POETRY IN THE PRAETORIUM:

LEGAL ELOQUENCE IN PREREVOLUTIONARY FRANCE

by
Nicole Genevieve Karam

A dissertation submitted to Johns Hopkins University in conformity with the requirements for the degree of Doctor of Philosophy

Baltimore, Maryland
June, 2020

© 2020 Nicole Genevieve Karam
All Rights Reserved

Abstract

My dissertation, "Poetry in the Praetorium: Legal Eloquence in Prerevolutionary France," interrogates the interlocking concepts of eloquence, law, passion and reason from within French legal culture as these notions were defined by and shifted away from their positions in a theological hierarchy of meaning. Early modern legal practice was a deeply textual activity; pleadings and *mémoires judiciaires* were embedded within the multiple codes and jurisprudences of Old Regime France. Yet these discourses were also often emplotted according to the received authority of religious texts. The mutual buttressing of positive and religious law had important professional and social implications; lawyers were expected not simply to convince the learned magistrates of one's claim, but also to persuade the public audience toward virtue. Eloquence thus consisted in the achievement of a hybrid rhetorical task – conviction and persuasion – through which the passions of the people and the reason of the judges would be temporarily in agreement.

Central to my re-evaluation of legal eloquence is the consideration of the role of the barrister as the embodiment of judicial imagination within the Old Regime body politic. Imagination, the intermediary element lodged between reason and passion in the theological vision of the soul, was considered to travel between the other two elements, communicating information and obedience between them. Legal eloquence was conceptualized in the same terms. However, as reason and passion were reconceived during the Enlightenment, legal eloquence was repositioned as well, reflecting the shifting ontological commitments of society.

The transformations and especially continuities between traditional and prerevolutionary legal eloquence are analyzed in this dissertation through a series of close

readings of the works of pivotal legal practitioners from the seventeenth and eighteenth century, such as Pousset de Montauban, Bonaventure de Fourcroy, Servan, Lacretelle, Pastoret, and Robespierre. Their discursive techniques are analyzed first according to their own professional context, and then further elucidated with respect to the tangential culture of letters, with particular reference to Descartes, Montesquieu, and Diderot. By taking a more diachronic and professionally-specific approach, a clearer picture of the political rise of prerevolutionary legal eloquence comes to light.

First Reader: Wilda Anderson

Second Reader: Kate Tunstall

Third Reader: Laura Mason

Acknowledgments

This project found its beginnings thanks to the Charles Singleton Center, which provided the valuable funding and time necessary to discover the surprising and intricate world of Old Regime legal literature. Its ending was achieved with the generous support of the Alexander Grass Humanities Institute, which allowed me to finish the writing free of teaching obligations and in an atmosphere of collegiality and critical reading. In the space between these bounds my efforts were sustained first and foremost by my wonderful advisor, Professor Wilda Anderson, whose invaluable guidance, discerning eye and insightful comments inspired so much of this work. I marvel still at my good fortune in having found a director willing and able to organize such a resplendent promenade. I could never thank her enough.

A most sincere thank you is due to my second reader, Professor Kate Tunstall, whose detailed comments and suggested improvements helped hone my ideas and writing. Her encouragement and enthusiasm illuminated the shadows of the project and my time spent at Worcester under her guidance provided me with yet another model of intellectual rigor and generosity that I will look to throughout my career. A special thank you also goes to Professor Laura Mason, whose knowledge and interest in my work helped propel me forward when I was stuck, and who kindly agreed to serve on my committee even as she finished her own manuscript. My profound thanks go to Professor Derek Schilling as well, whose keen interest in the dissertation and attention to my writing over the years helped to cultivate my voice. I am also indebted to Professor Doug Mao, who agreed to serve as chair on my defense committee at the height of the pandemic and whose comments and questions have already helped to shape this study for publication. Professor Anne Rousselet-Pimont

of the École de droit de la Sorbonne was kind enough to not only welcome me into her classroom, but consistently provided essential clarification on legal points that might have otherwise remained opaque to someone trained in American jurisprudence. I thank Professor Milad Doueihi for persuading me to view my discursive objects from new and refreshing perspectives. Professors Jacques Neefs, Elena Russo, Amy Wyngaard, Jean Jonaissant, Catherine Perry, Alison Rice, Alain Toumayan and JoAnn DellaNeva all deserve mention for my wider education in French literature over the years. Professor Hope Glidden is also here warmly remembered for her kindness in showing me the ropes at the BNF, how to teach a great class, and the importance of foregoing sugar in coffee. Of course, many thanks to the indomitable Kathy Loehmer for helping in all things administrative and always sending me my copier code at a moment's notice.

I am very blessed to say that the writing of this dissertation was leavened by the encouragement of many loved ones. Autumn Siquig and Rachel Waxman in particular tipped these pages with joy and laughter. Words cannot express how grateful I am to Patrick, Jackie, Aoife and Ryan Noonan, who welcomed me into their home so many times during research trips to Paris, and who made my (dubious!) choice of working in the archives with a newborn not only possible, but a truly lovely experience. I was also blessed with the extraordinary support of my wonderful in-laws, Kay and Bechara, who never hesitated to help watch the baby and gave me the peace of mind necessary to finish this project. Thank you so much.

I could never finish thanking my family, Steve, Kathy, Marcus, Chris, Alissa, Aunt Kim and Uncle Jerry, who have cheerfully tolerated what must have seemed an unending educational process and provided every form of support through the years. I love you all

and I promise to start hiring professional movers. To the younger set, Mia and Miles, I thank you both for your sudden curiosities and salutary indifferences; the future of alchemy is in good hands. Of course, the biggest thanks of all goes to my perfect husband, Manuel. You helped me formulate my thoughts every step of the way, and these sentences are no exception. You see, earnest statements are of no use for someone like you, whose faith and love tend to infinity and thus exceed the possibility of straightforward recognition. Yet I know that such taciturn ways are mine, not yours, but what can be done about it? I could paper our walls with lists of your contributions, that you learned French, moved homes and careers, became the most wonderful father, carried thousands of books back and forth to libraries, and generally consented to be kept up late at night by the sound of turning pages until finally I woke you in the very middle of the night so you might share with me a glass of champagne – it is done! Or perhaps a map would suit your tastes, with thumbtacks marking every classroom in which you heard out lengthy discussions, every hallway where you patiently waited, every museum that you showed me, every castle explored, every rail station and airport you have walked through on your way to find me. A timeline might be even more tempting to your passion for enumeration, but I imagine you are beginning to sense my dilemma. Therefore let it suffice for now to say that it cannot be said, which is not the same as it could never be said, and for that again I am thankful.

I dedicate this dissertation to my parents, for whom the following pages will likely be strange and confusing, but who will read it anyway.

Table of Contents

Abstract ii

Acknowledgments iv

List of Figures ix

Introduction 1
- **Legal Discourse in Prerevolutionary France: A Dramatic Turn?** 1
- **Defining Judicial Eloquence in Early Modern France** 9
- **Special Status of Old Regime Lawyers** 12
- **Summary of Chapters** 14
- **Works Cited** 19

Chapter 1: La Cause du Gueux de Vernon (1659) 22
- **Introduction** 22
- **The Advent of the *Académie Française* – Adjudicating Letters** 29
- **Olivier Patru: Blending Morality and Legality** 34
- **Lawyer as Political Imagination** 38
- ***La Cause du Gueux de Vernon* (1655-59)** 42
  - **Statement of the Facts** 42
  - **The *Grand'Chambre* of the *Parlement* of Paris** 44
- **Pleadings before the *Parlement* of Paris** 49
  - ***Plaidoyer* of Pousset de Montauban (1620-85) for Jeanne Vacherot** 49
  - ***Plaidoyer* of Bonaventure de Fourcroy (1610-91) for Jean Monrousseau** 59
  - ***Plaidoyer* of Antoine Bilain (…-1672) for Maître Louis Mordant** 74
  - ***Plaidoyer* of Claude Robert (1603-85) for Jacques le Moine** 93
  - ***Plaidoyer* of Jérôme II Bignon (1627-97): Disenchantment** 103
- **Conclusion** 111
- **Works Cited** 115

Chapter 2: The Enlightenment of Legal Eloquence 122
- **Preface** 122
- **Introduction** 125
- **Diderot and the Rehabilitation of the Passions** 133
- **Revisiting the Judicial Aesthetic: Diderot's *Salon de 1767*** 143
- **Michel de Servan and the Intention of the Laws** 152
- **Natural Law in 18th-Century Legal Discourse: An Aside** 165
- **Natural Law and *La Protestante*: Family as Emblem of Authority** 175
- **Enlightened Tribunal : Diderot's *Entretien d'un père avec ses enfants* (1773)** 186
- **Servan's Final Pleading: the Count of Suze vs. Demoiselle Bon** 198
  - **Servan and the Theater** 202
- **Conclusion: from Social Order to Moral Order** 210
- **Works Cited** 214

Chapter 3: Legal Discourse Between Reason and Passion 222
- **Introduction** 222
- **Lacretelle and Pastoret** 227
- **The Debate** 233

***Opinion publique* in the French Courtroom** 257
Spreading Enthusiasm..266
Pastoret's Response 270
Lacretelle's Response to Pastoret.. 282
Conclusion 285
Works Cited.. 289

Chapter 4: The Lawyer Robespierre 294
Introduction.. 294
Robespierre's Entry into the Legal Profession 297
Le Conseil d'Artois...299
***Mémoire* for the Alexander Family (1783)**.. 303
***Mémoire* for François Deteuf (1783)**.. 307
The *Affaire du Paratonnerre* (1783).. 315
L'Affaire du paratonnerre, suite..325
Dissolution or Constitution? 333
Robespierre's Final Case: the *Mémoire* for Hyacinthe Dupond (1789)............... 335
Conclusion 357
Works Cited.. 362

Conclusion 366
Works Cited.. 371

Biographical Statement 372

List of Figures

2-1. Jean-Jacques Durameau, *Le Triomphe de la Justice* (1767)…………………………..137

2-2. Sandro Botticelli, *La Calunnia di Apelle* (ca. 1495)………………………………..141

THIS PAGE INTENTIONALLY LEFT BLANK

Introduction

> C'est en vain que l'orateur se flatte d'avoir le talent de persuader les hommes, s'il n'a acquis celui de les connaître. L'étude de la morale et celle de l'éloquence sont nées en même temps; et leur union est aussi ancienne dans le monde que celle de la pensée et de la parole.
>
> – Henri-François d'Aguesseau, *La connaissance de l'homme* (1695)

Legal Discourse in Prerevolutionary France: A Dramatic Turn?

Just three years before the French Revolution, Maximilien de Robespierre, the political phenom who would rise from the bourgeoisie of Arras, order the execution of King Louis XVI and preside over the Reign of Terror, was penning some rather unexpected lines: "Je suis femme, je suis étrangère, je suis opprimée; vous êtes hommes, vous êtes Français, vous êtes Magistrats!" (*Pour Marie Sommerville*…in *OC* II: 395). Why would the future *Incorruptible* claim to be a woman, foreign and oppressed, positioning his voice in cloying supplication to provincial magistrates? Well, because he was a lawyer representing his client in a *mémoire judiciaire*.[1] Of course, this does not really answer the question but rather raises a whole new set: why would a lawyer write in the first-person

[1] The classic definition of a *mémoire judiciaire* or *factum* is "mémoire imprimé qu'on donne aux juges, qui contient le fait du procès raconté sommairement, où on adjouste quelquefois les moyens de droit" (Furetière, *Dictionnaire universel* I: 706).

perspective of his client when addressing the judiciary, a serious group of individuals tasked with the important job of determining truth and justice in the case set before them? Why would a lawyer couch the argument in such passionate language? Last but not least, why would a judiciary accept argumentation that travelled clearly beyond the limits of appropriate legal language and relevance?

Yet perhaps the most shocking characteristic of Robespierre's imploring peroration for the modern reader in his argument for Dame Somerville's fraud case is its utter banality. In the decades leading up to the Revolution, dramatic legal briefs flooded the streets, particularly of Paris, and people packed the courthouses to listen in on the latest cases. Sarah Maza's groundbreaking work, *Private Lives and Public Affairs* (1993), describes the incredible popularity of trial briefs during the 1770s and '80s, the most sensational of which had print runs in the tens of thousands.[2] The tone of these productions vacillated between acerbic and saccharine, with very little in between. But where was the law? Where was the procedure? Why did lawyers explicitly court the public's approbation if only the judges' decision mattered for the disposition of one's case?

From our modern perspective, the lawyers of this period appear either blissfully unaware or brazenly inattentive to any of the normative pressures particular to the genre of legal writing. Thus the briefs of this period have been studied as exceptions to normative modes of courtroom speech, apparent aberrations from an otherwise objective and staid approach to legal discourse. This purported transformation from legal to literary has been explained by scholars as evidence of the growing agency of the public sphere and influence

[2] Maza was the first scholar to present a major evaluation of the market culture surrounding *mémoires judiciaires*. *Private Lives and Public Affairs* gives an in-depth and engaging survey of the major *causes célèbres* that took place during the 1770s and '80s while demonstrating a keen sensitivity to the wider cultural events taking place within the world of the *philosophes* as well as the government.

of Enlightenment ideas, theater and novels throughout the eighteenth century. Following Jürgen Habermas' influential model of the bourgeois public sphere,[4] Maza, building off a series of articles,[5] treats the rise of *mémoires judiciaires* as evidence of the advent of an engaged public who learned civics at the theater and applied these lessons at the *palais de justice*, where a new type of melodramatic discourse was taking center stage and reaching a wider audience through print distribution. In this account, the new market for *mémoires judiciaires* in addition to lawyers' adherence to and adoption of Enlightenment thought and Rousseauean expression meant their writings and speeches would find an audience beyond the courtroom and a political resonance beyond the case. Maza's persuasive treatment of judicial literature has been largely accepted since its publication.[7] By 2001, Nadine Bérenguier, taking Maza's thesis as a given, simply inserted a specific case from 1773 into the methodological machine to obtain a reading of it as just another example of the lawyer's "tâche contradictoire de satisfaire à la fascination du public pour des histoires scandaleuses sans pour autant abandonner un discours sérieux familier aux professionels du droit"

[4] Habermas' *The Structural Transformation of the Public Sphere: an Inquiry into a Category of Bourgeois Society* (1962, trans. Eng. 1989), posited the rise of the public sphere as an essential hybridity between the rising sense of a private life (through the consumption of novels that focused on interior experience) and its public proclamation.

[5] "The Rose-Girl of Salency: Representations of Virtue in Prerevolutionary France," in *The French Revolution in Culture*, pp. 395-412; "Domestic Melodrama as Political Ideology: The Case of the Comte de Sanois," *The American Historical Review* 94 (December 1989): 1249-64.

[7] See, e.g., Bell, *Lawyers and Citizens*, p. 207; Merrick, "Impotence in Court and at Court," p. 190; Goldsmith, "Publishing the Lives," p. 34; Desan, "Reconstituting the Social after the Terror," p. 90; Riskin, *Science in the Age of Sensibility*, p. 143; Freedman, "The Danger Within," p. 352; Rizzo, *A Certain Emancipation of Woman*, p. 33. This is not to say that Maza's construal of public opinion or her consideration of important elements of Enlightenment politics as antifemale has gone unchallenged. Historians such as Daniel Gordon and David Bell in particular have been critical on these points. (This discussion was captured primarily in a series of 1992 articles: Bell, "The 'Public Sphere,' the State, and the World of Law"; Gordon, "Philosophy, Sociology, and Gender"; Maza, "Women, the Bourgeoisie, and the Public Sphere"). Yann Robert's recent contribution, *Dramatic Justice: Trial by Theater in the Age of the French Revolution* (2019), which "reads" the courtroom through the lens of the theater and vice versa, seeks to disturb Maza's *Private Lives* on a different point, namely her description of a society's evolution from a figural order (the king's body) toward a textual one (a view held also by Foucault, Landes and Huet), by demonstrating the rampant yet politically fraught theatricality of the revolutionary tribunals. However, Maza's particular interpretation of prerevolutionary *mémoires judiciaires* has gone largely unchallenged.

("D'un mémoire judiciaire à une *Cause célèbre*", p. 133). The result of this so-called paradox resulted in the extrapolation of particular cases to the level of general social calamities.[8] Closely following Maza's paradigm, Bérenguier indicates Rousseau's *Julie ou la nouvelle Héloïse* (1761) as the palimpseste for the lawyer's declaration that private marital affairs have broad social ramifications. However, as this thesis will demonstrate, efforts to adress both a lay and professional audience as well as broaden the interest of particular cases, are both techniques to be found in the legal literature published well before the prerevolutionary period. In fact, a brief perusal of only the most famous earlier pleadings[9] reveal the heralded lawyer, Claude Érard (1646-1700), arguing an analogous case before the *Parlement*[10] in very similar tones to the case studied by Bérenguier. "C'est ici une affaire toute publique où vous devez, Messieurs, considérer l'intérêt de la discipline autant & davantage que celui des parties qui plaident. Vous avez à décider, non simplement entre Monsieur & Madame de Mazarin, de leurs intérêts particuliers; mais entre l'honnêté publique d'un côté & l'inclination de Madame de Mazarin de l'autre; C'est à vous de voir si vous voulez sacrifier la première aux vaines délicatesses de la dernière […]" (Érard, *Plaidoyez*, p. 493). Indeed, private matters turned to public concerns in 1689 as well; the judges in the case were asked not to save a single marriage, but rather the morality of French society in general.

[8] "Le conflits particuliers, devenant les symptômes de maux sociaux qui les dépassaient, se voyaient promus au rang de drames humains de la plus haute portée" (Bérenguier 133).

[9] Érard's pleading went through six editions in less than six years (Munier-Jolain 184). Once received in London, it provoked a response on the part of Charles de Saint-Evremond, which found a similar level of popular success (ibid.).

[10] The term *parlement*, unlike the Anglophone legislative connotation, designated any of the twelve sovereign judicial courts of last resort in France where sat both lay and ecclesiastical magistrates to dispense the king's justice (only the original Parisian *Parlement* is capitalized).

Though the introductory chapter might seem a bit early to cite to a seventeenth-century *plaidoyez*, I quote Érard here, a famous lawyer[11] tasked with returning the beautiful Hortense Mancini (niece of Cardinal Mazarin) to her eccentric Jansenist husband as a way of indicating early on the constellations of texts sitting outside the late eighteenth century and thus beyond the ambit of current academic concern for *mémoires judiciaires*.[12] Michael Breen explains this disconnect as stemming from the "profound tension [that] has arisen betewen the revisionist emphasis on political stability and cooperation between king and elites during the seventeenth century on the one hand, and studies arguing that French politics 'broke out of the absolutist mold' in the decades leading up to 1789 on the other" (Breen, *Law, City and King*, p. 27).[13] This thesis will attempt to bridge the divided attentions by distending the temporal limits hitherto imposed on the study of judicial eloquence in order to evaluate the discursive choices made by lawyers not through the prism of the "public sphere," but rather through an analysis of primary source materials which demonstrate how the early modern legal practitioners defined and practiced eloquent courtroom discourse.

Thus this thesis will methodologically turn away from conflations of the theater and the *palais de justice*, trial biefs and novels, lawyers and actors in an effort to understand legal rhetoric on its own terms. The lawyer's case lived and died by the legitimacy of its

[11] Érard was not only a widely-read attorney from his own day (Munier-Jolain 182), his work would receive copious citation in the century to follow. In 1696, the Mazarin pleadings together with his other pleadings would be printed (against his wishes), and re-edited posthumously in 1734.
[12] Steve Hindle has previously made this point in the English context, stating "Even those scholars whose interest in Habermas has sent them scurrying after the origins of the 'public sphere' have tended to overlook sixteenth- and early seventeenth-century legal developments" (*The State and Social Change in Early Modern England, 1550-1640*, p. 235).
[13] This tension was best encapsulated according to Breen by Michael Kwass' question, "why would elites challenge a monarchy that was reinforcing their social position?" (Breen 27, citing Kwass, *Privilege and the Politics of Taxation*, p. 312).

words as they were construed by a judicial body. How could the words in Robespierre and others' briefs and pleadings, so wholely irrelevant to the legal questions presented before the courts, be considered not only legitimate, but eloquent by both the bar and bench? Such is the question that this thesis explores through a series of close readings of works, including pleadings, harangues, and *mémoires judiciaires* produced within the legal profession during the pre-revolutionary period. Because this is a deeply traditional rhetorical culture, the timeline of the investigation is expanded to include the seventeenth century as a way of framing our approach to legal discourse and revising its current scholarly appraisal.

As I hope to demonstrate, there is more than enough material in the rich and underused archives of early modern legal history to describe the discursive habits of lawyers from this period without incessant recourse to sources outside the profession. The approach here will thus consist in a sustained engagement with certain cases and lawyers of the period whose expressions are both emblematic of the implicit assumptions in legal epistemology and representative of how those assumptions shifted throughout the Enlightenment. That said, the *palais de justice* was, of course, not a world apart, and to isolate its expressions from the greater social and political context would merely mirror the approach I claim here to critique. At each moment encountered in this thesis, the definition of and attempts at eloquence from within the *palais de justice* imply changing relationships to religion, politics and the law itself, and, as such, the broader culture is taken into account as a means to elucidate the tectonic shifts taking place therein. In brief, definitions of important terms are thus sought primarily within the legal order itself, and transformations

of these terms are evaluated both with respect to the profession as well as the wider culture of letters.

By purposely avoiding what I consider to be premature comparisons of legal discourse with romance novels or the *drame bourgeois*, one might assume that this thesis seeks to skirt literary studies, but this is not the case. As the American legal scholar Robert Cover famously stated, "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning" ("*Nomos* and Narrative," pp. 96-96). The legal pleadings, speeches and publications studied in this thesis are narratives, which in turn are built upon a fundamental metaphor that constitutes the law. Indeed the basic assumption underpinning this thesis is the idea of law as metaphor. By this, I mean that the law, composed of languages both written and symbolic, stands for individual decision-making processes in the public realm. Public subscription compelled through sanctions shrouds the metaphor in the guise of law, but metaphor it remains, co-opting or otherwise interacting with the the individual's imagination of herself at varying levels of sufficiency. Because this metaphor defines the very mode of being in and of society, its contours rarely come into relief but for monumental efforts such as those of Ernst Kantorowicz's *The Kings Two Bodies* (1957) and Louis Marin's *Le Portrait du roi* (1981), whose works described the symbols upon which the Old Regime constitution relied. By analyzing the narratives offered by lawyers in their practice, we are able to approach this metaphor, or *nomos*, at the site of its most agonistic, creative, and especially *obedient* expression. These discursive objects thus offer a privileged glimpse not only at the generative metaphor of the state, but especially how subscription to it was maintained and transformed as competing constitutions were posited during the Enlightenment. Percy Bysshe Shelley's famous line

that “poets are the unacknowledged legislators of the world” is thus inverted, making legislators the unacknowledged poets of the world. Indeed, in a re-fashioning of J.L. Austin’s mechanism of law enforcement as rules backed by sanctions,[14] the law in this linguistically-embedded sense may be thought of as poetry backed by sanctions. Of course, this does nothing to dispense with Shelley’s claim; rather, in this conception poets and legislators occupy the same spectrum of authority; their relationships to one another are characterized by varying levels of either tension or complicity. Thus legal discourse should be considered a domain of literary studies, particularly at those historical junctures where the idiom of statecraft shifts toward the deployment of new metaphors.

During the early modern period, the pleadings and briefs of French lawyers composed the primary site of this metaphor, which can be glimpsed in profile through the construction of their attacks and defenses, cobbled together as they were upon the ontological commitments of the judicial system. Which is to say, lawyers could only employ words, images and arguments that could be integrated into the judiciary’s conception of the state. As we shall see, this conception was more than the monarch, promulgated laws and myriad bodies of jurisprduence. Lawyers were the imagination that powered the metaphor of the state in early modern France. Like today, the early modern French lawyer was hired to plead cases before the judiciary on behalf of clients or give them advice on legal matters. However, unlike today, a lawyer from this period was conceived as a type of messenger communicating in both a spiritual and physiological sense between two parts of the social body: the head (government) and the extremities (the people). The lawyer’s role was to act as a filter of the base passions of the people, turning

[14] Austin, *The Province of Jurisprudence Determined*, pp. 13-15.

their claims "en chyle" for the contemplation of the higher reason of the magistrates, who, thanks to this purification, could apply higher reason to the matters at bar, turning them into the "pur sang" of wisdom for distribution throughout the body politic (Faye d'Espeisses, *Neuvième rémonstrance,* in *Les Remonstrances ou Harangues faictes*, p. 196). Such was the theological role of the imagination in the soul as it was considered prior to 1750, and such was the task of the lawyer.[15] As the Enlightenment paradigm of understanding encroached further and further on the previous religious model of the soul, so too shifted the role of the lawyer as he continued his task of imagining the people for the state, and the state for the people.

Defining Judicial Eloquence in Early Modern France

This thesis will address the concept of eloquence as it evolved in the law courts during the French Enlightenment. The topic of judicial eloquence is vast, dating back to at least the fifth century BC with Corax and Tisias of Sicily who made their way to Athens and set up the famous Greek schools of rhetoric. Although it would be quite outside the scope of this introduction to survey all of Western rhetoric, a very brief discussion of Plato is warranted since the history of rhetoric is more or less an endless line of responses to the issues posed by him, particularly in his Socratic dialogue the *Gorgias* (380 BC). Plato regarded the sophists, or teachers of rhetoric, as engaged in a base enterprise because they provided – for a fee – instruction in how to persuade an audience of any argument without special regard to the truth or goodness of the claim. Worse, rhetoric, which was the primary means of achieving political power in Athens, could be successfully practiced by men who

[15] The theological conception of the imagination will be discussed at length in the first chapter.

had no knowledge of the good and were thus liable to lead the souls of the city away from it. Thus in the *Gorgias*, Socrates extolled justice and virtue in contrast to the self-serving flattery offered by the eloquent sophists. Of course, that sounds lovely, but what would this mean pragmatically for the business of politics? Could rhetoric have any legitimate, i.e., *just* role in society? In the *Phaedrus* (ca. 370 BC), Plato offered a personification of rhetoric, who spoke in the following way:

> I never insist on ignorance of the truth on the part of a man who wants to learn to speak. On the contrary if my advice goes for anything, it is that he should only resort to me **after he has come into possession of truth**. What I do pride myself on is that without my aid, knowledge of what is true will get a man no nearer to mastering the art of persuasion. (259d [my emphasis])

The knowledge of truth was thus the prerequisite to the development of eloquence. Thus to speak eloquently, one was required first to dedicate onself to philosophy. This was especially essential for the rhetorician involved in matters of justice or legislation because these branches of activity took as their aim the highest good of the soul. If one did not know what was good and just, one could not care for the welfare of the soul, and it would wither (*Gorgias* 465). Whether anyone could actually come into possession of truth raises another thorny matter for Plato, for whom truth was transcendent and thus beyond the grasp of man. Instead, philosophy placed man in a dialectical relationship with truth, always seeking after it though quite conscious that he would never succeed in its attainment. In this way, philosophy was training for death (*Phaedo* 64a).

This extremely cursory overview of the Platonic perspective on rhetoric is offered here because early modern French legal rhetoric also sought to ground itself in truth of a transcendent order. Though legal composition was often organized according to the Aristotlean principles of rhetoric, it was *not* considered by these lawyers in the Aristotlean sense as the pragmatic counterpart to the loftier goals of dialectic (*Rhet.* 1354),[16] but rather on a continuum with it. Thus an eloquent lawyer in early modern France was he whose speech persuaded an audience not merely to agree with his case, but toward a more pious and obedient attitude toward divine teachings. The *avocat général* of the *Parlement de Paris*, Jacques Faye, sieur d'Espeisses (1543-90) spoke thus of the proper role of the lawyer: "[O]u bien qu'il me fust permis comme à Pericles, à force [de] mon Eloquence, mesler non par [*sic*] proprement le ciel & la terre, mais la vertue qui est pure céleste, avec vos esprits & vos sens qui sont meslez de céleste & de terrestre, & les y unir en telle sorte, qu'il ne se peussent jamais séparer" (*Troisième rémonstrance* in *Recueil des rémonstrances*, p. 59). The great lawyers of this period sought to speak not simply as rhetoricians but "en philosophe chrétien" (Omer Talon, "Deuxième plaidoyer" [1632] in *Oeuvres* III: 42). Though the definition of eloquence will undergo various transformations throughout the eighteenth century, this thesis will argue that the fundamentally theological coloring of legal rhetoric must be first appreciated in order to understand the meaning of subsequent developments.

---

[16] Aristotle defined rhetoric as "the faculty of observing in any given case the available means of persuasion" (*Rhet.* 1355b).

Special Status of Old Regime Lawyers

The Order of Barristers constituted the most independent profession under the Old Regime. Unlike other collectivities whose organization depended on letters patent from the king, the Order grounded its authority on the free association of men united in the common pursuit of justice through the practice of client advocacy before the *parlements*.[17] "La principale raison de l'influence des avocats, c'était leur indépendance et leur liberté, si insolites dans le contexte institutionnel de l'ancien régime" (Bell, "Des Stratégies […]," 570).[18] The Order elected its own leaders (the *bâtonniers*), determined membership, and set its own rules. Education and discipline took place within the hierarchy of the Order, and the crown rarely interfered with their affairs.[19] Indeed, not even the king could toy with the barristers' notion of professional independence without incurring bitter reprobation.[20]

---

[17] On the distinction between the Order and other professional groups such as *communautés* and *corps*, whose establishment depended on the pleasure of the king, see Michael Fitzsimmons, *The Parisian Order of Barristers and the French Revolution*, Cambridge, MA: Harvard UP, 1987, pp. 1-32. For a contemporary account, see Charles Loyseau, *Traité des ordres et simples dignitez* (1613), in *Les œuvres de maistre Charles Loyseau, avocat en parlement* (Paris 1678), pp. 4-6, 49-50. A medieval origin tale was devised by Antoine-Gaspard Boucher d'Argis in 1753 (*Histoire abrégée des avocats*), which Ambroise Falconnet would later deconstruct in his *Mémoire sur les privilèges des avocats*, pp. 473-515.

[18] I would like to note here that the professional independence enjoyed by the barristers was conceptualized from within the Order as a result of their education and personal virtue. See d'Aguesseau's first discourse, "Indépendance de l'avocat" (1693). Robespierre's defense of the barrister's role a century later delineated the special case of the profession under the Old Regime: "Cette fonction [de l'avocat] seule échappa à la fiscalité et au pouvoir absolu du monarque. La loi tint toujours cette carrière libre à tous les citoyens […]" (*Archives parlementaires* XXI: 466 [14 December 1790]).

[19] The state of legal education in the Old Regime was notoriously uneven; although a certificate of study was required by the Order so as to gain admission to the bar, these were sometimes little more than receipts for payment. "With the corruption in legal studies at the universities, the effort to define the legal profession – the delineation of intellectual activity, the determination of what was accepted as knowledge, the formation of professional standards and outlooks – came much more from the Order than from the university" (Fitzsimmons 8). Nevertheless, by the time the lawyers began pleading, they were typically very well educated, due in no small part to their four-year *stage*, during which their attendance was required at the tribunal but they were not permitted to plead any cases (*avocats écoutants* as opposed to *plaidants*). Matters of discipline were stridently handled by the Jansenist leadership, who, between 1700 and 1770 removed ten percent of the Order's membership for professional as well as private infractions. See Bell, "Lawyers into Demagogues: Chancellor Maupeou and the Transformation of Legal Practice in France 1771-1789," *Past & Present*, 130 (Feb. 1991), pp. 107-41, 114. For a general overview of the state of eighteenth-century legal education, see Kagan, "Law Students and Legal Careers in Eighteenth-Century France," pp. 38-72.

[20] Crippling strikes were not uncommon on the part of the Order when ministers were perceived to interfere with their professional activities. Aside from the strike during the Maupeou Revolution (1770-74), Louis

Most curious of all perhaps was the lawyers' ability to circulate their writings quite unfettered by censorship laws, meaning authors of interesting *plaidoyers* or *mémoires judiciaires* enjoyed a free space of publication unparalleled in Old Regime France.[21]

I would like to note here that though scholars have discussed at some length the professional independence of Old Regime lawyers, this phenomenon cannot be properly understood without an appreciation of the moral independence claimed by lawyers of this period.

The lawyer was he who knew how to subject the passions (his own and those of his listeners) to reason and the law, a competence which *alone* would furnish him with capacity to perform his moral duty and social purpose. Unlike most professions in the Old Regime, the barriers to entry to the *barreau* were based not on birth but learning and character alone. In 1693, Chancellor Henri François d'Aguesseau (1668-1751) delivered a discourse before the Parisian lawyers entitled "L'indépendance de l'avocat" in which he described the moral state of the lawyer as follows: "Exempte de toute sorte de servitudes, [la profession d'avocat] arrive à la plus grande élévation sans perdre aucun des droits de sa première liberté; et, dédaignant tous les ornements inutiles à la vertu, elle peut rendre l'homme noble sans naissance, riche sans biens, élevé sans dignités, heureux sans le secours de la fortune" (d'Aguesseau, "L'indépendance de l'avocat," pp. 171-72). This elevation, based on moral

---

XV's attempt in 1730 to quash a judicial memorandum containing seditious political propositions ("les Lois sont de véritables conventions entre ceux qui gouvernent & ceux qui sont gouvernés" (Maraimberg, *Mémoire pour les Sieurs Samson Curé d'Olivet* […] p. 3)) sparked the *Affaire des avocats*, which deprived the capital of recourse to the law courts for over a year. On the Maraimberg memoir and its aftermath, see Van Kley, *The Religious Origins of the French Revolution*, pp. 112-15; Bell, "Des Stratégies d'opposition sous Louis XV: L'Affaire des avocats, 1730-31," *Histoire, Économie et Société* 9.4 (1990), pp. 567-90.

[21] Article 110 of the *règlement pour la librairie*, decreed 28 February 1723, stated that no privilege could be demanded of an attorney for the printing of case materials to be circulated in the courts. (Denisart, *Collection de décisions nouvelles* II: 746). The only positive rule associated with the *mémoire judiciaire* was the parlementary decree of 11 August 1708, which stated that legal documents could not be published unless they bore the names of both the authoring lawyer and the printer. See Maza, *Private Lives,* 36.

purity and erudition alone, rendered remarkably peerless the early modern lawyer. “Également élevés au-dessus des passions et des préjugés, ils sont accoutumés à ne donner leur suffrage qu’à la raison” (ibid., 172). Thus, within the political theology of the state described by Ernst Kantorowicz’s *The King’s Two Bodies* (1957), there resided a particular judicial theology that charted the role of the lawyer as the essential conduit between the *âme* (magistrates) and the *corps* (the people): “[S]i en la société civile on laisse aux Magistrats l’âme, & au peuple le corps, les Orateurs en sont les esprits qui les joignent, accourants à toutes les parties, pour en règler le mouvement” (Pré de la Porte, *Le Pourtraict de l’éloquence française* [1621], p. 3). The legal ministry, which was thought to lift the social body toward divine justice, was performed through the salutary intervention of eloquence in legal discourse. The spiritual status of the early modern lawyer will be explored throughout this thesis.

Summary of Chapters

The first chapter of this thesis presents a historical overview of the late seventeenth-century legal rhetorical culture and a close reading of the five pleadings delivered in the famous Affair of the Beggar of Vernon before the Grand’Chambre of the Parisian Parlement in 1659. This period of legal discourse, largely neglected by modern scholarship, is inextricably bound up with what I will term a judicial theology, in which lawyers sought less to reconcile their clients actions’ to the code of law than a vision of God’s divine justice, which was thought to subsume the former. The utility of the Affair for this thesis lies in the fact that the discursive strategies deployed during the trial both exemplify the rhetorical practices of the seventeenth century, which spoke on two registers, and privileged conviction over persuasion, while also hinting toward the new legal

epistemology infiltrating the learned spheres of French society with the advent of Descartes' treatise, *Les Passions de l'âme* (1649). The effects of a physiological rather than spiritual treatment of the passions can be viewed in embryo at both the metadiscursive as well as discursive levels. Instructions from d'Aguesseau to the members of the Order of Barristers will provide important views into the scaffolding of these often perplexing pleadings, and the greater culture of letters will be drawn upon to illustrate the general moral orthodoxy of the period. However, the emphasis will remain on a close reading of the case. The narrow focus of this chapter allows us to begin to understand the particularities and goals of legal practice in early modern France so we might more clearly evaluate the institutionally-specific aspects of the discourses studied in the following chapters.

Chapter 2 jumps ahead to the mid-eighteenth century to study legal discourse in a context where the passions are no longer denigrated as sources of sin and confusion, but rather exalted as conduits leading toward instances of truth and justice. The legal discourse and theoretical works of the philosopher-lawyer Antoine-Joseph-Michel de Servan (1737-1807) will direct our investigation, while Denis Diderot (1713-1784) will provide important philosophical context. The diverse provenance of texts in this chapter – coming from both the legal sphere as well as the realm of *belles lettres* – is justified by the hybridity of judicial discourse produced during this time. As we will see, lawyers and philosophers of this period (and there were many who were both) often collaborated in the exercise of their otherwise distinct professions in an effort to both win cases and reshape the legal and political climate. What might have been an altogether mystifying task was made possible – and even professionally beneficial – by philosophical investigations into the natural law

that vulgarized what had been an extremely esoteric professional activitiy. Thus this chapter seeks to demonstrate the philosophical moment in legal eloquence where lawyers no longer looked to write, speak or otherwise demystify God's Justice but rather sought to devise a new narrative by which a more human justice could be established.

Chapter 3 analyzes a particular debate on legal eloquence that took place in the pages of the *Mercure de France* between the lawyer Pierre-Louis de Lacretelle (1751-1824) and lawyer/judge Emmanuel de Pastoret (1755-1840). This particular back-and-forth demonstrates the way legal eloquence had evolved away from a question of God's Justice versus man's justice, toward a choice between a legal utopianism in which eloquence took the place of Christian virtue and an early legal positivism in which the written code was alone sovereign in judicial decisions. The *Discours sur le style* (1753) by the celebrated naturalist Georges-Louis Leclerc, comte de Buffon (1707-1788), mentor to Lacretelle and member of the *Académie Française*, provides necessary context for the discussion of legal eloquence. The concept of *opinion publique* receives fresh insight as well as the term is tracked back to its sixteenth-century occurrences within the early printed judicial literature of Jacques Faye d'Espeisses. Rather than a sociological or judicial term, I argue that it was primarily evoked in the judicial environment in a theological sense.

Chapter 4 takes as its chief object the legal rhetoric and efforts toward eloquence of the young and successful lawyer of Artois, Maximilien de Robespierre (1758-94). Through a series of close readings, the chapter investigates the particular way in which Robespierre's judicial briefs shut down the concept of the dual audience traditionally addressed in judicial memoranda. By moving through his major cases in a chronological order, the chapter demonstrates how Robespierre captured contemporary legal eloquence

and regrounded it in a religious notion of Justice while simultaneously rejecting the underlying metaphor on which this Justice had been traditionally based. The client was no longer to be re-absorbed back into the king's body through the lawyer's narrative, but rather the king himself was required by Robespierre to be absorbed into the body of his people. His final brief performs an interesting repetition of seventeenth-century judicial theology for a political body turned upside down. A final section suggests resonances between certain rather traditional elements of his legal eloquence and the radical discursive strategies adopted during his political career.

The chapters have been assembled to build up to a clearer vision of the processes of discursive legitimation that brought about the prerevolutionary *mémoire judiciaire*. The methodological incompatibility of taking a more diachronic approach to prerevolutionary judicial eloquence while also emphasizing close readings within the circumscribed setting of a dissertation means that certain trade-offs have been made. The most important of these is the small field of lawyers from whom I have drawn my corpus. Indeed, the major players emphasized by modern scholarship such as Pierre-Jean-Baptiste Gerbier, Guy-Jean-Baptiste Target, Ambroise Falconnet, Simon-Nicolas Linguet, Jacques-Vincent Delacroix and others receive little or no attention. Of the prerevolutionary lawyers treated here, only Michel de Servan (1737-1807) and Pierre Louis de Lacretelle (1751-1824) received any major recognition for legal eloquence during their careers. However, at the risk of sounding trite, I consider this small sampling as a strength for the purposes of our investigation. The lawyers chosen did not simply exemplify trends in eloquence but engaged with and inflected judicial discourse in such ways that allow us to see how it was conceptualized and transformed from within the profession; they were culled from their colleagues due to

their innovative approach to eloquence. Such innovations often occasioned professional friction, and these reactions offer further insight into the vexed issue of legitimacy and legal discourse. Most importantly, limiting the number of lawyers investigated affords the space necessary to reconstitute the meaning of their words in the very complicated and unfamiliar context of legal speech.

Works Cited

Archives parlementaires de 1787 à 1860. Eds. J. Mavidal, L. Laurent. *Standford French Revolution Digital Archive*. Web. March 2020.

d'Argis, Antoine-Gaspard Boucher and Pierre Biarnoy de Merville. *Histoire abrégée de l'Ordre des Avocats, & les Règlements qui concernent les Fonctions & prérogatives attachées à cette Profession.* In *Règles pour former un avocat, tirées des plus célèbres auteurs anciens et modernes*. Paris: Durand, Pissot, 1753. *Google Books*. Web. March 2020.

Austin, John, and Wilfrid E. Rumble. *The Province of Jurisprudence Determined*. Cambridge, England: Cambridge University Press, 1995. Print.

Bell, David Avrom. *Lawyers and Citizens: The Making of a Political Elite in Old Regime France.* New York: Oxford University Press, 1994. Print.

---. "The 'Public Sphere,' the State, and the World of Law in Eighteenth-Century France," *French Historical Studies* 17.4 (Fall 1992): 912-34. *JSTOR.* Web. March 2020.

---. "Des Stratégies d'opposition sous Louis XV: L'Affaire des avocats, 1730-31." *Histoire, Économie et Société* 9.4 (1990): 567-90. *JSTOR.* Web. March 2020.

---. "Lawyers into Demagogues: Chancellor Maupeou and the Transformation of Legal Practice in France 1771-1789." *Past & Present* 130 (Feb. 1991): 107-41, 114. *JSTOR.* Web. March 2020.

Cover, Robert. "*Nomos* and Narrative." Harvard Law Review 97.4 (1983-84): 4-68. *HeinOnline*. Web. March 2020.

Denisart, Jean-Baptiste. *Collection de décisions nouvelles, et de notions relatives à la jurisprudence actuelle*. Eds. Camus, Bayard, Meunier. 14 vols. Paris: Desaint, 1783-1807. *Google Books.* Web. March 2020.

Desan, Suzanne. "Reconstituting the Social after the Terror: Family, Property and the Law in Popular Politics." *Past & Present* 164 (August 1999): 81-121. *JSTOR*. Web. March 2020.

Érard, Claude. *Plaidoyez de M. Erard, Avocat au Parlement*. Paris: Jacques Le Febvre, 1696. *Google Books*. Web. March 2020.

Falconnet, Ambroise. *Mémoire sur les privilèges des avocats: dans lequel on traite du Tableau et de la discipline de l'ordre: pour M. Morizot, avocat au parlement*. In *Le Barreau français moderne, ou Choix de plaidoyers, mémoires et consultations, imprimés et non imprimés, des plus célèbres Avocats de Paris et des Départements*

[…]. Ed. Ambroise Falconnet. Vol. 2. Paris: Garnery, 1808. 473-515. *Google Books*. Web. March 2020.

Faye, Jacques, Sieur d'Espeisses. *Les Remonstrances ou Harangues faictes en la cour de Parlement de Paris aux ouvertures des plaidoyries*. Lyon: Frères de Gabiano, 1696. *Google Books.* Web. March 2020.

Fitzsimmons, Michael. *The Parisian Order of Barristers and the French Revolution*. Cambridge, MA: Harvard UP, 1987. Print.

Freedman, Jeffrey. "The Dangers Within: Fears of Imprisonment in Enlightenment France." *Modern Intellectual History* 14.2 (2017): 339-64. *Cambridge Core*. Web. March 2020.

Furetière, Antoine. *Dictionaire universel, contenant généralement tous les mots françois tant vieux que modernes, et les termes de toutes les sciences & des arts […]*. Vol. 1. The Hague and Rotterdam: Arnout et Reinier Leers, 1691. *Google Books*. Web. March 2020.

Goldsmith, Elizabeth C. "Publishing the Lives of Hortense and Marie Mancini." In *Going Public: Women and Publishing In Early Modern France*. Eds. Elizabeth Goldsmith, Dena Goodman. Ithaca: Cornell University Press, 1995. Print.

Gordon, Daniel. "The Public Sphere in the Eighteenth Century: Philosophy, Sociology, and Gender in the Enlightenment Conception of Public Opinion." *French Historical Studies* 17.4 (Fall 1992): 882–911. *EBSCOhost.* Web. March 2020.

Hindle, Steve. *The State and Social Change in Early Modern England, 1550-1640*. New York, N.Y.: Palgrave, 2000. Print.

Kagan, Richard L. "Law Students and Legal Careers in Eighteenth-Century France." *Past & Present* 68 (August 1975): 38-72. *JSTOR*. Web. November 2018.

Kwass, Michael. *Privilege and the Politics of Taxation In Eighteenth-century France: Liberté, Égalité, Fiscali*té. Cambridge, U.K.: Cambridge University Press, 2000. Print.

Loyseau, Charles. *Œuvres de maistre Charles Loyseau, avocat en parlement, contenant les cinq livres du droit*. Paris: Moette, 1678. *Google Books.* Web. March 2019.

Maraimberg, François de. *Mémoire pour les Sieurs Samson Curé d'Olivet, Couët curé de Darvoi, Gaucher chanoine de Jargeau, Diocèse d'Orléans*. Paris, 1730. *Gallica.* Web. March 2019.

Maza, Sarah. *Private Lives and Public Affairs: the Causes Célèbres of Prerevolutionary France.* Berkeley: University of California Press, 1993. Print.

---. “Women, the Bourgeoisie, and the Public Sphere: Response to Daniel Gordon and David Bell.” *French Historical Studies* 17.4 (Fall 1992): 935–950. *EBSCOhost*. Web. March 2020.

Merrick, Jeffrey. “Impotence in Court and at Court.” *Studies in Eighteenth-Century Culture* 25 (1996): 187-202. *Project Muse*. Web. March 2020.

Munier-Jolain, Jacques. *Procès de femmes*. Paris: Calmann Lévy, 1898. *Google Books.* Web. March 2020.

Œuvres d'Omer et de Denis Talon, avocats-généraux au parlement de Paris. 6 vols. Ed. D.-B. Rives. Paris: Égron, 1821. *Gallica*. Web. November 2019.

Pré de la Porte. *Le Pourtraict de l'Éloquence françoise avec X. Actions oratoires*. Paris: Jean Lévesque, 1621. *Google Books*. Web. November 2019.

Riskin, Jessica. *Science In the Age of Sensibility: the Sentimental Empiricists of the French Enlightment*. Chicago: University of Chicago Press, 2002. Print.

Rizzo, Tracey. *A Certain Emancipation of Women: Gender, Citizenship, and the Causes Célèbres of Eighteenth-century France*. Selinsgrove: Susquehanna University Press, 2004. Print.

Van Kley, Dale K. *The Religious Origins of the French Revolution: From Calvin to the Civil Constitution, 1560-1791*. New Haven, CT: Yale University Press, 1996. Print.

Chapter 1: La Cause du Gueux de Vernon (1659)

"La vraie éloquence se moque de l'éloquence."

- Pascal, *Pensées* (fr. 671)

Introduction

To call a barrister eloquent in the early modern period meant either high praise or a damaging accusation. In the first sense, it signified the ability of a lawyer to transmit abstruse legal rules and arguments in a manner that at once made such information clear and convincing to magistrates, while also persuading the general audience toward a feeling of assent to the judiciary's determination of justice in the particular case. The eloquent lawyer's discourse exuded erudition, taste, and, most of all, morality. In the second, less obliging sense, to call a barrister eloquent meant that he was covering up the deficiencies of his case with rhetorical devices chosen so as to blind his judges to the truth; eloquence meant artifice. Though eloquence constituted one of the great preoccupations of the seventeenth century, it was in the second, more destructive sense that the term was most commonly deployed among colleagues, while the first was typically reserved for ideal abstractions or the glorification of hallowed orators from the past, such as Demosthenes and Cicero. From this division, we might say that eloquence maintained its positive semantic value in the epideictic species of rhetoric, concerned primarily with praise and blame, but was debased in the forensic setting of legal discourse. How did legal rhetoric negotiate its ambivalent relationship to eloquence if it signified at once the pinnacle of the profession as well as its greatest vulnerability?

This chapter will explore the paradoxical attempts toward and away from the word "eloquence" in the legal culture of the late seventeenth century as a way of setting the stage for a better understanding of prerevolutionary legal discourse. The tensions around the nature of eloquence, of course, had already existed for milennia by this time.[22] I chose this specific period because at approximately one hundred years it is not too far removed from our primary discursive objects so as to render them culturally irrelevant, yet significant enough so as to allow us to perceive the distinguishing features of a previous discursive regime. Despite recent historiography that tends to present the prerevolutionary bar as steeped almost uniquely in the ideas and style of Voltaire and Rousseau, these earlier discourses had a canonical influence on eighteenth-century lawyers; they formed much of the primary source material for the construction of their style as well as the contents of their arguments.[23]

This chapter focuses on one specific court case, the Affair of the Beggar of Vernon (1659) for several reasons, the most important of which is that it was considered an example of eloquence; the totality of its pleadings were published in a collection soon after its

---

[22] As Samuel IJsseling pointed out, Homer spoke both of eloquence as a natural endowment from on high, as well as an important domain of pedagogy, and these antagonistic interpretations have remained a more or less prevalent feature of eloquence depending on the rhetorical context and culture in which it occurs. "So true is it that the gods do not give gracious gifts to all alike, not form nor mind nor eloquence. For one man is inferior in comeliness, but the gods set a crown of beauty upon his words, and men look upon him with delight, and he speaks on unfalteringly with sweet modesty, and is conspicuous among the gathered people, and as he goes through the city men gaze upon him as upon a god" (*Odyssey* 8: 167). Yet in the *Illiad*, we understand that Achilles learned eloquence as an art from Phoenix as a youth, who chided him: "For this cause sent he me to instruct thee in all these things, to be both a speaker of words and a doer of deeds" (*Illiad* 9: 443). (IJsseling, *Rhetoric and Philosophy in Conflict*, pp. 26-33).

[23] Eloquent lawyers of the previous era figured as authority in courtrooms and received copious citation in later pleadings and memoranda; Robespierre, for one, often cited the statements of Omer Talon (1595-1652). Other oft-cited authorities in eighteenth-century legal documents include the great Jansenist and pedagogue to Racine, Antoine Le Maistre (1608-1658), Olivier Patru (1604-1681), and Claude Érard (1646-1700). An aside: American lawyers will note the significant difference between this culture and their own, in that early modern French lawyers cited other *lawyers* and/or *avocats généraux*, while Americans would only cite the opinions of judges as authority. One of the many interesting reasons for this is that judicial opinions in Old Regime France were matters of the utmost secrecy, and their decisions were merely announced as decrees or *arrêts*, and, as such, the reasoning behind their decisions remained almost always a matter of conjecture.

decision. This was a rare event; pleadings were typically published (if at all) for a single orator during the seventeenth century – not a particular trial – and only once he had built a cachet sufficient to warrant such a commercial undertaking. Because of this we benefit from a complete record of the pleadings from all sides and can see how they interact with one another rhetorically. Furthermore, in order to get a taste for legal literature, we must understand the stakes; a close reading of a single case reveals much more about the specifities of the very particular culture of early modern French law than would a superficial perusal of a wider selection. By taking a major affair that involved the most prominent attorneys of the day as a case study of the exemplary styles of argumentation, I hope to offer a sense of the richness of the persuasive tactics employed by the barristers as well as their multifaceted relationship to other forms of literature. With that in mind, the investigation is not conducted in a vacuum, and the larger culture of letters will be carefully incorporated to illuminate key concepts. Lastly, the rhetorical dynamics of this period of legal eloquence remain largely unexcavated, a lacuna in the law and literature scholarship that I feel a close reading will make a first step toward rectifying.[24]

The Affair of the Beggar of Vernon involved a young boy, a wealthy woman and an impoverished vagabond whose identities with regard to one another were thrown into

[24] Of course, Fumaroli's masterful histories of rhetoric provide invaluable orientation on these questions. However, due to their breadth, these tend not to treat the discursive practices of lawyers in particular court cases. (Fumaroli, *L'âge de l'éloquence: Rhétorique et "res Literaria" de la Renaissance au seuil de l'époque classique*, Genève: Droz, 1980; *Histoire de la rhétorique dans l'Europe moderne: 1450-1950*, ed. Fumaroli (Paris: Presses Universitaires de France, 1999)). Indeed, the legal rhetoric of the seventeenth century has, since the eighteenth century, been almost universally dismissed as in bad taste, which may explain in part the lack of scholarly interest on this period. See, e.g., Théodore Froment, *Essai sur l'histoire de l'éloquence judiciaire en France avant le dix-septième siècle,* Paris: E. Thorin, 1874, p. 137 (in his explanation as to why Étienne Pasquier is remembered only for his erudition and not his eloquence, Froment explains that the legal discourse of this period is deserving of and receives general disdain, an opinion that eclipsed Pasquier's eloquence, despite the fact, in Froment estimation, that "il a échappé cependant à la contagion du mauvais goût de son époque" (Froment 137)).

turmoil during the years 1655-59 by the townspeople of Vernon and its magistrates, who claimed and determined that Jeanne Vacherot had cruelly abandoned her son to a beggar, Monrousseau, out of avarice. Vacherot, who meanwhile had been looking for her two runaway sons since their disappearance from her sister's home the previous year, categorically refused to acknowledge the boy in question as her own. Both the child and the beggar equivocated regarding their relationship to one another, while the lower court judges and myriad townspeople of Vernon remained vehement in their attribution. Had the prodigal son returned, or was he simply the hapless boy of a homeless father, caught up in the fervor of a capricious crowd?

With its heavy dose of rumor, masking, blood and money, the Affair was definitive of the semiotic malaise of the period, one that would soon be encapsulated by the logicians of Port-Royal in their *Logique.*[25] The dialectical tension between *être* and *paraître*, a major theme of seventeenth-century literature, stemmed from the growing unease surrounding codes and signs both in society (the social pretentions of a newly enriched bourgeoisie[26])

---

[25] *La Logique ou l'art de penser*, composed by the Augustinians Antoine Arnauld and Pierre Nicole of the Jansenist Port-Royal Abbey (with contributions from Pascal), first appeared in 1662 (final version 1683). Written with the rationalist Cartesian theory of knowledge as context, the *Logique* marked a major transition in logic and language theories. Jansenism, it should be noted, was a hallmark of the *parlements* of the Old Regime; the head of the *Parlement* of Paris, Mathieu Molé (1584-1656), was a known supporter of Port-Royal and close friend of the Abbé de Saint-Cyran. See, e.g., Van Kley's *The Jansenists and the expulsion of the Jesuits from France* (1975), which recounts the network of Jansenist judges and lawyers who, during the reign of Louis XV, concerted their efforts and eventually succeeded in expelling the Jesuits from France.

[26] Finance and commerce created a new social class during this period on whom the nobility both financially depended yet generally found reprehensible for their tasteless ambitions to ascend the fixed social hierarchy. Molière's comédie-ballet *Le bourgeois gentilhomme* (1670) encapsulated the aspiration to appear what one was not, through the ridiculous assumption of dress, speech and behavior codes patterned on one's social betters. More than a mere question of taste, this was a political issue between the displaced *noblesse d'épée* and the new class of *parvenus* enriched and installed at court by the absolutist prerogatives of Louis XIV. For a reading of how the feudal rhetoric of the *ancienne noblesse* was transformed and radicalized during the Enlightenment, see Russo, "Marivaux et l'éthique féminine de la sociabilité," pp. 165-80. Class mobility remained a major concern throughout the eighteenth century as well, but its more thoughtful treatment testifies to shifting attitudes; in 1756 the *abbé* Gabriel Coyer published *La Noblesse commerçante*, a short treatise arguing that the nobility should assume trade rather than warfare as their distinguishing occupation for the defense of the state, a suggestion that triggered debates that spoke to the very essence of the French state. For a discussion of the Coyer treatise, see Maza, *The Myth of the French Bourgeoisie*, pp. 27-30.

as well as language (the ever-widening gap between words and the things they were supposed to designate[27]). Yet despite the undercurrent of distrust that might have undermined the face value of eloquence, the era was defined by it. Myriad discontents had been long stewing over the growing absolutism of the monarchy while France edged ever closer to bankruptcy, and the end of the Thirty Years War (1618-1648) unleashed a oratorical violence from the heart of the state. The *Fronde parlementaire* (1648-49) and that of the princes (1651-53) pitted the eloquence of the magistrates and orators like the Cardinal de Retz against the hard line politics of Mazarin.[28] Jesuit instruction and its emphasis on rhetoric in conjunction with the "culte de l'héroïsme" (Delon 55) and the quest for personal glory that marked the age of Corneille and Honoré d'Urfé's *L'Astrée* would produce a flurry of talented preachers such as Bossuet (1627-1704), Bourdaloue (1632-1704), Fléchier (1632-1710), Massillon (1663-1742) and barristers such as Olivier Patru (1604-1681), Antoine Le Maistre (1608-1658), Claude Érard (1646-1700), and the defender of the ill-fated minister Nicolas Fouquet, Paul Pellisson (1624-1693).

We will find that central to the many techniques of seventeenth-century lawyers was the effort toward agreement of authoritative texts and narrative. The remarkable eclecticism of the sources favored by the barristers was almost always corralled in reverent

[27] The unreliable relationship between concepts and signs was perhaps best illustrated in Pascal's second letter from his *Les provinciales* (1656-57), in which he defended Jansenism by pointing out the semiotic manipulations of the Jesuits, whom he charged with using a common language despite knowing that it was subject to differing definitions: "[I]l y a deux choses dans ce mot de grâce suffisante: il y a le son, qui n'est que du vent; et la chose qu'il signifie, qui est réelle et effective. Et ainsi, quand vous êtes d'accord avec les Jésuites touchant le mot de suffisante, et que vous leur êtes contraires dans le sens, il est visible que vous êtes contraires touchant la substance de ce terme, et que vous n'êtes d'accord que du son" ("Seconde lettre," *Les Provinciales*, p. 4). The conflict was considered was considered not merely political by Pascal, but inherent to language itself, which could only ever approximate truth that resolved ultimately in God. The *conseil d'état* ordered *Les Lettres Provinciales* burned on 25 September 1660.

[28] For an brief overview of the *Fronde parlementaire*, see Briot, "La Fronde parlementaire," pp. 19-26; for a broad survey of the judicial eloquence from this period, see Holmès, *L'Éloquence judiciaire de 1620 à 1660*.

support of a single conception of reason, authority and experience, which all served to reinforce the truth of one another. The barristers' rhetoric, the ostensible goal of which was to persuade its listener to come to their desired conclusion, did not find success, as it does today, simply through its subservience to a written body of law, but rather in its compliance with and enhancement of the internal consistency of the social and moral order. The concept of society in Old Regime France was imagined very differently from the way we consider society now, and therefore the metaphors that were used to describe it are profoundly removed from our own. The social division into three orders (the Clergy, Nobility, and Third Estate) denoted a primarily *spiritual* (rather than financial) social hierarchy, divinely inspired and naturally arranged for God's authority and that of the king.[29] The overarching narrative – the one that all of the attorneys' pleadings needed to comply with and to serve – was one of social cohesion under the hierarchical structures of the Old Regime, as narrated by its foundational texts, particularly the Bible.[30]

A practical word of warning: the intertextuality rampant in seventeenth-century pleadings may confound the modern lawyer. For example: in a case of corporate privilege between shoemakers and woodworkers, the *parlement* of Bordeaux decided in favor of the former since Adam first covered himself in a fig leaf before taking to the woods for refuge[31]; an inheritance dispute between two brothers was pleaded primarily according to the Biblical stoy of Jacob and Esau,[32] and so on. How could works of fiction or Biblical

---

[29] For a fascinating exegesis of the Old Regime notion of social *ordre*, see Maza, *The Myth of the French Bourgeoisie*, pp. 14-40.

[30] "La Justice veut qu'un homme de bien ne forme point de souhaits, qui excèdent son mérite ou sa naissance, & elle lui apprend que pour être heureux & innocent, il faut qu'il prescrive des bornes à ses desseins" (Senault, *De l'usage des passions*, II: 250 [1641], Paris: Fayard, 1987).

[31] *Pour les faiseurs de sabot* […] in *Plaidoyers et Actions graves et éloquentes de plusieurs fameux advocats du parlement de Bourdeaux* (1616), pp. 185-196.

[32] Henrys, *Plaidoyez IV* […], in *Plaidoyers, arrêts et harangues de M. Claude Henrys* (1658), pp. 35-57.

exegeses possibly expedite or in any way add value to the findings of the *parlement*, which was sworn to uphold not the reputation of Virgil but rather the king's law?[33] The long expositions of Greek mythology that peppered these pleadings feel today like wasteful digressions, inappropriate and irrelevant to the pursuit of justice. The pursuit of justice, however, is always a culturally embedded practice, its meaning contingent upon the social, moral and political contexts in which it moves. A brief example to highlight my point: in order to weigh the legal issues of a case, today's legal scholars turns to online databases of all legal codes, case law and secondary sources, entering keywords into search fields then relies upon the service's filtering options to cull relevant material from the results. The mass of information, organized and made accessible by highly sophisticated software, is at the fingertips of anyone with a subscription. The modern legal memorandum thus normally contains only relevant information, rendered in precise terms and in an exhaustive manner. Compare our modern gesture of research and writing to the seventeenth century lawyer's use of commonplace books.[34] The commonplace books provided a means by which learned individuals stored and manipulated an ever-increasing wealth of available information. These bound compilations worked like highly-functional notebooks, comprising *copia* that could be tabulated according to theme, subject, etc., to be used in any number and variety of written productions as a way to underscore the authority of one's argument. I indicate this method of note-taking and writing as a practical step toward explaining the varied, sometimes random and usually hectic assortment of authorities used in typical seventeenth-

[33] The *Parlement* of Paris swore an oath of loyalty to the king and his ordonnances at least once a year (at the *rentrée d'hiver*), administered by the Chancellor.

[34] "Pour s'aider à composer leurs discours, les avocats [du 17e siècle] utilisent souvent des 'recueils de lieux communs.' […] Il n'est pas rare d'en trouver trace dans les inventaires des avocats." Loïc Damiani, "Discours chez les avocats parisiens aux XVIIe siècle," *Entreprises et histoire* 1.42 (2006): 7-28, 17.

century legal briefs – somewhat bizarre to today's average reader and absolutely shocking to today's average lawyer. Although this practical explanation of course cannot completely explain the choice of contents (a lapse that this chapter intends to help bridge), it may help us take into account our blind spots regarding these lawyers' culture of composition.

The Advent of the *Académie Française* – Adjudicating Letters

Because my argument relies upon the intellectual and social climate of moral orthodoxy surrounding the Affair of the Beggar of Vernon, it is important to first describe the *Académie Française* and its official function under the direction of Louis XIII's minister, the Cardinal Richelieu. During the early part of the century, erudite discussion of recent books, philosophy, music and other general topics were taking place in secret at the Parisian home of Valentin Conrart. Some of the most influential figures of the day met there, both Protestant and Catholic. After learning of these clandestine conversations, Richelieu decided in 1634 to incorporate and expand the group of intellectuals within the monarchical body so that they might serve a consolidating function of and under the sovereign power through a centralization of literary and linguistic standards.[35] Thus the representation of the intellectual interests of the monarchy constituted the primary task of the *Académie Française*, of whom a full quarter were members of the Bar. But what did such a job entail? Although the ostensible mission of the Académie was to give "des règles

[35] Although the *Parlement* of Paris, wary of the ever-increasing power of royal prerogative, initially met the *lettres patentes* for the *Académie Française* with strong resistance (Richelieu, after a year of pleading, finally issued three *lettres de cachet* to use against the *Parlement*), the body was eventually registered and from its original twelve members grew to the forty seats that it still holds today. The fears of the *Parlement* proved correct, however, and the suppression of the *Académie Française* as a symbol of royal authority took place early on in the French Revolution. The *Académie Française* was replaced in 1795 by the Institut de France, then reestablished in 1815 under its original name. For further background on the reticence of the *Parlement* vis à vis the official establishment of the *Académie Française*, see Fitzsimmons, *The Founding of the Académie Française*, pp. 3-24.

certaines à notre langue et à la rendre pure, éloquente et capable de traiter les arts et les sciences" (*Statuts et règlements de l'Académie Française*, 22 février 1635, art. 24), the twenty-second statute of the body's founding document provided greater clarity regarding the calibration of this literary-political machine: "Les matières politiques ou morales ne seront traitées dans l'Académie que conformément à l'autorité du Prince, à l'état du Gouvernement et aux lois du Royaume" (ibid., art. 22). That Richelieu demanded conformity with the authority of the prince on moral as well as political matters demonstrated the breadth of the cardinal's vision for the Académie and its potential for influence on the French social order.[36]

The infamous *Querelle du Cid* provides an early example of the authority of the Académie and its role as a regulator of public morality. At the heart of the debate was the question whether Corneille's *Le Cid*[37] had unacceptably transgressed the dramatic unities required under the rules of classical theater and instigated moral decay in its viewers through its depiction of a woman in love with her father's killer. The argument circulated well beyond the walls of Chancellor Pierre Séguier's home,[38] where the Académie met; dozens of discourses, letters and pamphlets authored by non-members made up the

---

[36] Of course, Richelieu was not extending the king's formal authorities, which were "inextricably bound up with theological concepts" and whose monarchy was "theocratic from at least the time of Charlemagne" (Peter Campbell, "Absolute Monarchy," p. 18); rather the Académie Française controlled the language of the nation, the *bon usage* of which reinforced the hierarchy of power and status of the Old Regime (Rosenfeld, *A Revolution in Language*, p. 20).

[37] Let us recall that Corneille was a lawyer himself (sworn in before the *Parlement* of Rouen on 18 June 1624 at the age of eighteen), as were La Fontaine (1621-1695), Perrault (1628-1703), Quinault (1635-1688), Boileau (1636-1711), La Bruyère (1645-1696)…

[38] Pierre Séguier (1588-1672) was a member of one of the most prominent legal families in French history. As a *président* in the *Parlement* of Paris, he maintained a defiant attitude regarding royal authority, typical of a *parlementaire*. However, upon his appointment by Richelieu as *garde des sceaux* in 1633 and subsequent alliance with the cardinal's family through marriage, he became a virulent defender of the king's prerogatives and often turned the idea of the *Parlement*'s sovereignty on its head (a transformation mirrored by Chancellor Maupeou under Louis XV over a century later). The *Académie Française* met at his home until his death, which housed an enormous library of manuscripts in keeping with Séguier's love of letters.

Querelle. The argument reached such a pitch that in 1637 the Académie was given jurisdiction over the quesiton by Richelieu.[39] The Académician Jean Chapelain (1595-1674) composed *Les sentiments de l'Académie sur Le Cid*, which condemned the play's blatant contravention of the *trois unités* of classical theater, but determined that its greatest fault indeed resided in Corneille's depiction of Chimène's love for Rodrigue:

> […] [N]ous disons que le sujet du Cid est défectueux en sa plus essentielle partie […]. Car […] la bienséance des mœurs d'une Fille introduite vertueuse n'y est gardée par le Poète, lorsqu'elle se résout à épouser celui qui a tué son Père […] [L]a fille consent à ce mariage par la seule violence que lui fait son amour. (*Les sentiments de l'Académie sur Le Cid*, 21)

It is important to note that it was precisely the point most appreciated by the audiences – Chimène's enduring passion – that merited the play's official repudiation by the Académie. Chimène's inability to overcome her desire for Rodrigue even after the murder of her father evoked a moral aberration that rendered the play "useless" to the spectators, since the event did nothing more than stir up the passions without instructing them toward virtue. Indeed, reasoned Chapelain, even if it were historically accurate, the story would need to be recast to fit the mold of appropriate literature produced not only for the amusement but the moral improvement of its audience:

> Le merveilleux se rencontre bien en cette aventure, mais c'est un Merveilleux qui tient du Monstre et qui donne de l'indignation et de l'horreur aux Spectateurs plutôt que de l'instruction et du profit. Or c'est

[39] For a full discussion of the *Querelle* and the institutionalization of "Aristotelian" poetics in neo-classical French theater, see Jules Taschereau, *Histoire de la vie et des ouvrages de P. Corneille*, (1829); *La querelle du Cid (1637-1638): édition critique intégrale*, ed. Jean-Marc Civardi (2004).

> principalement en ces occasions que le Poète doit préférer la vraisemblance à la vérité, qu'il doit plutôt travailler sur une chose toute feinte pourvu qu'elle soit conforme à la raison […] (*Les sentiments de l'Académie sur Le Cid*, pp. 21-22)

Fabrication trumped fidelity where the latter risked disrupting the passions without simultaneously shepherding them in the direction of virtue.[40] The uneasiness seeded in the moral fabric of society by an unpunished immoral act necessitated the intervention of the *Académie Française*, which firmly came down on the side of respect for *bienséances*: moral fault thus denoted aesthetic flaw.

> C'est alors qu'il [le dramaturge] la doit plutôt changer toute entière que de lui laisser une seule tâche incompatible avec les règles de son Art, lequel cherche l'universel des choses et les épure des défauts et des irregularités particulières […]. Mais le plus expédient eût été de n'en point faire de poème dramatique, puisqu'il était trop connu pour l'altérer en un point si essentiel et de trop mauvais exemple pour l'exposer à la vue du Peuple sans l'avoir auparavant rectifié. (*Les sentiments de l'Académie sur Le Cid*, pp. 21-22)

The moral edification of the audience was of paramount importance, thus fiction was to be preferred to truth, but if and only if the fiction was in conformity with reason. But what would have constituted a reasonable fiction in this case? Chapelain informed his readers that in order for Corneille's play to be *raisonnable*, Chimène could have continued to love Rodrigue – indeed, *should* have in order to heighten the price she put on her honor – but

[40] Boileau restated the distinction in 1674, writing "le vrai peut quelquefois n'être pas vraisemblable" (*L'art poétique* III, I.48).

that her obedience as a daughter must have ultimately prevailed over her role as a lover: “Et la beauté qu’eût produit dans l’ouvrage une si belle victoire de l’honneur sur l’amour eût été d’autant plus grande qu’elle eût été plus raisonnable” (*Les sentiments*, p. 39). In fact, it was Rodrigue – not Chimène – who “raisonnablement devait succomber” due to his sex’s well-known weakness for passionate satisfaction. Chimène should have maintained her vengeance against Rodrigue “puisque l’honneur de son sexe exigeait d’elle une sévérité plus grande” (ibid., 40). Reason, in this case, connoted honor, which in the seventeenth century meant the respect for and perpetuation of social hierarchies and the particular activities that distinguished them.

In announcing its judgment on the *Cid*, the Académie declared its hope that spectators enamored with the disordered play condemn themselves privately, “et qu’ils se rendent en secret à leur propre raison” (ibid., 88) which, the Academicians were certain, would only reiterate to them what the Académie had decreed. They were guilty of allowing the “passions violentes bien exprimées” by Chimène and Rodrigue to activate their own blinding passions,[41] a reaction which, assured the Académie, was excusable due to the perspicacity with which Corneille took hold of them through flattery: “L’Auteur s’est facilement rendu maître de leur âme, après y avoir excité le trouble et l’émotion, leur esprit flatté par quelques endroits agréables est devenu aisément flatteur de toute le reste, et les charmes éclatants de quelques parties leur ont donné de l’amour pour tout le corps” (ibid.) The show of clemency on the part of the Académie was perhaps only matched by their wiles, as they continued in most flattering tones to penetrate the passions of the spectators,

[41] Chapelain stated the reaction as such: “[L]es passions violentes bien exprimées, font souvent en ceux qui les voient une partie de l’effet, qu’elles font en ceux qui les ressentent véritablement. Elles ôtent à tous la liberté de l’esprit, et font que les uns se plaisent à voir représenter les fautes, que les autres se plaisent à commettre” (*Les sentiments*, p. 88).

which, this time, was commendable because they were ushering their audience toward reason:

> S'ils [the spectators] eussent été moins ingénieux, il eussent été moins sensibles; ils eussent vu les défauts que nous voyons et cette Pièce s'ils ne fussent point trop arrêtés à en regarder les beautés, et si on leur peut faire quelque reproche, au moins n'est-ce pas celui qu'un ancien Poète faisait aux Thébains, quand il disait qu'ils étaient trop grossiers pour être trompés. (ibid.)

Olivier Patru: Blending Morality and Legality

But why bring up the *Académie Française* and its literary laws in a discussion of pleadings written by lawyers before the *Parlement* of Paris? In fact, by the 1650s when the case of the *Gueux de Vernon* took place, a full quarter of the members of the *Académie Française* were lawyers, and their discursive practices witnessed the porosity between the bar and the critical theory and concerns developing around contemporary stage productions. One of them, the extremely influential lawyer and writer Olivier Patru (1604-1681), occupied the nineteenth chair of the Académie. The zeal for moral cohesion and improvement inherent in the work of the Academicians found full development in his legal arguments. In a memorandum delivered in for Mme Rambouillet against a brother-in-law seeking to disinherit her children from her husband's estate, Patru spent much of the text parsing evidence and law. However, at regular intervals and especially the culmination of his pleading, he set the law aside in order to demand a ruling basedon public morality in tones that recall the Académie's defense of *bienséances*. Such a ruling would protect

Rambouillet's children not merely from the avarice of an uncle, but, more importantly, exposure to the world of litigation:

> Ces Sages de l'ancienne Rome […] les uns & les autres ne prononcent que sur les principes de l'équité, de cette Loi qui n'est gravée ni dans le marbre, ni dans l'airain, & qui seule est immuable. […] Qu'il ne soit point dit, que ses enfants ont commencé le funeste apprentissage de plaider, par plaider ouvertement contre leur oncle. Considérez, s'il vous plaît, combien dans un âge si tendre, si frêle, les premières impressions sont dangereuses. On passe aisément d'un degré à l'autre […] Mais si vous ôtez à l'enfance le respect, la crainte, la honte, vous lui ouvrez au même temps la voie de perdition, en levant les seules barrières qui la peuvent arrêter. (Patru, *Sixième Plaidoyer*, pp. 193-94)

Patru beseeched the judges to conform to his opinion of the case not on legal grounds, but rather for the sake of protecting the children from the vulgar space of the courtroom, where private interests often outweighed good morals as parties sought to maintain or augment their property. Indeed, Patru extrapolated the duty of the judges toward the Rambouillet children to all French subjects, demanding that judges protect not merely the Rambouillet children but all of society from the dangers of corruption:

> Déjà notre siècle ne court que trop au précipice; la corruption, la gangrène gagne partout, il est de la sagesse des Magistrats de s'opposer autant qu'on peut, à ce torrent impétueux qui s'en va bientôt ravager nos bonnes moeurs, & tout ce qu'il y a de plus saint, ou de plus inviolable parmi les hommes. Il

> n'y a, MESSIEURS, il n'y a ni occasion, ni temps à perdre; on ne peut veiller de trop près à un mal si contagieux. (ibid., 194)

The urgency of Patru's exhortation to what one might call an early modern brand of judicial activism revealed an expansive view of judicial prerogative as moral authorities who could pre-empt potentially deleterious human behaviors as dissonant with public virtue. Indeed, according to Patru, it was only due to the laxity of certain members of the legal apparatus that evil had infiltrated the courtroom in the first place. Such appeals, however strange they may sound to our modern ears, posed no novel conception of the role of magistrates; the maintenance of public virtue was the business of the court,[42] and anyone who did not consider the supremacy of the moral order as the object to be maintained by the legal apparatus could be called an "étranger" to men of the law:

> C'est en ces rencontres que la plus petite tolérance porte coup; & si on eût tenu ferme sur les premières démarches de la licence & du vice, nous verrions encore aujourd'hui fleurir parmi nous la candeur & la vertu de nos pères. Mais pourquoi vous représenter ces choses? Vous les savez, MESSIEURS, vous les savez; & qui ne les sait, s'il n'est sans yeux, ou étranger parmi nous? (ibid., 194)

---

[42] The seventeenth-century conception of legal eloquence as primarily an arm against moral corruption rather than the art of "bien dire" was most thoroughly stated during an *ouverture des audiences*, published in 1685, in which the speaker exhorted the lawyers to disavow rhetorical lineage with the Greeks and Romans, who had sought to win arguments through impressive rhetorical tactics, and to espouse rather the Gallic tradition of speaking for the protection and elevation of virtue. The Ancients, related the speaker, revered Mercury as the god of eloquence due to "la puissance & les effets, non seulement à la subtilité & au bien-dire, mais aussi à la tromperie & au lucre" whereas the Gallic orators took Hercules as their deity because "tout ainsi qu'Hercule avait fait vœu par sa prouesse, de vaincre & dompter les Monstres, aussi fallait-il que l'Orateur ou Advocat fut fort & vertueux pour combattre & s'opposer aux vices, qui sont les vrais monstres de l'âme […]" (*Le Trésor des Harangues* II: 4). If the lawyer persisted in developing an eloquence based on "le bien dire" rather than virtue, he risked estranging himself from the *parlement*, ressembling "plutôt à un Comédien sur un théâtre, qu'à un Advocat dans un Sénat" (ibid.) The task of the truly French lawyer was thus "d'accoutumer les peuples à s'émouvoir plutôt par les bonnes mœurs de l'Oratuer que par ses paroles" (ibid., 8-9).

In Patru's pleading we hear as early as 1653[43] what has been generally held in the field of prerevolutionary legal literature as a "new" phenomenon (allegedly introduced by Voltaire's 1743's foray into the legal genre with the Calas case): the intensely personal styling of a case paired with a generalized, even universal meaning.[44] Patru did not hesitate to equate the fate of the Rambouillet children, young and still innocent enough to be enamored with their money-grubbing uncle – who they considered their father! – cried Patru- with the cause of all children, even innocence itself. Patru extrapolated from the Cour des aides to the universal then cosmic tribunal of good versus evil:

> Si on perd sa Cause, avant qu'on la perde, il se passera des années, des siècles, s'il est possible; & le temps qui consume, le temps qui accable l'innocence, ne donne que trop souvent la victoire à l'injustice. (Patru 175)

Though Patru's collected speeches were published in 1670, *plaidoyers*, unlike *mémoires judiciaires*, were always meant to be delivered before a live audience, and because of this we must recall that in reading his words after the fact, we miss out on the *actio*, or the pronunciation, gesture and vocal attributes that undoubtedly communicated a great deal to his listeners in addition to the discourse itself. This deplorable gap in our reception of the

---

[43] The case between Catherine de Rambouillet against Isac de Monceau was heard in the first chamber of the *Cour des aides* over two days in June, 1653. (The *cour des aides* was typically an appellate court that dealt with important matters of finance, but they allowed hearing cases of first instance among the nobility beginning in 1645).

[44] Sarah Maza and Roger Chartier tend to locate the 1780s as the moment when private family conflicts began to be politicized in judicial literature, which acted as fodder for the development of Habermas' new public sphere. (See Maza, *Private Lives*; Chartier, *Origines culturelles*). Chartier in particular cites Malesherbes' 1775 reception speech at the *Académie Française* as decisive evidence of the power of this new public tribunal ("Il s'est élevé un tribunal indépendant de toutes les puissances, et que toutes les puissances respectent […], et […] ceux qui ont le talent d'instruire les hommes, ou le don de les émouvoir, les gens de lettres, en un mot, sont […] ce qu'étaient les orateurs de Rome et d'Athènes au milieu du peuple assemblé" (Chartier, *Origines*, p. 51, citing Ozouf, "L'opinion publique," p. 424), but in fact, read in context, we discover that Malesherbes immediately proceeded to note that "Cette vérité, que j'expose dans l'assemblée des gens de lettres, a déjà été présentée à des Magistrats, et aucun n'a refusé de reconnaître ce tribunal du public comme le juge souverain de tous les juges de la terre" (*Discours de réception de M. de Malesherbes, le 16 février 1775*).

plaidoyer would dissipate with the rise in stature of the *mémoires judiciaires*, which circulated at the time of the case and often by the thousands in the period preceding the Revolution. Nevertheless, Patru's rhetoric as it was memorialized in its publications contains within it much of what would be considered "eloquent" in the following century and, barring his reliance on sundry extralegal sources as authority for his arguments, a tendency that redounded throughout all legal pleadings at this time, his pleadings stood long as models for legal eloquence that later lawyers would refer back to in the composition of their own arguments. What should be noted is that these techniques, often described by scholars as socially revolutionary strategies in the prerevolutionary lawyer's toolbox, were in fact not wielded for the purpose of upsetting the social order of the monarchy or fomenting revolutionary ideas; on the contrary, Patru's career was spent shoring up the relation between power and authority in his work as lawyer to the king as well as member of the *Académie Française*.

Lawyer as Political Imagination

The particular formulation of legal discourse of the seventeenth century can best be understood in light of the moral orthodoxy of the day, demonstrated in the *Académie Française*'s ruling on *Le Cid*, and in which the specific role of the lawyer was to embody the political imagination. As the political imagination, the lawyer acted as the middleman between the passions and reason, in keeping with the seventeenth-century paradigm of the soul.[45] Tasked with communicating the needs and desires of individual members of society

[45] "Vous êtes placés, pour le bien du public, entre le tumulte des passions humaines et le trône de la justice" (d'Aguesseau, "Discours pour l'Ouverture des audiences du Parlement: L'indépendance de l'avocat," *Œuvres choisies*, p. 177); this sentiment was repeated generally by the judge Emmanuel de Pastoret nearly a century later, under vastly different circumstances: "Mais jetons un moment les yeux sur l'origine de ce ministère sacré : n'a-t-on pas voulu placer un homme choisi entre la sainteté de la loi et la violence de nos

to the judiciary, the lawyer in the seventeenth century worked as a translator, purifying the passions of his client for presentation to the reason of the law. Unlike the late eighteenth century, the passions were almost uniformly conceived by seventeenth-century lawyers in a negative light as disturbing or even violent forces that worked against one's will, and from which one needed protection.[46] Thus in 1693 the *avocat général* d'Aguesseau demanded that a barrister "[é]tudie[…] les inclinations de ses parties pour les suivre si elles sont justes, et pour les réprimer si elles sont déréglées; connaître leur vertu pour prévenir les juges en leur faveur, et leurs défauts pour détruire ou pour affaiblir le préjugé qui leur

---

passions?"(Emmanuel de Pastoret, "Lettre à M. Lacretelle […]" in *Discours en vers* [...], Paris: Jombert, 1783, p. 19). The embodiment of judicial eloquence can be found in earlier discourses, including one by J. du Pré de la Porte (1620), a Norman magistrate and friend of François de Malherbe (1555-1628), whose pre-Harvey anatomical discussion illuminated the necessity of lawyers and legal eloquence for the proper function of the political constitution: "[S]i en la société civile on laisse aux Magistrats l'âme, & au peuple le corps, les Orateurs en sont les esprits qui les joignent, accourants à toutes les parties, pour en règler le mouvement. Il en sont pareillement les bras, puisque nous les voyons sans cesse employer comme généreux Alcides à défaire l'Hydre des procès qui sourdent entre les hommes. Qu'ils soient d'abondant le coeur de l'état, leur assiette & leur fonction le démontrent, en ce que comme le coeur a choisi le centre du corps, pour y départir partout avec proportion la vigueur & la force requise; aussi ont ils pris le milieu, afin qu'évitant le périle de la chute & du mépris (accidents inséparables des grandes & basses fortunes) ils inspirent dans les Royaumes ce qu'il y a de plus pur dans les bonnes lois, comme l'âme & le principe de leur vie. […] [S]'il est question de montrer qu'elle est autant à l'endroit du corps Politique, que les parties nobles du corps envers le tout, il n'en faut point de meilleures preuves que les fonctions de l'une & des autres. Car tout ainsi que l'estomac ayant converti l'aliment en chyle, en fait du sang, dont la partie plus terrestre est transmise en la veine cave […] l'Orateur a comme détrempé la masse des procès, & mis à part ce qu'il y a de superflu, il communique aux Juges ce pur chyle qui reste, lesqueles le convertissent en sang, c'est à dire en ces beaux arrêts, ont la partie plus nutritive (j'entends l'axiome qui en résulte) s'étend par tout le barreau […] & d'iceux aux inférieurs: si bien que tous les membres qui parfont ce corps, en reçoivent un singulier aliment, qui les dispose à bien conseiller & juger. […] Davantage, comme nos poumons soufflants à travers le corps le rafraichissent, & lui donne par ce moyen l'accroissement & la force; ainsi l'Éloquence fait sans cesse de son haleine pousser chez nous la plante de la vertu & des bonnes moeurs, & remplit ce qui s'y trouve de vide d'honneur & d'émulation" (*Le Pourtraict de l'éloquence française*, pp. 3-8). An even earlier anatomical description of eloquence converting difficulties "en chyle" can be found in a harangue delivered in 1585 by *avocat-général* Jacques Faye, seigneur d'Espeisses (*Recueil de la neuvième rémonstrance* […] in *Les Remonstrances ou harangues faictes en la cour* […], p. 165).

[46] The negative connotations of passion were evoked during pleadings as well; the *Journal des principales audiences* (a major resource for both judges and practicing attorney), which contained summaries and often complete transcriptions of important hearings cited "passion" in the following contexts: "[…] il ressentait déjà par avance le remords de son crime, ses passions s'excitèrent malgré lui dans lui-même […]" (*contre Joublot* [1686], p. 5); "[…] il se forme en lui une passion inquiète qui n'a point de retour […]" (ibid. 9); "[…] le torrent impéteueux d'une passion violente […]" (*Un mariage est nul* […] [1689], p. 189); "[…] on avait tâché de leur assurer contre la passion d'un beau-père […]" [1697], p. 664).

est contraire" (190). The lawyer was to act as a moral conduit offering passage for his client toward the wisdom of his judges.

Yet the barrister pleaded before the public as well, and the legal apparatus was anxious that the authority of the law, if it could not be understood by the public, at least maintained its general consent. This would be achieved through appeals to the public's passions. In 1695, d'Aguesseau, in his second speech before the Paris Bar, went so far as to advocate for the dramatic *mise en scène* of the lawyer's client through a first person portrayal:[47]

> [I]l faut que, sans prendre ni les passions ni les erreurs de ses parties, [l'avocat] se transforme, pour ainsi dire, en elles-mêmes; et que, les exprimant avec art dans sa personne, il paraisse aux yeux du public, non tel qu'elles sont, mais tel qu'elles devraient être. C'est par le moyen de cette fiction ingénieuse, et sous cette personne empruntée, que l'orateur, animé, pénétré, agité des mêmes mouvements que sa partie, ne dira jamais rien qui ne lui convienne parfaitement: il réunira la douceur et la sagesse de la raison avec la force et l'impétuosité de la passion; ou plutôt la passion de la partie deviendra raisonnable dans la bouche de son défenseur […]. Ce ne sera plus un seul homme dont le style, toujours le même, ne fait que changer de sujet, sans changer de ton. **Il se multipliera** […] **il empruntera autant de formes différentes, qu'il aura de causes et de parties d'un caractère différent.**

[47] Yann Robert, following Jeffrey Ravel's construal in his 2008 work, *The Would-be Commoner*, claims that d'Aguesseau was "deeply wary of theatricality" and that he forbade lawyers to espouse voices other than their own (*Dramatic Justice*, p. 105). These interpretations, however, suffer from a superficial reading of d'Aguesseau (who, as is demonstrated in the above citation, advocated lawyers to assume different styles depending on the case) and an anachronistic over-simplification of the alethic modalities available to early modern lawyers.

(D'Aguesseau, "La Connaissance de l'homme," in *Œuvres choisies*, pp. 190-91 [my emphasis])

D'Aguesseau firmly located the role of the lawyer at the interval between reason and passion, the space occupied by imagination, that janus-faced entity of the soul whose reason-facing profile d'Aguesseau was careful to emphasize.[48] Though the lawyer sought acclaim from both the judge and the public, he was nevertheless required to abstain from flattering the public except where such words were aligned with truth and reason: "[l'éloquence] ne cherche jamais à [plaire au peuple] par des vices agréables: elle trouve une route plus sûre pour arriver à son cœur; et, redressant son goût sans le combattre, elle lui met devant les yeux de véritables beautés, pour lui apprendre à rejeter les fausses" (195). Thus, the lawyers' pleadings in the seventeeth century were composed on a dual register – as a purification of the passions of the client's claim for the reasoned decision of the judge, and a passionate retelling of the reason of the law for the people's edification.[49] The idea of layered intentions or judicial eloquence as stratified speech during this period will be further elucidated throughout the chapter as we now turn to a close reading of the pleadings in the Affair of the Beggar of Vernon.

---

[48] The division of a pleading between conviction and persuasion was set forth by Cicero; the statement of facts and proofs (*narratio* and *confirmatio*) were provided for the conviction of one's audience, while the *exordium* and *peroratio* served to excite and persuade them. A more contemporary proximity between the rhetorical tasks of d'Aguesseau's lawyers can be established with Rousseau's *Législateur* (1762): "Les sages qui veulent parler au vulgaire leur langage au lieu du sien n'en sauraient être entendus. […] Pour qu'un peuple naissant pût goûter les saines maximes de la politque et suivre les règles fondamentales de la raison d'État, il faudrait que l'effet pût devenir la cause […]. Ainsi donc le Législateur ne pouvant employer ni la force ni le raisonnement, c'est une nécessité qu'il recoure à une autorité d'un autre ordre, qui puisse entraîner sans violence et persuader sans convaincre" (*Du Contrat social*, bk. II, ch. VII).

[49] D'Aguesseau's instructions regarding the didactic function of the barrister controvert Maza's claim that such concerns came to the fore only in the late eighteenth century, concommitant with the advent of the *drame bourgeois* (see, e.g., *Private Lives*, 322-23).

La Cause du Gueux de Vernon (1655-59)

Statement of the Facts

The trial of the Beggar of Vernon (1655-59) provides a wonderful example of the stylistic choices prevalent in the legal genre as practiced by some of the most celebrated barristers of seventeenth-century France.[50] The issue at the heart of the case turned on whether a young boy travelling through the township of Vernon was the child of a well-to-do widow or the son of an impoverished vagabond. The widow, Jeanne Vacherot, had been desperately looking for her two runaway sons when the inhabitants of Vernon discerned in the face of a street urchin a strong likeness to one of the woman's disappeared boys. Vacherot admitted that there was a striking resemblance between the beggar child and the younger of her two missing sons, but nonetheless refused to acknowledge him as her own. Meanwhile, Monrousseau, the *gueux* or pauper accompanying the child, was vehement in his claim to be the child's father. Vacherot's denial of parentage apparently outraged the populace, convinced that the widow had abandoned the boy out of greed to an old beggar in need of a pity-inducing sidekick.[51] The local authorities were quickly convinced to hold the widow and her property as well as Monrousseau, who was charged with collusion.

Despite all evidence to the contrary, the local judges determined that the boy belonged to Jeanne Vacherot.[52] On August 21, 1655, the widow succeeded in appealing the case to the *Parlement* of Paris. The legal apparatus of Vernon received this decree about

---

[50] The *Journal des sçavans* reported that the case was famous "par la nouveauté de son espèce; mais plus encore par l'éloquence des Advocats qui l'ont déffendue" (128).

[51] The dispute was particular in that it was the general population of Vernon, a small village midway between Paris and Rouen, that triggered the trial rather than a single accuser who was particularly wronged- neither the child, widow or beggar brought the case (similar to crowd justice, like the population of Toulouse in the *Affaire Calas* just over a century later).

[52] In fact, there was a substantial amount of evidence indicating that the officials stood to profit from Vacherot's punishment, since she had refused to sell them her farmlands; the forced divestment of her property worked as the transfer they could not transact otherwise.

one week later, but refused to translate jurisdiction of the case, citing the independence of the Normandy *parlement*. It was not until the Vernon judges received a petition from the king's Privy Council the following spring that the standoff was finally broken and the case removed to Paris, where the heralded jurist and First President of the *Parlement* Guillaume de Lamoignon (1617-1677)[53] was tasked with its hearing.

The case was resolved slowly and with much fanfare. In a stunning turn of events, while the procedural matters were being hashed out, the elder son of the widow finally returned home to her, announcing the death of his younger brother. Despite this monumental piece of evidence, the case remained in procedural limbo for approximately four years, and it was not until the spring of 1659 that it was heard. Jeanne Vacherot accused both the *Procureur du Roi* as well as the *Lieutenant-Général* of Vernon of something akin to a frivolous lawsuit, claiming that they desired her lands, which she had previously refused to sell, and in retaliation instituted the action and brought about the hasty verdict in order to acquire her property. She, as well as the beggar who had been all this time languishing in jail awaiting trial, sought damages and coverage of legal expenses, along with a formal declaration that the child did not belong to Vacherot but to Monrousseau. Barristers Pousset de Montauban for Vacherot, Bonaventure de Fourcroy

---

[53] Lamoignon, after participating in the *Fronde parlementaire* (1648-49), rallied behind the regency. Though a member of the *Compagnie du Saint Sacrament*, he seemed to have been a tolerant man in general who prized erudition. He took the mixing of religion and theater very seriously, however, and for a time succeeding in preventing the staging of Molière's *Tartuffe*. Boileau dedicated many of his works to the jurist, including the following lines:
C'est à toi, Lamoignon, que le rang, la naissance,
Le merite éclatant, et la haute éloquence
Appellent dans Paris aux sublimes emplois,
Qu'il sied bien d'y veiller pour le maintien des loix.
Tu dois là tous tes soins au bien de ta patrie.
Tu ne t'en peux bannir que l'Orphelin ne crie ;
Que l'Oppresseur ne montre un front audacieux ;
Et Thémis pour voir clair a besoin de tes yeux ("Epître VI," in *OC* 125).

for Monrousseau, Maître Robert[54] for the boy (dit Jacques le Moine during the trial), and Antoine Bilain for Louis Mordant, the judge from Vernon, all delivered their arguments, after which the *avocat général*, Jérôme II Bignon, who had recently inherited the prominent position from his venerable father, delivered his recommendation before the *parquet*. Bignon recommended vindicating Jeanne Vacherot on every count, to which the *Parlement* fully assented. The pleadings, which were required to be read faithfully, not improvised,[55] were printed in Paris by Louis Billaine in 1665.

The *Grand'Chambre* of the *Parlement* of Paris

On the day of the hearing, Jeanne Vacherot, Jean Monrousseau, the Vernon judge, the boy in question and their respective attorneys would have arrived around seven o'clock in the morning at the *Palais de la cité*. The barristers would have previously discussed the case amongst themselves, communicating their evidence as well as the major points of their pleadings so as to ensure a coherent case for the judges (*causam coniicere*). Upon entering, they would have traversed the long galleries of the *Grand'Salle*, where their judges would have heard mass an hour earlier (and where the major booksellers would now have been busily setting up shop for the day), to reach the *Grand'Chambre*, the highest court of justice in France. If the judges were still deliberating matters heard during the previous session, the chamber would be closed to the public. However, around 7:30am, a court bailliff would open the great door through which a teeming crowd of lawyers, procureurs, lower officials and curious onlookers would quickly filter.

---

[54] Though the term *maître* was often used as an honorific for barristers, Claude Robert was specifically referred to as *maître* in the pleadings likely due to his position as *maître des requêtes ordinaires* for King Louis XIII's rebellious brother and would-be assassin to Richelieu, Monsieur Gaston de France, Duke of Orléans (1608-60).

[55] Barristers were required to have their papers in their hand when pleading and to read from them, neither omitting or disguising anything (Ordonnance de François I, 1536, art. 35)

Except in very particular instances of royal or church interest, hearings in the *Grand'Chambre* were open to the public. Attendance was generally high due to the central location of the Palais de justice, which made it "un important lieu de sociabilité et d'échanges" (Houllemare 58).[56] In addition to hearing cases, it was usually within the Grand'Chambre that attorneys conducted meetings with their clients. Since its reconstruction by Enguerrand de Marigny during the reign of Philippe le Bel, the *salle des merciers* made the Palais the major commercial hub of the city. In the case of the Gueux de Vernon, we can be sure that a large number of spectators were in attendance and that the door dividing the *Grand'Chambre* from the *Grand'Salle* would have been open to let listen those who could not fit inside the room.

Thus, despite the prominence of the *Parlement* and its grand setting,[57] the room typically bustled with activity.[58] The court itself was situated in the shape of a diamond.[59]

---

[56] In Katherine Taylor's interesting article, "Geometries of Power" on courtroom design during the Old Regime and revolutionary periods, the author states that trials were not well-attended prior to the revolutionary period. This was, of course, true of *criminal* trials, which were always closed and did not permit professional oral arguments on behalf of the accused (written memoranda were allowed to circulate). Her claim of a lack of public interest in attending civil hearings, however, is ill-founded, based as it is on Brissot de Warville's 1781 lamentation – by then an extremely well-worn commonplace – that French eloquence was at a low point due to the aridity of topics presented to the bar, a comment much more political than sociological in nature. In fact, the civil tribunal was the one of the most "public" spaces of the Old Regime; by as early as 1534 public attendance was such that the role of *huissier* was established and continually expanded for crowd and noise control as well as the prevention of pickpocketing (Houllemare 59-60). "L'opinion des magistrats nourrit donc l'opinion publique, qui s'intéresse plus largement aux nouvelles juridiquess, qui sont, à en croire Étienne Pasquier [1529-1615], les plus commentées dans la capitale" (ibid., 60).

[57] The Grand'Chambre was nicknamed *la chambre dorée* because of its gilded ceiling and lamps. On the far wall hung a painting of the crucifix by Albrecht Dürer (1471-1528) below another of King Charles VI (1368-1422) dressed as a magistrate.

[58] Seven *huissiers* were tasked with keeping order in the Grand'Chambre. The multiplicity of ordonnances regulating the conduct of those present in the Grand'Chambre, especially the younger attorneys not yet allowed to plead cases (*avocats écoutants*), and the variety of penalties applicable in cases of disobedience, belie a rather disorderly chamber, however prominent. See Houllemare, "Secret des délibérations, publicité des procès," *op. cit.*

[59] On courtroom architecture from the Old Regime through post-revolutionary France, see Katherine Taylor, "Geometries of Power: Royal, Revolutionary, and Post-revolutionary French Courtrooms," *Journal of the Society of Architectural Historians* 72.4 (December 2013): 434-74.

A rail, or *barre*, separated the spectators from the action of the case before the court. Only the magistrates, high officials, and oldest lawyers were allowed to sit beyond this rail, in the area of the Grand'Chambre called the *parquet*, a sacrosanct space reserved for those presenting their case before the *Parlement*. Indeed, only princes of the blood and the *présidents* (highest magistrates) of the court were permitted to cross the *parquet* to find their seats; all other judges were required to gain their chairs by way of the cloak room. (Voltaire, *Histoire du Parlement*, ch. LIX). In the corner of the *parquet* was a raised platform reserved for the *lit* of the king, although the practice of kings presiding over hearings of the *Parlement* was virtually obsolete by this time.[60] On either side of the royal seat were arranged grand benches upholstered in the *fleur de lys*. These were reserved for the *présidents à mortier*, the highest-ranking judges who controlled the business of the court. Below these benches were others, also decorated with the *fleur de lys*, where sat the other judges, *gens du Roi*, high officials, and some of the oldest lawyers, who received this special privilege by decree of the *Parlement*. These lower benches lined the circumference of the parquet. Just beyond the *barre* were the barristers, seated on the *barreaux* or lawyer's benches, distributed on either side of the entryway into the parquet. The first bench was reserved for *avocats plaidants*, or those experienced lawyers permitted to plead cases, behind whom sat the newer members of the *Barreau*, known as *avocats écoutants*. These

---

[60] The *chancelier* was the highest-ranking member of the *Parlement de Paris* after the king. He presided over the opening of the new judicial term the day after the Feast of Saint Martin, whereupon he delivered a speech reminding the magistrates of their professional duties. At the conclusion of the speech, the magistrates swore an oath of loyalty, administered by the chancellor, to the king and his ordonnances. The chancellor was the conduit between the king and the magistrates. He could revise the decisions of the judges, hear cases of his choice, and refuse to give the official seal of approval to any certificates. All counsellors of the Parlement were subject to his direction and discipline. Although his position was separate from those of the magistrates, the majority of the chancellors were former members of the Parlement, thus there was no great tension between the two. However, other than his presence at the *rentrées*, he rarely presided over the *Parlement*; the *premier président* ruled the *parlements* in fact. For an overview of the professional organization of the *Parlement* of Paris, see Delachenal, *Histoire des Avocats au Parlement de Paris: 1300-1600*.

younger lawyers were required to listen to their older colleagues for a number of years before being permitted to plead their own cases.

Clients typically kept near their lawyers if their case was to be heard during the session; their physical presence was required by the *Parlement* before pleadings were allowed to proceed. It was in the clients' best interest to stick near their attorney anyway; if the latter overstepped procedural boundaries, the party would have the opportunity to disavow their lawyer and thus exculpate themselves from his potentially dangerous extravagance. Moreover, we know that the presence of clients could often produce compassionate judgments on the part of the magistrates.[61] The last section of the *Grand'Chambre* was that area beyond the *parquet* and the first *barreaux*, or benches; this was the space occupied by private sollicitors and the general public. (Delachenal 81).

During the early modern period, the number of judges in the *Parlement* of Paris varied depending on the politics of the king. The *présidents à mortier* numbered ten, and the other magistrates, or *conseillers*, who were divided more or less evenly between the clerical and the lay, totalled usually between thirty and forty. The *conseillers clercs*, dressed in red robes, sat on the left, while the *conseillers laïcs* were in purple on the right. All wore the same black hood. In order to adjudicate a case, the presence of at least one *président* and ten *conseillers*, or lower judges, was required. (*Ordonnance de Charles VII*, art. 79 (1451)). After hearing pleadings during morning and afternoon sessions, the magistrates would hold a private *conseil* in which the case would be deliberated and

[61] The compiler of Antoine Le Maistre's *plaidoyers* noted the *Parlement de Paris*' compassion for a mother of eight children, disinherited by her father for having escaped the convent to which he had destined her: "On estimait aussi au Palais, que [cette loi du Roi Henri II] […] ne s'était jamais observée à la rigueur. Et la pauvreté de cette mère chargée de huit petits enfants, qu'elle avait près de soi à l'audience, toucha les Juges d'une très équitable et très raisonnable compassion" (Le Maistre, *Les Plaidoyez et Harangues de Monsieur Le Maistre*, p. 18).

decided upon by a majority of voices.[62] If the *avocat général* was involved in the case, as he was in Gueux de Vernon affair, then the decision of the *Parlement* would almost undoubtedly conform to the opinion of this minister, a hybrid creature of the king who was neither a normal barrister nor quite a judge; the *avocat général* functioned as a royal lawyer, arguing for neither party but rather on behalf of the sovereign.[63] His presence at the case in question was likely due to the presence of a minor among the parties. After the presentation of arguments by the parties' lawyers, the *avocat général* would summarize the legal arguments of both sides, weighing their merits, then present his own *plaidoyer* for the consideration of the *Parlement*.

There was usually little delay between the pleadings and the decision of the *Parlement*; the case of the Beggar of Vernon was probably decided either the day of the *avocat général*'s final summation and opinion, or during the following session.[64] These deliberations took place behind closed doors; only the magistrates were present and they were all sworn to secrecy. Even the king's ministers (including the *avocat général*) were

---

[62] See Houllemare, "Secret des délibérations, publicité des procès," pp. 51-62. The decision by majority as opposed to unanimity was hotly contested in the sixteenth century, however, in tones that may recall to us now Rousseau's conception of the *volonté générale*. *Avocat du roi* Pierre Séguier gave a speech in 1554 in which he proposed a procedural reform to judicial deliberations, wherein each judge was to freely express his opinion, according to which the different possible dispositions would be enumerated. As deliberation over the options progressed, the majority voice would gradually form and detach itself from the rest. Those in the minority opinion(s) would thereupon have the obligation to perfect their spiritual selves through humbly acquiescing to the greater number regardless of personal conviction because such was "la voye de parfaiction de se humilier en leurs cœurs et d'acquiescer au plus grand nombre" (ibid., 53). The *Parlement* refused Séguier's suggestion to ratify this procedure. Nevertheless, the secrecy of the judges' *opinions* was of primary importance so as to maintain at least the *appearance* of unity: "si les juges du *parlement* donnent leur opinion à voix haute [during the secret deliberations] et non à bulletin secret, ce n'est pas pour que l'on garde une trace de leur opinion" (ibid.). Parlementary freedom of discussion was contingent on its immediate erasure. (The most notable exception being the 1580 trial instituted by René le Rouillier, who accused a fellow *parlementaire* of corruption, which elicited competing *factums* that circulated publicly. (Houllemare, *Une histoire de la mémoire judiciaire*, pp. 319-333)).

[63] The presence of an *avocat général* was required only in those cases relating to the king, the public, the church, *communautés*, or minors. ("Advocat général," *Enc.* I: 152 [all references to the *Encyclopédie* are to the the ARTFL Encyclopédie Project, ed. Morrissey. <http://encyclopedie.uchicago.edu/>]).

[64] The Ordonnance of 17 novembre 1318 required that magistrates deliberate the same day as the pleadings or the day after. Simple cases were decided immediately, without deliberation.

prohibited from joining the deliberations without obtaining prior permission from the *Parlement*.

Pleadings before the *Parlement of Paris*

Plaidoyer of Pousset de Montauban (1620-85) for Jeanne Vacherot

The *Parlement* of Paris required the appellant to present their case first before the *parquet*. Jeanne Vacherot was represented by Maître Jacques Pousset de Montauban, an acclaimed barrister born in Le Mans who spent most of his life as a lawyer and playwright in Paris and a frequent guest at the Hôtel Rambouillet.[65] His renown as a lawyer was such that the *Causes célèbres* of Gayot de Pitaval (1673-1743) took special care to copy many of his arguments verbatim,[66] and his pleadings were often studied by younger barristers as exemplary of the form.[67] In terms of fictional productions, in 1660, Molière's troupe performed his pastoral, *Les Charmes de Félicie, tirés de la Diane de Montemayor* on six occasions,[68] and his verse in praise of Louis XIV was compiled alongside that of Corneille in *Gloire de Louis le Grand* (1672).

Pousset's stylistic predilections were on full display throughout his pleading for Vacherot. As its lengthy paragraphs of philosophical, mythological and Biblical quotations attest, Pousset did not constrain his argument to legal authorities. These references, mined

[65] Two tragedies of Pousset have been preserved: *Zénobie, reine d'Arménie* (Paris: G. de Luine, 1653) and *Indégonde* (Paris: G. de Luine, 1654), as well as two tragicomedies: *Les charmes de Félicie, Séleucus* (Paris: G. de Luine, 1654) and *Le comte de Hollande* (Paris: G. de Luine 1654). His style was that of Corneille, but his verse, subject matter, and characters edged toward an excess that bordered on the burlesque. Pousset's literary coterie included Racine, Boileau, Costar and Jean de la Chapelle. (Hauréau, *Histoire littéraire du Maine* IX: 137-183).

[66] Munier-Jolain stated that the *Causes Célèbres* were a "monument élevé à la gloire de ce grand homme [Pousset de Montauban]" (*La plaidoirie dans la langue française*, p. 304).

[67] Sorel, *La Bibliothèque française* [1664], pp. 102-03.

[68] Evidence of the influence of Pousset's play, though much inferior is quality, is nonetheless present at certain thematic levels in Molière's *Le Misanthrope* (1666).

for moods and metaphors to work on his client's behalf, peppered the pleading like nodal points for his audience's attachment to and understanding of the case. Instead of presenting the facts of the case or the relevant laws, he instead embarked on a dramatic prelude of scenes with which the judges were already well-acquainted: the judgment of Solomon and the Emperor Claudius: "Il n'est pas nouveau de voir des mères disputer entre elles la possession d'un enfant […] Il n'est pas nouveau de voir une mère désavouer son fils […]" (Pousset 159). By situating his case among the most recognizable stories of the church and Roman history, Pousset elevated the importance of his *plaidoyer* and also marked it as a narrative. He was going to tell a tale, and not just any tale – something new and, most importantly, *strange*:

> Mais **il est nouveau de voir**, qu'un enfant qui reconnaît son père, & que son père reconnaît, qui désavoue celle que l'on lui veut donner pour mère, & qui est désavoué par elle, puisse être arraché à son père […]. **Il est nouveau de voir**, que l'on veuille faire un larcin à celui que la Nature a fait père, de son bien le plus précieux […] **Mais il est bien plus étrange**, que toutes ces suppositions se sont par le crime concerté du Lieutenant Général de Vernon […] (ibid. 159-60 [my emphasis]).

By focusing on the strangeness of the dispute, Pousset participated in a commonplace among the *avocats plaidants*, who often used the idea of *étrangeté* as both a means to fascinate their audience, while also distancing themselves from the social and moral excesses occurring at the heart of the case, lending them a scandalized air and posture that both the judge and general public could safely occupy while the legally and socially marginalized persons took center stage in the lawyer's discourse for public appraisal.

Pousset's foregrounding of *étrangeté* was especially deft, in that he couched it among the most familiar narratives of spiritual and classical sources. Thus arranging the case in a patently recognizable framework while also emphasizing its extraordinary character, Pousset opened up a comfortable listening position for his audience from which they could then judge the proceedings not in the idiom of the law, but rather through the lens of social narrative.

The careful framing evidenced by Pousset's opening remained a rhetorical constant; throughout the pleading he made incessant citation to extralegal figures, such as Plato, Virgil, Seneca, Lycurgus, Plutarch, Saint Ambrose, Saint Augustin, Tertullian, the Roman empire, various legends from Greek mythology, and Nature herself: "C'est par un autre intérêt, c'est par le seul principe de la Nature, c'est par le seul mouvement de sa douleur, que ma partie vous demande Justice" (Pousset 216). The flurry of references – not atypical for lawyers of this time period[69] – seem today to weigh down the pleading, which in this particular case had all the potential of an enthralling *cause célèbre*: disparity of condition, an "unnatural" woman, mistaken identity and the angry cries of the crowd. Yet the shocking facts of the case were often adorned with erudite references that seem to push the borders of good taste. For example, toward the end of his pleading, Pousset evoked Vacherot's elder son's miraculous return and shocking announcement of the death of his younger brother, who was buried in a different province. While this evidence seemed decisive and its heart-rending quality would have lent itself to an abundance of pity from the audience, Pousset nevertheless avoided recounting the dramatic *mise en scène* that the

[69] The legal rhetoric of the seventeenth century would later often be termed "une éloquence érudite" that could not detach itself from "ce cortège nombreux d'orateurs, d'historiens, de Pères de l'Église qu'elle mène toujours à sa suite" (D'Aguesseau, on Antoine Le Maistre in his *Instructions sur les Études propres à former un Magistrat* […] [1716] in *Œuvres*, p. 318).

reappearance of one son announcing the death of the other would seem to demand. Instead he detracted from it through an exceedingly tenuous comparison to Greek mythology: "Elle a cherché son fils, & ne l'a trouvé que dans le tombeau; encore si c'était dans le tombeau de son père, comme Astyanax dans celui d'Hector, elle aurait quelque sujet de consolation [...]" (215). Why did Pousset miss the chance to move his judges to tears over the disorienting misfortune of his client, the widow, standing there beside him, trading her flesh-and-blood agony for the pathos tucked safely away in Greek history?[70] In fact, this might be asking the wrong question; Pousset, like Patru in his case for the Rambouillet children, moved from a relation of the historical or particular toward the transhistorical, this being the privileged rhetorical mode for the seventeenth-century barrister whose varied registers were enjoined to resolve at the level of magisterial authority and reason, rather than public passion.[71] At this period, the political imagination was subservient to the authority of reason, and thus was deployed to act as a shepherd – not an agitator – of the passions.

Despite Pousset's seeming reticence to dive into the emotional particularities of the case, his pleading nevertheless provides a glimpse at the inflection point in legal eloquence

[70] Pathetic laments were not unknown to seventeeth-century lawyers; such stategies were common among the ancient orators whom they studied. Quintilian recommended producing images of sensory perceptions to one's listeners through a process of conjuring: "I am complaining that a man has been murdered. Shall I not bring before my eyes all the circumstances which it is reasonable to imagine must have occurred in such a connexion? Shall I not see the assassin burst suddenly from his hiding-place, the victim tremble, cry for help, beg for mercy, or turn to run? Shall I not see the fatal blow delivered and the stricken body fall? Will not the blood, the death-rattle, be indelibly impressed upon my mind?" (*Institutio oratoria*, 6.2).

[71] Though d'Aguesseau insisted that legal eloquence was persuasive of the passions, it was firmly grounded in the lawyer's ability to convince through reason: "La vérité simple et négligée trouve peu d'adorateurs: le commun des hommes la méconnaît dans sa simplicité, ou la méprise dans sa négligence; leur entendement se fatigue en vain à tracer les premiers traits du tableau qui se peint [sic] dans leur âme, si l'imagination ne lui prête ses couleurs. L'ouvrage de l'entendement n'est souvent pour eux qu'une figure morte et inanimée: l'imagination lui donne la vie et le mouvement. La conception pure, quelque lumineuse qu'elle soit, fatigue l'attention de l'esprit: l'imagination le délasse, et revêtit tous les objets des qualités sensibles, dans lesquelles il se repose agréablement" ("La Connaissance de l'homme" [1695] in *Œuvres*, pp. 186-87).

where literary references among legal discourse turn toward legal references among literary discourse. Unlike slightly earlier iconic barristers like Antoine Le Maistre (1608-58), who incessantly cited the philosophical or ethical writings of various ecclesastical or profane authors in service to his legal arguments, Pousset would cross that line, authoring his own fictions at various points of his pleading. It should be noted however that the lawyer-dramaturge's forays were cautious, carefully hugging the religious or mythological discursive monuments around him as he constructed his own tableaux. A case in point: Pousset sought to demonstrate that the similarity of the facial scar on the beggar boy's face to the one Vacherot's son was remembered to have on his own forehead by the townspeople did not prove identity. Instead of controverting the weight of this evidence through a detailed analysis of the conflicting witness statements regarding the scar (material readily available to him that was used later in the case by the *avocat général*), Pousset chose again to go the route of Greek myth before deploying his own scene. He first carefully summarized a passage from the *Odyssey* in which Odysseus revealed a scar to his parents as proof of his identity, a proof, which, according to Pousset's interpretation, was cast aside as irrelevant since the parents of Odysseus recognized him not by his scar but through both their natural love for him and the blood that they shared. The length of the quote is a testament to the prolixity of these addresses:

> Je sais bien que dans Homère Ulysse eut peine à se faire reconnaître à son père, qu'en lui donnant des marques dont il fut tout-à-fait convaincu; Voyez (dit-il) cette cicatrice, que j'ai reçu sur le Parnasse: (il découvrait une blessure, comme on prétend que cet enfant en montrait une) souvenez-vous du jour que vous m'envoyâtes visiter Antilochus mon ayeul, qui me chargea

> de présents; rappellez en votre mémoire, ceux que vous me fîtes, quand dans votre verger sur la fin du jour vous me donnâtes des figues & des fruits de toutes sortes; & que dans ce même verger il y avait des vignes & des raisins mûrs.
>
> Mais ces marques qu'il donna à son père, ne firent qu'aider la reconnaissance que la Nature avait déjà commencée, & ne vinrent que faiblement au secours de son amour, qui avait déjà trouvé son fils, & qui cherchait à l'embrasser.
>
> Mais quand ce même Ulysse, dans le même Homère, descendit dans les enfers, & qu'il y vit l'ombre de sa mère, il eut beau rappeller toutes ces circonstances, lui montrer sa cicatrice, la faire souvenir de ces présents, & des fruits de ce verger; elle demeura une ombre muette, une idole qui ne répondit rien: elle ne le reconnut point: il fallut pour le reconnaître qu'elle bût le sang de ce sacrifice, qui appaise les Dieux avec les Ombres: Il fallut qu'elle fût toute échauffée, & toute pleine de ce sang, qui réveilla ses connaissances & son amour. (199-200)

Odysseus was recognized by his father not because of the words he spoke or the scar on his face, but because of the communication of their common blood. His mother, however, could not recognize him because her blood was silenced in Hades. Pousset's dramatic retelling of the *Odyssey* and its special focus on the important role of blood and nature in recognizing one's children set the stage for the lawyer's own narrative. His staging described the widow's confrontation with the beggar boy as sufficiently distinct from Odysseus' meeting with his mother, Anticlea, as proof that his client was not the child's

mother. His own client's silence before the likeness of her child resulted from the absence of a common blood, which, like Odysseus' to Anticlea's, would have announced his identity to her. Thus firmly positioned in the style and logic of the Greek myth, Pousset discarded the scar as merely superficial evidence, meant to persuade onlookers; only blood was dispositive here, and, like a demonstration of a chemical reaction, Pousset explained that this boy's blood did not "speak to its source" because the two lines did not meet:

> Cet enfant vient à ma partie, il l'appelle sa mère, il lui montre sa cicatrice; il lui donne (dit-on) des marques de sa naissance par toutes les circonstances qu'il rapporte de sa maison: Ma partie ne le reconnaît point à ces marques; elle demeure muette comme la mère d'Ulysse: il fallait pour la faire parler, & pour reconnaître son fils, qu'elle eût été toute pleine & toute échauffée de son sang; qu'elle eût senti couler dans ses veines ce sang qu'elle a donné à son fils, & qui n'eût pas manqué de remonter jusques à sa source pour y murmurer.
>
> Ce sang eût été sans doute le sang du sacrifice qui eût reconcilié non pas les Dieux avec des Ombres, non pas la mère avec un fantôme; mais les Dieux domestiques avec la famille, la mère avec son fils, la mère avec elle-même; qui eût apaisé les séditions de son coeur, le murmure de ses entrailles, le bruit de la nature. (199-201)

The lack of commanlities that would justify an analogy between Odysseus' meeting with his mother in Hades, who, like all ghosts Book XI of the *Odyssey*, must drink the blood of the sacrificed sheep before speaking, and the confrontation between the beggar boy and the Widow Vacherot are staggering to us today; yet the question of relevance in seventeenth-

century legal discourse did not arise in the same fashion as it would now. The logical consistency we seek to establish in the modern courtroom through a compelling constellation of case law, statutes and evidence was also of the utmost importance during this time period, but this earlier legal discourse cohered not at the level of facts and law but rather in the central organizing principle of the culture: the perpetuation of the moral body and its social semiotics.

In keeping with this overarching code, with dramatic repetition Pousset transported his listeners away from the court of law, toward the primal tribunal of blood:

> [I]l ne faut point d'autre oracle que celui de la Loi écrite dans le cœur d'une mère: point d'autre violence, que celle des entrailles qui se remuent; point d'autre avertissement que celui du sang, qui ne se peut taire. (ibid., 70)

Blood, a typical graphic figure of kinship in Greek tragedy as well as in the book of Genesis,[72] was also the basis of the social constitution of the Old Regime. It was appealed to as though to a higher authority, superceding the determination of justice available through evidentiary procedures and judicial decree. Blood thus seemed to supplant the law here, but in an unproblematic way; despite Pousset's portentous declamation, we are well before the reality of daytime television paternity revelations; blood is silent, and the decision of the court was, of course, obliged to speak in its place. The evocation of blood provided no ostensible argument for Vacherot or incontrovertible proof in her favor; rather, it drew closer an immediately recognizable topos prevalent in classical theater, Biblical stories, and the reigning social order. Religion, mythology and royal authority constituted

---

[72] After Cain murdered his brother Abel, he tried to hide his crime, but the blood of Abel would not be silenced: "The LORD said, "What have you done? Listen! Your brother's blood cries out to me from the ground. Now you are under a curse and driven from the ground, which opened its mouth to receive your brother's blood from your hand […]" (Genesis 4:10-12).

the social body's shared sense of reality in the seventeenth century. Delivered in a theatrical register and Biblical lexicon, Pousset deftly marshalled his client within the sanctified bounds of the political body of seventeenth-century France.

Just as the silence of the blood had already decided the question before the court, Pousset also proclaimed that the punishment had already been applied as well. Jeanne Vacherot's real son had run away from home, in contravention of God's Fourth Commandment to honor one's parents, and his death was therefore a just punishment:

> Jacques le Moine a porté seul la peine de la désobéissance des deux. Le doigt de Dieu qui a écrit le commandement d'obéir aux pères, & de les honorer, a écrit en même temps la peine, & la réponse de la mort aux enfants rebelles: & ma partie a trouvé par le retour de l'un de ses enfants, que l'autre par sa mort, lui avait servi d'exemple de la justice & de la colère du Législateur. (ibid., 187-88)

Pousset's incessant invocation of divine justice as already delivered in the case worked to remove jurisdiction from the *Parlement*. However, to petition the celestial jurisdiction in this way did not contradict the authority of the magistrates in any important sense; the earthly justice emanating from the sovereign courts was understood as necessarily of a lower order than the decrees of God's justice.[73] Indeed, the larger Catholic context of the French state was not at odds with the *Parlement* in a spiritual sense; even though certain members of the legal profession pushed Gallican values over the Ultramontane leanings of

[73] Although the duties and rights of the *Parlement* were never established in any recording (Daubresse, *Le parlement de Paris* (2005)) the role of the magistrates was generally cast in explicitly theopolitical terms; they were "placés entre l'Église et l'État, [...] entre le ciel et la terre" to join together "la doctrine à la raison"; that "L'Église doit trouver en [les magistrats] ses protecteurs. Conservateurs de sa discipline, vengeurs de ses canons, et surtout défenseurs invincibles de ses libertés, c'est à [la] religion [des magistrats] que ce grand dépôt a été confié" (d'Aguesseau, "Treizième mercuriale," in *Œuvres choisies*, p. 117). For further discussion of the intersection between political and religious symbolism, see Marin, *Le portrait du roi* (1981).

their counterparts, the larger legal and spiritual contexts mixed harmoniously and supported one another during the seventeenth century.

Although Pousset was not the beggar Monrousseau's lawyer, the attorney devoted parts of his pleading to his case as well due to the interlocking nature of his and Vacherot's claims. Specifically, Pousset wanted to overcome negative evidence provided by the beggar himself, who, when asked by the Vernon officials whether he was the boy's father, equivocated; rather than saying yes, he merely stated that he fed the boy. Such a vague admission worked in the respondents' favor, who considered the beggar's evasion tantamount to an admission of guilt. In order to contravert the evidentiary assumption, Pousset recast Monrousseau as Jacob from Genesis, chapter 49, wherein Jacob called himself "Israel" before his sons. Pousset explained that Jacob's misnaming was only apparent; because in Hebrew "Israel" denoted God's presence, Jacob assigned himself this name as a way to reveal himself in holy alignment. The logical connections between the Biblical exegesis and Monrousseau's claim to be the boy's source of sustenance may appear to us now as most dubious. Yet Pousset obviously felt himself on firm footing before his audience and quickly launched into a tirade recalling the sermon genre, or *éloquence de la chaire*, with which the *éloquence du barreau* was still in competition at this time for audience.[74] Pousset retold the vague claim of the beggar not as an admission of guilt but rather as a holy oration spoken through God's creation:

---

[74] The competition appeared to be quite friendly; the two sides did not hestitate to take inspiration from one another: "Il est certain que les prédicateurs ne montaient pas en chaire les jours où Lemaistre devait plaider et qu'ils allaient l'écouter comme un modèle" (Oscar de Vallée, *Antoine Lemaistre*, p. 384). La Bruyère lamented the migration of legal stylings to Christian discourses: "Le discours chrétien est devenu un spectacle. […] L'éloquence profane est transposée, pour ainsi dire, du barreau, où Le Maître, Pucelle et Fourcroy l'ont fait régner, où elle n'est plus d'usage, à la chaire, où elle ne doit pas être. […] Celui qui écoute s'établit juge de celui qui prêche, pour condamner ou pour applaudir […]" ("De la chaire," in *Les Caractères*, p. 300). For further analysis of the rhetorical relationship between the *chaire* and the *barreau* and the

> Ce père pauvre parle à son fils: […] C'est Dieu qui parle avec lui; c'est la Nature qui s'explique par sa bouche; c'est son amour qui se fait entendre; ce n'est point les paroles d'un homme, ce sont les réponses de la Nature: ce ne sont point les doutes du mensonge, ce sont les décisions de la vérité; ce n'est point la voix du Pauvre, ce sont les oracles d'un père. (ibid., 191)[75]

Pousset's bold semantic assimilation of Monrousseau with Jacob made way for an archetypal association of his client – now reduced to his essential being, viz. a father – with God. Repetition again served Pousset's cause, rhetorically enfolding the impoverished man as a hallowed father figure within the sanctified space of the Bible, thus cleansing him of the *libertinage* his vagabond lifestyle marked him with before the court. Pousset's effort to exculpate Monrousseau took place not through appeals to law, but rather through religious and mythologizing references and scenes of Pousset's own composition.

Plaidoyer of Bonaventure de Fourcroy (1610-91) for Jean Monrousseau

Next to plead before the *Parlement* was Bonaventure de Fourcroy, the attorney for Jean Monrousseau, the unfortunate pauper who had been waiting nearly four years in jail by the time his case was heard in Paris. Fourcroy,[76] a poet-lawyer from Clermont-en-Beauvoisis, was known for two major literary works: *Les Sentiments du Jeune Pline sur la*

---

conference organized by Colbert in 1665 comparing their two eloquences, see Simiz, "Éloquence de la chaire et éloquence du barreau: une rivalité dans la seconde moitié du XVIIe siècle?" (2015).

[75] Pousset continued later: "En effet, MESSIEURS, ce nom de père a sa racine dans l'âme & dans le sang: ce nom est comme le point de perspective de la Nature qui s'y est toute recueillie: ce nom est comme son seau & son cachet; c'est ce qui l'achève, & qui la finit. Et comme S. Denis dit, que dans le nom de Dieu est comprise toute la vertu des choses sensibles: de même dans ce nom de père est renfermée toute la force de la Nature qui le rend fécond, tout l'empire de la Loi qui le fait souverain, toute l'autorité du caractère qui le fait maître. La prononciation de ce nom ne doit pas être une production sterile des lèvres qui articulent les syllabes qui le composent: c'est la marque extérieure de son empreinte dans le fond du cœur, qui s'ouvre, & qui en déplie les chiffres par la bouche" (ibid., 198).

[76] For more information on Bonaventure de Fourcroy, see Mongrédien, "Un avocat-poète au XVIIe siècle: Bonaventure de Fourcroy."

Poésie,[77] which offered translations of Pliny the Younger, Seneca, Macrobius, Cicero, in addition to his own original verse, and a book of twenty-one sonnets dedicated to the Prince of Conti.[78] He was an intimate of Boileau, Patru, Lamoignon and Molière, and knew a great deal of political intrigue as a *frondeur* (Mongrédien 9). Apart from his acerbic jabs at the Cardinal Mazarin, his poetry largely revealed a *bon-vivant* whose libertine epigrams belied the gravity of his profession. Indeed, his 1653 sonnet "L'homme libre" professed to demonstrate his playful disinterest in the world of royal pomp and judicial ceremony:

> Je me ris des honneurs que tout le monde envie,
> Je méprise des Grands le plus charmant accueil,
> J'évite les Palais comme on fait un écueil,
> Où pour un de sauvé mille ont perdu la vie.

Like Pousset, Fourcroy peppered his pleading with references to myriad legal and extra-legal sources. The prophet Jeremiah, Moses, Plato, Roman law, Constantine, Italian jurist Azo and his student Accursius, Cujas, Solomon, Francis Bacon, Livy, Valerius Maximus, Virgil, Aristotle, Sophocles, and especially the Old and New Testament were all paraded before the magistrates one after another as the barrister anchored his arguments in the discorporate world of seventeenth-century legal erudition. In so doing, Fourcroy obeyed the particular norms of pleadings of the time, but he also brought many important innovations to the genre, which were all on full display in this case. In addition to the authority of God, the king, Greek philosophy, etc., Fourcroy added something new,

[77] Paris, L. Billaine, 1660, in-12. This was the printer of the *plaidoyers* as well.

[78] *Sonnets à Monseigneur le Prince de Conty* (Paris, Ch. du Mesnil, 1651, in-4). Fourcroy was arrested at the Palais-Royal with Armand de Bourbon, prince de Conti on January 18, 1650 at the behest of the Cardinal Mazarin for his involvement in the Fronde (Conti's brother, with whom they were both arrested, was le Grand Condé, leader of the Fronde). They were sent to the prison at Vincenne, then to Havre, to be released on February 13, 1651.

something which would take root and eventually drive out all the others in the century to come: sentiment.

> Les contracts quelques obligatoires qu'ils soient ne sont jamais qu'une preuve imparfaite de nos sentiments, parce qu'ils ne sont que par l'entremise de la main & de la langue qui ne s'accordent pas toujours avec le cœur; **au lieu que les passions font preuve de nos sentiments malgré nos discours**, malgré notre écriture, & malgré même notre volonté (Fourcroy 250 [my emphasis]).

Where Pousset focused on the silence of blood as proof of Vacherot's non-relation to the boy in question, Fourcroy took a more modern approach through an explanation of the passions. If Jeanne Vacherot displayed no feeling or emotion upon seeing the boy, went the argument, then she was of no relation to him. The logic was built on the assumption that the observation of passions provided trustworthy evidence suspectible to forensic analysis. The rationalization of the passions was on the legal horizonline, and it would eventually do away with the commonly-held idea that displayed emotions constituted mysterious emanations of a soul in battle with itself and would instead confer upon the passions a sense of predictability and uniformity. Moreover, the empirical value of the passions meant that litigants, regardless of their class, could reasonably figure in the legal narratives that explained and argued their cases rather than suffer substitution by more virtuous figures from Antiquity and the Church. Because it would have such important effects on legal eloquence, a brief excursus on the evolution of the passions from worthless quandaries to decisive touchstones in the court of law is fitting.

Pleading the Passions in 17th-Century Legal Discourse

Treatises on the passions were abundant during the seventeenth century due to a renewed interest in classical humanism, Stoic principles (which propounded the eradication of the passions[79]), and religious debates on the question of grace.[80] Although inquiries into the passions were of course not novel, the scientific age did bring with it new responses. Whereas earlier theories placed the passions somewhere within the soul, the popular Augustinian preacher Jean-François Senault's *De l'usage des passions* (1641) located the passions *between* the body and soul: "La Passion n'est donc autre chose qu'un mouvement de l'appétit sensitif, causé par l'imagination d'un bien ou d'un mal apparent ou véritable, qui change le corps contre les lois de la nature" (*De l'usage des passions*, I:52).[81] In an active defense against Stoic principles, Senault was interested in rehabilitating the passions, disentangling them from sin and recasting them in a more neutral light, since, after all, God had endowed man with passion and no gift from God could be evil.[82] The passions were utterly subject to the images and feelings conveyed to them by the

---

[79] One of the most influential texts of the early seventeenth century was the *Philosophie Morale des Stoïques* by the legal scholar and statesman Guillaume Du Vair (1556-1621). (Strowski, *Histoire du sentiment religieux en France au XVII siecle: Pascal et son Temps*, t. I, Paris: Plan-nourrit 1907, p. 106).

[80] Cureau de la Chambre, *Charactères des passions* (1640-1662); Pierre Le Moyne, *Les Peintures morales, où les passions sont représentées par* tableaux[...], Paris: S. Cramoisy, 1640-43; Nicolas Coëffeteau, *Tableau des passions humaines, de leurs causes et de leurs effets* (1620); Pierre Charron, "Des passions en général," in *De la Sagesse*, (1601); Du Vair, *La Philosophie morale des stoïques* (1600). For further discussion of French theorizations of the passions during the *Grand siècle*, see Anthony Levi, *French Moralists. The Theory of the Passions 1585 to 1649*, Oxford: Clarendon P, 1964.

[81] The bodily change was considered against the laws of nature because it was produced by the immoderate reaction of the passions which attacked the heart, whose injury was made manifest through the body. (ibid.). Senault was considered the Patru of *la chaire* in that he ordered his speeches according to clear principles. His orations were extremely popular, and his style and even entire speeches (transcribed by up to twenty *copistes* at a time before the pulpit) were incessantly copied by other *prédicateurs* vying for similar celebrity. See Cloyseault, *Généralats* II: 172-74.

[82] Plato made analogous claims in the *Phaedrus* when Socrates disowned his first speech condemning *eros* since it has divine properties (242e), and offered a second speech wherein *eros* was still considered a kind of madness, but one that elevated human life toward its greatest possibilities (philosophy). The speeches on *eros* were only given as examples, however, for the main concern of the dialogue: rhetorical structure.

imagination, and the reaction thus produced was made visible to outside observation through the body: "[l'appétit sensitif] s'y porte avec tant d'effort, qu'il produit toujours du changement dans le corps [...]. [Les mouvements de l'imagination] ont tant d'acces avec les sens, et les sens ont tant de communication avec le corps, qu'il est impossible que leurs désordres ne lui causent de l'altération" (ibid.). The visibility of the passions when agitated meant that states of mind could be determined by outside viewers: "[E]t comme les Médecins jugent de sa constitution par le battement des veines et des artères, on peut juger des Passions qui le transportent par la couleur du visage, par les flammes qui brillent dans les yeux, par les horreurs et les frissons qui se répandent dans les membres, et par tous ces autres signes qui paraissent sur le corps quand le cœur est agité" (ibid.). Though still firmly ensconced in the Christian idiom that viewed disobedient passions as the source of false judgments, their physiological description in Senault's treatise was an important step in their eventual empirical recasting.[83]

Senault's interest in the passions was not merely scholarly; he was the foremost preacher of his day and his speeches were praised for their ability to explain difficult theological positions to the intellectual elite and lower classes alike.[84] He considered the passions from the viewpoint of collective ethical utility.[85] Senault's dedication to Cardinal

---

[83] Diderot's explicit division of the inner state and outer performance of the passions in the *Paradoxe sur le comédien* constituted a definitive empirical redescription of the passions as an object of rhetoric as opposed to a spiritual attribute.

[84] Charles Perrault (1628-1703) praised Senault as "un des premiers hommes de son siècle," whose style and erudition was such that his speech was "aussi intelligible aux esprits les moins éclairés qu'aux génies les plus vifs, les plus vastes and les plus transcendants, & c'est dans cette partie qu'il a excellé davantage […]" (*Les hommes illustres* I: 13).

[85] To speak of "utility" is here expedient yet anachronistic; Cavaillé describes Senault's project, which deserves much more extensive attention than can be provided here, most succinctly in the following manner: "Il s'agit pourtant de produire un modèle valable, c'est-à-dire utile, dans les conditions réelles de la pratique politique: en effet, le but de cette connaissance en fait surnaturelle des affections et des pensées des hommes, dont le ministre est le dépositaire, s'avère immédiatement pratique, et c'est ici que le modèle divin trouve son plus grand usage. À l'imitation du gouvernement de Dieu, Richelieu fait en effet servir les passions des

Richelieu presented the passions as spiritual economy that, though bestowed through the divine will, could be managed and even manipulated for political purposes by man.[86] Thus the passions, despite their blindness, could contribute to the conservation and even improvement of the state.[87]

Descartes' *Les Passions de l'âme* (1649) moved Senault's theory a step further by evacuating the moral approach of the prior treatise, evaluating the passions instead as a matter of pure natural philosophy. The bodily circumstances that resulted in tears of joy, a blush of shame and so on received a level of empirical explanation only gestured to in Senault. For example, Descartes reduced the shedding of tears to a set of purely physiological reactions: "La tristesse y est requise, à cause que, refroidissant tout le sang, elle étrécit les pores des yeux; mais, parce qu'à mesure qu'elle les étrécit, elle diminue aussi la quantité des vapeurs auxquelles ils doivent donner passage, cela ne suffit pas pour produire des larmes si la quantité de ces vapeurs n'est à même temps augmentée par quelque autre cause; et il n'y a rien qui l'augmente davantage que le sang qui est envoyé vers le cœur en passion de l'amour" (Descartes, *Les Passions de l'âme*, art. 128). Louis

---

sujets, toutes les passions, y compris les plus déréglées, à la gloire et à la prospérité de l'État monarchique" (Cavaillé, "Jean-François Senault, de l'usage politique des passions," p. 68).

[86] The ability to read hidden feelings meant for Senault that they could be instrumentalized for the establishment of a healthy political body; for this reason "le plus grand ouvrage que puisse entreprendre un homme d'État, c'est quand par son adresse il tâche de lire dans un coeur dissimulé, et d'y remarquer des pensées qu'on lui veut celer" (*De l'usage des passions* VI: 196). Rousseau's amoral restatement of Senault's premise ("S'il est bon de savoir employer les hommes tels qu'ils sont, il vaut beaucoup mieux encore les rendre tels qu'on a besoin qu'ils soient; l'autorité la plus absolue est celle qui pénètre jusqu'à l'intérieur de l'homme, & ne s'exerce pas moins sur la volonté que sur les actions. Il est certain que les peuples sont à la longue ce que le gouvernement les fait être" ("Economie," *Enc* V: 340)) would gain currency among legal reformers such as Servan.

[87] Senault extolled Richelieu's ability to manage the passions of the king's subjects toward the political ends of a Catholic monarchy: "Vous cherchez toutes les voies de douceur pour réduire les rebelles à l'obéissance, vous ménagez leurs Passions avec addresse, vous leur faites espérer la grâce, et appréhender le châtiment pour leur faire détester la rébellion; et par ces divers mouvements que vous excitez dans leurs âmes, vous les réduisez à leur devoir, et vous nous donnez la paix" (Senault, *De l'usage des passion*, preface). For a discussion of Senault's instrumentalization of the passions in this discourse, see Cavaillé.

XIV's official royal painter Charles Le Brun's took seriously Descartes' argument from first principles and in 1668 offered his *Conférence générale et particulière*, which gave detailed pictorial demonstrations of the passions based directly on the Descartes' passional physiology. Le Brun's resulting science of expression took as foundational the Cartesian concept of the man-machine, which allowed him to reduce the expression of the passions to an index of "neatly predictable formulae" (Montagu, *The Expression of the Passions*, 17).[88] The correlation of the passions to their physical manifestations was considered precise and direct, the proper understanding of which meant the informed viewer could determine the state of mind (or soul) of another person.[89]

Given the development of the scientific approach to the physiological principles of the passions, we must pay careful attention to how lawyers the decade after Descartes' publication sought to describe the passional states of their clients. Fourcroy described the physiological impossibility that Vacherot should be the child's true mother in the following manner: "[…] il ne faut pas penser quand l'enfant est conçu dans le sein de sa mère, que le sein où il est conçu soit le seul lieu où on le puisse trouver; lorsque la nature le forme dans le sein, l'amour en ce même instant le produit dans le cœur; il est insensiblement dans le sein, il est spirituellement dans le cœur […] il y a ce rapport entre le sein & le cœur, que l'enfant doit avoir été dans le sein pour être dans le cœur" (Fourcroy 247). Vacherot's indifference to the child was not, as claimed the opposing counsel, a product of her

[88] On the relationship between LeBrun's concept of expression and Descartes' treatise on the passions, see, e.g., Montagu, *The Expression of the Passions*; Hogg, "Subject of Passions," pp. 65–94. The physician Cureau de La Chambre's *Les Caractères des passions* (1640-62) was also considered a foundation for Le Brun's work by contemporaries (Montagu 17).
[89] To understand the science of expressions meant not only the ability to see into another person's soul, but, indeed, the ability to manipulate one's expression in order to generate the impression of a state of soul on one's audience. See, e.g., René Bary, *Méthode pour bien prononcer un discours, et pour le bien animer* (1679).

denatured soul, but a simply a physiological state; since he never occupied her entrails, the child could not move her passions: "c'est un témoignage naturel & infaillible qu'il n'a jamais été dans le sein" (ibid.)

However, it is important to note here that Fourcroy's emphasis on the passions as a type of forensic evidence did not detach itself from a moral and religious framework. For example, Fourcroy linked the new vocabulary of Cartesian soul-searching to the old wisdom of King Solomon, often cited as the first judge to have looked beyond words and appearances to sound the souls of those who sought his justice. Yet Fourcroy's blending of the empirical passions with scripture did not always produce arguments consistent with conventional Biblical interpretations; the direction of influence was changing course. For example, in his paraphrase of the New Testament story of the prodigal son, Fourcroy construed the reading to emphasize the passions as modes of veridiction: "[Son père] le reconnut aussitôt, il courut à lui, son cœur fut touché, il ne fut plus le maître de ses sentiments" (Fourcroy 249). Although close to the original Latin ("cum adhuc longe effet vidit illum pater ipsius, & misericordiâ motus est, & accurrens cecidit super collum eius, & osculatus est eum" (Lk 15:11)), Fourcroy's restatement was in fact at antipodes with the doctrinal reading of this famous Biblical tale as given by Saints Chrysostome, Augustine and Ambroise, which set forth the father of the prodigal son as an example of God's eternal forgiveness of fallen man; a father whose will was in divine accordance with God's, thus whose passions could not possibly have been in excess.[90] Instead, Fourcroy cited the story as demonstrative of the antangonistic relationship between the passions as set against the will: "Nous ne disposons pas de notre cœur comme il nous plaît, ses mouvements ne

[90] See readings of Saint Chrysostome, Saint Augustine and Saint Ambroise on the tale of the prodigal son given in Aquinas' *Explication suivie des quatre Évangiles* VI: 230-31.

relèvent point de notre empire, il éclate malgré nous, & des passions subites & imprévues qui nous emportent où nous ne pensions pas aller, nous forcent d'avouer que tous nos desseins sont inutiles contre les premiers efforts de la nature" (Fourcroy 249-50). By recasting the passions away from their original scriptual continuity with reason and the will in the Biblical parable, Fourcroy shrewdly shrouded his argument in holy colors while setting the passions forth as independent truth-telling devices.

The consequences of the rationalization of the passions were not limited to the narrative treatment of the parties, but also affected the manner in which Fourcroy sought to persuade his listener. Unlike Pousset, whose pleading was peppered with theatrical and historical exempla to such a degree that the case itself was almost entirely obscured, Fourcroy *embedded* his argument within the theatrical idiom by draping the parties in the robes of actors; instead of Vacherot, Monrousseau and Jacques le Moine, Fourcroy sets forth "les personnages: une mère, un père & un enfant" (Fourcroy, *Pour Jean Monrousseau*, p. 217). Thus, rather than crowding out the parties to the case in favor of iconic cultural touchstones in order to make an eloquent pleading before a disparate audience, Fourcroy foregrounded the actual parties to the case. This innovation was made functional by virtue of the lawyer's reinvention of the rather coarse group, which greatly abridged Vacherot, Monrousseau, and the undesignated child to their essential parts, i.e. as mother, father, and child. The presentation not of particular persons or even their Biblical/mythological avatars but rather eminently accessible *roles* or *conditions* worked to open up the status of his clients for a greater degree of narrative access and identification in the manner Diderot would theorize for his *drame bourgeois* the following century. In contrast to complicated exegeses of Ulysses and Jacob, Fourcroy greatly simplified and

generalized the particular sufferings of his characters to maximize clarity and comprehension: "Dans la mère la Piété souffre; dans le père la Nature triomphe; dans l'enfant la Fortune se joue" (218). From this basic cast Fourcroy gave dramatic emphasis: "une mère" would become "une veuve;" "un père" would be transformed into "un gueux;" and "un enfant," "un orphelin," a lexical shift that not only elicited greater compassion from the audience, but also positioned the case in perfect opposition to the edicts of the prophet Jeremiah, cited by Fourcroy, who tasked judges specifically with the protection of these three categories of vulnerable individuals. Thus Foucroy's modernity lay in his elevation of the case beyond the heft of the framing narrative; his liberation of the passions and abstraction of those experiencing them meant he could tailor his sentimental narrative to intersect with scripture – but it would no longer have to hide there. Whereas Pousset's case remained nested in Biblical, historical and mythological stories under which he likely sought to subsume it, Fourcroy boldly dramatized his case in a way that transformed the parties into relatable characters experiencing moral crises.

Fourcroy's careful observation of the rules of classical theater reinforce his dramatic intent. In his modern foregrounding of the beggar's appeal for justice, Fourcroy nevertheless claimed he would respect certain *bienséances* of classical theater. He promised at the outset to eschew lofty language and figurative speech due to Monrousseau's low social standing: "Je vous représenterai ma cause toute nue, & dans son état naturel sans déguisements & sans figures, parce que le discours le plus simple, est aussi le plus propre pour imiter la bassesse de la condition de ma partie" (220). In keeping with the stylistic requirements of the classical unities[91] he carefully reduced the time, place and

[91] The three unities of time, place and action, taken from Aristotle's *Poetics* and strictly enforced in French theater during the seventeenth century, were part of Richelieu's normative aesthetic-political project to

action of his narration (while simultaneously refuting witness statements and contrary evidence) by listing all of the things he would *not* discuss: "Il n'est pas nécessaire que je vous parle de sa naissance, ni des premier emplois de sa vie, sinon pour vous montrer qu'on ne peut pas lui reprocher sa pauvreté, qu'il n'a pas méritée par ses débauches, mais qu'il a trouvée en naissant dans sa famille" (220). The almost immediate abrogation of these covenants, however, leads us to recall that the pleading's exordium, or introductory phase, was, as they often were, of an aesthetic order, meant less to inform the audience than to sensitize them to the narration to come.

Embodying Passion: Fourcroy's Theatrical Innovation

Fourcroy's pleading is the most remarkable among those presented in the affair because he did something no other lawyer had done before: he performed a first-person representation of his client's case before the *Parlement*. According to my research, this pleading constituted the first example of such a mode of legal speech before a French judicial body.[92] Fourcroy, moreover, did not spare himself; his speeches as the beggar Monrousseau were lengthy and frequent. A sampling of these dramatic soliloquies is provided here to help the reader better imagine the nature of this rhetorical event before the most celebrated court in Europe, and to better grasp the nature of the discourse going forward, especially since it both ranges so for afield from what we would consider today relevant legal argumentation and coincides so clearly with the theatrical *mémoires judiciaires* of the prerevolutionary period:

---

reinforce morality during the Counter-Reformation. See Tindemans, "The Politics of the Poetics: Aristotle and Drama Theory in 17th Century France," pp. 325–336.

[92] Indeed, even the most recent investigation into the complex relationship between the stage and the *palais de justice* denies the existence of any processes of identification between lawyer and client prior to the mid-eighteenth century. (Robert, *Dramatic Justice*, pp. 94-98).

Que pouvez-vous accuser dans ma pauvreté? que pouvez-vous accuser dans son amour? Accuserez-vous ma mauvaise fortune? accuserez-vous la tendresse de son cœur? n'est-ce pas assez de la mauvaise fortune pour accabler un pauvre sans que vous y joigniez vos persécutions? n'est-ce pas assez de la douleur pour accabler une mère qui a perdu ses enfants, sans que vous y joigniez vos calomnies? Je suis pauvre, ne me faites pas souffrir le tourment des riches en me faisant un procès. C'est une mère affligée, respectez ses larmes, plaignez son malheur, protégez son innocence. (Fourcroy 230)

N'est-ce pas là une étrange manière de se défendre? J'exaggère le crime dont je suis accusé, mais je l'exaggère hardiment, parce que ce n'est pas mon crime: & je ne sais si nos parties adverses demeureront d'accord de tout ce que j'en ai dit, parce que ce sont eux qui l'ont commis en me ravissant mon fils au même instant que par un emprisonnement injurieux & cruel ils m'ont ravi ma liberté. (234)

Voilà une preuve par écrit que j'ai été marié, que j'ai eu des enfants. Pour montrer que celui dont est question en est un, quelle autre preuve en puis-je avoir que la possession? ma possession n'est-elle pas certaine, je l'ai toujours eu avec moi, je le tenais par la main, je demandais l'aumône pour lui quand j'ai été emprisonné. J'ai donc pour moi titre & possession, & des Officiers seront recevables à me disputer mon fils, pour le donner à une femme qui n'en veut pas? & malgré la déclaration de la femme, qui était la seule partie comme j'ai montré à la Cour, & malgré ma déclaration, ma

possession & mes titres, des Officiers seront recevables à informer du contraire? c'est un paradoxe sauf la révérence de la Cour. Qu'est-ce donc que j'oppose d'abord à ces prétendues informations? la fin de non recevoir. (269-270)

Vous voulez savoir qui est le père de l'enfant, je vous dis que c'est moi, je vous en rapporte les preuves par écrit, vous êtes témoins de ma possession, je le tenais entre mes mains quand vous me l'avez ôté, je l'ai suivi partout, pouvant m'évader je suis entré volontairement en prison, j'ai subi un premier interrogtaoire, je vous ai soutenu que c'était mon fils, on m'a menacé d'une information & de procès verbaux, tout cela ne m'a point épouvanté. On m'a interrogé une seconde fois, j'ai persisté dans ma première confession, **pourquoi me tourmentez-vous davantage? pourquoi me mettez-vous les fers aux pieds? pourquoi voulez-vous que je désavoue une vérité qui est plus forte que moi, qui est plus forte que vous, qui triomphe de vos cruautés & de ma douleur?** (275-76 [my emphasis])

Au fond. On dit que j'ai dérobé l'enfant de l'appellante. J'ai la preuve par écrit que cet enfant est à moi, je n'en répéterai point les actes, [...]. J'ai toujours eu mon fils avec moi, je le tenais par la main, je demandais l'aumône pour lui & avec lui quand on me l'a arraché. C'est donc mon fils, il n'y a point de pauvre au monde qui en puisse rapporter une meilleure preuve. (283)

> Il y a plus, car quand je n'aurais pas tous les actes que je rapporte, quand je n'aurais point de preuve par écrit; je prétends que la mère de qui on dit que j'ai dérobé l'enfant, ne se plaignant point, son silence devait fermer la bouche à tout le monde, & qu'au préjudice de sa déclaration & de celle de tous les parents au nombre de quarante & plus, des Officiers ne sont point recevables à me faire un procès pour soutenir malgré eux & malgré elle que c'est son fils. Je crois, MESSIEURS, vous avoir expliqué, & dans le droit & dans nos maximes cette seconde fin de non recevoir. (283-84)
>
> Mais je parle contre l'intérêt de mon fils, de le refuser à une mère qui sait bien que ce n'est pas son fils, c'est une mère qui ne pourrait jamais avoir pour lui des sentiments de mère. Hé peut-on douter qu'il ne soit beaucoup plus doux & plus avantageux à un fils d'être aimé d'un père qui est pauvre, que d'être sous la tyrannie d'une fausse mère, qui aurait toujours pour lui plus de haine que de biens? (285)
>
> S'il est certain, comme on n'en peut pas douter, que l'enfant dont est question est mon fils, il est certain par une conséquence necessaire que nos parties adverses sont des calomniateurs, parce qu'il est impossible que mon fils ait répondu, ait dit, ait reconnu tout ce que nos parties adverses lui ont fait répondre, lui ont fait dire, lui ont fait reconnaître dans la procédure de Vernon. (291)

Fourcroy, tasked with the defense of a man of the lowest reputation at the highest court, assumed the voice of his client but with thick rubber gloves; the tone of the vagabond character was even, sophisticated and often sounded more than a little lawyerly. It seemed

crafted less to evoke passionate outbursts from the audience (as would the first-person portrayals of lawyers in the following century) than to stage a socially acceptable rendition of Monrousseau, as a man who, however poor, would probably refrain from kidnapping.

But why choose the first-person perspective? Why did the third-person not suffice? Fourcroy's peculiar choice may be understood in light of an earlier case he argued on behalf of a medical doctor seeking exemption from the role of tax collector in 1657. What looked like a rather straightforward matter was in fact a political imbroglio for Fourcroy; immediately prior to the case, the barristers themselves had unsuccessfully petitioned the court for the same exemption now demanded by Fourcroy on behalf of the doctor. The lawyers' appeal was pending. Thus, in order to carve out a win for his client, Fourcroy needed to argue that doctors were in fact *more* honorable than lawyers and therefore deserved the exemption. The case therefore amounted to arguing against his own professional and personal interest. Instead of avoiding the awkward circumstance, Fourcroy ingeniously foregrounded the lawyer's duty of self-sacrifice in his pleading. By putting aside his own order's honor in favor of that of the doctor, Fourcroy implicitly elevated the magnificence of the bar beyond all other conditions of nobility in a passage that would be endlessly reprinted in legal literature throughout the eighteenth century:

> Pour me tirer de cette extrémité, mon premier dessein était de m'oublier moi-même, pour ne penser qu'à la défense de ma partie […]. Ces sentiments […] n'ont rien d'extraordinaire, le barreau […] & l'esprit qui y préside nous communique une certaine chaleur, pour des gens dont nous ne connaissons souvent que le nom, qui nous anime dans la défense de leurs intérêts, qui nous transforme en eux, & qui fait **par un échange merveilleux de notre**

> **esprit avec le leur que nous cessons d'être ce que nous sommes, pour devenir ce qu'ils sont,** & que nous négligeons nos propres affaires pour épouser leurs passions. (Fourcroy, "Plaidoyer pour l'exemption d'un médecin [1657]," 57-58 [my emphasis][93])

The virtue of the lawyer, according to Fourcroy, was the embodiment and presentation of his clients' passions before the court. This "échange merveilleux" meant for Fourcroy that lawyers were the common denominators of all social dignities, since it was by virtue of the lawyer's skill that subjects could hope to attain and protect special political status; "l'emploi de l'Avocat n'est pas une Dignité, parce qu'il est le principe & le séminaire de toutes les Dignités" (ibid., 61). Did he follow his most glorious statement to its most dramatic conclusion in his first-person pleading for the beggar Monrousseau? It is difficult to say with certainty; but the presence of the first-person perspective in the pleadings that followed Fourcroy's performance testify to the success with which the technique was met.

Plaidoyer of Antoine Bilain (…-1672) for Maître Louis Mordant

Louis Mordant, the provincial judge who had found Vacherot and Monrousseau guilty in Vernon four years earlier, was represented before the *Parlement* de Paris by Antoine Bilain, a renowned barrister from Reims. Following this pleading, Bilain would climb the professional ladder to the ministry, and would eventually be requested by Louis

[93] In 1657 the *Cour des Aides* decided in favor of Fourcroy's *plaidoyer*. François Gayot Pitaval reprinted the pleading in 1734 in the first volume of his popular twenty-volume collection *Causes célèbres et intéressantes*, and added an interesting comment on the legal climate of his day: "Certains Jurisconsultes farouches, veulent qu'il soit défendu à un Avocat de fréquenter le Pays des belles Lettres. N'envions point leur Barbarie, l'éloquence ne doit-elle pas être le partage des Avocats; où puise-t-on les grandes images qu'elle doit mettre en œuvre, que dans le commerce que l'on a avec les Orateurs & les Poètes? Aussi ces Jurisconsultes sauvages qui proscrivent les belles Lettres ont renoncé à l'éloquence. Dès qu'elle fait le caractère de l'Avocat, ne peut-on pas dire qu'un excellent Avocat, serait un digne sujet de l'Académie Française? […] M. de Sacy n'a-t-il pas fait honneur à l'Académie?" (Pitaval, *Causes célèbres et intéressantes* I: 177-78).

XIV and his minister, Jean-Baptiste Colbert (1619-1683), to aide in the reformation of the justice system in 1665. Perhaps more interesting for scholars of the Enlightenment, however, is Bilain's resurgence, indicated by Van Kley (*Religious Origins*, p. 246), nearly a century later as one of Diderot's sources for the problematic *Encyclopédie* article "Autorité politique," (*Enc.* I: 898) which emphasized the legitimacy of those governments based on the consent of the governed. In the elaboration of the article, Diderot and d'Alembert admitted recourse to Bilain's 1667 *Traité des droits de la reine très-chrétienne sur divers états de la monarchie d'Espagne*, which was written in order to justify the French claim to the Spanish Netherlands and served as the legitimizing document for the 1667-68 War of Devolution. Bilain's document, composed at the behest of Louis XIV, stressed a contractual form of government:

> [L]a loi fondamentale de l'État forme **une liaison réciproque & éternelle** entre le Prince & ses descendants d'une part, & les Sujets & leurs descdants de l'autre, par **une espèce de contrat** qui destine le Souverain à règner, & les Peuples à obéïr […]. [E]ngagement solennel dans lequel ils se sont donnés les uns aux autres pour s'entr-aider mutuellement; l'autorité de règner n'étant pas moins une servitude en sa manière que la nécessité d'obéïr en est une […]. (Bilain, *Traité des droits de la reine très-chrétienne sur divers états de la monarchie d'Espagne*, p. 129-30)

The strange afterlife of Bilain's text, composed as it were to demonstrate the necessary prerogatives of the king in the Spanish Netherlands, continued with its citation in 1753 by the *Parlement* of Paris during its *grandes remontrances* to the king regarding the refusal of sacraments to jansenists (*Remontrances du parlement au roi du 9 avril 1753*, p. 3-4).

Indeed the following year Bilain's monarchical text continued to go rogue, its terms ironized by Rousseau in his "Discours sur l'origine et les fondements de l'inégalité," as far too docile a statement of a proper social contract, due to what he considered to be the subjects' excessive passivity vis à vis the monarch (*OC* III: 113).

Now let us return to the case at hand. In keeping with the other lawyers from the case, Bilain cited a long list of extralegal resources, with particular emphasis on the Bible, Philo of Alexandria, Saint Jean Chrysostome, Greek and Roman theater,[94] and Saint Francis de Sales. His pleading could perhaps be seen as the most sophistic of the affair, given his willingness to espouse various and contradicting viewpoints and modes of argumentation in an effort to best manipulate the audience and procure a favorable reception. Thus his pleading, though inconsistent and sometimes almost silly, provides today's critic with access to the varied and incompatible "realities" that found acceptance among the magistrature and audience of the *Parlement* of Paris in 1659. The frenzied movement of his argument, which flitted back and forth between despair and exaltation, obscurity and light, worked to exhaust attention for detail and to emphasize the social stability of his client's condition as a judge, a move that magnified the viability of judgment based on social identity within a rigid social hierarchy.[95]

---

[94] Bilain's passing reference to Plautus in the original Latin provides us with a privileged glimpse into the different levels of intended audience for these pleadings. The quotation came from *The Two Manaechmuses*, whose plot dealt with the loss of a twin brother and the other's attempt to find him again. The analogous circumstances in both the play and the case, left unsaid by Bilain, indicated either a pervasive appreciation for the early Roman playwright, which would justify the downplayed connection, or that Bilain's clever allusion was only to be truly understood by a select few, thus intended to separate the learned judges from the unconsecrated listener. At the narrative level, Bilain's sophisticated choice put him at some remove from the vulgar crowd described in this section of his pleading, a veritable scene of mob justice, from which he must distinguish the conduct of his client in order to exculpate him. Furthermore, his dissembled use of the Roman play to illustrate his case meant that allusions to theater were not merely to satisfy the lay audience, but the cultivated judges as well, further distinguishing his client's social status.

[95] It may be interesting for the reader to know that Bilain and Pousset would find themselves adversaries again in another case involving a disputed filiation, the *Cause de Saint-Géran*, which would be fictionalized

Bilain's cleverly-worded opening drew upon the notion of uncertainty at both the local and general levels: "Cette cause produit un rare exemple de l'incertitude qui se rencontre dans toutes les choses du monde" (Bilain 293). The confusion evoked by Bilain was somehow rare but also ubiquitous. From this disorienting start he immediately provided a wholesome rule: "[R]ien ne doit être plus constant que l'état des hommes," but the respite offered by this well-established axiom of the Old Regime regarding social stability was snatched back in the next breath: "[L]a nature se trouve si défigurée en cette cause, que la mère ne peut reconnaître son fils, que le fils désavoue son père: en un mot, que le père, la mère, & l'enfant se méconnaissent eux-mêmes" (ibid.) The clouds had settled all around, and they were thick. Exquisite in its execution, Bilain's introduction set the stage for an interpretation of the case based not so much on the proof in the depositions – rather harmful to his client – but based rather on a inward consultation of the magistrate's own dispositions; after all, they (like his client!) were magistrates, God-like in their ability to restore order:

> Mais si l'on considère que l'évènement de ces sortes de questions a toujours fait paraître des miracles de sagesse en la personne de ceux qui les ont décidées; il semble que le Ciel n'en fasse renaître les exemples de temps en temps, que pour l'honneur de la Justice, & afin de rendre plus recommandables ces trônes souverains, qui reproduisent par la force des Arrêts les enfants dans leurs familles, de même que Dieu par la vertu de sa parole les a créés dans le monde. (Bilain, *Plaidoyer pour Mordant*, 294)

---

by Alexandre Dumas (1802-1870) almost two hundred years later as "La Comtesse de Saint-Géran," included in his eight-volume series *Crimes célèbres* (1840-41).

By recasting the magistrates as miracle-workers fulfilling their eternal roles as avatars of holy justice, Bilain erected a firmament only to be tarnished by a verdict against his client: to punish Mordant, a judge, would taint their noble profession with shame. His emphasis on the sacred vocation of the magistrates went beyond mere lipservice; he explicitly denounced the empirical notion of proof based on the observation of the passions as put forth by Monrousseau's attorney, Fourcroy, and instead based his defense on the divine inspiration of the judges:

> En effet, MESSIEURS, si dans ces occasions vos esprits n'étaient prévenus d'une certaine lumière qui les élève au-dessus de la Nature, comment pourriez-vous par les voies ordinaires, connaître une mère qui ne se connaît pas elle-même, & lui apprendre une verité qu'elle ne sent point dans ses entrailles, que la voix du sang ne lui a pas révelée, que son cœur ne peut comprendre? (Bilain 294)

Bilain argued for the judges to dismiss the appellant's testimony as unreliable due to Vacherot's alleged alienation from herself; she would neither learn, feel nor understand the truth that Mordant had revealed to her. This referential rupture followed from the fact that Vacherot was of the world, destined merely to grope in the darkness of its myriad uncertainties. It is important to note that Bilain sought to reveal Vacherot as a *sinful* woman whose criminality would – he hoped – be entailed by virtue of the close association between moral failings and legal delinquency prevalent at this period.[96] He sought less to criminalize Vacherot's conduct than to reveal the viciousness of her soul.

---

[96] The secularization of criminology would not begin in earnest until Cesare Beccaria's *Dei delitti e delle pene* (1764), which was translated into French in 1766. For a thorough tracking of the evolution of criminology from moral to secular, see Daniela Tinkova's thesis, *Péché, crime ou folie?* (2002).

Bilain's pleading thus depended on a theological framing for the comprehension of his arguments. With this lens in place, we may better understand one of Bilain's particularly complicated Biblical analogies, in which he explained Vacherot's refusal to even examine the boy to determine whether he was her own son due to her fear of ending up like Lot's wife, who, against the commands of the angels, turned to look back upon Sodom during her family's escape from the city and was thus changed into a pillar of salt (Genesis 19:26): "Quelle est […] la cause de cette dureté, c'est sans doute qu'elle appréhende, que comme la curiosité d'une femme la changea autrefois en une statue de sel, aussi la vérité venant à s'éclaircir, sa curiosité ne la transforme aux yeux de toute la terre, en une statue de marbre & de bronze […]" (319). The comparison worked to assimilate Vacherot with one of the Bible's weak women who could not govern their passions in obedience to God's will. Yet the analogy does not seem to work at first; Bilain's argument relied on a thoroughly dispassionate portrayal of Vacherot as an unnatural mother "insensible," "ses entrailles toutes de fer," and who refused "que la main de la Nature y gravât ces vérités" (318). She, unlike Lot's wife who could not help but turn back toward her native city, was refusing to look. Moreover, Lot's wife was commanded not to look by God, while Vacherot was impelled to look at the boy by Bilain throughout the pleading. Yet if we recall that we are working within the Christian context, we must understand that the theological interpretation of Lot's wife's punishment was not a result of her action, but rather the sin that was already within her and that caused her to halt her course. In a similar way, if Vacherot were to hesitate in her repudiation of the boy she would reveal herself for what she was: a cold, hard woman who did not follow God's edicts. She, like Lot's wife, would reap her just punishment.

Truth, on the other hand, was a purely spiritual matter, and only the justice of the magistrates could enter into communion with it:

> Mais il faut avouer que votre raison n'est pas moins souveraine que vos dignités, & que possédant toutes choses éminemment, **vous voyez dans vos idées, comme dans un miroir divin**, le véritable ou le faux père, l'enfant légitime ou le supposé, non point par quelque mouvement de nature; mais par la réflexion de vos lumières, & par l'effet admirable d'une sympathie toute spirituelle, de votre justice avec la vérité. (Bilain 294 [my emphasis])

Bilain's strategic flattery that emphasized the magistrates' remove from the world of appearances to a platonic space of pure intellection simultaneously enshrined his own client in this pre-discursive judicial arcadia. Circumscribing the ethos of the magistrate in this way also allowed Bilain an elevated discursive position from which to deride the rhetoric of Pousset and Fourcroy as artificial products meant merely to dazzle and persuade the lowly passions. Thus by claiming (if not necessarily displaying) discursive clarity, the paradoxical claim of a style devoid of style, he positioned his case in rhetorical proximity to justice, which required deeds, not words:

> Il avoue qu'il ne combat pas avec forces égales; & certainement, s'il mettait sa confiance ailleurs que dans la sincérité de ses actions, il ne m'aurait pas choisi pour le défendre contre tant d'éloquence. Mais le combat étant plutôt d'actions que de paroles, & les arbitres de la victoire, des Juges & non point des Rhéteurs, il cède volontiers à ces parties la gloire de bien dire, pour vous montrer qu'il a toute celle de bien faire. (Bilain 295)

Bilain's effort to link innocence with plain speech or even silence would be reprised a century later by Rousseau's glorification of Sparta over Athens as the locus of "la véritable Philosophie" (Rousseau III: 30). Bilain was in fact picking up an old precept of the nobility, whose axiomatic preference for good deeds over eloquence was explained thus by sixteenth-century lawyer Guillaume du Vair (1556-1621): "Ils s'étaient persuadés qu'il valait mieux bien faire que bien dire, et, contents du rang que leur donnait leur naissance ou vaillance, ils ne cherchaient point d'autre honneur que celui des armes à la guerre et du ménage en la paix" (*De l'Éloquence française*, p. 150).[97] Of course, to belittle the role of eloquence amounted in the judicial setting to little more than another layer of eloquence,[98] in that its objective was the successful persuasion of its listener, a task Bilain was involved in just like the other lawyers, all of whom claimed truth as their primary weapon:

> Ce ne sera donc pas comme une partie qui veut gagner sa cause par adresse, par invectives, par éloquence, que l'intimé défendra la sienne; mais ce sera comme un Juge, qui se laissant toujours prédominer par la Loi, aime mieux faire voir qu'il a la vertu d'un Magistrat qui pardonne, que la passion d'un homme qui se venge [...]. (295)

Bilain's emphasis on the interior virtues of his client demanded that the magistrates *imagine* justice for his client as though the gap between sign and signifier had, in fact, collapsed as the magistrates were ushered by Bilain toward the silent purity of the nobler

[97] The analysis of the choice between a *belle action* or a *belle page* would find much greater nuance the following century with Diderot, particularly in his *Essai sur les règnes de Claude et de Néron* (*OC* XXV).
[98] The eternally reiterable character of the claim to non-eloquence would find an interesting parallel a century later in the Jacobin judicial procedure of denunciation, which never yielded truth but rather revealed another layer of corruption or veiling. On the vexing issue of judicial denunciation for the Jacobins during the Revolution and Terror, see Yann Robert, *Dramatic Justice*, pp. 226-63; on the rhetoric of masking during the Revolution generally, see Huet, *Mourning Glory*, pp. 59-78.

judicial realm. Mordant would not defend himself like the other parties, but would rather sit in impassible peace like a judge.

Yet despite all Bilain's protestations to magisterial reticence, the majestic silence he claimed for his client was a rather long-winded one. While extolling the virtues of plain speech and action, Bilain depicted his opposing counselors in hammering tones as mere sophists who manipulated their words like novelists in order to better stir the passions and obscure the truth:

> Jusqu'ici, MESSIEURS, vous n'avez entendu que des parties, qui se sont expliquées selon leurs intérêts: maintenant vous n'entendrez plus qu'un Juge, qui s'expliquera selon sa conscience. **Jusqu'ici vous n'avez ouï que le langage de la passion**: maintenant vous n'entendrez que celui de la vérité. **Enfin, jusqu'ici vous n'avez ouï qu'un beau Roman qui flatte les oreilles, qui trompe les esprits, & dans lequel il semble que la nature ne se soit perdue, que pour faire admirer la raison**. (Bilain 299 [my emphasis])

He likened the previous speeches of Pousset and Fourcroy to scaffolding on the Tower of Babel, "où se fit la confusion des langues" (296). The rapprochement of legal eloquence with the story from Genesis was, again, a polyvalent image for Bilain; the obvious meaning being that Pousset and Fourcroy used words in a way that no one could understand clearly, and thus detracted from the pursuit of truth and justice, but, perhaps more interestingly, the metaphor charged the eloquent lawyer with hubris. The people of the earth, in their desire to attain the heavens through their construction of the Tower of Babel, sought not to imitate

God, as they were supposed to, but rather to become rival gods themselves.[99] In this way we might see the lawyer's derogatory use of "eloquence" as an accusation of hubris, or the will to create a reality, rather than imitate it through a faithful and closely tailored narration; to tell a new story before the court, rather than recount the old (true) one. But how could anyone tell the artificial from the actual? Bilain, of course, was their only chance of escaping the labyrinthine discourses: "je vous conduirai insensiblement par le fil d'une narration claire, succincte, & fidèle, à la conaissance de ce monstre d'imposture, qui veut dévorer un enfant, & perdre l'honneur d'un Juge" (ibid.). The rhetorical effort to eradicate rhetoric, of course, was logically self-consuming, and, as previously mentioned, pointed to the growing preoccupation in the late seventeenth century with language's representative function.[100]

However, far from a philosophical inquiry into the referential nature of language, Bilain's self-reflexive efforts to debase the currency of legal eloquence constituted a major piece of the lawyer's histrionics. By deeming his opponent's discourse eloquent, he ceded their arguments' effectiveness, but claimed that the truth arrived at through such speech was artificial; their eloquence was fraudulent. In this manner, he was able to confound their speeches from afar, without needing to contradict each point in a fashion that would likely

---

[99] The allusion may have also carried a tacit accusation of irreligion; the Tower of Babel was a symbol of Protestantism at this time, and its image could often be found adorning the frontispiece of Protestant Bibles from Geneva. See, e.g., Mark Greengrass, *Christendom Destroyed : Europe 1517-1648*, New York, New York: Viking, 2014.

[100] The concern over the obscurity of expression was best captured during this period in Antoine Arnauld and Pierre Nicole's 1662 *Logique de Port-Royal*: "Nous avons déjà dit que la necessité que nous avons d'user de signes extérieurs pour nous faire entendre, fait que nous attachons tellement nos idées aux mots, que souvent nous considérons plus les mots que les choses. Or c'est une des causes les plus ordinaires de la confusion de nos pensée et de nos discours." (*Logique*, ch. XI). The effort to "let the truth speak for itself" would not find a coherent conceptualization until Antoine Laurent Lavoisier's 1787 *Méthode de nomenclature chymique*, which, apart from structuring the terms of chemistry into an immediate and denotative language, shifted the behavior of the chemist, who, instead of using the common language to describe chemistry, was constrained to employ only the chemical nomenclautre. "He ceases to be an author to become the tool through which Nature explores and expresses itself" (Anderson, "Men of History, Men of Category," 740).

bore his listener and – worse – expose his client's unsavory position. Thus, the accusation of eloquence was a very eloquent thing to say indeed. In fact, according to Bilain, it was not the case but the barristers' eloquence that constituted the chief hurdle to the judges' ascertainment of truth: "Enfin, MESSIEURS, ce qui est plus difficile à surmonter que toutes ces choses, vous avez à vaincre l'éloquence de plusieurs Avocats qui seraient capables par leurs couleurs de rendre le mensonge aussi beau & aussi agréable que la vérité même" (Bilain 332).

Bilain's warning to the judges that they must defend themselves against the expert artifice of the lawyers did not subsume his own discourse because he would use words that would only convey facts: "je n'ai rien à vous persuader, puisque ma cause ne consiste qu'à vous rendre compte du fait" (Bilain 332). Bilain exposed the lawyer's chief strategy here, which consisted of suspending the genre – a tactic obviously available to all the lawyers involved, easily reversible, but which, if successful, could carry the lawyer's argument toward adhesion by his judges due to the establishment of a relationship of trust (*ethos*), one that had nothing to do with the court of law. "Que l'enfant appartienne à Jeanne Vacherot, ou au Mendiant, je n'y prends aucune part" (Bilain 332). Whereas Fourcroy skirted the semiotic anxieties of the day through a cutting-edge appeal to the passions as tools of veridiction, Bilain carved out a prediscursive sanctuary for the truth through discourse itself.[101]

Despite his condemnation of judicial discourse, Bilain was nevertheless required to speak the defense of his client. In order to do so, Bilain set forth a criterion of direct communication that would be taken up the following century as a higher standard of

---

[101] One is reminded here of Pascal Quignard's aphorism: "Le langage qui donne ce qu'il n'a pas, telle est la rhétorique." (*Rhétorique spéculative*, p. 115)

vraisemblance: gesture. In regard to Monrousseau's claim that he was the boy's father, words were not enough. Bilain demanded, as Diderot would in the following century,[102] a pantomime: "Les larmes, les clameurs, les sanglots, & les gémissements sont la voix ordinaire du sang & de la nature, dans ces sortes de questions; & non pas les équivoques, qui ne sont que des jeux & des divertissements de la parole" (Bilain 301). Whereas Bilain had earlier argued for the purely spiritual nature of truth, now he promulgated its unmediated communication through physical outbursts; truth resided anywhere but words.

The precise account Bilain nevertheless begrudgingly promised to relate "avec religion" (Bilain 314) produced an apocalyptic hypotyposis of a boy condemned to a nameless existence by a cruel mother whose abandonment constituted a fate worse than death:

> Il semble que cet enfant soit devenu l'enfant de tout le monde, depuis qu'il a cessé de l'être de sa mère; il semble que la patrie l'ait adopté, depuis que sa mère l'a désavoué; il semble que la Nature & le public fassent les funérailles de ce jeune innocent, qu'une mère condamne par un Arrêt impitoyable, à une mendicité perpétuelle, mille fois plus affreuse, plus dure & plus infâme que la mort même. (308)

[102] "Qu'est-ce qui nous affecte dans le spectacle de l'homme animé de quelques grandes passions? Sont-ce ses discours? Quelquefois. Mais ce qui émeut toujours, ce sont des cris, des mots inarticulés, des voix rompues, quelque monosyllabes qui s'échappent par intervalles, je ne sais quel murmure dans la gorge, entre les dents. La violence du sentiment coupant la respiration et portant le trouble dans l'esprit, les syllabes des mots se séparent, l'homme passe d'une idée à une autre. Il commence une multitude de discours. Il n'en finit aucun: [...] La voix, le ton, le geste, l'action, voilà ce qui appartient à l'acteur, et c'est ce qui nous frappe surtout dans le spectacle des grandes passions. C'est l'acteur qui donne au discours tout ce qu'il a d'énergie. C'est lui qui porte aux oreilles la force et la vérité de l'accent." Diderot, *Dorval et moi, ou Entretiens sur le fils naturel*, in DPV X: 102. The idea that true passions were speechless and render men speechless was repeated in the *Paradoxe sur le comédien*, in *DVP* X: 448-49.

The disorienting funerary phantasm offered as the provincial judge's faithful relation of the events once again reminds modern readers that the "truth" spoken about in the case was not of the purely empirical order, but rather sought to convey or espouse a moral or religious restatement of the events in a manner that, if it did not reveal the truth of the case, reinforced the stability of the social body:

> Cet esprit que Dieu a répandu dans l'Univers, qui parle au cœur & non point à l'oreille des hommes, qui se fait entendre par des instincts secrets, & non point par des paroles. Cet esprit dis-je qui anime cette grande machine du monde, excite contre cette action une certaine horreur dans le cœur, peint sur les visages une tristesse, met sur les lèvres des reproches qui marquent un deuil public. (Bilain 308)

Just like Greek tragedy, such cases could serve as moral lessons to their audience, warning of what awaited them in the event they abrogated their social roles in favor of those not assigned to them:

> Toutes les mères sentent leurs entrailles émues au récit & à la vue d'un spectacle si étrange. Tous les pères frémissent, qu'après leur mort il n'arrive de semblables désastres dans leurs familles. Tous les enfants tremblent sous la rigueur d'un si prodigieux exemple. (ibid.)

The public was of particular importance to Bilain not only as an audience to his purifying tragi-*plaidoyer*, but as an actor in it as well. For the original affair in Vernon was instigated not by a specific individual – neither Vacherot nor Monrousseau disputed the gaurdianship of the boy as it stood – but by a crowd of over one hundred largely unidentified townspeople who saw in Vacherot a greedy *marâtre* whose abandonment of

her own son could not go unpunished. Whether such a "plaintiff" had standing to institute the case at hand was one of the most contentious aspects of the trial; mob justice fell well outside legitimate forms of Old Regime judicial proceedings. This was a problem for Bilain's client, the magistrate of Vernon, because he was alleged to have heeded (or even instigated) the incensed mob, a terrible indictment of the judge's formal claim to impartiality. As such, Bilain needed to demonstrate that the crowd did, in fact, have sufficient standing to institute the suit and that therefore the judge merely performed his duty in hearing them.

But how could Bilain, whose defense of Mordant relied on a deeply theological vision of justice, exalt *la foule*, whose reputation for pernicious outbursts of enthusiasms and the diffusion of ungodly passion made them a patently untrustworthy and irreligious source of information? The problem of the people of Vernon's standing was the highest hurdle Bilain had to clear, and his peculiar strategy demonstrates to what creative lengths he was forced to go in order to dovetail Christian ideology and the voice of the public. Instinct replaced reason as the locus for judicial trust:

> Ne dites donc plus que c'est un peuple qui crie; mais dites que c'est une bonne mère qui recouvre son enfant égaré; & que comme les brutes ne se trompent jamais dans la connaissance de leurs productions, aussi la patrie ne peut errer dans la reconnaissance de ses enfants, quand elle agit par l'instinct de la Nature que les Philosophes nous apprennent être infaillible & ne pouvoir errer. (336)

Thus, instead of trying to build credibility through a personal accounting of the individuals demanding justice for the beggar child, the lawyer decided to literally dehumanize them by

likening the populace of Vernon to animals. It was an interesting decision; Bilain obviated the theological problem that may have been triggered by an effort to rehabilitate the enthusiasm of a crowd, while simultaneously referring to the leading physician of the day, Marin Cureau de la Chambre,[103] whose influential work on the passions led him to argue that animals disposed not only of a kind of imagination but also reason due to their sense of instinct implanted in them by God.[104] Thus Bilain sought to counter the deep theological suspicion of the impassioned crowd through a scientific exploration of animals in the scholastic tradition:

> C'est un peuple de vérité, MESSIEURS, qui parle; mais c'est un peuple qui parle par l'instinct de la Nature; […] Et si dans le monde l'effet d'une sympathie parmi les choses les plus inanimées, fait qu'une pierre aux approches d'un métal pour qui la Nature lui a donné quelque inclination, jette hors de sa masse de certains esprits imperceptibles pour attirer à soi le plus dur de tous les métaux; trouvez-vous étrange, que la patrie voyant son citoyen retourné, comme une bonne mère tendre & passionnée pour ses enfants, en ait tressailli de joie, & ressenti dans son âme une certaine

---

[103] Marin Cureau de la Chambre (1594-1669) was physician to Louis XIII and Louis XIV as well as to Chancellor Pierre Séguier. He gained accolades for his philosophical-psychological writings, and was elected as the first physician to the *Académie Française* (and first to occupy the 36th chair) in 1634. De la Chambre lived with Pierre Séguier and thus often socialized with members of the legal community, and the Parisian lawyer and future *Académicien* Jean Ballesdens dedicated his translation of Jean Brouaut's *Traité de l'eau-de-vie* to the physician: "[V]ous ne devez pas tant être considéré comme le Médecin d'un Illustre Particulier, que comme le Médecin du Public" ("Épitre," n.p.).

[104] Cureau de la Chambre's claim that instinct furnished animals with a sort of reason can be traced from 1645, when he added "de la connaissance des bestes" to the second edition of the second volume of his major work, *Caractères des Passions*, which was re-released the year before the Beggar of Vernon trial. In his effort to discover how newborn bees understand to leave the hive and gather pollen, for example, Cureau de la Chambre concluded that "il faut […] que ces Images soient nées avec lui, & que la Nature les ait imprimées dans l'Ame dès le premier moment de sa naissance." (573-74). Despite the physician's interests in the passions and his correspondance with Descartes, Cureau remained strictly within the bounds of the scholastic tradition, and did not hesitate to include the composition of angels in his reasonings on the human and animal passions.

> émotion, qui est comme l'oracle de la vérité dans ces doutes & dans ces obscurités de nature. (336)

Thus Bilain sought to elevate the people to legal standing through their debasement. Only by transforming man's deleterious *passion* into animalistic *instinct* could the lawyer convey divine will upon the crowd in Vernon and thereby hope to overcome the bias against "un peuple qui accuse" and show them rather as "la Nature qui condamne" (337). In such actions "de la partie inférieure," the people, untouched by higher faculties of thought, had unmediated access to the truth of nature. Thus Bilain juxtaposed the unnatural *marâtre*, who refused to look at the boy, and thus blinded herself to his identity, to the maternal people of Vernon, to whom the image of the beggar child "a frappé ses entrailles, a ému son sang" (336). The insensible blood of Vacherot was thus replaced by the spontaneous feeling of the intuitive crowd who spoke "comme l'oracle de la vérité" (336). Through this curious transformation Bilain was able to rhetorically elevate the crowd of unknown people to the sanctity of the maternal role left vacant by a guilty mother.

The deviance of Vacherot was demonstrated throughout Bilain's pleading by placing her in rhetorical opposition to the truth-seeking judge. Following Fourcroy's trailblazing example, Bilain assumed the first-person perspective of his client, the judge of Vernon, from whose perspective he castigated Vacherot in tones that blurred the line between the eloquence of the bar and that of the pulpit. He started slowly; in keeping with his emphasis on the provincial judge's uprightness, he continued to build his client's character as forthright and duty-bound, succinctly summarizing the case: "[J]e ne pouvais juger que ce que j'ai jugé" (Bilain 315). Yet the laconic nature inherent to Bilain's

characterization of the impassible judge eventually gave way as the *plaidoyer* crescendoed to its theatrical climax as Mordant, through Bilain, directly addressed the widow:

> Écoutez s'il vous plaît l'appellante, écoutez. Il y a, dites-vous, cinq années que vous pleurez votre enfant, & que vous le cherchez partout: et voici des nouvelles que vous n'avez pas voulu entendre sur les lieux, **mais que vous écouterez par ma bouche dans ce sacré sanctuaire de la vérité**. (Bilain 315 [my emphasis])

Bilain's direct address condensed the emotion of the Vacherot children's disappearance with that of the trial into a singular spectacle for the viewing pleasure of the audience at the *Parlement*, who must have craned their necks at this very moment to spy any trace of discomfiture on the face of Vacherot. Any display of latent grief at the loss of her son would likely have been taken as a sign of guilt. Though we cannot know the effect such a strategy had on Vacherot, we can appreciate Bilain's effort to stage her guilt in addition to its legal demonstration through various arguments for his judges. His strategy in fact improved upon that of Fourcroy in that he not only personnified his own client, but drew another (unwilling) litigant into the spotlight with him, thus increasing the tension of his monologue. Bilain, in his demand that Vacherot unstop her senses, recognize divine injunction and regain her proper condition as the mother of the lamentable child, approximated the tone of classical tragedy (and, interestingly, modern-day American-style badgering cross-examination as shown in films and television shows), thus calibrating his audience to desire catharsis in addition to justice.

The morality play composed and interpreted by Bilain focused on the corruption of Vacherot's soul. Yet he astutely distended her private sins, transforming them into public transgressions offensive to the population of France:

> Mais l'appellante, s'il reste encore dans votre cœur quelque place à la justice & à la raison, rentrez en vous-même, & considérez qu'en désavouant ce fils, peut-être que vous combattez votre Patrie, la Justice, & la Nature; & qu'en intimant un Juge qui a si religieusement agi, vous offensez plus la Magistrature que lui-même. (Bilain 362)

The case was extrapolated to the general polity and the various virtues and vices it fought as though before an eternal court of justice in tones that recalled Patru's appeal to the judiciary to combat the spread of evil in society: "Cette cause n'est plus le différend des appelants & des intimés; c'est le combat de la Nature, de la Justice, & de la Patrie, qui se sont rangés d'un même parti contre l'Imposture, la Mendicité, & l'Avarice qui se sont mis de l'autre" (Bilain 359). This method of staging the argument as an inner struggle over universal truths feels modern, and the strategy would be maintained and magnified throughout the eighteenth century.

Of course, not every techinque of seventeenth-century lawyers would be preserved as the Enlightenment galvanized a new *opinon publique* in new ways of understanding. The incessant and heavy-handed parallels drawn from Antiquity and the Bible present in nearly all the legal speech of this time period would fall rather quickly into disuse. A particularly bizarre example of this style of argument is provided by Bilain, in his argument that Vacherot would recognize her son once she had taken him away from Monrousseau:

> Car que pourront dire autre choses les Sages, sinon que comme Moïse eut horreur de sa verge, quand il la vit changée en serpent, & qu'il la reprit aussitôt qu'elle fut retournée en sa première figure, aussi vous retournez à cet enfant quand vous le voyez hors les mains de ce serpent malheureux, qui le retient pour s'abreuver & se nourrir de son sang. (Bilain 363)

Likewise, the child was cast as "mille fois plus infortuné que ne le furent & les Andromedes[105] & les Iphigénies" (361), the victim of "cet infame Cyclope, dont [il est] devenu la proie, ait fait voir à ta mère la tête de quelque Méduse, qui l'ait changée en pierre, puisqu'elle n'a plus d'yeux pour voir tes larmes, plus d'oreilles pour entendre tes soupirs, plus de cœur pour sentir tes misères" (362). Bilain's pleading, replete with rich images and modern legal strategies, also marked the apogee of mixed metaphors and violent hyperbole. The taste for baroque exaggeration and complexity of such passages would fade away in the following century as the rhetoric of the bar tracked the population's exposure to and taste for explanations based in rational materialism.[106] The public's preference in legal discourse moved quickly; by 1772 one of Bar's most eloquent lawyers and theoreticians recommended the complete suppression of extralegal citations before the court.[107]

---

[105] In Greek mythology, Andromeda is the daughter of Cepheus and Cassiopeia. After the mother brags of her daughter's beauty, Poseidon sends the sea monster Cetus to destroy the kingdom. The king consults the Oracle of Apollo, who informs him that no respite will come until he sacrifices his daughter, Andromeda, to Cetus.

[106] For example, Diderot's 1751 *Eneyclopédie* article "Beau" explained aesthetic concerns without recourse to metaphysical abstraction and made no reference to divine origins of beauty, substituting in its stead a Lockean reading of man's propensity to detect relationships among sense objects. (*ENC* II: 169-81).

[107] "Les Avocats chercheraient dans les Auteurs des raisons qu'ils s'approprieraient; mais on anéantirait à jamais ce cri de l'esclavage & de l'erreur, *un tel a dit cela*. Eh bien, il l'a dit: dis-le comme lui, ou plutôt dis-le mieux. Disons nous-mêmes hardiment à tout homme qui cite: *Moins de mémoire & plus de jugement: prouve ta preuve*" (Servan, *Discours d'un ancien avocat-général*, p. 51 [author's emphasis]).

Plaidoyer of Claude Robert (1603-85) for Jacques le Moine

The young boy in the case, called "Jacques le Moine" pursuant to the ruling of the lower court, was represented by Maître Claude Robert. His task, as guardian to the boy, was to protect his best interests from an "objective" point of view, which, in this case, meant maintaining the lower court's decision naming Vacherot mother to the boy. Similar to the other lawyers, he cited myriad sources, including French law, Seneca, the Bible, Roman law, Virgil's *Aeneid*, Egyptian history, Pliny, and several Church Fathers. Given the commonalities in their cases, he also built on Bilain's attack on Jeanne de Vacherot as a woman *dénaturée*, more *marâtre* than mother. Blood and its movements were evoked incessantly to magnify the cold indifference of Vacherot, who remained deaf to the call of nature.

Given his later position in the order of presentations, Robert was able to respond to and manipulate the contents of the earlier arguments. He used this advantage to dismantle the portraits of Vacherot and Monrousseau presented by their lawyers, replacing their carefully-constructed *personnages* with his own. Like a literary critic, he skillfully magnified the affective glut of the opposing counsels, condensing the record into a rapid-fire compilation that crumbled under the weight of its own ideals: "[O]n a appellé à son secours la chasteté de son veuvage, la sagesse de sa conduite, les tendresses d'une mère, la force du sang, & la voix de la nature […]" (Robert 366). Monrousseau received a similar summary: "[…] on vous l'a représenté gémissant dans les fers sans être coupable d'autre crime que d'un amour constant pour son fils; […] il n'a jamais eu d'autre pensée que celle de conserver cet unique bien que la fortune lui a laissé, & que dans l'horreur de la prison & les misères de sa pauvreté, rien ne lui a paru de plus cruel que l'enlèvement qu'on lui veut faire d'une personne si chère" (Robert 367). Why would Robert have chosen to rehash

the arguments of the opposition? Far from harming the position of his client, Robert's strategy cast doubt on the other attorneys' portraits of their clients as *invraisemblable*, nothing more than the ill-managed con of wily colleagues. "Je puis vous faire voir, MESSIEURS, que ces sentiments étudiés & exagérés avec tant d'artifice par son Avocat, ne sont que des mensonges ingénieux […]" (Robert 367).

Yet while Robert, like Bilain, disparaged legal rhetoric as artifice to discount the arguments of the opposing attorneys, he actually performed the most poetic pleading of all, delivered in the precious style particularly appreciated in the high *salon* culture of this period. In a brilliant foray into the subtle differentiations between the characters presented so far in the trial, and especially the relative trustworthiness of their voices, Robert staked his claim on the innocence of youth: "La voix de ma partie est bien différente. C'est un enfant qui s'écrie après sa mère, qui l'appelle à son secours, qui se jette à corps perdu dans le sein maternel, où il a pris la naissance, & les premiers aliments de sa vie […]" (368). Despite Robert's alleged distaste for the emotional surfeit of the other attorney's arguments, which he claimed to consider as nothing more than chicanery, his rhetorical strategy amounted to doing the same thing, but better. He attempted this by describing the perversion of beggars and the unruly passions of *marâtres* as disabling conditions that prevented Monrousseau and Vacherot from orienting themselves truthfully in the world, in contrast to the angelic boy whose youth meant purity. Despite his fourteen years of age (a number left unsaid by Robert), his client was nevertheless described in a near infantile state in order to emphasize his ingenous nature: "Ses actions ne peuvent donc être suspectes ni de dissimulation ni de mensonge; il n'a pas encore assez de raison pour être coupable, il n'exprime sur ses lèvres que les mêmes sentiments qu'il a conçus dans son cœur" (ibid.).

In stark contrast to the perfect innocence of the child described in such pitiful detail, Vacherot's portrayal was from an almost zoological remove:

> Les femmes d'ordinaire portent leurs enfants l'espace de neuf mois, & il ne s'en écoule pas un durant lequel la Nature ne les fasse souvenir de l'importance de ce cher fardeau, tantôt par des dégoûts, tantôt par des défaillances […] Ce sont autant de leçons que cette sage Maîtresse leur fait pour leur apprendre que cette qualité de mère les oblige à donner toutes leurs tendresses, & tous leurs soins à leurs enfants […] De sorte qu'une mère est coupable si elle laisse passer quelques jours sans songer à ses enfants […] & qu'elle est entièrement dépouillée des sentiments de mère. (377).

With this naturalistic background of the feminine moral biology, Robert did not even need to paint Vacherot as a bad mother, a tactic that may have breached *bienséances*, but instead depicted her as a deranged animal: "[… A]yant presque oublié qu'elle était mère, elle n'a ressenti ni la douleur que cause la perte des enfants, ni la crainte & l'inquiétude que cause leur danger, ni cet impatient désir de les revoir […]. [D]ans l'aveuglement & la fureur où elle est tombée, elle ne pouvait souffrir aucune marque de l'amour maternel […]" (378). Robert tasked her multiple times with blindness, inhumanity and fury, a controlled composite of the violent attributes typically found in classical myth and which would soon anchor Racinian tragedy.

Likewise, blindness and obscurity emblematized the figure of Monrousseau, whose alleged kidnapping of Jacques le Moine was described less as a criminal action than a state of spiritual sinfulness:

> Monrousseau après avoir profité de son larcin, pendant le cours d'une année toute entière, a éprouvé en sa personne, ce que l'Écriture Sainte dit qu'il arrive à tous les coupables. Ils essayent de dérober la connaissance de leurs crimes aux yeux des hommes: ils forment des nuages & une nuit obscure pour y ensevelir la mémoire de leurs méchantes actions; mais ils s'aveuglement eux-mêmes, & développent aussitôt les ténèbres de leur retraite […]. (382)

In keeping with the depiction of his action in the realm of spiritual suffering, Robert claimed that punishment was inevitable, as it was always already entailed as a necessary component of the sin itself:

> S'ils conçoivent quelque espérance de se sauver, cette espérance n'est qu'une lumière trompeuse, qui les éblouit pour les faire tomber dans le précipice, leurs résolutions sont des conseils d'une fausse prudence qui les abuse; ils sont infidèles à eux-mêmes, & tous les pas qu'ils font pour fuir le tribunal des Juges, sont ceux qui avancent davantage leur punition, & qui les mènent plus assurément au supplice. (382-83)

Parlementary and holy justice were, if not identical, then entirely complicit; while it was up to the judges to mete out punishment on earth, it was "l'oeil de la Providence [qui] a dissipé toutes les ténèbres, que l'on a découvert le crime de Monrousseau" (383). French and Biblical law formed two separate but mutually reinforcing constitutions.[108] Yet neither

[108] The sanctification of the French monarch as co-extensive with the holy Catholic Church was, in large part, a product of the medieval judiciary, which transposed the idea of the Church as the mystical embodiment of France to the kingdom itself, at the head of which was positioned the king in parallel with Christ's governance over the Church. The judiciary carefully positioned themselves within state symbolism as the representatives of immortal royal justice. See Kantorowicz, *The King's Two Bodies*, pp. 193-272. The *Parlement* would later transfer the sanctity of the state onto the king by inventing a legal fiction of the immortal person of monarch that did not extinguish when the corporeal bearer of kingship dies, i.e. Kantorowicz's image of the king's

could apparently save Vacherot: "il n'y a que sa mère qui demeure aveugle" (383). In order to explain Vacherot's confounding indifference to the voice of nature and piety, Robert, rather than consulting the evidence, had recourse to a theological explanation of the passions that followed closely Senault's *De l'usage des passions* (1641):

> [U]ne mère s'y porte [au crime] quelquefois par des mouvements de fureur, dont on ne voit point la cause […] qui ne sont connus qu'au Maître de la Nature. Il ne faut pas […] considérer ceux qui commettent un crime, ou une mauvaise action, comme de sages Philosophes, qui ne font rien qu'avec prudence, & pour quelque juste sujet: le monde vivrait encore dans la pureté de sa première innocence, si les hommes n'avaient jamais entrepris de crime, que par le conseil de la raison: au contraire, il est son plus dangereux ennemi, & sitôt que la passion a prévenu l'esprit, la raison n'en est plus la maîtresse; elle est obscurcie par une fumée épaisse qui l'empêche d'agir; ce ne sont que ténèbres & aveuglement dans l'âme, & alors un homme méprise les choses les plus saintes, si elles s'opposent au torrent de sa passion; elle l'entrâine sans résistance […] & cette fureur qui le domine, le porte aussi aisément à violer les devoirs les plus sacrés […]. (Robert 395)[109]

Without any real evidence of the alleged abandonment other than public hearsay regarding Vacherot's alleged actions and motive, Robert astutely skirted the need to concoct a

two bodies, the judicial advent of which the historian qualified as a "nouvelle version de l'union hypostatique" (ibid., 321).

[109] Senault explained criminal acts as a reversal of the soul's hierarchy, i.e., a result of the reason's obedience to the passions, whose case was pleaded by the intermediary faculty of the imagination, described as "un si bon Advocat" (*De l'usage des passions* II: 66-67).

dramatic *mise en scène* out of whole cloth, and instead framed her as a woman beset by vice. Both in its contents (the passions are blind) and its form (inserted as a substitute to the (absent) evidence), this passage covered the pleading's most serious deficiency by substituting *l'éloquence du barreau* in favor of *l'éloquence de la chaire*.

In order to establish the authenticity of his client's case, Robert embellished on Bilain's claim that only physical signs could reveal truth:

> [A]ussitôt que cet enfant eût jetté les yeux sur elle, **sans attendre ni que la mère parle, ni qu'on l'interroge, sans respecter ni les ordres de la Justice, ni la présence du Magistrat, la force du sang l'entraîne aux pieds de sa mère**, il se jette entre ses bras, il lui dit Bon-jour Maman; […] **son visage, ses yeux, ses paroles, son coeur, lui disent qu'il est son fils**: il ne prononce que ces deux mots, Bon-jour Maman, son amour qui le tient attaché aux pieds de sa mère, & qui les lui fait répéter souvent, ne lui permet pas d'en dire davantage. **Mais ne vous semble-t-il pas, MESSIEURS, que son silence est bien éloquent?** (Robert 401 [my emphasis])

Robert's dramatic scene of *retrouvailles* set before his audience the most basic human interaction rendered in the most pathetic tones that read along the same register as Diderot's stage directions from his drame bourgeois, *Le Père de famille*. The heart-rending tableau, designed to draw a tearful pity for his client from the audience, demonstrates the seventeenth-century lawyer's capacity to imagine domestic scenes dripping with pathos for his audience in order to influence their judicial deliberation. In this sense, we can see that Robert travels furthest away from d'Aguesseau's prescription to entertain the senses while nevertheless subjecting them to reason; the cancelling of rhetoric through rhetoric operated

to absorb the audience into a feeling of justice with no rational exits. Thus both conviction and persuasion are found entailed within Robert's narration: "[…] Il ne se peut une preuve plus puissante pour **convaincre** une mère que les caresses d'un fils, & ce doux nom a toujours une vertu secrète qui **persuade** le cœur" (ibid. [my emphasis]). The economy of adjudication had been transposed from the court of law into Robert's pathetic *tableau*.

However, whereas Diderot's *Père de famille* was written as an instruction in virtue quite disjoined from theological undertones, the virtue described by Robert – and the vice that allegedly consumed Vacherot – were still spoken in a firmly theological idiom in keeping with his century. Thus, when decrying Vacherot's repudiation of the beggar boy, Robert recalled the Virgin Mary, who needed no proof of her son's resurrection from the dead, but merely believed due to her steadfast faith:

> Il est certain, MESSIEURS, & les Théologiens en sont d'accord, que la sainte Vierge, Mère du Fils de Dieu, ne perdit jamais la foi, même au milieu de ses passions […]. [E]lle n'eut besoin d'aucune preuve ni d'aucune marque extérieure pour croire sa Résurrection, & son retour à la vie. (411)

Clearly not measuring up to the mother of God, Vacherot could not even be compared to Doubting Thomas, who, rather than agreeing with his fellow disciples that Jesus had, in fact, been risen from the dead, needed to "see to believe." The widow's refusal to recognize the boy as her own even after a doctor from her son's past recognized the scar on his head sent her bumping down the hierarchy of saints:

> Les âmes douteuses & incrédules demandèrent des preuves visibles & extérieures, & voulurent voir & toucher les cicatrices de ses plaies, *Nisi videro fixuram clavorum non credam*. [Unless I see the place where the nail

> wounds, I will not believe]. Pauvre mère si vous n'êtes point obligée à ne point douter du retour, du recouvrement, & pour ainsi dire de la résurrection de votre fils, vous êtes obligée […] à déferer à la preuve, au témoignage, à la démonstration qui a convaincu un Apôtre infidèle. (ibid.)

In a similar fashion, Robert depicted the elder brother, who had returned in the interim between the two trials, as the Biblical Joseph's jealous brothers who left him to die in a lion's den, persuading their father Jacob that he had been eaten by wild beasts.

> Le frère de ma partie dont la jalousie, & le crime est quasi semblable à celui de ces frères inhumains, les imite parfaitement dans leur fourbe pour assouvir son avarice, & satisfaire la haine de sa mère. Il vous dit que son frère est mort. Il vous apporte ce certificat comme une robe sanglante pour vous le faire croire. (414)

It should be noted that there was no evidence of any deception on the part of the older brother mentioned by the other laywers; Robert's portrait of a depraved and jealous boy proceeded solely from his ability to carve in large chunks of Biblical text as a sort of proof. "Mais l'Écriture sainte remarque, que si ce mensonge cruel trompa la simplicité d'un père crédule, ils ne pûrent tromper l'oeil de la Providence Divine" (Robert 414)

After having thus inscribed his client within the circle of virtue and Vacherot within that of vice, Robert, again following Fourcroy's example, commenced a very bold first-person narrative of the case:

> Je ne suis point le fils de ce vagabond & de cet imposteur, mais j'ai été sa proie & son esclave. Monrousseau n'est point mon père, il est mon ravisseur & mon tyran; il m'a ravi l'honneur de ma naissance, l'ingénuité de mon

> éducation; il a corrompu autant qu'il lui a été possible, le génie de liberté que ma naissance m'inspire; il m'a réduit à la plus vile, & à la plus sordide condition qui soit parmi les mortels […]. (423)

Robert's use of the first-person perspective to represent his client before the *Parlement* gives us a privileged glimpse into the politics of what we might call theatrical non-absorption[110] in the judicial space. That Robert assumed the voice of his client – whose youth and total innocence he had emphasized throughout the pleading – provides greater texture to our understanding of the legitimacy of these expressive frameworks, for unlike the lawyers for the Vernon judge or the beggar, who used the first-person perspective of individuals reasonably similar to themselves in terms of age and understanding, the difference between Robert and Jacques le Moine must have made the prospect of "playing the role" quite absurd; the studied elocution with which Robert spoke the boy's perspective was antipodal to the extremely youthful and naïve character that the lawyer had so carefully constructed during the preceding hundred pages. The pleading feels almost grotesque, yet I would posit this modern reception follows from our tendency to conceive of the first-person perspective as a rhetorical figure used to absorb the audience into the diegetic space of the narrative in order to access primarily the passions of the audience to stir them toward identification with the inner life of a character. That both the aspect and tone of this direct address were exceedingly preposterous and unbelievable indicates rather that the expectation at this time was likely not absorption into theatrical narration. Indeed, the voice

[110] As Michael Fried made clear in *Absorption and Theatricality* (1988), absorption as a technique in art and literature did not develop until the early 1750s with the rise of anti-theatrical painters Joseph-Marie Vien (1716-1809) and Jean-Baptiste Greuze (1725-1805). I use the term here to better delineate the aesthetic choices made by the lawyers in this affair, whose effort tended less toward the absorption of the audience into the sensibility of their clients, but rather to absorb their client into themselves and therefore fashion them in the image of an upright, moral member of society.

of Jacques le Moine was used for nothing more than a recapitulation of the pleading's previous points spoken from a different perspective:

> Oui, MESSIEURS, ce cœur dur & inflexible m'oblige de me jetter à vos pieds, & de vous demander votre protection contre un voleur impie, & contre une mère dénaturée […] Ne souffrez pas, MESSIEURS, que l'erreur ou l'aveuglement d'une mère, la violence d'un ravisseur, l'avarice d'un parent, triomphent injustement de l'état de ma naissance qu'on me dispute, de la condition de ma fortune qu'on me ravit, & de la faiblesse de mon âge dont on abuse. (425)

Robert was a famous lawyer; this peroration was certainly no gaffe, as the finale of pleadings was always carefully crafted for maximum persuasion. Thus we must consider it seriously in order to grasp what made it eloquent. There seem to be two explanations: first, that Robert, after having carefully developed his *ethos* throughout a pleading redolent with both theological references and sentimental tableaux, embedded his client's *personnage* within his own in a performance of public conciliation that was to be seen and heard not as a singular actor but rather as a social composite. Secondly, the audience of such judicial proceedings in this period were primed to employ their imagination in service to reason rather than passion.[111] This statement may seem bold, but given the serious role of the imagination as theorized by the leading orators of this period as a guide for the passions toward virtue, connecting the lower regions of the soul and polity with its more enlightened parts, the emphasis on Christian morality and judicial theology, and the larger

[111] Today's attorney might note that the activation of the imagination in their judge or (more likely) jury often remains a goal in oral argument. The techniques for this strategy, however, are infinitely more subtle due to modern expectations of strict conformity to written constitutions and the relevant bodies of code.

cultural context wherein the *Académie Française* was tasked with the regulation of the morals through the manipulation of both the true and the false, all of this sketches out for us a legal culture wherein the illusion of theatrical display in the courthouse did not need to be terribly convincing; the imagination, though an imperfect faculty compared to reason, was believed to be a critical buttress and supplement to higher forms of judgment. It did not need to be summoned for any special reason but rather was thought to accompany reason in the act of listening and judgment. Thus the "absorptive" aspect of theatricality was, at this moment in the Parisian courtroom, beside the point; the jurist expected his imagination to be constantly elicited and the audience doubtless enjoyed it. Let us not forget that the barristers in this case, despite their attacks on one another's arguments and stylistic choices as *mensonges* or *chicane*, they did not disparage each other's use of the first-person perspective or direct address as an example of this. Though the attorneys were sensitive to and often manipulated ad infinitum the anxiety surrounding the words and the things they were supposed to represent, the lawyers' practice of what we might view a form of theatrical illusion was here not considered in contravention of but rather supplementary to the pursuit of truth.

Plaidoyer of Jérôme II Bignon (1627-97): Disenchantment

Avocat général for the case was Jérôme II Bignon, who had recently inherited this position as well as *maître de la librairie* following the death of his father, the famed scholar and tutor to Louis XIII. In keeping with family tradition, Jérome II received his education at Port-Royal before commencing his legal career.[112] In addition to his public duties, he

---

[112] Jérome II's father was a very valuable servant to the crown and situated his children to continue their way up through the *noblesse de robe*; by the time his son inherited the position of *avocat général*, the position was worth 180,000 livres. Yet, as recounted by David Sturdy, despite their position and wealth, the Bignons remained staunch Jansenists; issues of religion and morality predominated all other concerns. (Sturdy,

continued his father's commentaries on the *Formulaire de Marculf*, a Frankish collection of codes from the seventh century composed by the monk Marculf that modeled the legal constitution of the Merovingian dynasty. Despite his spiritual renunciation of material comforts and wealth, Bignon II made it into the *noblesse d'épée* through his marriage to Suzanne Phélypeaux, sister of the Comte de Pontchartrain. Their son, Jean-Paul Bignon (1662-1743), would also receive his education at Port-Royal before becoming *prédicateur* to Louis XIV and one of the most influential *hommes de lettres* of the Old Regime.[113]

As the *avocat général*, Bignon was tasked with summarizing the arguments on all sides in the strongest light possible, before offering his own interpretation and argument of the case. His framing of the Beggar of Vernon Affair is representative of the seventeenth-century Jansenist legal practitioner, who reproved the experience of the theater as a perversion of the passions.[114] The theatricality of an affair involving runaway children, mistaken identities, crooked officials, and crowd justice was not lost on Bignon. The *avocat général* opened his pleading with an admission and exhaustive list of the similarities between the case at hand and the works of poetic drama written to enchant the public:

Science and Social Status, pp. 223-225). Later, Jérome II would lose his position as *maître de la librairie* due to political machinations on the part of the Colbert and especially Louvois families. Nevertheless, upon the death of Louvois in 1718, the regent Philippe d'Orléans returned the post to the son of Jérome II, the Abbé Jean Paul Bignon, who greatly accelerated the growth and organization of the royal collection of manuscripts and rare books through multiple initiatives. For more information on the Bignons, a family at the apex of the *noblesse de robe* in early modern France, see Clarke, "Librarians to the King," pp. 293–298.

[113] As master of the royal library, Bignon continued the family tradition of greatly expanding its archives, and eventually succeeded in opening the collection to the public in 1720. Deemed a "précurseur de l'*Encyclopédie* et véritable despote éclairé de la République des Lettres," (Bléchet 395) the abbé Bignon organized and centralized the administration of the various royal academies, official *journaux*, royal libraries as well as the printing and censorship authorities.

[114] Following Augustine, the Jansenists did not object to the passions as such, but rather believed that all passion should be reserved for the seeking after of God's trace in the signs of ultimately concealed meaning that constituted the physical world. Theaters and novels were thought to suspend this quest, or rather replicate its structure of desire within an illusory world of meaningful representations that hid the dialectical function of the sign, stripping it of its revelatory potential, and assigining it a false one. (Vinken, "The Concept of Passion and the Dangers of the Theatre").

> Le sujet de cette cause semble avoir beaucoup de rapport avec ces sujets inventés à plaisir; soit ceux que l'Antiquité fabuleuse nous a laissés, ou ceux que la fiction de la Poésie nous représente tous les jours; qui ont servi de spectacle à tous les siècles, & qui sont encore aujourd'hui l'admiration & le divertissement des peuples. La surprise de la nouveauté, le mélange de l'intrigue, l'opposition des personnages, les mouvements des grandes passions, la variété des faces différentes, l'incertitude de l'événement, l'attente & l'admiration, tout s'y rencontre avantageusement. (Bignon 1)

After detailing the similarities between typical stage productions and the case before the court, Bignon carefully exposed the difference between the two genres; while the spectator at the theater found herself entertained due to the *vraisemblance* of the play, or the playwright's ability to obscure the fiction at the heart of the work through believable action, to judge the case at hand required detecting the *vérité* hidden under an assemblage of lies. Thus while the theater-goer found herself believing the drama to be real, the courtroom expert was required, according to Bignon, to pierce the artifice to find the truth.

> Mais ce qui en fait tout-ensemble le rapport & la diversité, c'est que ces arguments fabuleux n'ayant pour fondement qu'un ingénieux mensonge, ne sont pourtant agréables que parce qu'ils portent l'apparence de la vérité: au-lieu que la nouveauté de celui dont il s'agit cause d'autant plus de surprise, que la vérité y approche extrêmement de l'apparence de ces mensonges innocents. (ibid.)

While the rules of neoclassical theater required masking its essential fiction under layers of *vraisemblance*, the *vérité* at the heart of the *Cause du gueux de Vernon* approximated

theatrical *vraisemblance* to such a degree that Bignon felt compelled to remind the audience that the trial, unlike the play, would determine the lives of the parties and reorganize society around its example.[115] His warning reveals a real anxiety regarding the lay audience's reception, whose essential function was, in the end, not terribly distinct from the theatrical spectator: would they remember that the course of justice was not a product of the imagination but rather the emanation of reason and authority? In such a dramatic case would their opinion remember its subservience to the will of the judiciary?

> Mais après tout, quelque rapport qu'il y ait de cette cause avec ces pièces inventées; **que le public qui est attiré en cette Audience par la curiosité, apprenne par notre bouche qu'il y a bien de la différence entre ces histoires feintes, & un sujet véritable**: & que si les premières n'ont pour fin que le divertissement & le plaisir, celle-ci ne doit avoir qu'un événement tout sérieux; & ne paraît sur ce tribunal auguste de la Justice, que pour recevoir une décision solennelle qui serve de loi à une famille, & peut-être d'un grand exemple à toute la postérité. (Bignon 3-4 [my emphasis])

Bignon's awkward insistence on the categorical difference between a drama and a legal affair after four long days of pleadings replete with references to theater as though it were law, theatrical analogies of legal proceedings, myriad theatrical *mises en scène* of the case, and lawyers arguing their client's case through the first-person perspective demonstrated

---

[115] We might note here that the trial *would* be different from the theater if the the audience were acquainted with the parties – which they most likely were not – but given the distance between the audience and the parties, the disposition of the latter's lives following the decision of the court would not differ too greatly from the resolution of a play with respect to the audience. Moreover, the ability of the audience to affect the outcome at either the theater or the *palais de justice* was tenuous at best at this time. (However, direct audience intervention and control over theatrical productions would become a popular movement during the revolutionary period, especially with the production of Marie-Joseph Chénier's tragedy *Charles IX, ou l'École des rois* (1789). See Maslan, "Resisting Representation: Theater and Democracy in Revolutionary France"; Friedland, *Political Actors*.

his desire to purge the pursuit of justice from any construal that might captivate the public's lower passions without providing sufficient edification. The hearing of cases and the spectating of plays needed to be kept separate and distinct.[116] Bignon's extremely reductive treatment of the two discursive modes operated so as to separate the work of the theater from that of the courtroom. It proceeded from a strict adhesion to a tragic Jansenist worldview that spurned aesthetic illusion as an evil perversion of "the inbuilt referential function of language to God" (Vinken 53). Fiction was targeted by Jansenists because "it does not only fail to represent the blindness of signs and consequently fails to convey the only insight possible, but necessarily perpetuates the error in taking signs for what they are not" (ibid., 52). The fullness of the sign in theater precluded the possibility of perceiving in it any trace of the divine; the sensual crowded out the spiritual ways of knowing. The semiological requirements of the Jansenist legal theoretician demanded a morally rigorous discourse steeped in erudite citations to better stimulate dialectical reasoning .[117] For the Jansenist, theater was a lie for the sake of lying, whereas the histrionics of the courtroom unfolded in order to reconstitute an event, which would then be referred to God's justice as mediated through man's imperfect authorities. The judicial narration was set to bring the world toward justice, not justice toward the world.

Of course, Bignon's axiomatic line of demarcation between the courthouse and the playhouse was its own sort of fiction. The theater was not simply for pleasure just as the tribunal went beyond the mere transmission of the law. Bignon's effort to distinguish the

---

[116] The Chancellor d'Aguesseau rebuked the magistrates of the *Parlement de Paris* in 1698 for even attending the theater: "[O]n voit un magistrat sortir avec empressement du sanctuaire de la justice, pour aller s'asseoir sur un théâtre. La partie qui retrouve dans un spectacle celui qu'elle avait respecté dans son tribunal le méconnaît ou le méprise ; et le public, qui le voit dans ces deux états, ne sait dans lequel des deux il déshonore plus la justice" (*Œuvres choisies*, p. 11).
[117] For an example of eloquence in the Jansenist fashion of the late seventeenth century, see the pleadings of Antoine Le Maistre (*Les Plaidoyez et Harangues de Monsieur Le Maistre*).

two spaces fell out of step with the times in that it stripped the one of its state-sponsored program to instruct and influence the morals of the spectators, and the other of its corporate desire to interest the passions of the people in order to persuade them toward justice. Moreover, Bignon's effort to banish illusion from the *palais de justice* was a precarious endeavor in itself, given that the Old Regime system of justice had no obvious grounds for its decisions outside of extremely lengthy examinations and interpretations of myriad and conflicting sources of authority. To produce faith in its production of justice necessarily entailed the sort of figurations reproved by the logicians of Port-Royal, especially if it endeavored to make itself understood before an audience of incidental spectators of particular cases. Likewise, Bignon himself could not help but occasionally fall into theatrical references and tropes to comment on the case;[118] a small group of witnesses was characterized as a Greek chorus (Bignon 7), the fate of the boy was given a dramatic turn,[119] and the underlying fact pattern was conveyed on several occasions as following the dictates of theatrical drama.[120] Lastly, Bignon's decision to underline the serious nature of the trial and thus demarcate it from theatrical fictions fell victim to the aesthetic mode he was attempting to denounce; his warning sounds like just another welcome layer of illusion, plunging the passions of the spectator further yet into the Vernon drama due to the reality

---

[118] On the inextricable representative relationship between literature- especially the theater and the novel- and law, see Biet, "Judicial Fiction and Literary Fiction," in *Fiction and Art: Explorations in Contemporary Theory*, pp. 243-258.

[119] "Au milieu de ces divers mouvements, nous trouvons un enfant incertain de son état & de sa naissance; & qui ne sachant encore qui sont ses parents ou ses persécuteurs, ne sait aussi lesquels il doit aimer ou haïr" (Bignon 3).

[120] In his explanation of the affair, he pointed to the agonistic relationship between love and hate, the "grandes & maîtresses passions qui gouvernent le monde [...] aussi-bien que dans les pièces de Théâtre" (Bignon 2). In his discussion of the older brother's return to Vacherot, he referred again to the theater: "Il survient d'ordinaire dans l'endroit le plus mêlé de la pièce quelque personnage nouveau, qui fait la reconnaissance, & le dénouement de l'intrigue" (ibid. 3). We are reminded of Louis Marin's adage: "tout récit est un piège" (*Le récit est un piège*, p. 8).

of the character-parties. In this way Bignon's digression on genre led him to the foggy margins of legal discourse, a mode showing signs of epistemological flux, which would soon enter a tumultuous century of moral, aesthetic and scientific theorization.

If the Jansenist legal ontology could not be conveyed to a public unfamiliar with the rigorous dialectical pursuit of justice without recourse to figural modes of speech, Bignon's chief goal nevertheless remained public disenchantment. Though we might well imagine that he was unsuccessful at the metadiscursive level (i.e., he could not perform the disenchantment *of* the public), Bignon's staunch refusal to accept the testimony of the crowd at Vernon gave him occasion to administer a blistering reprimand toward the figure of public as presented in the affair, and their susceptibility to persuasion (i.e., he argued for disenchantment *with* the public).[121] Indeed, the document certifying the crowd's "certainty" was enough for Bignon to dismiss all other criteria; he had found the bad actor: "[S]ans accuser personne, il nous semble qu'il ne faut point chercher d'autre suggestion que celle du peuple […]" (Bignon 47). The people, who were never led by reason but were enslaved only to passion, could therefore not rise above the level of mere persuasion, and thus "certainty" with respect to the public was an irrational proposition. Mirroring the theoretical underpinnings for legal eloquence which demanded lawyers tailor their arguments to the reason of the judges while interesting the passions of the public, Bignon emphasized that such a group would be unable to contemplate matters of conviction due to its general ignorance and moral depravity. Thus Bignon resisted Bilain's efforts to sacralize *la voix publique* as a natural reaction similar to the operation of all of God's animals,

---

[121] Persuasion, though necessary to the job of the barrister, was subservient to the work of convincing his judges through reason and proofs. The lawyer "qui croit avoir des mieux plaidé lorsqu'à bis ou à blanc il a persuadé" could thus be compared to "l'homme qu'en tout temps sa passion gouverne, son lit est au bordel, sa table à la taverne" by the lawyer and poet Jacques Du Lorens (1580-1655) (*Satire 23*).

endowed as they were with infallible instinct, maintaining rather the moral emptiness of their stream of sounds: "La persuasion s'en communique par une contagion secrète, & les espèces se multiplient & se grossisent tellement, que d'un doute particulier, il s'en forme une opinion universelle. C'est un écho qui rend les sons, & les multiplie à l'infini" (48).[122]

The magnitude of the public rumor was rivalled only by the obscurity it spread: "C'est cette légère vapeur qui s'élève du plus inconstant des éléments, *Quasi vestigium hominis ascendebat de mari*; & incontinent il s'en forme un grand amas de nuages qui obscurcissent le Ciel, & qui produisent une grande tempête" (ibid.)[123]. Not content to merely excoriate the Vernon crowd from his own perspective, Bignon buttressed his argument with historical proofs, tracing the infirmity of the *voix publique* back to the Sophist tradition of the Greeks, generalizing its reach across time and space: *la voix publique* had "ni auteur ni fondement"; it had undone armies and even crowned imposters, mistaking them for true monarchs (ibid. 49). After a lengthy quote in Latin from Tertullian on the worthlessness of the public witness, Bignon succinctly added "C'est donc à cette prévention d'esprits qu'il faut attribuer tout ce qui est arrivé à Vernon" (ibid. 49). The numerical, if not intellectual or social weight of the public's opinion was such that the Vernon judges were considered by Bignon to simply have been carried away by it, a turn of events which was summed up by the *avocat général* as unfortunate for everyone, but not their fault.

---

[122] Bignon's denigration of public opinion parallels that of Senault, who stated "ce qui semble l'authoriser [l'opinion publique] la condamne, et rien ne la doit rendre plus suspecte que le grand nombre de ses partisans […]" (Senault IV: 125).

[123] Bignon's Latin reference to the Book of Kings is one among many citations left untranslated, a stylistic choice that tracks conventional seventeenth-century esoteric rhetorical modes that emphasized erudition over accessibility. Though the *Ordonnance de Villers-Cotterêts* had mandated in 1539 that all judicial proceedings take place in vernacular French, law school itself was conducted in Latin until 1679 (and even then, only customary law was to be taught in French), and legal practitioners were assumed to understand all such references. (Holmès 23).

Bignon recommended that the lower court's decision be overturned and so it was decided. Vacherot was rid of the boy, the son was restored to Monrousseau, and the Vernon officials went home a little chastened but no poorer than when they arrived.

Conclusion

Was eloquence a manner of instutional decree or public taste? After having closely examined the pleadings in the Beggar of Vernon Affair of 1659 and the context – both professional and cultural – in which they occurred, we can draw some preliminary conclusions about the rhetorical culture of barristers practicing during this period. The 17th-century lawyer did not hesitate to blend legal and extra-legal sources in his effort to establish an authoritative interpretation of his party's position. Although this jurisdictional amalgam of jurists, philosophers, church fathers and poets may appear disorganized, irrelevant or even unjust to today's counselor, copious citation to various schools of authority across time and space was of obvious benefit to the early modern lawyer. Truth and justice for these barristers was a static, atemporal concept, memorialized in the work of great kings, religious leaders, legal theoreticians and poets across the ages; it simply required detection then exposition for a just outcome. Thus the Affair of the Beggar of Vernon demonstrates for us a moment in seventeenth-century France where the semantic fields of law, letters and religious doctrine were on relatively equal footing in the *plaidoyer*. We find that the religious ideology, philosophers and poets cited to by the lawyers did not *symbolize* the law in the way we might imagine – they *were* an essential component of the legal regime. The fiction of legal eternity claimed by absolute monarchy allowed the inclusion of these "extralegal" images and texts as cohesive with and productive of the

dominant legal ideology. In this way, we might well term the discursive practices of this period as a production of judicial theology.

Working within the limits of a judicial theology meant that legal eloquence generally consisted in the restatement of a French social body rendered in theological terms, and the seamless inclusion of one's client within the idealized structure. Lawyers of this period sought after a discursive Eden in which to embed their clients and exclude the opposition as heterodox. The difficulty of the task consisted in the hybrid audience to whom the eloquent lawyer was expected to tailor his arguments. Of course, priority was given to the magistrates, whom the lawyers were called to convince through reasoned proofs and logic, yet the persuasion of the general audience through appeals to the senses or passions was also an essential element of legal eloquence as the esteem and instruction of the population was an important political goal.

Thus the institutionally-prescribed rhetorical balance between the reason and the passions, generally maintained through the disciplinary hierarchy in the Order of Barristers and regular harangues to that effect, signified formal eloquence in legal discourse. Yet by 1659, signs of decomposition were beginning to show at the edges of this always already precarious dichotomy as lawyers started to elide barriers between feeling and reason. Reading the intensity and drama in the pleadings against the background of a transitional period of French history, in which the bright new possibility of knowledge as "clear and distinct" brought with it deep shadows of doubt regarding previously-held convictions, we understand that the lawyer had no real *parti pris*, at least not in the courtroom. Extremely well-educated, these lawyers used their entire toolbox of arguments, dipping into religion, Antiquity, theater, and even the law as it suited their needs. As new sources of knowledge

proliferated among the learned communities, the lawyers did not hesitate to make whatever use they could of them in their effort to convince their judges and perhaps impress the spectators. Yet this new epistemological diversity problematized the boundary between subjacent categories of legal discourse such as reason and feeling, *vérité* and *vraisemblable*. Perhaps unpalpable to orators at the time, who likely enjoyed the expanded palette of potential arguments and techniques available to them, the effects of stirring up the political soul of France would ripple into a great wave that would obliterate for a time the legal profession altogether.

Moreover, the preponderance of poetic references and dramatic expression in the legal discourse studied in this chapter in conjunction with the settling of boundaries for productions of fiction through the establishment of the *Académie Française* tell us as much about literature as it does of the law. Since Kantorowicz's *The King's Two Bodies* (1957), we understand law as a fictional notion, a construction of power managed through the careful marshalling of semantic fields such as literature and art. Our close reading of the Beggar of Vernon Affair confirms the view of law as a fictional notion, yet in light of the particularities around notions of fictional forms and their relationship to the state discussed in this chapter, the simple metaphor of *law as fiction* fragments into a dialectical tension; fictions buttressed the law, but the law circumscribed the forms fiction could take. During the eighteenth century the underlying metaphor founding the concept of law would be transformed almost beyond recognition. Thus, when we witness in the decade following the Affair of the Beggar of Vernon a young Racine's retort to those who critized the impassioned comportment of Pyrrhus, "Mais que faire? Pyrrhus n'avait pas lu nos romans. Il était violent de son naturel, et tous les héros ne sont pas faits pour être des Céladons"

(*Andromaque*, Première préface, 1667), we might well suspect that legal discourse, too, would be prepared to shed its spiritual aesthetic in its pursuit of a new, more "natural" eloquence.

Works Cited

Académie Française. *Statuts et règlements*. 1635. Ed. Maurice Druon. 1995. <academie-francaise.fr>. Web. April 2019.

D'Aguesseau, Henri François. *Œuvres choisies du chancelier d'Aguesseau, précédées d'une notice sur sa vie.* Paris: Firmin Didot Frères, 1850. *Google Books*. Web. April 2019.

Anderson, Wilda. "Men of History, Men of Category." *MLN* 116.4 (2001): 739–749. *JSTOR*. Web. June 2019.

Aquinas, Saint Thomas. *Explication suivie des Quatre évangiles*. Ed. l'abbé J.-M. Péronne. 8 vols. Paris: Louis Vivès, 1868-69. *HathiTrust*. Web. March 2020.

Baker, Keith Michael. *The French Revolution and the Creation of Modern Political Culture*. Oxford: Pergamon Press, 1987. Print.

Bary, René. *Méthode pour bien prononcer un discours, et pour le bien animer. Ouvrage très-utile à tous ceux qui parlent en public, & particulièrement aux Prédicateurs, & aux Advocats*. Paris: Deny Thierry, 1679. *Google Books*. Web. January 2019.

Biet, Christian. "Judicial Fiction and Literary Fiction: The Example of the Factum," in *Fiction and Art: Explorations in Contemporary Theory*. London: Bloomsbury Academic, 2015, pp. 243-258. Print.

Bilain, Antoine. *Traité des droits de la reine très-chrétienne sur divers états de la monarchie d'Espagne*, *avec la Lettre du Roy Très-Chrétien envoyée à la Reine d'Espagne*. Grenoble: 1667. *Google Books*. Web. January 2018.

Bléchet, Françoise. "Un précurseur de l'*Encyclopédie* au service de l'État: l'abbé Bignon." In *L'Encyclopédisme, Actes du colloque de Caen*, *12-16 janvier 1987*. Ed. Annie Becq. (Caen, 1991): 395-412. Print.

Blum, Carol. *Rousseau and the Republic of Virtue: The Language of Politics in the French Revolution*. Ithaca: Cornell UP, 1986. Print.

Boileau-Despréaux, Nicolas. *Œuvres complètes*. Ed. Françoise Escal. Paris: Gallimard/Pléïade, 1966. Print.

Briot, Frédéric. "La Fronde parlementaire dans les Mémoires du cardinal de Retz: Réflexion juridique et personnel." *Revue d'Histoire littéraire de la France*. 89.1 (février 1989): 19-26. *JSTOR*. Web. February 2019.

Brouaut, Jean. *Traité de l'eau de vie, ou Anatomie théorique et pratique du vin, divisé en trois livres*. Trans. Jean Ballesdens. Paris: Jacques de Senlecque, 1646. *Google Books.* Web. February 2018.

Cavaillé, Jean-Pierre. "Jean-François Senault, de l'usage politique des passions." *Rue Descartes* 12/13 (Mai 1995): 57-73. *JSTOR*. Web. January 2019.

Cloyseault, Charles Edme. *Généralats du P. François Bourgoing et du P. Senault*. 2 vols. Paris: Poussielgue, 1882. *Google Books*. Web. March 2020.

Daubresse, Sylvie. *Le parlement de Paris ou la voix de la raison (1559-1589)*. Geneva: Droz, 2005. Print.

De la Bruyère, Jean. *Les Caractères de la Bruyère*. Ed. Dussault. Paris: Ledoux, 1836. *Google Books*. Web. August 2019.

Delachenal, Roland. *Histoire des Avocats au Parlement de Paris: 1300-1600*, Paris: Plon, Nourrit et Cie, 1885. *Google Books*. Web. August 2019.

Campbell, Peter. "Absolute Monarchy." In *The Ancien Régime*. Ed. W. Doyle. Oxford: Oxford University Press, 2012, pp. 11-38. Print.

Chapelain, Jean. *Les Sentimens de l'Académie Françoise sur la tragi-comédie du Cid*. 1637. Ed. Georges Collas. Paris: A. Picard, 1912. *Gallica*. Web. April 2019.

Clarke, Jack Alden. "Librarians to the King, the Bignons, 1642-1784." *The Library Quarterly: Information, Community, Policy* 36. 4 (1966): 293–298. *JSTOR*. Web. January 2019.

Damiani, Loïc. "Discours chez les avocats parisiens aux XVIIe siècle." *Entreprises et histoire* 1.42 (2006): 7-28.

Delachenal, R. *Histoire des avocats au parlement de Paris, 1300-1600*. Paris: Plon, 1885. *Google Books*. Web. June 2019.

Delon, Jacques. "Retz Orateur pendant la Fronde parlementaire." *Littératures classiques* 2.57 (2005): 55-68. *Cairn*. Web. July 2019.

Diderot, Denis. *Plan d'une Université pour le gouvernement de Russie* in *Œuvres complètes de Diderot*. Eds. Assézat and Tourneux. Vol. 3. Paris: Garnier Frères, 1875. 20 vols. 1875-1877. Print.

Encyclopédie, ou dictionnaire raisonné des sciences, des arts et des métiers, etc., eds. Denis Diderot and Jean le Rond d'Alembert. University of Chicago: ARTFL

Encyclopédie Project (Autumn 2017 Edition), Robert Morrissey and Glenn Roe (eds). <http://encyclopedie.uchicago.edu/>. Web. April 2018.

Érard, Claude. *Plaidoyez de Mr. Érard, Avocat au Parlement*. Paris: Jacques Le Febvre, 1646. *Gallica*. Web. April 2019.

Faye, seigneur d'Espeisses, Jacques. *Les Remonstrances ou harangues faictes en la cour de Parlement de Paris aux ouvertures des plaidoyries.* Lyon: n.p., 1604. *Numelyo*. Web. October 2019.

Fitzsimmons, Michael P. *The Founding of the Académie Française and Its Development through the Late Seventeenth Century*. New York: Oxford University Press, 2017. Print.

Friedland, Paul. *Political Actors: Representative Bodies and Theatricality in the Age of the French Revolution*. Ithaca: Cornell University Press, 2002. Print.

Guilbault, L. *Le Trésor des harangues et rémontrances, faites aux ouvertures du parlement avec quelques oraisons funèbres des plus grands Personnages de ce Temps*. Paris: Nicolas le Gras, 1685. 2 vols. *Google Books.* Web. January 2018.

Hauréau, Barthélemy. *Histoire littéraire du Maine*. 10 vols. Paris: Dumoulin, 1870-77. *Google Books*. Web. April 2018.

Henrys, Claude. *Plaidoyers, arrêts et harangues de M. Claude Henrys*. Paris: Pepingué, 1658. *Gallica*. Web. December 2018.

---. *Oeuvres de M. Claude Henrys, Conseiller du roi, et son premier Avocat au Baillage & Siège Présidial de Forès, contenant son recueil d'arrêts, vingt-deux questions posthumes tirées des écrits de l'auteur trouvés après son décès.* Vol. 2. Ed. B.J. Bretonnier. 5th ed., Paris: Michel Brunet, 1738. *Google Books.* Web. December 2018.

Hogg, Chloé. "Subject of Passions: Charles Le Brun and the Emotions of Absolutism." *Philological Quarterly* 93.1 (Winter 2014): 65–94. *EBSCOhost*. Web. March 2020.

Holmès, Catherine E. *L'Éloquence judiciaire de 1620 à 1680*. Paris: Nizet, 1967. Print.

Homer. *The Odyssey*. Trans. A.T. Murray. Cambridge: Harvard University Press, 1919. *Perseus Digital Library*. Web. May 2019.

---. *The Iliad*. Trans. Trans. A.T. Murray. Cambridge: Harvard University Press, 1924. *Perseus Digital Library*. Web. May 2019.

Houllemare, Marie. "Secret des délibérations, publicité des procès: le Parlement de Paris et l'opinion au XVIe siècle." In *S'exprimer en temps de troubles : Conflits,*

opinion(s) et politisation du Moyen Âge au début du XXe siècle. Ed. Laurent Bourquin et al. Rennes: Presses universitaires de Rennes, 2012. <http://books.openedition.org/pur/124062>. Web. August 2019.

---. "Écrire la justice hors le greffe : la mémoire judiciaire dans la ville à Paris au XVIe siècle." In *Une histoire de la mémoire judiciaire: De l'Antiquité à nos jours.* Eds. Olivier Poncet, Isabelle Storez-Brancourt. Paris: Publications de l'École nationale des chartes, 2009. <http://books.openedition.org/enc/1556>. Web. August 2019.

Huet, Marie-Hélène. *Mourning Glory: the Will of the French Revolution*. Philadelphia: University of Pennsylvania Press, 1997. Print.

IJsseling, Samuel. *Rhetoric and Philosophy In Conflict: an Historical Survey*. The Hague: M. Nijhoff, 1976. Print.

Journal des principales audiences du parlement avec les Arrêts qui y ont été rendus et Plusieurs questions et règlements placés selon l'ordre des temps, Depuis l'Année 1685 jusqu'en 1700. Ed. Nicolas Nupied. Vol. 4. Paris: Compagnie des Libraires associés, 1757. 7 vols. *Google Books*. Web. July 2019.

Journal des sçavans. Ed. le sieur d'Hédouville. [Denis de Sallo, Sieur de la Coudraye]. Amsterdam: Pierre le Grand, 1669. *Google Books*. Web. March 2020.

Kantorowicz, Ernst. *The King's Two Bodies. A Study in Mediaeval Political Theology*. Princeton and Oxford: Princeton University Press, 2016. Print.

Lemaître, Alain. *Le Monde parlementaire aux XVIIIe siècle: L'Invention d'un discours politique*. Rennes: Presses universitaires de Rennes, 2010. Print.

Le Maistre, Antoine. *Les Plaidoyez et Harangues de Monsieur Le Maistre, cy-devant Avocat au parlement et conseiller du roy* […], ed. Jean Issali, 7e ed., Paris: Daniel Horthemels, 1688. *Google Books*. Web. June 2019.

Lorens, Jacques du. *Satires*. [1646] Paris: D. Jouaust, 1869. *Google Books*. Web. April 2019.

Marin, Louis. *Le portrait du roi*. Paris: Editions de Minuit, 1981. Print.

---. *Le récit est un piège*. Paris: Éditions de Minuit, 1978. Print.

Maslan, Susan. "Resisting Representation: Theater and Democracy in Revolutionary France," in *Revolutionary Acts: Theater, Democracy, and the French Revolution*, Baltimore: Johns Hopkins University Press, 2005, pp. 25-74. Print.

Maza, Sarah C. *Private Lives and Public Affairs: the Causes Célèbres of Prerevolutionary France*. Berkeley: University of California Press, 1993. Print.

---. *The Myth of the French Bourgeoisie: an Essay on the Social Imaginary, 1750-1850*. Cambridge, Mass.: Harvard University Press, 2003. Print.

Mongrédien, Georges. "Un avocat-poète au XVIIe siècle: Bonaventure de Fourcroy." *Revue d'Histoire littéraire de la France* 33.1 (1926): 1-13.

Montagu, Jennifer. *The Expression of the Passions: the Origin and Influence of Charles Le Brun's "Conférence sur l'expression générale et particulière"*. New Haven, CT: Yale University Press, 1994. Print.

Munier-Jolain, Jacques. *La Plaidoirie dans la langue française. Cours libre professé à la Sorbonne par M. Munier Jolain, avocat à la cour d'appel*. *Première année: XVe, XVIe, et XVIIe siècles*. Paris: Librairie Marescq Ainé, 1896. *Google Books.* Web. March 2020.

Pascal, Blaise. *Pensées, opuscules et lettres*. Ed. Philippe Sellier. Paris: Classiques Garnier, 2011. Print.

--- [Louis de Montalte]. *Les Provinciales ou les lettres écrites par Louis de Montalte à un provincial de ses amis & aux RR. PP. Jésuites sur le sujet de la Morale & de la morale et de la politique de ces Pères*. Cologne: Pierre de la Vallée, 1657. *Gallica*. Web. March 2019.

Patru, Olivier. *Plaidoyers et autres œuvres d'Olivier Patru, Conseiller du roi en ses Conseils, & Avocat de la Cour de Parlement*. Paris: Sébastien Mabre-Cramoisy, 1670. *Gallica*. Web. October 2019.

Perrault, Charles. *Les hommes illustres, qui ont paru en France pendant ce siècle, avec leurs portraits au naturel*. Geneva: n.p., 1697. *Google Books*. Web. February 2020.

Pitaval, François Gayot de. *Causes célèbres et intéressantes, avec les jugements qui les ont décidées.* Vol. 1. Paris: Guillaume Cavalier, 1734. *Google Books.* Web. March 2020.

La querelle du Cid (1637-1638): édition critique intégrale. Ed. Jean-Marc Civardi. Paris: Champion, 2004. Print.

Quignard, Pascal. *Rhétorique Spéculative*. Paris: Calmann-Lévy, 1995. Print.

Quintilian. *Institutio Oratoria*. Trans. Harold Edgeworth Butler. Cambridge: Harvard University Press, 1921. *Perseus*. Web. March 2020.

Remontrances du Parlement de Paris au XVIIIe siècle. Ed. Jules Flammermont. 3 vols. Paris : Imprimerie nationale, 1888-1898. *Gallica*. Web. February 2019.

Ravel, Jeffrey S. *The Would-be Commoner: a Tale of Deception, Murder, and Justice In Seventeenth-century France.* Boston: Houghton Mifflin, 2008. Print.

Robert, Yann. *Dramatic Justice: Trial by Theater In the Age of the French Revolution.* Philadelphia, Pennsylvania: University of Pennsylvania Press, 2019. Print.

Rosenfeld, Sophia A. *A Revolution In Language: The Problem of Signs In Late Eighteenth-Century France.* Stanford, Calif.: Stanford University Press, 2001. Print.

Rousseau, Jean-Jacques. *Du contrat social. Écrits politiques*. Ed. Bernard Gagnebin *et alia*. In *Oeuvres complètes*. Vol. 3. Paris: Gallimard/Pléiade, 1964. Print.

Russo, Elena. “Marivaux et l’éthique féminine de la sociabilité.” *French Forum* 20.2 (May 1995): 165-82. *JSTOR*. Web. March 2019.

Senault, Jean-François. *De l'usage des passions*. 1641. Paris: Fayard, 1987. Print.

Simiz, Stefano. “Éloquence de la chaire et éloquence du barreau: une rivalité dans la seconde moitié du XVIIe siècle?” *Histoire, monde et cultures religieuses* 35.3 (2015): 23-34.

Sorel, Charles. *La Bibliothèque française*. Paris, Compagnie des Librairies du Palais, 1667. *Google Books*. Web. March 2020.

Sturdy, David. *Science and Social Status: the Members of the Académie des sciences, 1666-1750*. Woodbridge: Boydell Press, 1995. Print.

Talon-Hugon, Carole. *Les Passions.* Paris: Armand Colin, 2004. Print.

Taschereau, Jules. *Histoire de la vie et des ouvrages de P. Corneille*. Paris: Jannet, 1829. *Gallica*. Web. August 2019.

Taylor, Katherine Fischer. “Geometries of Power: Royal, Revolutionary, and Postrevolutionary French Courtrooms.” *Journal of the Society of Architectural Historians*. 72.4 (December 2013): 434-474. *JSTOR*. Web. August 2019.

Tindemans, Klaas. “The Politics of the Poetics: Aristotle and Drama Theory in 17th Century France.” *Foundations of Science* 13.3/4 (September 2008): 325–336. *SpringerLink*. Web. March 2020.

Tinkova, Daniela. *Péché, crime ou folie ? Déicide, suicide, infanticide : la transformation de l’idée du crime et le processus de décriminalisation à l’époque des Lumières*. Diss. École des hautes études en sciences sociales, Paris, 2002. *theses.fr*. 2 vols. Web. August 2019.

Vallé, Oscar de. *Études sur le dix-septième siècle: Antoine Lemaistre et ses contemporains*. Paris: Lévy Frères, 1858. *Google Books*. Web. August 2019.

Plaidoyers et Actions graves et éloquentes de plusieurs fameux advocats du parlement de Bourdeaux. Ed. Gilbert Vernoy. Bordeaux: Vernoy, 1616. *Google Books*. Web. June 2019.

Van Kley, Dale. *The Religious Origins of the French Revolution. From Calvin to the Civil Constitution, 1560-1791*. New Haven and London: Yale University Press, 1996. Print.

---. *The Jansenists and the Expulsion of the Jesuits From France, 1757-1765*. New Haven: Yale University Press, 1975. Print.

Vinken, Barbara. "The Concept of Passion and the Dangers of the Theatre: Une esthétique avant la lettre: Augustine and Port-Royal." *Romanic Review* 83.1 (1992): 45-60.

Chapter 2: The Enlightenment of Legal Eloquence

> On croirait faire injure à la raison, si l'on disait un mot en faveur de ses rivales. Cependant il n'y a que les passions, et les grandes passions, qui puissent élever l'âme aux grandes choses. Sans elles, plus de sublime, soit dans les mœurs, soit dans les ouvrages; les beaux-arts retournent en enfance, et la vertu devient minutieuse.
>
> -Denis Diderot, *Pensées philosophiques* (1746)

> Les âmes sensibles ont plus d'existence que les autres: les biens et les maux se multiplient à leur égard. Elles ont encore un avantage pour la société, c'est d'être persuadées des vérités dont l'esprit n'est que convaincu; la conviction n'est souvent que passive, la persuasion est active […]. L'esprit seul peut et doit faire l'homme de probité; la sensibilité fait l'homme vertueux.
>
> -Charles Pinot Duclos, *Considérations sur les mœurs* […] (1751)

Preface

This chapter analyzes the discursive shifts that occurred in legal writing during the latter half of the eighteenth century as Enlightenment epistemology put forth new modes of understanding the world and of arguing within it. It will thus proceed very differently from the first chapter, which focused on a close reading of a single case in order to both generate a taste for seventeenth-century legal eloquence as well as to provide a cultural

framework for understanding later developments. The necessity of hewing together these periods follows from the practice of early modern law itself, which very often built its arguments on the authority of earlier pleadings by respected lawyers, which were carefully studied in the widely circulated *recueils d'arrêts* such as the *Journal des Audiences*.[124] With this larger cultural framework of the French legal profession in place, we can move forward now more surely into the latter half of the eighteenth century to evaluate prerevolutionary legal eloquence. Equal attention will be paid in this chapter to the legal as well as philosophical discursive productions since it was primarily the interaction of law and philosophy (as opposed to law and religion) that inflected the course of courtroom eloquence during this period. Because the focus will be on this new hybrid, the work of Michel de Servan (1737-1807), the *avocat-philosophe* par excellence, will be featured alonside certain works of the philosopher Denis Diderot (1713-84) that treat matters relating to processes of adjudication.

The choice of Diderot to help illuminate the inner workings of discursive trends in legal eloquence may surprise some readers, more attuned to the importance of Montesquieu or Rousseau as cultural influences in the Enlightenment world of law. Montesquieu, of course, fundamentally altered what it meant to interpret the natural law, and the

[124] The *recueils d'arrêts* were printed compendia of pleadings together with the court's decisions, and were in very high demand among lawyers beginning in the sixteenth century. "[L]'art de l'imprimerie semble n'avoir été inventé que pour l'usage des collecteurs d'arrêts" (Meynial, "Les Recueils d'arrêts et les Arrêtistes," p. 180). The *Journal des Audiences*, in particular, was compiled by members of the Bar, and was considered the most authoritative of these *recueils*. Their authority was not complete, however; beyond recording errors, court decisions could be legally erroneous (overturned on appeal) or otherwise irrelevant to the matters for which they were subsequently cited. Despite the Chancellor d'Aguesseau's warning to beware of putting too much faith in these collections ("[L]e Journal des Audiences du Parlement de Paris, […] n'est pas un garand [*sic*] bien sûr des maximes que l'Auteur de ce Journal y met dans la bouche des Avocats Généraux. Les précis qu'il y rapporte […] ont souvent plus d'autorité de loin que de près" (d'Aguesseau, *Lettre 420* (20 avril 1737) in *Œuvres* [1774], p. 585)), the *Journal des Audiences* was widely cited by Old Regime lawyers.

introductory matieral to this chapter will discuss these contributions. However, it is my contention that Diderot best illustrates the philosophical link between Montesquieu and the lawyers of the prerevolutionary period for reasons that I will quickly sketch here as a preliminary justification for this choice. It is my position that Diderot's *Entretien d'un père avec ses enfants* (1773) gave narrative form to the crisis of legal interpretation following the epistemological fallout of Montesquieu's *De l'esprit des lois* (1748). In the text, one of only a handful he had published during his lifetime under his own name, a series of *cas de conscience* demonstrates the incommensurable relationship between the laws of government and the intuitive morality of individuals. In a way it is the theodicy problem in reverse; what is there to do with episodes of individual justice in political economies whose own defining characteristics can neither abide by nor incorporate such expressions? The *Entretien d'un père* thus figured the irresolvable tension between brittle system and unworkable anarchy. Most interestingly, it indicated radical humility as the only sustainable nexus of justice between these two poles, embodied by the character of the father to whom everyone goes for advice but whose only response is a sort of mirroring behavior, in that he either asks others their advice on the matter or tells of his own trials with law and morality. Diderot's political economy was thus propelled by a paradox (like his theory of acting), namely, that judicial asceticism was required to protect the values associated with the judicial function. A society composed according to the principle of judicial humility could sustain itself without the supersession of one or more of its members to give it form.[125] Of course, Diderot's amalgamation of the moral and judicial function

[125] Diderot in a way posits the opposite of Rousseau's legislator, that beguiling man of "intelligence supérieure" who witnessed "toutes les passions des hommes et qui n'en éprouvât aucune" (*Du contrat social*, bk. II, ch. vii).

within the "citizenry" of the narrative was plausible because their operations were embedded within the domestic space and its passions, and I do not argue that it should be understood as a Diderotian political theory. Rather, this chapter will construe the *Entretien d'un père* as Diderot's effort to reverse the dialectic of seventeenth-century adjudication by grounding justice not in a transcendent God, but rather the fellow-feeling of the domestic sphere. However naïve the portrait may appear from our positivist perspective, the *Entretien d'un père* set forth the most incisive features of Enlightenment judicial philosophy, traces of which, as we shall see, percolated throughout legal discourse of the period.

Introduction

By the middle of the eighteenth century, the strong sense of reason and Christian morality that had largely underwritten legal eloquence during the previous era had almost entirely ceased to function. This outmoding, perceived in embryo in the arguments presented by the barristers in the *Gueux de Vernon* affair, tracked tectonic shifts in the explanatory apparatus of the passions triggered by Senault's *De l'usage des passions* (1641) and especially Descartes' *Les Passions de l'âme* (1649). Descartes' functional taxonomy removed the passions from the scholastic model of the soul, and placed them rather at the intersection *between* the material body and immaterial soul (at the pineal gland). This displacement was pivotal in that it cast the passions as important physiological *objects* of natural scientific inquiry, rather than the source of the soul's moral corruption, indivisible from (and thus unobservable by) the subject. Thus, rather than eternally fleeing his own spiritual degradation through recourse to holy imagery and religious hierarchies, man was

approvisioned with his own apparatus for the regulation of his soul via the observation of the passions. He had become a spectator unto himself.

Though the work of Descartes is considered the watershed moment for the early modern evolution of legal eloquence away from judicial theology in this thesis, empirical investigations into the nature of the passions of course continued throughout the Enlightenmnent period and deserve mention. Of particular note: John Locke's (1632-1704) immensely influential *Essay Concerning Human Understanding* (1690), in which the British philosopher posited that humans were born with no innate ideas, and that thoughts were nothing more than conventional abstractions grounded in sense impressions. Locke's employer, the Earl of Shaftesbury (1671-1713) was also of considerable influence, especially on Diderot, who translated the Englishman's 1711 "An Inquiry Concerning Virtue or Merit" (*Essai sur le mérite et la vertu* [1745]), in which the Earl defended the concept of innate ideas against Locke, interested as he was to ground morality in human nature. Diderot's positive take on the passions and enthusiasm, particularly, can be traced back to Shaftesbury's notion of "moral sense" and man's natural tools for its detection.

The recasting of the passions as the motive force behind the various shapes of laws and governments across time and space in the Baron de Montesquieu's *De l'esprit des lois* (1748) would be the next major epistemological shift after Descartes for lawyers. The treatise brutally detranscendentalized the Roman law for a body of practitioners whose highest achievement had hitherto consisted in the discernment of *a priori* truths found in Justinian's Code. With the publication of *De l'esprit des lois*, man became a spectator of mankind. The breadth of the work, which took into account the histories and intersections of ancient Greek and Roman law, as well as those of the various early Germanic tribes,

examined the diverse forms of government inhering in each as a natural function of the underlying human passions. The study was, like a legal tome, extremely detailed, and did not hesitate to prove its arguments through abundant citations to earlier and distant codes. This work of legal philology disenchanted its readers with the Roman law and the simplistic dichotomy of good or natural versus evil or unnatural law. The only truly "natural" law for Montesquieu was that of climate, which dictated the quality of air and food to be consumed by the people of a specific area. These fundamental realities would determine the circulation of the humors within the bodies and thus the passions of the polity, which would in turn inform the nature of the laws to which the people would likely submit. For example, trial by ordeal, whereby an accused under the Salic law might be made to submerge his hand in boiling water or hold it in fire for a period of time in order to prove his innocence, was an illogical judicial practice viewed from an eighteenth-century perspective. Such antiquated methods constituted "des preuves qui ne prouvaient point, et qui n'étaient liées ni avec l'innocence, ni avec le crime" (*De l'esprit des lois* in *OC* II: 811). Yet Montesquieu's methodology revealed this form of proof to in fact be a very astute choice for a literally calloused people physically inured to the rough handling of heavy iron weaponry. Only "efféminés," or those who wrongly shirked their social duties and thus made themselves worthy of blame were likely to carry the inculpatory blemish after the hand wrappings were removed for the "objective" determination of guilt. The judicial system was embedded along with the people within the physical context of their daily lives, configured to reveal digressions from its demands in moral and legal terms. Thus in this early chivalric culture, where morality and legality coalesced, the *preuve par l'eau bouillante* was an effective judicial practice. By relativizing the basis upon which laws and

procedure could be theoretically justified, Montesquieu demonstrated that laws were not transcendent dicta from God, but rather ephemeral rules whose viability was ultimately contingent on the *mœurs* of a given people, which were in turn contingent upon their larger environment.[126] This local example enclosed a methodology that, scaled up, could describe the economic principle behind all systems of law.

Though Montesquieu's treatise relativized the law through a summary and comparison of western legal systems and their transformations through time and space, his model was not entirely deterministic. Rather, as the Cartesian soul could manipulate the passions through careful physiological observations and thus potentially find reprieve from vice, Montesquieu's political persons could similarly manage the relationship between human passion and forms of government to achieve a relatively balanced state tailored to the economic principle. Thus during the Enlightenment the passions in legal eloquence moved from potentially dangerous, pre-determined affect within a Catholic moral framework to a powerful motivating force to be wielded in the development of a secular public ethics.[127]

Interestingly, my research as encapsulated in the first chapter shows that the rhetorical effects of the liberalization of the passions appears to have had earlier repercussions in legal discourse than in the realm of *belles lettres*. The *Gueux de Vernon* affair showed that what Diderot would theorize during the following century concerning the importance of pantomime, the paradox of acting, and the didactic potential of moral

[126] Montesquieu's contribution to the uncoupling of truth and tradition within the legal framework will be discussed in greater detail later in this chapter.
[127] The necessarily abbreviated discussion of the crucial evolution of the passions between the seventeenth and eighteenth centuries in France found here is more fully developed in Moreau, "Les passions: continuités et tournants" and Talon-Hugon, *Les passions* (2004), particularly ch. 1.

discourse on a public audience had already been developed and put into practice by the lawyers of the previous century. Of course, this is not to say that Diderot did not influence legal practice of the late eighteenth century. On the contrary, lawyers continued to assiduously court the world of letters, and, as we will see in this chapter, the approbation of Diderot and the *philosophes* regarding a piece of legal discourse would become more highly prized than that of the magistrate as the century wore on. Moreover, Diderot's suggestions regarding the improvement of the theatrical space were followed by radical legal reformers such as Jacques Pierre Brissot, who advocated in 1781 for a redesigned courtroom with better optics and stage space for pleadings: "L'avocat claquemuré dans un banc, confondu avec le peuple, pressé de tous les côtés, affublé d'un habit embarrassant, a tout au plus l'espace nécessaire pour remuer les bras. […] On ne peut pas voir les passions se peindre sur son visage […] toute la magie de sa déclamation est perdue pour l'auditeur" ("De la décadence du barreau français," p. 377). Nevertheless, as shown in Chapter 1, many of the fundamental discursive techniques of prerevolutionary lawyers that are often attributed to the philosophical climate of the time, were in fact present in the previous century. However suprising this might seem today, this timeline follows quite logically from the nature of the early modern lawyer's task; as witnessed in d'Aguesseau's speeches before the Parisian Bar, barristers were expected not only to represent the plights of an everyday clientèle, but also provide efficient moral edification to an anonymous crowd in attendance.[128] To that end, they, like playwrights, were enjoined to move the passions of their general audience through pleasing rhetorical devices and enchanting dramatic

[128] In fact, the message of public edification can be traced to the sixteenth-century harangues of *avocat-général* Jacques Faye d'Espeisses (1543-90), which will be discussed in further detail in the following chapter.

interventions which, *unlike* the techniques of playwrights, were aimed at merging the assent of an impassioned crowd with that of the erudite magistrate, in an overall effort to produce judicial and historical closure. Thus, given that lawyers were expected to both convince and persuade, to inflect a legal discourse with the new philosophy redeeming the passions was a relatively simple matter of shifting the balance toward persuasive (i.e., tailored to passion) rather than convincing rhetoric (tailored to reason). Yet, this seemingly innocuous tilting of the balance toward passion in legal discourse would be accompanied by transformations in audience, argument, law, and eventually the state itself as the political imagination sought new bearings in eighteenth-century France.

However, it must be observed that during the seventeenth and early eighteenth centuries, the social and political role of the lawyer was not explicitly conflated or confused with that of the actor. Yann Robert's recent historical revision of late eighteenth-century French theater and its absorption of processes of legal adjudication shows that this (very fraught) intermingling infiltrated public discourse much later, and was a common reflection only starting in the 1750s (*Dramatic Justice* 94-98). The reason for this (here is where I would part with Robert's analysis, which only gestures in passing to legal eloquence prior to the mid-eighteenth century) was that the lawyer's assumption of his client's voice was traditionally a politically sanctified act due to his role's assumed allegiance to reason, which meant that his "impersonation" cleansed the client's passion of any vice – an intervention much more religious in nature than theatrical from a contemporary standard (see Chapter 1, pp. 20-22). Thus the lawyer played the part of the *imagination* of the body politic, a position which permitted communication between the parts of the political soul, as it were, insofar as he imagined each for the other: the reason of the judge was conveyed

to the impassioned people, and vice versa. With the death of the scholastic vision of the soul, however, the ontological commitments of legal discourse shifted; the poltical imagination was liberated from its obedience to reason. However, as the dual register of conviction and persuasion slowly coalesced in the new climate of opinion, where old certainties were found lacking and passion perhaps correct after all, legal discourse would be somewhat adrift, thus permitting the plethora of varying characterizations of this role, including that of the theater player.[129]

This chapter will examine how the redemption of the passions affected discourses both of and about the law during the *siècle de sensibilité*. Of course, as we will see, the century did not just simply unfold according to the proposal of Montesquieu, who formulated the virtual nullification of the judiciary as an interpretive body, reducing it to a group of "inanimés" who served the mechanical task of the "bouche qui prononce les paroles de la loi" (*De l'esprit des lois,* bk. XI, ch. 6).[130] Indeed, if Montesquieu's view had been taken up, we doubtless would not have cause to study today the lofty flights of eloquence that marked the speeches of prerevolutionary lawyers, who would have merely tailored their data to the law and left the robots in peace. Rather, throughout the eighteenth century, norms of legitimate legal speech were being tested and explored through pleadings, judicial memoranda*, ouvertures d'audiences*, and debates among practitioners of the law. Furthermore, such questions were not restricted to the *palais de justice* and its

[129] On the suggested assimilation of roles between the lawyer and the stage actor, see Yann Robert, *Dramatic Justice*.
[130] As Troper points out, Beccaria would expand on this notion in his 1764 *Dei delitti e delle pene* (trans. *Des délits et des peines*, 1765) by being the first person to compare the law to a syllogism, whereby the law in question would constitute the major premise, the facts of the case the minor, with the conclusion formed by the sentence. The law would be furnished by the legislative body, the facts by the jury, and the conclusion would logically follow. "[T]hus, the judge is left with no discretion, and ideally could be replaced by a robot" (Troper 140).

functionaries; new conceptual spaces for adjudication were also being proposed and debated in the wider context of Enlightenment literary activity. This is perhaps nowhere more true than in the work of philosopher and Encyclopédiste Denis Diderot (1713-1784), whose art criticism, theoretical treatises and fictional works incessantly interrogated the generally accepted forms and figures of Old Regime notions of authority. Persecuted and imprisoned under a *lettre de cachet* following the anonymous publication of his 1749 essay, *Lettre sur les aveugles à l'usage de ceux qui voient*, Diderot was only too familiar with the inequities inherent to absolute rule and its power to censure ideas considered dissonant with its policies. Though his philosophical and aesthetic activities ran the gamut of genres from theoretical texts on drama to mathematical treatises, plays and novels, political works and art criticism, his disparate productions were all unified under the greater epistemological project that made knowledge dependent on sense experience. Thus, while legal discourse may have had a head-start in Enlightenment stylistics for various practical reasons, eighteenth-century philosophers enjoyed a relatively unconstrained intellectual and discursive horizon compared to barristers, which allowed the former group to interrogate the premises of the latter. The materialist view of knowledge paired with the epistemological machine of the French philosopher upended the traditional criteria of eloquence in the legal arena. This chapter will explore Diderot's rehabilitation of the (redefined) passions as an appropriate mode for the transmission of knowledge and the legal ramifications of this epistemological shift through the rhetorical production of the philosophical *avocat général*, Michel de Servan (1737-1807).

Diderot and the Rehabilitation of the Passions

As co-editor of the *Encyclopédie* (1751-1772), Diderot set himself and his stable of writers the behemoth task of disseminating forms of knowledge based in reason and set in scientific terms to a wider audience.[131] Unlike the national academies such as the *Académie Française* discussed in the first chapter, the *Encyclopédie* was defined by a material event, the birth and relevance of which depended upon a politically autonomous association of writers, editors, and readers gathered together not by their allegiance to a monarch but rather their common quest for knowledge. The goal of the project was not to reproduce or refine the image of Old Regime society but to reconstitute it according to eighteenth-century Enlightenment values. The traditional trickle-down epistemics of the seventeenth century that grounded true knowledge in an interlocking web of God's grace, the domination of reason over the imagination, and the guidance of the lowly passions by a submissive imagination, found itself subverted in the very experience of Diderot's *Encyclopédie*. Its alphabetical organization, which clustered together articles on religion and masonry, with no sanitizing space between, and especially the often subversive system of *renvois*[132] that connected seemingly disparate articles into problematic constellations, baptized the readership of the *Encyclopédie* in an empirical method that took sense

---

[131] The *Encyclopédie* was available to the public through subscription, a marketing technique recently imported from England (Chambers' *Cyclopaedia* was sold in this fashion). The thornier question of how many people actually could read and have access to the *Encyclopédie* at the time of its publication remains a matter of some debate; Daniel Mornet argued for a healthy distribution, citing its three thousand subscribers, two French re-editions, and multiple counterfeits (*Les Origines intellectuelles*, pp. 134-37), whereas James Melton contended that the *Encyclopédie* did not circulate as easily in France as it did in Germany and Britain, owing to "the cumbersome machinery of royal, ecclesiastical, and parlementary censorship […]"(*The Rise of the Public in Enlightenment Europe*, p. 128). On contemporary literacy trends generally, see R.A. Houston, *Literacy in Early Modern Europe* (2013). For further reading regarding the new form of social membership offered by the subscription model, see Goodman, *The Republic of Letters*, pp. 179-81.

[132] One of the many cherished examples of theologically problematic *renvois* is the article "Anthropophages," which links to "Eucharistie," "Communion," and "Autel."

experience as a viable – indeed the only – starting point. "Any attempt to go beyond sensation was 'vaine spéculation': and Descartes' rationalism suddenly became the promotor of 'l'esprit de système,' to be avoided at all costs" (Crant 108). The "blind passions" of the seventeenth century were blind no longer.[133]

How did the new epistemology affect the lawyers? As previously mentioned, eighteenth-century barristers hardly needed a lesson in the passions; the general audience Diderot hoped to affect had been coming to the *palais de justice* for ages, and the eloquent lawyer was by definition one who knew how to persuade the public as well as convince his judges. Yet it must be recalled that the persuasive elements of legal argumentation were only to be used as a *supplement* to the reasoned conclusions of the lawyer after he weighed the facts and the law; reason as it coincided with authority was the essential building block of eloquent legal speech, anchoring it to the competence of the law court as opposed to that of the public square.[134] This paradigm was fundamentally religious, and took for granted the fickle nature of the passions, to be catered to not as ends-in-themselves but rather as a means through which to corral the uneducated public opinion so it might coincide with the

---

[133] Interestingly, while Diderot gave "sight" (meaning ability to learn) to the senses, he blinded nature, understood here as the God function, by assigning it a random operation with no original order or inherent truth. See the *Lettre sur les aveugles* in *OC* IV, Paris: Hermann, 1975; Tunstall, *Blindness and Enlightenment*, pp. 9-10. It should be noted that the Abbé Prévost had suggested the preeminence of the passions as early as 1731 in his *Histoire du Chevalier des Grieux et de Manon Lescaut* ("Le commun des hommes n'est sensible qu'à cinq ou six passions, dans le cercle desquelles leur vie se passe, et où toutes leurs agitations se réduisent. […] Mais les personnes d'un caractère plus noble peuvent être remuées de mille façons différentes. Il semble qu'elles aient plus de cinq sens, et qu'elles puissent recevoir des idées et des sensations qui passent les bornes ordinaires de la Nature […] et qui les élèvent au-dessus du vulgaire […]" (p. 100). Charles Pinot Duclos (1704-1772), Encyclopédiste and member of the *Académie Française*, took *sensibilité* a step further in his *Considérations sur les mœurs de ce siècle* (1751), a move which had compelling rhetorical reverberations: "Les âmes sensibles **ont plus d'existence** que les autres : les biens et les maux se multiplient à leur égard. Elles ont encore un avantage pour la société, c'est d'être **persuadées** des vérités dont l'esprit n'est que **convaincu** ; la conviction n'est souvent que passive, la persuasion est active […]. L'esprit seul peut et doit faire l'homme de probité ; **la sensibilité fait l'homme vertueux**." (p. 81 [my emphasis]).

[134] The hierarchies of legitimacy proceeding from the distinction of these two spaces would progressively fade throughout the eighteenth century; by 1782, the lawyer Brissot presciently advocated for the abolition of the *Ordre des avocats*, claiming that eloquence could only take place before the public tribunal. *Op. cit.* p. 352.

reasonable decision of the legal apparatus. Thus when Diderot claimed in his early but very successful *Pensées philosophiques* (1746), that the passions were not nefarious, but in fact the enabling conditions without which man could not strive toward excellence, he upended the value hierarchies according to which lawyers had conventionally constructed arguments. "On déclame sans fin contre les passions; on leur impute toutes les peines de l'homme […]. Cependant il n'y a que les passions et les grandes passions qui puissent élever l'âme aux grandes choses. Sans elles, plus de sublime, soit dans les mœurs, soit dans les ouvrages; les beaux-arts retournent en enfance, et la vertu devient minutieuse" (DPV II: 17).

If the lawyer represented the imagination of the political body, traditionally in service to reason (the laws), whose task was the legible communication of images back and forth between reason and passion (the laws and the facts of the case, the judges and the parties), mediating their intersections, what did it mean to elevate the passions as truth-tellers, rather than treating them as meddling detractors requiring careful supervision and guidance? Of course, the judge remained the judge of the case, and the jurisdiction of public opinion remained formally null in the courtroom without any claim on the disposition of cases. Nevertheless, as this chapter will demonstrate, the local contingencies of eloquence were starting to pull apart as the epistemic boundaries separating reason and passion blurred; was the task of the lawyer to remain a demonstration of the passion of his clients as purified by the reason of the law, or had the seat of authority shifted, demanding the facts and even the law itself be submitted to the test of the passions in order to assign their value in an enlightened society? *Avocat général* Louis-Bernard Guyton de Morveau (1737-

1816) encapsulated the complexity of the moment in his 1780 inaugural address to the lawyers at the *parlement* of Burgundy:

> Il eût peut-être été difficile autrefois de décider lequel était le plus nécessaire à la noble profession que vous exercez, ou de la science profonde du Jurisconsulte, ou des talents de l'Orateur; mais le temps qui pèse sur toutes les institutions humaines, a insensiblement dégradé le vieil édifice de notre Jurisprudence; **la raison** tant de fois appellée pour en réparer les brèches, pour en étayer les restes, pour en récrépir les ruines, **a usurpé une partie de l'empire que la loi n'a pas daigné s'assurer,** & ce serait s'aveugler volontairement que de ne pas convenir aujourd'hui que celui qui se présente au Barreau avec cette élocution facile qui plaît à l'oreille & qui intéresse l'esprit, a, dans le plus grand nombre des occasions, un avantage réel sur celui qui ne sait qu'emprunter sans art le langage de l'autorité. Ainsi le premier objet des études de l'Avocat doit être de former son Style. ("Discours prononcé à l'ouverture […]: Du style du Barreau Français," pp. 137-38)

The architectural metaphor of state justice built and cared for by eloquent lawyers had been officially abandoned.[135] Guyton de Morveau's Buffonian prescription[136] to the lawyers of

---

[135] In 1586, the *avocat-général* Faye d'Espeisses evoked the "colonne" of public justice erected through the "divine éloquence" of lawyers as the result of a lengthy process: "N'est-ce pas toi [éloquence] qui aidée de la renommée, affermis & cloués dans nos mémoires & au plus profond de nos cœurs, les plus beaux effets de la Justce? & par ce moyen de l'attention qu'aura éveillée en cette audience mainte doctes & éloquentes contentions, ni plus ni moins que pour ficher une colonne, & tenter bien avant dans terre, on l'ébranle long-temps de part & d'autre, à fin que son ouverture s'élargissant, elle s'y enfonce par sa pesanteur?" (*Neuvième rémonstrance*, in *Les Rémonstrances ou harangues faictes en la cour de Parlement de Paris*, p. 194).

[136] Guyton de Morveau evoked Buffon early in his speech as "le sublime Ecrivain" and later cited a passage from his *Discours sur le style* (1753). Those familiar with Buffon's conception of style might counter that Guyton de Morveau's directive does not, in fact, altogether dispense with erudition; Buffon's *Discours sur le style* (pronounced at his reception into the *Académie Française*) carefully distinguished the man of style

Burgundy of style over erudition was in direct contravention to the counsel conventionally dispensed during such exhortations, which always and emphatically came down on the side of mastery of the subject matter as not only more important than the perfection of style, but as the very foundation of legal eloquence.[137] By cancelling the debt eloquence owed to authority, the Advocate General of Burgundy liberated the political imagination from its servitude, summoning lawyers to "s'élever de leurs propre forces" and to "penser d'après eux-mêmes" (ibid., 161).

How did such a revolution in the politics of legal rhetoric come to pass? Guyton de Morveau, for one, attributed the shift in legal eloquence to advances in philosophy: "[C]'est [la philosophie] qui élève les idées, qui met dans le Style la vie & le sentiment, qui y répand ce charme qui attache, cette chaleur qui se communique, ces mouvements qui transportent; puisque c'est elle enfin qui **crée** la vraie éloquence […]" (ibid., 186 [my emphasis]).[138]

---

from the man of talent; the efficiency of the former depended upon mastery of his subject and, most importantly, his ability to order it, while the latter constituted a mere mechanical event of speech, the effects of which remained at the superficial level. Nevertheless, Guyton de Morveau's injunction to privilege style over erudition marks a crucial turn in the epistemology of legal eloquence in that the knowledge demanded of the eloquent lawyer was to be had by his own drilling down into the material, which was to be thus made *integral* with the speaker, rather than a collection of propositional knowledge to be recalled at will.

[137] Quintilien was the ancient most often cited for the principle of science over eloquence. See Hubert Malfait, *Omer Talon, sa vie et ses oeuvres*, 98. Though this conventional prescriptive was detailed in the first chapter, the following extract from the famous jurist and legal scholar Jean Domat's 1679 *Ouverture des Audiences* provides an excellent – if exhaustive – reminder that the fundamental duty of the lawyer was the apprehension of the laws: "[Le] premier devoir [des avocats], est la science des lois […]. Dans les matières des Coutûmes, par l'esprit des Coutûmes; dans l'ordre judiciaire, par l'Ordonnance & l'usage; dans les causes Ecclésiastiques par les principes des Canons & des autres règles de ces sortes de causes; & dans toutes les matières en général, par les principes du Droit civil que nous tirons des Lois Romaines, parce que les Romains, qui s'étaient rendus les maîtres de tout ce qu'il y avait de connu & d'accessible dans l'Univers, avaient recueilli, composé & établi des Lois, qui dans leur étendue comprennent presque toutes les matières qui peuvent arriver dans la société, & qui dans leurs décisions sont fondées pour la plupart sur les principes de l'équité; ce qui a fait que les nations qui ont été démembrées de l'Empire Romain, & qui avaient été gouvernées par ces Lois, les ont conservées, ou pour s'en servir de lois, ou pour en tirer les principes d'équité dans les jugements" ("À l'ouverture des Audiences de 1679," pp. 432-33). It is important to remember, however, that the positive law was considered essentially rooted in "la loy divine" at this period in the same way that "les sciences particulières […] ont leurs principes communs & généraux dans la Géométrie" (ibid., 433).

[138] Likewise, in 1775 during his speech before the *grand'chambre* in Bordeaux at the return of the parlements from Maupeou's exile, Jean Baptiste Mercier-Dupaty, the *avocat général* of the *parlement* of Bordeaux, signalled philosophy as the cause of a new eloquence among the bar: "La philosophie a élévé, avec le temps,

Judicial eloquence had been inflected by an outside discourse. Indeed, the strategies of Enlightenment philosophers coincided largely with those of the barristers in that both parties understood the necessity of cultivating eloquence for purposes of reception. Diderot himself was a great innovator of philosophical eloquence; his was a seductive mode of expression that invited its reader/spectator to join a conversation or activity, one that often required them to suspend their prior knowledge. However, if the lawyer often engaged in this as well, it was never to *remain* at a state of passion or paradox, but rather to obtain a disposition of his dramatic narrative through a decisive speech-act authorized by the state.[139]

We must also distinguish between the rhetorical intentions of those engaged in the business of lawyering versus those seeking to spread philosophical ideas, for there are curious intersections. Like the lawyer, who traditionally fashioned *mémoires judiciaires* and *plaidoyers* with two audiences in mind, Diderot's *Encyclopédie* was also purposefully constructed for dual readership. In his article "Encyclopédie," Diderot explained his system of cross-references, or *renvois*, which linked together often radically disparate ideas, in the following manner:

> Il y aurait un grand art & un avantage infini dans ces […] renvois. L'ouvrage entier en recevrait une force interne & une utilité secrète, dont les effets sourds seraient nécessairement sensibles avec le temps. Toutes les fois, par exemple, qu'un préjugé national mériterait du respect, il faudrait à son article particulier l'exposer respectueusement, & avec tout son cortège de

---

un tribunal invisible d'où l'éloquence tonne encore quelquefois sur l'univers, où se discutent à présent les questions les plus intéressantes pour la législation des empires; où la liberté plaide à présent devant la raison […]" (qtd. in *Journal encyclopédique* V.i (juillet 1775): 297-98).

[139] For a full discussion of speech-act theory, see Austin, *How to Do Things with Words* (1962).

> vraisemblance & de séduction; mais renverser l'édifice de fange, dissiper un vain amas de poussière, en renvoyant aux articles où des principes solides servent de base aux vérités opposées. Cette manière de détromper les hommes opère très promptement sur les bons esprits, & elle opère infailliblement & sans aucune fâcheuse conséquence, secrètement & sans éclat, sur tous les esprits. (*ENC* V: 642a)

Diderot, in this relatively contentious article,[140] distinguished between two different types of readers, the first being the intellectual elite whose mental organization vibrated on a sufficiently common wavelength with that of the editor so as to hear the critical conversation swirling on top of the din of opposing articles. All other readers, whose minds were less atuned to the activity of unencumbered thought, would nevertheless receive the salubrious effects of uncertainty via the cacophony of dissonant articles, a mental environment too mobile for the accretion of harmful *idées reçues*.[141] This passage, written in opposition to those who were attacking the organizing principles of the *Encyclopédie* project, highlighted not only the new mode of philosophical discourse, but its assumed pedagogical responsibilities vis à vis the larger audience. Like the lawyers of the Ancien Régime, Diderot found himself compelled to convince two audiences: the elect and the rest. However, where lawyers were supposed to hold facts up to the light of the law for the judges while impassioning this same gesture in complementary narratives for the

---

[140] For an explanation of Diderot's polemical tone in this article as well as a full analysis of the system of *renvois*, see Anderson, "Encyclopedic Topologies."

[141] The double register employed by Diderot was characterized by Carol Blum as a kind of trap door for the reader to ensure he underwent the process of re-education: "If persuasion, or the appeal to reason, should fail, then seduction, or the manipulation of the passions, was deemed legitimate […]" (Blum, *Diderot: the Virtue of a Philosopher*, p. 37). As an aside, I do not dispute Blum's choice of words, which squares nicely with how Diderot conceived his sensual epistemology, but merely take the opportunity to point out how the mapping between persuasion and passion, reason and conviction, had importantly shifted from the previous era.

persuasion of the lay audience, Diderot's system of cross-references was intended to expose discrepancies in all systems, to remove blind consent to old beliefs, and to reauthorize sense experience as the primary locus of intellection. Thus, whereas the rhetorical training of the lawyers was intended to remain distinct from the contents of their legal training, in that their performance of the law did not map onto their knowledge of the law, for Diderot, the activity *was* the education. The passions were not to be manipulated, but followed as guides toward the production of knowledge.

Moreover, the tripartite vision of the soul that dominated idealist intellectualism (reason/imagination/passion), and according to which legal eloquence had traditionally been composed, found its materialist descendant in Diderot and d'Alembert's diagram of human knowledge, or "Système figuré des connaisssances humaines" (*Prospectus*). "The encyclopedic *mappemonde* or knowledge network was designed to map and thus reflect the order that the encyclopedists believed that thought imprints upon the world […]" (Brewer 48). Rather than a Soul comprised of Reason, Imagination and Passion, Diderot's paradigm depicted Understanding as composed of Reason, Imagination and Memory. It is important to note the differences: whereas in the seventeenth-century vision, the soul remained virtually dormant in the absence of God's grace, the Enlightenment concept of understanding was active only in the presence of sensory information. Though two faculties corresponded – reason and imagination – the passions were promoted from the lowest portion of the soul in the religious model to the irremissible context outside of which nothing could be thought in the *Encyclopédie* – i.e., the position previously held by God.[142]

---

[142] Of course, this comparison is not to say that Diderot and d'Alembert explicitly intended to desacralize the earlier model (though they would not have been opposed to doing so), but rather to highlight the crucial evolutions concerning theories of knowledge acquisition.

Given these important distinctions, we may wonder why Diderot's Enlightenment project would have mattered to the everyday work of the *advocats plaidants* in the way Guyton de Morveau claimed; they were tasked not with the improvement of society but the defense of their clients' interests. However, we must remember that Old Regime lawyers were also very often men of letters whose social standing depended on excellence in both capacities.[143] Recall that in the Beggar of Vernon case from the previous chapter, at least two out of the four lawyers were well-respected poets and playwrights, and that lawyers constituted a full quarter of the *Académie Française* at its founding. The professional boundaries between lawyer and poet, philosopher and magistrate were easily and frequently transgressed because they did not exist then in the way they do today. Moreover, even when lawyers declined to exchange their hoods for laurel wreaths, the professional activity of an early modern lawyer resembled in form and function the *homme de lettres*; for example, *avocats plaidants* often performed their pleadings before avid crowds of onlookers as though onstage, and *mémoires judiciaires* could be disseminated by the thousands to an insatiable public readership: "[P]ublished trial briefs were issued in quantities that outstripped those of most other kinds of printed matter at the time […]. [A]ny given copy of a hot *mémoire* in a sensational case was read by several people; and […] several texts describ[e] mob scenes around booksellers' shops and lawyers' houses when an eagerly awaited trial brief was finally made available to the public" (Maza 2). Thus, due to their traditionally wide range of intellectual pursuits and obligation to atune their rhetoric to the mood of the day in order to remain eloquent, lawyers and philosophers often moved in the same social circles, corresponded, and collaborated.

---

[143] For a general survey on the traditional intersections between the lawyer and the *homme de lettres*, see Fumaroli, *L'Age de l'éloquence*, pp. 585-622.

An anecdote to illustrate the intersectionality of the worlds of law and letters: on September 8, 1769, just as everyone was leaving the last representation of Diderot's *Le Père de famille*, Jean Baptiste Mercier-Dupaty, the brilliant young *avocat général* of the Parlement of Bordeaux, breathlessly introduced himself and his wife to the philosopher by presenting him a trial brief he had recently written for an impoverished widow against the family of her late husband.[144] Though Diderot had been trained in the law,[145] Dupaty obviously did not expect a technical opinion from a legal point of view. Rather, the young lawyer wanted the philosopher to confirm his *style*; legal eloquence for Dupaty as for so many other lawyers of this period was to be judged by the standard of *philosophical* eloquence, i.e., did the work persuade and seduce its audience toward civic virtue? Diderot's reaction to the brief, found in the *Correspondance littéraire* of 1 October 1769, was indeed limited almost entirely to the question of style: "Son plaidoyer sent encore le jeune homme. Il y a dans le style de l'emphase et de la diffusion. On lui désire plus de nerf, de précision, de sévérité. Malgré ces défauts on a peine à concevoir qu'à vingt-deux ou vingt-trois ans (car M. Dupaty n'en a pas davantage) on possède autant de connaissances, d'éloquence et de logique" (DPV XVIII: 74). That it was the philosopher demanding greater rigor and precision of the lawyer in the exercise of the latter's own genre belies the notion of discreet institutional categories of writing and audiences that we might otherwise imagine having existed between the two writers.[146] The cross-pollination that had gone on

[144] The brief in question was entitled *Le Discours de Monsieur Dupaty, Avocat général au parlement de Bordeaux, dans la cause d'une veuve accusée d'avoir forfait après l'an de deuil, prononcé à la Grande Chambre le 15 et 22 juin 1769*.
[145] After his education in Paris at the Jesuit collège Louis-le-Grand and the Jansenist collège d'Harcourt, Diderot attended the Faculté de droit between 1732-34 and clerked in the office of Clément de Ris (DPV I: 12).
[146] Diderot had also composed a defense of the Calas family for circulation in the *Correspondance littéraire* after having read the volume of defenses composed by the famous lawyers Élie de Beaumont, Mariette, and

in the preceding century between the theological *éloquence de la chaire* and the *éloquence du barreau* was tapering off and lawyers easily embraced the philosophical hybrid.

Revisiting the Judicial Aesthetic: Diderot's *Salon de 1767*

In the true style of Diderotian inquiry, let us make an unexpected turn here into the art world to gather an appreciation for Diderot's conception of the justice system. Today, if you were to step inside the criminal courtroom of Rouen's magnificent Gothic *palais de justice*, you would see a 12'x15' painting by the renowned Parisian artist Jean-Jacques Durameau (1733-1796)[147] entitled *Le Triomphe de la Justice*. The allegorical painting is ostensibly well-suited for a court of law: Themis, or Lady Justice, clothed in flowing garments of soft blue and gold, flies through a swirling rococo sky upon a chariot drawn by unicorns (symbols of purity) surrounded by lambs and cherubs. Her glorious caravan blithely crushes a dark world of monstrous evil below. Face set in unmoving determination, she crowns a supplicating, white-clad Innocence with her left hand as she holds aloft the scales of justice with her right. Prudence, Strength and other figures of virtue make up her hallowed cortège, while clawing personifications of Cruelty and Envy try to halt their progress. Themis tramples the evil figures with an air of serenity bordering on sedation. Of course, she need not demonstrate any preoccupation or engagement with the violent circumstances surrounding her; her presence alone suffices to maintain the balance of justice precisely because she is the symbol of divine order. Thus she remains above the fray, almost blind to the events surrounding her, situated rather to directly face the space

---

Loyseau, stating "il y a dans cette cause cent moyens secrets qu'ils n'ont pas fait valoir, et qui seraient d'un très-grand poids" (*C.L.* t. 3, 15 janvier 1763, p. 155).

[147] Durameau, a student of Jean-Baptiste Marie Pierre, won the prix de Rome in 1757 and was later named professor at the *École des beaux-arts de Paris* in 1781, confirmed 1794.

of the viewer. The message was clear, if also a bit trite: justice was utterly invulnerable to attack or dissuasion.

Figure 2-1, Jean-Jacques Durameau, *Le Triomphe de la justice* (1767). Rouen, Palais de justice.

The *Triomphe* was displayed at the 1767 Salon, or official art exhibition of the *Académie royale de peinture et de sculpture* that took place at the Louvre. The work, which recalled that of other contemporary rococo artists such as François Boucher (1703-1770) and Charles-Joseph Natoire (1700-1777), garnered approbation in the pages of the *Mercure de France*,[148] and Durameau would receive a royal commission for the ceiling painting of the Royal Opera of Versailles the following year.[149] Yet for all its accolades, the *Triomphe*

[148] "[...] l'auteur a mis tout le feu du génie & a rendu tous les objets dans le beau caractère de dessein, dont il a puisé les principes à Rome" (*Mercure de France*, octobre 1767, pp. 162-63).
[149] *Apollon couronnant les arts*, ceiling of the Opéra de Versailles (1769).

left Diderot utterly cold, an impression he related in his superlative work of art criticism, the *Salon de 1767* (*Salon III*: 436-441)[150] to which I will now turn.

Diderot begins his criticism of Durameau's painting of justice with a general description of the work's pictorial contents. After offering a point-by-point description of the painting's surface, Diderot begins his incisive critique: "L'effet général de ce tableau blesse les yeux" (437). Rather than the "mélange d'hommes, de femmes, de dieux, de déesses, d'animaux, de loups, de moutons, de serpents, de licornes" (ibid.) found in Durameau's painting, Diderot suggested forgoing allegory altogether ("la ressource d'une tête pauvre et stérile"), in favor of a more familiar subject, meaning one that might be found in the natural world: "on ne sait que louer ou reprendre dans des êtres dont il n'y a aucun modèle rigoureux subsistant en nature" (ibid.).[151] For the philosopher, the aesthetic and pedagogical stakes were one and the same; Themis, the Greek symbol of divine justice, was a poor choice of subject because the common man shared no dimension of mutuality or interchange with the metaphysical realm she occupied. Beyond the fact that "divine justice" simply fell outside Diderot's materialism, its pictorial representation was inefficacious due to the viewer's inability to identify with the mythological figures in the painting, an obstacle that would prevent the absorption of the painting's viewer into the

---

[150] All citations to the *Salon de 1767* are to the Hermann edition, *Salons III : Ruines et paysages*. *Le Salon de 1767*, eds. Bukdahl, et. al., 1995.

[151] Diderot's apathetic attitude before the didactic potential of mythological figures corresponds to the shift in taste during the Enlightenment away from the theogonical figures of traditional mythologies toward the sacralization of man, a shift described by Starobinski in "Fable et mythologie aux XVIIe et XVIIIe siècles," *Le remède dans le mal*, pp. 233-62. ("[C]e qui était le *sacré*, au début du XVIIIe siècle – révélation écrite, tradition, dogme – a été livré à la critique, "démystifiante" qui l'a réduit à n'être qu'œuvre humaine, imagination fabuleuse: c'était ramener le sacré à une fonction psychologique, et c'était tout ensemble conférer à certaines facultés humaines […] une fonction sacrée. Dans l'histoire intellectuelle du siècle, la sacralisation du mythe est étroitement tributaire de l'humanisation du sacré" (p. 260 [author's emphasis])).

action of the work.[152] Those parties, judges, attorneys, and general public that populated the bustling courtroom would not, in the manner of Diderot in *La Promenade Vernet*,[153] walk among Lady Justice astride her golden chariot, simulating the lessons of the narrative art into their own lives. Rather, they would remain detached, outside the scenic space due to the insurmountable distance between themselves and Durameau's overly theatrical figures. The viewer would remain unabsorbed, thus unimproved.

After criticizing the *Triomphe* for imposing an image of justice rather than creating a narrative world habitable by its spectator, Diderot explains how he would have gone about executing a commission destined for a *palais de justice*:

> Si j'avais eu à composer un tableau pour une chambre criminelle[…], au lieu d'inviter des hommes devenus cruels par habitude à redoubler de férocité par le spectacle hideux des montres qu'ils ont à détruire, j'aurais feuilleté l'histoire, au défaut de l'histoire j'aurais creusé mon imagination, jusqu'à ce que j'en eusse tiré quelques traits capables de les inviter à la commisération, à la méfiance; à faire sentir la faiblesse de l'homme, l'atrocité des peines capitales, et le prix de la vie. (438-39)

Diderot prescribed eschewing the essentialization of vice and virtue, counseling the artist to imagine instead the goings-on of the mundane courtroom, where judges grew

[152] Michael Fried explained the two main prongs of Diderot's anti-theatrical aesthetic program of absorption as sufficient similarity between the fictional world and that of its audience (so the latter might imagine themselves within it), and the perceived exclusion of the audience from the self-contained fictional world by virtue of the fourth wall. (*Absorption and Theatricality* (1988)). Absorption in works of literary fiction and Diderot's wavering attitude between "an ironic conception of the writer as a self-conscious spinner of lies and a sacralized conception of the writer as […] the virtuous carrier of a truth" is treated by Russo, *Styles*, pp. 22-24.

[153] In *La Promenade Vernet*, Diderot expresses the importance of spectator-subject proximity thus: "Moins la distance du personnage à moi est grande, plus l'attraction est prompte, plus l'adhésion est forte" (*Salons III:* 199).

dangerously apathetic as their duty required them to view their fellow man through a thick screen of legal categories and imperatives.[154] To further abstract the magistrate from the phenomenological experience of the courtroom through an iconic figuration of justice risked accelerating the judge's descent toward inhumanity.

Rather than sharpening the viewer's resolve to mete out judgment in obedience to categorical norms of justice, Diderot instead called for a tableau capable of generating feelings of mercy. To illustrate his point, Diderot offered a description of Apelles' *Calumny* as a suitable substitute for Durameau's work.[155] It should be noted that Diderot had not seen the painting – no one had since none of the renowned Greek's paintings had survived – but a description of it survived in Lucian's *Dialogues*, in which the author related a picture containing the ghastly female figure of Calumny, dragging by the hair toward a judge the figure of Innocence, a horror-struck child desperately imploring the heavens for deliverance. (I have inserted a reproduction of Sandro Botticelli's 1495 *La Colunnia di Apelle* for the reader's consideration, as this painting most carefully reconstitued the disposition of the original as told by Lucian[156]). The judge, rather than majestically occupying the center of the painting, was relegated to the extreme right of the frame, and seen in shadowy profile. Durameau's triumphant and celestial justice was replaced by a very human substitute, whose ability to transcend evil was entirely improbable: he sits, passively listening out of donkey ears to the lies of beautiful conspirators. Calumny

[154] Indeed, the magistrature itself worried over the potential degradation of the individual judge's morality if required to dole out punishments every day on his fellow man, and for this reason the criminal court of Paris regularly rotated its roster of judges (hence the name *la Tournelle*).

[155] True to Diderot's prescription that the painter should look to their own experience in order to derive the proper subject, Apelles was said to have composed the painting in reaction to a rival's effort to defame him to King Ptolemy, a plot which nearly cost Apelles his life.

[156] For a discussion of the influence of Lucian's *On Calumny*, and especially Botticelli's familiarity with and scholarly interest in the subject, see Altrocchi, "The Calumny of Apelles in the Literature of the Quattrocento," pp. 454-91.

disguised as innocence and her defenseless victim occupied the central space that Durameau had reserved for Lady Justice; vile iniquity had usurped the throne of righteousness. The viewer, caught in this pre-adjudication suspense, feels justice slipping away.

Figure 2-2. Sandro Botticelli, *La Calunnia di Apelle* (ca. 1495), Uffizi, Florence.

Diderot's "painting" implores spectators not to judge according to the even, apathetic ideal of justice as portrayed in Durameau's rendition, but instead to feel compassion for the oppressed and perhaps even accuse oneself of judicial negligence. By replacing the abstract notion of justice with the specific vice of calumny, an actionable speech that was both the cause and result of injustice,[157] the spectator is meant to see the

[157] In the *Encyclopédie*, "calomnie" is defined "outre sa signification ordinaire" as also the name of the punishment or fine imposed for a malicious or frivolous trial. This term derives from the older sense: "On appellait aussi anciennement *calomnie* l'action ou demande par laquelle on mettait quelqu'un en justice […]

painting and "adjudicate" at an emotional level.[158] It should be noted that justice for Diderot was extremely personal and hyper-local, and any attempt to institutionalize a procedure for justice was suspect because the philosopher did not admit the legitimacy of abstract, immutable judicial procedures in isolation from man's experience.[159] In a few short sentences Diderot exemplified his epistemological program for paintings of justice, or, rather, paintings *for* justice via the activation of compassion. He reached into the very real and recent past of the tribunal to find not a hero but a victim of the magistrates, a man to whom no mercy was shown but who now served as a rallying cry for religious tolerance and judicial circumspection.[160] The Calas Affair of 1764, in which a Protestant father was falsely accused and executed on the wheel for the death of his son, was for Diderot a perfect example of the evil fomented behind the guise of impersonal law.

> Ah, mon ami, le témoignage de deux hommes suffit pour conduire sur un échafaud. Est-il donc si rare que deux méchants se concertent? que deux hommes de bien se trompent? […] Le premier pas de la justice criminelle ne consisterait-il pas à décider sur la nature de l'action, du nombre de témoins nécessaires pour constater le coupable? ce nombre ne doit-il pas être proportionné au temps, au lieu, au caractère du fait, au caractère de

---

& en ce sens elle se disait même d'une légitime accusation, & d'une demande juste" ("Calomnie," *ENC* II: 564).

[158] The horror and indignation that the reader/viewer felt for the injustice embodied in the character of Innocence with whom he or she empathized was supposed to stimulate the viewer's capacity for just action in the world ("[…] Diderot saw no fundamental separation, but rather interpenetration, between the emotions created by fiction and those the reader would experience in real life […]" (Russo*,* *Styles*, p. 113)).

[159] Diderot puts forth his compassionate model of adjudication in his *Encyclopédie* article "Châtiment": "[S]e ressouvenir qu'en prononçant contre autrui, on prononce aussi contre soi-même, et que si l'équité est quelquefois sévère, l'humanité est toujours indulgente; voir les hommes plutôt comme faibles que comme méchants; penser qu'on fait souvent le rôle de juge et de partie […]" (*ENC* III: 250).

[160] Jean Calas was posthumously exonerated only two years prior to Diderot's *Salon de 1767*, thanks largely to Voltaire's very public denunciation of the case's judicial procedure in his *Traité sur la tolérance* (1765).

> l'accusée, au caractère des accusateurs; **n'en croirai-je pas Caton plus volontiers que la moitié du peuple romain?** O Calas, malheureux Calas, tu vivrais honoré au centre de ta famille, si tu avais été jugé par ces règles. (*Salon III* 439 [emphasis mine])

The rhetorical resonance between Diderot's lamentation and Enlightenment-era lawyers' own dramatic flights of passion is uncanny. Through the use of direct address and interjection, the passage dramatized judicial procedure, conveying a sense of intimacy, spontaneity, emotion and doubt. With his repetition of interrogative sentences, Diderot not only deconstructed the value of the two-witness system as a reliable test of guilt, but problematized the issue of witness testimony altogether.[161] How could the arithmetical equation that determined guilt or innocence in a given case[162] accommodate ultimately unfathomable questions such as personal credibility, especially in the supposedly neutral space of the courtroom? Rather than a dispassionate application of procedural rules for the determination of guilt or innocence of the accused, Diderot posited a preliminary trial to evaluate the morality of the accusers, accused, and witnesses, which would determine the weight of their testimony in the main case.

---

[161] Diderot's emphasis on the fallibility of witness testimony likely derived from his reading of Servan's *Sur l'administration de la justice criminelle*, published and widely distributed that year, which bemoaned the justice system's reliance on witness statements, the worth and evaluation of which could never be precisely determined. ("Mais, lorsque l'évidence de l'entendement ou la certitude des sens nous manquent, lorsque nous sommes contraints d'aller mendier nos connaissances chez d'autres que nous-mêmes, & de composer nos jugements parmi les témoignages étrangers des hommes ; il n'y a plus rien de certain & de commun. Quels sont en effet ces hommes que je consulte? Quels droits ont-ils d'être crus? Quel empire leurs sensations ont-elles sur mes sens, leur entendement sur ma raison? Quel rapport y a-t-il, en un mot, entre ce qui est, & les vaines paroles dont ils frappent mes oreilles?" (Servan, *Sur l'administration de la justice criminelle*, in *Œuvres diverses*, pp. 67-68)).

[162] The consitution of legal proof was often a matter of simple math in both civil and criminal matters in the Old Regime. For example, a single proof of an oral contract could be constituted only by two (upstanding) witnesses ("un témoin unique fait semi-preuve" (Potier, *Traité des obligations* II.ii)).

From our twenty-first century point of view, Diderot's proposal might seem wistful, utopian, or perhaps even downright dangerous – as though an art history major accidently sat down in a criminal procedure course and started asking questions. How could he be serious? Beyond the imposition of a unified civil morality for the individual appraisal of each witness' propensity toward truthfulness (an idea, granted, that would have seemed much more plausible in eighteenth-century France than today given its intertwining of church and state),[163] such "reforms" would extend judicial resources beyond measure in a potentially unending succession of morality plays, each likely designed to undermine the other.[164] Yet our most obvious objections did not give pause to Diderot, for whom there was no firmly objective set of normative criteria by which an accused might be judged; his was a mercy-based, emotional justice, a subjective standard always demanding that the judge place himself in the position of the judged. In brief, Diderot proposed in this piece of art criticism a judicial ethics entirely ineligible for codification in a way that might preserve the rule of law over a personal sense of justice.[165]

But are we not taking Diderot's views on the judicial system too far here? Despite his legal studies, the philosopher was no lawyer – why take his poetic digressions from the art world into the law so seriously? The answer is because Diderot's vision of justice was

---

[163] Of course, in the U.S. today, witnesses may generally be impeached when the opposing party introduces evidence attacking the character of the witness. However, it should be noted that a witness' character can *only* be impeached, never buttressed (unless it is first attacked). Diderot, on the other hand, seemed to suggest a moral qualification process for any and all witnesses, which would be open to an untold number of permutations dependent on many factors. Today's practitioner might explain the dissonance by observing that the law is no place for justice.

[164] Servan anticipated and acerbicly countered the convenience-based opposition to Diderot's proposal: "Eh! quel juge barbare voudrait risquer par un jugement précipité, de racheter, au prix d'un assassinat, quelques moments d'une vie qu'il doit toute entière au public?" (Servan*, Sur l'administration*, p. 72).

[165] Reddy describes the problem inherent in the veridiction process of feelings: "[E]motion claims about self or others do not admit of independent verification. The only way to determine the "accuracy" of an emotion claim such as "I am angry" is to notice the coherence of such a statement with other emotionally expressive utterances, gestures, acts, all of which make reference to something no one can see, hear, or sense" (Reddy 114).

congruent with that promulgated by the most prominent legal reformer and lawyer of the mid-eighteenth century, Michel de Servan, to whom we will now turn.

Michel de Servan and the Intention of the Laws

Despite an abbreviated courtroom career, Antoine-Joseph-Michel de Servan (1737-1807) was one of the most famous legal orators of the eighteenth century and Diderot's personal favorite. Sworn in before the *parlement* of Grenoble in 1764, Servan would become a star of the *philosophe* set only three years later following the publication of two widely-circulated speeches: *Sur l'administration de la justice criminelle* and his *Discours dans la cause d'une femme protestante*. Servan had clearly chosen to align himself with the philosophers from the beginning; he had introduced himself in 1765 to Voltaire, who wrote "Il est venu chez moi […] un jeune petit avocat général de Grenoble, qui ne ressemble point du tout aux Omer; il a pris quelque leçons des d'Alembert et des Diderot: c'est un bon enfant et une bonne recrue" (qtd. in Lanson, "Sept lettres inédites de Michel Servan à Voltaire (1766-1770)," p. 314). Beyond his warm exchange with Voltaire, he was also a correspondent of the Baron d'Holbach, Helvétius, and Grimm.[166] His emphasis on the necessity of good *mœurs* as the essential building blocks of a healthy society,[167] without

[166] For detailed biographical information, see Lanier, *Michel Joseph Antoine Servan ou de Servan* (1995), and de Portets, *Œuvres choisies* (1825).
[167] The important political role of *mœurs* in a stable society was a widely held opinion among eighteenth-century thinkers: from the *Discours sur les sciences et les arts* (1750) to his *Considérations sur le gouvernement de Pologne* (1780), public *mœurs* and their varying levels of health or depravity in relationship to the process of social change were of primary importance in the development of Rousseau's political writings; Charles-Pinot Duclos offered a discourse on national *mœurs* in the Enlightenment style of empirical observation (*Considérations sur les mœurs de ce siècle* [1751]); Guyton de Morveau delivered an address before the Parlement of Grenoble on the importance of public education, since it was here where *mœurs* were learned, without which the laws would not be respected (*Mémoire sur l'éducation publique* [1764]); and, of course, the baron d'Holbach (*Ethocratie, ou le gouvernement fondé sur la morale* [1776]), whose treatise took aim primarily at tyrannical government as the cause of bad *mœurs*. General interest in the development and perpetuation of *mœurs* throughout history as proof against the supremacy of Judeo-Christian nations constituted the longest occupation of Voltaire's life, visible in his *Essai sur les mœurs* (1740-1778). The

which positive laws could have no effect, furnished the central argument in both his pleadings and his public speeches. Though Diderot generally categorized lawyers among those functionaries who "se pervertissent avec le temps," who "veulent des honneurs et de la richesse à quelque prix que ce soit" and "deviennent souvent d'autant plus méchants qu'ils ont plus de lumières" (DPV XVIII: 74-75), he considered Servan an admirable exception, a "prosélyte de la philosophie" (*CL* t. 5, 1 février 1767 p. 307). In 1769, Servan's *Discours sur les mœurs*, delivered before the parlement of Grenoble, was so well received that admiring crowds thronged his home afterward to continue their applause. (Hoefer, *Biographie générale* 43: 806). His bright star burned quickly, however, and the powerful upstart found himself retired from public life only five years later, booed off the stage, or tribunal, as it were, for refusing to champion the cause of an opera singer against her erstwhile aristocratic lover.

Let us first examine the speech that shot him to stardom, *Sur l'administration de la justice criminelle*, which was composed during the same period as his most famous *plaidoyer* and might well be considered a pendant to the latter. In fact we will find that his pleading logically proceeds directly according to the philosophical tenets propounded in this rather political harangue pronounced before the judges, lawyers and procureurs of the Parlement of Grenoble during the *rentrée* of 1767. Such speeches were traditionally delivered twice each year (after the Saint Martin and Easter holidays) by the *avocat général*, who spoke on a subject usually pertaining to ethics in an eloquent style as a model for emulation by the lawyers. However, Servan's harangue differed markedly from the

---

lawyer and future Encyclopédiste François-Vincent Toussaint's philosophical treatise, *Les Mœurs*, was condemned to be lacerated and burned by the *Parlement* of Paris in 1748 due to one of the character's likeness to Queen Marie Leczinska (a sentence that did nothing to stifle its fabulous success; it went through thirteen editions in its first year).

usual fare. From the outset, Servan demarcated his speech from its lineage, claiming to address not the legal bodies of judges and lawyers, but rather the entire people of France: "[I]l faut même que je l'avoue, je désirerais que tous nos Citoyens m'écoutassent en ce moment: je voudrais leur dire, c'est pour vous, pour vous seuls, pour vous tous que je vais parler" (Servan, *Sur l'administration*, p. 4). This speech marks from within the height of the profession itself a pivot away from special knowledge, as Servan worked to curate the life of the law for mass consumption.[168]

From the very beginning of his speech it was clear that Servan considered passion both as his guiding principle, and his method of expression. The incipit to the otherwise serious-sounding *Sur l'administration de la justice criminelle* drips with sentiment as the avocat général effused apologies and subtle self-forgiveness for its composition, explaining his speech as the irrepressible emanation of "l'émotion continuelle, que j'éprouvais en le considérant," a feeling, however, that assured him his subject was not only useful but "intéressant" (Servan, *Sur l'administration*, 4). Though "interesting" has become about the least interesting word in today's usage, *intérêt* and *intéressant* were crucially important technical terms in eighteenth-century France. *Intérêt* was often used in a negative sense as an isolating principle, such as a selfish obsession with money or status that cut one off from more harmonious social instincts. Lawyers and judges were regularly admonished by their

[168] We can glimpse Servan's distaste for traditional legal erudition and a desire to not only reform but refound the laws in a letter to Voltaire, dating from late 1767: "Vous savez trop, Monsieur, que nous n'avons aucun ouvrage complet sur notre législation; nous n'avons pas même de bons ouvrages sur les parties séparées de notre législation; dans quel livre étudier notre droit public? Il faut aller le chercher dans nos ordonannces mêmes, et jusque dans nos vieux capitulaires; nos parlements ne nous entretiennent que des lois fondamentales, **et nous ne savons guère quelles sont ces lois**, et bien moins encore ce qu'elles devraient être, **il me semble que l'érudition a trop absorbé ce sujet**. On a beaucoup discuté les origines de nos lois, et fort peu le bien et le mal ; on nous laisse mourir de faim, en nous faisant avaler les cendres de nos pères." (qtd. in Lanson 322 [my emphasis]).

superiors for giving in to base *intérêt* rather than considering the public good.[169] The poet and philosopher Jean-François de Saint-Lambert (1716-1803) defined it thus: "[intérêt] signifie ce vice qui nous fait chercher nos avantages au mépris de la justice & de la vertu, & c'est une vile ambition; c'est l'avarice, la passion de l'argent [...]" (*Encyclopédie* 8:818). *Intérêt* in this sense was synonymous with *amour-propre*, despised throughout the seventeenth century by the likes of Blaise Pascal, François de La Rochefoucauld, and Pierre Nicole as that vicious passion which stymied human moral progress. However, by the second half of the eighteenth century, the realm of *belles-lettres* had generated a new form of *intérêt* altogether, one that meant quite the opposite of its predecessor but with which it was nevertheless intimately linked. Instead of impeding sympathy with one's fellow man, the *intérêt* present onstage or in the novel actually instituted a new mode of identification,[170] a "helpful conceptual channel between the spectator and the onstage characters who, of course, have 'interests' of their own" (Harris, *Inventing*, 166-67). It was the primary goal of the playwright to "intéresser [le public] au sort de ses Héros" (Mably, *Lettres*, 34). For a successful latching of *intérêt*, the illusion presented to the reader or spectator had to be complete and absorbing: "dès que l'illusion cesse, l'intérêt disparaît" (24). Illusion, in turn, would occur "dès que les passions seront vivement remuées" (33). By mid-century, the terms "'interest' and 'illusion' often become curiously intertwined and

---

[169] D'Aguesseau offered the following stern words in 1715 during his nineteenth *mercuriale*: "À mesure que le zèle du bien public s'éteint dans notre coeur, le désir de notre intérêt particulier s'y allume. Il devient notre loi, notre souverain, notre patrie. Nous ne connaissons point d'autres citoyens que ceux dont nous désirons la faveur, ou dont nous craignons l'inimitié. Le reste n'est plus pour nous qu'une nation étrangère, et presque ennemie" ("Dix-neuvième mercuriale, prononcée à la Saint-Martin, 1715: L'amour de la patrie," p. 165).

[170] For a more complete exploration of eighteenth-century *intérêt* as it related to *identification*, see Viala, *Lettre à Rousseau sur l'intérêt littéraire*, Paris: PUF, 2005. See also, Harris, "Identification and the *Drame*." The absorptive form of dramatic *intérêt* is treated only briefly in the *Encyclopédie* in an article by Diderot, in which, rather than describing *intérêt* directly, he offered a didactic series of negative examples: "Imaginez les situations les plus pathétiques; si elles sont mal amenées, vous n'intéresserez pas. Conduisez votre poëme avec tout l'art imaginable; si les situations en sont froides, vous n'intéresserez pas [...]" (*ENC* VIII:819).

could even merge" (Harris, *Inventing*, 167). Thus, *intérêt* was both the bane of human moral improvement and its potential redeemer. Implicit in its usages lies the technology for this momentous shift, executable in the judicial realm only if eloquence, as rhetoric's most beautiful child, were to be allowed to fully develop its illusionary capabilities and thereby bring about a new and better society by virtue of elevating petty *intérêt* to identificatory *intérêt*.

Thus Servan's political tract flaunted its sentimental frame of reference to mark out the author's gesture as grounded in individual experience – passion – which, for Enlightenment philosophers, was the only basis for true knowledge. It denoted a spontaneous communicative power, meant to be first *felt* rather than *understood*. Indeed, the hallmark of an author's eloquence at this period depended on whether she convincingly demonstrated that feeling was both the source and primary contents of her expression.[171] After having thus (not too subtly) situated himself as an eloquent author, Servan launched into a Rousseauean principial history of the criminal laws ("d'où vient la fatale nécessité qui oblige à punir des hommes?" (5)), which he claimed derived from the state of nature,[172] but far from condemning society as irretrievably corrupt in keeping with the thesis of Jean-Jacques, Servan instead offered civil society as the necessary culmination of natural man's activities and his social penchants. Man gave up his natural freedom for a place in society, and the role of instinct was replaced with that of the government. The transformation, for Servan, had no *a priori* moral ramifications because he considered it not as the advent of

[171] For an extensive analysis of the currency of the passions in eighteenth-century society, see Riskin, *Science In the Age of Sensibility* (2002).

[172] "Le cœur humain explique aisément cette difficulté. De bonnes lois nous procurent le bonheur dans l'état social; mais elles retranchent de celui qu'on pourrait goûter dans l'état de nature […]" (Servan, *Sur l'administration*, 8).

inequality among political factions but rather a simple translation and – most imporantly – *amplification* of the nuclear family; society constituted the evolution of happiness from a domestic matter to a public one. Unlike Rousseau, who saw this move as an ejection out of an Eden never to be regained, Servan constantly held up the ideal nuclear family as the viable and *attainable* model for the passional construction of civil society. It was the reason for which he stated that if he could travel back in time, he would not visit the Lyceum or other places of learning, but would rather visit the homes of Aristides and Cato in the hopes of imitating them as they acted in "ces simples foyers, au milieu de leurs femmes, de leurs enfants" (*Discours sur les mœurs*, p. 23). Indeed, the role of the public official was not to eclipse that of the father, but rather to reinforce the paternal role in the public sphere; thus the magistrate was to assume the role of benevolent father, with all the intimacy and immediacy of a true – and truly overbearing – parent: "Je vois une mère autour de ses enfants; elle les suit & les couvre de ses regards, les veille durant leur repos, & les observe sans cesse durant leur veille: plus attentive encore à prévenir les maux, qu'ardente à les soulager […]" (*Sur l'administration*, p. 8). The government's role was less a replacement of natural instinct than its mirroring, and was therefore to retain the full intensity of kinship relations. In this way the paternalism with which Servan invested the magistrates went well beyond the tired panegyric (more typically applied to the monarchy during the Ancien Régime); he conceived of it rather as a way to circumvent the courtroom altogether; the vigilant judge, like the vigilant parent, *prevented* infractions by their close monitoring and constant application of correctives:

> Nous l'avons déjà dit, la vigilance rend presque l'équité superflue. […] L'homme public, s'il est vigilant, ne laissera pas le temps à l'oisiveté de se

> changer en vice: en lui demandant compte de son inaction, il lui coupera tout d'un coup le chemin du crime; il fera sentir au citoyen oisif que, devenu suspect, il est à moitié criminel, et que désormais, victime dévouée à la justice, il ne cessera d'être investi de ses regards. (ibid., 16-17)

The vigilant magistrate would thus rectify the idle citizenry by accusing them *before* the law gave them grounds to do so. The vocation of the judge would thus be social, *familial* even – investing the bench with a degree of intimacy and boundless jurisdiction the likes of which only parents were conventionally thought to enjoy over their children. Hence the judge's range of influence was not limited to legal questions but would target the public's virtue and habits as well. "Les mœurs, surtout les mœurs occuperont son attention, elles sont le garant de toute vertu: partout où les mœurs règnent, non seulement on observe les lois, mais on les aime […]" (ibid., 17). Of course, *mœurs* in eighteenth-century French could be taken in two different senses, either as the "Habitudes naturelles ou acquises pour le bien ou pour le mal dans tout ce qui regarde la conduite de la vie" or "la manière de vivre, pour les inclinations, les coutumes, les façons de faire, & les lois particulières de chaque Nation" (*Dictionnaire de l'Académie française* (1762)).[173] Throughout his legal and philosophical writings, Servan would incessantly postulate the former, particular sense of personal *mœurs* as the necessary prerequisite for the development and maintenance of good public *mœurs*, erasing the distinguishing semantic space between as he sought to conjoin domestic and public notions of jurisdiction.

---

[173] The term "*mœurs*" does not lend itself to a simple English translation (a dilemma made clear in Allan Bloom's decision to use the burdensome "morals-manners" in his translation of the *Lettre à d'Alembert*). I will therefore use the French *mœurs* throughout this chapter.

Interestingly, the intimacy of Servan's proposed judicial hierarchy, pre-emptive and moral rather than punitive and legal, meant that ultimate responsibility devolved to the magistrate:

> Mais que la justice ferme les yeux un moment, & tout va changer de face, […] le crime se réveille, […] il attaque insolemment des citoyens dont les cris & le tumulte raniment trop tard un magistrat assoupi; c'est alors qu'ils [les plaideurs] peuvent se plaindre à la fois de celui qui a fait le mal & de celui qui n'a pas su le prévenir, & qu'en dénonçant le criminel ils accusent le juge. (ibid., 20)

The judge symbolized the threshold between the moral and legal realms, and for a citizen to pass from the former to the latter meant that he had left his post unoccupied. Thus the proper ambit of judicial activity for Servan inscribed itself *prior* to any criminal activity; the work of the judge took place everywhere *other than* the courtroom. In this way the magistrate's seat was also his *sellette*, and taking it meant he had failed in his duties and the public was there to accuse him as well as the formal delinquent.[174]

Servan portrayed the unremitting vigilance he demanded of the magistrates in a tale of a woman who came to court demanding restitution for her flock of lambs stolen during the night while she slept. The judge chided her for sleeping so soundly, to which this "femme intrépide" responded that she had fallen asleep because she had believed the judge to be watching over the flock in her place (ibid., 21). With no mention of the impracticality of the proposition nor its absurd logic, Servan characterized the response as "la plus

---

[174] Rousseau offered a radically different view of the magistrate's proper relationship to society in his 1755 article for the fifth volume of the *Encyclopédie*, "Economie politique," wherein he differentiated between the duties of a father, who "n'a qu'à consulter son coeur," and those of the judge, who must follow only "la raison publique, qui est la loi" (*ENC* V: 338).

énergique leçon de l'indispensable devoir de la vigilance" (ibid.). Lest this be thought an exaggeration to make a point about the moral duty of magistrates, Servan made clear that he considered his plan quite feasible: he recommended that the magistrate concentrate his natural forces, then determine all those that "art" could offer, and finally multiply this strength through a force of "agents subalternes" who would spread his vigilance. "[C]'est ainsi qu'un mécanicien ingénieux, aidé de quelques leviers, soulève des poids énormes avec une main faible" (13). We may notice here that the ministry Servan proposed for the magistrate was not, in the end, too far a cry from that of the king, whose network of spies provided a very similar service.

If the chief goal of the magistrate was the maintenance of good *mœurs* rather than the administration of the law, his primary mode of discourse would necessarily shift from the imperative, authoritative mode toward one of eloquent persuasion. Indeed, Servan considered the latter to belong to a higher order: "Tout homme peut bien faire obéir les personnes; mais qui saura persuader les cœurs?" (18). Though softer in appearance than the image of fire-and-brimstone *arrêts* handed down to shivering plaintiffs, the eloquence of the judges would be nearly inescapable: "sans cesse leurs yeux sont ouverts sur moi, pour en écarter les dangers de la société & ceux même de la nature. À peine ils me laissent le soin de mon bonheur, & je le reçois tout formé de leurs mains" (19). Evil would have nowhere to hide, not even in one's own thoughts: "à peine l'idée du crime se présente, qu'il la comprime dans le fond de son âme, & il craint encore que l'oeil perçant du magistrat ne la surprenne" (20). The vigilant magistrate who must anticipate, manipulate and surveil each idea and action of every lamb in his flock figured less as a mouthpiece of the law than

a symbol of the pedagogical practice embodied by the tutor in Rousseau's *Émile* (1762).[175] The preceptor's inculcation of social ideals for the formation of a virtuous political order precluded the role of magistrate through its functional absorption, as Servan's philosophical pursuit to locate civic man led him further and further upstream from his contemporary society.[176]

If the vigilant magistrate was supposed to bear ultimate responsibility for the virtue or vice of the citizenry, it did not follow that he bore ultimate power. Thus, despite the ubiquity of the vigilant magistrate's duty and gaze, Servan's civil society, unlike that of Rousseau, managed to conserve the sanctity of man's state of nature (which, for Servan, was the domestic sphere of the family hearth). Where Rousseau's vision of political formation through public pedagogy led him to disavow the intimate space of the family as unfit to manage the proper education of citizens,[177] Servan drew a moat around the domestic space and its local sentiments:

---

[175] Émile's tutor designed and manipulated every aspect of his charge's life to ensure a sound moral education (an education that, in the end, may have been just another form of enslavement in that Émile could not emancipate himself even in fatherhood from his former preceptor) (*OC* IV: 239-277). Rousseau's pessimistic view that despite their inherent freedom, men would tend toward enslavement if left to their own devices, necessitated in most of his works the benevolent presence of a transcendent man to staunch the polity's tendency toward self-degradation. On the *bipolarité* at the heart of Rousseau's *oeuvre*, see Shklar, "Rousseau's Images of Authority" (1964). Gemma Tidman provides important context for Rousseau's *Emile*, which was written during the debates on how to educate the lower classes. (*Ce qui s'enseigne: the Querelle des collèges and the emergence of littérature, 1750-1789* (2017)).

[176] We might consider Servan's treatise an effort to convert what Rousseau called "le pouvoir arbitraire" back to "le pouvoir légitime," the transformation that Rousseau described as the third denaturing stage of civil man. ("Si nous suivons le progrès de l'inégalité dans ces différentes révolutions, nous trouverons que l'établissement de la Loi et du Droit de propriété fut son premier terme; l'institution de la Magistrature le second; que le troisième et dernier fut le changement du pouvoir légitime en pouvoir arbitraire […]" (*Discours sur l'inégalité*, *OC* III: 187)).

[177]See, e.g., Rousseau's *Encyclopédie* article "Économie politique," where he both decomposes and reconstructs the domestic father from a local and temporal instantiation of natural law into a representative of public authority. Government of the family gives way to the more pressing needs of state government: "[…] comme on ne laisse pas la raison de chaque homme unique arbitre de ses devoirs, on doit d'autant moins abandonner aux lumières & aux préjugés des pères l'éducation de leurs enfants, qu'elle importe à l'état encore plus qu'aux pères; car selon le cours de nature, la mort du père lui dérobe souvent les derniers fruits de cette éducation, mais la patrie en sent tôt ou tard les effets; l'état demeure, & la famille se dissout." Thus "fathers"

> Cependant la vertu même a ses bornes, & dans ses excès elle est vice. […] Le magistrat qui veille à l'ordre public […] ne doit point pénétrer trop avant dans ces mystères des familles, dont le secret fait la douceur & le prix; qu'il ne vienne point troubler par sa présence sévère ces plaisir innocents, quoique secrets, & qui prouvent l'ordre même & l'union des citoyens: resserrons bien plutôt ces tendres liens de la société, au lieu de les altérer par la défiance; que l'ami soit toujours sûr de son ami, l'époux de son épouse, le frère de son frère, le père de ses enfants; ce serait un crime d'armer la nature contre elle-même: bientôt de vils espions remplaceraient de vertueux citoyens, & vous aviliriez les mœurs pour vouloir trop éclairer les actions. (21-22)

The authority of Servan's hyper-paternalistic state of judicial policing vanished at the threshold of the domestic space. The total jurisdiction exercised by the magistrate over the bodies and minds of its citizenry was bounded all along within the public arena; freedom from prosecution[178] obtained not in accordance with contemplated versus actualized states of misconduct (the distinction between *mens rea* and *actus reus* did not concern Servan overmuch), but was rather dependent on space (public versus domestic venue). Indeed, the family home and more particularly the sentimental ties generated therein constituted the

---

would evolve into "citizens" whose command no longer based its legitimacy in natural right but through the public law (*ENC* V: 343).

[178] I resist using the word "privacy" here because this was not an available concept at the time as it is today. For an overview of the question of "privacy" in eighteenth-century France, see *Representing Private Lives of the Enlightenment*, ed. Andrew Kahn (2010).

magistrate's source of authority; the legitimacy of his entire jurisdiction devolved from the immanent meaning of emotional claims made among family members.[179]

Reading Servan here recalls Diderot's *renvoi* in Rousseau's article "Économie publique" to the (non-existent) article "Père de famille," which could be found not in a separate volume of the *Encyclopédie* (the article was never written), but rather on the frontispiece of Diderot's revolutionary play, *Le Père de famille* (1758).[180] Diderot's *drame* staged the dichotomy established by Rousseau between the domestic and the public sources of authority by dividing the father-figure between two roles: the actual biological father of the children (Cécile and St. Albin), aptly titled "LE PÈRE DE FAMILLE" and his imperious, interfering brother-in-law, designated as "LE COMMANDEUR." The commander lived in the house of his dead sister's family, where, like Émile's teacher, he constantly observed everyone's actions in order to predict and prevent their shortcomings as members of society. He ruled harshly over them in the name of the father,[181] and even of the king.[182] The commander demanded justice of a public nature, deploring the shameful, sentimental comportment that moved the father to eschew his place in the

---

[179] As an aside, the necessity of either a domestic or public morality to address the law's practical shortcomings regarding the maintenance of an orderly society was an important issue for the *Comité des cinq* (or *sixième bureau*, at which sat Démeunier, Wandelaincourt, Tronchet, Mirabeau, and Redon) elected for the composition of the *Déclaration des droits de l'homme et du citoyen*. Three articles – later stricken from the document – related to this issue. The premise of the proposed article sixteen is especially interesting: "XVI. La loi ne pouvant atteindre les **délits secrets**, c'est à la religion et à la morale à la suppléer. Il est donc essentiel pour le bon ordre même de la société, que l'une et l'autre soient respectées" (*Séance du 23 août 1789* in Robespierre *OC* VI: 59 [my emphasis]).

[180] Diderot intended his *Le Père de famille* as an official break with the old conventional models of comedy and tragedy and the introduction of a new genre. He clarifies his project in the accompanying *De la poésie dramatique* (DPV X: 331-427).

[181] Saint-Albin is ordered by his father to listen to his uncle. When the youth attempts to escape the uncomfortable conversation, his uncle remonstrates: "As-tu oublié que je te parle au nom de ton père?" (DPV X: 235).

[182] When the *exempt* who comes to execute the *lettre de cachet* hesitates before his duty, the commander instructs him: "De par le Roi, Monsieur l'exempt, faites votre devoir" (DPV X: 299).

monument of the political body in favor of a blind intimacy and familiarity with his loved ones. The father constantly slipped back and forth between "tu" and "vous" when addressing his children, and every declaration of repudiation was followed immediately by sentimental capitulation.[183] He succumbed incessantly to his love for his children, which, rather than degrading the family, caused its expansion: the father counted an adopted son and many *pupilles* as members of his household. Conversely, the commander's desire for a strong public façade resulted in the abandonment of his chance to have his own family in the provinces,[184] the use of a *lettre de cachet* against his own nephew, and finally a self-imposed exile from the father's house at the close of the play after the latter reclaimed domestic authority. His insistance on an unbounded, Rousseauean dominion that muted personal sentiment in favor of a general authority accomplished his isolation from both the public and domestic family. The resonances between Servan's proposed modifications to the justice system and Diderot's *Père de famille* underline the lawyer's desire to logically reduce the justice system to a highly personal, domestic aesthetic, from which to build out a more coherent organization of judicial authority. This authority would be based on the natural law of familial affection.

---

[183] "LE PERE DE FAMILLE – Éloignez-vous de moi, enfant ingrat et dénaturé. Je vous donne ma malédiction. Allez loin de moi. (*Le fils s'en va. Mais à peine a-t-il fait quelques pas, que son père court après lui et lui dit*:) Où vas-tu, malheureux?" (DPV X: 233-34).

[184] "LE COMMANDEUR – Ne suis-je pas bien à plaindre?... Je me suis privé de tout pendant quarante ans. J'aurais pu me marier, et je me suis refusé cette consolation. J'ai perdu de vue les miens pour m'attacher à ceux-ci" (DPV X: 238-39).

Natural Law in 18th-Century Legal Discourse: An Aside

The idea that the affections springing from family relationships could found a judicial system might seem far-fetched, but in fact the "natural law" which bound husband to wife and parent to child can be detected much earlier in the work of Aquinas and even Aristotle.[185] The idea of a latent moral contiguity between the domestic sphere and the public civic space established by Servan did not therefore constitute an entirely novel approach in the world of political philosophy. The originality of Servan's theoretical enterprise was rather in its application: as a lawyer, his glorification of the family as the ideal social body due to its proximity to the state of nature gave him a concrete legal tool that he could exercise in the name of natural law.[186] However, the archaeology of "natural law" as deployed in the French courtroom demands an excavation specific to its context in order to understand the importance of Servan's tool. On the eve of the French Revolution, the idea of the natural laws was that they were generally considered to be those laws imposed by God on all men, discoverable through reason (*Enc. méthod*. III: 712).[187] They were alleged by lawyer and publicist Pierre-Louis de Lacretelle (to whom we shall return in chapter 3) to constitute a most lucid, almost trivial concept: "Les *lois naturelles* sont suffisamment connues des hommes, […] même la plupart de ces lois sont à la portée des esprits les plus médiocres" (ibid., 714 [author's emphasis]). However, for many practicing lawyers of the time and especially those of the preceding generations, nothing could have

---

[185] Aquinas, building on Aristotle's *History of Animals*, determined in the thirteenth century that marriage was a deeply natural, pre-political construction of human life (be it a Christian marriage or no) in his *Summa Contra Gentiles*, bk. III, pt. 2, ch. 85.
[186] Servan's efforts to render contiguous domestic and public justice would be reprised in revolutionary theater. See Maslan, *Revolutionary Acts*, pp. 183-215.
[187] Of course, the contemporary conceptualizations of theories of natural law and natural right are famously contested today by historians from the classical to the modern periods. The introduction to Edelstein's, *On the Spirit of Rights* (2019), provides a brief but engaging overview of these debates.

been further from the truth. For lawyers, the invocation of "natural law" usually triggered a contentious pursuit to discover the "right rule" in a case where the laws fell silent or contradicted one another; it was proposed not as a mere matter of speculation (as for theorists or dilettantes) but rather for the practical necessities of formulating a legally valid argument and (hopefully) winning one's case. Natural law was not a concept to appear *ex nihilo* in such narrow circumstances.

But what difference did a legal versus non-legal context make in a determination of *natural* law? Generally, all natural laws were considered in the legal world to proceed from the fundamental or primary natural laws, of which there were two: the love of God and one's neighbor.[188] Such a revelation did not exactly require a law degree. However, lawyers did not remain at this primary level of natural law. Indeed, the most important difference between the natural law of Enlightenment *philosophes*, for example, and the natural law of legal practitioners was that for the latter, Roman code, due to its long tradition and successful applications in varying geographies, was considered to contain within it almost nothing but natural law. The arbitrariness found in other systems was considered worn away from the Roman code through the erosions of time and space.[189] Thus, instead of engaging in a process of discerning the love of God and/or one's neighbor in a given fact pattern, lawyers and judges had recourse to the Roman code as a short hand for adjudication according to the natural law. The work considered to be done by

---

[188] Of course, there were many different theories of natural law floating around in the early modern and modern periods (most notably those of Hobbes, Grotius, and Pufendorf), but due to his royal sanction and influence in the French legal world of the eighteenth century, I follow the formulation here of Jean Domat as put forth in his *Lois Civiles dans leurs ordre naturel* (1689-94). For a summary of Domat's natural law theory and its influence, see Church, "The Decline of the French Jurists," pp. 17-18; Edelstein, *On the Spirit of Rights*, pp. 119-26.

[189] Like Leibniz, Domat considered the Roman code to consist almost entirely of natural laws. ("[T]out ce qu'il y a dans le Droit Romain […] ne consiste presque qu'au Droit naturel, & ne comprend que peu de lois arbitraires" (*Préface*, n.p., in *Les Lois civiles* (1695)).

Enlightenment thinkers, i.e., the reconstruction of the legal system according to the natural law, had long been considered complete within the traditional legal world. To be sure, the Roman code rarely offered the instantaneous sense of justice that could be produced pursuant to fellow-feeling; rather it offered a dialectical framework that could accommodate and respond to a very large set of ambiguous data in a relatively consistent manner. Thus this meant that *both* metaethical principles as well as *mos gallicus*, or philological investigation into the Roman code[190] would came into play when a lawyer invoked the natural law in a case before the *parlements*; lawyers could cite to legal philosophers such as Cicero, Plato, Grotius, and Domat,[191] but only insofar as these thinkers bolstered the natural law claim embedded (but not embodied) within the text of the Roman law(s) most relevant to the case at hand.[192]

[190] *Mos gallicus jura docendi*, meaning the French method of teaching the law, refers to the humanist culture of the jurisconsults of the sixteenth century, who organized legal instruction around philological principles generally. The humanist jurisconsults in late sixteenth-century France belonged to one of two camps: those who wanted to rediscover and systematize anew the authentic Roman code according to rationalism (exemplified in the works of Hugues Doneau (1527-1591)), and the historical humanists who believed their emphasis on the context in which the various compilations of the Roman code were composed and how they evolved through time and space would allow them to arrive at an understanding of the original Roman law. Xavier Prévost's article on this topic convincingly ties the first strand of humanist jurisconsults to the production of the subjective concept of natural law, whereas the second group, which included the bigger names such as François Baudouin (1520-73) and Jacques Cujas (1522-90), grounded understanding in philology. ("*Mos Gallicus jura docendi*: La réforme humaniste de la formation des juristes," pp. 491-513).

[191] D'Aguesseau prescribed Cicero (*De Legib*us), Plato (*The Republic, The Laws*), Grotius ("Prolegomena"), and Domat (*Traité des Lois*) as requisite reading for his son's apprehension of the metaphysical *loi naturelle* (d'Aguesseau, *Instruction*, pp. 224-25).

[192] One might wonder how a strictly Catholic society could see the hand of God and his natural law in a pagan jurisprudence. However, this was not a problem for the Old Regime in the same way as we might consider it today; the scholastic turn of Roman law had taken place much earlier, when the medieval Church utilized its rational method to formalize their autonomy vis à vis the secular order, which resulted in a science of legal principles (See Nahme, "Law, Principle, and the Theologico-Political History of Sovereignty," pp. 432-45). The more general objection that the natural law must be illegible to man due to the observation of an endless plurality of laws across territorial boundaries (proposed by Montaigne and Pascal, e.g.) was responded to by Domat, who distinguished God's work in each society's connection to the *immutable* laws as so many "lumières que Dieu a données à des Infidèles, dont il a voulu se servir pour composer une science du Droit naturel" (*Préface*, n.p., in *Les Lois civiles* (1695)). These immutable laws were considered the natural laws, and the positive laws, which changed depending on place and time, were termed the "loix arbitraires."

An example might help to clarify this tricky dual approach to natural law in the courtroom. The great Jansenist jurist Jean Domat's celebrated *Lois Civiles dans leur ordre naturel* (1689-94) was well-known for his explicit differentiation between the positive laws, which he called *loix arbitraires* and the natural laws, dits *loix immuables*. Our focus in this section will be on the *Traité des lois,* which was Domat's preface to the *Lois Civiles*. Though Domat (1625-1696) died before the eighteenth century, his work had a major influence on Enlightenment-era philosophers. Domat was first educated in the Jesuit tradition at Louis-le-Grand before turning toward Jansenism and Port-Royal. After having presided as *échevin* or county magistrate in Clermont, he moved to Paris in 1682 to focus on his great treatise, which sought (in Cartesian fashion) to bring order to the convoluted Roman civil code, a project for which he received the protection and approbation of Louis XIV. Of course, Domat was not the first to distinguish natural from positive law; however, his rendition was unique in the breadth of its explication of the differences to be found among different peoples as consonant with God's eternal will, which also entailed that the natural law remained in force even after the establishment of political society. Thus, Domat's reading of the natural law required no "social contract" for the establishment of communities.[193]

More to our purpose, Domat was also careful to differentiate between two sorts of natural laws: the clear and distinct natural laws "dont l'esprit est convaincu sans raisonnement" (a seller must guarantee his goods, a trustee must distribute assets, a promise must be upheld, etc.), and the ambiguous natural laws "dont on ne découvre la certitude que par quelque raisonnement, qui fasse voir leur liaison aux principes d'où elles

[193] For a brief overview of Domat's professional career and an incisive reading of his natural law theory, which required no "social contract," see Edelstein, *Spirit of Rights*, pp. 119-26.

dépendent" (Domat, *Traité des lois* XI: 29). Contrary to popular belief at the end of the eighteenth century, for lawyers this second sort of natural law vastly outnumbered the positive laws and was much more difficult to grasp. "[C]es règles naturelles étant en très grand nombre, leur diversité & leur multitude fait [*sic*] qu'elles ne se présentent pas toutes à la vue de tout le monde: & la raison seule ne suffit à personne pour les trouver […]" (ibid., 28). The majority of natural law was thus only considered discoverable through a long period of dedicated study of the ancient sources of French jurisprudence. Domat portrayed the difference between clear and ambiguous natural laws through the following anecdote: if two parties went to court to litigate a matter but settled the affair between themselves before the judgment was rendered, then the agreement struck between the two parties would be binding (such would be an example of a clear and distinct natural law – one should uphold one's promises – that required no further analysis). However, how might the matter have been disposed if the judge had decided the case *before* the deal was struck, and the parties had settled afterward but in complete ignorance of the decision? The Roman law provided two conflicting answers, neither of which addressed the specificity of the fact pattern (that a decision made between parties must be upheld *and* that cases decided by a judge may not be otherwise disposed among litigants). Which decision would hold – that of the judge or of the parties? The answer required a very close analysis and reflection on the conflicting natural laws embodied in the code in conjunction with the spirit of the fundamental natural laws in order to arrive at the answer: the judge's ruling was binding. More importantly, for our purposes, this finding, though it was not of "une telle évidence, que personne ne puisse en douter," was considered a natural law (ibid.). Thus the invocation of natural law in the courtroom had traditionally been a very tricky matter that

required a broad and penetrating understanding of the law in its sediments as well as its transcendence.

There was perhaps no figure more influential in specifically deconstructing the affiliation between the Roman code and the notion of natural law than Montesquieu (1689-1755). As briefly sketched out in the introduction to this chapter, the jurist's *De l'esprit des lois* (1748) removed the analysis of political institutions from the realm of scholastic ethics and instead proposed an empirical explanation that took human physiology as the radical model for all political iterations. Thus from observations of the human circulatory system, Montesquieu sought to explain the nature and especially the transformations of governments. This was no mere analogy; rather, the passions, produced as they were by the functioning of the circulatory system, constituted the force that moved the political economy. Further, circulatory systems did not function identically through time and space; the humors would move more or less quickly, and thus result in more or less *vivacité* in the passions, depending on their composition and environment. For example, people of different *terroirs* would absorb through their food sources varying levels of metals that would affect the momentum of their humors, as would the weight of the air. Thus climate, because it determined humidity and crops, was the underlying factor controlling the passions, which, in turn, affected its form of government. "Il y a cette différence entre la nature du gouvernement et son principe, que sa nature est ce qui le fait être tel, et son principe ce qui le fait agir. L'un est sa structure particulière, et l'autre les passions humaines qui le font mouvoir" (*De l'esprit des lois* liv. 3 ch. 1, *OC* II: 250-51).

As a result of widening the scope of analysis beyond the traditional natural law canon, the natural law itself was deeply problematized. The Roman code, hitherto

considered the omega of natural law for practitioners in its limitless applicability, was dispassionately plotted out by Montesquieu through the centuries for all to examine. Rather than rising like the sun throughout Europe, Roman law was shown to have ebbed and flowed in various iterations, entirely contingent on the many conquests and migrations that shaped the political institutions of the West. Where it was not entirely superseded by other laws or found otherwise deficient, the Roman code – either Theodosian and/or Justinian, depending on the time and place – was always tailored to the specific polity subscribing to it. In the end the notion of Roman law as a repository of universal justice buckled before Montesquieu's examination, whereby it was demonstrated to be little more than the happy beneficiary of myriad contingencies, or "la nature des choses" (*De l'esprit des lois*, bk. I, ch. I).

As we can hopefully now see, the epistemological shift advocated in *De l'esprit des lois* could hardly have been more antipodal to the previous natural law doctrine in which lawyers and judges were educated. Before Montesquieu's intervention, the reigning dilemma at the Bar regarded whether the Roman law would be studied seriously enough to be understood and used, or whether judges and lawyers would simply give themselves over to unhinged abstractions in a supposed effort to uncover the fundamental natural laws underpinning French jurisprudence, a lazy enterprise that would crumble French jurisprudence. For example, in 1709, during his thirteenth *mercuriale*, d'Aguesseau warned magistrates against efforts toward a principial history of the law:

> Mais qui pourrait remonter, par le seul effort d'une sublime spéculation, jusqu'à l'origine de tant de ruisseaux qui sont à présent si éloignés de leur source? Qui pourrait en descendre comme par degrés, et suivre pas à pas les

> divisions presque infinies de toutes les branches qui en dérivent, pour devenir, en quelque manière, l'inventeur et comme le créateur de la jurisprudence ? De semblables efforts s'élèvent au-dessus des bornes ordinaires de l'humanité. (*Œuvres choisies* 115)

Like Domat (under whom d'Aguesseau studied), the Chancellor considered the Roman digest to already contain all the secrets of the natural law if only jurisconsults wished to understand them (ibid.). Conversely, to have recourse to one's own inventiveness or creative analysis was wanton folly, a dangerous misapprehension of the conceptual breadth of the Roman apparatus: "Malheur au magistrat qui ne craint point de préférer sa seule raison à celle de tant de grands hommes, et qui, sans autre guide que la hardiesse de son génie, se flatte de découvrir d'un simple regard et de percer du premier coup d'œil la vaste étendue du droit sous l'autorité duquel nous vivons!" (116). D'Aguesseau's conception of the fundamental natural law was that of the primary mover behind all positive laws, but also that it revealed itself alongside the evolution of positive laws in a sort of dialectical relationship between the human and the divine. Thus, to perform a principial history of the law comprised an extremely convoluted procedure that would require a parallel deconstruction of centuries of cultural sediment – a virtually impossible task.[194] The Roman law built France, and it would be abandoned at their peril.

Through his great attention to it, Montesquieu succeeded in overturning the mythical status of the Roman law. His method was so successful that by the time Rousseau

[194] In reality, d'Aguesseau was less shooing the magistrates away from their own intellectual endeavors (for which they were not particularly well-known at this period (see, e.g., Montesquieu, *Lettres persanes* LXVI)) than he was warning them against the seductions of those pleas to an abstracted natural law that were cropping up in lawyers' pleadings. ("Mépriser la science et n'estimer que l'esprit, c'est le goût presque universel du siècle présent. […] [L]e magistrat qui doit montrer la loi à tous les hommes, se bornera-t-il à ne l'apprendre que dans les écrits des plaideurs?" (116)).

was penning his second discourse, *Sur l'origine et les fondements de l'inégalité parmi les hommes* (1755), the metaphysical approach to the natural law could be treated with open hostility. In his preface, Rousseau excoriated the legal community's cloistering of the natural law away from the understanding of the people:

> […] définissant cette loi chacun à sa mode, ils l'établissent tous sur des principes si métaphysiques qu'il y a même parmi nous, bien peu de gens en état de comprendre ces principes, loin de pouvoir les trouver d'eux mêmes. De sorte […] qu'il est impossible d'entendre la Loi de Nature et par conséquent d'y obéir, sans être un très grand raisonneur et un profond Métaphysicien. Ce qui signifie précisément que les hommes ont dû employer pour l'établissement de la société, des lumières qui ne se développent qu'avec beaucoup de peine et fort peu de gens dans le sein de la société même. (Rousseau, *Sur l'origine de l'inégalité*, *OC* III: 125).

For Rousseau, the legal metaphysicians' unfamiliarity with and exclusion of the larger society indicated their ignorance of nature, and their endless debates amongst one another meant they could not themselves understand the meaning of the law. Thus doubly disqualified, the legal community's eons of painstaking excavation of the natural law was swept away as Rousseau proferred his own definition: "Tout ce que nous pouvons voir très clairement au sujet de cette Loi, c'est que non seulement pour qu'elle soit loi il faut que la volonté de celui qu'elle oblige puisse s'y soumettre avec connaissance; mais il faut encore pour qu'elle soit naturelle qu'elle parle immédiatement par la voix de la Nature" (ibid.). Thus liberated from its legal straitjacket, the concept of natural law morphed into a political

term, postulated and usurped for endless reasons and goals throughout the late eighteenth century.

Of course, the liberalization of natural law theory did not occur overnight in France, as the brevity of this section may suggest. The modern natural law theory developed largely elsewhere through the work of Hobbes (1588-1679), Grotius (1583-1645) and Pufendorf (1632-1694), and was gradually imported into France through the diligent translation work of the French jurist Jean Barbeyrac (1674-1744). Indeed, Rousseau's scoffing treatment of the obscure legal approach to the apprehension of the natural laws echoes Barbeyrac's prefatory remarks to his very influential translation of Pufendorf's *De Jure Naturae et Gentium* (1672) (translated first in 1706 as *Le Droit de la nature et des gens, ou Système général des principes les plus importans de la morale, de la jurisprudence et de la politique*):

> Si les personnes du dernier ordre peuvent parvenir à un tel point de connaissance en matière de Morale; ceux qui ont plus de génie […] surtout les Gens de Lettres, doivent […] être capables d'acquérir là-dessus, & d'une manière beaucoup plus distincte, toutes les lumières dont ils ont besoin pour se conduire. […] [S]i l'on s'attache comme il faut à suivre pié-à-pié les Principes naturels de cette Science, & à les pousser dans toute leur étendue, on en déduira aisément […] tous les Devoirs de l'Homme […]. ("Préface du Traducteur," II, p. xix, in *Le Droit de la nature et des gens*, t. I (1712))

Notwithstanding its mutations in the popular culture, the term "natural law" continued to have currency in the court room, yet its evocations denoted less and less the once almost inscrutable foundations of traditional legal theory as transmitted by the Roman law and its

experts. As popular contemporary iterations of the natural law – infinitely more engaging and discursively malleable – gained legal legitimacy, "natural law" progressively shed its esoteric past to explicitly include the participation of a wider audience. With this background in mind, let us now return to Servan and one of the most famous pleadings of the century, a pleading that serves as both a beginning and an end for legal argumentation based on natural law.

Natural Law and *La Protestante*: Family as Emblem of Authority

Servan's emblematic use of the family as the standard for testing positive laws against the laws of nature set forth in his speech on the administration of the criminal laws would prevail in the law courts the same year. Servan's 1767 *plaidoyer* in favor a Protestant woman before the *parlement* of Grenoble caused a great sensation. Marie-Joseph Chénier recalled it as "le plus beau modèle de l'éloquence judiciaire" (*Œuvres posthumes*, p. 135). The case itself turned on whether a man could be held responsible to a woman whom he had married in a Protestant ceremony, which was prohibited as a matter of law following Louis XIV's Revocation of the Edict of Nantes (1685).[195] The facts: Jacques Roux and Marie Robequin, both Protestants, were married by a Protestant officiant in the presence of their friends and family. Two years later, Roux left a pregnant Robequin, disclaiming her as well as the Protestant faith, and quickly fathered another child with a woman whom he subsequently married in a Catholic ceremony. Robequin brought suit for restitution of

[195] Even beyond their political and religious ostracization from French life, the invalidity of their marriage contracts constituted, according to John Renwick, the "major grievance" among French Protestants at this period ("Voltaire and the politics of toleration," p. 182).

her dowry and costs of childbirth. Roux countered the claim on the basis that they were never married under the law, thus no legal duties could attach to him.[196]

After a brief restatement of the facts, Servan carefully put the legal question in the most neutral terms possible: "nous demandons si l'on ne doit pas dédommager des pertes qu'on a causées même par erreur" (Servan, *Discours dans la cause d'une femme Protestante*, 9). By whittling away all factual or narrative elements and reducing the question to its most precise and impersonal terms, Servan seemed to highlight here the appropriate boundaries of serious legal inquiry. But a word of caution: despite appearances, this proposition was *not* the legal question technically at issue, but rather an invention of Servan's that had the potential to obviate the massive legal roadblock (invalid contract) to Robequin's recovery.[197] The cookie-cutter legal phrasing operated as Servan's Trojan Horse, and just as Greeks came streaming out of the huge wooden contraption as they passed through the gates, as soon as Servan's issue to be objectively determined crystallized in its most convincing disguise, the advocate general immediately applied

---

[196] The uber-(in)famous barrister Simon-Nicholas Henri Linguet (1736-1794) would unsuccessfully plead a very similar case four years later in Paris, but employed very different tactics from those of Servan; before the case was heard, Linguet (as was typical) distributed a flurry of provocative propaganda in favor of his client, Marthe Camp. In addition, the tenor of his pleading was so out of keeping with courtroom etiquette that Vaucresson, the *procureur-général*, unable to bring him to order, warned all the *avocats écoutants* present not to take the audacious Linguet as a model. Despite having successfully marshalled public opinion to his side, Linguet lost the case. Lucien Karpik, summarizing the affair, stated that the decision "could scarcely have gone otherwise" due to the letter of the law, but I would like to point out that Servan's success in the case discussed here obviously controverts this statement. Linguet's failure in the case thus should not be reduced to legislative obstacles alone; his incendiary journalistic tendencies (his *mémoire* contained a piquant direct address from his client, the abandoned wife, to the new (Catholic) wife of her erstwhile husband, not party to the claim) meant he spent the majority of his career on the far outskirts of legitimate legal discourse, and while he was a popular figure who did win several of his cases, he was eventually disbarred. We should be cautious not to accept Linguet's outsized public persona as representative of contemporary legal representation or even its main crosscurrent. (Karpik, *French Lawyers*, pp. 88-89).

[197] In 1821, it would be remarked by the lawyer Jean-Denis Cochin (1789-1841) regarding Servan that "[s]a défense d'une femme protestante est sans contredit un chef-d'œuvre de l'éloquence judiciaire; mais cette cause, telle qu'il la présenta, se trouvait désavouée par la loi, et cette circonstance ne peut être relevée sans donner l'occasion de remarquer combien était différent l'esprit qui régnait au barreau du temps de [Henri] Cochin, de l'esprit qui appartint à l'époque suivante" (Cochin I: XX).

subjective feeling to its analysis: “Si j’écoute là-dessus la voix intime de ma conscience, elle me dit […]” (ibid.). Servan vacillated easily between objective formulations of legal questions and their subjective parsing in a method that slowly drew his listener toward a private experience of morality. Tableaux of innocence and vice invited the judges to imagine their reception of a case quite different from the one before them, one that approximated much more closely the moral codes of the *drame bourgeois*:

> Si dans cet instant, Messieurs, une concubine avérée osait se présenter ici, pour vous demander en public le salaire de ses vices; si dans le même moment paraissait cette jeune femme en pleurs, la pudeur sur le front, innocente, mais n’osant presque pas le dire dans le sanctuaire des lois qui réprouvent son union; n’ayant enfin que ces mots pour défense: *je suis malheureuse, & vous êtes bons;* quel intérêt différent ces deux femmes exciteraient dans toute cette assemblée! On attendrait avec ironie la condamnation de l’une, & l’infortune de l’autre arracherait des larmes. Se pourrait-il qu’un même arrêt les confondit toutes deux sous la même infamie? Quoi! vous verriez la débauche effrontée rire, peut-être d’un affront qu’elle ne sent plus, & l’innocence tomberait à vos pieds frappée d’un arrêt qui l’accablerait en public. Ah! Messieurs, vous êtes justes, & vos cœurs se soulevent à ces odieuses idées: ne parlons plus de cet abus qu’on a fait des termes pour insulter une malheureuse, & revenons à Jacques Roux. (ibid., 32-34)

Servan demanded tears of compassion for a fictional scene of injustice meant to sensitize the judges to the plight of Robequin not as an upstanding but ultimately unremarkable

member of society (as we found to be the case in the seventeenth century); rather, Robequin was portrayed as a particularly downtrodden yet *deeply* virtuous individual, conspired against by cruel circumstances out of which only the beneficence of the magistrates could rescue her. The dark specter of the shameless harlot served only to emphasize the halo glowing about Robequin's head as the audience was implicitly asked to play the role not of judge but of romantic hero.[198]

Servan's persuasive staging of a damsel in distress served as a preface to his more serious natural law argument, which was doubtless intended to address the magistrates more than the general public in attendance. Admitting that the marriage was void as a matter of civil law, Servan nevertheless claimed that Robequin had a right to recover damages as a wife by virtue of the natural law read through the lens of Samuel von Pufendorf (1632-94). However, Servan's reading was not really of Pufendorf at all; instead his quotation of the German jurist came entirely from a footnote added by the French Protestant jurist and natural law publicist Jean Barbeyrac (1674-1744), whose several translations of the Latin original into French were heavily mediated by his own experience as a religious refugee from France living in post-Westphalian Germany. Barbeyrac's long preface and annotations often construed Pufendorf's natural law theory as merging the moral and political orders (in a way that the latter would have kept entirely distinct) in an effort to reconcile spirituality with the unified state of French politics.[199] As we shall see,

[198] Servan's characterization of Robequin recalls Saint-Albin's effusive descriptions of the impoverished Sophie's noble bearing in Diderot's *Le Père de famille* (1758). Her life of poverty, it would be revealed, resulted from the inhumanity of her uncle who had deprived her of her noble birthright. The play concluded with her restoration to her rightful social standing.

[199] While Pufendorf's voluntarism called for a radical detranscendentalization of morality and politics, Barbeyrac remained committed to an ethico-theological civil order; whereas Pufendorf restricted civil authority to man's external actions, Barbeyrac attenuated the division, claiming rather that natural law was also concerned, though to a lesser degree, with man's inner morality. For Pufendorf, there was no possibility of natural knowledge of the state of man's soul, given his fallen nature; theological and civic morality were

this rather creative reading of Pufendorf squared exactly with Servan's strategy. Moreover, by explicitly mentioning Barbeyrac in his citation to Pufendorf, Servan raised the venerable image of a well-respected Protestant jurist sent into exile due to religious intolerance, an allusion that likely served as a helpful parallel to the plight of Robequin.

Servan used Barbeyrac's annotations on illicit contracts (under the (false) authority of Pufendorf) to demonstrate that those agreements that were illicit only in regard to positive law but not natural law were nevertheless valid once they were knowingly contracted by the parties and received partial performance.[200] While those agreements in contravention of both the positive and the natural law – meaning bad in themselves, such as an agreement to steal or murder – did not require performance on the part of the contracting parties,[201] those contracts rendered null or illicit only by virtue of the civil law, but that were harmonious with natural law, were to be respected by the parties *as though the civil law nullifying the contract did not exist*.[202] Thus basing his argument on Barbeyrac's antithetical digression of Pufendorf's natural law theory,[203] Servan sought to

---

thus entirely estranged from one another. This division was blurred by Barbeyrac's insistence on an inner moral judgment that could potentially justify certain civil conduct. See Hunter, "Conflicting Obligations," pp. 670–99 ("By retaining the notion of an ultimate rational identity capable of accessing divine law, Barbeyrac subordinates the sphere of permitted civil conduct to a higher inner morality, albeit one incapable of immediate civil enforcement" (694)).

[200] An example offered by Barbeyrac is where two merchants enter into an agreement for the sale of contreband (which would be against the civil law, but not the natural law). Either party can renounce his end of the bargain up until the delivery of either the goods or payment, at which point "ni celui à qui on l'a vendue ne saurait légitimement se dispenser de payer le prix convenu, dans le premier cas; ni on ne peut soi-même, dans l'autre cas, refuser de donner la chose même; à moins que, comme je l'ai dit, on ne puisse le faire sans se causer un grand préjudice, sans encourir par exemple, une grosse peine: car alors il suffit de rendre ce que l'on a reçu, ou l'équivalent" (Pufendorf [note by Barbeyrac], p. 405).

[201] The reasoning for this was because no one could freely consent to commit an evil act (due to the incapacitating nature of vice on free will, a concept discussed in greater detail in Chapter 4, pp. 269-70).

[202] "Mais lorsque ceux qui traitent ensemble au sujet d'une chose défendue par les lois civiles […] il sont censés traiter ensemble comme s'il n'y avait point de loi là-dessus […]" (Servan*, Discours pour une femme protestante*, 39).

[203] Pufendorf indeed seems to indicate in several places a contrary conclusion to the one drawn by Barbeyrac and Servan: "[L]e Serment par lui-même ne suffit pas pour faire qu'une chose à quoi on n'était tenu que par les maximes du Droit Naturel, soit dès-là obligatoire par le Droit Civil; à moins que les Lois Civiles ne l'aient ainsi expressément déterminé" (*Le Droit de la nature* bk. IV ch. II: 469).

prove the existence of a marriage contract within a legal apparatus that explicitly forebade it: "si ce contrat n'est point illicite par son essence; s'il n'est point condamné par cette éternelle loi de nature, qui caractérise essentiellement le bon & le mauvais; si ce contrat enfin n'a contre lui que les lois civiles: alors, quoi qu'on ne puisse en réclamer l'exécution, on peut exiger un dédommagement, un *équivalent* de la part de celui qui refuse le premier d'exécuter" (ibid., 41 [author's emphasis]). Servan's argument was actually highly specious; he omitted Barbeyrac's final lines, which qualified the legitimacy of such agreements between the contractants alone, stating that they should have no recourse to the legal system in the event of a breach: "[…] que le Magistrat ne donne point action en Justice à ceux qui voudraient en être relevés […]" (Pufendorf [note by Barbeyrac], p. 405). Barbeyrac explained his principle thus: if two men decided to illegally gamble (against the civil law but not the natural law[204]) the losing side could not later demand recovery of his money in the courts. (ibid.). Barbeyrac was thus referring to the moral rather than legal obligation in such cases, a distinction willfully obscured by Servan in his pleading.

Having thus elided the division in Barbeyrac's separate theories of moral and legal obligation, Servan's next step was to prove marriage was harmonious with the natural law. To do so, Servan offered an image of a couple in the state of nature, brought together initially by passionate desire, bound together by mutual pity, then finally fully united through their offspring. Heavily inspired[205] by Rousseau's exaltation of man in the state of nature, whose force was yet tempered by the refinements and tools of civilization into

[204] This was a principle specific to Barbeyrac, who had written a treatise regarding the natural law of gambling in 1709.

[205] Servan's 1783 *Réflexions sur les Confessions de J.J. Rousseau* informed the reader that the author had met Rousseau, and despite severe misgivings regarding the public utility of his last works given their defamation of several people esteemed by Servan, he claimed to have nevertheless genuinely admired his works, and Rousseau's influence was apparent in his earlier ideas for legal reform based on personal virtue (*Réflexions*, pp. 5-12).

which his vigor would slowly rarefy,[206] Servan postulated not only the existence of marriage in the state of nature, but that it was more perfect in this initial iteration: "Voilà l'époque intéressante où le contrat du mariage reçoit toute son énergie […] c'est le moment où la nature semble leur payer, par des plaisirs tout nouveaux, le bienfait qu'elle en a reçu, & bénir dans sa simplicité une union qui perpétue son ouvrage" (ibid., p. 55). Assimilating the sentimental portrait of the Arcadian husband-father to the fathers in the audience before him, Servan demanded their assent to the natural origin of marriage not through their minds but through their tears:

> [V]ous vous rappellez ce moment où vous reçûtes pour la première fois, dans vos bras tremblants de joie, un enfant qui vous devait la vie […] eûtes-vous besoin alors de vous souvenir des formalités de nos lois, pour vous contraindre à la tendresse? doutâtes-vous alors que votre engagement prît sa source dans la nature? Dites, dites donc, si vous le pouvez, à cette femme expirante, que vous ne lui devez rien qu'au nom des lois humaines; si vous le pouvez, repoussez cet enfant de votre sein. Vous pleurez! C'est ainsi que répond la nature. (ibid., 57)

Awash in the radiant tears of fatherhood, Servan's *plaidoyer* blithely set aside reasoned inquiry into the legal origins of matrimony as a superficial mode of discourse inappropriate to man's familial attachments: "Qu'on raisonne tant qu'on voudra; j'abandonne ici cet avantage, & je préfère de sentir: pourquoi se faire raisonneur, quand il ne s'agit que d'être

---

[206] See, e.g., *Discours sur l'origine et les fondements de l'inégalité parmi les hommes* ("Le corps de l'homme sauvage étant le seul instrument qu'il connaisse, il l'emploie à divers usages […] Laissez à l'homme civilisé le temps de rassembler toutes ses machines autour de lui, on ne peut douter qu'il ne surmonte facilement l'homme sauvage; mais si vous voulez voir un combat plus inégal encore, mettez-les nus et désarmés vis-à-vis l'un de l'autre, et vous reconnaîtrez bientôt quel est l'avantage d'avoir sans cesse toutes ses forces à sa disposition […]" (*OC* III: 135)).

homme?" (ibid.) Because the intimacy of domestic life was supposedly governed by a sense of unmediated natural equity, any questioning of it was both superfluous and insincere: "A quoi bon des analyses savantes, quand on n'a besoin que de l'équité naturelle? Je dirais volontiers à ces hommes: vous avez parlé; maintenant dites-nous ce que vous pensez" (58). Speech, like civil marriage, was but a paltry shadow of the primal feelings that communicated man's true virtue to himself and his intimate circle.

Servan's eloquence resulted from his ability to hew his discursive style to the substance of his argument. Formal reserve and cadence were set aside in favor of unrefined images of animal pleasure,[207] rapid phrasing, and calls for communal tears. He went so far as to apologize for his enthusiasm, the veritable mark of an eloquent orator[208]: "Le vif intérêt que cette cause m'inspire, me ferait répéter cent fois les mêmes raisons; je le contrains, & je respecte vos moments; je vais même réparer, en peu de mots, le désordre qu'il a pu jeter dans ce discours […]" (83). Servan's passionate disorder was, of course, meant to likewise disorient his audience before the plight of a woman who derogated from the law yet needed now its protections to save her. Thus he flattered their sense of righteousness while also insinuating that any decision contrary to his recommendation could only result from bigotry: "Si la Robequin avait d'autres Juges, je craindrais qu'une

[207] "Imaginons la première rencontre de ces deux êtres que leur auteur n'a fait si différents que pour les unir; avides de se posséder presque avant de se connaître; attirés & retenus par un instinct impétueux; si séduisants l'un pour l'autre, que chacun semble abandonner l'amour de lui-même pour le transporter dans un autre; ces deux êtres, que l'aimable & puissante nature ne paraît anéantir un moment, que pour conserver son ouvrage, & tirer d'un transport aveugle l'ordre constant des générations" (Servan 47).
[208] "Mettre en doute l'enthousiasme de l'orateur, c'est vouloir faire douter de l'existence de l'éloquence même, dont l'objet unique est de l'inspirer. Ce discours qui vous émeut, qui vous intéresse ou qui vous révolte; ces détails, ces images successives qui vous attachent, qui ouvrent votre cœur d'une manière insensible à celui des sentiments que l'on veut vous inspirer, tout cela n'est & ne peut être que l'effet de l'émotion vive qui a précédé dans l'âme de l'orateur celle qui se glisse dans la vôtre. On fait une déclamation, une harangue, peut-être même un discours académique sans enthousiasme; mais ce n'est que de lui qu'on peut attendre un bon sermon, un plaidoyer transcendant, une oraison funebre qui arrache les larmes" (Louis de Cahusac, "Enthousiasme," *ENC* V: 721).

fausse idée de bien public & de religion n'étouffât la justice & la pitié […]" (88). Thus sculpting his judges into the roles he needed them to play, he unveiled to them the stage on which they sat:

> Beaucoup d'hommes ici pourront reconnaître le vrai, comme vous, Messieurs; mais vous seuls avez l'heureux pouvoir de faire ce qui est utile: ces audiences solennelles qui attirent le concours des citoyens, sont autant de spectacles publics où la bienfaisance & l'équité distribuent aux hommes par vos mains leurs utiles présents. Chaque arrêt doit être une instruction de la vertu, & vous prêchez la morale en la faisant observer. (97-98)

After having thus erected his judges as so many players on the stage, Servan himself dropped his role as lawyer/playwright, and assumed the part he had composed for himself, the one most likely to awaken the pity of his judges. Addressing his judges from the almost mythic position of the Protestant Everyman, Servan supplicated his audience to hear him not as a Protestant but as their estranged brother, ready to be reunited:

> Une de nos filles est outragée; nous partageons, nous ressentons tous ses maux: en vous demandant justice pour elle, elle vous la demande pour nous; […] Magistrats équitables, regardez-nous, & voyez qui nous sommes; songez qu'il n'y a pas un siècle que nous étions vos concitoyens; songez que nous sommes encore vos frères: autrefois vos filles étaient nos femmes, & nos fils devenaient vos gendres […]. (100)

By modelling the Protestant voice in the second-person plural and emphasizing their group identity in familial terms, Servan positioned everyone in a state of sentimental reciprocity. Through a long passage insistently cadenced by the imperative anaphora "songez," Servan

sketched out a population occupying the golden horizonline of virtue gestured toward by Montesquieu's fable of the good Troglodytes:[209] "songez que c'est nous qui dans le midi de vos provinces labourons vos terres, & filons votre soie; […] renfermés par vos lois dans la profession de nos pères, nous cultivons des arts héréditaires, exempts de cette ardeur de s'élever qui fait la ruine de vos fortunes & de vos mœurs" (101-02). The utopian community thus animated turned toward the judges in innocent invitation and humble supplication: "aimez-nous d'abord, & jugez nous après" (101).

After playing his part as the Protestant icon, a wayward brother toiling away the earth after the father threw him out of Eden, whose reconciliation with his family in the true faith awaited only the benevolence of the magistrates, Servan cajoled the judges into reading their lines: "O Messieurs! qu'il est doux, qu'il est honorable d'être aimé, d'être béni par les hommes de tous les partis! & pour cela, je ne sais qu'un moyen: il faut être juste envers tous, […] il faut, en un mot, rendre justice les yeux fermés; & tout au plus les ouvrir après, pour se réjouir si nos amis ont profité de notre équité" (107). By evincing the pleasure to be obtained both as judges and as men, i.e., in their public as well as personal life, Servan aligned the legal function with the moral function, or rather, subsumed the legal under the moral, the distinction blurred through a series of hybrid appeals to both reason and passion.

The concept of society as a body composed of ordered and imovible parts, taken for granted by seventeenth-century lawyers whose eloquence came down to clarity for the judicial elite, and pleasant theater for the rest, shifted considerably in the eighteenth century as the eloquence of the philosophical lawyers depended on their ability to combine the

[209] "Lettres 11-14," *Lettres Persanes* (1721).

erstwhile separate bodies of judgment into a single intelligent and intelligible feeling. Sentimental principles at the *immediate* disposition of all constitued the form and content of the production of Enlightenment lawyers. Thus unlike the seventeenth-century barrister, Servan's discourse rarely played on two registers in an attempt to cajole the public to arrive at the reasonable judge's opinion of the matter, but focused on a unified audience, as his eloquence aimed at the establishment of a new social unity based not on religious obedience and adherence to social hierarchies, but on feelings whose natural setting was the nuclear family. The moral homogeneity sought by Servan was thus one based on *mœurs*, not tradition, laws, nor religious or political dogma: "Écoutons ces hommes, Messieurs, c'est le moyen de les gagner; c'est la douceur, c'est la charité qui, réunissant les cœurs dans la morale, confond bientôt les esprits divisés dans le dogme" (107). The head would follow the heart,[210] whose jurisdiction was Arcadia. Thus he could easily argue for the Protestant woman, since in her he recognized the sacred family unit, whose ties to one another he considered prior to the law.

However attenuated was Servan's legal claim in the case of the Protestant woman, his pleading carried the day and was published and distributed throughout France. Voltaire, in his letter of thanks to the author for sending him a copy, offered a glowing review of Servan, who, at all of twenty-eight years of age claimed the Sage de Ferney, was already being cited "comme un ancien":

[210] Pierre-Louis de Lacretelle, who will be discussed at length in the following chapter, used a similar argument in his defense of the Jews of Metz, the 1777 case that earned him his renown: "Essayons donc sur leurs cœurs le pouvoir des bienfaits. Cessons de demander des vertus à des hommes que nous avons dégradés. Acquérons, par notre clémence, le droit de les réprimer par notre sévérité; et sentons combien il serait beau, combien il serait doux de les arracher en même temps à leurs vices et à leur misère" (*Mémoire pour deux juifs de Metz,* p. 234).

> Je me souviendrai toujours d'avoir répandu des larmes pour cette pauvre femme que son mari trahissait si pieusement en faveur de la religion catholique. Tout ce qui était à Ferney fut attendri comme l'avaient été tous ceux qui vous écoutèrent à Grenoble. Je regarde ce discours, et celui qui concerne les causes criminelles, non seulement comme **des chefs-d'œuvre d'éloquence**, mais comme **les sources d'une nouvelle jurisprudence** dont nous avons besoin. (Voltaire, "À M. Servan" [13 janvier 1768], *Œuvres* LXIV: 513 [my emphasis])

Servan's eloquent pleading was more than just advanced lawyering; it was judicial activism under an absolute monarchy for the federation of justice. The message was clear: decrees should no longer be handed down from on high, but should bubble up from the many hearths of France.

Enlightened Tribunal : Diderot's *Entretien d'un père avec ses enfants* (1773)

But what exactly would justice look like if it were, as Servan seemed to propose, stripped of all its apanage, its jargon, even its laws, and left to the moral sentiment of the family to decide? In the *Entretien d'un père avec ses enfants ou Du danger de se mettre au-dessus des lois,* Diderot erected a tribunal in this very fashion as though to test Servan's theory.[211] In the space of this short story, multiple forms of natural, positive and religious law all grapple for superiority in a breathless sequence of personal and public dilemmas. A stolen dowry, starving heirs, vigilante heroism, shameless adultery... Diderot set his

[211] The idea of the natural law was of foundational importance for Diderot. Michèle Duchet remarked "Les textes où Diderot oppose au code civil et au code religieux le vrai code, celui de la nature, sont si nombreux qu'il est impossible de les citer tous. Leur nombre même impose l'idée comme une idée-force" ("L'anthropologie de Diderot," p. 440).

reader before a veritable parade of social disorder and flights of anarchy as though narrativizing from within the esoteric legal debates surrounding questions of natural law and their reliance on case analysis.[212]

What is perhaps even more interesting about the *Entretien d'un père avec ses enfants*, which was one of the only works of fiction signed and published by Diderot during his lifetime,[213] is that the rhetorical strategy employed by the main character *MOI* performs a profound inversion of legal ontology. In other words, encapsulated in this short text are all the strategies (minus the warning not to use them) sufficient to revolutionary rhetoric.

I will first quickly review what I mean by legal ontology to make my point more clearly. The particularity of legal thinking and discourse is its adherence to a degree of *non-particularity*; the true horizonline of the argument is always beyond the mere facts of the case. In order to make a properly legal (as opposed to moral, for example) argument, it must be fundamentally tailored to the law (whatever its iteration) rather than merely the case. This is because the essential function of the legal system is to uphold the law, not the parties. Thus lawyers are compelled to *argue the law* in a way that (hopefully) entails a favorable outcome for their clients. The rules of legal ontology may sometimes lead to results that appear inequitable in the particular case, but logically resolve toward justice in

---

[212] Diderot had evoked the inextricability of the competing codes (civil/natural/religious) earlier in his *Salon de 1767*: "[…] les uns prétendent que la vertu était l'habitude de conformer sa conduite à la loi, les autres que c'était l'habitude de conformer sa conduite à l'utilité publique. […] Pourquoi n'y a-t-il et ne peut-il y avoir de mœurs dans aucune contrée de l'Europe? c'est que la loi civile et la loi religieuse sont en contradiction avec la loi de nature. Qu'en arrive-t-il? C'est que toutes trois enfreintes et observées alternativement, elles perdent toute sanction. On n'y est ni religieux, ni citoyen, ni homme. On n'y est que ce qui convient à l'intérêt du moment. D'ailleurs, si chacun s'institue juge compétent de la conformité de la loi avec l'utilité publique, l'effrénée liberté d'examiner, d'observer ou de fouler aux pieds les mauvaises lois conduira bientôt à l'examen, au mépris et à l'infraction des bonnes" (*Salon de 1767* DPV XVI: 201-02).

[213] After *Les Bijoux indiscrets* (1748), Diderot avoided publishing his works of fiction. The *Entretien d'un père avec ses enfants* first circulated in a rather impoverished version in the March 1771 *Correspondance littéraire*, then appeared (along with *Les Deux amis de Bourbonne*) the following year in its full form in a volume of Salomon Gessner's pastoral poems. In 1773, the German publication was translated (back, in Diderot's case) into French, but censorship meant that only deluxe editions would circulate.

the general. For example, every lawyer reading *Les Misérables* knows that Jean Valjean ultimately deserved punishment because to exculpate a thief on the basis of personal hardship could open up the legal protection of property to endless antagonisms that, in the end, would likely lead to greater injustice than the admittedly horrific one suffered by Jean Valjean.[214] (Of course, I could hardly imagine any lawyer agreeing with the sentence of nineteen years of hard labor, but that is a different matter). Thus lawyers, in advocating for their clients, must primarily look after the non-particular character of their argument to ensure that its legal merit takes care of the particular case.

In the *Entretien d'un père avec ses enfants*, Diderot, who had been exposed to the rules of legal rhetoric as both a law student and clerk during his early years in Paris, turned legal ontology so entirely on its head that its merits could hardly be recognized by the end of the work. The main character *MOI* incessantly describes instances of justice in particular cases without regard for and even in contravention of the law, eventually reducing his interlocutors to silence and even a degree of concession. *MOI* contradicts various arguments for the supremacy of law and order on the basis that such a status quo depends ultimately on the particular will of the sovereign, who may choose to abdicate his responsibility to execute the laws.[215] An ineffective system of law that lets injustice go unchecked viciates the legal ontology, whereupon the declaration of non-particular justice devolves to the particular.

While I would not argue that Diderot sought to seed revolution in this paradoxical work, he nevertheless thoroughly problematized the moral and political role of the legal

[214] This is the typical slippery slope principle incessantly evoked by law professors teaching first-year law students.
[215] It is notable that Diderot did not depict a tyrannical ruler, but rather a merely incapacitated ruler.

system and its hierarchies of meaning. He did this by proposing a series of increasingly compelling arguments for particular cases against the hegemonic non-particular sphere of the law that, in the end, cause us to momentarily relocate radical justice within the particular (i.e., the person) as opposed to the non-particular (the law generally). This ephemeral concession is crucial because it logically refounds law *within the individual*. For Diderot, of course, this was not a stable position; such an individual was one of *génie* who, all the same, was likely a danger to society (the subtitle to the work was, after all, *Du danger de se mettre au-dessus des lois*). We will now turn to a closer reading of the text to understand how Diderot delineated the borders of legal and particular justice.

In the *Entretien*, the reader is presented with a warm, retrospective glimpse into the author's family home at Langres. Brothers, sister and adored father are seated around a warm fireplace for the purpose of hearing the father's confession of his part in a terrible dilemma that took place many years earlier. His speech is interrupted by a multitude of neighbors, each with their own *cas de conscience*, all of which present legal and philosophical aporia debated in turn but ultimately left undecided by the small private tribunal of intimates. Indeed, it is less the judgments of each character but rather the guiding principles each assumes as the foundational logic for his decision that are put into dialogue.

Analysis of the *Entretien* tends to focus on *MOI* as an anarchical figure,[216] governed by no one but his own inner sense of the laws of nature or morality. Yet given Diderot's knowledge of and interest in the philosophical set of lawyers, especially Servan, whose career, if brief, was decisive for the decade to follow, the *Entretien* should rather be considered in light of the lawyer's widely-published re-examination of civil and religious

[216] For a survey of the anarchist readings of Diderot, see McKinley, *Illegitimate Children*, pp. 106-118.

law according to his version of the natural law. Diderot's *conte moral* joined the debate just as legal discourse was intersecting with philosophical ideals, and offered a domestic vision where actions were either provisionally approved or disapproved through incessant conversation and frequent recourse to fictional tales. What is more, the main position assumed by *MOI* in opposition to his father that frames the entire tale, mirrors exactly an anecdote in Barbeyrac's translation of Pufendorf, which is to say that the principles espoused by *MOI* could hardly be considered an aberration in the thought of legal theorists at the time.[217]

The father had just begun his tale of how he had nearly ruined his children's estate "de fond en comble" (470)[218] when the arrival of their neighbor, the Doctor Bissey, arrives to check the old man's health. *MOI*, learning of the doctor's efforts to heal M. de la Mésangère, a criminal condemned to a punishment "infamante sinon capitale" (ibid.), declares that the doctor should leave him to die: "C'est qu'il y a tant de méchants dans ce monde qu'il n'y faut pas retenir ceux à qui il prend envie d'en sortir" (ibid.)[219] *MOI* thus

---

[217] In his notes on Pufendorf's section on *serments*, Barbeyrac added the following: "[I]l est libre à chacun de donner son bien à qui bon lui semble. Mais supposé qu'imprudemment quelqu'un ait juré de donner à une personne qui n'en a pas grand besoin, ou même aux Pauvres, une somme dont il ne saurait se défaire en leur faveur, sans manquer à ce qu'il doit aux personnes qui le touchent de près & qu'il est obligé d'entretenir ; en ce cas-là, le Serment est tout-à-fait nul" (Pufendorf bk. IV ch. II, p. 467).

[218] Denis Diderot, *Entretien d'un père avec ses enfants*, ed. Michel Delon et al. *Contes et romans* (Paris: Éditions Gallimard, 2004).

[219] Mésangère was convicted of financial crimes committed against his employer, thus the position taken by *MOI* that the criminal merits death subtly raises an important issue at this time, brought to the fore by Cesare Beccaria's *Des délits et des peines* (1764) regarding the proper proportion between a crime and its punishment. Diderot, for his part, considered all penal codes – even that proposed by Beccaria – as necessarily arbitrary since "la nature n'a rien institué de commun entre des choses dont on prétend compenser les unes par les autres, et qu'à l'exception des cas où la peine du talion peut avoir lieu, dans tous les autres on est presque abandonné au caprice et à l'exemple" ("Châtiment," *Encyclopédie* III:250). The reformist attitude in general, where it sought to rectify codes and statutes rather than the morals of those who decreed, enforced and obeyed them, seemed to Diderot's distaste; in his *Observation sur le Nakaz*, he ironized Beccaria's project thus: "Je ne prétends point à ôter au *Traité des délits et des peines* le caractère d'humanité qui lui a mérité un si grand succès […] Cependant je ne puis m'empêcher de calculer […] Dans tous les tribunaux de la France, on en supplicie […] un homme sur 83 000. Où est le vice, la fatigue, le bal, les fêtes, le péril, la courtisane gâtée, le cabriolet, la tuile, le rhume, le mauvais médecin qui ne cause plus de dégât?" (*Observations sur le Nakaz*, §62, 539-40). However opposed Diderot was to the penal system's status quo,

condemns the doctor for practicing his art and obeying the civil code where he should have simply followed the natural law – here under the guise of the law of nature? – and let the criminal die. The doctor rebuffs the role of accused, guilty, and judge all at once heaped onto him by the raging philosopher, to which *MOI* offers a quick riposte: "*Le Docteur*: Et à qui appartient-il de le déclarer malfaiteur ? Est-ce à moi ? *MOI*: Non, c'est à ses actions" (472). The prelegal declaration of guilt – a "fonction commune à tout bon citoyen" (ibid.) – that somehow vaguely emanates from the individual's actions and resolves questions of procedure reminds us of Servan's insistence that judges perform their duties *prior* to the event of courtroom procedure. Despite *MOI's* failure to elaborate a convincing argument for the annulment of the justice system toward which his accusation of the doctor seems to move, he nonetheless succeeds in seeding a tension between the natural man and the public citizen that will continue throughout the tale.

MOI continues his interrogation of the doctor, despite the latter's obvious hurry to visit other patients. *MOI,* in order to obviate the doctor's hesitation regarding the just desert of Mésangère, whose guilt has not yet been proved, tweaks his hypothetical by substituting for him the infamous criminal Cartouche. Would the doctor heal a convicted mass murderer? Louis Dominique Garthasuen, dit Cartouche (1693-1721) was probably the most famous criminal of the early eighteenth century, whose name alone could sell a book and pack the *parterre*.[220] His guilt as a thief and murderer was beyond dispute, deeds for which he was broken on the wheel in late 1721. Yet the dramatization of his life through

he was perhaps just as wary of what Andrew Clark recently termed the "dangers of passive illusion" that inhered in systems pretending to "perfect utopian clarity and utility" (Clark 203).

[220] "Le public a reçu avec une avidité incroyable tout ce qui regardait Cartouche, & le nom seul de ce fameux Scélérat, mis à la tête d'un Livre, ou d'une Comédie a suffi pour faire débiter l'un, & pour attirer à l'autre un succès prodigieux" *Histoire de la vie et du procès de Louis Dominique Cartouche*, (1722), p. 3. Louis-Sébastien Mercier lamented the glory of the Cartouche years: "Il n'y a plus de Nivet ni de Cartouche, ainsi qu'il n'y a plus de Racine ni de Corneille" (*Tableau de Paris*, p. 863).

plays and novels turned the highwayman into a durable celebrity,[221] the first iteration of the character of public enemy #1, a talented criminal "mais sans méchanceté radicale"[222] who need not be expelled from society but rather was erected as its ally. So captivated was the French imagination by the retellings of Cartouche that even after his execution, the public sought his exculpation on the stage.[223] As stated by law and literature specialist Christian Biet, "[…] Cartouche montre le désordre d'un monde sans valeur absolue" (Biet, "L'affaire Cartouche," 455). The polyvalence of Cartouche/*Cartouche* thus implicitly leavened the category of guilt in the *Entretien* of which the name was supposed to be a clear sign. Bissey, "après un moment d'incertitude," maintained his position that a doctor should perform medicine and not concern himself with doing justice. He warned *MOI* that if he did not maintain this professional distance, "bientôt il ne saurait plus où s'arrêter" (472) and to reinforce his point, he claimed that he would not regret curing a man even if that man would kill his friend the very next day. The schism between the man of feeling and the dispassionate doctor corresponds to the nature of the positive law, which demands individual sacrifice for the efficient operation of the general good.[224] *MOI* bristles at the

[221] Daniel Defoe composed the English translation of Cartouche's *Histoire de la vie* shortly after its debut, which included a promise to soon publish a translation of Legrand's play. Nicolas Racot de Grandval composed a poem entitled glorifying the criminal ("On ne peut s'empêcher d'admirer son grand coeur" (*Le Vice puni, ou Cartouche, poème*, (1723), p. 105). The Jesuit theologian Louis Patouillet also composed an *Apologie de Cartouche, ou le scélérat sans reproche* which figured a dialogue between a Jansenist and a theologian over whether Cartouche could be considered a saint. Legrand's collected works were republished in 1770 with the collaboration of Voltaire. Cartouche was romanticized at the end of the 18th century (beginning in 1798 with the anonymous *Amours de Cartouche*), and the mythic proportion of his name lasted well into the 19th century.
[222] Christian Biet, "L'affaire Cartouche (1721) : scène juridique/scène littéraire," p. 445.
[223] Antoine Legrand's, *Cartouche, ou les voleurs* (1721) had been submitted for royal approval two years before its first performance, but the censor would not authorize the play until Cartouche had been caught, on the grounds that it could be perceived as mocking the government as inept. It was played for the first time at the *Comédie française* the day of his execution. See Christian Biet, "L'affaire Cartouche (1721)," p. 445.
[224] *MOI's* brother puts the exigencies of the positive law more starkly: "Les juges ferment […] les yeux sur les circonstances […] et font bien. Ils sacrifient quelquefois contre le témoignage de leur conscience […] et font bien. […]" (485).

response, and tries in tones recalling Molière's Alceste to subjugate the doctor's opinion: "Docteur, écoutez-moi. Je suis plus intrépide que vous; je ne me laisse point brider par de vaines raisonnements" (473). In *MOI*'s effort to reconcile the man of positive law to his state of nature through his own *mise en scène*,[225] he merely isolates himself from the doctor, who simply ignores him and tries again to leave, wishing the father a good day on his way out. Eventually, after many attempts to extricate himself from the philosopher's arguments and depart the house, the doctor states his position with blunt condescension: "Cher Philosophe, j'admirerai votre esprit et votre chaleur tant qu'il vous plaira, mais votre morale ne sera ni la mienne ni celle de l'abbé, je gage" (474). The virtue of the doctor – to heal – thus continues its path unobstructed by the virtue of the philosopher – to reveal the nature of justice.

After the departure of the doctor and a string of other interruptions, the father finally resumes his tale of near-disaster: having been asked to divide the estate of a deceased neighbor between his kin, which will alleviate their wretched poverty, the father set dutifully about the task. During his examination of the accounts he discovered a very old will that left the entire estate to a family of exceedingly wealthy Parisian booksellers. The father hesitated, unsure whether to uphold the letter of the law and doom the dead man's poor relatives while enriching a greedy family, or destroy the will and distribute the man's goods among his needy relatives. Unable to decide, he asks a priest, who, blending civil and religious law, states that he can give the estate to the poor, as long as it makes total restitution to the legal heirs. "[I]l n'est permis à personne d'enfreindre les lois, d'entrer

[225] " *MOI*: Je suis médecin, je regarde mon malade, en le regardant je reconnais un scélérat, et voici le discours que je lui tiens […] Meurs, et qu'il ne soit pas dit que par mon art et mes soins il existe un monstre de plus" (473).

dans la pensée des morts, et de disposer du bien d'autrui. Si la Providence a résolu de châtier ou l'héritier, ou le légataire, ou le défunt, car on ne sait lequel, par la conservation fortuite de ce testament, il faut qu'il reste" (476). Such an option, however faultless in the eyes of civil and religious law, would have destroyed the resources of the father's own family.

After learning that his father enforced the will pursuant to the priest's counsel, *MOI* immediately judges him guilty of a far greater crime: "Je pense, moi, que si vous avez jamais fait une mauvaise action dans votre vie, c'est celle-là ; et que si vous vous fussiez cru obligé à restitution envers le légataire après avoir déchiré le testament, vous l'êtes bien davantage envers les héritiers pour y avoir manqué" (483). *MOI* defiantly sweeps aside any reference to religious or civil law profferred by his father and brother, calling the priest a "mauvais raisonneur, un bigot à tête rétrécie" (ibid.). In defiance of these codes, he claims that the only court that has jurisdiction over him is "le tribunal de l'équité naturelle" (482), which presided in his own heart and mind due to his status as an "homme de bien," able to detect and decipher the natural laws for himself and others.

The sovereign jurisdiction *MOI* claimed by right of his *mœurs* is challenged by his father, who differentiates between public opinion and that of individuals. These two opinions are conceptually incompatible, and require two separate mentalities: "*Mon père* : Tes raisons, comme particulières étaient peut-être bonnes, mais comme publiques elles seraient mauvaises. Il y a tel avocat peu scrupuleux qui m'aurait dit tête à tête : Brûlez ce testament… ce qu'il n'aurait osé écrire dans sa consultation" (485). *MOI*'s brother states the case even more starkly: "*L'abbé* : […] Les juges s'en tiennent strictement à la loi […] et font bien. Les juges ferment […] les yeux sur les circonstances […] par l'effroi des

inconvénients qui s'ensuivraient, et font bien. Ils sacrifient quelquefois contre le témoignage de leur conscience […] sans lâcher la bride à une infinité de fripons, et font bien" (ibid.). The rhythm and repetition of the brother's statement emphasize the mechanical adherence he demands, which leaves no room even for the exercise of equity on the part of the judges – an extreme position outside of the typical practice of magistrates at this time that hints at the radically religious nature of the brother. Yet the brother has finally stated the logical conclusion of the positive and religious law, which permits *MOI* to pose the question implicitly agitated throughout the tale as well as in the legal and philosophical communities of France at this moment: "Est-ce que la raison de l'espèce humaine n'est pas tout autrement sacrée que la raison d'un législateur? […] Est-ce que l'homme n'est pas antérieur à l'homme de loi?" (485).

The abbot proceeds to tell a story of a shoemaker who, due to the governor's inaction before the injustices abounding in his city, decided to become a vigilante:

> Au bruit de quelque délit atroce, il en informait, il en poursuivait chez lui une instruction rigoureuse et secrète. Sa double fonction de rapporteur et de juge remplie, le procès criminel parachevé et la sentence prononcée, il sortait avec une arquebuse […] s'il rencontrait les malfaiteurs […] il vous leur déchargeait équitablement cinq ou six balles à travers le corps. (487)

The arrogation of all judicial function on the part of the shoemaker is applauded by *MOI*, who considers him not only a righteous person, but fit to replace the vice-roy as ruler of the city. The political revolution thus implied gives *MOI* no pause; his desire to return to the natural source of justice where private *mœurs* dictate private action, unalloyed by practical concerns for public safety or stability – those very conditions overcome through

the establishment of a civil society – casts an ultimately unsocial, even tyrannical shadow. Yet the abbot's condemnation of the shoemaker as a murderer feels just as problematic from the perspective of particular equity, expressed by *MOI*: "Un meurtrier! le mot est dur. Quel autre nom pourrait-on lui donner, s'il avait assassiné des gens de bien?" (488).

A brief but personal *cas de conscience* constituted the final tale: the abbott had torn up a paper documenting a debtor's obligations in order to save his family from ruin, an act which had little effect on the creditors' finances overall. The father, despite his contrary decision in a strikingly similar legal situation, approved of his son's illegal action. However, he was careful to condemn the act in general: "Père: [S]i vous lacérez de votre autorité privée un billet, pourquoi n'en lacérez-vous pas deux, trois, quatre, tout autant qu'il se trouvera d'indigents à secourir aux dépens d'autrui? Ce principe de commisération peut nous mener loin. Monsieur le prieur, la justice, la justice" (494). His public concern over the "slippery slope" should have disclaimed his domestic blessing as a father – but did it matter? The father thus is shown to occupy several ethico-legal positions throughout the tale, rebuffing abstract applications of the law in concrete examples, yet acknowledging all the while their philosophical necessity. Would he have made the same decision again in regard to the poor relatives disinherited in favor of the greedy *libraires*, the central anecdote or *exemplum*[226] of the *Entretien*? His willingness to tell, listen and generally share deeply considered advice, an exchange that occurs within the family hearth but which welcomes friends and neighbors like a friendly court docket, leaves the question tellingly unanswered.

The *Entretien*'s fictionalization of contemporary legal issues moved the law from the juridical genre to a more aesthetic framework. The five aporia thus posed were

---

[226] On the *exemplum*, or short tale used as evidence in a doctrinal, religious, or moral work, in Diderot's *œuvre*, and especially the *Entretien*, see Diane Dutton, "De la rhétorique à la narration," pp. 13-26.

remarkably accessible to a wider public who, if not experts in the law, could nevertheless be made to feel the complexities and responsibilites of legal work; conversely, an iron-clad adhesion to the law typical of a barrister or jurist was likely presented with disconcerting cracks in this relationship. The unease with which the reader surveys the friction between civil, natural and religious laws is expressed in the final scene by the benevolent father, who, throughout the tale, has largely reserved judgment despite (or perhaps because of) his reputation as the wisest man in town. At *MOI*'S insistence that there can be no law for the wise man since every law is riddled with exceptions, the father responded that a small minority of people who considered themselves thus above the law would not bother him, but if everyone were to take this opinion he would find such a place uninhabitable. The father's *mise en abyme* of the tale's dilemma – when does justice become injustice – demonstrates his ability to abstract himself from the strict confines of the debate and condense its meaning into an aphorism, the paradoxical meaning of which would perhaps suspend the unbalanced excesses of both the principle of moral autonomy as well as unjust adherence to positive law.

In this tale, we find Diderot has pushed Servan's position to the breaking point; individual feeling of justice may be trusted in the domestic setting where they find their radical expression, and may justly prevail when applied to certain cases, but there nevertheless exists a point at which objective validity has no more to say in the extrapolation of the domestic principle of justice. Servan would be taught this lesson by experience in his doomed pleading for the Count of Suze against Demoiselle Bon.

Servan's Final Pleading: the Count of Suze vs. Demoiselle Bon

Though Servan's dedication to the primacy of domestic life and private *mœurs* over the enforcement of the civil law brought him great success in the case for the Protestant woman, the extension of this same logic to a 1772 dispute an opera singer's claim against a former aristocratic lover meant his professional demise. After hearing the arguments presented by the parties' attorneys, Servan argued for the Count, considering it a propicious occasion to correct public vice (Servan, *Discours d'un ancien avocat-général*, ix). When Servan stood to deliver his discourse, the public, who sensed his decision, drowned him out with boos and whistles. Crushed, the advocate general took his seat without finishing the second half of his pleading, announced his retirement from the courtroom and exiled himself to the countryside. Before leaving, however, he was careful to ensure the publication of his speech in its entirety against the opera singer, Mlle Bon, as a sort of bitter farewell to the courtroom.[227]

A quick word regarding the political context before entering into a discussion of the case itself. The year 1772 was a very tumultuous one for judicial France. Louis XV's Chancellor René de Maupeou (1714-92) had finally succeeded in resisting the frequent parlementary strikes triggered by various royal prerogatives and, by the end of 1771, had replaced the hereditary parlements with salaried magistrates. The parlement of Grenoble was the last bench to undergo the Maupeou reforms, but, in the end, the Chancellor oversaw there a "une réforme plutôt qu'une répression" (Dubarle 28). Seven *présidents*, including

---

[227] Although Servan would never again return to the legal profession, he continued authoring pamphlets and reflections on various topics relating to public morality, including his *Réflexions sur les Confessions de J.-J. Rousseau […]* (1783), followed by a *Commentaire sur un passage du livre de M. Necker, ou éclaircissements demandés à Messieurs les commis des postes, préposés à décacheter les lettres* (1784). In 1789 alone he circulated eight pamphlets, but declined a position in the Estates General. For a thorough analysis of Servan's advocacy for intellectual property rights, see Dena Goodman, "Epistolary property." For a general biography of Servan's life, see Charles Prud'homme, *Michel de Servan (1737-1807): Un Magistrat réformateur* (1905).

the *premier* (Bérulle, replaced by the *procureur général* Vidaud de la Tour), and twelve *conseillers* were exiled from Grenoble, but the majority of these had already vacated their positions many years earlier. In the end, the newly composed parlement did not include a single new face. Yet throughout early 1772, resignations came frequently, and the empty seats were filled quickly, with little thought to judicial experience or knowledge (Dubarle 33). Nevertheless, Servan remained in his position as *avocat général* throughout the political vagaries, and exited only when his popular courtroom audience would hear him no longer.

The facts of the case were simple enough: the Count Louis-Charles de Suze, a member of one of Europe's oldest families but with little money to its name, wrote a promissory note to his lover, Mlle Marie-Louise Bon, an opera singer, for the amount of 50 thousand *livres*. The count eventually left the actress, conformed to his family's wishes and married a woman of his social station. In an effort to maintain what was left of his family's dwindling fortune, he attempted to rescind the note to Mlle Bon, which amounted to half of the Suze wealth. Mlle Bon, represented by Alexis-François Pison du Galand[228] brought an action for enforcement of the note before the Parlement of Grenoble.

The issue of the case may initially be a little difficult to understand for the modern reader. The question turned on whether the Count of Suze had been in love. Why? As discussed in the first chapter of this dissertation, the passions, considered through the lens of classical moral philosophy, were blind, and to be subject to one's passions (as opposed to one's reason) was considered a disabling condition. An individual in love could be constantly led astray from reasonable conduct due to their impassioned state. Passionate

[228] The choice was an astute one; Alexis-François was the son of François Pison du Galand, a well-respected lawyer who had only recently been named *conseiller* to the parlement (8 February 1772) (Dubarle 59).

love, far from constituting the dreamy escapism marketed by Harlequin romance novels, was thus considered a form of enslavement that deprived the lovesick individual of their reason and thus their will. For legal purposes, one could not be held to a contract that one did not willfully enter into; just like today, there can be no valid contract where any of the contracting parties lacked capacity to form an agreement. The difference is that in the eighteenth century, love was included among the mental deficiencies vitiating the enforceability of a contract. Servan's argument against Mlle Bon thus focused on the passionate love that she had inspired in the Count, and utilized to her financial advantage as dispositive evidence against the validity of the contract.

The law supported the arguments of Servan: "Toutes donations faites à des concubines seront nulles & de nul effet" (Ordonnance de Louis XIII, art. 133 (1692)). Indeed, during this period, even gifts of substantial sums or properties between *spouses* after marriage were generally struck down in the courts as likely resulting from the extortion of passions rather than the deliberation of reason.[229] Yet Servan made very little of the letter of the law; he preferred to attack the contract as an offense to *mœurs*, since, according to the *avocat général*, it was morality, rather than laws, that knitted society together:

> Toute action […] contraire aux bonnes mœurs, est un scandale public qui porte atteinte aux lois mêmes, parce qu'il en altère le vrai principe, qui n'est que l'honnêteté naturelle; celui qui viole les lois, brise les liens de la société; celui qui agit ou contracte contre les mœurs, les dénoue. L'un est un scélérat

[229] See Charles Giraud, "Précis de l'ancien droit coutumier français (troisième et dernier article)," p. 419. The regions governed under *droit écrit* similarly rendered gifts between spouses virtually impossible (*Ordonnance de 1731*, art. 3).

> qui révolte; l'autre est un vicieux qui peut séduire. Le scélérat porte souvent une tête exécrable sur un échafaud, & plus souvent encore l'homme vicieux comblé d'éloges règne dans la société au milieu de ses imitateurs; & c'est à lui que nous réservons notre décret triomphal, en le consacrant du titre d'*homme aimable*. (23 [author's emphasis])

By differentiating between a *scélérat* who violated the law and received punishment, and a *vicieux*, or *homme aimable*, who violated *mœurs* yet received accolades from his fellow men, Servan sought to put public morality on trial. The "erreurs funestes de l'opinion" (ibid.) were the result, according to the advocate general, of private virtue fallen out of practice. By deeming the contract unenforceable on moral, as opposed to legal grounds, the audience would thereby recognize virtue as the essence of the law: "Quiconque n'observerait que les lois, serait encore un homme bien dangereux. Quoi! parce qu'elles ont laissé libre un vaste champ pour les mœurs, pourra-t-on y semer impunément des plantes vénimeuses?" (22). Servan understood that by positioning his discourse outside of the ambit of the law and in the realm of *mœurs*, he risked being accused of speaking beyond his jurisdiction: "On m'objectera peut-être encore qu'une partie des mœurs n'est pas du ressort des lois, & que les lois sont le seul ressort du Magistrat" (349). Indeed, the interpretive role assigned to the judge was conceived with great latitude by Servan, who saw in it the necessity to apply the intention of the law, rather than its express command. "[L]'autorité du Magistrat n'est pas si bornée; il ne doit pas seulement faire observer ce que les lois commandent; mais encore ce qu'elles indiquent; il est plus comptable au public de l'intention des lois que de leurs expressions" (ibid.). Thus, in an

exhaustively composed pleading,[230] Servan exposed the inner workings of the debauched relationship through myriad readings of their epistolary protestations, to which he added his own touches and criticisms, and often rephrased entire paragraphs in an effort to make plain the hidden intentions of the correspondents. Foremost in his argument was less the blinding love experienced by the debauched Count, which would have easily proved his point as a matter of law, but rather the vicious ploys of the clear-eyed actress.

Servan and the Theater

Of some surprise to the modern reader is the status of Servan's moral account of the theater, its relationship to society, and the role of the courtroom. The motif of the theater, a commonplace in many legal pleadings by this time, permeated every layer of Servan's discourse before the parlement of Grenoble. Of course, the theater and the tribunal were often rhetorically paired, and the plaintiff herself was an actress. Yet it was Servan's overarching concern with the moral utility of the spectacle that framed his discourse. As such, the image of the theater evolved throughout the lengthy pleading, evoked initially as a den of vice before finally coinciding with a virtuous spectacle of public justice.

Despite several ironic remarks made to emphasize the low repute of Mlle Bon as a singer,[231] Servan's pleading carefully avoided disavowing the theater in the style of Rousseau.[232] He accredited the salutary effects of the theater on the people, its ability to

---

[230] Servan put (only) this succinctly: "J'ai juré dans cette affaire la loi de l'ennui; c'est celle de tout dire" (Servan, *Discours d'un ancien Avocat général*, 301).

[231] "De quel singulier spectacle le [sic] passions humaines nous repaissent depuis deux mois! Une femme accoutumée à de moins nobles théâtres, a paru devant vous; un homme que sa naissance avait destiné à de plus illustres rôles n'a pas dédaigné d'y figurer avec elle […]" (Servan, *Discours d'un ancien Avocat général*, 1).

[232] Responding to d'Alembert's article "Genève" composed for the seventh volume of the *Encyclopédie* (1758), in which the editor recommended that the city allow theater within its walls for the refinement of its citizens, Rousseau's 1758 *Lettre à d'Alembert* vociferously attacked the Enlightenment notion that theater could improve the morals of citizens, contending that playwrights only please corrupt minds.

“charmer les ennuis de la vie” and “nous [faire] goûter des plaisirs ingénieux, mêlés des instructions les plus touchantes” (25). Servan’s trite praise made way for his warm admonition of the social responsibility of the players and their productions; the theater must remember its role as a mirror held up to the public, and that the public was a mirror held up to the theater: “Que ceux qui l’exercent, songent sans cesse qu’ils ont pour juges les hommes de génie qu’ils nous font admirer, & pour lois les maximes de vertu qu’ils nous font applaudir” (ibid.). The theater made society and its morals in its own image; thus for Servan, who considered morality the basis of civil society, the stage was the very site of statecraft. Given the asymmetrical relationship between actor and spectator due to the theater’s monopoly over the public’s imagination, virtuous love could not exist between them; thus Mlle Bon’s responsibility extended infinitely when she took the stage, which only further incapacitated her lover: “[T]outes les illusions de l’imagination viennent composer au théâtre un poison violent qu’on y débite sous le nom de l’amour. Malheureux! qui aime une de ces femmes dangereuses, te crois-tu libre?” (27). Moreover, any individual who became involved with an actress would be ineluctably dragged onto the stage himself: “Vous servirez de spectacle au spectacle même; […] C’est vous qui montez sur le théâtre avec elle, & c’est vous qui êtes le personnage de la scène” (28-29). The harm caused by this eventuality was not limited to the foolish lover; a passion for an actress was one for all to see and be influenced by, while the time of repentence would occur off stage: “Votre repentir n’est utile qu’à vous, & vos fautes ont été contagieuses pour tous” (29). Servan considered the actress in particular to have harmed both men and women, since the latter were thought to imitate her seductive methods in order to win back her own husband from the actress’ arms, thus catching all of society in a vicious cycle of illusion.

Yet for all his concern over the mixing of stage and spectator, Servan's primary goal as a philosophical lawyer was to expose the intention of the laws as the effort to found a civil family in the image of the natural family. He thus had little desire to break down the familial constitution by relegating actors to a separate sphere of action. Having sensed perhaps that his logic disqualifying relationships between actors and spectators would only buttress the already well-enforced disunion of actors from the rest of society,[233] Servan blamed the public for the rift, claiming that their prejudice was the source of the actors' debasement. In Diderotian fashion, Servan lamented that the theater could not have a beneficial effect on society until actors could be respected and their acting could be understood: "Le préjugé public en avilissant les acteurs nous faisait dédaigner de les choisir pour modèles; les sentiments même qu'ils récitaient, étaient souvent à une hauteur où nos mœurs & notre caractère ne pouvaient plus atteindre: nous levions les yeux pour les admirer; mais c'étaient pour nous des objets gigantesques & inaccessibles" (342). Thus beyond the social isolation incurred by the actors due to their ostracization by the public, the public itself suffered as well because such degraded figures could not cohere with the lofty themes set on stage in the minds of the spectators. This moral dissonance harmed the possibility of illusion, without which the audience remained disconnected from the action and their *mœurs* unimproved. The aesthetic was corrupted.

To cross the divide between the stage and *parterre*, and thereby restore the utility of the theater, Servan advocated for the inversion of the relationship between spectator and

---

[233] Church officials regularly refused sacraments to French actors unless they renounced their career. *See, e.g.,* Jacques Goetschel, "Les Pères de l'Église: la tentation du théâtre." However, as Servan pointed out in 1789, the public proscription of actors pre-dated Christianity, as it was inscribed in the Roman law as well: "*Infamià notatur qui artis ludicrae pronunciandive causà in scaenam prodierit*. Loi 1re, *De his qui notantur infamià*." (*Événements remarquables* [...] in *Œuvres choisies,* t. III (1825), p. 294).

spectacle: “Il faudrait, non pas comme on le propose, rendre les Acteurs citoyens; mais rendre comme autrefois les citoyens Acteurs. Les vrais spectacles sont moins ceux où l’on ne regarde que ceux où l’on se croit regardé” (345). Though it may be tempting to align Servan’s proposal with Rousseau’s call for *fêtes publiques*,[234] it should be noted that Servan’s reference point was the medieval tournament,[235] where the codes of chivalry demanded the public quest for glory and love. Servan, a true sensationist[236] who would later become one of Mesmer’s most fervent advocates, conceived of the tournament as a blending of the spectacle of the theater with that of the *palais de justice*: “Autrefois il fallait prouver son innocence, & pour lors il ne fallut prouver que son courage & sa tendresse” (340). Rather than determining who was on the right side of the law in a dispute, men who performed feats of chivalric hastilude[237] gave public testimony of their private character. Since glory and love formed the basis of action in tournaments, the two passions “les plus générales chez les hommes” (338) and in the presence of which “il est difficile que les mœurs ne contractent pas une grande énergie & de grandes vertus” (339), the excellence of the tournament derived from its intent to expose the worth of an individual in terms of glory and love. Thus the government’s implementation of the tournament guaranteed the

[234] In his *Lettre à d’Alembert* (1758), Rousseau described the *fête publique* as the total absorption of the spectators into the spectacle as the civic stage used then superceded the technology of the theater: “[R]assemblez-y le Peuple, & vous aurez une fête. Faites mieux encore : donnez les spectateurs en spectacle ; rendez-les acteurs eux-mêmes ; faites que chacun se voye & s’aime dans les autres, afin que tous en soient mieux unis. […] On ne peut trop multiplier des établissements si utiles.” (*OC* V: 114).
[235] Servan detailed his reverence for medieval chivalry more extensively in his *Discours sur les mœurs*, pp. 49-54. For a sample of the early modern view on tournaments, see Menestrier, *Traité des tournois, joustes, carrousels, et autres spectacles publiques* (1669).
[236] “Sensationists wanted to rediscover a world unsullied by human systems of thinking and governing, and to grow their philosophy and society organically from it. This generally meant developing their philosophy not so much from nature, as from the regions of their own natures that were untainted by systematic reflection. In philosophy they sought to effect […] a ‘conquest,’ led by a ‘new Paracelsus,’ whose qualities would command emotion more than intellect” (Riskin, *The Quarrel over Method*, p. 254).
[237] The term is the gallicized version of the Latin *hastiludium*, which meant “lance game” and was used throughout the Middle Ages as a generic term applicable to martial games.

mœurs of the nation: "De la direction que le Gouvernement donne à [l'amour et la gloire] dépendent surtout les mœurs générales d'une Nation" (338).

However, Servan was not so idealistic as to imagine the bygone days of chivalry around the corner. Rather, he considered the medieval tournament as the ideal paradigm of a pseudo-judicial spectacle that honed the virtuous side of man's most prevalent passions in accordance with social utility. The court of justice could form itself in the image of the medieval tournament if judges sought to implement not only the law, but the intentions behind the law for the benefit of the public. "La Magistrature n'a-t-elle pas aussi ses spectacles publics? Ses Palais ne sont-ils pas ouverts au peuple pour y contempler les scènes variées & réelles, où les passions humaines se partagent également entre le rire & les larmes? Le génie de l'éloquence ne s'y fait-il pas entendre? La curiosité n'amène-t-elle pas quelquefois nos citoyens en foule?" (346-47). Witness Servan's description of a theater of justice focused on the punishment of domestic crimes: "[…] Avocats & Magistrats accordons-nous pour offrir un spectacle noble & vertueux. Au milieu d'un maintien grave & d'un appareil majestueux, après des déclamations éloquentes, montrons à nos concitoyens la punition d'un fils ingrat, d'un époux tyrannique, d'une épouse infidèle, d'un homme sans foi" (347). The parallel with Diderot's conception of the *drame bourgeois* and its mise en scène of (fallen) social conditions as opposed to criminals is striking.[238] In a spooky twist, Servan's emphasis on the private *mœurs* of the public meant that the

---

[238] Diderot explained the importance of presenting *conditions* of people rather than particular characters on stage so the spectators could identify with them and recognize their duties: "Jusqu'à présent, dans la comédie le caractère a été l'objet principal, et la condition n'a été que l'accessoire; il faut que la condition devienne aujourd'hui l'objet principal […]. C'est la condition, ses devoirs, ses avantages, ses embarras qui doivent servir de base à l'ouvrage. […] Pour peu que le caractère fût chargé, un spectateur pouvait se dire à lui-même, ce n'est pas moi. Mais il ne peut se cacher que l'état qu'on joue devant lui ne soit le sien; il ne peut méconnaître ses devoirs. Il faut absolument qu'il s'applique ce qu'il entend" ("Troisième entretien," *Entretiens sur le Fils naturel*, DPV X: 144).

magistrates would deal out not only punishments but assign shame as a symbol of moral guilt: "Mais surtout, Messieurs, frappons, terrassons une femme impudente qui osera nous demander au nom des lois, ce que les lois ont regardé comme le prix de la corruption publique. Quand elle forcera la Justice à rougir & à baisser les yeux devant des lettres de prostitution, vengez la pudeur offensée en attachant cette femme au char des mœurs, & la promenant au travers de la honte publique" (347). The image of dragging someone behind a chariot as a show of domination over them is taken from the narrations of Roman conquerors, who dragged their captives at their chariot-wheels back to the city, yet the metaphor still begs the question: what would such a morality chariot look like? Would it resemble the one upon which sat Themis in Durameau's *Triomphe de la Justice*?

If Servan's judicial theater turned out to be more of an inquisition, the judges were not excepted from its reach: "[V]oilà par quels spectacles les Magistrats peuvent suspendre la corruption publique, & **s'ils veulent y joindre le spectacle privé de leurs mœurs**, si leurs démarches, si leurs discours, leur vie entière est un démenti continuel, une réclamation éclatante contre la dépravation de leurs concitoyens, ne doutez pas qu'un si noble contraste ne soit un spectacle utile à tous les yeux forcés de le contempler" (348 [my emphasis]). For Servan, the magistrates could not be *good* magistrates unless their moral dispositions were also on perpetual display, one from which the public could not step away. Engaged thus not merely in a display of just adjudication of morality but rather of moral behavior itself for the edification of their spectators, Servan argued that the *judges* (rather than the lawyers) assume authority over the judicial drama through the embodiment of its fundamental value: *private* virtue. Thus rather than appearing before an impassible frieze of magistrates arranged according to birth and/or royal approbation, the *plaidants* would

enter into an ongoing dramaturgy of so many judges organized not primarily for the disposition of their private affair, but for the performance of a particular scenario to be inserted as a sort of grist into the morality machine so it might continue its show.

In a surprising sense, we find that the *avocat-philosophe* produced a vision of court justice strikingly similar to that of the absolutist period that we considered in our first chapter. The earlier discursive aesthetic organized its narrative in such a way as to submerge litigants under the weight of pious obedience and tradition; its aim was to render the client's traits entirely indistinguishable from the social body. The *avocat-philosophe* reversed the means, but the result was strikingly similar; the narrative aimed to to individuate the party under a tractor beam of pathetic innocence toward whom the judge/audience would *naturally* gravitate in a process of profound spectatorial sympathy. Whichever narrative had greater pull (or was less repellent) would prevail. Both processes aimed at a startling collectivization of the public under the aegis of their society's critical conception of virtue.

However, for the audience in the case of the Count of Suze against Mlle Bon of 1782, Servan's stage of moral transparency remained empty. According to Servan, the public had already firmly sided beforehand with Mlle Bon due to a concentrated public affairs campaign prior to the trial which claimed that she had fed, lodged, and taken care of the Count's expenses for nearly a year. The judges, reluctant to brave public opinion, decided against their *avocat général*, and the opera singer was awarded the property of the

count. Servan, who had relied on generating a feeling of moral consternation in his audience, had instead found them "seduced" by the narrative of the actress.[239]

Though Servan's lamentations of a public gone awry may recall the theories behind legal rhetoric and the judicial theology of the seventeenth century, it is important to note several differences. First, whereas seventeenth-century lawyers sought to incorporate their audience into a static social narrative (in which their client was always well positioned) by means of persuasion and conviction, Servan endeavored to bring about moral progress by putting the entirety of his audience on stage. Secondly, while the legal community's concern with public morality was primarily discussed behind closed doors in the seventeenth century (during *ouvertures de séances* for the barristers, *mercuriales* for the magistrates, and in certain published materials for scholarly use), in Servan's discussion, reason and the passions were discussed very openly; his method was transparent and austere, as though to give a lesson to his audience, instead of charming and cajoling them toward the reasonable conclusion. Third, Servan spoke on a single register; we know there is no hidden discursive level for the magistrates because they were often directly evoked and reasoned with in the pleading itself. Fourth, during the seventeenth century reason and the passions were often cast in a religious idiom rather than in terms of a natural moral philosophy. In Servan's discourse there is a striking absence of religious reference, particularly noticeable in his discussion of marriage, a lacuna however quite typical of Enlightened-era lawyers whose interest in wielding the natural law tool would likely be stymied by such an evocation.

[239] "[Les] raisons [de l'actrice] étonnèrent beaucoup les hommes qui connaissent le monde & l'Opéra ; mais elles séduisirent tous les autres ; l'intérêt pour cette femme devint si vif, qu'il ressembla bientôt à une faction populaire" (Servan, p. v).

Conclusion: from Social Order to Moral Order

Servan and Diderot provide vivid examples of the ways in which the very purpose of the courtroom discourse were being reconceived during the Enlightenment, when calls to an underdetermined natural law displaced the authority of the concrete but often abstruse laws of the kingdom. By the late eighteenth century, the concept of natural law was no longer the intellectual fruit of years of study of Roman codes and commentaries, but rather a tool used to strike down old forms of authority as illegible to enlightened men. Servan's unlikely success in defending the Protestant woman owed much to the vagueness with which he brandished this tool, and his unexpected defeat in 1782, on the other hand, probably resulted from his specificity. Servan's brand of natural law meant a deep-seated public morality based on the relationships between members of a domestic family, palatable when used as a socially liberating – not constraining – mechanism.

However, the private, case-by-case application of justice in a familial setting advocated by Diderot and Servan had in fact long existed in ancien régime France: the *lettre de cachet* furnished a mode of justice that treated "affaires de famille [...] tout à fait privées: conflits mineurs entre parents et enfants, mésentente de ménage, l'inconduite d'un des époux, désordre d'un garçon ou d'une fille" (Farge, Foucault, *Le Désordre des familles*, 9). Those individuals who found themselves *embastillés* under a *lettre de cachet* were usually considered thus constrained as a measure of protection against their own disordered passions, such as lust or gambling, which rendered them a slave to vice if left to themselves (ibid., 9-11).[240] Their parents or close relations beseeched the king to intervene as a paternal

[240] Brian Strayer also discusses the consideration of *lettres de cachet* as a positive form of social control, and indicates Louis XVI's demand before the *Etats-généraux* to find a way of abolishing the use of *lettres de cachet* that would *not* have a deleterious affect on either state security or family honor as demonstrative of the complexities surrounding the issue (Strayer 148).

and moral authority to maintain the private social order, whose imbalance risked affecting public *mœurs*. "[L]a lettre de cachet de famille, malgré l'importance donnée à son secret, ne concerne jamais la seule famille, ce qui montre bien son imbrication nécessaire avec le monde qui l'entoure et son impossible isolement même si c'est là son désir" (15). Furthermore, the *lettre de cachet* was not a patrician tool, whose use signalled privileged intimacy with the royal power, but in fact was more often deployed by the lower classes (9-11). That the *lettre de cachet* served as one of the primary targets of the philosophical lawyer despite its functional equivalence to the judicial system he endorsed demonstrates that the barrister was not looking to implement a new type of justice, but rather to transpose authority away from the opaque and central will of a system seeking to maintain *social* order toward the distributed and transparent prerogatives of the vigilant magistrates seeking to maintain *moral* order.[241]

This chapter has attempted to demonstrate the desacralizing and decentralizing tendencies of legal discourse in the mid-eighteenth century as it attempted less to attain the old professional standards of eloquence than to redefine eloquence according to new ontological commitments. I hope that our discussion of Diderot's *Entretien d'un père avec ses enfants* has cast light on the timelessness of the philosopher's challenge to the basic processes that form legal discourse; the particularist claim, however negligible in a functioning legal system that depends on non-particular enunciations, nevertheless always founds the latter, and in this way a categorical refusal of its relevance or importance necessarily undermines the logic of the system itself. If left unentailed, reason separates

[241] This distinction should be kept in mind when we turn to Robespierre in the fourth chapter, whose legal career culminated in a "cri terrible" against the *lettre de cachet* along with an invitation for the king to take refuge from its abuse "dans le sein de ses peuples" (*Mémoire pour le sieur Louis-Marie-Hyacinte Dupond* […], (1789), *OC* XI: 53).

from legal authority. In this way Diderot reminds us of the need to incorporate the particular within the non-particular, despite the paradox – or perhaps because of it. This is particularly relevant to the on-going question in the field of legal philosophy – whether the law is something that exists on its own apart from any system of morality (legal positivism) – or whether law is fundamentally connected to morality (natural law).

Servan's effort to make these two states cohere on the plane of *mœurs* leads him to reject positive law as superfluous. Thus the dual strategy of conviction and persuasion for eloquent discourse delineated in the first chapter would forthwith deal only in persuasion. Yet Servan's inability to ground his otherwise skillful arguments in a coherent moral framework actually subscribed to by his contemporary audience as opposed to that of a bygone era meant that though he would be looked back on as a paragon of eloquence, his final pleading would not be sufficiently persuasive. Unwilling to follow the vagaries of public opinions on morality – the fate of any good lawyer once modes of conviction are no longer available forms of discourse – Servan sought rather to shape it through an incessant flow of politically-engaged publications.

Indeed, the game was considered far from lost. Taking as its enemy the perceived abuses of a legal system shrouded in secrecy and liberal in its punishments, lawyers in the wake of Servan's exit from the profession continued to attempt corralling and subtly correcting public opinion through lengthy excoriations of state violence and magisterial vice. The virtue of *opinion publique* would soon be approaching its apotheosis in the legal imagination. Yet the professional opinion remained undecided: would they be orators or lawyers? In the following chapter, we will study the debate on legal eloquence as it was

argued by two famous legal practitioners as we continue to track the stakes of judicial discourse through the century.

Works Cited

d'Aguesseau, Henri François. *Œuvres choisies du chancelier d'Aguesseau, précédées d'une notice sur sa vie.* Paris: Firmin Didot Frères, 1850. *Google Books*. Web. March 2020.

---. *Œuvres de M. le Chancelier d'Aguesseau. Contenant les lettres sur les matières criminelles & sur les matières civiles.* Vol. 8. Paris: Libraires associés, 1774. *Google Books*. Web. March 2020.

Altrocchi, Rudolph. "The Calumny of Apelles in the Literature of the Quattrocento." PMLA 36.3 (1921): 454–491. *JSTOR*. Web. February 2020.

Anderson, Wilda. "Encyclopedic Topologies." *Modern Language Notes* 101.4 (1986): 912-929. *JSTOR.* Web. January 2020.

Aquinas, Saint Thomas. *Summa contra gentiles*. Trans. Vernon J. Bourke. Notre Dame, Indiana: University of Notre Dame Press, 1975. *Calibre Library.* isidore.co. Web. September 2019.

Austin, J. L. *How to Do Things with Words*. 2nd ed. Cambridge: Harvard University Press, 1975. Print.

Biet, Christian. "L'affaire Cartouche (1721): scène juridique/scène littéraire." *Représentations du procès : droit, théâtre, littérature, cinéma*. Ed. Christian Biet and Laurence Schifano. Nanterre: l'Université Paris X-Nanterre, 2003. 445-460. Print.

Blum, Carol. *Diderot: the Virtue of a Philosopher*. New York: Viking Press, 1974. Print.

Brewer, Daniel. "The *Encyclopédie:* innovation and legacy." *New Essays on Diderot*. Ed. James Fowler. Cambridge, U.K.: Cambridge University Press, 2011. 47-58. Print.

Brissot de Warville, Jean-Pierre. "De la décadence du barreau français." *Bibliothèque philosophique*. Vol. 6. Berlin: Desauges, 1782, pp. 359-409. *Google Books.* Web. February 2020.

Chartier, Pierre. "La loi du père : Étude de l'Entretien d'un père avec ses enfants (1ère partie)." *Recherches sur Diderot et sur l'Encyclopédie* 23 (1997): 9-62.

Chénier, Marie-Joseph. *Œuvres posthumes de M.J. Chénier, membre de l'Institut*. Vol. 3. Ed. Daunou. Paris: Guillaume, 1824. *Google Books*. Web. September 2019.

Church, William F. "The Decline of the French Jurists as Political Theorists, 1660-1789." *French Historical Studies* 5.1 (Spring 1967): 1-40. *JSTOR.* Web. October 2019.

Clark, Andrew H. *Diderot's Part*. London and New York: Routledge, 2008. Print.

Cochin, Jean-Denis. *Œuvres complètes de Cochin, avocat au parlement de Paris. Nouvelle édition, classée par ordre de matières, précédée d'un discours préliminaire, et suivie d'une table analytique*. Vol. I. Paris: L'Éditeur, 1821. *Google Books*. Web. August 2019.

Correspondance littéraire, philosophique et critique de Grimm et de Diderot depuis 1753 jusqu'en 1790. Vol. 3. Eds. Taschereau, Jules-Antoine and A. Chaudé. Paris: Furne, 1829. 16 vols. 1829-31. *ARTFL.* Web. August 2019.

Crant, Phillip. *Authors and their Centuries*. Columbia: University of South Carolina, Dept. of Foreign Languages and Literatures, 1973. Print.

Dickinson, John. *Administrative Justice and the Supremacy of Law in the United States*. Cambridge: Harvard University Press, 1927. Reprint. Clark, New Jersey: The Lawbook Exchange, 2006. Print.

Le Dictionnaire de l'Académie Française. Paris: Veuve de Bernard Brunet, 1762. *Dictionnaires d'autrefois. ARTFL*. Web. February 2020.

Diderot, Denis. *Œuvres complètes*. Ed. Herbert Dieckmann, Jean Fabre, Jacques Proust, Jean Varloot, et. al. Paris: Hermann, 1975-. Print. This edition is noted in the text as DPV.

---. *Salons.* Vol. III. *Ruines et paysages. Salon de 1767.* Eds. Bukdahl, Else Marie, Michel Delon, Annette Lorenceau. Paris: Hermann, 1995. 4 vols. 1984-1995. Print.

---. *Entretien d'un père avec ses enfants*. In *Contes et romans.* Ed. Michel Delon et al. Paris: Éditions Gallimard, 2004. Print.

---. *Observations sur le Nakaz*. In *Œuvres*. Vol. 3. Ed. Versini, Laurent. Paris: R. Laffont, 1994. Print.

---. *Paradoxe sur le comédien*. Paris: Classiques Garnier, 1998. Print.

Domat, Jean. "À l'ouverture des Audiences de 1679." In *Le droit public*. Vol. 5. Paris: P. Emery, 1701, p. 432-33. *Gallica.* Web. March 2020.

Douthwaite, Julia. V. *The Wild Girl, Natural Man and the Monster: Dangerous Experiments in the Age of Enlightenment*. Chicago: University of Chicago Press, 2002. Print.

Dubarle, L. *Servan et une cause célèbre devant le parlement de Dauphiné.* Grenoble: Imprimerie Allier Frères, 1905. *Google Books*. Web. September 2019.

Duchet, Michèle. "L'anthropologie de Diderot." In *Anthropologie et histoire au siècle des Lumières*: *Buffon, Voltaire, Rousseau, Helvétius, Diderot*. Paris: Maspéro, 1971, pp. 407-75.

Duclos, Charles Pinot. *Considérations sur les mœurs de ce siècle.* 1751. *Google Books*. Web. September 2019.

Dutton, Diane. "De la rhétorique à la narration: les exempla dans l'Entretien d'un père avec ses enfants de Denis Diderot." *FLS* 23 (2001): 13-26.

Edelstein, Dan. *On the Spirit of Rights*. Chicago and London: University of Chicago Press, 2019. Print.

---. *The Terror of Natural Right: Republicanism, the Cult of Nature, and the French Revolution*. Chicago: University of Chicago Press, 2009. Print.

Encyclopédie, ou dictionnaire raisonné des sciences, des arts et des métiers, etc., eds. Denis Diderot and Jean le Rond d'Alembert. University of Chicago: ARTFL Encyclopédie Project (Autumn 2017 Edition), Robert Morrissey and Glenn Roe (eds), http://encyclopedie.uchicago.edu/. Web. March 2020.

Encyclopédie méthodique. Logique et Métaphysique et Morale, publiée par M. Lacretelle. Vol. III. Paris: Panckoucke, 1789. *Google Books.* Web. February 2020.

Farge, Arlette and Michel Foucault. *Le Désordre des familles: Lettres de cachet des Archives de la Bastille*. Paris: Éditions Gallimard, 1982. Print.

Fayes d'Espeisses, Jacques. *Les Remonstrances ou harangues faictes en la cour de Parlement de Paris aux ouvertures des plaidoyries*. Lyon: Frères Gabiano, 1696. *Google Books.* Web. February 2020.

Fried, Michael. *Absorption and Theatricality: Painting and Beholder In the Age of Diderot.* Chicago: University of Chicago Press, 1988. Print.

Fumaroli, Marc. *L'Age de l'éloquence: Rhétorique et "res literaria" de la Renaissance au seuil de l'époque classique*. Geneva: Librairie Droz, 1980. Print.

Geary, Edward J. "The Composition and Publication of 'Les Deux Amis De Bourbonne.'" *Diderot Studies* 1 (1949): 27–45. *JSTOR.* Web. February 2019.

Giraud, Charles. "Précis de l'ancien droit coutumier français (troisième et dernier article)." *Bibliothèque de l'école des chartes*. Vol. 3. Serie 3. Paris: J.B. Dumoulin, 1852. 409-446. *Google Books*. Web. October 2019.

Goetschel, Jacques. "Les Pères de l'Église: la tentation du théâtre." *Études théologiques et religieuses* 3.82 (2007): 393-415. *CAIRN.* Web. September 2019.

Goodman, Dena. *The Republic of Letters: A Cultural History of the French Enlightenment.* Ithaca: Cornell University Press, 1994. Print.

---. “Epistolary property. Michel de Servan and the plight of letters on the eve of the French Revolution.” *Early Modern Conceptions of Property*. Ed. John Brewer and Susan Staves. New York: Routledge, 1995. 339-364. Print.

de Grandval, Nicolas Racot. *Le Vice puni, ou Cartouche, poème*. Anvers, Paris: Pierre Prault, 1726. *Gallica.* Web. July 2019.

Guyton de Morveau, Louis-Bernard. “Discours prononcé à l’ouverture des Audiences du Parlement de Bourgogne, le 16 Novembre 1780: Du style du Barreau Français.” In *Discours publics.* Vol. 3. Paris: P.G. Simon, 1782, pp. 137-99. *Google Books*. Web. February 2020.

Harris, Joseph. “Identification and the *Drame*.” In *Identification Before Freud: French Perspectives*. Ed. Joseph Harris. *Nottingham French Studies* 47.3 (2008): 57-8.

---. *Inventing the Spectator: Subjectivity and the Theatrical Experience in Early Modern France*. Oxford: Oxford University Press, 2014. Print.

Hart, H.L.A. *The Concept of Law*. 3rd ed. Oxford: Oxford University Press, 2012. Print.

Histoire de la vie et du procès de Louis Dominique Cartouche. La Haye: Jean Neaulme, 1722. *Google Books*. Web. July 2019.

Houston, R.A. *Literacy in Early Modern Europe: Culture and Education 1500-1800*. 2d ed., New York: Routledge, 2013. Print.

Hunter, Ian. “Conflicting Obligations: Pufendorf, Leibniz and Barbeyrac on Civil Authority.” *History of Political Thought* 25.4 (2004): 670–699. *JSTOR.* Web. June 2019.

Jacob, Robert. “La dame à la balance” in *Images de la Justice. Essai sur l’iconographie judiciaire du Moyen-Âge à l’âge classique.* Paris: Le Léopard d’or, 1994, pp. 219-242. Print.

Journal Enyclopédique. Ed. Pierre Rousseau. Vol. 5.1. Juillet 1775. Bouillon: De l’imprimerie du Journal, 1775. *HathiTrust.* 1755-1793.Web. February 2020.

Karpik, Lucien. *French Lawyers. A study in collective action. 1274-1994.* Trans. Nora Scott. Oxford: Oxford University Press, 1999. Print.

Lacretelle, Pierre-Louis de. *Mémoire pour deux juifs de Metz contre l'Hôtel de ville et le corps des marchands de Thionville*. In *Œuvres de P.L. Lacretelle, ainé*. Vol. 1. Paris: Bossange Frères, 1823. *Google Books*. Web. July 2019.

Lanier, Jacques François. *Michel Joseph Antoine Servan ou de Servan (1737-1807): Avocat-général de l'humanité.* Romans-sur-Isère: Lanier, 1995. Print.

Lanson, Gustave. "Sept lettres inédites de Michel Servan à Voltaire (1766-1770)." *Revue d'Histoire littéraire de la France* 15.2 (1908): 314-329. *JSTOR.* Web. June 2019.

Mably, Gabriel Bonnot de. *Lettres à Madame la Marquise de P... sur l'Opéra*. Paris: Didot, 1741. *Google Books.* Web. December 2018.

Malfait, Hubert. *Un magistrat de l'Ancien régime: Omer Talon, sa vie et ses œuvres, 1595-1652*. Paris: Société française d'imprimerie et de librairie, Oudin et cie, 1902. *Google Books*. Web. March 2019.

Maslan, Susan. *Revolutionary Acts: Theater, Democracy, and the French Revolution.* Baltimore: Johns Hopkins University Press, 2005. Print.

Maza, Sarah C. *Private Lives and Public Affairs : the Causes Célèbres of Prerevolutionary France.* Berkeley: University of California Press, 1993. Print.

McKinley, Alexander C. *Illegitimate Children of the Enlightenment: Anarchists and the French Revolution, 1880-1914*. New York: Peter Lang, 2008. Print.

Melton, James. *The Rise of the Public in Enlightenment Europe*. Camridge: Cambridge University Press, 2001. Print.

Menestrier, Claude F. *Traité des tournois, joustes, carrousels, et autres spectacles publiques*. 1669. Lyon: Michel Mayer, 1674. *Google Books.* Web. November 2018.

Mercier, Louis-Sébastien. *Tableau de Paris*. Vol. 2. Ed. Bonnet, Jean-Claude. Paris: Mercure de France, 1994. Print.

Meynial, E. "Les Recueils d'arrêts et les Arrêtistes." In *Le Code civil, 1804-1904. Livre du centenaire*. Vol. 1. Paris: Rousseau, 1904. *Google Books.* Web. January 2019.

Montesquieu, Charles de Secondat. *Œuvres complètes*. Ed. Roger Caillois. Paris: NRF Gallimard/Pléïade, 1949-51. 2 vols. Print.

---. *Lettres Persanes.* Ed. Vernière, Paul and Catherine Volpilhac-Auger. Paris: Librairie générale française, 2006. Print.

Moreau, Pierre-François. “Les passions: continuités et tournants” in *Les passions antiques et médiévales*. Ed. B. Besnier, P.-F. Moreau and L. Renault. Paris: Presses Universitaires de France, 2003. Print.

Mornet, Daniel. *Les Origines intellectuelles de la Révolution française, 1715-1787* Lyon: La Manufacture, 1989 [1933]. Print.

Nahme, Paul E. “Law, Principle, and the Theologico-Political History of Sovereignty.” *Political Theology* 14.4 (2013): 432-79. *EBSCOhost.* Web. January 2019.

Nouvelle biographie générale depuis les temps les plus reculés jusqu'à nos jours, avec les renseignements bibliographiques et l'indication des sources à consulter. Vol. 43. Ed. Hoefer. Paris: Didot Frères, fils et cie, 1864. 46 vols. 1855-1864. *Google Books*. Web. June 2019.

Patouillet, Louis. *Apologie de Cartouche, ou le scélérat sans reproche*. Krakow: Jean le Sincère, 1731. *Google Books*. Web. February 2019.

Prévost d'Exiles, Antoine François. *Histoire du Chevalier des Grieux et de Manon Lescaut*. Ed. Paul Vernière. Paris: A. Colin, 1957. Print.

Prévost, Xavier. “Mos Gallicus jura docendi. La réforme humaniste de la formation des juristes.” *Revue Historique De Droit Français Et Étranger* 89.4 (2011): pp. 491–513. *JSTOR*. Web. March 2020.

Prud'homme, Charles. *Michel de Servan (1737-1807): Un Magistrat réformateur*. Paris: La Société du Recueil Général des Lois et des Arrêts, 1905. *Google Books*. Web. March 2019.

Pufendorf, Samuel von. *Le Droit de la nature et des gens, ou système général des principes les plus importans de la morale de la jurisprudence, et de la politique*. Trans. Jean Barbeyrac. 2nd ed. Vol. I. Amsterdam: Pierre de Coup, 1712. *Google Books*. Web. March 2020.

Renwick, John. “Voltaire and the Politics of Toleration.” *The Cambridge Companion to Voltaire.* Ed. Nicholas Cronk. Cambridge: Cambridge University Press, 2009. 179-192. Print.

Representing Private Lives of the Enlightenment. Ed. Kahn, Andrew. Oxford: SVEC, 2010. Print.

Riskin, Jessica. *The Quarrel over Method in Natural Science and Politics During the Late Enlightenment*. Diss. University of California, Berkeley, 1995. *ProQuest*. Web. March 2020.

---. *Science In the Age of Sensibility: the Sentimental Empiricists of the French Enlightment.* Chicago: U of Chicago P, 2002. Print.

Robert, Yann. *Dramatic Justice: Trial by Theater in the Age of the French Revolution*. Philadelphia: University of Pennsylvania Press, 2019. Print.

Rousseau, Jean-Jacques. *Œuvres complètes*. Vol. 3. *Du contrat social*. *Ecrits politiques.* Eds. Bernard Gagnebin, Marcel Raymond. Paris: Gallimard [Pléiade edition], 1964.Print.

Russo, Elena. *Styles of Enlightenment: Taste, Politics and Authorship In Eighteenth-century France*. Baltimore: The Johns Hopkins University Press, 2007. Print.

Shklar, Judith N. "Rousseau's Images of Authority." *The American Political Science Review* 58.4 (Dec. 1964): 919-932.

Servan, Joseph-Michel-Antoine. *Discours sur l'administration de la justice criminelle, prononcé par M. S**, Avocat-Général*. In *Œuvres diverses de M. Servan, Ancien Avocat-Général au Parlement de Grenoble*. Vol. I. Lyon: Grabit, 1774. 3-116. *Google Books*. Web. February 2019.

---. *Discours de M. Servan, Avocat-général au Parlement de Grenoble, dans la cause d'une femme protestante.* Grenoble: Grabit, 1767. *Google Books*. Web. February 2019.

---. *Discours d'un ancien avocat-général dans la cause du comte de ***, et la Dlle ***, chanteuse de l'Opéra*. Lyon: Sulpice Grabit, 1772. *Google Books*. Web. February 2019.

---. *Oeuvres choisies de Servan, Avocat général au parlement de Grenoble*. Vol. III. Ed. X. de Portets. Paris: Les Éditeurs, 1825. *Google Books*. Web. February 2019.

---. *Réflexions sur Les confessions de J.J. Rousseau: sur le caractere & le génie de cet Écrivain, sur les causes & l'étendue de son influence sur l'opinion publique, enfin sur quelques principes de ses opinions*. Paris, 1783. *Google Books*. Web. October 2019.

Starobinski, Jean. *Le remède dans le mal. Critique et légitimation de l'artifice à l'âge des Lumières*. Paris: Gallimard, 1989. Print.

Strayer, Brian. *Lettres de cachet and social control in the Ancien Régime, 1659-1789*. New York: P. Lang, 1992. Print.

Talon-Hugon, Carole. *Les passions*. Paris: Armand Colin, 2004. Print.

Tidman, Gemma. *Ce qui s'enseigne : the Querelle des collèges and the emergence of littérature, 1750-1789*. Diss. U of Oxford, 2017. EthOS: uk.bl.ethos.748914. Web. September 2019.

Troper, Michel. "What Is Interpretation of the Law for the French Judge." *Interpretation of Law in the Age of Enlightenment: From the Rule of the King to the Rule of Law*. Eds. Morigiwa, Stolleis, Halpérin. Springer, 2011. *Springer eBook.*

Tunstall, Kate E. *Blindness and Enlightenment: an Essay*. New York: Continuum, 2011. Print.

Viala, Alain. *Lettre à Rousseau sur l'intérêt littéraire*, Paris: PUF, 2005. Print.

Villa, Dana. *Teachers of the People: Political Education in Rousseau, Hegel, Tocqueville, and Mill*. Chicago: University of Chicago Press, 2017. Print.

Voltaire. *Traité sur la tolérance*. Eds. Bessire, François, Sylvain Menant and Marie-Hélène Cotoni. Paris: Editions du Temps, 1999. Print.

---. *Œuvres*. 70 vols. Ed. Beuchot. Paris: Lefèvre, Didot frères, 1833. *Google Books*. Web. March 2020.

Wachenheim, Pierre. "Emblèmes de la Robe : les représentations de la Justice dans l'imagerie pro-parlementaire sous le règne de Louis XV." *Sociétés & Représentations* 18.2 (2004): 233-249. *Cairn.* Web. March 2020.

Chapter 3: Legal Discourse Between Reason and Passion

Voulez-vous véritablement éclairer et subjuguer les esprits ? Puisez dans votre propre méditation, pénétrez-vous de vos preuves et énoncez-les ensuite comme vous les avez conçues et non comme vous les avez trouvées dans les livres.
–Pierre-Louis de Lacretelle, "De l'éloquence judiciaire: Conseils à un jeune avocat" (1779)

Mais jetons un moment les yeux sur l'origine de ce ministère sacré: n'a-t-on pas voulu placer un homme choisi entre la sainteté de la loi et la violence de nos passions?
–Emmanuel de Pastoret, "Lettre à M. Lacretelle […]" (1783)

Introduction

This chapter will examine the question of legitimacy of eloquence in legal discourse and the closely connected issue of the shifting conceptual boundaries of legal eloquence in the prerevolutionary period. Legitimacy is a complicated problem because of the abundance of interlocking issues that must be dealt with in turn. The historian of law Paul Ourliac (1911-98) stated the matter thus: "Un principe de légitimité ne vit, n'agit jamais par sa seule force. Il s'harmonise toujours avec les mœurs, avec la culture, avec la science, avec la religion, avec les intérêts économiques et, en définitive, avec l'opinion publique d'une époque" ("L'Opinion publique," p. 27). This is most certainly true in the case of

judicial eloquence, and thus this chapter will therefore deal with several major issues, including religion, history and public opinion. In order to restrain what otherwise might become an altogether unwieldy scope of inquiry, the matter is analyzed through the lens of a single debate on legal eloquence that took place between 1782-83. By this time, *éloquence* had virtually ceased to connote an institutionally-prescribed dual discourse of both conviction and persuasion destined for two separate audiences as championed by d'Aguesseau and others during the late seventeenth and early eighteenth centuries. Rather, as summarized in Chapter 2, eloquence was evoked generally as a mode of persuasion that endeavored to incline a relatively undifferentiated audience toward a *sense* of justice broken down and remade in man's image, and outside of whose authority any finding of "justice" would be a contradiction in terms. This is not to say that the positive laws were disregarded by the lawyers (though they sometimes were, as in the case of Servan) but rather the ontological commitments of the old arguments supporting the authority of the laws were being litigated anew by a set of lawyers essentially oriented not toward man's liberation from sin but rather from the imposition of arbitrary power on his natural liberty. The transformation of legal eloquence from a more esoteric and precise form of rhetoric aimed at two distinct audiences for the instruction of reason and guidance of lowly passions, to an underdetermined discourse based around the communicative ability of *prima facie* virtuous passion appears to track the cultural purification of the passions performed by the Enlightenment *philosophes* as discussed in the preceding chapters.

But of course the Enlightenment did more than just liberate its beneficiaries from a religiously constraining view of the soul's passions. Reason as well was endowed with new prerogatives as experience – as opposed to revelation – grounded epistemology. Thus the

breaking away of eloquence from the traditional "reasoned" discourse as a top-down technology by the state-church elite for the masses,[242] toward an experiential bottom-up approach to persuasion, meant the pluralization of the meaning and performance of eloquence within the Bar itself. Certain practitioners sought a reformed legal system made in the image of man's ordered reason. They sought a mathematical application of laws to facts, which would render courtroom eloquence irrelevant because they believed that eloquence confused what they knew could become a clear, equitable and accurate process. However, many others, like Michel de Servan discussed in the Chapter 2, sought to render the laws secondary to the improvement of man's inner sense of morality. In such a system eloquence would be indispensable because it was considered to move men toward justice in a visceral sense.

In order to best understand the ways in which the question of legitimate discourse was conceived of and debated at the time, this chapter will focus on a specific quarrel that took place among two elite members of the French legal profession from late 1782 to early 1783 in the *Mercure de France*. Our interlocutors were lawyer Pierre-Louis de Lacretelle (1751-1824), who published the initial article trumpeting the various benefits of courtroom eloquence and lawyer and jurist Emmanuel de Pastoret (1755-1840), who published a single response indicating its harmful effects on the judicial process. Though the problematic revolved around the utility of eloquence in courtroom discourse, it involved

[242] The unity of Church and State in Old Regime France was an important piece of statecraft deployed by both the *parlements* as well as the ministry, but should not be overstated; beneath the smooth doctrinal surface hid very stormy waters. The legal profession was replete with men who opposed on political grounds both the ultramontane claims of the clergy as well as the concept of princely infallibility. For a discussion of this struggle, which hit a high note after the promulgation of the papal bull *Unigenitus* (1713), see, e.g., Negroni, *Lectures interdites*, pp. 163-94 ("[L]es conseillers félons de la cour de Rome trompent le pape comme les conseillers flatteurs de la cour de Versailles séduisent le monarque; les conciles sont tout aussi indispensables pour faire éclore la vérité que les parlements" (163)).

other issues such as audience, reception and the conception and deployment of "natural" modes of communication in the legal space.

At the outset it should be noted that although this chapter will focus on the historical context of the debate as it was expressed in the late eighteenth century, the question posed by our interlocutors – what is the proper role of eloquence in courtroom speech? – remains unsettled even today in the United States.[243] When Justice Richard Posner of the Seventh Circuit Court of Appeals sought to establish the appropriate relationship between various writing styles and the law, he posed the following question: "Can it not be argued that style should have no role in legal writing? That it is at best a minor ornamentation and at worst, and indeed on average, an impediment to understanding?" ("Law and Literature," p. 1351). The choice to concentrate on the early modern period in France is an important dislocation for the contemporary debate, since it is here that both the figurative and the denotative, the epistemically open and closed, *pathos* and *logos*, were given their fullest expression in the law courts. Combing through the extant pleadings and memoranda from the prerevolutionary period reveals a veritable laboratory of divergent legal styles. At the extremes, there were two main strains fighting for primacy: a redefined eloquence that – in an intentional reversal of traditional epistemological commitments – privileged *pathos* over *logos*, versus a purely denotative use of language meant to apply laws to facts, a scientifically-ordered machine-like process churning in a closed system, bare of any confusing verbiage. Of course, these two species of rhetoric predated the quarrel, but they

[243] Though the issue of eloquence in legal discourse is a complicated one in the United States today, in France, eloquence is considered an essential aspect of legal training and a requirement for admission before certain jurisdictions. In order to qualify as an *avocat* at the *Conseil d'État* and the *Cour de cassation*, for example, young lawyers must win an eloquence competition. For an engaging overview of the current attitude toward eloquence in the French legal milieu, see Bertrand Périer, *La Parole est un sport de combat* (2017).

had long lived in a relatively stable state of interdependence in the law courts, with appeals to passion playing second fiddle to appeals to reason under the general masthead of eloquent judicial rhetoric.

Indeed, given what we have covered thus far, the very formulation of the question, whether eloquence was helpful or harmful, may strike us initially as odd. Eloquence had constituted the goal of legal rhetoric for centuries; if a barrister could not necessarily control the final outcome of his discourse, he was generally expected to maximize the probability that the judges would be convinced by it. He was the mediating voice imagining both the position of his client for the judges and the wisdom of the law to the people. To be sure, legal practitioners had warned against the danger inherent in eloquent discourse of enflaming the passions to the detriment of reason in the preceding centuries, but in fact such imbalances were considered ineloquent events to be avoided. Thus in the question's construal of eloquence as either helpful *or* harmful in the administration of justice, we note in its subtext the major redefinition of eloquence as predominantly composed of the rhetorical effort to persuade through the passions – not convince through reason. The question thus posed in this debate would not have even made sense under the previous discursive regime, which would likely have stated the problematic in the following manner: whether conviction or persuasion should predominate in courtroom utterances. Both conviction and persuasion were necessary to form an eloquent discourse, but eloquence itself was non-negotiable. By the 1780s, however, eloquence had lost its position as the de facto goal of all properly constituted legal speech.

Lacretelle and Pastoret

Before turning to the debate itself, let us first meet our interlocutors. Born in Metz into a family of barristers, Pierre-Louis de Lacretelle (1751-1824) would become one of the most influential lawyers, politicians and publicists of the revolutionary period. He first made a name for himself in 1775 when he argued before the *parlement* of Nancy on behalf of two Jewish clients for equal treatment before the law.[244] Although his efforts were in vain, the fervor with which he defended his clients earned him a certain level of fame,[245] and when he arrived in Paris in 1778, Lacretelle enjoyed the friendship of luminaries such as d'Alembert, Marmontel, Condorcet, La Harpe, Laclos and especially the liberal magistrate Guillaume-Chrétien de Lamoignon de Malesherbes (1721-94)[246] and the naturalist Georges-Louis Leclerc, comte de Buffon (1707-1788).[247] A prolific writer, Lacretelle was a very frequent contributor to the *Mercure de France*, which he helped to edit for a number of years, stating that the periodical "cultivait encore plus la philosophie politique et la philosophie morale que la simple littérature" (*Œuvres* I: xiii). It was in this

[244] Lacretelle's clients sought a printing license that was refused to them. (*Plaidoyer pour Moyse May, Godechaux & Abraham Lévy, Juifs de Metz* (1775; reprint, Paris: Lipschutz, 1928)). Lacretelle was already showing signs of the philosophical lawyer, ever-ready to cast into question the laws themselves rather than the legal issue: "La vraie question de cette cause, c'est de savoir si les Juifs sont les hommes. [...] La raison, MESSIEURS, a levé une tête radieuse dans notre siècle; elle s'indigne des longs outrages qu'elle a reçus; elle attaque surtout les Loix qu'elle n'a pas dictées" (4).

[245] His briefs in the mid-70s received favorable reviews in the *Gazette des Tribunaux.* See, e.g., *Gazette des Tribunaux* 1775, vol. 5; see also 1776, vol. 8. More importantly, following the trial and circulation of Lacretelle's memorandum, the status of Jews was increasingly discussed among learned circles, and in 1787 and 1788, the *concours* of the Académie Royale de Metz proposed the following question: "Est-il des moyens de rendre les Juifs plus utiles et plus heureux?"

[246] Malesherbes would appoint both Lacretelle and Pastoret to the commission established in 1787 for the purpose of reforming the legal code under Louis XVI.

[247] Lacretelle had a special link with the naturalist Buffon, who accorded him weekly visits to discuss his *Histoire naturelle*. ("À mon début dans la littérature, Buffon avait daigné m'accorder une singulière bienveillance. Pendant deux hivers, je dînais chez lui tous les dimanches; et de convention, j'arrivais une heure avant la réunion de ses convives. Le texte de nos entretiens était toujours là, sur la cheminée: c'était un volume de l'*Histoire naturelle*" (Lacretelle, *Œuvres* IV: 114)). Echoes of these weekly lessons with Buffon can be heard throughout Lacretelle's written production, specifically when he discusses the art of good writing.

particular context that Lacretelle embraced "la *philosophie législative* et *l'éloquence judiciaire*" (ibid. [Lacretelle's emphasis]). Especially attuned to questions of justice, in 1784 he shared first place with Maximilien de Robespierre in the Royal Society of Metz essay contest on the matter of *peines infâmantes*.

Lacretelle argued his most famous case before the *Parlement* of Paris in 1786 on behalf of the Count de Sanois, who had been imprisoned by *lettre de cachet* at the behest of his wife, whom he had abandoned the previous year when he fled to Switzerland to evade creditors. Upon his release, Madame de Sanois sued for separation and damages, but Lacretelle's fiery defense of the count, which consisted in a painting of the domestic sphere as having been unnaturally directed by the wife and included a lengthy attack on the system of *lettres de cachet* generally, thwarted her efforts.[248] Both tactics were quite fashionable at the time, and Lacretelle handled them with great flair. However, as pointed out by Maza, the originality of Lacretelle's *mémoire judiciaire* was in its highly peculiar introductory apparatus, which placed the *lawyer himself* as a primary character in the narrative version of the case. Thus Lacretelle described the scene of his first meeting with Sanois ("Il y a environ deux mois, je vois entrer dans mon cabinet un homme […]" (*Mémoire pour Sanois*, p. 4)) complete with lengthy dialogue and gestural details ("Et, en prononçant ce mot, une indignation contrainte animait sa figure […]" (ibid. 5)). Lacretelle's literary effect was well-received by the public, but the Count of Courcy, a lawyer and Sanois' son-in-law, fumed at the tactic, alleging – in the traditional style – that Lacretelle had exchanged persuasion for reason (Maza 275). First-person representations of one's client was a time-

---

[248] Maza gives a detailed account of the Sanois affair in *Private Lives*, pp. 271-76.

honored tactic condoned by the bar, but for a lawyer to portray himself was a transgressive innovation.

Given his professional success, it is surprising to learn that Lacretelle had shown little inclination or aptitude for the Bar as a young man; his father, a respected lawyer in Metz, even thought to dissuade him from the profession altogether (Parent-Réal 3). It is important to note that it was not until he came across the work of Michel de Servan (1737-1807), detailed in the preceding chapter, that Lacretelle gained a new and life-long appreciation for the science of jurisprudence, considering it henceforth as intimately connected with literature and morality (ibid.). Later, as Lacretelle gathered his collected works for publication in 1824, he claimed that during the 1780s and revolutionary years he had espoused the role of "jurisconsulte littérateur" (Lacretelle, *Œuvres* I:xv).

Lacretelle's counterpart in the debate was Emmanuel de Pastoret (1755-1840), a lawyer, jurist and politician who, though hardly remembered today, held considerable influence (along with his wife, Adelaïde Louise Piscatory) throughout the political convulsions of the end of the Ancien Régime.[249] Born into a legal family in Marseille, Pastoret first practiced as a lawyer in his hometown before moving to Paris in 1777, where he was quickly integrated into philosophical society.[250] He did not immediately resume his legal practice but spent approximately two years travelling across Europe, visiting various universities and libraries as he began his life-long work of compiling histories of the great ancient legislations. After settling down in Paris, he followed the advice of Malesherbes

[249] Pastoret was the first deputy elected President of the Legislative Assembly in 1791 (over Mirabeau). The most enduring mark he left on Paris was the conversion of the Sainte-Geneviève Church into the Panthéon. The fullest portrait of Pastoret is provided by Walckenaer in a "Notice historique sur la vie et les ouvrages de M. le Marquis de Pastoret."

[250] Pastoret was given letters of introduction to Malesherbes and d'Alembert, through whom he came into contact with, to name the most prominent, Turgot, Lamoignon, Barentin, Buffon, Lacépède, Bailly, Lalande, Lavoisier, and Laplace, for whom Pastoret would deliver a funeral oration in the *Chambre des pairs* in 1827.

and purchased a position as *conseiller* at the *Cour des aides* in 1781 (Walckenaer 182). His erudition brought him to the attention of the ministry, and in 1788 he was named to the extremely important position of *maître des requêtes*, whose task was to work closely with the Chancellor on all matters relating to the king's justice.[251] Pastoret was made a member of the *Académie des inscriptions et belles lettres* due to a flurry of prize-winning historical treatises on various legislations.[252] Although the precise date is unclear, Pastoret was also elected to the *Loge des Neuf Sœurs* around this period, and he would serve as the Masonic organization's final *vénérable*, or master, from 1786-89.[253] His 1790 treatise entitled *Des lois pénales*, which called in Beccarian tones for the end of cruel treatments of the accused and convicted in France, earned him another prize from the *Académie Française* for its *utilité morale* (one of the *prix Montyon* only recently established in 1782), and would furnish the touchstone for the legislators involved in the composition of the *Code pénal de 1791*.

Neither a devoted monarchist nor an ardent revolutionary, through Pastoret's voluminous treatises we discover a scholar-statesman whose faith was firmly planted in neither religions nor governments, but rather in a deistic God and the lessons of history. Over the course of his tumultuous life and busy career, he composed his eleven-volume *Histoire de la législation des anciens peuples* (1817-1837), which provided a compendium

---

[251] In fact, Pastoret did not work under the Chancellor but rather the *garde des sceaux* (Barentin) for the exceptional reason that Chancellor Maupeou had been politically disgraced following the ascension of Louis XVI to the throne.
[252] In 1784, Pastoret's *Dissertation sur l'influence des lois maritimes des Rhodiens*, which put forth the thesis that wise laws were the basis of flourishing states and that such laws were transportable through time and space (i.e., a counterargument to Montesquieu), won the prize of the *Académie des inscriptions*; *Zoroastre, Confucius, et Mahomet comparés comme sectaires, législateurs et moralistes* (1787) won the same prize, at which time Pastoret was made a member of the *Académie*.
[253] Founded in 1776 by lawyer and astronomer Jérôme de Lalande with the support of *salonnière* Madame Helvétius, the *Neuf Sœurs* brought together leading figures of the late Enlightenment and their American counterparts for the discussion and propagation of Enlightenment ideals in the political sphere.

of all of the major ancient legislations with scholarly commentaries on their various historiographies. His methodology obviously mimicked that of Montesquieu but also importantly digressed from it, in that Pastoret produced a highly *ordered* inventory of laws. This was no mere difference of aesthetic (is it ever?); unlike the essential contingency of Montesquieu's vision of natural law, which boiled down to the relationship between a population and its economic principle, in his introduction Pastoret made clear his commitment to the classical morally normative vision of the natural law:

> L'âge, le climat, le culte, la forme du gouvernement, peuvent établir entre [les hommes] des rapports mutuels qui n'auront pas toujours et partout la même force, la même durée, la même intensité: mais il en est d'invariables, d'universels; et c'est sur eux qu'est fondée cette règle primitive de nos sentiments et de nos actions, la justice. (Pastoret, *Histoire de la législation*, pp. 1-2)

Pastoret's natural law was one that would *not* be induced from pure reason, as in Aquinas, or proved in a geometric fashion, as in Huet.[254] Rather, it would *emerge* through the careful cataloguing of all major historical legislations. Pastoret noticed that virtues such as generosity, prudence, patience, and so on were increasingly reflected in the increasing order of societies because the fundamental organizing principle within each individual constituent was social integration that such virtues favored. This was no innovation on the part of Pastoret but rather a recommitment to a Ciceronian view of the immutable natural

[254] Whereas Antoine Arnauld and Blaise Pascal both rejected the use of logic for the demonstration of religious truths, the philosopher and theologian Pierre-Daniel Huet (1630-1721) composed the *Demonstratio evangelica* (1679) to demonstrate the geometic certainty of Christian revelation in order to counteract the spread of Cartesian doubt. For an overview of Huet and his motivations, see Shelford, "Thinking Geometrically," pp. 599-617.

law.[255] Inequality did not result from the advent of civil societies, as claimed Montesquieu (bk. I, ch. III); on the contrary, claimed Pastoret, through its establishment man knew peace for the first time "car l'abus de la force cesse, et avec elle l'inégalité; la force individuelle disparaît et s'abaisse alors devant la force de tous, devant la puissance publique, devant la loi" (Pastoret, *Histoire*, pp. 7-8). Thus through his method Pastoret espoused Enlightenment empiricism yet refused one of its most famous conclusions, making place rather for a distinctly Ciceronian reading of the natural law against its modern skeptics. Pastoret looked beyond Montesquieu however, and indicated Montaigne as the (naïve) leader of the trend that discounted the Ciceronian version of the natural law based in man's social instinct through the contention that no essential "justice" had ever existed (ibid., 3).[256] He examined the disagreement diachronically, as was his habit, and considered the contemporary state of natural law affairs as mired simply in the latest denial of fundamental justice, no more than a reprisal of ancient arguments propounded by the likes of Archelaus, Aristippus, Arcesilaus, Carneades, and others who held that nothing was unjust in itself but only held to be so by custom or law (ibid., 2). Cicero, held Pastoret, had already contradicted the skeptical position, and its recent reiterations, however novel in manner,

[255] Man's innate tendency toward society as the natural law of justice upon which is founded all positive law is taken from Cicero's *De Legibus* (ca. 52 BC), the classic touchstone for legal practitioners on the subject. (See, e.g., d'Aguesseau's *Cinq instructions sur les études propres à former un magistrat*).

[256] It is true that Montaigne was no great fan of Cicero; the humanist criticized the vainglory of the Roman senator, whose deeds never measured up to his eloquence (as in Brutus). In the first chapter of the third book of the *Essais* (1572-), "De l'utile et de l'honnête," describes the epistemological discontinuity between the classical school and the skeptics, gestured to by Pastoret: for Montaigne, nature and reason were entirely foreign from one another and thus human society could not be understood through the light of reason; sometimes even evil had to be done for the good of society. Far from a Machiavellian insight, Montaigne ironically took these evil-doers to be the most constrained and obedient servants of society. As Edelstein points out, Montaigne later conceded in his "Apologie de Raymond Sebond" that there may well exist natural laws, but that the development of reason and the detection of these laws were inversely related, and thus modern man had almost no way of discerning them (*On the Spirit of Rights*, p. 108). For Cicero (and Pastoret), on the other hand, reason was natural, and society reasonable. For a general overview of Montaigne's turning away from the cult of Cicero, see Green, "Montaigne's Critique of Cicero," pp. 595-612.

did nothing to unseat the natural law of man's social instinct, which meant that the formation of society "n'était pas sortir de l'état naturel, c'était y rentrer" (*Histoire de la législation* I: 5). Justice *was* utility for Pastoret, but he was careful to qualify his meaning: "elle n'est pas cette fausse utilité que les passions cherchent ou reconnaissent; elle est l'utilité que la raison découvre, inspire, avoue, et qu'elle inspire et découvre pour tous les temps, dans tous les lieux, chez tous les hommes" (ibid., 9). Justice, though it was for the people, was most certainly not intended by Pastoret to be *by* the people.

Although both would later be elected to the *Académie Française* and rise to great fame during the early years of the Revolution as members of the Legislative Assembly, at the time of the debate, they were still rather young men in the mornings of their illustrious careers. Both new to Paris, they quickly integrated the social scene of the *philosophes* and likely knew each other well. It is important to note that while both had worked as lawyers in their native cities, Lacretelle continued to do so in Paris, while Pastoret was to assume his position as a council member at the *Cour des aides*, meaning he was to henceforth act as judge, not as lawyer. However, they both appear to have devoted the 1780s to their literary and philosophical pursuits, evaluating the French legal system as theorists as much as practitioners.

The Debate

The initial article, written by Lacretelle, was entitled "Si l'Éloquence est utile ou dangereuse dans l'Administration de la Justice?" and was published in the *Mercure de*

France on October 5th, 1782.[257] The article was an extract taken from his 1779 "De l'éloquence judiciaire: conseils à un jeune avocat," his first composition written in Paris. The *Mercure* version left out the paratext found in the original, which is quite interesting in that it situates the otherwise serious institutional argument in the genre of epistolary fiction. The full text thus began with a parenthetical statement that reads like a stage direction for the reader: "C'est un ancien Avocat qui est censé écrire ce morceau" (Lacretelle, *Ouvrages judiciaires* I:1). Remember Lacretelle himself was only twenty-eight years old at the time of composition. The opening lines of the missive, again omitted from the *Mercure* article, anchored the reader further into the illusionary mode by pretending to address to a dear friend his reflections on a long career at the bar: "Mon ami, j'ai vieilli dans la carrière où vous entrez: les fruits de la vieillesse sont tristes comme elle-même [...]" (ibid.). The mood quickly turned theoretical (at which point the original and the *Mercure* text coincide word for word), and Lacretelle's theory on eloquence unfolded in a series of arguments with no further digression to the epistolary illusion. Comparing the two works, one wonders what purpose the brief paratext served, other than to signal its author as party to the *gens de lettres*. Lacretelle later explained this curious hybrid work in an 1807 collection of his judicial writings:

> Cet écrit est le premier que j'ai fait, sous la critique des gens de lettres, qui voulurent bien m'accueillir, à mon arrivée à Paris, et dont l'amitié fut pour moi un heureux développement. [...] Je me bornais, à l'époque de ce premier ouvrage, à la carrière du *barreau*; mais je cherchais à y porter le talent

---

[257] *Mercure de France*, *samedi 5 octobre 1782*, pp. 8-16. Because Lacretelle did not publish his article for the *Mercure* as a separate piece in his collected works, all reference to his first argument will be to the original from the *Mercure*.

littéraire. Je fis donc sur ce sujet un morceau, et j'en demandai une sévère critique à *Garat*, *Fontanes, Duruflé*, etc. [...] En le revoyant aujourd'hui, je m'applaudis d'avoir fait parler sur *l'éloquence du barreau*, un homme, que je suppose avoir beaucoup vu, et beaucoup fait dans cet ordre de travaux. (Lacretelle, *Ouvrage judiciaires* II: 393-94 [author's emphasis])

It seems that through this piece Lacretelle sought to please the more interesting crowd of *littérateurs* while keeping his barrister's hood firmly in place. He astutely noted that however literary his intentions, his work, once rid of the brief paratext and published in the *Mercure*, was taken seriously enough by a member of the legal profession to garner a public response that sought to deconstruct the logic of his arguments. In fact, Lacretelle *was* serious – his lengthy rebuttal to Pastoret's criticism tells us as much. Illusion did not discount good faith arguments for the lawyer.

This is not to say, however, that Lacretelle's article proceeded in an entirely straightforward manner. Obviating altogether his initial dichotomy set up in the title between the utility or danger of eloquence in the courtroom, Lacretelle forcefully answered that the repression of eloquence – however nefarious such language seemed in a court of law – was altogether impossible because eloquence was of natural origin. Moreover, Lacretelle claimed, eloquence favored the revelation of truth rather than falsity, thus edifying its listeners. To banish eloquence from the tribunal would be impolitic. Pastoret's riposte came on March 1, 1783, also published in the *Mercure de France*. The response painted eloquence as at best entirely unrelated to truth and at worst a harmful distraction to its discovery; justice was to be found in the careful study of the law. (Interestingly, Pastoret appended this response to his *Discours en vers sur l'Union qui doit régner entre la*

Magistrature, la Philospohie & les Lettres). The final word was Lacretelle's, a response article published in the very same issue of the *Mercure*, immediately following Pastoret's letter. The seemingly instantaneous (and lengthy) response may be explained easily enough: Lacretelle was an editor at the *Mercure de France* during this time. Moreover, we know that Pastoret published a poem along with this letter to Lacretelle at some point in early 1783 with the printer Louis-Alexandre Jombert (dit "Jombert jeune"), which means that his letter may have been re-printed in the *Mercure* for the very purpose of giving Lacretelle a place to respond.[258] In this final piece of the debate, Lacretelle largely reiterated his previous arguments, while attacking Pastoret's distinction between *jugement* and *sensibilité*. As for most Lockeans, for Lacretelle, the two faculties were quite inseparable.[259]

Let us now turn to a closer reading of the arguments. In his article, "Si l'éloquence est utile ou dangereuse dans l'Administration de la Justice?" Lacretelle began his essay in a provocative tone: "Un Peuple gouverné par l'Eloquence, l'avait bannie du Sanctuaire des Loix : était-ce contradiction, sagesse ou seulement sévérité?" (Lacretelle 8). This was a rhetorically deft incipit; against the mounting pressure to limit the discursive prerogatives of barristers, Lacretelle conceded an imaginary victory to his opponents while setting up a very large trap door through which they would be cast in the ensuing pages. Indeed, what

---

[258] We know that Pastoret's work was published with Jombert Jeune at least sometime before May 3, 1783, on which date the *Mercure* published its review of the poem (*Mercure de France*, *samedi 3 mai 1783*, pp. 30-32). The response to Lacretelle was not reviewed; the reader was simply referred back to the debate previously published in the March 1, 1783 issue of the *Mercure*.

[259] Lacretelle's Lockean position that knowledge is founded in sensation, and that memory and reason reflect on this data from the material world to produce ideas is readily apparent in the *avertissement* to his series on morality composed for the *Encyclopédie méthodique*: "L'homme n'existe, n'agit, ne pense que par ses sensations; elles sont pour lui la source & le mobile de tout. […] Comme nous tirons tout de la sensation, notre unique moyen d'acquérir des connaissances consiste à la bien observer, à y saisir tout ce qu'elle nous offre, à n'y rien mêler d'étranger" (*Logique et métaphysique* I: i).

did Lacretelle mean when he claimed that *eloquence* – not church, law or custom – was what governed the political economy? While this opening phrase would appear to scandalize those who believed in a society governed by forces more solid or consequential, Lacretelle immediately recuperated the status of eloquence, treating it not as a sophistic art to be perfected through practice but rather as a type of genius endowed upon certain men by a higher power: "L'Eloquence est le don que **la Nature** a accordé à certains hommes de parler avec l'empire de la persuasion" (ibid. [my emphasis]). By this time, the deeply *natural* provenance of eloquence was a cornerstone in Enlightenment thought. In his acceptance speech at the *Académie Française* in 1754, Jean d'Alembert, Diderot's co-editor for the *Encyclopédie*, and a friend of Lacretelle, painted a vivid picture of the purely natural origin of eloquence:

> L'éloquence est le talent de faire passer avec rapidité et d'imprimer avec force dans l'âme des autres le sentiment profond dont on est pénétré. Ce talent sublime a son germe dans une sensibilité rare pour le grand et pour le vrai; la même disposition de l'âme qui nous rend susceptibles d'une émotion vive et peu commune, suffit pour en faire sortir l'image au dehors; **il n'y a donc point d'art pour l'éloquence, puisqu'il n'y en a point pour sentir**. […] **La nature forme les hommes de génie, comme elle forme au sein de la terre les métaux précieux**, bruts, informes, pleins d'alliage et de matières étrangères. **L'art ne fait pour le génie que ce qu'il fait pour ces métaux**, **il n'ajoute rien à leur substance, il les dégage de ce qu'ils ont d'étranger, et découvre l'ouvrage de la nature.** (D'Alembert,

“Réflexions sur l’éloquence,” *Discours de réception de M. d’Alembert* [my emphasis])

By defining eloquence as a sublime talent offered freely and blindly by nature rather than as the pinnacle of the rhetorical arts long practiced in the closed environment of the law faculties, Lacretelle, like d’Alembert, removed it from under the aegis of the law. Thus, rather than some unholy accretion of bad taste piled on top of worse law, deserving of nothing more than a heavy-handed pruning by one’s professional and moral betters, Lacretelle claimed that eloquence was produced by the eloquent man by the fact of his very existence. Professional regulation would be of no avail, for to repress eloquence in this definition would amount to the perversion of Nature itself. Indeed, to prevent an eloquent man from using the voice that nature gave him would only cause it to erupt from a different outlet, such as piercingly pained glances and silences, pregnant with emotion:

> Direz-vous à cet homme doué de l'Eloquence: Renonce à cette puissance qui est en toi; je te défends de m'échauffer ou de m'attendrir. Cette nouvelle oppression ne ferait qu'ajouter à l'énergie de ses plaintes. Ce qu'il ne dirait pas sous une forme, il le dirait sous une autre; ce qu'il ne dirait pas, on l'entendrait dans les accents d'une âme déchirée & contrainte, on le lirait dans ses regards & jusques dans son silence. Tout fait parler, tout fait toucher au moins dans l’homme éloquent. (8).

In order to understand Lacretelle's claim that eloquence is not only natural but also the appropriate force for political governance, it may be useful here to turn to Georges-Louis Leclerc, comte de Buffon (1707-1788), generally considered one of the most famous naturalists of the Enlightenment. An important aside: It may seem counterintuitive to turn

from a lawyer to a natural historian for elucidation on a point of rhetoric, but today's current disciplinary distinctions did not exist in the same way during the 18th century; Buffon was a member of both the Académie des sciences as well as the *Académie Française*. Indeed, science was defined during the early modern period not simply as an analysis of the natural and physical world, but more broadly as an ordered collection of knowledge regarding a particular subject.[260] Moreover, Lacretelle himself eschewed the separation of bodies of knowledge as distinct: "Toute science qu'on sépare des autres se rétrécit et se dégrade; elle communique à l'esprit qui la cultive la sécheresse et la pauvreté où elle tombe elle-même" (*OC* IV: 44).[261] Lacretelle held this intellectual cohabitation to be especially true for the practice of law.[262]

Buffon's meticulous study of the natural world was so all-encompassing that, beyond the mere historical fact of mankind's existence, he also included in his scientific study man's productions, including the discursive. In fact, discourse was of particular importance for the naturalist; he was profoundly aware that his own analytic productions were simultaneously the objects of his scientific attention. As the study of the natural world would fall into obscurity without the communication of its findings via speeches and

[260] See, e.g., d'Alembert's "Discours préliminaire" to the *Encyclopédie* (I: i-xlv).

[261] Lacretelle here was reviewing Fournel's *Traité de la séduction, considérée dans l'ordre judiciaire* in the *Tableau raisonné de l'histoire littéraire du dix-huitième siècle rédigé par une Société de Gens de Lettres* (Paris: Yverdon, 1782, pp. 266-74).

[262] In the full article on eloquence (from which the *Mercure* article was extracted), Lacretelle lamented that the breadth of knowledge required of lawyers and judges had resulted in an intellectual silo that prevented the legal professions from sharing in the progress enjoyed in other fields of knowledge: "Comment donc est-il arrivé que la science des lois […] ait été jusqu'ici celle qui a le moins participé au progrès de nos connaissances? […] [C]ela tient au système des études adoptées par une grande partie des hommes du barreau. Obligés de connaître une foule de lois particulières, ils se hâtent d'en charger leur mémoire; il ne prennent pas le temps d'apprendre et de méditer les principes universels de la raison et de la justice, d'où toutes les lois devraient sortir, et auxquels il faut toujours espérer et s'efforcer de les ramener. […] On a vu même des avocats […] prendre en dédain la morale, la politique, l'histoire, la littérature, tout ce qui tient à l'étude des lois, tout ce qui augmente sa majesté, son intérêt; estimer *Denisart*, bien au dessus de *Montesquieu*; […]. En général toutes les professions, toutes les études qui doivent absorber l'homme qui s'y applique, exigeraient des esprits déjà nourris des autres connaissances" (*OC* IV: 43-44).

writings composed for its public, so, too, discourse itself would cease to generate meaning if devoid of meaningful reference to the intelligible world.

> Buffon [...] understood that in order to effectively and enticingly write about subjects of great consequence and grandeur, one could not just be a philosopher or an historian – one also had to be an orator and a poet. The orator not only informs his readers of what he wants to prove, but he touches their hearts with the energy of his poetic language [...]. (Roman, "Making an Authorial Voice [...]," p. 829)

Eloquence was thus both an object of analysis as well as a crucial tool capable of generating new and better ways of understanding the natural world. In this latter sense, there was an important reciprocity between the laws of eloquence and those of the natural world that, for Buffon, was at the heart of his epistemology.

But what does it mean to say, like Lacretelle, that eloquence is constituted solely of natural means, facts, and conclusions? Buffon considered the natural world (which for him included discourse) to be governed by a single law. This unique law was to be detected through the event of perceiving analogies in the physical world and the collection of analogous perceptions within the mind of man. Thus, for Buffon, good style was a discursive gesture carefully ordered in such a way that it built its argument through an elaboration of the underlying analogy that floated between the discourse and its subject matter. Diderot's art criticism, particularly the "Promenade Vernet" passage of his *Salon de 1767* (DPV XVI: 173) provides a good example of such a feat: instead of regaling the readers of his *Salons* with details of paintings *as* paintings, Diderot invited his reader into self-reflexive first-person accounts of himself as he moves like a character absorbed into

the painting he was supposed to have described.[263] The painting, sufficiently dynamic to expand its beholder's surface area of experience, thus created a new poetics, a new rhetorical space which, in turn, thickened the viewer's observation of the natural world. "[N]ature evokes the art object as much as the art object evokes nature" (Anderson, *Diderot's Dream*, p. 195). Eloquence in this iteration is thus the ability to profoundly experience a feeling given a set of stimuli and then translate a species of that particular feeling to others through a different expression.

In order to be efficient, the expression or discourse must touch or convince the listener through a type of analogy tailored to the audience's own reality. Thus the discourse must not only assemble an impression of the initial sense object; it must also enfold itself within *meaningful reach* of its audience; just as discourse is necessary to the spread of scientific knowledge, the only forms of knowledge that can be spread are those that map onto available learning structures found in the relevant audience. The modes of production and the modes of reception must have a certain degree of compatibility. Diderot conformed to this demand by writing – as most did during this period – to a delimited and well-known group of readers. As discussed in the preceding chapter, when he did write for larger, more anonymous publics, as in the *Encyclopédie,* he deployed marvelous literary conceits that tickled his audience, all while dotting his *œuvre* with little dissonances, such as the *renvois de génie*, that drew his more assiduous readers further down the path. Buffon, on the other hand, was content to put forth what he knew to be blatant falsities in his scientific writings,

[263] Michael Fried's *Absorption and Theatricality. Painting and Beholder in the Age of Diderot* (Berkeley: University of California Press, 1980) broke ground on this critical viewpoint and remains a crucial apparatus for reading 18th-century French painting. See also, Wilda Anderson, *Diderot's Dream*, pp. 185-200.

in the hope that such errors would work as palatable signposts that would eventually guide an otherwise too obtuse public toward the discernment of greater truths.[264]

If style, as opposed to virtue, was at the heart of Buffon's epistemological project – and indeed, his most celebrated words are probably "le style est l'homme même" (*Discours sur le style*, p. 30) – this was not to say the realm of human efforts toward statements of truth was to be considered as comprised of outward, physical expression and communications. In his famous *Discours sur le style* (1753), delivered at his reception into the *Académie Française*, Buffon distinguished (perhaps to the chagrin of some of the members in his audience[265]) between the man of talent and the man of style. The former had "cette facilité naturelle de parler qui n'est qu'un talent, une qualité accordée à tous ceux dont les passions sont fortes, les organes souples et l'imagination prompte" (18). The communication they produced, however, was only superficial: "Ces hommes sentent vivement, s'affectent de même; le marquent fortement au-dehors; et, par une impression purement mécanique, ils transmettent aux autres leur enthousiasme et leurs affections. C'est le corps qui parle au corps" (18-19). Although the talented rhetorician had the capacity to cause an emotional reaction in his listeners, thereby rendering them more amenable to his cause,[266] "la véritable éloquence" (18) of Buffon's variety demoted these attributes as happy accidents of the discourse, which was aimed, unlike that of the talented speaker, not toward the masses, but rather toward "le petit nombre de ceux dont la tête est ferme, le goût délicat et le sens exquis" (19). These special listeners of taste "comptent pour peu le ton,

---

[264] "Error in Buffon is [...] an epistemological tool, always historically relative to the context of the reader" (Anderson, "Error in Buffon," p. 701).

[265] Buffon took aim at the *traits saillants*, most likely in the works of Marivaux.

[266] Despite Buffon's description and categorization of merely talented discourse as a lower form of speech, he admitted its potency to persuade the crowd: "Que faut-il pour émouvoir la multitude et l'entraîner? que faut-il pour ébranler la plupart même des autres hommes et les persuader? un ton véhément et pathétique, des gestes expressifs et fréquents, des paroles rapides et sonnantes" (19).

les gestes et le vain son des mots" and instead required to be convinced through "des choses, des pensées, des raisons; il faut savoir les présenter, les nuancer, les ordonner" (19). For the speaker seeking to touch the hearts of such a critical audience, he was required to gain admission not through their senses but rather their minds: "il ne suffit pas de frapper l'oreille et d'occuper les yeux, il faut agir sur l'âme et toucher le cœur en parlant à l'esprit" (19). For Buffon, it was the development and careful refining of style, which was simply defined as "l'ordre et le mouvement qu'on met dans ses pensées" (19) that equipped a speaker with true eloquence.

Like Buffon's natural historian whose "real work [...] lies in the uncovering not of simple observations, but of **relationships** between observations" (Anderson 696 [my emphasis]), Lacretelle's eloquent lawyer generated a transversal event through his ability to connect precise observations into relationships of and for the imagination. Just in the way that, for Buffon, "natural history is produced when the scientist has to turn the science into a story" (699), for Lacretelle, it was not the quality of the case as inventoried against the relevant code that produced judgment, but rather the lawyer's ability to embody eloquence, and thereby generate a narrative world that his audience had the capacity and propensity to inhabit that produced justice.

With this understanding of the context in which Lacretelle pronounced eloquence as both a natural gift bestowed to some and the governing force of men, it may be surprising that he proceeded from this introductory definition to bemoan its necessary role in society. Eloquence, although natural, was only useful and thus necessary due to the corruption of the social order. Without such corruption, no one would need to be persuaded but would instead be guided by their infallible moral compass toward justice and truth. It was due to

this depravity that men needed to be coaxed toward truth; they could no longer detect it with their own senses. Eloquence was thus only necessary because corruption has rendered the administration of justice a formidable labyrinth. "Que le système social soit bon, & les plus grandes difficultés de la justice sont ôtées" (Lacretelle, *Mercure*, p. 9). According to Lacretelle, if the "chef-d'œuvre de bonnes lois unies aux bonnes mœurs" (ibid.) could be realized, eloquence would be rendered utterly useless and therefore rightly excluded from society. To demonstrate his point, Lacretelle painted a picture reminiscent of Montesquieu's troglodyte community from the *Lettres persanes* (1721), in which the small size, simplicity of manners, and moderation in all things regarding wealth and progress made it so the members' inner moral code always nearly matched or outstripped any set of legal codes that might be imposed:

> [S]upposons un Peuple où les mœurs renforçant toujours les lois, ou les suppléant, celles-ci seraient peu nombreuses, bien liées entre elles, égales pour tous, simples comme toutes les choses bien conçues ou déjà perfectionnées, & dignes d'être jetées comme les premières notions dans la mémoire des hommes, & **de devenir ainsi des sentiments avant d'être des devoirs**. (9-10 [my emphasis])

Like the well-ordered worlds that resulted from an innate sense of and justice as put forth in Rousseau's *Julie, ou la nouvelle Héloïse* (1761) and subsequent *Émile* (1762), Lacretelle posited an ideal society in possession of the natural innocence of its members. In such an uncorrupted state, citizens needed no other tool than their most immediate passions to properly conduct themselves within their communities. Sensation was the only currency for judgment since no other constructions had accrued upon this most radical basis of pure

feeling and intuition; there was nothing to discern since all modes of knowing and making known were common; knowledge could only take place directly. If a member of such a community had cause to explain herself to another member, to layer or embellish any expression through an effort toward eloquence would be consummate with an attempt to adorn instinct: a nonsense, since this would remove the instinct from the first order of sensation to which it must belong by definition. “Chez un Peuple pareil, la science de nos Jurisconsultes, l'Éloquence de nos Orateurs seraient des avantages inutiles ou funestes s'ils étaient compatibles avec un état de société si pur & si heureux” (10). In the event that any form of justice need manifest itself through a normative process in this natural, unconstructed society, Lacretelle claimed that any requisite speech would be made simply, “sans autre talent que le sentiment dont il est affecté, avec la candeur de l'innocence ou le trouble des coupables; car on ne connaît pas encore ici la dissimulation dans le crime, & l'audace dans la honte” (ibid.). Any attempt at eloquence would be immediately flagged as suspect due to these listeners' innate moral calibration. To put it differently, the inner arrangement of Lacretelle's natural citizens functioned like an algorithm for virtue, permitting them to recognize their analogue and instantly detect incongruities in the field around them as untruths:

> Celui qui mettrait de l'artifice dans ses discours ne ferait qu'éveiller la défiance : les mœurs simples donnent un jugement sain plutôt qu'un esprit crédule, & la probité démêle le mensonge partout où elle ne retrouve pas sa franchise, comme les passions récusent dans les livres tous les sentiments où elles ne se reconnaissent pas. (ibid.)

I would like to emphasize the comparison drawn here by Lacretelle between what I am characterizing as the algorithm for moral truth operational among the citizenry of the ideal community and the algorithm for passional verisimilitude activated within his real-life contemporaries through the consumption of novels. Identification with a character in one's pathos-ridden novel was, by now, a cornerstone of French intellectual society. Diderot had described the effect of Samuel Richardson's *Pamela* (1740) in the following way:

> Richardson sème dans les cœurs des germes de vertus qui y restent d'abord oisifs et tranquilles: ils y sont secrètement, jusqu'à ce qu'il se présente une occasion qui les remue et les fasse éclore. Alors ils se développent; on se sent porter au bien avec une impétuosité qu'on ne se connaissait pas. On éprouve, à l'aspect de l'injustice, une révolte qu'on ne saurait s'expliquer à soi-même. C'est qu'on a fréquenté Richardson; c'est qu'on a conversé avec l'homme de bien, dans des moments où l'âme désintéressée était ouverte à la vérité. (Diderot, *Éloge de Richardson* [1768], DPV XIII: 194)

While Lacretelle's ideal community would directly ascertain moral truth in their civic life, the reader of novels could only locate analogous representations of passion within the limits of the invented literary world of the novel. Here is where Lacretelle gives his reader a glimpse of his programmatic investments in the idiom of imitation and its attendant arts. Like Buffon, there is no such thing as "mere rhetoric" for Lacretelle, but only effective or ineffective attempts to absorb someone into a construction of a world, one in which they may not have otherwise participated. For, unlike the virtuous creatures of the ideal society who recognized only simple, naturally-occurring truth-phenomena due to their primitive state of innocence and could only ever *restate* their world, the realm of fiction writing is a

work of construction by its very nature and thus *recreates* the world through poetic mimesis; it requires an act of authorship. In short, the ideal citizens are like machines calibrated to accurately compute for virtue, while Lacretelle's fellow men, corrupted by unnatural excesses, needed to be transported into a machine (the novel or – better yet – the eloquently written *mémoire judiciaire*) in order to achieve similar computational accuracy. With this hint at Lacretelle's epistemological strategies, we might now begin to understand his consideration of eloquent courtroom discourse as a mechanism for Enlightenment progress and social improvement. Instead of resolving to "deliver" the law in an abstruse fashion to the public via a pedantic enumeration of code and procedure, Lacretelle set forth a theoretical paradigm that would render briefs and pleadings compatible to the sentimental states of their public.

But what was the sentimental state of Lacretelle's public? If the ideal moral citizenry was but chimera, and the aggregate properties of contemporary society emerged predictably only upon the individualized activation of passional states via efficient fictional technologies, how did the lawyer conceive of those flesh-and-blood French subjects who bustled about the actual courtrooms of the day? Lacretelle dismissed the idea of transposing the judicial system of the ideal citizenry – which performed nothing more than a reflection of their own moral code back to them – from that imagined society to his own:

> Mais de cette Nation encore assez pure dans ses mœurs pour avoir cette perfection dans ses lois, [...] transportons ce plan de justice que nous venons de tracer, d'admirer & d'aimer. En serait-il un plus propre à recevoir toute la corruption qui l'environne? (Lacretelle, *Mercure*, 11)

Lacretelle again reinforced the idea that the social system must precede the legal; from a more perfect jurisprudence, a more perfect society would most definitely *not* flow. Rather, in order to adequately regulate civil life, the laws needed be closely tailored to the social body. But to what are contemporary France's mind-numbingly diverse and contradictory laws tailored?

> Il est des maux qui ne trouvent leurs remèdes que dans d'autres maux. Ici les lois sont si multipliées, si diverses, si peu d'accord & dans leur but & dans leurs moyens, que souvent le Juge ne peut lui seul ni les toutes connaître ni les bien entendre; ici, les intérêts sur lesquels il faut prononcer sont si vastes, si compliqués, que c'est déjà un grand travail, un grand art de les démêler. (11)[267]

The "intérêts [...] si vastes" turned what might have been a pure and virtuous society into a hive of discrete persons, individuated by virtue of invisible, corrupting accretions to which the members of Lacretelle's contemporary society have all fallen victim. Here Lacretelle employs the polyvalent term *intérêt* – discussed in the preceding chapter (pp. 129-30) – in the negative sense, as a synonym of morally despicable *amour-propre*, to describe the social realities onto which the laws have been mapped. Only the *intérêt* generated typically in the realm of *belles-lettres* could hope to create a virtuous consensus in the citizenry and lay the foundation for a new legislation.

[267] Lacretelle's argument for courtroom eloquence on the basis of the positive law's difficulty reminds us here of Cicero's Rome, where trials were dominated by eloquent oratory due in part to the fact that nearly everyone involved was ignorant of the civil code. Cicero, unrepresentative of Roman orators at the time in his profound grasp of the law, pleads via his character Crassus for a deeper knowledge of the law among orators in *De oratore* I: 166-200.

Thus, instead of examining the danger of eloquence, Lacretelle held up the current systems of law, with all of its convolutions and potential for misapprehension, as the greatest threat to the social order. In order to make this move, he first lamented the imperfect sort of justice to be expected by the magistrates. Instead of blaming the judges, however, Lacretelle, like Montesquieu before him, denounced the mystifying plurality of laws and customs. Indeed, the ambiguous yet fraught question of jurisdiction in early modern France and the multiplicity and diversity of jurisprudences was a source of much vexation for the legal community of the period and confused parties in what often seemed a maze of arbitrary rules and procedures. Montesquieu had evoked the complexity of the system of laws, divided *grosso modo* between *le droit écrit* and *le droit coutumier* in the following terms:[268]

> Quoique le droit coutumier soit regardé parmi nous comme contenant une espèce d'opposition avec le droit romain, de sorte que ces deux droits divisent les territoires, il est pourtant vrai que plusieurs dispositions du droit romain sont entrées dans nos coutumes, surtout lorsqu'on en fit de nouvelles rédactions [...]. (*De l'esprit des lois* XXVIII: 45)

Beyond the problem of vague jurisdictional boundaries, legal practitioners also had to discern the meaning of esoteric laws whose meaning had been glossed by myriad interpretations which did more to obscure than illuminate the contents of the code. A

[268] The jurisdiction of *le droit écrit*, or the "written law," was to be found primarily in Southern France and was so called due to its proximity to Roman law, which, unlike customary law, originated through its writing. Customary laws, on the other hand, were observed in the northern provinces, including Paris. However, the geographic simplicity is only apparent: in the mid-18th century, there were more than 300 different bodies of customary law. In addition, many written law jurisdictions also followed certain customary laws, and vice-versa.

contemporary definition, in the article “Loi” of the *Encyclopédie* by the Chevalier de Jaucourt, explained the difficulty in the following terms:

> L'incertitude & l'inefficacité des lois procèdent de leur multiplicité, de leurs vices dans la composition, dans le style & dans la sanction, du partage des interprètes, de la contradiction des jugements, &c. Les lois sont, comme au pillage, entre les mains de ce cortège nombreux de jurisconsultes qui les commentent. La seule vûe de leurs compilations a de quoi terrasser l'esprit le plus infatigable. Leurs gloses & leurs subtilités sont les lacets de la chicane. (*ENC* IX: 646)

Lacretelle’s denunciation of the seemingly unending ambiguities in the law followed this rather well-used pattern but to it he added his concern that not only the lawyers but the judges themselves could not be expected to either know or understand the code; instead of describing them as collaborators in the mystification of the court system, then, Lacretelle painted them as its victims as well. Lacretelle’s description was quite conciliatory for his time; in his rendition of the judicial system, its difficulties resulted not from laziness or lack of erudition on the part of judges (the more familiar attacks on the holders of these venal offices) but rather from the impossible situation in which the judges found themselves through no fault of their own. The codes were too vast and too nuanced for anyone to understand, and it could not have been otherwise given the competing interests of a corrupt society.

This move was quite clever in that it drew the magistrate-readers into a sympathetic narrative of themselves just as Lacretelle turned to the plight of the parties. Given the plethora of perplexities surrounding the judge, how could one expect a plaintiff or

defendant to stand by in silence while such a hazardous expedition for the meaning of the law and the fate of their case took place without at least having the chance to shed light on the matter as best they could? “Laisserez-vous le sort des Plaideurs à la merci de son examen?” (12). The deft dovetailing of the real fears of judges with those pleading before them cancelled out the discursive boundaries meant to separate them. The need for a more immediate mode of communication was made palpable, accentuated by a series of juxtapositions that set in opposition individuals completely dispossessed of any right to even attempt to save themselves with a system of law so layered and extravagant that even its interpreters could no longer wrangle it. In this light both the magistrate and the accused were victims of the bloated and decrepit law, which swirled between them in the courtroom like so many curtains blocking them from the unmediated hearing of the case.

Indeed, in the maze of interpretive possibilities offered in the ever-expanding array of legal tomes, Lacretelle thought that the banishment of eloquence from the courtroom would only result in the triumph of *chicane*. “[D]ans cette forme d’administrer la justice, il faut choisir entre [..] l’Éloquence ou la chicane: vous ne pouvez chasser l’une que par l’autre” (12). As Antoine-Gaspard Boucher d’Argis explained in his *Encyclopédie* article, *chicane*, in its jurisprudential sense, meant the following:

> [E]n termes de Palais [la chicane] se prend pour l'abus que l'on fait des procédures judiciaires; comme lorsqu'une partie qui est en état de défendre au fond, se retranche dans des exceptions & autres incidents illusoires & de mauvaise foi, pour tirer l'affaire en longueur, ou pour fatiguer son adversaire, & quelquefois pour surprendre le juge même. (“Chicane,” *ENC* III: 326)

The accusations levelled against chicanery sound awfully close to those used against eloquence in that both could unnecessarily lengthen and confuse the judicial process through the manipulation of matters extraneous to the main substance of the case. In this way, chicanery worked as a useful scapegoat on which to unload the negative connotations of eloquence and thus purify it in comparison. Lacretelle differentiated between the two by claiming that, unlike eloquence, the disruptive ways of *chicane* confined themselves to matters of judicial procedure, or those forms of the proceedings relating to jurisdiction, admissibility of evidence or testimony, applicability of laws, etc. Eloquence, on the other hand, functioned only in relation to the substance of the claim itself and could not be summoned for mere procedural details.[269] Furthermore, unlike eloquence, which, for Lacretelle, could raise men up to the contemplation of higher virtues and always privileged the revelation of justice, *chicane* has no such possible redeeming characteristic. Thus, while both eloquence and chicanery had the capacity to bring about a judicial sentence, only eloquence, according to Lacretelle, could ever unveil the *truth*.

By denouncing legal procedure as a matter of chicanery manipulable only by those who had spent long periods studying such rules (like lawyers) and instead elevating the role of eloquence in its place, Lacretelle's discourse again seems to tend toward stripping the legal machinery of its distinction as a space apart from the public square and provisioned with its own particular codes of conduct and areas of expertise. Indeed, procedural law generates certain kinds of sociopolitical truth because it constitutes the legal realm of possibility to which society has recourse from time to time to maintain social and

[269] Louis de Sacy also drew this distinction earlier in the century: "Je suis donc persuadé, que tant qu'il restera en France quelque goût de l'éloquence, qui y a été portée dans ce dernier siècle au plus haut degré, où elle y ait jamais été, on renverra ces sortes d'extraits [non-eloquent memoranda of law divided into discontinuous sections such as *faits*, *moyens*, etc.] aux affaires de procédure & de chicane [...]" *Recueil* I: xxviii (1724).

political peace. The Romans had established the *ordo juris*, or judicial order, as a reasonable system set outside of human reason, based on the assumption that "seules les formes peuvent mener à la vérité du droit" (Renoux-Zagamé, "Ordre judiciaire," p. 57). The Christianization of *ordo juris* fashioned this order as, in the words of the lawyer and magistrate Guillaume du Vair (1556-1621), the "ombre de cet ordre éternel" (*Œuvres politiques*, p. 265), reflecting the order God had created out of chaos.[270] To associate judicial order with chicanery and eloquence with the substance of justice, the former to be banished by the latter, would corrode the special status of the law as a discrete narrative for and of society to which all persons and events summoned thereto need ultimately comply. Lacretelle implicitly rearranged order and ultimately sanctity on the side of human reason, assigning chaos to the special world of the law.

However Lacretelle did not focus on the epistemological distinctions he was drawing but rather painted a piquant moral tableaux of the two discursive strategies personified as female prostitutes:

> Et pourriez-vous balancer entre ce qu'il y a de plus beau & ce qu'il y a de plus vil? Pourriez-vous même balancer sur les dangers? **L'Éloquence a je ne sais quoi de fier qui ne peut entièrement se démentir**; elle conserve encore quelque respect d'elle-même dans sa prostitution; **mais la chicane s'applaudit de ses bassesses**; elle a des ruses dont on ne peut se défendre, parce qu'on n'ose les soupçonner. (Lacretelle 12 [my emphasis])

[270] The opposition between human judgment and *ordo juris* is perhaps most clearly evident in the Pivardière affair (1699), during which a trial for murder continued according to legal forms despite the reappearance of the man presumed dead. For a wonderful discussion of this case, see Renoux-Zagamé, "Ordre judiciaire."

Interestingly, it was not the lay reader of legal briefs who was treated as the hapless ingénu to be hopelessly duped by the clever ploys of the lawyer, but the magistrate as well: "Que deviendra le Juge, lorsque la chicane égarera son esprit dans ses obscurs détours, & qu'elle l'étourdira de son jargon insidieux?" (ibid.). Notice here Lacretelle grouped *chicane* with *jargon*. The latter signifies a constructed language that functions to exclude non-initiates from a system of understanding particular to a certain society or endeavor.[271] Again, the ambiguities inherent to jargon were not here decried by Lacretelle in relation to the knowledge divide between lawyers and non-lawyers, but rather between lawyers and *judges*. But how could jargon be insidious to those who were supposed to be its referential repositories? As Lacretelle invited the layperson to take the seat of the magistrate via dramatic focalization, first-person narration among other literary conceits, he likewise led the judge down from his bench and into the anonymity of the hapless crowd.

After explaining the necessity of eloquence due to the multiplicity of laws, their poor administration, and the potential for *chicane* to turn all of these weaknesses to its own advantage, Lacretelle turned to the moral tribulations regarding the inescapable personal judgments made by judges at the sight of the parties. These subjective matters, regulated to an ostensibly lesser degree than those of the law, required even more the precautionary measures provided by eloquence: "Quel opprimé dans son délaissement, ne doit s'effrayer de ses plaintes lorsqu'il apperçoit contre lui, ou les dignités, ou la faveur, ou la richesse, ou la beauté, ou la réputation? Et souvent toutes ensembles sont conjurées contre lui" (Lacretelle 12). Lacretelle presented eloquence in this passage as the "natural" weapon of the nameless, the destitute and the homely against the entitlements of the glittering upper

[271] The obscurity engendered by the use of jargon was criticized by Diderot, who stated "Plus un peuple est futile & corrompu, plus il a de jargon" ("Jargon," *ENC* VIII: 461).

classes. Such a tool was necessary for the downtrodden since, according to Lacretelle, the lucky beneficiaries of wealth, status and beauty benefited as a matter of course from the prejudicial attitudes of their judges – attitudes that resulted necessarily from the corrupt social system that only eloquence could heal. Lacretelle thus bemoaned the dazzling seductions of these privileging attributes as disabling conditions for the delivery of an equitable judgment, an argument approaching in terms that of his adversaries, yet delivered with unequivocal flourish:

> Comme tout s'émeut à leur nom! comme tout se glace à la vue de sa misère! Eh bien! qu'il invoque l'Éloquence; elle est sa protectrice naturelle; elle puise dans le sentiment de ses forces le courage & la générosité: seule elle défiera tant d'ennemis, seule en triomphera. (12-13)

Under Lacretelle's pen, eloquence rose to the level of pagan god, ready to do battle with the mighty in order to protect the weak, playing the narrative role of justice itself. The judges depicted had apparently shirked the duty; the only judgment in this passage was not the august function of the wise magistrate, but rather the weak and manipulated reactions of a group of spellbound spectators seated more likely in a theater than a courtroom. It is important to note that the judgment Lacretelle is talking about here is an emotional one; the verbs “s'émouvoir” and “se glacer” are used to describe the reactions of the judge, displacing him from the logical or legal lexicon into the sentimental register of the romanesque.

Despite Lacretelle's alleged abhorrence of the impressionable magistrate, he did not demand the erasure of sentimental idioms in favor of a more rigidly legal paradigm in which to argue (as would Pastoret) as a means to obviate the problem of passions. Rather,

reconciling himself with the frailty of man's judgment, he called upon eloquence to even the playing field in the magistrate's fickle heart. Eloquence could, on balance, outweigh the silent arguments in favor of dazzling wealth or beauty because its persuasiveness operated in a similar fashion. However, unlike wealth and beauty, eloquence was desirable in the courtroom precisely because it was not the privilege of the fortunate few to be wielded against the many, but rather functioned as the great leveler of courtroom prerogatives:

> Cette autorité, que veulent usurper les rangs & les réputations, elle [l'éloquence] la repousse avec les droits sacrés de la raison, de la vérité, de la justice. Aux fureurs de la tyrannie, elle oppose l'ascendant de l'opinion publique; contre les séductions du vice, elle s'arme des derniers cris de la conscience; elle fait pâlir devant l'effrayante image de son déshonneur, ce Juge qui ouvrait son cœur à l'iniquité; elle l'arrache au crime par le pressentiment du remords; elle ne se laisse pas même intimider par la majesté du rang suprême. Souvent les Ministres des Autels, les Ministres des Lois ont fait entendre de grandes vérités dans ce silence de l'adoration & de la terreur; elle a éclairé l'orgueil & fléchi la colère jusques sur le Trône. (12-13)

The unique efficacy of eloquence for Lacretelle was due to its more perfect constitution, which, unlike the machinations of rank, wealth or beauty, was uniquely tied to reason, truth and justice, whose "rights" were "sacred" and thus tied to "opinion publique." There is a lot to unpack here but it is crucial to do so in order to understand the position held by Lacretelle and so many other lawyers of this period regarding the political and moral value of eloquence and its connection to public opinion.

***Opinion publique* in the French Courtroom**

In this section, I will undertake to explain public opinion not in sociological or political terms, but rather as the term was used by lawyers and magistrates. The term "opinion publique" itself has of course been an extremely thorny issue for modern scholars of the revolutionary period. Since the publication of Jürgen Habermas' 1962 *Strukturwandel der Öffentlichkeit*,[272] the general consensus today is that *opinion publique* underwent a crucial shift during the eighteenth century, moving from the derogatory to the sanctified in a process of redefinition that mirrored the larger changes taking place in the way the French spoke about their political selves.[273] Sarah Maza's seminal text, *Private Lives and Public Affairs*, uses the Habermasian paradigm of the public sphere as a tool to understand the piquant *mémoires judiciaires* circulating in the late eighteenth century as an outgrowth of a new social consciousness spreading among the traditional lower classes. One of her fundamental premises is that the concept of public opinion shifted from the theatrical to the judicial idiom during the eighteenth century (Maza 17). This allows her to argue that the evocation in legal discourse of "public opinion" toward the end of the Old Regime had an important political impact because it was essentially asking the public, who had once judged the theater, to judge matters of state and thereby "to perform a function once invested in the king alone" (16). The power of fiction is thus put forth as one of the

[272] Habermas put forth the theory that the rise of the modern public sphere could be traced to the literary, apolitical formation of a common sense of intimate life associated with family and marriage. Public opinion has been examined as a discursive event in the writing of the *philosophes* by Keith Baker ("Politics and Public Opinion under the Old Regime," in Popkin, *Press and Politics*, pp. 204-46, and "Public Opinion as Political Intervention," in Baker, *Inventing the French Revolution*, pp. 167-99) and Mona Ozouf ("L'Opinion publique" in Baker, ed., *The Political Culture of the Old Regime*, pp. 419-34). Sarah Maza explores the constitution of public opinion specifically through the diffusion of *mémoires judiciaires* in the article "Le tribunal de la nation: les mémoires judiciaires et l'opinion publique à la fin de l'Ancien Régime."

[273] See, e.g., Chartier, *Les origines culturelles de la Révolution française*, pp. 37-60; Maza, *Private Lives*, p. 110. To cast a wider net regarding general semantic transitions during this period, see Bell, *Cult of the Nation*, pp. 22-49.

major motivating forces in society and possibly the Revolution. However, in his article "The 'Public Sphere,' the State, and the World of Law in Eighteenth-Century France," David Bell makes a compelling argument for a re-examination of *opinion publique* from the perspective of the law courts. He tracks the filiation retrospectively from the Revolutionary period, showing that the law courts had long used the "moral standards of the intimate domestic sphere" as the criteria for public judgments, indeed well before the advent of the *drame bourgeois* ("Public Sphere," p. 925). Bell further contends that the law courts had traditionally defined public opinion as "something stable, rational, undivided, and removed from the hurly-burly of day-to-day politics" (932). Although the concept of public opinion is widely accepted by other historians like Baker as "an abstract category of authority, invoked by actors in a new kind of politics to secure the legitimacy of claims that could no longer be made binding in the terms […] of an absolutist political order" (Baker, "Politics and Public Opinion under the Old Regime," p. 213), Bell challenges the timeline of its birth, typically indicated on or about 1750, stating that "[j]urists from the time of the Fronde to the Revolution justified their opposition to the crown by casting the high courts as the descendants of the general assemblies of the Frankish people on the Champ de Mars [which] reached decision by acclamation, not by majority rule" (Bell 931). Thus Bell concludes that rather than Habermas' precapitalist civil society, it was the "morally powerful but institutionally impotent restraint[s]" (931-32) emanating from the law courts that shaped the political rise of *opinion publique*.

This thesis generally supports Bell's contention for a filiation between the legal discourse of the Old Regime and the concept of *opinion publique*, and indeed has expanded

its breadth and timeline at several points.[274] However, given the archival evidence, we must disagree with Bell's estimation that parlementary *opinion publique* was an invention of necessity, a rhetorical pawn positioned in opposition to the royal ministry during the contentious *Fronde parlementaire* (1648-49). Though the evidence supports a rational, unanimous conception of *opinion publique* among the legal bodies, we find praise for it as early as 1585, when the *avocat général* of the *Parlement de Paris*, Jacques Faye, sieur d'Espeisses (1543-90) praised the independence of public opinion, declaring that "la voix et opinion publique […] est une déesse inviolable" (*Neuvième rémonstrance* in *Recueil des rémonstrances*, p. 161).[275] Far from situating himself, the *parlements* or the barristers in opposition to the king, Faye d'Espeisses was perhaps the most stalwart supporter of his friend, King Henri III, whose reign he had secured in Poland, and whom he would follow into exile only three years after this speech upon the assassination of the Duc de Guise and the uprising of the Catholic League. *Opinion publique* was most certainly not defined here as a weapon against the royal ministry.

Rather, if we trace the evocation of *opinion publique* in these early remonstrations, we can begin to reconstitute its meaning in the judicial space. I argue here that judicial *opinion publique* was first and foremost a *theological* term – as were many of the legal concepts at this time – used by a professional body that conceived of itself as ordained for

---

[274] For example, whereas Bell locates the advent of "universal morality plays" at law with early eighteenth-century struggles between the ministry and Jansenist bar (his primary interest lies in this politico-legal opposition), the first chapter of this thesis demonstrates that the strategy was in use at least as early as the seventeenth century.

[275] "Remontrances" or remonstrations would denote the speech delivered by a *parlement* at its refusal to ratify the king's decree during the eighteenth century; however, during the sixteenth century we find "remontrances" to designate what would later be known as the harangues at the biannual *ouvertures d'audiences*, which were generally morality speeches delivered before the body of lawyers regarding their duties. These harangues began in the mid-1550s following the reading of the *parlement*'s ordinances. The publication and dissemination of these speeches began in 1569 with the *avocat du roi* Guy du Faur de Pibrac (or Pybrac). Numerous reprints inform us of their popularity.

divine justice. Indeed, though it is a commonplace now to consider the early modern magistrates as the *bouche du roi*, there is much evidence that magistrates and lawyers considered their role not as mere functionaries of the king's law, but rather envisioned themselves as having a direct line to a holy sense of justice. Faye d'Espeisses spoke thus in one of his famous remonstrations:

> Dieu qui seul est juste, & de qui l'œuvre le plus parfait est la justice, voulait faire part aux hommes de ce qu'il a de plus beau entre ses mains, en a distribué un rayon aux Roys & Princes, afin de l'épandre parmi le monde. Les Princes ne pouvaient porter seuls une si pesante charge, vous en ont remis une partie sur les épaules. **Qu'ai-je dit, qu'il vous l'ont remise**? Je vous ai cuidé faire un grand tort, ils l'ont véritablement remise aux Juges, mais vous en avez fait comme Prométhée, vous l'avez vous-mêmes ravi du ciel, avec votre labeur & industrie, ou pour le moins, **Dieu vous l'a donnée de sa propre main, sans qu'il vous l'ait fallu mendier du Prince.**" (*Première remonstrance* in *Recueil des rémonstrances*, p. 5 [my emphasis])

God's justice – not the king's laws – was the early modern barrister's primary occupation. Early modern judges as well considered themselves to be acting in obedience to God; Domat made this clear in 1679, stating "Qui peut douter qu'on ne doive exercer cette fonction divine de juger de la manière dont Dieu l'ordonne? […] [Les juges] savent que c'est de Dieu qu'ils tiennent leur autorité & qu'ils participent à sa puissance" (*Harangues* in *Les Loix civiles* I: p. 260).[276] If the people went to the priests to discover "la science de

[276] Renoux-Zagamé indicates the link between Domat's language (the authority for which he cited 2 Chron. 19.6) and a statement made by Bossuet ten years earlier: "Pourquoi commandent les hommes si ce n'est pour faire que Dieu soit obéi" (*Du droit de Dieu au droit de l'homme*, p. 1).

la Religion & la Loi divine," the judges were sought out for "le jugement de Dieu" (ibid.). This higher allegiance might seem a trivial distinction, given that the king was supposed to have received his mandate from God and thus the two legislations – one human, the other divine – would thereby have coincided quite conveniently for the purposes of lawyers and jurists. Yet the difference was crucial, especially on the subject of eloquence. Man was composed, according to Faye d'Espeisses, of *esprit* and *sens*, which were a mixture of *céleste* and *terrestre*. Virtue, on the other hand, was *pure céleste*. Eloquence was thus the capacity of tipping the balance toward the *céleste* in one's listener: "[O]u bien qu'il me fust permis comme à Pericles, à force [de] mon Eloquence, mesler non par [*sic*] proprement le ciel & la terre, mais la vertue qui est pure céleste, avec vos esprits & vos sens qui sont meslez de céleste & de terrestre, & les y unir en telle sorte, qu'il ne se peussent jamais séparer" (*Troisième rémonstrance* in *Recueil des rémonstrances*, p. 59). Eloquence was not merely the pinnacle of rhetoric, meant to persuade the judge of one's case, but was rather the crowning achievement of speech itself in that it brought its listener toward heavenly virtue. Eloquence was evangelization.

That eloquence was considered to uncover the truth for the public who would always recognize true eloquence depended on a very particular conception of *opinion publique*. We can catch a glimpse of this notion in Faye d'Espeisses' first remonstration before the lawyers of Paris in 1581. During his explanation of the ascendancy of lawyers over judges despite their lower rank, he stated

> Que si la loi ou l'usage (tyran de notre vie) nous donne un lieu qui semble plus bas que notre vertu ne mérite, **l'opinion commune** & la renomée qui étant **composée de la partie de l'âme impassible**, n'est subjecte à loi ni à

> ordonnance, nous répare ce tort sur le champ, faisant par le moyen de ses idées, lignes & points géométriques, paraître en l'imagination d'un chacun, que ce lieu est le plus haut & le plus digne, sur lequel est assise la vertu. (*Recueil de la première remonstrance*, pp. 7-8 [my emphasis])

Opinion commune (a synonym for *opinion publique* in this context), like the classical version of the natural law (though not immutable), was considered sovereign by its nature, entirely outside the bounds of political dominion or hierarchical influences. Eloquence was intimately related to this *opinion* because its object was the admixture of virtue ("pure céleste) with the *esprit* and the *sens* (considered themselves an alloy of *céleste* and *terrestre*) that could potentially communicate and even illumine *opinion publique* due to their common virtue. The inviolable, impassible nature of *opinion publique* did not necessarily mean that it would act justly, but rather that its essence was just and thus however blinded or misled it could be by lies, rumors and superstition, these were no more than passing stumbles.[277] God's creation of man's soul meant that *opinion publique* could never be entirely corrupted.

In this view, eloquence was the lawyer's God-given tool to protect justice in the world by recalling the public to its own truncated but intrinsic virtue. "[L]e premier effet qu'aura opéré l'Éloquence des avocats sera d'avoir cultivé les esprits des assistants & iceux rendu capables de raison" (159). The correlation with d'Aguesseau is clear, whose

[277] D'Aguesseau echoed this sentiment in 1695 his second discourse before the Paris Bar, comparing Roman mob justice to the French audience at the *palais de justice*: "Ce peuple, cette multitude qui, dans le temps qu'elle exerçait elle-même les jugements, se faisait craindre aux parties par son caprice, n'est plus terrible qu'aux orateurs par la juste sévérité d'une censure rigoureuse. [Ils] ne se trompent presque plus depuis qu'ils sont devenus simples spectateurs ; et **le caractère de l'infaillibilité est presque toujours attaché au sentiment de la multitude**. […] C'est donc ce jugement, cette approbation du public qui donne le privilège de l'immortalité à vos ouvrages. Vous jouissez auprès de lui du même avantage qu'auprès de vos juges. **Incapable d'être corrompu**, il n'applaudit constamment qu'au véritable mérite; mais il lui applaudit toujours" ("La connaissance de l'homme," in *Œuvres choisies*, p. 194 [my emphasis]).

explanation of the moral necessity of eloquence for the edification of *opinion publique* was detailed in Chapter 1, but Faye d'Espeisses actually went much further by warning of the political power latent in *opinion publique*. Eloquence was the task specific to lawyers, because it was only through their words that the public could be convinced of the righteousness of the magistrates' silent *arrêts*. Without the lawyers' eloquent pleadings, the losing litigant could calumny the judges, ("[il] épanchera aux oreilles du monde une mauvaise odeur des gens de justice"), cause the public to question the judgment, potentially toppling the hierarchy of justice altogether. However, when the *arrêt* conformed to the most eloquent pleading, or that speech during which "la verité surgira de soi-même, & entrant dans les esprits des plus doctes, puis de là glissant d'oreille en oreille & se renforçant par le consentement commun," then whosoever tried to deny the justice of the decision to others would be called "mutin, furieux, privé de sens commun" for trying to "tendre son bras contre un torrent […] & se formaliser non pas contre un arrêt, mais contre une loi, contre un vœu public, & contre des Comices généraux […]" (ibid.). The barristers' eloquence formed public opinion in the law courts, but public opinion was what gave his persuasion force and confirmed the judges' decree in the public imagination. "Savoir si ceux à qui il [le 'mutin'] se plaindra, ne se tiendront pas pour demi outragés, de ce qu'il blâme non seulement les Juges, mais eux-mêmes qui ont été de cet avis, & non pas seulement eux-mêmes, mais la voix & opinion publique, qui est une déesse inviolable?" (ibid.). Eloquence was God's justice in the courtroom, and public opinion was the law of eloquence in the world.

The sixteenth-century theological roots of *opinion publique* are quite interesting, but of course the question remains: did this conception of *opinion publique* persist in a

meaningful sense for Lacretelle or the other eloquent lawyers of the eighteenth century? It is helpful here to move forward over one hundred years to a work by Louis de Sacy (1654-1727), a noted lawyer and member of the *Académie Française*, entitled *Traité de la gloire* (1715). We know that Lacretelle was influenced by this text not only due to a certain lexical proximity between his concept of *opinion publique* with that of the earlier lawyer, but also because he republished de Sacy's treatise in his *Logique et métaphysique* series of the *Encyclopédie méthodique.*[278] In this work, de Sacy, acknowledging the perception of *opinion publique* as a source of rumor and blind confusion, nevertheless deemed it the best possible moral compass:

> [R]egarder **l'opinion publique**, comme quelque chose d'incertain, de variable, de trompeur, de frivole, c'est n'en connaître ni la nature, ni le prix. […] Ce n'est pas qu'il ne soit vrai, que la plus grande partie des hommes est livrée à l'ignorance & à la corruption; & de là il semble que l'on serait en droit de conclure, qu'il n'y a pas de sagesse à faire cas de ce que pensent des gens aveugles & dépravés. **Mais ne vous y trompez pas; la dépravation qui règne dans leurs mœurs & dans leur conduite, n'infecte point leurs opinions & leurs sentiments.** [...]
>
> **Je ne puis trop répéter en cet endroit, que quand je donne tant de poids à l'opinion publique, je n'entends point parler de cette opinion momentanée,** qu'un heureux événement, une cabale, […] ont fait naître, & qui se dissipe encore plus facilement qu'elle n'a été formée. **Je parle de cette opinion durable & constante, qui née de la vérité, loin de périr**

[278] *Encyclopédie méthodique. Logique et métaphysique*, III: 238-78.

> **s'entretient & se fortifie avec le temps; qui passe d'âge en âge avec la même vénération**, & qui ayant eu notre propre témoignage pour premier fondement, est à l'épreuve de toutes les révolutions. Je dis donc qu'une telle opinion ne peut-être que trop respectée. **C'est Dieu qui s'explique ordinairement par la voix du peuple**. Dans les jugements que le peuple porte des hommes, exempt des passions dont quelquefois les sages se laissent prévenir sans le sentir, **il va plus droit à la vérité**: mais s'il lui arrive de s'en écarter, comme il s'égare de bonne foi, il reconnaît sans honte son erreur, & revient sans peine à leurs avis. (*Encyclopédie méthodique. Logique et métaphysique* III: 246 [my emphasis])

However devoid of a thick theological apparatus that might explain the otherwise flimsy attribution of God's authority to *opinion publique*, de Sacy largely restated the judicial conception of an independent *opinion publique* essentially and eternally configured for the recognition of truth. Indeed, we find very little variation in the treatment of *opinion publique* from the sixteenth century to the Revolution. It may be recalled that in Chapter 1, *avocat général* Jérôme II Bignon's *plaidoyer* in the Gueux de Vernon affair harshly reprimanded the crowd and discounted it as a witness, but the crowd category must not be conflated here with *opinion publique*. The distinction is made clearly in the de Sacy text, where he distinguishes between *opinion publique* and what he calls *opinion momentanée*. Thus I would contend that *opinion publique* remained a hallmark of judicial discourse throughout the early modern period not due to a rise in literacy, availability of printed material, or refractionary attitudes toward various governmental authorities, but rather

because, in a very radical sense, *opinion publique* had constituted the imaginary and fundamental tribunal to be persuaded of the law's justice for centuries.

Read in light of this recontextualization, Lacretelle's argument for the pre-eminence of *opinion publique* might now sound shockingly old-fashioned. For example, he likened public opinion to a good conscience, aligning it with justice, truth, and reason. The moral rectitude of public opinion was mirrored in the truly eloquent speaker, who, in turn, was put in explicit parallel with the spiritual domain as Lacretelle interchangeably invoked both priests and eloquent men as parrhesiasts inflecting the everyday practice of earthly justice. "Souvent les Ministres des Autels, les Ministres des Lois ont fait entendre de grandes vérités dans ce silence de l'adoration & de la terreur; elle a éclairé l'orgueil & fléchi la colère jusques sur le Trône" (13). Yet despite the centuries-long resonances, everything had changed. Though the sacral treatment of *opinion publique* did not originate in the eighteenth century, the sacral character of *opinion publique* was no longer patterned on the Divine as it had been in the past. Rather, the sacred nature of public opinion was self-referential.

Spreading Enthusiasm

Lacretelle next confronted the familiar critique – well known to us even today – that eloquence disrupted the normal course of legal disputes and brought about judicial waste. He framed the accusation as pitting utility against "une pompe qui [fait respecter la justice] davantage" (Lacretelle 14). While admitting that "la marche serrée d'une logique rigoureuse conduirait plus rapidement & peut-être plus sûrement à la vérité que la discussion embellie de l'Éloquence" (14), Lacretelle denied the existence of any such

devoted and zealous jurists who could reliably perform so difficult and dry a task, an absence that rendered such a potentially efficient and reliable system virtually impossible to realize. “[P]eut-on les supposer tous pourvus d'une sagacité si rare, & d'une attention si inébranlable?” (14). Once again, he reminded his reader that real people “apportent, dans des fonctions communes, des caractères & des esprits différents” (14), a variety of dispositions that squandered any possibility of predictable, algorithmic identification of legal data. A purely rationalistic approach to the law was destined to fail because man was irrational; he was not up to the task. He needed to first be elevated through eloquence before he could be trusted to use his judgment.

As though to underline his argument for the animating, salutary power of eloquence, Lacretelle described himself as though suddenly delivered via passion to the contemplation of philosophical notions. “Je ne sais si un peu d'enthousiasme ne me séduit pas; mais il me semble que, sous tous les aspects, le beau ici tient toujours à l'utile” (14). Among intellectuals at this time, *enthousiasme* was no longer considered a passing moment of madness, indescribable due to its shadowy, occult origins. Enlightenment thinkers, deeply influenced by Lockean empiricism particularly through Condillac's sensationalist representation of the Englishman's thought,[279] had quite rehabilitated enthusiasm as not only a derivation of the rational capacity, but in fact its crowning achievement:

> C'est la raison seule cependant qui le fait naître [l'enthousiasme]; il est un feu pur qu'elle allume dans les moments de sa plus grande supériorité. Il fut toujours de toutes ses opérations la plus prompte, la plus animée. Il suppose une multitude infinie de combinaisons précédentes, qui n'ont pu se faire

[279] See, e.g., Marcel Raymond's critical edition of *Les Rêveries du Promeneur Solitaires* (*OC* I: 1821).

qu'avec elle & par elle. Il est, si on ose le dire, le chef-d'oeuvre de la raison. ("Enthousiasme," *ENC* V:719-20)

Enthusiasm was the productive or admiring emotion made available to those capable of experiencing it when in the presence of ideas or works of artistic merit as presented by rational thought. Although words like *imagination*, *génie*, *esprit*, and *talent* were associated with enthusiasm, all of these concepts were brought back from the realm of the obscure and arranged in orderly fashion under the reign of reason. In this manner, works of art such as paintings, operas and oratory could be analyzed like scientific objects,[280] their inner working discoverable to those who wished to pierce the secrets of their power. The reverberations of such tectonic shifts rippled through the legal profession; "even a conservative barrister like Pierre-Louis Gin could argue in his handbook on eloquence that sensations, classified, compared, and judged by mental faculties, formed the basis of all knowledge" (Maza, *Private Lives*, 275-76). Thus, when Lacretelle seemed to almost sheepishly confess, "Je ne sais si un peu d'enthousiasme ne me séduit pas," rather than discounting the argument which follows, the formulation lent an additional layer of authority to his marriage of beauty and utility, which may have otherwise fallen quite flat.

By prefacing his argument for the admixture of beauty and utility in terms of enthusiasm, Lacretelle gave a little wink to the savvy reader who had understood the game from the very beginning. Eloquence, as an artistic production with the capacity for beauty, could transport its recipient from the contemplation of their several interests to the

[280] Redemption offered itself theoretically to artists as well: "On pourra désormais être poète excellent, sans cesser de passer pour un homme sage; un musicien sera sublime, sans qu'il soit indispensablement réputé pour fou. On ne regardera plus les hommes les plus rares comme des individus presqu'inutiles, peut-être même s'imaginera-t-on un jour qu'ils peuvent penser, vivre, agir comme le reste des hommes" ("Enthousiasme," *ENC* V:721).

spectacle of higher, more communal and thus civic forms of interests. In this way, eloquence, according to Lacretelle, lent itself not to the covetous and decadent ways of the upper classes, but rather the pitiful needs and worries of the everyman. Through this mechanism, the readers of the *mémoire judiciaire* not only learned to choose the just answer, but also becomes more just themselves by focusing on a deeply common social narrative.

> L'Éloquence, dans nos Tribunaux, est particulièrement un appui accordé aux malheureux. Eh! quel avantage pour eux de voir les raisons qui sollicitent en leur faveur, s'anoblir par l'alliance des grandes vues qui peuvent s'y réunir! Ne leur importe-t-il pas d'ailleurs que l'attention de leurs Juges, que celle du Public, dont l'estime est pour eux une si noble consolation, sont retenue sur leur cause par l'intérêt qu'un Orateur sait y répandre? (Lacretelle 14-15)

Thus, by couching legal matters in terms of eloquent narratives, Lacretelle argued that the case would not only be more justly resolved, but that the judges would also be treated to a morally edifying lesson that only eloquence could deliver. “L'exercice des fonctions de la Magistrature est la meilleure école du Magistrat. Et quelle noble & heureuse instruction ne peut-il pas puiser dans ces discussions agrandies par la philosophie, animées par l'Éloquence!” (15). The public, of course, would benefit as well:

> L'Éloquence est réservée à quelque chose de plus grand encore. *Jugeons dans la Place publique, si nous voulons ne faire tort à personne*, disait un Roi de Macédoine. [...] Arbitre universel, [la justice] doit aussi manifester les règles qui la dirigent, & s'enseigner elle-même. Et qui mieux que

l'Éloquence pourrait proclamer ses instructions & solemnifier ses décrets? (ibid.)

Lacretelle thus concluded his article, restating contemporary man's reliance on eloquence as a pathfinder to justice. “Telle est donc parmi nous la justice, que si l'Éloquence est utile à sa décoration, elle est peut-être nécessaire à la sagesse, à la pureté de ses décrets” (Lacretelle 16). Nodding to the prevailing counterargument, he noted the corruptibility of eloquence when in the wrong hands, but quickly reasserted its natural, even essential affiliation with virtue. For Lacretelle, freedom and glory were the spoils of eloquence (here we hear De Sacy again): “[L'éloquence] pourrait se dégrader dans la corruption générale, prévenez ce malheur [...]; l'Éloquence s'en éloigne naturellement; elle est née au sein de la liberté, du besoin de la gloire. En perdant ses motifs, elle perd sa force” (Lacretelle 16).

Pastoret’s Response

Emmanuel de Pastoret published the following year a response to Lacretelle’s paean to courtroom eloquence that argued for its exclusion on the basis that it was no more than a distraction in the world of legal obligation. The text, entitled “Lettre à M. de Lacretelle sur le danger de l'éloquence dans l'administration de la Justice”[281] was (perhaps counter-intuitively) attached to his *Discours en vers sur l'union qui doit régner entre la Magistrature, la Philosophie & les Lettres*. To be sure, Pastoret was no enemy of *belles-lettres*; his verse, though sporadically given to clumsy repetitions, reveals an able poet who favored substance over form. In this poem on the relationship between justice and poetry,

[281] *Discours en vers sur l'union qui doit régner entre la Magistrature, la Philosophie & les Lettres; suivi d'une lettre à M. de Lacretelle sur le danger de l'éloquence dans l'administration de la Justice* (Paris: Jombert jeune, 1783).

the poet-magistrate expressed his deep and abiding affection for the fine arts but was categorical in his commitment to the law: "Que le goût des beaux arts, en embrassant mon coeur, laisse l'amour des lois y régner en vainqueur" (Pastoret, *Discours en vers*, p. 15). Indeed, in the final lines, Pastoret succeeded in enfolding the pleasure of *belles-lettres* within the work of the jurist, trading the attraction of the muses for Thémis, and the delight of the *parterre* for the solitude of the *cabinet*:

> O Thémis! tes bienfaits, prévenant mes désirs,
> Du sein de mes devoirs font naître mes plaisirs.
> Vois d'un œil maternel un fils qui t'idolâtre;
> Et si de mes travaux le zèle opiniåtre
> Du repos un instant me permet les douceurs,
> Souffre que, parcourant l'asyle des neuf Sœurs,
> Ivre des sentiments que ta bonté m'inspire,
> Je chante mon bonheur en chantant ton empire. (16-17)

How could a poet-magistrate be opposed to eloquence in legal discourse? In his letter to Lacretelle, Pastoret argued to exclude eloquence within the courtroom on the basis that is served no more than as distracting ornamentation. As a *conseiller à la Cour des aides* at this time, Pastoret was himself an appellate court magistrate and despite his marked affinity for letters, he considered eloquence entirely superfluous and even harmful to just outcomes in the court of law. In his estimation, the law needed only to state itself via its organs – the jurists – in order to enjoin obedience. For Pastoret, the law itself was holy, and the courtroom was a sacred space. While Lacretelle established public opinion, eloquence and social virtue as a sort of holy trinity, the public revelation of which was to

be sought at all costs, Pastoret categorically denied the utility of eloquence within the courtroom, holding that truth and eloquence had nothing to do with one another. On the contrary, eloquence, that "talent si dangereux" (Pastoret 21) was precisely the kind of discourse that the office of lawyer was supposed to have silenced:

> Mais jetons un moment les yeux sur l'origine de **ce ministère sacré**: n'a-t-on pas voulu placer un homme choisi entre **la sainteté de la loi et la violence de nos passions**? Qu'on laisse aux parties le droit de défendre leurs causes, nous allons voir la haine et la vengeance semer leurs discours d'imputations étrangères, et distiller à grands flots de toutes parts le poison de la calomnie. C'est donc pour éviter cet abus qu'on a créé cette fonction honorable. **L'avocat doit être l'organe impassible de la vérité ; elle seule doit obtenir ses hommage**s: et pourquoi la déshonorerait-il par un langage qui lui est souvent étranger? (Pastoret 19 [my emphasis])

We find Pastoret here echoing one of the traditional justifications for the role of lawyers, that they stood midway between the holiness of the law and frenzied interests of humanity. However, rather than acting as a translator for each side, i.e., using persuasion to instruct the public toward reason, and conviction to obtain a decision from the learned magistrate, the ideal lawyer in Pastoret's estimation was he who presented his client's case cleansed of any taint of feeling or passion, putting the matter forward in terms suitable for legal parsing. However familiar this might sound to us today, we must note that such a conception of legal discourse must have sounded rather strange to lawyers of this period in that it would function to ignore the presence of the public who crowded the courtrooms of the day and voraciously consumed *mémoires judiciaires*. The traditional duty to provide

moral edification to the public was dropped altogether as the communicative function of the courtroom was restrained to the law, the *faits* and the *moyens*.

Lacretelle's eloquence, that enthusiastic outpouring of genius, the connective energy of which was to glue together the social fabric into a general civic assembly centered around natural feeling, was considered by Pastoret as nothing more than *langage* intended to stir up the lowly passions. But the passions were precisely what the lawyers had been put in place to expel! However, we should note here that Pastoret's definition of the lawyer only presented half of the traditional description, set forth here in the words of the great jurist, Jean Domat (introduced in Chapter 2, pp. 139-40):

> [Les avocats] sont devenues nécessaires par deux sortes de désordres, […:] **la multitude des injustices & des entreprises contre les premières lois**, a [*sic*] donné sujet à la multitude des lois positives; & ainsi il a fallu des personnes qui aient eu la connaissance de ces lois pour la défense des parties, & d'ailleurs **les passions & les emportements** des parties ayant troublé l'ordre judiciaire […] il a fallu les en exclure, & mettre en leur place des défenseurs qui sussent les représenter, & défendre leurs intérêts dans la vérité, & sans mélange de mensonge & de passion. ("Harangue prononcé à l'Ouverture des Audiences de l'année 1673," p. 374 [my emphasis])

The discrepancy is interesting because by eliding the tangled multiplicity of laws, the resulting injustices, and the initiatives against the natural law narrative (by which Domat most assuredly meant those that would later gain primacy with the Enlightenment *philosophes*), and focusing solely on the erring ways of man, Pastoret demonstrated a profound level of trust in the law both in regards to its forms and authority. This allegiance

belied an almost total absence of care for both actual public opinion, which excoriated the inextricable legal system, as well as the abstract public opinion considered to evolve toward truth over time.

The earlier alliance of public opinion with the word of God was nowhere to be found in Pastoret's vision of judicial discourse. For Pastoret, holy was the *law* to which the social order owed its constitution, and the lawyer was to act as its priest, deciphering its irreproachable truths for the congregation of litigants whose only role was to submit to its wisdom. Indeed, Pastoret seemed to consider the legal code even more irremissible than canon law for which he willingly admitted the utility of eloquence; Pastoret would not proscribe eloquence for philosophers or priests because these public ministers could not obligate their listeners *except* through persuasion. However, such persuasion, for Pastoret, would be entirely beside the point for the "citoyen utile" (the lawyer); legislation need only be announced in order to be obeyed; positive law was the algorithm of the social order:

> La vérité doit parvenir au juge sans obstacle et sans apprêts. Qu'un orateur sacré, qu'un philosophe, nous instruisent à la science des mœurs; il faut nous persuader, et pour cela peut-être il faut être éloquent. Il s'agit en effet d'inspirer la vertu quand la volupté entraîne. Oui, quelque certains que soient les principes de la morale, ils sont toujours combattus par l'intérêt et les passions des hommes. Il n'en est pas de même de ceux de la législation: ils n'ont pas besoin d'être persuadés pour faire la base de nos jugements: **il suffit au contraire de les exposer pour enchaîner l'obéissance du Magistrat et du Plaideur**. (21 [my emphasis])

Most notable is perhaps the absence of any mention of either the public or *opinion publique* as potential audiences for or arbiters of legal discourse. Pastoret did not aspire to make the public obey; lawyer, judge and adjudicant alone fill the closed space of Pastoret's courtroom and it was their obedience alone that was in question. Likewise, neither *intérêt* nor *vertu* figured anywhere in Pastoret's estimation of jurisprudence.

The absence of moral reference in Pastoret's proposed legal discourse followed from his proposal (left implicit) to dissolve the practice of judicial theology that had determined the ontological commitments of legal discourse for hundreds of years. We catch this revolutionary proposition almost in passing, as Pastoret continued, in quite lawyerly fashion, to cite important figures whose simple, unembellished enunciation of law signified its authenticity. Solon, Lycurgus, Justinien, Zoroaster, Confucius and even John Locke (regarding his authorship of the *Fundamental Constitutions of Carolina* of 1669) were trotted out as examples of forthright, unbeguiling speakers who nonetheless provided a beneficial civil framework for their fellow men. "Ces grands philosophes, ces politiques profonds, crurent pouvoir assurer le repos de leur concitoyens sans les charmer par des accords ravissants" (Pastoret 19-20). To be sure, Pastoret also provided counterexamples such as Muhammad, but distinguished these legislators as irrelevant to his argument on the grounds that their authority was generated through religion, and thus they required eloquence and all its persuasive characteristics to maintain the legitimacy of their governments.[282] Tucked into this historical comparison was Pastoret's most subversive idea: that government and religion, law and morality could be entirely disengaged from

[282] On the whole, Pastoret had deep respect for Muhammad as a legislator *de génie.* For an interesting contemporary portrait of Muhammad from the judicial perspective, see his *Zoroastre, Confucius et Mahomet*, particularly pp. 407-08.

one another in a civil society, and that this separation would produce a greater degree of social order through a more predictable and efficient administration of justice.

Lawyers, no longer earthly angels[283] or even sublime heroes, were simply the bridge between the government's legislation and the people it was intended to govern. Notwithstanding the rather sudden demotion, lawyers would still be expected by Pastoret to mirror the gravity of laws in their own behavior. "Interprète du législateur, qu'il s'exprime avec sa noble précision" (19). Unlike Lacretelle's lawyer, whose duty was to render as touching as possible his client's position, Pastoret's lawyer's allegiance was to the law: "Pourquoi donc le citoyen utile **dont le devoir est de rappeler les principes de la législation** se laisserait-il séduire par un talent si dangereux?" (20-21 [my emphasis]). Given Pastoret's representation of the law's inherent truth and authority, that he finds the presence of eloquence absurd in what should rather be a direct delivery of code follows quite logically:

> À quoi sert d'ailleurs cet étalage superbe de phrases harmonieuses? Il enchante l'oreille, il flatte l'esprit, je le sais; mais est-ce donc pour se livrer à ces plaisirs que le juge s'assied sur son tribunal auguste? Ne sera-t-il pas même forcé, quand il donnera son opinion, d'écarter tout cet appareil, et de **réduire la cause au simple syllogisme** que l'avocat aurait dû lui présenter? (Pastoret 21)

Interestingly, Pastoret's legal reductionism presented nothing fundamentally new for contemporary legal practitioners, who were well-versed in the compositional requirements of the *rapport*, in which brevity and clarity were of ultimate consideration:

---

[283] Faye d'Espeisses quite seriously characterized lawyers as angels in his *Troisième rémontrance* (*Recueil des rémonstrances*, pp. 56-57).

> Ce laconisme paraît effrayant; mais comment faisons-nous nous-mêmes dans les procès dont nous sommes rapporteurs? une exposition simple des faits, une froide analyse des moyens, le texte de la loi rappelé, voilà où se borne tout notre ministère. Pourquoi un usage aussi simple ne serait-il pas adopté par les défenseurs des citoyens? (21-22)

The *rapporteur* was a member of the courtroom (usually a judge) appointed to develop a *rapport* of each case pending before the *parlement* for the instruction of the judges. Thus, apart from the narratives developed by the parties' barristers through pleadings and written submissions, the *rapporteur* produced alongside these discourses a parallel rendition of the case that sought to distill the matter to its essential parts.[284] Contrary to the barristers' discourse, whose eloquence was considered by Pastoret to cloud the issues, the *rapport* was not intended for a general audience, but was constructed with the sole aim of elucidating and simplifying the matter for the judges' comprehension. The *Encyclopédie* described the task of the *rapporteur* in the following words (which happened to be those of the great eloquence professor and ardent Jansenist, Charles Rollin (1661-1741)) in 1765[285]:

---

[284] *Rapporteurs* were not used in all cases; the *rapport* was not assigned unless the judge(s), after hearing arguments and examining the case, could not decide it immediately or later that day. Such cases were ordered to be *délibérés*, and a *rapporteur* was then selected to produce a *rapport* for the judges' examination ("Délibéré," *ENC* IV: 782).

[285] This article was taken almost word for word from Rollin's *Traité des études* (1726-31), which had been more recently plagiarized in the *Traité de l'éloquence dans tous les genres* (Paris: Brocas, 1757), signed G*** (attributed since in various European bibliographies to a Monsieur Graverelle, following Antoine Barbier's suggestion in his *Dictionnaire des ouvrages anonymes* (t. IV, col. 747), though contradicted by Saiviy Ben Messaoud (1998)). Interestingly, the only elements left out by both Graverelle and the *Encyclopédie* from Rollin's section on the *rapport* were a Latin citation to Cicero's *Brutus* distinguishing between the eloquence of a judge and that of a lawyer. Perhaps the more curious absence in the *Encyclopédie* article is Rollin's suggestion that in addition to the harangues of Cicero, students destined for the law should analyze philosophical treatises like those specifically of Descartes or Malebranche to enhance their abilities to write a clear and useful *rapport*.

> [Le rapporteur] devient […] l'oeil de la compagnie. Il lui prête & lui communique ses lumières & ses connaissances; or pour le faire avec succès, il faut que la distribution méthodique de la matière qu'il entreprend de traiter, & l'ordre qu'il mettra dans les faits & dans les preuves, y répandent **une si grande netteté**, que tous puissent sans peine & sans efforts, entendre l'affaire qu'on leur rapporte. Tout doit contribuer à cette **clarté**, les pensées, les expressions, les tours, & même la manière de prononcer, qui doit être **distincte, tranquille & sans agitation**. ("Rapport," *ENC* XIII: 798)

Despite his vague and truncated praise of the role of the barrister, by suggesting they adopt the methods deployed in the *rapport*, Pastoret seems to imply that their function was almost entirely superfluous to courtroom justice given the function of the *rapporteur*.[286]

However, the hoped-for redundancy of the lawyer could only obtain in a judicial setting that excluded the public and could depend upon learned and just magistrates. Within the closed world of the legal order, those tasked with reporting cases to the judiciary were obligated to adhere only to those materials relevant to the administration of the law. There, public opinion was inconsequential and irrelevance unthinkable. Pastoret's argument figured his ideal courtroom in that his argument moved ever further away from the general reader to address himself plainly to only those who practiced the law. An anecdote reinforced the circumscribed space of the courtroom:

> Vous connaissez l'histoire de cet avocat, qui, entendant son confrère parler avec emphase de Troie et du Scamandre, l'interrompit par ces mots: *La cour*

[286] We hear an echo of Bayle's distinction between the *avocat*, who hid the weakness of his argument, and the *rapporteur*, who, like a historian, represented both the strong and weak elements without partiality. (See "Chrysippe," remark G in *Dictionnaire historique et critique* II: 169).

> *observera que ma partie ne s'appelle pas Scamandre, mais Michaud*. Cette observation, sous un air frivole, me paraît renfermer deux grandes leçons. (Pastoret 24-25)[287]

Pastoret's arguments constantly reeled in the limits of courtroom speech as well as those who should hear it. Unlike Lacretelle's boundless, eternal audience and the transcendent objects on which it was to fix its common gaze, Pastoret's trial descriptions were intimate settings; the confidence between individuals was not general but contingent on their initiation and appropriate participation within a bounded body of code and its efficient administration. Through the pithy use of a brief anecdote that left its point devastatingly unsaid, Pastoret effectively collapsed the neo-classical tribune under which Lacretelle proposed to hold forth as orator, demonstrating and ironizing the distance between the good French lawyer and the one gone quite astray from his duties.

Furthermore, unlike Lacretelle, who considered eloquence an essential part of the mechanism for truth and social justice, Pastoret considered it not only utterly superfluous but also troublesome to the magistrate's capacity for ascertaining truth:

> Vous voulez m'échauffer et m'attendrir. Je pourrais vous répondre que cet état de l'âme est celui de tous où elle est le moins capable d'asseoir un jugement solide. Mais si à ce danger se joint cette défiance perpétuelle et de vous et de moi que votre art doit m'inspirer, je vous le demande alors, **quel est l'objet de ce supplice intérieur auquel vous me condamnez**? Je vaincrai, ajoutez-vous, et ce sera pour moi un triomphe de plus. **Mais, d'abord, pourquoi me forcer à cette lutte éternelle entre l'éloquence et**

[287] Voltaire also quoted this anecdote in his article "Éloquence" in the *Encyclopédie* (V: 530).

> **la vérité**? pourquoi me déchirer sans cesse par des craintes injurieuses à des hommes estimables, dont je dois révérer les talents et la bonne foi? (22 [my emphasis])

Such conduct rose to the level of moral, if not criminal, culpability:

> [S]i malgré ma vigilance et l'attention la plus sévère, je me laisse séduire par vos lumières trompeuses; si ma bouche, qui ne respira jamais que pour l'innocence et la justice, prononce l'avis coupable que vous m'avez suggéré, mon ignorance ou mon délire peut mériter vos reproches: mais vous, à qui j'ai dû mon erreur; vous, qui m'avez fait trahir le plus saint des devoirs, répondez à votre tour, croyez-vous être exempt du crime? (22-23)

Rather than awakening the judge and audience to virtue, eloquence splintered the truth, took advantage of weakness and encouraged culpable behavior.

Despite his hostility toward courtroom eloquence, Pastoret was not so severe as to ignore the presence of truly good writers and orators among the lawyers of the day. Given the dazzling success of various *mémoires judiciaires* for *causes célèbres*, it would have been hard to deny their talent. He even confessed to reading the beautiful productions with delight but his transports were nevertheless tainted with grave misgivings: “mais cette admiration ne ferme pas mes yeux sur les périls que cette éloquence entraîne” (Pastoret 23). For every truly eloquent barrister, or one who argued for the sake of justice, there existed hordes of bombastic and false lawyers who sought only fame and fortune. Whereas Lacretelle would also likely complain of the disingenuous theatricality and outrageously long *plaidoiries* of some lawyers, he differed with Pastoret in that the latter claimed the sins of eloquence were original to it: “Il en est [des avocats] qui y suppléent quelquefois

par une diffusion fatigante ou par des personnalités déplorables. C'est l'abus de la chose, il est vrai, mais **cet abus est lié à son existence**" (23 [my emphasis]). While Lacretelle preferred to consider eloquence as the highest epistemological gesture whereby one could not only detect justice but also generates just citizens, Pastoret saw it as a trap door no mortal, riddled with "amour-propre, toujours insatiable" (Pastoret 25), could help slipping down unless it was strictly banned from the legal space. Eloquence was the breeding ground of narrow *intérêt*.

Pastoret ended his article by revisiting with exemplary precision the argument that eloquence produced judicial waste. Rather than merely contending that judges could hear more cases and help more people by limiting lengthy or irrelevant speeches, Pastoret offered a mathematical explanation to prove his point: "Qu'on me permette de joindre ce calcul, qu'on n'avait pas fait encore. [...] Il y a en France au moins six mille juridictions royales, en y comprenant tant les juridictions ordinaires que celles d'attributions [...]" (26-28). His detailed calculations produced the following result: "oui, cent trois ans que l'éloquence arrache au juge chaque année : au bout d'un siècle, il aura donc, malgré lui, perdu à peu près deux fois autant de temps qu'il y en a que le monde existe" (28). His due diligence thus having led him to his astounding proof, this was the only topic in the article on which Pastoret unleashed a bit of drama:

> N'est-il pas vrai qu'à l'instant qu'un orateur célèbre charme [le magistrat] par la pompeuse harmonie d'une période cadencée, les bras tendus vers lui, une foule de malheureux l'attendent à la porte du sanctuaire de la justice, et lui demandent en gémissant de les arracher et aux angoisses d'un jugement

incertain, et au dépenses qu'occasionne un séjour forcé loin de leurs possessions et de leurs familles? (26).

The surprising imagery of the passage reminds us of typical Lacretelle productions. But it is important to note the context: only on the subject of efficiency – an extra-legal concern that touched laymen more than lawyers and judges – did Pastoret wax eloquent, composing his prose to include and interest the entire range of likely readership. This style of writing demonstrates Pastoret's acknowledgment of and appreciation for the sentimental taste of the public, as well as his capacity to weaponize according to suitable issues. Through eloquence, Pastoret sought to shut down eloquence within the confines of the court of law. That Pastoret resorted to this technique highlights the slippery state of legal discourse at this historical moment, as well as the social categories of judgment and authority that sustained it.

Lacretelle's Response to Pastoret

Lacretelle's initial arguments found themselves largely duplicated in his response to Pastoret's letter, published together with the letter, in the March 1, 1783 issue of the *Mercure de France*.[288] Given their divergent theoretical investments, it is not surprising that Lacretelle and Pastoret appear to be speaking two different languages. Lacretelle's admonition of Pastoret reveals as much:

> Il n'est pas ordinaire de se plaindre de n'être pas attaqué d'assez près; c'est cependant l'espèce de plainte que je forme contre vous. Il me semble,

[288] All cites will be to the first volume of the 1823 edition of Lacretelle's collected works.

> monsieur, qu'en motivant votre opinion vous avez laissé subsister tous les motifs par lesquels j'en avais établi une différente; je puis donc vous opposer, pour première réponse, la discussion même que vous avez combattue. (Lacretelle, *Oeuvres*, I:57)

Despite his initial reaction to send Pastoret back to his original article, Lacretelle indulged his interlocutor by responding to his arguments. Although the document was largely a re-hashing of the convictions he set forth in the first article, this time he established them with a more traditionally legal rather than dramatic tone. The hitherto exuberant defender of truth and justice at all costs was here playing the role of obedient law student, presenting his conclusions at the outset in list form before substantiating them in a gentle persiflage: “Je crois qu'il résulte de ma discussion deux choses: l'une, [...]” (57-58). The stylistic switch comes off quite comic, further subverting the intention of legal discursive practice by opening it up for public laughter.

As promised, Lacretelle revisited his previous arguments in response to those put forth by Pastoret, but their writings were clearly like two ships passing in the night. Lacretelle, most likely sensing this, finally stated in conclusion the potential incommensurability of their positions:

> On pourra croire, monsieur, que nous avons parlé ici chacun selon l'esprit de notre état. Vous êtes magistrat, et un magistrat doit se tenir en garde contre les séductions de l'éloquence; je suis avocat, j'en exerce quelquefois les fonctions, et l'éloquence fait un de nos titres à l'estime publique: voilà ce qui pourra nous rendre l'un et l'autre suspects de quelque partialité. (64)

By thus positioning the lawyer and magistrate in opposition to one another, Lacretelle interestingly conceded an important point to Pastoret, that judges need be wary of the lawyer's discourse lest they be duped into deciding a case according to unsound principles. This point of ultimate concern for Pastoret left Lacretelle uninterested because his judge was public opinion. The justice sought by the magistrate was but a shadow of what Lacretelle considered the eloquent lawyer's task to be.

> Il n'est que trop commun de ne voir les objets qu'à travers notre intérêt ou notre penchant; et un écrivain pour qui la vérité est sacrée doit se prémunir contre cette surprise. Je puis me rendre au moins le témoignage que, dans l'examen de cette question, j'étais tout prêt à adopter et à établir, de toutes mes forces un résultat contraire, s'il m'avait paru le mieux fondé en raison. (ibid.)

Just as Pastoret closed his argument against courtroom eloquence via the technology of eloquence, here we find Lacretelle likewise declaring what might be considered a Pyrrhic victory; by admitting that the two did not and perhaps could not share a common standard or measure regarding eloquence, yet maintaining eloquence as the natural tool by which to detect truth, Lacretelle perhaps inadvertently admitted a cognitive dissonance or gap regarding valid modes of veridiction by and among categories of people. If positive law was not to furnish the basis for truth and justice, but rather eloquence, then this lacuna becomes not a legal problem, but a potential social contagion.[289]

---

[289] That the debate ended on a sinister note does not necessarily signify a lapse in Lacretelle's argumentation; as Kate E. Tunstall points out in an article regarding Diderot's *Essai sur les règnes de Claude et de Néron*, scholars must not be too quick to attach themselves to "une vision de la République des Lettres comme un espace irénique [...]. La base du consensus, comme celle du dissensus, est de l'ordre du sentimental – c'est une affaire d'identification ou non, de sympathie ou non, d'amitié ou d'inimitié. C'est une logique profondément partisane, voire sectaire – *qui non est mecum, contre me est* – présentée, qui plus est, comme une affaire de morale [...]" ("'Ne nous engageons point dans les querelles': un projet de guerre perpétuelle,"

Conclusion

As the Scholastic tradition faded into the background, the theological vocabulary that founded the principle of early modern legal eloquence remained in use in the law courts but for vastly different jurisprudential projects. The interpolations of religious imagery and references in the secularizing arguments of both Lacretelle and Pastoret demonstrate the legitimizing affect of faith among the Enlightenment lawyers, though it no longer referred to a Christian God but had rather splintered into prostration before the two other sources of justice: the public and the laws, respectively. The Lacretelle-Pastoret debate thus showcases the diversity of opinion regarding legal eloquence that reigned among even the reform-minded lawyers as divergent moral worldviews came to the fore. For lawyers like Lacretelle, law was superfluous to human morality; man's nature simply needed unshackling from the tedious rules and forms that had hitherto hindered communication and connection to come into a state of political exaltation. Lacretelle's utopia was not, however, one of unlimited freedom, but rather submission to eloquent phenomena. Eloquence was the only vehicle compelling enough to carry an audience to true justice. On the other hand, for those in Pastoret's camp, persuasion was quite irrelevant to the law because outside of the legal system there could be no morality; human law and morality were concomitant events, each originating in the other. It was the ordering nature of the judicial system itself that morally justified its existence and with that the authority of the laws executed within the courtroom. Thus it was the law itself – not the lawyer's eloquence – that instilled in man the desire for virtue and justice.[290] Yet from this position it does not

p. 369). From Lacretelle's purported desire to protect the weak and defenseless against the mighty, it does not at all follow that his utopia was an inclusive one.

[290] "[L]es loix ne sont bonnes que lorsqu'elles donnent un grand intérêt à être juste. Leur véritable caractère n'est pas de punir les passions, mais de les diriger vers le plus grand bien de la république […]. Les vrais

follow that Pastoret agreed with the tangled web of laws or turned a blind eye to the abuses of the judicial system of prerevolutionary France; his *Des loix pénales*, composed during the final years of the Old Regime, conveyed a clear-eyed account of the justice system's shortcomings and provided critical suggestions for the *Assemblée législative's* reform measures. Rather, Pastoret considered the law in an abstract sense as the only possible foundation for a civil society. The perfection of the laws through an analysis of past legislations was the only way to reform society, but such were the concerns of legislators and thus outside the bounds of courtroom discussion.

This chapter has also demonstrated that the presence of *opinion publique* in the judicial discourse of the Enlightenment era was not a novel invocation or argument meant to call into question the king's authority or the letter of the law, but rather had been a touchstone of such discourse for hundreds of years. By tracking this notion back to its earlier sources, we understand that *opinion publique* was both a real and ideal category, understood in religious terms. *Opinion publique* in these earlier usages denoted either a passive ideal (a vessel – however imperfect – of divine virtue) or a reality to be kept passive through eloquence (the audience who could disagree with the judge's decision). *Opinion publique* in this earlier sense was also a vague barometer from which to determine the degree to which true eloquence – which embodied celestial virtue – oriented a lawyer's pleading. Early modern rhetoric around *opinion publique* was thus conceptually enfolded within a spiritual dialectic in that the lawyer's speech was required to commune with God in order to move *opinion publique* toward the truth. As lawyers increasingly cited *opinion publique* in the late eighteenth century, the term maintained the reverence shown it across

---

principes de la législation ne sont que ceux de la raison et de la morale universelle, consacrés par l'autorité publique" (Pastoret, *Des loix pénales* I: 15).

the centuries, yet everything had changed. *Opinion publique* was invoked as an *active* constituent because the truth lawyers hoped to reveal now terminated in this amorphous body; the human potential for happiness and well-being through the reorganization of the political body had come to found a new natural law. Transcendence was still an important motivation in these legal discourses, but it was no longer sought in the spiritual but rather the social realm. Conversely, we find in Pastoret the complete dismissal of *opinion publique* along with eloquence from any role in legitimate legal discourse. Though Pastoret's position advocating for a textual constitution sounds quite familiar to us today, through this chapter I have endeavored to demonstrate how peculiar his proposition was in light of early modern French jurisprudence.

Meanwhile, in the town of Arras, a young lawyer who would eventually become one of the most eloquent men of the Revolution was just beginning to plead petty matters before the local courts. Maximilien de Robespierre's style would coincide largely with that of Lacretelle, with whom he would share first prize for an essay on *peines infâmantes* awarded by the Royal Society of Metz in 1784,[291] but in fact his approach coincided with elements of Pastoret's polemic as well, in that his conception of the natural law had a decidedly classical turn. As will be discussed in the following chapter, in his last case before the outbreak of the Revolution, Robespierre repudiated the notion of Rousseau's social contract, arranging himself rather in the long legal tradition of jurists like Jean Domat and Pastoret who considered the natural law not abridged but rather confirmed by the arrangement of men in civil society. Yet Robespierre's discourse cannot be reduced to a hybrid of the stylistic philosophies of Lacretelle and Pastoret, because rather than seeking

[291] The question of *peines infâmantes* and whether the civil dishonor it conveyed to a convict's family was a just outcome of the penal system constituted an important political question on the eve of the Revolution.

out a social utopia like Lacretelle, or a utilitarian legal system like Pastoret, in his final case before leaving Arras for Paris as deputy of the *tiers-état* at the Estates General, Robespierre would harken back to the evangelical prescriptions of Faye d'Espeisses, arguing that God created man for "des fins sublimes" (*Dupond*, *OC* XI: 112).[292] However, unlike his sixteenth-century predecessor, Robespierre meant to see this sublime potential translated away from the celestial realm as designated by the Catholic tradition, to be made manifest in Revolutionary France.

---

[292] Dupond, whom we will treat in the next chapter, was imprisoned pursuant to a *lettre de cachet* issued upon his return from exile at the behest of his siblings who sought to exclude him from the family inheritance. Robespierre's highly spiritual natural law theory found in his defense of Dupond was not constrained to this case; it would be largely reproduced in his speech at the *Fête de l'Être suprême* (18 floréal Year II [7 May 1794]).

Works Cited

Aguesseau, Chancelier Henri-François d'. *Instruction sur les études propres à former un magistrat* (1716). *Œuvres*. Vol. 1. Paris: Libraires associés, 1787. *Google Books.* Web. December 2019.

Alembert, Jean d'; and Denis Diderot. *Encyclopédie, ou Dictionnaire raisonné des sciences, des arts et des métiers*. The ARTFL Encyclopédie: Project for American and French Research on the Treasury of the French Language. University of Chicago. n.d. Web. March 2020.

Alembert, Jean d'. "Réflexions sur l'éloquence," *Discours de reception de M. d'Alembert.* 19 December 1754. Web. http://www.academie-francaise.fr/discours-de-reception-de-m-dalembert. October 2019.

Anderson, Wilda. *Diderot's Dream.* Baltimore and London: Johns Hopkins University Press, 1990. Print.

---. "Error in Buffon." *MLN*, vol. 114, no. 4, 1999, pp. 691–701. *JSTOR*. Web. September 2019.

Baker, Keith Michael. *Inventing the French Revolution: Essays On French Political Culture In the Eighteenth Century.* Cambridge: Cambridge University Press, 1990. Print.

Barbier, Antoine. *Dictionnaire des ouvrages anonymes*. Paris: Paul Daffis, 1879. *Google Books*. Web. November 2019.

Bayle, Pierre. *Dictionnaire historique et critique. Miscellanea philosophica*. Paris: Les Belles Lettres, 2015. Print.

Bell, David A. *Lawyers and Citizens: The Making of a Political Elite in Old Regime France*. New York and Oxford: Oxford University Press, 1994. Print.

---. *The Cult of the Nation In France: Inventing Nationalism, 1680-1800*. Cambridge, Mass.: Harvard University Press, 2003. Print.

---. "The 'Public Sphere,' the State, and the World of Law in Eighteenth-Century France." *French Historical Studies* 17.4 (Fall 1992): 912-934.

Buffon, Georges-Louis Leclerc, Comte de. *Discours sur le style*. Paris: Éditions Climat, 1992. Print.

Chartier, Roger. *Les origines culturelles de la Révolution française*. Paris: Éditions du Seuil, 1990. Print.

Chisick, Harvey. "Public Opinion and Political Culture in France during the Second Half of the Eighteenth Century." *The English Historical Review* 117.470 (February 2002): 48-77. *JSTOR*. Web. March 2020.

Cicero. *De oratore*. Trans. E.W. Sutton. Cambridge, MA: Harvard University Press, 1942. *Loeb Classical Library.* Web. January 2020.

Condorcet, Marie Jean Antoine Nicolas de Caritat, marquis de. *Esquisse d'un tableau historique des progrès de l'esprit humain*. Paris: Flammarion, 1988. Print.

Diderot, Denis. *Œuvres complètes*. Ed. Herbert Dieckmann, Jean Fabre, Jacques Proust, Jean Varloot, et. al. Paris: Hermann, 1975-. Print. This edition is noted in the text as DPV.

Domat, Jean. *Le droit public, suite des Lois civiles dans leurs ordre naturel*. Vol. 5. Paris: P. Emery, 1701. *Gallica.* Web. November 2019.

---. *Les Loix civiles dans leur ordre naturel, suivies du Droit Public, &c*. Luxembourg: 1702. *Google Books.* Web. December 2019.

Edelstein, Dan. *On the Spirit of Rights*. Chicago and London: University of Chicago Press, 2019. Print.

Faye d'Espeisses, Jacques. *Les remonstrances ou harangues faictes en la Cour de Parlement de Paris aux ouvertures des plaidoyries. Par feu M. Jaques Faye seigneur Despeisses,... Ausquelles en ceste derniere edition ont esté adjoustees les remonstrances faictes en la mesme Cour par feu M. Guy du Faur, seigneur de Pybrac : et celles de M. Jaques Mangot*. Lyon: n.p., 1604. *Numelyo.* Web. October 2019.

Fried, Michael. *Absorption and Theatricality. Painting and Beholder in the Age of Diderot*. Berkeley: University of California Press, 1980. Print.

Fumaroli, Marc. *L'âge de l'éloquence: Rhétorique et "res literaria" de la Révolution au seuil de l'époque classique.* Geneva: Droz, 1980. Print.

Green, Jeffrey Martin. "Montaigne's Critique of Cicero." *Journal of the History of Ideas* 36. 4 (1975): 595–612. *JSTOR*. Web.

Harris, Joseph. *Inventing the Spectator: Subjectivity and the Theatrical Experience in Early Modern France*. Oxford: Oxford University Press, 2014. Print.

Lacretelle, Pierre de. *Oeuvres*. 6 vols. Paris: Bossange, 1823-24. *Google Books.* Web. March 2020.

---. *Ouvrages judiciaires*. 2 vols. Paris: Buisson, 1807. *Google Books*. Web. January 2020.

---. *Encyclopédie méthodique. Logique et métaphysique*. 4 vols. Paris: Panckoucke, 1786-91. *Gallica.* Web. March 2020.

---. "Si l'Éloquence est utile ou dangereuse dans l'Administration de la Justice." *Mercure de France* (samedi 5 octobre 1782): 8-16. Paris: Panckoucke, 1782. *Google Books.* Web. March 2019.

---. "Réponse de M. de la Cretelle." *Mercure de France* (samedi 1 mars 1783): 6-13. *Google Books.* Web. December 2019.

Leuwers, Hervé. *L'invention du barreau français, 1660-1830. La construction nationale d'un groupe professionel*, Paris: Éditions de l'École des hautes études en sciences sociales, 2006. Print.

Maza, Sarah. *Private Lives and Public Affairs: the Causes Célèbres of Prerevolutionary France.* Berkeley: University of California Press, 1993. Print.

---. "Le Tribunal de la nation: Les mémoires judiciaires et l'opinion publique à la fin de l'ancien régime." *Annales: Économies, sociétés, civilisations* 42 (1987): 73-90. *Persée.* Web. March 2019.

Messaoud, Saiviy Ben. "Note critique sur un plagiat: les véritables auteurs du *Traité de l'éloquence dans tous les genres.*" *Rhetorica: A Journal of the History of Rhetoric* 16.1 (Winter 1998): 111-19. *JSTOR*. Web. October 2019.

Montaigne, Michel de. *Les essais*. Eds. Jean Balsamo, Michel Magnien, Catherine Magnien-Simonin. Paris: Gallimard, 2007. Print.

Negroni, Barbara de. *Lectures interdites: Le travail des censeurs au XVIIIe siècle 1723-1774*. Paris: Albin Michel, 2014. Print.

Ourliac, Paul. "L'Opinion publique en France du XIIIe au XVIIIe siècle." In *L'opinion publique*. Paris: PUF, 1957. Print.

Ozouf, Mona. "L'opinion publique." In *The Political Culture of the Old Regime*. Ed. Keith Baker. Oxford: Oxford University Press, 1987, pp. 419-34. Print.

Parent-Réal, Joseph. "Notice nécrologique sur P.-L. Lacretelle." Extrait de la *Revue encyclopédique* 71.24 (November 1824): n.p. *Gallica*. Web. August 2019.

Pastoret, Emmanuel de. *Discours en vers sur l'union qui doit régner entre la Magistrature, la Philosophie & les Lettres; suivi d'une lettre à M. de Lacretelle sur le danger de l'éloquence dans l'administration de la Justice*. Paris: Jombert jeune, 1783. *Gallica.* Web. February 2019.

---. “Lettre à M. de la Cretelle, sur la question de savoir si l’Éloquence est utile ou dangereuse dans l’administration de la Justice.” *Mercure de France* (samedi 1 mars 1783): 6-13. *Google Books.* December 2019.

---. *Zoroastre, Confucius et Mahomet, comparés comme sectaires, législateurs et moralistes ; avec le Tableau de leurs Dogmes, de leurs Lois & de leur Morale*. Paris: Buisson, 1788. *Google Books.* December 2019.

---. *Des loix pénales*. 2 vols. Paris: Buisson, 1790. *Google Books.* Web. December 2019.

---. *Histoire de la législation*. 11 vols. Paris: Didot aîné, 1817-37. *Google Books.* Web. December 2019.

Périer, Bertrand. *La Parole est un sport de combat*. Paris: Lattès, 2017. Print.

Posner, Richard A. “Law and Literature: A Relation Reargued.” 72 Va. L. Rev. 1351 (1986). *Westlaw.* Web. January 2019.

Press and Politics in Pre-Revolutionary France. Eds. Censer, Jack R. and Jeremy D. Popkin. Berkeley: University of California Press, 1987. Print.

Renoux-Zagamé, Marie-France. “Ordre judiciaire et vérité du droit: le plaidoyer de l’avocat général d’Aguesseau dans l’affaire La Pivardière (1699).” *Droits* 1.33 (2001): 53-72. *Cairn.* Web. December 2019.

---. “Lumières de la pensée juridique: le Chancelier d'Aguesseau.” Conference talk delivered at the Cour de cassation. Paris, 2007. Web. https://www.courdecassation.fr/IMG/File/pdf_2006/28-11-2006/28-11-2006_renoux_zagame.pdf. 4 Jan. 2018. January 2020.

---. *Du droit de Dieu au droit de l'homme.* Paris: Presses Universitaires de France, 2003. Print.

Renwick, John. *Voltaire et Morangiés, 1772-1773 : ou, les Lumières l'ont échappé belle*. Oxford: Voltaire Foundation at the Taylor Institution, 1982. Print.

---. *Œuvres de Maximilien Robespierre*. Ed. Florence Gauthier. Vol. 11. Paris: Société des études robespierristes, 2007. Print. 11 vols. 1910-2007.

Roman, Hanna. “Making an Authorial Voice: Buffon and the Anti-Anonymity of Natural History.” *MLN*, vol. 126, no. 4, 2011, pp. 825–837.

Shelford, April G. "Thinking Geometrically in Pierre-Daniel Huet's 'Demonstratio evangelica' (1679)." *Journal of the History of Ideas* 63.4. (October 2002): 599-617.

du Vair, Guillaume. *Œuvres politiques, morales et meslees du Sieur du Vair, Garde des sceaux de France, comprises en cinq parties*. Genève, Aubert, 1621. *Google Books*. Web. September 2019.

Walckenaer, Charles-Athanase. "Notice historique sur la vie et les ouvrages de M. le Marquis de Pastoret." *Mémoires de l'Institut national de France* 16.1 (1850): 178-200. *Persee.* Web. October 2019.

Chapter 4: The Lawyer Robespierre

Introduction

To study Robespierre before the Revolution is a dubious undertaking; his historical personage tends to leave such an imprint on the modern mind that it is difficult to not "read ahead" in time and consequently treat the prerevolutionary years as the less interesting parts in a causal chain terminating at the guillotine. Nevertheless, in this chapter I propose a close reading of Robespierre's *mémoires judiciaires* not as an origin tale from which to point out influences on his subsequent political speeches (a fairly obvious yet important exercise for the myriad lawyers *cum* politicians of the period[293]) but rather to examine his rhetorical techniques as the culmination of the lawyer's function as constitutional imagination under the Old Regime. Robespierre himself did not consider his move from the courtroom to the assembly as a significant break with his old life and goals; he would evoke his previous career in later political speeches not as a means to demonstrate training or competence but rather to indicate his pedigree as a parresiast who spoke from a position of recalcitrant professional isolation vis à vis legal norms and hierarchies well before the Revolution.[294] Thus this chapter does not attempt to make, though it may not escape implying, claims about the political discourse of the *Incorruptible* or the historiography of the revolutionary figure. Rather, it is my contention that reading Robespierre's legal

---

[293] For a good example of this kind of research, see David Bell's "Lawyers into Demagogues," which demonstrates the continuities established between legal and political discourse during the Maupeou Revolution (1770-74) that exiled the *parlements*, which in turn led to a massive strike on the part of the barristers. Bell indicates this period, brought to an end by Louis XVI's recall of the *parlements*, as pivotal in the politicization of the Ancien Regime lawyers.

[294] In this way, if we are to agree with David Jordan's statement that Robespierre considered himself to be "the first of what might be thought a new race of men: a man wholly and absolutely devoted to revolution" (*Revolutionary Career*, p. 3), we must deal with the substantial contiguities between his prerevolutionary and revolutionary discursive strategies.

literature in its appropriate judicial context helps not only to clarify the evolving role of eloquence in prerevolutionary France, but the nature of eloquence as a discursive relationship between the imaginary and the actual.

Robespierre's briefs provide a wealth of understudied material in which one can trace both continuities and ruptures with traditional legal discourse. Unfortunately, historians have tended to treat Robespierre's legal works (if at all) in a superficial manner, pivoting away from the complexities of legal semiotics and institutional practices as they sought after a coherence that would either be disrupted or entirely bogged down if too much was made of those writings whose assertions, in any case, could be described as incidental to the specificities of a particular trial before the provincial court of Arras.[295] By isolating Robespierre studies from legal studies, important considerations can be lost or mischaracterized regarding the "revolutionary" aspects of speeches from this period.[296] Yet by taking Robespierre's judicial utterances into account and especially by examining that discursive tradition in its appropriate professional context we can more clearly view the long trajectory of eloquence as it moved from the legal to the political sphere. On the other hand, while this chapter focuses on restoring a thick description of the textual objects produced by Robespierre in his capacity as a lawyer, moderation in the effort toward

[295] Most biographers give brief details of the lightning rod case – Robespierre's only *cause célèbre* – before moving on to his political life (Gallo 47-49; Mathiez 36-38); Walter gives only slightly more detail (29-64); Jordan indicates Robespierre's legal career merely to underline his rhetorical training (*Revolutionary Career* [1985], pp. 64-66); Guillemin's biography spends less than a page on Robespierre's career as a lawyer (*Robespierre: politique et mystique* (1987), p. 20); McPhee's biography gives important information regarding Robespierre's early education and extrajudicial writings, but leaves his legal career largely to the side (*Robespierre* [2012], pp. 1-61); Gauchet's *Robespierre*, which does not claim to be a biography but a "libre essai d'interprétation da sa carrière révolutionnaire" (7) similarly elides Robespierre the lawyer.

[296] For example, in his cursory discussion of Robespierre's case for Dupond, Jordan describes Robespierre's use of the first-person perspective of his client an "exceptional capacity for empathy and embodiment [that] would be extended in the Revolution to encompass the longings of the many in his own personal vision" (*Revolutionary Life* 39). Given the preceding chapters, in particular Chapter 1 which revealed the general acceptance of such rhetorical strategies among lawyers as early as the seventeenth century and their justification in a Christian moral worldview, such an account is rendered deeply problematic.

institutional "purity" is important as well. For to place Robespierre's legal discourses in an unalloyed legal context would limit his discourse according to our own cultural cosmologies and thus skew any potential insights. As this thesis has sought to demonstrate, legal eloquence was a matter of taste as well as a matter of erudition in the Ancien Regime, and as such participated in a multitude of contexts; to strip the *plaidoyer* or *mémoire judiciaire* of its extrajudicial resonances would merely err in the opposite direction from the prevalent assumptions regarding Robespierre's legal career as a mere primer for his political vocation.

Furthermore, by situating a close reading of a selection of Robespierre's judicial eloquence among the contemporary debates' conceptual frameworks particular to the professional use of eloquence, this chapter acts as an important corrective to his biographers and historians who (with the distinct exception of Hervé Leuwers) tend to glance over this period of Robespierre's life from outside the *mémoires*, summarizing their contents merely as loud proponents of virtue and empathy, in keeping with other "enlightened" lawyers of his day. Montesquieu, Rousseau and a smattering of classical authors are cited as key influences on his legal writing, whereupon the *mémoires judiciaires* are typically shelved in favor of Robespierre's political speeches. Such commentary is of course not incorrect, but it tends to present a superficial picture of the early modern history of legal eloquence as pre- and post-virtue. This is an unhelpful heuristic particularly in reference to the language of the law, which nearly always coincides with the language of morality and indeed grounded itself within it structures until the end of the Ancien Regime.[297]

---

[297] Justice is a principle that rhetorically dwells within and without the law; we talk of "justice according to the law" as well as the justice (or injustice) of the law itself. The scholastic theory of natural law considered

Robespierre's Entry into the Legal Profession

Robespierre left Arras for Paris at the age of eleven after receiving a full scholarship to study at the prestigious Louis-le-Grand, where he met his friend and future revolutionary Camille Desmoulins (1760-1794), as well as many other sons of lawyers from the northeast, most of whom had also received scholarships.[298] Express prohibitions regarding the formation of close friendships as well as the virtual non-existence of free time for personal conversation sought to shut down what may have otherwise have been an ideal locale for social interaction.[299] Robespierre dedicated himself to his studies, the majority of which focused on classical texts.[300] He obtained his law degree from the Université de Paris and passed his bar examination on May 15, 1781. After being sworn in before the *Parlement* of Paris,[301] Robespierre took his oath in his native jurisdiction of Arras at the Council of Artois on November 8th of that year. He was not the first Robespierre to practice at the *Conseil d'Artois*; his grandfather, Maximilien de Robespierre[302] and father had also

legal justice essentially a branch of morality. See H.L.A. Hart, *The Concept of Law*, 3rd ed., Oxford: Oxford UP, 2012, pp. 7-9. As previously described, the concept of natural law was subject to a dizzying array of various interpretations during the eighteenth century. See, e.g., Edelstein, *Terror of Natural Right*, especially pp. 1-25.

[298] For a demographic breakdown of the *boursiers* of Louis-le-Grand on the eve of the Revolution, see Harvey Chisick, "Bourses d'études et mobilité sociale en France à la veille de la Révolution: bourses et boursiers du Collège Louis-le-Grand (1762-1789)," *Annales* 30 (1975), pp. 1,562-84.

[299] The degree of success with which the faculty uprooted recreational behavior is unknown, but R.R. Palmer's account of the measures taken thereto leave little doubt that discipline was of the utmost importance at Louis-le-Grand; indeed, Louis XV stated the mission of the college as "education in morals and discipline." Palmer, *The School of the French Revolution. A Documentary History of the College of Louis-le-Grand and its Director, Jean-François Champagne, 1762-1814* (Princeton: Princeton UP, 1975), pp. 66-70.

[300] The pedagogical approach at Louis-le-Grand focused largely on Greek and Latin texts, particularly those Latin texts written between 80 BC and AD 120 interpreting the Roman decline as the result of vice triumphing over virtue. See McPhee, *Robespierre: A Revolutionary Life*, New Haven and London: Yale UP, 2012, pp. 15-20.

[301] The Parisian *parlement* was the last appellate court for Arras, thus Robespierre gained admittance to both courts presumably in order to ensure he could appeal his cases to the highest jurisdiction if the need arose. (Leuwers, "Un avocat […]," 12).

[302] The Robespierre family was not noble, but the aristocratic particle appears often (and in various spellings) alongside their name. Permission to use it likely derived from their ancestor, Robert de Robespierre, who acted as a legal officer for the lord of Vaudricourt (in Artois) in the 1460s. For further details regarding Robespierre's lineage, see McPhee, *Robespierre,* pp. 1-5.

practiced before this bench. Robespierre started pleading cases in February of 1782. The eloquence with which he represented his clients gained him immediate renown among his seasoned colleagues,[303] and the following month, he was nominated to a judgeship at the episcopal court.[304]

In addition to his dual role as both advocate and magistrate, Robespierre also fashioned himself a man of letters.[305] The Royal Academy of Arras welcomed him among their exclusive ranks on 15 November 1783, and his inaugural speech against the prejudice associated with *peines infâmantes*[306] would be reworked and submitted before the Royal Society of Arts and Sciences in Metz in 1784. He came technically second to Lacretelle, yet both were awarded the top prize of 400 *livres*. His expression of thanks to the Society declared his ambition to find consideration in both the world of law and that of letters, stating that he could not have received "en entrant dans **la carrière des lettres et du barreau**, un encouragement plus puissant ni plus flatteur" (qtd. Leuwers, *Robespierre*, p. 40 [my emphasis]). He would later be asked to join the 'Rosati,' a literary circle for the young and talented men of Arras for which Robespierre composed several verses and songs. Most importantly, Robespierre considered the texts of judicial eloquence that he

[303] The Arras lawyer d'Ansart, in his correspondence with a law student in Paris, lauded Robespierre after his first pleading in the following terms: "Il laisse […] bien loin après lui, par la manière de débiter, par le choix des expressions, par la netteté du discours, les Liborel, les Desmazières, les Brassart, les Blanquart, et le célèbre Dauchez […] On ne voit que vous […] qui peuvent obscurcir cette éclatante lumière" (*OC* II: 23).
[304] "À ce titre, au côté d'autres avocats, il a pour tâche de rendre une justice gracieuse et de trancher les différends civils et criminels intervenus dans la "cité" d'Arras et certaines paroisses de la campagne environnante" (Leuwers, "Un avocat […]," 13).
[305] "[P]our Robespierre, la carrière du droit ne s'envisage pas sans celle des lettres" (Leuwers, "Un avocat […]," 13.
[306] Prejudicial legal labels, such as the *peine infâmante*, as well as the status of illegitimate children, were important issues of reform for Robespierre.

composed for clients and their judges sufficiently literary to send to the men and especially charming women around him as gifts.[307]

Le Conseil d'Artois

The judicial court at Arras where Robespierre both heard and argued cases was called the *Conseil d'Artois*, a creation of Charles Quint, thus named during its function as appellate court when the territory was under the power of the Spanish Netherlands (1526-1659). The *Conseil*, due to its tumultuous past, exercised a particularly convoluted jurisdiction; its rulings were supreme in nearly all criminal instances but subject to the *Parlement* of Paris in many civil matters. Its hybrid character and conservative regionalism required a very thorough understanding of procedure for those practicing in its jurisdiction.[308] At the dissolution of the Maupeou courts in 1775, Louis XVI offered to this *Conseil* first-degree nobility (i.e., nobility that would transfer to posterity) after twenty years of service to all *présidents*, *conseillers*, *avocats* and even *procureurs généraux*.[309] Situated in the heart of Arras within the medieval residence of the counts of Artois, the *Conseil* had been renovated for the reception of large audiences and furnished with many

---

[307] In a letter to Mlle Dehay in which he included one of his voluminous legal memoranda, he noted "Il est rare que l'on puisse présenter à une jolie femme un écrit de la nature de celui que je vous envoie. C'est ce qui m'a paru toujours ravaler les faiseurs de mémoires au dernier rang de la littérature, en supposant néanmoins que l'on puisse leur accorder une place quelconque dans la république des Lettres" (qtd. in Leuwers, *Robespierre* 76). The occasion was perhaps not as rare as Robespierre claimed, however, for Dehay often received his *mémoires*, as did several other young women of Arras (ibid.).

[308] For an exhaustive history of the Conseil d'Artois, see Philippe Sueur, *Le Conseil Provincial d'Artois (1640-1790): Une cour provinciale à la recherche de sa souveraineté*, Arras, Mémoires de la Commission Départementale des Monuments Historiques du Pas-de-Calais, 2 tomes, 1978 and 1982.

[309] *Edit du roi portant rétablissement du Conseil provincial d'Artois, donné à Fontainebleau, le 8 mai 1774 ; édit du roi concernant la noblesse des officiers du Conseil d'Artois, donné à Versailles, au mois de mai 1775*. The ministry likely granted this gift due to the Chancellor Maupeou's identical offer to the *Conseil supérieur*, which replaced the *Conseil d'Artois* from 1771-74.

paintings of the regional nobility as well as the king.[310] Like the Paris *Parlement*, the *Conseil* opened every morning with the celebration of mass for the judges and lawyers in the castle chapel, after which two sessions of hearings were held in the great halls. On Saturday morning, the magistrates deliberated and decided the cases heard during the week.

Robespierre's Legal Style: a General Overview

Though Robespierre's debut *mémoire* adhered closely to the most basic conventions of legal exposition, his style quickly evolved. A brief comparison illustrates the contrast between the tender-footed lawyer just sworn in before the Conseil with the iconoclast of 1789. The earliest extant *mémoire* by Robespierre is from 1782, composed on behalf of his mentor, Guillaume Liborel, for the Dame de la Massilay in a matter of inheritance. Its introduction makes clear the lawyer's careful obedience to the impersonal aesthetic of objectivity reduced to its simplest form and intended for a qualified readership:

> Un contrat de mariage, passé devant Notaires en double, doit-il être déclaré nul, sur le fondement qu'il n'en serait point resté minute, dans la circonstance surtout où l'un des deux doubles n'est sorti de la main du Notaire qui l'avait reçu que pour être déposé peu de temps après au Greffe du Gros. Telle est la Question importante sur laquelle la Cour doit prononcer. (*Massilay*, *OC* II: 45)

Seven years later, the tone for his client Hyacinthe Dupond was of an entirely different register. Though this case is often presented[311] as treating the question of *lettres de cachet*

[310] For a list of the artworks adorning the *salles d'audience* of the Conseil d'Artois, see *Œuvres complètes de Maximilien Robespierre*, ed. Emile Lesueur, t. II, Paris: Leroux, 1912, p. 4.
[311] Florence Gauthier's preface (*OC XI*: 50-52) to the Dupond case focuses on the plaintiff's personal background as a prior prisoner under a *lettre de cachet*, which was also the main focus of Robespierre's *mémoire*; yet the proper legal issue was one of inheritance. To minimize the legal issue before the court in favor of the issues emphasized in Robespierre's argument is to blur the ambit of the legal question with that of Robespierre's strategic choices, which skews our ability to clearly perceive and determine the value of his

and legal reforms generally, we should bear in mind that the proper issue before the court was whether Dupond's brother's will disinheriting him was enforceable (thus essentially the same issue as above). By keeping in mind the legal (as opposed to political) context and goal of the *mémoire*, Robespierre's stylistic choices stand out in greater relief. He commenced his *mémoire* on the inheritance matter thus:

> Je viens dénoncer aux Magistrats et à l'indignation publique des persécutions inouïes, des injustices sans exemple, même dans l'histoire de cet horrible système des lettres de cachet, dont je suis sans contredit une des plus déplorables victimes. Mes malheurs ont commencé avec le règne d'un Prince dont les vertus promettaient dès lors le bonheur de la France; ils se terminent à cette époque à jamais mémorable, où elles vont enfin l'assurer. Presqu'en sortant de ces cachots dont les infortunés habitants ont au moins le droit de douter s'il existe parmi nous des mœurs et des lois, mon oreille longtemps accoutumée à n'entendre que les sanglots de la douleur et les cris du désespoir a été frappée des acclamations de tout un peuple, excitées, par une révolution qui semble annoncer la régénération des mœurs et le règne des lois […]. (*Dupond*, *OC* XI: 53)

In the *Dupond* case, we see that Robespierre has come into his own. He comfortably set aside the conventional parlance of specialists and the institutionally-prescribed format of legal composition to shock and stir his judges. In this way Robespierre's legal writing

---

style. As a corrective against this prevalent tendency to let the legal issue and the argument go undistinguished, I would suggest that editors of judicial literature delineate the issue before the court as clearly and succinctly as possible (i.e., in the style that the question(s) would have been presented, for example, by the *rapporteur*, who is that member of the court that informs the judges of the legal merits of the case and "[dont] l'office […] exige qu'il mette de l'ordre dans les preuves, de la clarté dans les informations, de la précision dans la récapitulation, & des motifs dans son avis […] (Jaucourt, "Rapporteur," *ENC* XIII: 809)).

certainly bore the melodramatic mark common to *mémoires judiciaires* of the era, but what distinguished them to the reader was his ability to condense the fact pattern down to its most piquant narrative nutshell (a truly standout accomplishment among a profession decried for its centuries-long grandiloquence). Whereas lawyers usually spent great lengths of time detailing the *faits* before moving onto the *moyens*, Robespierre employed literary heuristics in order to quickly but effectively schematize the story of his clients as well as their opponents. Rather than ascertaining the underlying cause through a laundry list of dates, writs, and testimony, Robespierre's reader met the actors immediately, reduced to their simplest recognizable elements. Thus a poor client was presented as having to take the bread out of the mouths of his own children; an outraged woman as pale and trembling, on the brink of collapse; a Protestant family toppling an altar. The legal issues themselves were also often staged using a polemical device common to Enlightenment literature: rather than describing the question before the court and the relevant law directly to his audience, Robespierre presented cases as hypothetical stories schematized for an innocent outsider like Montesquieu's Usbek or Diderot's Orou[312] so as to estrange his audience from the relevant context and thereby elide a straightforward (and potentially unfavorable) application of the law.

[312] "Un Homme a paru de nos jours, qui a osé former le projet d'armer les hommes contre le feu du Ciel […]. [I]l y a eu une réclamation… Dans ce siècle, au sein des lumières qui nous environnent […] Il est une ville dans le monde ou des citoyens ont dénoncé à leurs Magistrats les par-à-tonnerres […] Messieurs, quel pays a pu être le théâtre de cette scène incroyable; vous la placez dans quelqu'une de ces contrées lointaines où le flambeau des Arts n'a jamais lui […] Non, Messieurs, c'est au centre de l'Europe […] c'est, (car il faut faire enfin ce pénible aveu), c'est….. dans la province même que nous habitons" (*Vissséry*, *OC* II: 138-39); "[M]ais je suis sûr que si l'on disait à un homme raisonnable: 'une femme, une étrangère respectable devait depuis peu de temps à quelques Habitants d'une Ville […] des sommes modiques […]. [O]n l'a traîna aux yeux d'un peuple immense; on la plongea dans une prison infecte […]' Oui….. (je ne balance point à le dire), si l'on faisait ce récit à quelqu'homme capable de sentir, sans lui nommer le lieu de la scène; il ne la placerait pas chez un peuple humain et poli […]. Eh bien! cette hypothèse est précisément l'histoire des vexations dont je demande la vengeance" (*Dame Sommerville*, *OC* II: 338).

Of course, this narrative economy did not actually result in abbreviated pleadings or *mémoires judiciaires*; Robespierre often indulged in protracted digressions, detailing how the case would be decided in other times and places, a fundamentally fictional technique that lent extrajudicial perspective to questions in order to cast ridicule on the magistrates of the day and their backward jurisprudence. The locus of reason was firmly under the dominion of Robespierre the lawyer, and its boundaries were ever receding. To that end, Robespierre's discourses were replete with irony, and though his use was always pithy, very little attempt was made to moderate its application. Together with his lengthy use of direct address, Robespierre's *mémoires* did not break with the tradition of protraction dear to the bar. However, whereas the lengthy discourses of other lawyers often resulted from a tendency to spread the substance of their argument across hundreds of pages, examining each detail with minute attention, Robespierre inverted the trend, and encapsulated his case with the ruthless precision of a *rapporteur* while using the language of a *littérateur*. After establishing his central image (e.g., a lonely woman, a father, etc.), Robespierre dedicated the remainder of his discourse to examining it from myriad (but always favorable, of course) perspectives before finally relinquishing the case to his judges' consideration.

***Mémoire* for the Alexander Family (1783)**

One of Robespierre's earliest cases was for a family disinherited by a close relation due to the former's refusal to convert to the Protestant faith. Jean-Baptiste de Beugny had espoused Protestantism in his later years and succeeded in converting half of his family, while his sister and her children remained staunch Catholics. Beugny, incensed at their rebuff, refused to recognize them as his family and wrote them out of his will. Although

this might seem less like a legal problem and more like a eccentric's domestic drama to us today, the disowned family members were able to estop the execution of the will on the same principle used in Servan's (unsuccessful) defense of the Count of Suze (Chapter 2): passion. Robespierre demonstrated that it was not Beugny's reasoned decision but rather his blind hatred for the Catholic faith that led him to cut the Alexander family out. The stage was set: passion disabled free will, and a contract drawn without free will was (as it is today) unenforceable. Undue influence during the early modern period could come from within.[313]

Robespierre's defense of the Alexander family stayed largely within the bounds of expected legal discourse. The young barrister relied on the Edict of Nantes as well as previous *arrêts* (judicial decisions) relevant to the case, citing carefully to dates and volumes, chapters and page numbers in the *Journal des Principales Audiences du Parlement* wherein the references could be found.[314] Although Robespierre's orthodox depiction of the reformed Beugny as a vicious soul infected "du venin de l'hérésie" (*OC* II: 112) does not strike us as particularly modern, this early case stands out for a single paragraph, whose extraneous contents seem inserted not for the sake of the case (an easy

[313] The modern legal notion of "undue influence" requires that the testator/contractor be influenced by another person in order to consider whether the former had the capacity to exercise their free will. The typical example where such a claim might be brought is where children are disinherited in favor of a caretaker or spouse who may have exercised undue pressure over the testator to achieve this end (or vice-versa). See, e.g., *Marshall v. Marshall*, 547 U.S. 293 (2006).

[314] The *Journal des Audiences* was a seven-volume compendium of case law covering the period from 1622-1722 used by lawyers to build arguments based on accepted precedent. The editor of the last volume, Michel du Chemin, stated the purpose of the *Journal des audiences* thus: "On peut dire qu'il est essentiel & même très-avantageux à l'Orateur, au Jurisconsulte & au Juge de pouvoir fonder leurs opinions, leurs jugements & leurs décisions sur ce qu'ont pensé leurs Prédécesseurs, & sur une multiplicité d'exemples anciens & nouveaux, afin de paraître, par l'étendue de leurs connaissances, avoir vécu dans les siècles même les plus reculés" (*Journal des audiences* VII: iv).

win; his opponents desisted before the final decree) but rather as an ad hoc remonstrance regarding the status quo of legitimate legal reference:

> On peut dire en général que les Empires ne se gouvernent point par les opinions méthodiques des Jurisconsultes; en particulier que ce n'est pas d'après leurs sentiments, ni sur les règles du droit Romain que l'on décidera de l'étendue qu'il faut donner à une Loi dont les malheurs des temps, les troubles qui menaçaient le Royaume d'une ruine prochaine, ont déterminé l'existence et forcé toutes les dispositions. (ibid., 118)

Robespierre's dismissal of Roman code and the methodical analysis of law – i.e., the main sources of early modern jurisprudence – was a shocking departure from the historically-embedded modes of argumentation praised and practiced for centuries in France with reverential attention by the barristers. The civil law in France *was* the Roman law; Justinian's Code, the *Institutiones* and the *Digesta* comprised the course materials for students hoping to practice civil law,[315] and the profession defined itself as coextensive with the glorious Roman orators.[316] Nevertheless, Robespierre, himself a great admirer of the classical authors and orators, argued against the application of the classical model. In an interesting way his admiration of the classical models coupled with his reticence to follow in their footsteps strongly recalls Diderot's preface to the *Salon de 1767* (pp. 69-75), in which Diderot excoriated the habit of contemporary artists of copying ancient

[315] Louis XIV regulated the study of law in his 1679 reform, which required students throughout the kingdom to learn the Roman code (in Latin), canon law, as well as French law in the vernacular. For an overview of the reforms in legal education in the Ancien Regime, see Leuwers, *L'Invention*, pp. 17-22.

[316] On the commonplace assimilation of the seventeenth and eighteenth-century barrister with the Roman orator, see Leuwers, *L'Invention*, 173-75. ("L'assimilation des mots 'orateur' et 'avocat' témoigne de la conviction d'une parenté directe entre les défenseurs de Rome et ceux du XVIIIe siècle, qui n'est pas sans conséquence symbolique. Par les mots s'opère une assimilation du barreau d'hier à celui de l'époque moderne […]" (174)).

models in an effort to capture nature ("Réformer la nature sur l'antique, c'est suivre la route inverse des Anciens qui n'en avaient point; c'est toujours travailler d'après une copie" (71-72)). Instead he suggested that the slow and additive process of *tâtonnement* would bring eighteenth-century artists "à un modèle original et premier, à une ligne vraie qui aurait été bien plus nôtre, qu'elle ne l'est […]" (74). Diderot took this principle as fundamental and advocated for its extension into other domains: "[…] ces principes s'étendent également à l'éloquence, à la poésie et peut-être aux langues" (75). Whether he had read Diderot's *Salon* we do not know, but Robespierre evidently took this principle quite seriously. He enshrined his attack on rhetorical conventions in a free-standing paragraph without reference to the case at bar, which gives the impression that he was not only arguing these sources as legally irrelevant to the disposition of the Alexander affair but intended his criticism to be understood on a grander scale. This opinion, anonymously but hardly more explicitly promulgated three years later by Jean-Baptiste Mercier Dupaty (1746-88),[317] would contribute to that famous jurist's professional ouster as well as the condemnation of his *mémoire* by the *parlement* to be *brûlé et lacéré*.[318]

---

[317] "Les Lois sont malheureusement la plupart moins des combinaisons réfléchies de la morale & de la politique, que des jeux du hasard ou des caprices de la force. Les Lois devraient créer les événements, & ce sont les événements qui créent les Lois. Presque toutes les constitutions des Empires, que sont-elles autre chose que des faits plus ou moins durables, résultats eux-mêmes d'une multitude de faits plus ou moins fugitifs" (Dupaty, *Mémoire justificatif*, 89). The lawyer Jacques Pierre Brissot de Warville (1754-1793), a dual disciple of Rousseau and Linguet, was similarly condemned by the Order and judiciary for his *Théorie des lois criminelles* (1781), which disparaged the sources of French law. ("[…] il y a longtemps qu'aux yeux des philosophes les compilations de Justinien ne sont qu'un magasin d'erreurs où la raison dédaigne de puiser" (*Théorie des lois civiles*, I:144)). Brissot's eighth footnote contains a blistering attack on the personal qualities and reign of Justinian and Tribonien, the editor of the *Code*, as proof that its authority should be vitiated in the courts (p. 12-15). For a first-hand account of his banishment from *parlement*, see his prefatory remarks to *De la décadence du Barreau français* in *Bibliothèque philosophique* VI: 343-58.

[318] The parlementary act of censoring by laceration was defined in the *Encyclopédie* thus: "en termes de palais, signifie le déchirement de quelque écrit ou imprimé. Quand on déclare nulles des pièces qui sont reconnues fausses, on ordonne qu'elles seront lacérées par le greffier: quand on supprime quelque écrit ou imprimé scandaleux ou injurieux à quelque personne ou compagnie constituée en dignité, on ordonne qu'il sera lacéré par l'exécuteur de la haute justice, & ensuite brûlé" (Boucher d'Argis, "Lacération," *ENC* IX:160).

Indeed, in his very next sentence, Robespierre declared that a law must not be parsed according to its words, history or formal interpretations, but rather that "[c]'est dans les vues politiques […] qu'il faut chercher son esprit" (ibid.). Happily for us, this does not mean (as it would today) a problematic (ab)use of minutes from legislative subcommittees[319]; rather, Robespierre disposed of the political meaning of the law in question (the Edict of Nantes) in a single sentence: "Il a été porté pour remettre la paix dans l'État et dans les familles […]" (ibid.). The truth of Robespierre's explanation was irrefutable, of course, but his methodology – to explain the meaning behind a law in order to decide a relevant case – was perplexing to say the least. Here was a strategy – infinitely reproducible – that declared the barrister's virtual autonomy in the interpretation of the law and thus the mind of the legislator (the king).

Whether Robespierre's striking statement ruffled any feathers at the *Conseil d'Artois* is not known to us; the case was settled out of court and thus elicited no *arrêt* or comment from the *parlement.*

Mémoire for François Deteuf (1783)

Like the previous case for the Alexander family, Robespierre's case for François Deteuf (1783)[320] did not receive a judgment, but for a very different reason: the case had already been decided. Deteuf had been judged innocent as a matter of law (it turned out that the alleged crime had not occurred) and the monk who had accused him had been

[319] Such a statement might call to mind our modern issue regarding the proper use of legislative history, exemplified best in the debates between Justices Scalia and Breyer. For a general overview of the question, see Charles Tiefer, "The Reconceptualization of Legislative History in the Supreme Court," 2000 Wis. L. Rev. 205 (2000).
[320] *Mémoire pour François Deteuf... contre les Grand-Prieurs et Religieux de l'Abbaye d'Anchin*, (*OC* II: 234-65).

imprisoned through a *lettre de cachet* issued from his own abbey. Robespierre was thus simply seeking damages for his client's pain and suffering as a result of the monk's false allegation of theft. However, the case for indemnisation was not being heard; the *juge seigneurial* had stated that, as a matter of law, there was no defamation, and that any seeming defamation was a result of a rumor of imprecise origin. Without a slanderer, there could be no claim. Furthermore, as a man of the cloth, the monk had taken an oath of poverty, meaning that any suit for damages would be meaningless. Robespierre's *mémoire* was the first published in Arras for an inactive case.[321] Given Robespierre's willingness to flout the procedural rules at such an early point in his career, it may not be surprising that in his *mémoire* for Deteuf, which ostensibly attacked the abbey of Anchin (from whom he sought damages and costs for Deteuf in lieu of the monk), it was the judiciary itself that emerged as his true target.

Robespierre's client was a man accused of stealing 262 *louis* by an important monk from the local – but very rich and powerful – Benedictine abbey of Anchin. During the preceding trial it was discovered that the monk made the allegation out of spite toward Deteuf's sister, who had refused his advances, and as a means to cover up his own embezzlement of the abbey's funds. Deteuf was innocent, but his honor and especially his resources had taken a serious hit during the affair, which required travel and legal expenses.

While Robespierre's unanticipated *mémoire* clearly ignored formal court procedure, he attacked the judicial apparatus quite directly in the substance of his argument.

[321] Leuwers corrects the prevailing opinion of Robespierre's biographers on this point: the Deteuf *mémoire* was remarkable in that it was published without the case having been "repris," not because it was published before judgment of the case (*mémoires judiciaires* would normally have circulated before judgment). *See* Leuwers, *Robespierre*, pp. 64-68.

He set the scene for his client by painting the lower courts of Arras as a tangled web of petty procedural traps for the unsophisticated litigant:

> Effrayé de voir tomber sur lui la honte réservée pour les coupables, l'innocent se hâte d'implorer la protection des Magistrats; mais le malheureux s'égare, dès les premiers pas, dans les routes de la procédure. Par une erreur, que les circonstances de cette affaire rendaient assez difficile à éviter, il porte son appel au Parlement de Douay; les Juges d'Anchin ses adversaires bornent leur défense à une exception déclinatoire; la rigueur des formes l'emporte sur la faveur de la cause; le Parlement de Douay se déclare incompétent pour la juger; il renvoie la cause et les parties devant les Juges qui en doivent connaître, et condamne Deteuf aux dépens de cet incident. (*OC* II: 238)

Robespierre put forth an innocent, childlike image of Deteuf, "le malheureux," desperately wandering through a forest of judicial procedure in order to purge himself of the shame of criminal guilt. "L'innocent" in fact was also "l'innocent" in matters of law; Robespierre deftly shifted the juxtaposition between criminal innocence and guilt to an equally fraught procedural opposition. It was now the judges who composed "ses adversaires," and Deteuf, by an error made nearly unavoidable by the circumstances of the circuitous and costly judicial system, instead of finding the "protection des Magistrats," had fallen victim again to those in whom he had sought refuge.[322]

[322] In 1786, Robespierre would take this critique of the judiciary further when, in his *mémoire* for the Page family, he characterized the criminal court system as "écueils sanglants" against which a "foule de malheureux, se bris[ent] tous par mille causes semblables que l'on ne devine pas" (qtd. Leuwers, "Robespierre, avocat des fermiers Pepin et d'Herlin...," 545).

After painting the intervention of a higher court as a providential but ultimately arbitrary delivery from the cruel judiciary of Arras, Robespierre assumed the first-person perspective of his client in tones that evoked all the sentiment of the mid-century *drame bourgeois*[323]:

> L'honneur de Deteuf est lavé par cet Arrêt; **mais la justice, l'humanité est-elle satisfaite**? Quand j'ai vu toutes mes ressources anéanties par l'accusation atroce dont j'ai été si longtemps chargé, quand j'ai épuisé ma modique fortune pour solliciter, dans deux Tribunaux, la proscription du décret lancé contre moi; quand j'ai été **forcé d'arracher de la bouche de mes enfants la moitié du pain que je leur gagnais**, à la sueur de mon front, pour les dérober à l'infamie dont ils étaient menacés, un Arrêt, qui déclare que je ne suis point un voleur, sera-t-il la seule indemnité de **tant de dépenses, de sollicitudes, de tourments et de malheurs**? (*OC* 238-39 [emphasis mine])

Robespierre effaced himself and the codified, institutionally determined role he represented in order to create a quasi-autonomous rhetorical space for the sentimentally rendered plight of his client. As in the *plaidoyers* of the Affair of the Beggar of Vernon (1659), we witness the erasure of legal and institutional mediation through the use of the first-person perspective. However, it should be noted that the subjective *mémoire judiciaire*, which foregrounded the narrative technique of *prise de parole* borrowed from fiction, differed

[323] Robespierre would be mocked by opposing counsel in a later case, *Dame Sommerville, Veuve de M. Mercer v. Buffin* (1786), for having employed all of the "troupes auxiliaires" of sentimental rhetoric: "Pas une figure qui n'ait été mise à contribution. Ici elle peint les horreurs d'un noir cachot; là, son visage se baigne de larmes, ou se couvre d'une pâleur mortelle […] mais rassurons-nous, l'art surpasse ici la nature […] Nous ne suivrons pas l'exemple de la dame Mercer: il était intéressant pour elle qu'une plume habile surchargeât sa défense d'une foule de beautés de détail; mais la vérité et la justice n'ont pas besoin d'ornements" (*OC* II: 336).

from the subjective *plaidoyer* in that the latter was embodied by the person of the lawyer and acted out before the legal and lay audience of the courtroom; though it was written and read by the lawyer, these *plaidoyers* were only read by a wider audience post-performance.[324] The difference is not negligible; the lawyer who acted as his client through a first-person pleading performed in front of a room full of judges and laymen had an entirely different relationship to his audience compared to the authoring lawyer who wrote from the first-person perspective of his client for a diverse readership. Print increased the legibility of *je* as a *témoin oculaire* whose account could be trusted due to their proximity to the events narrated. More importantly, the written *je* took on metonymic properties in that its institutional disembodiment offered conceptual space for the reader to not only be persuaded by *je* (as in the case of its physical performance), but to dwell in its subjectivity, a process rendered even more expedient by virtue of Robespierre's extrapolation of Deteuf to humanity in general.

Even with a sympathetic reader, in this particular *mémoire* Robespierre still needed to establish a source of liquidity from which he could extract damages for his client. But this was no simple case: the defamatory statements were made by a monk, a man who had no means to satisfy any claim for monetary damages no matter how egregious his crime. Robespierre attempted to obviate this massive roadblock by charging that the delinquent monk's monastery was financially responsible for the infractions of its member. The vague sources of authority cited indicate Robespierre's reliance on rather nebulous ideas open less to the judgment of a magistrate than the reasoned argument of the *philosophes*:

---

[324] The 1706 case pitting Madame de Pommereu (née Marie Michelle Bernard) against her husband currently stands as the earliest first-person factum that was primarily intended as a written intervention in a case at law. See Chatelain, "Le " je " féminin en procédure civile : un cas du début du XVIIIe siècle."

> Toute Communauté religieuse est tenue des dommages et intérêts causés par les délits de ses membres. Cette proposition est une conséquence des **premiers principes de l'ordre social**. Tout homme est obligé de réparer le tort qu'il a fait à un autre: cette obligation doit être réciproque entre tous les citoyens. Si je suis responsable du préjudice que je puis causer, vous n'avez pas le droit de m'outrager impunément: telle est **la loi de la nature, telle est celle de la société.** (242 [emphasis mine])

If arguments from first principles and the law of nature had become rather commonplace in legal writings by the 1780s, they were usually buttressed by various other references to authority, such as code or precedent. Thus Robespierre's exclusive reliance on the underdetermined laws of nature and society contrasts with the institutionally-bounded discursive techniques of his contemporaries. Robespierre refused to cite any of the innumerable codes or *arrêts* on which he might have established the authority of his argument that religious organizations were responsible for the actions of its individual members. The exceptions and nuances inherent to legal argumentation evanesced as Robespierre blurred conventional social distinctions: "Cette règle [la loi de la nature] sans doute est faite pour les Religieux comme pour les autres hommes" (ibid.). By applying natural law theory to the French social hierarchy, Robespierre was playing a dangerous game, yet he refused to backpedal; rather, he forced the paradigm before the court through a stark syllogism: "Si l'on rejette cette conséquence [that monks are bound by the law of nature], il faut rejeter aussi le principe fondamental d'où elle dérive nécessairement. Il faut dire que les Religieux sont exempts de l'obligation imposée à tous, de réparer le mal qu'ils ont causé; qu'il y a dans l'État une classe de citoyens qui ont le privilège de fouler aux

pieds les droits de tous les autres […]" (ibid.). Of course, there was a class of citizens who were allowed to abrogate the rights of others as construed by Robespierre – indeed, there were two of them: the nobility and the clergy. Robespierre was announcing principles that cut against the actual state of legal and social affairs; he championed a social economy that did not exist in fact: "[L]es lois […] n'ont pu ni voulu renverser les premiers principes de l'ordre social, favoriser une classe de citoyens au détriment de tous les autres, établir entr'eux une injuste inégalité, qui offenserait le droit naturel, et rompre la réciprocité des engagements sacrés qui les liaient tous" (245).

Robespierre shattered the custom of deference toward religious establishments in his most poignant argument, delivered in the voice of Deteuf, in which the peasant lectured the powerful abbey on its duties in strong terms:

> O Vous! qui aspirez à la prérogative, aussi injuste que dangereuse, de ne point répondre des dommages et intérêts auxquels peuvent donner lieu les Particuliers qui composent votre Communauté, songez-vous quelles obligations vous imposerait une pareille prétention? Commencez par veiller avec une attention infatigable sur les actions des individus soumis à vos lois: rappelez-les sans cesse à l'esprit de vos saintes Institutions [….] car vous devez désormais au public un compte rigoureux de votre conduite: quand vous aurez rempli ces conditions, je vous réponds qu'aucun de vos Membres ne se livrera aux excès que Dom Brongniard a commis envers moi. (249)

The stunning reversal in the social hierarchy, so out of keeping with social *bienséances* and the respect usually shown to the Church and her ministers[325] positioned the poor Deteuf above the rich and powerful abbey as he thundered "[D]e quel front osez-vous me refuser la juste indemnité que je réclame?" (ibid.). The booming demand that seemed to issue from an alternative polity was immediately bolstered by an accusation that the abbey was not only complicit but had *encouraged* the debauched monk in his criminal actions: "Que serait-ce si j'allais plus loin? Si je prouvais que l'Abbaye d'Anchin a manifestement applaudi à la conduite de Dom Brongniard envers Deteuf; et qu'en effet ce Religieux n'a rien fait qu'avec l'agrément et l'aveu de sa Maison?" (248-49).

Robespierre's strategy in Deteuf consisted of oscillating between a tone of astounding ascendancy, and the description of an immoral abbey rendered in the most incisive terms. Robespierre's rhetoric devolved from impersonal argument to a pragmatic first-person singular, then finally into the "nous" that would mark his later political speeches: "O nous tous qui nous glorifions du titre de citoyens, […] faisons tous des vœux, pour qu'il ne soit point aujourd'hui décidé que des calomniateurs pourront provoquer contre nous le glaive de la Justice, sans craindre notre juste réclamation" (253).[326] Through this discursive technique Robespierre produced social community and solidarity not on the basis of exclusive bodies, such as the ecclesiastical order or other professional *corps*, or

[325] Yet irreligion on the part of Robespierre should not be inferred from this *mémoire*; before the Revolution, Robespierre demonstrated a deep respect for the Catholic faith and its ministers. His appointment to the Episcopal Court (9 March 1782) by the Bishop of Arras, his 1784 defense of the local Oratorians as well as requests from other clerics for legal advice show a young lawyer not at all at odds with the general population in matters of faith.

[326] For an interesting discussion on Robespierre's peculiar use of pronouns, see Anderson, "General Will Anonymous?," pp. 847-48; Anderson, "Unnaming." Montesquieu also pointed out the demonstrative political power of pronouns in his preparatory notes for *De l'esprit des lois*: "Pour prouver que les mœurs conviennent mieux à la bonne république qu'à la bonne monarchie : c'est que, dans les bonnes républiques, on dit : *Nous*, et, dans les bonnes monarchies, on dit: *Moi*" (*Mes pensées* 233, *OC* vol. I, p. 1048 [author's emphasis]).

even on the grounds of common history or religious beliefs. Rather, Robespierre grounded the social unity to whom he wrote in a near future that would come to be through the participation of his audience: "Demandons que les lois soient faites pour tous; que toute injustice soit réparée, quelque soit l'état et la qualité de celui qui l'a commise" (ibid.). His *mémoire* produced less a legal defense in the proper sense than a rallying cry for political upheaval.

The publication of the *mémoire* for Deteuf, written in defiance of almost every code of legal procedure and eloquence, stirred the ire of his colleagues. In defense of the abbey, Liborel, the successful Artesian barrister who had acted as Robespierre's mentor and given him his first few cases, described the work as a "libelle infâme" and a "diffamation la plus atroce" (qtd. Walter 54). More troublesome was the decree of the magistrates published throughout the entire province, which condemned Robespierre's *mémoire* for "les termes attentatoires à l'autorité de la loi et de la jurisprudence et injurieux aux juges" (Leuwers, *Robespierre*, 73). Worst of all was his own client's disavowal of Robespierre's *mémoire*, traded no doubt by the abbey in exchange for a considerable sum to settle the matter quietly. The monastery's shrewd stipulation demonstrates their need to marginalize Robespierre to soften the impact of his political and spiritual messaging.

The *Affaire du Paratonnerre* (1783)

Despite the verve of Robespierre's style of legal writing, only one of his cases would ever reach a public outside the small city of Arras: the lightning rod affair (*l'affaire du paratonnerre*). The facts were simple: a lawyer and scientist by the name of Visséry de Bois-Valé had mounted a lightning rod to the chimney of his home in neighboring Saint-Omer in May 1780. The townspeople, either through malice or genuine fear, successfully

petitioned the municipal court to order the rod immediately dismantled. The lower court's decision was affirmed in late June. On its second appeal, the young Robespierre was named to the case, likely due to the intervention of his best friend, the wealthy lawyer Antoine-Joseph Buissart, who was himself an amateur scientist. His opponent was the prosecutor of Arras, the Procureur Général du Roy, Foacier de Ruzé.[327] With Buissart's help, Robespierre had the ruling overturned in 1783 before the Conseil d'Artois, earning him a flattering byline in the *Mercure de France* (1 May 1784) and his first (and only) successful *cause célèbre*.

The legal question before the Council of Artois at the time of Robespierre's pleading was not precisely whether a lightning rod was a danger to public safety and thus an impermissible fixture within Artois, but rather whether the court was in fact competent to judge the question at all. In light of the competing expert claims that demonstrated its safety on the one hand and its dangers on the other, the *avocat-général* in the case had urged the court to outsource the fact-finding to a body better equipped to deal with questions of a scientific nature, such as the *Académie royale des sciences* in Paris or one of its counterparts in Lyon or Dijon. He reasoned that the task of the magistrature was the decision of legal questions and that scientific matters were beyond its competence. Sure of Visséry's success in the event of its transfer before such a body of worldly and learned men, Robespierre nevertheless insisted that the *Conseil* decide the case immediately themselves. His primary argument was not, as the modern reader might expect, the

[327] Both Robespierre and Foacier de Ruzé would join the *Rosati* in 1787, at which time Robespierre sang a poem to his former opponent, but their congeniality would not last; Foacier de Ruzé circulated an accusation written by the noble Briois de Beaumez to his father throughout Arras in 1790 claiming that Robespierre was attempting to increase direct taxes in his home province. (McPhee 100-02).

expedition of justice, but rather the public alignment of the judicial system with the world of scientific progress:

> [L]'unique but de la discussion à laquelle je me suis livré n'était pas de vous déterminer à l'anéantir [the lower court's decision]; mes vues se sont étendues plus loin; le véritable objet de tous mes efforts a été de vous engager à la réformer d'une manière digne d'une pareille cause, à venger, avec éclat, l'affront qu'elle a fait aux Sciences, en un mot, à donner au Jugement que la Cour va rendre dans une affaire, devenue si célèbre, un caractère capable de l'honorer aux yeux de toute la France et des Nations étrangères […]. (*OC* II: 167)

A brief aside: at first glance, the dispute in this case may seem to amount to nothing more than a few bumpkins caught in a dither over progress and its attendant discomfitures; indeed, it has been largely treated as such by historians.[328] Yet the debate occurred not in the public square but in the court of law, and its finding in favor of Robespierre's client, Visséry, was very much a surprise to the legal community; indeed I would contend that Visséry surely would not have won his case even today in light of zoning ordinances regulating the use of land. Similar regulations existed in the eighteenth century as well.[329] Moreover, it must be recalled that though the lightning rod had been invented by Benjamin Franklin twenty-five years before its erection in Saint Omer, it was still a unique sight in

---

[328] Though scholarship on this case tends to examine it from a sociohistorical point of view, the case received comprehensive treatment by the historian of science, Jessica Riskin, whose demonstration of the rhetorical pathways of scientific progress led her to seek out a full picture of the case in its adversarial back and forth. (*Science in the Age of Sensibility*, pp. 139-88).

[329] Maître Lesage, opposing counsel, described the protocol before erecting a new building or fixture in a later brief: "Quand il a fait placer un paratonnerre sur sa maison, que devait-il faire? Sans doute il devait en demander la permission au juge de police, puisqu'il s'agissait d'un établissement nouveau. Qu'aurait-il fait alors, ce juge? Il aurait ordonné la communication de la requête aux parties intéressées: car, telle est la marche prescrite par tous les règlements et par la raison" (*Répertoire universel* 8: 758).

France, and entirely novel in this small Artesian community. The Abbé Bertholon's *Mémoire sur un nouveau moyen de se préserver de la foudre* had only been received by the Académie of Montpellier in 1777, and in Bertholon's correspondence with Buissart regarding the case, the scientist recommended that the lawyers avoid mention of the number of lightning rods in France, since "[c]e dénombrement […] ne serait pas assez considérable pour frapper les ignorants" (*OC* II: 220). Furthermore, the complaint did not contest the practical benefits of the lightning rod; despite their novelty, the general population seemed to accept the significance of the invention. Yet reasonable questions persisted. The lightning rod might well be a boon for the house upon which it was elevated, but what of the surrounding buildings? Even if the lightning rod were to be accepted as a neutral or salutary technology for the areas surrounding it, was there assurance that what Visséry had attached to his home was in fact a functional lightning rod? Such were the questions presented to the various courts that handled this case. Thus our first impression of the case as a foregone conclusion for any lawyer lucky enough to present it – a perception reinforced by Robespierre's easy, mocking dismissal of the lower courts' decisions[330] – clouds the legal complexities of the case, and hides the years of preparation and correspondence undertaken by the young lawyer for its defense. That Robespierre prevailed upon the magistrates to forgo expert witnesses and testimony stunned legal professionals who saw in the decision a miscarriage of the law. "Cette sentence, à laquelle

[330] Robespierre incessantly fashioned the case as quite inconceivable, adding an addendum to his printed pleading to emphasize its outlandishness even as he prepared to re-litigate the entire matter brought up on a third-party appeal: "Le Public, qui a eu peine à concevoir qu'un Procès si ridicule ait pu naître dans un siècle si éclairé, croira-t-il que la Sentence dont on vient de parler, n'a pas suffi pour le terminer?" (*OC* II: 201). Robespierre would win this subsequent case as well, a triumph that the legal community, however, would consider "une fatalité inconcevable" (*Répertoire universel* 8: 758). Thus, Leuwer's claim that the *plaidoyers* enjoyed a complete critical success should be tempered to include the derision with which Robespierre's work was greeted within his professional community.

ont applaudi des journalistes, n'a pas trouvé la même approbation parmi les jurisconsultes, qui n'ont pu voir de sang-froid juger sans rapport préalable d'experts, et sans avoir entendu les voisins, qu'un paratonnerre était construit et placé suivant les règles de l'art" (Merlin de Douai, *Répertoire universel* VIII: 755)[331]. The odds had decidedly not been in Robespierre's favor.

How did Robespierre gain advantage over the law? Rather than focusing on the procedural issues that gave rise to the case (Visséry's noncompliance with the *règlements de police*; whether the Conseil was competent to judge a scientific question), he defined the matter as a preposterous debate between science and its deterrents. "Qui l'aurait pu croire, qu'au période où nous sommes, on serait obligé de prouver que l'usage des par-à-tonnerres n'est point une invention pernicieuse?" (147). To find against his client was to declare oneself at variance with popular opinion. In order to bring a scientific question under the jurisdiction of the Conseil d'Artois, Robespierre deftly placed the magistrates under the scrutiny of science. To do this he resuscitated the aesthetic of citation, but contrary to the seventeenth-century lawyers (detailed in the first chapter) who assembled Plautus, Homer, St. Ambrose and others as legitimating authorities consonant with the purpose of the law, Robespierre mobilized the great figures of scientific progress like Galileo, Descartes, Harvey, Franklin, Buffon, Voltaire, Guyton de Morveau, and Le Monnier. Thus, rather than perform a mutual embedding of contemporary jurisprudence with the Classical learning and early Church doctrine, Robespierre lined up a vastly more contemporary troupe of actors – many of whom were not only still alive but still performing

[331] The Artesian lawyer Émile Pagart d'Hermansart a century later would similarly conclude that "le bon sens était du côté des magistrats municipaux" in his appraisal of the case. (*Le paratonnerre de Saint-Omer en 1780* […], p. 16).

– as agents of social improvement and sources of national glory. The law could only be in service to such men. "Quand leur puissance bienfaisante règle la destinée des nations, quand tous les Princes de l'Univers s'efforcent de les fixer dans leurs États […] de quel œil les Magistrats doivent-ils les regarder? Un de leurs premiers devoirs, sans doute, est de les protéger et de favoriser leurs progrès, d'exciter l'émulation des sujets, et de seconder les vues sages et utiles des gouvernements" (146). Robespierre advocated for a pure system of judicial activism. To reject Visséry's lightning rod was to reject science itself, a decision that, given the competitive mood of the European states, seemed to border on treason. Robespierre indicated primitive societies as cautionary tales; the progress of science was the only difference between the Europeans who "se sont élancés, comme la foudre, dans un autre Univers" and the "sauvage habitant de l'Amérique": "La nature les avait fait égaux; mais les arts et les sciences avaient effacé tous les traits de leur ressemblance primitive" (145). Progress as opposed to nature was what *made* man: "Les Amériquains et leurs vainqueurs étaient-ils donc des êtres de la même nature? […] Par eux, l'Européen éclairé était devenu un Dieu pour le sauvage habitant de l'Amérique […]" (145).[332] Robespierre described the incorporation of scientific ideas and inventions within the body politic as the regenerative power that estranged man from his original oblivion and lifted him out of savagery. Moreover, this process, which so flattered the Frenchman from the point of view of the New World, was repeated all over Europe with astounding success –

[332] Note here that the differentiating factor between sets of humans is considered progress in the arts and sciences, whereas in the early seventeenth-century text on eloquence cited in the first chapter, it was rhetoric that demarcated men's evolution relative to one another: "[C]omme le parler diffère du mugir ou du hennir, ainsi fait l'éloquent du naturel; & si l'homme approche de Dieu par le bien dire, il s'ensuit que l'Orateur laisse autant après l'homme qui ne fait qu'à peine entendre, que lui derrière la bête qui ne saurait parler: encore y aurait-il plus à dire de l'ignorant à l'éloquent, que de la brute à l'idiot […] [C]ar de Dieu à l'homme tout s'y trouve tellement inégal, comme de l'effet à la cause, que qui peut se conformer à lui par un langage disert (qui est le premier attribut que lui donne Homère) il fait un plus grand saut, que ne ferait la brute prenant la parole de l'homme" (Du Pré de la Porte, *Le Pourtraict de l'Éloquence française*, 1-2).

even Russia was "sortie du néant" (146). Could the magistrates impede the progress of science in France, while it flourished all around them? Would the magistrates allow the French to sink back into barbarism? Robespierre's pleading focused on the glory of scientific progress and its potential to forge man anew, wrenching him from his previous forms and teleologies in an ever upward path. But the magistrates were custodians of the king's law, tasked with the disposition of events that took place in the past in accordance with rules set down in the past. However enabling it might be for the magistrates to ease their task and cast their votes with the majority described by Robespierre, they would be discarding legal procedure and thus blurring the contours of their institution with the court of public opinion. Yet Robespierre's arguments ignored the distinguishing, differentiating characteristics of the judiciary entirely. Robespierre asked them essentially to declare their independence from the laws through their blind submission to public opinion. He stalwartly maintained that the magistrates would either fall in line, i.e. suspend their function as custodians of the king's laws and act as ushers of progress, or be abandoned to the list of irredeemables who had (unsuccessfully) blocked the forward march of history throughout the ages. Robespierre elided legal history in favor of a socio-legal utopia.

To crowd out the possibility of an alternative logic, Robespierre cited all the major cities of the world that had welcomed the lightning rod, listing names and castles as proof of the general agreement on their utility. The plethora of examples served as the perfect backdrop for his favorite rhetorical device: "Il faut en convenir, la prudence est aujourd'hui bannie du reste de la terre: Saint Omer est la seule ville du monde, où la Police veille à la sûreté des Citoyens. Partout les Par-à-tonnerres dominent impunément […]" (159). Robespierre's sarcastic sequences ran surprisingly long, and they were very frequent. His

biting passages signaled anyone in opposition to his cause as inveterate fanatics, blind to the world and its goings-on. This group of intractable ignoramuses, of course, included the lower court magistrates. Irony as a rhetorical strategy was of course nothing new in the adversarial space of the court of law, where right and wrong was necessarily a line in fervent dispute between the parties and their lawyers.[333] Functional in legal rhetoric, it works on the political level as well – particularly in times of upheaval – because, as Rainer Warning aptly put it, "[ironic discourse] presupposes a public that is prepared to exclude itself from dominant value systems" ("Irony and the 'Order of Discourse,'" p. 264). It should be noted that Robespierre reserved the majority of his irony for the magistrates, and thus exceeded the limits of purely judicial irony by inserting political irony within the judicial space. The admixture of political and judicial irony as a way to diminish not only the court's interpretive measures but the members of the court themselves was a recent rhetorical phenomenon at the height of fashion but the limit of institutional acceptability.[334]

---

[333] The standard definition of sarcasm was stated by Quintilian as a speech in which the listener understands the opposite of what is actually said. (*Institutio Oratoria* 1:8.6).

[334] Beaumarchais provides perhaps the earliest example of political irony applied to a judge in the *mémoire judiciaire* genre. In the early 1770s, the playwright published a series of four memoranda – famous throughout Europe for their wit and irreverence – in a case of fraud against a magistrate. (This was possible because non-lawyers were permitted to author their own memoranda, as long as they obtained a signature from a lawyer in good standing – a duty not assiduously performed by the playwright). Despite their success, these memoranda were all condemned on 5 March 1774, and although we do not have a record of the precise grounds for this condemnation, we may assume it resulted from phrasing such as "[La nation] est en tout temps le Juge des Juges" ("Quatrième mémoire," in *Mémoires de Beaumarchais contre M. Goëzman*, (Paris: Ruault, 1774), p. 30). Less than two weeks later, Louis XV issued harsh prohibitions on the publication and sale of judicial memoranda. However, his death a month later, together with Louis XVI's permissive attitude toward the legal profession, meant this ordonnance was practically defunct. Ten years later, Beaumarchais' spicy ironizing of the magistrates would be reprised in Dupaty's famous memorandum for the *trois roués*, in which he castigated the magistrates who had taken part in the case. (*Mémoire justificatif pour trois hommes condamnés à la* Roue (1786)). The document was also condemned and Dupaty became a veritable pariah of the legal institution and was forced to go into exile. Interestingly, it has recently come to light that Beaumarchais helped edit Dupaty's *mémoires* for the *trois roués* and acted as treasurer as well for its distributions, which may explain the international fame of the affair and the royal contributions made for the defense of the three men. (Spinelli, "Beaumarchais and Dupaty: Some Unpublished Correspondence," p. 123).

Robespierre compensated for his bitter comedy with fawning phrases extolling the virtues of the enlightened magistrate who would protect the sciences and be a model for the international community. "Tels sont du moins les principes des *vrais Magistrats* […]" (147 [my emphasis]). But who was this eloquent remark addressing? The traditional hierarchy of reception between a reasoning audience (the jurists) and a feeling audience (the public), which necessitated the eloquent lawyer's concomitant use of conviction and persuasion in order to generate consensus, had been radically revised; there were no longer plebes and patricians to cajole and convince, but only magistrates whose decision would simply announce their identity *as such*. The validity of the magistrates' decision and thus their identity would be determined by its agreement with the opinion of enlightened men ("le suffrage unanime des Sçavans" (185)) and the international community. "C'est au peuple de Sienne que j'appelle du Jugement des Echevins de Saint-Omer; qu'il décide en dernier ressort" (157). The figure of the magistrate stood alone as the sole recipient of Robespierre's diatribe while the people, the men of science, and all the enlightened countries of the world were assembled alongside the barrister's claim, waiting to cast judgment on the judge's decision. In Robespierre's pleading, popular conviction rendered that of the judges nearly obsolete. Nearly, but not completely however, because, as Robespierre painstakingly described in his following brief, the lower courts' orders to dismantle the lightning rod had tainted the international community's view of Artois; they were now associated with the "ignorance" of the municipal judges whose decision fell so far outside mainstream beliefs. Robespierre implored them to rehabilitate themselves and thus their community: "Lavez-nous, Messieurs, de ces soupçons flétrissants: vous êtes nos premiers Magistrats; votre gloire est inséparable de la nôtre, et c'est vous, surtout, que cette

injure regarde; hâtez-vous d'effacer jusqu'à la moindre trace de cet injuste préjugé" (*OC* II: 200). Either the judge would obey the evidence of the majority opinion on science embodied by the lawyer (for Robespierre refused to explain Visséry's lightning rod with any degree of particularity[335]), or he was not a true judge. Worse, he was a social affliction – the antithesis of the man of science. Thus, Robespierre's objective appears less to desire the conviction or even persuasion of the magistrates, but rather the *production* of an ideal magistrate.[336] Such a magistrate would conform his decisions not to the law but rather the spirit of the times, bending their judgments to buoy the operations of "[t]ous ces hommes illustres, dont le suffrage forme l'opinion publique" (201). Robespierre's eloquence, which consisted in the invention and isolation of a social ill concentrated on a single point in close proximity to the image of the magistrature, and the amplification of his own speaking voice through ample citation to the crowd of voices around him, had all the undertones of a threat.[337]

But did Robespierre actually threaten the magistrates of the Conseil d'Artois? In other words, did the judges perceive his argument as a threat? This is very doubtful. His conclusion quickly banished the idea that the judges would impede the advancement of "les nouvelles connaissances": "Non, Messieurs; tant que vous serez nos premiers

---

[335] Robespierre offered only the most general explanation of the theory behind lightning rods; he reserved the great majority of his argument for citations to successful installations of lightning rods and the general approbation that followed: "[Q]uand l'expérience l'a clairement établie, quand un usage généralement répandu a fixé l'opinion publique sur cet objet, alors il n'est plus nécessaire d'être savant pour en connaître les avantages, il suffit d'avoir du sens commun et des yeux pour les apercevoir; et les Magistrats peuvent prononcer hardiment sur ce point" (*OC* II: 188). See also, Riskin, *op. cit.*

[336] The production of one's readership as an Enlightenment strategy of reception is detailed in Wilda Anderson's "Is the General Will Anonymous: Rousseau, Robespierre, Condorcet."

[337] At several points Robespierre described the public humiliation that would result if the judges did not agree with him, before assuring the judges such a fate would not be theirs as long as their decision conformed to the evidence: "Non, Messieurs, non, vous ne vous exposerez point à ces reproches injurieux. Sans chercher des éclaircissements inutiles dans une matière évidente, vous prononcerez par vous-même sur le mérite des conducteurs […] et vous n'aurez pas besoin de toutes vos lumières pour juger une pareille Cause" (187).

Magistrats, elles auront des protecteurs; […] vous vous empresserez de casser la Sentence que les premiers Juges ont prononcé contr'elles. Oui sans doute; elle ne peut éviter ce sort; votre Sagesse l'avait déjà proscrite avant même que je l'eusse attaquée" (167). Whereas earlier pleadings typically concluded somewhere between a simple recommendation to the judges or a saccharine supplication to their great wisdom, the syntax of Robespierre's *péroraison* issued a sort of summons to the judges.

The validity of his arguments obtains in a context where the opinion of the majority was right as a matter of principle and where the judge was a mouthpiece of the majority; in such a society there was no sense in trying either to convince or persuade a man whose identity required subscription to the majority opinion. The threat, if one had occurred, had preceded his arguments and likely the *Visséry* case altogether in that Robespierre's refusal to submit to social and legal hierarchies produced a disorder in the discursive semiotics of authority that estranged men from their corporate role, that turned judges into men, and men into judges.

***L'Affaire du paratonnerre*, suite**

Scholarly treatment of the *Affaire du paratonnerre* typically concludes on May 31, 1783, when the Conseil d'Artois decided firmly in favor of Robespierre's client. None of Robespierre's biographers, not Gérard Walter nor Max Gallo nor Ernest Hamel, mention the subsequent suit; Leuwers merely mentions an audacious salad merchant by the name of Bobo in his explanation of the material realities of Robespierre's *plaidoyer* and its distributions; Charles Vellay's articles (the most detailed historical account of the trial) on the lightning rod case merely state that there was a further appeal and that it was also won. This lacuna in the scholarship is likely due to the relative obscurity of the appeal; the

Répertoire printed lengthy extracts in its explanation of tierce-opposition but did not cite Robespierre's name. In that the matter turned on a question of law in an issue previously litigated, it is unlikely that these documents circulated outside of the necessary parties, especially given the fact that Visséry had proved so reticent to pay for the prior print runs. Visséry could once again place a lightning rod atop his home, Robespierre convinced (after some difficulty) his client to undertake the printing costs for the two *plaidoyers*,[338] and the young lawyer gained a reputation for eloquence beyond the limits of his hometown. All seemed right in the world. Yet this hardly spelled the end of the lightning rod case for Robespierre (nor a final triumph for Visséry, whose legal troubles would follow him beyond the grave[339]). The victory was quickly appealed to the same court under the principle of *tierce-opposition*, a legal device dating from Roman jurisprudence and officially codified in 1667 (and still enshrined in the modern French code of civil procedure[340]), which permits an individual to bring a complaint against the decision in a previously-adjudicated case on the grounds that he or she has an interest in its disposition that was not heard during the underlying litigation. Thus, in the fall of 1783, Jean-Baptiste Goury (nicknamed "Bobo") and Pierre Nédonchel, represented by the Arras lawyer Philibert Lesage, brought a virtually identical case to the one prosecuted by the king's *procureur*, Foacier de Ruzé. Rather than relitigating the *faits* and *moyens* of the grievance, Robespierre moved to dismiss Lesage's appeal as a matter of law: Foacier de Ruzé had

---

[338] Five hundred copies were printed and sold (at the price of twelve *sols* in the provinces, and fifteen in Paris). (Leuwers, *Robespierre*, 47).

[339] Visséry, tenacious even in death, detailed the maintenance of his lightning rod in his will. This caveat greatly reduced the sale price of the home, and, upon its purchase, the new owner immediately ordered a scientific appraisal of the rod's safety (in accordance with the municipal regulations previously ignored by Visséry). The report came back negative, and the lightning rod was definitively dismantled. For the relevant extracts of his will, see Pagart d'Hermansart, *Le Paratonnerre*, pp. 7-10.

[340] C. civ. ch. 1 art. 582-92.

already represented the public and lost; private individuals were covered by the public minister as a matter of logic, thus Goury and Nédonchel's suit was precluded under the principle of *res judicata* ("la chose jugée"), which barred continued litigation on a judgment previously rendered.

> Quand [Visséry] obtint le jugement dont il est question, contre qui plaidait-il? Contre la partie publique. La partie publique défendait la cause du public. Quel était ce public, si ce n'est la classe entière des particuliers qui pouvaient paraître intéressés à la destruction du paratonnerre? La sûreté des habitants du marché aux herbes, des voisins […] voilà le seul prétexte qui pouvait déterminer le ministère public à prendre parti dans cette affaire." (*Répertoire universel*, 755)

Robespierre's integrated vision of the public defender, based on "les premiers principes de l'ordre judiciaire," sounds logical and even quite practical in the abstract: why should a defendant be subjected to lawsuits by both the voice of the public, which speaks on behalf of private individuals, as well as private individuals themselves? Yet a more sinister consequence follows from such reasoning: such a "public voice" would preclude the presentation of individual complaints before the law – whether or not the public representation was actual or nominal. By virtue of Robespierre's interpretation, in the event of an alleged harm against which the public agent speaks, the public's opinion would be expressed at a single time and place, absorbing all claims for personal harm that the civil justice system was intended to repair. Under such a construal the intended function of the *procureur* would shift substantially; rather than act as gaurdian of the state against infringement of its laws (e.g., Visséry's refusal to abide by zoning rules), the *procureur* in

Robespierre's characterization would be rather considered a direct representative of each individual that populated the notion of the public, and the legal fiction of the state was thus taken to its serious conclusion. "Ce sont donc tous ces particuliers qui ont été défendus par l'organe du ministère public; ce sont ces particuliers qui étaient parties dans cette cause; c'est avec eux qu'elle a été jugée; aucun d'eux n'a donc le droit de la renouveler dans ce tribunal" (755). The *procureur*, departing from his traditional capacity as mouthpiece of the king's symbolic body, takes on an emergent reality that negates the hierarchies of representation. Any other construal of his function would lead, according to Robespierre, to irrationality:

> Soutenier le système contraire, c'est dire que le public, c'est-à-dire, la généralité des particuliers dont on veut attacher la destinée à celle du paratonnerre, a été condamnée par votre jugement dans la personne de son défenseur, et que ce même jugement ne frappe sur aucun des individus qui composent cette généralité ; c'est faire de vos décisions, de vaines formules ; du ministère public, un fantôme destiné à défendre un être chimérique sur lequel personne n'aurait aucune prise, qui formerait un tout destitué de parties, un corps qui n'aurait point de membres […]. (755)

Robespierre's tendency to take the role of the *procureur* as a philosophical category, focusing on the quality of "public" versus "private," rather than according to his primary legal duties as defender of the state and only by proxy the interests of the individuals, thus propounded a legal novelty and dealt a blow to the stratification of both eloquence (he refused to speak the language of the law at all) and the body politic (the individual body was subsumed under the public body).

In fact, the matter of *tierce-opposition* was significantly more complicated in its proper legal setting. This difference is made apparent in LeSage's methodical response for the plaintiff, which reads like a law school hornbook, setting forth legal definitions with their subdivisions and exceptions before applying them to the fact pattern and finally buttressing his conclusion with several analogies. A quick (as possible) summary is provided below to afford the modern reader a glimpse of the legal complexities triggered by the claim of *tierce-opposition*. It is important to note that LeSage focused not on the facts of the case nor even its underlying issues; the law – not the case – constituted the primary narrative. Thus LeSage's argument took the form of an exhaustive system of definitions relevant to the principle of *tierce-opposition.*

His argument began at a substantive distance from the particular matter at hand: "On doit, dans l'ordre judiciaire, distinguer trois sortes d'actions: les unes publiques, les autres privées, et les troisièmes enfin que j'appellerai mixtes. Les actions publiques sont celles qui appartiennent tellement au ministère public, que les particuliers n'auraient pas le droit de les intenter […]" (755). The issue – whether a plaintiff was precluded from bringing a suit where the claim had previously been brought and decided by the *procureur* – was put aside entirely as he proceeded to paint a landscape of the law rather than an abstract portrait of *l'homme public*. I will quickly recapitulate his description of the relevant law here for the understanding of the reader: the *procureur*, he stated, was the only party allowed to bring a criminal action before the criminal court; private individuals were also permitted to litigate criminal actions but only in civil court to obtain money damages caused by the underlying criminal event (i.e., an issue may be relitigated between private and public actors under separate bodies of law). Likewise, only private individuals were

allowed to bring private complaints before the court, yet the *procureur* was also permitted to bring cases in civil court as a representative of the king in his private person (i.e., the king's two bodies denoted a severing of interests between private and public claims): "[I]l représente, non pas l'universalité des citoyens confiés, pour ainsi dire, à ses soins et à sa défense; mais le prince qui descend de son trône pour soutenir ses droits comme les autres particuliers, et qui vient, comme eux, invoquer, par l'organe de son procureur, les lumières des magistrats qu'il a bien voulu rendre dépositaires de son autorité" (756). Furthermore, where it was not the individual person of the king implicated but rather the civil body of the crown, the *procureur* could still intervene in civil cases between private individuals, not in order to demand or call for a specific decision from the magistrates, but rather to give his opinion (his *avis*), and this only in special circumstances where the crown deemed a party to be under its special care (i.e., only in special cases did the public agent represent the king's opinion in matters between individuals). However, LeSage continued, the *Visséry* case was neither a public nor private matter, but an *action mixte*, in that Visséry contravened a municipal regulation and thus triggered a public reaction, i.e., the intervention of the *procureur*, but also gave potential rise to private claims from individuals with a proximate interest in the removal of the lightning rod (insofar as the neighboring townspeople should have been put on notice before the structure was built and they may be found to have a reasonable fear of harm to their property due to the building). In such mixed cases, LeSage argued, it would be unjust to silence one interest-holder (the private individual) on the grounds that the other (the public party) had failed before the law. LeSage illustrated his reasoning through different analogies dryly delivered ("C'est dans cette partie de la législation qui a pour objet la police, que nous trouvons des exemples de

la vérité de ces principes. […] En voici la preuve: […] Je suppose […] je suppose […] Autre exemple: […] Mais aussi n'est-il pas nécessaire de supposer […] Ainsi […] par une conséquence nécessaire […] Appliquons ces principes […]" (756-57)). After a meticulous parsing of the legal principles and their explication through analogy, LeSage finally posed the underlying issue as though awaking from a trance: "En effet, quelle est la question qui nous divise? Celle de savoir si les paratonnerres ne sont pas dangereux pour les édifices voisins, et s'il n'est plus dangereux encore de laisser le sieur de Visséry construire à son gré celui qu'il lui a pris fantaisie d'élever sur sa maison" (757).

LeSage's traditional style took the learned magistrate as his audience and catered to his taste for clarity and order. Entirely devoid of ornamentation or figural language, the argument proceeded slowly and cautiously, exuding a sort of hermeneutic pleasure in its expansive yet austere aesthetic. Unlike Robespierre, answers were not delivered *ex nihilo* but slowly, inexorably distilled through a serpentine peregrination through the laws, indeed barely looking up from them, as it were, to the case at hand. Through the performance of his legal nomenclature, LeSage positioned himself to finally attack Visséry's petition to dismiss his *tierce-opposition* based on the representational slippage of *l'homme public*, which, by this point in his argument, he had proven as a matter of law: *l'homme public* was not an incarnation of the individual polity any more than he was an incarnation of the king, which was to say only on rare occasions and in a very narrow sense. *L'homme public* only stood for individuals when their own exercise of justice would call into question the king's monopoly on violence (as in the case of vendetta justice) or role as executor of the laws (as in the failure to abide by municipal rules). The right to bring civil suit to enjoin the harmful actions of another to one's property or life remained with the individual. "L'homme public

n'avait, après tout, intérêt à la cause qu'en sa qualité d'homme public: mais je crains pour ma vie, et je n'aurais pas le droit de faire valoir tous les moyens possibles de me conserver ce bien précieux? Ce n'est pas oublier seulement toutes les règles de l'ordre judiciaire, c'est afficher le mépris de l'humanité" (757). Under LeSage's pen, the appeal to humanity, one of Robespierre's favorite rhetorical moves, is found here only in the peroration – the section traditionally reserved for emotional appeal[341] – arranged solidly atop a veritable fortress of legal arguments.

To Robespierre's contention that Visséry would be exposed his entire life to lawsuits brought by the inhabitants of St. Omer, Lesage again relied on the law: if Visséry had wanted to ensure that the matter would not need re-litigating before separate parties, then he should have obeyed procedure and joined the townspeople in the original litigation.[342] To Robespierre's argument of inconvenience, based on the empirical logic prized by Enlightenment thinkers and altogether estranged from the intricacies of the legal codes, LeSage opposed relevant rules and at one point slyly derided the lawyer of Visséry, "peu curieux de répondre à des principes," (757) as willing to sacrifice legal principles for the sake of "un avenir imaginaire" in which everyone would be free from lawsuits by virtue of the public voice (758).

Despite LeSage's carefully structured arguments, the Conseil found the *tierce-opposition* inadmissible and Robespierre won his appeal (21 April 1784). Thus it was

---

[341] Cicero divided legal oratory into four distinct sections: the *exordium* (introduction, devised to obtain the listener's attention), *narratio* (the statement of the facts), *confirmatio* (statement of proof), and *peroratio* (conclusion, devised to arouse favorable emotion). See *De Partitione Oratoria*, LCL 349: 312-13.

[342] This legal lapse may have been what Visséry was indicating when, in his 8 June 1783 letter of thanks to Buissart, he remarked "Vous m'avez donné pour quatre sols de victoire: j'eusse voulu en donner cinq, et qu'elle fût plus complète […]" (Vellay 213). Why Robespierre desisted from joining the private complainants to the case (who were parties to the original litigation) can only be surmised; most of his private papers from this period were lost or destroyed.

decided that *l'homme public* did not protect the public in the abstract, but the people at the individual level – even if that meant against the will of private individuals.[343]

Dissolution or Constitution?

Even when the odds were not in his favor, Robespierre could still astound the legal community and win difficult cases. But how did he construct such eloquent legal arguments if the law did not function as their organizing principle? Unlike Servan, who cast the domestic family as the law's epistemological foundation and ultimate test of validity, Robespierre had no preestablished political model upon which he sounded the legitimacy of claims and laws made by his opponents. Rather, the process of rupture was prevalent throughout his legal briefs. Judges were shorn from the law, laws from history, and history from morality. On this point, Hervé Leuwers has compared two of Robespierre's later cases with the courtroom technique of the lawyer Jacques Vergès (1924-2013), who, during his defense of the Front de libération nationale (FLN) militants during the Algerian War of Independence (1954-62) in Paris, made a name for himself through his "rupture strategy" (Leuwers, *Robespierre*, 70),[344] whereby rather than defending his clients against charges of terrorism brought against them by the state, Vergès instead accused the French state of the very same crimes.[345] Likewise, Leuwers claims, in later cases such as *Mercer* (1786)

---

[343] We merely know the final disposition of the case as it was reported in the *Réquisitoire*; the decree is not extant. However, *parlements* rarely offered any justifications for their decrees and thus such a document would likely provide us with little illumination on the reasoning behind their decision. My characterization of the decision is not intended to reproduce their thought process but merely to show which set of criteria – political or legal – was applied for such an outcome.

[344] For Vergès personal account of his "défense de rupture" trial strategy, which he likened to the technique employed by Socrates and Jesus before their accusers, see *De la stratégie judiciaire*, Paris: Éditions de Minuit, 1968. The context in which he employed this technique were what he termed "political trials," wherein the lawyer's goal became less the acquittal of his or her client, but rather to expose their political ideas to the public.

[345] It should be noted that his strategy typically did not work in the courtroom; for example, the famous Algerian militant Djamila Bouhired was convicted of terrorism after allegedly bombing a café in Algiers in

and *Page* (1786), Robespierre defended his clients by respectively attacking the customs of arrest and the prohibition on interest-bearing loans under which they had been inculpated. Unlike Leuwers, however, I do not consider this a strategy like that employed by Vergès; on the contrary, I find such an equivalency gravely obscures the stakes of Robespierre's rhetorical manoeuvres. Robespierre did not seek to quash the sentence of his party by demonstrating an equivalent crime taking place within the government to act as an affirmative defense for their actions. Rather, by staking out an ethical position beyond and often at odds with the interests of the state and its laws, Robespierre poked holes in the government's monopoly on reason and morality. He was not arguing for pity, anger, disgust or forgiveness; he was arguing for a civil rebirth according to new principles of reason and equity. In *Page*, for example, Robespierre did not deny that Mme Page issued interest-bearing loans in clear transgression of the law, but rather challenged the law itself as contrary to the public interest.[346] If, following Leuwers, Vergès' technique were applied, instead of decrying the law as in dissonance with the public good, Robespierre would claim the government itself was committing usury.

I stress this point to absurdity because I find that Robespierre's technique resembles much more closely a challenge on constitutional grounds familiar in United States jurisprudence. In such a case, a lawyer defends a client by drawing into question the constitutionality of the federal or state statute that the client was found to have contravened. "Constitutionality" in this sense means whether the statute contradicts the laws embodied in the written Constitution or its amendments as these are construed by the Supreme

1957 in which eleven civilians died, and sentenced to death. However, due to public pressure produced largely by Vergès' technique, she was later pardoned and released from prison at the end of the war. This would be the case for all of Vergès' FLN clients.

[346] Leuwers, "Robespierre, avocat des fermiers Pepin et d'Herlin…," p. 545.

Court.[347] The main difference is that Robespierre defended his clients by testing the applicable laws against the legal order of an enlightened political model that *did not yet exist*. Robespierre's constitution was not written; he was speaking it into existence by constituting its possibility within the imagination of his audience through a vocabulary rich in abstract but uncodified terms such as *le droit des gens, la loi de la nature*, *l'humanité*, and *le droit naturel*. As demonstrated throughout the preceding chapters detailing the role of barrister as public imagination, the imaginative role played here by Robespierre should not be construed as an innovation, however tempting it might be to dispense with eloquent legal style as no more than the pragmatic effort to graft discourse on to the popular semantic fields of sentimental narrative literature and bourgeois drama, in order to embody forms of authority more readily transparent to the senses. If that was all that was at play, Robespierre's rhetoric actually would have constituted nothing significantly different from the centuries of legal discourse that preceded him. Rather, Robespierre's skillful wielding of the lawyer's discursive toolbox was radical in that he had displaced reason away from the law.

Robespierre's Final Case: the Mémoire for Hyacinthe Dupond (1789)

As summarized earlier in the chapter, Robespierre's last case turned on a question of inheritance. The date should be noted; Robespierre was very busy in early 1789 as he

[347] The right of the Supreme Court to interpret the laws in light of the Constitution was enshrined in *Marbury v. Madison* (1803): "So if a law be in opposition to the constitution; if both the law and constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. […] Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions [and] reduces to nothing what we have deemed the greatest improvement on political institutions – a written constitution […]" (5 U.S. 137, 178).

prepared his candidacy for the Estates General. He composed two pamphlets to this end: *À la nation artésienne* and *Les Ennemis de la patrie*, all while maintaining a hefty schedule of pleadings.[348] Despite his political preoccupations (or perhaps because of them) Robespierre managed in the Dupond *mémoire* to produce one of his most memorable arguments as a lawyer. The facts: Hyacinthe Dupond was the youngest of three sons. In October of 1745, at the age of sixteen, he entered the military service of the powerful Breton family Rohan-Rochefort but deserted in 1748. Realizing his action carried with it a death sentence, he took refuge with an uncle, a priest at Vacquerie-le-Bouc, who disguised the young man and transported him across the border under a false name. For over twenty years he fought under the banners of Switzerland and Denmark. He decided to return to France and his home region of Artois upon learning of the general amnesty granted in 1761 for all deserters. Upon arrival, he learned that his parents and uncle were dead, his brother, Jean-Baptiste, had become the local *procureur*, and that he and Hyacinthe's sister had divided the inheritance among themselves, believing their brother, from whom they had not had news during the past thirty years, to be dead. Hyacinthe presented himself before them and demanded his fair share of the inheritance. They protested their good faith and his brother, the *procureur* obtained an official pardon for his returned brother and even invited him to live in his home. Yet Hyacinthe did not desist from his demand for a share in his parents' inheritance. The tension finally spilled into violence, and Hyacinthe moved away from his brother's home and brought his case before the court in Vacquerie in 1774. While the case was pending, Hyacinthe's brother and sister obtained a *lettre de cachet* against him, claiming he exhibited erratic and debauched behavior. He was imprisoned

[348] Robespierre presented sixteen pleadings in the first quarter of 1789. The Dupond *mémoire* is unfortunately the only printed material that remains from this flurry of activity.

north of Arras in the town of Armentières at the age of forty-six and there he would remain for twelve years, to be liberated only upon the death of his brother. No longer imprisoned but without resource, Hyacinthe again disputed the distribution of his parents' property against his brother-in-law before the Conseil d'Artois.

It was at this point that Robespierre took on the case. As had Lacretelle in the Sanois case three years earlier,[349] Robespierre pivoted the matter away from the inheritance claim to dwell rather on the *lettre de cachet*. By this period, the *lettre de cachet* had become a red-hot issue for philosophers and legal reformers, who described harrowing fates meted out arbitrarily among the population.[350] Yet, as scholars have revealed, the barbarous reputation of the *lettre de cachet* was largely a fabrication, so we will look into the matter in greater detail to understand the claims put forward.

The traditional meaning of a *lettre de cachet* was actually quite benign; it simply indicated a document from the king's household sent in a personal capacity, as opposed to the official *lettre patente* meant for the public. Thus, a *lettre de cachet* could simply contain directions for the organization of festivities, a summons, or matters of personal housekeeping, such as a message asking monks to remove statues from the future mausoleum of Louis XIV's cousin.[351] When *lettres de cachet* were used to imprison an

---

[349] This case was discussed generally in Chapter 3 (pp. 197-98); for a more in-depth reading, see Maza, *Private Lives*, pp. 271-76.
[350] The *lettres de cachet* became a target for legal reformers during the late eighteenth century, particularly since its denunciation as an arbitrary exercise of power by Louis Sébastien Mercier's *Tableaux de Paris* (1781) ("Ô murs épais de la Bastille, qui avez reçu sous les trois derniers règnes les soupirs et les gémissements de tant de victimes, si vous pouviez parler, que vos récits terribles et fidèles démentiraient le langage timide et adulateur de l'histoire! […] La tour de Vincennes renferme encore des prisonniers d'État, qui paraissent devoir y finir leurs tristes jours. Qui a pu calculer au juste les lettres de cachet délivrés sous les trois derniers règnes?" (I: 282, 723). Mercier's criticism was followed by the Count of Mirabeau's *Des lettres de cachet et des prisons d'État* (1782) and Simon-Nicolas-Henri Linguet's *Mémoires sur la Bastille et sur la détention de M. Linguet* (1783).
[351] *Lettre de cachet de Louis XIV, aux Prieur et Religieux de l'abbaye de Saint-Denis […]* in *Œuvres de Louis XIV* VI: 541-42.

individual, such *lettres* were almost always requested by a member of the individual's family and thus rarely resulted from a despotic motive formulated by the king or his ministers. Indeed, as Brian Strayer (1992) and Claude Quétel (2011) have indicated, prior to the prerevolutionary period the *lettre de cachet* was generally considered a salutary device for the honor and unity of a family (Strayer xi).[352]

Counterexamples to the narrative of *lettres de cachet* as a beneficent measure of social control were to be found largely within the judicial realm. During the eighteenth century, it was not rare for entire *parlements* to suffer exile through *lettre de cachet* for refusals to ratify the king's decrees. Louis XV issued *lettres de cachet* confining the *parlement* of Dijon within the city walls (so as not to disrupt the local economy) for one year (1761). The same method was applied against the *parlement* of Rennes by the Duc d'Aiguillon (whose son would be the first aristocrat to call for the end of noble privileges in 1789 during the *Assemblée constituante*) in 1765. The magistrates of the *parlement* of Toulouse were put on house arrest for over a month in 1763. (Flammermont, *Rémontrances* II: 180-81), and so on.

Thus it may not surprise us that the reduction of the *lettre de cachet* as a purely arbitrary and despotic measure of control finds its earliest expression in the legal community. The early petitions against the *lettres de cachet* can be found in parlementary *rémontrances*, or devices that permitted *parlements* to voice their disagreement with and even obstruct the ratification of the king's laws, which were often (illegally) published (Baker, "Memory and Practice," 139).[353] In 1759, the *Parlement* of Paris remonstrated on

[352] This is seen clearly during the Louis XVI's demand to the Estates-General to do away with the *lettre de cachet* in such a way that it would not imperil the state nor, importantly, family honor. (Strayer 148).
[353] The parlementary right of remonstration did not afford veto power to the magistrates, but nevertheless served to temper the king's authority. The frequency with which the *Parlement* of Paris remonstrated during

behalf of the *parlement* of Besançon,[354] the majority of whom had been exiled by *lettres de cachet* due to a disagreement with the local royal authority (who had also been recently named *premier président* of the *parlement*) regarding taxation. The *Parlement* of Paris took a principled approach:

> [L]es lois ont établi des règles pour la poursuite des délits et que ces règles sont la sûreté commune des citoyens; que si elles peuvent être violées dans un état monarchique où les hommes sont libres, la liberté ne sera plus qu'un vain nom; que rien donc n'est plus contraire aux lois essentielles de la Monarchie que ces ordres rigoureux qui, sans aucune instruction préalable, enlèvent un citoyen à sa famille et à sa patrie, en le supposant coupable […] [S]i la liberté des citoyens est sous la protection des lois, elles ont pris des précautions encore plus grandes pour garantir celle des magistrats […]. (*Rémontrances* II : 173)

Though it concluded on a somewhat self-serving tone, the *Parlement* of Paris nevertheless set forth conceptual arguments that clearly demonstrated their opposition to *lettres de cachet* in terms of legal philosophy (not simply the king's law[355]). This choice, of course,

---

the late eighteenth century, especially with regard to the levying of royal taxes, contributed to the Chancellor's Maupeou's banishment of the entire body and their replacement by men of varying competence. Beaumarchais' memoranda in his case against Goëzman poked the most fun at the unpopular Maupeou *parlement*. Louis XVI restored them upon his ascension to the throne. For a general discussion of the conflict between the king and his *parlements* and the ambiguities that ruled this often-fraught relationship, see Jean Egret, *L'opposition parlementaire*.

[354] The *parlements* of Ancien Regime France were known for their solidarity, and the Besançon affair was no exception; the parlements of Rouen and Dijon also came to their aide. Due to the legal particularities of each parlement, however, this support was legally imprecise and likely focused on legal and political philosophy. For details about the affair, see Julian Swann, "Parlements and Political Crisis in France under Louis XV: The Besançon Affair, 1757-1761."

[355] Of course, the *parlement* did cite Louis XIV's 1648 decree in which he expressly prohibited the the use of *lettres de cachet* against members of the court, an order, the *parlement* maintained, which had only "confirm[é] les lois précédentes" (*Rémontrances* II: 174). The *parlement*, however, merely mentioned this as a fact to buttress their theoretical arguments.

way due to necessity; there were no procedures and very little law upon which the magistrates could rely to build their case to the king, who, predictably, rebuffed the argument and took particular exception to its tenor; through his Chancellor Guillaume II de Lamoignon (1683-1772), the king took the *parlement* to task over their jurisdictional extravagance, tersely reminding them that "[c]'est dans la personne seule du Roi qu'existe l'universalité, la plénitude et l'indivisibilité de l'autorité […]" (185) and that their conceptual framework was very much misguided:

> Le Roi ne dissimulera pas l'attention que quelques termes échappés dans les remontrances se sont attirée de sa part […]. On y parle du droit de la Nation, comme s'il était distinguée des lois dont le Roi est la source et le principe, et que ce fût par ce droit que les lois protégeassent les citoyens contre ce qu'on veut appeler les voies irrégulières du pouvoir absolu. Tous les sujets du Roi en général et en particulier reposent entre ses mains à l'abri de son autorité royale […]. (186)

The *parlement* continued its remonstrations, but due to in-fighting and other issues, the matter was dropped in favor of more pressing issues of wartime taxation.

The king's chancellor had won the parlementary battle over Besançon, but his son, the judge and statesman Guillaume-Chrétien de Lamoignon de Malesherbes (1721-1794)[356] remonstrated strongly before Louis XV against the use of *lettres de cachet*, which

[356] Though Malesherbes was a monarchist (he presented Louis XVI's defense at the latter's trial and would be hanged along with his entire family in 1794), he was also strongly influenced by Enlightenment principles; as the head of royal censorship he supported the publication of the *Encyclopédie.* He was a magistrate at the *Chambre d'enquêtes*, which decided financial matters and certain affairs of nobility. The magistrates were generally younger compared to the *Grand'Chambre*, and, in the late eighteenth century, more easily found in conflict with royal prerogative.

he termed alternately "ordres extrajudiciaires" and "ordres illégaux" that were made freely available for the (ab)use of his ministers without the king's knowledge or explicit consent:

> Si ce sont des crimes qui méritent une peine grave, il faut faire juger les coupables suivant les lois; et dans aucun cas, on ne peut les retenir pendant un mois dans les chaînes et dans l'horreur des cachots souterrains. Ce genre de tourment n'est pas mis par la loi au nombre des peines légales; et si c'en était une, on ne pourrait la prononcer que par un jugement régulier et sujet à l'appel; car, après la peine de mort, il n'est point de punition plus terrible, et il n'est aucun criminel qui ne préférât sans hésiter une condamnation aux galères pour plusieurs années. […] Nous ne sommes point jaloux, Sire, de la triste fonction de punir des coupables ; toute notre douleur est que votre Conseil nous prive si souvent de la satisfaction de tendre une main secourable aux innocents. […] Votre Majesté doit attendre de cette instruction [d'un procès institué à la suite d'un emprisonnement par lettre de cachet], des éclaircissements sur l'abus le plus révoltant qui puisse être fait de son autorité; sur cet abus qui blesse non seulement l'ordre de la justice, mais l'humanité même qui est la première de toutes les lois […]."
> (*Œuvres inédites* 75-77 [1770])

Homing in on the fundamental questions of justice regarding the use of *lettres de cachet* rather than developing a constitutional doctrine as to the inviolability of the magistrates that the king could never stomach, Malesherbes gave at once a more pithy and more poignant argument. Nevertheless, he was in a vexing position; in the name of humanity – rather than the king – he demanded the king give up one of his most efficient tools for the

maintenance of public order so as to allow the judiciary to protect his subjects – a role more commonly associated with that of the king. Whatever erstwhile paternalistic feelings that remained regarding intervention via *lettre de cachet* suddenly decayed into despotism in Malesherbes' descriptions of dank jail cells and the shrieking despair of their inhabitants. Though he was careful to exculpate the king from any knowledge of such abuses, the logic of his argument against extrajudicial punishment would clearly apply in cases involving the king as well.

In regard to the king, Malesherbes succeeded only in obtaining for himself a *lettre de cachet* exiling him to the countryside. Yet his words, circulated clandestinely until their publication in 1808, influenced writers and lawyers alike. Mirabeau's attack on the *lettre de cachet* was largely inspired by Malesherbes' remonstrance (*Œuvres inédites*, pp. 43-79), and Lacretelle, who had clerked under Malesherbes, also borrowed certain ideas in his widely-circulated *mémoire* for the Count of Sanois.[357] In 1786, the Count of Cagliostro, the Italian magician implicated with the Cardinal de Rohan in the Diamond Necklace Affair, protested his imprisonment under *lettre de cachet* through his lawyer, Jean-Charles Thilorier (1756-1818) in rather strong terms: "Les lettres de cachet sont un remède extrême, utile peut-être dans quelques circonstances bien rares, mais dont on abuse trop souvent. Let lettres de cachet sont hors de la loi" (Thilorier, *Mémoire pour le comte de Cagliostro*, 21). Beyond the lawlessness of the act, Thilorier alleged that the king by virtue of his position was blinded to the truth and thus could not be a trustworthy source of such

[357] "Mais, pour faire arrêter un Citoyen, il faut un crime. Où est ici le crime?" (*Mémoire pour le comte de Sanois*, p. 51). Opposing counsel pointed out the illegitimacy of Lacretelle's philosophical arguments, of which we only have second-hand evidence due apparently to the relatively small interest it provoked among the general readership: "Le Mémoire de Madame de Sanois, consistant principalement en faits judiciaires […] ne mérite aucun détail & ne produira nulle sensation sur le public en général, qui ne juge & ne s'attache que par instinct" (*Mémoires secrets* XXXIII: 68).

an expedient form of punishment: “La sublimité du rang ne permettant à la Vérité de parvenir au trône que par des bouches intermédiaires, souvent intéressées à la déguiser, c’est un malheur attaché à la condition des Rois, que de prendre souvent l’erreur pour la vérité” (22). The choice was clear: either the king was a hateful tyrant or a fool whose affairs needed better looking-after.

Thus, Robesepierre’s decision to plead Dupond’s case as a *lettre de cachet* affair rather than an inheritance claim was in keeping with the political climate of the time. No effort was made to dissemble his stratagem; rather, Robespierre made an outright declaration that the case was not brought before the court to obtain redress for prior wrongs, but rather to offer a platform for the public’s edification:

> [J]e suis bien moins occupé de mes maux particuliers que de l’espoir de voir bientôt tarir les sources de l’oppression à qui je dois les imputer, et si l’on me voit approcher aujourd’hui de ces tribunaux illustrés par leur généreux dévouement pour la cause publique, mon principal but […] n’est pas d’exciter un stérile compassion, ni d’obtenir des Magistrats les secours et la vengeance personnels qu’ils me doivent. […] Mais je veux au moins consacrer mes dernier jours à révéler des mystères odieux dont la connaissance peut être salutaire à mes concitoyens. (*Dupond*, *OC* XI: 54[358])

The plaintiff *cum* preacher stood before the law not to find justice but rather to *do* justice; the activity of the legal system was demoted relative to the sacrificial gesture of Dupond, who continued in mythic tones:

---

[358] This *mémoire judiciaire* was printed in 1789 by l’Imprimerie de la Veuve M. Nicolas, but whether it was ever pleaded before the magistrates remains a mystery.

> Avant de descendre dans la tombe vers laquelle des hommes impitoyables ont précipité mes pas, avant le terme marqué par la nature, je veux, par un cri terrible, qui pénètre jusqu'au trône et qui soit entendu de la nation, avertir la société dont les lois impuissantes m'ont trahi qu'il est temps d'anéantir des abus monstrueux et déshonorants, qui rendent les Peuples aussi vils que malheureux; et lorsqu'enfin je comparaîtrai devant le tribunal de ce juge éternel […] je pourrai du moins lui rendre compte des efforts que j'aurai faits pour rendre mes malheurs utiles à mes semblables. (ibid.)

What was Robespierre up to? By orienting his client toward God's justice while simultaneously deploring the injustice of the temporal laws encoding his civil behavior, he explicitly rejected the king's legislation and the jurisdiction of the court to whom he was writing, while nevertheless obeying the norms of judicial procedure (in that he was submitting the case at least formally before the court). In other words, Robespierre vacated the proper substance of his claim while abiding by its procedure, taking instead legal procedure writ large as the substance of his claim. The framework was being sabotaged by its parts. How? Robespierre displaced his discourse from the court of adjudication and reconstituted it in accordance with a Christian ethic whose other-worldly sanctity his client obviously shared.

Despite what we might call today Robespierre's rather dubious venue-shopping, I would argue that the *mémoire* did not break with the norms of legal eloquence, but rather exemplified its quite literal apotheosis. For centuries lawyers had been tasked with bringing their cases before the judges *as well as the public*; their eloquence turned on whether they could persuade both audiences. As the Enlightenment advanced and the spirit of reform

grew, lawyers availed themselves of these newfound authorities born of philosophical inquiry as another tool with which to win their case. Because the philosophical as opposed to legal method of prosecuting one's case was not overladen with doctrinal intricacies, a wider public was available to not only be sentimentally persuaded by the *pathos* of a barrister, but convinced, along with the judge, on the basis of the argument's *logos*. Robespierre's spiritual rendition of this new rhetoric through the martyr's heroic cry embodied the *ethos* of a society reborn, marching forward toward man's horizons. The judicial monopoly of the magistrates continued, but their intellectual monopoly was in question.[359] To argue along the lines of conventional reason instead of or in addition to the highly specialized form of legal reason thus meant the possibility of convincing a larger population while also persuading the entire audience through rhetorical embellishments. Legal reason and reason itself had disentwined, with the latter offering a more eloquent pathway to victory in the courts.

Therefore, despite Robespierre's refusal to submit to the law in the Dupond affair, his style was nevertheless informed by legal eloquence. After the thundering first-person introduction, he dissected the contents of the *lettre de cachet* point by point, ridiculing its terms ("'Son frère,' ajoute-t-on, 'fût charmé de le revoir ; […] il l'a pris *publiquement* chez lui' […] On a vu que l'affectation visible de cette démarche en trahit le coupable motif. *Il*

---

[359] Toward the end of the century, non-lawyers such as Beaumarchais and Mirabeau felt sufficiently comfortable in the genre of *mémoires judiciaires* to present their own cases to the courts; likewise, in the Visséry case, we find the physicist and priest Pierre Bertholon de Saint-Lazare (1741-1800) writing to the lawyers (Robespierre and Buissart), advising *them* on the strategy to be employed before the judges: "Le meilleur moyen et le plus efficace pour réussir, me paraît de jeter sur les Magistrats de St. Omer un vernis d'ignorance et de ridicule; d'annoncer avec confiance qu'on est sûr de gagner cette cause à Arras; que ce tribunal se couvrira de gloire en faisant triompher la vérité, et que l'ignominie et la honte que des écrivains se préparent à verser sur les officiers de St. Omer va leur être propre, sans être commune avec qui que ce soit" (*OC* II: 222). By 1783, the lawsuit provided an opportunity for the public intellectual to play the emotions of the magistrate. That Robespierre appears to have conformed his pleading – and successfully so – to Bertholon's counsel indicates the shift in the hierarchy of legal address.

l'a pris chez lui PUBLIQUEMENT. Voudrait-on qu'il l'eut logé chez lui *secrètement*?" (*OC* XI: 62 [author's emphasis])) as well as the spirit in which it was written: "Après avoir exposé [dans la lettre de cachet] que le Procureur Dupond […] a acheté une charge de Procureur; après avoir fait son éloge, sans doute, pour qu'on ne doute pas de la vérité des inculpations dont il va charger son frère […]" (ibid.). Robespierre's commentary on the *lettre de cachet* painted a trenchant portrait of a vile figure riddled with corruption, all while using the brother's own words. It was a deft technique; instead of avoiding mention of the *lettre de cachet*, which cast his client as a drunken and violent deserter, Robespierre exposed the worst allegations – emphasized them even – confident that he could shift their public interpretation. Indeed it was a very lawyerly technique, already observed in the first chapter in the 1659 pleading of Claude Robert for Jacques le Moine, that consisted in taking the most harmful allegations of the opposition, exacerbating and listing them one after another to obscure through persiflage the substance of the opponent's contention.

Yet within his legal style, among his numbered lists and calculated contradictions, the legitimacy of the legal institution remained in question. Robespierre accused a judge in nearly the same sentence as he called the public to witness:

> Que dis-je, [le juge] ne se borne point à donner un avis […] il se porte accusateur, et même accusateur ardent et passioné […]. Voilà donc les principes de morale et de jurisprudence, d'un jurisconsulte qui s'est engagé par serment à défendre les lois et l'innocence! Je viens d'exposer les motifs, les circonstances et les actes de l'espèce de procédure qui fut faite, pour provoquer la détention du Sr. Dupond. Citoyens, il vous est permis de vous alarmer […]. (*OC* II : 73-74)

Robespierre drew a stark difference between the magistrate as he ought to be, and the magistrates as he found them:

> Mais [le juge] ne portait-il pas aussi […] un caractère sacré? Le sieur [juge], investi, par la loi même, dans le sanctuaire de la justice, du titre de défenseur des faibles et de vengeur des opprimés, le [juge], qui, à la connaissance des lois éternelles de la justice gravées dans tous les esprits, joignait encore celle des lois positives, acquise dans le fréquent exercice de sa profession […]. [Ce juge] enfin, qui, à tant de titres, devait entraîner si facilement le suffrage des autres membres de l'assemblée, employer ce fatal ascendant à faire triompher l'injustice! à accabler l'innocence malheureuse! […] …. que de réflexions affligeantes un pareil spectacle ne peut-il pas inspirer à tous les honnêtes gens! (85)

If not outright deplorable, Robespierre made clear that the indifference of the magistrate was a matter of serious concern "qui doit affliger ici tous les bons citoyens" (100). Their willingness to accept as valid the assertions on a *lettre de cachet* and thus dispose of the need for proof before locking a person away was the grave sin Robespierre charged them with, yet to adjudicate a matter of *lettre de cachet* would nullify its purpose, which was to imprison an individual without recourse to the justice system; it was the king's prerogative to act as a father and protect the individual against him or herself. Yet Robespierre's construction of the *lettre de cachet* was of an entirely different coloring: "[Q]uiconque, mettant ses passions, sous la sauvegarde du pouvoir arbitraire, ose enchaîner l'autorité des Lois, pour opprimer impunément des citoyens qu'on leur défend de protéger, celui-là n'est point simplement l'oppresseur d'un particulier; il est l'oppresseur des Lois; il est l'ennemi

de la Patrie, il est […] véritablement criminel de haute trahison" (110-111). How could an individual, using a tool provided for by the king, be considered a traitor? Robespierre based his claim on the primacy of the natural law of the social order; an individual "renversant, autant qu'il est en lui, les principes fondamentaux de l'ordre social" necessarily perverted the foundations of the positive law and thus caused the social body to suffer "tous les attentats du despotisme […]" (111).

As Robespierre named the legal device of the *lettre de cachet* not only illegal but antisocial, he likewise announced that it was an abuse of the past. "Mais que dis-je? Ils sont passées, sans doute, et sans retour, ces temps malheureux, où le vice en crédit s'arrogeait le pouvoir de proscrire arbitrairement les citoyens" (ibid.). This hallucinatory exclamation of a present not yet arrived, coupled with the prohibition of a king's action still not withdrawn, detached the reader from the present, locating her in an imagined future. In this same passage, Robespierre slipped deftly back into the first-person narrative of Dupond, who in a fit of ecstasy for the public good supposedly come, declared himself able to assume his duties in the civic utopia: "Eh! à qui donc convient-il plus qu'à moi, de remplir avec zèle ce devoir, imposé, dans un moment tel que celui où nous sommes, à tous les hommes à qui le ciel a départi la faculté de penser et de sentir?" (111). Robespierre's curious situation of Dupond's voice outside of time and space followed, as the reader discovers, from the irreperable injustices he bore at the hand of his nation's justice system: he was a "citoyen à qui il n'est plus même, en votre pouvoir, de donner la réparation que vous lui devez, pour toutes les injustices dont vos lois devaient le garantir" (112). He was thus beyond the concerns of the world, "placé entre les hommes qui l'on a opprimé et Dieu,

qui va le juger" (ibid.), a distance sufficiently categorical to permit him to speak in a disinterested manner.

Due to Dupond's proximity to God, he was thus endowed with the wisdom to interpret His creation according to the divine will. According to Robespierre, God designed man "pour des fins sublimes" and society was intended to provide the necessary context for the realization of man's sublime potential. "[T]outes les formes de sociétés, […], sous quelque nom qu'on les désigne, sont bonnes dès qu'elles peuvent conduire à ce but et qu'elles sont essentiellement vicieuses et nulles toutes les fois qu'elles le contrarient; voilà la base de ce contrat social" (112). Despite certain resonances with Rousseau, Robespierre did not distinguish between a state of nature and a civil state as did the philosopher[360]; for the lawyer, the civil state was primarily *spiritual*: "[C]e contrat social, dont on parle tant, **qui n'est point l'ouvrage d'une convention libre et volontaire de la part des hommes**, mais [celui] dont les conditions fondamentales, écrites dans le ciel furent de tout temps déterminées par ce législateur suprême, qui est la source unique de tout ordre, de tout bonheur et de toute justice" (*ibid.* [my emphasis]). Robespierre's essentially metaphysical social contract, as iterated in his *mémoire* for Dupond, entailed a subjective orientation toward civic virtue.

Robespierre's exposition of the social contract, wherein any form of society that promoted the fulfillment of man's "fins sublimes" was good, and any form that thwarted it was bad, did not exclude the figure of the king. Rather, Robespierre addressed the king in tones similar to his pleading before the judges in the Visséry case. Though better disguised than his contempt for the magistrates forestalling scientific progress, Robespierre, in a

[360] Rousseau claimed that the civil contract was not God-given, but founded rather on social conventions. *Du Contrat social*, bk I, ch. 2-6.

lengthy anaphoric passage stressing the monarchy's historical negligence of the abuse of *lettre de cachet*, pressured Louis XVI to break with the demoded version of kingship.

> Importait-il à l'autorité royale, que tout homme en place put répondre par des Lettres de cachet, aux attaques de ceux qui offensaient son amour-propre […]? Importait-il à l'autorité royale, que des querelles théologique devinssent un motif d'emprisonner […]! Importait-il à l'autorité royale que les traitants fussent armés du redoutable pouvoir de précipiter dans les cachots, sans aucune forme de procès, les malheureux qu'ils soupçonnaeint de fraude […]? Importait-il à l'autorité royale, que la vérité […] fut éternellement bannie de leur présence […]? Importait-il à l'autorité royale, que des épouses criminelles pussent conclure dans les bras d'un amant en crédit, l'abominable traité, qui leur livrait les dépouilles et la liberté de leurs époux outragés? Importait-il à l'autorité royale, que la corruption et la vénalité tinssent pour ainsi dire, des bureaux ouverts […]? Importait-il à l'autorité royale, que l'on vit, parmi nous, un évènement inouï, dans les annales du genre humain, des particuliers armés de lettres de cachet, en blanc […]? (*OC* XI: 114-15)

The use of repetition to evoke a passionate response in one's audience was common to the legal community, but Robespierre weaponized the rhetorical device explicitly against kingship to an extent rivalled only by Dupaty's 1786 *Mémoire justificatif pour Trois hommes condamnés à la Roue*, also addressed to the king, wherein he refused to "se taire" twelve times (op. cit., 232-33).

However, just as Robespierre did not implore the magistrates' justice but their recognition of the truth of human progress through scientific discovery in the *Vissséry* case, the king was similarly asked not to do justice but rather to join himself to the people in an act of political absorption: "Hâtez-vous donc de venir au milieu d'elle [la nation], condamner solennellement cette maxime funeste, que l'usage des *Lettres de cachet* est nécessairement au maintien de la tranquilité publique et de l'autorité royale, maxime si souvent répétée, autour du trône, par les oppresseurs des peuples et désavouée par votre cœur" (114). The king's moral rectitude could only be assured if his body was fused with that of his people.

In order to rhetorically constitute the new political hierarchy,[361] the Dupond *mémoire* provided a stunning series of narrative dislocations. Beyond the mere assumption of his client's first-person perspective – the long history of which was set forth in the first chapter – the voice of Louis XVI himself was made use of in a lengthy passage for the expression of Robespierre's politics of ecstasy:

> Ah ! heureux […] celui qui, à la vue de tant de maux répandus sur l'univers, élevé par un sentiment profond et sublime, pourra se dire à lui-même : « **Je veux au moins les faire cesser pour une nation de vingt millions d'hommes** […]. **Ce n'est point en vain que la providence m'aura appelé à gouverner la plus intéressante nation de l'univers, dans le moment le plus intéressant de toute son existence.** […] Ainsi, mon règne s'écoulera,

[361] The flatness of Robespierre's political model by the time of his composition for the *Dupond* case can indeed hardly be termed a "hierarchy" anymore, unless the term be understood in its classically received theological sense as a celestial hierarchy. (The word "hierarchy" derives from the Greek *hieros* [ιερός], meaning "sacred"). The most important reference for the hierarchy of angels for the scholastic tradition comes from the Syrian monk and fifth-century theologian Pseudo-Dionysius the Areopagite in his *De Coelesti Hierarchia* [*On the Celestial Hierarchy*].

au sein de l'amour et de l'admiration des peuples ; mon nom se présentera à la postérité, **environné de titres plus sacrés que ceux mêmes des Monarques** qui furent les plus chers à l'humanité […] ». (121-22 [my emphasis])

The king's voice melded with that of the unbounded soldier of God, whose obedience to divine reason would make him "seul véritablement Roi," a position he would assume only upon death:

> […] Bientôt, sans doute, tous les Rois, doués de quelque élévation, tous les peuple capables de quelque énergie, mettront leur gloire à suivre cet exemple sublime; et **je ne serai point le bienfaiteur d'une seule nation; je serai celui du genre humain**; et lorsque […] je finirai **la noble carrière que la providence m'avait tracée**, je dirai à celui qui tient dans sa main la destinée des sujets et celle des rois: Dieu puissant, j'ai rempli autant qu'il était en moi, la tâche que tu m'avais imposée; regarde cette portion de la société humaine que tu m'avais confiée, et **assigne-moi le rang que ta bonté infinie m'a destiné**, dans le séjour immortel de l'ordre, de la justice et de la félicité ». (122)

Such a king would not govern the passions of the people (as had Richelieu[362]), but through his spiritual elevation (which would occasion his worldly humility), "il sera [le Roi] de la raison, de la vérité, de la providence" (ibid.).

[362] As discussed in Chapter 1 (pp. 43-45), the famous preacher Jean-François Senault praised Richelieu in his dedicatory preface to *De l'usage des passions* for the latter's ability to manipulate the passions of the people for the good of government.

Robespierre's ideological definition of good kingship also entailed a new kind of social body: "il est temps de reconnaître que la même autorité divine qui ordonne aux Rois d'être justes, défend aux peuples d'être esclaves, par la raison qu'elle leur ordonne d'être bons et vertueux et d'adopter un ordre de société, qui les conduise à ce but" (ibid.). He summoned the people and their king toward this new political consciousness through a series of disorienting descriptions of mental states unchained from a stable time and place in a generative *mise en abyme* of the lawyer's function as political imagination: "Mais que dis-je? Ils sont passés, sans doute, et sans retour, ces temps malheureux" (111); "Mais n'est-ce point une chimère que je combats? Et un usage aussi inconcevable que celui dont je viens de parler, a-t-il donc jamais existé?" (113); "Mais non; ensevelissons, dans un éternel oubli, ces attentats trop récents des véritables ennemis du Roi et du royaume… Ou plutôt rappelons-en le souvenir, pour rendre d'immortelles actions de grâces au monarque […]" (115) "Voilà, peut-être, le moment unique que nous ait ménagé la bonté de l'être tout-puissant qui fait la destinée des empires; […] Ah Sire, hâtez-vous de le saisir; […]. Oui, Sire, de cette élévation, où vous place la grandeur de vos étonnantes destinées, jetez un regard de commisération sur l'espèce humaine tout entière; et, embrassant l'histoire de tous les siècles et de toutes les nations, voyez partout […]" (119-20). By refusing to assume the conventional position of the lawyer as conduit between the reason of the state and the passions of the people, Robespierre was breaking the lawyer's role as political imagination out from its intermediary position as interlocutor and reconfiguring the political body in the image of his doctrine. In this way, the *Dupond mémoire* demonstrates the inflection point delimiting the work of the Old Regime lawyer, whose eloquence was judged

according to his ability to continually reconstitute the polity according to a scholastic vision of the soul, from the work of metaphysical legislation.

As we already saw in the lightning rod case, Robespierre, like many lawyers, enjoyed ending his pleading in a hypnotic future tense that foretold the conclusion of the judges as though it belonged to God's predetermined plan (indeed, that was very much their task): "Vous ne le souffrirez pas, Messieurs; […] à peine aurez-vous prononcé le Jugement qui doit nous venger […]" (*OC* II: 201). However, this strategy was diffused and diversified throughout the entire Dupond *mémoire*; Robespierre dilated the temporal positions of the narration, moving frenetically back and forth through the past, present, future, regeneration and death, nightmare and dream. The text housed a manifold of tenses that plunged the reader down an almost anarchic path of narration. Through a labyrinth of voices and tense, Robespierre disposed of the lawyer as the special intermediary between the sacred law and his client, to establish Dupond as the voice of the virtuous *citoyen* imbued with irrepressible faith straddling the limit between historical time and eternity:

> [V]ous, nation généreuse, qui seule, entre tous les peuples du monde, avez recouvré, sans révolution funeste […] ces droits sacrés et imprescriptibles, violés, dans tous les siècles, presque sur toute la surface de la terre, écoutez la voix d'un citoyen […] **à qui il n'est plus même en votre pouvoir de donner la réparation que vous lui devez** […] et qui, désormais au-dessus de la crainte et de l'espérance, **placé entre les hommes qui l'ont opprimé et Dieu, qui va le juger,** ne peut vous parler des grands intérêts de l'humanité qu'avec la franchise d'un homme qui ne dépend plus que de sa

> conscience et avec **cette sainte liberté**, que chacun de nous tient immédiatement, de son éternel auteur. (112 [my emphasis])

The intrinsic freedom and theo-political nature traditionally associated with the early modern lawyer was by Robespierre entirely bequeathed to the anonymous citizen.[363] Rather than speak according to the laws, however, Robespierre's citizen claimed to announce the eternal truths of humanity as written by "son immortel fondateur" (112). From this rarified perspective, the narrator could redefine society according to "des fins sublimes" for which man was created, i.e., virtue and goodness, the attainment of which was contravened by man's servitude. Aware of his sedition, Robespierre again dislocated the context of his argument by setting his accuser in opposition to God: "Non la justice et la vérité ne sont point séditieuses et il n'est pas possible de les traiter en criminelles, à moins que l'on ne se sente assez fort pour **faire le procès à ce monarque tout puissant de la nature** […]" (123 [my emphasis]). The spiritual character typical of the early modern legal discursive tradition was distended here such that it entirely supplanted the worldly allegiances that had conventionally flowed from the religious and political hierarchies.

Robespierre's eloquence in his final *mémoire judiciaire* consisted in his emphasis on political and spiritual *élévation* above worldly constraints. The *mémoire* was more than transgressive; Lacretelle's *mémoire* for Sanois, in which he decried the use of *lettres de cachet*, was transgressive. Robespierre's *mémoire* for the Dupond case was transformative in that he used it as a vehicle to excoriate the *lettre de cachet* from a temporal perspective that painted the laws, habits, style of government and French social organization in general

---

[363] Chapter 1 generally discussed the political independence the legal function conveyed to member of the Bar. D'Aguesseau's celebrated 1693 harangue, *L'Indépendance de l'avocat* founded the independence of the lawyer in his conscious submission to the virtue of justice. (*Œuvres choisies*, pp. 170-80).

as deeply regressive due to their rhetorical location in a distant, nightmarish past. The distortion of the *mémoire*'s scope was imposed also by a vertically arranged discourse that brought together in high relief the frightful tedium and black depths of dank jail cells with the holy eternity of a golden afterlife. Robespierre abundantly detailed Dupond's imprisonment as plunged inside a tiny "antre humide et infect, qui n'avait pas six pieds de long sur quatre de large," deprived even of the use of his limbs, which had been "charg[és] de fer" (*OC* XI: 77). For years, Robespierre claimed, Dupond remained shackled in this tiny, dank space "garroté et immobile, sur une couche de paille" (ibid.). The compression of space and abstraction of time were rendered even more palpable in Robespierre's description of Dupond's state of mind, which, despite the prisoner's most valiant efforts, could not escape the depths of despair:

> [I]l ne mesure la marche lente et monotone du temps, que, par la succession des cruelles pensées qui le déchirent; lorsque, tourmenté du passé, accablé du présent, il ne découvre, au loin, dans un avenir menaçant, que des tourments nouveaux, qui s'avancent à la suite des tourments auxquels il est en proie. En vain son âme affaissée cherche quelquefois à se relever, avec l'appui de l'espérance; elle retombe aussitôt, plus douloureusement, sur elle-même; […]. [I]l ne lui reste plus qu'à s'abîmer dans le sein des chagrins affreux qui l'environnent et qui le dévorent. (*OC* XI : 75)

Actual civil life, which occupied the social and political space in between the hell of the jail cell and the peace of heaven, emerged only in the margins of the *mémoire*'s drama. These minor players, i.e., the representation of the actual people of France, were construed both as not being in accordance with the divine will due to their inability to live up to their

natures, as well as cruelly apathetic toward the victims of the corrupt penal system they allowed to persist. The prisoners themselves were described as unable to grapple with the cognitive dissonances rampant in civil life, and whose only privilege was "le droit de douter s'il existe parmi [les Français] des mœurs et des lois" (*OC* XI: 53). Dupond's rhetorical translation from the desperation of the prison to the wisdom of the afterlife served to unshackle the *mémoire* from mundane political constraints, yet through this strategy Robespierre continued to uphold the legal tradition of acting as political imagination. If the Dupond case served as the basis of the *mémoire*, it was in the same way that Proust's madeleine functioned in his *À la recherche du temps perdu* – a necessary entrypoint for the reader's extrapolation from this particular case into (political) eternity.

Of course, Robespierre succeeded in his bid to represent the Third Estate of Artois, and he left for Paris before a decision was rendered for Dupond. In fact, his unfortunate client was destined to wait another two years before receiving any part of his inheritance due to the dissolution of the *Conseil d'Artois* during the Revolution's great project of judicial harmonization. However, on 28 February 1792, the district court of Arras that replaced the old *Conseil* finally ordered Dupond's brother-in-law to pay him restitution plus interest, totaling eight thousand *francs* (Paris 126).

Conclusion

I hope to have demonstrated how Robespierre's legal writing offers literary scholars a uniquely multifaceted discursive object through which to consider the shifting culture of eighteenth-century French legal eloquence. His briefs sit on the edge of what appears to us now as several distinct fields of speech, but which, for a fleeting moment, joined legal posture and literary technologies in a revamping of the already well-known theatrical

synthesis of the poet-legislator. The discursive techniques present in Robespierre's briefs presage a moment of political discontinuity which was to take place in the early years of the Revolution and in which he would play a major part. Well before the Revolution, his rhetoric was constructed not to persuade his audience of something, but rather to enjoin them *to be* something. Assured that once human nature was rid of arbitrary influence, a golden age of reason would surely unfold, he never attempted to fit his clients into any social or hierarchical mold, but rather depicted them from the margins of such organizations, from which they could look back on their case as a small moment in a grand history coming to its final culmination. Moreover, such a salutary event was considered imminent by Robespierre; all the groundwork had been laid out, and the period of construction was upon them: "les moyens de parvenir à ce but sont faciles, certains et familiers à tous les bons esprits; ils ont été développés dans plusieurs ouvrages; il n'est question que de les mettre en œuvre" (*OC* XI: 116).

Interestingly, the political discontinuity of the Revolution did not entail a fundamental discursive rupture for Robespierre; rather, from a comparison of one of his last public speeches before his execution with his early legal brief for Visséry, we find him deploying not only many of the same techniques but also the same image of a reborn people who would be denatured by recourse to traditional modes of thinking. Indeed, Robespierre did not limit revolutionary virtue to the simple protection of humanity against despotism and fanaticism; his project was to act as steward for humanity's transition toward a new moral and political existence. In his speech before the Convention on 18 floréal Year II (7 May 1794), Robespierre described the ascension of the French people from political subjugation as a national, exclusive phenomenon so radical that it severed relations

between the French and everyone else: “Le peuple français semble avoir devancé de deux mille ans le reste de l’espèce humaine; on serait tenté même de le regarder, au milieu d’elle, comme une espèce différente. L’Europe est à genoux devant les ombres des tyrans que nous punissons” (*OC* X: 444-45). French morality had evolved to such a point, claimed Robespierre, that the values associated with social conditions were inverted: “En Europe, un laboureur, un artisan est un animal dressé pour les plaisirs d’un noble; en France, les nobles cherchent à se transformer en laboureurs […] et ne peuvent pas même obtenir cet honneur” (ibid., 445). Politics had been re-ordered to such a degree that subjugation was no longer imaginable by the French *citoyens*: “L’Europe ne conçoit pas qu’on puisse vivre sans rois, sans nobles; et nous, que l’on puisse vivre avec eux” (ibid.). Of course, we know now that Robespierre’s list of national civic merit was more politically aspirational than technically accurate. However, the boldness of the rhetorical strategy should no longer surprise us; to bend the public to an image of the polity had always been the traditional role of the lawyer, and the temerity of Robespierre’s discourse follows not from his technique but from the historical void into which his argument was inscribed.

Robespierre’s 18 floréal speech explicitly borrowed from his legal career precisely because its composition depended upon the epistemological gesture embedded within the metaphysics of traditional legal eloquence. The imagining of an ontological shift was a task he had previously performed as the lawyer for Monsieur Visséry in the lightning rod case over ten years earlier. As discussed previously in this chapter, Robespierre contended there that the paradigm-shifting improvements won in the physical sciences had made the European into a species apart from the Native Americans, allowing the former to dominate the latter *as a god* (page 284). Neither the magistrates nor the law could be permitted to

arrest man's natural ascent in the sciences, which increased his dominion over nature as well as himself. The 18 floréal functioned as the moral pendant to the technological argument of the Visséry case; the French had attained a new plane of political existence that estranged them from the rest of the world. Progress here was not a matter of simple addition, however; Robespierre believed rather that the advances made in the physical sciences had obscured and even possibly detracted from public morality:

> La raison de l'homme ressemble encore au globe qu'il habite; la moitié en est plongée dans les ténèbres, quand l'autre est éclairée. Les peuples de l'Europe ont fait des progrès étonnants dans ce qu'on appelle les arts et les sciences, et ils semblent dans l'ignorance des premières notions de la morale publique. Ils connaissent tout, excepté leurs droits et leurs devoirs. D'où vient ce mélange de génie et de stupidité? De ce que, pour chercher à se rendre habile dans les arts, il ne faut que suivre ses passions, tandis que, pour défendre ses droits et respecter ceux d'autrui, il faut les vaincre. (*OC* X: 444)

Robespierre's most remarkable innovation in what we might hardly recognize as legal rhetoric unless considered in its most abstract sense, was his understanding that to achieve eloquence, he needed to ground the natural law of the Enlightenment in the existence of a transcendent supreme being. However, unlike the Christian God, Robespierre's supreme legislator was not hidden away, shrouded in mystery and doctrinal debate, and forever disappointed by postlapsarian man, but rather quite simply the initial cause of existence from whom all goodness and virtue flowed. By appending the Enlightenment religious cosmology to his brief on *lettres de cachet*, Robespierre brought into high relief what he

described as man's natural inheritance and the dank jail cells in which they had been left to rot. By setting up in the 18 floréal speech an equivalence between moral and technological progress, Robespierre at once issued a theological warning taken from the past, that the free play of the passions would not serve public morality, while simultaneously emphasizing the presence of the enabling conditions that made feasible the dream of lasting political revolution.

Lastly, the rhetorical position assumed by Robespierre for his final client, Hyacinthe Dupond, would be largely reprised in the fashioning of his own political personage. The apocalyptic overtones of a voice detached from worldly concerns from which the virtues of natural man could be extolled and the corruptions of tyrannical governments condemned, created by Robespierre for Dupond, would be absorbed five years later as the Incorruptible seemed to foresee his own death in his speech before the Jacobin club (6 prairial Year II [25 May 1794])[364]: "Moi qui ne crois point à la nécessité de vivre, mais seulement à la vertu et à la Providence, je me trouve placé dans l'état où les assassins ont voulu me mettre; je me sens plus indépendant que jamais de la méchanceté des hommes" (*OC* X: 471). The eloquent indifference to eloquence of the early modern lawyer had transformed into the eloquent indifference to life of the revolutionary politician.

[364] Robespierre had been the object of various attempts on his life; prior to this speech, a young woman was discovered trying to enter the Duplay home where Robespierre stayed, armed with two knives. (*OC* X: 469).

Works Cited

D'Aguesseau, Henri François. *Œuvres choisies du chancelier d'Aguesseau, précédées d'une notice sur sa vie.* Paris: Firmin Didot Frères, 1850. Google Books. Web. March 2020.

Baker, Keith. "Memory and Practice: Politics and the Representation of the Past in Eighteenth-Century France." *Representations* 11 (Summer 1985): 134-164.

Beaumarchais, Pierre-Augustin Caron de. *Mémoires de M. Caron de Beaumarchais* […] *contre M. Goëzman* […], Paris: Ruault, 1774. *Google Books*. Web. March 2020.

Bell, David A. "Lawyers into Demagogues: Chancellor Maupeou and the Transformation of Legal Practice in France 1771-1789." *Past & Present* 130 (Feb. 1991): 107-41. *JSTOR.* Web. March 2020.

Brissot de Warville, Jacques-Pierre. *Bibliothèque philosophique du législateur, du politique, du jurisconsulte; ou Choix des meilleurs discours, dissertations, essais, fragments, composés sur la Législation criminelle par les plus célèbres Écrivains, en français, anglais, italien, allemand, espagnol, &c. pour parvenir à la réforme des Lois pénales dans tous les pays, traduits & accompagnés de notes & d'observations historiques*. Vol. 6. Berlin: n.p., 1782. *Google Books*. Web. December 2019.

Chatelain, Claire. "Le 'je' féminin en procédure civile : un cas du début du XVIIIe siècle." HAL (2018): 1-11. Web. February 2020.

Cicero. *De oratore*. Trans. E.W. Sutton. Cambridge, MA: Harvard University Press, 1942. *Loeb Classical Library.* Web. January 2020.

Cover, Robert. "The Folktales of Justice: Tales of Jurisdiction." 14 Cap. U. L. Rev. 179 (1985). *Westlaw.* Web. January 2020.

Diderot, Denis. *Ruines et paysages: Salon de 1767*. Ed. Else Marie Bukdahl, Michel Delon, Annette Lorenceau. Paris: Hermann, 1995. Print.

Dieudonné, Louis. *Œuvres de Louis XIV*. Vol. 6. Paris : Treuttel et Würtz, 1806. 6 vols. 1806. *Google Books*. Web. March 2020.

Douai, Philippe-Antoine Merlin de. *Répertoire universel et raisonné de jurisprudence*. Vol. 8. Paris: Garnery, 1808. *Google Books.* Web. March 2020.

Dupaty, Charles-Marguerite-Jean-Baptiste Mercier. *Mémoire justificatif pour trois hommes condammés à la roue*. Paris: Impr. de P-D Pierres, 1786. *Gallica.* Web. March 2020.

Edelstein, Dan. *The Terror of Natural Right: Republicanism, the Cult of Nature, and the French Revolution*. Chicago: University of Chicago Press, 2009. Print.

Egret, Jean. *Louis XV et l'opposition parlementaire, 1715-1774*. Paris: A Colin, 1970. Print.

Encyclopédie, ou dictionnaire raisonné des sciences, des arts et des métiers, etc., eds. Denis Diderot and Jean le Rond d'Alembert. University of Chicago: ARTFL Encyclopédie Project (Autumn 2017 Edition), Robert Morrissey and Glenn Roe (eds), http://encyclopedie.uchicago.edu/. Web. March 2020.

Fabre, Jean. André Chénier. *L'Homme et l'œuvre*. Paris: Hatier-Boivin, 1955. Print.

Gallo, Max. *L'homme Robespierre: Histoire d'une solitude*. Paris: Librairie Académique Perrin, 1989. Print.

Gauchet, Macel. Robespierre. *L'homme qui nous divise le plus*. Paris: Gallimard, 2018. Print.

Guillemin, Henri. *Robespierre. Politique et mystique*. Paris: Éditions du Seuil, 1987. Print.

Heidmann Vischer, Ute. "'La représentation exacte d'impressions vives...': le plaidoyer de Georg Forster pour les 'Lettres sur l'Italie, en 1785' de Ch. M. Dupaty." *Versants* 17 (1990): 71-84. *E-periodica*. Web. <http://dx.doi.org/10.5169/seals-259598>. January 2020.

Jordan, David P. *The Revolutionary Career of Maximilien Robespierre*. New York: The Free Press, 1985. Print.

Lacretelle, Pierre-Louis de. *Mémoire pour le comte de Sanois, ancien aide-major des Gardes-Françaises, sortant du Charenton, où il a été détenu pendant neuf mois ; contre ses Accusateurs*. Paris: Simon, 1786. *Google Books*. Web. March 2020.

Leuwers, Hervé. *L'Invention du barreau français, 1660-1830*. Paris: Éditions de l'École des hautes études en sciences sociales, 2006. Print.

Linguet, Simon-Nicolas-Henri. *Mémoires sur la Bastille et sur la détention de M. Linguet*. London: T. Spilsbury, 1783. *Google Books*. Web. March 2020.

Madival, J. and E. Laurent, et. al., eds. *Archives parlementaires de 1789 à 1860: recueil complet des débats législatifs & politiques des Chambres françaises.* Paris: Librairie administrative de P. Dupont, 1862- . https://purl.stanford.edu/bm916nx5550. Web. March 2020.

Malesherbes, Chrétien-Guillaume Lamoignon de. *Œuvres inédites*. Ed. N.L. Pissot. Paris, Hénée, 1808. *Google Books*. Web. March 2020.

Mathiez, Albert. *Études sur Robespierre (1758-1794)*. Paris: Messidor, 1988. Print.

Maza, Sarah. *Private Lives and Public Affairs: the Causes Célèbres of Prerevolutionary France.* Berkeley: University of California Press, 1993. Print.

McPhee, Peter. *Robespierre: a Revolutionary Life*. New Haven: Yale University Press, 2012. Print.

Mercier, Louis Sébastien. *Tableau de Paris*. Vol. 1. Ed. Jean-Claude Bonnet. Paris: Mercure de France, 1994. Print.

Mirabeau, Honoré-Gabriel Riqueti de. *Des lettres de cachet et des prisons d'État*. 2 vols. Hamburg: n.p., 1782. *Google Books.* Web. January 2020.

Pagart d'Hermansart, Émile. *Le paratonnerre de Saint-Omer en 1780: le testament de M. de Visséry, la revanche des échevins*. Saint Omer: d'Homont, 1891. *Google Books*. Web. December 2019.

Paris, J.-A. *La Jeunesse de Robespierre et la Convocations des États-généraux en Artois*. Arras: Rousseau-Leroy, 1870. *Google Books*. Web. March 2020.

Pré de la Porte, Monsieur du. *Le pourtraict de l'Éloquence française avec dix actions oratoires.* Paris: Jean l'Evesque, 1620. *Google Books*. Web. September 2019.

Quintilian. *The Orator's Education*. Edited and translated by Donald A. Russell. Cambridge MA: Harvard University Press, 2002. *Loeb Classical Library*. Web. December 2019.

Riskin, Jessica. *Science In the Age of Sensibility: the Sentimental Empiricists of the French Enlightenment*. Chicago: University of Chicago Press, 2002. Print.

Robespierre, Maximilien. *Oeuvres de Maximilien Robespierre*. Ed. Émile Lesueur. Vol. 2. Paris: Ernest Leroux, 1912. Print. 11 vols. 1910-2007.

---. *Œuvres de Maximilien Robespierre*. Ed. Florence Gauthier. Vol. 11. Paris: Société des études robespierristes, 2007. Print. 11 vols. 1910-2007.

Spinelli, Donald C. and Adrina Garbooshian. "Beaumarchais and Dupaty: some unpublished correspondence." *SVEC* 6 (2002): 117-140.

Strayer, Brian E. *Lettres de cachet and Social Control in the Ancien Régime, 1659-1789*. New York: P. Lang, 1992. Print.

Swann, Julian. "Parlements and Political Crisis in France under Louis XV: The Besançon Affair, 1757-1761." *The Historical Journal* 37.4 (Dec. 1994): 803-828.

Vellay, Charles. “Robespierre et le procès dit du paratonnerre.” *Annales Révolutionnaires*. (January-March 1909): 25-37; (April-June 1909): 201-19.

Vergès, Jacques. *De la stratégie judiciaire*. Paris: Éditions de Minuit, 1968. Print.

Walter, Gérard. *Maximilien De Robespierre.* Paris: Gallimard, 1989. Print.

Warning, Rainer and Michael Morton. “Irony and the ‘Order of Discourse’ in Flaubert.” *New Literary History* 13.2 (Winter 1982): 253-86. *JSTOR*. Web.

Conclusion

Car en effet, si en la société civile on laisse aux Magistrats l'âme, & au peuple le corps, les Orateurs en sont les esprits qui les joignent, accourants à toutes les parties, pour en régler le mouvement.

- Du Pré de la Porte, *Le Pourtraict de l'éloquence française* (1620)

O Peuple souverain! À votre oreille admis,
Cent orateurs bourreaux se nomment vos amis:
Ils soufflent des feux homicides.
Aux pieds de notre orgueil prostituant les droits,
Nos passions par eux deviennent lois […]

- André Chénier, *Ode sur le Serment du Jeu de Paume* (1791)

The role of the barrister would not survive the Revolution.[365] By 1789, the monopoly on legal representation enjoyed by the Order of Barristers was considered incongruous with the ideals of the revolutionary moment, which abhorred both exclusive bodies and rhetorical hierarchies. The legitimation of passion as a mode of judicial veridiction begun during the early Enlightenment was complete, and the search for a truth

[365] "Les hommes de loi, ci-devant appelés avocats, ne devant former ni ordre, ni corporation, n'auront aucun costume particulier dans leurs fonctions" ("Déclaration sur l'organisation judiciaire," (2-11 septembre 1790), Duvergier I: 354-55).

authorized by inner feelings rather than analyses of code meant legal representation was at the disposal of all. Thus legal defense became a universal right in 1791, meaning all citizens could either plead their own case or designate any individual to do so in their stead. The *avocat* was thus replaced by the *défenseur officieux*, who was not formally bound by any standards of preparation or professional rules; they were to act as a friend, providing a "service momentanté, un service d'ami absolument libre" (*Gazette des Nouveaux Tribunaux* III: 95). However, the new government could not *entirely* do away with legal expertise; the instruction of civil suits – a procedural task previously performed by the *procureur* – remained an obligatory step requiring a certain degree of legal know-how. To close the gap, the *Assemblée* created the position of *avoué*, which was open to almost any current member of the legal world – lawyer, judge or *procureur* (Duvergier II: 184-85). Despite the professional possibility provided by the *avoué* role, lawyers (and judges) assiduously avoided it as below their station: "La plupart des anciens avocats n'ont pas accepté d'exercer la postulation, jugée indigne, ou de se mêler à ces procureurs dont ils ont cherché à se distinguer tout au long du siècle" (Leuwers 253). The lawyer class generally preferred to take up roles in the new administration, which often led them to be elected as judges. (ibid., 252-53). Old Regime legal training and culture precluded a direct translation of Old Regime lawyers into the new legal organization.

Against the large body of lawyers and other *hommes de loi* that populated the Third Estate and pushed through the measures abolishing the *barreaux*,[366] Robespierre stood

[366] The vast majority of deputies from the Third Estate were men from the legal profession. For a granular analysis of their educations, financial backgrounds, and political activities, see Tackett, *Becoming a Revolutionary*, pp. 35-47; for an overview of the legal tenor of the political activities of the Revolution, see also Tackett, *The Coming of the Terror* ("Of all the future deputies who published before the Revolution, those writing in the field of legal studies were perhaps the most distinguished. […] Clearly, a legal turn of mind would be one of the most characteristic features of the culture of Revolutionary leadership" (p. 17)).

alone in his principled (but ultimately unsuccessful) defense of the professional lawyer. He was acutely aware of the crucial relationship between legal categories of persons and the constitution of the political body, and though Robespierre had used his position as lawyer to argue time and again for the dissolution of social and political hierarchies, it was for this very reason that he was opposed to the dissolution of the legal order. He argued that this was the only profession available to any man regardless of birth, a fact which had lent barristers the corporate independence necessary to maintain the scales of justice despite the moral corruption of the Old Regime:

> [L]a fonction de présenter les faits aux yeux des magistrats, de développer les motifs des réclamations des parties, de faire entendre la voix de la justice, de l'humanité et les cris de l'innocence opprimée. Cette fonction seule échappa à la fiscalité et au pouvoir absolu du monarque. La loi tint toujours cette carrière libre à tous les citoyens […] tant le droit de la défense naturelle paraissait sacré dans ce temps-là […]. (Robespierre, *AP XXI*: 466 [25 November 1790])

Robespierre had gained his political voice by virtue of his activity within French legal society and its particular culture. He went so far as to attribute the Revolution itself to the work of the barrister:

> [S]uis-je du moins forcé de convenir que le barreau semblait montrer encore les dernières traces de la liberté exilée du reste de la société; que c'était là ou se trouvait encore le courage de la vérité, […] enfin ces sentiments généreux qui n'ont pas peu contribué à une Révolution qui ne s'est faite

dans le gouvernement que parce qu'elle était **préparée dans les esprits**. (ibid. [my emphasis])

Though Robespierre's ideal lawyer closely resembles a political insurgent for us today, it is my hope that this thesis has succeeded in problematizing such bright-line categories by recasting the role of early modern legal eloquence in its proper interpretive context. Through close readings of seventeenth- and eighteenth-century legal eloquence, we have discovered that implicit in the practice of traditional legal rhetoric was the assumption that legality and morality shared common ground and were meant to interact with the public via the lawyer through appeals to imagination. Indeed, the task of representing a client before the court of law had always implied the secondary function of preparing *les esprits* of the lawyer's lay audience. Legal eloquence had thus been conventionally bound to a judicial theology, as described in Chapter 1, which ministered to a sense of truth as revealed by God and discoverable through time-honored modes of inquiry. This circuitry formed the eloquent economy of the law courts for hundreds of years. In this way Robespierre's eloquence was continuous with the traditional legal eloquence. His innovation consisted in the reversal of rhetorical and political priority; the people would no longer be cajoled toward submission to the law through a paternalist eloquence, but rather the law would appear as an excrescence of the people's natural virtue. This reversal, as I argued in Chapter 2, was made possible through the advent of Enlightenment empiricism and the decomposition of the religious model of the soul, which pluralized the potential loci of authority away from God and king and thus generated new possibilities for eloquent discourse. As shown in Chapter 3, the epistemological consequences of the Enlightenment within the legal culture could be generally reduced to

two modes of eloquence, namely the (silent) eloquence of a written code reduced to simple principles, whose composition was as yet to unfold but whose contours could be plainly envisioned (if not necessarily agreed upon) by reformers, or the eloquence of enthusiasm that put disinterested passion on display for an undifferentiated audience. We thus glimpse in the margins of the Lacretelle-Pastoret debate that the constitution to come would be either based on the authority of the written law or public instantiations of the people's corporate virtue. These two methods of judicial determination, once united on transcendental grounds, became incommensurable in the eloquent pleadings of Robespierre, for whom the laws up until that point had no special claim to truth but were mere products of happenstance. However, the breakdown of legal epistemology was not a crisis for Robespierre. The vacuum of authority generated by the century-long process of disjoining morals from the law offered rather a moment of divine renewal whereupon the immanent transcendence of the traditional judicial concept of public opinion would be made manifest in the general will. During the Revolution, morality and legality, the two modes of Old Regime eloquence that had once worked in lockstep at the *palais de justice*, would ground distinct and deeply antagonistic political positions.

Works Cited

Duvergier, J.B. *Collection complète des lois, décrets, ordonnances, règlements, avis du Conseil-d'état*. 17 vols. Paris: Guyot et Scribe, 1824-71. *Google Books.* Web. March 2020.

Madival, J. and E. Laurent, et. al., eds. *Archives parlementaires de 1789 à 1860: recueil complet des débats législatifs & politiques des Chambres françaises.* Paris: Librairie administrative de P. Dupont, 1862- . https://purl.stanford.edu/bm916nx5550. Web. March 2020.

Gazette des Nouveaux Tribunaux ou Recueil de jurisprudence et de législation. Vol. 3. Paris: Perlet, Couret, 1792. 17 vols. 1791-94. *HathiTrust.* Web. February 2020.

Leuwers, Hervé. *L'Invention du barreau français, 1660-1830*. Paris: Éditions de l'École des hautes études en sciences sociales, 2006. Print.

Tackett, Timothy. *Becoming a Revolutionary: The Deputies of the French National Assembly and the Emergence of a Revolutionary Culture (1789–1790).* Princeton, NJ: Princeton University Press, 1996. Print.

Tackett, Timothy, and James E. Strick. *The Coming of the Terror in the French Revolution*. Cambridge, London: Harvard University Press, 2015. *ProQuest*. Web. March 2020.

Woloch, Isser. "The Fall and Resurrection of the Civil Bar, 1789-1820s." *French Historical Studies* 15.2 (1987): 241–262. *JSTOR*. Web. March 2020.

Biographical Statement

Nicole Karam was born in Rochester, New York in 1986. She graduated from the University of Notre Dame with a B.A. in philosophy and French in 2008. During the 2006-07 academic year, she studied at the Université catholique de l'Ouest in Angers, France. She went on to earn her J.D. at the State University of New York at Buffalo School of Law in 2011, during which time she spent a semester at the Faculté de droit at the Université de Nice. In 2013, she received her Master's degree in French and Francophone Studies at Syracuse University, where she delivered the commencement speech. In August 2013, she joined the graduate program at Johns Hopkins University. During the 2016-17 year, she studied at the École normale supérieure in Paris. As a Ph.D. candidate, she spent a period of research at Worcester College, Oxford University and received a Singleton Center Fellowship for research in Paris. She also designed and taught a course on eighteenth-century French law and literature, for which she received a Dean's Teaching Fellowship. During the 2018-19 year, she was a fellow at the Alexander Grass Humanities Institute.