

"E proboscis unum: Law, Literature, Love, and the Limits of Sovereignty"

### **Abstract**

The phrase "e proboscis unum," a parody on the more familiar Latin phrase that means "out of many one" is taken from the courtroom scene of the 1964 Broadway musical Hello, Dolly!. In this scene, the entire cast is under arrest for disturbing the peace, but the young impoverished clerk Cornelius Hackl takes the opportunity to proclaim his love for the milliner Irene Molloy in the song "It only takes a moment." The matchmaker Dolly pokes fun at the judge, the figure of authority, by commenting on the size of his nose, "e proboscis unum." The bickering, fighting crowd, however, in spite of the parody, are transformed into a community as they witness the young man's declaration. As this episode shows, popular culture reads the law and the courts as making possible a space for personal transformation and transformative sociality. The recent debate about same-sex marriage in Massachusetts shows that both individual persons and the law itself are open to a process of mutual transformation. The paper uses Hello, Dolly!, the 2003 Massachusetts Supreme Court decision on same-sex marriage, and Shoshana Felman's The Juridical Unconscious to argue that the study of law and literature is crucial in the current academic environment in which many critics, influenced by Giorgio Agamben, argue that law and the courts are merely the space for the exercise of the state's sovereign power to carry out punishment.

In Homo sacer: Sovereign Power and Bare Life Giorgio Agamben

provocatively argues that the basis for the state's protection of human "life is the possibility of destroying it." The constitution of sovereign power is the ability to decide life and death. Agamben provides three fundamental theses at the conclusion of his work:

1. The original political relation is the ban (the state of exception as zone of indistinction between outside and inside, exclusion and inclusion).
2. The fundamental activity of sovereign power is the production of bare life as originary political element and as threshold of articulation between nature and culture, *zoe* and *bios*.
3. Today it is not the city but rather the camp that is the fundamental biological paradigm of the West (Agamben 1998).

The way that political life, or sovereign power, also called state power-- creates itself is by expelling a part of itself, which it defines as "bare life." Bare life marks the constantly shifting boundary between what and who is included in political life, and its protections and opportunities, and who is not. Andrew Norris, explicating Agamben, writes "Politics thus entails the constant negotiation of the threshold between itself and the bare life that is both included within and excluded from its body" (Norris 2000). The state of exception, or, the boundary space, is the all-important defining moment of political life for Agamben.

Bare life means human life as nothing more than a mere instrument that performs labor and, as Agamben says, can be killed, but not sacrificed. Bare life is the life of "homo sacer," the "sacred" human. The concentration camp inmate, stripped of all rights, outside

of all law, and reduced to a status of a "living corpse"-- is the exemplar of bare life for Agamben. The model of the "living corpse" comes from the discussion of the concentration camp in Hannah Arendt, on whom Agamben significantly depends. In The Origins of Totalitarianism Arendt relates the camp inmate to the citizen of the totalitarian state: "the human specimen reduced to the most elementary reactions, the bundle of reactions that can always be liquidated and replaced by other bundles of reactions that behave in exactly the same way, is the model 'citizen' of the totalitarian state; and such a citizen can be produced only imperfectly outside the camps" (Arendt 1973). For Agamben the "bundle of reactions" is the model citizen of and the condition of possibility for the citizen of any state, any form of political life. While recognizing some differences between totalitarian and democratic states, Agamben defines sovereign power as totalitarian power. The possibility of safeguards, limits, checks, and balances is excluded.<sup>1</sup> Agamben writes that "the categories whose opposition founded modern politics (right/left, private/public, absolutism/democracy, etc.) ... have been steadily dissolving to the point of entering today into a real zone of indistinction" (Agamben 1998). Human beings in Agamben's description of state power are incapable of any social relation. The term "agency" loses all relevance. There is no fellowship, neighborliness, community, or solidarity in Agamben's vision of the state. Life is always and only the ongoing process of useless labor and death, lacking in the shape and meaning that events would provide, devoid of employment. The chronotope of this world is a blur or steady state, since the only completed form of action is death. Narrative fails in such a context, because there are simply no stories to tell. Nothing happens. Law, and law's stories, would appear only as a screen for the exercise of violence, the sovereign act of defining the state of exception.

Agamben's deconstruction of law threatens the law and literature movement, traditionally oriented towards story, language, and interpretation. Framing law in the context of narrative, identifying the need for more storytelling in the legal context, diagnosing the problematic nature of first-person, confessional narrative, and calling for more emotion in law—are some of the ways that the law and literature movement has left its mark on the study and practice of law.<sup>2</sup> As has been argued elsewhere, the goal of the law and literature movement has been to humanize the law (Pantazakos 1995). If however, the focus is to shift away from stories to bodies and biopower, if all stories are merely the traces left by power's footsteps, then such issues as narrative, language, and emotion hardly seem relevant. The study of law should logically collapse into the study of violence. Violence, and the suffering it brings, destroys language and meaning, as Elaine Scarry and Emmanuel Levinas have argued. Such literary issues as the multiplicity and instability of meaning, intertextuality, and irony would have little importance-- let alone the more traditional questions of beauty and the aesthetic—for the political world as Agamben defines it.

An examination of marriage in American legal and popular culture, however, reveals that the expressive, emotional, and ethical potential of law should retain their importance as objects of not only of study but also as vital to practice. This paper challenges Agamben and defends the humanizing impulse of the law and literature movement by focusing on the problem of marriage.<sup>3</sup> It is not only that attention to language, literature, and narrative humanize law, which would remain otherwise merely formalistic or scientific. I am arguing instead that law itself includes the possibility of open-ended meaning. Law, in other words, has-or, can have-- the qualities that are more

typically associated with literature, and recent developments in marriage law reveal that potential .

It is a commonplace to say that marriage is the foundation of society, and to invoke this cliché suggests a backward looking and traditional society, in which marriage is heterosexual marriage, women are confined to the home, and an unruly population disciplined by the heavy hand of state authority. There are, however, other ways of defining the common thread between marriage and society. In exploring marriage as a form of association freely chosen between two people, it is possible to ask a broader question about law and the state that goes beyond this image of a hierarchically ordered world. Is the basis for both marriage and the state nothing more than violence, to follow Agamben's line of analysis, or is the basis something having to do with a contractual, verbal agreement? How does access to marriage, and the processes of inclusion and exclusion define what marriage is? Agamben reduces the boundary between private and public to a zone of indistinction in which sovereign power dominates. I argue for a different relation between the public and the private. The public institution of civil marriage makes possible a range of particular meanings in private life. It affords a form of human expression and human relatedness not easily achieved outside the sanction of the law. In this civil marriage, the law's impact on subjectivity is not merely the regulation of bodies and populations. My argument is based on three readings: the 2003 Massachusetts Supreme Court decision regarding same-sex marriage, Shoshana Felman's discussion of Tolstoy's "Kreutzer Sonata" and the O. J. Simpson trial, and the Broadway musical Hello, Dolly! (1964), which tells the story of a matchmaker, Dolly Levi, and her clients.

Both the Massachusetts decision and the Broadway musical take cognizance of the

role of power and constraint in the lives of individuals. The Massachusetts decision in particular defines marriage as a creature of state, or, to use its language, "police power." The musical also reveals, albeit humorously, an appreciation of the central role of police power in making the pursuit of happiness possible. The young clerk, Cornelius Hackl, virtually a slave to his employer, decides to "live" for an evening. He defines "living" as eating a good meal, having an adventure, almost getting arrested, and kissing a girl. The law plays a central role in Cornelius's definition of "living," or, the good life, because transgressing the law makes for the good life. The fact of state power, and the fact of bare life, do not, however, diminish the emotive, expressive, and transformative potential of political life and legal institutions. The Massachusetts decision, furthermore, suggests that individuals can transform institutions in significant ways. In the Massachusetts decision the exception produces not only more "bare life" in Agamben's sense, but instead, more political life in a positive sense, more opportunities for fulfillment.

The reason that totalitarian states and democratic states are fundamentally the same, in Agamben's view, is that they share the same object, "bare life." It is not only in totalitarian regimes that private life, family matters, leisure, and health are regulated. What seems like a safeguard against the incursion of governmental power into everyday life is in fact the opposite. Agamben writes: "It is almost as if, starting from a certain point, every decisive political event were double-sided: the spaces, the liberties, and the rights won by individuals in their conflicts with central powers always simultaneously prepared a tacit but increasing inscription of individuals' lives within the state order, thus offering a new and more dreadful foundation for the very sovereign power from which they wanted to liberate themselves" (Agamben 1998). The argument about the duality of the fight against the

intrusion of government power comes from Foucault. Agamben relies on Foucault's insight that individuals are caught in a double bind: the techniques which produce the individual as individual also produce the state's political power. To use Foucault's language, the "technologies of the self" and the "political techniques" of state power intersect (Agamben 1998). Language, of course, may be used in service to the technologies of the self.

Marriage is an ideal test of Agamben's argument, because as an institution it combines three realms: (1) the body, biology, sexuality, and procreation; (2) law, license, and regulation; and (3) expression, cultural meaning, and speech. It is a form of contract and it can be an arena for violence. The phrase "I now pronounce you husband and wife" is the prime example of what John Austin called performative speech, words that not only posit some quality about something, but actually change the state of affairs, and thereby offering an instance not of biopower, but language power—and lasting literary significance. Marriage, and its failures, has been the central theme of the classic nineteenth century novel, including such works as Madame Bovary and Anna Karenina, both of which offer a strikingly negative picture of marriage.<sup>4</sup> I will return to this issue later. These novels have not traditionally appeared in the law and literature canon, which has favored instead such works as "Billy Budd" and The Brothers Karamazov, because they more directly address the problems of law and justice. The new importance of bodies, gender, and sexuality as matters of legal regulation means that marriage can play a central role in debates about state power and law .

The Massachusetts decision is fundamentally a debate about what marriage is, and provides a useful overview of the changing history of marriage. It is significant that the disagreement between the majority opinion and the dissent fall along the lines suggested by

Agamben's claims. The opinion in favor of granting marriage licenses to same sex couples separates marriage from procreation, and thus shifts the definition of marriage away from the state's regulation of procreation. A reading of the majority opinion reveals an emphasis on aspects of human existence that transcend "bare life." First and foremost among these human qualities is dignity. The extension of marriage to same-sex couples is consistent with the Massachusetts Constitution, "which affirms the dignity and quality of all individuals"(2003). The opinion asserts that the U. S. Supreme Court that the Fourteenth Amendment protection of human dignity "precluded government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner" (2003).

Notwithstanding the emphasis on the personal, private, and individual nature of the choice of a marriage partner, the majority opinion acknowledges the central role of state power in the institution of civil marriage. The state enters the bedroom. "In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State" (2003). Without using the terms "biopower" or "biopolitics" the opinion draws a direct line from the state's regulatory capacity through the institution of marriage to the health of the citizenry. Again, the opinion affirms "Civil marriage is created and regulated through exercise of the police power" (2003). The object of regulation is the collective body of the population and the individuals who constitute it: civil marriage " is central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data" (2003). The role of civil marriage in the regulation of the bodies of the



population, however, does not diminish the personal, emotive, and ethical dimensions of marriage:

Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. 'It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects' (2003).

The last line is from the Griswold case, which prevented the State from barring the use of contraceptives among married couples. The 2003 Massachusetts majority opinion stresses that marriage offers the opportunity for recognition, interconnectedness, reciprocity, and individuality not available by any other means and not flattened out or even significantly reduced by the role of State power in civil marriage, which the opinion fully acknowledges to be central. Again, the opinion clearly and emphatically identifies civil marriage as a creature of State power and names the State as one of the three partners in any civil marriage.

The disjuncture between the celebratory, personal, private, and expressive value of marriage, on the one side, and the role of the State in using civil marriage to regulate conduct, identify individuals, and track data, on the other side-- does not disturb the overwhelmingly positive view of civil marriage in the opinion as a whole. It would seem that civil marriage is precisely an instance of the double bind I discussed earlier, that is, "the technologies of the self by which processes of subjectivization bring the individual to bind himself to his own identity and consciousness and, at the same time, to an external power" (Agamben 1998). The Massachusetts Supreme Court decision, however, finds that

life inside the double bind has more material advantages and more opportunities for happiness than life outside it. According to the majority opinion, greater inclusivity changes the nature of the institution of civil marriage, but the harm done to individuals who would otherwise be excluded outweighs the potential harm caused by the change.

The dissent, in contrast, minimizes the personal dimension of marriage and enhances its public and State importance. Marriage, in this view, amounts to little more than the exercise of state power over the bodies of individuals. According to J. Cordy, the author of the dissent, marriage laws in Massachusetts, based on English common law, "were enacted to secure public interests and not for religious purposes or to promote personal interests or aspirations. The primary goal of marriage is procreation and not "the expression of emotional support and public commitment" (2003). The dissenting opinion goes on to say that "the institution of marriage has systematically provide for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized." The language of a case from 1810, which the defense quotes, emphasizes the controlling, regulatory effect of marriage: "intended to regulate, hasten, and refine, the intercourse between sexes; and to multiply, preserve, and improve the species" (2003). The object of marriage law, this language strongly implies, is not individuals and their happiness, but the human population generally. The State's regulation of marriage is a clear instance of the exercise of what Foucault and Agamben would call biopower.

The dissent conjures up a promiscuous world of rampant heterosexual intercourse leading inevitably to the birth of children. Without marriage, fathers would be incapable of being identified, and children would be left without care. The opinion states "a society

without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic." The process of connecting fathers to children and husbands to wives has another benefit: marriage is the basis for a stable social order; marriage is the "foundation of the family and of society, without which there would be neither civilization nor progress." Binding women to men binds the society together. Just beneath the surface of the text is a claim about the justification for patriarchal power. The real threat to a stable society seems not to be same-sex marriage, but women's reproductive power, which, left on its own, creates chaos. Indeed, feminist attacks on the institution of marriage emphasize its role in the subordination of women, and the correlation between marriage and violence against women.<sup>5</sup>

I want to consider this argument in relation to the broader claims I am trying to make about marriage as a model for a form of association. The arguments about law and expressiveness, emotion, dignity, and human connectedness hardly mean much if we close our eyes to the fact of violence in marriage. The potential for new forms of power and domination to surface even as marriage grows more inclusive is also an issue. This last argument has been made by Anna Marie Smith, who writes that same-sex marriage "might enlarge the privileged married class and contribute to the further marginalization of the unmarried class" and "might contribute to new forms of domination" (Smith 2001). It seems that relations of power and domination are inescapable, however, it also seems that institutions have the capacity to change to respond to the articulation of individuals' desires for their particular forms of happiness. In the Massachusetts ruling on same-sex marriage, making new law does not mean merely reproducing the body politic. The group of people who previously constituted the exception, those who wished to enter marriages but could

not, because they chose same-sex partners, now can enter marriage, which itself changes. The change is not merely that same-sex couples may be married, but that marriage is no longer defined primarily in terms of procreation. In Agamben's logic, political life defines itself by what it places along its threshold, namely, bare life. In the Massachusetts decision, in contrast, the exception is not proving the rule, as the saying goes, but changing the rule. Marriage is less a domain of power and more a performative speech act in which two individuals create a relation between themselves by affirming it in public. The particular nature of the relation is up to them, as well as the subsequent tasks of re-affirming and transforming their association. The Massachusetts decision shifts the emphasis from prescribing a particular content to marriage, namely, the procreation and raising of children, while ascribing far greater importance to the performative nature of the marriage ceremony. The bond of marriage is something that is made in the saying of it, and not in the control exercised over it by state power. The version of state power proposed by Agamben as the hidden truth of all forms of society denies the possibility of subjects forming associations with one another, since the decision about inclusion and exclusion rests entirely with the sovereign.

The question about the potential for violence in marriage requires a fuller discussion, however. The two alternatives are civil marriage as a relation of power and marriage as a form of association that affords the possibility of happiness, by allowing for the emotive, expressive, ethical dimension of human existence to be articulated (the public celebration that the Massachusetts decision points to as one of the central features of marriage). Since I am emphasizing the dimension of expression and language, it is pertinent to go back to some of the literary works that I mentioned earlier. In comparison to

such canonical works of literature as Tolstoy's Anna Karenina and especially his subsequent work The Kreutzer Sonata, the Massachusetts opinion looks extremely naïve. Dolly and Anna are trapped in marriages which give them little happiness, and even the happily married Levin has to hide rope and guns because the temptation to commit suicide is so strong. After her disappointment in love, Kitty comes to the conclusion that marriage is nothing more than the exchange of bodies, as in a market. In Anna Karenina the first sexual encounter between Anna and Vronsky is described as something akin to murder: "And as the murderer falls upon this body with animosity, as if with passion, drags it off and cuts it up, so her covered he face and shoulders with kisses" (Tolstoy 2000). I have argued elsewhere that what kills Anna is not her unhappy marriage to Karenin per se, but the loss of her role and identity in society: as "no one's wife" (to use Dolly's language) she has no way to connect her private life, which includes more than just her passion for Vronsky with her role in public. She is deprived of self and voice.

There is a common thread between Anna Karenina and the 2003 Massachusetts decision, because both see marriage as the joining of a particular kind of private sphere with the public. The two are inextricably mixed, but not to produce Agamben's zone of indistinction in which bare life and political life are one and the same. Again, the particular crossing over between the public and the private that I am stressing is an occasion for happiness and an ethical connection between two people, and the deprivation of this opportunity, according to both Tolstoy and the Massachusetts decision, is the loss of this opportunity.

Tolstoy returned to the problem of marriage in his later work, The Kreutzer Sonata. Here the dismal reading of marriage as the exchange of women's bodies and as an

opportunity for nothing more than violence takes center stage. On this reading, marriage provides a very poor model for other forms of voluntary association, because it is fundamentally an institution built on quicksand. The discussion of this work that most closely suits my broader purposes in terms of law and society is that provided by Shoshana Felman in The Juridical Unconscious: Trials and Traumas in the Twentieth Century. Felman reads Tolstoy's "Kreutzer Sonata" together with the O.J. Simpson trial, seeing in both the fiction and the trial law's failure.

"The Kreutzer Sonata" was first published in 1891, although it circulated in other forms beginning in 1889 (Møller 1988). Its appearance, as Felman argues, caused tremendous controversy. Tolstoy, like Agamben with respect to political life, was interested in stripping away the false veneer of family life and marriage to reveal its underlying horrific core. The truth of marriage is economic exchange and violence. This position is articulated by Pozdnyshov, who murdered his wife out of jealousy. According to the murderer, his act was only the logical extension of what marriage is to begin with: a form of murder. Tolstoy's hero, in a passage Felman quotes, says:

They asked me in court how I killed her <...> Imbeciles! They thought I killed her that day, the fifth of October, with a knife. It wasn't that day I killed her, it was much earlier. Exactly in the same way as they're killing their wives now, all of them.<sup>6</sup>

This thorough indictment of all of culture, typical of late Tolstoy, is similar to Agamben's unmasking of the secret relation between the sacredness of life and bare life, the secret relation between totalitarian and democratic society. In Tolstoy's story, the law protects marriage and sanctions murder, yet marriage is nothing more than a form of murder. For

both Tolstoy and Agamben, there is no difference between what the law enshrines and protects and what it excludes.

For Tolstoy's murderer, there is no basis for marriage aside from violence. Felman stresses Tolstoy's use of the term "abyss," citing several passages in which Pozdnyshev states that an abyss lay at the heart of the relation between himself and his wife, as in the line "It all happened because of that terrible abyss there was between us." The gap that he is referring to is never spelled out concretely, but it has to do with the difference in power between men and women. The fundamental violence and alienation separating women and men (and blacks from whites in Felman's discussion of the O.J. Simpson trial) is more than a mere set of superficial disagreements or differences of view. It makes individuals in society monsters to each other.

Law, according to Felman, does not recognize, much less address this underlying and permanent upheaval in human relations. Felman writes:

In its pragmatic role as guardian of society against irregularity, derangement, disorganization, unpredictability, or any form of irrational or uncontrollable disorder, the law, indeed, has no choice but to guard against equivocations, ambiguities, obscurities, confusions, and loose ends.<...> Under the practical constraints of having to ensure accountability and to bring justice, the law tries to make sense of the abyss or to reduce its threat (its senselessness, its unintelligible chaos) by giving it a name, by codifying it or by subsuming its reality (which is inherently nameless and unclassifiable) into the classifying logic and into the technical, procedural coherence of the trial (Felman 2002).

Felman's image of the law is surprisingly similar to its definition in the dissenting opinion

of the Massachusetts Supreme Court decision on same-sex marriage. Both represent the law as bringing order to chaos. I quote from the dissent: "The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic (2003). Felman is far less sanguine about law's efficacy, because she sees the chaos erupting within the legal institution of marriage and within the legal process of the trial, yet she and the Massachusetts dissent share the view that law, particularly when it comes to marriage, is or seeks to be a form of control over what would otherwise be the unruly, chaotic, and incoherent sexual life of individuals. In both the Massachusetts dissent and in Felman human beings are fundamentally incapable of forming bonds between themselves. They cannot form associations and cannot function in any kind of public. In this regard—in the absence of the potential for community—Felman and the Massachusetts dissent, to a certain extent, share Agamben's dismal view of political life without foundations. For Agamben, as we recall, rejects the image of the human being in political life as a rational, deliberative creature who freely enters relations with others. In contrast, the model citizen of Agamben's political world is bare life, the replaceable bundle of reactions.

It is only a short set of steps from Felman's foundationless and fundamentally chaotic law to Agamben's argument about sovereign power. To help explicate this point, I turn to Andrew Norris's discussion of Agamben. As Norris points out, the figure behind Agamben, in addition to Arendt, whom Agamben does not mention, but relies on heavily nonetheless is Carl Schmitt. The sovereign, or, sovereignty, in Agamben as in Schmitt, defines the boundary between the realm of law and what is outside it (bare life). Law does not work when there is chaos. Law only works when there is such a thing as everyday,



normal life. Norris cites Schmitt, who writes "There is no norm applicable to chaos. For a legal order to make sense, a normal situation must exist, and he is sovereign who definitively decides whether this normal situation exists."<sup>7</sup> If all we have is chaos, groundlessness, and a lack of foundations, Felman, Agamben, and Schmitt agree, mere law alone is helpless to do anything.

According to Felman literary texts unmask the chaos and trauma that the law attempts to hide. Literature, in contrast to law, enables us to encounter what the law covers over, as Felman puts it, "the purpose of the literary text is to show or to expose again the severance and the schism <...> to wrench apart what was precisely closed or covered up by the legal trial" (Felman 2002). The literary work "transmits the force of the story that could not be told (or that failed to be transmitted or articulated) in the legal trial" (Felman 2002). For Felman, the literary text uses language to reveal what the legal trial's use of language conceals: the violence that is present in marriage. Pozdnyshev's story—the literary work and the confession of its hero—is a form of "discourse and a speech act <...> a speech performance" that continues to have significance beyond Tolstoy's time because it conveys the underlying trauma of gender, incapable of being addressed or reconciled by law and thereby doomed to repetition. I understand Felman to be saying that Tolstoy's literary work stages a speech performance in another sense, having to do with the narrative structure of "Kreutzer Sonata." Pozdnyshev's confession is embedded in the first person narrative of a traveler on a train who hears his story. The confession is a performance because it is a reiteration. Acquitted by a jury, but deprived of his children, his life becomes an endless train journey in which he confesses over and over again, without ever being absolved. The literary work exposes in its repetition what the law is condemned to repeat, the

fundamental trauma that underlies political life.

The relation between law and literature that Felman argues for is directly opposed to the claims I am making. Law imposes order both by means of language and by means of force on that which fundamentally escapes its control. Literary language splits open, exposes, and performs what law closes, orders, and hides. Tolstoy's "Kreutzer Sonata" and the O. J. Simpson trial reveal that literary language is true, but law is false—not because it is duplicitous, but because it is unequipped to handle the violence that grounds the traumatic relation between men and women and blacks and whites. Thus far I have argued that law is not merely the imposition of controls over unruly bodies. Civil marriage is a kind of statement, a use of language to articulate, celebrate—as the 2003 Massachusetts Supreme Court decision would have it—and create an ethical and emotive association between two individuals. Civil marriage is a promise made between two people and not a form of control imposed from the outside. It is an open-ended speech act whose language shares the qualities that Felman ascribes uniquely to literature. Law's language, in this reading of marriage, is neither true nor false, because it is a performative speech act. We don't just have groundlessness, chaos, the abyss, and trauma. We also have the power of language.

Thus far I have relied on the 2003 Massachusetts Supreme Court decision to emphasize the aspects of marriage that have to do with speech and language as opposed to bodies. Marriage is the (public) commitment of two people to (privately) pursue happiness together. I am inspired to use this language by Stanley Cavell's 1981 Pursuits of Happiness: The Hollywood Comedy of Remarriage, a study of philosophy and American films of the 1930s and 1940s.<sup>8</sup> There are striking similarities between the 2003 Massachusetts decision

on same-sex marriage and Cavell's definition. Marriage, in both, is a way of life and a form of association between people that joins the private and the public in a particular way. Its fundamental purpose is not procreation, but association, and it is in this regard, as a form of association—not as a power hierarchy—that it is in itself a "little community." The "form of association" has an erotic dimension, but the meaning of marriage, according to Cavell, is not to be reduced to this aspect alone. Cavell cites Milton's discussion of the meaning of marriage to buttress his claim. According to Milton, God solved the problem of Adam's loneliness by giving him a spouse to talk to, in Milton's words, which Cavell cites, "in God's intention a meet and happy conversation is the chiefest and noblest end of marriage" (Cavell 1981). Cavell does not reference the 1965 Griswold decision, which, again, declares that marriage is "an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." He echoes the thrust of this decision nonetheless when he describes marriage as achieving "purposefulness without purpose" (Cavell 1981). There is no pre-ordained content to the association called marriage, what is more important is that the two spouses want the association. Human beings make and re-make themselves by the pledges and agreements they make with each other. In contrast, in Agamben's vision of the state, it is sovereign power that decides who has the privileges of being human and who is merely bare life. The sovereign's word is law. For Cavell, there is no ground or foundation for this mutual constitution of marriage, or of democratic society, for that matter, and in this regard he differs significantly from Robert Cover. Cover argues for the foundational significance of the narratives that give law and legal institutions meaning (Cover 1983). The groundlessness, however, does not signal for Cavell, as it does for Agamben, the state of

emergency and the subsequent sovereign decision, and nor does it signal law's permanent state of trauma, as in Felman. The association without content, purpose, or foundation only requires the pledge and consent between the individuals who make the marriage and the society.

The approach to marriage in Hello, Dolly! is similar. The musical, first performed on Broadway in 1964, is based on Thornton Wilder's play, "The Matchmaker."<sup>9</sup> Wilder wrote, "My play is about the aspirations of the young (and not only of the young) for a fuller, freer participation in life" (Wilder 1957). In the play and the musical that was based on it, marriage is the vehicle for this "fuller, freer participation in life." Life without this possibility is reduced to the endless and uneventful cycle of production, consumption, and death that is characteristic of Agamben's bare life. Cornelius Hackl (whose name reveals his instrumentality; "Hackl" suggests one who chops, or, hacks) is a thirty-three year old clerk. His entire existence is defined by his employer's grain and feed store. Cornelius goes to bed at nine in the barn room of the store, rises at six to mind the supplies, never has an evening off, and never sees his wages, because Horace Vandergelder, his boss, keeps them. The first appearance that Cornelius makes emphasizes his lowly, downtrodden existence. Horace bangs his foot on the floor, and a trapdoor opens to reveal the clerk, who says, "You stomped, Mr. Vandergelder?" If Cornelius's life does not conform to the camp inmate's, it does correspond to Agamben's model of bare life in his replacability, lack of individuality and freedom, and his confinement to his job. Time has no shape in Mr. Vandergelder's feed store; Cornelius is repeatedly promoted to chief clerk. The repetition of his daily life is only underscored by the repetition of his meaningless advancement. He merely exists, but doesn't "live"—this is the play's term for "the good life," which it defines

in a passage from which I have already quoted, "really living" means, according to Cornelius, having a good meal, being in danger, risking arrest, spending all your money, and kissing a girl. Cornelius accomplishes everything on his list. To merely get all these things and experiences, however would not be to change anything. Nothing new would enter his world. Cornelius's concept of really living undergoes a significant shift. The musical includes a notion of a public, communal life in its vision of what the truly living means. In order to achieve his private happiness, the clerk has to enter the public realm.

The highlight of the musical, from the perspective of this paper, is not Dolly's triumphant return (the song, "Hello, Dolly!") to the Harmonia Garden's restaurant, but Cornelius's moment of transformation. Having fallen in love with the milliner Irene Malloy, he declares his love to her from the prisoners' dock in a courtroom. He and all the other patrons of the Harmonia Gardens are under arrest for disturbing the peace. His song, "It Only Takes a Moment" describes the transformation that love brings by emphasizing time. Cornelius searches for the right word to describe the instant of time that it took to fall in love, rejecting "minute" and "second" as too long before settling on "a moment."

It only takes a moment  
 For your eyes to meet and then  
 Your heart knows in a moment  
 You will never be alone again  
 It only takes a moment  
 To be loved a whole life long  
 And that is all  
 That love's about

And we'll recall when time runs out  
 That it only took a moment  
 To be loved a whole life long  
 (Stewart & Herman 1964)

In the musical, the articulation of what "only takes a moment" requires a public space. The courtroom setting for this song reveals an understanding of law as affording the opportunity for the expression of the emotive and ethical dimensions of human existence and for their articulation *to someone*. The law gives a public space for a private *moment*—as the song says—and this moment changes everything. The 1969 film version of Hello, Dolly! lacks the courtroom scene, setting the song instead in Washington Square park in New York, in which a small group of witnesses gather, including a policeman. The park and the presence of a policeman lend a similar legal and public setting for the song.

Instead of the endless cycle of production, consumption, and death that marks life in Vandergeler's feed store, the song marks the transformative event as taking no time. The new thing that changes everything takes no time, lifting those who experience it outside of time. In Agamben's writing, death provides the framework for the political; one of the synonyms for "biopolitics" is "thanatopolitics," the politics of death. Agamben's point is the zone of indistinction between life and death that the state regulates. The song, like the musical and the play, do not ignore the fact of death: Dolly, Vandergelder, and Irene Malloy have each lost a spouse. The significance of death here, however, has to do with remembering and returning to what life made meaningful.

Cornelius's speech to the judge emphasizes what I described earlier as the contentless pledge of marriage. The young man hardly knows Irene Malloy, indeed he has

no real idea of who she is; she, like all women, is "mysterious." Cornelius says

I bet you could know a woman a hundred years without ever being really sure whether she liked you or not. Today I've lost so many things. My job, my future, everything that people think is important, but I don't care! Even if I have to dig ditches for the rest of my life, I'll be a ditch digger who once had a wonderful day (Stewart & Herman 1964).

The loss of his future means the loss of knowledge of the future based solely on the past. What he has gained is the possibility of something new that he previously did not know. Included most importantly in this new, unknown and unknowable life is Irene herself, who like all women, will never let him know for certain that she likes him, but who will require that he promises to try to make her like him over and over. There is no foundation for Cornelius's happiness, only the possibility of pursuing it, and this possibility depends on a particular interconnection between the public and the private.

This paper has argued for a reconsideration of the law-literature relation not for the purpose of reinscribing the opposition between the two, but instead, for the purpose of bringing them closer together. The force and efficacy of statements as means of bringing about connections among individuals without any other ground for their association is one of the features of language that law and literature share. These statements may be deliberative and rational, or they may be emotional, but what is important is that their utterance creates a relation between the speakers, a public, in a sense.<sup>10</sup> The most private and intimate form of association between two people depends on the possibility of their relation receiving public recognition. They must make at least one, crucial statement in public, namely, their promises to each other.

A musical, unlike a literary work that is read in private, is, of course, performed in public. In Hello, Dolly! the private moment that Cornelius articulates in public has two publics: one formed by the other characters in the play who listen to him in the courtroom, and the second formed by the audience viewing the performance. The doubling of the public reiterates the significance of the particular link in marriage between private and public independent of the threshold between bare life and political life. The world in which statements are actions comes into being only if the participants believe in their capacity to make such statements. The musical Hello, Dolly! (and many other artifacts of popular American culture) and the 2003 Massachusetts Supreme Court decision share a belief in this possibility as well as an awareness of the power of the State and the brute fact of bare life. The awareness of the fundamental groundlessness of such belief does not drive the collective authors of these texts into the arms of the sovereign, but instead, into each others' arms.



<sup>1</sup> For a discussion as to why Agamben ignores the possibility of safeguards, see Hussain N, Ptacek M. (2000).

<sup>2</sup> I am referring to such works as Cover (1983); Brooks (2000); Brooks P, Gewirtz P. (1996); Scheppele KL (1988); White (1994); Sarat and Kearns (1994); Weisberg R. (1984).

<sup>3</sup> For a discussion of Agamben that defends the role of poetry in political life, see MacNamee (2002).

<sup>4</sup> For a discussion of the classic novels of marriage and adultery in the broader context of human social order, see Tanner (1979).

<sup>5</sup> For a discussion of this critique, see West (1993). Felman provides bibliography of the key work in Felman (2002).

<sup>6</sup> Leo Tolstoy, "The Kreutzer Sonata," cited by Felman (2002).

<sup>7</sup> Carl Schmitt, "Definition of Sovereignty," in Political Theology, trans. George Schwab, cited by Norris (2002).

<sup>8</sup> I am indebted to my husband Bruce Rosenstock for my discussion of Cavell, which is based on his article. See Rosenstock (2005).

<sup>9</sup> Wilder wrote an earlier version of the play, which was called A Merchant of Yonkers (1938). Wilder's work was based on the Austrian playwright Joann Nestroy's Einem Jux will es sich Machen (1842). The hero of the Austrian play wants to have a "fling" and not a marriage, and as Wilder points out, there is no Dolly Levi in the Austrian play.

<sup>10</sup> For an argument about the act of speech and the act of reading as creating multiple publics, see Warner (2002).

## **Bibliography**