "Take it off. Let me breath[e]." Then the switch was turned off.[139]

The Court held, however, that the re-execution of this man would not constitute cruel and unusual punishment.[140] No-one at any stage sought to ask the 'victim' of this 'accident' about his experiences. That indeed, was one of the concerns of the dissenters who wanted to remand the case for further information "including the extent, if any, to which electric current was applied to the relator during his attempted electrocution."[141] Even here it was the *facts* surrounding Francis' electrocution about which the dissenters wanted to learn more, and not his *experience* of electrocution. The lack of cruelty of the mode of execution was treated as *res judicata.* "The Supreme Court of Louisiana has held that electrocution, in the manner prescribed in its statute, is more humane than hanging."[142] What could Willie Francis possibly have to say on the subject?

If no-one cares much about the pain of dying, they do care about the discomfort of seeing it. It is not the painless death which we seek, but the bloodless, markless death. Beheading is clearly unacceptable on these grounds. Hanging also stretches the neck and disfigures the body; debates on the change to electrocution in some states emphasized that point. Electrocution, initiated with the celebrated execution of William Kemmler in 1890, was undoubtedly seen as an

improvement in that regard, although here too the process leaves temporary distortion and the odour of charred flesh. But the gas chamber, first used in Nevada in 1924 leaves no mark.[143] This constitutes progress of a sort, but it demonstrates clearly that it is the aesthetic sensibilities of the witnesses that are of prime concern. Death which leaves no mark leaves no physical sign of the suffering that preceded it or the institutions that perpetrated it. It is the very opposite of the psychology of punishment which in *anciens régimes* visibly inscribed state power on the body of the victim. Now, death just seems to have *happened*, on such and such a day at such and such a place—no cause, no trace.

Lethal injection is the natural next step. First used by Okalahoma in 1977 it is now practiced in all but two of the twenty-one states of the U.S.A. in which there has been an execution since *Gregg*.[144] Lethal injection is not only markless, but carried out by the medical profession. Silent and markless, it safeguards the sensibilities of the perpetrators. Furthermore, in the image of medical injection, what I have termed the 'anaesthesia' of death coalesces with a more familiar anaesthesia. The condemned man is not being killed, but being put to sleep like a patient or a pet.[145] It is common practice for doctors injecting the mixture of drugs which will paralyze and kill the condemned man to first swab the "patient's" arm with alcohol. This is what doctors always do when giving an injection: *it prevents infection.*[146] Obviously, it serves no purpose here, but it presents a reassuring image that this is a medical act performed with medical competence. This is not an execution, it is like a vaccine, a medical procedure for the good of society and perhaps for the good of the condemned man too.

Not only doctors but the *imagery* of the medical profession has been co-opted to mask an act of violence. The reality of State power has been camouflaged by the image of medical authority. Return to the colour of the death chamber. Bilious green—also known as '*hospital* green'. The colour of hospital walls, of nurses' uniforms, or of starched sheets on the sick bed. It is the colour of clinical

efficiency and of the routine but justified infliction of discomfort on the one hand, and of medical legitimacy on the other. This is not death, it is *science*. This is not politics, it is *medicine*.

The question of the use of the bodies of condemned men for organ transplantation takes the medicalization of capital punishment to a still higher level. In England in the early nineteenth century, public anatomization or dissection was seen as an aggravated form of punishment and was abolished by the reforms of 1832. Like torture or being hung in chains, it was a symbol of the State's visible power over the body of the criminal. Now it is presented as a diminution of punishment, and as a justification whereby some good may come of the murderer's life.[147] More than ever, the condemned man has become a patient, his execution an operation, his death an unfortunate by-product. Look closer and our attention is all the time being moved away from the condemned man. Do not look at this man you are killing: look instead at the havoc he has wrought, the monster we have created, the comfortable science with which we have surrounded him. Now we have new images to focus on: a young man in need of a new heart, a woman with a new cornea... On the level of image, the question of organ donation functions to induce us to ignore the man on death row, and to see instead only the promise of life and rejuvenation in his death.

(c) From the cell to the chair

The changing means of execution, along with the development of the blindfold and the end of public execution, demonstrate how the technology of execution responds to the aesthetic concerns of those who witness it, and does so in ways calculated to further isolate the condemned man. As Berns writes, ironically attempting to justify the secrecy of the death penalty, "Men cannot witness the lopping off of heads or the breaking or stretching of necks without becoming less

human as a result."[148] For Berns, therefore, doing these acts is humane, but *seeing* them is not.

In this deception the condemned are also made collaborators.

> Don't nobody want to sit in that chair. They are saying the reason they don't want to sit in the chair is because it messes the body up terrible. I say that too, out loud. But deep down inside, the real reason is because I am afraid that I might break down before I get to the chair. You've got to walk to that chair.[149]

Why do you have to walk to that chair? The answer is of course how much easier it makes it on everybody, for it denies the reality of what is going on. This does not always happen. In 1923, Mrs Thompson went to her death in panic and despair. So brutal was the manner of her dying and the force required to subdue her that the executioner attempted suicide shortly afterwards and the prison governor became severely mentally disturbed.[150] Such nightmarish scenes have a profound effect on all who experience them because they break through the barriers of isolation and objectification which the system has so carefully constructed. It replaces, finally, the images of peace with the sensory brutality of sanctioned death.

It is perhaps for this reason also that we demand the sanity of those we execute. Ritualistic behaviour requires either drugged indifference or mental acuity. Like the fool of old, an insane man may express the truth of the event. But a sane man may do likewise; his bodily functions may betray him. Accordingly, as I have noted, the anus of the executed man is plugged. Like the question of sanity, what is being suppressed here is any evidence of how our senses react to *being killed.* The body and the emotions of the condemned man must be restrained. Otherwise he may turn out to be more of a human being than we want.

IV. Libera me

Libera me, Domine, de morte aeterna in die illa tremenda...
Requiem aeternam dona eis, Domine, et lux perpetua luceat eis.

Deliver me, O Lord, from eternal death in that awful day...
Rest eternal grant them, O Lord, and may perpetual light shine upon them.

A.. Empathetic meaning

The *Libera me* is an appeal for release, for liberation from the curse of death: it looks to the future, to the freedom of a final rest. Therefore I move from an aesthetic analysis of capital punishment to an argument for the different ways in which aesthetics might suggest deliverance from the sterile rationality of the debate: from the interpretative insights of aesthetics, let us briefly consider its normative implications. The implications of an aesthetic analysis are examined in more detail in the last two chapters, for it is the sensible continuation of my argument. But we can begin to see here that aesthetics is not just a question of analysis but of priorities. In consequence, to take the aesthetic dimension seriously suggests different approaches to a problem, which may help us understand it not just better but differently.

Aesthetic interpretation is built on empathy. To understand its demands, return to the question of cruelty for, as Montaigne wrote

> My horror of cruelty thrusts me deeper into clemency than any example of clemency could draw me. A good equerry does not make me sit up straight in the saddle as much as the sight of a lawyer or a Venetian out riding...[151]

In *Francis* v. *Resweber* , the U.S. Supreme Court ruled that the re-execution of Willie Francis would not be cruel, although his first electrocution was hideously botched, and in *Gregg* v. *Georgia* the Court confirmed that capital punishment was not inherently cruel.[152] The Court seems to think that, except when the amount of pain inflicted is objectively excessive such as to offend "the basic concept of human decency", cruelty comes from the intentional infliction of suffering. Intention here means not only an intent to do the act which inflicts the suffering,

but also a conscious intent to cause the suffering.[153] In Willie Francis' case, on the other hand, the State did not intend to do more than "extinguish [his] life humanely." The additional suffering he had to endure was merely "the unfortunate and unintended consequence of an intended act."[154]

Imagine a typical case of cruelty: a child pulling the wings off butterflies, or tying firecrackers to a cat. Children are often cruel because they live in a solipsistic universe in which nothing is real outside their own experience. It is exactly this *lack* of awareness of the pain they are causing that constitutes cruelty. The question has not entered their calculations, as a cat 'playing' with a mouse does not stop to ask the mouse if it wants to play. Their cruelty is a literal indifference to the feeling of another living thing. Only their curiosity matters, as only their pain is real. We are born into a world conjugated entirely in the first person; we *learn* the difference between self and other, learn to appreciate how others suffer from our actions. If we do not, if we remain as children, we become cruel—a product not of intention (an inward directed inquiry) but insensitivity (an outward directed one). So it is with a character like Iago in *Othello*, one of the great cultural icon of cruelty, who wrought utter havoc all about him, all the while demonstrating a clinical and dismaying disinterest in the harm his actions caused. Cruelty, in short, is the diametrical opposite of empathy, for the former ignores the "other" while the latter seeks it out.

Now the judgment of the Supreme Court in *Francis* v. *Resweber* takes on a different complexion. The plurality did not care about Willie Francis' pain. They showed no interest in the narration of his experience at all. Instead they concentrated on the intent of the State. The attitude of the self and not the suffering of the other was the focus of the Court's concern. Everywhere they manifest a failure of empathy and imagination. Their interpretation of "cruel and unusual punishment" is itself an act of cruelty. Like a small boy, the Supreme Court of the

United States says that it does not mean to cause Willlie Francis any unnecessary suffering. It only wants to rip his wings off... twice.

B. Symbolic meaning: From lex talionis to lexicon talionis

The aesthetic dimension encompasses not only senses, but the symbols which imbue them with meaning. Here once again, an analysis of symbols suggests a way ahead based on the idea of prosopopoeia or the literalization of metaphor. Recall the *lex talionis,* the fundamental principle of capital punishment: "Life for life, Eye for eye, tooth for tooth." Clearly, this is a metaphor. It insists on a carefully graded system of symbols of disapproval, but it does not tell us what symbols should in fact be used. "Eye for eye, tooth for tooth" is an injunction to use the penalties appropriate to offences, and scarcely a prescription as to what those penalties should be. Yet the advocates of the death penalty literalize the metaphor and insist on, if not "stripe for stripe" then certainly "life for life." It is this reification of metaphor that lies at the heart of the debate.

What are the consequences if, on the contrary, we recognize that proportionality is itself a symbolic rather than a literal question. Capital punishment satisfies a variety of symbolic functions. For the families of victims, for example, it is a symbol of hope and of respect; for society itself, it is a statement of values, an act of reparation, and the sacrifice of a scapegoat. Capital punishment is a symbol of the most absolute social condemnation possible in society. But this symbolism has not stayed constant. At different times different penalties have served this function. Torture and corporal punishment, slavery and exile have all served similar functions at different times, although all are by and large considered barbarous in contemporary Western society.[155]

Language is a crucial example of a system of meaning in which signifier and signified are conceptually separate and constantly in flux. And punishment is itself

a language, a way of communicating social condemnation—a *lexicon talionis.* Swear-words operate in the same way. They express, in a much less enduring form, personal grief and condemnation. A particular swear-word is part of an intricately graduated series ranging from the slightest imprecation to the most severe of epithets. In much the same way the State imposes a careful graded structure of punishment from the smallest fine to the longest term of imprisonment or death.

Ironically, the very existence of the death penalty as a punishment option gives rise to demands for its continued use. Execution has pride of place in the *lexicon talionis*. There is a desire to speak it because it signifies the utmost grief and rage and *this* above all is what the families and friends of victims want to declare. But if execution is no longer part of that language, do we think that grief and rage will no longer find adequate social expression? Of course not; only its symbolic form will have changed. Swear-words, too, are constantly in transition; they become otiose, worn out, archaic. But the meaning which they signify does not vanish just because the specific mode of its expression alters. It is true that the swear-words of the past seem too gentle for our taste whilst punishments of the past seem too barbaric, but in both cases this perspective is anachronistic. In the eternal play of signifier and signified, language has changed but the meaning has not.

This is why in countries in which a considerable period of time has elapsed since the abolition of capital punishment—in Canada, Australia, and the United Kingdom, for example, and perhaps even in some parts of the United States such as Michigan, which abolished the death penalty in 1847[156]—I suspect that there is little likelihood of its reinstatement.[157] First there is a period of transition in which the language of death is felt to be necessary, and its lack is keenly felt. In this period the situation is volatile, and a particularly vicious crime may give rise to such a feeling of outrage that the death penalty is reinstated in short order.[158] Like

a person forbidden to swear, the emotions rise up but language seems impotent. Soon enough, however, the new symbolic order becomes familiar. In a system in which the most severe social sanction is life imprisonment, *that* becomes the ultimate swear-word. Since the death penalty is no longer part of the *lexicon talionis,* a failure to enact it is no longer perceived to be a sign of trivialization or inadequate respect. The signifier has changed but there is no short-fall of signification. In time, the old language of punishment will seem as dated as a Shakespearian curse, or the ducking stool.

The problem is not one of social values, nor of treating the dead with adequate respect, nor of the anger of the living. In a world of symbols, the problem is rather one of which symbols come to be adopted, and how. If we understand that the *lex talionis* is a metaphor not an instruction, and that the *lexicon talionis* is itself a symbolic system, it becomes possible to develop empathy with the condemned and to imagine on a sensory level the experience of waiting for death, without surrendering the important meanings that punishment has in our society. An aesthetic analysis, which focuses on exactly on these factors, not only describes what is going on in the debate and the procedure of capital punishment, but suggests a way forward.

C. Sensory meaning

The aesthetic imagination does not demand of us forgiveness, or even love. It may not even change our mind. But it offers the *possibility* of a way forward much more promising and powerful than endless disputes over statistics. It is not an easy task, especially when faced with a violent murderer, for it demands of us that we try to understand, from the inside, the particular experiences and life history of the condemned man. It is a perspective which even committed abolitionists have shied away from.[159] But Sister Helen Prejean's remarkable book

Dead Man Walking, for example, narrates her experiences as the spiritual adviser to condemned men in Louisiana.[160] Her charges she portrays without distortion, bluntly acknowledging their horrible crimes, their cruelty, selfishness, and weaknesses. All the same, they come across as human beings, needing love and afraid of death. Such an approach finds, even under the most aberrant of conditions, familiar patterns of human behaviour on the one hand, while on the other hand, it seeks to understand those unique circumstances of each individual's history which have led him to such a crossroads.

An aesthetic approach seems to demand that we imagine the unimaginable. What is it to die?, we might ask, and shrug our shoulders. Supporters of the death penalty and its critics alike have tended to concentrate on these issues of pain, death, and the void thereafter. They have defended or decried, in other words, the fact of death. Echoing the words of Sir Walter Raleigh, who is said to have remarked on the way to the executioner's block that his was "a sharp medicine", capital punishment is treated as "a few moments of violent pain followed by total oblivion."[161] Justice Scalia, for example, focuses on the moment of death, for the victims of murder brutal and for the condemned man, apparently peaceful. In *Callins* v. *Collins,* for example, Callins' victim was "ripped by a bullet suddenly and unexpectedly...and left to bleed to death on the floor of a tavern. The death-by-injection...looks pretty desirable next to that."[162]

But this shows a poverty of imagination. Perhaps we should ask, not 'what is it to die?' but rather 'what is it to wait for death?' The death penalty is not a moment but a process, and *pace* Sir Walter Raleigh, it is a very dull medicine indeed. While the system of capital punishment may cease to be painful, it cannot avoid the infliction of suffering caused by a system which "warehouses for death."[163] Imagining the sensory experience of the death penalty does not centre around the fact of death, then, but rather around the consciousness of the imminence of death. This is an experience everyone shares; we are all, as the title

of Philippe Ariès' history of Western attitudes to death suggests, *Hommes devant la mort*—'before' death and living in the face of it.[164] Through the exercise of imagination, the anaesthetic of death is replaced by the aesthetics of dying—dying institutionalized and made routine, marked not by violence and oblivion, but by lengthy waits, gradually intensified isolation, and the slow death of hope. Next to that, I must confess, and Justice Scalia to the contrary, a sudden and unexpected death looks pretty desirable to me.

Involving all the senses in the development of this understanding, making it a truly aesthetic understanding, is a powerful tool of persuasion. Hear the gates being opened and shut, feel the damp, close spaces of the row, see the green of the death chamber. It is these touches which bring home reality to us. Even the emptiness of death may be approached in this way. Here is Caryl Chessman, writing shortly before his own execution:

> The floor officer will go to the dead man's cell, accompanied by the prisoner who does clean-up work on the Row, remove the dead man's personal effects and bedding, place these on a rubber-tired utility cart.[165]

What does it matter if the trolley is "rubber-tired"? It does not, but actual experience is always a riot of meaningless details, fixed upon randomly by the senses. To adequately enter into a situation, we require the accumulation of details, unimportant as well as vital. This is what it means to understand something aesthetically; and this is what it means, too, to begin to truly empathize. Both require an engagement of the senses with the infinite particularity of a situation.

We can see the importance of the aesthetic imagination as a force for change by considering again the judgment of Justice Blackmun in *Callins* v. *Collins*. The change in tone from his dissent in *Furman* is quite remarkable. There, he wrote about the "fear" that "stalks the streets" and which, personified, the death penalty aims to extirpate. But the beginning of *Callins* is very much more specific and radically changed in perspective.

> On February 23, 1994, at approximately 1:00 a.m., Bruce Edwin Callins will be executed by the State of Texas. Intravenous tubes attached to his arms will carry the instrument of death, a toxic fluid designed specifically for the purpose of killing human beings. The witnesses, standing a few feet away, will behold Callins, no longer a defendant, an appellant, or a petitioner, but a man, strapped to a gurney, and seconds away from extinction.[166]

This important transformation has been wrought by Blackmun's new-found consciousness of the sensory reality of capital punishment. The language here is utterly different from that of *Furman*. The faceless fear of terror has been replaced by a "man", with a face, undergoing a very real, and slow experience: "the machinery of death" with which Justice Blackmun will no longer "tinker". It is not the "lethal injection" of Justice Scalia, but the experience of "intravenous tubes" which concern Blackmun; not a "sharp medicine" and oblivion, but the experience of being "strapped to a gurney". This is how it actually happens, says Justice Blackmun: at a particular time ("From this day forward..."), in a particular way ("...the death penalty as currently administered"; "the machinery of death"), to a particular person ("no longer a defendant, an appellant, or a petitioner, but a man").[167]

From *Furman* to *Callins* was for Justice Blackmun a journey from personified evil to a real person, from an abstract solution to a concrete experience. I have no doubt that Justice Blackmun's years of sitting on the Bench, hearing petitioner after petitioner only a desperate appeal away from extinction, gave him this knowledge of what institutionalized death really feels like. In contrast to this sensory and imaginative understanding which has so transfigured his understanding of the death penalty, Blackmun sees only "verbal formulas". He uses the phrase twice and it sticks in his craw, for it connotes everything which is wrong with the failed attempt to subjugate the discretion of judgment to the exercise of reason: rules that cannot be be applied, generalizations which cannot be sustained, and laws which cannot deliver justice.

There is, as I have suggested, an unavoidable incommensurability between justice law, rule and emotion, universal and particular, which none of us can vacate by the exercise of reason alone. The *Requiem,* already imperfect in Mozart's fragmentary realization, recognizes this. *Kyrie eleison, Christe eleison, Kyrie eleison:* Lord have mercy, Christ have mercy, Lord have mercy. In the Latin Mass, a text of reason and power and judgment, these few words are the only ones spoken in Greek, and the only reference to mercy. There is no *Miserere* in the *Requiem.* The bracketing of the *Kyrie* in this way singles it out for special treatment. The section stand apart from the words around it, prominent and alien. There is a different register here, a register which cannot be absorbed into a rational system, but is nevertheless intrinsic to our understanding and our humanity. Law and mercy *are* different languages, necessary yet incommensurable, and one cannot be spoken in the voice of the other. The use of a different language, so sudden and striking, literalizes this metaphor.

Kyrie eleison: perhaps even the use of Greek to make this appeal is appropriate. The aesthetic dimension, which captures the insurrectionary force of justice and mercy, is not literal and functional like Latin, but metaphorical and expressive like ancient Greek; it is not the language of lawyers and administrators (like the Romans), but of philosophers and poets (like the Athenians). It is not as modern as reason but as old as our engagement with the world. This sensibility stands apart from the law and yet is part of it as it is part of us; inviting, perhaps, a way of seeing and a way of feeling which may help deliver us from the modern curse of institutionalized, rationalized, killing.

Dona eis requiem.

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1 W.A. Mozart, *Requiem Mass,* K.626 (1791) at bars 1-8.

2 There are a number of extant completions which flesh out those movements Mozart only sketched, and add in some cases a number of other sections, such

as the Sanctus and Benedictus. By far the most commonly performed of these reconstructions is that of Süssmayr.

3 See the discussion of Legendre in P. Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld & Nicholson, 1990) at 295.

4 E. Weinrib, "The Jurisprudence of Legal Formalism" (1993) 16 Harv. J. L. & Pub. Pol. 583; S. Perry, "Professor Weinrib's Formalism: The Not-So-Empty Sepulchre" (1993) 16 Harv. J. L. & Pub. Pol. 597.

5 See T.C. Grey, *The Case of Wallace Stevens: Law and the Practice of Poetry* (Cambridge, Mass.: Harvard Univ. Press, 1991) at 90-96.

6 O.W. Holmes, "The Path of the Law" (1897) 10 Harv. L. Rev. 457 at 466. But as he continues, "certainty generally is illusion, and repose is not the destiny of men."

7 E. Martin, *The Woman in the Body: A Cultural Analysis of Reproduction* (Boston: Beacon Press, 1987) at 171-72.

8 Lord McCluskey, *Law, Justice and Democracy, The Reith Lectures* (London: Sweet & Maxwell, 1986) at 2.

9 H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

10 Quoted in H. Berman, "The Origins of Historical Jurisprudence: Coke, Selden, Hale" (1994) 103 Yale L.J. 1651at 1690.

11 See K. Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Chicago: University of Chicago Press, 1962); K. Llewellyn, "Some Realism About Realism" (1944) 44 Harv. L. Rev. 1222; L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart" (1958) 71 Harv. L. Rev. 630; L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969); S. Fish, "Dennis Martinez and the Use of Theory" (1987) 96 Yale L.J. 1773; S. Fish, *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies* (Durham, NC: Duke University Press, 1989); R. Dworkin, "Hard Cases" (1975) 88 Harv. L. Rev.; R. Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap Press, 1986); R. Dworkin, "Law as Interpretation" (1982) 60 Tex. L. Rev. 527.

12 In a vast literature, see for example "A Bibliography of Critical Legal Studies" (1984) 94 Yale L.J. 461; P. Fitzgerald and A. Hunt, "Critical Legal Studies: An Introduction" (1987) 14 J. Law & Soc. 5; A. Hutchinson and P. Monahan, "Law, Politics and Critical Legal Studies" (1984) 36 Stan. L. Rev. 199; A. Hutchinson, ed., *Critical Legal Studies* (Totowa: Rowman & Littlefield, 1989); M. Kelman, "Trashing" (1984) 36 Stan. L. Rev. 293; M. Kelman, *A Guide to Critical Legal Studies* (Cambridge, Mass.: Harvard University Press, 1987); D. Kennedy, "Legal Formality" (1973) 2 J. Leg. Stud. 351; F. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 Harv. L. Rev. 1497; J. Singer, "The Player and

the Cards: Nihilism and Legal Theory" (1984) 94 Yale L.J. 1; M. Tushnet, *Red, White and Blue* (Cambridge, Mass.: Harvard University Press, 1988); M. Tushnet, "The Critical Legal Studies Movement" (1984) 36 Stan. L. Rev. 623; D. Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 Harv. L. Rev. 1685; D. Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28 Buff. L. Rev. 205; R. Unger, *Knowledge and Politics* (Cambridge, Mass,: Harvard University Press, 1975).

13 See esp. Kelman, *A Guide to Critical Legal Studies, op. cit. supra* n. 12 at 15-63.

14 Thus see H.L.A. Hart, *op. cit. supra* n. 9; P. Nonet, "What is Positive Law?" (1990) 100 Yale L.J. 667; and see generally R. Cotterrell, *The Politics of Jurisprudence* (London: Butterworths, 1989).

15 J. Derrida, "Force of Law: The Mystical Foundation of Authority" (1990) 11 Card. L. Rev. 919 at 1007; see also at 927, 937, 993, 995 for similiar demonstrations of a naïve legal centralism. To treat this "force of law" as fundamentally external and violent leads one reluctantly to think that, here at least, Derrida would gain from reading Hart on the oughtness of law.

16 J.B. White, *Justice as Translation* (Chicago: University of Chicago Press, 1990), Chapter 7, "The Reading of Precedent" at 160-75.

17 *Ibid. at* 246-47.

18 See Klinck, "This Other Eden: Lord Denning's Pastoral Vision" (1994) 14 Oxf. J. Leg. Stud. 25, whose discussion includes, for example *New Windsor Corporation* v. *Mellor* [1975] 1 Ch 380 ("Today we look back far in time. . . To a town or village green..."); *Miller* v. *Jackson* [1977] 1 QB 976 ("In summertime village cricket is the delight of everyone..."); *Hinz* v. *Berry* [1970] 2 QB 40 ("It was bluebell time in Kent...").

19 Thus see Lord Denning, *The Family Story*; and constant reference in case after case to "a lovely village", "natural beauty", "prettiest [village]", "pleasing villages", "the lovely Cotswald country": all discussed in Klinck, "This Other Eden", *op. cit. supra* n. 18 at 29-31.

20 *Hinz* v. *Berry*, [1970] 2 QB 40.

21 Klinck, *op. cit. supra* n. 18 at 335-60.

22 Quoted in Klinck, *op. cit. supra* n. 18 at 336.

23 *Ibid.* at 342-43; see also H.-G. Gadamer, *The Relevance of the Beautiful and Other Essays*, trans. N. Walker (Cambridge: Cambridge University Press, 1986); P. Ricoeur, *The Rule of Metaphor: Multi-disciplinary studies of the creation of meaning in language* (Toronto: University of Toronto Press, 1977).

24 Thus see, for example, A. Hutchinson, *Dwelling on the Threshold: Critical Essays in Modern Legal Thought* (Toronto: Carswell, 1988); Kelman, "Trashing" *op. cit. supra* n. 12; Tushnet, *Red, White and Blue, op. cit. supra* n. 12. See in particular the neo-Marxist analysis of common law developments in American law, in M. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass.: Harvard University Press, 1977); M. Horwitz, *The Transformation of American Law, 1870-1960: the Crisis in Legal Orthodoxy* (New York: Oxford University Press, 1992).

25 Dworkin, *Law's Empire, op. cit. supra* n. 11, at 111. He makes a similiar response later, when he suggests that CLS simply "want[s] to show law in its worst rather than its best light": at 275. See the same defensive posturing in, for example, A. Ruvin, "Does Law Matter? A Judge's Response to the Critical Legal Studies Movement" (1987) 37 J. Leg. Ed. 307; L. Schwartz, "Darkest CLS-Land" (1984) 36 Stan. L. Rev. 413. As Kelman puts it so succintly, "one can rely on Louis Schwartz to express what might otherwise be thought to be the "straw man's" position": M. Kelman, *op. cit. supra* n. 12, at 355.

26 Peter Goodrich, "*Jani anglorum:* Signs, symptoms, slips and intepretation in law", in C. Douzinas*et al.*, eds., *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent* (London: Routledge, 1994) at 107.

27 J. Derrida, *Positions,* trans. Alan Bass (Chicago: University of Chicago Press, 1981); P. Kamuf, ed., *A Derrida Reader: Between the Blinds* (new York: Columbia Univ. Pres, 1991); C. Norris, *Deconstruction: Theory and Practice* (London: Routledge, 1982, 1991). For particular useful discussions of the work which has been done on applying deconstructionist theory to legal issues, see P. Fitzpatrick, ed., *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (London: Pluto Press, 1991); D. Cornell*et al.*, ed., *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992); -, "Roundtable—The Call to the Ethical: Deconstruction, Justice and the Ethical Relationship" (1992) 13 Card. L. Rev. 1219; J.M. Balkin, "Deconstructive Practice and Legal Theory" (1987) 96 Yale L.J. 743; M.H. Kramer, *Legal Theory, Political Theory, and Deconstruction* (Bloomington: Indiana University Press, 1991), at 5-36.

28 J. Derrida, "Différance" in *Margins of Philosophy,* trans. A. Bass (Chicago: Chicago University Press, 1982), collected in Kamuf, ed., *op. cit. supra* n. 27, at 59-79.

29 See, for an excellent example, C. Douzinas and R. Warrington, "On the Deconstruction of Jurisprudence", (1987) 14 J. L. & Soc. 33; see also M. Tushnet, "Critical Legal Studies and Constitutional Law: An Essay in Deconstruction" (1984) 36 Stan. L. Rev. 623.

30 *Furman* v. *Georgia* (1972), 408 U.S. 238, for example at 250 per Justice Douglas, 310 per Justice Stewart. It was the rather magical transformation of a Fourteenth Amendment issue, under which the death penalty had been

upheld the previous year in *McGautha* v. *California* (1971), 402 U.S. 183, into an Eighth Amendment issue, which accounts for the Court's turnaround.

31 Despite the somewhat triumphalist legalism affected in some quarters: see for example M. Meltsner, *Cruel and Unusual* (New York: Random House, 1973).

32 See *Gregg* v. *Georgia* (1976), 428 U.S. 153; *Jurek* v. *Texas* (1976), 428 U.S. 262; *Proffitt* v. *Florida* (1976), 428 U.S. 242; *Woodson* v. *North Carolina* (1976), 428 U.S. 280..

33 *Gardner* v. *Florida* (1977), 430 U.S. 349 at 358, is oft-quoted.

34 S.H. Verhovek, "With Practice, Texas is the Execution Leader", *New York Times:* 5 September, 1993 at p. E6.

35 S. Nathanson, *An Eye for An Eye? The Morality of Punishing by Death* (Totowa, NJ: Rowman & Littlefield, 1987) at ix-x. Italics added.

36 *Ibid.* at 86-7, 109.

37 The classic exposition of this principle in *Woolmington* v. *D.P.P.,* [1956] A.C., with its reflections on the "golden thread of English justice", are clear evidence of the emotional and rhetorical basis of the concept.

38 See for example Nathanson, *op. cit. supra* n. 35 at 16. This would hardly seem to need stressing, but writers in support of capital punishment often consume considerable space arguing that punishments (of any sort) do deter (to some degree): see for example W. Berns, *For Capital Punishment: Crime and the Morality of Punishment* (New York: Basic Books, 1979) at 104-24, 143-45. It is thus important to emphasize that this is both undeniable and irrelevant.

39 T. Sellin, *The Death Penalty* (Philadelphia: American Law Institute, 1959) at 79-94; and the articles collected in H. Bedau, ed., *The Death Penalty in America* (Chicago: Aldine Publishing, 1964) at 258 et seq.; see in particular T. Sellin, "Death and Imprisonment as Deterrents to Murder" at 274-84, T. Sellin, "Does the Death Penalty protect Municipal Police?" at 284-301, W. Graves, "The Deterrent Effect of Capital Punishment in California".

40 Thucydides, *The Peloponnesian Wars,* trans. R. Warner (Harmondsworth: Penguin, 1972) at 220.

41 See E.Van den Haag and J. Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983) at 65; J. Gibbs, *Crime, Punishment, and Deterrence* (New York: Elsevier, 1975; J. Gibbs, "Deterrence, Penal Policy and the Sociology of Law" (1978) 1 Research in Law and Sociology 101. The studies by Isaac Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death" [1975] Am. Econ. Rev. and I. Ehrlich, "Deterrence: Evidence and Inference" (1975) 85 Yale L.J. 209 is in

particular cited by those in favour of retaining the death penalty for murder. But see P. Passell, "The Deterrence Effect of the Death Penalty: A Statistical Test" (1976) 28 Stan. L. Rev. 6; W. Bowers and G. Pierce, "The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment" (1975) 85 Yale L.J. 187; Nathanson, *op. cit. supra* n. 35 at 27-28; H. Zeisel, "The Deterrent Effect of the Death Penalty: Facts v. Faith" at 116-38 and L. Klein, B. Forst, V. Filatov, "The Deterrent Effect of Capital Punishment: An Assessment of the Evidence" at 138-59 in H. Bedau, ed., *The Death Penalty in America* (New York: Oxford University Press, 1982 ed.).

42 H. Bedau, *Death Is Different* (Boston: Northeastern University Press, 1987) at 27-28; Nathanson, *op. cit. supra* n. 35, at 122-29.

43 Van den Haag, *op. cit. supra* n. 41, at 116.

44 Nathanson, *op. cit. supra* n. 35,at 34-36.

45 Van den Haag, *op. cit. supra* n. 41,at 129; see also many similiar comments, for example at 190, 215-16, 300.

46 *Ibid. at* 300.

47 See *supra,* note 41.

48 Berns, *op. cit. supra* n. 38 at 102-03.

49 *Ibid. at* 103. There is another complication here, which is that the reference to Jarrette evokes, without explicitly stating, the 'specific deterrence' benefits of capital punishment; that is, the argument that we should kill murderers to prevent *them* from killing again. Undoubtedly, capital punishment is 100% effective from that point of view. Nevertheless, I leave that issue aside for two reasons. First, although the fact that Jarrette had already been convicted for murder adds to the horror of the story, Berns never actually defends the specific deterrence thesis. Secondly, the evidence is overwhelming that murderers rarely kill again and indeed have a below average recidivism rate. The number of murders prevented through the specific deterrence effects of executing convicted murderers is generally agreed not to be significant: see Bedau, ed., *op. cit. supra* n. 42 at 399.

50 *Ibid. at* 137.

51 *Exodus,* xxi, 23.

52 Bedau, *op. cit. supra* n. 39, at 61; Nathanson, *op. cit. supra* n. 35, at 73-76.

53 Canada, *Commons Debates vol. 119*, 1976 at 13239.

54 J. Derrida, "Signature Event Context" in *Margins of Philosophy, op. cit. supra* n. 28, at 82-111, 107.

55 See Derrida, *op. cit. supra* n. 15, at 949 et seq., 1023.

56 See *Furman* v. *Georgia* (1972), 408 U.S. 238; *Gregg* v. *Georgia* (1976), 428 U.S. 153; *McGautha* v. *California* (1971), 402 U.S. 183 For a useful general summary of the different positions of the justices, see M. Radin, "The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause" (1978) 126 U. Penn. L. Rev. 989at 1003-1011.

57 *Furman* v. *Georgia* (1972), 408 U.S. 238 at 423 per Justice Powell, quoting *In re Kemmler* v. (1888), 136 U.S. 436at 447; quoting *Trop* v. *Dulles* (1958), 356 U.S. 86 at 99. See also at 468 per Justice Rehnquist. The position of Justice Blackmun is even firmer: see *Furman* v. *Georgia* (1972), 408 U.S. 238 at 407-14 :

> The several concurring opinions acknowledge, as they must, that until today capital punishment was accepted and assumed as not unconstitutional *per se*... Suddenly, however, the course of decision is now the opposite way...The Court has just decided that it is time to strike down the death penalty...I fear the Court has overstepped. It has sought and has achieved an end.

58 See in particular *Furman* v. *Georgia* (1972), 408 U.S. 238, at 281 per Justice Brennan.

59 *Ibid. at* 394 per Chief Justice Burger. See *Trop* v. *Dulles* (1958), 356 U.S. 86

60 *Ibid. at* 375 per Chief Justice Burger.

61 *Ibid. at* 468, 465; *Woodson* v. *North Carolina* (1976), 428 U.S. 280 at 313 per Justice Rehnquist.

62 *Furman* v. *Georgia* (1972), 408 U.S. 238, at 405 per Justice Blackmun.

63 *Ibid. at* 414 per Justice Blackmun.

64 See J.H. Miller, *Versions of Pygmalion* (Cambridge, Mass.: Harvard University Press, 1990) at 1-3.

65 *Furman* v. *Georgia* (1972), 408 U.S. 238, at 253 per Justice Douglas; at 274 per Justice Brennan.

66 *Georgia Criminal Code,* §27-2534.1(b); *Gregg* v. *Georgia* (1976), 428 U.S. 153

67 See J. Rosen, "The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard" (1986) N.C.L. Rev. 941; Note, "A Reasoned Moral Response: Rethinking Texas's Capital Sentencing After

Penry v. Lynagh" (1990) 68 Tex. L. Rev. 407 at 428-29; see the Court's decisions striking down these provisions in *Maynard* v. *Cartwright* (1988), 486 U.S. 356, and *Godfrey* v. *Georgia* (1980), 446 U.S. 420.

68 *Zant* v. *Stephens* (1983), 462 U.S. 862, at 869, quoting (1980) 631 F. 2d. 397 at 406.

69 *Ibid. at* 872, 878. The case of *Barclay* v. *Florida* (1983), 463 U.S. 939 provides another example. In reviewing the case, the U.S. Supreme Court trenchantly criticized the trial judge, Judge Olliff, for citing "aggravating circumstances" which were not mentioned in the Florida statute. They were therefore, apparently, exactly the kind of irrational and irrelevant consideration which *Furman* and *Gregg* sought to prohibit. For the majority, however, since there were also statutory aggravating circumstances present in the case, the judge's discussion of non-statutory matters did not impeach the judgment.

70 *Fla. Stat. Ann.* §782.04 (1); *Proffitt* v. *Florida* (1976), 428 U.S. 242

71 *Proffitt* v. *Florida* (1976), 428 U.S. 242, at 260 per Justice White.

72 *Texas Penal Code,* Art. 1257 (b); *Jurek* v. *Texas* (1976), 428 U.S. 262. The other two "special issues" are largely devoid of meaningful content: see Note, *op. cit. supra* n. 67 at 438-48.

73 *Barefoot* v. *Estelle, Director, Texas Dept. of Corrections* (1983), 463 U.S. 880 at 920-21.

74 The Court's response to this problem of expert evidence was breathtaking in its superficiality: see for example *ibid. at* 899-901. See also P. Davis, "Texas Capital Sentencing Procedures: The Role of the Jury and the Restraining Hand of the Expert" (1978) 69 J. Crim. Law & Criminology 300; G. Dix, "Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness" (1977) 55 Tex. L. Rev. 1343; C. Black, "Due Process for Death: *Jurek v. Texas* and Companion Cases" [1976] Cath. U. L. Rev. 1.

75 *Jurek* v. *Texas* (1976), 428 U.S. 262 at 279 per Justice White.

76 See *Adams* v. *State* 577 SW 2d. 717; *Smith* v. *State* 540 SW 2d. 693; *Felder* v. *State* 564 SW 2d. 776; *Shippy* v. *State* 556 SW 2d. 246: see the review of these cases in G. Dix, "Appellate Review of the Decision to Impose Death" (1979) 68 Georgetown L.J. 97 at 143-49. He concludes "Rather than openly acknowledge its apparent reliance on the offensiveness of the defendants' conduct the court tends to hide this reliance under the label of dangerousness": *ibid. at* 149.

77 *Penry* v. *Lynagh* (1989), 109 S. Ct. 2934 at 2952 per Justice O'Connor.

78 *Lockett* v. *Ohio* (1978), 438 U.S. 586 at 604; see also *Eddings* v. *Oklahoma* (1982) 455 U.S. 105.

79 Note, *op. cit. supra* n. 67 at 413, 415.

80 *Penry* v. *Lynagh* (1989), 492 U.S. at 359-60 per Justice Scalia.

81 *North Carolina General Statute,* §14-17; *Woodson* v. *North Carolina* (1976), 428 U.S. 280

82 The Black Acts, enacted at the beginning of the nineteenth century, led to the creation of over 200 capital offences. In offences where the death penalty was mandatory for theft of over five shillings, for example, juries were notorious for finding the value of the goods to be 4s/6d—another moment of indeterminacy, another exercise of discretion. And on many occasions, when they did not want the accused to die, they refused to convict at all. Indeed, one of the main arguments used to support the steady reform of the English law over the following half century was the unenforceability of statutes providing for the death penalty. See D. Cooper, *The Lesson of the Scaffold: The Public Execution Controversy in Victorian England* (Athens, Ohio: Ohio University Press, 1974); D. Hay, ed., *Albion's Fatal Tree: Crime and Society in 18th Century England* (London: Allen Lane, 1977); E.P. Thompson, *Whigs and Hunters* (London: Allen Lane, 1975).

83 *Roberts* v. *Louisiana* (1976), 428 U.S. 325 per Justice White.

84 *Callins* v. *Collins* (1994), 114 S. Ct. 1127 per Justice Scalia.

85 *Ibid. at* 295-96 per Justices Stewart, Powell, and Stevens.

86 *Callins* v. *Collins* (1994), 114 S. Ct. 1127 per Justice Blackmun (citations omitted).

87 *Ibid.*

88 *Ibid.*

89 Derrida, *op. cit. supra* n. 15, at 947; see generally at 947 et seq. For further on the "impossibility of justice", see Cornell, ed., *op. cit. supra* n. 27; and especially chapters by Butler, Cornell, Keenan, and LaCapra therein. Dix, "Appellate Review", *op. cit. supra* n. 76 at 160-61, makes a similiar point with respect to the evident inability of appellate review of death penalty decisions to supervise the discretion exercised at first instance.

90 *Gardner* v. *Florida,* 430 U.S. 349 at 358.

91 *Georgia Criminal Code,* §27-2534.1(b)(7) and 2534.2; *Gregg* v. *Georgia* (1976), 428 U.S. 153

92 Dix, *op. cit. supra* n. 76 at 111-13. Courts are frequently required to evaluate whether individual death sentences fall within a pattern of similar decisions in order to determine if the sentence in question has been imposed arbitrarily or capriciously. This creates another moment of indeterminacy,

since the open-ended nature of what counts as 'similar' allows any conceivable decision to be placed in an appropriate 'category'. Thus, reviewing the decision in *Blake* v. *State* , 239 Ga. 292, the Georgia Supreme Court concluded that dropping a small child from a bridge could be described as a "not-for-profit execution style murder" for which the death penalty had been imposed consistently: see *ibid.* at 114.

93 *Godfrey* v. *Georgia* (1980), 446 U.S. 420

94 *Blake* v. *State* 239 Ga. 292; *State* v. *Dixon* 283 So. 2d. 1, 9; *Spinkellink* v. *State* (1975), 313 So. 2d. 666, implicitly approved by the U.S. Supreme Court in *Proffitt* v. *Florida* (1976), 428 U.S. 242 at 255-56, footnote 12. For a more careful examination of the jurisprudence of this section, see Dix, *op. cit. supra* n. 76 at 107 et seq.

95 *Godfrey* v. *Georgia* (1980), 446 U.S. 420 at 449-451 per Justice Rehnquist.

96 *Ibid. at* 451.

97 See for two excellent studies of the reality of capital punishment in the United States, H. Prejean, *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States* (New York: Random House, 1993); W. Lesser, *Pictures at an Execution: An Inquiry into the Subject of Murder* (Cambridge, Mass.: Harvard University Press, 1993).

98 Part I of M. Foucault, *Discipline and Punish,* trans. A.M. Sheridan Smith (New York: Vintage Books, 1979) is a rich and disturbing account of the meanings and uses of torture in the *ancien régimes* of Europe.

99 E. Scarry, *The Body in Pain: The Making and Unmaking of the World* (New York: Oxford University Press, 1985). Further, see H. Kelman, "Violence without Moral Restraint: Reflections on the Dehumanization of Victims and Victimizers" (1973) 29 J. Social Issues 25.

100 The literature on the historiography and sociology of death is fascinating and complex. See P. Ariès, *The Hour of Our Death,* trans. H. Weaver (New York: Oxford University Press, 1981) for a remarkable history of Western attitudes to death over the past thousand years: In particular I rely on Ariès' contrast between "the tame death" and "the invisible death": at 5 et seq., 559 et seq. For more on the denial of death in Western culture, see E. Becker, *The Denial of Death* (New York: Free Press, 1973); M. Somerville, ""The Song of Death": The Lyrics of Euthanasia" (1993) 9 J. Contemp. Health L. & Pol. 801.

101 Thus the title of Prejean, *op. cit. supra* n. 97.

102 *Ibid.;* R. Johnson, *Condemned to Die: Life Under Sentence of Death* (New York: Elsevier, 1981) at 43-44.

103 "They realize, well, this person on death row, he's not getting out. They slowly cut you off.": Johnson, *op. cit. supra* n. 102 at 102.

104 Johnson, *op. cit. supra* n. 102 at 52; see also at 50, 115.

105 Foucault, *op. cit. supra* n. 98; see also J. Baehre, "Origins of the Penitentiary System" (1977) 69 Ont. Hist. 182.

106 See also Michael Kroll, "The Fraternity of Death" in M. Radelet, ed., *Facing the Death Penalty: Essays on a Cruel and Unusual Punishment* (Philadelphia: Temple University Press, 1989)

107 In New York, the world's first legal electrocution took place in 1889: *In re Kemmler* (1888), 136 U.S. 436. Sing Sing had a green door as early as that, and there the New York *Herald Tribune* reported the death of Caryl Chessman in "the little green room" in 1960. In Louisiana, it is the death cell, in Alabama the electrocution chamber. In other states we find reference to the "chill green solitude of the gas chamber": J. Laurence, *A History of Capital Punishment* (New York: Citadel Press, 1960) at xxv-vi, 64. See also Prejean, *op. cit. supra* n. 97.

108 From a war poem by Wilfrid Owen, in the "Dies Irae", B. Britten, *War Requiem*, op. 66 (1942).

109 Van den Haag, *op. cit. supra* n. 41 at 129; see also many similiar comments, for example at 190, 215-16, 300.

110 Berns, *op. cit. supra* n. 38 at 104-24, 142-43, 52.

111 *Ibid. at* 172-73.

112 *Ibid. at* 182, 114-15.

113 *Leviticus* 16. Nonetheless, the Supreme Court held that exile was "cruel and unusual punishment", while capital punishment was not: *Trop* v. *Dulles* (1958), 356 U.S. 86; *Furman* v. *Georgia* (1972), 408 U.S. 238 at 423 per Justice Powell, quoting *In re Kemmler* (1888), 136 U.S. 436 at 447; *McGautha* v. *California* (1971), 402 U.S. 183.

114 Stephen Gettinger in Johnson, *op. cit. supra* n. 102 at 1.

115 S. Levine, ed., *Death Row: An Affirmation of Life* (San Fransisco: Glide Publications, 1972) at *xviii*; see also Chaplain Byron Eshelmann at 176; Elizabeth Purdum & Anthony Paredes, "Rituals of Death" in Radelet, ed., *op. cit. supra* n. 106 at 139 et seq.

116 Van den Haag, *op. cit. supra* n. 41, at 115.

117 In the same way, to call someone a "drug addict" is a process of deviancy labelling by which a whole person is branded and limited by certain specific aspects of their behaviour. For further on deviance labelling, see for

example P. Wilson and J. Braithwaite, eds., *Two Faces of Deviance* (St. Lucia: University of Queensland Press, 1978); J. Gusfield, "On Legislating Morals: The Symbolic Process of Designating Deviance" (1968) 56 Cal. L. Rev. 54; H. Becker, *Outsiders: Studies in the Sociology of Deviance* (New York: Free Press, 1963).

118 See J. Edgar Hoover, quoted in H. Bedau, *op. cit. supra* n. 39 at 130-32, 133.

119 Johnson, *op. cit. supra* n. 102 at 23.

120 Caryl Chessman, extracted in *ibid.*, at 23-24.

121 Hook quoted in Bedau, *op. cit. supra* n. 39 at 224.

122 Caryl Chessman, extracted in Johnson, *op. cit. supra* n. 102 at 23.

123 E. Said, *Orientalism* (London: Routledge, 1978).

124 *McCleskey* v. *Kemp, Superintendent, Georgia Diagnostic and Classification Centre* (1987), 481 U.S. 279 at 309.

125 See M. Wolfgang & M. Reidel, "Racial Discrimination, Rape, and the Death Penalty" in Bedau, *op. cit. supra* n. 41 at 194-205; W. Bowers & G. Pierce, "Arbitrariness and Discrimination under Post-*Furman* Capital Statutes" (1980) 26 Crime & Delinquency 563. They assert categorically that "the probability that a difference [as to capital sentencing] of this magnitude...could have occurred by chance is so remote that it cannot be computed with available statistical programs...The presence of differential treatment by race is unmistakeable."

126 Levine, *op. cit. supra* n. 115 at xix; see also the discussion of Bill Cook at 12.

127 *Furman* v. *Georgia* (1972), 408 U.S. 238 at 198; 250 per Justice Douglas; 293 per Justice Brennan; 309-10 per Justice Stewart. See also *Gregg* v. *Georgia* (1976), 428 U.S. 153 for example at 222-26.

128 Quoted in A. Koestler, *Reflections on Hanging* (London: Victor Gollancz, 1956) at 14.

129 H. Bedau, "Background and Developments" in Bedau, *op. cit supra* n. 41 at 13.

130 In England executions took place at eight in the morning on the first Monday after the intervention of three Sundays since the signing of the writ. In New York, Thursdays at eleven in the evening was the normal time; in Lousiana at midnight; this is typical of other American jurisdictions: Laurence, *op. cit. supra* n. 103, at 27.

131 S. Wilf, "Imagining Justice: Aesthetics and Public Executions in Late Eighteenth-Century England" (1993) 5 Yale J. L. & Humanities 51 at 53; see also the passages quoting Henry Fielding at 56-57 and William Paley at 75.

132 See Cooper, *op. cit. supra* n. 82.

133 See Ariès, *op. cit. supra* n. 100, Part IV; Cooper, *op. cit. supra* n. 82. See also Foucault, *op. cit. supra* n. 98, at 61-63. "In these executions...there was a whole aspect of carnival, in which the roles were inverted, the powerful mocked, and criminals transformed into heroes": *ibid.,* at 61. The popular festival culture of the lower orders was under threat more generally in Victorian England (and in America)—the making of a working class out of a peasantry was underway. See J. Blackwell, "Crime in the London District, 1828-1837" (1981) 6 Queen's L.J. 528; D. Hay, *op. cit. supra* n. 82; D.R. Kelley, *Historians and the Law in Postrevolutionary France* (Princeton, NJ: 1984); D. Lane, "Crime and the Industrial Revolution" (1974) 7 J. Soc. Hist. 287; R. McGowen, "The Body and Punishment in Eighteenth-Century England" (1987) 59 J. Mod. Hist. 651; E.P. Thompson, *The Making of the English Working Class* (Harmondsworth: Penguin, 1975).

134 Wilf, *op.cit. supra* n. 131. Linebaugh has written of public execution as "a morality play," a suggestive metaphor not only in terms of the kinds of messages which were sought to be inscribed into these events, but also in terms of the engagement and participation of the crowd in the unfolding spectacle: see P. Linebaugh, "The Tyburn Riot Against the Surgeons" in Hay et al, *op.cit. supra* n. 82 at 65.

135 Foucault, *op. cit supra* n. 98.

136 Laurence, *op. cit. supra* n. 107 at 42.

137 Recall Willie Francis, electrocuted but not killed in 1947. The heavy leather cap which covered his head made it virtually impossible for him to breathe. "Take it off. Let me breathe," he pleaded: *Francis* v. *Resweber, Sheriff, et al* (1947), 329 U.S. 459 at 480-81.

138 See for example Laurence, *op. cit. supra* n. 107, at 68.

139 *Francis* v. *Resweber, Sheriff, et al* (1947), 329 U.S. 459 at 460 per Justice Reed; Official Chaplain Maurice Rousseve, quoted at 481.

140 *Ibid. at* 470 per Justice Frankfurter; at 464 per Justice Reed.

141 *Ibid. at* 472 per Justice Burton.

142 *Ibid. at* 474 per Justice Burton.

143 The execution of Gee Jon took place on 8 February 1924: Bedau, "Background and Developments" in Bedau, *op. cit. supra* n. 41 at 16.

144 *Ibid. at* 17.

145 Ronald Reagan, master of euphemisms, put it this way (quoted in Prejean, *op. cit. supra* n. 97 at 216):

> Being a former farmer and horse raiser, I know what it's like to try to eliminate an injured horse by shooting him. Now you call the veterinarian and the vet gives it a shot and the horse goes to sleep—that's it.

146 *Ibid. at* 217-18.

147 J. Laurence, *op. cit. supra* n. 107 at 22; see 25 GEO. II; see also the transformation from visible to invisible punishment, from corporeal to incorporeal penitence, in M. Foucault, *op. cit. supra* n. 98.

148 Berns, *op. cit. supra* n. 38, at 25.

149 Johnson, *op. cit. supra* n. 102 at 87.

150 Koestler, *op. cit. supra* n. 128, at 139; 139-40 and 18.

151 Michel de Montaigne, "On the Art of Conversation", in *Four Eesay,* trans. M. Screech (London: Penguin, 1995) at 34.

152 *Francis* v. *Resweber, Sheriff, et al* (1947), 329 U.S. 459; *Gregg* v. *Georgia* (1976), 428 U.S. 153.

153 See *Gregg* v. *Georgia* (1976), 428 U.S. 153at 182 per Justices Stewart, Powell, and Stevens; *Francis* v. *Resweber, Sheriff, et al* (1947), 329 U.S. 459 at 464 per Justice Reed, 470 per Justice Frankfurter, 476 per Justice Burton.

154 *Ibid. at* 464 per Justice Reed.

155 *Trop* v. *Dulles* (1958), 356 U.S. 86

156 See the discussion of abolition and restoration in Bedau, *op. cit. supra* n. 41 at 346 et seq. See also D. Chandler, *Capital Punishment in Canada* (Ottawa: McClelland & Stewart, 1976)for a discussion of capital punishment at a crucial period of the debate in that country.

157 It is difficult, however, to make such a bold generalization about the United States. The recent example of the restoration of capital punishment in New York is a particularly salutary example. Apart from general cultural features—above all, a pathological cultural history of the sanctification of violence—however, I think the situation in the U.S.A. does not fall into this pattern because so many States have maintained, and in recent years used, the death penalty. The language of punishment—on a national and regional level—has by no means been purged of the voice of death.

158 This has been the frequently repeated pattern in the United States. Capital punishment is most likely to be reinstated within a few years after abolition, typically following the commission of a particularly brutal crime in which community feeling is effectively mobilized. Thus in Oregon, capital punishment was abolished in 1914 and reinstated in 1920; in Missouri abolition in 1917 was reversed two years later; in Delaware, the death penalty was abolished in 1958 and reinstated in 1961: see Bedau, *op. cit. supra* n. 39 at 346 et seq. Indeed, in only three States out of twelve—plus the recent example of New York—has restoration followed abolition by a period of over six years. Maine, which abolished capital punishment, restored it seven years later and finally abolished it once more four years further on, is a particular example of the operation of this transitional volatility.

159 Frequently, the question of worth is evaded by focusing instead on 'acceptable' cases. The several case histories collected in Hugo Bedau's monumental *The Death Penalty in America, op. cit. supra*, nn. 39 & 41. provide striking evidence of this for, with few exceptions, these cases focus on the exceptional: on innocent men convicted, on 'insane' people tried as if they were sane, on juvenile killers, and so on. In all these cases, it is the extenuating circumstances which are addressed, and not the common humanity possessed by even the most ruthless killer: See S. Ehrmann, "The Human Side of Capital Punishment", in Bedau, *op. cit. supra* n. 39 at 492-519; J. Martin, "Crime of Passion" at 519-39; J. Martin, "The Question of Identity" at 539-48; S. Agron, "The Making of a Boy Killer" at 548-56. Compare, however, R. Bailey, "Rehabilitation on Death Row" at 556-63, in *ibid.* See also M. Radelet*et al.*, *In Spite of Innocence: Erroneous Convictions in Capital Cases* (Boston: Northeastern University Press, 1992).

160 Prejean, *op. cit. supra* n. 97. See also the first-person accounts of life in the shadow of death, contained in, for example Johnson, *op. cit. supra* n. 102; Levine, *op. cit. supra* n. 115.

161 Bedau, "Death as a Punishment" in Bedau, *op. cit. supra* n. 3 at 220. Neither is this the position only of those in favour of capital punishment. Bedau, too, emphasizes the *fact* of execution—"total activity smashing total passivity"—while expressing doubt about arguments that "waiting for it" constitutes a cruel and unusual punishment: see Bedau, *op. cit. supra* n. 42, at 123-24, 168.

162 *Callins* v. *Collins* (1994), 114 S. Ct. 1127 per Justice Scalia.

163 Johnson, *op. cit. supra* n. 102 at *ix.* For more on the distinction between pain and suffering, see E. Cassell, *The Nature of Suffering and the Goals of Medicine* (New York: Oxford University Press, 1991).

164 Ariès, *op. cit. supra* n. 100.

165 Caryl Chessman, quoted in Levine, *op. cit. supra* n. 115 at 8.

166 *Callins* v. *Collins* (1994), 114 S. Ct. 1127 per Justice Blackmun.

167 *Ibid., passim.*

Variations on a Theme

Metaphors of the Boundary and the Boundaries of Metaphor

Themes & Variations:

Var. I (precedent)[1]

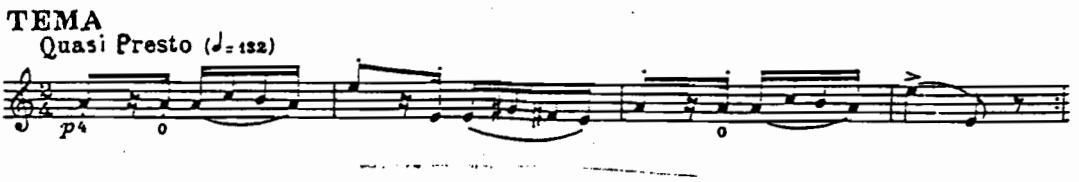
The use of music throughout this thesis has been on one level a metaphor for formal and non-linguistic meaning. And the aesthetic is itself, as I have explained, in part about metaphor—about the ways in which our sensory reactions transport cultural and social meaning across the boundaries of our faculties. But what, in music, is the form which expresses the idea of meaning through resemblance? What is the musical form of metaphor?

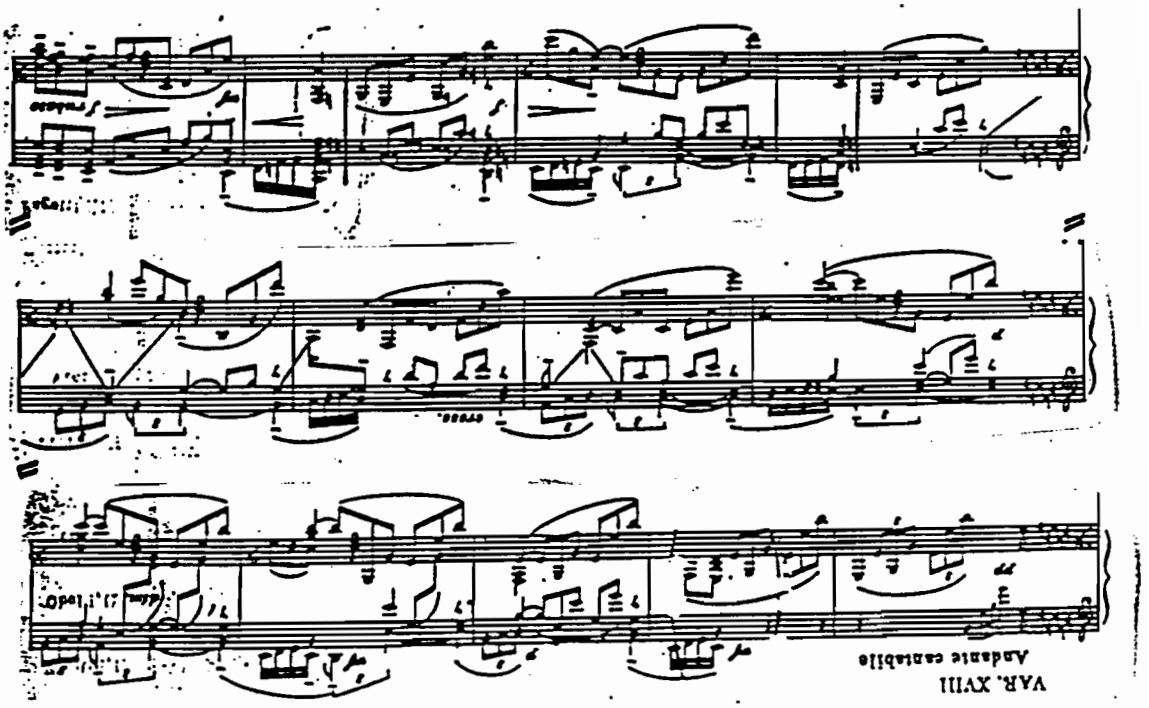
It is surely the theme and variations, not only a musical structure but an organic one. Life itself is a theme with perpetual variations, twisting ribbons of DNA by gradual metamorphosis giving birth to the myriad forms of living matter around us. Repeated everywhere on a scale as vast as the galaxies and as small as an amoeba, the variation form derives from the tumult of nature and, in return, gives it voice. Perhaps because of this organic character, it is a form which has proved of unsurpassed resilience throughout the history of music.[2] From the great Bach Chaconne and the Goldberg Variations, to the symphonies and late piano sonatas of Ludwig van Beethoven,[3] to virtually the whole of the jazz tradition,[4] the theme and variations has proved a defining form in the history of music, at once accessible to a wide range of listeners while at the same time enabling the most searing exploration of musical and emotional resources.

The very simplicity of the form permits this depth. A theme is chosen, something melodically and harmonically straightforward, and short enough to be able to be held in the listener's head. This theme, this law, is then developed through a series of interpretations, each of which elaborate one aspect of the theme:

Variations on a Theme

Metaphors of the Boundary and the Boundaries of Metaphor





Themes & Variations:

Var. I (precedent)
Theme
Var. II Health and Beauty

Metaphors of the Boundary:

Var. III Dirt: From Defilement to Disease
Var. IV Opium: From Disease to Depravity
Var. V Drugs: From Objects to Symbols

The Boundaries of Metaphor:

Var. VI The double-sided symbol
Var. VII From Other to Self
Var. VIII From Symbols to Fetishes
Var. IX

typically keeping the harmonic progression constant, while changing the rhythm of the parts, exploring this or that little motif, or breathing into it a variety of different characters, by turns tranquil, then melancholy, strident, impassioned, laconic. The variations are not exhaustive in any sense; terse, epigrammatic, they provide only enough detail to encapsulate a concept. They are sketches of essences. In this way, the crucible of multiple variations allows the composer to lay bare diverse aspects of the theme, and diverse aspects of his soul. In the finest examples of the genre, there is, furthermore, a gradual resolution at work, until at last we come to understand the theme anew, as containing within it all those disparate forces and elements which the variations slowly unravelled. The repose comes from having seen, in that simple shard of a theme, a mirror of the world.

Each variation, taking a point of resemblance as a point of departure, reveals a different aspect of the theme. By thus rendering explicit that which was previously only implicit, our understanding of the theme is enriched beyond measure. This enrichment, through discovery, development, and contrast, is the hallmark of metaphor. It too treats a point of resemblance as a point of departure, and by creating a conflict between sameness and difference, improves our understanding of both.

There is a distinction. A metaphor is a stranger in a foreign land, and its strength comes from the shock occasioned by its presence. All metaphors started life with the element of surprise, an original and unexpected conjunction of images which sparks imagination and understanding.[5] The metaphor, then, is literally a 'transference across' or trans-lation from one realm to another. It is a boundary violation, an immigrant—a graft. The variation, on the other hand, is always already nascent in the theme—a natural-born child or chrysalis. Variations on a Theme are a particular sub-species of metaphor, because they are begotten not

made.[6] They find their tension and novelty within the belly of the theme itself and thus disclose rather than illuminate its innate problematics.

If this form is a specific kind of metaphorical structure, then Niccolò Paganini's famous theme and variations for solo violin—the twenty-fourth and last *Caprice* of those published together as his opus one—is its quintessential musical example. Not just for the ardour of the theme but for the fecundity of its progeny. Paganini wrote a theme—simple, rhythmic, repetitive. He composed twelve variations on it. Brahms rewrote the theme, and fourteen variations on it. And then another fourteen variations. Then Rachmaninoff, with twenty-four variations. Not to mention Schumann. Liszt. Lutoslowski. And so on.[7] The products of authorship are as driving and incessant as the theme on which they are based. But the lines of authority are less than clear. Rachmaninoff claims to be writing a *"Rapsodie sur un thème de Paganini,"* which is undoubtedly true. But is it not Brahms' variations which serve as his guide here? Who is the dialogue really between? And what of Lutoslawski?—is it really the Paganini which has influenced him, or the Rachmaninoff? Variations on variations on variations. We are in the midst of a culture here, a tradition of composition in which succeeding generations have found it necessary to go back to the *ur-text* and stake their own claims to cultural competence by contributing to a tradition—"an argument through time"—on the potential of the theme.[8] The debate is on-going and collective. Each composer is engaged in a dialogue not just with Paganini but with all those who have elaborated the theme, and all those who will come after. The complexity of the metaphoric elaborations of the original theme is therefore further enriched by the plurality of its authors, each contributing their own unique language or palette.

Theme

Aesthetics is a methodology, a way of enriching our interpretation. If we approach legal texts with an aesthetic eye, there is much we can learn about their meaning and that of the world around them; the *Motet* was, accordingly, largely textual in its approach. If we approach legal arguments with an aesthetic eye, there is much we can learn about their motivation and the deeper concerns that generate them; the *Requiem,* for its part, focused in particular on the values and feelings which lay behind the claim of judges and scholars to be developing a jurisprudence of death built solely on an edifice of reason. Legal texts always reveal themselves to be more than 'rational'.

The *Requiem* marks a transition in this argument, for it traces a movement from text to context, from figure to background, and from methodology to epistemology. To understand how the law of capital punishment can be justified in a modern society, we have to look at the aesthetic framework which surrounds it. The jurisprudence of death is made possible by the treatment of the human body and the imagery of the condemned man, from trial to the muffled drums of death. It is justified by a way of thinking about and seeing the fact of execution which *cannot* be explained solely in terms of its rationality. This approach can be applied to other areas of legal discourse. The law relating to illegal drugs, for example, as this chapter goes on to demonstrate, is likewise explained not in terms of its logical coherence but rather by the aesthetic horror, the instinctive reactions which the imagery of 'drugs' brings forth. The law comes to pass in a context awash in compelling imagery and influenced by aesthetic values which drive us to bodily responses only latterly rationalized by the mind.

This argument, which I first introduced in the previous chapter, is continued here. It is an argument which seeks to incorporate ideas about aesthetics into an

epistemology of law: how, in other words, we as a community, or parts of it, come to have the values and knowledge which law, however imperfectly, expresses. Aesthetics is an instrument in the interpretation or exegesis of the law; but it is also a potent force in its construction. It helps explain not only the 'what' of legal meaning, but the 'why'.

The theme of these variations is that aesthetics forms as well as reveals the law. Aesthetics exercises this formative influence over our beliefs in two inter-related ways. First, we must recognize the persuasive force of our sensory reactions and instincts, acknowledge the singularity of this voice in our lives. Secondly, aesthetic meaning is semiotic in origin. Our aesthetic reactions are not given, unmediated, or absolute. They are a response to images and experiences which are imbued with symbolic and metaphoric significance. Aesthetics, then, is in part a felt judgment in reaction to an image. But it is also about the way those images operate through and draw upon a kind of symbolic grammar. So it is with a metaphor or myth which seizes upon an idea and expresses it in tangible and forceful form. There is logic to a metaphor, but that is not what persuades us. On the contrary, its force lies in its corporeality. It reaches down inside us and establishes a new connection through the senses it incites and the symbols it invokes.

As a case study, this chapter examines senses and symbols in the legal construction of drugs—I use the word in its popular sense, referring in particular to "illegal substances" such as opium and heroin. The kind of legal framework we have in almost all Western societies is characterized by a complete prohibition of these substances and severe penalties aimed at eradicating their use. Again, there is no rational explanation for this remarkable absolutism. We must look instead to the sensory imagination of drugs and its complex and ambiguous symbolism within

our society, in order to understand the panic which even the words 'illegal drugs' seems often to incite. To develop this argument, I adopt a general and historical approach. The first section, comprising the theme and first two variations, introduces the argument, and in particular emphasizes the important role of boundaries in our society, and its symbolic expression through highly sensory images such as pollution. The boundary is a place of danger, a place of great significance, skirted with totems and taboos. It is a representation of belonging and not belonging, and the social fear of its destabilization finds many forms.

> At borders, as at death and in dreams, no amount of prior planning will necessarily avail. The law of boundaries applies; in the nature of things, control is not in the hands of the traveller.[9]

Under the rubric "Metaphors of the Boundary," the next three variations look at the ways in which the fear of boundary violation has been given symbolic expression and sensory power. In nineteenth century Australia, as we will see in Variation III, hostility to Chinese immigration (a violation of geographic boundaries) was expressed in the sensory and emotive language of dirt and disease. An aesthetic language using the rhetoric of health gave xenophobia both immediacy and legitimacy. Chinese opium use, in particular, as I discuss in Variation IV, became a receptacle of prejudice exactly because it came to be imbued with and to gain force from a deeply-felt complex of cultural symbols. The Chinese use of opium was a metaphor for nothing other than Chinese immigration itself, and it was this metaphor, this symbolism, which generated the power of aesthetic reaction. Finally, Variation V argues that the modern-day opiate user experiences the same kind of deep-seated hostility, and for similar reasons: here too, a sensory fear of drugs is allied with a symbolic meaning centred around the transgression of boundaries. Just as with the Chinese, drugs are a 'problem' because of what they symbolize and not because of what they do.

This argument suggests not only the power of the aesthetic realm but its perils too. A metaphor or a symbol adds a new dimension to our understanding of a particular circumstance or problem, but it cannot simply substitute for it. We can treat symbolic meaning too literally; if we forget what something is a metaphor *for,* it becomes a metastasis. As J. Hillis Miller writes, using Ovid's *Metamorphoses* as his text, "tropes tend to materialize in the real world in ways that are ethical, social, and political."[10] Throughout the world we treat metaphors as if they were the literal truth; as if they were in fact the things they only symbolize. It is merely one example of the way in which contemporary society—nowhere more evidently than in the legal system—so often *mistakes* form for content.[11]

The literalization of a metaphor is called prosopopoeia,[12] and the Eucharist might help us understand it. From a Protestant perspective, the communion wine is a *symbol* of the blood of Christ. The Catholic church takes the wine to be Christ's blood itself, but self-consciously describes the process of transubstantiation as a "mystery".[13] Between these two positions, over which so much real blood has been spilt, lies the danger of prosopopoeia, in which the symbolic wine is simply treated as literal blood. We observe a similar fallacy whenever a symbol—of value or of a problem—becomes so important that in the eyes of its beholders it is treated as the value or the problem incarnate: when it becomes, in fact, an icon.[14]

The strength of feeling of those who, seeing the flag being burnt or defaced, feel that they are witnessing some act of national arson, provides another instance of the operation and emotional strength of this trope.[15] In fact in this instance it is more accurate to speak of prosopopoeia as the literalization of metonymy. In the leading U.S. case of *Texas* v. *Johnson* , Chief Justice Rehnquist (dissenting) speaks of those who "die for the flag".[16] 'The flag' is a metonym, a rhetorical device by

which one small tangible part or adjunct of something is used to stand for a whole (and often intangible) complex—it thus makes ideas concrete by the juxtaposition of objects rather than (in the case of metaphor) through the association of concepts. To speak of soldiers as dying for the flag, when in fact they died for the things which the flag only stands for is again, therefore, a literalization. As metaphor or metonymy, this is the very power of aesthetics, to transform symbols into icons, and tropes into sacred relics.[17]

The third set of variations, "The Boundaries of Metaphor," argues in two ways for a more sophisticated recognition of the meaning and power of symbols. In another metaphorical turn, Variations VI and VII argue that symbols are by their nature ambiguous: the fearful imagery of drug use, for example, has another side, a seductive symbolism which helps us understand why the violation of boundaries can and always will seem attractive to some people. To appreciate the symbolic power of drugs—from both sides—may help us recognize that drug use will never be eliminated, for its urges lie deep within us all. And in the final variations, I argue that drug law, like the drug user, has literalized the symbolic. We have treated drug laws as laws about drugs. They are not. A failure to appreciate that drugs really matter in our society because they are a *metaphor* for the fear of transgression, has led to a legal fixation on substances—on the purely literal manifestation of symbolic meaning. This failure to recognize the aesthetic dimension of legal norms has had the most grievous social and medical consequences.

Binary form thus spirals towards a ternary analysis: from senses to symbols, and from metaphor to prosopopoeia. Each aspect is a child, born out of its predecessors, and each provides a somewhat different variation on the epistemological power of the aesthetic dimension. And each aspect requires

instantiation, variations—concise sketches intended to convey specific concepts—to illustrate with greater specificity the ways in which aesthetics plays these roles in the construction of social and legal values. Thus the intonation and harmonic colour of the theme are augmented; thus through variations are its implications revealed.

Var. II

Health and Beauty

The power of aesthetics in the construction of social values, experienced sensorily and understood symbolically, is nowhere more apparent than in areas related to health. After all, health is not simply a fact or an idea. It is also a compound of images, ranging from the socialized ideals of beauty about the human body, to the ugly and unsettling images that manufacture our approach to sickness and death.[18] We need look no further than the ways contemporary norms of female beauty encourage in women epidemics of sickness and debilitation to recognize that the connection of health to beauty, and sickness to ugliness is neither unproblematic nor unrelated to broader social and political agendas. Look at the extent to which imagery about the "mentally ill", our disturbance at the way they look rather than how they feel, influences the social treatment they receive. Or consider, as Susan Sontag has suggested, how the *symbolic* meaning of AIDS in relation to disease and sexuality, as of tuberculosis in the nineteenth century, has determined the depth of our fear and the nature of our response. Health and the imagery of health has always been a powerful rhetorical weapon in the battle over social values, and illness, as Sontag says, a way "to impute guilt, to prescribe punishment."[19]

The conjunction between health and aesthetics typically arises from a shared concept of conformity. Plato applied the concept of 'ideal form' to physiology no less than to ethics, metaphysics, and the natural sciences. From that time to this, our notion of beauty has been formed around a calculus of proportion and homogeneity. In the eighteenth century, the study of physiognomy sought to categorize and define a vast array of deviations from a norm, and to give those deviations moral significance. Later still, phrenologists believed that the slightest "imperfections" of the skull corresponded to imperfections of the character. So too, the dominant paradigm of beauty in our age often exhibits a certain authoritarian uniformity, just as health is largely defined in terms of normal functioning. Each ideal demands conformity to a standard.[20]

This conjunction, however, frequently remains covert. Aesthetics, though an important influence on how we think and feel, often lurks as the silent minor premise behind social syllogisms couched in more acceptable discourses of justification. 'Health,' like 'law,' is such a justificatory discourse, ostensibly rational and socially authoritative. The implicit discourse of aesthetics is therefore to be found legitimated by the language of health. To say, in the public sphere, that something is ugly, seems puzzling or discordant; to say, on the other hand, that it is dirty, renders the claimant not only respectable but of presumptive virtue. But as we shall see, to speak the latter is frequently to mean the former. If we are to illuminate the power of aesthetics in the construction of social values, we must learn to distinguish the two.

The experience of immigration provides an excellent illustration of the use of aesthetics in the expression of social conflict, and its sublimation within a discourse of health. In particular, the rhetoric of 'dirt' and 'dirty immigrants' appropriated the idea of health to express an aesthetic opposition to difference. 'Dirt' marks the

point of collision and collusion between three vectors: the experience of immigration; the legitimate language of health; and the persuasive power of aesthetics. This is not a surprising intersection. Immigration, after all, directly confronts expectations of conformity in people's appearance and behaviour. Moreover, as Mary Douglas argued in *Purity and Danger*, dirt is to be understood as "matter out of place." The law of nuisance provides a legal illustration of this principle. Many cases, especially in the nineteenth century, focussed on the question of pollution, of the smell of a factory or stable, and the invasion of personal space it implied. But it was always the relationship of "matter" to "place" which determined whether pollution was truly a nuisance. A Montréal stable or factory was not by itself dirty, but only in relation to particular—inappropriate—urban contexts. It was the social construction of 'dirt' which formed the basis of legal doctrine.[21]

Dirt, in its place, is "soil" or "earth" or "the land", totemic of health, and strength, and even of nationhood. But in the wrong place it is filthy, even taboo. It is problematic, at least in part, because it is a breach of boundaries: the 'outside' world trampled 'inside', or our own insides made outwardly visible (human waste not flushed away, for example, or garbage loose on the streets). Dirt represents a crucial breach in the ramparts we build, both biologically and socially, between the public and the private sphere.[22]

But in a homogeneous and introverted society, immigration is itself a threat to the boundary between self and other. It exposes the rockpool of a culture to the oceans of humankind. The result is perhaps a feeling of being swamped, in which the migrant community *itself* is perceived as "matter out of place". Given this feeling, the suitability of the language of disease to the expression of horror becomes apparent. That is why the use of terms like cultural 'pollution' or

'invasion' is so common. The rhetoric of immigration is an example of prosopopoeia, in which the metaphorical idea of pollution is soon treated as if it were literally true. From a symbolic understanding, in which immigrants are taken to represent pollution, we move quickly to a situation in which they are treated as if they were an actual sign or symptom of pollution.[23] This perception well-publicized cases of plague and smallpox carried by migrants, serve only to intensify.[24]

The rhetoric of dirt demonstrates the importance of understanding the metaphorical basis of such arguments, for without such an understanding, literalization takes place unchallenged, with the most tragic consequences. The history of the Chinese in Australia, which I focus on, is by no means the most egregious example of the consequences of the literalization of dirt, the failure to be aware of the power and role of metaphor. How was the Holocaust possible except in part through prosopopoeia?, the deliberate insistence through images and language that Jews were a plague, parasites, pests—to be sent to "disinfectant centres" and "exterminated" with Zyklon B, a gas developed from common household insecticides. Literalization encouraged a certain way of thinking,. More, it made behaviour *possible*.[25]

Metaphors of the Boundary:

Var. III

Dirt: From Defilement to Disease

The story of the Chinese late nineteenth century Australia provides a specific example through which to explore these connections. In White Australia's long

history of racism, the treatment of the Chinese merits a special place of ignominy.[26] Fear of the 'yellow peril' dated back as far as the early gold-rush years of the 1850s, when sizeable Chinese immigration to Australia began. Places like Canada and the United States underwent similar experiences, where both railroad-building and the Pacific gold-rushes attracted large numbers of Chinese. From the 1860s law after law of the colonial legislatures attempted to limit or outlaw Chinese immigration, a policy finally enshrined in one of the first Acts passed by the newly federated Australian government in 1901.[27] Nonetheless, until the turn of the century, there were large Chinese communities on the goldfields and in Australia's major cities. 17,000 Chinese were working the Palmer River goldfields of North Queensland in 1877, and only 1,400 Europeans; by 1887, the Northern Territory had a population of 7,000 Chinese and only 1,000 Europeans. Darwin has been a Eurasian city ever since.[28]

For some protagonists, the racism directed against the Chinese seemed an economic imperative, part of an ongoing debate in Australia between capitalism and the unions, protectionism and free trade.[29] The *Bulletin*, Australia's premier weekly, insisted that "the badness of the Chinaman, socially and morally, is the outcome of his low wages"; they were, apparently, "jaundice-coloured apostles of unlimited competition."[30] But this was not just a debate about economics. The Chinese were vilified in language striking for its visceral hatred and excess. A pamphlet written by 'Humanity'—ironic pseudonym—was by no means unusual:

> The Chinese [live] amidst their evil surroundings, and their filthy and sinful abodes of sin and swinish devilry ... It would never be believed that our Saxon and Norman girls could have sunk so low in crime as to consort with such a herd of Gorilla Devils ...[31]

The notion of filth was evidently essential to this characterization. The Chinese were not only portrayed as evil, but as "filthy" and "swinish". Indeed, the imagery of the "dirty Chinese" was a constant refrain. Here once more is the

Bulletin, writing in typically purple prose for an 1886 special edition on "The Chinese in Australia":

> Disease, defilement, depravity ... these are the indispensable adjuncts which make the Chinese camps and quarters loathsome to the senses and faculties of civilised nations. Whatever neighbourhood the Chinese choose for the curse of their presence forthwith begins to reek with the abominations which are forever associated with their vile habitations.[32]

This is an evocation to make our senses reel. Undoubtedly ideas about health—about the dangers of "disease"—were intended to legitimize the *Bulletin*'s invective, but if we look closer it is apparent that health is here understood overwhelmingly in aesthetic terms. It is not merely the *unsanitary* nature of the quarters to which the writer objects, but the fact that they "reek" and are "loathsome to the senses". It is not in fact the health of the Chinese (or of the wider community) which concerns the *Bulletin*, but its impact on *our* senses. This is the essence of an aesthetic reaction: what matters is not the well-being of the subject, but their appearance to the observer. "Disease and defilement" nicely sums up this dichotomy: you may be diseased, but *I* am defiled by it.

The same conflation was made by the Sydney City and Suburban Sewage and Health Board, for whose 1876 Report five members inspected the living quarters of some of the poorest parts of Sydney, touring day and night for fifty-one consecutive days.[33] Yet although the inspectors did not particularly concentrate on Chinatown, the Board treated the squalor they encountered there as a trait of the Chinese community in general, and not a function of poverty. "If these people ever wash themselves, they do it by stealth," reported Alderman Chapman and Dr Read, going on to recount in lurid detail their experiences:[34]

> For the next forty-eight hours...the horrible sickly smell of opium smoking which pervades all the Chinese quarters seemed to adhere to us, to say nothing of the fear of infection, which is not a pleasant sensation.[35]

Leaving aside for the moment the question of opium, note for the moment that the critique of "the Chinese quarters" was of a "horrible" "smell". It was the assault on the senses of the observers that was of prime concern here and not the health of the inhabitants: the smell, after all, adhered "to us". In a world in which disease was understood to be transmitted through miasmas in the atmosphere, the defilement of the air was, of course, of no small importance. But, it was not the *experience* of infection that concerned the Board, nor was there any attempt to discern the extent to which infection constituted a real risk. Rather it was the *fear* of infection about which they expressed anxiety. This fear affected them, and not the Chinese at all. Again, the aesthetics of the observer appears to be at stake—*their* fears and sensations—and not the health of the observed.

Why is it that the Chinese were seen as "dirty"—why did the ideas of "disease" and "defilement" congeal in this manner? It was surely the difference of the Chinese, in their appearance and manner, their customs, and their sequestration in separate communities, which provoked such a powerful need to label and condemn, exactly as it has, time and again, in the oppression and characterization of other immigrant groups.[36] This is the power of prosopopoeia. In the experience of immigration, the metaphor of pollution and invasion—in short, of defilement—was literalized, finding expression in the language of health.

Dirt, then, was a rhetorical miasma for the transmission of sensory and symbolic meaning. Chinese market gardeners, for example, were accused of using unprocessed human waste—nightsoil—as fertilizer. This allegation received considerable attention during the hearings of the 1892 N.S.W. Royal Commission on Alleged Chinese Gambling and Immorality.[37] But was even this an aseptic question of health? In England and Australia, human waste, dried and processed, was often turned into manure.[38] And the use of the fresh waste of a cow or pig is

routine. As far as the vegetables themselves are concerned, nightsoil is simply a nutrient like any other.[39] But for a lot of people, more is at stake here than a question of nutrition. Our squeamishness about the functions of our own bodies betrays a broader concern, not with our physical well-being but our aesthetic comfort.[40]

Significantly, the Report of the Royal Commission accepted the evidence of its medical witnesses that "the objections often urged against the practice" had nothing but "a sentimental basis"; and the Chinese, for their part, denied ever partaking in the practice.[41] But those who saw the use of nightsoil as proof of the dirtiness of the Chinese would not be reassured. Many of the Commissioners, for example, stuck doggedly to a story they had heard tell, about a cabbage grown by "a Chinaman at Forbes" in which the manure had somehow, miraculously, been absorbed in its raw form right up into the head of the plant. Botanists and chemists gave evidence that this was impossible, but the Commissioners remained obdurate.[42] In evidence to the Commission, furthermore, much was made of the question of smell: the smell of this mythical cabbage, the differing smells of different types of manure—it was even said that water used to cook a "Chinese-grown cabbage" smelled differently.[43] Once again 'health', presented as if it were a purely 'scientific' matter, turns out to be about the *imagery* of cleanliness and the stench of pollution.

At times, more specific health arguments were used against the Chinese. With anti-Chinese sentiment at its height early in 1888, the 'Afghan' and three other ships arrived in Australia from Hong Kong, bearing a total of nearly 600 Chinese passengers. Those on board tried to disembark in Melbourne, and were denied permission to do so. They sailed on to Sydney, and again they were denied. There they waited, hoping vainly for a change of heart, while angry

crowds lined the shore and demonstrated against their presence, and the New South Wales parliament debated new legislation to ensure their exclusion. Finally, defeated, the 'Afghan' set sail, eventually returning in failure to Hong Kong.[44]

The actions of the governments of Victoria and New South Wales were clearly illegal, even under the suggestively named "Influx of Chinese" Restriction Act.[45] But Sir Henry Parkes, the great New South Wales Premier and "founding father" of Australian Federation, for example, appealed to a "higher law"

> to terminate a moral and social pestilence and to preserve to ourselves and our children, unaltered and unspotted.. to preserve the soil of Australia that we may plant upon it the nucleus of a future nation stamped with a pure British type.[46]

Note the contrast between purity and pestilence, soil and dirt. In this rhetoric, the question of disease was crucial.[47] The 'Afghan' was declared infected with smallpox, and flew the flag of quarantine. The refusal to land its passengers seemed then sound health policy. But the 'Afghan' had not been to an infected port. Furthermore, non-Chinese and, following an order of the Supreme Court of Victoria, fifty Chinese, too, were finally allowed to come ashore.[48] A strange disease, this, that was so discriminating in its contagion.

Smallpox was a disease closely associated with the Chinese. Phil May's infamous 1886 cartoon, "The Mongolian Octopus-Grip on Australia," depicted the Chinese as a giant octopus, "every one of [whose] arms, each of [whose] sensile suckers has its own class of victims or special mission of iniquity." Alongside gambling, opium, and "immorality" among others, we see the tentacles of "smallpox" and "typhoid" squeezing the life out of two white children.[49] The fear was undoubtedly real, but it was a fear of Chinese immigration as well as of disease. In the public mind, the two were inextricably linked. Even the phrase "yellow peril" suggests these connections, for if it is meant to arouse a fear of invasion, 'yellow' also connotes contagion, fever, jaundice, pus, and poison.

It is no coincidence that a disease like smallpox served the rhetorical and justificatory purposes it did. The effects of smallpox are immediate and visible. We may contrast it with a sickness like consumption whose wounds are purely internal, whose pallor seemed to accord with an entrenched ideal of feminine weakness, and which even acquired a certain glamour during the nineteenth century.[50] In smallpox, on the other hand, the pustules which form on the skin are disturbing and its scars are permanent. The horror of smallpox is in part a consequence of its ugliness. Furthermore, as well as being ugly, smallpox is extremely contagious. It was therefore a perfect metaphor for the pollution and violation which immigration itself was seen to represent.

Var. IV

Opium: From Disease to Depravity

Health, then, was used in a powerful way: its aesthetic aspects, concealed beneath the rhetoric of medical rationality, and its symbolic aspects, rendered literal, intensified and justified the fears of White Australia. The disgust these associations engendered became part of a whole racist folklore based on the image of the Chinese as squalid, as fæcal, as fœtid, as infected. There was nothing accidental about this. The anti-Chinese rhetoric of dirt and pollution, typical in places like Australia, was a powerful sensory expression of the metaphor of the boundary, treated as if it were a literal reality. Tropes materialize "in the real world in ways that are ethical, social, and political"[51]—and, one might add, in ways that are medical. Nothing better illustrates these imbrications than the question of the Chinese use of opium. Here we can see most clearly both the power of our senses in the very construction of social values and legal responses, and the grammar of the symbolic which generates it.

Of all the things that served to set the Chinese apart, their use of opium was the most horrifying to white Australians. From small beginnings in 1857, the importation of "prepared opium" increased dramatically through the century, catering to an almost exclusively Chinese market. Best evidence suggests that somewhere between fifty and ninety per cent of the Chinese population in Australia regularly smoked opium.[52] Australia, of course, was not a temperate society. Per capita, Australians were the world's greatest consumers of patent medicines, the active ingredients of which were frequently opium or a derivative thereof.[53] But the Chinese did not drink their opium, or take it in tablet form; it was their custom to smoke it, specially prepared in pipes and frequently in 'dens' fitted out for the purpose. Smoking was at once a private reverie, and a convivial activity. There were occasional users, and addicts, houses in which the smoking of an opium pipe was regarded as a social courtesy, and others in which it was serious business.

The opium smoker in his den was therefore a sign of difference, visible and constant. White Australia's hostility to Chinese opium use, though again typically framed in the language of health, betrays once more an aesthetic basis. When the *Bulletin* described the "shambling gait, glistening eyes, and trembling muscles" of an opium smoker, it intended to provoke horror in the reader and not sympathy.[54] And what are we to make of this description of the dangers of opium uttered in 1893 by the Victorian Minister for Health, himself a medical doctor?—

> Who has not seen the slave of opium—a creature tottering down the street, with sunken yellow eyes, closely contracted pupils, and his skin hanging over his bones like dirty yellow paper.[55]

We do not learn from Dr Scott what 'opium slavery' feels like, but rather what it *looks* like. The slave of opium was not a man but a "creature", "dirty" and "yellow". Do not these words seem familiar? This was simply the image of the Chinese we have already encountered, dehumanized, polluted, and discoloured.

The pollution of being Chinese and the odour of opium smoking here catalyzed: what was wrong with both was expressed and understood in aesthetic terms. The newspaper article which began "Disease, defilement, depravity..." contained this suggestive description of an opium den:

> Down from the fan-tan dens are stairs leading to lower and dirtier abodes: rooms darker and more greasy than anything on the ground floor: rooms where the legions of aggressive stinks peculiar to Chinamen seems ever to linger ... Yet the rooms are not naturally repulsive, nor would they be so when occupied by other tenants; but the Chinaman has defiled their walls with his filthy touch; he has vitiated what was once a reasonably pure atmosphere with his presence, and he has polluted the premises with his disgusting habits... The very air of the alley is impregnated with the heavy odour of the drug.[56]

The *Bulletin* judges difference aesthetically, and finds it wanting. In the alien environment of the crowded opium den, everything impinges upon the senses at once, strange and disordered, until only the sensation of dirtiness remains.

The sensory objection to opium, and it ran and still runs very deep, cannot be separated from its symbolic association with the Chinese. Indeed, opium is best understood as a metonym for Chinese immigration. Metonymy uses an evident or paradigmatic fragment or adjunct to represent something much greater than itself, just as the opium dens of Sydney or Melbourne were the highly visible face and the pungent presence of Chinese intrusion into the life of "white Australians". Opium was the tentacle that came to stand for the whole octopus.

We need to go further in our analysis of the role of the aesthetic dimension in the construction of these social values. *Why* did opium come to have this metonymic and metaphoric significance? Why not Chinese clothing or dress or religion? What was it about opium smoking in particular that transformed it into a symbol of *such* overwhelming negativity, in fact, that between 1891 and 1908 every colony and state of Australia outlawed its use and possession in language of unique and Draconian severity?[57]

First, certain aspects of the aesthetic experience of the drug, the sensory strangeness of opium itself, made it particularly well-suited to adopt the symbolic meanings it came to encapsulate for Australian society. It is not surprising that the *smoking* of opium should elicit this deeply hostile reaction. The imagery of the *Bulletin* was to some extent visual, using the familiar language of dirt and filth, of darkness and descent. But it was the peculiarity of the *smell* of opium to the European nose which in particular highlighted the difference of the Chinese, and stimulated revulsion. The "pure" atmosphere of the room was polluted by the lingering "aggressive stink" of opium; there was an odour, clammy and overpowering, which seemed to impregnate "the very air," just as the "horrible sickly smell of opium smoking" clung to the inspectors of the Sydney City & Suburban Sewage and Health Board.[58]

The olfactory system is directly connected to our emotions and serves as a powerful trigger of feelings. Smoking, moreover, is the one kind of drug consumption which most involves the observer. We experience others' smoke as we do not experience their taste or sight. Smells, moreover, physically challenge our sense of boundary: they escape, they are shared, they envelop—they do cling. The liminal and communal nature of the sense of smell is in itself a violation of autonomy.[59] An unfamiliar odour, even more so, violates the normal. A strange smell peculiarly associated with the Chinese was uniquely placed to become an important symbol of pollution and danger, and to find expression in the vocabulary of revulsion.

The second reason for the symbolic importance of opium lay in the mythology which surrounded it, a mythology which conflated not just dirtiness with disease, but dirtiness with depravity. Consider "Mr Sin Fat", a fictional opium trader whose story appeared in the *Bulletin* in 1888.[60] Mr Sin is the wealthy

owner of dens "reeking with the nauseating odour of opium and pollution and Chinamen, and always clouded with smoke." Already the boundaries between metaphor and reality, disease and defilement, have been violated by a series of conflations: smell and the senses; invasion and pollution; and the Chinese. Mr Sin Fat's particular pleasure is to entice innocent young girls into his lair, turning them there into hopeless addicts and sexual slaves. The story ends when one new victim turns out, unbeknownst to Sin Fat, to be the daughter of his 'wife': the latter finds out, and in a fit of rage stabs him to death with a pig-sticker.[61] For the *Bulletin,* no symbolism was too heavy-handed.

"Mr Sin Fat" is an image of evil, and his name says it all—'Fat' implies bodily unhealthiness, and 'Sin', moral unhealthiness. The *Bulletin's* main purpose was to link the two conditions. As Sin Fat flourishes and becomes more and more sinful, so too he gets fatter, until at last,

> he was fatter than fat, his obesity was phenomenal... Layers of blubber bulged about his eyes... and his mighty neck rolled almost on to his shoulders, and vibrated like jelly with every movement.[62]

Fatness, although also suggestive of prosperity and power, is portrayed as ugly just as the smell of opium is ugly, and that ugliness was treated as if it were not merely a symbol or metaphor of sin, but an unarguable sign of it.

Just as "defilement" was translated into the scientific correlative of "disease", then, "disease" became the visible and moral correlative of "depravity"—from ugliness to dirtiness, and uncleanliness next to ungodliness. Again, that metamorphosis was accomplished through the persuasive power of aesthetics: the ugliness of opium use came to *stand for* sin, just as we saw the ugliness of dirt coming to stand for disease. In both cases, the metaphors of an aesthetic representation have been literalized: defilement construed as if it really were a symptom of disease, and disease as if it were the stigmata of depravity.

The depravity which opium was alleged to encourage—in the Mr Sin story and indeed throughout the literature—took a specific form, for the defining myth of opium use in Australia last century was that (white) women who consumed it either lost all sexual control or became so addicted that they were unable to resist seduction. The *Bulletin*, to give only one example, argued that there was "only one possible result when a lustful and unscrupulous Chinaman is one of the parties and an unsuspecting, though perhaps instinctively cautious girl, the other". The effect of opium was, it was said, to enable "the criminal and sensual Chinese" to have their way with white women.[63]

> "I went to — —' place when I was only about 16 because he used to give me presents. He then wanted me to smoke, but I never would, because the pipes looked so dirty. But one day he put a new pipe before me, and made it ready, and after the first whiff from it, he or any other man —— —— —— — — —. I was completely at their mercy, but so help me God I was a good girl before that."[64]

Despite the repeated denial of this mythology,[65] the fanciful attribution of near-magical powers to a drug found in no less potent form in any number of commonly-available patent medicines continued to have a powerful hold over the minds and imagination of Australians. This mythology made opium not only into a metonym for the evil Chinese, but into a scapegoat for them. To understand the reason that opium exerted this symbolic power, we must return to the idea of a metaphor. For what fear did this address, and seek to explain, after all, but *miscegenation?* Miscegenation—inter-racial or inter-tribal coupling—has always been a key question of social organization, girt round by rules and regulations relating to its prohibition or authorization. What greater violation of the community's boundaries could there be; what more disturbing affront to the sensibilities of a homogeneous and prudish society?

It is entirely predictable, therefore, that the fear of cultural and social change which Chinese immigration raised should be most intently concerned with sexual relations between Chinese men and "white women". And in looking for symbols through which to express this fear, what could be more appropriate than "prepared opium", a drug (that is, already a metaphor of violation and loss of control) identified uniquely with the Chinese? Opium was in fact the ideal metaphor through which to express those fears of invasion, boundary violation, and pollution, which Chinese immigration raised, which the spectre of miscegenation epitomised, and which opium had come to symbolize. The result was a potent amalgam between fear, the symbolic forms of its representation, and the sensory forms in which it was expressed—a formula for value-creation much stronger than reason.

Var. V

Drugs: From Objects to Symbols

The hostility which the use of opium generated had little to do with its dangers as a substance, but lay, rather, in the mutual amplification of sense and symbol which characterizes the aesthetic dimension. The result was an influential metaphor of boundary violation, of infection, literalized into an objective and medicalized discourse. A complex interplay of reference and reverberation was at work: between immigration and the metaphor of boundary violation, between metaphor and sensory reaction, between the feelings of the senses and the discourse of health or morality. The strength of this interwoven web provided it with the power to construct and reinforce values about the use of 'drugs', which continues to be of enormous significance. For in Australia, as in Canada the United States and elsewhere, the association of the Chinese with opium was the beginning, in many ways, of the modern legal prohibitions on 'drug' use.[66] And a consideration

of the role of the aesthetic dimension in the construction of social values and legal responses, remains relevant.

There is something to explain here. Around the world, there is an awful sameness to the offences and penalties which control the use of substances such as cocaine, marijuana, and the opiates (including opium and derivatives such as morphine and heroin)—a sameness not of specific content, but of character and ferocity. In the Philippines and Jamaica, in Malaysia and Singapore, drug trafficking is an offence punishable by death. In the several States of Australia, the trafficking of a "commercial quantity" of a drug may typically lead to a penalty of 25 years' imprisonment and in addition a fine of up to $250,000. In some jurisdictions the guilty are liable to $500,000 fines and to life imprisonment.[67] In Canada likewise, and in the U.K., trafficking in a narcotic drug or even possession for that purpose are punishable by life imprisonment. As Bob Solomon and S.J. Usprich have argued, the *Narcotic Control Act* (Can.) and its many analogues are extraordinary, not simply due to the severity of particular provisions but through the fact that so many exceptional devices are therein harnessed together.[68] Other laws also provide for harsh penalties; for mandatory sentencing; for a reverse onus of proof, requiring defendants to prove their innocence; for expanded police powers of search and seizure. Only in 'drug' laws, however, do all these measures coincide. The result is that modern drug laws are a collection of extravagances, an expression of fury in legislative form.

The smoking of opium, as I have noted, symbolized the transgression of boundaries. The same is true of the odour of marijuana: we can close our eyes but not our nose.[69] Smoke connotes contagion and invasion. What of the needle? No other image so pervades the field of drugs. From lurid airport paperbacks with embossed and gilded covers, to grey and scholarly monographs; incorporated into

the logos of a hundred earnest organizations and conferences, and undoubtedly in the mind of the public, the needle is the very cenotaph of illegal drug-taking. Neither necessary for the consumption of any substance nor even the most common means of facilitating its use, the image of the needle exerts a fascination out of all proportion to its significance. A syringe, made of plastic; a tapering tube, hollow at one end, at the other a plunger. Into this is placed a very thin tube of metal, sharp yet hollow, which can be inserted under the skin. Now it will work; it will act as a medium between the outside world and the inside of our bodies. It will propel heroin or morphine or a million other chemicals directly into our bloodstream.

Whether the syringe is sterile or dirty, whether it is administered in a hospital or a doctor's surgery, in the comfort of a bedroom or on some cold ceramic floor, whether you inject yourself or have a nurse in a white gown or a lover do it for you—whatever the context, purpose, and environment, it is still an experience of powerlessness, to submit to it; of discomfort, to undergo it. Do you *look* at it puncturing your arm, watch it disappearing under the surface of your skin? Or do you rather look away or close your eyes in discomfort? What then accounts for this aversion? Surely not the pain itself which is, after all, not that great. Is it not rather the fact of bodily violation itself, which disturbs? This unnatural invasion governs our understanding of the injection of drugs and although in certain well-defined medical contexts we are prepared to ignore our revulsion, there is no such charity for the illegal drug user. The hypodermic syringe is the ultimate boundary violation. It is, to return to Mary Douglas, 'metal out of place' and the drug user, by definition, polluted.[70]

Indeed, the virulence of the reaction to much other drug use besides, is born directly from the way it transgresses our understanding of boundaries. Why does

there seem to be something particularly unpleasant about glue sniffing, which is such a problem in some Australian aboriginal communities, or in the sniffing of gas from pipelines running across Inuit territory, or in the drinking of Lysol or methylated spirits?[71] Partly, perhaps, because of the desperation it suggests amongst those who would do such a thing. But, then again, why do we think this behaviour desperate? Because such drug use utilizes, for a very different purpose, something whose function we had thought to be clear . Glue and disinfectant have their place in all our houses, but their use as intoxicants threatens, as cocaine use or pill popping do not, the boundary between the normal and the abnormal, and undermines the safe roles they have been assigned in our world. It is a threatening example of matter out of place.

The olfactory violation of smoking, the visual and tactile violation of injection, or the violation of normality, all generate a powerful sensory response out of the challenge to boundaries which they symbolically represent. To carry further this idea of the boundary, consider the question of ritual, in which, of course, illicit drug use is embedded. In this case, it is not the dismantling of boundaries but their unwanted construction which provokes fear and hostility. There is always a certain discomfort occasioned by being present at an alien ritual. The non-believer sits in church, shifting self-consciously in his pew. The guest at dinner wonders awkwardly whether there is going to be grace before dinner, and which fork to use, and whether to ask for seconds. Traditional behaviour and rituals of all kinds bind a community together—but simultaneously they create a boundary against outsiders.

The strangeness of others' rituals alienates us, and often particular objects used in those rituals become symbols for us of that alienation. Unfamiliar in appearance or function, they highlight our ignorance of the practice which

incorporates them. We are left with things, divorced from meaning, whose function and relationship we can scarcely guess at. The series of photographs and illustrations which accompanied the 1980 Australian Royal Commission Into Drugs provide a good example.[72] The pictures are very discomfiting: full of unusual objects, or objects in unusual contexts. A radio next to a bag of heroin; a collection of bloated condoms. But there is no effort at explanation or contextualization here. In fact, there are no people in these pictures at all, only objects: agents of corruption and places of secretion. This photo-essay draws attention to the *mystery* of these objects, the uses of which remain perplexing and alien.

Drug paraphernalia may generate the same feelings of disgust in us, which is perhaps one reason why there are often specific statutory provisions which allow for their confiscation and make their possession an offence.[73] In the U.S. Supreme Court case of *Harmelin* v. *Michigan*, Justice Kennedy wrote that the petitioner was found with the "trappings of a drug trafficker,"

> including marijuana cigarettes, four brass cocaine straws, a cocaine spoon, 12 Percodan tablets, 25 tablets of Phendimetrazine Tartrate, a Motorola beeper, plastic bags containing cocaine, a coded address book, and $3500 in cash.[74]

Seen in isolation, these objects are not exclusively the trappings of the trafficker, but they build an intimidating portrait of their owner through their juxtaposition. There is clearly an aesthetic reaction here to the mere conjunction of these items whose use is mysteriously specialized ("four brass cocaine straws"—the brass suggesting a hidden culture of drug use whose very refinement is contemptible, just as the Puritans found so offensive the ornate and intricate artistry of Catholic icons) and a perversion of the normal (tablets of Percodan and Phendimetrazine, a "coded" address book: even "a Motorola beeper" takes on a sinister professionalism). Justice Kennedy fears a practice of which he knows nothing and

which somehow finds a use for straws fashioned of brass and a Motorola beeper. It is an objection founded on these objects and their puzzling conjunction.

A needle and a rubber coil; a collection of brightly-coloured pills; a rolled-up dollar bill and a mirror. These powerful images seem to outsiders a strange and even random assortment of objects. The peculiarity of their association emphasizes the existence of rituals to which we are not privy, and through which these objects gain coherence and meaning. Our hostility to such mysteries is as emotional and potent as that which the Incas and the Aztecs must have felt at the arrival of men carrying incense and crosses—objects whose symbolic power they could sense but whose meaning they could not fathom.

The Boundaries of Metaphor:

Var. VI

The double-sided symbol

The social hatred of "illegal drugs" to which the legal system gives a very clear expression, is born of a reaction to images, sensory experience, and objects of drug use associated with the metaphor of the boundary. 'Drugs' have come to symbolize belonging and not belonging.

But this alone is inadequate to explain the hostility which illegal drug use everywhere confronts. It is the *ambiguity* of this symbolism, the multiple and contradictory meanings which in fact it encompasses, which is problematic. Because its meaning is typically not made explicit, a symbol never just means one thing to everybody: it is open to many different interpretations, depending on its audience and context. The richness of symbolic meaning comes from its flexibility, its freedom, its evolutionary potential, its lack of denotative rigour.

Symbols are, in fact, "*potential* bearers of meaning". This is the other side of the symbol, and it is important to understand it, in order to get to the heart of those social battles which are "contests fought in metaphors."[75]

As Elaine Scarry argues, the same is true of battles fought in the physical dimension. For war, like law, is not merely an exercise in brute force, but rather a series of symbolic acts. Death and mayhem here have great symbolic power, but for each side the meaning of these sacrifices are different—the loss suffered for the sake of 'freedom' or 'anti-communism' by one side, represents 'ethnic community' or 'anti-colonialism' for the other. Consequently, the human sacrifices of war are symbolically ambiguous, and it is only when the war is finally over, when the veterans limp home to endure the ticker-tape and tele-movies, or the silence, that the winning side appropriates the rhetoric of death for itself. The memorialized dead and the injured serve, then, as a visible reminder of the meaning now ascribed to symbols and issues previously in contention. The intensity and violence of war is to be understood not simply as an exercise in power or as politics carried on by other means, but as a dispute over symbols.[76]

Political disputation in general is no different, where "the prize is the capture of a core of accepted implications which will support further metaphorical elaboration, and may, at length, become part of what we mean when we talk about the primary subject of these metaphors."[77] Behind "the war on drugs" lies precisely this symbolic ambiguity and dispute centred around the metaphorical field of the boundary. Boundaries, after all, have at least two sides, although we often wish to keep one hidden from view. So much is immediately evident with respect to the question of ritual. Inherent in any ritual is its doubleness, which serves to define insiders who know what to do, and outsiders who do not. The needle is also invested with double meaning, depending on whether one is an

insider or not. Illicit injection might appear to symbolize death, and pain, and danger. But from the tain of the mirror, within the community of heroin users, in particular, the symbolic meaning of the act of injection is very different.

First, the very aspects of discomfort and violation which account for the negative connotations of intravenous injection have been appropriated by users. As with rituals involving the commingling of blood, the very difficulty and unpleasantness of the procedure becomes a boundary and proof of the commitment of those who wish to traverse it.[78] The willingness to tolerate invasion is appropriated as a rite of passage, a way of setting apart injection from ingestion. Finally, the user may well become addicted to the feeling of injection itself. This is why there are many different levels of heroin users: there are some who do not inject, and some who inject subcutaneously but not intravenously, and still others who do not inject themselves but get a partner to do it for them.[79] Each is a step along a gradual course towards self-identification as a heroin user. The ability to self-inject marks graduation.

Secondly, the image of injection has been radically re-interpreted within the culture of the needle. From the outside, it looks like death and harm. From within, it connotes sexuality. Sex and death are already closely linked: for example, from the point of view of the connections between sex and disease (syphilis then, and AIDS now); and because of the connection between the procreative urge and the desire for immortality. More generally, the intensity of physical experience in sex reminds us, I think, of our corporeality, and our mortality.[80] "To die" was in days gone by a common euphemism for orgasm.[81] That moment of bodily singularity was, and is, the savour of life and a foretaste of death.

The use of sexual metaphors to describe intravenous drug use is common. The phallic needle, the act of penetration, the orgasmic experience of the rush—this

much is obvious; undoubtedly a stereotypical and heterosexist view but very commonly expressed amongst users. But rather than being merely analogies which one might observe, these homologies are central to users' understanding of their experience. For many users, the act of injection has the same memorable and life-changing quality about it as a first sexual experience:

> I fell in love with heroin that night in my good friend's house. I felt very secure. Like I wasn't alone any more. I realized that things wouldn't be the same for me, now that I've used the needle.[82]

Injection is an invasion, certainly. So is intercourse, and equally compelling for many people.

The sexual nature of injection is particularly marked in relation to the sharing of needles. Some writers have emphasized that there are pragmatic reasons for needle sharing: they are often scarce, in many places even their possession is illegal, and for heavy users the desire for an immediate hit can overwhelm a sense of caution. In general, the availability of the drug rather than the availability of needles governs the behaviour of many users.[83] Whatever the functional needs which may have given rise to needle sharing, however, it has become a cultural practice of some significance. The neophyte is almost always injected by somebody else, a more experienced user, with their equipment.[84] For many users, sharing and subjection remain the normal mode of proceeding long after. The sharing of needles, and, in particular, submission to the needle of another, have become acts rich in sexual overtone. Here the symbolism of penetration and of rush is most persuasive; the feeling of sharing and intimacy it evokes most compelling; and the quality of submission in the injected partner most marked. Accordingly, needle sharing tends to be gendered in a fairly stereotypical way. Most women never shoot up alone, and a majority always share; about half of all women users, but only 5% of men, are tied off and injected by somebody else.[85]

The intimacy of needle sharing is not simply sexual. Certainly, heroin lessens libido, and injection with a partner may become a substitute for sexual activity, not only metaphorically but physically.[86] But more than this, "running partners," who seek out, purchase, and consume heroin together, develop an alternative intimacy. The blood-brotherhood of needle use—furtive and taboo—is further strengthened by the experience of heroin use itself, through which partners begin to develop a shared physical rhythm of life, getting high together, suffering withdrawal together.[87] This is the double-sidedness of the injection: what seems to be horrific from one perspective is seductive from another. Just as the power of drug imagery to conjure up revulsion and horror explains the deep-rooted hostility to those who transgress the boundary between medical and non-medical use, so too the *alternative* imagery and symbolism of the drug user explains the dogged continuance of transgression.

There is a third aspect to the ambiguity of symbols, one only infrequently commented upon. It is not enough to draw attention to conflicting interpretations of the needle by mainstream and mainline culture. For the needle holds an ambiguous symbolism *within* mainstream society, too. Although the needle connotes bodily invasion, it also symbolizes the curative properties of technological medicine. You submit to the needle as you submit to doctors, and in return science cures you. The needle is thus a symbol for both the powerlessness of sickness and the promise of health. As Scarry and Douglas would both emphasize, the internal contradiction here, the very fragility of the boundary between good and bad, makes it vital to jealously control the meaning of the needle. But the use of the hypodermic syringe in illegal drug use undermines that control, and the very ease with which it is able to do so is part of the danger it represents. This is the essence of a nightmare: day's comfortable shapes made

ominous by night. In that ambiguous object, the needle, nascent strangeness breaches the ramparts of normality.

Do not think for a moment that *revulsion* is a kind of uncomplicated rejection. That which revolts us is not simply ugly or hateful. Horror movies, pornography, and drug use may all be 'revolting', but all have their adherents. Revulsion arises from a certain kind of fascination, at times appalling, but perhaps at other times quite compelling. We are not aloof from the culture of the needle, from its sexual enticement, its secrecy and its violation of social order. Revulsion against the images of drug use belies, I have no doubt, a certain primordial allure. Almost immediately afterward comes the horror of ever having had that thought. It could be then, that revulsion is the experience of being caught looking; of seeing in the object of your revulsion aspects of your own character or shared humanness which you would rather deny. There is, after all, nothing so vociferous as denial.

Var. VII

From Other to Self

The central thing to understand in this conflict over symbols is that it is not simply a conflict between 'our' interpretation and 'theirs', self and other, but a conflict between two alternative ways of looking at the boundary, and indeed at the meaning of drug use, which are inherent within our *own* way of looking at the world. The prohibition of drugs, therefore, is the exile of part of ourselves. The needle is a specific example of this paradox, the metaphor of the boundary a more general one. *What* boundaries do drugs seem to violate, by their smoky embrace, by their steely intrusion? I think one answer to this question is that drug use is feared as a challenge to the boundaries we have erected between mind and body, reason and emotion, self and other. The modernist Western concept of the mind

entails a number of related themes: a dichotomy between the mind and body and the greater importance attached to the former in our self-identity; the mind as an individual and abstract faculty; the equation of its 'natural' and 'proper' state with clarity and rationality. Any deviation from this norm constitutes a deterioration in condition. Drug use challenges exactly these assumptions. The experience of drug use is at times one of intimacy and community, as we have seen; it has been defended as a means of expanding consciousness; or at least as a way of escaping the constrictions of the rational self and the everyday world.[88]

Our aesthetic horror of drug use arises because of the importance we attach to maintaining inviolate the integrity of the self and of the mind. But this boundary is also double-sided. We do not always yearn for self-control and autonomy; we are more complicated creatures than that. As Friedrich Nietzsche put it, Western culture since the time of the ancient Greeks has struggled to accommodate both Dionysus, representing the irrational and the ecstatic, and Apollo, god of order, rationality, and discipline.[89] Both appeal to desires deep within us. Unreason may threaten disorder, but in the tain of the mirror it also promises liberation and illumination. Above all, the dominant aesthetic of the mind is based on a selective view of what constitutes normality—a model of conformity which, like the dominant paradigm of beauty, denies much that is human. Andrew Weil, in his ironically titled *The Natural Mind,* argues that altered states of consciousness *are* a natural human desire and experience.[90] Sleep, dreams, daydreaming, meditation, and trances are all manifestations of changed consciousness; the child who spins and spins until the world spins with her is experimenting with her mind as much as the drunk or the religious ecstatic.

In most cultures, these desires are channelled into carefully organized rituals, in which there is often extensive drug use by some persons or on some occasions as

part of the spiritual and emotional life of the community. Often these drug-induced experiences, which may last days or weeks, have profound significance and poetic rhythm.[91] In our culture, the Cartesian model of mind and being is so strong that, by and large, we suppress the ecstatic altogether. The contradictory messages which the symbols of boundary and the transgression of boundaries therefore evoke are not simply challenges to the social order from 'outside', from deviants or social pariahs. The same conflict is to be found within us, in our shared values, in a culture which is, like all cultures, by its very nature ambiguous and argumentative.

A musical metaphor may help us recognize that these contradictions can be synthesized, for music too is one of our most important expressions of intimacy and community, expansion and escape, embodiment and emotion. Towards the end of Rachmaninoff's *Rapsodie sur un thème de Paganini,* there is an epiphany. Suddenly, the intensity and agitation of Paganini's original theme evaporates and a new theme emerges out of the cocoon of the old, harmonically clarified, transparent, and with breath-taking calm.[92] This variation sounds fundamentally different, and unrelated to its predecessors, but it is in fact exactly an *inversion* of the original theme. Where the original theme rises a certain interval, the inversion descends by the same amount, and so on. This is the substance and process by which this new variation is developed: the world turned upside down. It comes as the revelation of a hidden truth, a transubstantiation. After waiting for over a century buried deep within Paganini's theme, yet always there for those who cared to listen, Rachmaninoff at last reveals to the world a tranquillity and introspection that serves to contrast and in fact to resolve the original. Was this metaphor always there, hidden in the theme, or has the variation generated something entirely new? This is the paradox and the gift of the *Rapsodie*: by embracing its opposite, it makes of itself something greater than it ever was before.

The *Rapsodie's* inversion comes from within. This is why the problem of drugs is specifically a theme and variations, and not just a metaphor: the maintenance of the boundary, which generates the aesthetic reaction we have seen, seeks to keep out something which is already deep within us. The hostility with which 'drug' use is seen in the west, however, stems from the denial of our Dionysian desires and from a monolithic dogmatism about what constitutes the natural. Drug use blurs the lines between mind and body, rational and irrational, self and other. The symbolic war on drugs is fought against that unsettling blurring of boundaries. But there is an alternative to this war. In both its organic nature and its ability to reconcile the contradictory, the *Rapsodie* argues for an approach which is ethical no less than musical. It tells us, and the idea of the Jungian "shadow" is close to the surface here, that our opposite, the "other", is not an alien, but an aspect hidden within all of us.[93] Our inversion is within us not beyond us. And the peace which the *Rapsodie* achieves also illustrates the possibility of the Hegelian ideal of the dialectic, in which both shadow and light are incorporated into new stages of development.[94]

Var. VIII

From Symbols to Fetishes

Analyzing the drug debate requires a trip to the aesthetic dimension: an appreciation of the symbolic meaning of drugs, and an acknowledgment of the ineradicable ambiguity of that symbolism within all of us. This epistemological approach to aesthetics has focused on the kind of social meaning which has driven the development of drug policy in Western countries such as Australia. It is an approach which gives us a richer understanding of why the present regime of drug laws has come about, the kinds of concerns they actually express, and why they

will always be doomed to failure. We cannot prohibit drug use because we cannot prevent the expression, by many people, of a natural human desire, though for many of us it exists as an unacknowledged shadow. What stops us, therefore, from recognizing the metaphorical nature of social attitudes to drugs? What prevents us, furthermore, from giving to "drug users" the respect and tolerance which they are owed as people like us?

The problem lies in the literalization of metaphor. Consider the obsession which rules the life of someone addicted to 'drugs'. The life of the user is completely absorbed by the discovery, procurement, and consumption of the drug—it is a full-time occupation that, often enough, leaves little room for other thoughts.[95] Indeed, the drug experience itself becomes so focused on the apparatus that surrounds it, that this equipment and not the substance itself comes to actually cause the physical high.[96] Ironically, for heroin users in particular, the needle and not the drug is the *sina qua non* for the rush they seek. In this limited gaze, even the human body becomes an object to be understood in relation to the needle and the drug. Long-time users stare with envy at those whose veins are fresh and new.[97] This is the culture of the needle, and indeed the culture of the vein.

Desire is intensified into obsession and fixation, leaving in its wake a trail of illness and death. One way of describing this is as a *fetish.*

> Irreducible materiality; a fixed power to repeat an original event of similar synthesis or ordering; the institutional construction of consciousness of the social value of things; and the material fetish as an object established in an intense relation to and with power over desires, actions, health, and self-identity of individuals whose personhood is conceived as inseparable from their bodies.[98]

A fetish, then, is an all-consuming passion for a symbolic object realized in material form. It is no longer metaphor, or variation, but mindless and literal repetition. The fetishist comes to associate some bodily pleasure with a mute

object, and eventually cannot find satisfaction without it—it alone has the power "to repeat an original event." The same is often true of the drug user. But such a fetish, a crippling metastasis, is merely another example of the literalization of metaphor. The real desires and the real problems which drug use expresses, are *concealed* because the user treats a symbol of pleasure as if it were the sole cause thereof. In this process, the drug object—a metaphor and a means—becomes the fetish of his or her desire until eventually no satisfaction can be achieved without it. Drugs, as Weil insists, "have the capacity to trigger highs; they do not contain highs."[99] But the victims of prosopopoeia forget this truth.

How does *the law* see drugs? As we have seen evinced by the severity and detail of legislative provisions, there is a fixation in the law with certain drugs. Neither is it the use or harmful consequences of these substances which occupies the law. Simply their possession or sale brings about the intervention of the legal system. With rare exceptions the law penalizes the act and not its mere potential: we do not punish the murderer for possession of a knife or the coster for his blackjack. Still more so is this apparent in the field of health law. Smokers are prevented, if at all, from smoking in designated areas; the alcoholic is punished for the consequences of their act, drunk driving or public nuisance. But who would provide a jail term for the possession of cigarettes in an airport, or whisky in a car? Yet that is exactly the structure of the law of possession, which penalizes not the harmful consequences of drug use, nor even the fact of use itself, but merely the possession of the goods. When we do see the crimes for which similar provision is made—the possession of machine guns, stolen property, or state secrets—we begin to see the company which drug users are treated as keeping. In other words, the law is focused not on problematic behaviour but on the drugs and equipment themselves. The gaze of the law is directed not on people but on things; not consciousness but needles and powders mark out the scope of its vision.

The law sees the world the way the addict sees the world. They share a world view which literalizes the metaphoric. The legal system, much like the drug user, has succumbed to a fetish, believing in its magical potency and thinking that the only answer is to prohibit it absolutely—to outlaw high heels, or leather ... or dried weeds. Prohibitionist legislation, like the addict, thus treats the symbols of bodily, mental, and social boundary-violation as a reality and fixates upon them. Would our concerns about the traversal of boundaries disappear if drugs vanished from our lives? Of course not—there would still be alienation, and unhappiness, and desire; the Dionysian would still seek a precarious voice in our lives; the mind and body would still seek, in some of us at least, release from their rigorous compartments. These contradictions in our society would find a new symbolic expression, and perhaps in a few years we would be railing about the evils of addiction to video games and virtual reality: that may happen in any event. Yet law's drug fetish prevents us from seeing where our fears really lie, which is to say, it prevents us from seeing ourselves.

To take *sides* in this ritual conflict between the law and the drug user is to miss their deeper parallels. Just as we have already seen in relation to the internal contradictions of the needle, and of the mind, it is a mistake to see the law and the user as opposites. If the legal system expresses a *repulsion* of illegal drug use, this is exactly because of the hidden similarities of their position; because one is but an organic *inversion* of the other. For, significantly, the legal system has given birth to the addict, precisely as Pietz noted that the fetish was "the institutional construction of consciousness of the social value of things." The institutional and legal construction of deviancy *creates* identity.[100] We understand a person who uses drugs as "an addict" or a "drug abuser", a focus on one aspect of their life which serves, without more, as the explanandum for any and all supposed behaviour patterns no matter how improbable. "The drug abuser" does this, "the

drug abuser" does that: it is an *anthropological* approach which entitles the observer to ascribe difference without ever having to explain it or put it in context. The effect is that, in and around that one aspect of their life, an identity is created for "the addict" which they, no less than the rest of the community, adopt. In the throng of images which help us determine what to look for in the world and how to see it, the law is by no means unimportant. The gaze of the statute invites a like gaze in those who come in contact with it. It is not only true, then, that the addict and the law share a fixation, but, by fixating on the specific objects of that addiction, the legal system perpetuates it.

Contemporary drug legislation thus fuels the very fetish it desires to destroy. It constructs a literalized image of drug users. It ignores the natural desires which drug use expresses, whether for intimacy, community, liberation, discovery, or transcendence. It ignores the serious problems which drug use may express, whether of poverty or oppression, and there, too, sees only secondary manifestations of those problem—needles, powders, and weeds. While the abuse of drugs therefore stems from the belief that certain desires can only be satisfied chemically, the law itself actively promotes that belief, ignoring both the real desires and the real problems, and fixating instead only on the chemicals which have come to symbolize them. This concerted imagery has a normative effect: the statute's fetish becomes our fetish; its metaphors our metaphors.

We do not have to fall into the trap of the false dichotomies of the boundary, nor adopt the prosopopoeia it invites. The power of the aesthetic lies in its ability to convert the symbolic to real and sensory form, and we have seen the influence of this power in the construction of social values and legal responses. But the point of a metaphor is the insight it gives you on the issue or thing it is illuminating. Once we lose sight of the original issue and argue only about the metaphor, then, as

Benjamin Cardozo wrote, what started out as a device to liberate thought, has ended up enslaving it.[101] Literalization is a corruption of metaphor which arises from the ignorance of its use. This is what has happened with drugs: as a consequence of *concealing* the metaphoric meaning of drug use, the metaphor has become literalized. On the one hand, drug use is frequently a symptom of poverty, alienation, and abuse: it does not *cause* any of those things. On the other hand, addiction likewise resides in the mind and personality of the user and not in the substance.[102] In both cases, we do ourselves no favours by focusing on the chemical substance as if *it* were the problem. The reality of social change and conflict has been displaced by literalized metaphors, the broader context ignored at the expense of metonymic fragments, and scapegoats manufactured to avoid confronting deeper causes.

Var. IX

The inter-relationship of senses and symbols in the aesthetic, and the power it exerts over us, must be felt from the inside. So too the difficult promise of the incorporation of otherness which metaphor makes, and the fear which thus accompanies it. Listen to the organically emerging tension and resolution of the Rachmaninoff; listen to the metaphoric richness and variety of the Brahms; then listen, again, to the fanatical insistence of Paganini's last *Caprice*. Can you hear it? Can you hear the force and attraction of the aesthetic?

Variations are not simply repetitions—they are not fetishes. But one may easily elide into the other. What is a series of variations but a structure of constant and elemental obsession? A theme and variations requires an intense focus on narrow and unremitting thematic material. It focuses on a single musical object to

the exclusion of all distractions. Play it again. Play it again. Play it again. The line between continuation and repetition, interest and fixation, is slight indeed.

The Paganini, for example. Why have so many composers found it necessary return to a theme which has little but energy to recommend it? Why this itch that so many composers have found irresistible to scratch? The answer is that the fury and magnetism of the theme makes it a perfect partner to the form: the two aspects, form and instance, symbol and sense, amplify each other. The theme goes around in your head incessantly, *demanding* repetition. After an hour or so of this, an hour of twelve or twenty variations, nothing but the feeling of being in the music remains. This is as close as music comes to an altered state. But far from exorcising the demon theme, such surfeit has only buried it deeper in your unconscious, and left you aching for more.

Obsession, which is the variation form's temptation, is perfectly matched to the obsessive character of Paganini's theme, simple and rhythmic, but for that very reason nagging, absorbing, and finally mesmeric. And this theme was itself perfectly matched to the personality of Paganini, a character frequently described as diabolical or mephistophelian. Perhaps the greatest virtuoso in the history of the violin, he was a man so jealous to preserve the secrets of his skill that, despite his undoubted ability, he published relatively few compositions. His legendary virtuosity is nowhere more apparent than in the *Capricci* with which he announced his presence as a composer to the world. The final theme and variations in particular reflected, both stylistically and technically, his own obsession in pursuit of accolades and fame. And found the satisfaction fleeting and the desire unquenchable.

The theme and variations, then, is a metaphor for metaphor, and Paganini's *Caprice* its paradigm. But it is also a metaphor for and a musical articulation of the

dark side of compulsion and caprice. In the progression of a symbol or metaphor into a *idée fixe*[103] (both within a single series of variations, or in the constant return to the theme by generations of composers) lies the danger of addiction: we find ourselves absorbed by a single symbol, focusing on one object of desire, to the exclusion of all else, around and around until all other reality is excluded and one theme, constantly reiterated, takes over our lives. Metaphor is an invaluable tool in the creation of meaning, but the peril of literalization also awaits us there, awaits the drug user and the drug lawyer alike. Listen to what the variations on a theme of Paganini tell us. Its structure, its musical character, its authorship and its history all express simultaneously the laudatory and the cautionary, the creative and the perilous power of aesthetics.

The fact that the aesthetic dimension is a *force* in our lives makes it both creative and perilous, a source of metaphors and the origin of fixations. This raises the central question of judgment. For finally, how can we tell the difference between the literal and the metaphoric, the variation and the fetish? When does symbolic meaning and sensory power stop being an important part of how we understand the world, and become a rhetorical ploy or a way of playing on emotions? If the aesthetic is such an important part of our lives, then what is wrong with anti-abortion activists, for example, focusing on "the silent scream" or the feet of aborted foetuses?

These are difficult questions. The aesthetic dimension, I have argued, is a way of seeing, a way of reading, and a way of knowing. Whether this methodology and epistemology is used to advance good values or bad ones is a different question, a question of how we apply our sense of justice to the interpretation and construction of the law. So far, then, the aesthetic dimension has told how to recognize but not how to choose *between* aesthetic values. It has

provided, in other words, an explanatory but not yet a normative model. At the end of the *Requiem,* I tentatively argued that adopting an aesthetic perspective does nevertheless support a particular approach to the question of the death penalty. Can we go further than this? Is there a normative element to the aesthetic—does it tell us not only how we judge and what we judge, but what the outcome of that judgment ought to be? The final two chapters further address these issues. The aesthetic dimension will give us new insights into the debates of contemporary legal theory, and will guide us towards a legal theory, pluralist and critical, which is in tune with the aesthetic tenor of the age and which, moreover, takes aesthetic values seriously.

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1 The many sets of variations on Paganini's theme provided me with a choice of models for the structure of this chapter. I finally settled on Sergei Rachmaninoff, *Rapsodie sur un thème de Paganini pour Piano et Orchestre,* op. 43 (1934). There were a number of reasons for this. Two in particular are worth mentioning. First, his use of a "precedent" variation *before* the first exposition of the theme seemed a good way of describing the structure of the first few pages of this chapter: a variation before I state my theme. Second, the famous inversion of Paganini's theme, the *Rapsodie* which is at the heart of his composition (Var. XVIII), provided an inspiration for one of the most important sections of this chapter, Var. VII, in which I discuss the idea of "inversion" in relation to metaphors and boundaries.

2 One may distinguish the 'naturalness' of the theme and variations from those forms which were purely musical in origin, such as sonata or rondo form, or the concerto. While these forms hardly survived the structural freedom of the nineteenth century, and are, in the age of postmodern compositional techniques, rarely used in a recognizable fashion, the form of a theme and variations continues to provide a structural anchor to the most diverse compositional styles and intentions.

3 J.S. Bach, *Chaconne in D minor* from J.S. Bach, *Partita in D minor for solo violin,* BWV 1004 (1720); J.S. Bach, *Goldberg Variations,* BWV 988 (1742). Of the symphonies of Ludwig van Beethoven, examples include the *Andante con moto* from *Symphony No. 5 in C minor,* op. 67 (1809), and the *Allegretto* from *Symphony No. 6 in F Major,* op. 68 (1809). Significantly, the last three *Sonatas* for solo piano, op. 109, 110 & 111 (1822-3), unparalleled in their depth and intensity, are each centred around a theme and variations increasingly complex in nature. In fact, Beethoven's last word in the genre of a piano sonata, the final movement of the opus 111, is a theme and variations, mystical and expressive of an almost religious ecstasy.

For a survey of the development of variation form, and a detailed bibliography, see S. Sadie, ed., *The New Grove Dictionary of Music and Musicians, vol. 19* (London: Macmillan, 1980) at 536-56.

4 It is no exaggeration to say that the whole genre is built on the concept of a theme and variations: typically, the main theme is stated by the ensemble, and then a series of variations are developed, each demonstrating the capacities of a different instrument or performer, followed by a final variation-cum-recapitulation. The harmonic (non-melodic) focus of jazz, and its special emphasis on extemporization, combine to make the form of a theme and variations particularly appropriate.

5 P. Ricoeur, *The Rule of Metaphor: Multi-disciplinary studies of the creation of meaning in language* (Toronto: University of Toronto Press, 1977); H.-G. Gadamer, *The Relevance of the Beautiful and Other Essays,* trans. N. Walker (Cambridge: Cambridge University Press, 1986).

6 For further on the distinction between procreation and creation, see A. Schütz, "Sons of Writ, Sons of Wrath: Pierre Legendre's Critique of Rational Law-Giving" (1995) 16 Card. L. Rev. 979 at 1015-17.

7 Niccolò Paganini, *Ventriquattro Capricci, Opera Terza (Dodici Capricci),* op. 1, no. 12 (1820); Johannes Brahms, *Variationen über ein Thema von Paganini, I & II,* op. 35 Heft 1 & 2 (1866) (there are fourteen numbered variations in each set, but the finale to each ought perhaps be counted another variation); Rachmaninoff, *op. cit. supra* n. 1; Robert Schumann, *Introduction and Variations on a Theme of Paganini* (1831); Franz Liszt, *Études d'exécution transcendante d'après Paganini,* op. 140, no. 6 (Theme and Variations) (1840); Witold Lutoslawski, *Wariacje na temat Paganiniego* (1941).

8 See E. Shils, *Tradition* (Chicago: University of Chicago Press, 1981).

9 J.T. Hospital, *Borderline* (St. Lucia: Queensland University Press, 1985) at 11.

10 J.H. Miller, *Versions of Pygmalion* (Cambridge, Mass.: Harvard University Press, 1990) at 1.

11 R. Samek, *The Meta-Phenomenon* (New York: The Philosophical Library, 1981).

12 This is often characterized as the personification of an abstract thing, but the extension—the animation of the inanimate, a morbid and Frankensteinian task—is evident: see Miller, *op. cit. supra* n. 10 at 3-4.

13 For a richer, not to mention more Catholic, analysis of the question as it relates to the idea of law, see S. McGuire, (Doctor of Civil Laws thesis, McGill University, work in progress).

14 The distinction between symbol and icon, the former a referent to a value and the latter a value in itself, is particularly elaborated in the semiotic system of C.S. Peirce: see the discussion in R. Kevelson, *The Law as a System of Signs* (New York: Plenum Press, 1988).

15 S. Gey, "This Is Not a Flag: The Aesthetics of Desecration" [1990] Wisc. L. Rev. 1549.

16 *Texas* v. *Johnson* (1989), 109 S. Ct. 2533 per Chief Justice Rehnquist (diss.).

17 The absolute nature of the claim of aesthetic experience has been at the heart of both the force of its appeal and the fear it has generated: see Plato, *The Republic,* trans. B. Jowett (Oxford: Clarendon, 1921); I. Kant, *Critique of Judgment,* trans. W. Pluhar (Indianapolis: Hackett, 1987); T. Eagleton, *The Ideology of the Aesthetic* (Oxford: Blackwell, 1990).

18 For example, N. Wolf, *The Beauty Myth* (New York: William Morrow, 1991); E. Becker, *The Denial of Death* (New York: Free Press, 1973); P. Ariès, *The Hour of Our Death,* trans. H. Weaver (New York: Oxford University Press, 1981).

19 S. Sontag, *Illness as Metaphor/AIDS and its Metaphors* (New York: Anchor Books, 1990) at 83; see also S. Faludi, *Backlash: The Undeclared War Against Women* (London: Chatto & Windus, 1992); T. Campbell and C. Heginbotham, *Mental Illness: Prejudice, Discrimination and the Law* (Aldershot: Dartmouth, 1991); R. Davenport-Hines, *Sex, Death and Punishment* (London: Collins, 1990); M. Foucault, *The Use of Pleasure, The History of Sexuality vol. 2,* trans. R. Hurley (New York: Vintage Books, 1986).

20 B. Stafford *et al.*, "One Face of Beauty, One Picture of Health: The Hidden Aesthetic of Medical Practice" (1989) 14 J. Med. & Phil. 213 at 215-22; Wolf, *op. cit. supra* n. 18.

21 *Ratté* v. *Booth* (1886), 11 O.R. 491; *W. Drysdale* v. *C.A. Dugas* (1895), 26 S.C.R. 20; and see *St. Helen's Smelting Co.* v. *William Tipping* (1865), 11 H.L.C. 642.

22 See M. Douglas, *Purity and Danger* (London: Routledge and Kegan Paul, 1966); and see also the discussion of the meaning of bodily waste in Becker, *op. cit. supra* n. 18. For further on the rhetoric of dirt, specifically in relation to racism, see K. Thomas, "Strange Fruit" in T. Morrison, ed., *Race-ing Justice, En-gendering Power,* New York, Pantheon Books, 1992, 364-89; and more generally, J. Kovel, *White Racism,* New York, Columbia University Press, 1984. On the psychological power of the idea of contagion in human societies, see Rozin & Nemeroff, "The laws of sympathetic magic", in J.W. Stigler et al, *Cultural Psychology* (Cambridge: Cambridge University Press, 1990) at 207-24.

23 The distinction between a symbol and a sign is important here: in a symbol, A is conventionally taken to represent B (as an elephant represents the Republicans, or the Red Flag communists); while in a sign, A necessarily points to the presence of B (as lightning points to thunder): R. Kevelson, *The Law as a System of Signs* (New York: Plenum Press, 1988).

24 A.M. Kraut, *Silent Travelers: Germs, Genes, and the "Immigrant Menace"* (New York: Basic Books, 1994).

25 H. Bosmajian, *The Language of Oppression* (Lanham, Md.: University Press of American, 1983) at 41.

26 See, for extensive material, A. Yarwood and M. Knowling, *Race Relations in Australia: A History* (North Ryde: Methuen, 1982); E. Rolls, *Sojourners* (St Lucia: University of Queensland Press, 1992); I. McLaren, ed., *The Chinese in Victoria: Official Reports and Documents* (Melbourne: Red Rooster, 1985).

27 See for example Chinese Restriction and Regulation Act, 1888 (N.S.W.), 52 Vict. No. 4, s. 2; N.S.W. Legislative Council, *Conference on the Chinese Question*, Sydney, 1888, 5-6. See also, (S.A.) 51 & 52 Vic. No. 439; (Vic.) 52 Vic. No. 1005; (W.A.) 53 Vic. No. 3; (Qld.) 53 Vic. No. 22; *Immigration Act,* 1901 (Cth.), No. 4 of 1901.

28 Yarwood & Knowling, *op. cit. supra* n. 26 at 176 & 185.

29 See C.M.H. Clark, *A History of Australia, Vol. V: The People Make Laws* (Melbourne: Melbourne University Press, 1981).

30 *Bulletin*, Sydney, 12 January 1889 at 6; 10 March 1888 at 5.

31 'Humanity', *Sketches of Chinese Character* (Castlemaine, 1878) at 3-4.

32 *Bulletin*, Sydney, 21 August 1886 at 11-14. See also Phil May, "The Mongolian Octopus Grip on Australia" in *ibid.* at 12-13; and *Bulletin*, Sydney, Supplement to 14 April 1888.

33 Sydney City & Suburban Sewage and Health Board, *Eleventh Progress Report* in N.S.W. Legislative Assembly, *Votes and Proceedings 1875-6, Vol. V.* at 535-661.

34 Alderman Chapman and Dr Read in *ibid.* at 569.

35 *ibid.* at 568-69.

36 See also Kraut, *op. cit. supra* n. 24.

37 New South Wales Legislative Assembly, Royal Commission on Alleged Chinese Gambling and Immorality (Mayor Manning, Chairman), *Report* (Sydney:

Government Printer, 1892) at 28 and various evidence given to the commission.

38 C. Hamlin, "Putrefaction and Providence", in P. Brantlinger, *Energy and Entropy: Science and Culture in Victorian Britain* (Bloomington: Indiana University Press, 1990) at 93-123.

39 Of course if liquid manure has been used directly to douse vegetables, rather than merely being mixed with the soil, then they must be well washed before use, but this is true whatever the species of waste.

40 For an interesting discussion of the use of metaphors of waste, particularly the connotations of wetness and slime, see M. Duncan, "In Slime and Darkness: The Metaphor of Filth in Criminal Justice" (1994) 68 Tulane Law Rev. 725.

41 Royal Commission on Alleged Chinese Gambling and Immorality, *op. cit. supra* n. 37 at 28; see also at 377-81. I do not necessarily take to be the truth the denial of the market gardeners called to give evidence before the Commission. Clearly, however, it shows how much the Chinese themselves knew the indomitability of these beliefs and the power of disgust to adversely affect their business.

42 *ibid.* at 378, 421.

43 *ibid.*, e.g. at 381.

44 Archive Office of New South Wales, Colonial Secretary Special Bundle, *Chinese 1888,4/884.1.* See also the discussion in Rolls, *op. cit. supra,* 464-504; and my own discussion in D. Manderson, *From Mr Sin to Mr Big: Tha History of Australian Drug Laws* (Melbourne: Oxford University Press, 1993) at 17-18.

45 Although the legislation in place at the time set a quota on the number of Chinese immigrants per ship which the 'Afghan' certainly exceeded, the Collector of Customs refused to land any Chinese, including those who were British subjects (such as passengers from Hong Kong): Influx of Chinese Restriction Act, 1881 (N.S.W.) 45 Vic. No. 11, ss. 4,5 & 10 and cognate legislation.

46 *New South Wales Parliamentary Debates, Session 1887-8,* at 4789 & 4793.

47 Sir Henry Parkes in *New South Wales Parliamentary Debates, Session 1887-8, 51 & 52 Vic. Vol. 32* at 4787.

48 A.O.N.S.W., *op. cit. supra* n. 44.

49 *Bulletin*, Sydney, 21 August 1886 at 11; Phil May, "The Mongolian Octopus Grip on Australia" in *ibid.* at 12-13.

50 S. Sontag, *op. cit. supra* n. 19; but see also F.B. Smith, *The Retreat of Tuberculosis* (New York, Croom Helm, 1988).

51 Miller, *op. cit. supra* n. 10 *at* 1.

52 See N.S.W. Legislative Assembly, *Votes and Proceedings 1878*; W. Young, *Report on the conditions of the Chinese population in Victoria*, Melbourne, 1868 in McLaren, *op. cit. supra* at 33-58. By 1890, a Chinese population of about 21,500 in New South Wales and Victoria imported over 37,000 pounds of opium. In 1902, the Chinese population of Australia was 29,627; New South Wales imported 14,000 pounds of opium, Victoria 10,000 and Queensland, with over 10,000 Chinese working the canefields, 18,000 pounds: Quong Tart, *A plea for the abolition of the importation of opium* (Sydney: ML 178.82 B2, 1887 at 11 and A. McCoy, *Drug Traffic* (Sydney: Harper & Row, 1980) at 72; N.S.W. Census of 1891 and Colonial Censuses of 1891 and 1901; *Commonwealth Parliamentary Debates 1905, V Edw. VII Vol. 26* at 1773 & 1777.

53 Mrs Winslow's Soothing Syrup, Bonnington's Irish Moss, Ayers' Sarsaparilla and Godfrey's Cordial, all contained opium, while Ayers' Cherry Pectoral was morphine-based. Most other patent or proprietary medicines were alcohol-based. See Royal Commission on secret drugs, cures & foods (Octavius Beale, Commissioner), *Report, Vol. 1* (Melbourne: Govt. Printer, 1907); Manderson, *op. cit. supra* n. 44 at 52-54; McCoy, *op. cit. supra* n. 52 at 52-70.

54 *Bulletin*, Sydney, 21 August 1886 at 15.

55 Dr Scott in *Victorian Parliamentary Debates, Session 1893, Vol. 73* at 2640.

56 "The Chinese in Australia" in *Bulletin*, Sydney, 21 August 1886 at 11-14.

57 See Manderson, *op. cit. supra* n. 44 at 20-58. *Sale and Use of Poisons Act of 1891* (Qld.), 55 Vic. No. 31, s. 13; The Opium Act, 1895 (SA), 58 & 59 Vic. No. 644; *Opium Smoking Prohibition Act*, 1905 (Vic.), 5 Edw. VII, No. 2003; Police Offences Amendment Act, 1908 (NSW), 8 Edw. VII, ch. 12, ss.18-19. And see also its declaration as a prohibited import by *Commonwealth of Australia Gazette No. 64*, Cth, 30 December 1905. In the United Kingdom, where there was never a large Chinese population, very different legal and medical approaches to the control of opiates developed: see V. Berridge, "War Conditions and Narcotics Control: The Passing of the Defence of the Realm Act Regulation 40B" (1978) 7 J. Social Policy 285.

58 Sydney City & Suburban Sewage and Health Board, *op. cit. supra* n. 33 at 568-69.

59 See in particular D. Howes, "Olfaction and Transition" in D. Howes, ed., *The Varieties of Sensory Experience: A Sourcebook in the Anthropology of the Senses* (Toronto: University of Toronto Press, 1991) at 128-47; see also A. Corbin, *The Foul and the Fragrant: Odor and the French Social Imagination* (Cambridge, Mass.: Harvard University Press, 1986); C. Classen *et al.*, *Aroma: The Cultural History of Smell* (London: Routledge, 1994); D. Howes, "Odour in the Court"]1989-90] border/lines, winter, 28.

60 I am here sticking closely to my earlier discussion in Manderson, *op. cit. supra* n. 44 at 26-27, although there the discussion has an historical intent and not a theoretical one.

61 "Mr. and Mrs. Sin Fat", *Bulletin*, Sydney, 14 April 1888 at 8-9.

62 *ibid.* at 8.

63 "The Chinese invasion of Australia" in *Bulletin*, Sydney, 4 September 1886 at 4. Further example, from both popular literature and official reports, are to be found in Manderson, *op. cit. supra* n. 44 at 24-30.

64 *Bulletin*, Sydney, 21 August 1886 at 11-14.

65 See in particular the evidence of a dozen European women who lived with the Chinese in Sydney's Chinatown, before the 1892 NSW Royal Commission on Alleged Chinese Gambling and Immorality, *op. cit. supra* n. 37 at 380-420.

66 In an extensive international literature, see D. Musto, *The American Disease* (New Haven: Yale University Press, 1973); J. Helmer, *Drugs and Minority Oppression* (New York: Seabury Press, 1975); M. Green, "A History of Canadian Narcotics Control: The Formative Years" (1979) 37 U. T. Fac. L. Rev. 42; N. Boyd, "The Origin of Canadian Narcotics Legislation" (1984) 8 Dalhousie L.J. 102; P.J. Giffen *et al.*, *Panic and Indifference: The Politics of Canada's Drug Laws, A Study in the Sociology of Law* (Ottawa: Canadian Centre on Substance Abuse, 1991); D. Manderson, "The First Loss of Freedom: Early Opium Laws in Australia" (1988) 7 Aust. Drug and Alcohol Rev. 439; D. Manderson, *op. cit. supra* n. 44; Berridge, *op. cit. supra* n. 57.

67 *Customs Act, 1901-1979* (Cwth.), s.235; *Drugs Poisons and Controlled Substances Act 1981-1983* (Vic.), s.71; *Controlled Substances Act, 1984* (S.A.), s.32(5); *Drug Misuse and Trafficking Act 1985* (N.S.W.), ss. 23(2), 24(2), 25(2) & 33; *Drugs Misuse Act Amendment Act 1990* (Qld.); *Drugs of Dependence Act 1989* (A.C.T.), s.164.

68 *Narcotic Control Act, R.S.C., 1985*, s. 4; R. Solomon and S. Usprich, "Canada's Drug Laws" (1991) 21 J. Drug Issues 17.

69 Classen *et al, op. cit. supra* n. 59, e.g. at 203-5.

70 *See* the discussion of Douglas, *op. cit. supra* n. 22.

71 *See* the provisions specifically dealing with the latter in the *Poisons and Controlled Substances Act,* 1981 (Vic.), Part X.

72 Commonwealth & States of Australia, *Australian Royal Commission of Inquiry into Drugs, Books A-F* (Canberra: A.G.P.S., 1980) (Commissioner: Justice E. S. Williams), Book A, following *xx.*

73 C. Pascal, "Intravenous Drug Abuse and AIDS Transmission: Federal and State Laws Regulating Needle Availability", in R.J. Battjes and R.W. Pickens, ed., *Needle Sharing Among Intravenous Drug Abusers: National and International Perspectives* (Rockville, MD: U.S. Department of Health & Human Services, 1988) at 119-36.

74 *Harmelin* v. *Michigan* (1991), 115 L.Ed. 836, 874.

75 J. Rayner, "Between Meaning and Event: An historical approach to political metaphors" (1984) 32 Political Science 537 at 549.

76 E. Scarry, *The Body in Pain: The Making and Unmaking of the World* (New York: Oxford University Press, 1985), Part II.

77 Rayner, *op. cit. supra* n. 75 at 549.

78 S.B. Murphy, "Intravenous Drug Use and AIDS: Notes on the Social Economy of Needle Sharing" (1987) 14 Contemporary Drug Problems 373.

79 J.B. Page and P.C. Smith, "Venous Envy: The Importance of Having Functional Veins" (1990) 20 J.D.I. 291 at 300.

80 Becker, *op. cit. supra* n. 18, and Davenport-Hines, *op. cit. supra* n. 19.

81 See for example, John Dowland's motet (set to the words of John Donne) "Come Again, Sweet Love" ("I sit, I sigh, I weep, I faint, I die, I die in deadly pain, and endless misery.").

82 Quoted in D. Des Jarlais, S. Friedman, & D. Strug, "AIDS and Needle-sharing within the IV-Drug Use Subculture", in D. Feldman and T. Johnson, ed., *The Social Dimensions of AIDS* (New York: Praeger, 1986) at 115.

83 Murphy, *op. cit. supra* n. 78; D. Waldorf *et al,* "Needle Sharing Among Male Prostitutes" (1990) 20 J. Drug Issues 309; H. Feldman & P. Biernacki, "The Ethnography of Needle Sharing Among Intravenous Drug Users," in Battjes & Pickens, *op. cit. supra* n. 73 at 28-39.

84 Murphy, *op. cit. supra* n. 78 at 383; Page & Smith, *op. cit. supra* n. 79, 300.

85 See J. Howard & P. Borges, "Needle Sharing in the Haight: Some Social and Psychological Functions," in D.E. Smith and G. Gay, *It's So Good Don't Even Try It Once* (Englewood Cliffs, NJ: Prentice-Hall, 1972). These generalizations remain largely true, but for a more contemporary and subtle analysis, see A. Taylor, *Women Drug Users: An Ethnography of a Female Injecting Community* (Oxford: Oxford University Press, 1993)

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87 Des Jarlais et al, *op. cit. supra* n. 82 at 119.

88 P.T. Furst, *Hallucinogens and Culture* (San Francisco: Chandler & Sharp, 1976), e.g. at 194; A. Huxley, *The Doors of Perception* (London: Chatto & Windus, 1954).

89 F. Nietzsche, *The Birth of Tragedy/The Case of Wagner,* trans. W. Kaufmann (New York: Vintage Books, 1967).

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91 See, for example, the compelling discussion of a peyote 'hunt' in Furst, *op. cit. supra* n. 88 at 133.

92 Rachmaninoff, *op. cit. supra* n.1, Var. XVIII.

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94 G.W.F. Hegel, *Hegel's Science of Logic,* trans. A. Miller & ed. H. Lewis (Humanities Press, 1989); *Philosophy of Right,* trans. T.M. Knox (Oxford: Oxford Univ. Press, 1967).

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96 Weil, *op. cit. supra* n. 90 at 72-97.

97 Preble & Casey, *op. cit. supra* n. 95.

98 See W. Pietz, "The Problem of the Fetish, Part I (1985) 9 RES: Anthropology and Aesthetics 3 at 10, discussed in Pamela E. Lee, "The Aesthetics of Value, the Fetish of Method" (1995) 27 RES: Anthropology and Aesthetics 133 at 138.

99 Weil, *op. cit. supra* n. 90 at 194.

100 Pietz, *op. cit. supra* n. 98; P. Wilson and J. Braithwaite, ed., *Two Faces of Deviance* (St. Lucia: University of Queensland Press, 1978).

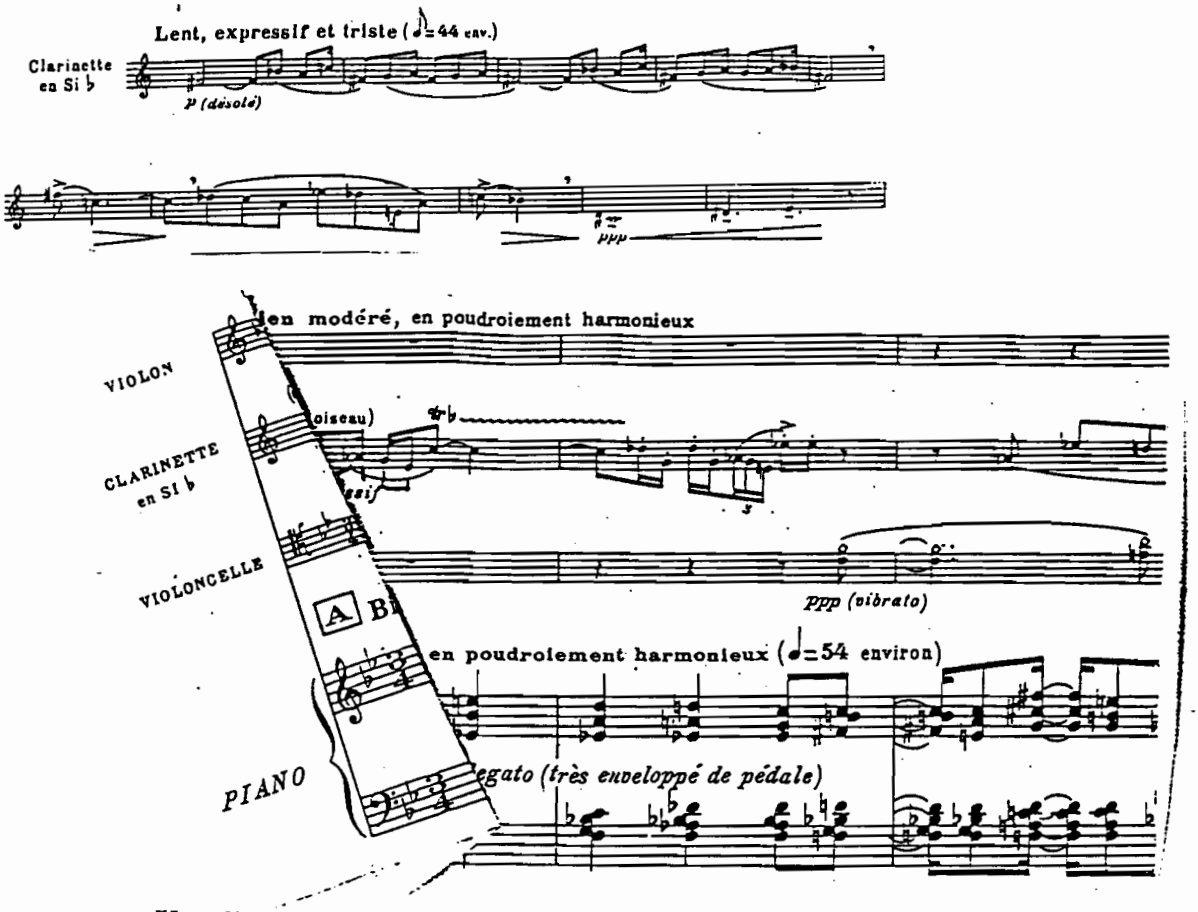
101 *Berkey* v. *Third Ave. Ry. Co.* (1926), 155 N.E. 58 at 61 (N.Y. 1926); and see B. Hibbitts, "Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse" (1994) 16 Card. L. Rev. 226 at 233-38.

102 S. Peele, *The Meaning of Addiction: Compulsive Experience and Its Interpretation* (Lexington: Lexington Books, 1985).

103 The phrase is often used to refer to the recurrence of the principal theme in every movement of Hector Berlioz, *Symphonie Fantastique,* op. 14 (1845).

Quartet for the End of Time

Legal Theory Against The Law



Vocalise, for the Angel Announcing the End of Time—
Themes and Structures

Space, Time, and Modernism
Four Movements, Four Instruments, and a Fifth Dimension

The Abyss of the Birds—
Legal Theories in Modernism

Denial: Space and Geometry
Despair
Accommodation: Space and Geography

Tangle of Rainbows, for the Angel Announcing the End of Time—
Against Reification: Legal Theories in Postmodernism

Dimensions of Indeterminacy
Reimagination: Space and Chaotics

Crystal Liturgy—
Towards Aesthetics: New Metaphors for Legal Theory

From Newton to Mandelbrot
From Bach to Messiaen

Quartet for the End of Time

Legal Theory Against The Law

Conceived and written in captivity, my Quartet for the End of Time was given its first performance in the Stalag VIII A, January 15 1941, in Görlitz, Silesia, in atrociously cold weather. The Stalag was shrouded in snow. We were 30,000 prisoners...[1]

Vocalise, for the Angel Announcing the End of Time—

Themes and Structures

"The first part...evoke[s] the power of this strong angel, crowned with a rainbow and clothed in clouds, one foot on the sea and the other on land. The [second] section deals with the impalpable harmonies of heaven, the piano playing soft cascades of chord."[2]

Space, Time and Modernism

Olivier Messiaen's contemplation of the "end of time" has an Apocalyptic quality which stems not only from the millenarian ideas that are its basis—the Day of Judgment and the Book of Revelations—but to the human conditions of its creation. Written amidst the ravages of war and the moral no less than the physical wreckage of Europe, in the very heart of darkness, in the very depths of winter, Messiaen's music is steeped in despair. How did the world look in the snows of 1941, but as if time itself had come to a stop, as if the Thousand Year Reich was not getting a day older; or at least as if only the destruction of time and the intervention of the divine would save the world from devastation?

There is undoubtedly a spirit of desolation in the work, especially, perhaps, in the woody clarinet's "abyss of the birds." But Messiaen sees something more here, the promise of a new beginning. Time is something to be survived, in order to reach beyond time to a divine reward. So it is that the "end of time" is met with "a

tangle of rainbows," dense and rapturous chord clusters. Thus belaureled, the Angel ushers in a new era beyond the torments of temporal existence.[3] In the depths of prison, the depths of winter, the depths of war, Messiaen hears the song of birds and the vision of angels.

Devastation makes us think of chaos, but when Messiaen looked around him, he saw not chaos but an excess of order. The catastrophe of totalitarianism represents the apotheosis of *modernism,* of system-building, both physical and ideological, considered as a fine art: the triumph of the principle of subjectivity and the single and totalizing perspective which modernism adopted. Horkheimer and Adorno, also writing in the middle of the Second World War, declared that "Enlightenment is totalitarian." There is nothing irrational, still less incoherent, about Stalinism or fascism; indeed there is a kind of inexorability to its logic.[4] It was a logic which destroyed Europe with exhaustive efficiency. Chaos could hardly be worse.

When Messiaen alludes, therefore, to the "end of time," I read him as heralding the end of 'modern time'. I mean this in two ways: the end of modernism and the abyss into which it has plunged us; and the end of the modernist *concept* of time.[5] From Isaac Newton to Richard Dawkins, one of the most enduring images of modernism has been that of the cosmos as *clockwork*—a mechanical instrument for the regulation of time.[6] This does not represent an interest in the complexities of time; far from it. On the contrary, it enforces, as Bergson argued, a *spatialized* image of time: something linear and precise, able to be mapped out, sub-divided and pinned down. Clockwork converts an idea of some mystery into an image of manufactured and predictable parts. It represents the attempt to define and *conquer* time. In short, clockwork as the epitome of modern time converts rhythm to regulation, and art to technology.[7]

Our understanding of time has been governed by modernism—carved up into discrete units in a process which Foucault sees as paradigmatic of the era; to be saved and spent like a currency; to be measured and defined like an object under a speculum.[8] Norbert Elias says that time was *built* as a functional human tool, a product of our capacity for synthesis and memory; *treated* as an abstraction, objective and reified; and therefore *experienced* as a powerful instrument of social discipline. This is the heart of the matter, for these factors conceal each other—the reification of time and space legitimates its regulatory operation.[9]

Boaventura de Sousa Santos, following Chaim Perelman, argues that, modernism having privileged temporal metaphors, post-modernism (a temporal construction if ever there was one!) ought to "resort to spatial metaphors."[10] To be sure, modernism has been pre-occupied with temporal ideas of progress and advance—"time's arrow", a clockwork universe, and the theory of evolution. But this is a particular understanding of time as something constant, linear, and objective which Santos adopts as if it were what 'time' really is—"vulgar" according to Heidegger, according to Saussure "a line".[11] But it is in fact modernism and not 'time' itself which Santos stoops to conquer.

In fact, time and space in modernism are subject to the same pressures: they are both treated as things which exist aside from our human construction and interpretation of them, as abstractions in which we happen to find ourselves rather than as regulatory constructions devised by human minds to serve specific social purposes. To distinguish them or to express a preference misses the point. They exist together, as relative and human conceptual tools.

> In brief, every change in 'space' is a change in 'time'; every change in 'time' a change in 'space'. Do not be misled by the assumption that you can stand still in 'space' while time is passing: it is you who are growing older... The change may be slow, but you are continuously changing in 'space' and 'time'—on your own, while growing and growing older, as part of your changing society, as inhabitant of the ceaselessly moving earth.[12]

Indeed, the modernist understanding of 'time' and 'space' emerged in roughly the same time and space. Alberti and Brunelleschi, as I have elsewhere mentioned, were central figures in the development of theories of perspective which exemplified, in art, that movement towards the subjective individual located in an objective and reified space. And Galileo's experiments, a century later, on the acceleration of falling bodies used for the first time techniques of 'time' to measure phenomena in the 'objective' and 'natural' world. Time and nature are conceived as external and regular sources of order, and we as individuals in it but apart from it. Time for Galileo is something abstract and measurable, capable of division, definition and observation. We see here the beginnings of the *reification* of time: its conversion into something God-given like the oceans, rather than man-made like the boats that float upon them.

Four Movements, Four Instruments, and a Fifth Dimension

Reification, the conversion of a human concept into an external thing, is therefore one of the central hallmarks of modernist thought. In modernist legal theory, 'the law' also is an example of a concept which has been reified, of a human invention which has come to be seen as a "system", objective and abstract. This chapter is an argument against reification and towards aesthetics—from Newton's clockwork universe to Einstein's relativity, and from Euclid's geometry to Mandelbrot's fractals. The methodological and epistemological approach which in previous chapters has enabled me to spotlight the aesthetic dimension of law, is now to turned to illustrate the aesthetic influences in and values of contemporary legal theories. But there is also a normative element to this chapter, since it uses ideas about aesthetics and aesthetic change to advance a pluralist understanding of law and legal theory. Let me foreshadow some of the steps in this argument.

The "Abyss of the Birds," the title of the next movement, is Messiaen's sombre reflection on the ravages wrought by the modernist reification of space and time. Legal theory at the present time finds itself in an abyss of its own, caused by the disjunction between its changing intellectual focus, and the *continuing modernism of its aesthetic*—an aesthetic of coherence and the reification of space. A range of different legal theories, despite their internecine squabbles, share these problems. Obviously the analysis of this abyss is only a contribution to the debate: it is by no means a replacement for a normative critique, for example, of Dworkin or Weinrib. My argument is rather that the aesthetic dimension, particularly as it has affected the conception of space in legal theory, illuminates important aspects of what is at stake in these different theories, as well as revealing the imagery and vision of the world which has generated them. It is therefore an important, though not an exclusive, dimension of analysis.

In the following movement, "A Tangle of Rainbows", the discussion moves from the effect of modernism in legal theory to the changes that have taken place in recent years. Drawing on those epistemological changes, I seek to better incorporate ideas of subjectivity in the construction and interpretation of what 'the law' is, and thus to resist its reification through a legal theory that is both critical and pluralist. The "abyss" is an aesthetic analysis of legal theory, while the "tangle" proposes a new vision for law. This step flows naturally from my basic argument: because ostensibly different legal theories nevertheless share a modernist aesthetic, it is only by developing a different aesthetic—a different vision of the beautiful in law—that we will be able to develop genuinely innovative legal theories.

The last movement, "Crystal Liturgy", like its Messiaenic equivalent, is more overtly aesthetic and metaphoric in character, and looks at the changing epistemology and aesthetics of the world around us. Legal theory is always influenced by currents of aesthetic vision and desire, such as the love of coherence

and order in modernism. In the "liturgy" I focus on the aesthetic paradigm shift which has taken place in science and in music, and call on these trends in support of a new aesthetic of disorder and chaos, and new metaphors to understand it. A movement beyond modern times in thinking about law must be accompanied by an aesthetic no less than an intellectual shift in paradigms. Critical pluralism appeals to the changing perspectives of both, and it is only by marshalling both that we can add force and depth to its ideas.

Taken as a whole, this chapter attempts to hold in place many different threads, drawing together the intellectual and the aesthetic values of legal theories, and to relate them to the intellectual and aesthetic legacy of modernism at the same time as it looks at the trends that are moving us in different directions. It is a Janus-faced enterprise, at once reflecting on the baggage of modernity and at the same time trying to catch glimpses of an as yet unknown future. The analysis is framed using four interactive variables: music; legal theory; the epistemology of science and philosophy; and aesthetics. I could have chosen others, but these four instruments will suffice: a Quartet of separate but interactive voices.[13] Messiaen, again, makes clear how form and content interact in a way which is neither free nor unfree:

> In the name of the Apocalypse, my work has been reproached its calm and austerity... I began with a beloved image...and I wrote a quartet for the instruments (and instrumentalists) on hand, i.e. violin, clarinet, cello and piano.[14]

One works with what is on hand, but the structure and the technology available mould the work as you mould it. The violin sings, the clarinet intensifies, the cello grounds, and the piano binds it all together. Music sings, law intensifies, epistemology grounds, and aesthetics binds it all together.

This *Quartet for the End of Time* stands opposed to the reification of 'time', 'space', and 'the law', and urges instead that we see ourselves not as living *in* four passive dimensions, but as *part of* five or more. What is a dimension? It is a

structurally distinct variable, and the number of dimensions corresponds to the number of co-ordinates it takes to define a point. A dimension, then, is a "degree of freedom." To conceive of time and space in four dimensions is to present them as objective things removed from human interpretation. The fifth dimension is the human dimension, which emphasizes the power of human ideas and symbols to effect our understanding of the world. Interpretation is a degree of freedom. This human and symbolic realm renders 'the law'—it sounds just like a four-dimensional thing which exists apart from us—actually multiple, indeterminate, and interpretative. Legal meaning, therefore, is human not objective, contested not determined. For we are all part of this fifth dimension as surely as we seem to find ourselves in the other four.[15]

A three-dimensional object appears to throw a two-dimensional shadow.[16] A four-dimensional object, mathematicians tell us, would throw a three-dimensional shadow. So it is that, in our own lives, we observe the passage of time—the fourth dimension—through the shadows it throws in three-dimensional space. A monument, a graveyard, or a Constitution: these are the shadows time leaves behind. What of the fifth dimension? We would expect it to leave a four-dimensional shadow. And do not ideas, on their part, leave their traces in time? Is that not precisely the weight and purport of Foucault's "archaeologies of knowledge"—that each period of time is subject to the workings of a certain framework of ideas and concepts, whose substance we cannot directly observe, though its shadow is everywhere to be seen?[17]

We have lived in the shadow of modernism for many years. One of its effects has been the effacement of its own fifth-dimensionality—the human and subjective nature of its symbolism—and the presentation of its shadow as something unavoidable and objective. The reification of time and space is thus both an aspect and a technique of modernism: an aspect of how it orders the world, and a technique for the totalization of that order. To resist the reification of time

and space which is manifested in the reification of 'the law', is to oppose both the modernist understanding of the fifth dimension, and its own concealment of that understanding.

The end of modern time, therefore, constitutes a liberation from the linearity and reification which Messiaen witnessed, and an escape into a fifth dimension of freedom. Messiaen's music is nothing more than an anticipation of these changes arising from his apocalyptic sense that we are now on the cusp of nothingness. So too we have heard from other postmodern and proto-postmodern luminaries that we are witnessing the "end of philosophy", the "end of metaphysics", the "death of God", the "death of the author" and the "death of man." Indeed, much of Western philosophy of the past one hundred years has betrayed an obsession with death and with *auto-da-fé.* On the edge of this abyss Olivier Messiaen stands, Janus-faced himself, looking back at the wreckage wrought by modernism, and looking forward—only uncertainly—to a mysterious transcendence. Messiaen's music invites not only despair at the collapse of the modernist system, but the possibility of proceeding beyond it. It represents the potential for a *new aesthetic,* an invitation to imagine the end of modern space/time as a new beginning.

The Abyss of the Birds—

Legal Theories in Modernism

"The abyss is time, in its sorrows and lassitudes. The birds offer a contrast, symbolizing our yearning for light...The piece begins in sadness. ...The return to desolation is manifested in the dark timbre of the clarinet's lower register."[18]

Denial: Space and Geometry

The aesthetic of origins

Legal theorists have responded to the vast and precipitous changes in their social and intellectual world by denial, despair, or accommodation.[19] My purpose here is not to trace the precise contours of these three approaches, but rather to suggest how each embodies an aesthetic temperament as well as an ideology, and an aesthetic, moreover, which can be caricatured as involving a distinct approach to ideas of space/time.[20]

As Saul Levinson and J.M. Balkin astutely observed, there are close parallels here between legal theory and music theory. This is hardly surprising, since the social order of which law is one expression is itself constructed through dance, art, religion, technology—in short, through every aspect of our lives in which symbols are given meaning.[21] Law and music are but two of them. These parallels centre around time in modernism. The *denial* of change, in the first place, may manifest itself as an attempt to reclaim the past, above all to maintain coherence with it in a conscious, studied, and wholly artificial way, such as Eric Hobsbawm describes in *Invention of Tradition.*[22] Tradition is here understood as something frozen in time, not to be developed but rather thawed out. This attempt to bring back the past, as it supposedly existed once upon a (mythological or fictitious) time, does not preserve or enhance tradition. It merely demonstrates its morbidity.[23]

In music, for example, the "original instruments" school sometimes naïvely judges musical performance according to how closely it is said to replicate the "authentic" performance style and standards of the time of composition. One does not need to rehearse the many arguments why this approach is doomed to failure.[24] And what of the case of Olivier Messiaen's *Quartet* itself, "conceived and written in captivity."

> The four instrumentalists played on broken instruments: Etienne Pasquier's cello had only three strings, the keys of my piano would stick. Our clothes were unbelievable; they had given me a green coat all torn, and I was wearing wooden shoes.[25]

Even if we could determine it, is this the kind of authenticity we want?

"Original instruments" are to music as "original intent" is to law: both attempt to preserve historical meaning in aspic. As Levinson and Balkin note, the obsession with "authenticity" captures not past meaning but present anxiety, and reflects the denial of the pastness of the past which is one response to that anxiety. In fact, the aesthetic of authentic music is exceptionally modern: "lighter textures, faster tempi, and austere and astringent string tone" reflect our post-romantic distaste for emotion, and appreciation of ironic distance.[26] There is nothing scandalous or illegitimate in this: more recent and sophisticated exponents of original music now present performances from "within" a *new* tradition which prioritizes musical values by reference to, rather than by replication of, history.[27] But the attraction of this originalism has nothing to do with the ultimate legitimacy of the past and everything to do with the sensibilities of the present. In law as in music. On the one hand, originalism in law offers us a coherence with the past which we desire and lack; on the other, it offers us a certainty of meaning, in which we can no longer happily believe, by locating that certainty safely in the past. We do not know what is true *now*, but we can know what was true *then*.

The aesthetic of coherence

Originalism is one face of denial. The aesthetic of coherence is another. In the face of the vast literature in the social sciences and in law which addresses indeterminacy and incoherence, plurality, disorder, and ambiguity, what accounts for the resilience of this denial? Not simply an intellectual position but an aesthetic desire is involved here, a passionate belief in the *beauty* of the modernist commitment to order, consistency, and system. This section explores the aesthetics of denial and in particular connects it to a modernist understanding of space.

Lon Fuller recognized the strength of the desire for order in law.

> All theories of law have this in common, that they attribute "law" to one source.... But even when one does not subscribe to any particular theory of the "nature of law", one is apt, consciously or unconsciously, to embrace...the "fiction of the unity of law". We talk constantly as if there were a unified body of rules proceeding from somewhere which constitute 'the law'.[28]

Even a hard-nosed Realist like Karl Llewellyn recognized the influence of this aesthetic in legal theory. Llewellyn argued that the beauty of law lies in its instrumental value:

> Their beauty is functional; the prose is clean by the nature of the man, but it is thrice clean because hewn powerful to purpose. Carven pillar and keystone sing, but the song is the song of the arch they hold and bind.[29]

There is more going on here than the admiration of a worker for his tools. There is an aesthetic of organization, of austere and unbending lines, which is admired for its own sake and not merely as a means to an end. There must be in law, says Llewellyn, something "aesthetically satisfying" of itself, something which appeals to our desire for "sense" and "balance". "Is it not fair to conclude, then," asks Llewellyn, "there can be no part of our institution of law which may not yield fresh light, if one knocks at it asking, there also, after Beauty?"[30]

John Austin and, in different ways, modern positivists including H.L.A. Hart and Joseph Raz, share a definition of law which requires a linear pedigree

recognized by singular State paternity. Law is thus a closed structure which establishes rules of recognition by which every law can be determined and related.[31] I do not mount a critique, but merely suggest that part of both the charm and motivation for positivism comes from its materiality and its promise of certainty. Still more so is this apparent in Hans Kelsen, whose *General Theory of Law and State* describes law as a complex hierarchy of norms finally traceable to a *Grundnorm* from which everything else is derived. Kelsen ultimately urges us to 'obey the makers of the first Constitution'—whoever they are, and whatever that is. A more positivist treatment of the mythic origins of law could hardly be imagined. But for Kelsen, anything less than this closed and determinate system did not constitute law at all.[32]

Formalists like Ernest Weinrib were born under the star of this aesthetic of order and the linear. Formalism dismisses the relevance of other disciplines—sociology, or economics, or literature—in explaining the structure and doctrine of 'law'. This is denial in full voice. Law is to be understood in its own terms, as a product of an internal logic and morality, and everything else is excluded, by fiat, from the province of law. For Weinrib, therefore, we can understand the basic structure of tort law, for example, not by reference to the efficacy of deterrence or compensation (external and functional principles) but because it recognizes a particular moral relationship between the parties, based on Hegelian principles of abstract agency. The principles and very structure of tort law are meant to reflect this understanding of social relationships.[33]

Formalism is of course a familiar tactic in other disciplines. It was the approach of the New Critical School in literary theory; it is the conventional strategy of musicology. The strength of the formalist tradition in music as well as law makes the comparison between the two all the more striking, a violent conjunction between two disciplines insistent on their solitude. But as Kramer argues, "the protective barrier between music and the world is fictitious; it can

stand only as long as we misperceive it as a commonsensical, self-evident fact."[34] Formalism's commitment to this protective barrier has marked the musical tradition and marks likewise legal formalism. To those who are attracted to this vision, to strive for anything less than an hermetically sealed explanation of law seems but a "shortening of ambition".[35]

Of formalism in law, in the first place, one may notice that Weinrib claims for law an "immanent intelligibility" answerable only in its own terms.[36] Yet, like Hans Kelsen before him, Weinrib ultimately grounds law in (a rather idiosyncratic reading of) Aristotle, Hegel, and Kant.[37] Why law gets to be a species of philosophy and not a species of politics, literature, or aesthetics, is unclear.[38] More importantly in terms of my argument, which is to seek the aesthetic grounds of legal theory, Weinrib's justifies his approach solely in terms of coherence. He aims to find in legal rules "an internally coherent whole...a single justification that coherently pervades the entire relationship...the most abstract and comprehensive patterning of justificatory coherence [possible]." He continues:

> Coherence...is the interlocking into a single integrated justification of all the justificatory considerations that pertain to a legal relationship. ...Coherence thus denotes unity.[39]

The more abstract and coherent the explanation for laws or for conduct, the better. But what exactly, in the context of an explanation of legal phenomena, does "better" mean here? Not 'better' in the sense of describing the complexities of people's conduct or the inconsistencies of their actual motivations. Not 'better' in the sense of providing the community with a richer set of moral principles to which it might aspire. Not 'better' in the sense of capturing the jumble of intentions and processes by which laws are actually developed. Indeed, Weinrib expressly refuses to provide an argument in favour of coherence as an ideal.[40] Rather, "better" amounts to an aesthetic criterion. It is an appeal to the beauty of an internally-regulated system in which each part is related to each other part in set proportions such that there is an "harmonious interrelationship among the constituents."[41]

Weinrib's style parallels this image of law—it too is abstract, logical, philosophical, and densely argued. The Homeric reiteration of talismanic phrases such as "immanently intelligible", "justificatory coherence", and "law's aspiration", serves a rhetorical purpose, because it creates exactly the image of coherence which he values. But this coherence, too, is purely formal, firstly because the phrases themselves are highly abstract, and secondly because his usage is so elusive, that its meaning is difficult to fathom.[42] One is left with the image of coherence unanchored to meaning, words without referents. Formalism therefore not only expresses aesthetic values, but communicates them by aesthetic means.

The idea of coherence runs through much modern legal theory like a refrain. Ronald Dworkin, too, urges a form of coherence that in his case goes under the name of "integrity". Although Dworkin's approach is hermeneutic and ostensibly pluralist where Weinrib's is hermetic and decidedly monist, each treat coherence as both a model for the functioning of the legal system, and a model for how to view it. Dworkin argues that integrity is a separate value in our legal system, and we ought therefore strive to make that system as consistent as possible in the application of political principles.[43] Whether "integrity is a virtue" is arguable.[44] But for Dworkin, the virtue lies not just in whether integrity exists in law or society, but whether it is *seen* to exist.

> Here, then, is our case for integrity, our reason for striving to see, so far as we can, both its legislative and adjudicative principles vivid in our political life... If we can understand our practices as appropriate to the model of principle, we can support the legitimacy of our institutions... [Integrity's] standing as part of an overall successful interpretation of these practices hinges on whether interpreting them in this way helps show them in a better light.[45]

A cheery optimism marks Dworkin's interpretative practice and his style.[46] This is not a descriptive preference. Dworkin *wants* to see integrity "vivid in our life", so we *"can* support the legitimacy of our institutions." But neither is it simply normative. There is an aesthetic appreciation here of a chain of laws stretching

from the past into the future as a coherent narrative. This is why he vents his spleen against writers in Critical Legal Studies who criticize not only the specific content of law, but its overall consistency.

> Nothing is easier or more pointless than demonstrating that a flawed and contradictory account fits as well as a smoother and more attractive one. The internal sceptic must show that the flawed and contradictory account is the only one available.[47]

Dworkin justifies his *preference* for an account rooted in the consistency of legal principles by an appeal to "smoothness" and "attractiveness" as criteria of judgment.

Space and Reification

Both these legal theories depend upon the imagery of reified space. The *spatiality* of formalism is evident. Law is seen as a domain, and it organizes relationships, abstractly and geometrically, over this legal territory. For Weinrib, judgments of law have no temporal dimension, no history, no social context or evolution. Rather 'the law' is understood to exist all at once, organizing principles over a space law unproblematically and exclusively controls. Weinrib accomplishes thus the creation of a uniform space in which law operates, and the holding together of all law within it.[48]

The same tropology of space is true whether we turn to the "province" of jurisprudence in Austin or law's "empire" in Dworkin. This language is not merely a flourish: it reflects the shared values of legal monism. 'Law' is understood as a system by which the State exerts exclusive control over the whole society. The modernist empires of Europe competed for sole and exclusive control over territory; no two countries could, on this model of power, share the one geographical space. The same could be said of two legal orders. In the rhetoric of

empire, there is a fixation upon and an isomorphism between law and physical space.

There is of course nothing necessarily wrong with seeing beauty in order and coherence, although I would argue that it is an aesthetic of rather limited appeal, especially now. The problem lies in the superhuman efforts of formalists to avoid all trace of dissonance and incoherence in the model of the law they present as 'real'. The desire for a particular aesthetic—I want to emphasize both 'desire' and 'aesthetic'—works to erase all inconvenient and contrary evidence. One is struck, for instance, by the absence of human beings from the austere aesthetic of formalism. Weinrib treats human actors as nothing but abstract free agents. The reality of human conditions or specific problems is completely irrelevant to this equation. According to formalism, tort law, for example, should and does treat citizens as abstract agents bereft of context and personality. Law is envisaged as a system which functions for its own benefit, "indifferent" and anterior to the "goodness" or "desirability" of particular human purposes or well-being.[49] It is a landscape unpeopled.

In their absence, there is the most remarkable reification, the master trope of modernism and of legal theory. Weinrib claims, for example, that "law's most abiding aspiration [is to be] immanently intelligible"; that legal systems "striv[e]...toward their own justificatory coherence"; that "implicit in the law's conceptual and institutional apparatus...is the claim to be a justificatory enterprise." The claim to speak for "law's own aspirations" is particularly prevalent.[50] But what is this 'law' that aspires and strives, and how does it do so? To this question there is no answer. People do not think and act and realize in this world; only law.

Roberto Unger argues that efforts to realize the ideal in everyday life run the twin dangers of idolatry and utopianism. "Idolatry consists in mistaking the

present situation of the state for the accomplishment of the ideal... [I]dolatry is the form taken by a political imagination surrendered to pure immanence."[51] I would go further: an idol is the reification of an abstraction, and it is by constant reification and constant abstraction that Weinrib accomplishes the immanence of his idolatry.

Weinrib is at pains to remove from his equation real live lawyers thinking about real live law—in most unformalist ways—arguing that since coherence is law's *aspiration,* it can be criticized for falling short. Lawyers who think that law has certain instrumental goals "are simply making a mistake."[52]

> The point is not that the positive law...necessarily embodies justificatory coherence, but that such coherence is possible, and that positive law is intelligible to the extent that it is achieved and defective to the extent that it is not.[53]

Law, then, is thrice abstracted from reality: firstly from the human beings that act and suffer under it (but are no part of it); secondly from the legal community that actually gives it whatever meaning or effect it possesses (but are no part of it); and thirdly from any actual instantiations of law (but are no part of it). Law exists only as a dreaming thing, as a beauty in the eye of its beholder. Weinrib, of course, is by no means alone in this: it is remarkable how lawyers and jurists can remove themselves and their own (often disordered) lives when talking about 'the law' as if it existed somehow apart from them.[54]

Dworkin, despite his differences, also makes law reified and spatial. He too believes in "law's empire", in "law's ambitions for itself", and even in "law's dreams."[55] Dworkin does, admittedly, address the question of agency—of who psychoanalyzes law's dreams, and who realizes them. So while Weinrib sees law as an entity to be declared and thus discovered, Dworkin sees it as an entity to be interpreted and thus developed. This interpretive turn peoples the landscape in a way quite different from the empty planes of Weinrib, though often enough one finds myths and archetypes rather than human beings.[56] But in both cases, 'law' is

understood as a thing, a tangible and finite reality that can be mapped with some precision. It is in this sense that the yearning for coherence is not only an aesthetic, but one based on the desire for order in reified space. Law exists as an object in a certain exclusive space, determined by provenance and allocated by province.

The guiding image is of linear geometry, a field that has always had an association with ideas of social ordering and with the image of truth as abstraction. What, after all, is geometry but the abstraction of spatial form, land without people and shape without context? Geometry is the paradigm of pure abstract reasoning which epitomizes the formalist world-view. Early modern 'legal science' in particular used geometry as a point of reference and of inspiration. The comparison of Euclid to the great scholars of Roman law was something of a commonplace in the eighteenth and nineteenth century. Certainly it was by no means extraordinary to see mathematicians engaged in legal thought. Liebniz, to give only the most celebrated example, perceived of the ideal legal system as a moral derivative of his calculus.[57]

Weinrib takes the metaphor further, referring approvingly to the idea of the "shapes" of moral experience. Formalism, on this account, treats law as a distinct "form" or "shape" which, to be adequately realized, must be kept "internally coherent".[58] His image of law, then, is hermetic, and the intrusion of external values would constitute a violation of geometry—an attempt, as he says, "at squaring the circle."[59] The circle, the corral, encloses all within it, and excludes all those beyond its pale. Any move away from the internal perfection of law, any pluralism of forms or multiplicity of justifications, would constitute a deterioration in condition.[60] It is a decidedly monist and exclusory image.

An interest in patterned time (history) as well as patterned space (geometry) marks out the terrain of Dworkin's jurisprudential project. But it is modernist time, time spatialized. He wishes to show that despite the undoubted ambiguity of

meaning in legal texts, there is a coherence in the history of the common law which provides it with legitimacy. History has always served this legitimating function, a belief in the authority of the past which distinguishes the English tradition from Continental rationalism. Thus Blackstone treated *lex non scripta* as the building blocks of law, and Coke appealed to the power of "immemorial usage".[61]

The high point of this tradition came in 1898, when the House of Lords proclaimed the infallibility of its own decisions.[62] It is no surprise that that case should have emerged when and as it did. The conjunction of a system based on tradition with the high modernist desire for consistency, hierarchy, and truth, logically *required* that the decisions of the final arbiter of the system be perfect. A system which had evolved on the basis of earlier values of power and stasis, could thus be reconciled with modernist ideals, simply by insisting that the holders of ultimate power *were* the repositories of ultimate truth. That other great medieval institution, the Catholic church, faced with the same pressures at the same time, responded in like fashion by transforming supremacy into infallibility, and authority into immovability.[63]

The rigours of infallibility have long since passed, in the common law if not in the Catholic church, but the doctrine of precedent remains central.[64] This is what concerns Dworkin, who wants to legitimate tradition by demonstrating its coherence through time. Dworkin says that history matters "only in a certain way."

> ...it does not require that judges try to understand the law they enforce as continuous in principle with the abandoned law of a previous century or even a previous generation. It commands a horizontal rather than vertical consistency of principle across the range of legal standards the community now enforces.[65]

"The chain novel" vivifies this understanding of interpretation, demonstrating Dworkin's commitment to legal *texts* written in the past, though not to a particular meaning of that text. A judge interpreting a case, for example, must show maximal

consistency with earlier cases: they must render previous decisions coherent with present ones.[66]

History thus governs interpretation because past texts are the raw data with which interpreters in the here-and-now must try to cohere. Dworkin does not respect the past as an authoritative guide to its own meaning, as the doctrine of original intent does, or as a time of special wisdom, as rhetoric about the U.S. Constitution often implies, or as the purveyors of a tradition which we as its trustees are duty bound to protect, which one often finds in English decisions. Neither is he interested in the purposes and forces which have in fact shaped the past.[67] For very different reasons, all these approaches value the pastness of the past. Not so Dworkin, who treats the past as present, as if all the relevant precedents had been decided just yesterday. It is an approach which renders precedent ahistorical, time flattened and without dimension. Dworkin's parallel with "the chain novel" is thus more on point than he thinks. For the novels of Charles Dickens or Arthur Conan Doyle, like common law precedents, were issued in serialized form, but were not meant to be understood as temporal. The unfolding of law and literature in time was a question of expediency and not an aspect of interpretation.

Despair

CLS has pursued with a sense of mission the incoherence of legal texts and the indeterminacy of legal judgment. It is hardly surprising, therefore, that they have provoked a hostility which has been aesthetic, even visceral, in nature. For someone devoted to law as a beautiful story or a beautiful shape, the CLS approach seems perverse and even wicked. Why would you *want* to see law in anything other than "its best light", as anything other than a "systematically intelligible"

enterprise?[68] This is a criticism not against their arguments, but against their purpose, their lack of desire to find system in law.

And yet. Late modernity is characterized by an overwhelming *anxiety*, about losing the past, about the incoherence of the present with respect to it. This anxiety manifests itself in a variety of different responses which betray, in different ways, a continuing aesthetic *desire* for that coherence whose loss is feared. As the other side of anxiety is alienation, so the other side of denial is despair. In much contemporary composition, Levinson and Balkin argue, we find a relentless search for novelty. There is no connection with a living tradition here, either, but rather a detachment from it. Though reference may be made to past styles, the past is treated as raw material to be plundered: a process of appropriation which exactly highlights our distance from its spirit. There is alienation and despair here borne of anxiety that our past has been irretrievably lost.

The same can be said of CLS.[69] Here too an eclectic attitude towards the past accompanies a restless search for the future. This is in stark contrast to Dworkin, of course, who treats both past and future as always present. In CLS, on the other hand, there is a distance from the past—the coherent, innocent past—tinged with yearning. Formalism is not nostalgic for lost certainty (one can hardly be nostalgic for the immanent). CLS is. Nostalgia is just this sense of impossible contrast, a disjunction between the 'then' of our aesthetics—our desire for coherence—and the 'now' of our philosophy—a cynical contemplation of the impossibility of rational order. The ancient Cynics suffered from a surfeit of idealism not an absence.

One senses this despair in CLS nihilism, and the so-called "trashing" of the existing conceptual order.[70] Yet beneath their efforts at obliteration, as beneath all such efforts, traces of desire remain. The attempt to develop, at the level of content, alternatives to legal positivism's structures and principles, merely replicates, at the level of structure, the same old problems. The substitution of

'new' rights for old, or 'new' hypotheses about human nature and human society for old, does nothing to transcend the indeterminacy of rights or the vacuity of abstraction:[71] it merely replicates them.

Sometimes the desire for certainty suggests little more than a sneaking suspicion, as when Arthur Leff confesses, *sotto voce,* "Nevertheless: Napalming babies is bad. Starving the poor is wicked...Sez who? God help us."[72] Sometimes the whole intellectual edifice comes tumbling down. Roberto Unger, at the end of his seminal book, turns to the question of "the imperfections of knowledge and politics." He mourns this lack of perfection; he yearns for "a complete and perfect understanding of reality."[73] And he, too, turns to God to solve his problems; only God can "complete the change of the world" which humanity by itself cannot accomplish. And it is with despair that Unger ends.

> But our days pass, and still we do not know you fully. Why then do you remain silent? Speak, God.[74]

A demand? An entreaty? A chastisement? Does not this appeal to a higher reality assume all that it has been the earnest ambition of Critical Legal Studies, amongst a host of other movements, to abolish once and for all?—the absolutism of truth and the possibility of comprehension, the immediacy of the speaking voice and the objectivity of the listening ear?

The aesthetic of transcendence and unity has survived despite the most earnest attempts at its exorcism. Having been so vigorously swept out the front door, the hope of right answers, of determinacy, and of objective somehow sneaks in through the back. It is an aesthetic *envisioned* as union and order. But it is an aesthetic *experienced* as despair, because it is everywhere observable only by its absence. The contradiction between aesthetic desire and human reality, the search for God and God's mute indifference, brings forth anger and nihilism.

CLS therefore shares with its brethren an aesthetic ideal, though it differs as to its perception of reality. Robin West comes to a similar conclusion in her

"aesthetic analysis of modern legal theory." For those opposed to the "dangerous and limiting cynicism" which the "tragic" disjunction between reality and idealism provokes, this perspective can appear, as Roscoe Pound said of legal realism, "a cult of the ugly"—an aesthetic critique which foreshadows precisely the distaste which some find in CLS.[75] While West characterizes CLS as "black comedy", dark in its criticism of the failings of the current legal order yet nonetheless finally "comic" due to its faith in the redemptive power of community, I see in it more of the nihilism and despair which she rightly names tragic.[76]

Legal pluralism provides a striking contrast in temperament. If CLS diverges from formalism on the question of the 'reality' of the legal system, CLS and pluralism diverge on the question of idealism. For pluralism, despite its limitations, which I will shortly address, is characterized by an aesthetic which in some senses *welcomes* incoherence. This particularly important in relation to the sources of this meaning. Conventional accounts of the legal system argue that particular products of the state alone count as 'law'. Legal pluralism says otherwise. John Griffiths declares, "Legal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion [an aesthetic?]." In similar vein, Galanter attacks centralism as an "ideology" attempting to delegitimate alternative sources of normativity.[77] Very well. But ideology always affects our understanding of the world; there is no view from nowhere.[78] What if the "myth", the "illusion" of a single normative order were universally believed? Would not any alternative norms thus have lost their power to guide conduct and affect behaviour: would they not, in other words, have *ceased to be norms* for that society? All law is in fact "a claim" to normative authority, more or less effective. Legal centralism is a myth which has the potential to realize itself. Legal pluralism therefore resists the claim not just because it is untrue, but because pluralists do not wish it to be true. It is the *desire* for incoherence which governs their interpretation.

Legal pluralism, therefore, is embedded in faith in the value of 'people's law' and custom in the face of a system which is claiming to obliterate it.[79] Fitzpatrick has rightly acknowledged that the work of reclamation is—*pace* Griffiths—an act of insurrection against the legitimacy of bourgeois legality.[80] And although some writers have been able to conceal their normative intent, they have not always been able to conceal what Upendra Baxi has termed a somewhat "millenarian" flavour in their work.[81] This confidence is a significant contrast to the denial and despair we have observed in other writers. It arises because pluralism is not wedded to the beauty of coherence and certainty. On the contrary, it relishes the weakening of state power and centralized order. There is a trust in disorder here and an attraction to the small scale, contingent and even contradictory workings of what Clifford Geertz called "local knowledge."[82] Accordingly, legal pluralism synthesizes its critique of "the big system," the philosophical tenor of the times, with its normative and aesthetic vision. Unlike CLS, desire and thought are, to some extent at least, companionable.

Accommodation: Space and Geography

If the denial of incoherence is legal geometry—the abstraction and reification of space—then the accommodation of incoherence is legal geography—the specificity and contextualization of space.[83] Legal pluralism, the form of this geography, acknowledges the indeterminacy of the way law claims to control space. Nevertheless, the priority of the spatial in an analysis of law is never questioned. Pluralism therefore *accommodates* indeterminacy and conflict within a framework which remains spatial and modernist .

After all, legal theory and geography have historically treated space and law as apolitical and pre-given objects. Both disciplines have reflected a monism at least since the 16th century, and have therefore developed as part of the vast

phenomenon of modernism. Thus the conception of space reflected in the science of cartography, is of something able to be represented externally and objectively. Furthermore, as Nicholas Blomley and Richard Helgerson both argue in discussing the parallel careers of Sir Edward Coke, law-maker, and Christopher Saxton, map-maker, the mutual objectification of law and space as realities to be discovered and not invented, developed together in early modern England.[84]

The present-day connections between modernist space and legal pluralism are immediately evident. In its simplest form, pluralism posits that more than one legal order inhabits the same physical territory. In this, it stands directly against both the explicit construction of legal space in formalism, and that implicit in ideas of the "province" of law, or "law's empire". On any such construction, 'law' is understood to be the monopolization by a State, within a discrete physical space, of a particular species of norm creation. It is just this imperialism which pluralism rejects.

Multiplicity in legal space is pluralism's organizing image. Law on this analysis is not an empire but a contested terrain. This is not just metaphor. Modern legal pluralism originated in a far more literal argument over questions of empire and terrain. It emerged out of the colonial experience: out of the attempt to impose imperial legal order on to the existing, and sometimes resilient indigenous legal system of a colony. In its "weakest" form, pluralism connoted only the way in which the dominant legal order chose to recognize or delegate power to these subservient systems of norms. The territorial supremacy of the empire's law thus went unchallenged, because it merely incorporated some alternative sources of law *within* the state law structure.[85] In a slightly stronger form, pluralism connoted the complex interaction of native legal systems with the imposed law of the metropolis.

The *Journal of Legal Pluralism* has until recent times borne everywhere the marks of this history.[86] Its articles are empirical and anthropological in

perspective, and they are spatial in orientation because they see the problem of law as the clash between "indigenous" and "State" laws within the same space. It is this spatial incoherence which legal pluralism explores, and the developing literature in "law and geography" thus has a strong pluralist agenda just as pluralism has a strong spatial agenda.

When later scholars began to explore the plurality of law within developed societies themselves, therefore, they brought with them a framework forged in the colonial experience.[87] Peter Fitzpatrick and Leopold Pospisil in Papua New Guinea, Boaventura de Sousa Santos in Brazil, and so on, are scholars who began by chronicling the interaction of indigenous and imposed law, and only later translated their perspective to include developed or "core" societies themselves.[88] Furthermore, in what we might call a first stage of 'modern pluralism', a clear political agenda operated which required pluralism to reify the legal order. Whether in colonial societies, Brazil or the inner city, 'pluralism' stood for resistance to the established legal order. Consequently, it was an analysis driven by the spatial totality of that order in the first place, and by the desire to carve out a niche for the powerless which would be protected from invasion by its own total authority within that legal niche. The monopoly of legal space, according to this political pluralism, was both the problem and the solution.

The metaphors of pluralism have been spatial: "spheres of justice", "legal levels", "competing, overlapping, constantly fluid...associations", and "semi-autonomous social fields".[89] These images all convey pluralism's quest to reach an understanding of law which acknowledges the multiplicity of normative orders within a single social space. The answers, of course, have differed widely. For some, the State's legal order is a bargaining chip in whose "shadow" unofficial legal norms are generated by particular groups or individuals. State law thus influences but does not determine legal practice. For others, alternative legal orders exist and have continuing force outside of or "without" the law. [90]

There is a shared imagery here: an understanding of the world as overlapping *objects* in space. And the problem of such an approach is exactly that which we would expect. Reification; which is to say, prosopopoeia. For 'law'—whichever law is meant—is understood as an object with a definite and determined content. It is not the meaning of law but its claim to exclusive authority which is being questioned. The very language of alternative processes of norm creation as existing in or as the "shadow" of law reveals this. 'the law'—formal or informal—is an object which can throw a shadow: a definite thing, which interacts with other things in legal space, and in whose shadow we dwell.[91] Legal pluralism *multiplies* legal systems but it does not doubt their objective and defined meaning. On this analysis, we can know what a particular "legal order" demands, although there may be many such orders in competition or engagement.

The image of reified legal space recurs, whether in Marc Galanter's reference to "the legal order" or "indigenous ordering" as pre-existent and independent entities, or in Sally Engle Merry's definition of legal pluralism as "two or more legal systems [which] coexist in the same social field."[92] It is perhaps ironic that this imagery should be so prominent in a school intended to subvert the totalizing ambitions of "state law", but it is perhaps a question of the creation of a political villain larger than life.

A second phase of pluralist writing, including that of Sally Falk Moore, Pospisil, and Weyrauch, for example, somewhat disanchored pluralism from the politics of resistance, demonstrating the operation of conflicting normative orders within a variety of different contexts ranging from factories to the Mafia.[93] Now it was not just a case of a State legal order against a subjugated group, but rather of the conflict between varying orders claiming normative authority—unions, businesses, syndicates, communities, churches. But when faced with the need to explain what made these orders 'legal', pluralism fell back on precisely the criteria of spatial sovereignty claimed by legal centralism. Legal pluralism presented

alternative legal orders as mirrors of the State, thereby replicating its conceptual apparatus. If the State was no longer the hegemonic legal order, it remained the paradigmatic one.

Falk Moore thus conceives social space (for example, a factory) as a site of overlapping "social fields", such as State law, the union, organized crime, and so on, each of which impose certain norms of conduct which can be appropriately characterized as legal.[94] The social terrain is subject to several laws simultaneously. It is certainly true that Falk Moore, for one, rejects the positivistic conception that law passes from law-maker to individual without being transfigured. The social space between legislator and subject is not a vacuum, but likewise a "semi-autonomous social field." Yet even here, the move to towards a relativist understanding of space and law is difficult to achieve. Falk Moore conceives of law as the interaction of semi-autonomous fields and not of semi-autonomous individuals. Each 'law,' then, has a certain determinate shape, size, and content, on this conception, although it is changeable under the influence of different fields acting in accordance with different (and equally determinate) 'laws' of their own. In other words, the individuals who are subject to law are understood as the *inhabitants* of interacting social fields and not their authors.

A third phase of pluralism, including the literature on "law and geography",[95] still proceeds by reification. By insisting on the need to pay attention to variations in the realization of law from geographic specificity to geographic specificity, the (local) objective and definable reality of law and the (general) objective reality of space is assumed.[96] Boaventura de Sousa Santos, who has done more than most to radicalize pluralism in recent years, also continues to conceive of pluralism as a problem of overlapping space, of multiple "maps" of the law. This spatial understanding likewise manifests itself in the structuralism that is the product of his training as a "social scientist", and in the endemic taxonomy and list-making which in consequence riddles his work. Thus we learn that there are "two pillars of

modernity," each constituted by "three principles or logics";[97] that there are three ways to mobilize laws in a dispute; that the distinction between explicit and implicit issues in a dispute must be clarified in terms of two points, the first of which provides us with two hypotheses which require three correctives, the second of which can be analyzed along three dimensions;[98] that we need to distinguish between types of language (common, technical, and folk technical) and types of silence (procedural and substantive, the latter of which can again be subdivided; normal and deviant, the latter of which is subject to formal and informal sanctions, the first of which can be applied in the same process or a different one; and so on).[99]

There is something almost medieval in this compulsion, this yearning for certainty, as if numbering and labelling were a strategy for capturing an experience. The insistence on *ordering* as a mode of *understanding* seems to lead Santos to treat metaphor simply as a failed description of (objective) reality. Indeed, there seems to be a confusion between metaphor and the "literal sense" throughout his work, and a vigorous denigration of the former.[100] There is much that is rich in these analyses, but likewise there is much that is lost in the analyst's violent assertion of power, carving up of the world into discretely named packages. The subjective and the personal disappear and only the mind of the analyst remains. Even more, the compiling of lists constitutes a spatial and abstract understanding of the world which, ironically, it has been precisely the project of modernist science to universalize. Categories and sub-categories become multiplied like so many branches of a tree or boxes in a chart; our understanding of the subject-matter is sub- divided into its various components, and laid out for examination. This is an anatomist's approach to the body.[101]

Santos is by no means unaware of this scientistic taxonomy in his work. In a chapter looks back on his seminal work in the *favela* of Rio, he writes

> The compulsive use of enumerations throughout the text (first, second, third...) is a *document* in itself. Counting issues, ideas or arguments is an expedient manner of taming the discourse, the reality or the reader... It is thus an example of how knowledge-as-regulation may be smuggled into a text supposedly telling of knowledge-as-emancipation.[102]

Significantly, this chapter in particular engages with both the failings of the scientific method, and the question of temporality, the contrast between the self that experiences, the self that writes, and the self that reads. But this is a reflection and not a redemption; it remains structurally distinct and indeed a mirror-image of his work. Although his latest work elsewhere discusses "the time-spaces of law", the examples he gives of plurality—"local," "national," and "transnational" law—remain resolutely spatial in orientation.[103]

This modernist conception of space is not unavoidable. Notably in the work of Nicholas Blomley, space and law are both treated as indeterminate and mutually engaged. There is an attempt here to move from a model of 'law' and 'space' as two separate variables impacting one upon the other, towards an understanding of their mutual construction.[104] Nevertheless, this sensitivity to the relativity of space remains an exception. Even amongst pluralist theories, law has been reified. Whether "state law" or "people's law", legal systems are still understood as separate and determinate objects in contention.

Tangle of Rainbows, for the Angel Announcing the End of Time—

Against Reification: Legal Theories in Postmodernism

"In my colored dreams I become dizzy, bathed in the gyration of sound and color, combinations of blue-red, blue-orange, or gold-green, these daggers of fire, these shooting stars, and here lies the tangle, here are the rainbows."[105]

Two critiques emerge from this discussion of the abyss of legal theory. The first is aesthetic because it addresses the imagery through which we experience the world. Legal theories, whether of geometry or geography, remain governed by modernist conceptions of reified space and spatialized time. The reification of law which we see in both formalism and pluralism is an aspect of this reification. The rejuvenation of legal theory requires a move from modernism to postmodernism in which the reification of legal space is replaced by a more sophisticated recognition of the indeterminacy of 'the law' and "legal systems".

The second is a question of aesthetics because it addresses the question of vision and desire. Legal theories, whether of denial or despair, remain governed by modernist aesthetics of order and coherence. The rejuvenation of legal theory requires a new aesthetics, an aesthetics which appreciates the value of disorder by developing alternative metaphors for legal ideals. This question of vision and utopia is by no means secondary. A paradigm shift is marked by an aesthetic no less than an epistemological shift. The shift from the pre-modern to the modern was marked by a change in music and art no less than in science and technology. We are going through such a change now, a paradigm shift from modernism to postmodernism, and clues to the aesthetics and the metaphors which we will need to develop to make sense of it, lie all around us.

To combine these two critiques requires an integration of CLS and legal pluralism. This integration has two aspects. On the one hand, pluralism must take

from CLS an indeterminacy of meaning to accompany its familiar insistence on an indeterminacy of sources. Such a project serves to undermine the reification of legal space: this is the first critique, which I address in this movement. On the other hand, CLS must take from pluralism its acceptance and even its celebration of disorder and multiplicity. Such a project serves to advance a new aesthetic ideal in tune with the tenor of the age: this is the second critique, which I address in the movement which follows. Consequently, my argument now moves from the abyss of legal theory to the rainbow-bedecked possibilities for its development. I attempt in these two ways to explore the implications of the end of modern space and modern time for legal theory.

Dimensions of indeterminacy

I want to combine CLS's problematic of meaning with pluralism's problematic of sources. On the indeterminacy of legal meaning, CLS has been exceedingly vigorous. Pluralism on the other hand has tended to reify a particular "legal system", of whatever kind, as if its internal principles and meaning could be determined with precision—as if "the law of the state" or "customary law" or "the tax laws of a local Mafia", the law of England or a tribe in Papua, could be objectively interpreted. This then has been the strength of CLS and the weakness of legal pluralism. But when it comes to the multiplicity of legal *sources,* CLS have yet to incorporate the insights of pluralism. There is still, in much critical writing, an overweening faith in the exclusive authority of 'mandarin materials' to determine legal ordering. In the next few pages, I suggest three levels at which the indeterminacy of legal sources is apparent—institutional, communal, and individual.

I do not wish to be mistaken for a structuralist on a bad day. These three levels are simply examples of the multiplicity of ways in which indeterminacy

manifests itself, and they are themselves mutually interactive. My argument is therefore about the human dimension which makes laws and theories (including pluralist ones) relatively indeterminate, and which the spatial obsessions of reified law ignore. Law does not just exist in four dimensions, but as a human intellectual creation: a product of five dimensions. We are not located "in" law any more than we are located "in" time and space, but rather consistently *reinventing* them through acts of symbolism and interpretation. The three levels of pluralism I mention below are examples of that reinvention.

First, institutional indeterminacy is a function of the multiple entities, formal and informal, responsible for the interpretation of legal texts. Let us not imagine that there is a magical osmosis been word and world, between what "the king ordaineth" and what his citizens experience. It is not only legislators and judges who decide what a law 'means'; but also academics and lawyers, journalists and politicians, policemen and bureaucrats. As Robert Gordon writes,

> We'll never understand the power that legal form holds over our minds unless we see them at work up close, in the most ordinary settings... the field levels of lower-order officials, practitioners, or private law-makers.[106]

At each step along the way, there is a five-dimensional act of legal symbol-making, and symbol interpretation. 'Law' as a reified thing, therefore, is always subject to reinvention and reinterpretation. For example, perhaps the single most important development in the history of Western law was the reception of Roman law into medieval Europe, a process accomplished above all by academics in a movement distinct from either the political or the narrowly 'legal' professions.[107] Academic influence on the meaning of law today exists not only (and in fact, by and large, not at all) through the articles they write, but simply through misleading generations of trainee lawyers.

To take as another example the question of bureaucracy, let me turn once more to drug policy. One central issue that arose throughout the world in the

administration of new drug laws in and after the 1920s was whether it was legal for doctors to prescribe "dangerous drugs" simply to 'maintain' the addict on a controlled dose of their drug of addiction. Australian regulations in several jurisdictions expressly prevented this.[108] Despite the clear words of the statute, and over the objections of other departments and legal advice, the maintenance of a sizeable number of middle-class addicts continued for over thirty years, as a settled policy requiring the connivance not only of State law enforcement agencies and health departments, but the Commonwealth government, which effectively administered this policy. Provided the addicted user was being prescribed the drug by a medical practitioner and being supplied by only one chemist, the additional amount of the drug needed to fulfil their requirements was legally supplied.

What was 'the law' in this case? Was the Department Of Health 'wrong'? This seems to mischaracterize the situation. Law is a matter of authoritative interpretation, and in a world of conflicting interpretations, the question of meaning resolves itself, as the Realists said, into the question of who decides.[109] The situation might be different if there is no genuine belief in the legitimacy of the interpretation being acted upon, for in that case the "internal aspect" of law, the belief that the legal obligation in question 'ought' be followed, might be absent.[110] But that is not the case here. Law does not exist without legal interpretation, exercised by a raft of institutions all of which refract and influence what is experienced as law.

Secondly, not only institutions, but communities, serve an interpretative role. This is Bob Ellickson's argument, in bringing R.H. Coase's simplistic but celebrated story of the rancher and the farmer out of the realm of fable and into the 'real' world. According to Ellickson, questions of cattle trespass, fencing rules and so on are not resolved "in the shadow of the law," as Coase had argued, but in fact through the application of norms constituted by quite different social mechanisms. Ellickson argues that the community of Shasta County continually 'got the law

wrong' in the principles it applied; yet the cattlemen, despite all evidence to the contrary, continued to believe that it was the insurance companies and the courts who were making the mistake.[111]

Here, I think, it is Ellickson who misses the point. The practice of cattlemen and farmers demonstrated a consistent understanding of 'the law,' and although it might be different from the principles applied in the courts from time to time, this understanding has an enduring quality and a distinct meaning. The legal texts of judicial decisions may be an important aspect of what counts as 'law,' but social practices are also interpretative. In this context, it is not helpful to try and contrast "official" with "unofficial" law, or "law" with "non-law". There was no such conflict, by and large, in the consciousness of the Shasta County community.

Thirdly, the proposition that law involves both a multiplicity of interpretations and a multiplicity of norms, applies to individuals as well as to groups. Law involves the interpretation of norms and the mediation of concepts in a way which is experienced differently for each of us. For the most part, I do not experience 'law' as saying one thing, and 'informal norms' as urging another. On the contrary, the two come together in my mind and influence each other. The result is that law means something to me which is different from what it means to you, just as does a piece of music or a book. This psychological and personal dimension of legal meaning most actively undermines the reification of "the legal system" as an entity capable of objective definition.

As Marc Galanter said, law is to be found in the courtroom no more than health is to be found in hospitals.[112] From time to time law is an external authority, which may arrest us or fine us: in these cases or even in the face of the threat of such action, we might characterize law as a code marked by the dyad legal/illegal, or as principles marked by specific procedures of justiciability.[113] From the legal realists to postmodernists like Dragan Milovanovic, from CLS' hermeneutics of

suspicion to Ronald Dworkin's hermeneutics of credulity, law is treated almost exclusively in its juridical, not to mention juridogenic, dress.[114] But for most of us most of the time, law wears mufti. Undoubtedly, in the process of the social construction of law which marks our most typical experience of it, we are all gravely affected by legal texts and judicial decisions—either because we read them or hear about them—and by the pronouncements of law made by judges or lawyers or academics. But these influences are at the same time intermingled with our other normative beliefs, cultural, religious, literary, or personal; and with myths, archetypal and urban alike, about legal obligation.[115] All these influences affect our individual understanding of what we believe the law requires of us.

How we *think* about law is relevant to its character *as* law. The attitudinal aspect of law was, in fact, one of Hart's important insights. In drawing attention to the "internal aspect" of law he acknowledged that law is a question of self-regulation as well as of the imposition of order by an external power. But Hart never pursued these ideas as an aspect of meaning rather than simply of legitimacy.[116] On the contrary, just as our ethics are created by the complex interaction of authoritative texts (such as the Bible or Aristotle) and significant interpretations (such as those of priests or philosophers) with social norms and personal values; so too the law is subject to interpretation on all these levels. The result is that law is a psychological phenomenon in which we all interpret its claims upon us in a slightly different way or form.

The internal aspect of law highlights most clearly the continuing weaknesses of autopoietic theory. For Gunther Teubner, legal change eventuates because law "misreads" the meaning of other discourses, external to it—which is to say, exactly due to the inevitable ambiguities of interpretation. Undoubtedly this captures the ambiguity and the linguistic nature of much law.[117] But nevertheless, autopoiesis continues to manifest the problem of reification common to all theories which treat law as a 'system' or a series of systems. According to Teubner, "law" is a

"system" which "misreads" other social systems in order to generate norms encoded as legal. But what *are* these laws and who decides? Such an approach still takes these "systems" and "law" as given and determined, and deals with complexities of their interaction and not their interpretation. This is still a pluralism of sources and not of meaning; still a misreading by systems and not within systems.

The human dimension of misreading is necessary to any genuine pluralism, for it rejects the reification of 'system' or 'society' or 'community'—or even 'pluralism'—as a thing which can think or read. Law is not manufactured by "a multiplicity of closed discourses"[118] because it is only realized in the actions of particular human beings who exist simultaneously in several discourses and who are, therefore, themselves plural. We must go beyond understanding law as a system, a clash of systems, or even as the interaction of sub-systems, if we are to take full account of the lessons of indeterminacy which extends through five dimensions.

In these ways, therefore, it is evident that the insights of pluralism must be extended to combine a pluralism of sources with a pluralism of meaning. Law exists only through a process of interpretation, and that interpretation is itself plural. Legal pluralism in its original incarnation, operating according to a spatial understanding of 'law's empire,' saw informal norms as operating first "under the law", and then in the "shadow of the law".[119] Later writers have suggested that is more accurate to understand norm-creation as a process which goes on "without the law".[120] We need to take another step, and recognize that pluralism in fact operates "within the law", and indeed within the law within ourselves. For both pluralism and 'the law' alike are theories and therefore entirely metaphoric, imperfectly realized, constantly reinterpreted, and always in flux.[121]

We see some glimmers of this further step, this more radical pluralism *within* rather than between social systems, in a variety of recent scholarship. Peter Fitzpatrick, for example, has recently turned his attention to the inherent problems of legal interpretation. The notion of "integrative pluralism" suggests that ultimately the interpretation of law's meaning is a question for each of us to resolve, integrating in our minds a whole variety of normative demands.[122] The need to extend ideas of indeterminacy to legal pluralism has perhaps been most suggestively explored by Boaventura de Sousa Santos, who moves towards an idea of "inter-legality" according to which codes and norms are mixed in reality and in the contents of our minds.[123]

> [W]e see at work not one legality, but a network of different and sometimes conflicting legalities: local informal legality, state legality, transnational human rights legality, "natural" law legality, insurgent and revolutionary legality, and top-down terrorizing legality.[124]

In the *favela* of Rio, for example, state law and the law of the shanty, moral and procedural principles, are all inter-connected and form, in the mind of the *presidente* of the Residents' Association, for example, a complete and different whole. There is no conflict between the demands of one system of law and another here; only an interplay which finally resolves itself as 'the law': a manifestation in response to a particular conflict and a particular resolution.[125]

Above all, Santos at times rejects the idea that law can properly be thought of as a system or systems at all. Although Santos prefers instead the metaphor of the map, with its geographical and spatial overtones, he does attempt to pluralize it. We each of us carry many maps around with us, varying in scale, projection, and symbolism. One needs only recall the elaborate symbolism and ornamentation of medieval maps, in their interlaced portrayal of spaces physical, relational, and mythological, to appreciate how various, how subjective, and how political and even deceptive is the work of map-making.[126] The different symbolism of modern maps, the equality of perspective they attempt to achieve in their efforts to capture

a part of the world as seen from *beyond* its boundaries—from some all-seeing and external point—all this does not suggest that maps are now any less politico-cultural and partial than they were, but only that the contours of that partiality have changed.[127]

So it is with law: there are many maps, each of which draw attention to various features, scales, relationships, and values to the utter exclusion of others. At times it is relevant to think about law as an emanation of the state, and at other times the customs of a small community are what concerns us.[128] The only perfect map, as any cartographer will tell you, is drawn on the scale 1:1. To ask "what is law?" is like asking what map to use; it depends utterly on why we want to know.

> The large-scale legality is rich in details and features; describes behaviour and attitudes vividly; contextualizes them in their immediate surroundings; is sensitive to distinctions and complex relations between inside and outside, high and low, just and unjust... On the contrary, small-scale legality is poor in details and features, skeletonises behaviour and attitudes, reducing them to general types of action. But, on the other hand, it determines with accuracy the relativity of positions (the angles between people and between people and things), provides sense of direction and schemes for short-cuts and finally it is sensitive to distinctions (and complex relations) between part and whole, past and present, functional and non-functional.[129]

Reimagination: Space and Chaotics

The map is an appropriate metaphor for the reimagination of legal theory by a critical legal pluralism which refuses to reify the phenomenon of 'the law'. It is metaphor about how we understand space, and therefore in keeping with one of the main tropical themes of this chapter. Formalism, I have suggested, is legal geometry and pluralism is legal geography: they are each ways of mapping space. But the spatial metaphor best suited to this reimagination is legal chaotics. Now chaos is a grand and multi-faceted idea. Chaos theory itself is a collection of perspectives in a wide variety of disciplines rather than a single body of

knowledge.[130] The science that emerged through and out of the rubble of the world left by the cataclysmic clash of modernist ideologies—capitalist, fascist, socialist—had many aspects: indeterminacy, uncertainty, and quantum theory, also come to mind. But, to over-generalize, chaotics displays an interest in space relativized rather than reified, non-linear rather than linear, complex rather than simplified.

Take the fractal.[131] A fractal is a way of measuring the degree of roughness or irregularity in an object, which maintains that complexity regardless of the scale of analysis adopted. A coastline is a good example. If you look at a map, say of a country, it has a certain irregularity to it: you see tangled lines that represent rugged cliffs or meandering rivers.[132] If you enlarge the scale, this tangled quality does not disappear; rather, new details appear , new complexities which were not apparent previously. Bays and inlets turn out, on closer inspection, to have bays and inlets of their own. At every level, there is a certain degree of complexity—a fractal dimension—which does not change. No matter how detailed the map, the fractal dimension remains the same.

If we model this, we can imagine a curve or series of curves, for example, with "percolations" along its surface. Examine just the "percolations" close up, and you see the same thing: a curve with percolations. The result is, in mathematical terms, something remarkable: an infinite line within a finite space; a vision of eternity; infinite variety within constant complexity.[133] So it is with coastlines (or snowflakes). The measurement of the length of a coast depends entirely on the scale of measurement adopted, which determines those percolations which are noticed and measured, and those which are ignored. There is no final answer. The map of a coast, too, is an infinite line nested in a finite space.

In the humanities, the image of the fractal bears a striking similarity to the approach of Michel Foucault. He too is concerned to draw our attention to similarities in contour between different disciplines; he too insists that the degree

and character of the implementation of strategies of power of a certain time, remain constant regardless of the level of analysis.[134] The "disciplinary society" surveys and controls its members at every level from the most intimate to the most general.[135] There is a seamless constancy to this process which is, perhaps, fractal in nature.

In law, legal chaotics adds complexity to the geometry and the geography of the map.[136] It demonstrates Fuller's point, which the cartographer knows so well: the answer to the question, what map should we use, depends on why we want to know. All maps—all theories of law or the legal "system"—are metaphors whose worth varies depending on their function. For some purposes, it is useful to focus on law a system of rules, or as a series of judgments, or as a kind of practice. For some purposes we need generality and for others, specificity.

Further, to concentrate on the State-wide—or the supra-national—emanations of law is to ignore the differences in how different communities, for example, understand and receive law. To focus on the 'community' as a homogeneous group of perceptions is to ignore the divisions without that community. Even to focus on sub-groups is to ignore the differences between individuals' own understanding of law. It is a problem which feminist legal theories, in particular, have been forced to face in recent years, confronted from within by critics who resist the essentializing project of making generalities about what it is to be a "woman" in the world.[137] In resisting the reification of law, pluralism no less than chaotics must appreciate that the process of segmentation is never-ending. The law is a network of interactions characterized by a *high* fractal complexity. This suggests not only a purposive approach to theory, but a humble one. Law is an infinite line nested in a finite space; a vision of eternity.

A second aspect of chaotics moves the discussion from theory to praxis, from comprehension to prediction, and from the present to the future. Chaos betokens,

above all, the unpredictability of human affairs. A chaotic system is *determinate*, and indeed often it operates according to a few clearly defined rules. The interaction of as few as three determinate rules is enough to generate a system which is complex and chaotic in its operation.[138] Even quite elementary systems—a dripping tap for example, or a boiling pan of water—manifest chaotic behaviour. They become turbulent. Although there is order in chaos, a pattern even, this pattern cannot be predicted in advance.[139]

The point is stronger in relation to more complex systems, such as climate. Here it is the sensitivity of such a system to its initial conditions that renders predictability impossible and long-range weather forecasts pretty well meaningless. There are so many variables at work here, a tiny variation in any one of which might have greatly multiplied effects over the system as a whole, that prediction rapidly becomes impossible.[140] It is this sensitivity to "perturbations" of the system, and the exacerbating effects of those changes as they are magnified throughout the system as a whole, which generates chaos. Chaos develops because these systems are dynamic: the rules which govern their operation interact with each other. It is this interaction which makes the function they describe *non-linear* rather than linear. Most typically, interaction occurs because the output from applying the rules which operate in the system becomes an input in the next operation of the system, thus creating a vast feedback loop.[141]

In law, I have insisted that we cannot speak of the word "system" as anything other than metaphor, for meaning is constituted by a vast range of variables and actors, all mediated through the interpretative prisms of our minds. The reduction of "law" and "power" to the emanations of particular State institutions, is a fallacy of profound proportions. But let us bracket this and think only of the legal system as a series of actors in a web of influential communities: judges and lawyers, bureaucrats and police.[142] The unpredictability of law stems from the fact that each of these 'variables' has their own responses to a legal question, and these

responses influence the responses of other actors, influencing their responses in a never-ending cycle of intensifying perturbation. It serves us well to understand that this process is itself a dynamic one, and its results therefore non-linear. For law is generated by the constant iteration and reiteration of rules and understandings, a feedback loop as inherently unpredictable as a game of Chinese whispers. Furthermore, we cannot think of "judges" or "bureaucrats" as generic or systemic. They are individuals whose responses are subjective and—even if only minutely—unpredictable. The "initial conditions", therefore, cannot be specified in advance, and subtle and unexpected differences can have vast effects.

The legal regulation of 'drugs' again provides an example. Drug laws were enacted to lessen use. Yet this legislative framework has instead been responsible for the impoverishment of inner cities, the sickness and death of drug users, a vast drug market, and in many places, a hopelessly corrupted political and judicial system.[143] From its beginnings in a few countries such as the United States of America, the ramifications of this legislation have encompassed the globe in an ever-expanding sequence of unintended consequences, unforeseen alliances, and the perturbation of good intentions.[144] It is a story which stands testimony to the modernist ideal of law as control, and to postmodernist ideas of chaos and unpredictability.

To accept the limits of predictability in law is perhaps to recommend a certain caution in the implementation of legal regulation, for it contrasts the modernist dream of order with the significance of the practical limits to human knowledge.[145] Gödel says: we know more than a system can prove; that suggests the ineradicable non-rationality of law. Chaos says: a system behaves differently than we can know; that suggests the ineradicable uncertainty of law. The natural world—and *a fortiori* the human world—is not a giant clock, nor we but cogs within it. The mutability of rhythm rather than the immutable regularity of clockwork governs the movement of the world.[146] Inasmuch as chaotics argues

against our ability to predict the consequences of legislative control, it stands in opposition to the micro-regulatory practices of modern law.

Non-linear dynamics thus emphasize the importance of local action. The smaller and closer the system under consideration, the more limited the variables and the more predictable the outcome. Fractal geometry and non-linear dynamics, however, interact. Chaos theory is not particle physics: it is not simply a focus on the microscopic. Rather it emphasizes the way in which processes percolate *through* different levels of analysis, each of which are marked by a similar kind of complexity. The emphasis on "local knowledge" which unpredictability suggests must be accompanied by an awareness of the reiteration of forces on every level from the sub-atomic to the international.[147] We need to distinguish, therefore, between the level of action and the level of analysis. The message of chaos theory is, in part, the interdependence of every scale of human interaction.

This approach, then, is not quietism; on the contrary, it is the standard model which encourages passivity. Modernism assumes almost without exception that "systems" are normally linear in function. Imagine a diagonal line on a graph, the end product of a linear equation: the implication of this model of the world is that the scale of action corresponds to the scale of transformation.[148] A small input will have a proportionately small output. But non-linearity turns that on its head. Small variables have disproportionate results as they magnify and feed back through the system. The model of chaos implies the importance, and indeed the imperative, of "local knowledge" and local action .[149] There is an endemic overstating of the power of law on a macro-level in our society. Social change does not take place by legislative pronouncement: it takes place through local action, and by the aesthetic communication of particularity.

Crystal Liturgy—

Towards Aesthetics: New Metaphors for Legal Theory

"Around five o'clock in the morning, a lone bird improvises, surrounded by fine fragments of sound, by a halo of harmony lost high in the trees. Transposing that to a religious level, you have the harmonious silence of heaven."[150]

"As a musician I have worked on rhythm. Rhythm, by its very essence, is change and division. To study change and division is to study Time. Time - measured, relative, physiological, psychological - divides itself in a thousand different fashions, for us the most immediate being the perpetual conversion of the future to the past."[151]

From Newton to Mandelbrot

The move from modernism to postmodernism in law is the change from geometry to geography to chaotics, from the linear to the non-linear, and from the ordered to the disordered. We are all products and producers of our times; as legal theory by and large has matched the beliefs and anxieties of modernism, so this emphasis on illusion and metaphor, indeterminacy and incoherence, pluralism and subjectivity, is part of the mantra of postmodernism.[152] Neither is it law alone which is changing with the spirit of the times. We are living through a paradigm shift in the epistemological foundations of society. Scientific theory is a good exemplar of this change, as Jean François Lyotard emphasized. We can find in certain scientific trends over the past few years, illumination of the nature of postmodern law, and suggestions for the way forward.[153]

A shift in intellectual paradigms requires a shift in aesthetics, which will neither deny, despair, nor merely accommodate change, but will rather embrace and develop it.[154] Legal theory always embodies an aesthetic element, as we have seen, and to date this aesthetics have been resolutely modernist in character. The transition to a critical legal pluralism, therefore, requires new metaphors and a new aesthetic. First, using chaos as an example, I argue that intellectual change has a

strong aesthetic component, which is an integral part of its normative meaning and persuasive power. Second, it is by using this new aesthetic paradigm that a reimagined legal theory will unfold. The kind of pluralism I have defended has the capacity to harness the aesthetic power of chaos, and thus at last to reunite the intellectual and the aesthetic dimensions of legal theory.

The aesthetics of chaos

Chaotics has been enormously influential, not just in the fields of scientific endeavour in which they were originally developed, of course, but throughout academia[155] and indeed in the wide world too. Why then, did chaos catch on? In the first place, the very abstruseness of science makes it authoritative. The appeal to "science" has a certain status exactly because of our own ignorance.[156] Furthermore, there is a rhetorical interest in the development of the science of chaos, because it provides evidence—satisfactory to a rationalist—with which to illustrate the limits of rational systems. It demonstrates the limits of modernity, from within the very temple of modernism. But beyond this, there is something that captures our imagination in the images which convey these paradoxes. Chaos theory has seized upon the quotidian reality of boiling water, the weather, and coastlines, and found in them something completely familiar and entirely new.[157] As Tom Stoppard's fictional chaotician says,

> The ordinary-sized stuff which is our lives, the things people write poetry about - clouds - daffodils - waterfalls - and what happen in a cup of coffee when the cream goes in - these things are full of mystery.[158]

These images touch us by their conversion of the immediate into the absolute and in so doing, they seem to speak more than they say. The appeal of these images lies in their union of sensory force and symbolic depth—their aesthetics.

The most important moments in the history of the reception of chaos theory have been images.[159] The first was fractal: the front cover of *Scientific American*.

emblazoned in gorgeous technicolour by a picture of a mathematical model. "Is this the face of chaos?" it asked. The second was dynamic: the celebrated image of the beating of a butterfly's wing in the rainforests of Brazil, a tiny variable with the capacity, it was said, to effect the meteorology of the planet.[160] The importance of these two images was not just that they conveyed significant ideas in a manner so concrete and yet so redolent as to seize the mind. Even more importantly, they are images of great beauty. Not numbers but colours engulf the imagination. Not a bat's wing but a butterfly's, communicates the sensitivity of the weather system to initial conditions. Do you not sense the moist and verdant presence of the jungle, see the wing on the butterfly, imagine its electric colour, hear its zephyred beat, and feel the swirling winds as they tumble about the world? It is beauty that captures us, and aesthetics which leaves us changed. This beauty is not just a strategy or a trick: it is part of what it means to us, and why it has value. Truth, as we have seen, is a question of normative intent; and aesthetics is part of that normativity.

The third was non-linear: a graph which appeared in Edward Lorenz' "Deterministic Nonperiodic Flow", "that beautiful marvel of a paper." Elementary and elegant, the "strange attractor"—even the word is suggestive—which the graph depicted by the elliptical oscillations of an infinite line would become perhaps the most influential image of chaos, and an emblem of its mysterious imaginative power.[161] There is something haunting, beautiful, even mesmeric, in this simple line drawing. Moreover, it even looks like the wings of a butterfly. The meaning of the Lorenz attractor, of the complexity and unpredictability of dynamic systems, resonates powerfully with the popular image associated with it. There is therefore a fusion of form and content here which provides in turn a feedback loop of meaning and force. The attractor itself illustrates the synergetic operation of the aesthetic.

The change from linear to non-linear *aesthetics* has been a fundamental element of both the intellectual appeal of chaos, and indeed its intellectual

trajectory.[162] Chaos could not have developed as it did without the abstract communicative ability of visual aids, and this ability itself required the advanced graphic capabilities of modern computers. As Mandelbrot commented, "there was a long hiatus of a hundred years where drawing did not play any role in mathematics because hand and pencil and ruler were exhausted... And the computer did not exist."[163] Beauty, therefore, is not something extraneous or strategic to chaos theory: it has been central to how chaos theory developed, to what it said, and to how it said it.

Throughout the literature of chaos theory, one finds surprising boundary violations between the realms of aesthetics and science. Here is the conclusion to a well known scientific paper on "strange attractors."

> I have not spoken of the [a]esthetic appeal of strange attractors. These systems of curves, these clouds of points suggest sometimes fireworks or galaxies, sometimes strange and disquieting vegetal proliferations. A realm lies there of forms to explore, and harmonies to discover.[164]

In the case of fractals, aesthetic meaning has been consciously explored—Mandelbrot and Heinz-Otto Peitgen, for example, have both intentionally contrasted the image of the fractal with the "geometric straight-line approaches" of modern art and have thus defended the new sciences on aesthetic grounds.[165] John Briggs similarly insists that "art has always been fractal. The science of chaos is helping to newly define an aesthetic that has always lain beneath...changing artistic ideas".[166]

The aesthetics of modernity—in legal and political theory as in science—spoke to the necessity of order and coherence. It was the beauty of clockwork time and geometric space. In this paradigm of beauty, Hobbesian and Newtonian, the opposite of order was anarchy, and another name for anarchy was chaos.[167] Modernism establishes a dichotomy between anarchy and order as it does between tradition and reason. But in the new aesthetics, this dichotomy has been shattered. "Is this the face of chaos?" asked the *Scientific American*, somewhat astonished.

Chaos, it turns out, is beautiful and colourful; in architecture, art, and human life, we value the non-linear and the fractal and find, on the contrary, linearity to be deeply alienating.[168] Chaos, then, is not to be feared and not to be confused with anarchy. There is *order* in chaos, but not order of the human kind—instead there are patterns beyond human prediction and depth that passeth understanding. Chaos is above all an appeal to complexity, and to the surprise it promises. As Hawkins writes, "*Adios* Eden, and welcome to Jurassic Park."[169] These elements of unpredictability—our expulsion from the divine and unchanging order of Paradise—permits people to give up the ideal of absolute control and regulation over the natural (or social) world, secure that beauty and patterning remain. It requires people to abandon the relentless and arrogant system-building of modernity and direct their attention instead to the poetry and power of the local and the particular.[170] In this sense, the new science is ultimately empowering. The beauty of chaos is that butterflies matter.

The aesthetics of pluralism

The aesthetic dimension provides a valuable tool for understanding law, as I have argued. But it is also an essential element of what the normative means and an essential element in how that normative vision gains acceptance. To speak of the "disorder" of law or its "indeterminacy" only imparts a sense of the tragic to the same old modernist aesthetic aspirations of coherence and order. This disjunction between aesthetic desire and analytical understanding lies at the heart of the crisis of modern legal theory. But "chaos" is part of a broad new aesthetic in which, as I have suggested, claims to the knowability and predictability of the "legal system" must be radically subdued and the idea of local knowledge—the specific context of inter-legality in a particular situation—needs to be valued and taken seriously.[171] If the "abyss" into which legal theory has plunged has been its yearning for

coherence, it is on the other hand only by an embrace of complexity that we will truly have come to the "end of modern time" and the beginning of something else.

Santos recognizes that one of the central problems of legal change is the way knowledge has always been associated with order, and order with colonialism, while ignorance has been connected with chaos, and chaos with solidarity. He argues that we need to recast chaos as a kind of knowledge which encourages solidarity.[172] Approaching the question from a purely analytic perspective, the reconstruction of chaos as a positive value is extraordinarily difficult, and Santos himself from time to time slips back into the habit of using chaos as a term of abuse.[173] But he underestimates the power of the aesthetic to advance this project.

The aesthetic of pluralism, in keeping with the aesthetic spirit of the time, celebrates multiplicity in stark contradiction to the legal trinity of coherence/order/control. At its best, it recognizes that it too, like all theories, can only be a metaphor and therefore subject to interpretation, flux, and dissonance. Uncertainty, indeterminacy, unpredictability, particularity: these are not *failures* of analysis if we abandon the equation of order with beauty and chaos with ugliness. Pluralism *is* local knowledge and local action, a recognition of the cultural, communal and individual construction of legality, just as "pluralism and localism" are fundamental elements of a postmodern understanding of the interplay of social forces. No reification or systemization of "space" or "time" can capture the complexity of legal meaning as each of us experience it, because each of us experience it differently. Law is essentially plural because it exists in each of us and we, too, exist as a plurality, as chaos. There is something attractive in this image and this attractiveness is part of its force.

Modernism seems to have missed the beauty of pluralism. Though liberal theory claims to value it, it does so as a kind of safety valve: unprepared to decide which "good life" is objectively to be preferred, we allow people and communities

to make their own choices with a minimum of interference—not because these differences are themselves desirable, but because liberalism has no way of arbitrating between them. Pluralism is valued as a necessity and as a process, because it allows *us* the kind of life *we* want.[174]

Thus, within a modernist State, social communities often seem to be expected to position themselves in one of two characteristic ways: by assimilating, or through the creation of kinds of ghettoes. Both are static conceptions which limit the perturbations of a society by expecting one tradition to absorb another, or by isolating one from another. The former, the assimilation valued by modernist monism, is the modernism of denial, for it conceives of a single community as a product of homogeneous space and linear time. The latter, the ghettoization of modernist pluralism, is the modernism of despair, for it conceives of multiple "communities" as a product of reified space and frozen time—as unchanging and impermeable. The so-called "pluralism" of the internet or of niche marketing, for example, every person connected to a "virtual community" of interests in the privacy of their own home, is not a critical pluralism at all. It is the multiplication of monisms, the ghettoization of the mind. It limits and controls our interaction with difference and encourages a retreat into stasis and solipsism. The nightmare of this image can be well imagined, a city of a million unconnected lights, each of us alone and typing silently in the half-light of a computer screen which reflects back—only ourselves.[175]

In despair or denial, communities are preserved, but as antiquities not traditions, as "distinct" but not as interactive. Monist or pluralist, this is a social form of that modernist abstraction manifested most clearly in the famous "geometric straight-line approach" of Piet Mondrian, blocks of pure colour kept rigidly separate by unbending black boundary lines. The aesthetics of critical pluralism must go further. It must celebrate diversity not as a means to an end, but as an end itself. In the first place, it is an expression of teeming life, a disorder and

a multiplicity and therefore intrinsically beautiful just as the diversity and interaction of the eco-system is intrinsically beautiful. The essence of chaos, after all, is that states of non-equilibrium are normal and viable. The alternative is the stasis of death. Rather than appreciating plurality in our lives *despite* the fact that people are different, we celebrate it *because* people are different. The very fact of diversity is itself a kind of beauty. This view is contrary to the work of many so-called pluralists, who are fabulously tolerant of everybody except those who disagree with *them.* But pluralism must respect its own limits, too, and make room for a tapestry of other voices, other perspectives.

Such a concept of legal pluralism is not about preserving intact the hermetic integrity of any particular "community," for example. On the contrary, beauty lies in their conjunction, in the way tiny perturbations may have enormous and unpredictable influence. This vision of pluralism requires, therefore, communication and experience of the 'other' as other. The result is a vibrancy and change which is worth celebrating not just in spite of but because there is no predicting where it will end up. Roberto Unger and Boaventura de Sousa Santos have written in utopian vein on the creative and spiritual benefits to be obtained by living on the margins and the frontiers, by living a life governed by re-invention and destabilization.[176] The study of chaos and its marvellous complexity, is a study of the frontiers of change—of the wonderful things that happen when the going gets turbulent.

The study of dynamic systems is a study of the nature of change itself. Influenced by chaos, it is an aesthetic which revels in the permeability of boundaries rather than their black and hard-edged definition. As Mandelbrot noted, a dynamic system is "more boundary than anything else,"[177] boundaries, moreover, which dissolve into fractal complexity before our curious eyes. The connection is clear: both chaos theory and pluralism aim to multiply boundaries.[178] Even more generally, "chaos is a science of process rather than state."[179] If capitalism

celebrates 'having' and communitarianism celebrates 'being', then pluralism celebrates 'becoming'. It is this ideal of the beauty of the process of becoming, uncertain of our final destination, which unites many of the fields I have been discussing. For Mandelbrot geometry describes a dynamic process; the aesthetic is a dynamic process; and pluralism, likewise, is a dynamic process.

This pluralism will be accepted if we are prepared to accept change as inevitable and unpredictable. Rather than denying the loss of control or despairing at it, we can welcome the question marks it brings, as for example we do in literature.[180] It is an approach which requires, above all, an aesthetic shift because within the aesthetic of modernism, diversity and non-linear change have always been seen as threatening. Modernism encourages fear at the thought of unpredictable movement, and we see this fear all around us: in the fear of social change, the fear of drugs, the hatred of immigration, the clamouring for the death penalty. The new aesthetic, on the contrary, replaces fear with hope for, after all, there can be *no* hope in a world without uncertainty. It sees the beauty of turbulence and, in our own lives as in our societies, appreciates the whorls and eddies of everyday life. In such a society what is order but blandness, and predictability but monotony?

From Bach to Messiaen

The idea of plural communities, plural meaning, subjectivity, and localism is not just descriptive: no legal theory ever is. It is a normative vision which gains strength from its aesthetic vision. In part, this resonates with the paradigm shift which chaos theory represents. But pluralism also needs its own metaphors. Aural metaphors in particular express in aesthetic language the aspirations of pluralism. Aurality is relevant in two ways: first, and as a preliminary point, because it reflects certain aspects of our changing society; and secondly, and more

importantly, because specific aspects of aurality and music communicate through metaphor and exemplification some of the ideas I have been urging. Plato warned that "when modes of music change, the fundamental laws of the State always change with them."[181] Jacques Attali said something similar:

> For twenty-five centuries, Western knowledge has tried to look upon the world. It has failed to understand that the world is not for beholding. It is for hearing. It is not legible, but audible...[182]

The first point is the connection between vision and modernism, the aural and the postmodern. "Sight isolates, sound incorporates," writes Walter Ong.[183] Sight is the most specific and the least diverse sense. It provides a single perspective, a unitary point of view, and a sense of distance. On the other hand, we hear from every direction at once. To see is to see one thing at a time. To hear is to be enveloped by diversity. So too, colours, like smells, commingle when mixed and amalgamate to form something completely new. Sounds do not operate like that. They do not, in fact, blend at all but maintain instead their integrity.[184]

The Middle Ages were tactile and aural, but dramatic technological developments, like printing, and spectacles, for example, heralded the birth of an intensely visual culture.[185] Philosophy has laid great store in the centrality of sight and the eye at least since the Enlightenment: for its rationality, for its distance, for its monism. For Foucault in particular, but by no means exclusively, sight has been central in the development of power relations in modernity. The act of the *gaze* is an act of objectification, distancing, and surveillance; the ideal instrument of modern discipline is the panopticon, a structure which enables all within it constantly to be seen by unseen authority.[186] Modernity is the condition of the tyranny of the eye, and Louis Buñuel's razor-sharp assault upon it nothing short of an act of sacrilege.[187]

Marshall McLuhan argues that we are becoming again a culture of hearing, and Bernard Hibbitts emphasizes the changing metaphorical nature of American

law, the growing use of metaphors of "hearing" and of "voices" in legal doctrine and legal theory.[188] One can rather overstate the point. I suspect that we are witnessing not so much a change in metaphorical structures but a super-saturation of metaphors of all kinds, just as we suffer sensory overload throughout our lives. But, at least to some extent, the point holds: the changing paradigms of our age involve a movement from the visual to the aural, which is itself a movement from monism to pluralism. The aural already, therefore, conveys a sense of multiplicity, diversity, and community.[189]

The second and more important question is the relation between musical metaphors and critical legal pluralism. This requires an analysis of the changing character of music in and after modernism. I have already argued that when we try to think about 'time' or 'space', our understanding is initially overborne by our modernist interpretation of it. So it is with music; here too familiar conceptions are not inevitable, but bear everywhere the constructions of modernism. How then has the paradigm shift away from this intellectual framework affected music? And what might this change tell us about a new pluralism?

Vertical chords

Let us go back, from the second World War to the first, and from the conflagration of modernity to the first intimations of its flammability. Vladimir Nabokov writes about *Sounds.* It is 1914; the sounds of change knell romanticism's doom.

> An instant passed. During that instant, much happened in the world: somewhere a giant steamship went to the bottom, a war was declared, a genius was born. The instant was gone.[190]

That was the year that Alban Berg began his revolutionary opera *Wozzeck.* The 11
development of atonality, though still shocking to the ear, does not mark the death of modernity any more than trench warfare or Guernica, Auschwitz or the gulags.[191] On the contrary, they each manifest the inexorable unfolding of its rationality. In the case of the twelve-tone system, that is particularly evident. Arnold Schoenberg is insistent that his work, far from undermining Beethoven and Brahms, is their natural heir and successor: here the democracy and finitude of the musical staff—the impossibility of any sound other than the twelve semitones schematized thereby, and the radical equality and independence of the notes that perch thereon—is pursued to its nemesis.[192] But as Theodor Adorno wrote, Schoenberg marks the turning of modernity against itself, "the suppressing moment in the domination of nature, which suddenly turns against subjective autonomy and freedom itself."[193] Modernist politics and music—and legal theory, too—share an aesthetic love of the reified, the abstract, the individualized, the austere, the systematic.

For Nabokov, the anticipation of those acoustic traumas, let alone the demise of modernism that was to follow its excesses, fills him with intimations of loss. He looks instead to the past for comfort.

> You were playing Bach....
>
> I had a feeling of enraptured equilibrium as I sensed the musical relationship between the silvery spectres of rain and your inclined shoulders, which would give a shudder when you pressed your fingers into the rippling lustre. And when I withdrew deep into myself the whole world seemed like that—homogeneous, congruent, bound by the laws of harmony. I myself, you, the carnations—at that instant all became vertical chords on musical staves. I realized that everything in the world was an interplay of identical particles comprising different kinds of consonance: the trees, the water, you.... All was unified, equivalent, divine.[194]

As evocative as this description is, as persuasive a testimony to the possibility of an internal empathy with all the elements of the cosmos, it will not do to take uncritically his terminology. Although he was able to absorb the changes going on

around him, Nabokov, like the formalists and the Realists and the Crits, could not modify his aesthetic.

Music, for Nabokov, is the art of peace, and therefore a kind of silence: an equilibrium which is enraptured no less. Messiaen appears to be suggesting something very similar when he refers to harmony as "the silence of heaven". So, too, we may recall that Fourier's utopia was called Harmonia and its quiescent inhabitants, Harmonians. "Homogeneous, congruent, consonan[t], unified, equivalent": these are exactly the words which describe such an understanding of harmony. They conjure up an image of co-ordination, unity, and stillness. It is a view predicated on the assumption that harmony is a question of the configuration of "vertical chords on musical staves." That is, each note is married to those that sound at the same time (vertical chords), according to predetermined principles of order (musical staves).

I want to interrogate both aspects of that phrase: "vertical chords" first. Certainly this is an advance on Saussure's two-dimensional conception of music as simply a linear unfolding through time. Nevertheless this understanding is inadequate. One could perhaps understand such an interpretation if Nabokov were listening to Tchaikowsky or even Rachmaninoff, where harmony is indeed vertical in nature, each note in a chord subservient to the harmonic purpose of which it is but a part, that purpose itself determined by the overwhelming dominance of the melodic line. One starts with the melody—only one at a time allowed. From the melody derives, with more or less law-like inevitability, the harmony which supports it. And the harmony having been decided upon, the other musical parts are simply slotted in to their relevant supporting roles. Each part is but a servant of the harmony determined by the melodic line. For the nineteenth century was an era of monism in music, as also in philosophy, and politics, and culture. Nothing could be more monist, more modernist, than the *melody*, whose supremacy throughout the nineteenth century relegated every other voice to the role of a vertical

pillar—in its support. And though the *number* of 'voices' to be heard at one time grew and grew, until one reached, in Bruckner's time, the vast instrumental resources of the crowded orchestra first fantasized by Berlioz, the independence and clarity of each individual voice was accordingly lessened.

Ironically, however, Nabokov is listening to Bach not Tchaikowsky, and proving only how modernism governs our ears. The aesthetic dimension is not phenomenological, but culturally influenced. Nabokov listens to Bach with the ears of a late-Romantic Russian. He listens to polyphony, but he hears vertical harmony; hearing harmony, he understands it to mean vertical unity. Nothing could be further from the truth. The polyphony of a Bach fugue grants to each part a radical independence and equality. Each line develops according to its own internal dynamics, and there is therefore a pluralist and horizontal rather more than a monist and vertical imperative. Neither is it true that harmony connotes unity. Certainly this is not the case in Messiaen (despite what he himself seems to say) where great clusters of clashing notes equate dissonance with a kind of rapturous love. But if the laws of harmony forbade conflict, Bach too would be serving time. Listen to a Bach fugue: it is full of dissonance. The parts frequently clash exactly because they maintain their independence. Of course, there is a harmonic co-ordination at work here, but we must be careful not to misstate it. In polyphony, the many voices come together *at the same time as* they stay apart.

It is a mistake to equate harmony with unity in any context. This is a question of the science of sounds. A single note or monophonic chant is a unity; a chord is not. Sounds, as I have noted, do not blend at all but rather maintain their individuality.[195] Now if you play two notes together, each note is physically changed by the presence of the other, because harmonics and resonances are set up between them. An E played with an A will have different overtones from an E played with a D. But at the same time, a chord still maintains the integrity of each

note that constitutes it: it makes of those notes something new and different, but never at the cost of dissolving its constituent elements. Harmony is not alchemy.

All this betokens a metaphor for social and legal organization far different from that which Nabokov, the modernist, the romantic, envisaged. The message of polyphony is far more complicated than a mere "vertical chord", and it is a message with which the contemporary world finds itself much more in tune than the modernists and Romantics ever were. That is why Bach had such a mixed reputation until Felix Mendelssohn began the process of rehabilitation almost a century after his death; why his unaccompanied cello suites suffered such astonishing neglect until Pablo Casals came across them mouldering in a second-hand bookstore earlier this century; and why Bach's canonization has never been so secure as now. It will not do to say that we were right and the past was wrong; we have experienced a shift in aesthetic paradigms and find ourselves, in some ways, closer in ear to the eighteenth century than the nineteenth.

Songs Without Music has argued that aesthetics motivates meaning, action and belief, in law as elsewhere: the strength of the metaphor of polyphony is that it provides an aesthetic paradigm for the diversity and fragmentation of the contemporary legal order which currently provokes much disquiet. In a fugue, by Bach for example, we can hear a celebration of that diversity and freedom, if only we cast off the ears with which we have often approached it. Of course, a fugue is written with enormous care, but we, as listeners, are not gods. We are not privy to the creative force which bequeaths a fugue, as we are not privy to the creative forces which bequeath the universe. We witness only its consequences, a meandering exegesis of separate and interactive wills, beautiful but surprising. A fugue is, literally, a *flight,* the parts tumbling one upon the other in independent and turbulent conversation. Listen to some Bach, and let its infinite complexity astonish you, its whorls and eddies, sub-plots, new directions, and sudden reunions.

Polyphony has on occasion been cited as a model for law, though often without much understanding of how polyphony actually works.[196] It is an aesthetic model for pluralism: it tolerates difference and conflict as a melodic model does not. It would see the interaction of different social groups and individuals as mutually constitutive, as the notes in a chord are, in a quite physical sense, mutually constitutive. It would celebrate diversity and independence rather than coherence and unity. It would hear society as a series of intersecting, dialogic lines, moving from dissonance to consonance in an independent but interactive way; it would, in short, be the exemplification of legal pluralism.

The very idea of poly-phony—of 'plural voices' in inter-relationship—is a key to understanding pluralism. Pluralism is about giving facets of a range of communities a "voice".[197] This is not a spatial understanding of the necessities of accommodation within the legal and political system. The voices that pluralism respects are not just those of "visible minorities". This is a visual and an individualist rhetoric, since only individuals are capable of being literally seen—affirmative action, for example, is about visibility and sheer presence. Pluralism is something different; it is about making audible the "voices" not of visible individuals but of multiple communities. Sounds, after all, come from all directions at once. Audibility, furthermore, is the key to having a "voice", and this is not just a matter of freedom of speech, but rather of a freedom to be heard. It is the *interaction* of the oral and the aural. Above all, the image of "voice" is about harmony, *not* silence and "peace".[198] The image of voice is a noisy one, and it connotes sounds *continuing* to be in contention, in profusion, in clangorous conversation. The image of polyphony, of many voices singing and many voices heard, is the aesthetic ideal of the language of modern pluralism, an image of diversity, and harmony—and chaos.

Musical Staves

What of the "musical staves" which ground Nabokov's harmony? Here, on the contrary, we find ourselves much more distant from Bach than the modernists. A staff is a kind of a grid which marks the parameters of the possible in music. It establishes norms and limits, customary and shared expectations within which the composer functions. From the development of modern notation codified by Franco of Cologne, which I discussed in the *Motet*, to the very recent past, composers despite their radically different sensibilities have worked within a common framework, a common law. Not exactly the *lex non scripta* of which Blackstone wrote, the musical staff is perhaps the papyrus which makes writing possible. It has been for almost seven hundred years the most abstract and necessary 'ground' on which the 'figures' of Western music have played.

For Nabokov, the existence of these staves are assumed—in music, and in society. They are the common norms of which we are all part. When he writes of our basic consonance, an "interplay of identical particles," he sees us all taking our place against a shared field. We are all notes on the same staff of life, and therefore there are values and experiences we all share. It is this shared background which configures his empathy. This reflects Michel Foucault's characterization of the modernist mentality, in which everything is understood as unitary, equal, individual, modular, regular: the world view which constructed for us the species, the coin, the alphabet, the atom, and the human subject, now offers us human crotchets bobbing along together on a musical clothesline.[199]

We live in a world in which those staves have faded away to nothingness. Compositional techniques have burst the bounds set down by Franco of Cologne: new sounds are now possible, but at the same time the re-invention, by every composer, of tonality, sonority, and notation, has led to a radical individualization of musical language, an interiority of meaning. With the death of the shared reality

which those musical staves represented there has been an inevitable alienation of author from audience. Much music now expresses but does not communicate. Here we are faced with the paradox which Derrida has done so much to expose, that in creating a language which is unique, cleansed of the ambiguity which always comes with iterability, we create a purely private and therefore ultimately incomprehensible symbolism.[200] I do not mean to be too sombre: it is certainly true that the 'music' that I am writing about represents only a tiny and dwindling proportion of what counts as music—a dried-up tributary which was at one time the mainstream of an important cultural tradition. And whatever the problems of the vast majority of other contemporary Western musics, an excess of innovation is not amongst them. Nevertheless, I speak about what has happened to a particular tradition, and I find the patterns of its historical trajectory, its movement through time, suggestive.

The insularity of Western 'classical' music may eventually lead to silence. But there also remains a creative possibility opened up by the constant re-invention of communicative codes, of musical syntax as well as musical semantics.[201] This possibility is essentially a pluralist and chaotic one, for it requires re-invention on an entirely localized and specific basis. If the language of Western music survives as anything other than an ossification, it will do so through "individuals and small groups [which] dare to reclaim the right to develop their own procedures, their own networks."[202]

The monism of the past—reflected in the rise to singular authority, legitimacy, and reach, of legislated norms which I explored in the *Motet*—is no longer attainable. Nabokov's "musical staves" have been lost in law as in music. As Franco's notation and the holistic ambitions of the normativity of State law arose together, so also are they in decline. Speaking literally, we have lost the common law, a sense of widely shared and understood values: pluralism exists in the subjective comprehension of legal meaning as in the multiple sites of legality.

There is no point feeling nostalgic about this decay, and little reason. This monism was always, indeed, a myth, and as comforting as the conformity of legal and social structure may have been, it was equally oppressive.

This then is the pre-eminent task of law in the postmodern era. To provide the facilitation and freedom of polyphony, understood as more than obediently vertical chords, through a world in which the musical staves on which we build our life are invented by each of us anew. The beauty of any legal system built on these principles will not be homogeneous, congruent, unified. It will not even be coherent. Rather it will resemble chaos in its infinity, its unpredictability, and its interactive complexity. But there is more to harmony than peace, and more to beauty than coherence.

Time & Rhythm

What of the future? The end of modern time is neither a moment of despair nor a retreat into silence. It is the promise of something different, something disorganized but liberating. We hear a glimpse of that vision of the future in Messiaen where two kinds of surprising beauty shroud his work. On the one hand, there is the value he places on an individual note, a single note or repeated note going on almost eternally, it seems, loaded with a weight of emotion which seems only to intensify the longer it continues.[203] This is not just a metaphor for subjectivity and localism, but an aesthetic experience of it.

On the other hand, the piano in particular often has "tangles" of notes thick with dissonance. Not one, but crowds of notes compete for attention under the hand of the pianist. Yet Messiaen makes of this cluster of discord something lustrous. I cannot describe for you the torrents of love which have flowed through me as I have caressed those gentle fistfuls. "Tangles of rainbows." There is something spiritual in these dissonances which makes me wonder whether the most

beautiful sound might not be the most various, the *most* discordant. Dissonance here is not experienced as rivalry or irresolution, but as an infinite and all-inclusive unity. The "harmony of heaven" might not be silence but on the contrary the capacity—and the willingness—to hear every note, to the fullness of its truth, at once. The harmony of chaos is the promise of a truly plural society.

I throw out one final allusion to the music of pluralism. There is another clue to the end of time in the work of Olivier Messiaen, for in his work there is always an intense focus on the symbolic and emotional meaning of rhythm. Rhythmic forms are charged with extraordinary significance throughout his work.

> Rhythm, by its very essence, is change and division. To study change and division is to study Time. Time - measured, relative, physiological, psychological - divides itself in a thousand different fashions...[204]

Modern time is one thing: linear, absolute, objective, and reified. It divides the world into isolated and equivalent parcels, symbolized by clockwork, the metronome, and serial composition. What would time unreified be? It would be rhythm. Rhythm is changeable, subjective, and contextual. It exhibits a care for relationship for it exists only in combination. As we become absorbed in rhythm, we learn the lesson of our interdependence and mutual constitution. On a very different level, the distinction between time and rhythm teaches us the lesson of patience—that time moves at different speeds for different people. Change not only takes time, but also has a rhythm, a cycle. The focus on rhythm has been a growing characteristic of musical composition this century. Exemplified in the work of Messiaen, it suggests not only the "end of time" but the beginning of rhythm.

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1 Olivier Messiaen, *Quatuor pour le fin du temps* (1942): Erato recording, 1993 at 12. My own Quartet for the End of Time was also conceived and written in captivity. Any further resemblance to McGill University, Montréal, another institution with 30,000 inmates set in an atrociously cold climate, is, of course, entirely coincidental.

2 Messiaen, *op. cit. supra* n. 1 at 14.

3 "III. Abîme des oiseaux" and "VII. Fouillis d'arcs-en-ciel, pour l'ange qui annonce la fin du Temps," in *ibid.* See also the analysis in Erato, 1993 at 14-16.

4 M. Horkheimer and T. Adorno, *The Dialectic of Enlightenment* (New York: Continuum, 1982) at 6; A. Koestler, *Darkness at Noon* (London: Hutchinson, 1973); the first chapter of J. Habermas, *The Philosophical Discourse of Modernity*, trans. F.G. Lawrence (Cambridge, Mass.: MIT Press, 1987) presents very clearly the connections between 'subject-centred reason', monism, and totalization.

5 I should note that François Ost, in characterizing the different sensibilities of time in law, connects postmodern law with what he calls "temporalité aléatoire." The aleatoric is a schematic form of modernism, for it represents a radical democratic notion of strict equality, and a kind of systemization. The aleatoric is to be distinguished, therefore from the chaotic, which is the true temporality of postmodernism: see F. Ost, "Les Multiples temps du droit," in J.J. Austruy *et al.*, eds., *Le Droit et le Futur* (Paris: Presses Universitaires de France, 1985) 115-53 at 139.

6 See R. Dawkins, *The Blind Watchmaker* (New York: Penguin, 1990); I. Peterson, *Newton's Clock: Chaos in the Solar System* (New York: W.H. Freeman, 1993).

7 See J. Attali, *Histoire du temps* (Paris: 1982); S. Grazias, *Of Time Work and Leisure* (New York: Twentieth Century Fund, 1962); J. Riley, "The Hours of the Georgian Day" (1974) 24 History Today 307; E.P. Thompson, "Time, Work-Discipline and Industrial Capitalism" (1967) 38 Past and Present 56; S. Toulmin and J. Goodfield, *The Discovery of Time* (London: Hutchinson, 1965); G. Grant, *Technology and Empire*; N. Elias, *Time: An Essay*, trans. E. Jephcott (Oxford: Basil Blackwell, 1992).

8 See, in general, M. Foucault, *The Order of Things* (New York: Vintage Books, 1973).

9 Elias, *op. cit. supra* n. 7 at 45.

10 B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London & New York: Routledge, 1995) at p. xii, 400. See also similar reflections in P. Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992) at 93.

11 Saussure discussed in J. Derrida, *Of Grammatology* (Baltimore: John Hopkins University Press, 1976), quoted in P. Kamuf, ed., *A Derrida Reader: Between the Blinds* (New York: Columbia University Press, 1991) at 44-45.

12 Elias, *op. cit. supra* n. 7 at 99-100.

13 See M. Polanyi, *The Logic of Liberty: Reflections and Rejoinders* (London: Routledge, 1951) for a discussion of polycentricity in analysis.

14 Messiaen, *op. cit. supra* n. 1 at 13.

15 After I had written several drafts of this chapter, I was astonished to discover remarkably similar arguments in Norbert Elias' *Time: An Essay, op. cit. supra* n. 7. His ideas have helped me clarify the relevance of the "fifth dimension".

16 An object actually throws a three-dimensional shadow, although we only observe it in two dimensions. There is an easy test of this proposition: if you hold your hand between an object and the sun, the object casts a shadow upon it no matter *where* your hand is put. The shadow thus exists at all depths although we only perceive it when it strikes a surface. When we can see a shadow in all three dimensions, we call it a hologram.

17 M. Foucault, *The Archaeology of Knowledge*, trans. A.M. Sheridan Smith (New York: Pantheon Books, 1972); Foucault, *op. cit. supra* n. 8.

18 Messiaen, *op. cit. supra* n. 1 at 14.

19 R.A. Macdonald, "Critical Legal Pluralism as a Construction of Normativity and the Emergence of Law" (unpublished, 1994).

20 I am speaking here of legal *theory* as embodying particular *conceptions* of space, rather than how legal systems construct and organize particular spaces. It is the understanding of law *as* space rather than its application in, of, or to space that concerns me: for this, see the developing literature of "law and geography" discussed in W. Pue, "Wrestling with Law: (Geographical) Specificity vs. (Legal) Abstraction" (1990) 11 Urban Geography 566 at 576. Of this, the finest work is N.K. Blomley, *Law, Space, and the Geographies of Power* (New York: The Guilford Press, 1994). See also, J. Bakan and N. Blomley, "Spatial Boundaries, Legal Categories, and the Judicial Mapping of the Worker" (1991) Environment & Planning, Special Issue; N. Blomley & G.L. Clark, "Law, Theory, and Geography" (1990) 11 Urban Geography 433; P. Carter, *The Road to Botany Bay: Landscape and History* (New York: Alfred Knopf, 1988); K. Economides *et al.*, "The Spatial Analysis of Legal Systems: Towards a Geography of Law?" (1986) 13 J. Law & Soc. 161.

21 S. Levinson and J.M. Balkin, "Law, Music, and Other Performing Arts" (1991) 139 U. Pa. L. Rev. 1597.

22 Levinson & Balkin, *op. cit. supra* n. 21 at 1632-35; "Introduction" to E. Hobsbawm and T. Ranger, eds., *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983).

23 See E. Shils, *Tradition* (Chicago: University of Chicago Press, 1981); and see also M. Krygier, "Law as Tradition" (1986) 5 L. & Phil. 237; J.M.

Balkin, "Tradition, Betrayal, and the Politics of Deconstruction" (1990) 11 Card. L. Rev. 1613.

24 Even at times going so far as to advocate playing off pitch, or on badly tuned instruments: generally, see Levinson & Balkin, *op. cit. supra* n. 21 at 1601, 1616-22; see P. Kivy, *Authenticities: Philosophical Reflections on Musical Performance* (Ithaca, NY: Cornell University Press, 1995).

25 Messiaen, *op. cit. supra* n. 1 at 12.

26 Levinson & Balkin, *op. cit. supra* n. 21 at 1637, 1636-39. It is at this point that the critique by, amongst others, Kivy, *op. cit. supra* n. 24, of the 'authentic' school goes astray; before we reach the *reductio* phase of authentic performance at any rate, it is not that theory has overruled our aesthetics but that aesthetics has determined our theory.

27 I am grateful to Nicholas Horn for this point. He refers to John Eliot Gardner, the Kuijken brothers, Montserrat Figueras, and Loeki Stardust, and examples of this more aestheticized generation of performers within the originalist tradition. The critique of originalism, which Balkin & Levinson argue somewhat by way of an exposé, is merely a critique of authority rather than of legitimate traditions. Even the most illegitimate authority can—and frequently does—give birth to a genuinely creative tradition. The authority of the origin is *always* a legitimating myth for contemporary practice: see J. Derrida, "Declarations of Independence" (1986) 15 New Political Science 7; J. Derrida, "Force of Law: The Mystical Foundation of Authority" (1990) 11 Card. L. Rev. 919; D. Cornell, "The Violence of the Masquerade: Law Dressed Up As Justice" (1990) 11 Card. L. Rev. 1047; D. LaCapra, "Violence, Justice, and the Force of Law" (1990) 11 Card. L. Rev. 1065.

28 L. Fuller, *Legal Fictions* (Stanford: Stanford Univ. Press, 1967) at 128. Note, however, that, even as fiction, Fuller finds the idea a useful means of describing reality.

29 K. Llewellyn, "On the Good, the True, the Beautiful in Law" (1942) 9 U. Chi. L. Rev. 224 in K. Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Chicago: University of Chicago Press, 1962) at 173.

30 *Ibid. at* 195, 196.

31 J. Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld & Nicholson, 1971 (1834)); H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961); J. Raz, *Authority of Law* (Oxford: Oxford University Press, 1979); J. Raz, "Authority, Law and Morality" (1985) 68 The Monist 295.

32 H. Kelsen, *General Theory of Law and State,* trans. Anders Wedberg (New York: Russell & Russell, 1961 (1945)).

33 See E. Weinrib, "Causation and Wrongdoing" (1987) 63 Chi-Kent L. Rev. 407; E. Weinrib, *Understanding Private Law*; E. Weinrib, "Corrective Justice" (1992) 77 Iowa L. Rev. 403; E. Weinrib, "Right and Advantage in Private Law" (1989) 10 Card. L. Rev. 1283. These themes roughly correspond to Perry's characterization of the "internalist thesis" and the "justificatory aspect" of Weinrib's formalism: S. Perry, "Professor Weinrib's Formalism: The Not-So-Empty Sepulchre" (1993) 16 Harv. J. L. & Pub. Pol. 597, at 598-99.

34 L. Kramer, Letter in *New York Review of Books*, Sept. 22 1994 at 74; see also L. Kramer, *Music as Cultural Practice, 1800-1900* (Berkeley: University of California Press, 1990); S.P. Scher, ed., *Music & Text: Critical Inquiries* (Cambridge, U.K.: Cambridge University Press, 1992); R. Leppert and S. McClary, eds., *Music and Society: The Politics of Composition, Performance, and Reception* (Cambridge: Cambridge University Press, 1987).

35 E. Weinrib, "The Jurisprudence of Legal Formalism" (1993) 16 Harv. J. L. & Pub. Pol. 583 at 594. Formalism in all its guises is precisely the opposite of the aesthetic interest in form which I have advocated, because it sees formal characteristics as a membrane, sealed rather than permeable, and because it sees the conversation amongst those characteristics as purely internal rather than as influenced by and evidence of the social processes around them.

36 *Ibid.*, at 583; E. Weinrib, "'Legal Formalism': On the Immanent Rationality of Law" (1988) 97 Yale L.J. 984.

37 See Fitzpatrick, *op.cit. supra* n. 10 at 116; I. Ward, "A Kantian (Re)Turn: Aesthetics, Postmodernism and Law" (1995) 6 L. & Crit. 256 at 171; for a more enriched explication of Kant in this context, see C. Douzinas and R. Warrington, *Postmodern Jurisprudence* (London: Routledge, 1991) at 163-69; C. Douzinas*et al.*, eds., *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent* (London: Routledge, 1994) at 26; P. Crowther, *Critical Aesthetics and Postmodernism.*

38 See Weinrib, *op. cit. supra* n. 35 at 594. This of course raises several additional problems of its own: neither can Kant and Hegel themselves be treated as simply manifestations of self-evident rationality. As Perry writes, "their arguments in support of agency-based rationalism are deeply controversial and cannot simply be treated as self-evidently correct": Perry, *op. cit. supra* n. 33 at 603.

39 Weinrib, *op. cit. supra* n. 35 at 586-87, 587-88. For a more detailed analysis of the meaning of coherence in formalism, see K. Kress, "Coherence and Formalism" (1993) 16 Harv. J. L. & Pub. Pol. 639. It is clear, for example, that although Weinrib claims that "coherence is the criterion of truth," he is not thereby appealing to the idea of coherence as it is commonly understood amongst modern philosophers, in partnership with relativism and pluralism, but, on the contrary, to an "extremely ambitious

conception" which is deductive and monist in the extreme: see *ibid. at* 641, 649.

Weinrib's response to this critique equivocates; in claiming the inherent validity and desirability of coherence, arguing that "justifying coherence on incoherent grounds" would be "absurd", he confuses these two distinct meanings of coherence. There is in fact a complete failure to distinguish between coherence as a criterion of rational argument, and coherence as an explanation of institutional form: the first is a normative claim *for* something, and the second a descriptive claim *about* something which is said to exist in the world. E. Weinrib, "Formalism and Practical Reason, or How to Avoid Seeing Ghosts in the Empty Sepulchre" (1993) 16 Harv. J. L. & Pub. Pol. 683 at 695.

40 See Kress, *op. cit. supra* n. 39 at 646; Weinrib, *op. cit. supra* n. 39 at 695-96.

41 Weinrib, "Jurisprudence," *op. cit. supra* n. 35 at 593. Perry also emphasizes the aesthetic dimensions of Weinrib's analysis, *op. cit. supra* n. 33 at 617.

42 For a critique of his use of language, which demonstrates both the unnaturalness of his terminology and the difficulties of interpretation this presents, see in particular Kress, *op. cit. supra* n. 39, *passim*, and esp. at 649, 668.

43 R. Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap Press, 1986) at 176-224, 214-16.

44 See D. Réaume, "Is Integrity a Virtue?: Dworkin's Theory of Legal Obligation" (1989) 39 U.T.L.J. 38; A. Hunt, ed., *Reading Dworkin Critically* (New York & Oxford: Berg, 1992) for discussion.

45 Dworkin, *op. cit. supra* n. 45 at 214-15.

46 D.C. Hoy, "Dworkin's Constructive Optimism v. Deconstructive Legal Nihilism" (1987) 6 L. & Phil. 321.

47 Dworkin, *op. cit. supra* n. 45 at 274; see also 272-75, and the notes at 440-44.

48 W.P. MacNeil, "Living on: Borderlines—Law/History" (1995) 6 L. & Crit. 167 at 175.

49 Weinrib, *op. cit. supra* n. 39, at 693-95, 686; see also sources cited, *supra* n. 33.

50 Weinrib, *op. cit. supra* n. 35 at 583, 592, 591, 593.

51 R.M. Unger, *Knowledge & Politics* (New York: Free Press, 1975) at 236-37.

52 Weinrib, *op. cit. supra* n. 39 at 697, discussing Perry, *op. cit. supra* n. 33 at 620.

53 Weinrib, *op. cit. supra* n. 36 at 972.

54 There are some exceptions: CLS literature from time to time intrudes personal experience into legal discussion, although even here the narrative is often intended to contrast 'law' with 'life' rather than to allow one to inform the other: e.g. P. Williams, "Alchemical Notes" (1987) 22 Harv. C.R.-C.L. Rev. 1401. For a rarer and more integrated approach, see N. Kasirer, "Apostolat Juridique: Teaching Everyday Law in the Life of Marie Lacoste Gerin-Lajoie (1867-1945)" (1992) 30 Osgoode Hall L.J. 427.

55 Dworkin, *op. cit. supra* n. 45 at 404-08.

56 Of the judge who is the star of *Law's Empire,* "Call him Hercules" says Dworkin: *ibid. at* 239.

57 M.H. Hoeflich, "Law and Geometry: Legal Science from Liebniz to Langdell" (1986) 30 Am. J. of Leg. Hist. 95; see the discussion of Gottfried Liebniz at 99-102; and see also Douzinas*et al.*, *Politics, Postmodernity and Critical Legal Studies, op. cit. supra* n. 37 at 17.

58 Weinrib, *op. cit. supra* n. 39 at 684-85. The use of this metaphor in fact runs through this article.

59 *Ibid. at* 696.

60 Weinrib claims for formalism a kind of pluralism since he argues that law is but one "shape" of moral life, and "the requirement of coherence within a shape does not deny the existence of other shapes"—different geometries for different spheres: *ibid. at* 685. But this hardly an adequate answer, since the impact of law is felt in every corner of our lives. The history of pink triangles and yellow stars, furthermore, are just two instances of the ways in which legal monism does indeed on occasion attempt to "deny the existence of other shapes."

61 See M. Horwitz, "The Historical Contingency of the Role of History" (1981) 90 Yale L.J. 1057; H. Berman, "The Origins of Historical Jurisprudence: Coke, Selden, Hale" (1994) 103 Yale L.J. 1651; W. Blackstone, *Commentaries on the Laws of England* (Chicago: University of Chicago Press, 1765-69, 1979).

62 *London Street Tramways* v. *London County Council,* [1898] A.C. 375.

63 See B. Tierney, *Origins of Papal Infallibility 1150-1350* (Leiden: E.J. Brill, 1972); J.J.I. von Döllinger, *The Pope and the Council* (London: Rivingston, 1869).

64 *Practice Statement (Precedent),* [1966] 1 W.L.R. 1234; see A. Kronman, "Precedent and Tradition" (1990) 99 Yale L.J. 1029; F. Schauer, "Precedent" (1987) 39 Stan. L. Rev. 571.

65 Dworkin, *op. cit. supra* n. 45 at 227. In providing this limitation, Dworkin seems only to be distinguishing himself from advocates of original intention, who would maintain that the meaning of a legal text is to be found by ascertaining what its authors meant by their words. Dworkin rejects this approach, which attempts to freeze the meaning of a text at the very moment of its birth: *ibid.,* at 227-28, 313-37, 348-50.

66 *Ibid at* 228-38. The discussion of *McLoughlin v. O'Brien* at 238-54, emphaszies the way in which present interpretations, to be legitimate, must reconcile precedent cases coherently.

67 Dworkin, *op. cit. supra* n. 45 at 273. The CLS approach to history, on the other hand, is not simply that law was *constructed* to serve certain vested interests—which appears to be Dworkin's reading of it—but rather that the interests which history illuminates still govern the meaning and shape of law: see, for example, M. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass.: Harvard University Press, 1977); M. Horwitz, *The Transformation of American Law, 1870-1960: the Crisis in Legal Orthodoxy* (New York: Oxford University Press, 1992); M. Horwitz, "History and Theory" (1987) 96 Yale L.J. 1825.

68 Weinrib, *op. cit. supra* n. 35 at 594; Dworkin, *op. cit. supra* n. 45 at 275.

69 Levinson & Balkin, *op. cit. supra* n. 21 at 1641-46.

70 See J. Singer, "The Player and the Cards: Nihilism and Legal Theory" (1984) 94 Yale L.J. 1; M. Kelman, "Trashing" (1984) 36 Stan. L. Rev. 293; D. Cole, "Getting There: Reflections on Trashing from Feminist Jurisprudence and Critical Theory" (1985) 8 Harv. Women's L.J. 59; A. Hutchinson, ed., *Critical Legal Studies* (Totowa: Rowman & Littlefield, 1989); R. Gordon, "Critical Legal Histories" (1984) 36 Stan. L. Rev. 57; A. Hutchinson and P. Monahan, "Law, Politics and Critical Legal Studies" (1984) 36 Stan. L. Rev. 199; M. Tushnet, "The Critical Legal Studies Movement" (1984) 36 Stan. L. Rev. 623; R. Unger, "The Critical Legal Studies Movement" (1983) 96 Harv. L. Rev. 561. For further discussion of the scope and implications of 'nihilism', see also J. Stick, "Can Nihilism Be Pragmatic?" (1986) 100 Harv. L. Rev. 332; Hoy, *op. cit. supra* n. 46.

71 S. Lynd, "Communal Rights" (1984) 62 Tex. L. Rev. 1417; Unger, *op. cit. supra* n. 51 at 236-95; see A. Hutchinson and P. Monahan, "The "Rights" Stuff: Roberto Unger and Beyond" (1984) 62 Tex. L. Rev. 1477.

72 A. Leff, "Unspeakable Ethics, Unnatural Law" [1979] Duke L.J. 1229 at 1249.

73 Unger, *op. cit. supra* n. 51 at 290-91.

74 *Ibid. at* 295.

75 R. West, "Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory" (1985) 60 N.Y. Univ. L. Rev. 145, 183; R. Pound, *Justice According to Law* (1959) at 90, quoted in *ibid.* at 177. See N. Frye, *Anatomy of Criticism* (Princeton: Princeton University Press, 1957).

76 West, *op. cit. supra* n. 75 at 177-82. The difference is above all a question of timing. West's article appeared in 1985, and contain, of course, references to none of the material published in 1984 in which one begins to observe the development of a more tragic tone: for example, the works of Gordon, Kelman, Singer, Tushnet, and Hutchinson cited above.

77 J. Griffiths, "What is Legal Pluralism?" (1986) 24 J. Leg. Pluralism 1 at 4; M. Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law" (1981) 19 J. Leg. Pluralism 1 at 21.

78 For a particularly helpful analysis, devoid of the opprobrious overtones that normally accompany the word 'ideology', see J.M. Balkin, "Ideology as Cultural Software" (1995) 16 Card. L. Rev. 1221.

79 See Peter Fitzpatrick, "Custom, Law, and Resistance" in P. Sack & E. Minchin, *Legal Pluralism—Proceedings of the Canberra Law Workshop* (Canberra: RSSS, 1988) at 63; E.P. Thompson provides a good example of this work of reclamation, and its emotional and normative basis: see "Custom, Law and Common Right", "The Moral Economy of the English Crowd in the Eighteenth Century", and "The Moral Economy Reviewed" in E.P. Thompson, *Customs in Common* (New York: The New Press, 1993).

80 Fitzpatrick, "The Rise And Rise Of Informalism", in R. Matthews, *Informal Justice* (London: Sage Press, 1988).

81 Upendra Baxi, "Discipline, Repression, and Legal Pluralism" in Sack & Minchin, *op. cit. supra,* n. 79 at 52-3; see also the similar point made in G. Woodson, "Book Review, *Legal Pluralism - Proceedings of the Canberra Law and Workshop VII*" (1988) 27 J. Leg. Pluralism 173.

82 C. Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983).

83 See Pue, *op. cit. supra* n. 20 at 576; see especially Blomley, *op. cit. supra* n. 20; and other sources cited, *supra* n. 20.

84 Blomley, *op. cit. supra* n. 20 at 69-99; R. Helgerson, *Forms of Nationhood: The Elizabethan Writing of England* (Chicago: University of Chicago Press, 1992).

85 Griffiths, *op. cit. supra* n. 77 at 8. M. Walzer, *Spheres of Justice* (New York: Basic Books, 1983), is likewise evidently spatial in metaphor, although not post-colonial in origin. He argues that different ideas of justice are appropriate in different "spheres" of life, and seems to see law

exercising an overall supervisory role, defining and delegating "spheres of justice" according to its ultimate normative authority.

86 The first issue dates from 1962, and the characterization I am suggesting holds even until the very recent past—a random sampling of the table of contents of any issue will suffice to demonstrate the proposition.

87 A division between colonial and postcolonial pluralism, and capitalist pluralism, dealt with in more detail in S. Merry, "Legal Pluralism" (1988) 22 Law & Soc. Rev. 869

88 See Peter Fitzpatrick, "Law, Plurality, and Underdevelopment" in D. Sugarman, ed., *Legality, Ideology, and the State* (London: Academic Press, 1983) at159; P. Fitzpatrick, "Law and Societies" (1984) 22 Osgoode Hall L.J. 115; Fitzpatrick, *op. cit. supra* n. 79; P. Fitzpatrick, ""The desperate vacuum": Imperialism and Law in the Experience of Enlightenment" (1989) 13 Droit et Societé 347; L. Pospisil, *Law Among the Kapauku of Netherlands New Guinea* (New Haven, Conn., 1956); B. de Sousa Santos, "The Law of the Oppressed: The Construction and Reproduction of Legality in Pasagarda" (1977) 12 Law & Soc. Rev. 5; B. de Sousa Santos, "Law, State, and Urban Struggles in Recife, Brazil" (1977) 1 Soc. & Leg. Stud. 235. It is an argument expressly confirmed in Santos, *op. cit. supra* n. 10 at 116.

89 See the excellent summary of these approaches in Griffiths, *op. cit. supra* n. 77 at 15-36.

90 R.H. Mnoonin and L. Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale L.J. 1979; Galanter, *op. cit. supra* n. 77 at 8, 23; H. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto: University of Toronto Press, 1985); R. Ellickson, *Order Without Law: How Neighbours Settle Disputes* (Cambridge, Mass.: Harvard University Press, 1991) ; J. Auerbach, *Justice Without Law* (Oxford: Oxford University Press, 1983).

91 Galanter, *op. cit. supra* n. 77 at 8, 23.

92 Galanter, *op. cit. supra* n. 77 at 8, 23; Merry, *op. cit. supra* n. 87 at 870. Thus when Galanter seeks to invert the hierarchy, and argues for "law in the shadow of indigenous ordering," rather than vice-versa, the reified quality of his imagery is not diminished: he still conceives of law, formal and indigenous alike, as objects independent of our perception of them.

93 S.F. Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (1973) 7 Law & Soc. Rev. 719; L. Pospisil, *Anthropology of Law: A Comparative Perspective* (New Haven: HRAF Press, 1974), esp. at 97-126; W.O. Weyrauch & M.A. Bell, "Autonomous Law-Making: The case of the 'Gypsies'" (1993) 103 Yale L.J. 323; J. Auerbach, *Justice Without Law* (Oxford: Oxford University Press, 1983).

94 Falk Moore, *op. cit. supra* n 93. One finds a similar schematization of law as the interplay of "social fields" in P. Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (1987) 38 Hastings L.J. 805.

95 See sources cited *supra,* n. 20..

96 See Pue, *op. cit. supra* n. 20.

97 Santos, *op. cit. supra* n. 10 at 2.

98 *Ibid. at* 128-40.

99 *Ibid. at* 146-56.

100 *Ibid.,* for example in Chapter 1, Chapter 7, and at 456-48. This is particularly prominent in his Chapter 7, "Law: A Map of Misreading" at 403-55, in which he insists that his explanation of law as a "map" is to be taken "literally."

101 M. Danesi, "Thinking is Seeing: Visual Metaphors and the Nature of Abstract Thought" (1990) 80 Semiotica 221; Foucault, *op. cit. supra* n. 8; M. Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception,* trans. A.M. Sheridan (New York: Vintage Books, 1975) makes exactly these points about science in the classical age in general, and about changing conceptions of the body and medical science in particular.

102 "Chapter Three-in-the-Mirror: Relationships Among the Perceptions that We Call Identity: Doing Research in Rio's Squatter Settlements," in Santos, *op. cit. supra* n. 10 at 149-51.

103 Santos, *op. cit. supra* n. 103; Santos, *op. cit. supra* n. 10 at 111-22.

104 Blomley, *op. cit. supra* n. 20 at 27-51; see also other sources *supra,* n. 20.

105 Messiaen, *op. cit. supra* n. 1 at 16.

106 R. Gordon, "Critical Legal Histories" (1984) 36 Stan. L. Rev. 57, 122.

107 Santos, *op. cit. supra* n. 10 at 57-60; H. Berman, *Law and Revolution: The Formation of Western Legal Tradition* (Harvard Univ. Press: Cambridge, 1983); P. Stein, *The Teaching of Roman Law in England Around 1200* (London: Selden Society, 1990).

108 Supplement to New South Wales Government Gazette No. 120, 30 August 1927, r. 22; *Dangerous Drugs Regulations 1930* (Vic.), Gazette No. 12, r. 16.

109 I refer in particular to the Realists' insight into the performative aspects of law and adoption of a pragmatic philosophy of meaning. But the Realists, for their part, seemed to emphasize the authoritative pronouncements of the *courts* to the exclusion of all other loci of legal interpretation: see for

example J. Frank, *Law and the Modern Mind* (New York: Brentano's, 1930); K. Llewellyn, *The Bramble Bush: On Our Law and its Study* (New York: Oceana, 1951); K. Llewellyn, "A Realistic Jurisprudence—The Next Step" (1930) 30 Col. L. Rev. 431.

110 Obviously, I am echoing here the "internal aspect" discussed in Hart, *op. cit. supra* n. 31.

111 R.H. Coase, "The Problem of Social Cost" (1960) 3 J. of L. & Econ. 1; Ellickson, *op. cit. supra* n. 90 at 52, 92-103.

112 Galanter, *op. cit. supra* n. 77.

113 See G. Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism" (1992) 13 Card. L. Rev. 1443; Santos, *op. cit. supra* n. 10 at 126-28.

114 See Llewellyn, *op. cit. supra* n. 29; Hart, *op. cit. supra* n. 31; Dworkin, *op. cit. supra* n. 45; D. Milovanovic, *Postmodern Law and Disorder: Psychoanalytic semiotics, chaos, and juridic exegeses* (Liverpool: Deborah Charles, 1992).

115 H. Hawkins, *Strange Attractors: Literature, culture and chaos theory* (Hemel Hempstead: Prentice Hall/Harvester Wheatsheaf, 1995) at 69, makes a similar point about the chaos of literature: "In our minds, as in everyday life, we are all postmodernists, experiencing and fusing popular and classical and ancient and modern works in wildly eclectic and chaotic combinations."

116 Hart, *op. cit. supra* n. 31.

117 Teubner, *op. cit. supra* n. 113 at 1447-51; see also -, "Closed Systems and Open Justice: The Legal Sociology of Niklas Luhmann" (1992) 13 Card. L. Rev., vols. 5-6, 1419. The characterization of law as a process which encodes behaviour as 'legal' or 'illegal' is far too simplistic. Not only does it reduce law to criminal law, ignoring the way in which law facilitates and structures conduct as well as encoding it. It also ignores the symbolic functions of law—the way it draws a picture of the society to which we are striving. Symbolism can hardly be reduced to a binary code.

118 *Ibid. at* 1457; see also C. Sampford, *The Disorder of Law* (Oxford: Basil Blackwell, 1989).

119 Coase, *op. cit. supra* n. 111; Mnoonin & Kornhauser, *op. cit. supra* n. 90; Thompson, *op. cit. supra* n. 79; Galanter, *op. cit supra* n. 77.

120 Ellickson, *op. cit. supra* n. 90; Arthurs, *op. cit. supra* n. 90; P. Fitzpatrick and A. Rüegg, "Book Review, *Without the Law* by Harry Arthurs" (1988) 27 J. Leg. Pluralism 135; Santos, "The Law of the Oppressed" *op. cit. supra* n. 88.

121 See R.A. Macdonald, "Les Vieilles Gardes: Hypothèses sur l'emergence des normes, l'internormativité et le désordre à travers une typologie des institutions normatives," in J.-G. Belley, ed., *Le droit soluble: contributions québecoises à l'étude de l'internormativité* (Paris: L.G.D.J., 1996).

122 Fitzpatrick, "The desperate vacuum", *op. cit. supra* n. 88; P. Fitzpatrick, ed., *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (London: Pluto Press, 1991).

123 Santos, *op. cit. supra* n. 103 at 297-98.

124 Santos, *op. cit. supra* n. 10 at 385; see generally "Chapter 5: Law, The State and Urban Struggles in Recife" at 378-97.

125 Santos, "The Law of the Oppressed", *op. cit. supra* n. 88; "Chapter 3: The Law of the Oppressed," in Santos, *op. cit. supra* n. 10 at 124-248, esp. at 176-84, and generally at 176-234.

126 See Blomley, *op. cit. supra* n. 20, Chapter 3. See M.S. Monmonier, *How to Lie with Maps* (Chicago : University of Chicago Press, 1991).

127 Compare the map by Saul Steinberg, "The View from Fifth Avenue," which attempts to map the perspective of the New Yorker, Fifth Avenue in sharp relief, then the Hudson River, New Jersey vaguely perceived in the distance, and India and Asia scarcely a speck upon the horizon.

128 Santos, *op. cit. supra* n. 103, 298-99.

129 *Ibid.,* at 289-90.

130 J. Gleick, *Chaos: Making a New Science* (New York: Viking, 1987); J. Casti, *Complexification: Explaining a Paradoxical World Through the Science of Surprise* (New York: Harper Collins, 1994). A further, if rather fragmentary, explication of the relationship of chaos to postmodernism and law is Milovanovic, *op. cit. supra* n. 114 at 117-8 129, 228-40. D. Milovanovic, "Humanistic Sociology and the Chaos Paradigm: Review Essay of N. Katherine Hayles, *Chaos Bound*" (1991) 15 Humanity & Society 135. And for other brief excursions, see R.E. Scott, "Chaos Theory and the Justice Paradox" (1993) 35 William & Mary L. Rev. 329; G.H. Reynolds, "Chaos and the Courts" (1991) 91 Col. L. Rev. 110. I would note, however, the largely peremptory nature of the discussion of chaos in these articles, despite their claims. Scott, in particular, fails to distinguish chaos theory as an explanation of "law" or "justice" from its value as an explanation of legal theories.

131 The seminal work is B. Mandelbrot, *The Fractal Geometry of Nature* (New York: W.H. Freeman, 1983).

132 Gleick, *op. cit. supra* n. 130 at 98. I use the word tangled with care, since it is not only typical of the descriptions of fractal geometry in Gleick, for

example, but at the same time establishes a connection with the dense interwoven harmonic "tangles" in the linguistic and harmonic language of Messiaen's *Quartet for the End of Time.*

133 A Koch curve is a simple geometric model of this idea; a snowflake is something similar. There is an important distinction to be drawn here. If you look at the Mandelbrot set, each magnification is not simply a *repetition* of the previous levels of analysis—each level provides surprises and nuances. The fractal never exactly repeats itself: what stays constant at different levels is the *degree of complexity* of the system, and not the precise form that complexity takes.

134 Milovanovic, *op. cit. supra* n. 114 at 235.

135 See, for example, the concept of "bio-power" developed in M. Foucault, *The Use of Pleasure, The History of Sexuality vol. 2,* trans. R. Hurley (New York: Vintage Books, 1986); M. Foucault, *The Care of the Self, The History of Sexuality vol. 3,* trans. R. Hurley (New York: Random House, 1988), with its exploration of the replication of relations of power at the level of the body; see also the discussion of "the bodily hexus" as it instantiates social relations in P. Bourdieu, *Language & Symbolic Power* (Cambridge, Mass.: Harvard University Press, 1991).

136 Milovanovic, *op. cit. supra* n. 114 at 230-33, 242-45, relying in particular on Deleuze and Guattari, provides a different interpretation. Focusing on the fractal as a fraction of a dimension, he treats it mainly as a metaphor for indeterminacy of meaning. The meaning of a text, he argues, is never either 0 (wrong) or 1.0 (right); rather, it lies in between as a "semiotic fractal," filling the space of meaning only partially. This interpretation of the fractal does not seem to me to capture either its shape or its meaning, let alone the reason for its aesthetic appeal (see below). A fractal is not simply another word for a *fraction.*

137 C. MacKinnon, *Feminism Unmodified* (Cambridge, Mass.: Harvard University Press, 1987); L. Nicholson, ed., *Feminism/Postmodernism* (London: Routledge, 1990); A. Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 Stan. L. Rev. 581; M. Kline, "Race, Racism and Feminist Legal Theory" (1989) 12 Harv. Women's L.J. 115. "Critical race theory" has provoked the same kind of debate within CLS.

138 See the discussion of the Lorenz attractor in Gleick, *op. cit. supra* n. 130 at 23; E. Lorenz, "Deterministic Nonperiodic Flow" 20 J. Atmospheric Sciences 130. The same is true in research on "strange attractors"; there too it is simplicity which generates complexity: e.g. at 272. The result is a system which gives only the "*appearance* of complete randomness by means of a purely deterministic rule:" Casti, *op. cit. supra* n. 130 at 88.

139 See also the discussion of "catastrophe theory" in Casti, *op. cit. supra* n. 130 at 43-84.

140 R. Penrose, *Shadows of the Mind* (London: Vintage Books, 1994) at 21-24 emphasizes that this emphasis relies on the *practical* impossibility of definition and prediction, despite the theoretical determinism of the system. See also Polanyi, *op. cit. supra* n. 13.

141 The question of non-linearity is returned to frequently in Gleick and others: e.g. *op. cit. supra* n. 130 at 23-24, 27.

142 See Sampford, *op. cit. supra* n. 118.

143 See, for example, -, "Toward a Rational Drug Policy" (1994) U. Chi. Leg. Forum, no. 1, 1; Australia, Parliamentary Joint Committee on the National Crime Authority, *Drugs, Crime and Society* (Canberra: A.G.P.S., 1989) (Commissioner: P. Cleeland); J.C. Blackwell and P.G. Erickson, ed., *Illicit Drugs in Canada: A Risky Business* (Scarborough: Nelson Canada, 1988); I. Elliott, "Heroin: Mythologies for Law Enforcers" (1982) 6 Crim. L.J. 6; D. Hawks, "The Implications of Legalizing Heroin" (1990) 34 Quadrant 53; J. Kaplan, *The Hardest Drug—Heroin and Social Policy* (Chicago: University of Chicago Press, 1983).

144 See for example K. Bruun*et al.*, *The Gentlemen's Club* (Chicago: Univ. of Chicago Press, 1975); D. Manderson, *From Mr Sin to Mr Big: a History of Australian Drug Laws* (Melbourne: Oxford University Press, 1993); D. Musto, *The American Disease* (New Haven: Yale University Press, 1973).

145 It also suggests a suspicion of those theorists who claim to be interested in law as the science of prediction: "The prophecies of what the courts will do, and nothing more pretentious, is what I mean by law": O.W. Holmes, "The Path of the Law" (1897) 10 Harv. L. Rev. 457; or in the Realists' assertion that law itself is "generalized predictions of what courts will do": "Some Realism About Realism" (1931) 44 Harv. L. Rev. 1222, in Llewellyn, *op. cit. supra* n. 29, at 56.

146 See Peterson, *op. cit. supra* n. 5.

147 Gleick, *op. cit. supra* n. 130 at 309.

148 I do not mean, of course, that there is a one-to-one correspondence between action and transformation—one can imagine all sorts of different geometric progressions—but there is a *ratio* between the two which remains constant.

149 C. Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983); M. Polanyi, *Personal Knowledge* (London: Routledge & Kegan Paul, 1958). C. Geertz, *After the Fact* (Cambridge, Mass.: Harvard University Press, 1995) provides a fusion of personal knowledge and local knowledge in a narrative of richness and beauty.

150 Messiaen, *op. cit. supra* n. 1 at 13.

151 *Ibid.*, at 13.

152 In a rapidly expanding literature, see sources cited at note 27; Douzinas, *et al, op. cit. supra* n. 37; Douzinas & Warrington, *op. cit. supra* n. 37; A. Hunt, "The Big Fear: Law Confronts Postmodernism" (1990) 35 McGill L.J. 507; -, "Deconstruction and the Possibility of Justice" (1990) 11 Card. L. Rev., nos. 5-6, 919; S. Benhabib, "Critical Theory and Postmodernism: On the Interplay of Ethics, Aesthetics, and Utopia in Critical Theory" (1990) 11 Card. L. Rev. 1435; J. Butler, "Deconstruction and the Possibility of Justice: Comments on Bernasconi, Cornell, Miller, Weber" (1990) 11 Card. L. Rev. 1715; C. Douzinas and R. Warrington, "Posting the Law: Social Contracts and the Postal Rule's Grammatology" (1991) 4 Int. J. Sem. L. 115; D. Cornell, "Toward a Modern/Postmodern Reconstruction of Ethics" (1985) 133 U. Pa. L. Rev. 291; -, "Law and the Postmodern Mind" (1995) 16 Card. L. Rev., nos. 3-4, 699; A.E. Cook, "Reflections on Postmodernism" (1992) 26 New Eng. L. Rev. 751; -, "Postmodernism and Law: A Symposium" (1991) 62, Colorado L. Rev., no. 3, 433; P. Schlag, "Introduction to Postmodernism and Law: A Symposium" (1991) 62 Colorado L. Rev.439; M.J. Frug, "Law and Postmodernism: The Politics of a Marriage" (1991) 62 Colorado L. Rev.483.

153 The relationship of science to legal theory is a notable feature of Santos' book, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition.* There is, in particular, an excellent summary of the tenets of Newtonian science, and the breakthroughs of this century which have undermined it. Nevertheless, this analysis is concerned mainly with an explication of the "crisis" of rationalist science—as an exemplar of modernism generally—rather than a consideration of any of the aspects of a new scientific paradigm. Chaos is treated, briefly, as a destabilizing feature of science rather than as a new and suggestive orthodoxy: *op. cit. supra* n. 10 at 19, 25-26. As we have already seen in relation to legal pluralism, there is a tendency here to treat the "dominant paradigm" (of modernist epistemology) as a more powerful and undisturbed villain than it really is.

154 For example, D. Pacher, "Aesthetics v. Ideology: The Motives Behind "Law and Literature"" (1990) 14 Columbia-VLA J. Law and the Arts 587; D. Cornell, "Toward a Modern/Postmodern Reconstruction of Ethics" (1985) 133 U. Pa. L. Rev. 291; D. Polsby and R. Popper, "Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act" (1993) 92 Mich. L. Rev. 652; W. Stevens, "Imagining Justice: Aesthetics and Public Executions in Late Eightheenth-Century England" (1993) 5 Yale Journal of Law and the Humanities 51; S. Gey, "This Is Not a Flag: The Aesthetics of Desecration" (1990) Wisconsin Law Review 1549; R. Kevelson, ed., *Law and Aesthetics* (New York: Peter Lang, 1992); C. Douzinas, *Justice Miscarried: Ethics, Aesthetics and the Law* (Hemel Hempstead: Harvester Wheatsheaf, 1994); Ward, *op. cit. supra* n. 37.

155 Milovanic, *op. cit. supra* n. 114 (although as I have noted earlier, the title is somewhat deceptive, for the book in fact treats chaos theory only briefly); K. Kelly, *Out of Control: The New Science of Machines, Social Systems, and the Economic World* (Reading, Mass.: Addison-Wesley, 1994); N.K. Hayles, *Chaos Bound: Orderly Disorder in Contemporary Literature and Science*

(Ithaca, NY: Cornell University Press, 1990); N.K. Hayles, ed., *Chaos and Order: Complex Dynamics in Literature and Science* (Chicago: University of Chicago Press, 1991); Casti, *op. cit. supra* n. 130 at Hawkins, *op. cit. supra* n 115. There are also suggestive references to 'postmodern science' in J.-F. Lyotard, *The Postmodern Condition: A Report on Knowledge* (Minneapolis: Minnesota University Press, 1984).

156 It is an ignorance and an authority exploited incessantly by the advertising industry; no cosmetic is complete without "hydroxinol 5" or some other magic ingredient.

157 Gleick, *op. cit. supra* n. 130 at 47-52.

158 T. Stoppard, *Arcadia* (London: Faber & Faber, 1993) at 47, quoted in Hawkins, *op. cit. supra* n. 115 at 23.

159 See "Images of Chaos" in *ibid. at* 213-40.

160 See the paper by Edward Lorenz, "Predictability: Does the Flap of a Butterfly's Wings in Brazil Set Off a Tornado in Texas?" discussed in Gleick, *op. cit. supra* n. 130 at 18-23.

161 Lorenz *op. cit. supra* n. 138; Gleick, *op. cit. supra* n. 130 at 29-31.

162 See for example H.-O. Peitgen, *The Beauty of Fractals* (Berlin & New York: Springer-Verlag, 1986); John Briggs, *Fractals: The Patterns of Chaos* (New York, Touchstone, 1992); John Briggs & F. David Peat, *Turbulent Mirror: An Illustrated Guide to Chaos Theory.*

163 Quoted in Gleick, *op. cit. supra* n. 130 at 102.

164 D. Ruelle, "Strange Attractors", (1980) 2 *Mathematical Intelligencer* 126, quoted in Gleick, *op. cit. supra* n. 130 at 153.

165 Quoted and discussed in Gleick, *op. cit. supra* n. 130 at 116-18. See the wonderful imagery reproduced in Gleick, *op. cit. supra* n. 130, between 114-15; see also Peitgen *op. cit. supra* n. 162; Briggs, *op. cit. supra* n. 162.

166 J. Briggs, *Fractals: The Pattern of Chaos* (New York: London, 1992) at 2.

167 T. Hobbes, *Leviathan* (Oxford: Blackwell, 1946), first published in 1651, and Sir Isaac Newton, *Philosophiae naturalis principia mathematica* (London: W. Dawson, 1966), first published in 1687. The closeness of these publications is of course by no means coincidental and reflects the emergence of just this shared modernist sensibility.

168 See the discussion of Tom Wolfe, *From Bauhaus to our House* (New York: Washington Square Press, 1981), which discusses the alienation of modernist architecture and housing, in Hawkins, *op. cit. supra* n. 115 at 164-67.

169 Hawkins, *op. cit. supra* n. 115 at 40.

170 Although I do not consider the matter here, the same message that comes from the conclusions of chaos theory also, to some extent, comes from the process of chaos theory—and even more so, from quantum theory. Modern science in general has increasingly focused on the complexities and mysteries of the miniature. There could scarcely be a more extreme metaphor for the local and the particular than the sub-atomic particles that are today shattering our understanding of physics: see for a helpful summary, Penrose, *op. cit. supra* n. 140 at 237-300.

171 The connection of ideas of chaos to postmodern legal theory is further developed, although not centrally, in Milovanovic, *op. cit. supra* n. 114 at 117-8 129, 228-40. There is a growing literature on the implications of chaos for the social sciences and humanities: see for a popular example, Kelly, *op. cit. supra* n. 155; Milovanovic, *op. cit. supra* n. 130; Hawkins, *op. cit. supra* n. 115; Hayles, *ops. cit. supra* n. 155.

172 Santos, *op. cit. supra* n. 10 at 26.

173 *Ibid.,* e.g. at 458, 497.

174 Thus N. Reschler, *Pluralism* (Oxford: Clarendon Press, 1993) at 4, describes pluralism as "damage control" given the inevitable continuance of dissensus in society. It is an approach which finds echoes in classic works of liberalism such as J.S. Mill, *On Liberty* 1857); and J. Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1972).

175 It is a narcissism which the technology of the "news group" further facilitates by artificially limiting the subject-matter of any communication, and by even denying us the capacity to see or hear our colleagues. Influenced only by the stream of words emanating from the screen, the fantastic projection of ourselves onto the other is encouraged. Even e-mail suffers from this problem. It encourages most intimate relations, but sometimes that intimacy is an illusion caused by way in which the other is so easily reimagined in fantasy. Dialogue becomes a mutual soliloquy.

176 R.M. Unger, *False Necessity* (New York: Cambridge University Press, 1987) at 531-2; Milovanovic, *op. cit. supra* n. 114 at 234-36; Santos, *op. cit. supra* n. 10, at 491-98. Santos most notably relates these ideas to chaos theory.

177 Quoted in Gleick, *op. cit. supra* n. 130 at 235.

178 Santos, *op. cit. supra* n. 10 at 496-97.

179 Gleick, *op. cit. supra* n. 130.

180 See Hawkins, *op. cit. supra* n. 115 at 51.

181 Plato, *Republic,* trans. B. Jowett (Oxford: Clarendon, 1921) at 424c.

182 J. Attali, *Noise: The Political Economy of Music,* trans. Brian Massumi (Minneapolis: University of Minnesota Press, 1985) at 3-4.

183 Walter Ong, quoted in B.J. Hibbitts, "Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse" (1994) 16 Card. L. Rev. 229 at 343.

184 *Ibid. at* 295.

185 *Ibid. at* 249-51, 238-63 and sources there cited.

186 In particular, the ocular authority of modernity is developed throughout M. Foucault, *Discipline and Punish,* trans. A.M. Sheridan Smith (New York: Vintage Books, 1979) and Foucault, *op. cit. supra* n.*104.* See in particular the analysis of this question in M. Jay, "In the Empire of the Gaze: Foucault and the Denigration of Vision in Twentieth Century Thought", in D.C. Hoy, ed., *Foucault: A Critical Reader* (Oxford: Basil Blackwell, 1986) at 175-204. Jay places Foucault's argument in the context of a variety of other writers, including Bergson, Bataille's *The Story of the Eye*, and the discussion of "le regard" in Jean-Paul Sartre's *Being and Nothingness.* I mention but do not discuss the central importance of the idea of masculinity of "the gaze" in much contemporary feminism.

187 L. Buñuel & S. Dali, w. & dir., *Un Chien Andalou* (Spain, 1927).

188 *Ibid.,* at Part III; M. McLuhan, *The Gutenberg Galaxy: The Making of Typographic Man* (New York: Signet, 1969).

189 There are interesting questions here about the operation and meaning of these senses in a differently constructed sensorium— in different cultures, for example (see D. Howes, ed., *The Varieties of Sensory Experience: A Sourcebook in the Anthropology of the Senses* (Toronto: University of Toronto Press, 1991), but also in the sense-world of the blind or deaf. One might compare the clutter of noise which invades the world of the partially deaf from the almost visual acuity of the blind person's ear. My arguments about the different sensory meanings of colour and sound relate specifically to people with all their senses intact, and not to these situations.

190 V. Nabokov, trans. D. Nabokov, "Sounds" (1923) in *The New Yorker:* Aug. 14, 1995, 74 at 78.

191 See A. Koestler, *Darkness at Noon* (New York: Macmillan, 1941); J.R. Saul, *Voltaire's Bastards: The Dictatorship of Reason in the West* (Harmondsworth: Penguin, 1992), 41-47, 73-76.

192 Mayakovsky argues that the democratic individualism of the twelve tone system is an aural representation of communism, but perhaps this is to look at the matter too narrowly and pedantically.

193 Quoted and discussed by F. Jameson in "Foreword" to Attali, *op. cit. supra* n. 182 at pp. x-xi.

194 Nabokov, *op. cit. supra* n. 190 at 74.

195 From D. Ackerman, *A Natural History of the Senses*, in Hibbitts, *op. cit. supra* n. 183, at 345.

196 J.M. Curtis, *Culture as Polyphony: An Essay on the Nature of Paradigms* (Columbia & London: University of Missouri Press, 1978); C. Weisbrod, "Practical Polyphony: Theories of the State and Feminist Jurisprudence" (1990) 24 Ga. L. Rev. 985.

197 R.A. Macdonald, "Pluralism and Constitutionalism" (Laval, Que.: unpublished, 1995).

198 We can find this distinction and this change in rhetoric in surprising places. In 1957, Karl Llewellyn wrote about "inter-racial peace": K. Llewellyn, "What Law Cannot Do for Inter-racial Peace" (1957) 3 Villanova L. Rev. 30. Now we would say inter-racial *harmony.*

199 Foucault, *op. cit. supra* n. 7.

200 Derrida, *op. cit. supra* n. 11; J. Derrida, *Positions,* trans. Alan Bass (Chicago: University of Chicago Press, 1981).

201 Attali, *op. cit. supra* n. at 121-42.

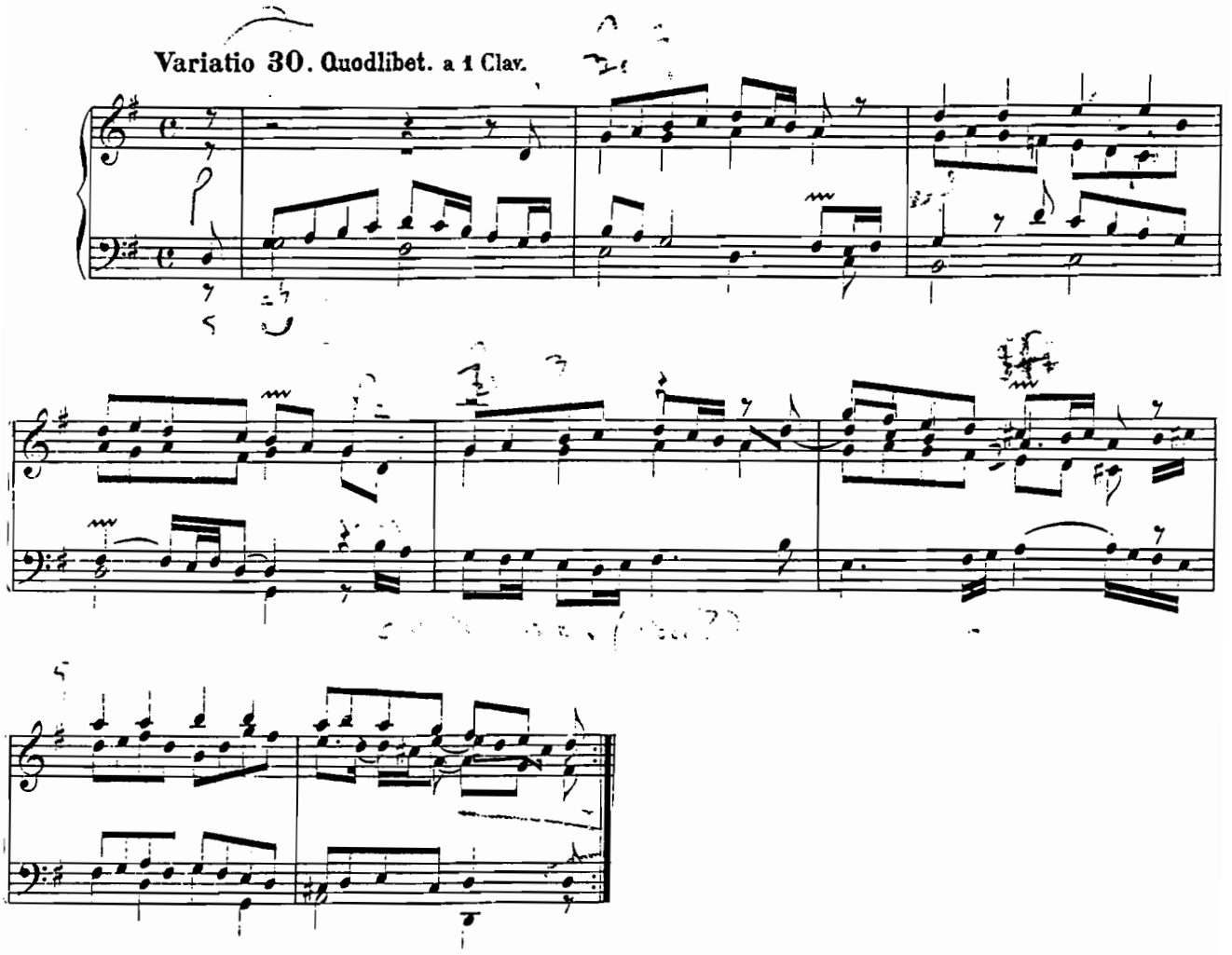
202 S. McClary, in *ibid. at* 158.

203 I am thinking here particularly of the extraordinary expansive semibreves/whole notes played by the clarinet in the "Abyss of the Birds," and also the very end of the violin's part "In Praise of the Eternity of Jesus".

204 Messiaen, *op. cit. supra* n. 1 at 13.

Quodlibet

Just Aesthetics and the Aesthetics of Justice



Quodlibet

Just Aesthetics and the Aesthetics of Justice

> Quodlibet [A.L. *quodlibet* (f. *quod* what + *libet* it pleases (one))...]
>
> 1. Any question in philosophy or theology proposed as an exercise in argument or disputation, hence, a scholastic debate, thesis or exercise on a question of this kind...
>
> 2. A fanciful combination of several airs; fantasia, medley.[1]

Music is not just noise: it has rhythm, harmony, tone, and so forth. But to an important extent the difference between the two is form, which is always a system for the channelling and control of raw power.[2] Noise without form is a weapon.[3] This is why the relationship of form to content, and the speaking of each through the other, has been such an integral aspect of these *Songs Without Music.* Formally, I have attempted to communicate my understanding of the meaning of law, the forces which influence it, and the nature of interpretation, precisely through the structures I have developed and the metaphors I have adopted. Substantively, and in light of the understanding of the normative aesthetics of the present outlined in the *Quartet,* I have urged a broad pluralism, a joy in difference for its own sake, a restraint on legislative social control and regulation, and a focus on local knowledge. But none of this is to say that there is no place for 'law' in society. Law is one of the ways in which form is developed in society, and law expresses itself *through* form, as we have seen—through structure and style and ritual. Form and content are bound together. To abandon form altogether is to abandon creative tension, for it is through the constraint of form that content forms. Peter Brooks puts it this way:

> The realm of the aesthetic needs to be respected, by an imperative that is nearly ethical. ...[P]ersonality must be tempered by the discipline of the impersonal that comes in the creation of form. "Form" in this sense is really an extension of language, which is itself impersonal in the same way. ...To understand that [language] possesses and defines us—that it is a formal system in which and through which we speak—is a necessary condition of subjectivity.[4]

Rather, my message has been about the need to expand what we mean by "the law" beyond the customary reifications which jurisprudence practices, to understand more richly how it operates, and to reconfigure the ideal of a legal society, to think about chaos rather than order as its final goal. The desire for "law and order"—by which is typically meant too many laws and too many orders—stems from a fear that chaos is equivalent to anarchy, and that freedom begets licence. One of the crucial messages of chaos theory is that chaos exhibits an internal order, structure, and indeed stability. To encourage diversity and even destabilization in society will not lead to an entropic soup.

We come now to an exercise in disputation about the question of the normative. If aesthetics is about lessening and pluralizing laws, what does it say about justice? Is aesthetics silent as to the contours and meaning of justice? Is aesthetics, ultimately, of analytic but not of normative significance? Does it describe but not imply a way of choosing between different values? On the contrary, the aesthetic suggests very strongly a *particular normative dimension* in the pursuit of justice. This is the argument I will pursue in the fantasia which follows. A Quodlibet was frequently used as the short, concluding section of a set of variations, intended to play on the themes of the rest of the piece, but in a more liberal and reflective style. The Quodlibet which concludes J.S. Bach, *The Goldberg Variations,* is a fine example, and returns us to the combination of Bach and Glenn Gould with which these *Songs Without Music* began.

***

I want to argue, in fact, that justice is inevitably connected with aesthetics. What do these rich yet somehow inexplicable concepts share which suggests such a deep connection? There is, no doubt, deep division as to what each entail, and so we might begin by noting that they share a history of contention. The literature on both is vast, yet there is no commonality as to their meaning. The philosophy of aesthetics seems to be a series of false starts and new beginnings, each philosopher sharing with his or her predecessors only passion at best, and dogmatism at worst. So it is with justice, too, which is described according to a wide variety of different frameworks—as procedure or as content, as desert or as fairness—and the adherents of one have little to say to the advocates of another.[5] One begins to suspect that 'justice' is nothing but a rhetorical spice the addition of which effectively disguises the stench of festering prejudices.

The meaning of justice and of aesthetics is not, then, a matter for agreement. It seems to encompass a variety of contradictory impulses, and we can concede, with Plato, that the good is never entirely knowable "for it does not admit of verbal expression like other branches of knowledge."[6] This is a particularly important point to make because the history of aesthetics is replete with dogmatisms as to the 'inherent' nature or necessary shape of beauty. I want to briefly critique this universalization of the aesthetic. Now, undoubtedly both justice and aesthetics are *felt* to be absolutes in our lives. Kant conveys well the way in which beauty is experienced as something so compelling that we take it to be universal.

> Since the judgment of beauty or of taste must be universally and necessarily valid for all men, its ground must be something identical in all men... For the fact of which everyone is conscious, that the satisfaction [in the judgment of beauty] is for him quite disinterested, implies in his judgment a ground of satisfaction for all men...For it has this similarity to a logical judgment that we can presuppose its validity for all men.[7]

But Kant's error lay in confusing the experience of universal truth with its reality. There is, as I have argued, nothing absolute or a-cultural in the perception of beauty, although the awe or rapture which invades the heart as we contemplate the beauty of nature or are borne along by Beethoven's force, may appear to sweep all doubt before it. The same feeling of 'oughtness' overwhelms us in the face of justice: an appeal to justice, like an appeal to beauty, exactly because it is *felt* to be bedrock and self-evident, is *not* explicable. Thus the impossibility of any definition of justice or beauty, since both are axiomatic in our lives; thus also the dogmatism of so many of its claimants.

It is this absolutism which accounts for the questionable lineage of those who have sought to incorporate aesthetic arguments into the ethical and political realm. For Friedrich Nietzsche, the idea of aesthetics was a way of approaching a world "beyond good and evil". Through aesthetic arguments, Nietzsche glorified the beauty of power, the triumph of will over morality, and those "artists of violence ... who build states."[8] Indeed Nietzsche not only argues for the triumph of aesthetic criteria in judging people and behaviour but does so in overwhelmingly aesthetic language and by a continual use of specific sensory images.[9]

Nietzsche's aesthetic values are very different from Kant's, but he is equally guilty of universalizing his preferences. For Nietzsche the "will to power" which guided his life was never questioned. There is, in general, an assumption in Nietzsche that *homo natura* is a "beast of prey" who enjoys the infliction of pain and the experience of life as a savage and untempered Dionysian dance.[10] He scorned the "herd instinct" with its levelling nature of the modern world, the unnatural "slave

morality" in which only the most "mean and average of desires" is branded virtue.[11] But this assertion of *naturalness* merely justifies his own passionate aesthetic drive. In this he presents the archetype of the man who refuses to stand outside his own world-view and finds it impossible even to begin to understand the way in which the world might seem to those he so contemptuously brands "lambs" and "pygmy animals". In no other writer is the power of the aesthetic at once so well-perceived and yet such an obstacle to clear sight.

Nazism likewise treated a love of power and force as somehow intrinsic to the idea of beauty. Universalizing the particular aesthetic obsessions of Nietzsche and Richard Wagner, brought to a pitch of passion in Joseph Goebbels' orchestrated spectacles of unity and by the filmic skill of Leni Riefenstahl, the Nazis used the power of aesthetics to quell resistance, inspire conformity, and subjugate the individual to the State. "The aestheticization of politics"—in Walter Benjamin's devastating and tragic phrase[12]—sums up, on the one hand, the chilling immorality of treating the State as a work of art and human suffering as a necessary or even poetic tool of its creation; and on the other, the victory of spectacle over meaning, "providing imaginary reconciliations to contradictions that remained unresolved in the real world." Indeed, some have seen these same totalizing instincts in postmodernism, the same willingness to surrender the critical sense in the face of the "seduction" of aesthetics.[13]

The conflation of a particular construction of beauty with its absolute character has been a common and mistaken impulse from the time of Plato. It has served a wide variety of contending ideologies to make such totalizing claims.[14] But the beautiful is not something absolute, and there are different views as to its content. In arguing that aesthetics provides us with normative values of relevance to ideas of justice, I naturally think that the Nazis got it wrong. Nazism demonstrates the power of aesthetics, but also its corruption. In fact, what we see in Nazism is above all the manipulation of *modernism* in art. Benjamin argues that "reproducibility" is the

essence of modernism, manifested in the cult of the signature as a guarantor of value, and in the importance of the artist reproducing some trade-mark from canvas to canvas. Baudrillard likewise declares that the "serial character of modern art as precisely that which assigns value to the singular object." Warhol makes the same point...over and over again. Not uniqueness but rather constancy of "gesture and signature" has been the essence of modernism.[15]

It is this characteristic which was played upon with such success by Nazi imagery, gaining emotional force precisely by the massification of characteristic gestures—of salutes and swastikas and blue-eyed blonde youths multiplied division upon division. If there was an element of formal ritual here, as in liturgy or dance, it was a ritual from which the opportunity for personal interpretation had been removed, and in which no potential for change was envisaged—the Third Reich was to last a thousand years, just as it was. Ironically, given that I am arguing that fascism saw the triumph of modernism rather than the triumph of the aesthetic, the Nazi suppression of modernism in art was wholesale and vicious. But "degenerate art," as the famous Munich exhibition of 1937 called it, included everything *generative* in the art-world. All that was left was an 'art' which, for the most part, was deracinated and static.[16] Although Nazism was able to successfully appropriate some of the symbolism and emotional techniques of modernism, it saw only danger in the *process* of artistic change itself.

'Process' is the key to this dispute. To see what aesthetics and justice share, one must move to a higher dimension of analysis, away from the deeply contingent claims as to what beauty or fairness 'really is', and towards the common process by which they structure a discourse.[17] We can draw conclusions about *how* aesthetics and justice are experienced and exercised, rather than in *what* they are said to require.

Both are a mode of apprehension and expression: a way of seeing, and not a thing to be seen.[18]

If, unlike the modernists, we aesthetics as a process of understanding rather than as a product, different values come into focus. There are two ways in which these aesthetic values relate to our ideas of justice, and can help to inform it. They are two sides, of course, of the same coin. First, the aesthetic dimension is part of our best understanding of the nature of justice in our society. This is the aesthetic nature of justice. Secondly, the aesthetic is, in itself, a libratory process which aims "to retrieve the totality and harmony of the human personality."[19] Appreciating aesthetics is part of the work of making a better society which will influence how we think about justice just as it influences how we think about the world around us. This is the just nature of aesthetics.

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The aesthetic nature of justice is suggested by several different perspectives. Both are kinds of judgments. They weigh up the merit of a thing or a person. Kant's discussion of aesthetics, for example, is to be found in his *Critique of Judgment.*[20] The postmodern "return" to aesthetics, therefore, particularly in relation to law, far from constituting an abandonment of ethics, is a recognition of their intimate alliance, and—as Kant himself recognized—the ultimately free and unbounded nature of both.[21]

Such judgments are in fact very closely connected. Let us focus on justice as a way of knowing. The work of Kurt Gödel may provide a useful insight. Perhaps the shift beyond modernism began with Einstein; he at least is the token for the world-shift from a mechanical to a relativist universe, and in particular for the rupture in linear time which the idea of relativity represents. Perhaps it was Schrödinger;

perhaps Heisenberg; but few have as great a claim as Kurt Gödel, the destabilizing ramifications of whose famous theorem are still being worked through. Roger Penrose puts it helpfully.

> Human mathematicians are not using a knowably sound algorithm in order to ascertain mathematical truth.[22]

Gödel proves, from *within* the logic of the mathematical system, that certain things which are true according to its premises, nevertheless cannot be logically derived from it. All systems have "metamathematical properties" which cannot be observed from within.[23]

Our knowledge of these truths, then, stems from some *understanding* of the system of rules and axioms which the system does not itself replicate and cannot either manufacture or comprehend. This "understanding" is the heart of Penrose's argument, although he is not precisely clear what he means by it. But it relates to an "awareness" of the 'why' of the system to which the system itself—mute sequence of rule-following algorithms—has no access to, just as a computer can carry out rules but cannot display a consciousness of what it is doing.[24] It is this understanding which allows us to supplement algorithms of procedure with a contemplation of their purposes. The word "supplement" indicates the connection between Jacques Derrida's philosophy and Kurt Gödel's mathematics. For Gödel's theorem is nothing but a specific case of Derrida's argument, and vice-versa. The most rigorous and analytic theory or system *requires* a supplement which is both necessary to its functioning and yet cannot be admitted by its structure.[25]

This supplement is an awareness of the "purposes" which motivate the system, an argument most closely associated with Lon Fuller. Fuller's point is nothing but an analogous case of Gödel's theorem, and vice-versa. Positivism conceives of specific rules or a whole legal system as an algorithm and nothing but an algorithm: "some system of formalized procedures for which it is possible to check, entirely computationally, in any particular case, whether or not the rules have been correctly

applied."[26] But well before CLS, Fuller insisted that the process of interpretation always requires an understanding of the reasons why we are engaged in interpretation. For Gödel and Fuller alike, the 'is' and the 'ought', the how and the why, of legal interpretation are inextricably linked.[27]

> Human lawyers are not using a knowably sound legal rule in order to ascertain legal truth.

Gödel's theorem demonstrates that legal meaning overflows rule-following. Even from the point of view of law as a system of rules *itself,* legal meaning requires another element which, by definition, cannot be defined in terms of those rules and systems, and remains an indigestible supplement or remainder to them. Justice is one way of understanding this supplement; something both utterly removed from and yet embodied in the operation of law. It is a mistake (nonetheless frequently made) to conflate the two, as if an exacerbated quantity of the latter could somehow accelerate the former.[28] Neither the rote application of law nor the random exercise of mercy constitute justice. It is rather both one and all, within and without.

Justice is beyond and yet essential to law, irreducible and irreplaceable. This paradox leads to another, for justice, exactly *because* it can never be found through the application of an abstract rule, is the fusion of the universal and the particular. Justice is understood as the application of general principles, but at the same time—and especially within the common law system—it demands an acknowledgment of the "irreducible singularity" of each individual context.[29]

> This other—insofar as we can apprehend it at all—*is* the familiar, strangely lit, refracted, self-distanced....It is, in each text, a *singular* process; otherness cannot be generalized—which would mean that it could be coded, carried away, replicated—but must be staged *as* uniqueness, as untranscendable contingency.[30]

A just decision, therefore, is not an act of rule-following, but of the rediscovery, as an act of free will, of the appropriateness of a general principle in the particular case.

> In short, for a decision to be just and responsible it must in its proper moment, if there is one, be both regulated and without regulation: it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, remystify it, at least reinvent it in the reaffirmation and the new and free confirmation of its principle.[31]

The same is true of the work of art. The judgment of aesthetics, as I argued in the *Prelude,* sees the object on which it is focussed as a statement of the universal *and* as an incommensurable singularity. But it is not a treatise. The universal nature of its content must be fused with and arise organically out of the singularity of its form. For the grounds of beauty, like the grounds of justice, may be *felt,* but the specifics of what is being articulated lie always fractionally out of reach. The meaning of justice and the meaning of the aesthetic may both be sensed, but they can never be codified or entirely understood. They lack an essence, or a definition; they exist in specific performances rather than as general propositions.[32] The aesthetic and the just alike deny the application of *a priori* models or abstract understandings, and instead focus on the tangible and unrepeatable experience of singular events. The art-work and the moment of judgment come each time differently: reproduction is forgery.

Above all, the idea of aesthetic value provides us with an important clue as to what people mean when they demand 'justice', in other words, what they seek to express through justice. Again, I do not write here of what justice requires, or whether those who appeal to justice are right to do so. On the one hand 'justice' seems often a first cousin to mercy, sounding an appeal to sympathy or fairness, whether formal or substantive. Both require subjective and interpretative participation, whereas 'law' and 'order' on the other hand appeal to something which is (said to be) objective and pre-determined. But justice is a sword with a hard edge that ought not be dulled by politeness. The "revolutionary justice" that supposedly legitimated the terrors of the French or Russian revolutions found expression in

secret executions and public massacres. The language and practice of "popular justice"—often but by no means exclusively invoked in Marxist rhetoric—implies peremptory and violent retribution. It is a term which scarcely invites either formality or compassion.[33] Quite the opposite, it suggests a combination of severe judgment and swift vengeance. Neither is this simply a case of the ironic inversion of the discourse of the elite in revolutionary times. It would seem that "rough justice" is genuinely understood to be a kind of justice, however arrogant and merciless its practitioners.

This is what we need to explain: not what you or I believe justice demands in any case, but rather what those who use the language of justice—whatever they believe—share. The answer, I suspect, is that as a discourse or process of understanding, justice relies on aesthetic values. One of those values is the idea of proportion or balance. This is to say no more than Montesquieu: "Justice is a relationship of fitness."[34] Justice is never understood as being about pragmatism; it focuses exactly on establishing, in a universe devoid of other considerations, a 'fit' between the individual subject (a criminal, for example) and the social response. Aesthetics likewise deigns functionalism, and focuses on the form and balance of the individual object (a pot, for example) in a universe devoid of other criteria. In both cases one seeks a match between subject/object and consequence.

Supporters of the death penalty, for example, as I discussed in the *Requiem*, resort to the rhetoric of justice, specifically in terms of the *lex talionis*. This too is an aesthetic criterion. "An eye for an eye, a tooth for a tooth" proclaims not only the importance of enforcing responsibility for acts committed, but enacting that responsibility in a way which balances the two. The image of execution is seen to *balance* the image of murder. The promise of closure derives from an appeal to symmetry. And opponents of capital punishment also believe in justice as an aesthetic criterion. But in this case, State-sanctioned murder is not seen to balance the act of murder, but to *duplicate* it. Far from being an image of symmetry, it is an

image of multiplication which intensifies the lack of proportion and thus only exacerbates the ugliness of the original act. Balance and fit, far from being restored, are further distorted.[35]

The question of balance is but one aspect of a broader point. Justice is in fact a kind of aesthetic appeal because it operates by a language of symbolic meaning expressed in sensory form. To say that 'justice is done' is therefore not simply to say that the right result has been achieved, but also that it has been done in the right way—a question of form and imagery. In *Othello,* the Moor and Iago plot Desdemona's murder:

> *Iago:* Do it not with poison, strangle her in her bed, even the bed she hath contaminated.
> *Othello:* Good, good; the justice of it pleases; very good.[36]

Othello sees justice in the symbolism of the act, the rhetorical balance between punishment and crime.

At times, and especially in periods of revolution or turbulence, the symbolic aspect of punishment becomes even more significant. We need only recall the ways in which the "popular justice" of the poor in eighteenth century England typically took symbolic form,[37] to see that justice in these contexts includes ideas of fit, imagery, and irony. Look the burning of wealthy farmers in their silos in the rural terror of revolutionary France. Neither do such acts live only in the dimly remembered past. Here is a case of the so-called "popular justice" of the Vietnamese revolution, a young man whose eye-glasses incited in his interrogator the hackles of suspicion and enmity.

> "Are you trying to act blind? We are the people; we are the justice. We know you so well, traitor. Why don't you come and get them?" ...[He] dropped the glasses into the dirt, lifted his foot, then brought it down, grinding glass into the dust.[38]

I am not for a moment suggesting that this was a just or a justified act. But it was an act which was *believed* to be "justice," and it therefore shares expressive characteristics with other acts done in the name of justice. I am interested in the kind

of claim that justice is, rather than the content of the claim. And my argument is that this was not simply an act of punishment or even of cruelty. In this case, the rhetoric was extremely complicated, and stemmed from the accuser's belief that the victim was an "intellectual". His glasses thus represented both the knowledge which alienated him from the peasantry, and his blindness, therefore, to their plight. The act of destroying the glasses was therefore intensely symbolic, and it is precisely because of its symbolic dimension that it was claimed to be an act of justice and not of law.

It is, I think, the symbolism of the act which most deeply haunts and horrifies me. At the same time, when I think about what I want when demanding of others "justice", it is that they genuinely confront the nature of their actions. This internal reckoning is not accomplished simply by external acts of confession or punishment—that was, perhaps, the hope of the inventors of the "penitentiary", but in that they were naïve.[39] It is more likely to be accomplished by the way in which symbolism speaks to the heart; that is, by the power which aesthetics has to reach us as nothing else can. The aesthetic element of justice therefore has a second element. For the claimant, the combination of the sensory experience of punishment and its symbolic meaning promises fit and some kind of symmetry. And for the recipient, it is meant to induce a jarring and personal recognition of a truth. In *both* cases, the role of sensory symbolism in the exercise of justice is as the literal embodiment of memory—the values of the community are memorialized through making them present in a visible and symbolic inscription upon the body of the individual.[40] This inscription is abrupt and deep in the case of capital or corporal punishment, shallow and enduring in the case of imprisonment. Even a trial, with its enactment of the rituals of presence and its statement of public values, involves important elements of symbol and memory. At this level, the process of a public trial is an aspect of the cry for justice and not just law, or retribution, or administration.

Justice and aesthetics share important characteristics as *processes* of *judgment.* Once this connection is accepted, we can consider more schematically the way in which aesthetic judgment is exercised—as a model for the exercise of justice. I mention three related themes of the aesthetic process. First, as I argued in *Variations,* the central characteristic of a symbol is that it is double-sided and overflowing with meaning. There is a plenitude and an ambiguity to the symbolic realm which resists reduction to definition and meaning. Indeed, this uncertainty is part of the strength of the art-work, for it creates its own resistance.[41] There is a potential of alternate interpretation in a work of art which goes beyond intention and beyond convention. There is always therefore something radical, something licentious, in aesthetic apprehension. The symbolic and the non-discursive invite a freedom which cannot be stamped out. So it was for the yellow stars and pink triangles of Nazi demonology, appropriated by its victims as a symbol of defiance. So it was even with an event as stage-managed as a public execution. As I suggested in the *Requiem,* the aesthetic meaning of the scaffold threatened to foment such counter-cultural acts of defiance that it had, finally, to be abandoned altogether.[42] The symbolic realm stands, at least potentially, outside the pedantry of social control.

Justice should engage in resistance too. It ought to listen to the voices which express alternative concepts of legality. There is, after all, a long connection between law-making as *revolutionary*, a mode of radical transformation, although it is a tradition now masked by the ideology of law as order.[43] I do not say that this should be the sole concern of the idea of justice, but it is an aspect which is too often ignored in a headlong rush towards abstract concepts of "rights" and "equality" or towards a blind and reductive faith in the meaning of rules. Justice is a species of symbolism and of aesthetic judgment. A radical resistance to univocal meaning is the heart of the value that the aesthetic has for us, so too it ought to be the heart of the value we place on justice.

Secondly, aesthetic judgment is empathetic. In a world of radical subjectivity and invariable indeterminacy, such empathy is most difficult to accomplish. We look at an art-work as something which remains forever distant to us, something forever more than our understanding of it: there is an 'otherness' to a work of art, a painting, a poem or a quartet, which begins with its very artifice and its formal quality, which continues by its symbolic depth and refusal to spell out what it means, and which is intensified by the way it is bracketed and set apart for special contemplation.[44] And yet in striving to understand it, we are invited to engage with it on its own terms, to appreciate its worth *despite* that difference. It requires us, as observers or as creators, to treat the object of contemplation not simply as something of utilitarian value for us, but as a thing of worth itself. This connection with and across otherness is the heart of empathy. Justice too must be construed as a recognition of the individuality and difference of others. Justice is not instrumental; it does not treat people as means; it does not demand conformity. On the contrary, it attempts to understand people and communities precisely on their own terms, no matter how hard that might be. This is not to say, of course, that the requirement of justice always results in forgiveness, but it *must begin* with an effort at comprehension.

Thirdly, the aesthetic is part of the task of community-building in society. Art creates a shared discourse, a compendium of cultural references which bind together a community or even a collection of otherwise disparate communities. Like language itself, the symbolic discourses of dance, song, religion, ritual, and so on, generate a sense of tradition and allow, by reference to it, the communication of both shared visions and conflicting ones.[45] One can see this in the reception of Shakespeare or Bach, and the way their works have become a common currency—a shared vocabulary that allows a vast range of ideas and experiences to be understood, exchanged, and valued. But the same process is underway every day, when we watch a film or go to see a band. The mutual experience of these symbols creates a

shared field for discussion, and thus mediates communication. At the same time, the very act of witnessing creates amongst the audience a sense of community. The presence of the symbols binds together those in its gaze, even as their interpretations differ. In this way, the aesthetic media "both compose and reflect community."[46]

This too is an important model for the development of justice. Justice can be understood as an effort to create community through symbolic performance. A trial, for example, uses a shared field of legal discourse to mediate communication. It is a field in which different visions of the right and the good are, again, translated into a common currency—a shared vocabulary that allows those visions to be understood, exchanged, and valued.[47] For the participants and for the broader community, the performance of justice, if successful, provides us with a canvas for communication, and with a sense of belonging through witnessing. In the case of both justice and aesthetics alike, we might say that the performance in question "is one geared to facilitating a shared appreciation of meaning, as opposed to an assertion of truth."[48]

Justice, therefore, needs to be understood as a kind of aesthetic judgment. More, "justice" is always "poetic", always expressive and symbolic. To propose the aesthetic nature of justice is not therefore simply a surrender to emotion and feeling. As Schiller made clear, the aesthetic constitutes a way of thinking through the unity of presentational form and sensory perception, and not a denial of thinking *tout court.* It is a question of what the aesthetic can teach us rather than what it forces us to abandon, for "if man is ever to solve the problem of politics in practice he will have to approach it through the problem of the aesthetic."[49]

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Let me turn now to the obverse of the coin: that is, to the just nature of aesthetics. A society which values aesthetics will itself be progressing towards justice. Consider the question of empathy. According to Schiller, the lesson of learning to appreciate natural beauty is transferable to inter-subjective relations; in both cases, individuals come to respect the otherness of different objects and subjects, rather than dominating them.[50] Is it not so? Does not the approach we adopt to colour and sound, to beauty and ornament, effect us throughout our lives, encouraging a habit of perception and appreciation, a way of looking which becomes a way of standing and of understanding. "The temple, in its standing there, first gives to things their look and to men their outlook on themselves," said Heidegger.[51] Aesthetic appreciation, moreover, is a way of looking which is inherently about empathy, simply because it operates on the level of representation. What is representation but the memorialization of absence, the attempt to portray something, by way of something else—the expression of symbols through the senses. The art work and the experience of aesthetic observation is always an experience of distance and therefore it is intrinsically about the communication of otherness.

Furthermore, the symbolism and resistance inherent in the art-work, have an affect on social organization. Simply by learning to listen differently and to see more, we become more sympathetic and tolerant people. Art requires *effort* to accomplish and to understand; it exemplifies the *difficulty* of inter-subjective communication and the leap of understanding; it suggests the *complexity* of meaning and the possibility of alternatives. Respecting art and aesthetics is therefore an aspect of the provision of social justice. These elements of complexity and resistance lie within much of the canonical tradition in Western art, indeed in their resistance to the

very attempt to define and limit their significance which the act of canonization attempts. But they are also to be found in new art and symbolization, which has not yet been judged and reified. The Messiaen *Quartet* lies, perhaps, somewhere in between the extremes of the perennial and the ephemeral. But its beauty and meaning lie in its difficulty, in the very opacity which demands the engaged participation of the listener, and in the rich variety of interpretations it offers as reward.

The dissemination of art and music in society, the celebration of graffiti and buskers no less than symphony orchestras, is therefore itself an expression of justice. There is an important correlation here. On one level, a society which offers its citizens a rich variety of aesthetic experiences is demonstrating a healthy toleration and freedom of expression. But such an argument suggests that the place of aesthetics in society is only as some kind of barometer of other values. On a higher and more important level, aesthetic apprehension *is* work, empathy, resistance. A work of art requires the art of work. It is an act of revolt against the generic and the complacent. This bodily habit of perception and recognition influences our lives. It has nothing to do with *what* is being perceived, but with *how* that perception comes about. The more we listen to music, the more we listen; the more we look at art, the more we look; the more we are accustomed to engagement, the more we are prepared to engage in the transformation of the structures around us. There is a further, and still more elemental, level to this relationship. Aesthetics does not just *talk about* these things: it does them. And the doing is a becoming, in which we are also participants. Aesthetics does not just reflect justice, it exemplifies it; it does not just exemplify justice, it enacts it.

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Why do the aesthetic dimensions of law and justice matter? Robin West emphasizes that legal theory, because it is a narrative, is an exercise in world-making. The theories we adopt will depend on our aesthetic values, and the images of beauty through which we feel and understand and judge the world.

> We are not compelled to accept or reject an aesthetic vision of human nature that appears in a novel or in a legal theory...we must ask whether the imaginative vision [it] presents is attractive or repulsive, whether it is "true" not to this world, but to our hopes for the world. To the extent that legal theory is narrative, however, it is also art. Therefore we must decide not whether the worlds we envision are true or false, right or wrong. Rather, we must decide whether they are attractive or repulsive, beautiful or ugly.[52]

More than this, a recognition of the relevance of aesthetics is of normative as well as analytical significance because if we value the aesthetic in the life-world, we ought to value certain features of the legal world, too. Respect for aesthetics demands a certain kind of theory of law, which I have summed up as being critical and pluralist. Respect for aesthetics demands a certain kind of approach to justice, which I have summed up as symbolic and empathetic. To take aesthetics seriously demands of us a respect for the particular, the diverse, the local. Aesthetics is a process, a realm of apprehension, but it is not neutral as to values. It is a way of engaging with the world to which we should aspire.

In all this, I have chosen music as an exemplar of the aesthetic dimension of our lives, manifested through form on the one hand, and through the senses on the other. It is the presentational aspect of music, its non-linguistic and non-rational nature, which I have sought to highlight. All around us there is meaning and normative content: not by any means only in what is rationally expressed, but, crucially, in form and style, in our sensory reactions and our symbolic associations.

The purpose of the preceding chapters was exactly to unfold some of the dimensions of that idea. If you want to understand what "the law" means and where it is to be found, you have to explore these aesthetic—formal and stylistic—elements of law's meaning. That is a methodology which explores the depth of legal meaning. If you want to understand what people believe and why, you have to explore the aesthetic influences which are central to their values. That is an epistemology which explains human motivations and values. And aesthetics is also an ontology which mandates of people a certain stance to law. The journey through the aesthetic dimensions of law and justice has been, therefore, by way of a genealogy, and here I misquote Nietzsche, on the genealogy of morals, *mutatis mutandis.*

> [aesthetics] as consequence, as symptom, as mask, as tartufferie, as illness, as misunderstanding; but also [aesthetics] as cause, as remedy, as stimulant as restraint, as poison...[53]

I have tried to manifest these ideals throughout my own writing. I have, on the one hand, focused on presentation and form as a means of communication and not just a neutral medium of it. I have, on the other, attempted to attend to the sensory and symbolic particularity of each subject I have addressed as well as developing a generalized argument about it; to develop not just a commentary on or analysis of a social problem, but a genuine reading of it. These are difficult tasks because the aesthetic, although of visceral power, is a submerged and illegitimate discourse in modern society, and one sees its operations indirectly, sideways or through a looking-glass. Yet this is also the advantage of the analysis. For the sudden glimpse of a concealed discourse comes as a revelation. The aesthetic, inadvertent and habitual, has as much to teach us as artifice studiously rendered. The approach has something, therefore, in common with a psychoanalytic approach to law, in which the symbolic meaning of sensory experience is understood as the discursive manifestation of deep desires. Both psychoanalysis and aesthetics lay bare to us what is going on in terms of legal meaning, legal interpretation, and social values, by

delving far beneath the surface of discourse, to what lies buried in the subconscious soil.[54]

Above all, and uniting all these aspects, the aesthetic dimension is of great force: something about the particular moment, the concrete case, and the symbolism it connotes, shakes us to the depth of our being. The aesthetic makes ideas tangible and in giving them form, it gives them meaning and power. Whether a metaphor or a painting or a piece of music, the aesthetic creates meaning through concrete sensation, and belief through feeling.

Aesthetics helps us apprehend space as an opportunity to create meaning. It is an act of the imagination and representation, and these work *only* on what is absent. Aesthetic judgment fills the vacant, instilling present sensations with absent signs. Where is the aesthetic in law? The answer is, everywhere: for law, like a cellular structure, is nothing but empty spaces, nothing but an attempt at representing absent will and meaning; and in that nothingness, there aesthetics is.

Aesthetics helps us apprehend time as flow or rhythm. It is, as music demonstrates, relational, an expression of the dialectics of change, for no individual sound has rhythm: it is only the constant movement from sound to sound, and the relationship between them, that constitutes rhythm. Aesthetic judgment is an act of memory, and memory, likewise, works *only* on the absent. Aesthetic judgment realizes the past, "remembering past sensations with present signs."[55] Where is the aesthetic in law? The answer is, everywhere: for law is change, a constant movement; and in representing the possibilities and the dreams of that movement, there aesthetics is.

Aesthetics helps us apprehend the meaning of form, style, and metaphor. It is a discovery of the significance of these ways of understanding. Aesthetic judgment satisfies the desire for expression, enriching sensory experience with symbolic meaning. Where is the aesthetic in law? The answer is, everywhere: for law is also a medium of expressive form, the power of senses and of symbols, communicated and interpreted through presentational elements of form, style, and metaphor. In that expression, there too we find the aesthetic dimension of law and justice.

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1 *Oxford English Dictionary* (Oxford: Clarendon Press, 1933).

2 J. Attali, *Noise: The Political Economy of Music,* trans. Brian Massumi (Minneapolis: University of Minnesota Press, 1985) at 26-31.

3 *Ibid.* at 24. E.P. Thompson provides an excellent example of the use of noise as a weapon and furthermore as a legal sanction in his discussion of social practices in defense of the moral code of eighteenth century plebiean England: see "Rough Music" in E.P. Thompson, *Customs in Common* (New York: The New Press, 1993) at 467-531.

4 Peter Brooks, "What Happened to Poetics?" in G. Levine, ed., *Aesthetics & Ideology* (New Brunswick, NJ: Rutgers University Press, 1994) at 165.

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8 F. Nietzsche, *Beyond Good and Evil,* trans. R. Hollingdale (London: Penguin, 1990), e.g. at 52-54; F. Nietzsche, *On the Genealogy of Morals and Ecce Homo,* trans. W. Kaufmann (New York: Vintage Books, 1989) at 87.

9 It is an appeal, above all, to the sense of smell. In *Ecce Homo* he writes, "I was the first to *discover* the truth by being the first to experience lies as lies—smelling them out. —My genius is in my nostrils.": Nietzsche, *Ecce Homo, op. cit. supra* n. 8 at 326; see also 233, 273, 290.

10 Nietzsche, *Genealogy of Morals, op. cit. supra* n. 8 at 61, 40.

11 Nietzsche, *Beyond Good and Evil, op. cit. supra* n. 8 at 120-27, §199-203.

12 Quoted, for example, in Geoffrey Galt Harpham, "Aesthetics and Modernity", in Levine, *op. cit. supra* n. 4, 124 at 128. I say "tragic," of course, because Benjamin paid for his insights with persecution and died in his attempt to escape fascism. for further on the legal implications of Walter Benjamin, see also F. Jameson, ed., *Aesthetics and Politics* (London: NLB, 1977); J. Derrida, "Force of Law: The Mystical Foundation of Authority" (1990) 11 Card. L. Rev. 919; R. Gasché, "On Critique, Hypercriticism, and Deconstruction: The Case of Benjamin" (1992) 13 Card. L. Rev. 1115; A. Heller, "*Marche Funèbre* for a Century (1914-1989)" (1992) 13 Card. L. Rev. 1173; S. Weber, "Deconstruction Before the Name" (1992) 13 Card. L. Rev. 1181; -, "Roundtable—The Call to the Ethical: Deconstruction, Justice and the Ethical Relationship" (1992) 13 Card. L. Rev., vols. 5 & 6, 1219.

13 Harpham, *op. cit. supra* n. 12, 128-32; C. Norris, *Paul de Man: Deconstruction and Critique of Aesthetic Ideology* (New York and London: Routledge, 1988); C. Norris, *Deconstruction: Theory and Practice* (London: Routledge, 1982, 1991); T. Eagleton, *The Ideology of the Aesthetic* (Oxford: Blackwell, 1990), 366-419. The focus here has been in particular on the story of Martin Heidegger, and of Paul de Man, a leading exponent of deconstruction and also—as it emerged after his death—a fascist sympathizer in Belgium during the early years of the war: see also D. Lehman, *Signs of the Times: Deconstruction and the Fall of Paul de Man* (New York: Poseidon Press, 1991); C. Norris, *Paul de Man: Deconstruction and the Critique of Aesthetic Ideology* (New York and London: Routledge, 1988).

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17 See the discussion of Plato and Socrates in C. Douzinas and R. Warrington, *Postmodern Jurisprudence* (London: Routledge, 1991) at 134-37.

18 See the excellent and thorough survey contained in E. Wilkinson & L. Willoughby, "Introduction" to F. Schiller, *On the Aesthetic Education of Man,* trans. E. Wilkinson (Oxford: Clarendon Press, 1967). See also the discussion of the aesthetic philosophy of Montesquieu and Earl of Shaftesbury in Oscar Kenshur, "The Tumor of Their Own Hearts", in Levine, *op. cit. supra* n. 4, 57 at 69-70. Here too there is a strong emphasis on this idea of the aesthetic as a mode of apprehension of truth, although, in typical eighteenth century style, this 'truth' is rendered absolute and statist: see also Eagleton, *op. cit. supra* n. 13.

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21 I. Ward, "A Kantian (Re)Turn: Aesthetics, Postmodernism and Law" (1995) 6 L. & Crit. 256, discussing the postmodern interpretation of Kantian aesthetics in the work of Paul Crowther. See especially Douzinas, *op. cit. supra* n. 5.

22 R. Penrose, *Shadows of the Mind* (London: Vintage Books, 1994) at 76; see generally 64-116. See K. Gödel, *Kurt Gödel, Collected Works,* trans. S. Feferman (Oxford: Oxford University Press, 1986); K. Gödel, *On Formally Undecidable Propositions of Principia Mathematica and Related Systems* (New York: Basic Books, 1962). See also D.R. Hofstadter, *Gödel, Escher, Bach: An Eternal Goldern Braid* (Hassocks, Essex: Harvester Press, 1979); J. Casti, *Complexification: Explaining a Paradoxical World Through the Science of Surprise* (New York: Harper Collins, 1994) at 138-70.

23 Casti, *op. cit. supra* n. 22 at 122 et seq. Casti puts Gödel's argument as a mathematical formulation of Epimenides paradox: *ibid.* at 138-43.

24 This is to compress a very complex argument: see Penrose, *op. cit. supra* n. 22 at 127-209.

25 J. Derrida, *Positions,* trans. Alan Bass (Chicago: University of Chicago Press, 1981); P. Kamuf, ed., *A Derrida Reader: Between the Blinds* (New York: Columbia University Press, 1991); J. Derrida, *Of Grammatology* (Baltimore: John Hopkins University Press, 1976). There is a reference to Gödel in "The Double Session" (1972), but not, I think, one which does justice to the meaning or relevance of his theorem. On the contrary, Derrida, writing of "undecidability", appears to equate and even to some extent to confuse Gödel's theorem with Heisenberg's uncertainty principle: see Kamuf at 189. It is true that Gödel's theorem, understood as a systemization of paradox, can be neither 'right' nor wrong' within the framework of the system, and is forever condemned by the system to a 'grey zone': Casti, *op. cit. supra* n. 22 at 139-41. But *undecidability* is only half the point, for the proposition, although undecidable within a formal system, is also *true*: Gödel's paper is not entitled "on undecidable

propositions" but "on *formally* undecidable propositions:" Gödel, *supra* n. 22.

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