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LAW AND LITERATURE
A Discussion on Purposes and Method

Proceedings of the Special WS on *Law and Literature*
held at 24th IVR World Conference
September, 2009, Beijing

Edited by M. Paola Mittica



ISLL Papers

The Online Collection of the Italian Society for Law and Literature

<http://www.lawandliterature.org/index.php?channel=PAPERS>

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ISLL Dossier

ISBN - 9788898010486

DOI - 10.6092/unibo/amsacta/5553

Dossier

“Law and Literature. A Discussion on Purposes and Method”.

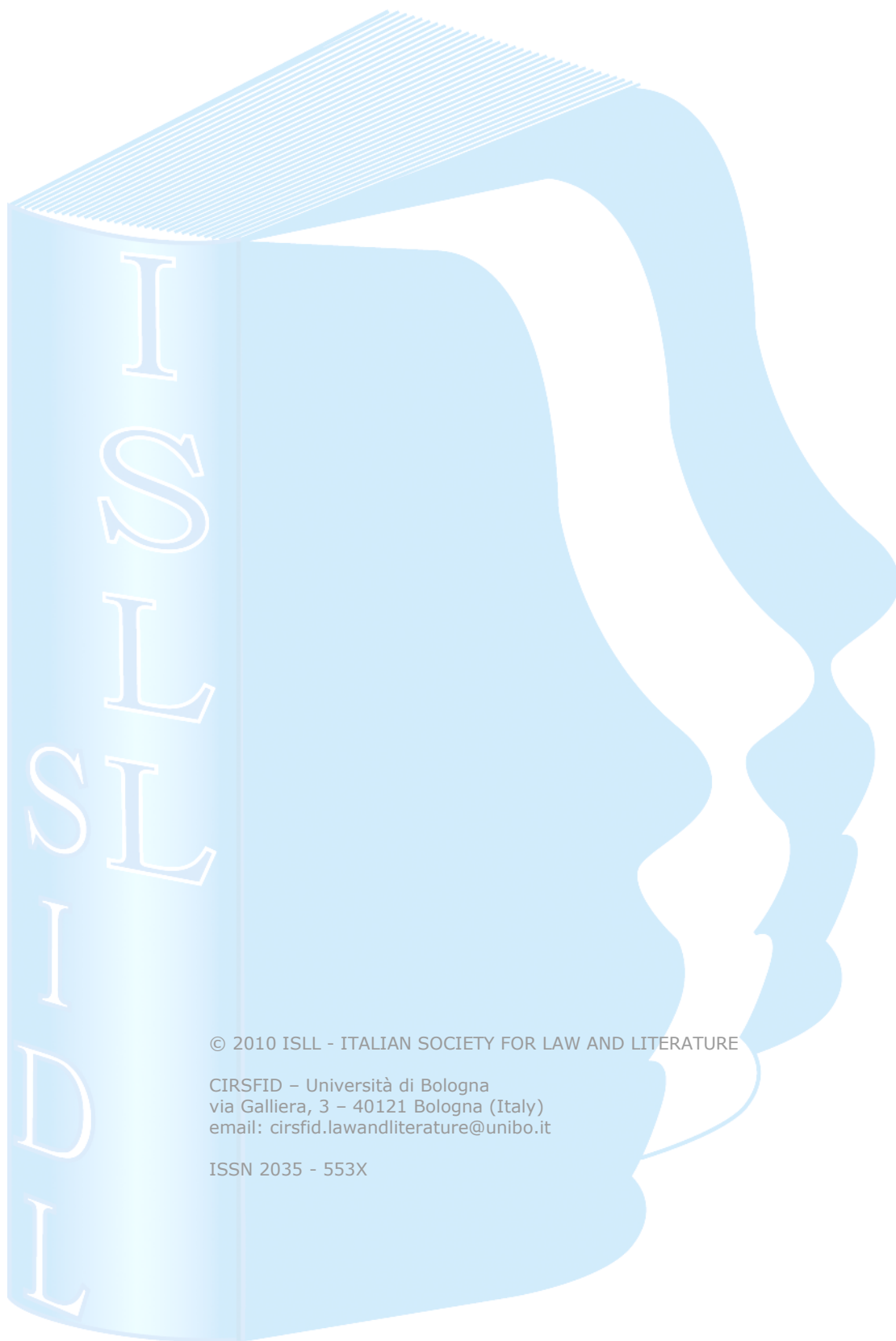
Proceedings of the Special WS on Law and Literature held at 24th IVR World Conference in Beijing, pp. VII+145

It is truly a pleasure to present the proceedings of the second edition of the Special Workshop on Law and Literature, held last September 18, 2009, in Beijing, as part of the 24th World Conference of Philosophy of Law and Social Philosophy (IVR). The workshop was coordinated by M. Paola Mittica and chaired in Beijing by Vincenzo Ferrari, president of the Italian Society for the Philosophy of Law.

You can find here the contributions by Vera Karam de Chueiri, José Manuel Aroso Linhares, Mônica Sette Lopes, Alessia Magliacane, M. Paola Mittica, Marzio Pieri, István H. Szilágyi, Alberto Vespaziani, Irem Aki, Wojciech Załuski.

Ed. by M.P. Mittica

Published online 16/09/2010



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ISSN 2035 - 553X



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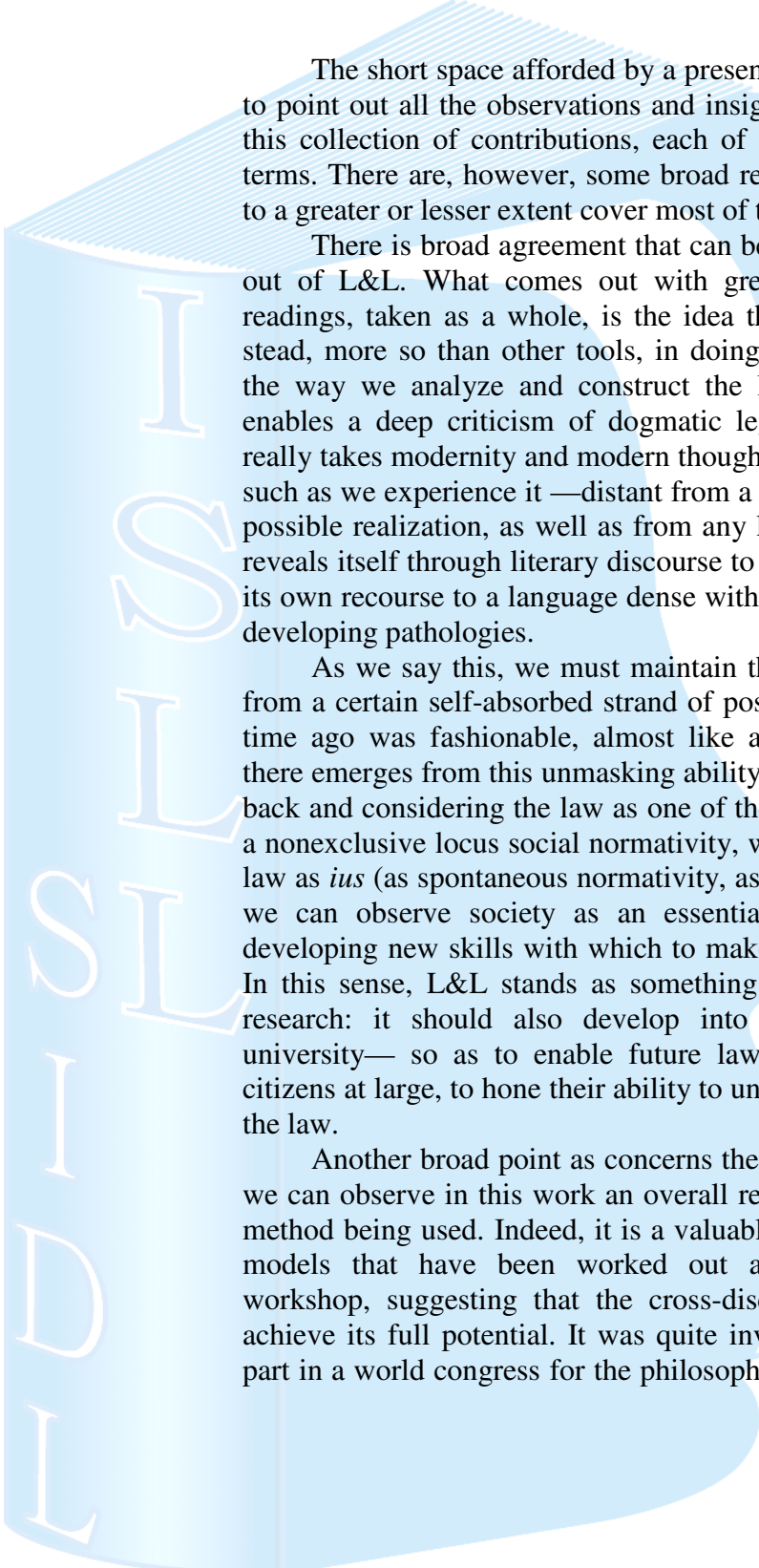
PRESENTATION

It is truly a pleasure for me to present the proceedings of this second edition of the Special Workshop on Law and Literature, held last September 18, in Beijing, as part of the 24th World Conference of Philosophy of Law and Social Philosophy (IVR).

The workshop was organized under the guidance of Enrico Pattaro, former president of IVR and founder of the Italian Society for Law and Literature (ISLL). Also contributing to the workshop's organization was the president of the ISLL, Carla Faralli, while its coordination was my own work. In Beijing we were honoured to have the workshop chaired by Vincenzo Ferrari, president of the Italian Society for the Philosophy of Law and a sociologist of law of international acclaim: I heartily thank him for his participation. And I also thank all my colleagues for helping to make this a successful workshop: this is a thank you I extend not only to those who joined us in Beijing to discuss their papers but also to those who contributed their papers in absentia, as it were, showing their commitment to the workshop and its subject matter.

In continuity with the previous workshop, organized by Jeanne Gaaker and François Ost, the participants were given absolute freedom to choose their own topic and approach (Law *in* or Law *as* Literature), so long as they did not discount the epistemological and methodological concerns that L&L currently deems essential in those countries where L&L is a more recent development, as in Europe and Latin America. Besides, a methodological discussion becomes all the more important in this case, where scholars are coalescing around L&L from a variety of different backgrounds.

I should scarcely mention that the workshop bore fruit, with an array of contributions that hold the promise of future development.

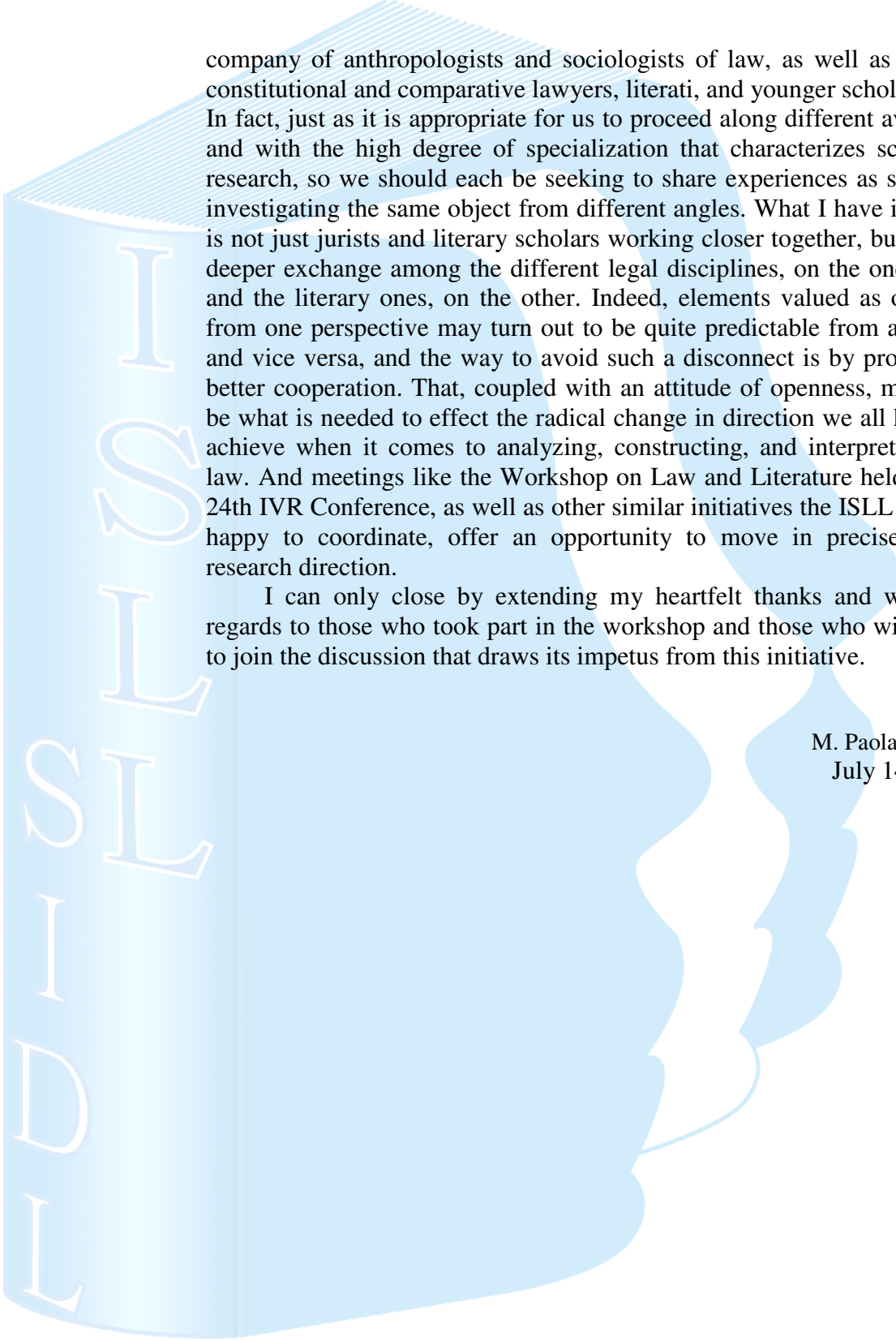


The short space afforded by a presentation will not make it possible to point out all the observations and insights that have come together in this collection of contributions, each of which is best read on its own terms. There are, however, some broad remarks that can be made which to a greater or lesser extent cover most of the contributions.

There is broad agreement that can be observed as to what to expect out of L&L. What comes out with greater driving force from these readings, taken as a whole, is the idea that L&L can serve us in good stead, more so than other tools, in doing an about-face, turning around the way we analyze and construct the law. This is to say that L&L enables a deep criticism of dogmatic legal reasoning, a criticism that really takes modernity and modern thought as its primary object. The law such as we experience it—distant from a pure theory of law and from its possible realization, as well as from any legal-economic framing of it—reveals itself through literary discourse to be gappy, wanting, innocent of its own recourse to a language dense with metaphor, like a system that is developing pathologies.

As we say this, we must maintain the distance that separates L&L from a certain self-absorbed strand of postmodernism, which until some time ago was fashionable, almost like an affectation. Indeed, because there emerges from this unmasking ability the further possibility of going back and considering the law as one of the components of culture and as a nonexclusive locus social normativity, we can go back and observe the law as *ius* (as spontaneous normativity, as living law), just as, in parallel, we can observe society as an essential source of community, thus developing new skills with which to make better the world of daily life. In this sense, L&L stands as something more than a fecund mode of research: it should also develop into a curriculum—not only at university—so as to enable future lawyers and officials, as well as citizens at large, to hone their ability to understand and critically interpret the law.

Another broad point as concerns the essays in this collection is that we can observe in this work an overall refining of the cross-disciplinary method being used. Indeed, it is a valuable set of theories and analytical models that have been worked out and presented at the Beijing workshop, suggesting that the cross-disciplinary approach has yet to achieve its full potential. It was quite invigorating in this sense to take part in a world congress for the philosophy of law and find myself in the



company of anthropologists and sociologists of law, as well as among constitutional and comparative lawyers, literati, and younger scholars. In fact, just as it is appropriate for us to proceed along different avenues, and with the high degree of specialization that characterizes scientific research, so we should each be seeking to share experiences as scholars investigating the same object from different angles. What I have in mind is not just jurists and literary scholars working closer together, but also a deeper exchange among the different legal disciplines, on the one hand, and the literary ones, on the other. Indeed, elements valued as original from one perspective may turn out to be quite predictable from another, and vice versa, and the way to avoid such a disconnect is by promoting better cooperation. That, coupled with an attitude of openness, may just be what is needed to effect the radical change in direction we all hope to achieve when it comes to analyzing, constructing, and interpreting the law. And meetings like the Workshop on Law and Literature held at the 24th IVR Conference, as well as other similar initiatives the ISLL will be happy to coordinate, offer an opportunity to move in precisely this research direction.

I can only close by extending my heartfelt thanks and warmest regards to those who took part in the workshop and those who will want to join the discussion that draws its impetus from this initiative.

M. Paola Mittica
July 14, 2010



BENJAMIN A READER OF BAUDELAIRE: IMAGES OF MODERNITY
THROUGH TIME, MYTH AND THE LAW

by
Vera Karam de Chueiri

Verse-nous ton poison pour qu'il nous réconforte!
Nous voulons, tant ce feu nous brûle le cerveau,
Plonger au fond du gouffre, Enfer ou Ciel, qu'importe?
Au fond de l'inconnu pour trouvez du nouveau!

(Baudelaire 1997, *Le Voyage*)

The most sophisticated civilization and the most “modern”
culture are not part of my private comfort; some of them
are the very means of my production.

(Benjamin 1931)

Introduction

Benjamin, a German reader of Baudelaire who arrives in Paris by means of Baudelaire's verses tells us about an experience of space and time, which can be translated by “modernity”. Time already belongs to modernity's own representation so that *modern times* or *temps modernes* is —not by chance— the picture of modernity. (Modern) time and its movement (re)defines (modern) space.

It is noteworthy that in another Franco-Germanic dialogue Deleuze (1996, vii) refers to Kant's first great reversal in the ‘transcendental aesthetic’ of the *Critique of Pure Reason* remarking that time is no longer related to the

movement, which it measures, but movement is related to the time which conditions it: This is the first great reversal in the *Critique of Pure Reason*. Movement is subjected to time. For Deleuze (*Ivi*, viii), Kant's new definition of time implies completely new determinations of space and time. It is no longer a question of defining time by succession, nor space by simultaneity, nor permanence by eternity. Permanence, succession and simultaneity are modes and relationships of time. Thus, just as time can no longer be defined by succession, space cannot be defined by coexistence.

The priority of time over space can be related to the fact that time is the form of all intuition, that is, it is directly the form of inner intuition and indirectly the form of outer intuition. Heidegger, in *Being and Time*, says the question must first be asked whether and to what extent in the course of the history of ontology in general the interpretation of being has been thematically connected with the phenomenon of time. We must also ask whether the range of problems concerning temporality, which, necessarily belongs here was fundamentally worked out or could have been. Kant is the first and only one who traversed a stretch of the path toward investigating the dimension of temporality—or allowed himself to be driven there by the compelling force of the phenomena themselves (Heidegger 1996, 20):

This step back to the “transcendental aesthetic” of the *Critique of Pure Reason* shows us briefly the commitment of modernity with time/temporality, by one of the most exemplar representative of its (modernity's) early manifestation. The discussion in this paper is, then, driven by this commitment of modernity with temporality.

When Benjamin addresses his critical analysis of modernity, for what it is meant part of the nineteenth century and the first four decades of the twentieth century, he is concerned with a time whose spatial representations can be Paris, Berlin or Moscow. Benjamin's writings and thoughts in order to (re)think modernity take into account these urban images (*Bilde*).

This paper focuses on Benjamin as an interlocutor of Baudelaire and hence on the urban atmosphere of Paris which both talk about: Baudelaire in the lyric of his poetry and Benjamin as a reader of Baudelaire as well as an “exiled” (living) in Paris. Benjamin proceeds from the conviction that the allegorical poetics of Baudelaire constituted a privileged vantage-point from which to view the plight of a “self-alienated humanity” in the era of industrial capitalism (Wolin 1982, 231). That which is concerned in Benjamin's view of modernity is precisely a question of time and of an alteration in its relation to space.

Then, back to the Germanic-Franco dialogue, Benjamin and Baudelaire, there is time conditioning the movement of the commodities, the movement of the machines and the movement of the *passants* through the Parisian *passages*. Pictured by Benjamin's eyes especially on the lyric of Baudelaire's verses one sees the contradiction or the dialectics of modernity: Samples of bourgeois

movements, the movement of the masses and the rhythm of the revolutions. As Benjamin observes, “[...] Baudelaire’s own poetry [...] supported the oppressed, though it espoused their illusions as well as their cause. It had an ear for the chants of the revolution and also for the ‘higher voice’ which spoke from the drum roll of the executions. When Bonaparte came to power through a coup d’état, Baudelaire was momentarily enraged. ‘Then he looked at the events from a ‘providential point of view’ and subjected himself like a monk’”.¹

Modernity is time redefining itself in a promising but scaring way where *all that is solid melts into air*.² The turbulence of the streets, mass and bourgeoisie, commodities and the new arts which hesitate between becoming or not commodities, new techniques, the iron made “arcades” of Paris, all of these movements in the urban site are constitutive of the “new/novelty” that is in the core of modernity.

Yet, the assumption of the “new/novelty” as a central category to recognize modernity is not free of problems and contradictions. Modernity’s (pre)tension of being eternal is the first and perhaps most insurmountable contradiction. On the one hand, the condition of the “new/novelty” implies a permanent movement which, on the other hand, no longer continues in the perspective of the eternal. There is a tension between what aims at being unchangeable and eternal and, at the same time, is meant by the transitoriness and contingency of actuality. Here remains one of modernity’s dilemmas. In the essay called *Modernism*,³ Baudelaire talks about a man who has a higher aim than that of a simple *flâneur*, that is, a more general aim, distinct from the ephemeral pleasure of the circumstance. Such man is a lonely fellow with an active imagination traveling through the huge desert of men. He seeks for something one can call modernity. According to Baudelaire there is no better word to express such idea, to extract the eternal from the transitori.⁴ “La modernité – anticlassique et classique. Anticlassique: en tant que contraire du

¹ Benjamin (1992, 26) quotes Paul Desjardins. 1887. “Charles Baudelaire”. *La revue bleue* 19.

² “All that is solid melts into air, all that is holy is profaned and man is at last compelled to face with sober, his real conditions of life, and his relations with his kind”(Marx-Engels 1976, 487).

³ Modernism is the third essay of “The Paris of the Second Empire in Baudelaire” (Benjamin 1992). In the French edition of this book *modernism* is translated by *modernité*. The relation as well as the distinction between modernism, modernity and modernization will not be discussed here. Nevertheless, in the French edition (1997), the German word in the glossary is *Die Moderne* (modernity). So, even using the English translation of *Charles Baudelaire* I rather consider the German word and its French translation to which I will refer as modernity.

⁴ “By *modernité* I mean the ephemeral, the fugitive, the contingent, the half of art whose other half is the eternal and the immutable” (Baudelaire 1981).

classique. Classique: en tant qu'exploit héroïque de l'époque qui imprime sa marque sur son expression" (Benjamin 1997, 311 [J 38a, 1]).

Benjamin criticism is first concerned with revealing the "new/novelty" (the ever-new) as the always-the-same and secondly with unmasking the always-the-same as nothing but the transitory and temporary. The whole idea of modernity is, in this sense, entangled by this paradox.

The image of a hero could be a good representation of these "modern times". A time which promises adventure, power, happiness, revolution but also threats with the destruction of that which one have known, gained, and been. The heroic attitude redeems from the "old", that is, the hardness of social roles in the feudal society, the pre-(iron)-capitalist society, the so-behaved art expressed in the figurative paintings, the romanticism in literature and so forth. Baudelaire identifies the hero in the figure of the artist. Both (the hero and the artist) embody this new subject who signifies this new time. Modernity is after all the time of this subject whose actions shaped the "new/novelty" through the changes he or she has unchained. The subject is an agent of changes which, at the same time, are changing him. "The hero is the true subject of modernism" (Benjamin 1992, 74). Therefore, to experience modernism it is necessary a heroic attitude.

This heroic attitude or this heroic desire that signifies the modern subject radically expresses itself through one of the manifestations of modern passion that is the suicide. "Modernism must be under the sign of suicide, an act which seals a heroic will that makes no concessions to a mentality inimical towards this will. This suicide is not a resignation but a heroic passion. It is the achievement of modernism in the realm of passions" (*Ivi*, 75). We are condemned to this heroism that gives rhythm to Baudelaire's verses. Benjamin himself performs the modern hero. His suicide on the Franco-Spanish border, at Port Bou, on September of 1940 is nothing but the tragic fate of our condition as moderns.

Indeed, Benjamin tells us about this radical modern passion as the sign, which crosses over our lives turning them especially modern (and tragic). Humanity is thus fated to its damnation: Everything that we can expect as "new/novelty" is, since then, a reality that is already present. It is a time in which progress is nothing but the phantasmagoria of history itself, the eternal recurrence of the same. Modernity is seen in the reproduction of the always-the-same under the appearance of the production of the everlastingly new. In other words, the representation of modernity through its elements can be seen in the image of the eternal recurrence. Modernity, in this way, is the image of a world commanded by its own phantasmagorias: The repetition of the same. So, death and transitoriness in the realm of modernity's passion and beauty have to be understood in the eternity of such repetition. "L'humanité sera en proie à une angoisse mythique tant que la fantasmagorie y occupera une place" (Benjamin 1997, 22).

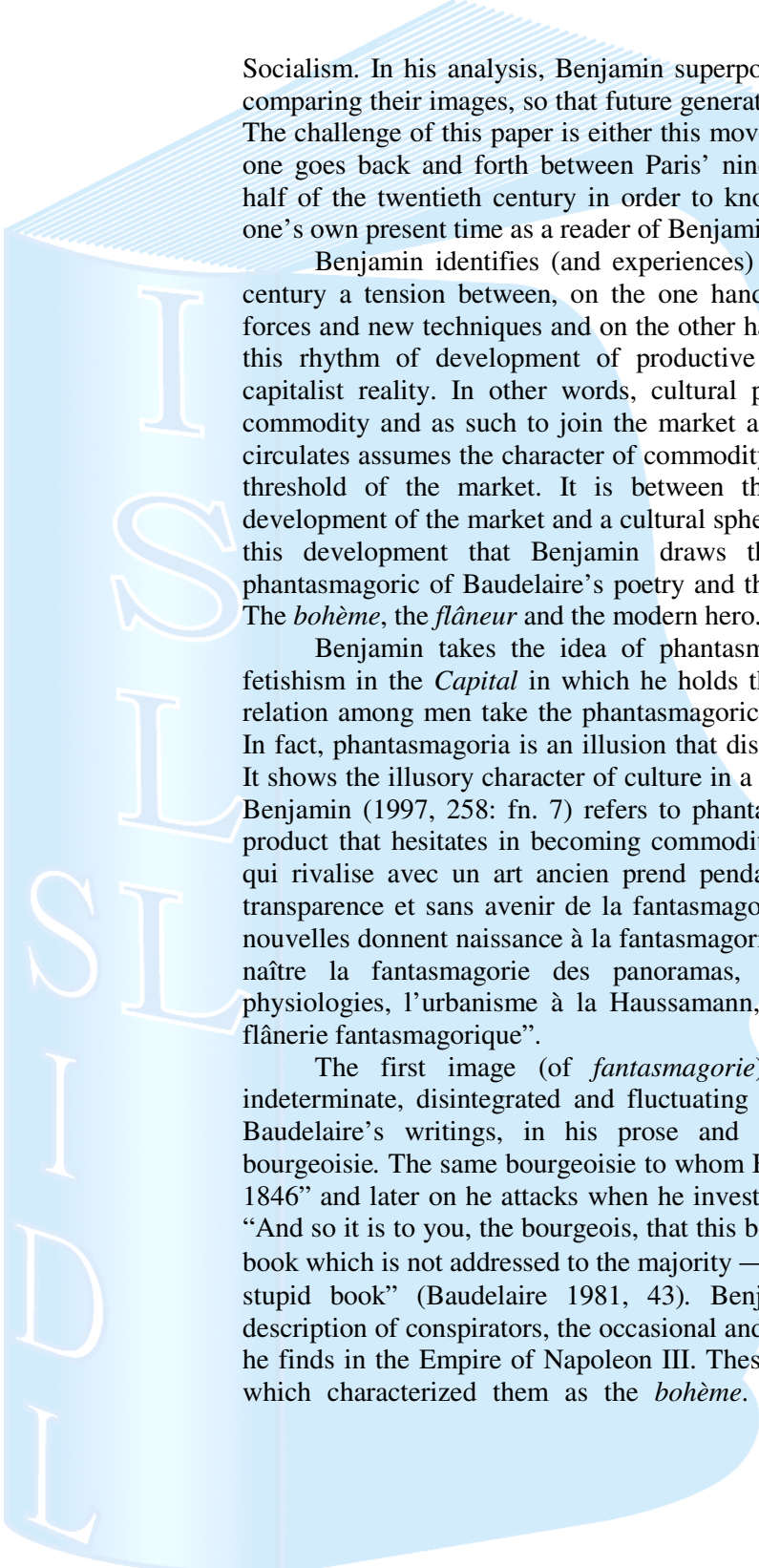
Benjamin also identifies in Baudelaire's poetry, the passion, which defines the content of modern life. The interweaving of passion, poetry and thought is in Benjamin's works as well as in his life. His analysis of Baudelaire is nothing but an analysis of the experience of a time that is beaten by the rhythm of passions, machines, commodities, and masses, that is, the (modern) time of the "metropolis".

Then, reaffirming the purpose of this paper is to show how Benjamin approaches modernity as an experience of time seen through its urban representations or rather through modernity's mythic aspects. Such approach is based on Baudelaire's writings which are deeply involved with the Parisian social life of the nineteenth century and on Benjamin's own experience as a Berliner admirer of Paris with a fair metropolitan soul.

There are two kinds of narratives, which reciprocally crisscross here: Baudelaire's poetry and prose and Benjamin's critique of them. The poems and their reviews flow in the rhythm of the perceptions of their narrators. They both are free narratives comparing to the academic narrative that bounds papers, thesis and dissertations. The narrative of the paper tries to be faithful to this modern commitment that makes Baudelaire and Benjamin accomplices of a project yet free in the way they narrate it. Then, this paper takes modernity as its leitmotif first focusing on Paris as the capital of nineteenth century as well as the center of capital (time I). It also focuses on the Parisian arcades (time II) to where Baudelaire arrives and from where Benjamin departs in acknowledging the paradox of modern times: Heaven and hell. Finally, it relates (modern) time to myth and both to (modern) law stressing the element of violence Benjamin talks about in referring to the law.

Time I: Paris, the capital of nineteenth century and the center of capital

Benjamin was attracted and repelled by the urban centers. As a Berliner he grew up in between this cloudy metropolitan atmosphere. The air of promise, excitement, exhilaration and development of the metropolis seduced him to the same extent that threatened him with a present of exploitation, alienation and despair. The daily life of the city, especially Paris to where Benjamin decided to go with the rise of the National Socialists in Germany, became the very means of his intellectual production. Benjamin finds in Baudelaire's writings, especially in his poetry, the picture of Paris in the second half of the nineteenth century, which symbolizes the time —modernity— that both reflect about. Baudelaire offers images of a time, which Benjamin's eyes capture and around which the narrative of this paper flows (in order to think its own time, that is, the present time of this narrative). In fact, *The Paris of Second Empire in Baudelaire* is a reading of the past through which Benjamin talks about the transformation of the Weimar Republic during the raise of the National



Socialism. In his analysis, Benjamin superposes two distinct historical epochs comparing their images, so that future generations could know their own epoch. The challenge of this paper is either this movement, this *passage*, which makes one goes back and forth between Paris' nineteenth century and Berlin's first half of the twentieth century in order to know modernity or it is to decipher one's own present time as a reader of Benjamin.

Benjamin identifies (and experiences) in the threshold of the twentieth century a tension between, on the one hand, the development of productive forces and new techniques and on the other hand culture which does not follow this rhythm of development of productive forces, moving away from the capitalist reality. In other words, cultural production hesitates in becoming commodity and as such to join the market as the place where everything that circulates assumes the character of commodity. Cultural production rests on the threshold of the market. It is between this hesitation of an immoderate development of the market and a cultural sphere that remains in the threshold of this development that Benjamin draws the figures which represent the phantasmagoric of Baudelaire's poetry and that critically expresses modernity: The *bohème*, the *flâneur* and the modern hero.

Benjamin takes the idea of phantasmagoria from Marx's analysis of fetishism in the *Capital* in which he holds that in the capitalist system social relation among men take the phantasmagoric form of a relation among things. In fact, phantasmagoria is an illusion that distracts men from their own reality. It shows the illusory character of culture in a society dominated by commodity. Benjamin (1997, 258: fn. 7) refers to phantasmagoria to mean every cultural product that hesitates in becoming commodity: "Chaque innovation technique qui rivalise avec un art ancien prend pendant quelque temps la forme sans transparence et sans avenir de la fantasmagorie: les méthodes de construction nouvelles donnent naissance à la fantasmagorie des passages, la photographie fait naître la fantasmagorie des panoramas, le feuilleton s'accompagne de physiologies, l'urbanisme à la Haussmann, dans sa brutalité, s'oppose à la flânerie fantasmagorique".

The first image (of *fantasmagorie*) is that of the *bohème*: An indeterminate, disintegrated and fluctuating mass that Benjamin identifies in Baudelaire's writings, in his prose and poetry, when he refers to the bourgeoisie. The same bourgeoisie to whom Baudelaire dedicates his "Salon de 1846" and later on he attacks when he invests against the school of *bon sens*. "And so it is to you, the bourgeois, that this book is naturally dedicated; for any book which is not addressed to the majority—in number and intelligence—is a stupid book" (Baudelaire 1981, 43). Benjamin also recalls Marx in his description of conspirators, the occasional and the professional conspirators that he finds in the Empire of Napoleon III. These political types had some habits, which characterized them as the *bohème*. As says Marx: "their uncertain

existence, which in specific cases depends more on chance than on their activities, their irregular life whose only fixed stations were the taverns of the wine dealers —the gathering places of the conspirators— and their inevitable acquaintanceship with all sorts of dubious people place them in that sphere of life which in Paris is called *la bohème*” (Benjamin 1992, 12). The conspirators also erected and commanded the barricades. However, they were not the only people there. Behind the cobblestones, especially with regard to the event of the Commune in 1871, there was a mixed mass of bourgeois and proletarian types. Baudelaire mentions the barricades in his poem *Dans l’adresse à Paris* which was supposed to conclude *Les Fleurs du Mal* but remained as a fragment. He remembers the barricade’s “magiques pavés dressés en fortesses” (*Id.*, 1997, 29).

Marx addresses his attention to Blanqui, a central figure of the barricades, to whom he refers as an alchemist of the revolution and who “fully share[s] the disintegration of ideas, the narrow-mindedness, and the obsessions of the earlier alchemists’. This almost results in Baudelaire’s image: The enigmatic stuff of allegory in one, the mystery-mongering of the conspirators in the other” (*Id.* 1992, 17). In another parallelism that Benjamin stresses between Marx and Baudelaire we are sent to taverns and absorbed by the aroma of the wine, thanks to the *chiffonniers*, *alchemists of the taverns*, by means of whom the *bohème* stayed in the taverns as if they were their home.

On voit un chiffonnier qui vient, hochant la tête,
Butant, et se cognant aux murs comme un poète,
Et, sans prendre souci des mouchards, ses sujets,
Épanche tout son couer en glorieux projets.

Il prête de serments, dicte des lois sublimes.
Terrasse les méchants, relève les victime,
Et sous le firmsment comme un dais suspendu
S’enivre des splendeurs de sa propre vertu.

Oui, ces gens harcelés de chagrins de ménage,
Moulus par le travail et tourmentés par l’agê,
Éreintés et pliant sous un tas de débris
Vomissent confus de ‘énorme Paris
(Baudelaire 1997, *Le vin des chiffonniers*)

According to Benjamin, the *chiffonniers*, even not being part of the *bohème*, could be recognized among the bohemian types such as the *littérateur* among professional conspirators. A spirit of revolt and a suspicion about the future were shared by all of these men. It is remarkable that the *chiffonniers* do not even belong to this community of outsiders, that is, their misery is such that

they do not belong to the “community of those who do not belong” (Frey 1996, 153).

Yet Benjamin points up the poet and his political idiosyncrasies as well as the situation of the man of letters in the society. In picturing the man of letter in his searching for a place in the capital of nineteenth century and the center of capital, Benjamin refers to another Baudelaire’s phantasmagoria, that is, the image of the *flâneur*. Baudelaire sees the man of letters as having a similar attitude to the conspirator: He, the man of letters, conspires with language itself.

The figures that represent the *bohème* are outsiders, are types that have little to do with one another but which are linked by the fact that they have been excluded from society. As Frey says (*Ibid.*): “the *bohème* thus has the structure of a constellation. [...] For Benjamin, the constellation is an order of relationships that was concealed by an existing order and is divulged by the isolation of its elements. Isolation itself is what establishes the connection. Discontinuity here is not the suspension of one order so that another becomes visible; rather, what is discontinuous is similar to itself as such”. In this sense, the *chiffonniers* who do not even belong to the outsiders (who recognize something of themselves in them), give the idea of the *bohème* as a constellation. The *chiffonniers* are the outside appearance of the outsiders. In fact the *bohème*, the constellation, brings all these excluded types together.

In connection with the *bohème* is the *flâneur*. “Baudelaire knew the true situation of the man of letter was; he goes to the market place as a *flâneur*, supposedly to take a look at it, but in reality to find a buyer” (Benjamin 1992, 34).

Paris was an excellent place for strolling. After all, it was the capital of the capital. However, with the replacement of wide pavements by narrower ones it became dangerous to stroll because of vehicles and the little protection from them. “Strolling could hardly have assumed the importance it did without the arcades” (Benjamin 1992, 36). The arcades or *passages* were such an invention in the second half of nineteenth century. A picture of the development of luxury covered by glass, marble-panelled passageways, the *passages* in Paris were the house of the *flâneur*. As Benjamin says, the place of little *métiers*: “as for himself he obtains there the unfailing remedy for the kind of boredom that easily arises under the baleful eyes of a satiated reactionary regime” (*Ibid.*). The arcades were the devices of the physiologies, the device of the *feuilleton*, they became essential for this kind of modest-looking, paperbound literature. They changed the boulevards into an *intérieur* and the street became a dwelling for the *flâneur*. The physiologies pictured the Parisians who were *habitués* of the arcades as friendly types helping to fashion the phantasmagoria of the metropolis. “The walls are the desk against which he presses his note books” (Benjamin 1992, 37).

The *flâneur* rambles in the metropolis without destination. This type, according to Benjamin, became an unwilling detective in times of terror. He

searches for a crime. Detective stories also fashioned the phantasmagoria of Parisian life. Baudelaire himself adopted the genre, which first arrived in France by means of Poe's stories. Poe's *The man of the crowd* is for Benjamin an X-ray of the detective story. "A man who arranges his walk through London in such a way that he always remains in the middle of the crowd" (Benjamin 1992, 48). It is hard to identify this man among the crowd turning him even more suspected. For Baudelaire this man is the *flâneur*.

This genre of literature transformed the city into a place of danger, of fearless and of daring people. "What are the dangers of the forest and the prairie compared with the daily shocks and conflicts of civilisation? Whether a man grabs his victim on a boulevard or stabs his quarry in unknown woods —does he not remain both here and there the most perfect of all beasts of prey?" (*Ivi*, 39)

The crowd that appears in Poe's poem has a straight relation to the city. Benjamin stresses this relation analyzing Baudelaire famous poem *A une passante*:

La rue assourdissante autour de moi hurlait.
Longue, mince, en grand deuil, douleur majestueuse,
Une femme passa, d'une manière fastueuse
Soulevant, balançant le feston et l'ourlet;

Agile et noble, avec sa jambe de statue.
Moi, je buvais, crispé comme un extravagant,
Dans son oeil, ciel livide où germe l'ouragan,
La douceur qui fascine et le plaisir qui tue.

Un éclair... puis la nuit! – Fugitive beauté
Don't le regard m'a fait soudainement renaître,
Ne te verrai-je plus que dans la éternité?

Ailleurs, bien loin d'ici! trop tard! jamais peut-être!
Car j'ignore où tu fuis, tu ne sais où je vais,
O toi que j'eusse aimée, ô toi que le savais!

For Benjamin, the crowd which Baudelaire does not explicitly mention ("la rue assourdissante autour de moi hurlait / car j'ignore où tu fuis, tu ne sais où je vais") determines the events described in the poem. It is beautiful how Benjamin interprets the poem in the sense that the crowd is not the refuge of a criminal but it is that of love which eludes the poet. This very crowd brings the apparition who fascinates him (the poet) to him. The delight of the city-dweller is not so much love at first sight as love at the last sight (Benjamin 1992, 45). The poet who looks to the crowd without really looking to it because "une femme passa, d'une manière fastueuse / soulevant, balançant le feston et

l'ourlet". Yet, an unexpected pleasure and excitement is there in the multitude ("ne te verrai-je plus que dans la éternité?"). The object of desire comes out from the crowd. This is modernity shaped by the big city: The excitement of the ephemeral (love). However, what is love but the possibility of the eternal? Again, we find ourselves confronting the paradox of heaven and hell, given by the very idea of modernity. Gilloch (1997, 146) writes: "the erotic becomes a momentary act of seeing, of voyeurism. The glimpsed remains unfulfilled. For the poet the city is the site of temptation: It is the home of Tantalus".

The arcades were where the *flâneur* would find entertainment, fun, and novelty. "To promenade without purpose is the highest ambition of the flâneur" (*Ivi*, 153). He is that bourgeois type who strolls through the passages searching for diversion.

Baudelaire (1981, 9) sees the *flâneur* as a man of the crowd comparing him to Poe's character: "His passion and profession are to become one flesh with the crowd. For the perfect flâneur, for the passionate spectator, it is an immense joy to set up house in the middle of the multitude, amid the ebb and flow of movement, in the midst of the fugitive and infinite". In *Some Motifs in Baudelaire*⁵ Benjamin does not accept Baudelaire's view of the *flâneur* as a man of the crowd. The *flâneur* is not just one more among the crowd as if he was wedged there. He is a pedestrian who "demanded elbowroom and was unwilling to forego the life of a gentleman of leisure" (Benjamin 1992, 129). At the same time he enjoys the crowd which offers him pleasure, enchantment and makes him an accomplice, he does not feel himself as belonging to it. It is essential for the *flâneur* to dissociate him from the crowd, the ignoble mass. His individuality is taken to be a heroic attitude, a resistance from being devoured by the mass. "For Benjamin, the flâneur is heroic in his arrogant retention of an aloof independence and a disdainful individuality" (Gilloch 1997, 153).

The crowd helps to turn invisible that which is to be visible in order to shape the bourgeois type embodied by the *flâneur*. Bourgeoisie has an extreme necessity of being recognized in its individuality: A class that, obviously, does not want to be seen as a collectivity. The most distinguished type of bourgeois who, as a *flâneur*, walks on the streets of Paris doing nothing is the dandy. This very bourgeois figure is someone who dares the time of competition determined by the rhythm of the market. His laziness in a time beaten by the sound of serial production is a kind of paradoxical heroism. After all, he is not a man of the marketplace but he goes to the arcades in order to sell his product, that is, his "fashionable" idleness. "The flâneur-as-idler is thus doubly phantasmagoric: In

⁵ Benjamin wrote his first essay on Baudelaire called *The Paris of the Second Empire in Baudelaire* as a first draft of the third part of a major work called *Passagenarbeit*. After he submitted the essay to Adorno in order to become a member of the Institute, Adorno raised some issues and the debate between them resulted in another essay Benjamin (1939) wrote called *Some Motifs in Baudelaire*.

what he writes (the physiologies) and what he does (the pretence of aristocratic idleness and the reality of bourgeois commercial interest)” (Ivi, 156).

For Benjamin, whether a man of the letter or a dandy in his aristocratic costume, the *flâneur* takes the Parisian arcades in order to see and to be seen and then be bought as any other commodity in the marketplace. The *flâneur* is rendered by the intoxication of the commodity. The *flâneur*, like a prostitute, offers himself as a commodity in the marketplace. Intoxication, prostitution and the big city: Modernity in the (de)humanizing perspective of its fate.

However, at one moment these reversed types of the metropolis such as the *flâneur* (seen in all of his representations), the prostitute and the gambler are the true heroes of modern life. They are images of anti-heroes, phantasmagorias that reveal that which is to be in capital of the capital. The true modern hero is nothing but commodity. Benjamin reads Baudelaire stressing these deceiving characters of the metropolis who are heroes exactly for being the anti-heroes.

We are at the point of a great irony: The hero in the modern metropolis is that who is intoxicated by it to the same extension he is stimulated by it. Opium, absinthe, narcotics, intoxication and pleasure, hell and heaven: Modernity.

The modern hero is one who while embodying the tendencies of modern capitalism, is simultaneously engaged in an inevitably struggle against them. The heroism of modernity takes the form of self-deception while it deals with a universe of paradoxes and illusions. As I mentioned in the introduction of the paper the most paradoxical and illusory heroic attitude of this modern subject is the deprivation of his own life: “the resistance which modernism offers to the natural productive élan of a person is out of proportion to his strength. It is understandable if a person grows tired and takes refuge in death. Modernism must be under the sign of suicide, an act which seals a heroic will that makes no concessions to a mentality inimical towards this will. This suicide is not a resignation but a heroic passion” (Benjamin 1992, 75).

Time II: The *passages* (arcades)

Around 1822 it arrives in Paris the *magasin de nouveautés*. The new condition of industrialization raises a new form of commerce that takes place in this new architecture of glass and iron and gaslight: “invention du luxe industriel; des couloirs au plafond de verre et aux entablements de marbre; [...] un monde en miniature” (Benjamin 1997, 65 [A 1, 1]). The *Passages* are really the sign of modern times. Besides the architectonic resource with an arched roof, *passage* also means a short extract from a book, movement, transition. It is always a way through which one (we) is (are) taken, in which one (we) is (are) exposed. Modern time is the time of the passages/exposition.

Therefore, the *Passages* through where one sees the urban life of the metropolis happening is the central image for Benjamin (re)thinking of modernity. It is not by chance that in the beginning of 1927 Benjamin engages

himself in a project dedicated to the critical revelation of the modern metropolis as the phantasmagoric site of mythic domination, calling it *The Arcades Project*. It was in fact an *exposé* in 1935 about *Paris, the capital of nineteenth century* that somehow established the axis of the whole project. Later, he rewrote its main section under the title *Paris of Second Empire in Baudelaire* and *On Some Motifs in Baudelaire*. Yet, the project as a whole remained suspended and unfinished with Benjamin's heroic and tragic death which, paradoxically, ends by giving a meaningful end to it.

It is possible to say that the *Arcades exposé* adopted a very close standpoint to the study of the seventh century in the *Trauerspiel*. Its theoretical main point is the concept of the "prehistory" of the nineteenth century (*Urgeschichte des 19ten Jahrhunderts*). The *exposé* was to introduce the nineteenth century into the present. Benjamin's intention was to reveal elements of prehistory "such as myth, fate and the always-the-same beneath the apparent phantasmagoria of *nouveauté*, the fantastic array of commodities and innovations that swept the nineteenth century under the banner of 'the modern'" (Wolin 1982, 174). He aimed at demonstrating how modern(ity) itself regressed (!) to the level of prehistory.

Benjamin sees the phantasmagoric proliferation of new commodities (which distinguished urban life under the conditions of nineteenth century capitalism) as regression to the notion of eternal recurrence or mythical repetition. That is, it represents a return to the notion of cyclical time which was dominant in prehistoric times. From the privileged point of consumption, full-scale commodity production signified the reversion to a Great Myth: The reproduction of the always-the-same under the semblance of the production of the perpetually new (*Ibid.*). Benjamin's analysis of Baudelaire's poem *Les Sept Viellards* talks about the new/novelty as that which is revealed as the phantasmagoria of always-the-same.

Fourmillant cité, cité pleine de rêves,
Où le spectre en plein jour raccroche le passant!
Les mystères partout coulent comme des sèves
Dans les canaux étroits du colosse puissant
...
Tout à coup, un vieillard don't les guenilles jaunes
Imitaient la couleur de ce ciel pluvieux,
Et don't l'aspect aurait fait pleuvoir les ânômes,
Sans la méchanceté qui luisait dans ses yeux,
...
Son pareil le suivait: barbe, oeil, dos, bâton, loques,
Nul trait ne distinguait, du même enfer venu,
Ce jumeau centenaire, et ces spectres baroques
Marchaient du même pas vers un but inconne.
...

À quel complot infâme étais-je donc en butte,
Ou quel méchant hasard ainsi m'humiliait?
Car je comptai sept fois, de minute en minute,
Ce sinistre vieillard qui se multipliait!

Que celui-là qui rit de mon inquiétude,
Et qui n'est pas saisi d'un frisson fraternel,
Songe bien que malgré tant de décrépitude
Ces sept monstres hideux avaient l'air éterne!

Aurais-je, sans mourir, contemplé le huitième,
Soisie inexorable, ironique et fatal,
Dégoûtant Phénix, fils et père de lui-même?
-Mais je tournai le dos au cortège infernal
[...]

The old man with a repulsive aspect appears eight times. The magic circle, as Benjamin (1997, 55) says, never ceases: "Car je comptai sept fois, de minute en minute, / Ce sinistre vieillard qui se multipliait! [...] Aurais-je, sans mourir, contemplé le huitième?" It is the anguishing phantasmagoria that occurs to the individual in the "fourmillant cité, cité pleine de rêves / Où les spectre en plein jour raccroche le passant! Baudelaire qualifie l'aspect de cette procession d'infernal. Mais le nouveau que toute sa vie a guetté, n'est pas fait d'une autre matière que cette fantasmagorie du 'toujours le même'".

The *passages* can be seen as lustful streets where the desire is the desire to consume and to be consumed.

The *passages* which inspired Benjamin's *exposé* let us with the sensation of Benjamin's fascination with the ruins of nineteenth century, (the ruins of) modernity made visible by the allegorical images he finds in Baudelaire's poetry, especially images of Paris.

The allegorical image consists in the devaluation of the intrinsic meanings of things for the sake of its own arbitrary meanings. As commodity turns objects and persons into lifeless abstractions so does allegory. Through reification allegory manifests the perfect technique for the poetic representation of capitalist society. It shows the transformation of social relations between men into lifeless relations between commodities. "The allegorical mode of intuition is always built in a devaluated phenomenal world. The specific devaluation of the world of things which occurs in the commodity is the basis of the allegorical intention of Baudelaire" (Wolin 1982, 67-8). Allegory as a way of representing an element by something else leads to a multiplicity of meanings, that is, any object, person or relationship can mean anything else. If each thing can mean anything then a lack or emptiness of meaning occurs. "The commodity is in the realm of artifacts what the allegory is in the realm of words" (Gilloch 1997, 135).

The sentiment that expresses the modern experience of devaluation follows in Baudelaire's verses:

Paris change! Mais rien dans ma mélancolie
N'a bougé! Palais neufs, échafaudages, blocs,
Vieux fauburges, tout pour moi devient allégorie,
Et mes chers souvenirs sont plus lourds que des rocs.

Paris is not the same. "Le vieux Paris n'est plus (la forme d'une ville/ Change plus vite, hélas! Que le couer du mortel)". There is an atmosphere of sadness considering that what the city was and there is a lack of hope considering that what it is coming to be. That is, antiquity and modernism are connected in catastrophe. Precisely progress is the catastrophe Baudelaire refers when he sees a "changed" Paris.

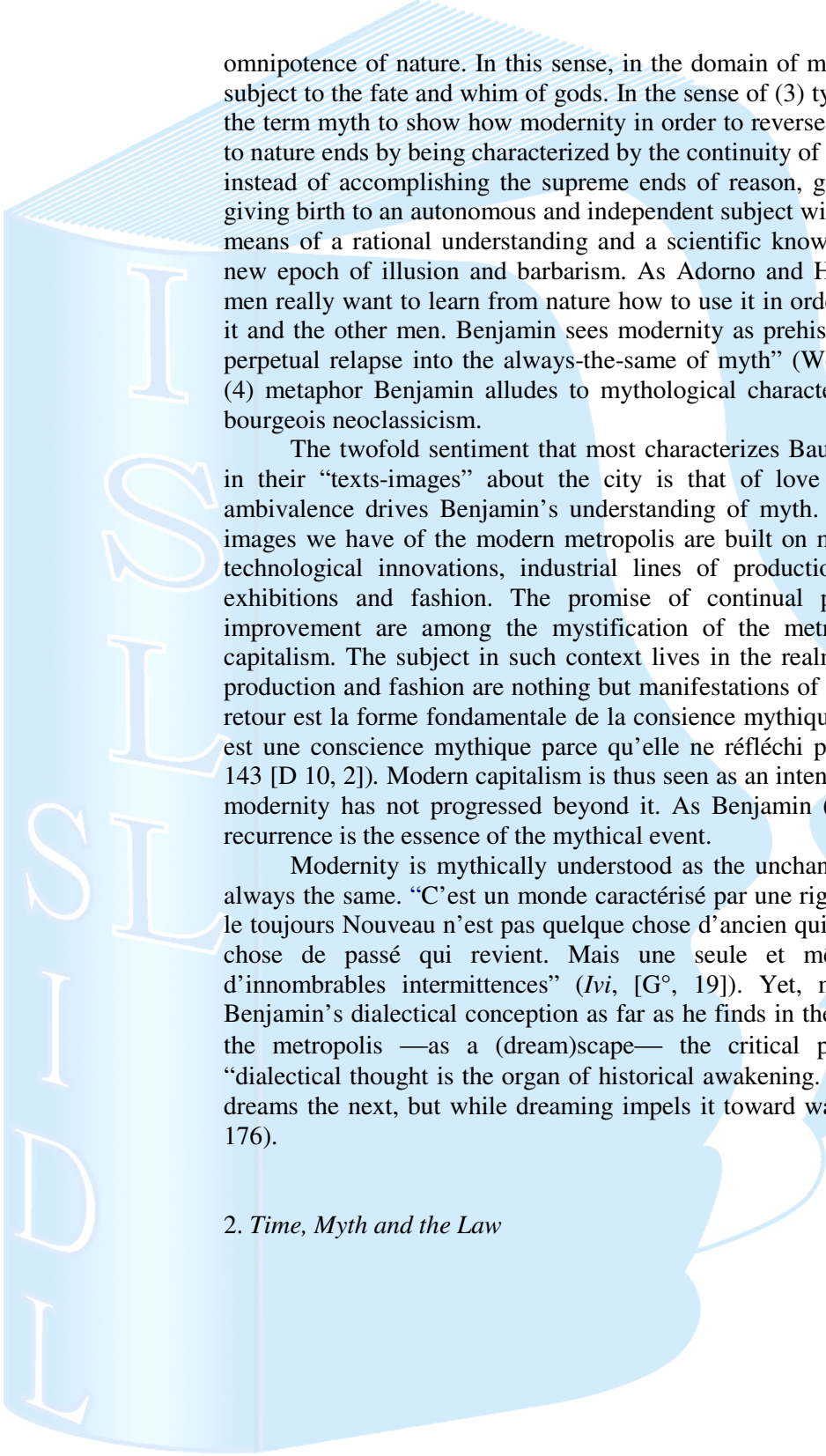
For Benjamin, Baudelaire was an allegorist who sought to link the experience of commodity to that of allegory. In the way Baudelaire refers to the decay of Paris and tells us about it through the allegorical images of his poems, commodity as well embodies the allegorical and in the cycle of production it ends by its decadence/ruination. Obsolescence is the necessary condition for producing.

The capital of the capital: Images of seduction; heaven and hell (and the necessary melancholy to picture them in verses). Paris as the urban site of Baudelaire and Benjamin's narratives is the space of ruin. However, there is a positive feature in the allegorical narrative. Benjamin (1985, 223) says that one of the strongest impulses of allegory is the appreciation of the transience of things and the concern to rescue them for eternity. Ruination and redemption, history overcomes myth.

1. *Time and Myth*

Paris as the privileged image to (re)think modernity is the site of the mythic. Benjamin is touched by this feature of the metropolis. In fact, he wants to show that the traditional historical image is not dialectically built but mythologically given. A new historical image has to be free of its mythological weight. In the realm of myth time loses its historicity and becomes homogenous and uniform.

As Gilloch (1997, 9) says, myth "appears to have at least a fourfold significance for him (Benjamin): As fallacious thought, as compulsion, as tyranny, and as a metaphorical device". It generally refers to archaic forms of perception and experience which can be seen as (1) fallacious ideas, illusions and fantasies. As a (2) compulsion, myth is the opposite of truth and human freedom. It points out the powerlessness of human beings with regard to the

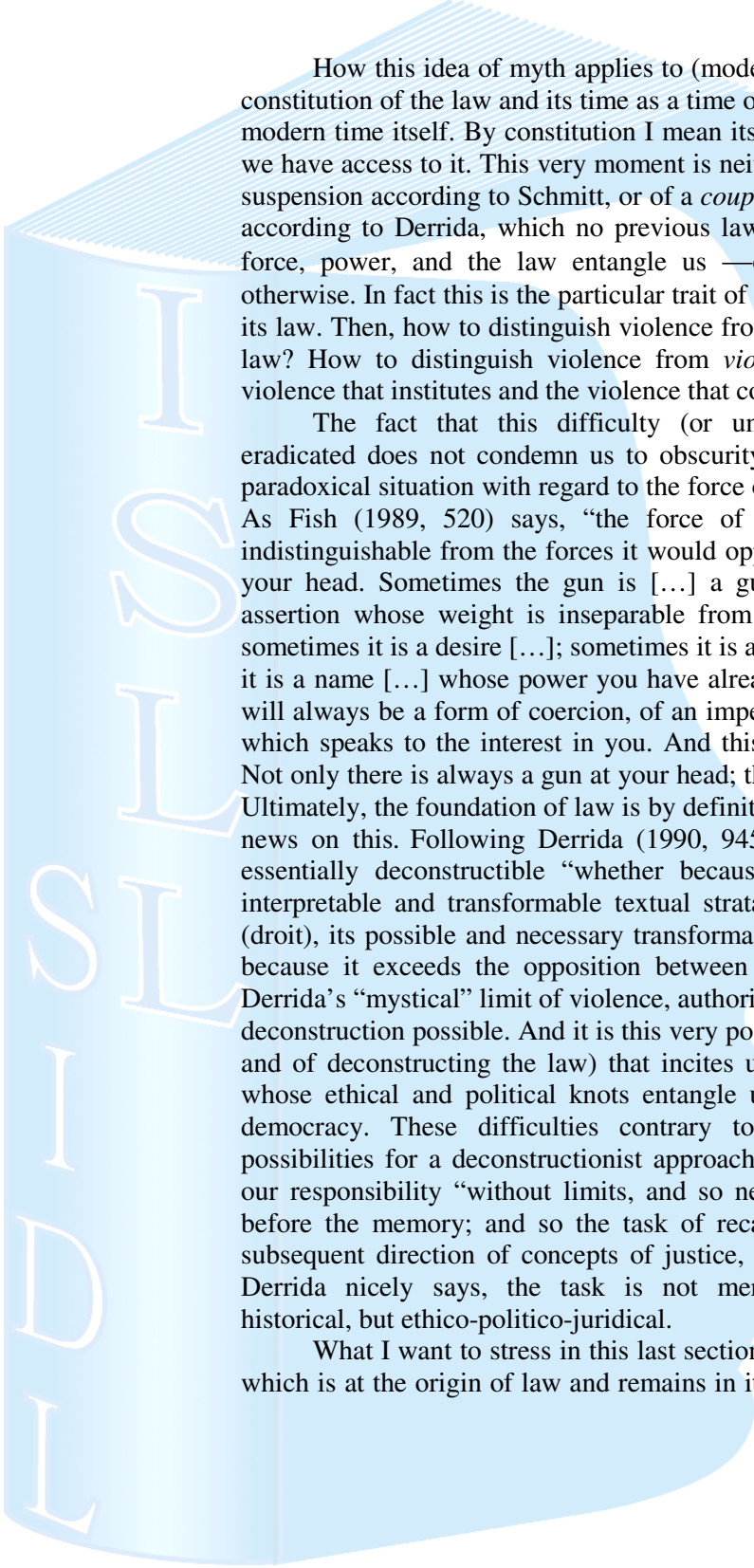


omnipotence of nature. In this sense, in the domain of myth one's humanity is subject to the fate and whim of gods. In the sense of (3) tyranny, Benjamin uses the term myth to show how modernity in order to reverse the human subjection to nature ends by being characterized by the continuity of mythic forms. That is, instead of accomplishing the supreme ends of reason, generally conceived as giving birth to an autonomous and independent subject with regard to nature, by means of a rational understanding and a scientific knowledge, modernity is a new epoch of illusion and barbarism. As Adorno and Horkheimer points out men really want to learn from nature how to use it in order to wholly dominate it and the other men. Benjamin sees modernity as prehistoric. It constitutes "a perpetual relapse into the always-the-same of myth" (Wolin 1982, 211). As a (4) metaphor Benjamin alludes to mythological characters to parody modern bourgeois neoclassicism.

The twofold sentiment that most characterizes Baudelaire and Benjamin in their "texts-images" about the city is that of love and hate. The same ambivalence drives Benjamin's understanding of myth. On the one hand the images we have of the modern metropolis are built on modern myths such as technological innovations, industrial lines of production, serial production, exhibitions and fashion. The promise of continual progress and endless improvement are among the mystification of the metropolis in the era of capitalism. The subject in such context lives in the realm of repetition. Serial production and fashion are nothing but manifestations of recurrence. "L'éternel retour est la forme fondamentale de la conscience mythique, préhistorique. (Elle est une conscience mythique parce qu'elle ne réfléchi pas)" (Benjamin 1997, 143 [D 10, 2]). Modern capitalism is thus seen as an intensification of myth and modernity has not progressed beyond it. As Benjamin (*Ivi*, [D, 10, 3]) says, recurrence is the essence of the mythical event.

Modernity is mythically understood as the unchanging of that which is always the same. "C'est un monde caractérisé par une rigoureuse discontinuité, le toujours Nouveau n'est pas quelque chose d'ancien qui demeure, ni quelque chose de passé qui revient. Mais une seule et même chose traversée d'innombrables intermittences" (*Ivi*, [G°, 19]). Yet, myth is redeemed in Benjamin's dialectical conception as far as he finds in the surrealist image of the metropolis —as a (dream)scape— the critical power of awakening: "dialectical thought is the organ of historical awakening. Every epoch not only dreams the next, but while dreaming impels it toward wakefulness" (*Id.* 1992, 176).

2. Time, Myth and the Law



How this idea of myth applies to (modern) law? It is worthy thinking the constitution of the law and its time as a time of contraction and contradiction, as modern time itself. By constitution I mean its founding moment through which we have access to it. This very moment is neither legal nor illegal; a moment of suspension according to Schmitt, or of a *coup de force* or performative violence according to Derrida, which no previous law could guarantee. Here violence, force, power, and the law entangle us —or perhaps we have never been otherwise. In fact this is the particular trait of modernity concerning its time and its law. Then, how to distinguish violence from force, authority, power, and the law? How to distinguish violence from *violence* (a distinction between the violence that institutes and the violence that conserves and enforces the law)?

The fact that this difficulty (or undiscerning violence) cannot be eradicated does not condemn us to obscurity or paralysis but to an enduring paradoxical situation with regard to the force of law, its origin, and constitution. As Fish (1989, 520) says, “the force of the law is always and already indistinguishable from the forces it would oppose [...] there is always a gun at your head. Sometimes the gun is [...] a gun; sometimes it is a reason, an assertion whose weight is inseparable from some already assumed purpose; sometimes it is a desire [...]; sometimes it is a need you already feel; sometimes it is a name [...] whose power you have already internalized. Whatever it is, it will always be a form of coercion, of an imperative whose source is an interest which speaks to the interest in you. And this leads me to a second aphorism: Not only there is always a gun at your head; the gun at your head is your head”. Ultimately, the foundation of law is by definition unfounded and there is no bad news on this. Following Derrida (1990, 945) this structure in which law is essentially deconstructible “whether because it is founded, constructed on interpretable and transformable textual strata (and that is the history of law (*droit*), its possible and necessary transformation, sometimes amelioration)” or because it exceeds the opposition between founded and unfounded (this is Derrida’s “mystical” limit of violence, authority, power, and law) is what makes deconstruction possible. And it is this very possibility (of law, of deconstruction and of deconstructing the law) that incites us to weave a more intricate web whose ethical and political knots entangle us in the question of justice and democracy. These difficulties contrary to what one could imagine are possibilities for a deconstructionist approach of law that provokes or invokes our responsibility “without limits, and so necessarily excessive, incalculable, before the memory; and so the task of recalling the history, the origin and subsequent direction of concepts of justice, the law and law” (*Ivi*, 953). As Derrida nicely says, the task is not merely philologico-etymological or historical, but ethico-politico-juridical.

What I want to stress in this last section of the paper is how this violence which is at the origin of law and remains in its existence is related to myth and

particularly how Benjamin (1971) does it in a text called *Pour une critique de la violence*. “Myths are absolute and comprehensive representations that exhibit [...] a 'violence of mythic subsumption'” (McCall 1996, 185). This mythical violence pertains to powerful structures such as law. One may perceive the violence that precedes the law and it is at its origin yet the violence that conserves it is hardly perceived. Manifest and non-manifested violence can be related to the violence that precedes and founds the law and the violence that conserves it. This latter appears to be natural and normative and then invisible. As McCall (*Ivi*, 187) says, violence “appears to come from heterogeneous sites, both representable and not, both 'manifest-focused' and 'invisible-pervasive’”. Benjamin (1971) in his critique of violence articulates myth and (modern) law through the notion of a mythic-legal violence.

For Derrida (1990, 997), the violence that founds the law must encompass the violence that conserves it and it cannot brake with it: “It belongs to the structure of fundamental violence that it calls for the repetition of itself and founds what ought to be conserved, promised to heritage and tradition, to be shared. A foundation is a promise. Every position (*Setzung*) permits and promises (permet et pro-met), it positions en mettant et en promettant. And even if a promise is not kept in fact, iterability inscribes the promise as guard in the most irruptive instant of foundation. [...] with this, there is no more a pure foundation or pure position of law, and so a pure founding violence, than there is a purely conservative violence”. There is a *différentielle* contamination between them and this very idea is at the core of law.

If in or to Derrida it is the mythical element that leads to deconstructibility of law here we are before an attitude or a *passage* whose origin is a non-origin as far as it does not situate itself or determinates itself in or out of the law. That is, we are before a moment or an attitude or a passage of exception.

Benjamin (1988, 257) in his eighth thesis on history says: “The tradition of the oppressed teaches us that the ‘state of emergency’ in which we live is not the exception but the rule. We must attain to a conception of history that is in keeping with the insight. Then we shall clearly realize that it is our task to bring about a real state of emergency, and this will improve our position in the struggle against Fascism”.⁶ According to Agamben (1998, 62), that which

⁶ See too Benjamin (1988, 257): “The tradition of the oppressed teaches us that the 'state of emergency' in which we live is not the exception but the rule. We must attain to a conception of history that is in keeping with the insight. Then we shall clearly realize that it is our task to bring about a real state of emergency, and this will improve our position in the struggle against Fascism. One reason why Fascism has a chance is that in the name of progress its opponents treat it as a historical norm. The current amazement that the things we are experiencing are 'still' possible in the twentieth century is *not*

Benjamin calls real (*wirklich*) “state of emergency” produces an inversion, that is, to the law that is merely force and then indeterminable and not enforceable there is life that opposes itself and then transforms itself entirely in law. Such inversion relates the exception to a messianic time, a time of promises; this real state of emergency which is the messianic time in its own form. Benjamin affirms that the “state of emergency” in which we live *is not the exception but the rule*. Here messianic time appears as the interruption of the law for the restoration of its originary structure. The messianic time is, paradoxically the time of the suspension of the law for its own restoration. It is the aporia modern law face which means the procrastination of time or its deferment to the time that remains.

According to Derrida (1990, 993), “this moment of suspense, this *epokhé*, this founding or revolutionary moment of law is, in law, an instance of non-law. But it is also the history of law. This moment always takes place and never takes place in a presence. It is the moment in which the foundation of law remains suspended in the void or over abyss, suspended by a pure performative act that would not have to answer to of before anyone. The supposed subject of this pure performative would no longer be before the law, or rather he would be before a law yet not determined, before the law as before a law not yet existing, a law yet to come, *encore devant et devant venir*”.

Benjamin talks about a mythical manifestation of violence which is identical to the violence of law and the insidious quality of its historical function. He opposes this mythical violence to pure and immediate violence which could be able to suspend the former. “La violence mythologique est violence sanglante exercée en sa propre faveur contre le simple fait de vivre ; la violence divine est violence pure exercée en faveur du vivant contre tute vie. La première exige le sacrifice, la seconde l’accepte” (Benjamin 1971, 144).

Pure, immediate and divine violence is present in everyday life through a sacralized manifestation. It is an instructive violence. It is a violence that manifests itself in exposing and deposing the relation between violence and the law. Benjamin (*Ivi*, 147-8) affirms: “C’est sur la rupture de ce cercle magique des formes mythiques du droit, sur la suspension du droit, y compris les violences auxquelles il renvoie, comme celles qui renvoient à lui, finalement donc de la violence de l’État, que s’instaurera une nouvelle ère historique. Si déjà le règne du mythe est présentement, ici et là, battu en brèche, ce nouveau ne se situe pas dans un horizon lointain si difficile à concevoir qu’une parole contre le droit s’éliminerait d’elle-même. Mais si la violence, elle aussi, voit, au-delà du droit, son statut assuré comme violence pure et immédiate, la preuve alors sera faite qu’est également possible, et de quelle manière, cette violence

philosophical. This amazement is not the beginning of knowledge-unless it is the knowledge that the view of history which gives rise to it is untenable”.

révolutionnaire dont le nom est celui qui doit être donné à la plus haute manifestation de la violence pure parmi les hommes [...]. Mais il faut rejeter toute violence mythique, la violence fondatrice de droit, qu'on peut appeler violence gouvernante. Il faut rejeter aussi la violence conservatrice de droit, la violence gouvernée, qui est service de la gouvernante. La violence divine, qui est insigne et sceau, non point jamais moyen d'exécution sacrée, peut être appelée souveraine”.

Benjamin stresses the relation between between divine violence and mythical-legal violence yet he “concentrates on the bearer of the link between violence and the law, which he calls *bloss Leben*” (Agamben 1998, 65). According to Agamben (*Ibid.*) divine violence “establishes an essential link between bare life and juridical violence”. The clash between divine violence and mythical-legal violence exposes and deposes violence showing that “la renonciation à la violence de droit, [...] renvoie à la culpabilité du simple fait naturel de vivre, laquelle, de manière innocente et malchanceuse, livre le vivant à l'expiation qui le 'libère' de sa culpabilité – et aussi bien libère le coupable, non pourtant d'une faute, mais du droit” (Benjamin 1971, 144).

For Benjamin violence is the object of his critique as far as it is inseparable from moral concerns and it is not by chance that he discusses it as an engagement of law and justice. Moreover, Benjamin is attentive to the engagement of law and violence appropriate to the modern rule of law model and that mythical violence is precisely the mode of state-imposed violence. As McCall (1996, 206) nicely puts it: “violence of law, like that of myth, has to do with just this constitution and marking of bodies”.

For Benjamin modernity in the manifold of its manifestations is the time and the site of myth. The urban scenario of the metropolis, the urban types of Paris and the political scenario of most European nation-state show the paradox of this time of enlightenment and obscurity. Yet Benjamin is very aware of the contradictory aspect of modernity and then his critique is, somehow, an attitude of deconstruction or destruction or annihilation of its mythic forms. If one can say that the mythic reverses in the allegorical, this latter represents the very annihilation of the former. For, mythical-legal violence reverses in the rule of law which is also the very possibility of its critique and deconstruction.

4. *Some Final Words*


Modernity, modern times, capitalism, at the same time that freed men from the hardness of social roles in the pre-capitalism feudal society generated a social organization, rudely alienated, lacerated by economic exploitation and social indifference able to destroy each value —moral, cultural, political—

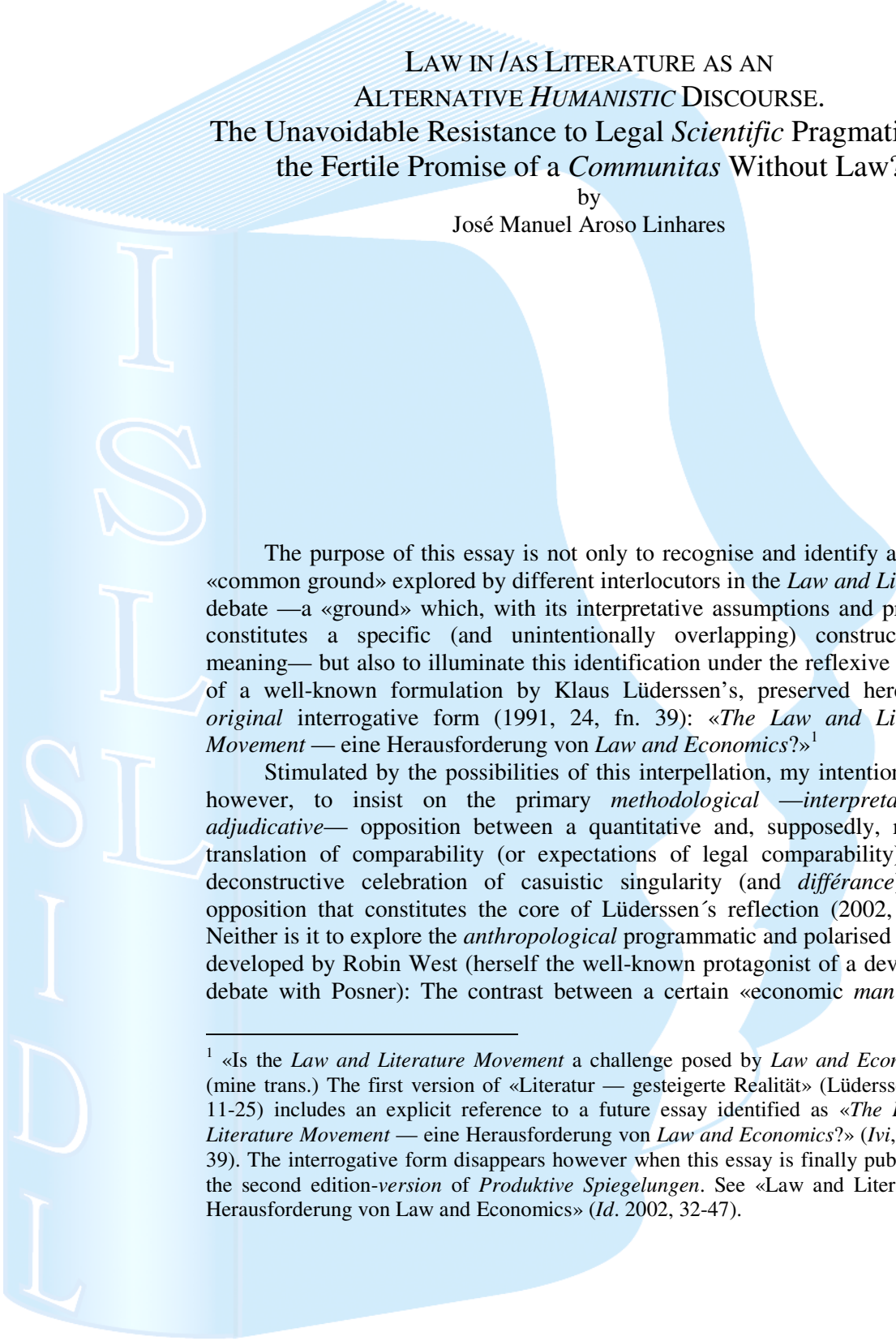
raised by this very modern social organization. Thus, capitalism in promoting the self-development of the individual, in making him free has also developed in him anguish, frustration, unconfidence and despair.

Modernity could be translated as a time in which everything can be bought, everything can be exchanged, everything happen in the rhythm of violence and in a violent rhythm. To such image (of hell) is opposed an image of satisfaction, pleasure and enchantment such as the Parisian *passages*. The *flâneur*, the *physiologie*, the poet, the dandy, the prostitute, the rag-picker, all peripheral types in the realm of capitalism but who do not succumb to it, are the heroes of modernity as well as Benjamin and Baudelaire. A mixture of melancholy and amusement but after all a “modern” deeply conviction that we can be redeemed from hell through liberation is what both pursue. In this way, it would be necessary to restore the sense in which modernity might signify criticism and revolution in order to face the dangers of the own modern world.

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LAW IN /AS LITERATURE AS AN
ALTERNATIVE *HUMANISTIC* DISCOURSE.
The Unavoidable Resistance to Legal *Scientific* Pragmatism or
the Fertile Promise of a *Communitas* Without Law?

by
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The purpose of this essay is not only to recognise and identify a *certain* «common ground» explored by different interlocutors in the *Law and Literature* debate —a «ground» which, with its interpretative assumptions and practices, constitutes a specific (and unintentionally overlapping) construction of meaning— but also to illuminate this identification under the reflexive impulse of a well-known formulation by Klaus Lüderssen's, preserved here in its *original* interrogative form (1991, 24, fn. 39): «*The Law and Literature Movement — eine Herausforderung von Law and Economics?*»¹

Stimulated by the possibilities of this interpellation, my intention is not, however, to insist on the primary *methodological* —*interpretative* or *adjudicative*— opposition between a quantitative and, supposedly, rigorous translation of comparability (or expectations of legal comparability) and a deconstructive celebration of casuistic singularity (and *différance*) —the opposition that constitutes the core of Lüderssen's reflection (2002, 37-41). Neither is it to explore the *anthropological* programmatic and polarised contrast developed by Robin West (herself the well-known protagonist of a devastating debate with Posner): The contrast between a certain «*economic man*» and a

¹ «Is the *Law and Literature Movement* a challenge posed by *Law and Economics?*» (mine trans.) The first version of «Literatur — gesteigerte Realität» (Lüderssen 1991, 11-25) includes an explicit reference to a future essay identified as «*The Law and Literature Movement — eine Herausforderung von Law and Economics?*» (*Ivi*, 24, note 39). The interrogative form disappears however when this essay is finally published in the second edition-version of *Produktive Spiegelungen*. See «Law and Literature als Herausforderung von Law and Economics» (*Id.* 2002, 32-47).

certain «literary person», or better put, between the «excesses of an *economic man* run wild», which «emerge from economic legal analysis», and the possibilities of a «literary person», if not even of a «literary woman», that emerge (or are beginning to emerge) from literary legal analysis.²

Besides these two major specifications of the *Law and Literature* enterprise —with its emphases on the possibilities of *law as literature* and *law in literature*, respectively, or more accurately, on *interpretive* and *literary jurisprudences* (Minda 1995, 153-159), if not indeed on *hermeneutic* and *literary interdisciplinary projects* (West 2008, 1)— I should also insist that my aim is not even to reproduce or to reconstruct the global «cognitive dissonance» (D'Amato 1990, 164) between *Law and Economics* and *Law and Literature*, but rather to revisit the Lüderssen's challenge by replacing its two explicit interlocutors.

But what does replacing the involved interlocutors mean? It means not only expanding the question, but also causing an explicit turn in its dynamic accentuation. The main problem would thus be the resistance offered by a certain view of interdisciplinarity —the one which sees Law as a part of the «noble republic of letters», «not complete unless it draws nourishment» («assistance» and «edification») from the «sources of *external* knowledge» that «the humanities» (including philosophy and literary criticism) as such provide— to another view of interdisciplinarity —the one which is determined by the hegemony of the social sciences and by empirically explanatory models (if not explicitly by the prediction that the future of the «rational study of law» demands as protagonist «the man of statistics and the master of economics»), as if the path could be cleared by remembering the disagreement between Learned Hand and Oliver Holmes Jr. about the «future direction of Law»:³ Without forgetting that to expand these plausible *interlocutors* means now to enlarge either the targets of resistance (opponents) or the *front* of resistance itself.

(a) To enlarge the *opponents'* axis... in what sense? So that this axis may include (and overlap with) all the possible *positive* answers to a maximizing *intertwined* challenge between effective social macroscopic strategies and microscopic tactics... and these answers under the unifying *mask* of a basic generalized bet (*-pari!*) on a scientifically informed *Zweckrationalität* (and *Zweckprogramm*). As if we could recognize a manifold *legal instrumentalism* or *pragmatism* coherently assumed, seriously taken as an ultimate model of integration... and this recognition might include and absorb Pound's *social engineering* and Posner's *pragmatic judge*, but also Hans Albert's *technological teleologism*, and Vermeule's pragmatic justification of a *New Textualism*, without excluding some overtly ideological representations of the *political*

² See «Economic Man and Literary Woman: One Contrast» in West 1993, 251-264.

³ An exemplary «*tale of two speeches*» is told by Balkin-Levinson 2006, 155-160.

judge (as the tactic executor of a certain constitutional strategy or as the tactic performer of alternative emancipatory strategies) still informed by a «scientific» or «pseudo-scientific» concept of *public reason*, basing his choices on the social empirical effects that alternative decisions are likely to have.⁴

(b) To enlarge and unify the targets means however, as I have already said, to grant a meaningful development to the possibilities of the promised resistance, to the point that these, at last identified and justified as *humanistic approaches* (or «humanistic» interdisciplinary projects), may recognize themselves not only as immediate productive outgrowths of the *linguistic literary turn* (and *The Law and Literature Movement*) but also as participants in other complementary or sometimes alternative trends such as *narrative critical jurisprudences*, *law as musical and dramatic performance*, *legal iconology* or *ars legis*, *law and film* and *law and culture movements*. A meaningful outgrowth, I insist, and a no less meaningful *spectrum*: from Boyd White's «communitarian» *narrativism* (and *communal lawyer*) to Balkin's *transcendental deconstruction* (and *performative triangle*); from Martha Nussbaum's *poetic judging* (and *literary judicious spectator*) to Costa Douzinas' *ethical diké* (and *momentary principle of Justice*); from John Denvir's *jurisprudence of comedy* (and *comic view of Law*) to Richard Delgado's *legal counter-storytelling* (sustained by a specific *voice-of-colour thesis*); from Martin Jay's iconic creative tension between *alterity* and *commensurability*⁵ to David A. Black's reconstitution of legal and cinematic *narrative regimes* and its productive interactions; from Richard Weisberg's morally relevant deconstruction and «reconstruction» of specific *procedural narratives* to Naomi Mezey's defense of a particular intertwinement between *law as culture* and *culture as law*.

Although certain that this is a «common ground» (a kind of a defensive front) from which we *should not* exclude Robin West's approach, even though she expressly teaches us that «adjudication despite a superficial resemblance to literary interpretation is not primarily an interpretative act»,⁶ it is also a «common ground» from which we *have to exclude* Dworkin —even though his

⁴ The formulation of «*public reason*» is by Martha Nussbaum, in *Poetic Justice* (1995, xviii-xix): «The aim of this book is [...] to present a vivid conception of public reasoning that is humanistic and not pseudo-scientific, to show how a certain type of narrative literature expresses and develops such a conception, and to show some of the benefits this conception might have to offer in the public sphere...».

⁵ As a «call for a compromise [between] *seeing* and *unseeing* justice» (Jay 1999, 33-34). See also Douzinas-Nead 1999, 12.

⁶ «Adjudication is in form interpretive, but in substance it is an exercise of power in a way that truly interpretive acts, such as literary interpretation, are not...» (West 1993, 93).

fidelity to the *aesthetic hypothesis* to the «use of literary interpretation as a model for the central method of legal analysis» (Dworkin 1986, 158) and, more clearly still, his representation of *hard cases deciding* determined by the *chain novel* example, seem at first sight to recommend the opposite *integrative* solution. But we shall return to this apparently paradoxical parallelism and its *differentiation* nucleus: A differentiation, we shall see, that is far from being irrelevant.

Once exposed to this crude resistance *story* —or at least to the promise of a *concertatto* involving such heterogeneous protagonists (different voices that address themselves to shared unified targets!), it behooves us immediately to ask, using a formulation by Rorty's, if it is productive or «interesting» to identify such a *common ground* and its parallel *interdisciplinary claims* (and these concentrated in a plausible *front*) with the inclusion and exclusion processes that configure this *ground*, and the reduction of complexity that its axis of intelligibility necessarily engenders. The sequence that follows is an attempt to specify and answer this question, or at least to privilege it as a leading thematic choice.

1. Let us begin by beating a path through shared territory: As if scouting it around meant, here and now, to pay attention to the *different* voices that inhabit it (to ear them, privileging their explicit formulations). As we might expect from a resistance front story, it is a *negative* feature —i.e., an explicit convergence still of the opponents about the law's typical conceptions we have *to reject*— that constitutes the main *topos*. Invoking the binomial *society/community* (*societas/communitas, Gesellschaft/Gemeinschaft*), we could say that this permanently revisited *topos* corresponds to the conclusion-claim that the experience of *societas* (and the collective identity that this experience constructs as *totality* and *artifact*) is *one* perspective or *one* interpretative «tradition» among others, with its own understandings of «person, nature [and] the good» and a specific *catalogue of virtues* (Taylor 1989, 601).

To see this experience as *one* among others means, as a matter of fact, to reject exemplarily all the conceptions of Law that, assuming the exclusivity of *society's* approach and its «acultural way of understanding the rise of modernity»,⁷ project (or specify) this exclusivity onto or/as a dogmatically pre-

⁷ «[A] “cultural” theory of modernity is one that characterizes the transformations that have issued in the modern West mainly in terms of the rise of a new culture. The contemporary Atlantic world is seen as one culture (or group of related cultures) among others, with its own specific understandings, for example, of person, nature, the good, to be contrasted to all others, including its own predecessor civilization (with which it obviously also has a lot in common). By contrast, an “acultural” theory is one that describes these transformations in terms of some culture-neutral operation. [...] [The]

determined search of a *unique* language. Which *unique* language? To say it with Boyd White (1999, 103), the *one* that *formalism* sustains —reducing law to a set of self-sufficient rules, and the legal enterprise to an internal use of textual materials and traditional skills—, but also the *one* that instrumentalism or pragmatism justify —«imagining» law as a «branch of public policy, in which legal questions are collapsed into questions of social or political preference»— (See also *Id.* 1990, 22-45, 46-85). A *unique* language nevertheless that, in any of these poles, independently of the different institutional stages where it is performed, addresses itself always to us (*et pour cause!*) as an explicit *nonnarrative mode of speaking* (White 1987, 56-57): A *nonnarrative mode* which —condemning its implicit addressees to the story of an «*ex nihilo* creation» (Walzer 1995, 54) if not too the model of a consummated contractuality (Goodrich 1990, 149-175, 319-323) constructed through a selective convergence of Kant's and Bentham's *arguments* (MacIntyre 1988, 353)— justifies not only a unilateral experience of democratic citizenship radically obfuscated by a supposedly scientific conception of public reason (Nussbaum 1995), but also a self-repressing jurisprudential enterprise: A «legal discourse» which, as «literature» and as «rhetoric», is unavoidably committed to the repressing of its «literary quality» or to the forgetting of its «textual organization and aesthetic arrangement» (Douzinas-Nead 1999, 10).

2. Be that as it may, to resist simultaneously rule-centered formalism and legal *scientific* instrumentalism (brought together as *calculating forms of reason*), demands not only an alternative type of discourse or rationality but also a renewed experience of *community*. Stimulated by this *new* reformulation of our basic challenge,⁸ we should immediately ask if our draft of a *common*

changes are not defined by their end-point in a specific constellation of understandings of, say, person, society, good, they are rather described as a type of transformation to which any culture in principle serve as “input”...» (Taylor 1989, 601-602). «[The] project of founding a form of social order in which individuals could emancipate themselves from the contingency and particularity of tradition by appealing to genuinely universal, tradition-independent norms was and is not only, and not principally, a project of philosophers. It was and is the project of modern liberal, individualist society» (MacIntyre 1988, 335).

⁸ A reformulation that expands a step further the circle of the plausible opponents, bringing together *formalistic internal* and *pragmatic external* attitudes to the point of allowing Boyd White (1999, 103) to denounce them as two possible specifications of an *outside view* : «Of course the law can be imagined, sometimes usefully, in each of these ways [...] —as a set of rules (to be obeyed or disobeyed) [...] and as a branch of public policy, in which legal questions are collapsed into questions of social science or political preference [...]— [...] especially when viewed from the outside».

ground can in fact globally and positively reveal *anything else* of relevance about the alternative ways and their institutional background. Which means of course asking if we are in a position to show these alternatives meaningfully as a real shared ground, before the effective exploration of the correlative paths conducted by each of the possible convergent voices gives rise to an unavoidable emergence of differences, that will fragment and destroy the promised unity. Taking this question seriously, I would risk answering that it is possible to recognize some *other* common features, even though not *positively* as many as we might expect.

2.1. The call to this facet of *interdisciplinarity*, which we may qualify as a *cultural* or *humanistic* one, involves as a matter of fact two basic complementary common challenges: The first one committed to the return-reinvention of a *communitarian context* [α], the second one concentrated in the possibilities of an autonomous *praxis-prattein* and its rationality types [β]. The articulation of these challenges favours, in turn, a sequence of other relevant convergences [γ].

α) The first commitment corresponds, *on one hand*, to the shared claim of freeing the communitarian context or its interpretative enterprise from the necessity of an ontological (or onto-anthropological a-historical representation —saying it *positively*, to the demand of reinventing the experience of *communitas*, assuming (for once) the plenitude of its symbolic-cultural attributes; *on the other hand*, to the search of a constitutive *dialectic* equilibrium between *community* and *society*.

The first attempt justifies the community's horizon as a specific cultural project: Not only revealing a determinant bond with an explicit experience of *historicity* as “a radical constitutive historicity”, but also recognizing the *positive* circularity that makes this experience possible, so that this communitarian project —nuclearly incompatible with an abstract predetermination— may offer itself always inescapably and simultaneously either as the foundational *context* or as the reinvented *correlate* (the correlate-*ordinans*) of a changeable stabilizing *praxis*. What kind of *praxis*? A historically open *praxis*, which may only aspire to be recognized as a plausible “valid” actualisation of the project's intentions when submitting them to specific contexts or to pragmatically or rhetorically precise situations (i.e., when constituting and transforming these intentions).

The second complementary claim establishes an exemplary counterpoint between two unmistakable cultural projects of collective identity, which are also two irreducible typical faces of a certain *teleological turn* —both of them responsive to the present circumstance, both of them facing the claims of pluralism, fragmentation, difference: So that the *society project* may be the one which assumes the basic equivalence (if not the quantitative commensurability) of all the subjective needs, ends and interests, and treats them as preference

claims... and imposes the exclusive answer of a possible set of hierarchizing decisions, but also the social-political artefact that legitimises collectively these decisions; so that the so-called *community project* may open up our experience (and our possibilities of practical deliberation) to the consideration of an integrative horizon of shared practical commitments and responsibilities, in order to sustain and explore an insurmountable dualism between *subjective goals* and *human goods*, between *ends* and *values* —or at least to reveal the importance of «non-commensurable» «qualitatively distinct and separate» *ultimate ends*, each one pursued «for its own sake» demanding as such a set of plausible specifications.⁹

β) What about the rationality types? We may say that the resistance to the dominant axis of the *episteme-techné* or *techné-episteme* —which is also a resistance to the exclusivity and unilaterality of the *society project*, and to this one as the regulatory nucleus of an historically insurmountable evolutionary stage— affords us the privileged *occasio* of reinventing the equilibrium of Aristotelian *intellectual virtues* as a major experience of *plurality*:¹⁰ Here and now as the opportunity to pursue the interrupted emancipation of *praxis-prattein* for once radically freed from the theoretical predominance of *sophia*, which is also the opportunity to reformulate the challenge of *phronêsis*. What kind of reformulation? A very specific one. Certainly not the reformulation which bets on the radical autonomy of *phronêsis* (and explores its internal hermeneutic and/ or argumentative possibilities), but the one which, reappraising the concern with «the ultimate and the particular» (Aristoteles/Gadamer 1998, 42-43 [VI, 9, 1142a, 25]), brings *phronêsis* and *poiesis* together through the specific mediation of *aesthesis*: A reformulation that explores the possibilities and promises of a certain «*perception*» or «*sense-perception*»'s *analogy* as a productive reconciliation of normative and aesthetic arenas —made possible by the return of law and legal thought to rhetoric and its «imagistic language» (Douzinas-Nead 1999, 8) or by «literary imagination's interpretative sense of life» (Nussbaum 1995, 1-12)— but also as the opportunity (the only one that today remains for us!) to «awake the jurisprudential enterprise from its positivistic slumber and make jurisprudence again the prudence or *phronêsis* of law».¹¹ Which means recognizing a very

⁹ The quoted formulations are by Nussbaum (1999, 179-188): «Virtue Ethics...» and (Ivi, 182-183): «The Anti-Utilitarians; Expanding Reason's Domain».

¹⁰ A paradigmatic consecration of plural rational types, if not of a certain *plurality theorem*. See «Aristoteles oder die Selbstständigkeit von Vielfalt» in Welsch 1991, 277-284.

¹¹ «The aims of literary jurisprudence and of legal iconology are not dissimilar; but while the former closes the eyes to open the ear to the *ars legis* the latter insists that law's captures the soul by addressing the totality of the senses...» (Douzinas-Nead 1999, 11). «In acknowledging the *ars legis*, the aesthetic dimension of law, we open the

specific *path*, followed by such different interlocutors as Boyd White and Douzinas, Nussbaum and Balkin, without forgetting that this path is made possible by an eloquent (selective) dialectic convergence of Aristotelian and Kantian arguments, the latter certainly recomposed on the basis of a *new* hard nucleus, named *Kritik der Urteilskraft*...

γ) Once one recognizes the convergence of these two challenges and the alternative *pathos* they invoke, a few words are enough to catalogue the steps-*topoi* they justify. These involve, as a matter of fact, a sequence a possible «landings», to be successively accessed (and more or less intensely inhabited) as one presents and explores certain assumptions: the normative and regulatory —if not the *subversive*¹²— potential of the *linguistic-literary turn*;¹³ the defense of *narrative* as the archetypal form of practice;¹⁴ the assumption that the construction of meaning and the circulation of signs have either stabilized or been transformed through the interpretative communities' *decisions* of *writing* and *rewriting*¹⁵ —the assumption at least that interpretative pragmatics and/or performance involve the methodological priority not so much of a *reading situation* as of a microscopic *rhetoric circumstance* experienced as the possibility of «establishing or losing community» (Boyd White 1985, 3)—; last but not least (we'll see why), the representation that legal textual materials are constitutively wounded by *indeterminacy*.

institution to the ethics of otherness and the justice of the senses or of Justitia, the feminine principle of transcendence that challenges the patriarchy of sublime Law...» (Douzinas 1999, 67).

¹² See Derrida (1985, 134): «La littérature est peut-être venue, dans des conditions historiques qui ne sont pas simplement linguistiques, occuper une place toujours ouverte à une sorte de juridicité sub-versive [...], une juridicité [qui] suppose que l'identité à soi ne soit jamais assurée ou rassurante. Elle suppose aussi un pouvoir de produire performativement les énoncés de la loi, de la loi que peut être la littérature et non seulement de la loi à laquelle elle s'assujétit. Alors elle fait la loi, elle surgit en ce lieu où la loi se fait...». See also Nussbaum 1995, 1, 9 (reading Dickens's *Hard Times*).

¹³ Boyd White (1985, 122-123, 131; 1990, 16-20) writes: “We must read law as a kind of literature, we must read literature as a kind of law”. See also: (*Id.* 1994, 275 ff.) «Reconstituting Self And World: The Creation Of Authority As An Act Of Hope»; (*Id.* 1999, 52-72) «“Law and Literature”: No Manifesto», and (*Ivi*, 89-110): «Meaning in the Humanities and in the Law».

¹⁴ Boyd White (1985, 175) again: “[...] The narrative as the archetypal legal and rhetoric form [...], as the archetypal form of human thought in ordinary life”.

¹⁵ Decisions that, invoking the «promise» of a critical reconstitution of «topics» (Balkin 1991; 1996), include a kind of basic *rhetoricization of narratives*. See too «Law's Tales. Semiotics and Narratology as Storytelling», in Douzinas-Warrington-McVeigh 1991, 92-110.

2.2. If I've just said that a few words would be enough to recognize these common positions, I must add that, as far as the several plausible *answers* are concerned, *only* a few words will be ultimately *possible*. As a matter of fact, every specification, being indispensable to construct a supposedly conclusive answer, exposes the shared ground to an explosion of different irreconcilable voices —differences we cannot pass over in silence, certainly because they present our *humanistic approaches* as divided between distinct ways of experiencing the interpretative enterprise.

To characterize this enterprise and its conception of literary language, we are certainly still allowed to go on speaking about a *dialectic constitution of meaning* (Jauss), justified by the irreducibility of the authorial or creative *artistic pole* and the interpretative or performative *aesthetic one* (Iser), and supported by the presupposition (the endorsed reconstructed *modus operandi*) of an *implicit «reading» judge*. This call to the categories of *reception aesthetics* (even though taken in *latissimo sensu*) does not, however, avoid the *internal tension* between the discursive strategies of the *intentio lectoris* and the *intentio operis* (the latter disregarding the constitutive *différance* between *effects* and *reading reception processes*), as it does not avoid the oppositions between *narration* and *performance*, between the stabilizing possibilities (and the integrative strength) of a *narrative-text* and the contextual demands of an open *textual notation* “as a text that requires performance”,¹⁶ or even between different ways of understanding the internalist or externalist attitudes about the enterprise of law.

Besides, to recognize an exemplary concentration of all these polarised tensions, it would be enough to invoke and contrast Boyd White' and Balkin's *implicit judges*: the former presenting himself/herself as a *communal lawyer* engaged in a *specific way of life* —telling a «shared story» in a «shared language»,¹⁷ but also viewing law *from the inside* as a *culture of argument* and carrying out a compositional and literary process of translation that entails an ethical commitment (*justice as translation*);¹⁸ the latter justifying

¹⁶ «Law and music require transforming the ink on the page into the enacted behavior of others. In an important sense, there is *only* “law (or music, or drama) in action”, in contrast to poetry or fiction, whose texts do not require public performance but can be read silently to one's self...» (Balkin-Levinson 1999, 1518).

¹⁷ Boyd White (1985, 98) writes: «The law is a way of creating a rhetorical community over time [...]: [it is] a culture that makes us members of a common world. This culture is not reducible to rules, but it is objective, in the sense that it can be found and mastered and in the sense as well that it cannot be disregarded or unilaterally changed. Like the text produced by a single mind, the text produced by the culture has a genuine force and reality notwithstanding its irreducibility to rules or to scientific “knowledge”».

¹⁸ See again by Boyd White (1990, 229 ff.), «Translation, Interpretation, and Law», and (*Ivi*, 257 ff.), «Justice as Translation»; also *Id.* 1999, 69-71 (V), 97-102 (II) : «For

himself/herself as a *performer* or as a *performance director* —understanding the limitations and interests of her co-performers and her audiences and «tailoring her interpretation accordingly» to correspond to a certain «duty of fidelity and responsiveness», both to the author or composer of the text and to the audience or community in which he or she performs (Balkin-Levinson 1998, 1), that is experienced as a kind of *indefinite* (rather than *infinite*) *duty*, presupposing the intelligibility horizon of an *ethics of Otherness*.¹⁹ We are aware, however, that the interpretative *spectrum* is far from being reduced to these poles. Isn't our

whatever the merits of the social sciences as methods for making and informing social policy, they cannot be applied to what is more distinctive about what lawyers and judges actually do, which is to discover, determine, interpret and compose legal texts [...]. [Scientific] “methods” cannot simply be applied to the law, any more than its “findings” can. There must be a process of translation [...] [which] is at heart compositional and literary, in fact a form of writing [...]. Humanistic work can thus be seen as a species of “translation”...». See also (*Ivi*, 84): «As an ethics of tentativeness and respect for the other, arising out of the recognition that one's statements and gestures can never have universal validity [...] but also as the paradoxical duty, impossible to discharge with perfection, of simultaneously affirming respect for the other —the other language, the other culture, the other person— and asserting the value of one's own experience and judgement, and one's culture too...». And (*Id.* 1990, 268): «A world of difference is thus created; it is kept from the prison-house of “single meanings” —of thinking that meanings translate directly from text to text— by honest attention to language, to particularity of phrase and context; it is kept from the chaos of indifferent relativism —of thinking that nothing can be known or understood, no common values held— by a principle of humility and sincerity, or what I would call the ethic of the translator...».

¹⁹ And the *external* mediation of Deconstruction, as *transcendental Deconstruction*. See Balkin (1994, part III «Speaking in the Language of the Other», 5): «The encounter between deconstruction and justice has changed both parties; yet, of the two, deconstruction appears to be the more transformed. If deconstructive practice is to be of any use to the question of justice, it must become a transcendental deconstruction. It must exchange the logic of the infinite for that of the infinite. It must act in the service of human values that go beyond culture, convention and law. It must recognize the chasm that differentiates human values from articulated conceptions of it, and it must identify Deconstruction with that chasm...». And (*Ivi*, 7-8): «Thus, the scope of the duty owed to speak in the language of the Other depends on our definition of the roles of the parties —as victim or injurer, strong or weak— but this definition will in turn be affected by the scope of the duty to speak in the language of the Other. [...] The scope of our duty to speak in the language of the Other does not exist before we decide what their respective roles are, but the roles each plays cannot fully be determined before we fix the scope of the duty; each feature of the situation provides the proper context in which the other feature is to be judge. Because of the mutual dependence and differentiation of these contexts, the scope of the duty toward the Other is indefinite....». See also «Ideology» (*Id.* 1998, 99 ff.) and «Transcendence» (*Ivi*, 142 ff.).

shared ground also inhabited by a political judge who wants to be a privileged listener of narratives, paying attention to stories of marginal identities and contributing to the microscopic destabilization of hierarchies,²⁰ and by a judge who wants to become a *literary judicious spectator*, going behind «empathy» to focus our attention on «individual singularity», to treat the other «as a unique person with one's own narrative history»,²¹ or even by a judge who wounds us as a spinner of alternative tales, answering aesthetically and ethically to the call of the suffering Other, assuming the task of a specific *justice as dike* as a “momentary principle of Justice”²²

When one gets to this degree of differentiation, the opposition is no longer played out only between different ways of experiencing the interpretative enterprise or the literary turn —or between different ways of understanding rhetoric and the practical *continuum* (justified by the intertwining of *prhronêsis* and *aesthesis*, law and ethics), or even between different «evaluations» of modernity's heritage (including the need of identifying a *postmodern path*), but between radical different conceptions of *community* (and of the *return to community*).

On one hand, with Boyd White and Nussbaum, although with different outcomes, we have communitarian meaning stabilized in the collective identities of a *community of memory* and a *community of ideas*,²³ or in the unequal dialectic process these *communities* construct. James Boyd White oscillates, as a matter of fact, between the foundational share of common stories and a common narrative pragmatics and the care-*Sorge* with intercultural dialogue which is also the «bet» on an *ethics of translation* (Boyd White 1985; 1990); while Martha Nussbaum invokes the integrative horizon of a democratically participatory and republican citizenship (a typical *community of ideas!*), claiming that this experience of citizenship finds its constitutive experience in a kind of *concrete* universalism or cosmopolitanism which values the presupposed horizon as a patrimony of incommensurable goods, still opening itself to the emotions and singularity of difference.²⁴

On the other hand, with *CIs* and *postmodern jurisprudence* scholars, one experiences community as a microscopic reinvented *promise* permanently sought and *deferred* —as the construction of meaning (the cultural articulation

²⁰ A political judge sensitive to *Critical Race Scholars's* arguments. See «Legal Storytelling and Narrative Analysis» in Delgado-Stefancic 2001, 37 ff.

²¹ See «Poetic Judging» in Nussbaum 1995, 72-78, 79 ff., 90ff., 99-118.

²² See «Another Justice» and «A Well-Founded Fear of the Other: the Momentary Principle of Justice» in Douzinas-Warrington 1994, 132-185, 211-241. Also 1991a, 117-120, 142-147.

²³ To say it invoking the *ideal types* proposed by Fowler (1995, 88 ff.).

²⁴ See an exemplary synthesis in Nussbaum 1994, without forgetting the *corrections* introduced in Nussbaum 2008, 78 ff.

and the integrative order-ordinans) that a specific *praxis* pursues and recognizes when invoking the reunited or separated spells of a certain *political morality* (based on the Foucaultian experience of a capillary immanent tissue of *powers* and *resistances*), of an *aesthetics/anaesthetics of the sublime* (justified through a Lyotardian reinvention of Kant's *reflexive judgment*) and of a radically autonomous *ethics of alterity* (committed to the Derridian translation of Levinas's *infinite responsibility*).²⁵

3. But let us go back to our leading question. When differences are so overwhelming, is it productive or «interesting» to identify such a *common ground*? I would insist it is. Certainly because it's only when one pays attention to the diversity of the implicated voices, assuming the *need* of going beyond a basic "crude" diagnosis of connections and affinities, that the character and the limits of the sought *human alternative* become at last clear. One may even add that this is so because the awareness of an irreducible *pragmatics of plurality* (sometimes clearly the celebration of an invincible *différend*) paradoxically opens up the way for us to experience *other* troubling not to be confessed affinities between the reunited voices, which in turn contribute to the structural perpetuation of the differences!

3.1. As a matter of fact, all the *humanistic approaches* that we have brought together reproduce a-problematically what we may denominate with the unexpected help of Kelsen's and Posner's formulations a conception of *law as frame (Rahmen)*²⁶ or an *open area* discursive strategy.²⁷ Not only because all of them treat law as an ensemble of textual materials to be read or to be performed, but also because all of them wound these materials (standards, policies, rules, canons) with an a-problematic *indeterminacy thesis*, justifying indeterminacy as

²⁵ I have systematically explored some possibilities-trends of these *promises of community*, specially in Linhares 2001, 92 ff. and 181-211 (the Foucaultian contribution), 221 ff. and 462-507 (the Lyotardian's *aesthetics of sublime*); see also *Id.* 2008, 551-667 (the Derridian trend) and 2007a; 2007b.

²⁶ See Kelsen (1960, 349): «Das Ergebnis einer Rechtsinterpretation [...] kann [...] nur die Feststellung des Rahmens sein, den das zu interpretierende Recht darstellt und damit die Erkenntnis mehrerer Möglichkeiten, die innerhalb dieses Rahmens gegeben sind».

²⁷ See Posner (2008, 9): «Legalism's inability in many cases to decide the outcome [...] and the related difficulty, often impossibility, of verifying the correctness of the outcome, whether by its consequences or its logic [...], create an open area in which judges have decisional discretion—a blank slate on which to inscribe their decisions—rather than being compelled to a particular decision by "the law". How [the judges] [...] fill in the open area is the fundamental question that this book addresses, though lurking in the background and occasionally coming to the fore is the question how they should fill it in...».

a decisive parameter of the interpretative enterprise. Which means recognizing that the juridically autonomous “internal” treatment of these *wounds* and *blind spots*²⁸ —i.e., the juridically relevant «capacity» of dealing with this situation of *uncertainty* (Boyd White 1985, 21-23, 25-26, 42, 192-212; 1990, 84-86)—arrests itself drastically with a process of determination of *limits*: A process that —with more or less meaningful stabilizing effects— is, so to speak, already predetermined in the abstract representation of these materials, and consummates itself without remission in the construction of the *frame*, the frame that confines (allows) an ensemble of virtually plausible legally equivalent alternatives, simultaneously renouncing interference with the *open area* or the *blank slate* it contains. Thus the choice between those alternatives must be pursued through decisional jurisdictional discretion, taking seriously a *decision paradigm*, which means invoking different foreseeable effects, but also an evaluation of these effects justified by an horizon of intentions, expectations and possibilities of determination which are explicitly *non-juridical* —those that the literary or performative imagination justifies with the constitutive aid of *humanistic arenas* such as literary and ideology criticism, moral and political philosophy, ethical and ecological studies, semiotics and... *grammatology*.

Without forgetting that this *indeterminacy thesis* specifies itself in a sequence-chain of exemplary positions, such as:

(a) the reproduction of the binomial *easy/hard cases* (the first ones corresponding to the exceptional methodological situation of a frame which allows only one possible decision);²⁹

(b) the rejection of the intelligibility category of the *legal system* (whose possibilities are reduced to those justified by *formalistic understanding*);³⁰

(c) the complementary assumption of a *continuum* between *legal materials*, which is also a deliberate *confusion* between *principles* and *rules*,

²⁸ If not *points of rhetorical or argumentative loosening or condensation*. See the development proposed in: «Hermes versus Hercules» in Douzinas-Warrington 1991a, 55 ff.; and *Ivi*, 193-196, «The Books of Judges», 4 and «Suspended Sentences», (e), 238 ff.; see also 1991b, 117; 1994, 250 ff. (III-V).

²⁹ So Nussbaum (1995, 117): «Does literary judging make a difference? Not in all imaginable cases, obviously. Sometimes the legal issues tell clearly one way or another; sometimes the facts are so simple and uncontroversial that literary imagining is not important...».

³⁰ See Boyd White (1990, XIII): «At least until recently the image of law most widely accepted among legal academics [...] was that of a set of rules passed by the legislature or articulated in judicial opinions [...] perhaps coupled with the more general rules called “principles” that inform the lesser ones...». Again (*Id.* 1985, 29): «So that law is in this sense objectified and made a structure [...] and the question “what is law?” is answered by defining what its rules are, by analysing the kinds of rules that characterize it».

principles and *policies* as «standard forms of legal justification» (Balkin 1996, 8-11);

(d) a consequent impossibility of justifying an autonomous methodological problem.

Let's add two words *only* about the third item. It is in fact surprising that all these discursive strategies assume constitutively a *community* project, as a return to values or human goods, or at least to «non-commensurable» *ultimate ends*, without paying attention to the specificity of legal principles and at least discussing this specificity. There is in them even an explicit hostility to an autonomous mobilization of *arguments of principle*, which we could exemplify invoking once again the exemplary polarised proposals of James Boyd White and Costas Douzinas: Boyd White (1985, 29; 1990, XIII) as he confines the relevance of the assumption of the legal system to a rule-oriented formalistic approach, named *law as rules plus principles theory* —which means also reducing principles to «more general rules»; Douzinas (-Warrington 1994, 237) as he denounces the violence against *singularity* and *difference* that *arguments of principle* and the interpretative presupposition of *law-worked-by-principle* radically aggravate —which means also denouncing Dworkin and Drucilla Cornell as hermeneutical positivists.³¹

3.2. The conclusion seems unavoidable. Shouldn't we recognize after all that *our* humanistic approaches only get to generate an effective alternative to legal instrumentalisms or pragmatisms when they converge —partially but no less paradoxically— with these privileged opponents, that is to say, when they a-problematically reproduce an *indeterminacy thesis* and an *open area* conception concentrated in a certain *hard cases* theory? I would say that there are two different *problems* that converge here.

3.2.1. The first one concerns the efficiency of *resistance* itself. Is the resistance to *Zweckrationalität*, that these reunited interlocutors are in a position to oppose, a fragile one? I would say it is... because of the reinvention of *praxis* and *practical thinking* they offer (if not because of the *practical world* they presuppose). This fragility does not however reside in the more or less happily explicit renunciation to an order-*ordinata* of Being and its ontological *mirror*. As we have already seen, it is the circumstance of this renunciation that opens up, on the contrary, the opportunity for an unique (for once constitutively autonomous) practical philosophy!

This fragility resides rather in the specific *paths* or *routes* that, in the name of that autonomous status, *praxis* and its *intellectual virtue* (*phronêsis*) seem here constrained to follow. As if the loss of *sophias*'s theoretical

³¹ The first one, besides, «motivated by the desire to answer positivism's embarrassment», if not to «purify positivism's scandal». See «Hermes versus Hercules» in Douzinas-Warrington 1991a, 23-24, 55-7; and 1994, 199 ff. (III).

predominance has condemned contingency and mutability to a practical *continuum*, and this one involved an holistic ethical commitment where *energeia* and *kinesis*, *praxis* and *poiesis*, but also *êthos* (ἦθος) and *éthos* (έθος), *ethos* and *pathos*, would be definitively reconciled and without distinction melted. But also as if this holistic experience justified an immediate rejection of all the persistent attempts that —persuasively projected in several legal thinking trends not certainly by chance to sustain some well-known *internalist attitudes*— accentuate either a praxis of hermeneutical re-contextualisation, or a topical problematically committed conception of *practical arguments*... and either one or the other of these poles searches for and justifies an autonomous *prudential subject/subject's* rationality.

These options shape (constrain) our *humanistic approaches*, not only preventing the possibility of establishing a clear counterpoint between *moral* and *intellectual* virtues,³² but also favouring a certain concept of *ultimate goods*: a concept that —thanks either to the persistence of a selective dialogue with Aristotelian *onto-teleologism* (White, Nussbaum), or to the protagonism of an emancipatory *critic of ideology* (Balkin, Douzinas)— cannot really avoid a very troubling *continuum* with *means-ends rationality*. As if the problem was still only *one* of competitive uncertainty, developed in the immanence of pure *ends*, and the single positive difference to be found might be that of mitigating the rigid equivalence of these ends with the introduction of some plausible hierarchies (commensurable/non-commensurable, instrumentally pursued/ for their own sake pursued ends). Not certainly arbitrary hierarchies, but those sustained by *altruistic ideological convictions* (Balkin) or practical-existential-aesthetic bets (Douzinas), but also recognized thanks to the restitution of *subjective ends* to cultural systems and horizons —the cultural contexts from whose possibilities they were supposedly extirpated (White, Nussbaum).³³

3.2.2. The other *problem* to pay attention to has to do with a kind of a *misjudgement* (if not with *the* misjudgement *par excellence*) that all the open area discourses cultivate. I mean the kind of misjudgement that inscribes the *claim of legal autonomy*, whatever mask it puts on, exclusively in the prescriptive realm of normativism and formalism and formalistic legal thinking,

³² See the well-known reconstitution of Aristotle's «practical wisdom», «akin to sense-perception», proposed in Nussbaum 1986, 291-306, «Non-scientific Deliberation».

³³ See in particular Boyd White (1985, 42): «Our motives and values are not on this view to be taken as exogenous to the system (as they are taken to be exogenous to an economic system) but are in fact its subject. The law should take as its most central question what kind of community we should be, with what values, motives and aims; it is a process by which we make ourselves by making our language». And (*Ivi*, 21-23): «The only rational “ends”, the only ends we can confidently use as guides to conduct, are conceptions of ourselves and of our relations with others, not materially describable states of affairs».

reducing the possibilities of an *internal juridical attitude* (the experience of law as an autonomous dimension of practice and an autonomous field of knowledge) to the corresponding *program* of *isolation* of an abstract self-sufficient normative cosmos (freed from the dynamics of social reality or reducing it to an ensemble of discrete *facts*, as such foreseen in the rules' *hypothesis*).

It is this reductive *misjudgement* that allows our *humanist front* to treat Dworkin as a more or less overt formalist, and that after all imposes that the alternative to *legal pragmatism* and its *interdisciplinary choice* has to be sought (and found!) thanks to the propulsive impetus of another *interdisciplinary claim*: A claim that preserves the *framing task* of legal materials, also plunging into the *open area* and choosing one of the consented alternatives... merely substituting the explanatory dominance of the social sciences by the privileged contribution of *humanistic arenas* (and literary or performative invention). Thus the transitive decision *alternative* to be chosen may be the one whose effects better contribute to defend the judgement's authority in the «language of community itself», if not also to the creation of meaning of a *communitarian ethics of translation* (Boyd White 1985, 191), to the singular celebration of «emotions» as «forms of intentionality» (Nussbaum 1999, 180),³⁴ to the microscopic pursuit of an *indefinite duty toward the Other* (Balkin 1994, part III), to a plausible «ethical acting against the grain of the pure interpretative moment» (Douzinas-Warrington 1991a, 146)... even to the political authoritative performance of a «jurisprudence of empathy», if not a «jurisprudence unmodified» (West 1996, 243-244).³⁵

This last accentuation confronts us as a matter of fact with the explicit or implicit *need* to search for the *homo humanus* (or the humanity's project) that our circumstance demands... *beyond Law* or at least renouncing Law' specific «thirdness» (*tértialité* in Levinas) and its comparison claim (its dialectics of personal autonomy and *limited* communitarian responsibility). To justify this need is indeed to assume a kind of constitutive paradox: The one which strikes us when we notice that... if it is true that all these reunited voices are eloquently committed, *in the name* of Law or at least *because* of Law's relevance, to a

³⁴ Nussbaum 1999, 180: «Emotion and desire are not simply mindless pushes, but complex forms of intentionality infused with object-directed thought; they can be significantly shaped by reasoning about the good...».

³⁵ «A perfect legal system will protect against harms sustained by all forms of life, and will recognize life affirming values generated by all forms of being. Feminist jurisprudence must aim to bring this about and, to do so, it must aim to transform the images as well as the power. Masculine jurisprudence must become humanist jurisprudence, and humanist jurisprudence must become a jurisprudence unmodified...». (West 1996, 243-244, «Conclusion: Toward a Jurisprudence Unmodified»)

specific urgent reinvention of praxis and practical discourse —a reinvention which may be able to resist *Zweckrationalität's* hypertrophy, it is not less true that all the different parallel answers that these attempts construct only get to impose themselves as plausible, more or less successful, alternatives when they renounce Law —or when they dilute Law in a practical holistic *continuum*, where its project loses sense and autonomy.

Is this all we have to say about the presumed *common ground* and its constructive endeavour? Isn't this a disappointingly aporetic conclusion? Or at least a conclusion which, in its best light, condemns us to the *alternative-call* of an *ethical* answer...or perhaps better, to the challenge of a *certain* political contingent institutionalisation (the *one* which may be able to *ear* attentively this call)? I wouldn't say it is. Certainly because to insist on this conclusion does not constrain us either to accept or to reject outright these parallel attempts, even less to forget their meaningful reflective patrimony (or the problems' diagnosis they contribute to *unveil*). The awareness of this paradox rather invites us to *ear* carefully these proposals, recognizing however that we should not so promptly renounce, as they do, *betting* on Law's autonomy... or *reinventing* this autonomy claim in our specific circumstance, to give it the *chance* of an indispensable continuous practical renovation. To go on *betting on law* as an autonomous *task* or an autonomous *way of life* means today either paying attention to plural multifarious contexts of realisation, or rejecting the *open area discretion* with all the presuppositions this discretion invokes. Without forgetting that to reject this area (to admit the *need* of an autonomous juridically plausible answer) means, in turn, to explore the possibilities of a multidimensional open *legal system*: a system of *principles and rules*, in permanent constitutive dialectics with singular, unrepeatable practical controversies, where normative principles (experienced as autonomous *jus*) are (luminously!) seriously taken and circularly reconstituted as an irreducible foundational *stratum*.³⁶

Now this bet *inverts* the emphasis that the drawing of our *common ground* has presupposed since the beginning. It inverts it, *on one hand*, to receive (to welcome) the experience of narrativity and performance (and its imaginative respect for singularity and difference) as a precious «informative» input among other interdisciplinarily constructed informative inputs —a contribution which is indispensable to recognize our practical circumstance and its cultural articulations, but also and in particular to pay attention to the specific sensitivity to singularity that these cultural articulations experience (and to assume the possibilities and the relevance of the different realization contexts). It inverts it, *on the other hand*, to free the *legal materials* from their exclusive framing task,

³⁶ I invoke here the specific *legal system's* conception proposed by Castanheira Neves: See specially Neves 1993, 78-81, 152-157, 188-196, 278-283 (BB); 1995, 155 ff., 167-180.

i.e., to make them and their constitutive realisation *responsible* for plausible successful answers to concrete inter-subjective controversies, which also means assuming a specific *humanitas* project—a project which is to be pursued in an historical context, and which is as such conditioned by all the involved (political, economic, cultural) *contextual* factors, a project however that is not necessarily (rather on the contrary!) condemned to lose its identity or its distinctiveness.


Does not this mean concluding that the way of combining the specific contributions of *law* and *literature*, legal thinking and literary criticism, legal practice and literary realisation, seems to be much more adequately assumed by Dworkin (who never forgets the *distinctiveness* of the legal enterprise) than by all the voices that we have selected as *exemplary frequenters* of a certain *common ground*? I would say it does. To agree on the path to be taken (where literary *stimuli* are mainly used as resources to expose and defend the law's fidelity to *arguments of principle*) does not however mean to agree entirely and unconditionally on the proposed answers and the mobilized resources (to begin certainly with the argument that defends the centrality of interpretation in the adjudicative process). But this is naturally another discussion!

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CLARICE LISPECTOR AND FORGIVENESS:
INCIDENCES AND COINCIDENCES

by
Mônica Sette Lopes

At first I thought about starting this text with an eccentric declaration: I don't like Clarice Lispector (Tchetchelnik-Ukraine 1920, Rio de Janeiro-Brazil 1977). However, such a conclusive statement would prevent any improvement; hence I shall refrain from declaring it.

But, if the statement was true, then what's the reason behind this text?

How can one not like this mysterious writer; who turned herself into a genuine Brazilian, making writing the essence of her own life?

Perhaps there really is a vestige of rejection that has got history, time, place, and disseminates in an academic discord, as if it were impossible to dislike what everyone *must like*. Not to like Clarice Lispector is a problem and to state that will either solve it or make it worse.

I shall do exactly as she. I shall answer the question that is at the end of the book, which is the reason for this rejection and for the blame that might not be forgiven among the accepted versions of right and wrong, on the field of erudite forms of expression.

I was about ten years old when a friend gave me one of her books, *A mulher que matou os peixes* (*The Woman Who Killed the Fishes*) (Lispector 1999). I remember taking it on a vacation trip and feeling frustrated for simply not liking it as I read through each page; a feeling compounded by the fact that the book was a present given from a dear friend. I've always looked for an answer for that feeling. On the one hand, perhaps I would answer 'No' when Clarice asks the readers if they forgive her for not feeding her son's fishes for three days, which leads to their death. However, this is perhaps hypocritical, for one day I killed my yellow pet canary in a similar show of negligence, something for which I too might seek forgiveness. This story, with all its banalities of human cruelty, can flourish in its randomness and become trivial in due course (Arendt 2004).

The purpose, therefore, might only be to illustrate the way in which the need to forgive can unite us as humans; so too the need to be forgiven. Because inside the sources of these two tiny and sparing stories is laid bare the human disposition: a potential to not only make mistakes, but rather deliberately behave badly; the stigma of sin that potentially embraces us in its weak arms. We are all prone to falling, and as such we need forgiveness; we need to be given the opportunity to get rid of the stain.

A mulher que matou os peixes is a typical children's book, but it is also an insignificant point among the literary compositions of this great writer. It is illustrated. It is short. Its language appears deliberately childish, devised with a certain audience in mind and with the express intention of creating complicity between author and reader to the point where the childish tone borders on the forced, as if the writer is at pains to create the intimacy of a friendship that would not otherwise exist.

The problem is announced on the first page:

For I killed two little red fishes that don't harm anyone and are not ambitious; they just want to live. People also want to live, but fortunately they also want to enjoy life and to do something good. (Lispector 1999, 1)¹

The explanations start immediately after this well presented argumentative line when she guarantees that the reasons will come at the end of the book:

I am not yet brave enough to tell you now what's happened. But I promise that at the end of the book I will tell you and you, who's about to read this sad story, will forgive me or not. You will ask: why only at the end of the book? And I will answer: It's because at the beginning or at the middle I will tell you some other stories of pets that I had, just so you will see that I couldn't have killed the fishes on purpose. (*Ibid.*)

The suggested form is the same as a judgment. Facts are explained. The connection within the parameters is condensed into rules of conduct and is reviewed, be it rightly or wrongly. The arguments for a request for forgiveness—the final goal—are synthesized. Guilt is left to be apportioned by the reader. The thought is analogical: the various steps of life must be considered and compared. Equality and difference will have to be evaluated in the context of the death of the little fishes and the limits that govern human behaviour (Kaufmann 1976). The judgment expressed by the writer about herself will not

¹ This edition's pages are not numbered. Therefore, the informal numbering from the first page of the narrative will be considered.

be enough to impose a result. An appreciation of the stark facts is fictitiously made.

All the intercalated stories talk about suffering, loss or death of animals. The causes vary: whether it's the need to move abroad which means she must leave the dog with friends or the need to give it away because of the noise, or the monkey that is already ill when she gets it and dies in a few days, or the small chicks that appear fragile. There are stories about some of her friend's animals like the dog, Bruno, who killed another dog because he got jealous of his owner and, for this reason, was killed by the neighbourhood dogs:

Bruno soon noticed that he was being surrounded by several big and strong dogs. Bruno knew that the dogs' law is the revenge. He wanted to escape but he couldn't break the circle. [...] The dogs suddenly attacked Bruno all at once, making justice themselves, because, as I said, in the dogs' world they carry judge and police. (Lispector 1999, 18-19)

Children's stories prepare an ethical background that is rehearsed and tested throughout people's character formation. It's common for them to have a morality around good and evil and to play up to children's feelings, making them incorporate the concepts even if it means confronting them with feelings of fear, repulsion and dislike.²

On the above mentioned passage she compares revenge and forgiveness. Dogs don't forgive. They don't talk about it. They take revenge. They kill.

Animals are traditionally used as characters to serve the mimetic process in that they are used as pedagogic resource. They are different —for a start they are not human; however, they can easily be used as a metaphorical symbols of the human disposition, a disposition inhabited by revenge and forgiveness; dialogue and death.

Carlos Mendes de Sousa (2004, 176) reinforces, as from the book, the idea of coincidences or sharing:

There is a game at play in which a larger explanation scale is involved, this game is expandable to different derivations, in comparison to the coincidences of the significant values and to the tendencies to mentally create or understand these coincidences.

² It will not be lazy to re-read the Chesterton of *Ortodoxia* that talks about the communication of values through this kind of narrative (Chesterton 2001, 67-90). At the same pace, it's interesting the comparison made by Vilma Arêas between the work of Clarice Lispector and the similarities with the children's classic of the Countess of Ségur, mandatory reading for girls from a certain generation, that was my own, together with the *Poliana* of the happiness game, always overcoming the annoyances of life. The *Sofia* of innumerable disasters also lived with the (bad) girl that killed the fishes (Arêas 2004, 234).

To interpret these coincidences demands this analogical exercise in that it puts to the test the effects life choices have on *others*, and hence it will always be a measure of us, of our sharing with these *others*.

For this reason, the writer puts Bruno at the centre of the picture of revenge and paints in that picture a scene of voracity. The dogs are anthropomorphised, displaying the sort of institutionalised characteristics found in humans (in the dogs' world they "carry judge and police"). As such this metaphorical approach insures that the text is grounded steadfastly in reality. And this approach is no accident: Clarice Lispector had a Law degree.³ The diversity, in this circumstance symbolised by the animal, is a representation of the human equality under the light of a potential fall and dissuasion. The human imagery carries the perpetual anger inherent in revenge and can also carry *judge and police*. Is this a coincidence or is it perhaps planned?

Law can be understood as a set or a system of rules of conduct that generate a framework of traditions that are formally established (to try) to prevent conflicts, or at the very least, solve them when they arise. However it is not always possible to explain away the oft misguided desire for revenge or thirst for power as merely arbitrary facets of the human soul. The anger for revenge has the same strength as the desire to interfere or change the past in which the forbidden occurred. That's why punishment is never enough; why compensation rarely sates, why the penalty is never enough and why the Law's time is always too long.

Bruno's story, drafted by the cruelties of the wildness, reflects the border between conflicting ancestral sociability; between good and evil; between right and wrong; between compassion and revenge. Ricouer talks about it by questioning the link between forgiveness and the idea of justice:

On another instance, forgiveness cannot be put over justice, all the manifestations of compassion, of holiness, even in the inner of the administration of justice, as if justice, touched by grace, aimed in its own sphere that extreme to which after Aristoteles we call equity? Finally, I could [...] suggest the following idea: wouldn't it be convenient to forgiveness to walk with justice in its effort to eradicate in the symbolic level the sacred composition of the revenge [...]? It's not a matter of simply trying to dissociate it from the wild revenge, due to the reason that blood calls for blood, and intends to call itself justice. Deeper into the symbolic level, the game played is the separation between *Dike*, human

³ She explains the fact backwards (Lispector 2004, 59): "San Tiago Dantas (a Brazilian Law Philosopher and professor) once told me he couldn't resist to the curiosity and asked me what after all I was doing at a Law School. I told him that Criminal Law interested me. He replied: 'Oh, well, I promptly guessed. You became interested by the literary part of Law. A real jurist likes Civil Law.' How I miss San Tiago Dantas...".

justice, and *Themis*, the last and tenebrous refuge of the equation between Revenge (with capital letters) and Justice (equally with capital letters). Is it not forgiveness' work to act over this sacred harm the catharses that will reveal a sacred wholesome? (Ricoeur 1995, 208)⁴

The thought combines with the matrix of Christianity that adapts the occidental concepts around forgiveness and justice. Chesterton (2001, 127) links it to charity, the fascination with which lying in “the simple tenderness to men in their quality of men” and, therefore, of closeness or equality:

Charity is a paradox, like modesty and courage. Thickly speaking, charity means one of these two things: to forgive unforgivable acts or to love people who don't deserve to be loved.

He highlights that, in Christianity, good things manifest with greater enthusiasm by virtue of understanding the human paradox that puts together horror and purity. Christianity manages to separate crime and criminal:

We shall forgive the criminal up to seventy seven times. As for the crime, we must never forgive it. [...] We should be stricter with theft than what we used to be, and a lot more compassionate with the thief than what we used to demonstrate until now. There was room for anger and love to become. (*Ibid.*)

What space, therefore, does the Law reserve for charity and forgiveness? Is there room in legal practice to incorporate love in conduct; to separate anger as destiny from the attribute of legal rule?

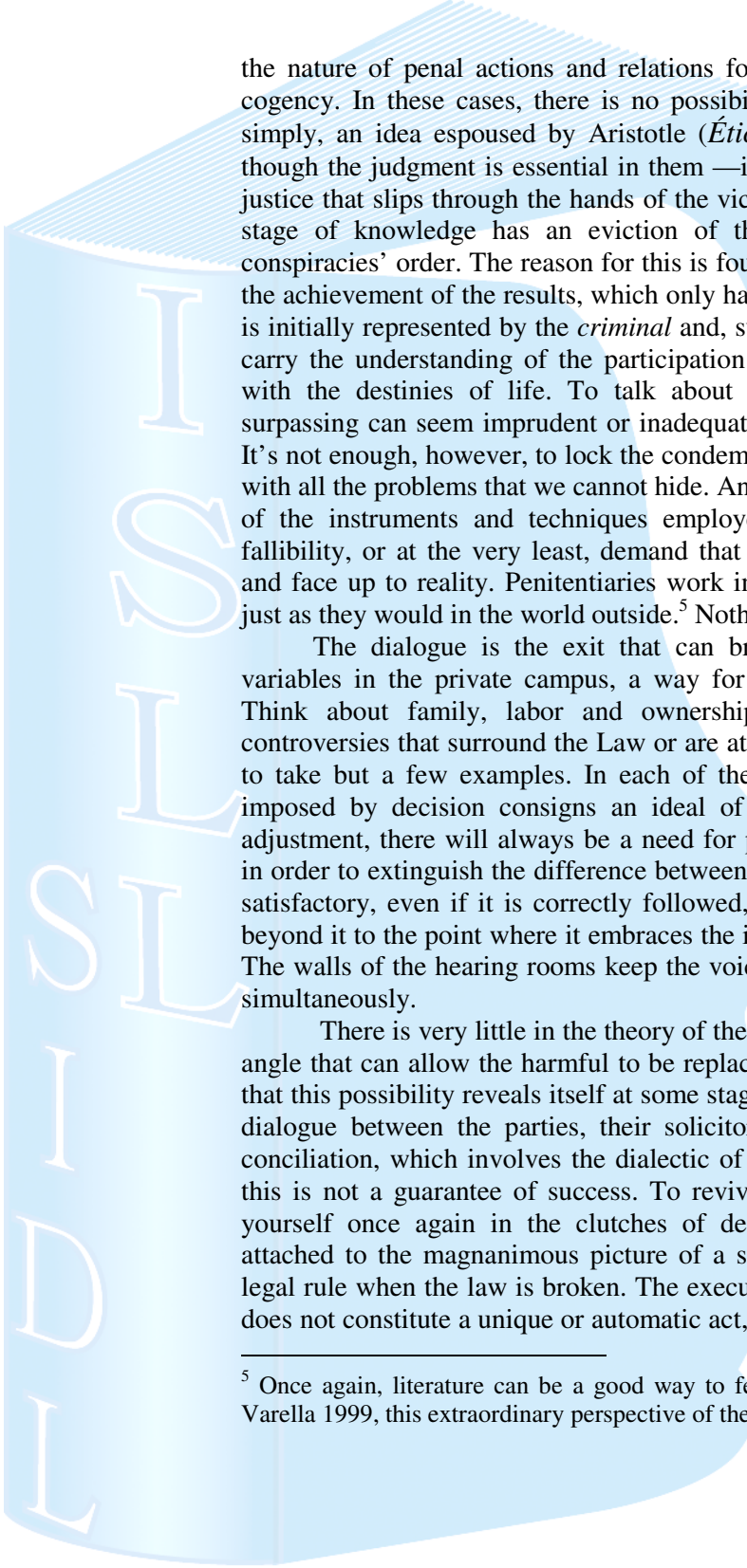
The sanction is the formal replacement of revenge taken over by the impersonal hands of the State (Falcón y Tella- Falcón y Tella 2005). It doesn't always represent the banishment of conflict. Most of the time, it artificially superposes it. It's not good practice to question the functionality of the sanction in places of judicial erudition. It's as if this were not right. In these places, the sanction is; it *simply is*.

However, there's more to the game.

It digs the visibility of dialogical factors that could supersede the conflict where the solution demands negotiation and understanding; adjustment without absolute boundary, like on the associations of private relations in which the extinction of the harm or the reestablishment of the previous situation can be the subject of the frontal negotiation in which all sources are manifested with the colours of truth.

This path gains other obstacles in certain areas of judicial apprehension. When a crime happens, these negotiations are, to some extent, impracticable by

⁴ To make a profound study of this conception of the sacred see Agamben 2004.



the nature of penal actions and relations formed by the criminal law and its cogency. In these cases, there is no possibility for forgiveness, put pure and simply, an idea espoused by Aristotle (*Ética a Nicômaco*). However, even though the judgment is essential in them —inside the structure built to make a justice that slips through the hands of the victim— there is a process where the stage of knowledge has an eviction of the execution, surpassable by the conspiracies' order. The reason for this is found in the concrete actions vital for the achievement of the results, which only happen if the interface like the *other*, is initially represented by the *criminal* and, subsequently, by the condemned, to carry the understanding of the participation in which each of us falls in step with the destinies of life. To talk about forgiveness, about charity, about surpassing can seem imprudent or inadequate in the realm of legal techniques. It's not enough, however, to lock the condemned in jail. He is still alive in there with all the problems that we cannot hide. And, for this reason, the effectiveness of the instruments and techniques employed reflect our humanity and our fallibility, or at the very least, demand that we put ourselves in others' shoes and face up to reality. Penitentiaries work in a routine in which the days pass just as they would in the world outside.⁵ Nothing is hidden. No one hides.

The dialogue is the exit that can bring, in a dynamic facing of the variables in the private campus, a way for forgiveness and for resettlement. Think about family, labor and ownership and property relations in the controversies that surround the Law or are at the heart of society's dissolutions, to take but a few examples. In each of these cases, even when the solution imposed by decision consigns an ideal of legal technique in its maximum adjustment, there will always be a need for practically accommodating actions in order to extinguish the difference between the parties. Even if the sanction is satisfactory, even if it is correctly followed, the transposition of conflict goes beyond it to the point where it embraces the idea of reciprocity and forgiveness. The walls of the hearing rooms keep the voices of bitter and of voices of relief simultaneously.

There is very little in the theory of the sanction to emphasize the positive angle that can allow the harmful to be replaced with the beneficial. It might be that this possibility reveals itself at some stage during the orality that guides the dialogue between the parties, their solicitors and the judge as they attempt conciliation, which involves the dialectic of the argumentative exposition. But this is not a guarantee of success. To revive the conflict is an agony; to see yourself once again in the clutches of defeat. Law and its custodians get attached to the magnanimous picture of a sanction as the final destination of legal rule when the law is broken. The execution of the coerciveness, however, does not constitute a unique or automatic act, but rather a process of unexpected

⁵ Once again, literature can be a good way to feel the extension of the problem. See Varella 1999, this extraordinary perspective of the real life behind bars.

dynamism that demands the reinforcement of dialogue and the triumph over the conflict, latent and renewable, for the effectiveness of its implementation. Remember, once again, the penitentiaries, their jails, their routine and the costs that the perpetuity of their maintenance demands.

The compensation, the expiation and the urge for justice must keep this dialogue open for the assimilation of past the and for the liberation of its effects inside the universe of possibilities. Nothing is simple or easy. Even if one cares only for the operation or the achievement of the sanction the effects will come only from an immeasurable effort. Adding to it the need to surpass the origin of the conflict, an addition of actions specifically focused on the lived circumstances that increase the demands and the work is at stake.

Normally a judgment, a penalty, an indemnity or a millimetric definition of what belongs to each one is wanted, almost as if it were possible to replace the past. The impossibility to do this and the operational difficulty of the formal structures created to do this conjure the feeling that human justice is always insufficient and that it inoculates conflict beyond what would be necessary.

The starting point can be the separation referred to in Chesterton: mankind is always on a tightrope on which it oscillates between the paradoxes and the spheres of excess. We are all steeped in good and evil. For this reason, Law must absorb the simultaneous violence of anger and love, like vectors of the understanding of its effective fragility in the implementation of justice, as the strength that is required to reset the stream of life of each and every person comes from the past.

The importance of the narrative, therefore, gets firmer as it permits the review of the stories. It liberates the imaginative strengths in favour of a comprehension situated in what has happened. It is the revival that can even bring the confession (or else, the declaration of the total factual source) and the prayer for forgiveness (or else, the anti-revenge), and it is the revival that establishes a transformation in the theoretical-practical transition as referred by Ricoeur, which affords this frontal protection:

The first transition from theoretical to practical is made by hand, whilst certain fictions describe the human action in itself. Or, to say the same thing in the opposite way, the first way that the man tries to understand and to take the *diverse* for himself in the practical way is via a fictional act. (Ricoeur 1986, 247)

While telling different stories and transcribing a similar need, Clarice Lispector strives to make an argument by way of the dialogue that she tries to establish with the reader; the person who puts themselves in the same position as her son, whose fishes she left to die. She intends to achieve the essential relevance (wrong and right concurrently) which is the demand of whoever wants to know the contents and the morality of a given behaviour (Lopes 2009).

The description, therefore, comes to its culminating point. The writer assumes the deviation's main role. She describes what happened yet refuses to confess to her crime, refuses to shoulder any responsibility. It wasn't on purpose. It wasn't her (my) intention.

Well, now it's time to tell you everything about my crime: I've killed the fishes. I swear that it was not on purpose. I swear that it was not my fault. If it was, I would say. My son went on a trip for a month and asked me to take care of two little red fishes inside the aquarium. But it was too much time to leave the fishes with me. It's not that you can't trust me, but I'm such a busy person and I also write stories for big people. (Lispector 1999, 24-25)

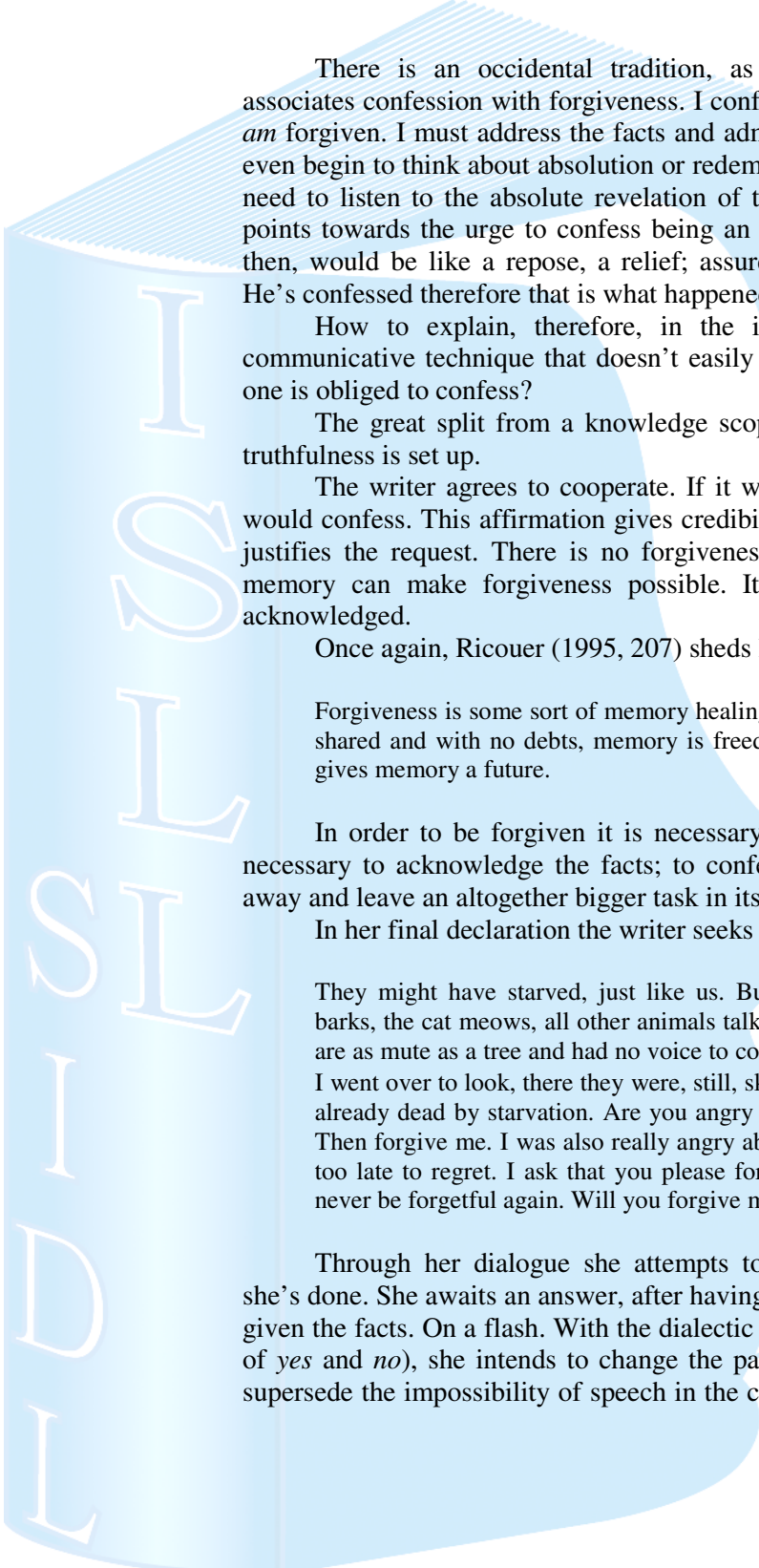
The confession is a call for uniformization, for the mimetism in relation to the other individual that joins the description. It's as if she'd said during the imagined dialogue, 'Look, I'm just like you, so pay attention, this could happen to anyone!'

The writer attempts to rationalise her actions by way of her confession, whereby the nature of the task and her inability to meet its challenge meant that she was doomed from the beginning. It is not her fault that she failed. She should never have been put in that position.

She hopes to be forgiven, but is conscious that it is not the same as the omission, pure and simple, because omission would give place to a predominant shadow or obscurity, as emphasised by Ost (1999), who would capture the idea of a non-justice.⁶ He talks about an omission that carries the past in itself, that preserves it and that, for this exact reason, fixes a promise of non return, of progress for the future:

From memory to progress, the path, however, is not right. It doesn't just fly by, as it was seen, by good omission, by the pacifying omission and by the selective omission that chooses what's needed in the addition of the past. But it also asks for the return of forgiveness that not caring about keeping or selecting the past, changes it while engraving it in the prospect of a new future. (Ost 1999, 136)

⁶ François Ost (1999) divides in four the forms of how time and Law institute themselves reciprocally: a) Turn on the past; b) Turn off the past; c) Turn on the future; d) Turn off the future. Thou the adjective is not adequate to law books, this is a wonderful book, because it reinforces the need to simultaneous knowledge of each one of these ways of temporal insertion of justice and, then, makes a concentrate critics of its perspectives. The chapter in which he deals with turning off the past is where the idea of forgiveness is dealt with in more depth.



There is an occidental tradition, as inherent in Christianity, which associates confession with forgiveness. I confess to be forgiven. I confess and I *am* forgiven. I must address the facts and admit my transgressions before I can even begin to think about absolution or redemption. Perhaps in this most simple need to listen to the absolute revelation of the incident there is a clue which points towards the urge to confess being an unquestionable ideal. Confession, then, would be like a repose, a relief; assured by a logic without diversions. He's confessed therefore that is what happened.

How to explain, therefore, in the imaginary field, translated by a communicative technique that doesn't easily absorb the legal concepts that no one is obliged to confess?

The great split from a knowledge scope in the law's action heading to truthfulness is set up.

The writer agrees to cooperate. If it were her fault, she would say. She would confess. This affirmation gives credibility to the idea which reduces and justifies the request. There is no forgiveness without memory, because only memory can make forgiveness possible. It happens only where history is acknowledged.

Once again, Ricouer (1995, 207) sheds light on this fact:

Forgiveness is some sort of memory healing; the achievement of its grief, shared and with no debts, memory is freed for big projects. Forgiveness gives memory a future.

In order to be forgiven it is necessary to capture the true history. It is necessary to acknowledge the facts; to confess them. The past can then fade away and leave an altogether bigger task in its wake.

In her final declaration the writer seeks to rationalise her shortcomings:

They might have starved, just like us. But we talk, complain, the dog barks, the cat meows, all other animals talk by making sounds. But fishes are as mute as a tree and had no voice to complain and call me. And when I went over to look, there they were, still, skinny, red —and unfortunately already dead by starvation. Are you angry at me because I've done that? Then forgive me. I was also really angry about my distraction. But it was too late to regret. I ask that you please forgive me. From now on I will never be forgetful again. Will you forgive me? (Lispector 1999, 25)

Through her dialogue she attempts to make the reader confront what she's done. She awaits an answer, after having exposed all of her arguments and given the facts. On a flash. With the dialectic knowledge (a complex interaction of *yes* and *no*), she intends to change the past. The present dialogue wants to supersede the impossibility of speech in the conflicting scene. The fishes are as

mute as a tree. Like a tree that does not speak; that does not opine; that does not complain. But yet like us it gets hungry. It dies just like us.

The writer, however, can speak, can opine, and can complain. Her call for forgiveness is reasoned. It is argued. She integrates each passage and its foundations. She is conscious that there might be something revolutionary, a chance of a new beginning, of a *year-zero* (Ost 1999, 137) something touched upon by François Ost, who spurred on by Ricouer (1995, 207) says:

The tolerated mistake translates the benevolence of the indulgence, the forgotten mistake reveals the absence of moral conscience and the dismissal of justice, but the forgiven mistake opens a new history —a history that breaks the everlasting return of the pulsation of death based in a crime-revenge cycle. (*Ibid.*)

The *year-zero* is the absolute beginning born anew. It synthesises the complex essences of various superseded, contiguous pasts such that a path forward can be beaten towards a new future and hence a new life. That's how conflict is confronted by justice. There is no pure, aseptic, hygienically arranged rule capable of freeing itself from the accumulation of immoderations. The process itself, formal or instrumental armour of the achievement of justice, is made of the dialectic sediment of information and contradiction (*due process of law*) in which the conflict gains new tunes and the need for its banishment stays at the hands of the arguments like an almost unreal possibility. Justice's final pronouncement is only ever sought as a last resort.

François Ost, however, analyses justice in a far deeper way, placing in it the context of real life, whereby forgiveness occurs only once one has overcome the conflict and fits everything back together, a process which means addressing every small angle in the totality of their senses; in the plenitude of the dialogue:

If forgiveness is beyond justice, one can say, it's beneath justice. There is relaxation, fatalism and even cynicism in the forgetfulness; in the forgiveness, on the contrary, there is the overflowing, the sublime and even the joy. One is above all justice's virtues, the other is below. One operates over the dark side of the law where the political calculation and the individual interest act, the other shines over the luminous side while cleared by an ethic inspiration. Free, offered without compensation, forgiveness re-sends to heroism the moral conscience, in certain cases, in the religious registry, above the exuberance of a joy that opposes love to hate. (*Ivi*, 136)

This is a justice that diverts from the merely positivist method. This is a justice that runs away through a narrow, rough gap. It's very difficult to deal with this justice where each person is an individual; full of stories, engaged with life. The absolute unity of troubles demands care, even when the answer is no; a

senseless action; a conviction. No, there is no justice. Even so its attributes demand that there is an overflow of goodwill. The reason must be understood. It must be understood so that the sanction is not another's death, but instead a recovery of their life. And so it should be.

Forgiveness is swallowed up by the legal system, remaining hidden at the corners, like a mechanism; a prohibitive fact; an exercise of freedom that is rejected by the formal legal structure in which the sanction is the magnificent fact; the great revelation. Ricoeur's question (1995, 208) "Is it not forgiveness' work to act over this sacred harm the catharses that will reveal a sacred wholesome?" is not inserted in the conjecture's order. This idea cannot be linked to the form of the law, the form of the decision or the form of the administrative acts.

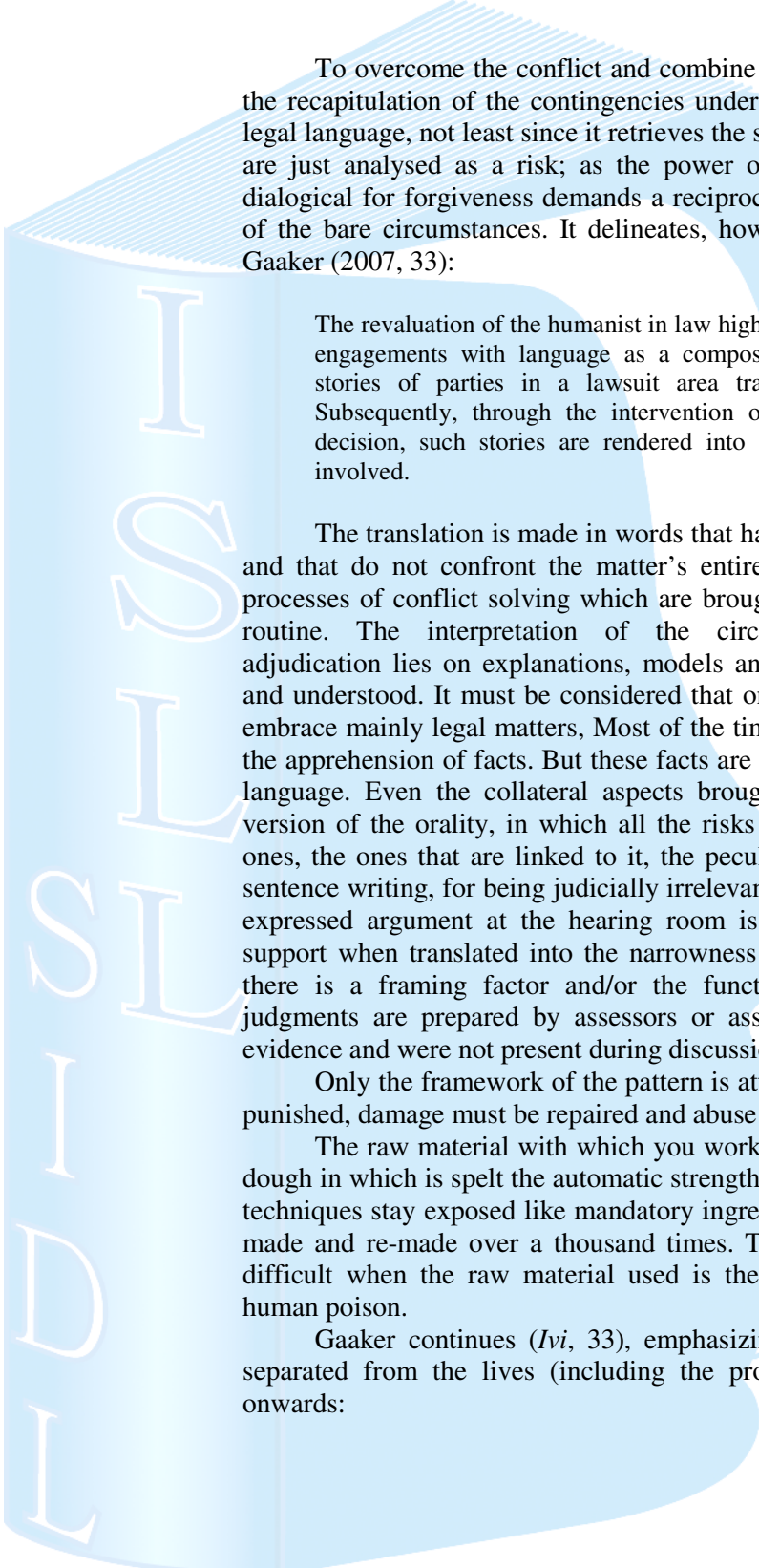
Forgiveness demands *face to face* confront. The one who forgives enters into the soul of the forgiven through the power of his exposure, looking into the eyes, the vision melting; exposed. As if a fragmentation of time were possible, one in between the other, in between us; with the conscience, the knowledge that we are responsible for each other (Lévinas 1991; Martins Filho 2009).

There is a word that needs to be addressed in order to forgive. It only has a meaning when it gets to the ears or to the eyes of the forgiven. I forgive you.

I've seen this several times at the hearing room. After the obstacles were revealed, after new bases for the future were established by the agreement, I see people returning to be who they once were. I saw this especially in a sequence of two separate hearings over the course of a few months. At the first hearing there was bitterness, an accusation of moral harassment and one of verbal abuse. At the following one, an agreement was reached and, after the term was signed, there was at last recognition of transgressions: the wild word, said by the employer, really went beyond the normal limits. For this, the apology was clearly made known—and there were smiles all round at the hearing session, as if they had somehow recovered the lost time. Face to face. The nearly symbolic indemnity has only absorbed the formality in its tradition leaving the sanction to take its place: A mechanism to overcome the conflict, to recover the time.

Cecília Meireles proclaims in her poem *Palavras aéreas* (1989, 182-184, in "Aerial words"), that the word is a dream of courage, defamation, fury and defeat. If it elaborates the freedom of the souls, it is the finest retort of humans' poisons; as fragile as glass as yet more powerful than steal. And so too is justice when is employed to cover both the fragile and the powerful.

It is not easy to shoehorn the idea of forgiveness into justice. Law does not allow forgiveness. The theorists treat it only as a peripheral; an almost irrelevant matter. The advocacy market is repulsed by it because it removes the litigation and the demands. The legal system does not formally encourage it by superposing revenge's visibility through sanction. This word does not serve legal language as an operational concept for the performance in the dynamic.



To overcome the conflict and combine it with forgiveness it is necessary the recapitulation of the contingencies under a view that is not appropriate in legal language, not least since it retrieves the simple fact line in which legal data are just analysed as a risk; as the power of incidence and application. The dialogical for forgiveness demands a reciprocal interaction and a confrontation of the bare circumstances. It delineates, however, a translation as pointed by Gaaker (2007, 33):

The revaluation of the humanist in law highlights the consequences of our engagements with language as a compositional practice in which the stories of parties in a lawsuit area translated into legal language. Subsequently, through the intervention of the judge and the judicial decision, such stories are rendered into a new reality for the parties involved.

The translation is made in words that have meanings stemming from Law and that do not confront the matter's entirety in the way required by other processes of conflict solving which are brought to the human life by the daily routine. The interpretation of the circumstances which characterizes adjudication lies on explanations, models and how the decisions are exposed and understood. It must be considered that only very seldom the controversies embrace mainly legal matters, Most of the time the legal language is applied to the apprehension of facts. But these facts are transformed or traduced into legal language. Even the collateral aspects brought forward in the argumentative version of the orality, in which all the risks are made explicit (the own legal ones, the ones that are linked to it, the peculiar life risks), are ignored, at the sentence writing, for being judicially irrelevant. Most of the time the informally expressed argument at the hearing room is ignored because it doesn't find support when translated into the narrowness of legal language. Added to this there is a framing factor and/or the functionality of the Tribunals where judgments are prepared by assessors or assistants who did not help collect evidence and were not present during discussion of the variables.

Only the framework of the pattern is attained by the Law: Crime must be punished, damage must be repaired and abuse must lead to penalty.

The raw material with which you work is at risk of becoming a complex dough in which is spelt the automatic strength of the days. The processes and its techniques stay exposed like mandatory ingredients used in a recipe that's been made and re-made over a thousand times. This situation becomes even more difficult when the raw material used is the word, this fragile and powerful human poison.

Gaaker continues (*Ivi*, 33), emphasizing that legal concepts cannot be separated from the lives (including the professional ones) lived from then onwards:

[...] law is an institutional language that, given its substantive and procedural aspects, necessarily imposes its conceptual framework on its users.

There is no doubt that some versions of forgiveness are absorbed by the conceptual frame.

When the party lets the time run out, when it, conscious of what justice is beyond a mere presumption, decides not to deduce any pleading, the idea of forgiveness is often lost to the void. Not only does it exist behind the decision of not to get involved with the process and its formalities, but rather it also contrives in the legislative option as lapse, determines a deadline to consolidate the forgetfulness (Ost 1999, 140-143).

It is also in the effects attributed by the legal system to the transaction or to the novation. As if continuing that way, they embrace the liberating power of forgiveness. When a dispute for mutual concessions is prevented or terminated (art. 840 of the Brazilian Civil Code) it necessarily has a place for forgiveness. A given aspect of the conflict is replaced. A new path is presented. It is possible to relax.

What is at stake in any of these symbols is the reconciliation of the factual picture, a remodelling of reality focused on the implementation of the normative meaning. The remodelling of circumstances, from memory, and the open narrative to cheat the transaction are phenomena inherent in this process.

The most intense question, however, persists in situations in which the power of decision is left to the judge. To the life story of each of the litigants, of the victim and the respondent, of the solicitors and the prosecutors, are added, then, the facts that are the process itself; the facts that come from the process.

The process makes a meta-description of real life that paradoxically becomes part of it.

The judge's decision is inexorable and as such impossible to change. The decisions which consolidate the past become what they establish. For this reason, if they could be seen from the outside, as an entity composed by adding the sheets of paper that multiply in the confusion of the lawsuit records, they would reveal something about how the Law is that goes beyond the trivial conception. It's what Laé (2001, 23) emphasises on the composition:

The narrative has no value to the jurist. What counts is the group of final decisions taken by the tribunal. The decisions, as source of the law, substitute by the group of narratives retold at the judgments, to think the event beyond the decision. If it gets restricted to the narrative, if it temporarily stays away from the decision and from the cumulative group of judgments, then it's found out the common continent in a group of evaluations in the previous process: a correlation, a similitude,

dependence, a spiral. We know, however, that this proposal is suspiciously seen both in history and law. (Trans. by A.)

The problem is, therefore, that the description about how the process is made isn't completely revealed and hence is ignored as a possible source of knowledge about the Law. The history of the process and its difficulty doesn't show itself as being part of the Law, except in the pasteurization of the merely conceptual discussion or in the media's unfolded view. The law becomes an imagined story that doesn't always appear to keep hold of what is peculiar to its nature.

There is a very significant chapter from *The Legal Imagination*, in which James Boyd White debates the way in which each person sees or estimates the character of the group of people, explaining the importance of each factual scene's assertions like in a harvest where the subject of proof is relevant and is dependent of its construction by the debate (White 1986, 109-145). He addresses the essential role of the narrative in justice; both its necessary introduction into the decision process and its place in its own legal epistemology. This passage might synthesize his conjectures:

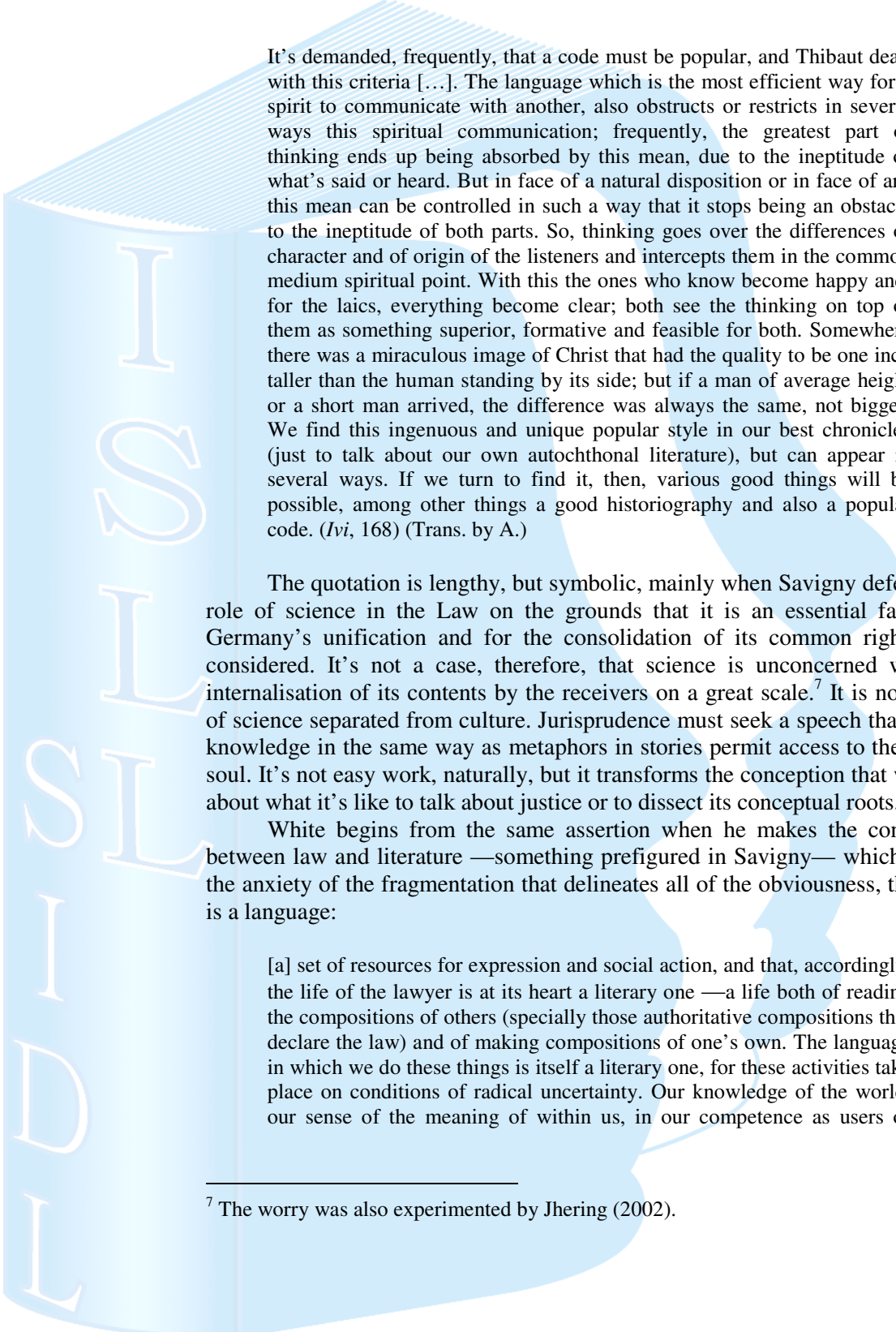
This is a world filled with emotion and moral significance, in which the business of life is the process of social relation and social judgment; one is constantly trying to fix one's view of others, to do justice to one's emotions and one's judgments, but language always seems inadequate to express what one knows. This is a world that many people leave behind as they grow up. But it is with something like the feelings of the sixteen-year-old that you are urged to look at what can be said about people in the language of law. Is this language fit only for the half-dead obese men of business, whose sole concern is for things? Or is it —can it be made to be— something else? Can we use this language to say what you want about people and their experience? (*Ivi*, 112)

How can one turn the language of law into a way of communicating that interacts with people? Not least since language is something that belongs to the people, affording them the ability to voice experiences and tell of their lives.

In a certain way Savigny had this same perception about Law (despite it being somewhat limited by the possible modes of thinking common to his era) when he posited Law's shortcomings and told of his wish that, through science, Law could survive, like the speech survives on people's conscience (Savigny 1970, 54).

His *dream* (that is if jurists dream!) was a justice linked with science that communicated in a simple way, captivating its audience just as the stories captivate children.

The conclusion of Savigny's text follows this path:



It's demanded, frequently, that a code must be popular, and Thibaut dealt with this criteria [...]. The language which is the most efficient way for a spirit to communicate with another, also obstructs or restricts in several ways this spiritual communication; frequently, the greatest part of thinking ends up being absorbed by this mean, due to the ineptitude of what's said or heard. But in face of a natural disposition or in face of art, this mean can be controlled in such a way that it stops being an obstacle to the ineptitude of both parts. So, thinking goes over the differences of character and of origin of the listeners and intercepts them in the common medium spiritual point. With this the ones who know become happy and, for the laics, everything become clear; both see the thinking on top of them as something superior, formative and feasible for both. Somewhere there was a miraculous image of Christ that had the quality to be one inch taller than the human standing by its side; but if a man of average height or a short man arrived, the difference was always the same, not bigger. We find this ingenuous and unique popular style in our best chronicles (just to talk about our own autochthonal literature), but can appear in several ways. If we turn to find it, then, various good things will be possible, among other things a good historiography and also a popular code. (*Ivi*, 168) (Trans. by A.)

The quotation is lengthy, but symbolic, mainly when Savigny defends the role of science in the Law on the grounds that it is an essential factor for Germany's unification and for the consolidation of its common right to be considered. It's not a case, therefore, that science is unconcerned with the internalisation of its contents by the receivers on a great scale.⁷ It is not a case of science separated from culture. Jurisprudence must seek a speech that allows knowledge in the same way as metaphors in stories permit access to the human soul. It's not easy work, naturally, but it transforms the conception that we have about what it's like to talk about justice or to dissect its conceptual roots.

White begins from the same assertion when he makes the connection between law and literature —something prefigured in Savigny— which carries the anxiety of the fragmentation that delineates all of the obviousness, that Law is a language:

[a] set of resources for expression and social action, and that, accordingly, the life of the lawyer is at its heart a literary one —a life both of reading the compositions of others (specially those authoritative compositions that declare the law) and of making compositions of one's own. The language in which we do these things is itself a literary one, for these activities take place on conditions of radical uncertainty. Our knowledge of the world, our sense of the meaning of within us, in our competence as users of

⁷ The worry was also experimented by Jhering (2002).

ordinary language, not in any claim we make as scientists to observe and measure the external world. (White 1985, 77)

The dimension of the external world attributed to Law *scientists* has a troublesome object that absorbs the connection between the concepts of reading and writing that rest on the judge's peculiar duties, in the measurement that leads to the preparation of the case's principle and to its vital dialogue with life that, as external source, articulates judicially by the conflict. On a scale of importance, based on how it interferes in the effective life, the judge's description imposes itself on life, transforming it. It enters it either as salvation or agony, depending on the point of view of the audience that deciphers it.

It is possible for the judgment to be the great place for the narrative proximity, thus, through it the sense of justice in a solid case is clearly defined. The narrative, therefore, is the wider point for the comprehension and, as a result, composes the essential elements of the process that leads (or can lead) to forgiveness.

The substrate of reasons that lead to a certain decision consists of descriptions of the nature of facts and rules where a situation that has begun in the past is recreated; a situation which is at times surprising and unknown. Once again, this relativity is instituting, as pointed out by Gaaker (2007, 37):

All stories force us to define our position with respect to new and unexpected things, which we have to accept as 'true', if only for the moment.

The solicitor and the prosecutor or the attorney as supporting actors seek to win the judges acceptance of the stories they tell, since the judge is the main author of the narrative on which the decision rests. He/She seeks the acceptance of the story told by them, seeks its complete assimilation by the message receiver and/or by the audience.

Even for a moment the story that is consigned in the judgment will be considered as the *true story*, if targeted by the ballast of the text. The due process of law establishes channels of discourse. It's the judge's duty to notice the other, to listen to him, to take interest in his private story:

The ideal judge would show that he had listened to the side he voted against and that he had felt the pull of the arguments both ways. The law that was made that way would comprise two opposing voices, those of the parties, in a work made by another, by the judge who had listened to both and had faced the conflict between them in an honest way. In this sense the judge's most important work is the definition of his own voice, the character that he makes for himself as he works through a case. (White 1985, 47)

The question, however, can be unfolded under forgiveness' view: Does the party forgive the judge when he/she loses the case? Does the society forgive the judge if it cannot understand the reason in the applied technique of adjudication? Is the judge ever heard?

Judgment is the place where the rendering of accounts takes place and it cannot be unheard. The soliloquy of the conviction formation process falls over the impositive power that hits the other; the *other* who must listen and understand who must necessarily make compromises based on that report, even if it contradicts the final limit of possibilities.⁸

It all depends on how a narrative is assimilated, since it is a chronicle of facts and of rules assimilated to facts. Calvo (1996, 70) points the question:

The epistemological statute of facts coincides then with a reality that exists by itself, without any other human mediation other than the effort to offer from it a mnemonic chronicle, memorably faithful, to enable the duplication, in an impeccable way, of what has happened. [...]

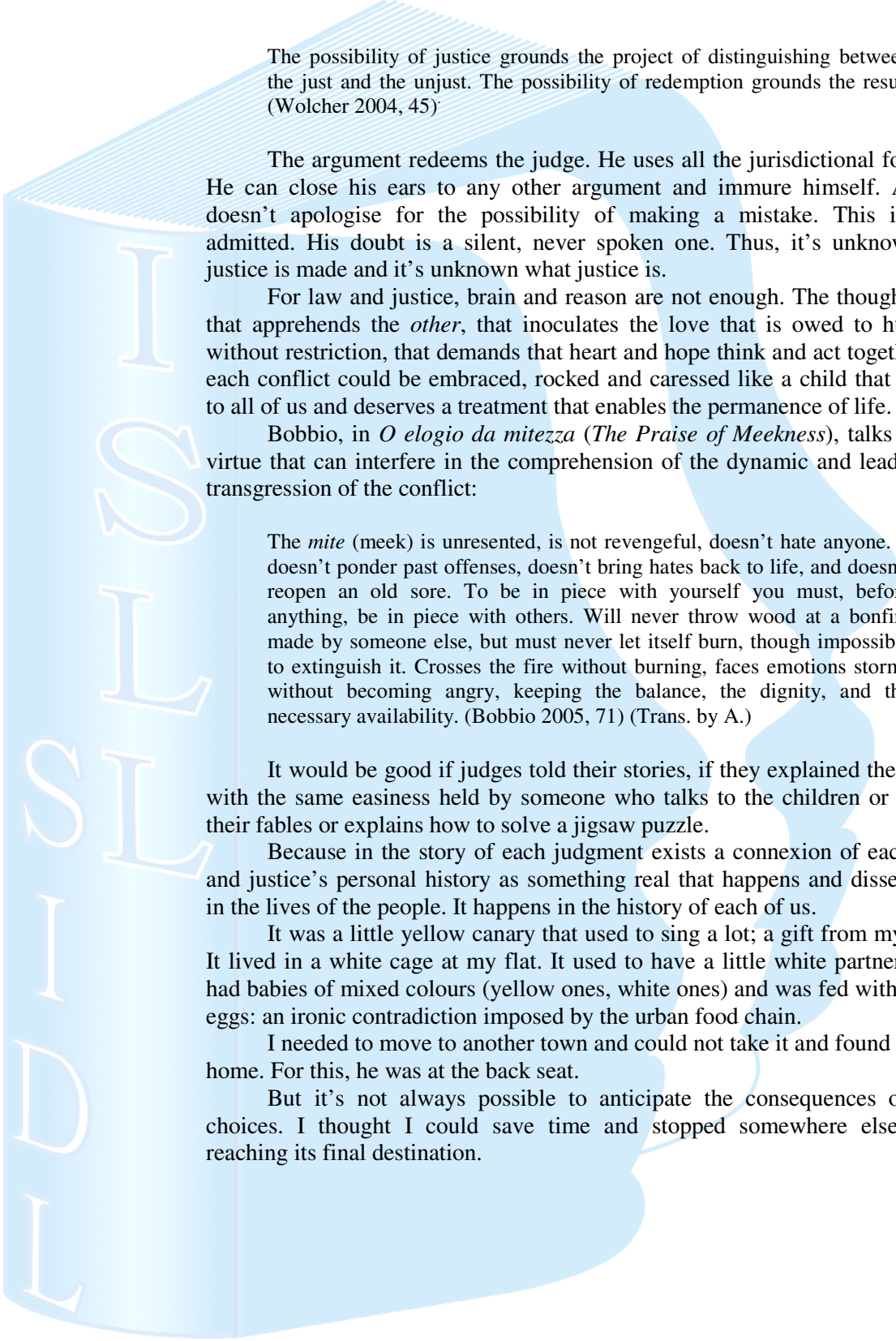
But just pointing or describing is not enough to explain. One can supply a notorious information or even mark an explanation, this, however, does not offer the explanation, does not make the argument. And the narration, furthermore, requires the presence of *the other* who reads and listens. To narrate is not a soliloquy, nor an empty declamation, for this it will stop existing if, as if sucked by an empty bell, it becomes unheard. To narrate, to tell is to take account, and whoever doesn't 'take account' doesn't justify, nor in the judges case justifies himself.⁹

The judge always seeks forgiveness, because he/she necessarily says *no* to one of the parties and hence denies their interests. The excuse, therefore, follows the same pattern of Clarice Lispector's text when leading to the final question, which is subconsciously announced on the power of law enforcement; silenced by the power of *res judicata*. The argument addresses to the same desire for an overcome that is in the forgiveness:

Justification lays down on law, redemption transcends it. Justification lies within history, redemption lies outside history as its ultimate meaning. The time of redemption is the future —it promises that the sum of our presents, once passed, will count for something. The organ and faculty of justification are the brain and its reason: Justification thinks and blames. The organ and faculty of redemption are the heart and its hope: redemption loves and excuses. The virtues of justification are justice and righteousness. The virtues of redemption are compassion and atonement.

⁸ See the importance to pass on the assurance that the other is being heard in Friedman 1984, 101.

⁹ See also the criticism to the ways of the narrative approach according to Dworkin's version (Fish 1995).



The possibility of justice grounds the project of distinguishing between the just and the unjust. The possibility of redemption grounds the result (Wolcher 2004, 45)

The argument redeems the judge. He uses all the jurisdictional formulas. He can close his ears to any other argument and immure himself. A judge doesn't apologise for the possibility of making a mistake. This is never admitted. His doubt is a silent, never spoken one. Thus, it's unknown how justice is made and it's unknown what justice is.

For law and justice, brain and reason are not enough. The thoughtful ear that apprehends the *other*, that inoculates the love that is owed to humanity without restriction, that demands that heart and hope think and act together as if each conflict could be embraced, rocked and caressed like a child that belongs to all of us and deserves a treatment that enables the permanence of life.

Bobbio, in *O elogio da mitezza (The Praise of Meekness)*, talks about a virtue that can interfere in the comprehension of the dynamic and leads to the transgression of the conflict:

The *mite* (meek) is unresented, is not revengeful, doesn't hate anyone. It doesn't ponder past offenses, doesn't bring hates back to life, and doesn't reopen an old sore. To be in piece with yourself you must, before anything, be in piece with others. Will never throw wood at a bonfire made by someone else, but must never let itself burn, though impossible to extinguish it. Crosses the fire without burning, faces emotions storms without becoming angry, keeping the balance, the dignity, and the necessary availability. (Bobbio 2005, 71) (Trans. by A.)

It would be good if judges told their stories, if they explained themselves with the same easiness held by someone who talks to the children or narrates their fables or explains how to solve a jigsaw puzzle.

Because in the story of each judgment exists a connexion of each judge and justice's personal history as something real that happens and disseminates in the lives of the people. It happens in the history of each of us.

It was a little yellow canary that used to sing a lot; a gift from my father. It lived in a white cage at my flat. It used to have a little white partner. It had had babies of mixed colours (yellow ones, white ones) and was fed with cooked eggs: an ironic contradiction imposed by the urban food chain.

I needed to move to another town and could not take it and found it a new home. For this, he was at the back seat.

But it's not always possible to anticipate the consequences of one's choices. I thought I could save time and stopped somewhere else before reaching its final destination.

The closed window. The car heat. The little bird's fragile body. When I came back I found it dead at the bottom of the cage. And until this day I haven't an excuse. I have no forgiveness.

Negligence, unconcern, lapse. Just for one split-second. And it's always like that. It's enough. The incapability to turn back the clock and undo the past.

The fact might be fussy, but the problem that plagues justice is that it is an impossible feat to go back in time. Broken limits. Clock ticking. To go somewhere before the final destiny. Banality. Accident. Fate finished. The substitution of what should have been done by the replacement for the difficult implantation on the lived reality, the thereafter. For there are no words that can make life go back to the exact place. No words that can reverse it. No way in which that everlasting wish to hug that little pet as if it was still alive can come true.

Perhaps I had already forgiven Clarice Lispector at the beginning. Perhaps I understood the meaning of her attitude from the first reading. What I've seen there, however, what I've never gotten over, was the risk to kill some fishes one day, like she did. By negligence. By tumult. By lack of attention. By negligence, unconcern, lapse. The risk of not following the rules. What was promised. And to be in her shoes. Seeking forgiveness. Without an alternative to recover the past. In need of an authorisation from someone else to get over it, as if it was the only chance to continue the way. Strengthened. As she says: sometimes it's too late to regret.

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INSTINCT AND CONSCIOUSNESS INTO REGULATION:
AN ESSAY ON SADE'S *CENT VINGT JOURNÉES DE SODOME*

by
Alessia J. Magliacane

Par contre nous tenons que le boudoir sadien s'égalé à ces lieux dont les écoles de la philosophie antique prirent leur nom : Académie, Lycée, Stoa. Ici comme là, on prépare la science en rectifiant la position de l'éthique.

Lacan 1999 [1963], 243

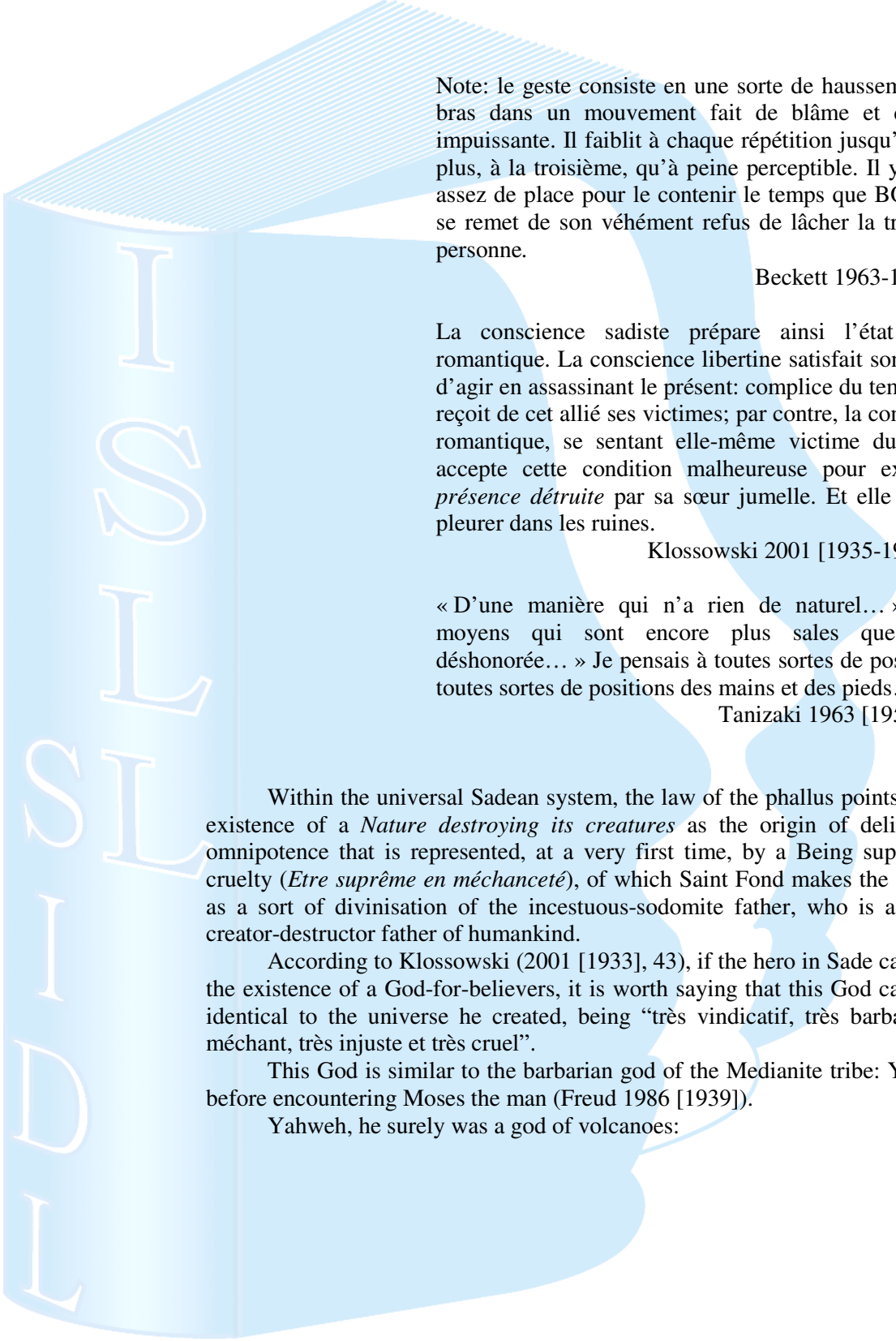
En cela Juliette est vraiment l'enfant de l'ère nouvelle, pour la première fois, elle pratique consciemment la transvaluation des valeurs.

Horkheimer-Adorno 2000 [1944], 113

1. *An ultimate quest of God's voice*

Nous nous avançâmes dans la petite plaine sèche et brûlée où s'aperçoit ce phénomène. Le terrain qui l'environne est sablonneux, inculte et rempli de pierres: à mesure que l'on avance, on éprouve une chaleur excessive et l'on respire l'odeur de cuivre et de charbon de terre que le volcan exhale: nous aperçûmes enfin la flamme qu'une légère pluie, fortuitement survenue, rendit plus ardente: ce foyer peut avoir trente ou quarante pieds de tour: si l'on creuse la terre dans les environs, le feu s'allume aussitôt sous l'instrument qui la déchire...

Sade 1966 [1797], 552



Note: le geste consiste en une sorte de haussement des bras dans un mouvement fait de blâme et de pitié impuissante. Il faiblit à chaque répétition jusqu'à n'être plus, à la troisième, qu'à peine perceptible. Il y a juste assez de place pour le contenir le temps que BOUCHE se remet de son véhément refus de lâcher la troisième personne.

Beckett 1963-1974, 95

La conscience sadiste prépare ainsi l'état d'âme romantique. La conscience libertine satisfait son besoin d'agir en assassinant le présent: complice du temps, elle reçoit de cet allié ses victimes; par contre, la conscience romantique, se sentant elle-même victime du temps, accepte cette condition malheureuse pour expier la *présence détruite* par sa sœur jumelle. Et elle s'en va pleurer dans les ruines.

Klossowski 2001 [1935-1936], 87

« D'une manière qui n'a rien de naturel... » « Des moyens qui sont encore plus sales que d'être déshonorée... » Je pensais à toutes sortes de postures, à toutes sortes de positions des mains et des pieds...

Tanizaki 1963 [1956], 114

Within the universal Sadean system, the law of the phallus points out the existence of a *Nature destroying its creatures* as the origin of delirium of omnipotence that is represented, at a very first time, by a Being supreme in cruelty (*Etre suprême en méchanceté*), of which Saint Fond makes the apology as a sort of divinisation of the incestuous-sodomite father, who is a sort of creator-destroyer father of humankind.

According to Klossowski (2001 [1933], 43), if the hero in Sade can admit the existence of a God-for-believers, it is worth saying that this God cannot be identical to the universe he created, being "très vindicatif, très barbare, très méchant, très injuste et très cruel".

This God is similar to the barbarian god of the Medianite tribe: Yahweh, before encountering Moses the man (Freud 1986 [1939]).

Yahweh, he surely was a god of volcanoes:

C'est un démon inquiétant, avide de sang, qui rode la nuit et fuit la lumière du jour. (Freud 1986, 102 [1939])¹

Egyptian Moses gave a different representation of God, a sort of a spiritualized one, the idea of a unique divinity, loving all creatures and setting a path of truth and justice to men's supreme goal.

Thus:

Notre Moïse égyptien n'est peut-être pas moins différent du Moïse madianite que le dieu universel Aton du démon Yahvé résidant sur la montagne des dieux. (*Ivi*, 105)

The orthodox law sense of «mélange interdit» (Deutsch 1977, 91-92) — to the first chief, the interdiction of simultaneously eating milk and meat (symbolizing the prohibition of the incest)—² expresses, then, another sort of *refoulement*, corresponding to Freud's analysis of the *refoulement* written on its verso: the compromise of Cadès which gave room to the final Mosean god's triumph upon Yahweh, instead of the patriarch assassination.

Cadès is the foundational lieu for this new religion, which is common to all tribes where Israel comes from. That is —even historically speaking— the legal foundation of monotheism as a religion.³

¹ «Il semble qu'en ce siècles obscurs, plus ou moins soustraits à la recherche historiques, les pays du bassin oriental de la Méditerranée furent le théâtre de fréquents et violents éruptions volcaniques, qui produisirent le plus puissant effet sur les populations. Evans avance l'hypothèse que la destruction définitive du palais de Minos, à Cnossos, fut également la conséquence d'un tremblement de terre. En Crète, comme probablement dans le reste du monde égéen, on adorait alors la grande déesse mère. Qu'elle se fut trouvée incapable à défendre sa demeure contre les attaques d'une puissance supérieure peut avoir contribué à son éviction par une divinité masculine, et dans ce cas le dieu des volcans eut plus le droit qu'un autre pour la remplacer. Zeus est en effet couramment qualifié d'*ébranleur de terre*. Il n'est guère douteux que ces temps obscurs virent le remplacement des divinités mères par des dieux (peut-être à l'origine leurs fils ?). Le destin de Pallas Athénée est particulièrement impressionnant. Probablement forme locale de la divinité mère, elle fut ravalée au rang de fille par la révolution religieuse, enlevée à sa propre mère et, par la virginité qui lui fut imposée, définitivement exclue de la maternité» (Freud 1986 [1939], 118, fn. 1).

² «Faire cuire le petit dans le lait de la mère signifie remettre l'enfant dans le ventre de la mère, le placer dans la pleine et unique possession de la mère. Le fils appartient à la mère» (Fromm-Reichmann 1927, 175). According to Woolf (1945), the character of *isolation* results from the fight of Jewish monotheism against the paganism, an internal psychological and not only an external one.

³ « On s'efforça par contre de déplacer dans des temps anciens des prescriptions et des institutions du présent, de les fonder en règle générale sur la législation mosaïque pour déduire de là le caractère sacré et contraignant qu'on revendiquait pour elles. [...] la

Paulian Christianity constitutes a progression, in Freud (1990 [1912-1913]), even if only to religious history, that is according with the return of refoiled. At a cultural level —we can also say at Sade's political level— it is nevertheless a regression: once the father lost, the son becomes god, that is Moses reborn to life and, behind him, the primitive father of the originarian horde as transfigured and taking the place of the father as *the* son.

Without any doubt, Sade himself regarded the same movement by revealing the revolutionary act: The king sent to death that constitutes the parricide precipitating the nation onto the unforgivable (*plongeant la nation dans l'inexpiable*).

From that, the social covenant, once the tyrant annihilated, exists on, unilaterally, only for the citizens. What for? Sade tries to demonstrate what for in his well-known pamphlet in *Philosophie dans le boudoir* (2002 [1795]) whose title is *Français, encore un effort si vous voulez être républicains*.

Here comes the main focus, that on the divergence between Sade and the Revolution, Sade and the Terror, Sade and Robespierre: The revolutionary are taken into account for it by the substitution of the *mère patrie* to the sacred instance of the father, that is to say of the king (Klossowski 1967 [1947]).

L'homme Moïse is not simple "*histoire*", like the bible (otherwise) is, but a sort of a counter historical theology, where the chain of tradition is replaced by the chain of unconscious repetition (Yerushalmi 1991, 53).

Et c'est sans doute parce qu'il y voyait une force coercitive que Sade voulait substituer à la fraternité de l'homme naturel cette solidarité du parricide propre à cimenter une communauté qui ne pouvait être fraternelle parce qu'elle était caïnique. (Klossowski 1967 [1947], 73)

Sade seems to run this chain until the bifurcation point between *la conscience libertine sadiste et la conscience romantique* (Klossowski 2001 [1935-1936]) embodied by the mother's betrayal as allied to the phallic law towards the primary Nature.

The late before the object (from psychoanalysis to philosophy) shows to be fundamental: the romantic consciousness at the origins of the legal relationship fears the losing of the object, properly like the primitive horde of brothers did, and therefore it exactly appears as the inversion of Sadean consciousness.

religion de Yahvé avait subi une élaboration rétrospective qui l'avait conduit à concorder, peut-être à s'identifier avec la religion originelle de Moïse. Et tel est le résultat essentiel, le contenu lourd de destin de l'histoire religieuse juive ». (Freud 1986 [1939], 119-120)

Mais ce qui semble surtout ressortir de cette vision mythologique de deux humanités, l'une naissante directement de la nature, l'autre de la femme, c'est l'idée que l'introduction de la maternité dans le monde établit la loi de la reconnaissance de la créature envers le créateur (idée de Dieu), de la reconnaissance de la progéniture envers la mère, et qu'ainsi se trouve inauguré le règne des contrats indissolubles donnant aux uns les moyens moraux de se soumettre et d'enchaîner les autres ; le règne des notions religieuses, inspirées par la crainte et l'incertitude. (Klossowski 2001 [1933], 42-43)

Kantian law —law of acknowledgement (*reconnaissance*)— is introduced by maternal order. The obstacle to the hybridizing incest —which implies the exclusion of the father as law, that is distinction, division, order, centre of the monotheistic religion as the history both of a nomination (Genesis), and of Egyptian morals (Maat) which takes the place of disorder (Morenz 1962)— is not only the father but the chronological incoherence between the manifestations of the oedipal desire and the conquest of the skill to fulfil it.⁴

The notion of *Nature destructrice de ses créatures* directly proceeds from this original conflict that is enlightened by Klossowski in the following poetical way:

Elle représente la projection grandiose, sur le plan métaphysique, du moment traumatique où l'enfant se sentit trahi par la mère. Ainsi, ce qui était à l'origine un motif de souffrance devient, sur le plan métaphysique, la réparation même de cette souffrance. (*Ivi*, 47)

While denying the long-time elaboration of its very self (*soi*), and by providing *tout le possible* which has become impossible once taken consciousness of the self (*moi*), the erotic imagination turns itself to aggressiveness —where the conscience itself proceeds from— despite of reality (*au principe de*). It is also worth to recall that, in this reality,

le solitaire, le prisonnier Sade, privé de toute moyen d'action, dispose en fin de compte de la même puissance que le héros omnipotent dont il rêve : la puissance inconditionnée qui ne connaît plus de résistance, qui ne connaît plus d'obstacles ni en dehors, ni à l'intérieur de soi-même, qui n'a plus que la sensation de son écoulement aveugle. (Klossowski 2001 [1936], 95-96)

⁴ «Le sadisme de Sade serait donc l'expression suprême d'un facteur de haine primordial. Ou plutôt : la haine a *choisi* la libido agressive pour mieux pouvoir exercer sa mission : celle de châtier la puissance maternelle sous tous ses formes et d'en bouleverser les institutions». (Klossowski 2001 [1933], 31)

We see now Sadean hero as linked to his Mother Nature, cruel nature, pitiless, blood thirsty, which he identifies himself with, by excluding God-the-father. Sadean hero is *le père châtiant la mère en faveur de l'enfant*, or breaking down with his wife for loving his child, or *le père exécutant la mère conjointement son fils*—like we are told in the history of Brisa Testa, which symbolizes for Sade's regard the fulfilment of the passions that nature placed in men.⁵

Sadean heroes recall Greek heroes. Classical Greece, in the Hellenic époque —writes Mircea Eliade (1989, 301-303)— saved for us a sublime outlook of heroes:

En réalité, leur nature est exceptionnelle et ambivalente, voire aberrante... Quant à leur comportement sexuel, il est excessif ou aberrant : Héraclès féconde, en une nuit, les cinquante filles de Thespies; Thésée est renommé pour ses nombreux viols (Hélène, Ariane, etc.), Achille ravit Stratonice. Les héros commettent l'inceste avec leurs filles ou leurs mères et massacent par envie, par colère ou, maintes fois, sans raison aucune, ils assomment même leurs pères et mères ou des parents [...]. L'outrance des héros ne connaît plus de limites. Ils osent violenter même les déesses (Orion et Actéon assaillent Artémis, Ixion attaque Héra, etc.) et n'hésitent pas devant le sacrilège (Ajax agresse Cassandre près de l'autel d'Athéna, Achille assomme Troïlos dans le temple d'Apollon). Ces offenses et sacrilèges dénotent une *hybris* démesurée, trait spécifique à la nature héroïque.⁶

It derives that incest in Sade is not connected to the appeasement of a long-time nostalgia for oedipal object, but to the abolition of the *categories* “infant” and “parent”; this *hybris* expresses itself within the terms of a *hybridising*, a meddle, a desire of catching up with the *Chaos* —literally speaking: *fault, lack*— where a new reality is supposed to arise from.

⁵ «C'est donc précisément en lui donnant le rôle du héros noir, et non pas celui de l'homme vertueux et respectable, que Sade établit entre sa propre personne et celle du père une identification qui prend la forme d'une véritable vénération du père, comme contrepartie de cette haine vouée à la mère qui, elle, tient toujours le rôle de la femme honorable, afin d'être mieux foulée pieds». (*Ibid.*)

⁶ And : «En somme, les dieux ne frappent pas les hommes sans raison, aussi longtemps que les mortels ne transgressent pas les limites prescrites par leur propre mode d'existence. Mais il est difficile de ne pas transgresser les limites imposées, car l'idéal de l'homme est l'«excellence» (*arete*). Or une excellence excessive risque de susciter l'orgueil démesuré et l'insolence (*hybris*).» (*Ivi*, 274)

Est chaos exactement, ce qui est inséparable dans le phénomène à double face par lequel l'Univers à la fois se désintègre et s'organise, se disperse et se polynuclée... La genèse des particules, des atomes, des astres s'opère dans et par les agitations, turbulences, remous, dislocations, collisions, explosions. Les processus d'ordre et d'organisation (de l'Univers) ne se sont pas frayés un chemin comme une souris à travers les trous du gruyère cosmique, ils se sont constitués dans et par le chaos, c'est-à-dire le tournoiement de la boucle tétralogique. (Morin 1981 [1977], 57-58)

Sadean hero casts a challenge because he sets renewed combinations, different forms, new species. He, as a demiurge, takes creator's place in order to welcome the times of the "anal", when every difference will be abolished.⁷

He is an alchemist, and thus he

bouscule le rythme [des] lentes maturations chthoniennes ; en quelque sorte, il se substitue au Temps. (Eliade 1977 [1956], 38)⁸

At the same time, in his moral tales,⁹ properly defined as *héroïques* and *tragiques* (so, without hope content), under the empire of the law of the father, Sade outlines the different *modes d'attente destructrice du présent*.¹⁰

These are stages in the interdiction of the chosen love:

transformations dues, comme dans l'exfoliation du fantasme *Un enfant est battu*, à des déplacements pulsionnels par refoulement ou régression, et

⁷ This is one of the prescriptions of the legal code of *Cent vingt journées* —remembers Chasseguet-Smirgel (1984, 228): «“Tout sera pêle-mêle, tout sera vautré sur des carreaux, par terre, et, à l'exemple des animaux, on changera, on se mêlera, on incestera, on sodomisera”». This subversion of the law is even more evident when we compare it to the biblical prohibitions (le *Lévitique XIII*, versicles 6-18). For exemple, in the passion 20 of the third part of the code: “Pour réunir l'inceste, la sodomie et le sacrilège, il encule sa fille mariée avec une ostie”. As noted: “C'est tout au long de l'œuvre de Sade que ce procédé de détournement de la loi est utilisé: ce ne sont que prêtres libertins, moines débauchés, maîtres de pension dépravés. Jusqu'au Pape lui-même”». More specifically, on the relations between perversion, *hybris* and law, see *Ivi*, ch. VII.

⁸ The alchemist ideology is related « à une conception générale de la *réalité cosmique* perçue en tant que *Vie* et, par conséquent, sexuée, la sexualité étant un signe particulier de toute *réalité vivante*.» (Eliade 1977 [1956], 29)

⁹ See, among others, *Faxelange ou les torts de l'ambition, Florville et Courval ou le fatalisme, Dorgeville ou le criminel par vertu, La comtesse de Sancerre ou la rivale de sa fille, Eugenie de Franval nouvelle tragique*, now in Sade 2007.

¹⁰ By quoting Klossowski (2001 [1935-1936], 87): «[e]n amenant ce qui n'est pas encore dans ce qui n'est plus (Saint Augustin) ; en ramenant ce qui n'est plus pour que ce qui n'est pas encore ne devienne pas ; en ramenant ce qui n'est plus pour économiser (donc préserver du néant) ce qui n'est pas encore et doit devenir.»

impliquant donc un usage [...], parfaitement réglé-régulateur, de la négation. (Lyotard 1974, 75)

2. A Normative Third

Il ne faut pas commencer par la transgression, il faut aller tout de suite jusqu'au bout de la cruauté, faire l'anatomie de la perversion polymorphe, déployer l'immense membrane du «corps» libidinal, toute à l'inverse d'une membrure.

Lyotard 1974, 10-11

Je défends que mon corps soit ouvert, sous quelque prétexte que ce puisse être... Ma fosse sera pratiquée dans ce taillis par le fermier de la Malmaison, sous l'inspection de M. Lenormand, qui ne quittera mon corps qu'après l'avoir placé dans ladite fosse... La fosse une fois recouverte, il sera semé dessus des glands, afin que, par la suite le terrain de ladite fosse se trouvant regarni et le taillis se trouvant fourré comme il était auparavant, les traces de ma tombe disparaissent de dessus la surface de la terre, comme je me flatte que ma mémoire s'effacera de l'esprit des hommes.

Testament du Marquis de Sade
in Klossowski 2001 [1936], 93

Les deux sérails sont environnés de hauts murs. Toutes les fenêtres en sont grillées et jamais les sujets ne sortent. Entre le bâtiment et le haut mur environnant est un intervalle de dix pieds formant une allée plantée de cyprès, où les membres de la Société font quelquefois descendre des sujets, pour se livrer avec eux, dans cette promenade solitaire, à des plaisir plus sombre et souvent plus affreux. Au pied de quelques-uns de ces arbres sont ménagés des trous, où la victime peut à l'instant disparaître. On soupe quelquefois sous ces arbres, quelquefois dans ces tous mêmes. Il y en a d'extrêmement profond, où l'on ne peut descendre que par des escalier secrets et dans lesquels on peut se livrer à toutes les infamies possible avec le même calme, le même silence que si l'on était dans l'entrailles de la terre.

Zero is a figure where several libidinal devices are affirmed as a whole (Lyotard 1974).

The passage through Zero is also the special libidinal path of a religious (thus libidinal) fantasy.

Sade moulds an affirmative idea of Zero: The pagan theatre of the *Cent vingt Journées de Sodome* (1975 [1785]), where we deal with the accumulation of the vastest lot of reverses, ruptures, splits of chimerical relations.

Elle est empreinte d'une dépense de quantités importantes d'énergie, employées à rendre supportable quelque chose qui n'est l'est pas, qui est peut-être cette accumulation même de puissances. (Lyotard 1974, 19)

The figure of life and death gather together. They are the energy of an instant or eternity which devours it, as demonstrated by the awful set of postures and manoeuvres required, of beats inferred, of victims involved.

C'est la quantité, le nombre imposé qui par lui-même est déjà motif d'intensité. (*Ivi*, 140)

Sade gives shape to a sort of *intensity*, which determines the body itself. Libidinal skin is a sort of tapestry, a patchwork of organic and social bodies. Coitus, in Sade, is always a group activity, whose characters are children, old men, maids, whores, priests and nuns, gay people, nobles, outlaws... erogenous parts are all equivalent: one can fill the anus with milk, defecate into a vagina or a mouth, force a woman to an anal procreation...

Anyway, we deal with a sort of progression against the subject, who is mutilated and, finally, destroyed at the accomplishment of the tale. Suspense bears narration. The author often prompts out and says that he can reveal just a little of facts at the time, being forced by the *order of matters*. As a result, confusion between libidinal skin and inscription register will always be legitimated.

We learnt, after Deleuze and Guattari, and Lyotard, that the inscriptional surface is, without chance of discerning, either *la peu libidinale engendrée par la barre folle* or *la sage aplat du livre de compte*.

2.1 A Brief Excursus on Freud.

The focus of the children game *Fort da* is the edition and the narration time.

The repetition of this childish game confirms that we are in the negative, inside the capitalistic logic of the *lack*, and thus under the realm of the principle of pleasure. We are not allowed the chance of an *absence*, being supposed that the mother was there, as a space of totalization of several singularities, several libidinal intensities. Lack is, thus, an attack.

Here the stress is on the word *fort* that is on the first step of the playing, the fable time of disparition, which is a most amusing time for the baby, like Freud himself took down.

It arrives that suffering is a cut, a scar, dismemberment, but it only hurts a totality.

Cet enfant, / il n'est pas là, / il n'est qu'un angle, /un angle à venir, et il n'ay pas d'angle.../ or ce monde du père-mère /est justement ce qui / doit s'en aller, /c'est ce monde dédoublé-double, /en état de désunion constante, / en volonté d'unification constante, aussi.../autour duquel tourne tout le système de ce monde / malignement soutenu par la plus sombre organisation. (Artaud 1967, 12)¹¹

Oedipus, we know it, is an angle. If he is an angle, then he is a son; if he is a son, then he is *death intense*. If he is *death intense*, then he is an orphan: *Anti-Œdipe*. That dualism is from neither a dialogue/monologue (like those that we can find in Kantian order of discourse *if... then*), nor does it start any dialectics. It is *l'indiscernabilité des impossibles* at any time.

Moi, Antonin Artaud, je suis mon fils, mon / père, ma mère, / et moi.
(Artaud 2003 [1947], 128)

According to Lyotard (1974), in 1920 text (trace, cold, lack of intensity...) Freud introduces the instance of death drives, properly in order to keep that sign and the whole libidinal economy away from the concept of binarial discrimination.

The dichotomical couple pain/pleasure belongs to the order of the unified body, which fulfils the principle of pleasure as transformed into principle of reality, but here we discover the reverse;

Il s'agit... de rendre insoluble la question de savoir si telle *Gestaltung* est un effet de mort plutôt que de vie, si telle inondation, déliaison pulsionnelle, est suicidaire plutôt que thérapeutique... si au contraire telle

¹¹ See, obviously, Deleuze-Guattari 1972.

stase, tel blocage, telle cristallisation... relève plutôt de l'orthopédie salvatrice ou de l'entropie mortifère. (Lyotard 1974, 38)¹²

We should have the chance of not assigning an effect, a *sign*, to a pulsional principle. Thought itself is from libido. What matters is its strength, the force, which lets the words pass.¹³ Syntax is a sort of a libidinal skin, that is to say a *tensorial sign* (*Ivi*, 57).

Le séducteur dont a parlé Duclos assemble deux femmes. Il exhorte l'une, pour sauver sa vie à renier Dieu et la religion, mais elle a été soufflée et on lui a dit d'en rien faire, parce que si elle le faisait elle serait tuée, et qu'en ne le faisant pas elle n'avait rien à craindre. Elle résiste, il lui brûle la cervelle: «En voilà une à Dieu!». Il fait venir la seconde qui, frappée de cet exemple et de ce qu'on lui a dit en dessous qu'elle n'avait d'autre façon de sauver ses jours que de renier, fait tout ce qu'on lui propose. Il lui brûle la cervelle: «En voilà une autre au diable!». Le scélérat recommence ce petit jeu-là toutes les semaines. (Sade 1975 [1785], 432)

In this accomplishment of Lacanian *vel: ni l'un, ni l'autre* (*ni l'un, ni l'autre choix, ni l'une, ni l'autre femme*), even death itself—which obviously modifies the structure and recalls Kantian freedom (to choose death is to have freedom of choice) (Lacan 1973 [1963])—is tragically masked in the seducer's speech, who makes the *contrainte* the definite element of performance (if... then...) (Martyn 2003, 51-52).

The speech (dis)covers a region into the libidinal space where «*ça ou mourir*» turns into «*ça et mourir*» (Lyotard 1974, 117), and «*être et ne pas être, là où elle est*», wherever it is, is a property of the sole virtual object, which Lacan subdues to Poe's *lettre volée* (Lacan 1955; Deleuze 2003 [1966]).

The meaning of this author's infinitely profound works is in the desire he had to disappear (Bataille 1979).

Les Cent vingt Journées is even its very purloined letter. “*Violence et solitude*” emerging from the seducer's rational order of the discourse (Bataille 1957).

Be the structure what covers the secret and its dissimulation, here comes the *tensor*. Thus Sade refouls the relationship between who speaks and who he speaks to (*Ibid.*). He denies the ternarian structure of language as communication, as well as oedipal Self's triangle, in order to let us infringe the

¹² And: «Il ne s'agit pas de concepts, puisque même si nous pouvons *penser* les instances de vie et de mort [...], nous ne pouvons pas saisir, prévoir, contrôler, les effets, les affects, à l'aide de cette pensée des instances...» (Lyotard 1974, 41-42)

¹³ Sade uses the «pieds» of the table or of the trees, the «bras» of the sofa, the «boyaux» of the corridor, the «entrailles» of the earth. And Cœur-de-Feu to Justine, describes the anus as *le temple le plus secret, où l'on est logé qu'avec peine*.

screen of the mimetical play of psychic identities and discover the lull where both void and narcissic turn into the grade zero of imagination (Green 1983).¹⁴

Letter is a trace of the archaic inscription of what Freud names “the father of any individual’s prehistory”: the instance of idealization, bringing sexual attributes of both parents.

This *bêtise libidinale*¹⁵ of libidinal body —the One, described by Freud as Father, whom we fulfil the identification with (for love, to become like him, One, a subject of enunciation)— has to be granted not as a seducer but as a law: an abstract instance of One, selecting our capacity of identification and idealization.

The archaic mode of fatherly function —which is previous to the *Name*, to the *symbolic*— calls for the *Third* as a condition of psychic life as a love (*erotic*) life. The mother-desired Phallus: Anyway, *Not I, Pas moi*.

The seducer’s purloined letter, his private diary, they are from the order of the *Einfühlung*, that of the identification in love, of the assimilation of sentiments, of other people’s words (to Sade, confession and prostitution differ from a grade only).

This *Identifizierung* is not from the order of «to have». It is from the order of «to be like». To Freud’s caustic rationality, it was madness.

This archaic identification is not “objectale” identification. Kristeva explained in her *Histoires d’amour* (1983, 31):

Je m’identifie non pas avec un objet, mais à ce qui se propose à moi comme *modèle*.¹⁶

Sade’s letter is all but a grand plan. You can see the regulation of libertines and the classification of four classes of passions, whose narration by women storytellers has to be made true by the castles inhabitants, as Republic is

¹⁴ See too Kristeva (1983, 29): «Le narcissisme serait cette corrélation (au père imaginaire et à la mère ‘abjet’) qui se joue autour du vide central du dit transfert. Ce vide qui apparaît comme l’amorce de la fonction symbolique est précisément cerné en linguistique par la barre signifiant/signifié et par l’‘arbitraire’ du signe, ou, en psychanalyse, par la ‘béance’ du miroir».

¹⁵ «D’abord: observons cette immensité de la bêtise, qui s’étend bien au-delà de la bestialité de Bataille, laquelle continue à savoir ce qu’elle fait, même si la conscience ne le sait plus, et c’est là tout le secret *acéphale* du petit érotisme, tandis qu’avec Schreber il faut patauger dans le marais d’une incertitude qui travaille les instincts eux-mêmes, les montages de la bête, qu’on est en deçà de ce que sait l’acéphalie animale, que le ‘corps’ ne sait plus chier alors qu’il en a “besoin”, que la merde ne connaît plus son chemin vers la sortie.» (Lyotard 1974, 74)

¹⁶ And: «C’est à la logique interne du discours, réursive, redondante, accessible dans le ‘dire-après’, que pourra être rapportée cette énigmatique identification non objectale, qui installe au cœur du psychisme l’amour, le signe et la répétition». (*Ibid.*)

libidinal, and law is libidinal. And her, the letter, is its very desire to herself/itself.

In Horckheimer and Adorno's words (2000 [1944], 98):

L'utopie, dont la Révolution française avait tiré l'espoir [...]. Elle est devenue une finalité sans fin qui, de ce fait, peut s'attacher à toutes les fins. En ce sens elle est le plan considéré pour lui-même. [...]

[This way] Après le bref intermède du libéralisme, où les bourgeois se sont tenus mutuellement en échec, la domination se révèle comme terreur archaïque sous la forme rationalisée du fascisme.¹⁷

Le phantasme sadique figures and refers itself to a sort of unity. *Somewhere*, it looks for a body to be transgressed, whose energy is *purloined* from its natural destinations. It is the very body of law(s), where the unequal exchange between intelligent sign and intense sign is definitely dealt.¹⁸

The legal code, or the regulation code, of the *Cent vingt journées* is the variation of an agreement.

Sadic contract is nothing else than the submission of the object to its intestinal functions, «à la seule lois qui régit le processus se déroulant à l'intérieur du tractus digestif» (Chasseguet-Smirgel 1984, 196), which is a sort of

fractionnement des aliments ingérés et en leur dégradation successive en unité de moins en moins différenciées, perdant progressivement leurs particularités originelles et formant finalement une masse homogène, le bol fécal. (Grunberger 1960, 188)

Sadean scene has often been observed as it flew within closed spaces: churches, unbreakable castles, dark forests..., lieu of the fulfilment of the contract —Sade himself (1975 [1785], 110) defines the *Cent vingt journées* as a “journey”: «afin de faire durer l'amusement jusqu'au bout du voyage»— that

¹⁷ See too (*Ivi*, 99): «La structure architectonique particulière du système kantien, comme les pyramides gymniques des orgies de Sade, et la hiérarchie des principes des premières loges bourgeoises –dont le pendant cynique est le règlement sévère de la société libertine des *120 Journées*– annonce une organisation de la vie entière privée de toute fin ayant un contenu.»

¹⁸ «On aperçoit cette monstruosité: cette barre qui disjoint, qui délimite donc des propriétés (corps, biens, Soi), et règle les transferts de l'une et de l'autre, qui est donc le support de la loi même des échanges, qu'on appelle loi de la valeur ou prix de production – si elle est elle-même 'investie', si c'est elle-même qui fait l'objet de l'attrait des pulsions, il faut qu'*en même temps* qu'elle sépare et distingue, et pour cela même, elle brûle et mêle dans sa rotation insensée les quant-à-soi qu'elle régit, il faut que sa froideur 'syntaxique' soit son incandescence». (Lyotard 1974, 98)

outlines the proper path which paves the way to understand the fundamental aim: *fécaliser* la Loi.

Understanding this mechanism, sending the letter where the intensities simulated behind the republican equality are a different zero themselves (the circumference zero as a regulatory devices of the conquest)¹⁹... it is what makes the strength of a *philosophe scélérat*. The use of law (like that of money) forecasting the results to come, the metempsychosis of the destruction, whose unbalanced time —the reproduction time— is achronic like the time of structures.²⁰

Ces vérités une fois admises, je demande si l'on pourra jamais avancer que la destruction soit un crime... La seule chose que nous faisons en nous livrant à la destruction, n'est que d'opérer une variation dans les formes. (Sade 2002 [1795], 179)

Pasolini's genius: in *Salò o le 120 giornate di Sodoma*, away with Golem's or Frankenstein's Zero, he was able to picture the only comparable death, that of a wordless body with a risen fist: Nameless body, stone statue rigid, which splits, under the fire of fascist guns, its libidinal fragments at thousands.


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¹⁹ We refer to two models, the two paradigms of Zero: a zero of cancellation and a zero of the conquest, a zero of value or of price and a zero of profit or plus-value. See Lyotard 1974, 219.

²⁰ *Ivi*, 270: «Le crédit dans son usage (re)productif repose sur cette analogie: le futur qu'il ouvre n'est pas différent du passé. L'un et l'autre sont en principe identiques, c'est pourquoi ils sont réversibles, et c'est pourquoi le créancier peut acheter du futur». See also, Baudrillard 1976.

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NARRATION AS A NORMATIVE PROCESS

by
M. Paola Mittica

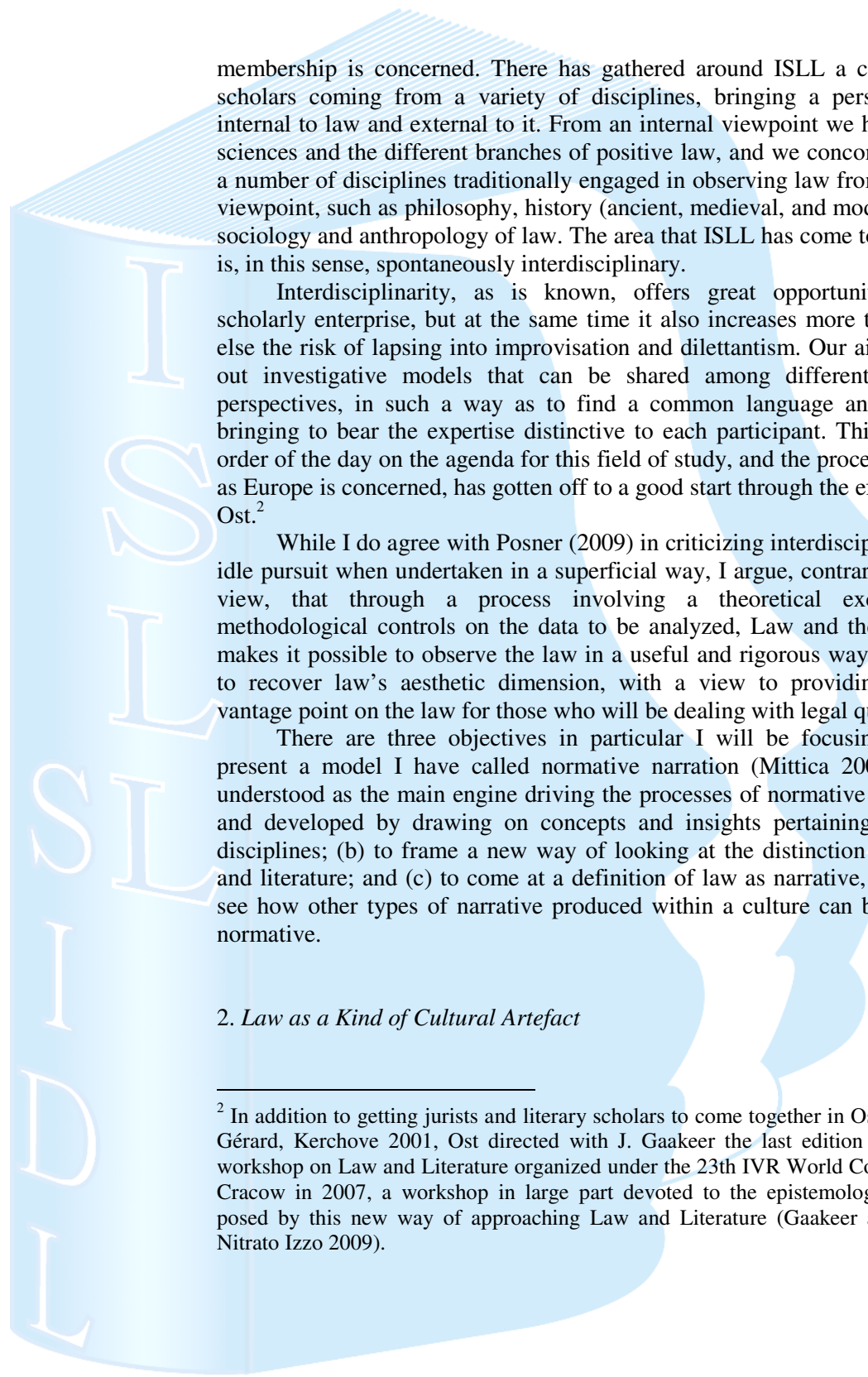
1. *Premise*

The Law and Literature approach has become one of the most promising ways to go about observing the legal phenomenon. I will not trace out the way this approach has developed, for which purpose there is an abundance of critical essays the reader can refer to, but I will point out that Law and Literature has a long history even in Europe (Sansone 2001) and is very much thriving here (Aristodemou 2000; Buescu-Trabuco-Ribeiro 2010; Gaakeer 2007; Gaakeer and Ost 2008; Garapon and Salas 2008; González 2008; Mittica 2009; Ost et al. 2001; Ost 2004; Pozzo 2010; Ward 1995, 2004; Williams 2005), as it is in other countries outside the United States (Melkevik 2010), most notably in Australia (Dolin 2007) and less notably in Latin America (Coaguila Valdivia 2009; Karam Trindade, Gubert, and Neto 2008a, 2008b; Lopes 2006; Schwartz and Trindade 2008).

Also testifying to the growing interest in this interdisciplinary approach is the large following attracted by the Italian Society for Law and Literature (ISLL), established in June 2008 at the University of Bologna with the aim of promoting Law and Literature and, more broadly still, Law and the Humanities: an international network has been set up linking some of the most prominent organizations devoted to this approach; an online multilingual journal called ISLL Papers has since been founded, and also a library that extends its scope so as to also keep a close eye on the research being conducted in this field in different parts of the world and from different disciplinary perspectives.¹

It is too early to have a proper assessment of this experience, to be sure, but at least one observation can be made from the outset as far as the society's

¹ A fuller statement of ISLL's aims and activity can be found online at www.lawandliterature.org.

The image features a large, light blue watermark of the ISLL logo. The logo consists of the letters 'I', 'S', 'L', and 'L' stacked vertically on the left side, and a stylized profile of a human head facing right on the right side. The background of the watermark is a grid of fine lines.

membership is concerned. There has gathered around ISLL a community of scholars coming from a variety of disciplines, bringing a perspective both internal to law and external to it. From an internal viewpoint we have the legal sciences and the different branches of positive law, and we concomitantly have a number of disciplines traditionally engaged in observing law from an external viewpoint, such as philosophy, history (ancient, medieval, and modern), and the sociology and anthropology of law. The area that ISLL has come to stretch over is, in this sense, spontaneously interdisciplinary.

Interdisciplinarity, as is known, offers great opportunities for any scholarly enterprise, but at the same time it also increases more than anything else the risk of lapsing into improvisation and dilettantism. Our aim is to work out investigative models that can be shared among different disciplinary perspectives, in such a way as to find a common language and to proceed bringing to bear the expertise distinctive to each participant. This need is the order of the day on the agenda for this field of study, and the process, especially as Europe is concerned, has gotten off to a good start through the effort François Ost.²

While I do agree with Posner (2009) in criticizing interdisciplinarity as an idle pursuit when undertaken in a superficial way, I argue, contrary to Posner's view, that through a process involving a theoretical exchange with methodological controls on the data to be analyzed, Law and the Humanities makes it possible to observe the law in a useful and rigorous way, and not just to recover law's aesthetic dimension, with a view to providing an ethical vantage point on the law for those who will be dealing with legal questions.

There are three objectives in particular I will be focusing on: (a) to present a model I have called normative narration (Mittica 2006), a model understood as the main engine driving the processes of normative construction, and developed by drawing on concepts and insights pertaining to different disciplines; (b) to frame a new way of looking at the distinction between law and literature; and (c) to come at a definition of law as narrative, as well as to see how other types of narrative produced within a culture can be considered normative.

2. Law as a Kind of Cultural Artefact

² In addition to getting jurists and literary scholars to come together in Ost, Van Eynde, Gérard, Kerchoue 2001, Ost directed with J. Gaakeer the last edition of the special workshop on Law and Literature organized under the 23th IVR World Congress held in Cracow in 2007, a workshop in large part devoted to the epistemological problems posed by this new way of approaching Law and Literature (Gaakeer and Ost 2008; Nitrato Izzo 2009).

In an important book published in 2000, Guyora Binder and Robert Weisberg summarize all genres of literary criticism of law. Depending on the approach in question, law is understood as an “interpretive practice” (hermeneutic criticism of law); as a “narrative practice,” or a construction of stories (narrative criticism of law); as an “activity aimed at persuading, deciding, conversing” (rhetorical criticism of law); as “language” (deconstructive criticism of law); or as a tool for action in disputes and transactions, operating on the level where a relational context is represented (cultural criticism of law).

For Guyora and Binder (2000, 26), each of these genres offers its own point of view on a broader cultural perspective that sees the law mainly as a practice which consists in composing a kind of literary artefact, a practice aimed at constructing a representation of reality —the outcome of interpreting, enacting, or constructing a story, a performance, or a linguistic sign.

This broader cultural perspective depicts law as an arena where the structural aspects have an equal role with the voluntaristic aspects proper (the social actors’ choices and actions) in the symbolic universe that imparts an order to life in common (community), and both aspects are expressed according to the modes and forms of literature.

We have here a theoretical advance of no small account in Law and Literature. The idea of law as a compositional practice unfolding on the level of culture makes it possible to embrace a vision, broadly anthropological, in which law presents itself as one of several narrative resources used by culture in the process of enabling the mediations necessary for life in common. There is something truly anticipatory in this sense in the concept of *nomos* worked out by Cover (1983) on the premise that human communities are in the first place “narrative” communities.³

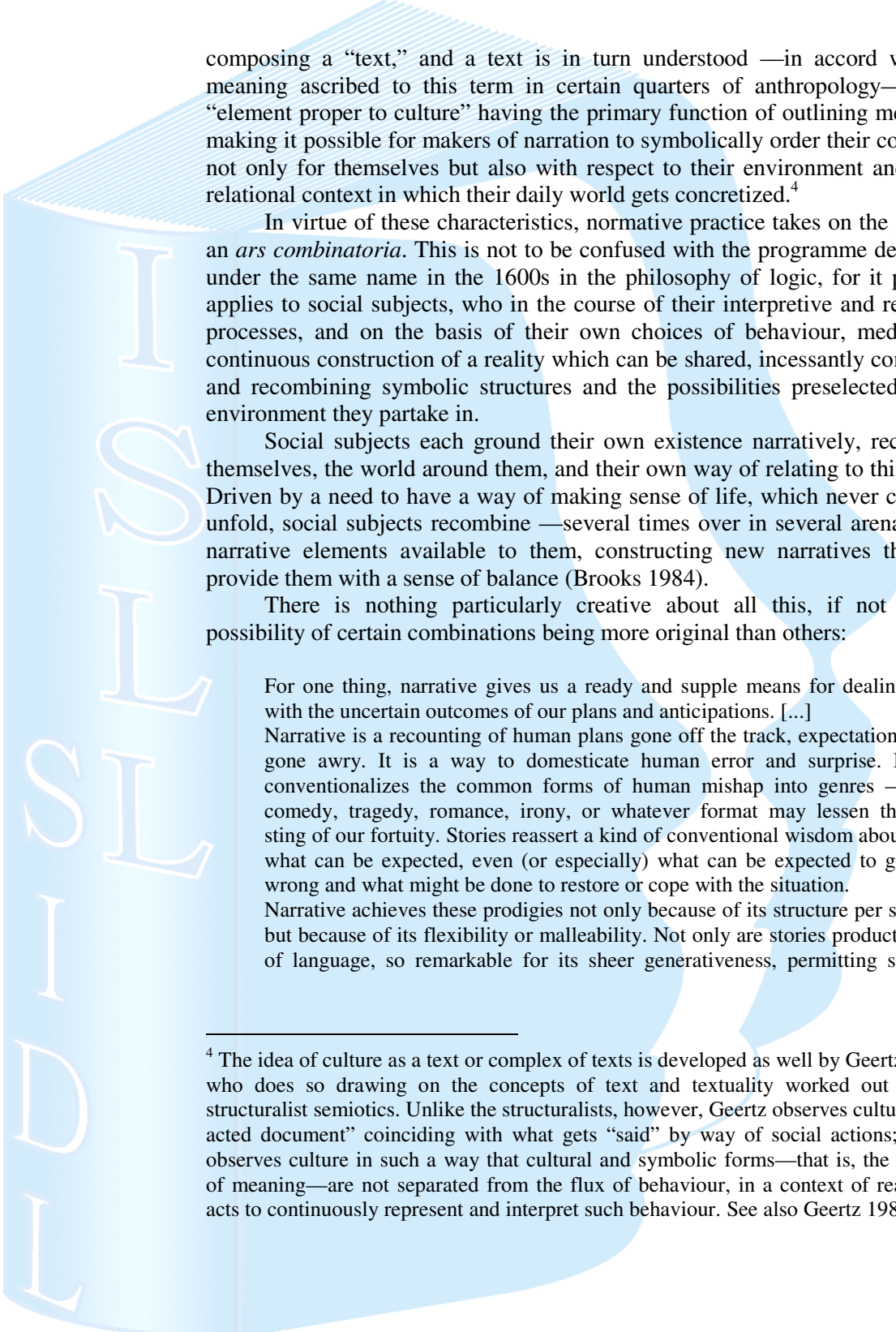
In other words, underlying the observation of law as a cultural phenomenon is an idea of law as a compositional practice that resolves itself into a narrative practice, where narration is understood as a process inherent in culture and serves a function closely bound up with the normative dimension of human coexistence.

There are a few ideas of theory and method which can be advanced if we take that to be the premise of our reasoning.

3. Toward a Theory of Normative Narration

Let us proceed by first putting forward a concept of normative practice. Where we are concerned, this is generally understood to be the practice of

³ Even Ost (2004) bases on the same premise his study on the foundational stories of law, the premise being that all human communities should be understood as “narrative.”



composing a “text,” and a text is in turn understood—in accord with the meaning ascribed to this term in certain quarters of anthropology— as an “element proper to culture” having the primary function of outlining meanings, making it possible for makers of narration to symbolically order their condition, not only for themselves but also with respect to their environment and to the relational context in which their daily world gets concretized.⁴

In virtue of these characteristics, normative practice takes on the guise of an *ars combinatoria*. This is not to be confused with the programme developed under the same name in the 1600s in the philosophy of logic, for it properly applies to social subjects, who in the course of their interpretive and relational processes, and on the basis of their own choices of behaviour, mediate the continuous construction of a reality which can be shared, incessantly combining and recombining symbolic structures and the possibilities preselected by the environment they partake in.

Social subjects each ground their own existence narratively, recounting themselves, the world around them, and their own way of relating to this world. Driven by a need to have a way of making sense of life, which never ceases to unfold, social subjects recombine—several times over in several arenas—the narrative elements available to them, constructing new narratives that may provide them with a sense of balance (Brooks 1984).

There is nothing particularly creative about all this, if not for the possibility of certain combinations being more original than others:

For one thing, narrative gives us a ready and supple means for dealing with the uncertain outcomes of our plans and anticipations. [...]

Narrative is a recounting of human plans gone off the track, expectations gone awry. It is a way to domesticate human error and surprise. It conventionalizes the common forms of human mishap into genres—comedy, tragedy, romance, irony, or whatever format may lessen the sting of our fortuity. Stories reassert a kind of conventional wisdom about what can be expected, even (or especially) what can be expected to go wrong and what might be done to restore or cope with the situation.

Narrative achieves these prodigies not only because of its structure per se but because of its flexibility or malleability. Not only are stories products of language, so remarkable for its sheer generativeness, permitting so

⁴ The idea of culture as a text or complex of texts is developed as well by Geertz (1973), who does so drawing on the concepts of text and textuality worked out in post-structuralist semiotics. Unlike the structuralists, however, Geertz observes culture as “an acted document” coinciding with what gets “said” by way of social actions; he thus observes culture in such a way that cultural and symbolic forms—that is, the structure of meaning—are not separated from the flux of behaviour, in a context of reality that acts to continuously represent and interpret such behaviour. See also Geertz 1983.

many different versions to be told, but telling stories soon becomes crucial to our social interactions. (Bruner 2003, 28–31)

Bruner reiterates the importance of telling stories as an activity of symbolic mediation, on the level of subjects with respect to themselves and their environment, as well as on the level of human coexistence, suggesting that our survival as subjects participating in a community depends on an ongoing dialectical process through which meaning (or new portions of meaning) is deconstructed and restructured, a process carried on in the course of social interactions and through the creation of conventional forms as to what can legitimately be expected.

Although Bruner was specifically referring a moment ago to literary narrative practice, he otherwise invites us more broadly, on the model of the *ars combinatoria* I am here developing, to maintain a distinction between the two levels or dimensions in question: On the one hand, we are in the wider ambit of the processes of symbolic mediation, aimed at imparting sense and semantic order to the world in which we are situated, and this is the cultural dimension broadly understood; on the other hand, we find ourselves in the ambit of culture more specifically understood as legal, where the *ars combinatoria* proceeds from our representing such rules and guidelines of behaviour as are necessary for enabling human relations.

Once the question is so framed, we can see how a theory of legal narrations can be developed having at its core a universe of narrative practices and means, such as are necessary to make sense of and mediate the conflicts proper to coexistence, and such as emerge out of our life in common, through its culture, for the purpose of survival.

So this is the universe of life in common, a universe that survives and changes through these cultural resources, and these resources are entrusted with holding together the equilibriums of coexistence. This, in other words, is the legal dimension of culture, where the narrations resorted to can be described as legal in the sense that they bring to us the combinations worked out in the sphere of community, as well as in the sense that they depend on our capacity to structure codes of both signification and behaviour.

And, finally, there is the question of the forms in which these compositional activities are configured, and it is clear in this regard that narration assumes the full gamut of forms our cultural environment enables as either a possibility or an expectation.

There are three important consequences that so far in this discussion can be drawn in regard to narrative practices:

(1) Narrative practices are productive of reality, such that the distinction between reality and fiction cannot be made to rest on the imaginary or factual origin of a given event, because reality must be observed starting from the

effects that narration yields in the concrete in the representations of the social subjects involved.

(2) Narrative practices are in large measure “legal” insofar as they mediate not only codes of meaning but also norms pertaining to such acts and relations as are socially relevant or oriented.

(3) Narrative practices potentially avail themselves of all the resources expressive of culture.

The only idea of reality put forward on this analytic approach is thus that of a boundless web of narrative combinations. This is reality such as we observe it from a sociological and anthropological point of view: Reality understood as the relational universe underlying our life in common and grounded in representation (White 1980).

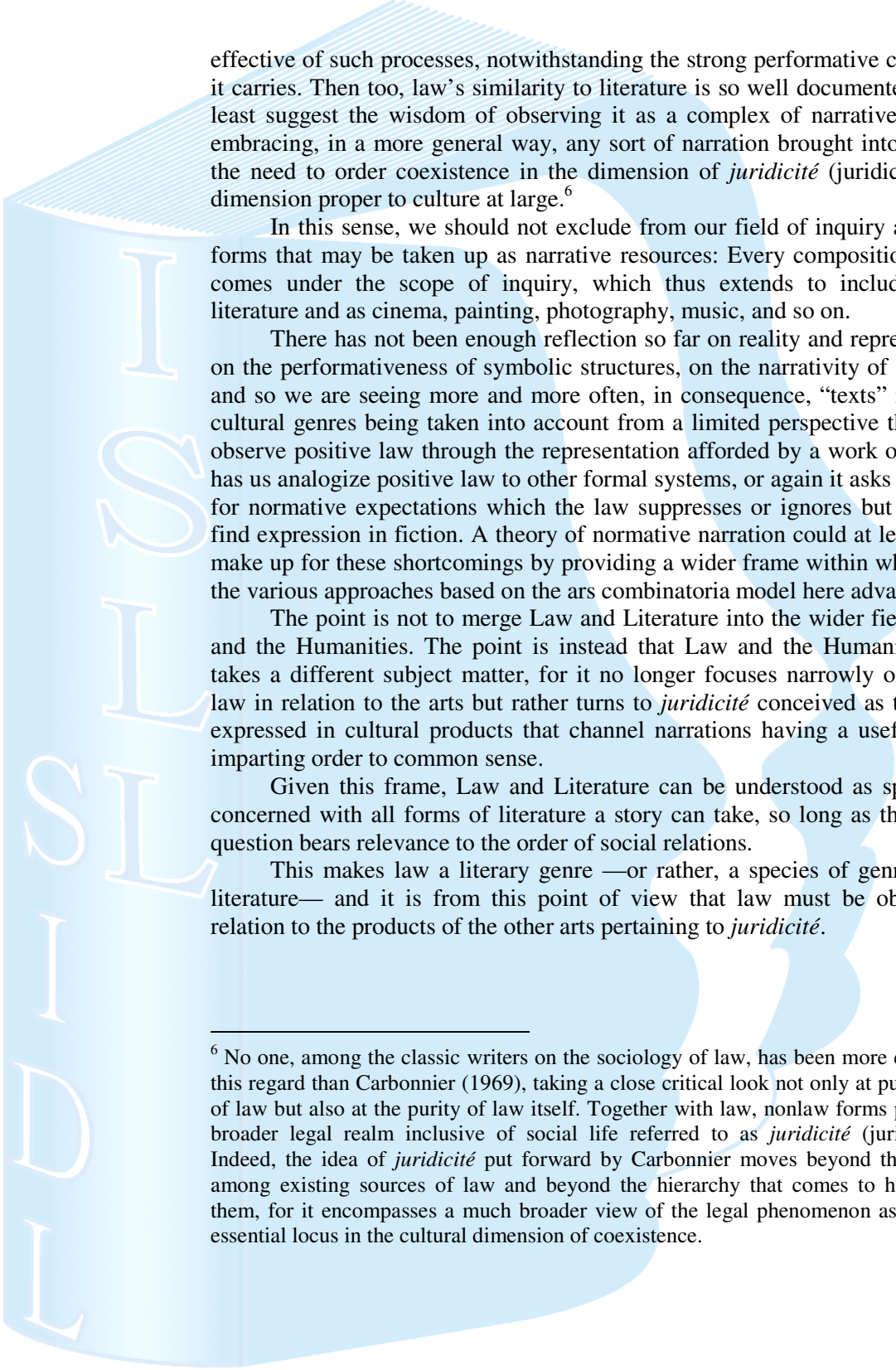
Inherent in this world are certain equilibriums that need to be maintained even as our orderings undergo change. We can appreciate from this perspective that it is no longer useful to distinguish what is true from what is false: We instead need to consider whether and how narrative resources serve the function of maintaining the equilibriums they are called on to maintain; so too, we need to consider what contents and limits such resources operate with, as well as whether and how these resources exert influence on one another and, finally, which of them are more effective in offering suggestions and in enabling and accompanying change.

Normative narration can be described as any cultural form forged by way of this *ars combinatoria*, and so as including within its scope any legal text, literary novel, or poem; or the scripting and staging of a trial, play, or movie; or again a visual work, such as a painting, sculpture, or photograph.

There is nothing new about having detected in much of one’s own creative work (in the genres pertaining to “fantasy,” inclusive of literature and art in a broad sense) social norms, rules, and institutions, or rites aimed at channelling conflict or perpetuating a *modus vivendi* or power and violence — all of them codes structuring our living in common. It is legitimate to at least suspect that this work, more than a “mirror of reality,” is actually part of reality: It does not so much represent reality as it itself consists in portions of reality,⁵ or at least it consists in that portion of reality which is the symbolic universe of human relations, with respect to which it serves the function of codifying and communicating rules.

By the same token, law is not the only system called on to play out processes of social signification and modelling, and it may not even be the most

⁵ We are thus working here from a different perspective than that established among scholars of *Droit et Littérature*, who instead take an *aesthetic*-legal approach on which art is understood as a “mirror of reality” and, consequently, as a mirror of law (Andrini 1997).



effective of such processes, notwithstanding the strong performative component it carries. Then too, law's similarity to literature is so well documented as to at least suggest the wisdom of observing it as a complex of narrative practices embracing, in a more general way, any sort of narration brought into being by the need to order coexistence in the dimension of *juridicité* (juridicalness), a dimension proper to culture at large.⁶

In this sense, we should not exclude from our field of inquiry any of the forms that may be taken up as narrative resources: Every compositional genre comes under the scope of inquiry, which thus extends to include law as literature and as cinema, painting, photography, music, and so on.

There has not been enough reflection so far on reality and representation, on the performativeness of symbolic structures, on the narrativity of law itself; and so we are seeing more and more often, in consequence, "texts" in various cultural genres being taken into account from a limited perspective that has us observe positive law through the representation afforded by a work of art, or it has us analogize positive law to other formal systems, or again it asks us to look for normative expectations which the law suppresses or ignores but which do find expression in fiction. A theory of normative narration could at least in part make up for these shortcomings by providing a wider frame within which to set the various approaches based on the *ars combinatoria* model here advanced.

The point is not to merge Law and Literature into the wider field of Law and the Humanities. The point is instead that Law and the Humanities itself takes a different subject matter, for it no longer focuses narrowly on positive law in relation to the arts but rather turns to *juridicité* conceived as the *nomos* expressed in cultural products that channel narrations having a useful role in imparting order to common sense.

Given this frame, Law and Literature can be understood as specifically concerned with all forms of literature a story can take, so long as the story in question bears relevance to the order of social relations.

This makes law a literary genre—or rather, a species of genre we call literature—and it is from this point of view that law must be observed in relation to the products of the other arts pertaining to *juridicité*.

⁶ No one, among the classic writers on the sociology of law, has been more eloquent in this regard than Carbonnier (1969), taking a close critical look not only at pure theories of law but also at the purity of law itself. Together with law, nonlaw forms part of that broader legal realm inclusive of social life referred to as *juridicité* (juridicalness). Indeed, the idea of *juridicité* put forward by Carbonnier moves beyond the disparity among existing sources of law and beyond the hierarchy that comes to hold among them, for it encompasses a much broader view of the legal phenomenon as having its essential locus in the cultural dimension of coexistence.

4. Structures of Order and Structures of Possibility

What makes the literary criticism of law the approach closest to my own analysis has mainly to do with the fact that literary texts and legal texts alike are expressed in verbal language, most of it set down in writing: this not only makes them easier to use and access but also endows them with a specific performative capacity. Indeed, unlike other forms of narrative resource, literary texts draw on largely shared codes and on a highly formalized language, as is the case with the language of verbal communication, and this gives them a greater capacity to structure wide tracts of *juridicité*.

The first thing to flow from usability so understood is the possibility of receiving codes and sharing meanings, at which point we have already entered the universe of relations and so of *juridicité*. And if we look at the performative aspect, we will realize not only that words are in themselves performative as a code—they form a fragment of our reality—but also that the very structuring of a literary work is effected in ways which can in certain respects be described as performative.

This characteristic of the process of normative structuring I will come back to shortly, when I discuss the connection between performance and narration; but before we get there, we need to understand what types of narrative develop in the literary cultural dimension of *juridicité*.

If we keep within the *ars combinatoria* model I am here proceeding from, we will see that social actors evolve essentially two types of narrative, both of which we can refer to as “stories,” ignoring for the time being the literary form they can find themselves translated into: On the one hand, we have stories practiced by subjects who orient themselves to already established codes of behaviour, and so these people will come up with narratives having solutions that look to the past, tending to conserve settled and certain meanings; on the other hand, we have stories whose plotlines are worked out by subjects who, by contrast, call into question the solutions the given order can produce, and so these are people who look to new possibilities. And so it can be observed, depending on the plotline in question, that people will use symbolic structures (or narrative elements) tending to either conserve a settled order or set out a possible new order.

To be sure, the combination making up a story is clearly such that both types of narrative elements—the conservative and the innovative alike—can find their way in there. But let us stipulate, for the sake of expository expediency, that a distinction can be drawn between, on the one hand, stories aimed at consolidating a preexisting order and, on the other, stories that instead outline the way this order changes and the new content it takes or can take. To this end we can consider—as our term of distinction—the ending of each story, its denouement. We can accordingly class as belonging to the first type those stories whose ending is predictable (you already know how things will

turn out), and as belonging to the second type those stories which do not offer a solution to the problem framing the story or which offer an unexpected solution.

While it's conceivable that stories concerned to consolidate a given order will draw on the semantics proper to that symbolic-normative order—made up of rules, norms, and values intended to guide social action—it may not be as easy to recognize a story as one that sets out or introduces a possibility, a story having performative characteristics on a par with other stories, but geared toward unsettling and changing the preexisting order.

On the other hand, the existence of a world of possibility extending beyond culture is something that can take shape only as a story, a story like any other story, for it falls outside our field of observation and so does not cross our path.

All that can be observed from a sociological and anthropological perspective is the social fact of the existence of stories acting as the main engine of change and innovation.

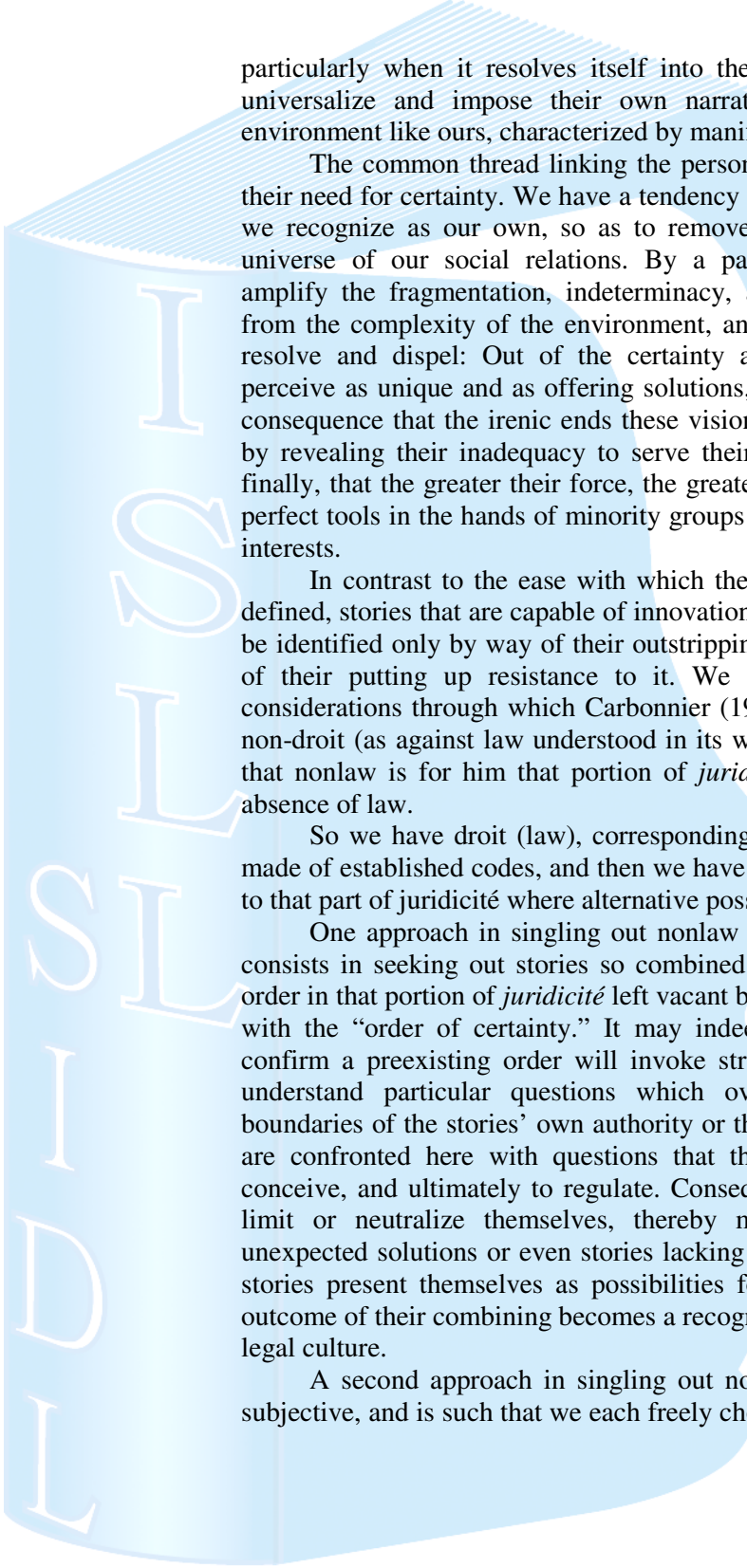
We are dealing here especially with the narration of crises, whose plotlines share a perturbative kind of force, which they can bring to bear by textualizing the human environment, and doing so in such a way as to question rules and meanings hitherto considered certain and univocal. Even as these stories, so combined, carry uncertainty, confusion, equivocalness, and indeterminacy, they nonetheless make it possible for other authors and for users (the ones and the others reinterpreting such stories) to conceive of new solutions for mediation and coexistence, solutions we would not be able to alight on through stories of the second kind, those fashioned using only such elements as stabilize the normative-symbolic order.

It is this unquiet, albeit imaginative, dimension that creeps into our culture. In fact, its presence in our world of meanings is evidenced by something that eludes the codes, exceeding all that can be named. Out of this dimension, which does not lend itself to description, come tensions we cannot name: They are “nameless” and, in this sense, “lawless”; they cannot be governed or mediated.

Having made this point, we can now proceed to a more precise definition of the two types of narrative.

We can reckon among stories of the literary-conservative type—the ones typifying the existing normative symbolic order—those that use the symbolic structures found in much of law, of a social group's dominant morality, and of religion, and generally of shared social codes handed down by tradition or by way of established practices. We have here a portion of *juridicité* that offers resources aimed at cementing and defending rules of coexistence, answering a need for certainty, security, and predictability in the game of social expectations.

This part of *juridicité*, only apparently tranquillizing, winds up actually generating greater possibilities for conflict than for peaceful coexistence,



particularly when it resolves itself into the combining of stories tending to universalize and impose their own narratives as unique, and that in an environment like ours, characterized by manifoldness and alterity.

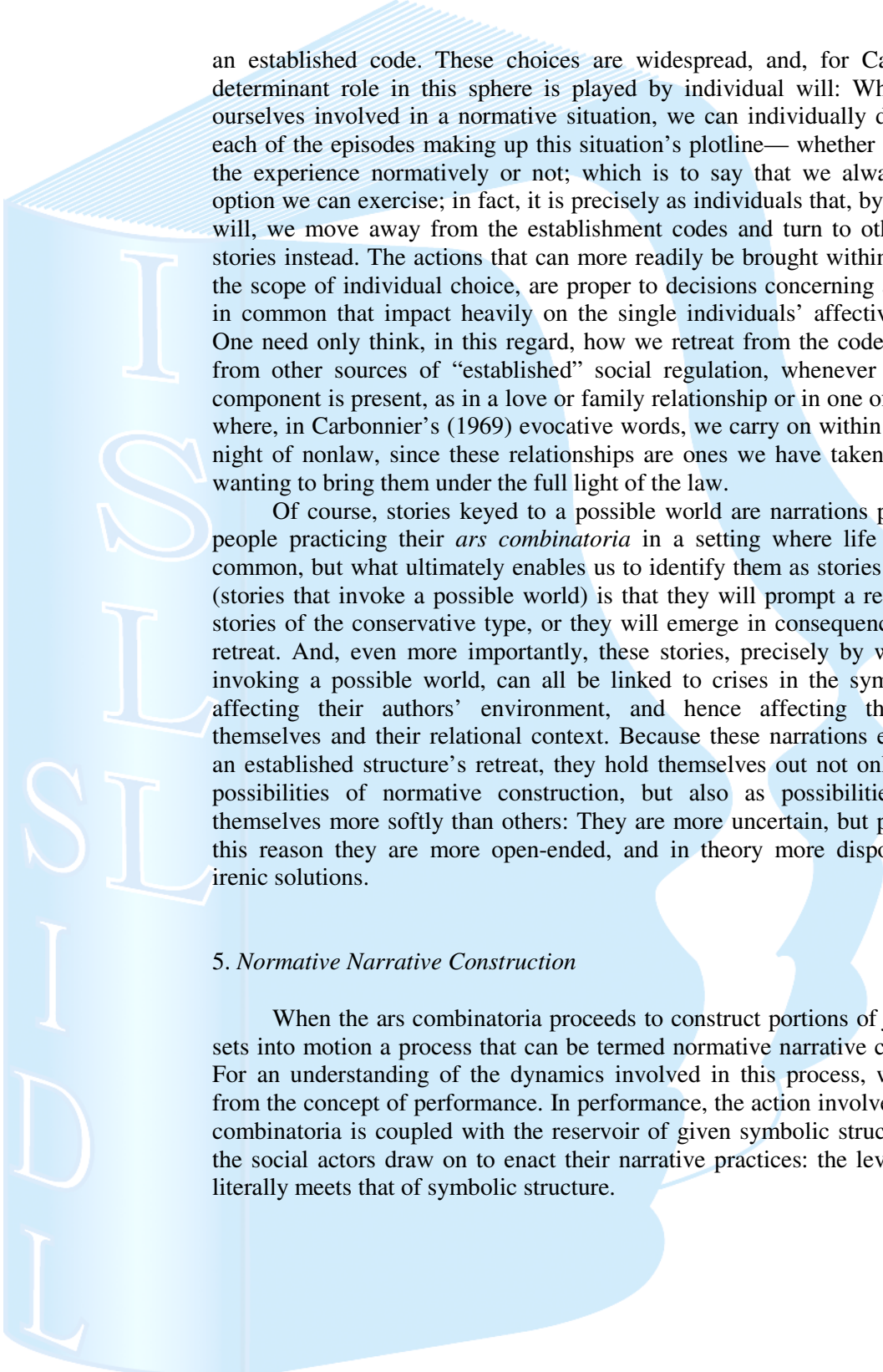
The common thread linking the persons involved in this type of story is their need for certainty. We have a tendency to confirm and cement a semantics we recognize as our own, so as to remove risk and bewilderment from the universe of our social relations. By a paradox, however, these narrations amplify the fragmentation, indeterminacy, and confusion which we take up from the complexity of the environment, and which we would instead like to resolve and dispel: Out of the certainty and coherence of the visions we perceive as unique and as offering solutions, we instead get conflicts, with the consequence that the irenic ends these visions promote are not achieved if not by revealing their inadequacy to serve their stated function. Not to mention, finally, that the greater their force, the greater will be their capacity to become perfect tools in the hands of minority groups who use them to further their own interests.

In contrast to the ease with which the symbolic-normative order can be defined, stories that are capable of innovation, and so are bearers of change, can be identified only by way of their outstripping the conservative type or by way of their putting up resistance to it. We could use to this end the same considerations through which Carbonnier (1969) singles out different forms of non-droit (as against law understood in its widest acceptation), which is to say that nonlaw is for him that portion of *juridicité* which manifests itself as an absence of law.

So we have droit (law), corresponding to that part of *juridicité* which is made of established codes, and then we have non-droit (nonlaw), corresponding to that part of *juridicité* where alternative possibilities come into being.

One approach in singling out nonlaw can be described as objective and consists in seeking out stories so combined that they are keyed to a possible order in that portion of *juridicité* left vacant by law or by other stories belonging with the "order of certainty." It may indeed happen that stories minded to confirm a preexisting order will invoke structures of meaning inadequate to understand particular questions which overstep boundaries, meaning the boundaries of the stories' own authority or those of their own reasoning; so we are confronted here with questions that these stories fail to understand or conceive, and ultimately to regulate. Consequently, these stories retreat: They limit or neutralize themselves, thereby making space for stories having unexpected solutions or even stories lacking any conclusion at all. These other stories present themselves as possibilities for action, in such a way that the outcome of their combining becomes a recognizable and formalizable portion of legal culture.

A second approach in singling out nonlaw can instead be described as subjective, and is such that we each freely choose whether or not to subscribe to



an established code. These choices are widespread, and, for Carbonnier, a determinant role in this sphere is played by individual will: When we find ourselves involved in a normative situation, we can individually decide—for each of the episodes making up this situation’s plotline— whether we will live the experience normatively or not; which is to say that we always have an option we can exercise; in fact, it is precisely as individuals that, by an effort of will, we move away from the establishment codes and turn to other possible stories instead. The actions that can more readily be brought within this scope, the scope of individual choice, are proper to decisions concerning areas of life in common that impact heavily on the single individuals’ affective intimacy. One need only think, in this regard, how we retreat from the codes of law, or from other sources of “established” social regulation, whenever an emotive component is present, as in a love or family relationship or in one of friendship, where, in Carbonnier’s (1969) evocative words, we carry on within the tranquil night of nonlaw, since these relationships are ones we have taken up without wanting to bring them under the full light of the law.

Of course, stories keyed to a possible world are narrations produced by people practicing their *ars combinatoria* in a setting where life is a life in common, but what ultimately enables us to identify them as stories of this type (stories that invoke a possible world) is that they will prompt a retreat among stories of the conservative type, or they will emerge in consequence of such a retreat. And, even more importantly, these stories, precisely by way of their invoking a possible world, can all be linked to crises in the symbolic order affecting their authors’ environment, and hence affecting their authors themselves and their relational context. Because these narrations emerge with an established structure’s retreat, they hold themselves out not only as “new” possibilities of normative construction, but also as possibilities asserting themselves more softly than others: They are more uncertain, but precisely for this reason they are more open-ended, and in theory more disposed toward irenic solutions.

5. Normative Narrative Construction

When the *ars combinatoria* proceeds to construct portions of *juridicité*, it sets into motion a process that can be termed normative narrative construction. For an understanding of the dynamics involved in this process, we can start from the concept of performance. In performance, the action involved in the *ars combinatoria* is coupled with the reservoir of given symbolic structures which the social actors draw on to enact their narrative practices: the level of action literally meets that of symbolic structure.

The most significant work on performance is that done in anthropology.⁷ Authors like Turner and Moore view the structuring of social reality as an ongoing process of situational regularization driven by the need to manage the indeterminacy present in the social and cultural order:

The cultural, contractual, and technical imperatives always leave gaps, require adjustments and interpretations to be applicable to particular situations, and are themselves full of ambiguities, inconsistencies, and often contradictions [...]. [C]ommon symbols, customary behaviors, role expectations, rules, categories, ideas and ideologies, rituals and formalities shared by actors do exist and frame mutual communication and action. But [...] the fixing and framing of social reality is itself a process or a set of processes. (Turner 1986, 78)

Because performance serves precisely this adjustment function, it must be understood as a process by which meaning or portions of meaning are structured, and this process unfolds through procedures that may transform or simply stabilize meanings and codes.

So far, we have not yet looked at any specific process by which juridical codes are structured. But Turner points out that there is an essential element of drama to performances: These are enacted in response to the outbreak of a social drama, which happens when someone stirs up tension among those engaged in life in common, and does so in such a way as to cause that order to shift into crisis, thus taking up what is substantially a normative perspective.

Social drama presents itself as an eruption out of the horizontal process of daily life in its unfolding, with its interactions, transactions, and reciprocities, and with its customs in producing regular and ordered sequences of behaviour. This perturbative force is always latent in the context of human coexistence, ever ready to turn into a source of uneasiness or into a conflict.

Turner explains it by noting that social life, even when apparently quiet, is in reality pregnant with social drama. It's as if each of us had two faces, a peaceful one and a bellicose one, as if we were programmed for cooperation but were ready to engage in conflict. This perennial and primordial fighting mode is

⁷ It is to Turner (1986) that we owe the reconstruction of an anthropology of performance. His main objective is to study the interrelations between sociocultural structures and the individual by laying emphasis on the creative action of individuals themselves, and this is an objective the other anthropologists he refers to partly share. Even as Turner moves in this direction, he works out a theory of the "process" by which meanings are structured: This is a process necessary to life in common and to its change, and it can also be applied from a perspective like ours, where the creative activity of social subjects is understood as limited to the practice of combining meanings and possibilities preselected by the environment the subjects themselves participate in.

the social drama itself. But just as our species has evolved over time and has become more skilled at using and manipulating symbols, just as our technological domination of nature and our capacity for self-destruction have grown exponentially over the last several thousand years, so in a comparable measure have we somehow advanced in our ability to conjure up new cultural modes by which to grapple with, understand, and make sense of a crisis, and sometimes even to solve it: This is the second phase in the ineradicable social drama that threatens us at every time and place, and at every level of sociocultural organization (Turner 1982).

By and large, what makes the state of drama recognizable is its being acted out on the level of life in common, the level most closely bound up with the dimension of *juridicité*. Performance, after all, gets engaged precisely from the moment that a crisis is publicly acknowledged, and the crisis is pushed forward until a point is reached where a new equilibrium can be shared.

Typically, [social dramas] have four main phases of public action. These are: (1) Breach of regular norm-governed social relations; (2) Crisis, during which there is a tendency for the breach to widen. Each public crisis has what I now call liminal characteristics, since it is a threshold (limen) between more or less stable phases of the social process [...]. [I]t takes up its menacing stance in the forum itself, and, as it were, dares the representatives of order to grapple with it; (3) Redressive action ranging from personal advice and informal mediation or arbitration to formal juridical and legal machinery, and, to resolve certain kinds of crisis or legitimate other modes of resolution, to the performance of public ritual. Redress, too, has its liminal features, for its “betwixt and between,” and, as such, furnishes a distanced replication of the events leading up to and composing the “crisis.” This replication may be in the rational idiom of the judicial process, or in the metaphorical and symbolic idiom of ritual process; (4) The final phase consists either of the reintegration of the disturbed social group, or of the social recognition and legitimation of irreparable schism between the contesting parties. (Turner 1986, 74–75)

Social drama, then, sums up the complex of conditions we would find ourselves in once, having been confronted with an exceptional event that has unsettled our everyday order, we fall into crisis and find it necessary to display our uneasiness to others, projecting such uneasiness onto a communitarian (public) frame, or indeed any shared frame, from which to start in reconstructing a form of equilibrium, even if such an equilibrium simply resolves itself into redefining the problem.

The area in this sequence where disorder arises is that of the limen, present in the crisis phase as well as in the redressive phase, and this disturbance can be described as a highly destabilizing and destructuralizing “energy in motion” that performance must come to grips with. Turner (1982)

even posits a direct correlation between *communitas* and liminality, for on the one hand we have a process by which the subject's publicly staged crisis calls into question the semantic order of the environment (or portion thereof) that comes under criticism or revision, but this plot runs parallel to and coincides with the process through which the crisis could be composed by mediation (*limen*). And then, the moment the breach is so mended, the environment that the initiator of the crisis and the other members of the community participate in will have been renewed or will have been consolidated into an order.

While the drama describes a sequence of situations, performance takes shape as a complex of actions the social actor carries out within the frame of the same sequence.

Structure and process meld into each other through dynamics of a ritual kind, and in addition to marking the unfolding of the drama, in such a way as to also reenact or dramatize the drama itself, these dynamics make distinctly performative the performance's actions.

To understand these dynamics, we have to imagine what happens when someone begins to move about within the space of the social order: This moving about takes place in a ritual and performative way, and yet —despite the ritual component— a crisis arises because any change in condition entails a readjustment in the overall scheme. And the crisis is answered with an order (even a new one) that restores itself ritually, that is, through a ceremony (Turner 1986).

Performance is a complex sequence of symbolic acts: It has transformative power, but it can only exercise this power through formal procedures.

Turner stresses how inadequate this ritual processuality is, especially in the liminal passage from crisis to redressive action to reintegration. In this transitioning, the ritual process of performance serves the function of symbolic mediator, having an ability to grasp or devise new meanings for possible redressive action or, more simply, an ability to process the terms of the crisis. The performative function proper, then, is served by performance itself, in the final phase of the social drama, that of reintegration, where the aim is to restore order by reintegrating such symbolic and legal codes as were already shared or by formalizing new ones.

It is my opinion that the social-drama model can explain the process of normative construction. Not incidentally, Turner connects social drama to the main genres of literary narration (considering in particular how performance can translate into theatre). And even though he does not concern himself with law, the possibility that social drama may represent the main genres of literary narration encourages me to use this model in an effort to understand the process described by the *ars combinatoria* as applied to the structuring of *juridicité*.

We can analogize the two models and say that performance relates to social drama the way narrative practice (understood as an *ars combinatoria*)

relates to narrative itself, where social drama is the context of performance just as narrative, or indeed any other literary form, is the context for the practice of narration, that is, for the *ars combinatoria*.

Narrative practice and performance can both be configured as processes aimed at limiting or keeping within manageable bounds the share of indeterminacy present in a cultural and social plotline, a plotline that gets filtered through individual experience.

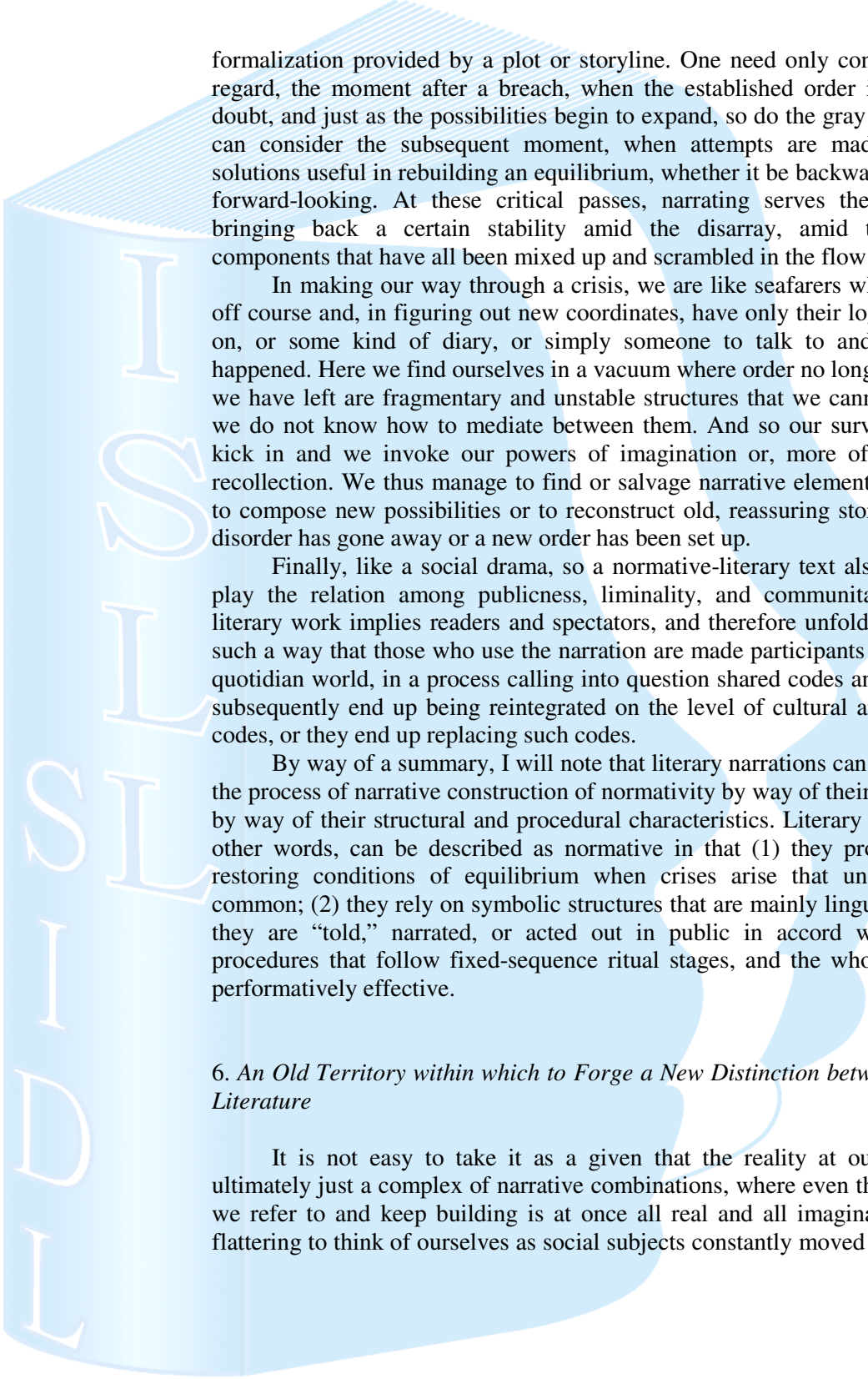
Furthermore, just as performance finds its occasion when a social drama arises, so the process of narration is deliberately set in motion when a given order that is taken for granted gets breached, and it is this breach that provides the occasion for the story. Indeed, stories start out by assuming the normality of some state of affairs in the world, a state of affairs whose order will soon be breached: It is from this infringement of the predictable order of things that a story takes its cue. In what ensues, the character or characters affected by the breaching event shift into a phase of crisis and make their way through it by calling into question what had hitherto seemed obvious. And so, a process gets underway whereby the indicators of daily life get worked together, intervening in the dialectic between retaining the established order and embracing the possibility of new orders, a dialectic that works itself out narratively, by making attempts at moving beyond the unsettled order or striking a compromise with the old order so as to reconstitute it. The plotline will finally offer a solution to the entire affair by making a selection from among the culturally available options or by narratively suggesting and firming up new possibilities.

As to the characters in the story, they will reflect that share of autonomy that Turner ascribes to social actors: even as they find themselves situated in an established social order, they present themselves as persons capable of choosing and acting in unexpected ways if it comes to that.

Narration thus drives a plot having a structure very much like that of a social drama (breach, crisis, redressive action, and reintegration). And so, just like performance, narration can act as an agent of change, not only by recombining given narrative elements but also by playing out that ritual processuality which at the same time involves a processing and codification of forms.

The *ars combinatoria*, in other words, describes a process of normative narrative construction that social actors engage in by drawing on literary structures (those available in the existing order or otherwise extracted from the making of possibilities), as well as by drawing on models with which to narratively structure the forms proper to the different literary genres, in such a way that these forms can become the point on which to focus the options open to the stories' authors and characters.

The analogy between stories and social dramas is strong even as concerns the idea of a limen, describing areas of liminality where indeterminacy develops, and which we can get a handle on only by way of the ritual



formalization provided by a plot or storyline. One need only consider, in this regard, the moment after a breach, when the established order is called into doubt, and just as the possibilities begin to expand, so do the gray areas; or one can consider the subsequent moment, when attempts are made at finding solutions useful in rebuilding an equilibrium, whether it be backward-looking or forward-looking. At these critical passes, narrating serves the function of bringing back a certain stability amid the disarray, amid the semantic components that have all been mixed up and scrambled in the flow of events.

In making our way through a crisis, we are like seafarers who have gone off course and, in figuring out new coordinates, have only their logbook to rely on, or some kind of diary, or simply someone to talk to and relate what happened. Here we find ourselves in a vacuum where order no longer exists: All we have left are fragmentary and unstable structures that we cannot mend, for we do not know how to mediate between them. And so our survival instincts kick in and we invoke our powers of imagination or, more often, those of recollection. We thus manage to find or salvage narrative elements with which to compose new possibilities or to reconstruct old, reassuring stories, until the disorder has gone away or a new order has been set up.

Finally, like a social drama, so a normative-literary text also brings into play the relation among publicness, liminality, and *communitas*. Indeed, a literary work implies readers and spectators, and therefore unfolds publicly, in such a way that those who use the narration are made participants in one's own quotidian world, in a process calling into question shared codes and values that subsequently end up being reintegrated on the level of cultural and normative codes, or they end up replacing such codes.

By way of a summary, I will note that literary narrations can be likened to the process of narrative construction of normativity by way of their function and by way of their structural and procedural characteristics. Literary narrations, in other words, can be described as normative in that (1) they prove useful in restoring conditions of equilibrium when crises arise that unsettle life in common; (2) they rely on symbolic structures that are mainly linguistic; and (3) they are "told," narrated, or acted out in public in accord with narrative procedures that follow fixed-sequence ritual stages, and the whole process is performatively effective.

6. An Old Territory within which to Forge a New Distinction between Law and Literature

It is not easy to take it as a given that the reality at our disposal is ultimately just a complex of narrative combinations, where even the knowledge we refer to and keep building is at once all real and all imaginary. Nor is it flattering to think of ourselves as social subjects constantly moved by a sense of

disquietude and forced by the demands of coexistence to concoct a story for ourselves and stick to it (until some other disruption comes along), and that without having to be particularly creative at it.

Still, this seems to be the only basis we can proceed from in working toward a new approach to law and literature. Which is to say that we have to work on the level of representation, without giving way to the latent need to penetrate a “true” reality, or at least a “verisimilar” one, in a territory that is cultural and real because symbolic.

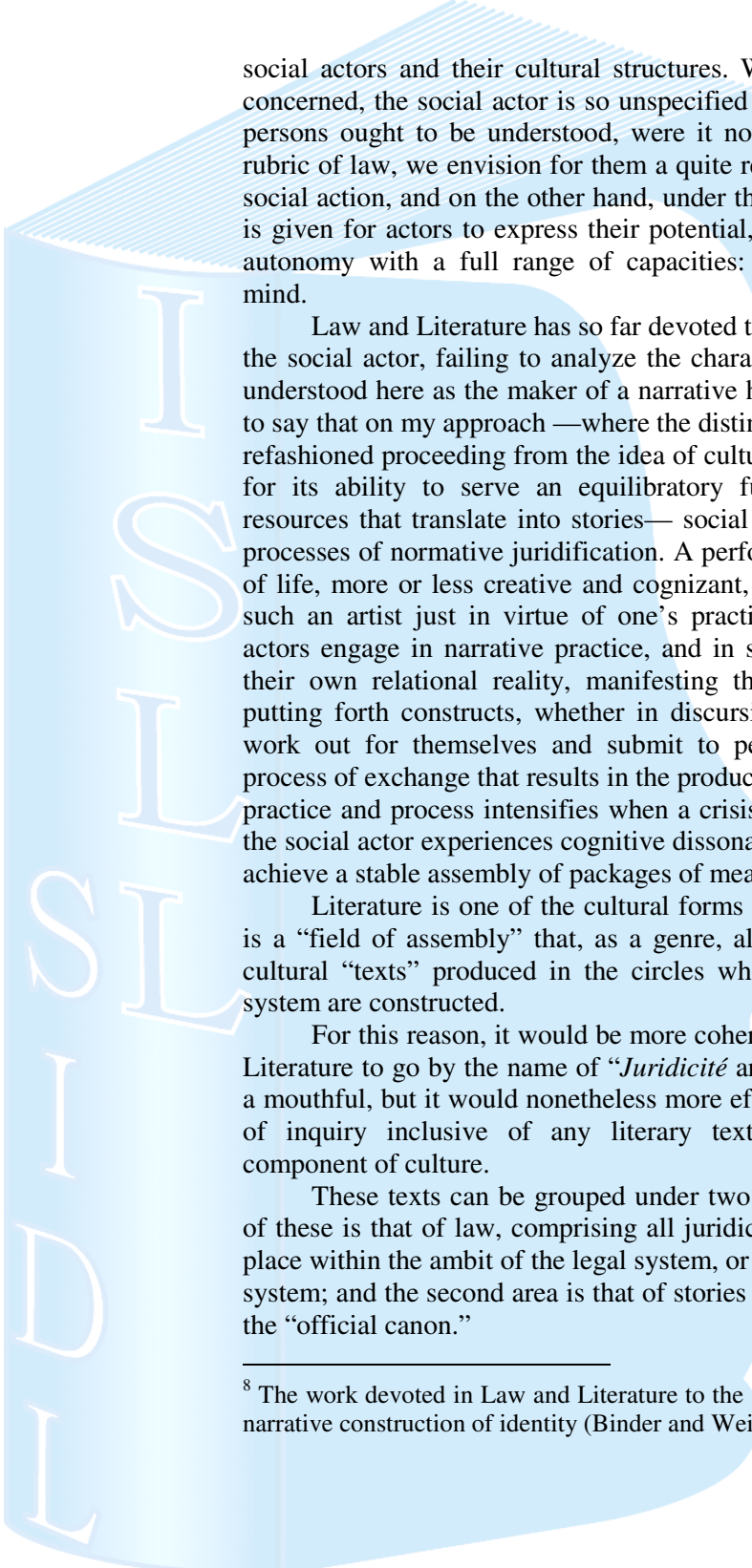
The distinction between law and literature is constructed on the basis of a contrast between an actual reality of law and the nonreality or fictional reality of literature: a contraposition on which the distinction tends to be overlaid between stories concerned to preserve an established and certain order (law) and stories where everything is possible (normative fiction). But this way of framing the distinction at hand diminishes the potential offered by the narrative approach, for it forces us to look through lenses that are not always clear.

One need only consider in this regard the paradox the distinction so framed leads to when it locates the disquiet, restive face of law in its literary representation, as if the only way we could detect this face were to break the mirror we are reflecting ourselves into: This casts literature as the true locus of life, the place where life is “more authentic,” precisely on the notion that fiction is much more telling of the law than is “a real-life story.” (But then, where does the truth lie?)

Then, too, unlike what is entailed by the distinction between the conservative stories proper to law and the possible-world stories proper to literature—a distinction loosely based on the true-false dichotomy—it is by no means a foregone conclusion that law cannot be a source of stories looking to the possible (just think of the legal framework for mediation, or of the unexpected rulings and pronouncements a case can resolve itself into), nor is it so clear that the more complex aspects of law can only be observed through their literary representation, nor can it be taken for granted that this representation will always offer the deepest insights into the law. Conversely, and to the same effect, we should not neglect to bear in mind that even literature, for its part, produces stories offering recurrent themes and solid, certain solutions drawing on a shared fund of ideas in a settled order of meaning.

If we inhabit a universe of stories, then what is the point of distinguishing between “real” stories and “fictional” ones? Why proceed on such a classificatory distinction between fields of inquiry, giving heed to which we run the risk of being stuck on the surface of these narrative resources, affording a limited understanding of their real function and effectiveness when it comes to human coexistence?

And what about the person as social actor? In this useless toing and froing between reality and fiction we lose sight of the problem of the relation between



social actors and their cultural structures. Where law and literature alike are concerned, the social actor is so unspecified it is hard to understand how these persons ought to be understood, were it not that on the one hand, under the rubric of law, we envision for them a quite restricted and conservative range of social action, and on the other hand, under the rubric of literature, wide latitude is given for actors to express their potential, so much so that they regain their autonomy with a full range of capacities: imagination, creativity, a critical mind.

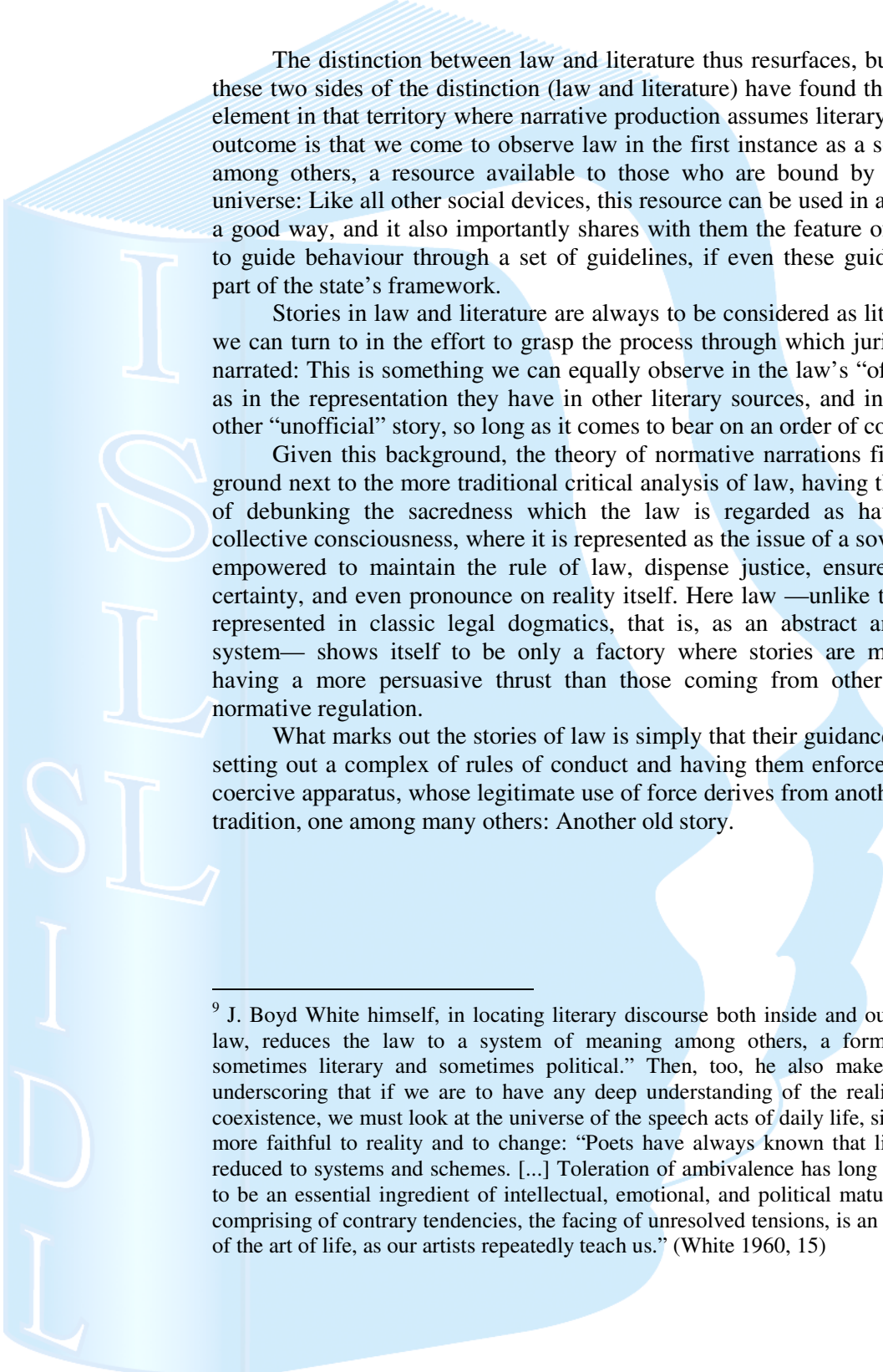
Law and Literature has so far devoted too little attention to the question of the social actor, failing to analyze the characteristics that distinguish an actor, understood here as the maker of a narrative having relational import.⁸ Which is to say that on my approach—where the distinction between law and literature is refashioned proceeding from the idea of culture as something we look to in part for its ability to serve an equilibratory function by drawing on narrative resources that translate into stories—social actors are persons who undertake processes of normative juridification. A performing social actor is thus an artist of life, more or less creative and cognizant, but the point is that one becomes such an artist just in virtue of one’s practicing the *ars combinatoria*. Social actors engage in narrative practice, and in so doing construct themselves and their own relational reality, manifesting their existence as social actors by putting forth constructs, whether in discursive or narrative form, which they work out for themselves and submit to people other than themselves in a process of exchange that results in the production of reality (Calame 1986). This practice and process intensifies when a crisis arises, for in these circumstances the social actor experiences cognitive dissonance, and that makes it impelling to achieve a stable assembly of packages of meaning (Schütz 1981).

Literature is one of the cultural forms through which this can be done: it is a “field of assembly” that, as a genre, also includes among its species the cultural “texts” produced in the circles where the semantics of the juridical system are constructed.

For this reason, it would be more coherent, on this approach, for Law and Literature to go by the name of “*Juridicité* and Literature”, which is admittedly a mouthful, but it would nonetheless more effectively convey the idea of a field of inquiry inclusive of any literary text concerned with the normative component of culture.

These texts can be grouped under two broad areas of narrative. The first of these is that of law, comprising all juridical literary “texts” having a formal place within the ambit of the legal system, or otherwise making reference to that system; and the second area is that of stories having other literary forms outside the “official canon.”

⁸ The work devoted in Law and Literature to the social actor has focused mostly on the narrative construction of identity (Binder and Weisberg 2000).



The distinction between law and literature thus resurfaces, but only once these two sides of the distinction (law and literature) have found their common element in that territory where narrative production assumes literary forms. The outcome is that we come to observe law in the first instance as a social device among others, a resource available to those who are bound by a relational universe: Like all other social devices, this resource can be used in a bad way or a good way, and it also importantly shares with them the feature of purporting to guide behaviour through a set of guidelines, if even these guidelines form part of the state's framework.

Stories in law and literature are always to be considered as literary works we can turn to in the effort to grasp the process through which juridicalness is narrated: This is something we can equally observe in the law's "official" texts as in the representation they have in other literary sources, and indeed in any other "unofficial" story, so long as it comes to bear on an order of coexistence.⁹


Given this background, the theory of normative narrations finds its own ground next to the more traditional critical analysis of law, having the objective of debunking the sacredness which the law is regarded as having in the collective consciousness, where it is represented as the issue of a sovereign state empowered to maintain the rule of law, dispense justice, ensure peace and certainty, and even pronounce on reality itself. Here law —unlike the way it is represented in classic legal dogmatics, that is, as an abstract and coherent system— shows itself to be only a factory where stories are manufactured having a more persuasive thrust than those coming from other sources of normative regulation.

What marks out the stories of law is simply that their guidance consists in setting out a complex of rules of conduct and having them enforced through a coercive apparatus, whose legitimate use of force derives from another narrative tradition, one among many others: Another old story.

⁹ J. Boyd White himself, in locating literary discourse both inside and outside official law, reduces the law to a system of meaning among others, a form of "culture sometimes literary and sometimes political." Then, too, he also makes a point of underscoring that if we are to have any deep understanding of the reality of human coexistence, we must look at the universe of the speech acts of daily life, since these are more faithful to reality and to change: "Poets have always known that life cannot be reduced to systems and schemes. [...] Toleration of ambivalence has long been thought to be an essential ingredient of intellectual, emotional, and political maturity. [...] The comprising of contrary tendencies, the facing of unresolved tensions, is an essential part of the art of life, as our artists repeatedly teach us." (White 1960, 15)

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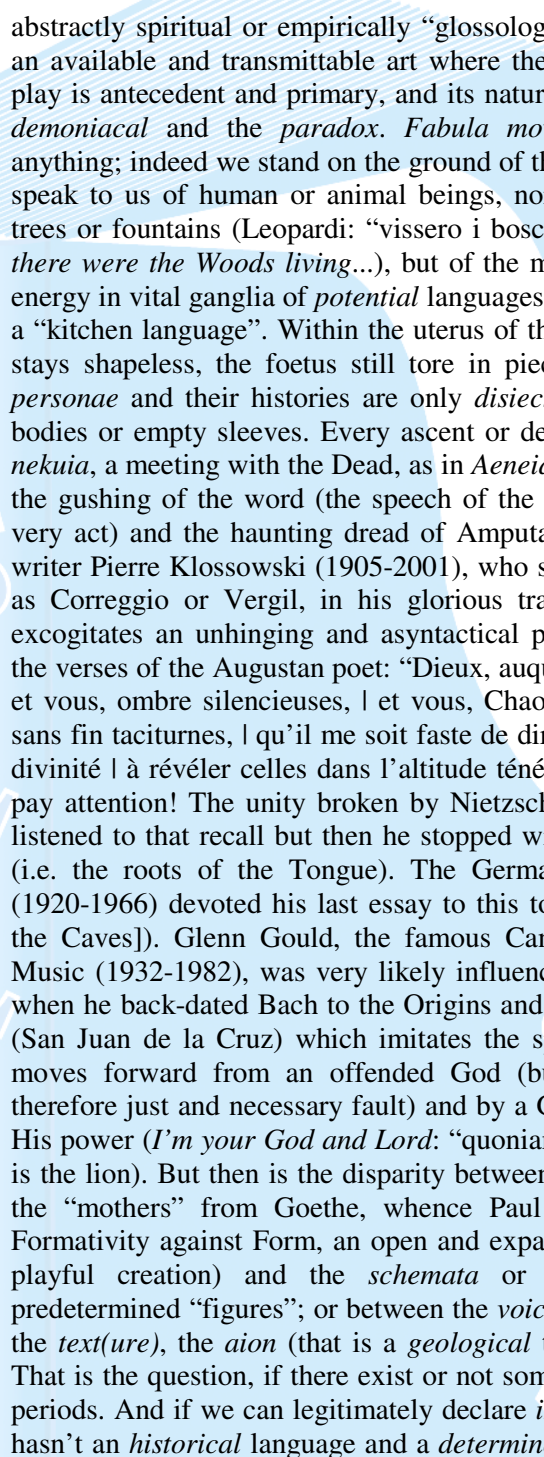
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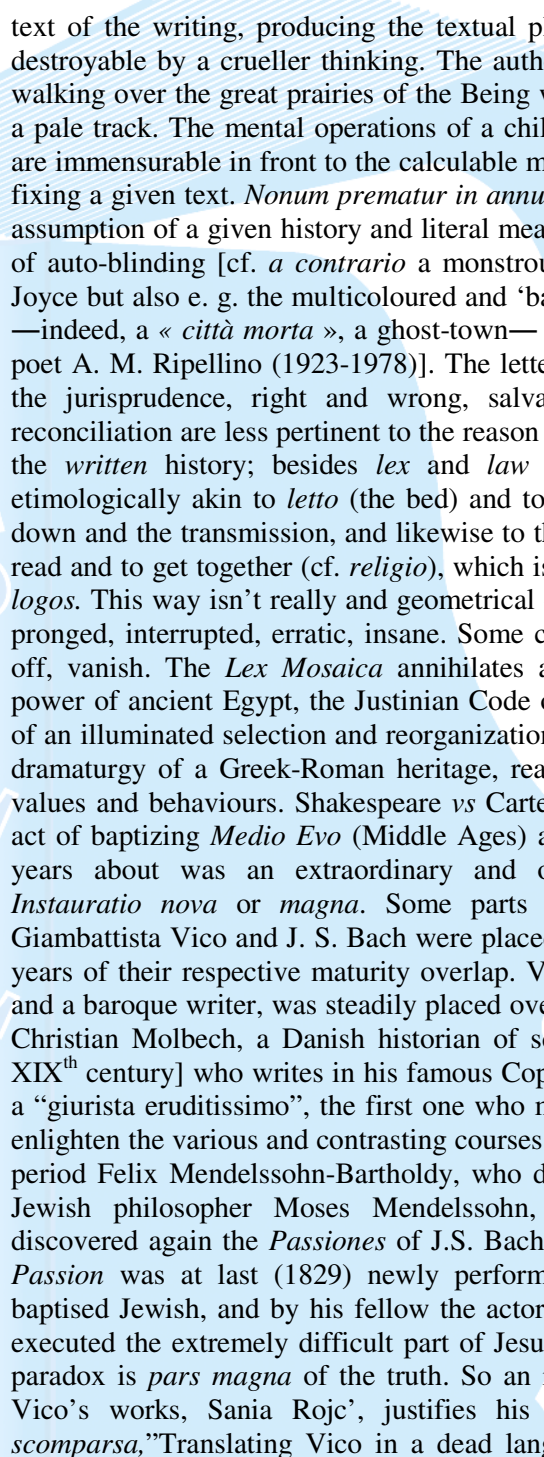
AGUDEZA AND THE LAW

by
Marzio Pieri


Law & Letters; it's certainly a duty of the jurists and law scholars to fix the boundaries & the contents of the area within their natural province. But undoubtedly a decision about the jurisdiction of the literature in this binomial or "working torque" is urgently needed, the preliminary and *sine qua non* requirement for moving off together towards a common and real object. On this way, it's highly probable to come to a dead-end. A combinatorial or interpolating process that enucleates and puts together some important facts is in my mind very probably misleading. By 'important facts' I mean a great novelist (e.g. Zola, Dostoevskij, Pirandello, Balzac, and on purpose I don't include among them the 'comic' Franz Kafka, who stands rather by the side of our Woody Allen) who puts us in front of some "realist" *legal* occurrences —as e.g. trials, convictions, crimes & punishments, or one's bearing the blame of a fault as a matter of conscience and not for a justice sentence— or an illustrious lawyer whose noble pastime is to invest his legal and worldly experience in historical or fictional or theatrical writings. That is not the case of the physician-writer (*medico scrittore*) which stands almost always by the side of a pure *amateurish* hobby. We must at the opposite take as our model a great jurist and writer as Piero Calamandrei, one of the fathers of Italian constitution, who strongly and closely joined together his style (*vis rhetorica*) and character with his legal, and political, and journalistic, and epistolary workings. His hobbies, if that is the case, are his liberal essays on the Tuscan and Rinascimental artist and writer Benvenuto Cellini or, always on the side of an ideal 'Tuscan order', those nourished ones on georgical matter (*Inventario della casa di campagna* [Inventory of a country-house]). Calamandrei, we must remember, was also a folk-tale writer. But then we must be careful not to consider him, or people like him, as a sort of hero. Their wonderful examples must be for us a spur to descend underground in search of the (Goethian) *mothers* (i.e. *matrices*) of the laws and to disclose the secrets of a *logos* which isn't merely rational or



abstractly spiritual or empirically “glossological”. It means that the rhetoric is an available and transmittable art where the bravest most shines, but the real play is antecedent and primary, and its nature has two distinctive features: The *demoniacal* and the *paradox*. *Fabula movet, non docet*: It doesn’t teach anything; indeed we stand on the ground of the fabulous. But this fable does not speak to us of human or animal beings, nor of mythological satyrs, nymphs, trees or fountains (Leopardi: “vissero i boschi un di...”, i.e. *Once upon a time there were the Woods living...*), but of the metamorphosis of a pure emotional energy in vital ganglia of *potential* languages; metaphorically we could speak of a “kitchen language”. Within the uterus of the Earth (that is the Hell) the word stays shapeless, the foetus still tore in pieces as the body of Orpheus. The *personae* and their histories are only *disiecta membra*, as trunks of trees or bodies or empty sleeves. Every ascent or descent towards the text is a sort of *nekuia*, a meeting with the Dead, as in *Aeneid VI*, where Vergil clearly connects the gushing of the word (the speech of the Cumaean Sibyl or Rhetoric in the very act) and the haunting dread of Amputation. The French philosopher and writer Pierre Klossowski (1905-2001), who studied Nietzsche and Sade as well as Correggio or Vergil, in his glorious translation of the *Aeneid* where he excogitates an unhinging and asyntactical poetical language reflects this way the verses of the Augustan poet: “Dieux, auxquels appartient l’empire des âmes, et vous, ombre silencieuses, | et vous, Chaos et Phlégéon, lieux dans la nuit, sans fin taciturnes, | qu’il me soit faste de dire les choses ouïes: m’assiste votre divinité | à révéler celles dans l’altitude ténébreuse de la terre ensevelies”. But pay attention! The unity broken by Nietzsche isn’t even reformed. Heidegger listened to that recall but then he stopped within the borders of the etymology (i.e. the roots of the Tongue). The German philosopher Hans Blumenberg (1920-1966) devoted his last essay to this topic (*Höhlenausgänge* [Exits from the Caves]). Glenn Gould, the famous Canadian pianist and philosopher of Music (1932-1982), was very likely influenced by the savage and hellish jazz when he back-dated Bach to the Origins and to the Baroque: A “noche oscura” (San Juan de la Cruz) which imitates the spirit of the Holy Bible, where all moves forward from an offended God (but in consequence of a due and therefore just and necessary fault) and by a God making laws on the ground of His power (*I’m your God and Lord*: “quoniam nominor leo”, because my name is the lion). But then is the disparity between the pure shapeless shapes (again, the “mothers” from Goethe, whence Paul Klee comes with his theory of Formativity against Form, an open and expansive space of active, musical and playful creation) and the *schemata* or rhythmical, prosodical, rhetorical predetermined “figures”; or between the *voice* and the *writings*, the *gesture* and the *text(ure)*, the *aion* (that is a *geological* time) and the *chronological* time? That is the question, if there exist or not some laws, unnecessary measures and periods. And if we can legitimately declare *in limine*: No admittance for whom hasn’t an *historical* language and a *determined* law. The law itself supports the



text of the writing, producing the textual philology and the copyright, easily destroyable by a crueller thinking. The author is a greedy and abusive owner, walking over the great prairies of the Being where all the passers-by leave only a pale track. The mental operations of a child (of every child) learning talking are immensurable in front to the calculable movements of a philologist formally fixing a given text. *Nonum prematur in annum?* The preliminary (“hygienical”) assumption of a given history and literal meaning is just the same as a principle of auto-blinding [cf. *a contrario* a monstrous work as *Finnegans Wake* by J. Joyce but also e. g. the multicoloured and ‘baroque’ prose-poem *Praga Magica*—indeed, a « *città morta* », a ghost-town— of the great Italian Slavophile and poet A. M. Ripellino (1923-1978)]. The letter is not enough even to itself. For the jurisprudence, right and wrong, salvation and falling, punishment or reconciliation are less pertinent to the reason or the instinct —*vox Dei*— than to the *written* history; besides *lex* and *law* according to certain authors are etimologically akin to *letto* (the bed) and to *legato* (legacy), that is the lying-down and the transmission, and likewise to the greek *léghein*, lat. *legere*, i.e. to read and to get together (cf. *religio*), which is the very function and meaning of *logos*. This way isn’t really and geometrical or logical but anfractuuous, uneven, pronged, interrupted, erratic, insane. Some cultures wholly and abruptly break off, vanish. The *Lex Mosaica* annihilates and replaces the sacred right and power of ancient Egypt, the Justinian Code only apparently retains by the way of an illuminated selection and reorganization the actual and, so to say, floating dramaturgy of a Greek-Roman heritage, really reduced to a jungle of natural values and behaviours. Shakespeare vs Cartesius, Plautus vs Vergilius! So, the act of baptizing *Medio Evo* (Middle Ages) a concrete history of one thousand years about was an extraordinary and obscurantist violence, nicknamed *Instauratio nova* or *magna*. Some parts of the respective lives of, e.g., Giambattista Vico and J. S. Bach were placed one upon the other, and even the years of their respective maturity overlap. Vico, as well as a visionary thinker and a baroque writer, was steadily placed over a perfect juridical knowledge (cf Christian Molbech, a Danish historian of science and literature [first part of XIXth century] who writes in his famous Copenhagen lessons (1831): Vico was a “giurista eruditissimo”, the first one who made an attempt to philosophically enlighten the various and contrasting courses of the human history); in the same period Felix Mendelssohn-Bartholdy, who descended from the great German-Jewish philosopher Moses Mendelssohn, nicknamed ‘the Jewish Plato’, discovered again the *Passiones* of J.S. Bach. His long time forgotten *Matheus Passion* was at last (1829) newly performed by Mendelssohn, who was a baptised Jewish, and by his fellow the actor and singer Eduard Devrient, who executed the extremely difficult part of Jesus Christ. An historic paradox! But paradox is *pars magna* of the truth. So an illustrious expert and translator of Vico’s works, Sania Rojc’, justifies his translation (*Vico in una lingua scomparsa*,”Translating Vico in a dead language”): “[the Croatian language]



isn't the first language who disappears and in history it often happens that somebody is deprived of the Idea of a Motherland. Let's hope that the libraries don't end all in fire...". Another Vico's scholar and translator (particularly of the Neapolitan philosopher's juridical works and grounds), Alain Pons, moves in some ways from the ideologically *maudit* French philosopher Pierre Boutang (1916-1998), a Catholic and monarchical follower of Charles Maurras, and a long time a friend of G. Steiner and E. Lévinas though suspected of antisemitism. Here are the fractures and the blindnesses and the secret counter-trends I was talking about. We must establish our new thinking on Nietzsche, whose metaphoric Zarathustra is nevertheless too much European, the treatise *Dhvanyāloka* of the great Ānandavardhana (a Kaśmir thinker, IXth century), who insists on the concept of the "poetical Unexpressed" or 'semantic resonance' (*dhvani*), and the essay of Sigmund Freud about the Wit. But *dhvani* is substantially the analogous of Aristotele's *thaumaston* and Cavalier Marino's "meraviglia" (*poetic marvelous*). An indispensable compendium could be the basic and propagated *Institutio Oratoria* by Spanish master of rhetoric Quintiliano, who originally combines the Greek-Latin or Attic style-line with the Asian one. That's the main-road to end the too long and abstract question of the Baroque in the name of a joyful clownery. *Incipit Comedia Nova...*



CHRONICLE OF A DEATH FORETOLD: A RETROSPECTION

by
István H. Szilágyi

He was newly graduated and still wore his black linen school suit and the gold ring with the emblem of his degree, and he had the airs and the lyricism of a happy new parent.¹

A turn

Following Paul Ricoeur's instructions we can wander the way to the right interpretation passing through three phases: contextualisation–de-contextualisation–re-contextualisation.² Contextualisation means those efforts with which we try to explore the meaning of the work considering the conditions of its birth. This comprises the investigation of the author's relation to the literary tradition and to the contemporary social problems as well as the determination of the place of the work within the whole oeuvre of the author, and the identification of those literary themes and aesthetic problems which has aroused

¹ G. G. Márquez, *Chronicle of a Death Foretold*, trans. J. Cape, London: Penguin Books, 1996¹³ [*Chronicle*], 99.

² I have borrowed the concepts of “decontextualisation” and “recontextualisation” from Ricoeur's writings although I shall use them with a slightly different meaning in the following sketch. As he wrote (1981, 139): “An essential characteristic of a literary work, and of a work of art in general, is that it transcends its own psycho-sociological conditions of production and thereby opens itself to an unlimited series of readings, themselves situated in different socio-cultural conditions. In short, the text must be able, from the sociological as well as the psychological point of view, to ‘decontextualise’ itself in such a way that it can be ‘recontextualised’ in a new situation —as accomplished, precisely, by the act of reading.” See also Ricoeur 1986, 366-370.

her attention. In short, contextualisation aims to outline the authorial intention, or at least to draw the horizon of plausible authorial intentions that encompasses a multitude of the possibly right interpretations, of course, since the authorial intention could never be determined exactly.

The reader (interpreter) tries to tear the text out of the social, psychological and other contextual conditions of its birth, taking account of the possible meanings of the text itself in the phase of de-contextualisation. For example, the unstitching of the plot's threads, the analysis of the characters' motivations and their importance in the plot and of the dramaturgical structure of the work traditionally belong to this phase in case of a novel. Here, the proper aim of our investigations is to bring to the surface the meanings which are hidden in the text independently from the original authorial intention.

Finally the re-contextualisation requires us to determine the text's actual meaning for ourselves seizing one meaning out from the multiple possible ones, at the same time, determining our position in the interpretational community, and founding our aesthetical value-judgement.

This sketch of interpretive process can not afford a complete image of its complicated inner relationships; nevertheless, it is suitable for pointing out its two features having greater importance in achieving our purposes: The openness and the dynamics of interpretive process.

Openness means in relation with interpretation that we could not reach a solely correct meaning of a literary work, even if we follow the instructions for the "proper interpretation", but only a multitude of authentic readings.³ However, this does not make our efforts to acquire a right interpretation senseless. They are not senseless for just two reasons. Partly, since we can still disclose a multitude of false interpretations in this way. On the other hand, and maybe this is an even more important reason than the previous, the openness just turns the act of interpretation into a two-way act. For grabbing out the meaning for ourselves induces us to determine our position toward the author and the other members of the interpretive community at the same time. That is why every literary work offers an opportunity for improving our self-knowledge, and contains an implicit call for self-determination addressed to the reader. This effect is one of the most important propelling forces of the dynamics of interpretation.

³ In relation with this problem James Boyd White (1985, 77-84) has pointed out that neither the act of writing itself, nor the meaning of the text can be fully described in purely descriptive or analytical terms. Even the most "simplest" text, with the less literary value, has a more complex structure than the experience of its reading could be summing up in a couple of sentences. Here lies the sense of the literary scientific platitude: the meaning of a literary work is not its "message", but the experience of its reading.

The structure of contextualisation–de-contextualisation–re-contextualisation already implies the concept of a progressing move in time. In the first sight, it seems to be a rectangular movement which, passing through the phases of “right interpretation”, brings us to seizing the meaning for ourselves. Nevertheless, what we can find here is nothing but a meandering, a cycle of joining circles returning to the provisionally already answered or decided questions. For those points of comparison, necessary for grabbing the meaning for ourselves are in a constant move: The formation of literary tradition, the social conditions surrounding the reader, and her position in the interpretive community are constantly moving.

Just from this dynamic character of the hermeneutic circle results, too, that we do not have to keep ourselves to the sequence of contextualisation–de-contextualisation–re-contextualisation. And in fact, often happens, for example, that we take a book in our hands without previously investigating thoroughly the author’s identity, and we try the contextualisation only later, if the book has aroused our attention.

Well, just this insight is the base of the concept of the present study, since I shall not keep myself to the above suggested sequence in the following analysis of Márquez’ novel, of which title has been borrowed for this essay, instead I shall catch up the thread of interpretation in the phase of de-contextualisation. A didactic consideration stands in the background of this decision, since the discussion of this novel is the central theme of a Law and Literature course for law students, and the proper aim of this paper is taking account the experience drawn from a more than a decade teaching of this course by its teacher.

De-contextualisation

Right away, one of the most exciting tasks for the students is the reconstruction of the plot, the chain of the events presented in the novel. The contemporary Hungarian system of legal education generally concentrates on the acquisition of the legal rules and on their dogmatic analysis, so students very rarely meet the task of fact finding. Even on those courses where the students are analysing court decisions, they usually deal with previously established facts in which the legally relevant elements are pointed out already, therefore they have not so much experience in the difficulties and pitfalls of fact finding. However the fact finding is the base not only for the adjudication, but generally for all kinds of practical legal works.⁴

⁴ For example David Simon Sokolow (1991, 969-987) gives an account about his similar experiences concerning the difficulties of teaching fact finding, albeit it is a well

And the reconstruction of *Chronicle's* is not a simple task at all, because, in contrast with its title, the novel is not a chronicle in the sense that the story would be told in a rectangular time line by a neutral, objective, outsider narrator. The narrator is the writer himself who has returned after twenty years to that Columbian small town where he spent his youth. The life of the town was changed drastically by the tragedy of events (*Chronicle*, 97) which the author, who had taken part in the plot himself, tries to clear up and explain, even if just as a “supporting character”. Each five chapters of the novel tells the drama from another perspective jumping back and forth in time, nevertheless, each ends up by the dramatic culmination of the killing of Santiago Nasar. The whole story can be assembled only by synopsising the five chapters which are rounded up from the multiple testimonies and statements of the witnesses, so it is not easy to undo the often parallel running threads of the various characters’ actions.

An affair of honour stands in the centre of the *Chronicle's* plot, which happens in the 1930s.⁵ A young man, Bayardo San Román, of whom turned out, passing several months, that he is looking for a bride for himself, arrives in the small town. Finally he picks out Angela Vicario,⁶ the youngest daughter of a family of scant resources (*Ivi*, 30), who accepts her suitor due to her family’s pressure. The wedding-feast, which has been arranged after long preparations, swells into a carnival in which nearly the whole town takes part, and which obscures even the bishop’s next day visit. But at the wedding night Bayardo discovers that Angela has already lost her virginity, and he brings her back to her parents. Angela’s twin brothers, for restoring their family’s honour, decide to kill the person, who has taken her virginity. The intimidated Angela, urged by her brothers, names Santiago Nasar as the “perpetrator” (*Ivi*, 47), a wealthy young man who belongs to a group of Arabian immigrants. The twins, who have known Santiago since their childhood, do everything for they do not have to wash their family’s fame clean by blood. At Sunday morning, they tell all the world what they want to do, at the main square of the village, in the bustle of crowd hurrying to give the bishop, arriving by ship, a warm welcome. By the time the bishop has passed away, nearly everybody, except Santiago Nasar, learns of the twin’s plan, but nobody stops them because of hatred, negligence, cowardice, indifference or the coincidence of chances. After the tragedy, the

known fact that the American system of legal education is much more practical centred and problem oriented than the Hungarian.

⁵ The affair took place in 1951 in the “real time”. We shall return yet to the problem of chronology below in the section of *Contextualisation*.

⁶ The expression of “picking out” seems to be quite correct here. The way Bayardo San Román choose Angela was very characteristic: it showed that he did not feel love for Angela, and, at the same time, it mirrored the macho thinking what Bayardo represented so well (*Chronicle*, 27-28).

court acquits the twins who have spent three years in pre-trial detention. The Vicario family leaves the village already on the following day after the tragedy, and passing a couple of days, Bayardo San Román, who has escaped from the shame into drunkenness, is also taken away by his relatives. Angela, who had been enforced to accept her suitor in fact, suddenly realises that she has fallen in love with Bayardo in the course of the tragic events, and she writes hopeless love letters for her husband for more than twenty years, when he returns to her at last.

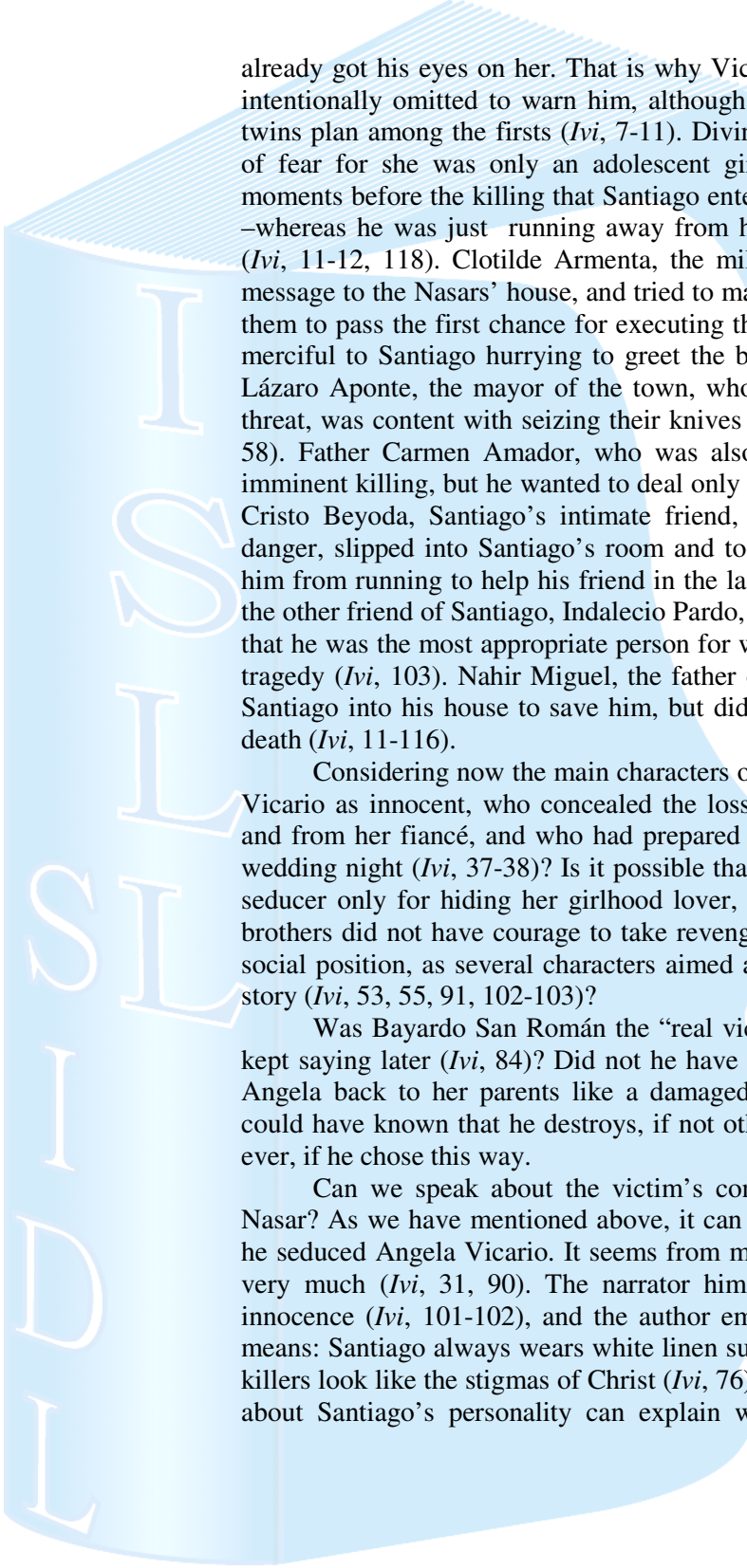
For the students, the reconstruction of the events of the preceding several hours before the killing is a really exciting exercise, while the facts have to be tidied together from the “testimonies” of the dozen characters and eyewitnesses, and we even draw imaginary maps to survey better the moves of the characters. However, the most important lesson for the students is that the picture they have made with fatiguing work is an uncertain, obscured and ambiguous one: Everybody has seen different things and remembers other ways. There is no concord in those unimportant details whether it was raining at that fatal Sunday morning or the sun was shining. But the greatest uncertainty appears just in the most important question: Was it really Santiago Nasar who had taken Angela’s virginity?⁷ In the *Chronicle* (99-100), Márquez masterfully demonstrates the impossibility of grabbing the “objective” reality, and the inherent uncertainty of the legal fact finding.

With this we have arrived to the other group of interesting problems of the intra textual interpretation, to the questions of responsibility. This gives us an opportunity to examine the characters’ personality and to explore the motives of their actions at the same time.⁸

How much can be blamed Plácida Linero, Santiago Nasar’s mother, who herself had put the bar up on the door of their house in the last moments before the killing, closing Santiago’s escape route, because she was in the belief that his son is already in the safe of the house? And who blamed herself in the remaining part of her life just for she had not been capable to decipher her son’s previous night dream (*Ivi*, 1-2, 4-5, 98-99, 118-119). Victoria Guzmán, the cook of the Nasars’, the one time mistress of Santiago’s father who had fears for her daughter, Divina Flor, was to share the same destiny, because Santiago had

⁷ A lot of references can be found in the novel suggesting the fact that Santiago Nasar did not understand the charge against him until the last moment, and he himself behaved as someone innocent in the case (*Chronicle*, 16-17, 20, 41, 45, 67-68, 100-102, 116-116). Although Angela Vicario, even twenty years after, firmly kept that Santiago Nasar had been “her perpetrator” (*Ivi*, 91). And certainly this question, the question of Santiago Nasar’s guiltiness alarmed also the investigating magister the most (*Ivi*, 100-101).

⁸ I shall mention below the more important supporting characters in the order of their appearance in the novel.



already got his eyes on her. That is why Victoria Guzmán hated Santiago, and intentionally omitted to warn him, although she had been informed about the twins plan among the firsts (*Ivi*, 7-11). Divina Flor, who did the same because of fear for she was only an adolescent girl, and who imagined in the last moments before the killing that Santiago entered in the house and went upstairs –whereas he was just running away from his attackers outside on the square (*Ivi*, 11-12, 118). Clotilde Armenta, the milk shop keeper, who had sent the message to the Nasars’ house, and tried to make the twins drunk, and persuaded them to pass the first chance for executing their plan: she requested them to be merciful to Santiago hurrying to greet the bishop (*Ivi*, 14-15, 53-55). Colonel Lázaro Aponte, the mayor of the town, who did not take seriously the twins’ threat, was content with seizing their knives instead of detaining them (*Ivi*, 55-58). Father Carmen Amador, who was also among the firsts hearing of the imminent killing, but he wanted to deal only with the bishop’s visit (*Ivi*, 70-71). Cristo Beyoda, Santiago’s intimate friend, who, hearing that Santiago is in danger, slipped into Santiago’s room and took his gun, but the fear prevented him from running to help his friend in the last moment (*Ivi*, 106-112). Just like the other friend of Santiago, Indalecio Pardo, about whom the twins had thought that he was the most appropriate person for warning Santiago and impeding the tragedy (*Ivi*, 103). Nahir Miguel, the father of Santiago’s fiancée, who invited Santiago into his house to save him, but did not hinder him from rushing into death (*Ivi*, 11-116).

Considering now the main characters of the drama, can we regard Angela Vicario as innocent, who concealed the loss of her virginity from her parents and from her fiancé, and who had prepared to cheat her future husband at the wedding night (*Ivi*, 37-38)? Is it possible that she named Santiago Nasar as her seducer only for hiding her girlhood lover, and because she believed that her brothers did not have courage to take revenge on a wealthy person of a higher social position, as several characters aimed at this possibility repeatedly in the story (*Ivi*, 53, 55, 91, 102-103)?

Was Bayardo San Román the “real victim” of the affair, as the villagers kept saying later (*Ivi*, 84)? Did not he have really other solution than bringing Angela back to her parents like a damaged good to the seller? Although he could have known that he destroys, if not other’s, but at least Angela’s life for ever, if he chose this way.

Can we speak about the victim’s contribution in the case of Santiago Nasar? As we have mentioned above, it can not be taken as a granted fact that he seduced Angela Vicario. It seems from many details that he never liked her very much (*Ivi*, 31, 90). The narrator himself inclines to accept Santiago’s innocence (*Ivi*, 101-102), and the author emphasises this with certain literary means: Santiago always wears white linen suits, and the wounds stabbed by his killers look like the stigmas of Christ (*Ivi*, 76). On the other hand, what we learn about Santiago’s personality can explain why the twins did not hesitate to

accept his name from their sister without any doubt. Santiago's engagement to Flora Miguel was based on common agreement of the two families, and he did not attached to her with so much emotion than to María Alejandrina Cervantes who run the local bordello, and with whom Santiago had a stormy love affaire (See *Ivi*, 65-66, 77-78). By the way, it was widely known that “he went about alone, just like his father, nipping the bud of any wayward virgin that would begin showing up in those woods” (*Ivi*, 90-91).

Finally, were the killers of Santiago Nasar, Pedro and Pablo Vicario, really innocent? The twins did not waste a moment to consider whether Santiago had been guilty in seducing their sister or not, and they did not doubt that they had to take the law in their own hands, although they did everything for not to shed the blood of Santiago (*Ivi*, 49). In any case, the court in the novel upheld that the homicide was in a legitimate defence of honour, so they were innocent (*Ivi*, 48).

The writer even heightens the unsettling uncertainty about the responsibility with using contradictory artistic means. On the one hand, he suggests that the drama was inevitable —it happened what it should be happened (*Ivi*, 10-11, 47, 84, 114), in other words nobody is responsible personally for the events. On the other hand, Márquez weaves allegories (*Ivi*, 78-79) and sporadic allusions⁹ expressing the collective responsibility of the whole community.

The problem of responsibility generally grabs the students' attention, and at least half of the seminary papers deals with this question. Most of the students do not see the acquittal of the twins by the court rightful, nevertheless I have read several papers whose authors felt sympathy for the Vicario brothers: In their opinion, only the twins behaved honestly when they kept themselves to the community's codex of honour and, at the same time, they did everything for not to carry out the bloody reckoning in fact. The students are also agreeing in that they see culpable negligence on the side of the community's leaders, colonel Aponte and father Amador. According to the general opinion, they should have stopped the tragic developments by their determined intervention.

Comparing to this, a rather great uncertainty can be seen among the students in judging the responsibility of the community as a whole. They are fairly wavering in deciding between the alternatives of “nobody is guilty” (beyond the leaders of the community) and “everybody is guilty”. Reasoning for the former standpoint, they are pointing out that love affairs belong to the private sphere, and the tragedy happened due to a line of incident chances in fact. Those who take the latter standpoint emphasise the culpable carelessness of the villagers with which they let happen the tragedy. However, relatively

⁹ “They [the twins] didn't hear the shouts of the whole town, frightened by its own crime.” (*Chronicle*, 120)

many students arrive to the analysis of the community's value-system after considering these two contradictory alternatives.

But what can we learn about this value system from the novel? At first sight it appears that it is homogeneous in the sense that it is shared by the whole community, and even the state law recognises it. The small town is not too differentiated socially: the differences in the wealth are not so big that the riches could separate themselves from the poor,¹⁰ and the minority of the Arabian immigrants, who have already turned Christians, to whom belongs Santiago Nasar too, is also integrated into the community (*Ivi*, 9-10, 82-83).

Nevertheless, if we take a closer look then it can be seen that the general rules are "not so much" valid in case of the rich people. This is very well pointed out in the detail that many thought that Angela Vicario told Santiago's name to her brothers in the hope that they had not courage to attack a rich man.¹¹ On the other hand, perhaps the Vicario brothers stuck themselves to the unwritten code of honour, just because their family had seen better days one time.

The most evident inherent contradiction of this value system, however, is the inequality in the man-woman relationship that comes into light in all aspects of the social connections,¹² of the partner-choosing,¹³ and of the family life.¹⁴ A patriarchal,¹⁵ macho,¹⁶ hypocritical¹⁷ and sanctimonious¹⁸ value-system

¹⁰ This is fairly demonstrated by the description of the wedding-feast swelling into a carnival, from which comes clear that nearly every villagers took part in the festivities (*Ivi*, 16-17, 41-45, 66-68).

¹¹ For example, Polo Carillo's, the owner of the electric plant, opinion was that Santiago Nasar "[t]hought that his money made his untouchable." (*Ivi*, 102. See also 53, 55, 91)

¹² The women nearly never leave the house, except festive occasions, while the spinsters have to be escorted (*Ivi*, 19, 27-28, 37).

¹³ While Bayardo San Román could freely wander the word to find a wife for himself: "In any case, not even his family knew much more about him than we did, nor did they have a slightest idea of what he had come to do in a mislaid town, with no apparent aim than to marry a woman he had never seen." (*Ivi*, 88); until Angela Vicario's family had decided in the matter of marriage instead of her: "Angela Vicario never forgot the horror of the night on which her parents and her older sisters with their husbands, gathered together in the parlor, imposed on her the obligation to marry a man whom she had barely seen. [...] The parents' decisive argument was that a family dignified by modest means had no right to disdain that prize of destiny. Angela Vicario only dared hint at the inconvenience of a lack of love, but her mother demolished it with a single phrase: «Love can be learned too.»" (*Ivi*, 34)

¹⁴ The mother of the author, who herself appeared too in the novel, summarised her opinion about the Vicario sisters this way: "«They're perfect», she was frequently heard to say. «Any man will be happy with them because they've been raised to suffer.»" (*Ivi*, 31)

¹⁵ The figures of the charismatic patriarchs, who have full authority in the family matters, are serving as a background of the story: Ibrahim Nasar who shut his son out of

determines the behaviour of the characters, so the whole story in fact dramatises the inherent contradictions of this value-system. Although the examination of this problem is leading us into the next phase of the interpretation, since the evaluation of this value-system can not be separated from seizing the text's meaning for ourselves.

the bed of his lover with a whip (*Ivi*, 65), Nahír Miguel who kept his house closed and his whole family had to sleep until noon on his order (*Ivi*, 112), and, of course, Petronio San Román, Bayardo's father, the almost inevitable figure of the "general" of Márquez's novels (*Ivi*, 38-39).

¹⁶ Not only Bayardo San Román's outward appearance was emphatically manly —he dressed like a toreador (*Ivi*, 24-25), but he gained popularity throughout the town because "[h]e liked noisy and enduring festivities, but he was a good toper, a mediator of fights, and an enemy cardsharps. One Saturday after mass he challenged the most skilful swimmers, who were many, and left the best behind by twenty strokes in crossing the river and back." (*Ivi*, 26). We could learn about Santiago Nasar's character that he inherited his instincts from his mother, and "[f]rom his father he learned at a very early age the manipulation of firearms, his love for horses, and the mastery of high-flying birds of prey, but from him he also learned the good arts of valor and prudence." (*Ivi*, 6). And we could add to this: he learned from his father how to handle women (*Ivi*, 65-66, 90-91). Pedro Vicario, the veteran, boasted with his blennorrhagia without a break, and shaved himself with a butcher knife at the main square. See too *Ivi*, 59-64.

¹⁷ A nice example for the hypocrisy lacing all the social relationships is the above quoted (fn. 39) argument of Angela's parents about their "family's dignity". However, the most profound example of the vileness behind the appearance of the honest intentions and true emotions was the behaviour of Bayardo San Román who had never been interested at all in Angela's personality —whom he barely knew, because he had been arrived in the town just a couple of months earlier, and he courted not her, but her family during the short period of their engagement (*Ivi*, 28-37) — but he simply wanted to buy a wife for himself: "Bayardo San Román, for his part, must have got married with the illusion of buying happiness with huge weight of his power and fortune [...]" (*Ivi*, 38). On the other hand, it could be seen that neither Santiago Nasar was embarrassed by the fact of his engagement with Flora Miguel in visiting regularly the brothel, or in catching at maidservants (*Ivi*, 90-91).

¹⁸ The primary metaphor of this is the bishop's visit: All the villagers had been eager to greet him, who did not take the trouble even to ashore at the end (*Ivi*, 15-16). And there was the behaviour of Father Amador, to whom it was more important to greet the bishop than to prevent the imminent murder. Nevertheless, there were very characteristic gestures, for example, when Bayardo brought back Angela to her parents' house, and he "[...] didn't go in, but softly pushed her wife into the house without saying a word. Then he kissed Pura Vicario on the cheek and spoke to her in a very deep, dejected voice, but with great tenderness. «Thank you for everything, mother», he told her. «You're a saint.»" (*Ivi*, 46)

Re-contextualisation

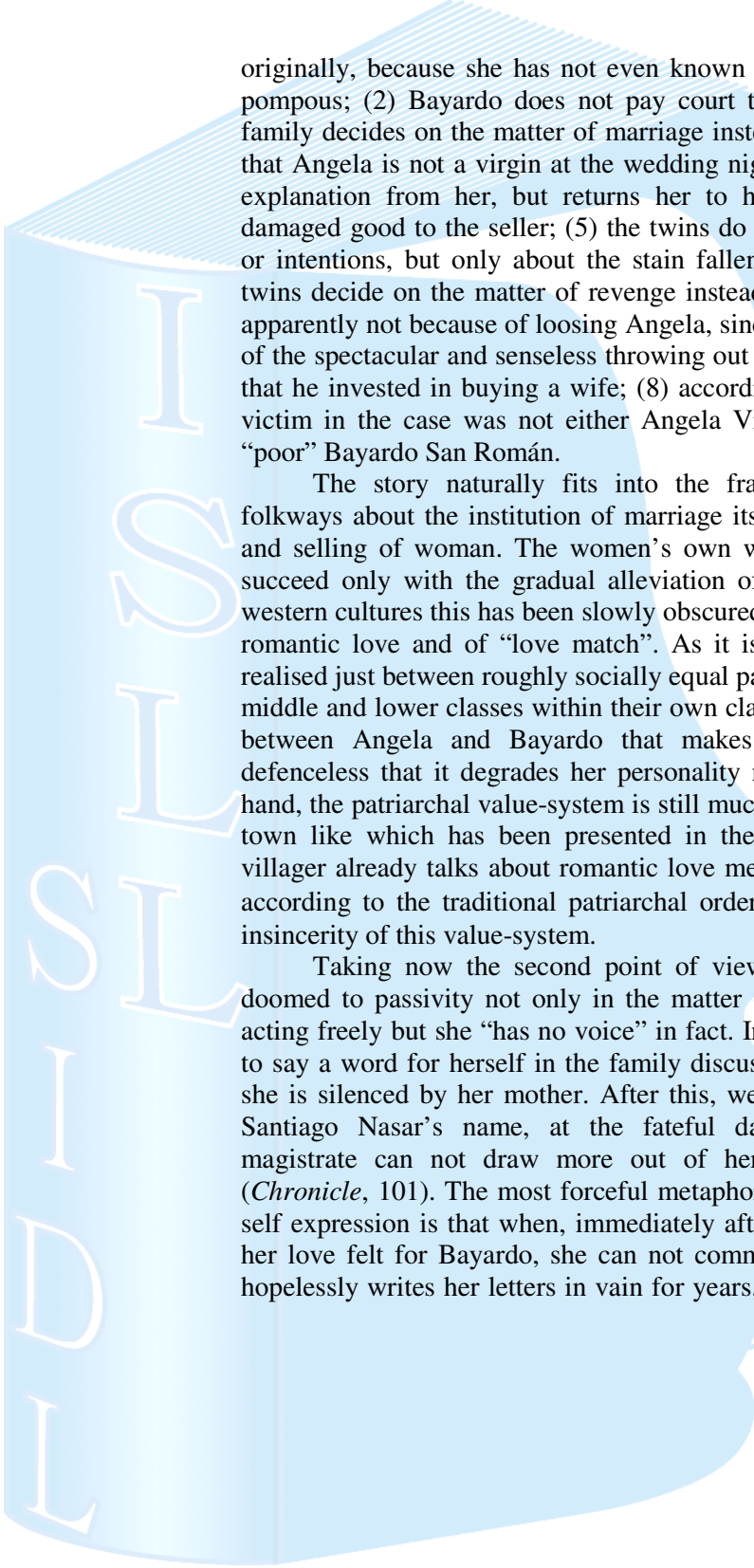
Taking in account the legally relevant readings of the novel, the feminist legal theory's perspective offers itself firstly for the analysis of the value-system outlined from the story.

The feminist branch of the Critical Legal Studies movement is not so much cultivated in Europe —except in Great Britain, and even less done in Hungary, comparing to its position in the American legal theory: This fact is evidently related to the general conditions of the feminist movement, of course. Presently I rely mainly on Ian Ward's summary of the feminist approach in my following analysis (Ward 1995; see also MacKinnon 1983 and Butler 1998; for a feminist reading of the *Chronicle* see Aristodemou 2007).

Two insights of the feminist perspective are worth bringing in play in the interpretation of the novel. One of them is that all the modern legal systems — both the common law and the Roman-German systems— describe the women's social positions with such categories which are originated in a previous epoch of the legal development preserving its patriarchal attitude, thereby they incline to define the woman, and the woman's integrity with the categories of property. For example the contemporary English legal term of "rape" originated from the Roman *raptus*. In early medieval Europe "rape" meant the abduction without consent of a marriageable woman, as Ward and others has pointed out, but the consent was not that of the woman herself, but of the (male) head of the family, what means that "rape" was a crime of theft, not of sexual conduct, and it was not even necessarily a violent action. A woman could voluntary eloped with her lover, however, the family still had been raped independently of the actual lack of violence. The element of violence has been attached to the original sense of the legal term only as an evidential qualification at the beginning, and it has just much later, with the gradual emancipation of the women, become a substantive element of the term. However the original meaning of the "rape" —that it is a theft against a man— still has an impact on the public thinking which continues to emphasise the male experience of loss instead of the woman's experience of suffered violence in this crime (Ward 1995, 130-131).

The other issue calls attention to a problem lying on a wider horizon. Namely, since the shaping of language reflects the social relations of power — thus the language conforms to the "fallogocentric" thinking of men in a man-dominated society, thus women have no language to express their own proper experience. It is eminently true for those social fields, such as that of politics and of law, which are especially controlled by men (*Ivi*, 119-128).

Well, in the *Chronicle*, both insights seem to be extensively verified in Angela Vicario's character and fate. That she is in fact a property of her family what (whom) Bayardo San Román wants to simply buy for himself comes clear from the following details: (1) Angela does not want to marry Bayardo



originally, because she has not even known him, and she has considered him pompous; (2) Bayardo does not pay court to her, but to her family; (3) the family decides on the matter of marriage instead of Angela; (4) when turns out that Angela is not a virgin at the wedding night, Bayardo does not require any explanation from her, but returns her to her family as someone returns a damaged good to the seller; (5) the twins do not care about Angela's emotions or intentions, but only about the stain fallen on the family's honour; (6) the twins decide on the matter of revenge instead of Angela; (7) Bayardo worried apparently not because of losing Angela, since he has not known her at all, but of the spectacular and senseless throwing out of an enormous amount of money that he invested in buying a wife; (8) according to the public opinion, the real victim in the case was not either Angela Vicario or Santiago Nasar, but the "poor" Bayardo San Román.

The story naturally fits into the frame of the traditional societies' folkways about the institution of marriage itself based on the forms of buying and selling of woman. The women's own will in choosing spouse begins to succeed only with the gradual alleviation of the female position. In modern western cultures this has been slowly obscured by the nineteenth century idea of romantic love and of "love match". As it is well known, this idea could be realised just between roughly socially equal parties, that is, between members of middle and lower classes within their own class. It is the great social difference between Angela and Bayardo that makes Angela's position so radically defenceless that it degrades her personality nearly to an object. On the other hand, the patriarchal value-system is still much vivid in such a borderland small town like which has been presented in the *Chronicle*. More exactly, every villager already talks about romantic love meanwhile everyone thinks and acts according to the traditional patriarchal order —this is just one aspect of the insincerity of this value-system.

Taking now the second point of view, it can be seen that Angela is doomed to passivity not only in the matter of declaring her own will and of acting freely but she "has no voice" in fact. In the sole occasion when she tries to say a word for herself in the family discussion over the matter of marriage, she is silenced by her mother. After this, we can only hear from her a name, Santiago Nasar's name, at the fateful daybreak. Even the investigating magistrate can not draw more out of her later, recording her testimony (*Chronicle*, 101). The most forceful metaphor of the impossibility of linguistic self expression is that when, immediately after the tragedy, Angela awakes on her love felt for Bayardo, she can not communicate her feelings to him: She hopelessly writes her letters in vain for years, and when her husband returns to

her after twenty years, it turns out that he has not read any of the almost two thousand love letters she has written to him.¹⁹

Finally, closing the analysis from a feminist perspective, we have to point out that the court, by the acquittal of the twins, in fact reinforced the traditional patriarchal value-system of which inherent contradictions caused the tragedy. Nevertheless, this issue leads us to a more general investigation of the law's role in resolution of social conflicts, to a legal sociological reading of the novel.

It is a widely accepted statement in the literature of legal sociology that the courts actual social role can be localised not so much in their manifest function that is in resolving the individual social conflicts, but in their less direct, latent function which means the diffusion of the ideas and values embodied in law (Shapiro 1981; Cotterrel 1992, 225-232). The story presented in the *Chronicle* demonstrates both parts of the above statement: The ineffectiveness of the legal conflict resolution on the one hand, and the working of the law's ideological function on the other hand.

The following elements of the story enlighten the ineffectiveness of law: (1) the negligence of colonel Aponte, the local represent of the executive state power, who could have prevented the tragedy; (2) the ordering of an absolutely senseless and useless autopsy which is carried out not even by an expert, but by father Amador (*Ivi*, 72-77); (3) the investigating magistrate arrives at the scene twelve days after the murder; (4) the investigating magistrate is a "happy new parent" who can not clarify what happened; (5) the trial is appointed three years after the crime, what time the twins are spending in pre-trial detention, because they have not enough money for the bail (*Ivi*, 49). Moreover, Márquez describes these details sometimes with irony but other times in a quite sarcastic tune that culminates in the naturalistically detailed description of the autopsy turning into a tragicomic burlesque.

As for the ideological function of law, the last mentioned (5) element of our story indicates that the law does not only reinforce the traditional patriarchal value-system built on the inequality of the man-woman relation, but it also contributes to the social differences based on wealth. After all, regarding the acquittal judgement, the twins suffer detriment for the dragging on process only because they can not afford the bail.

Returning to the problem of the law's ineffectiveness, it can be explained partly by the infrastructural weakness of the state organisation: The small town presented in the novel lies in a distant corner of the country, far from any

¹⁹ "He [Bayardo San Román] was carrying a suitcase with clothing in order to stay and another just like it with almost two thousand letters that she had written him. They were arranged by date in bundles tied with colored ribbons and all unopened." (*Chronicle*, 96)

provincial or central governmental residence,²⁰ the available means of transport and of telecommunications are underdeveloped,²¹ and as it becomes clear from the (2) detail, colonel Aponte has a military experience and has no idea about the process of the civil adjudication.

On the other hand, starting from the point of the relative weakness of state we can involve the sociological theory of legal pluralism in our analysis.²² This theory emphasises the importance of the various behaviour-ruling systems competing with state law in determining the individual actions. It is quite clear that the rules of the established moral, sanctioning the patriarchal value-system, possess primary importance for the characters of the *Chronicle*. As compared to these moral rules, the state law has only secondary importance, what is indicated by the fact that the Vicario brothers immediately run to father Amador into the church to plead not guilty after the killing, instead of to the mayor (*Ivi*, 48-49).

From the problems of the weak state law and the legal pluralism we arrive to the investigation of those means of conflict resolution which are competing with the state law that is to the field of legal anthropology. For our present purpose, two topics offer themselves from this perspective: the theme of revenge and that of ritual.

The revenge is evidently one of the central motives of the *Chronicle*: The Vicario brothers decide to avenge the injury of family honour by blood revenge on the base of a codex of honour that has been defined by the customs. And they are, in turn, afraid of the Arab community's counter revenge just because of the same law. Besides bringing the findings of legal anthropology on the proto-legal institution of the revenge into mind (Verdier 1981-1984; Grönfors 1997), it is worth referring here to Richard Posner's micro-economic analysis of this phenomenon. He explains that the revenge is a socially more expensive and less certain means for maintaining the social order. The *Chronicle* mainly illustrates the eighth mentioned reason from the nine that Posner worked out in his writing: It is a substantial drawback of a revenge based system that, lacking differentiated institutions, it can not afford proper principles to make distinction

²⁰ The city of Riohacha, which is mentioned in the novel, really exists, and it lies in the eastern corner of Columbia's northern, Caribbean coastal region, more than six hundred kilometres from the capital, Bogota.

²¹ For example, according to the novel, the most important means of transport, besides walk on foot, are the horses and mules. Only two automobiles appear in the novel: one is Petronio San Román's, and the other is the one that the newly married couple got from him as a wedding present. In the time of the story the old paddle-wheeler steamboats just started to be succeeded by the turbine driven ones in the river shipping. Colonel Lázaro Aponte asks order from the governors of the province by the means of spark-telegraph.

²² About legal pluralism see e.g. Moore 1973; Griffiths 1986; 2003.

between the culpable and the morally or legally justifiably injuries (Posner 1988, 27-33). And in fact, the Vicario brothers have not checked on whether Santiago Nasar was really guilty or innocent. The uncertainty arising from this doubt is a primary source of the dramatic tension since neither the twins, nor the investigating magister, nor the narrator resuming the investigation, and finally neither we, readers, ourselves can be sure that we were not witnesses of a senseless death of an innocent man.

Finally, we can read the story of the *Chronicle* as, saying with Clifford Geertz (1973), a “thick description” of a social drama accompanied by bloody rituals.²³ We should refer here first to the insight of Max Gluckman (1965) who has firstly recognised the rituals’ importance in conflict resolution, studying the tribal societies. According to Gluckman, these means start to work when the political and legal ways are not suitable in the solution of certain conflicts which are usually generated by the inner structural tensions of the tribal societies, such as the existence of a tribal aristocracy or the social inequality of genders. As, among other authors, Victor Turner (1969) and Clifford Geertz (1957) have pointed out that the social drama is usually originated just from this kind of conflict, presenting in ritual forms the antagonisms of the social structure and these of the value-system legitimising the structure. So the social drama is a junction of various ritual processes which bolsters the communal sense of belonging and, at the same time, vents off the anger arousing from the frustrations caused by social contradictions what the members of the community believe insurmountable.²⁴ However, Turner has also called attention to that the rituals not only ensure the continuing maintenance of the social order but they are important sources —primary by affording the experience of *communitas*, of an original community, in the liminal phase of the ritual process— of the social changes and reforms, too.

Thus, the social drama described in the *Chronicle* is a junction of two rituals, in fact: The ritual of marriage and that of revenge. The ritual of marriage stops in its liminal phase, and before it gets into the following phase of reintegration the ritual of revenge is inserted in. Angela Vicario and Bayardo San Román are the “passengers” in the ritual of marriage, while the Vicario brothers in that of revenge. We can better understand the ritual character of murdering Santiago, if we point out a certain substantial feature of ritual: It is a sequence of formalised actions that has no inherent meaning in itself. Just this meaninglessness of ritual, its substantial emptiness, in other words, makes it

²³ We have to keep in mind that the act of defloration on the wedding night can convert the marriage itself into a bloody ritual, too. One meaning of the revenge in the *Chronicle* is to replace the blood “missing” from the act of consummation.

²⁴ For the analysis of the concept of “social drama” from the perspective of a narrative theory see Mittica 2010.

possible to join people of different beliefs, motives, and interests in a common action.²⁵

The ritual character of the marriage in the *Chronicle* becomes important in two ways: Partly since this offers an opportunity for Bayardo to demonstrate his wealth and higher social status, partly because Angela has been enforced into this marriage against her will. Angela and Bayardo after passing through the first ritual phase, through that of separation—which itself can be divided into the subsequent phases of courting, of engagement, and of wedding—arrive in the liminal phase at the wedding night. Since Bayardo brings Angela back to the parental house because of the “missing blood”, both get into an uncertain situation, so characteristic of the liminal phase: They are already spouses formally, but they immediately part from each other. The liminal phase of marriage that is generally limited to the wedding night meaning the consummation of marriage, and that is right away followed by the reintegration into an already higher social status, becomes a many years long period bringing a lot of suffering for them in their case. Although this dragged on initiation changes both of them: Angela discovers love and sets herself free from her mother’s tyrannical influence; as for the self-satisfied and cold hearted Bayardo, he forgives her at the end, and returns to her.

For the twins, the first phase of the ritual revenge is reduced to those several hours which have preceded the murder, when they are informed about that Santiago Nasar has taken the virginity of Angela, and they are waiting to kill him at the main square. The ritual separation can be observed in two directions: On the one hand, the twins do everything to communicate their intention, supposing that somebody will prevent them from executing the killing—but as if they were in a vacuum bubble, nobody wants to take them seriously. On the other hand, Santiago Nasar is in just the same kind of bubble:²⁶ The whole town knows already what is imminent, he is the only one who has not heard about it. The twins enter in the liminal phase of revenge with the act of killing, and this phase lasts until the end of the legal process, up to their acquittal after the pre-trial detention. Then comes the phase of reintegration of them: since they have proved that they are “real men”, they can step in a higher social status.²⁷

²⁵ On the meaninglessness of the rites see Winn 1991; Schreiner 1996; Szilágyi 2009.

²⁶ “It was a thick crowd, but Escolástica Cisneros thought she noticed that the two friends [Santiago Nasar and Cristo Beyoda] were walking in the center of it without any difficulty, inside an empty circle, because the people knew that Santiago Nasar was going to die and they didn’t dare touch him.” (*Chronicle*, 103-104)

²⁷ For Pablo Vicario, standing the trial of revenge was indeed a condition to marry his fiancée, Prudencia Cotes, who said to the narrator, that: “«I knew what they were up to, [...] and I didn’t only agree, I never would have married him if he hadn’t done what a man should do.»” (*Ivi*, 63)

Márquez emphasises the ritual character of the plot with various artistic means: we can firstly mention the proper Marquezean style of “magic realism”²⁸ that lends the sense of inevitability to the chain of events. That mixes epic colours in this “otherwise rather ordinary Latin-American drama” as the author himself called it (Mendoza-Márquez 1997), and still this feature of the novel just lightens the irrationality of the described actions.

Moreover, the element of “convertibility” of characters is worth special attention, since it contributes to the ritual character of plot. The convertibility of characters partly refers to the first phase of ritual in which the subjects, waiting for initiation, lose their individuality and they become uniformed, thereby changeable. At the same time the convertibility emphasises the irrational and fatal features of the plot, too.

The convertibility also appears naturally in a metaphoric way in the twins’ case. The two brothers, who are confusingly alike in their outward appearance, have different personalities that symbolise two different aspects of manhood: Pablo, who has learned his father’s trade and founds a family, and Pedro, who has a daring, violent and commanding nature (*Chronicle*, 59-60), they are alternating the initiative role between themselves in the course of the killing (*Ivi*, 60-63), so to say, animating the master-servant relationships’ dialectic, well known from Hegelian philosophy.

The similarity of the two victims, that of Santiago and Bayardo, is not so obvious but maybe even more important for the dramaturgy: Both men are young, wealthy, grossly materialistic, cold hearted²⁹ and perfectly incarnate the macho concept of “real man”. The convertibility of the victim and the “real” victim clips together the ritual of marriage and of revenge. The convertibility makes possible for Santiago Nasar to transform from the victim of murder into the perpetrator of rape meanwhile Bayardo San Román steps in his position as the “real” victim of the drama. A symbolic feature of Santiago’s personality also refers to his metamorphosis. He has the magic ability of transforming: His

²⁸ The substantive feature of the “magic realism” is that it laces fantastic or surrealistic elements in the otherwise everyday tone, conversational style descriptions. The “magic realism” has become a characteristic style in the 1960’s thriving Latin American literature, and it manifested in the works of such influential writers as Alejo Carpentier and Carlos Fuentes beside Márquez (Zamora-Faris 1995).

²⁹ As for Bayardo San Román, his materialism and cold heartedness can be observed not only in his above analysed relationship with Angela Vicario. These characteristics are exposed by the metaphoric episode when Bayardo buys the most beautiful house of the town for Angela from the old Xiux. The elderly widow can not resist the money offered by Bayardo, but not much later he dies in pain of he has to leave the place where he has been happy (*Chronicle*, 34-37). Santiago Nasar’s materialism becomes clear in the scene of the wedding party where he is occupied only in counting the costs of it, and he repeatedly promises for his friends that his own wedding will be even more grandiose (*Ivi*, 16-17).

favourite amusement is to dress the girls up in the bordello in each other's clothes in such a tricky way that even they can not recognise themselves in the mirror (*Ivi*, 66).

Summarising the educational experiences of the phase of re-contextualisation, it can be said that, maybe not surprisingly at all, the students display only a moderate interest in the surveyed theoretical investigations comparing to the problem of responsibility. The feminist perspective usually mostly grabs their interest. It seems to be that law students prefer act, that is judge, to contemplate, that is understand difficult social situations: This feature of their habit, however, may be explained also by their age.

Contextualisation

Arriving in the last phase of our interpretation, as a provisional closing up of the hermeneutic circle, let us investigate how these earlier explored layers of meaning are relating to the author's original intention, keeping in mind at the same time the above mentioned limits of this kind of undertaking. In other words, the authorial intention simply can never be determined exactly. One reason for this is that all the inner psychical motives and the outer compelling factors —beginning from the author's social and financial position up to the spiritual climate of her age and especially of the contemporary literary life—forming the authorial intention, never appear directly in her work only in an indirect way ruled by the own laws of artistic creative work transforming reality into art. This reason gives an explanation for the widely known paradox of Márquez's oeuvre: Meanwhile he has maintained a close friendship with Fidel Castro, one of the basic topics of his art has been the depiction of cruelty and of tyrannical power and of loneliness of the tyrant himself. A theme from which such great works as *In Evil Hour*, *The Autumn of the Patriarch* and *The General in his Labyrinth* has originated.

Another substantial obstacle of determining the author's intention is that the reader's or interpreter's own interests have an influence even on this kind of investigations. Our case is not an exception either: This explains the fact that in the following analysis, we shall devote special attention on those conditions that could have formed Márquez's views on law. We shall investigate beyond this, with regard to the earlier presented theories, in the phase of re-contextualisation, the author's personal relations to the patriarchal value-system presented in the novel and his opinion about man-woman connections in general.

Nevertheless, before we start analysing these topics, it is worth asking the question, how far the reality of novel is distanced from that of author? In other words, how far the work can be seen as a "report" recording Márquez's own personal experiences or as a "fiction" reflecting the author's fantasy? The

answer is also important, because it helps us estimate how far the “message” of the work expresses the authorial intention.

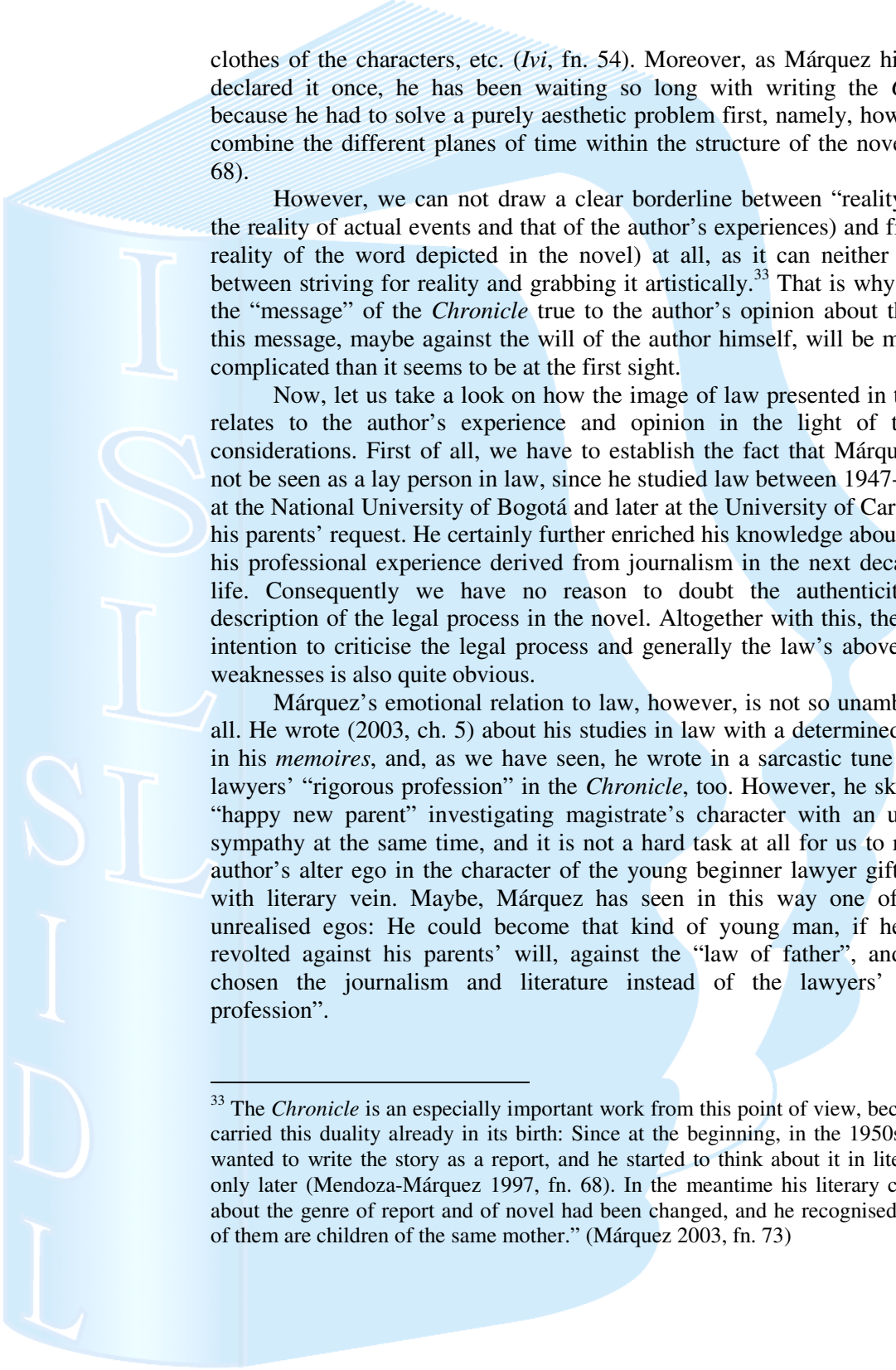
There are a lot of signs referring to that Márquez has tried to catch the social reality in this work; that is the emphasis lays here on the second part of the “magic realism”. In relation to his curriculum, this is supported by the fact that Márquez was working as a journalist in the first third of the period³⁰ — which was exactly thirty years long, between 1951 and 1981, according to the author’s memoirs (Mendoza-Márquez 1997, fn. 68)— while the novel has been formed out, and his explicit intention was at that time to establish the literary genre of “report” which had been nearly unknown in the contemporary Columbian literature. Considering Márquez’s whole oeuvre from this point of view, we can find *The Story of a Shipwrecked Sailor* —which was published in 1970 as a book but it had firstly appeared as a report series written for *El Espectador*, a Columbian newspaper, in 1955— as an antecedent, and, from the period after the *Chronicle*, we can mention the *News of a Kidnapping*, published in 1996, as a return to the genre of report. The fact that the author exceptionally speaks in first person in the *Chronicle* also points towards the realism. This fact would not have got much importance in itself, but since several members of the Márquez family³¹ appear among the characters, too, notwithstanding it shows that there is indeed a close connection between the narrator of the novel and the author’s person.

Although, the striving after realism and the autobiographic inspiration is evidently present in the novel, still we do not have to underestimate the importance of authorial fantasy. For example, Márquez met his future wife, Mercedes Barcha Pardo, and merrily proposed her another time and under other circumstances than the wedding ceremonies described in the novel.³² (By the way, the question, to which we shall return yet below, instantly turns up: Why does Márquez insert such a personal detail in the plot at all?) Neither the time of the novel corresponds to the real time of the original events that took place in 1951, while many sceneries of the *Chronicle* suggest the air of the 1930s, the years of Márquez childhood, a period which often appears as a background of his novels’ plot: The paddle-wheeler steamboat, the Model T Ford with official plates, the gramophone inlaid with mother-of-pearl, the spark-telegraph, the

³⁰ On Márquez’s life and works see Márquez 2003; Mendoza-Márquez 1997; Ruch 2003.

³¹ First of all, the author’s mother, Luisa Santiaga Márquez, after whose figure Márquez has carved many women characters in his writings, but she appears in the first and only time in the *Chronicle* under her own name. Beside her, Márquez’s younger sister, Margot, and his two younger brothers, Enrique and Jaime, also appear in the novel.

³² Márquez met Mercedes Barcha Pardo, whose parents were friends of the writer’s parents, in the summer of 1946 at Sucre on a vacation that the two families spent together, and the merry proposition happened at a school ball.



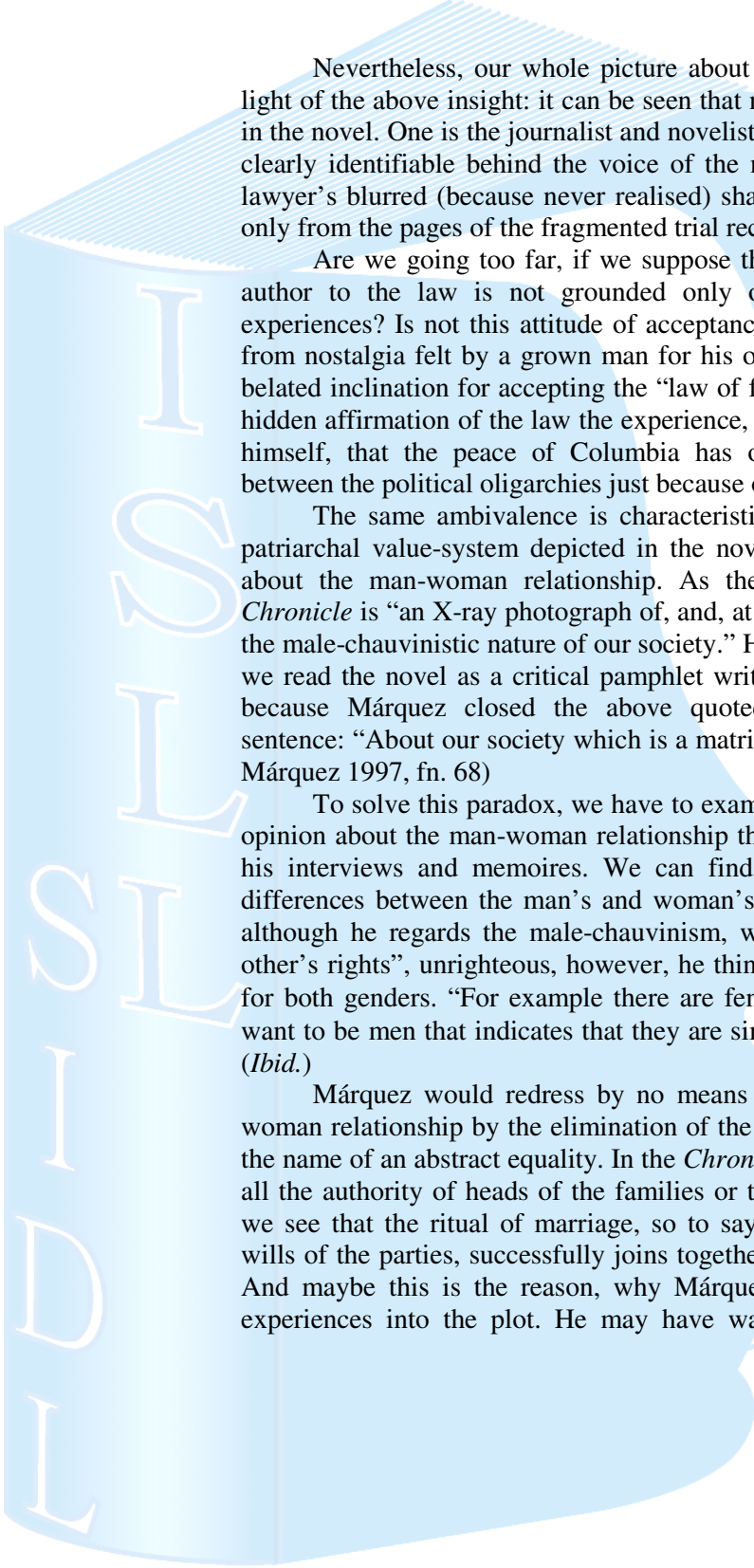
clothes of the characters, etc. (*Ivi*, fn. 54). Moreover, as Márquez himself has declared it once, he has been waiting so long with writing the *Chronicle*, because he had to solve a purely aesthetic problem first, namely, how could he combine the different planes of time within the structure of the novel (*Ivi*, fn. 68).

However, we can not draw a clear borderline between “reality” (that is the reality of actual events and that of the author’s experiences) and fiction (the reality of the word depicted in the novel) at all, as it can neither be drawn between striving for reality and grabbing it artistically.³³ That is why, although the “message” of the *Chronicle* true to the author’s opinion about the events, this message, maybe against the will of the author himself, will be much more complicated than it seems to be at the first sight.

Now, let us take a look on how the image of law presented in the novels relates to the author’s experience and opinion in the light of the above considerations. First of all, we have to establish the fact that Márquez should not be seen as a lay person in law, since he studied law between 1947-1949 first at the National University of Bogotá and later at the University of Cartagena for his parents’ request. He certainly further enriched his knowledge about law with his professional experience derived from journalism in the next decade of his life. Consequently we have no reason to doubt the authenticity of the description of the legal process in the novel. Altogether with this, the authorial intention to criticise the legal process and generally the law’s above analysed weaknesses is also quite obvious.

Márquez’s emotional relation to law, however, is not so unambiguous at all. He wrote (2003, ch. 5) about his studies in law with a determined rejection in his *memoires*, and, as we have seen, he wrote in a sarcastic tune about the lawyers’ “rigorous profession” in the *Chronicle*, too. However, he sketches the “happy new parent” investigating magistrate’s character with an undeniable sympathy at the same time, and it is not a hard task at all for us to realise the author’s alter ego in the character of the young beginner lawyer gifted-beaten with literary vein. Maybe, Márquez has seen in this way one of his own unrealised egos: He could become that kind of young man, if he had not revolted against his parents’ will, against the “law of father”, and had not chosen the journalism and literature instead of the lawyers’ “rigorous profession”.

³³ The *Chronicle* is an especially important work from this point of view, because it had carried this duality already in its birth: Since at the beginning, in the 1950s, Márquez wanted to write the story as a report, and he started to think about it in literary terms only later (Mendoza-Márquez 1997, fn. 68). In the meantime his literary conceptions about the genre of report and of novel had been changed, and he recognised that “both of them are children of the same mother.” (Márquez 2003, fn. 73)



Nevertheless, our whole picture about the novel is also reshaped in the light of the above insight: it can be seen that not one but two narrators are there in the novel. One is the journalist and novelist author's character whose shape is clearly identifiable behind the voice of the narrator, and the other one is the lawyer's blurred (because never realised) shape whose voice is speaking to us only from the pages of the fragmented trial record.

Are we going too far, if we suppose that this ambivalent relation of the author to the law is not grounded only on his own personal, individual experiences? Is not this attitude of acceptance springing against rejection only from nostalgia felt by a grown man for his own unrealised chances, or from a belated inclination for accepting the "law of father"? Can be read out from this hidden affirmation of the law the experience, maybe unconscious for the author himself, that the peace of Columbia has often become the victim of war between the political oligarchies just because of the lack of the rule of law?

The same ambivalence is characteristic for the author's relation to the patriarchal value-system depicted in the novel, and generally for his opinion about the man-woman relationship. As the author himself has stated, the *Chronicle* is "an X-ray photograph of, and, at the same time, a judgement about the male-chauvinistic nature of our society." However, it would be misleading if we read the novel as a critical pamphlet written in the spirit of feminism also because Márquez closed the above quoted statement with the following sentence: "About our society which is a matriarchal one, of course." (Mendoza-Márquez 1997, fn. 68)

To solve this paradox, we have to examine more particularly the author's opinion about the man-woman relationship that can be best reconstructed from his interviews and memoirs. We can find there that, as for Márquez, the differences between the man's and woman's social roles are given by nature, although he regards the male-chauvinism, what he defines as "usurpation of other's rights", unrighteous, however, he thinks that the concept could be used for both genders. "For example there are feminists" —says Márquez— "who want to be men that indicates that they are simply frustrated male-chauvinists." (*Ibid.*)

Márquez would redress by no means the unrighteousness of the man-woman relationship by the elimination of the differences between their roles in the name of an abstract equality. In the *Chronicle*, Márquez does not question at all the authority of heads of the families or the institution of marriage. Indeed we see that the ritual of marriage, so to say, against the meanwhile changed wills of the parties, successfully joins together Angela and Bayardo at the end. And maybe this is the reason, why Márquez has inserted his own personal experiences into the plot. He may have wanted to emotionally balance the

tragedy: While a marriage runs aground (provisionally) just at the same moment another relation, a happy one, begins.³⁴

One plausible reading is after all that Márquez criticises not the patriarchal value-system itself than rather the social inequalities distorting it and making it hypocritical. In his work we have seen what an important role was played by the social differences in the development of the tragedy. If we dig deeper, however, we shall find not the patriarchal value-system or the social differences but simply the cold-heartedness and the incapacity for love at the roots of all the miseries.³⁵ On the other hand, the flaring up love can overcome on all obstacles, they sprang either from the social inequality or from the traditional patriarchal value-system: At last, the spouses rejoined twenty years after the tragedy in the *Chronicle*. Love can defy even the flying away time and the death —as Márquez has written this theme so amazingly in his *Love in the Time of Cholera* and in the *Memories of My Melancholy Whores*.

Taking in account the didactic proceeds of the contextual interpretation, we have to establish the fact first that there have been up to now only a few students who would have chosen this approach for writing her essay. Theoretically this phase of interpretation helps to draw a fuller image of interpretational process, and to qualify the earlier presented theoretical perspectives. Maybe a more important role of this phase, however, to intensify the vibration in the students' mind bringing into play the dynamics of the contradiction between reality and imagination, identification and critical self-distancing. The vibration which produces the keynote not only for legal profession and literature but generally for creative human life: The oscillation of human spirit between the painful experience of human life's uncertainty and the discovery of freedom springing from just this uncertainty. This voice unavoidably sets us the task of self-determination. Only I could never be sure that the students will resonate on this tune.

³⁴ At that certain ball when Márquez met Mercedes Barcha Pardo, who was only thirteen at that time, she declined his proposition saying that first she had to finish her school. But after this, she had been waiting fourteen years faithfully to be married by Márquez.

³⁵ This statement is also supported by Márquez's ideas about the nature of power and tyranny: "Power is nothing but a replacement of love." (Mendoza-Márquez 1997, fn. 68)

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TOWARDS A HERMENEUTICAL APPROACH
TO LEGAL METAPHOR

by
Alberto Vespaziani

“Normative language is metaphorical” (Giuliani 1970, 379; 1975). With these words, Italian scholar Alessandro Giuliani called upon legal scholars to venture into the field of metaphor studies, in order to deepen their awareness of legal terms and doctrines. Legal practitioners and scholars work with words to resolve disputes and pursue justice, but also to obscure, mislead and further unspoken interests. The inevitable, sometimes insidious, use of metaphor reflects the ambiguous nature of law and of language; metaphors can be used to further communication and clarification, but also to produce disinformation and confusion:

[t]he entire history of legal thought could be studied from the standpoint of language as a sequence of metaphors: it would be enough to examine any ordinary controversy in legal scholarship to see that the different arguments are conditioned upon the accepted metaphors, analogies and the use of examples. We can see the demonstration of Blumenberg’s theory of the existence of key terms as *absolute metaphors*, which cannot be broken down further into logical terms: The impossibility of agreeing on the meaning of the term “law” is an example of this fact. The job of legal analysis is the correction of metaphors and the clarification of language. (Giuliani 1970, 379)¹

So Giuliani suggests that legal experts ought to study rhetoric. The purpose of this is not to sharpen our oratorical skills or our ability to create and employ seductive metaphors. The purpose in studying rhetoric derives from the fact that legal language is intrinsically metaphorical, for better or for worse.

¹ All translations in English are by the A.

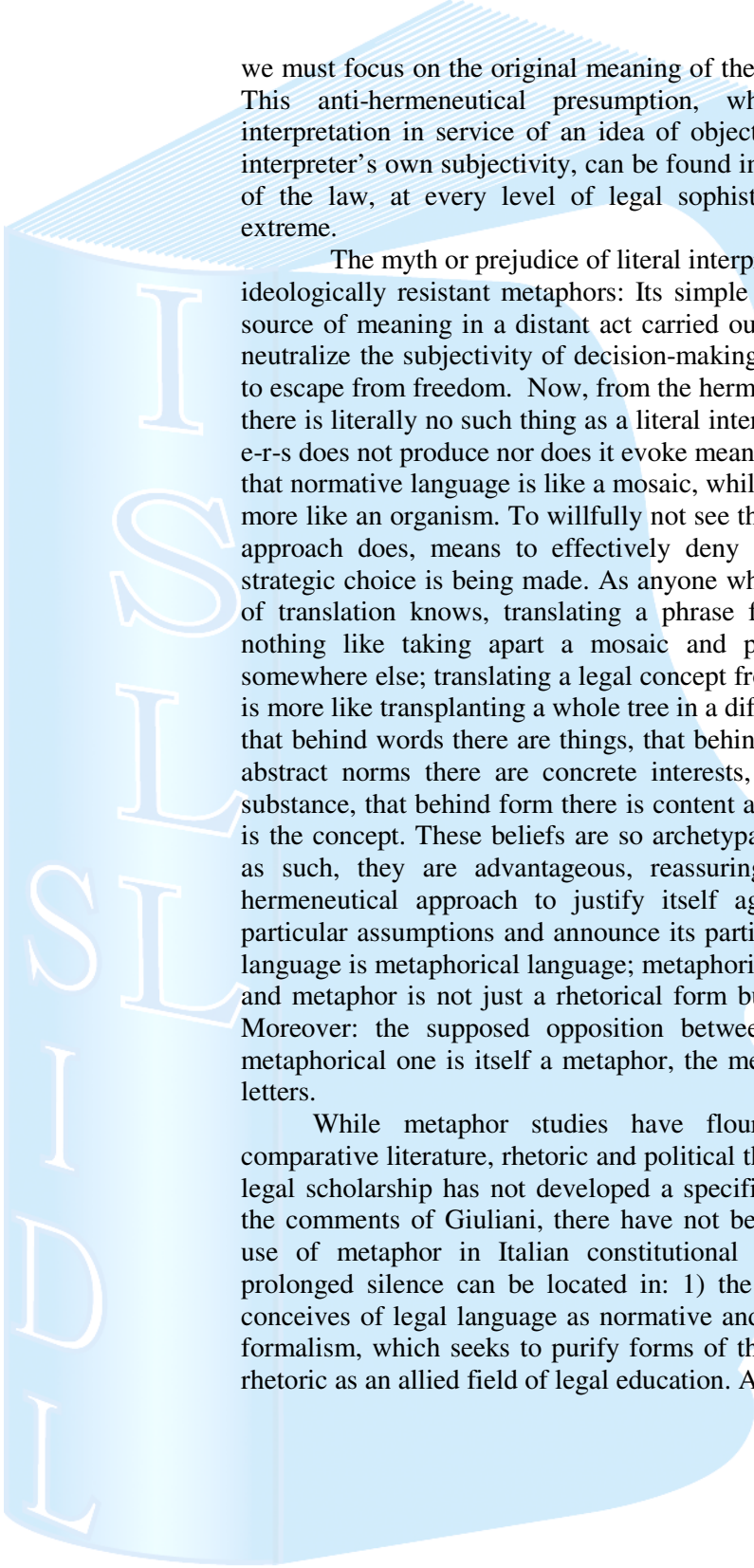
The ethical task of legal thought thus consists in uncovering the ideological projects hiding behind—or even within—legal metaphors.

The classic objection to the discussion of metaphors, raised by the traditional, professional, legal academic is that they are the concern of literature, maybe even philosophy, but have nothing to do with the life and practice of the law.² Underlying this belief is the assumption that legal language may be cleansed of the sentimental imperfections of poetry and literature, of the base materialism of economics and of the senseless mental gymnastics of theory and philosophy. But this assumption is not only epistemologically naïve. It also serves ideologically to justify the legal profession's project of manipulating the sentiments and interests of others for economic gain, political power and social privilege.

The legal thinker that instead accepts Giuliani's suggestion to travel down the uneven path of clarifying, reframing and correcting legal metaphors will have to critically examine the values underlying legal terms and expressions, as well as the power relationships implicit in legal doctrines' choices of words. For example, if we ask "why do we say 'sources of law'? Why do we use this a hydraulic metaphor?", we will begin to analyze the presumed nature of the "product" of a legal norm; the norm originates somewhere underground, and then gushes out of a kind of mountain spring (a pristine place presumably, this site of political power condensation), ready to be bottled and delivered to judges, government lawyers and other faithful servants passively carrying out orders received from on high, without asking too many questions about their content or value. Notice how the hydraulic metaphor of the source gives rise to the imperative and anthropomorphic metaphor of the "law-maker", which leads to the bureaucratic and military metaphor of the civil servant. Similar considerations follow when expressions like "head" of state, constitutional "organ", electoral "body" (to mention a few of the most obvious organic metaphors in constitutional law) are viewed through the lens of metaphor studies.

Another classic objection that the serious legal scholar might make against the study of metaphors appeals to the correctness of the literal meaning as opposed to the vague arbitrariness of metaphor. A precise, professional judge might argue that when it comes to interpreting the meaning of a legal provision,

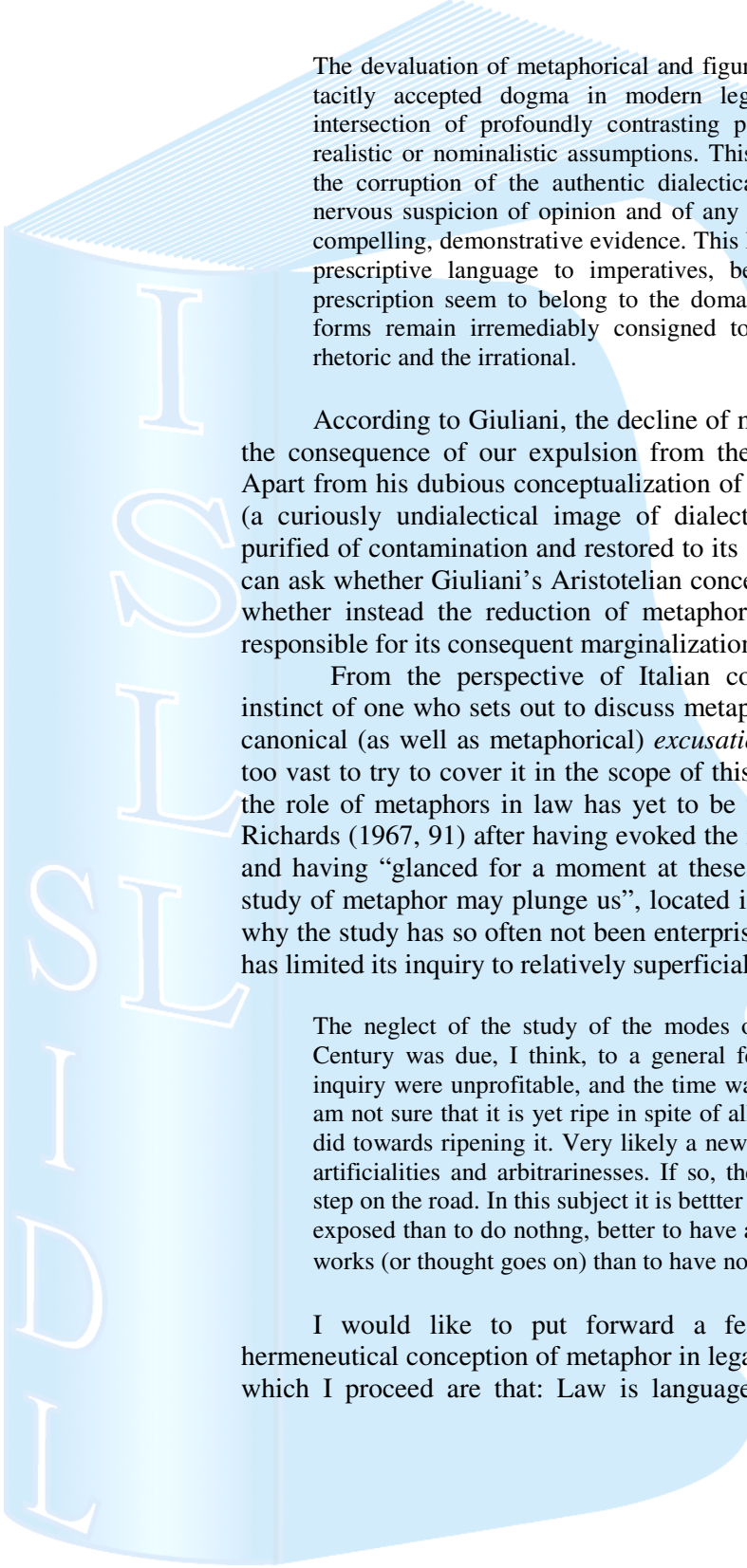
² The provocative aspect of metaphor studies has been well-described by Severo Sarduy (1981, 187): "Metaphor is the point at which language's plot thickens, the point at which it takes on such importance as to render the rest of the sentence flat and innocent. Like a yeast bubbling at language's continuous surface, metaphor confers a certain degree of denotative purity on all that comes near it. Purity. Let us underscore the moral implications of this word: metaphor as extraneous to the "nature" of language, like an illness; it impugns every rhetorical figure, dragging it into the forbidden zone, so much that Saint Thomas boasted of having no use for metaphors at all".



we must focus on the original meaning of the text as intended by the legislator. This anti-hermeneutical presumption, which denies the relevance of interpretation in service of an idea of objective meaning and thus denies the interpreter's own subjectivity, can be found in every legal culture, in every area of the law, at every level of legal sophistication and at every ideological extreme.

The myth or prejudice of literal interpretation is perhaps one of the most ideologically resistant metaphors: Its simple suggestion of an uncontaminated source of meaning in a distant act carried out by someone else, and its call to neutralize the subjectivity of decision-making, serve every jurist's latent desire to escape from freedom. Now, from the hermeneutic perspective, it is clear that there is literally no such thing as a literal interpretation. The sequence of l-e-t-t-e-r-s does not produce nor does it evoke meaning. Literal interpretation suggests that normative language is like a mosaic, while a hermeneutical approach sees it more like an organism. To willfully not see the forest for the trees, as the literal approach does, means to effectively deny that a qualitative, ideological or strategic choice is being made. As anyone who has crossed the shadowy valley of translation knows, translating a phrase from one language to another is nothing like taking apart a mosaic and putting the pieces back together somewhere else; translating a legal concept from one cultural context to another is more like transplanting a whole tree in a different soil. Still, the belief persists that behind words there are things, that behind logic there is being, that behind abstract norms there are concrete interests, that behind appearance there is substance, that behind form there is content and that behind the metaphor there is the concept. These beliefs are so archetypal, and thus so deeply-rooted (and as such, they are advantageous, reassuring and forgiving) as to force a hermeneutical approach to justify itself again and again, to set forth its particular assumptions and announce its particular critical program: Normative language is metaphorical language; metaphorical language is ordinary language; and metaphor is not just a rhetorical form but the very structure of language. Moreover: the supposed opposition between a literal interpretation and a metaphorical one is itself a metaphor, the metaphor of language as a series of letters.

While metaphor studies have flourished in semiotics, semantics, comparative literature, rhetoric and political theory (Rigotti 1989, 1992), Italian legal scholarship has not developed a specific interest in this subject. Beyond the comments of Giuliani, there have not been searching examinations of the use of metaphor in Italian constitutional discourse. The reasons for this prolonged silence can be located in: 1) the prevalence of positivism, which conceives of legal language as normative and imperative; 2) the prevalence of formalism, which seeks to purify forms of their content; and 3) the decline of rhetoric as an allied field of legal education. According to Giuliani (1970, 382):



The devaluation of metaphorical and figurative language has become a tacitly accepted dogma in modern legal thought: And it is the intersection of profoundly contrasting positions, which depart from realistic or nominalistic assumptions. This devaluation is connected to the corruption of the authentic dialectical tradition. At its root is a nervous suspicion of opinion and of any analysis that is not based on compelling, demonstrative evidence. This has produced the reduction of prescriptive language to imperatives, because only these forms of prescription seem to belong to the domain of the rational. The other forms remain irremediably consigned to the domain of persuasion, rhetoric and the irrational.

According to Giuliani, the decline of metaphorical language in the law is the consequence of our expulsion from the dialectical paradise of antiquity. Apart from his dubious conceptualization of an “authentic” dialectical tradition (a curiously undialectical image of dialectic, so insulated from discussion, purified of contamination and restored to its ancient and original splendor), one can ask whether Giuliani’s Aristotelian conception of metaphor is satisfying, or whether instead the reduction of metaphor to a mere trope is not partially responsible for its consequent marginalization.

From the perspective of Italian constitutional scholarship, the first instinct of one who sets out to discuss metaphors and law is to put forward the canonical (as well as metaphorical) *excusatio propter infirmitatem*: the field is too vast to try to cover it in the scope of this examination, a complete study of the role of metaphors in law has yet to be written, the literature is endless... Richards (1967, 91) after having evoked the intuitions of Shelley and Bentham, and having “glanced for a moment at these deep waters into which a serious study of metaphor may plunge us”, located in the “fear of them [...] one cause why the study has so often not been enterprising and why Rhetoric traditionally has limited its inquiry to relatively superficial problems”. Moreover (*Ivi*, 115):

The neglect of the study of the modes of metaphor in the later 19th Century was due, I think, to a general feeling that those methods of inquiry were unprofitable, and the time was not ripe for a new attack. I am not sure that it is yet ripe in spite of all that Coleridge and Bentham did towards ripening it. Very likely a new attempt must again lead into artificialities and arbitrarinesses. If so, their detection may again be a step on the road. In this subject it is better to make a mistake that can be exposed than to do nothing, better to have any account of how metaphor works (or thought goes on) than to have none.

I would like to put forward a few considerations in favor of a hermeneutical conception of metaphor in legal discourse. The assumptions from which I proceed are that: Law is language, legal language is metaphorical,

metaphorical language is ordinary language, legal language is as specialized as it is common, the meaning of legal discourse can be grasped only through a process of interpretation, metaphors work by essentially transacting between contexts, and that comparative law —whose basic and difficult task is translation— is in a privileged position to study their function. Metaphor studies and translation studies intersect in the zone of critical hermeneutics: In contrast to the other approaches to metaphor, only hermeneutics is concerned with the historical embodiment of the subject which is interpreting a text. It takes two ideas to make a metaphor, and so there are no metaphors in the dictionary, but only in discourse. The function of a critical study of metaphor is to suggest a technique for liberating ourselves from the defects of the interpretative traditions that we have received but not interrogated.

This paper will proceed in four steps: First, I will summarize the origins of the reduction of metaphor to a rhetorical trope, then I will discuss three main currents in modern metaphor studies: the semantic paradigm, the structuralist paradigm and the hermeneutical paradigm.³

I intend to argue that (1) language in general, and thus legal language in particular, is constituted by a mobile army of metaphors, by metaphors that point to other metaphors; (2) a non-metaphorical language does not exist; and (3) there are a series of prejudices, laden with ideology and false conscience, that resist this hermeneutical vision, such as the illusions of an objective substance underlying subjective appearances, of an ontological reality underpinning linguistic formulations, of an economic structure giving rise to a legal superstructure and of scientific rigor that is superior to a poetic indeterminacy.

The pioneer of contemporary metaphor studies, Hans Blumenberg, synthesized both the semantic and structural conceptions of metaphor while, in a Hegelian fashion, moving beyond them. While semantic views employed “paradigms” to focus on the mechanisms for displacing meaning, structural approaches studied the classifications of metaphor’s persuasive and coercive effects. For Blumenberg (1969, 114), by contrast, only a hermeneutic conception could do justice to the value of metaphor: A metaphor is not just an enunciation that can be reduced into concepts, nor a disciplinary strategy making use of manipulative rhetorics to subordinate individuals, but rather a point of condensation for historically-conditioned cultures and traditions. So, for example, European metaphor is more organic, while American metaphor is more mechanistic. The rhetorical origin of metaphor corresponds to its original

³ Like all classifications, this one is ultimately arbitrary and subject to criticism. As Barthes reminds us (2006, 53): “The passion for classifying always seems Byzantine to one who does not share it [...] and yet it is usually normal. The taxonomic option implies an ideological one: there is always a *placed* in the place of things: *tell me how you classify and I will tell you who you are*”.


ambiguity: “metaphor undoubtedly has its roots in the ambivalence of ancient rhetoric: the orator can let the truth ‘appear’ in its legitimate splendor, but can also make the false assume the same appearance as the truth”.

The “literal meaning” is in fact the flood lands formed by the disaggregation and commingling of the old metaphorical rocks. According to Blumenberg, there are thus some archetypal metaphors, continually invoked in order to designate phenomena for which there is no specific figure and that cannot therefore be reduced to conceptual terms (such as law, the force of law, constitution, state, sovereignty). From the hermeneutical standpoint, metaphor’s value is not objective and intrinsic, but rather depends on the context in which it is inserted and on the tradition from which it emanates.

In his masterpiece, *The Rule of Metaphor*, Ricoeur (1977, 6) argues for a hermeneutical conception: “metaphor presents itself as a strategy of discourse that, while preserving and developing the creative power of language, preserves and develops the *heuristic* power wielded by fiction”. “Through metaphor, subjectivity opens up to the tension of the truth, required by the fictitious aspect of the category or the concept. This is obviously a metaphorical, comparative truth, which interrogates the meaning of translation.” (*Id.* 1981, 152)

In the great majority of studies dedicated to metaphor, be they rhetorical or semantic, we do not see a due respect paid to the insuperable contribution of Nietzsche’s early essay on truth and lying (Nietzsche 1976). A master of metaphor, Nietzsche reflects on the birth and development of language in the phase of his own life in which he left philology to pursue the fusion of poetry and philosophy that would mark his unmistakable style. Nietzsche imagines a scene very much like the beginning of *2001: A Space Odyssey*: “In some remote corner of the universe, poured out and glittering in innumerable solar systems, there once was a star on which clever animals invented knowledge”. This fable imagines that the invention of language corresponds to the original sin of the claim to truth: The word is the result of three metaphorical leaps of translation: A nerve stimulus is translated into an image, an image into a sound, a sound into a word. Words cannot correspond to things, because they are the product of these leaps in the sensory realm. Even when comparing words in different languages that are supposed to mean the same thing, we come up against the ultimate impossibility of translation, and must disabuse ourselves of the false claim of actually grasping the noumenous, ontological essence of things:

The different languages, set side by side, show that what matters with words is never the truth, never an adequate expression; else there would not be so many languages. The “thing in itself” (for that is what pure truth, without consequences, would be) is quite incomprehensible to the creators of language and is not at all worth aiming for. One designates only the relations of things to man, and to express them one calls on the boldest metaphors. A nerve stimulus, first transposed into an image —



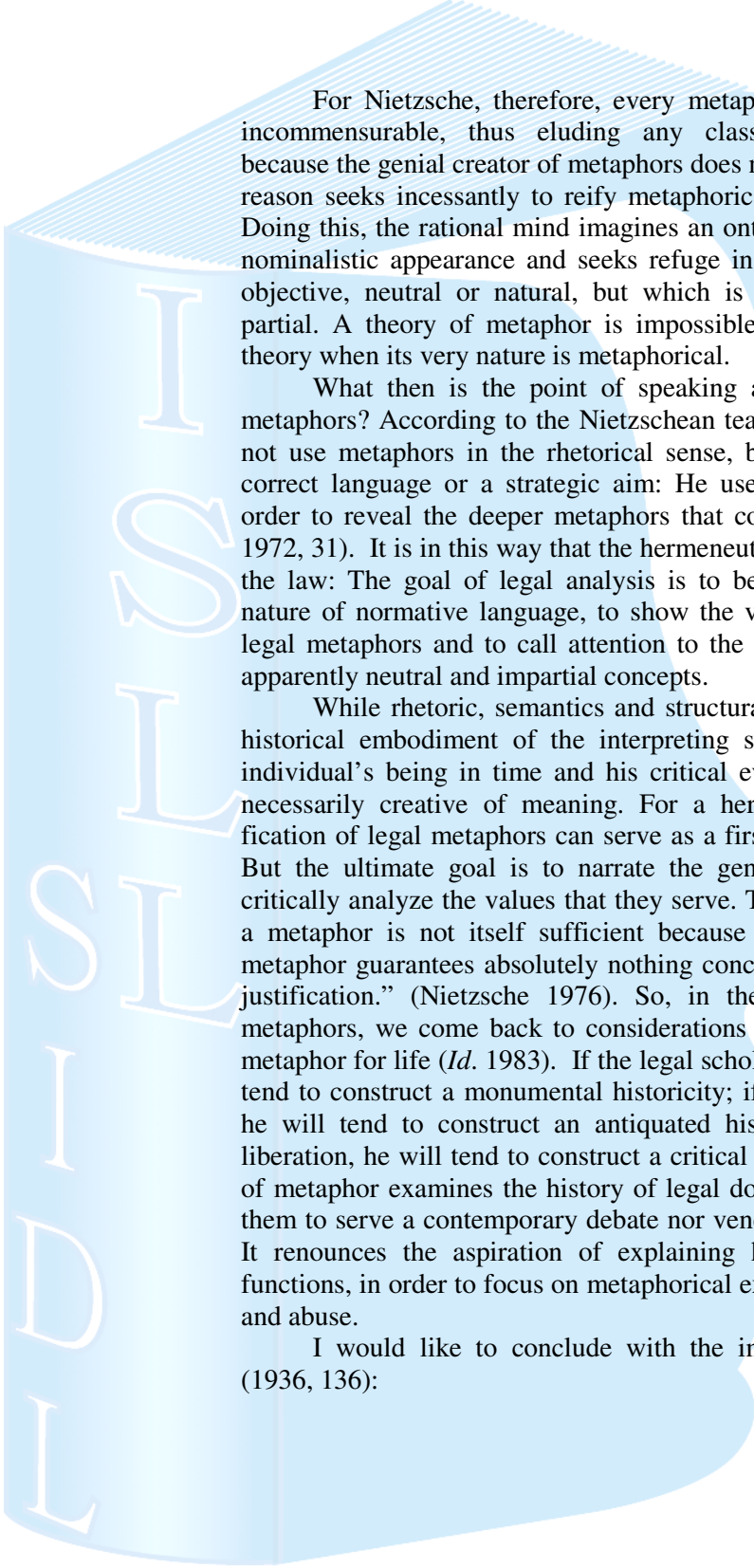
first metaphor. The image, in turn, imitated by a sound —second metaphor. And each time there is a complete overleaping of one sphere, right into the middle of an entirely new and different one. (Nietzsche 1976)

Nietzsche is not simply making the nihilistic argument that there is no truth. In emphasizing the importance of translation in the transformation of sounds into images and then into words, Nietzsche advances the paradoxical idea that the very “nature” of truth claims is metaphorical, that there is only metaphorical truth:

What, then, is truth? A mobile army of metaphors, metonyms, and anthropomorphisms —in short, a sum of human relations, which have been enhanced, transposed, and embellished poetically and rhetorically, and which after long use seem firm, canonical, and obligatory to a people: truths are illusions about which one has forgotten that this is what they are; metaphors which are worn out and without sensuous power; coins which have lost their pictures and now matter only as metal, no longer as coins. (*Ibid.*)

While metaphorical creativity is the pulse of life, the conceptual order is created and imposed by subjects incapable of abandoning themselves to artistic, mythological or onirical ecstasy. The metaphorical style is a sign of the fullness of life, just as the “demonstrative” style points to its impoverishment. Nietzsche lavishes particular scorn upon those who (like myself) make a profession out of scientific research, for having fled from metaphorical heights to seek refuge in dead concepts:

We have seen how it is originally *language* which works on the construction of concepts, a labor taken over in later ages by *science*. Just as the bee simultaneously constructs cells and fills them with honey, so science works unceasingly on this great columbarium of concepts, the graveyard of perceptions. It is always building new, higher stories and shoring up, cleaning, and renovating the old cells; above all, it takes pains to fill up this monstrosly towering framework and to arrange therein the entire empirical world, which is to say, the anthropomorphic world. Whereas the man of action binds his life to reason and its concepts so that he will not be swept away and lost, the scientific investigator builds his hut right next to the tower of science so that he will be able to work on it and to find shelter for himself beneath those bulwarks which presently exist. And he requires shelter, for there are frightful powers which continuously break in upon him, powers which oppose scientific truth with completely different kinds of “truths” which bear on their shields the most varied sorts of emblems. (*Ibid.*)




For Nietzsche, therefore, every metaphor is intuitive and singular and incommensurable, thus eluding any classification. Notwithstanding this, because the genial creator of metaphors does not learn from his own experience, reason seeks incessantly to reify metaphorical life in conceptual abstractions. Doing this, the rational mind imagines an ontological substance lying behind a nominalistic appearance and seeks refuge in a conceptual order, presented as objective, neutral or natural, but which is really arbitrary, value-laden and partial. A theory of metaphor is impossible because it reduces metaphor to theory when its very nature is metaphorical.

What then is the point of speaking around, through or by means of metaphors? According to the Nietzschean teaching, “the new philosopher does not use metaphors in the rhetorical sense, but rather subordinates them to a correct language or a strategic aim: He uses non-stereotypical metaphors in order to reveal the deeper metaphors that constitute every concept” (Kofman 1972, 31). It is in this way that the hermeneutics of metaphor has a meaning for the law: The goal of legal analysis is to become aware of the metaphorical nature of normative language, to show the values contained and furthered by legal metaphors and to call attention to the abuse of metaphor committed by apparently neutral and impartial concepts.

While rhetoric, semantics and structuralism do not need to consider the historical embodiment of the interpreting subject, hermeneutics regards the individual’s being in time and his critical evocation of his own traditions as necessarily creative of meaning. For a hermeneutical approach, the classification of legal metaphors can serve as a first step in a serious study of them. But the ultimate goal is to narrate the genealogies of legal metaphors and critically analyze the values that they serve. The genealogical reconstruction of a metaphor is not itself sufficient because “hardening and congealing of a metaphor guarantees absolutely nothing concerning its necessity and exclusive justification.” (Nietzsche 1976). So, in the face of historically embedded metaphors, we come back to considerations of the uses and disadvantages of metaphor for life (*Id.* 1983). If the legal scholar is active and ambitious, he will tend to construct a monumental historicity; if he seeks to preserve and revere, he will tend to construct an antiquated historicity; if he suffers and seeks liberation, he will tend to construct a critical historicity. A critical hermeneutic of metaphor examines the history of legal doctrines, without instrumentalizing them to serve a contemporary debate nor venerating them for a glorious future. It renounces the aspiration of explaining how law is created and how it functions, in order to focus on metaphorical expressions’ potential for distortion and abuse.

I would like to conclude with the important admonition of Richards (1936, 136):



It is an old dream that in time psychology might be able to tell us so much about our minds that we would at last be become able to discover with some certainty what we mean by our words and how we mean it. An opposite or complementary dream is that with enough improvement in Rhetoric we may in time learn so much about words that they will tell us how our minds work. It seems modest and reasonable to combine these dreams and hope that a patient persistence with the problems of Rhetoric may, while exposing the causes and modes of the misinterpretation of words, also throw light upon and suggest a remedial discipline for deeper and more grievous disorders.

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PATHOLOGIES OF LEGAL REASONING OR LEGAL REASONING AS
A PATHOLOGY? TWO INTERPRETATIONS OF *THE STRANGER*

by
Irem Aki and Wojciech Załuski

1. *Introduction*

The Stranger by Albert Camus naturally attracts the attention of legal philosophers: This is arguably the most frequently commented novel by the proponents of the Law and Literature movement. (See, e.g., Weisberg 1975-1976; Carroll 2004-2005; Posner 1998; Newman 2000, 87-117) The reason why *The Stranger* arouses so great an interest among legal scholars is that one of the important layers of this multilayered novel is a sophisticated critique of law or legal system. What is not clear, however, is how profound this critique is, i.e., how it should exactly be interpreted. The aim of our paper is to attempt to answer this question: we shall propose two different interpretations of this critique, compare them and try to decide which of them is more plausible. Let us briefly present these two interpretations. According to the first interpretation, *The Stranger* provides a non-radical critique of law: it reveals some pathologies of legal reasoning but does not imply that legal reasoning is inherently pathological, whereas according to the second interpretation, *The Stranger* provides a radical critique of law: It does much more than just reveal pathologies of legal reasoning —it implies that legal reasoning is inherently pathological.

Before we turn to a more detailed presentation of these interpretations, let us mention some “non-legal” readings of *The Stranger*. For instance, the novel can be read as revealing threats which society poses for an individual, or as describing the alienation of human being in the modern world of powerful institutions and political systems, or as presenting the conflict between the Epicurean form of life (which can arguably be assigned to Mersault —the novel’s protagonist) and the conditions of the modern society. These readings of *The Stranger* seem neither mutually exclusive nor exclusive with the “legal”

readings to be presented in the following sections; in point of fact, in order to give justice to the novel's richness, one would have to combine those "non-legal" and "legal" readings in some way (the task which is beyond our scope in this article).

2. Interpretation I: Pathologies of Legal Reasoning

As we have already mentioned, the first interpretation asserts that *The Stranger* provides a non-radical critique of law: It points to some avoidable pathologies of legal reasoning. Let us now develop this interpretation at greater length. According to the dominant —and, arguably, plausible— account of legal reasoning, in the process of legal decision-making the duty of judge is to be "within law". This means that a judge should base his/her legal decisions only on legal rules and principles. One type of rules excluded by this account of legal reasoning are various social conventions and other evidently extra-legal elements (e.g., the fact of having or not given religious convictions). There are two main reasons for the exclusion of such elements from among those elements that constitute the basis of legal verdicts. First, given the fact that social conventions are often not universally accepted by the members of a society and may change relatively fast, to let them be allowed for in the process of legal reasoning would arguably violate such important principles of law as objectivity and predictability, and, consequently, the principle of the rule of law. Second, social conventions do not have a moral character: Their infringements do not constitute *mala in se*, or, to put it alternatively, they do no harm to other people. Now, one admissible way of reading *The Stranger* is that this novel provides a critique of legal reasoning in so far as it is based on this kind of conventions. Mersault —the aforementioned novel's protagonist— committed a crime, homicide. However, in the course of legal proceedings Mersault is in fact judged also for his having failed to comply with social conventions unrelated to his crime, e.g., for his not having behaved properly, i.e., in accordance with social conventions, after his mother's death, or for his firm rejection to accept any religious convictions. The questions posed to Mersault in the course of legal proceedings clearly illustrate this problem; it may be worthwhile presenting some of those questions.

Mersault's lawyer finds it important to know whether the charge of Mersault's callousness during his mother's funeral is true:

"You must understand," the lawyer said, "that I don't relish having to question you about such a matter. But it has much importance, and, unless I find some way of answering the charge of "callousness," I shall be handicapped in conducting your defense." (Camus 1946, 41)

Mersault can hardly discern the connection between his case and his mother's funeral, but the lawyer insists that from the standpoint of the law such a connection exists:

"When I suggested that Mother's death had no connection with the charge against me, he merely replied that this remark showed I'd never had any dealings with the law." (*Ibid.*)

Indeed, the lawyer's remark was true. It is confirmed by the further course of the legal process. During the process of Mersault is more or less openly accused of not loving his mother, not shedding tears on her funeral, having a liaison with a woman just after the funeral. To put it generally: He is accused of flouting social conventions which in fact have nothing to do with his crime.

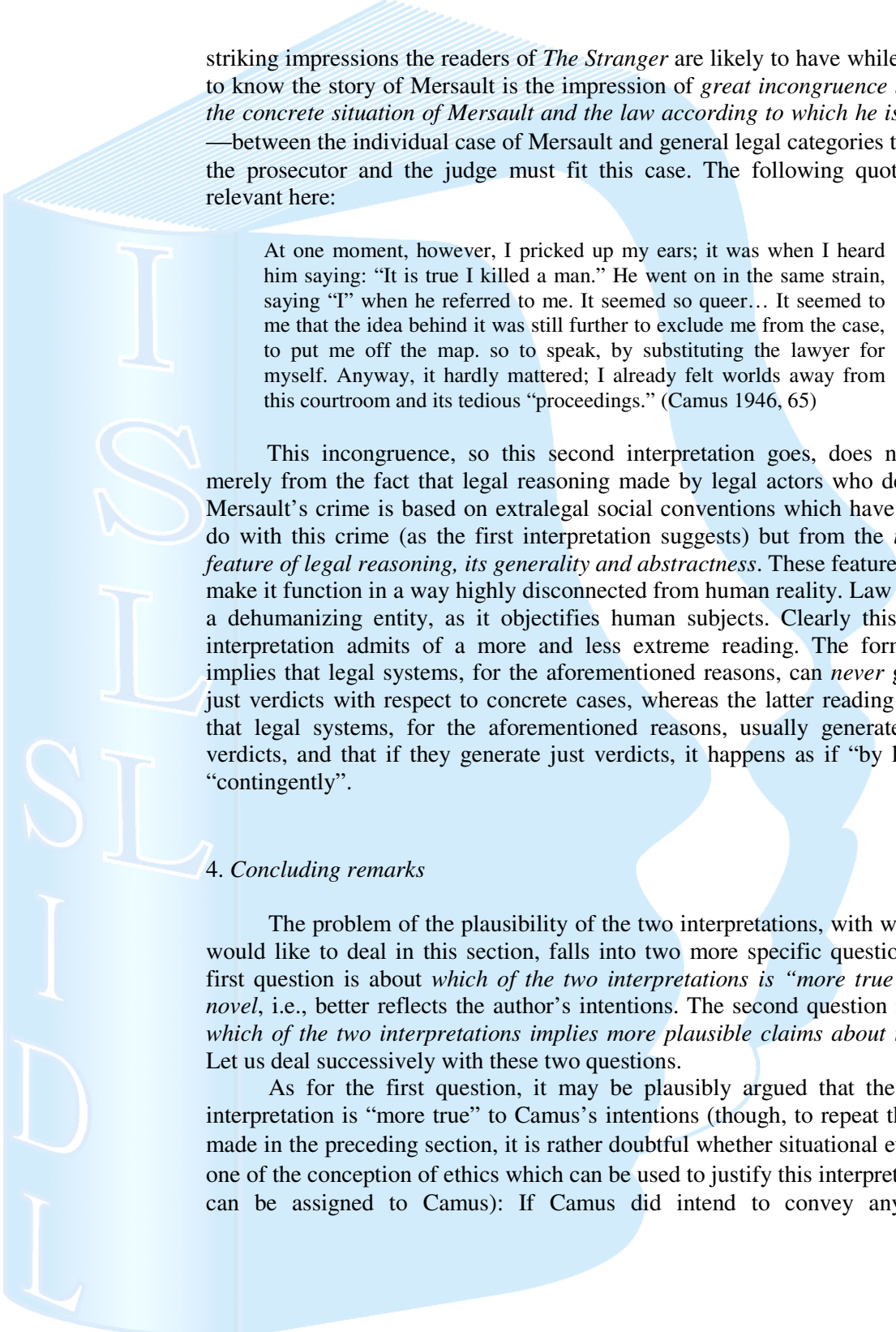
Mersault was finally sentenced to death. It is clear that extralegal social conventions unrelated to his crime played an important role in passing this sentence. This is pathology of legal reasoning—an obvious violation of the rule of law. The rule of law requires that legal rules and principles upon which legal verdicts are to be passed should be defined as precisely as possible. It is clear that they cannot be defined with *absolute* precision—contrary to what some positivistic legal philosophers have claimed. However, it seems equally clear that this legal basis cannot be defined as broadly and vaguely as it is in fact defined in the course of Mersault's process.

Three additional points may be in order here. *First*, our first "legal" interpretation of *The Stranger* does not imply that extra-legal elements should never be allowed for by judges in the course of legal process. It is clear that some of them should be *to some extent*: It is impossible to pass a just verdict focusing on an accused person's deed alone and neglecting his personality traits, for the simple reason that the knowledge of personality traits is often indispensable for defining the very character of the deed (say, whether it was premeditated or not); and in order to determine these traits, it may be necessary to know how the person tends to behave in various situational contexts. However, these elements should not become a *basis* for legal decisions as they in fact do in the course of Mersault's process. *Second*, this interpretation does not imply any answer to the question as to how great is Mersault's guilt, or, to put it another way, who "he really is": A passionate and disinterested truth seeker (the first reading), or, rather, an alienated man, deeply estranged from the society and living an empty and unreflective life (the second reading). The first reading, arguably closer to Camus' intentions, implies the view of society as a threat to an individual which bars, by imposing on him various arbitrary requirements and expectations, his free and full development. On this reading, which does not seem very plausible to us, Mersault is a hero of truth who refuses to accept falsities which the society requires its members to accept and

is sufficiently courageous tell unpalatable truths, e.g., “All normal people, I added as an afterthought, had more or less desired the death of those they loved, at some time or another.” (Camus 1946, 41) *Third*, this interpretation does not imply that legal reasoning is necessarily bound to be pathological: If it is conducted correctly, it can be non-pathological—it can lead to just decisions. This is the reason why we have dubbed “non-radical” the critique of law under this interpretation: It does not imply that legal reasoning is “by nature” or inherently pathological.

3. Interpretation II: Legal Reasoning as a Pathology

We have already mentioned that according to the second interpretation *The Stranger* provides a radical critique of law: It points at an unavoidable pathology of legal reasoning. This interpretation of *The Stranger's* critique of law can be called “radical”, as it assumes that legal reasoning is inherently pathological: it always—or at least usually— leads to unjust decisions. The source of legal reasoning’s pathological character lies in its *generality*—its being based on general rules intended to apply to *classes of situations similar in all relevant aspects*. However, according to this interpretation, such classes do not exist: Each concrete situation from such a putative class is in fact different from any other situation from this class not only in its irrelevant aspects but also in its relevant aspects. In other words, *each situation to be decided by law constitutes its own—one-element— class*. This means, in consequence, that no general rules can ever be rightly applied to concrete situations. Each situation needs to be judged according to a unique rule constructed by a judge only with the intention to decide this concrete situation. A judge should examine each concrete case in its uniqueness and concreteness, and not through the prism of abstract and general rules, since the latter perspective leads inevitably or almost inevitably to unjust judgments. The conception of ethics which can be appealed to buttress this critique of law is “situational ethics”. According to this conception of ethics any view of ethics assuming that normative reasoning consists in the application of general and abstract rules to concrete cases is deeply mistaken, as it neglects the complexity of concrete cases—the complexity on account of which these cases’ essential features can never be captured by this kind of rules. Since situational ethics was accepted by many existentialist thinkers (though it should be stressed that it is doubtful whether this conception of ethics can be ascribed to Camus), the second interpretation can be called “existentialist”, whereas the first interpretation can be called “non-existentialist”, as it does not rely on any specifically existentialist assumptions. What arguments can be put forward to support the claim that *The Stranger* can be interpreted along the above presented line? Arguably, one of the most



striking impressions the readers of *The Stranger* are likely to have while getting to know the story of Mersault is the impression of *great incongruence between the concrete situation of Mersault and the law according to which he is judged*—between the individual case of Mersault and general legal categories to which the prosecutor and the judge must fit this case. The following quotation is relevant here:

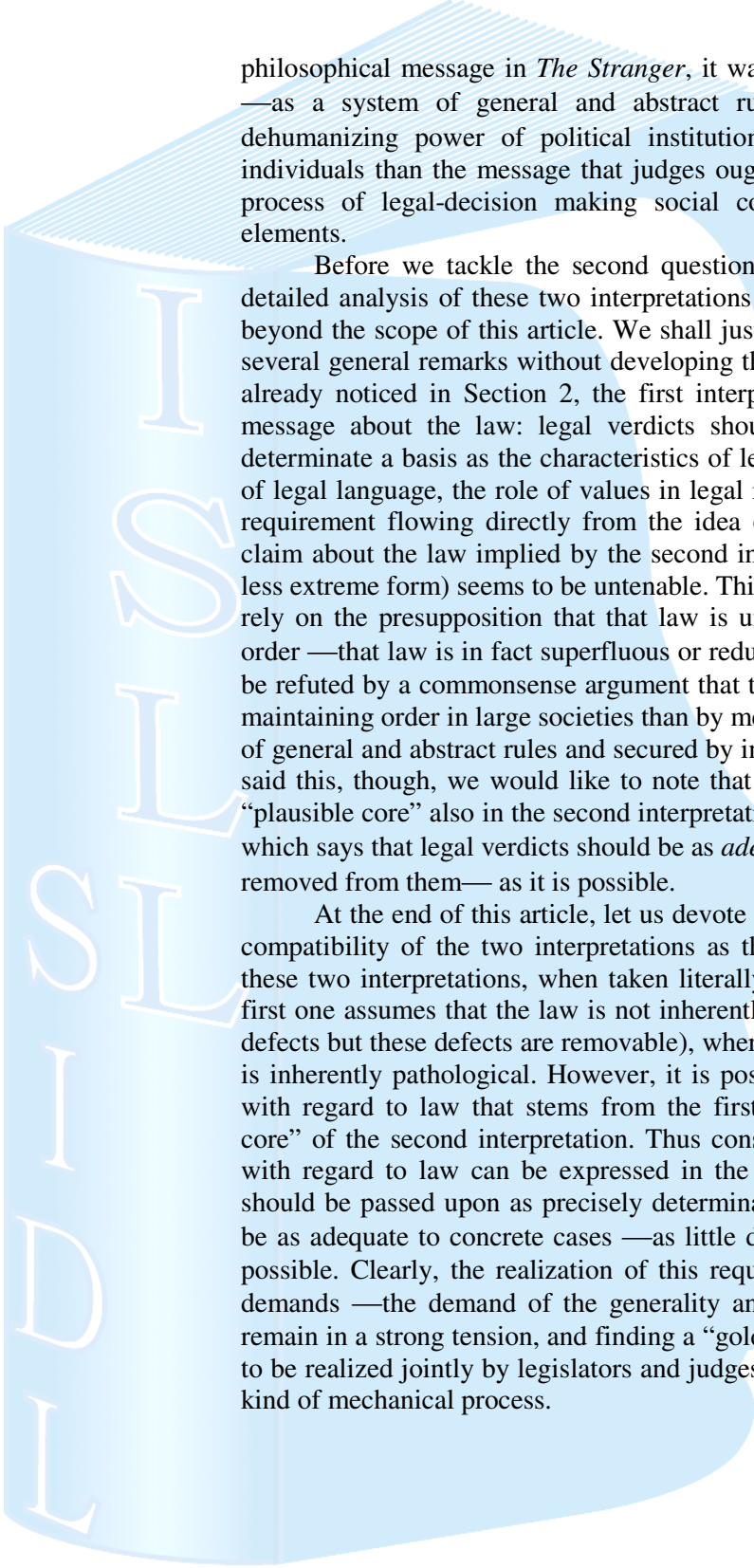
At one moment, however, I pricked up my ears; it was when I heard him saying: “It is true I killed a man.” He went on in the same strain, saying “I” when he referred to me. It seemed so queer... It seemed to me that the idea behind it was still further to exclude me from the case, to put me off the map. so to speak, by substituting the lawyer for myself. Anyway, it hardly mattered; I already felt worlds away from this courtroom and its tedious “proceedings.” (Camus 1946, 65)

This incongruence, so this second interpretation goes, does not stem merely from the fact that legal reasoning made by legal actors who deal with Mersault’s crime is based on extralegal social conventions which have little to do with this crime (as the first interpretation suggests) but from the *inherent feature of legal reasoning, its generality and abstractness*. These features of law make it function in a way highly disconnected from human reality. Law is, then, a dehumanizing entity, as it objectifies human subjects. Clearly this radical interpretation admits of a more and less extreme reading. The former one implies that legal systems, for the aforementioned reasons, can *never* generate just verdicts with respect to concrete cases, whereas the latter reading implies that legal systems, for the aforementioned reasons, usually generate unjust verdicts, and that if they generate just verdicts, it happens as if “by luck” or “contingently”.

4. Concluding remarks

The problem of the plausibility of the two interpretations, with which we would like to deal in this section, falls into two more specific questions. The first question is about *which of the two interpretations is “more true” to the novel*, i.e., better reflects the author’s intentions. The second question is about *which of the two interpretations implies more plausible claims about the law*. Let us deal successively with these two questions.

As for the first question, it may be plausibly argued that the second interpretation is “more true” to Camus’s intentions (though, to repeat the point made in the preceding section, it is rather doubtful whether situational ethics — one of the conception of ethics which can be used to justify this interpretation— can be assigned to Camus): If Camus did intend to convey any legal-



philosophical message in *The Stranger*, it was rather the message that the law—as a system of general and abstract rules and a manifestation of the dehumanizing power of political institutions— may constitute a threat to individuals than the message that judges ought not to take into account in the process of legal-decision making social conventions and other extra-legal elements.

Before we tackle the second question, let us at first emphasize that a detailed analysis of these two interpretations as the claims about the law goes beyond the scope of this article. We shall just confine ourselves to formulating several general remarks without developing them at greater length. As we have already noticed in Section 2, the first interpretation seems to convey an apt message about the law: legal verdicts should be passed upon as precisely determinate a basis as the characteristics of legal discourse (e.g., the vagueness of legal language, the role of values in legal reasoning) allow. This is a simple requirement flowing directly from the idea of the rule of law. However, the claim about the law implied by the second interpretation (both in its more and less extreme form) seems to be untenable. This is so because this claim seems to rely on the presupposition that that law is unnecessary for maintaining social order—that law is in fact superfluous or redundant. This extravagant claim can be refuted by a commonsense argument that there seems to be no better way of maintaining order in large societies than by means of formal law (i.e., composed of general and abstract rules and secured by institutionalized sanctions). Having said this, though, we would like to note that one can find a “rational core” or “plausible core” also in the second interpretation. This core is a simple intuition which says that legal verdicts should be as *adequate* to concrete cases—as little removed from them—as it is possible.

At the end of this article, let us devote a few words to the problem of the compatibility of the two interpretations as the claims about the law. Clearly, these two interpretations, when taken literally, are not compatible because the first one assumes that the law is not inherently pathological (it may have some defects but these defects are removable), whereas the second one assumes that it is inherently pathological. However, it is possible to combine the requirement with regard to law that stems from the first interpretation with the “rational core” of the second interpretation. Thus constructed “compound” requirement with regard to law can be expressed in the following manner: legal verdicts should be passed upon as precisely determinate a basis as possible and should be as adequate to concrete cases—as little detached from human reality—as possible. Clearly, the realization of this requirement is difficult, as these two demands—the demand of the generality and the demand of concreteness—remain in a strong tension, and finding a “golden mean” between them (the task to be realized jointly by legislators and judges) is more like an art than as some kind of mechanical process.



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