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'It is a *task* to come to see the world as it is.'¹

All judges on the couch? On Iris Murdoch and legal decision-making

Iris van Domselaar²

I. Introduction

Largely ignored during her own professional lifetime³, over the last three decades Murdoch's vision-based moral philosophy has received increasing attention from those who sympathize with the idea that the concept of moral perception should have a more prominent place in moral philosophy.⁴ However, as Murdoch herself was largely evasive on matters of public morality⁵, thus far the potential relevance of Murdoch's moral philosophy for the law - a public institution par excellence - has hardly been addressed.

In this chapter, I flesh out the relevance of Murdoch's moral philosophy for the law, legal decision-making in particular. The main motivation for this endeavour is that legal decision-making is a public institutional practice that, if anything, deals with particulars, with concrete, unique (constellations of) facts and persons. These particulars do not jump into the judge's sight of their own accord but require a particular capacity on the part of the judge, the capability to adequately discern the particulars and respond accordingly. Arguably, Murdoch's vision-based moral philosophy with its prominent role for moral perception can help us to account for this capacity.

¹ Murdoch (1997). 375.

² A draft version of this article was first presented at the colloquium 'Virtue, Emotion and Imagination in Legal Reasoning', which was organised by the *Universidad Nacional Autónoma de México* and the Queen Mary University of London. The author is grateful to Amalia Amaya and Maksimilian del Mar for the invitation, and to the participants for their comments. An earlier version of this text was also presented at the research colloquium of the Paul Scholten Centre for Jurisprudence at the University of Amsterdam. The author would like to thank the participants, Wouter de Been in particular, for their valuable comments.

³ See Broackes (2012).

⁴ See e.g. Broackes (2012) and Nussbaum (1995).

⁵ Nussbaum (2001) articulated an outspoken critique of this apolitical aspect of Murdoch's work. I will come back to this point later.

To begin, I offer an outline of Murdoch's vision-based moral philosophy. Subsequently, I discuss the contours of a Murdochian approach to legal decision-making (MAL). Finally, I identify the main issues that need to be addressed further in order for MAL to be feasible in the context of a liberal rule of law.

II. Murdoch's moral philosophy: an introduction

Highly influenced by the work of Heidegger and Wittgenstein, Murdoch takes a phenomenological approach to morality in that she tries to go back to the data', make sense of the first-person experience, the lived experience of moral life.⁶ It is on the basis of this perspective that she claims, both in an empirical and a normative sense, that 'vision' plays a key role in our moral lives.⁷

She juxtaposes her account of the moral life with those accounts that envisage morality as a 'series of overt choices which take place in a series of specifiable situations', such as Utilitarianism and Kantianism.⁸ These theories, according to Murdoch, falsely ignore that it is one's vision, rather than a 'free-floating' detached reason, that largely determines the choices that one makes. Murdoch: 'Man is not a combination of an impersonal rational thinker and a personal will. He is a unified being who sees and who desires in accordance with what he sees [...].'⁹ In support of this claim, Murdoch uses the image of a magnetic field to describe the way the world imposes itself compellingly on the will of an agent.¹⁰

But, for Murdoch, vision is not merely a crucial explanatory factor for the actual choices that people make; it is also a vital and prominent moral capacity independent of these choices. As she puts it: '[t]he moral life [...] is something that goes on continually,

⁶ By 'phenomenological approach to morality', I have in mind an approach that is committed to what Hegel, Husserl and Heidegger meant with getting back 'to the things themselves'. For Murdoch's discussion of Heidegger see: Murdoch (2012). 93-114. See also: Bagnoli (2012).

⁷ For a critical and illuminating discussion of Murdoch's use of different visual metaphors, see Blum (2012).

⁸ Murdoch (1997).

⁹ Ibid. 332. Or, as she puts it (ibid. 375) elsewhere: "[w]e act rightly 'when the times comes' not out of strength of will but out of the quality of our usual attachments and with the kind of energy and discernment which we have available."

¹⁰ Ibid. 200-201.

not something that is switched off in between the occurrences of explicit moral choices [..].¹¹

In addition to these claims based on her philosophy of mind, Murdoch's account of vision in addition has a highly normative dimension. For this morally-implicated account of vision¹² - which I will here call moral perception -, Murdoch took inspiration from Simone Weil's concept of *attention*.¹³ In Weil, she found, *inter alia*, the idea that to perceive *adequately* is not something that is directly under one's control or a matter of simply opening one's eyes or directing one's attention. Rather, as Murdoch puts it: 'it is a *task* to come to see the world as it is.'¹⁴

Murdoch's idea, that perceiving adequately in the moral domain is a matter of hard work and discipline, hinges on her pessimistic conception of the moral ability of average human beings. Influenced by Weil, but also by Plato's moral psychology, and, to some extent by the work of Freud¹⁵, she holds that most people find themselves in a state of illusion due to the influence of the 'fat relentless ego'¹⁶. Due to their childish, egocentric need for security, stability and reassurance, they have difficulty in seeing moral reality for what it is: contingent, ambiguous and largely obscure. As Murdoch states: 'We are anxiety ridden animals. Our minds are continually active, fabricating an anxious, usually self-preoccupied, often falsifying veil which partially conceals the world.'¹⁷

¹¹ Murdoch (1997). 329. See also: Murdoch (1992). 297, 303.

¹² For illuminating discussions of the specific terminology that Murdoch uses to distinguish between what Lawrence Blum has dubbed 'a morally-implicated visual term' and a 'non-morally-implicated one', see: Hollands (1998) and Blum (2012).

¹³ Murdoch reviewed the Notebook of Simone Weil and, as Broackes observes: "more or less every part of [it] was adopted by Murdoch into her own philosophy." See Broackes (2012). 20.

¹⁴ Murdoch (1997). 375.

¹⁵ Murdoch emphasizes that she is not a 'Freudian', yet she does endorse both his "realistic and detailed picture of the fallen man" and the idea that "much of human conduct is moved by mechanical energy of an egocentric kind." See: *ibid.* 341-342; Several similar passages can be found in Murdoch's oeuvre: e.g. Murdoch (1992). 296; 322; 331.

¹⁶ Murdoch (1997). 342.

¹⁷ *Ibid.* 369.

Indeed, Murdoch's account of moral perception is largely a negative one in that it entails, if anything, that people must try to 'break the barriers of egoism'¹⁸, to become emotionally mature so as to be able to genuinely face the complex nature of the real, in particular the unique reality of other people. But, in addition to this negative requirement, moral perception also includes the requirement of possessing a loving attitude, an empathic bearing towards other people which allows one to see them as unique individuals with their own needs.¹⁹

As moral perception is concerned with grasping an *external* reality, Murdoch emphasizes that moral perception largely hinges on the ability to imagine, which she primarily understands as the ability to escape a self-enclosing, deluded, egotistical perspective.²⁰ Whereas fantasy is a self-enclosing activity, imagination allows one 'not to escape the world but to join it.'²¹

Notably, in this context Murdoch stresses the resemblance between (good) art and morality. Acknowledging that living a good life might in the end be more difficult than making good art, she claims that a good novel and moral life are both the outcome of imagination as opposed to (selfish) fantasy.²² Both the artist and the good man therefore have the ability 'to see the other thing, what one might call, nature, reality, the world.'²³

On the basis of the above, we can now see why, according to Murdoch, moral life consists of a complex interplay between activity and passivity. Passivity, because at important moments of choice the world is, to a large degree, already 'fabricated' when

¹⁸ Murdoch (1992). 297.

¹⁹ Ibid. E.g. 301; 317; 354; and 374.

²⁰ Murdoch (1997). E.g. 11; 255; and 292-294.

²¹ Ibid. 374. As Murdoch sees the imagination as a capacity that allows one to grasp reality in the *here and now*, its importance seems not to lie in the widely shared idea that it allows *counterfactual* thinking, the attempt to "figure[e] out what would happen—or what would have happened—had things been different from how they in fact are or were." See: Gendler (2011).

²² Murdoch (1992). 333. Murdoch has been highly influential on scholarship that examines the (close) relationship between morality and literature. Martha Nussbaum for instance draws on Murdoch when developing the claim that the good novel is a paradigm of moral activity. See: Nussbaum (1990).

²³ Ibid. 255.

we come to look at it.²⁴ In these situations, we cannot change our perception simply by an act of ‘pure’ will, in the same way that one cannot stop being in love or feeling resentment merely by choosing to do so.²⁵ At these moments of choice, whether we act rightly is not under one’s direct control.

The active dimension of moral life for Murdoch predominantly lies in the attempt to gradually gain control over the ‘forces’ within us. As she puts it: ‘we can change what we are, but not quickly or easily, there is such depth and density in what needs to be changed.’²⁶ Moral perception is a form of moral freedom in that it is the outcome of this long, slow and difficult process of liberating oneself from a deluded, infantile perspective.

Murdoch famously substantiates her understanding of moral perception and, relatedly, of moral progress by the fictive example of M. M. is a mother who bears hostility to D., her daughter-in-law. M. considers D. to be ‘unpolished’, ‘lacking in dignity and refinement’, and ‘tiresomely juvenile, and brusque’.²⁷ Yet, because M. is an intelligent and well-intentioned woman, she decides to ‘look again’ and give D. ‘careful and just attention’.²⁸

Murdoch’s discussion of M. bears a resemblance to a phenomenon that Wittgenstein calls ‘aspect seeing’, the activity of ‘seeing something as something’, an activity that sometimes leads to ‘aspect-change’ (*Aspektwechseln*), a different way of seeing an object or person.²⁹ Without a change in the external world and without her having been the victim of a visual illusion, as a result of her changing attitude, that is, a more ‘loving’ attitude, M. comes to see other aspects of D’s behaviour.³⁰ That is, ‘D. is discovered to be not vulgar but refreshingly simple, not undignified but spontaneous,

²⁴ See Murdoch (1997). 200.

²⁵ Ibid. 345.

²⁶ Murdoch (1992). 325.

²⁷ Murdoch (1997). 313.

²⁸ Ibid.

²⁹ Wittgenstein (2009). par. 129. Wittgenstein describes the Jastrow’s famous rabbit–duck illusion in which both a rabbit or a duck can be seen. See, for a discussion of the relevance of Wittgenstein’s idea of aspect-seeing for moral thought, Agam-Segal (2018). For Murdoch’s critical discussion of these passages in Wittgenstein see Murdoch (1992): 277-283.

³⁰ Murdoch (1997), 317.

not noisy but gay, not tiresomely juvenile but delightfully youthful, and so on.³¹ M. takes up the task that, according to Murdoch, any morally responsible agent should be committed to: 'to try to see justly, to overcome prejudice, to avoid temptation, to control and curb imagination, to direct reflection.'³² Again, this endeavour is difficult, painful, and predominantly slow. It proceeds gradually and requires patience; in a sense, it always risks coming too late, unable to prevent wrong, unjust actions from occurring.³³

The example of M. brings us to another defining element of Murdoch's moral philosophy: the intimate connection between moral perception and (using) language. As she puts it: 'How we see our situation is itself, already, a moral activity, and one which is, for better as well as worse, 'made' by linguistic processes.'³⁴ More specifically, her account of moral perception is inextricably linked to the vital role she assigns to thick ethical values (or what she names normative descriptive, specialized, or secondary value words) concepts such as those we came across in M.'s description of D.: 'vulgar', 'spontaneous', 'noisy'.³⁵ Murdoch emphatically demarcates the practical value of thick value concepts from the limited practical use of thinner concepts such as 'right' or 'good'. Due to their abstract and allegedly *a priori* character, these concepts, according to Murdoch, are less helpful for grasping the moral bearing of the situations and persons people are confronted with.

³¹ Murdoch (1997). 313.

³² Ibid.

³³ Murdoch has constructed the example of M. in such a way that M.'s activity does not have any influence on the external state of affairs; she stipulates that D. is either absent or dead. Ibid. 313.

³⁴ Murdoch (1992). 315. As Bagnoli (2012, p. 221) has put it: "According to Murdoch, what is distinctive of live individuals is that they perpetually engage in the activity of reassessing, redefining, and redescribing reality."

³⁵ Murdoch (1997). 324, 333. The introduction of 'thick ethical concepts' is generally accredited to Bernard Williams. However, Williams was, in this regard, highly inspired by a seminar organised by Iris Murdoch and Philippa Foot in the 1950's. See Williams (1985), 218 n.7; and Broackes (2012). 15. For an illuminating discussion of this element in Murdoch's work see: Diamond (1996).

Thick value concepts, by contrast, do give substance to moral perception because, characteristically, they contain a descriptive as well as an evaluative element.³⁶ They are, as Murdoch puts it, 'patently tied on to the world' and for that fact enable agents, in a more or less pre-reflective way, to perceive an evaluative landscape and respond accordingly.³⁷ It is for this very reason that Murdoch stresses that we should 'protect the precision of these secondary moral words, exercise them and keep them fit.'³⁸

Following the late Wittgenstein, Murdoch accordingly stresses that the meaning of these 'thick ethical values' largely depends on the way they are commonly used in every life, embedded as they are in 'forms of life', socio-material contexts in which these concepts make sense.³⁹ Hence, for moral life and moral perception to flourish, such social-cultural contexts, too, must be kept in place. 'Uses of words by persons grouped round a common object is a central and vital human activity', she states.⁴⁰

Besides this conventional dimension, the use of thick value concepts has, according to Murdoch, a highly individual and personal component to it. Their application is always also intimately linked with one's personal history and

³⁶ In *Ethics and the Limits of Philosophy* Williams (1985, p. 129) describes this point as follows: thick concepts [...] "seem to express a union of fact and value. The way these notions are applied is determined by what the world is like (for instance, by how someone has behaved), and yet, at the same time, their application usually involves a certain valuation of the situation."

³⁷ Again, this is one of the reasons for Murdoch's skepticism of Kantian, Liberal and Utilitarian normative theories of morality; they largely rely on the normative role of thin concepts. She for instance states: "We were too impressed by words when we assumed that the word 'good' covered a single concept which was the centre of morality. We were not impressed enough when we neglected less general moral words such as 'true', 'brave', 'free', 'sincere', which are the bearers of very important ideas." Murdoch (1997). 73.

³⁸ Murdoch (1992). 327.

³⁹ Murdoch (1997). 97. Note that Wittgenstein himself never explicitly defined this notion of forms of life. Pitkin (1973, p. 132) describes its general significance as follows: "human life as we live and observe it is not just a random, continuous flow, but displays recurrent patterns, regularities, characteristic ways of doing and being, of feeling and acting, of speaking and interacting. Because they are patterns, regularities, configurations, Wittgenstein calls them *forms*; and because they are patterns in the fabric of human existence and activity on earth, he calls them forms of *life*."

⁴⁰ Murdoch (1997). 325.

background.⁴¹ As illustrated by the example of M.: it shows the agent where he or she stands on certain matters at a particular point in life. Indeed, Murdoch sees the ability to grasp moral reality as a function of the moral progress made during one's life.⁴²

Importantly, this claim is far from an assertion that the meaning of thick value concepts is inherently arbitrary or exclusively subjective.⁴³ It does, however, suggest that striving towards objectivity, for Murdoch, is not tantamount to taking up an *impersonal* point of view. The conceptual content of a notion such as 'courage' or 'cruelty' is formed by (partaking in) social practices and by means of a situated and thus personal process of applying them.⁴⁴ This is what Murdoch means when she states that moral terms 'must be treated as concrete universals'.⁴⁵ It is in this context that Murdoch emphasises that the learning process required for grasping 'reality' must be understood as being endless. That is, thick concepts, according to Murdoch, are 'infinitely to be learned' in the sense that the process of applying them has no 'point of arrival'.⁴⁶ As one interpreter of Murdoch has put it: 'correctness in practical matters admits of infinite gradations; even the agent who acted well can ask how she might have acted better.'⁴⁷

Thick value concepts in addition for Murdoch play a vital role in justifying to others why one sees what one sees and, on that account, also in convincing them of the rightness of one's response. One way of explaining one's negative evaluation of particular behaviour would for instance be to say that it is crude. Thick value concepts

⁴¹ Ibid. 322.

⁴² See e.g. *ibid.* 324; and 352.

⁴³ See for this point also Clarke (2018).

⁴⁴ See Bagnoli (2012) and again Clarke (2018). Clarke neatly illustrates the plausibility of this idea by using the example of an accomplished musician. A jazz player "puts a personal stamp on the tunes he covers and *thereby* illuminates those tunes. [..T]his is a way—in jazz, *the way*—of realizing the music itself. Coltrane's inimitable rendition of "My Favorite Things" taught us about the song, extended our sense of its possibilities and emotional reach. He lit up the song precisely by making it his own. [...] To see moral concepts as concrete universals, in the relevant sense, is to see them as akin to established tunes that we must realize in our own special way if we are to successfully realize them at all." Clarke (2018). 46.

⁴⁵ Murdoch (1997). 322-323.

⁴⁶ *Ibid.*

⁴⁷ Clarke (2010). 288.

are useful tools for giving a truthful account of reality to others, one that moral agents should use skilfully. Here again Murdoch sees an important resemblance with the artist ('We are all artists'), in particular with the novelist who tries to communicate the real in a highly skilful and creative way.⁴⁸ But, also similar to artists, during this communicative endeavour moral agents will also experience (discursive) limitations on what they can explain to others. Murdoch emphasizes that one's choices and vision can never be exhaustively explained, articulated or exhaustively justified.⁴⁹ Due to the "inexhaustible richness" of the practical world, but also to our own obscurity, our choices and vision are always more than any explanation can cover.⁵⁰ Hence, for Murdoch, being morally mature means that one can cope with the fact that, sometimes, as she puts it, "we are moved in a manner which we are at a loss to explain."⁵¹ Both moral philosophy and moral agents should take this into account, also in case of moral disagreements.⁵² Not surprisingly, Murdoch does not conceive of such disagreements, for instance about the question whether an interaction between two children amounts to 'bullying', as a controversy on the application of an allegedly publicly accessible concept due to opposing views of the facts. Rather, she understands such disagreements as simply the result of the fact that we 'see different worlds'.⁵³ In view of the embodied and situated nature of one's vision, for Murdoch, such disagreements require, if anything, creative and skilful form-free *persuasion* that takes into account the specific features of one's opponent and the concrete context in which the disagreement take place. How one can

⁴⁸ Murdoch (1992). 315.

⁴⁹ Murdoch states: 'There may be no deep structure. This is the lesson of Wittgenstein and one which, incidentally, has not been taken enough to heart by those who want to reduce morality to a single formula.' Murdoch (1997). 74.

⁵⁰ Ibid. 53.

⁵¹ Ibid. 58.

⁵² Ibid. 91.

⁵³ Murdoch. 82. Clarke (2010, 287), thereby drawing on McDowell, has phrased this point as follows: 'In the absence of knock-down arguments, phrases such as "You have to see it" mark the point at which discursive justifications have *run out* [...]. This point may never be reached in a given exchange, or it may take a long time to reach it.'

best try to convince others of one's own take on the situation is a matter of situational appreciation too.⁵⁴

III. A Murdochian approach to legal decision-making: a tentative sketch

On the basis of the above, in the section below I explore what a Murdochian-spirited approach to legal decision-making (MAL) amounts to. Again, this is a tentative sketch: Murdoch herself has hardly written about the implications of her moral philosophy for the public domain; and, within legal theory, the concept of 'vision' has so far rarely been explored.⁵⁵

It goes without saying that MAL is strongly at odds with the idea, widely embraced in legal theory, that the moral essence of legal decision-making essentially boils down to legal judgments. These judgements are then understood as the application of - morally defensible - legal rules and principles to a well-defined, value-free constellation of facts.⁵⁶ MAL by contrast holds that the vision of the judge plays a key role in coming to grips with the moral nature of legal decision-making. This is based on the premise that a judge, like any other human being, does not see a value-neutral world when confronted with a legal case, but rather faces an evaluative landscape that 'invites' him to respond, for instance by addressing certain comments to a litigating party during a court session or when writing a judgment.

MAL in addition holds that this evaluative landscape is largely influenced by a judge's prior being and doing. Hence, to know why a legal decision is as it is, or why a judge uses a certain rule in a particular way, requires knowledge of his entire life history. In this respect MAL shows strong resemblance with legal realism, most notably

⁵⁴ McDowell (2000. 113) in this regard, and I think in line with Murdoch, states: 'One exploits contrivances similar to those one exploits in other areas where the task it so back up the injunction 'See it like this': helpful juxtapositions of cases, descriptions with carefully chosen terms and carefully placed emphasis, and the like. (Compare, for instance, what one might do and say to someone who says 'Jazz sounds to me like a mess, a mere welter of uncoordinated noise.' See for this citation also Clarke (2010. 287).

⁵⁵ See for exceptions: Solum (2003), Amaya (2011), Michelon (2018), van Domselaar (2018). For one of the few discussions of Murdoch's moral philosophy in relation to law, more specifically in relation to legal education see: Del Mar (2016 (2013)).

⁵⁶ See for a discussion of this 'fact-evasiveness' within legal theory: Van Domselaar (2018).

with the work of Jerome Frank - the *enfant terrible* of legal realism who emphasized that the person of the judge is the 'pivotal factor' in the administration of law.⁵⁷ Indeed, in view of its empirically loaded assumptions, MAL can be said to be naturalistic. That is, its understanding of the workings of a judge's mind is corroborated by contemporary legal-psychological findings that put in perspective the role of explicit legal principles and rules in actual judgements, and stress the influence of pre-reflective thought on the act of judging.⁵⁸

As to its normative dimension, MAL holds that the crucial difference between a good judge and a bad judge is that the former possesses a capacity for *judicial perception*. Judicial perception is a species of moral perception that allows a judge to perceive the 'otherness' of the parties involved and the complex, ambiguous nature of the case while making use of the available legal resources.

A judge who possesses this capacity has, if anything, ridden himself of egoistic, escapist fantasies and projections such as all kinds of 'scripts' or frameworks that impede him from facing the complexity and ambiguity of a legal case. For instance, from the perspective of MAL, a bad judge is in any case one who "portray[s] the chosen decision as certain, singularly correct, and as determined inevitably by the legal materials."⁵⁹ Such a decision would be an affront, to use Murdoch's words, to the "inexhaustible detail of the world, the endlessness of the task of understanding, the importance of not assuming that one has got individuals and situations 'taped' [..]"⁶⁰

MAL in addition characterizes a good judge as someone who maintains an attitude of loving kindness and empathy towards the parties involved, even, and perhaps in particular, if the litigants or defendants are very different from himself. Such a judge does not restrict these empathic responses to the private domain, but integrates them into his professional viewpoint and allows them to 'push' in a certain direction, or

⁵⁷ See Frank (2009 (1931); and 1973 (1949)). Interestingly, (the philosophical claims underlying) Frank's legal realism reveal, on more points, resemblances with MAL. This is an interesting topic in itself which, for reasons of scope, will not be fully addressed in this paper, but will merely be touched upon incidentally.

⁵⁸ E.g., Simon (1998); Rachlinski, Guthrie, and Wistrich (2001); and Maroney (2011).

⁵⁹ Simon and Scurich (2014). 429.

⁶⁰ Murdoch (1997). 87.

toward a certain outcome.⁶¹ Importantly, these outcomes may, but not necessarily, consist of an alleviation of the suffering of the parties involved.⁶²

Because empathy is constitutive for the judicial viewpoint and because judicial perception requires a certain level of emotional matureness on the part of the individual judge, within MAL the personal and the professional are seen as intimately linked. Accordingly, the scope of evaluation of legal decision-making is not limited to actual legal judgments and the reasons offered to support them. It rather includes all the data that can sensibly be understood to express the judge's vision.

On the basis of MAL, we have, for instance, reason to criticize a judge who, during informal gatherings - be it in a professional or a personal setting- regularly expresses a cold-hearted attitude towards the fate of immigrants, or who makes sexist jokes, or is keen to stress that he has never been troubled by any of his decisions. These spontaneous utterances are all relevant 'data', expressions of the judge's vision. In this case they indicate that the evaluative landscape the judge sees when confronted with a legal case will be distorted due to a failure of vision. This failure of vision amounts to a failure of judicial goodness, which impedes the judge's grasp of the real.

This point brings us to the difference between a judge's *judicial perception* as opposed to the *moral* perception of a private person, and in particular to the role that (legal) language plays in understanding the difference. In this regard it is important to note that although Murdoch pays little attention to the public realm, she does emphasize the importance of demarcating private and public life. "[W]e do not live the world of politics in the way we live our private lives", she states.⁶³ Public life according to Murdoch differs from private life most notably because it is characterized by certain firmly ensconced 'axioms' such as the idea of equality, dignity and inviolable rights.⁶⁴ In

⁶¹ See, also Henderson (1987), Bandes (2009); Maroney (2014) and van Domselaar (2015) who argue that empathy should play a constitutive role in our understanding of law and legality. See for an outspoken critique of empathetic judging in law: Massaro (1989).

⁶² Henderson (1987).

⁶³ Murdoch (1992).

⁶⁴ These axioms, according to Murdoch (1992, p. 365) are 'isolated unsystematic moral insights which 'arise out of and refer to a general conception of human nature such as civilized societies have gradually generated.'

addition Murdoch acknowledges the importance of conformity to generally accepted rules and principles in a liberal democratic society.⁶⁵

Codified legal rules, legal principles and said axioms have an important role to play in MAL's account of judicial perception albeit not in the form of action-guiding, context independent norms. MAL holds that the substance of judicial perception largely derives from legally codified and non-codified *thick* value concepts, for the very fact that they are relatively concrete and thus contain factual content.⁶⁶

A judge may for instance have to decide about whether a social interaction on the work floor is an instance of *sexual intimidation* or just a *friendly tap on the back*, or about whether certain utterances defaming a minority group amount to *hate speech*. Insofar as these thick value concepts have been instilled in the judge by means of social and institutional 'practices of attention', they will spontaneously pop up and lead to a legal inclination as to the adequate response.⁶⁷

In addition, their use will always express and manifest something personal, mediated as they are through the consciousness of the individual judge. On account of this personal dimension, MAL understands legal disagreements between judges (e.g. between lower and higher courts) as a possible indication that the judges in question have conflicting (value-laden) 'visions' of the legal case.

Such disagreements cannot then be solved by merely making a reference to either an allegedly publicly accessible rule or principle, or to the 'naked' facts. Rather, they require that judges possess the ability to use the available discursive materials creatively *vis-à-vis* all relevant parties, including the judicial community itself. MAL thus sees the reason-giving dimension of legal decision-making- ideally - as an expression of

⁶⁵ See e.g. Murdoch (1992). 362.

⁶⁶ Thus far, little has been written on the role of thick value concepts in law. See, for exceptions, Enoch and Toh (2013); Wang and Solum (2013). Here I do not delve into the interesting question of the exact relation between the meaning of the same thick-value term when used in a strictly legal and a non-legal context. Wang and Solum, in this regard, I think rightly argue that the latter meaning does in fact constrain the meaning of the legal usage. See, for this point also, Van Domselaar (2018).

⁶⁷ I owe the term 'legal inclination' to Crowe (2011).

the judge's perceptive sensitivity as to how to use the available discursive materials in the most effective and truthful way.⁶⁸

Indeed, a good judge can in this regard be qualified as a poet-judge who, like a poet, possesses the knowledge and ability to imaginatively and skilfully work with and within the constraints posed by language.⁶⁹ Again, such a judge would also instinctively honour the fact that not all the factors that play a role in forming his response to a legal case can be exhaustively articulated through language and that, as Jerome Frank put it, "[the] decisional process, like the artistic process, involves feelings that words cannot ensnare."⁷⁰

I will now further expound the contours of MAL by giving an example of how an individual judge could make progress and sharpen her vision. Judge (J.) presided over a case involving a young woman (W.). W. was in her early twenties and worked at the only supermarket in a small village. W. had been prosecuted for killing her new-born baby. As she was well known in the village, the case upset the local community tremendously. In court, W. gave a detailed account of how she had attempted to conceal her pregnancy from her husband, parents, colleagues and fellow villagers, and how she had managed to hide the corpse in her parents' attic for two years.

On the basis of W.'s declaration during the police interrogation and the court hearing, J. found her to be rather 'cold-hearted'. W. had given birth to the baby in seclusion and killed it with her bare hands, all without attracting attention. J. therefore saw W. as a woman who had operated in a 'callous' and 'calculating' manner; she after all seemed to possess an almost super-human degree of self-control that allowed her to avoid making any noise both during and directly after giving birth. J. also saw her as 'irresponsible' for not having used contraceptives or opting for abortion. During the court's deliberations, J. convinced the other judges on the panel to impose on W., as guilty of murder, the maximum penalty.

⁶⁸ For this reason, I do not think that MAL is sensitive to the critique that, for instance, Tim Dare has voiced against virtue-ethical approaches as not being able to acknowledge the reason-giving dimension of legal practice. See: Dare (1998).

⁶⁹ See also, for this idea of the poet-judge, Nussbaum (1995).

⁷⁰ Frank (1973 (1949)). 173.

As a highly professional, self-critical and well-intentioned judge, J. continued to ponder the case long after handing down the decision. She tried to think of W. empathically and lovingly and, as part of this endeavour, reflected upon the quality of her earlier, perceptive judicial deliverances. Perhaps she then felt that her vision of W. and her deeds had been largely influenced by her own projections, i.e., that she projected too much agency on W., keeping her at a remove because, unconsciously, she did not wish to confront her own ambiguous feelings about being a mother.

If she would be fully aware of the extent to which her own emotional state had blocked her from grasping W's reality, it could well be that J. started to see W. and her deed differently. She could for instance arrive at the conclusion that W. had not hidden the corpse in the house of her parents out of 'calculation', but only had done so in a 'desperate attempt' to keep her baby close by. W.'s deed would then not be 'coldblooded', 'calculated', or 'callous' but rather a sign of 'utter despair', 'loneliness' and a 'need for help'. From the perspective of MAL, it is through this kind of (sometimes painful) pondering and self-scrutiny that J. could make progress, both as a person and as a judge.⁷¹

Not surprisingly, within MAL one of the central questions is *how* to foster judges becoming more unselfish, emotionally mature, humble and just judges. Or to phrase it in Murdoch's terms: which techniques are most suitable 'for the purification and reorientation of an energy which is naturally selfish, in such a way that when moments of choice arrive we shall be sure of acting rightly?'⁷² Should all judges perhaps, as part of their 'education of attention'⁷³ undergo psychoanalysis – as for instance judge Jerome Frank suggested and himself did?⁷⁴ Or should they (in addition) enhance their imagination by means the contemplation of great art?⁷⁵ For it is great art that according to Murdoch 'teaches us how real things can be looked at and loved without being seized and used, without being appropriated into the greedy organism of the self.'⁷⁶

⁷¹ See, for the importance of an engaged, post facto way of acknowledging loss for making moral progress as a judge, Van Domselaar (2017) and Van Domselaar (2018).

⁷² Murdoch (1997). 344.

⁷³ Del Mar (2016 (2013)).

⁷⁴ Cf. Posner (2006).

⁷⁵ Cf. Nussbaum (1995).

⁷⁶ Murdoch (1997). 353.

How to decide which techniques to use to strive toward this ideal is, of course, itself a complex task. But, regardless of the outcome, the implications of MAL for the education and training of (aspirant) judges are quite radical. MAL is in any case at odds with dominant accounts of professional morality, which embrace a marked distinction between the role and the person behind the role.⁷⁷ It will to some extent hail *personal* transformation as a goal of one's professional training.

Drawing on Murdoch's pessimistic account of the moral abilities of the average human being, MAL emphasises that to become a good or a better judge is a difficult, slow, piecemeal process that starts long before one enters the profession. This process is not directly under the (aspirant) judge's control, as his viewpoint is constituted by the way thick and thin concepts are used in social and legal practice. Moreover, a judge cannot prevent himself from having particular thoughts or emotions at will. Murdoch's pessimism also implicates that a 'right' decision is never the end of the story; the judge must always ask himself how he might have acted better.

IV. Issues to be addressed (further)

Now that we have a sense of the contours of MAL, this section addresses the central concerns that need to be further explored in view of its feasibility. Here, feasibility has two dimensions: the extent to which MAL meets the requirements of political legitimacy that apply to the judiciary under a liberal rule of law, and the extent to which it is responsive to the specific judicial context.

One concern is that MAL would justify a practice in which "[j]udges too often rely on their intuitive, emotional reactions without subjecting them to 'the light of intense study' that is supposed to produce rational choices."⁷⁸ This point resonates with the critique voiced against Murdoch's moral philosophy as being 'overenamored of situations in which the agent can *immediately* (italics author) see both the need for her to act and what act she should perform' and, on that account, also for having a blind spot for the value of the more reflective dimensions of moral agency.⁷⁹

⁷⁷ See, for influential critiques on this distinction, Postema (1983) and Wolgast (1992).

⁷⁸ Wistrich, Rachlinski, and Guthrie (2001).

⁷⁹ Blum (2011). 323.

In addressing this critique, it is useful to distinguish between varying conceptions of reflective activity. MAL indeed denies that reflection - understood as an activity of detached, disembodied, free-floating 'legal reason' - could be of direct action-guiding value to a judge when facing a legal case. Yet, as the example of judge J. also illustrates: MAL does assign an important role to a more engaged form of reflection in that it does not occur 'in detachment from [*the judge's* italics author] deepest sense of self.'⁸⁰ Judge J. tried to think of W. imaginatively and kindly and, as part of this endeavour, reflected upon the quality of her earlier, perceptive judicial utterances. MAL assumes not only an appropriate degree, but also *different* degrees of reflection and, relatedly, self-consciousness during all kinds of judicial activity in which judicial perception plays a prominent role.⁸¹ Think for instance of a judge's communications at trial with litigating parties and their lawyers, or his ponderings about how to legally qualify certain facts.⁸²

One could of course question whether the emphasis on self-monitoring and judicial perception might not come at the cost of securing the right outcome. This is a highly urgent point; in the legal domain, citizens involved in legal proceedings, if anything, seem to deserve, from the perspective of political legitimacy, a right *outcome*. As such, MAL is particularly vulnerable to the critique voiced by Martha Nussbaum against Murdoch's moral philosophy: that it shows an 'obsession with one's own state' and falsely ignores 'the difference that action can make.'⁸³

For MAL, one route for addressing this concern is to further elaborate, for the legal domain, Murdoch's claim that true vision will more or less spontaneously lead to right action, for instance by connecting this claim with the literature on embodied

⁸⁰ Clarke (2012). MAL is thus strongly at odds with accounts of a legal viewpoint founded on the dichotomy between emotion and reason, or the heart versus the head'. The legal viewpoint, at least when it is the result of judicial perception, is not at odds with 'having' emotions, but rather comprises emotions that are carefully thought through. See for this point Maroney (2015).

⁸¹ As already hinted at above, MAL indeed shows some resemblance to a 'law-as-craft' approach in the way it is able to make sense of the idea of unreflective judicial action. For this point I am indebted to: Del Mar (2011, *supra* note 20).

⁸² A strong fictive example of such an engaged kind of reflective judicial activity that lies at the heart of what MAL understands as judicial perception can be found in McEwan's *The Children Act*. See Van Domselaar (2018).

⁸³ Nussbaum (2001).

cognitions on expert action. The claim would then be that a perceptive judge, like other experts such as Wittgenstein's expert tailor, possesses a specific form of skilled perception, a 'responsiveness to normative significance'⁸⁴ in a concrete situation and, on that account, is more likely to spontaneously 'hit' the right response.⁸⁵ In this regard it would, for instance, be interesting to explore the extent to which the literature on moral expertise in the field of embodied cognition can make sense of Murdoch's claim that '[t]he more the separateness and differentness of other people is realized, and the fact seen that another man has needs and wishes as demanding as one's own, the harder it becomes to treat a person as a 'thing'.⁸⁶

Another line of thought for MAL to pursue is to further substantiate its claim that judicial perception has value independent of the actual legal decision. Arguably, MAL could find support in the literature on 'procedural justice' that suggests that what matters for (even the losing) citizen involved in legal proceedings is, in the end, not only the content of the actual outcome, but also that they feel that they have been taken seriously.⁸⁷

MAL's strong focus on moral self-scrutiny on the part of the individual judge also raises the liberal concern that MAL lacks the critical bite needed to prevent all kinds of *social* bias such as racism and sexism from influencing the judge's perception.⁸⁸ The fundamental rights of citizens will in any case not be protected by judges who are highly *self-critical*, yet at the same time unconsciously reproduce prevailing *social* 'illusions'. This point is particularly pertinent due to the central role that MAL assigns to thick value concepts which, precisely because of their social embeddedness, are vulnerable to corruption. Think for instance of the aforementioned judge who had to decide whether a

⁸⁴ Rietveld (2010). 87; 202.

⁸⁵ See e.g. Varela (1992); Charness, (1994); Dreyfus (2004); Wright (2007); Rietveld (2008).

⁸⁶ Murdoch (1997). 353.

⁸⁷ As Tyler (2007) has put it 'how people and their problems are managed when they are dealing with the courts has more influence than the outcome of their case on the issues noted above.'

⁸⁸ Indeed, Murdoch's moral philosophy has been criticized for not paying sufficient attention to social injustices. See Blum (2012), Clarke (2012), and Lovibond (2011),). Clarke (2012), Hämäläinen (2015) and Antonaccio (2000) have in response to this critique tried to interpret Murdoch's moral philosophy in a way that incorporates social criticism into the process of moral self-scrutiny.

particular social interaction on the work floor amounted to *sexual harassment* as opposed to a 'friendly tap on the back'.

It could well be that the conventional use of these concepts - as well as the relevant, adjacent non-legal concepts that define the judge's vision - are permeated with sexist biases. It remains to be seen whether it can realistically be expected that individual judges will dismantle such socially constructed 'fantasies', or whether a more feasible division of labour should be contemplated in this regard. This problem in any case suggests that MAL largely relies on the moral quality of certain social practices being in place.

A final concern from the perspective of political legitimacy: MAL allows for legal decision-making, at least to some extent, to remain obscure and unexplained. Consequently, from the viewpoint of liberal legitimacy a *moral* danger arises in promulgating obscurity in the legal domain as this principle requires transparency and accountability where the exercise of state-power is concerned.

On this count MAL must plead guilty as charged, at least insofar as it indeed demands from both judges and citizens that they do without the fantasy of a final, justificatory, transparent scheme that 'goes all the way down'. At the same time, MAL should further explore how equilibrium can best be reached between, on the one hand, the need for public justification in a pluriform society, while honouring the (obscure) nature of legal decision-making on the other.

For this purpose, Bernard Williams' idea of society as an *ethical federation* might prove instructive and in line with Murdoch's thought.⁸⁹ In such a society, the more general and merely regulatory the function of a state-agency is, the more reason there is, at least from the perspective of respect for individual citizens in a pluriform society, for public justifications in general and abstract terms. By contrast, public decision-making procedures at a more 'local' or concrete level, such as court procedures, would be allowed to be more lenient in using 'denser' ethical considerations, and in being messier and apparently less transparent so as to be meaningful for the individual parties involved.

Thus far we have not addressed MAL's feasibility in view of the specific institutional setting of a legal procedure. One important question that arises in this

⁸⁹ Williams (2005). 50.

regard is the extent to which judicial perception could flourish within the context of a legal procedure. Time constraints, digitalization, but also arrangements for the division of labor within the judiciary, all influence the extent to which court proceedings can seriously be considered a 'context of attention'.

More fundamentally, during these proceedings the interaction between judge and litigant parties is typically, and by a large degree, 'off-line' or indirect and, as regards the actual court sessions in real time, a one-off encounter. This is – *ceteris paribus* - in strong contrast to a family relationship such as Murdoch's example of the relationship between mother and daughter-in-law. Also, within the context of court proceedings, oftentimes there is more than one person involved. Can we then expect from judges - from whom MAL demands an attitude of loving kindness – that they, to paraphrase Massaro, "apply their hearts and minds to every litigant in any deep empathic sense."⁹⁰ On pain of projecting too much moral activity onto encounters between judges and citizens involved in legal proceedings, MAL must reckon with the different forms of interaction in, respectively, the private and public domain.

Finally, a multitude of problems arise from MAL's highly personal and transformative conception of professional development. If for instance (the best methods available in) psychology were indeed to attain a central place in the law curriculum or the training of (aspirant) judges so as to increase the student's or judge's level of self-understanding, it would not be easy to counter charges of indoctrination. Also, it would need to be taken for granted that those who educate the 'immature emotional minds' are themselves sufficiently emotionally mature. This in turn would require that society at large, or at least its most important formative social practices, merit being labelled what Nussbaum felicitously dubbed a 'society of perceivers'.⁹¹

This brings us back to the point broached earlier: that the feasibility of MAL seems to depend largely on social background practices being in place, which, if anything, indicates that it should never be pursued as an isolated project. MAL cannot but be intimately linked to a vision-based account of justice, an account that in any case

⁹⁰ Massaro (1989). 2125. *Supra* note 99.

⁹¹ Nussbaum (1990). 101.

provides an answer to the question of what it means, in concrete terms, to - as Murdoch put it - “feel socially responsible about what in our society people do and do not see.”⁹²

V. Conclusion

In the foregoing I have expounded an approach to legal decision-making that is based on Murdoch’s vision-based moral philosophy. In addition, I have set an agenda for further research that may be relevant for any vision-based approach to the legal life.

Admittedly, in this contribution, I have simply assumed rather than argued that there is no strict divide between moral life and legal life. Indeed, a bad person can never be a good judge. From the perspective of MAL, this is not the end of the story; it is simply where our inquiry must begin.

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⁹² Murdoch. 329.

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