

# Apocryphal Jurisprudence

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## Clerical error

The purpose of the present article is to present to readers a conspectus of post-structural perspectives on legal theory which, I will argue, have been gravely misunderstood precisely because they have so often been discussed within the inappropriate terms of the bounded disagreement between CLS and positivism. My argument is rather to clarify the ways in which these new approaches ask very different questions and derive from different and irreconcilable concerns.

The way in which standard jurisprudential argument partakes of a peculiarly complicitous logic was strongly brought home to me as I read a recent book by William Lucy. *Understanding and Explaining Adjudication*<sup>1</sup> is not a text I found satisfactory, but nevertheless it is exemplary in its way. Because his analysis demonstrates so clearly the power and limits of the discourse against which I wish to contrast post-structural perspectives, I will frequently have occasion to return to it. Lucy begins by characterising jurisprudence as a battle between two warring tribes: “the orthodoxy” and “the heresy”. Now this is indeed a suggestive distinction, for again as he notes in the process of not pursuing it, the orthodox and the heretic are closer than one might suppose.<sup>2</sup> A heresy is a disagreement within a tradition, and a tradition, far from being a static structure of rules or doctrines, is an argument through time.<sup>3</sup> It establishes a conversation about certain subjects and provides the language through which the conversation is to go on. We may understand a tradition not as providing a series of answers, but rather as posing a series of questions. On one level, then, a heresy challenges the conventional answers *within* a tradition, but on another level, it confirms precisely the power and relevance of its questions.

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<sup>1</sup> William Lucy, *Understanding and Explaining Adjudication* (Oxford: Oxford University Press, 1999).

<sup>2</sup> Lucy, *op. cit. supra*, pp. 354, 386.

<sup>3</sup> Edward Shils, *Tradition* (Chicago: University of Chicago Press, 1981) 4.

Arianism and orthodoxy were divided on the divinity of Christ, but united on the centrality of the relationship between God the Father and God the Son on which the question turned. Protestantism and Catholicism divided on the relationship between God, priest, and book, but again agreed on the eternal importance of just these questions.

To wage war requires a disagreement as to denomination, but an agreement as to currency. The field of mars must be determined; cannons must meet cannons; victory must be recognisable.<sup>4</sup> Ironically, hierarchs and heresiarchs, patron saints and sinners, desperately need each other, for they mutually constitute their own importance: what they reject on the level of content, they sustain on the level of discourse.

Kafka presents a similar dynamic in ‘The problem of our laws.’<sup>5</sup> According to the overwhelming majority,

Our laws are not generally known; they are kept secret by the small group of nobles who rule us. We are convinced that these ancient laws are scrupulously administered... There is a tradition that they exist and that they are a mystery confided to the nobility, but it is not and cannot be more than a mere tradition sanctioned by age, for the essence of a secret code is that it should remain a mystery.

The consequence of such a view is a hope and a desire that, if only our knowledge were great enough, and our tools of analysis precise enough, “everything will have become clear, the law will belong to the people, and the nobility will vanish.” Yet for a small party, such an exercise in rational reconstruction, a search for “law’s integrity”,<sup>6</sup> is futile.

When in accordance with these scrupulously tested and logically ordered conclusions we seek to adjust ourselves somewhat for the present or the future, everything becomes uncertain, and our work seems only an intellectual game, for perhaps these laws that we are trying to unravel do not exist at all. There is a small party who are actually of this opinion and who try to show that, if any law exists, it can only be this: The Law is whatever the nobles do. This party see everywhere only the arbitrary acts of the nobility, and

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<sup>4</sup> This mystery of closure, by which both parties come to an agreement as to who won a war and thus put an end to it, is analyzed at length in Elaine Scarry, *The Body in Pain* (New York: Oxford University Press, 1985), Part I.

<sup>5</sup> Franz Kafka, “The Problem of Our Laws” in *Collected Stories*, trans. Willa and Edwin Muir (London: Everyman’s Library, 1993), 404-406.

<sup>6</sup> Ronald Dworkin, *Law’s Empire* (Cambridge, Mass.: Belknap Press, 1986), Chapter 5.

reject the popular tradition.

The consequence of such a view is a nihilism which threatens to take down not only the legal order but the social order with it.

A clearer statement of the matter at issue between HLA Hart and the Realists, between Ronald Dworkin and Critical Legal Studies,<sup>7</sup> could scarce be imagined, for it combines the articulation of these positions with an explanation of the distinct emotional resonances which give them their urgency. But in reading this lesser known parable, one is struck above all by the self-enclosed logic which admits of no alternatives but these two. The two parties to the debate are destined to continue their wary encirclement endlessly, like Alpha Centauri: two stars caught in the thrall of their mutual gravity.

From the readers' perspective, other questions seem more pressing, precisely because they fall outside the framework of the parties: why is this belief so important? whence did it arise? how is it justified? what can this conversation illuminate for us about this society and our own? In the light of these, and other, questions, the truth or falsity of their beliefs (are there such laws? are they written down? do they bind the nobles?) seems neither here nor there. On the contrary, what is interesting includes what is shared by these perspectives, and what cannot be countenanced by either. Above all, one senses a mutual complicity in this dialogue of the damned. The argument, by the bounded nature of the disagreement, confirms to both sides the central importance of the issue over which it is fought. Yet to the reader, what matters is not the content of the argument—medieval scholastics fighting to the death over obscure points of exegesis—but the *discourse* in which it is situated.

The choice for scholars is not just between the orthodoxy or thesis of positivism and the heretical antithesis of Critical Legal Studies; nor yet to accomplish a species of synthesis, which perhaps deserves the label *ecumenical*. These are all ways of maintaining a tradition. But it is also possible to look where the tradition is blind, to engage with different concerns entirely, and thus to develop a new language whose strength lies in its very incommensurability.

Feminist and critical race theory has in recent years mounted perhaps the strongest challenge to the dominant jurisprudential tradition. I do not wish to deal with that challenge here because I believe that while the arguments of these schools have been and are the subject of on-going debate, their importance is now unassailable. But at the same time, a very

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<sup>7</sup> HLA Hart, *Concept of Law* (Oxford: Clarendon, 1961); Karl Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Chicago: University of Chicago Press, 1962); Dworkin, esp. at pp. 271-2.

new language of legal theory has begun to circulate, at first subterranean and now with increasing confidence.

In its refusal to answer the traditional questions, however, the new language has been a source of considerable perplexity; accordingly these alternatives have been acknowledged little and appreciated less. William Lucy is again illuminating. For the canon of heretics he addresses contains little that was not first presented fifteen years ago—indeed, there is a distinctly Reaganesque feel to a list which is largely limited to the work of Unger, Kennedy, Kelman, Singer, and Dalton.<sup>8</sup> A bonfire of the vanities.<sup>9</sup> Indeed, critical legal scholars themselves seem to have composed their obituaries well over a decade ago.<sup>10</sup> Shockingly, for example, James Boyle's bibliographic *Critical Legal Studies*, published in 1992, contains little after 1984 and nothing later than 1987.<sup>11</sup>

Lucy's focus on scholars whose work constituted the heyday of Critical Legal Studies is understandable in an evaluation of heresy, yet it draws attention above all to the limited representation of modern scholarship such an analysis affords. What on earth has been happening since?

Part of the answer can be found in the exceptions which Lucy notes. He includes Drucilla Cornell and Pierre Schlag in his analysis, and by so doing unfortunately conflates modernist and post-structural approaches to law. Clearly these two projects draw on fundamentally different intellectual influences and perspectives.<sup>12</sup> Lucy is aware of the problem. Nevertheless he attempts to analyse post-structuralism in terms of its success in

<sup>8</sup> Undoubtedly, Lucy's analysis includes much more recent work by these writers, in particular Roberto Unger, *Politics: A Work in Constructive Social Theory*, vols. 1-3 (Cambridge, Mass.: Harvard University Press, 1987) and Duncan Kennedy, *A Critique of Adjudication* (Cambridge, Mass.: Harvard University Press, 1997), but these and other works reflect the development of projects and argument begun much earlier: Lucy, *op. cit. supra*, p. 7.

<sup>9</sup> Tom Wolfe, *The Bonfire of the Vanities* (New York: Bantam Books, 1988).

<sup>10</sup> See for examples of this synoptic tendency, Peter Fitzgerald and Alan Hunt, 'Critical Legal Studies: An Introduction' (1987) 14 *Journal of Law and Society* 5; Robert Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57; Allan Hutchinson, ed., *Critical Legal Studies* (Totowa: Rowman, 1989); Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge, Mass.: Harvard University Press, 1987); Mark Tushnet, 'The Critical Legal Studies Movement' (1984) 36 *Stanford Law Review* 623; Roberto Unger, 'The Critical Legal Studies Movement' (1983) 95 *Harvard Law Review* 561.

<sup>11</sup> James Boyle, *Critical Legal Studies* (Aldershot: Dartmouth Press, 1992).

<sup>12</sup> Undoubtedly CLS writers themselves sometimes show an appalling carelessness in confounding them: Kennedy, *Critique, op. cit. supra*, p. 340; Morton Horwitz, 'History and Theory' (1987) 96 *Yale Law Journal* 1825; Lucy, *op. cit. supra*, pp. 9-10.

answering the demands of the orthodox tradition—and unsurprisingly finds it wanting. Still more disappointing is Lucy's treatment of British and French critical legal theory, reduced for its troubles to a couple of cursory footnotes according to which the very distance between these approaches and standard US jurisprudence is treated as a reason to exclude them from the debate.<sup>13</sup>

There is, then, an emerging non-traditional literature which I wish, by way of analysis, and later by case study, to explore and distinguish. Those who have contributed to it have been largely British, Australian or European, self-consciously influenced by contemporary continental writing—literary or philosophical, sociological or psychoanalytic—and avowedly eclectic in their disciplinary orientation. This emergent literature is not orthodox. Neither is it heretical. Rather, what is being developed here is a new genre of legal theory—I do not say *the* genre or seek to over-estimate its importance—which might be termed *apocryphal jurisprudence*.

A deliberate irony attaches to the term. It is on the one hand appropriate, since apocryphal jurisprudence is, like its namesake, concerned with the circulation of stories in a culture: as we will see, many of its practitioners are interested in ideas of myth and reality, of the historical contingency of authority, and of the importance of narratives in the construction of our beliefs. Yet 'apocryphal' seems larded with deception and inauthenticity. An apocryphal story is fiction dressed up as history. Not so; the very history of the biblical Apocrypha suggests something more complicated. These religious texts were refused the status of holy writ only at the time of the Reformation. Neither was it their authenticity or their age but rather the dramatic and unusual nature of the stories therein that constituted the grounds of their exclusion. They were a congeries of writing inconsistent with and therefore dangerous to what *became* the canon. The supposed illegitimacy of the Apocrypha demonstrates the power of the orthodoxy to set the terms of the debate and to exclude forever texts that proved impossible to domesticate.

An 'apocryphal' story suggests something invented after the event. In fact, the opposite is more nearly true. It is the bestowing of legitimacy on one story rather than another that comes after the event, as an exercise of power and not of knowledge—or rather, in Foucauldian terms, as an exercise of power which *thereby* constitutes what is to be counted as knowledge and what, henceforth, is not. The connotation of invention or untruth is merely a function of the orthodox perspective from which it is viewed and which has delegitimised it through the power of semantics. The apocryphal is not inauthentic but *apokrupto*, hidden from view. And at the

<sup>13</sup> Lucy, *op. cit. supra*, p. 7 and esp. footnotes 24 and 25.

same time, whatever interest the apocryphal yet possesses derives from its subversive position, not opposed to the canon but, far more subversively, outside of it. What would it mean, we might ask, to reject a hegemony which equates the hidden with the untrue, the marginal with the irrelevant?

Yet no discourse is parthenogenic, no tradition invented but from some position.<sup>14</sup> Apocryphal jurisprudence remains traditional in two distinct ways. First, its representatives have enriched the study of law with a variety of alternative, yet in their own realm well established, intellectual traditions. In what follows, I will explore the distinctive elements which these traditions have contributed to the study of law in terms of their discourse, their aesthetics, their ethics, and their style. Secondly, by analysing as discourse the issues whose truth-claim is at stake within the orthodox heresy, the apocrypha remains engaged with the tradition of ‘understanding and explaining adjudication’, albeit by explicating its difficulties and not by attempting to resolve them. To illustrate this I will, in the last part of this essay, offer a regrettably brief analysis of the different insights which an apocryphal approach to the case of *Kruger v The Commonwealth* might afford. A case concerning a claim of genocide brought by aboriginal peoples against the government of Australia might be thought an appropriate coda to an essay centred on histories lost, erased, and *apokrupto*.

## Different differences

### Discourse

What *unites* the orthodox and the heresy against this jurisprudence is, somewhat surprisingly, its faith in rules. While the orthodoxy is in denial, the heretics are in despair.<sup>15</sup> Both parties would appear to agree, by and large, with the proposition that the legal system ought to be a ‘system of rules’ in which adjudicators decide cases relatively constrained by relatively determinate standards whose application is justifiable in principle.<sup>16</sup> They disagree mainly over whether this ideal has really been met. In this regard, then, HLA Hart is quite right to have characterised the Realists as “disappointed absolutists”.<sup>17</sup> Beneath the intellectual efforts of CLS ineradicable traces of desire remain. The attempt to develop, at the level of

<sup>14</sup> Eric Hobsbawm, ed., *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983).

<sup>15</sup> For a fuller exposition of the argument that follows, see Desmond Manderson, *Songs without Music: Aesthetic dimensions of law and justice* (Berkeley: University of California Press, 2000), pp. 162-69.

<sup>16</sup> Lucy, *op. cit. supra*, p. 2.

<sup>17</sup> Hart, *op. cit. supra*, p. 139.

content, alternatives to legal positivism's structures and principles, merely replicates, at the level of structure, the same old problems. The substitution of 'new' rights for old, or 'new' hypotheses about human nature and human society for old, does nothing to transcend the indeterminacy of rights or the vacuity of abstraction: it merely replicates them.

Thus no less a luminary than Roberto Unger, at the end of his seminal book, turns to 'the imperfections of knowledge and politics', and betrays in the final analysis a desire for certainty in law as in all things. He wishes to have—he *needs* to have—a complete and perfect understanding of reality'.<sup>18</sup> But only God can achieve this; only God can 'complete the change of the world' of which human beings are not capable.

But our days pass, and still we do not know you fully.  
Why then do you remain silent? Speak, God.<sup>19</sup>

On the level of vision and faith, which is to say *doxa*, CLS agrees with the *ortho*: their disagreement lies purely on the level of reality.<sup>20</sup> Theirs is a version of the Manichean heresy, for to a remarkable degree both sides believe in the goodness of the god of rules. They only differ as to the extent of the power of the Devil in the details.

The alternative for most CLS writers is simply an abandonment of law for the safety of some kind of participatory politics, of giving up on the promise of law altogether.<sup>21</sup> For Unger, as for Kennedy, the solution is "to place legal analysis in the service of democratic experimentalism".<sup>22</sup> But this fundamentally confounds law's possibilities as discourse, with its failure to achieve closure. This approach, therefore, simply does not accept the logic of its own arguments (as Lucy rightly shows).<sup>23</sup>

Undoubtedly the heretic and the apocryphal have many aspects in common. Foremost amongst these is the claim to the indeterminacy of legal judgment, and the impossibility of right answers in legal cases, a subject on which much ink has been shed.<sup>24</sup> Yet it is disheartening to see so many

<sup>18</sup> Roberto Unger, *Knowledge and Politics* (New York: Free Press, 1975), p. 290.

<sup>19</sup> *Ibid.*, p. 295.

<sup>20</sup> Robin West, 'Jurisprudence and Narrative' (1985) 60 *New York University Law Review* 145 argues that this contrast of *visions* helps explain why various jurisprudential schools find themselves not just in dispute but at war.

<sup>21</sup> Thus see Unger, *op. cit. supra*; Allan Hutchinson, *Dwelling on the Threshold* (Toronto: Caswell, 1988), Peter Gabel and Duncan Kennedy, 'Roll Over Beethoven' (1984) 36 *Stanford L. Rev.* 1.

<sup>22</sup> Unger, *What Should Legal Analysis Become?* (London: Verso, 1996), p. 23; see also *Politics: A Work in Constructive Social Theory*, vols. 1-3 (Cambridge: Cambridge University Press, 1987).

<sup>23</sup> Lucy, *op. cit. supra*, pp. 284-93, 342-48.

<sup>24</sup> For a discussion and survey, see Lawrence Solum, 'On the Indeterminacy

luminaries of CLS continue to make the same old arguments in the same old ways.<sup>25</sup> From an alternative perspective, what is interesting is not the endemic nature of ‘tensions’ or ‘contradictions’, or the process by which rules are consumed by exceptions, and formalism made vulnerable to context.<sup>26</sup> Rather, these resources and alternatives have always been available within the common law, and must be so in language governed by the impossibility of constituting a finite and objective text. Here, the influence of Jacques Derrida and the principle of *différance* is palpable;<sup>27</sup> every text differs from and defers to another in a cycle of endless reference that cannot be halted by some decisive brush with reality or even with an *ur-text*. Closure is simply not a possibility. The study of rhetoric, therefore—the methods by which established meanings are derived, or rather, the means by which alternative meanings are hidden—illuminates for us not some curial *failure*, against the lights of an impossible certainty, but rather what counts as success in this particular context. Accepting as inevitable the impossibility of ‘algorithmic justice’,<sup>28</sup> the apocryphal looks instead at what works and how—at the power of rhetoric as the triumph and not the defeat of legal argument, and at the trace of the *apokrupto* that remains unvanquished.<sup>29</sup>

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Crisis: Critiquing Critical Dogma’ (1987) 54 *University of Chicago Law Review* 462; Peter Drahos and Stephen Parker, ‘The Indeterminacy Paradox in Law’ (1991) *University of Western Australia Law Review* 305.

<sup>25</sup> Kennedy, *A Critique of Adjudication*, *op. cit. supra*; Mark Tushnet, ‘Defending the Indeterminacy Thesis’ in Brian Bix, ed., *Analyzing Law: New Essays in Legal Theory* (Oxford: Clarendon Press, 1998), pp. 223-38.

<sup>26</sup> For seminal examples of this approach, see Duncan Kennedy, ‘The Structure of Blackstone’s *Commentaries*’ (1979) 28 *Buffalo Law Review* 205; Mark Kelman, ‘Trashing’ (1984) 36 *Stanford Law Review* 293.

<sup>27</sup> Jacques Derrida, *Of Grammatology* (Baltimore: John Hopkins University Press, 1976); ‘Différance’ in *Margins of Philosophy* (Chicago: Chicago University Press, 1982), p.1. For the reception of the concept of *différance* and *supplement* into specifically legal contexts, see in particular Peter Fitzpatrick, ed., *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (London: Routledge, 1991); and Drucilla Cornell, Michel Rosenfeld, and David Gray Carlson, eds., *Deconstruction and the Possibility of Justice* (Routledge: New York, 1992).

<sup>28</sup> Allan Wolfe, ‘Algorithmic Justice’ (1990) 11 *Cardozo Law Review* 1409.

<sup>29</sup> The relationship of rhetoric to trace in the construction of the common law system of precedent is productively explored by Peter Goodrich, in *Reading the Law* (Oxford: Blackwell, 1986), esp. at 126-200; and in several of the chapters to be found in *Legal Discourse* (Basingstoke: Macmillan, 1987). Early and more specific examples of the approach can be found in Peter Goodrich, ‘Law and Language: An Historical and Critical Introduction’ (1984) 11 *Journal of Law and Society* 173; and throughout Costas Douzinas and Ronnie Warrington, eds., *Postmodern Jurisprudence* (London: Routledge, 1991). For a more recent example of the use of a specifically



Indeed, a self-proclaimed “agnostic” like Lucy comes to a broadly similar conclusion, arguing in sum that judges’ choices “are not compelled by reasons even though informed by Reason.” His “deflationary argument” is that, in consequence, “orthodoxy and heresy are nowhere near as different as they are often assumed to be.”<sup>30</sup> The difference is that apocryphal writers take this conclusion as a beginning and not an end, and explore, in creative ways, exactly how legal discourse actually uses and practices this insight.

This is the discursive turn. What is additionally important in such an analysis is that no reasoning can ever eliminate from its interstices the trace of the other. It is entirely inaccurate to claim that the methodologies of deconstruction — as opposed to the heresy — “appear to be instances of external scepticism [which] lack any critical power in relation to discussions within a practice”,<sup>31</sup> on the contrary, it is precisely the internal nature of such instability that characterises the discussion. The apocrypha therefore presents a constant debate which occurs within a text and not just between them, in which victory is never permanent, and in which the history of law sustains, as it must, a *discourse*—which is to say the enduring possibility of opposites—and not an extinction. This explains the particular interest of many non-traditional writers, and Peter Goodrich in particular, for example in *Oedipus Lex* and *Languages of Law*, in the historical development of the legal tradition.<sup>32</sup> History reveals—within the privileged site of the common law’s self-image—a continuity of discontinuity, a triumph of traces. It reveals, that is to say, in distended temporal form, the narratives and disagreements embedded within the discourse of each legal text, the heteroglossia and hieroglyphs and diremptions which the rational surface of modern law seeks to suppress and fails mightily.

To insist, on the one hand, on a “core” of rules, as the orthodox invariably do in some shape or form, concedes too much to an

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Derridean framework, Desmond Manderson, ‘Et lex perpetua’ (1999) 20 *Cardozo L. Rev.* 1621, pp. 1626-30.

<sup>30</sup> Lucy, *op. cit. supra*, pp. 352, 373, 385, 386.

<sup>31</sup> Lucy, *op. cit. supra*, pp. 285. One must be careful not to claim too much at this juncture. Lucy is very cautious and limited in his discussion of post-structuralist theory. As he recognizes, its insights are not central to his endeavour. It is precisely the limited task of that endeavour, and the way in which there is therefore an implicit marginalization of other approaches to jurisprudence, which is the purport of my commentary here.

<sup>32</sup> Peter Goodrich, ‘The Rise of Legal Formalism’, *op. cit. supra*; ‘Historical Aspects of Legal Interpretation’ (1983) 3 *Journal of Legal Studies* 248; ‘Literacy and the Languages of the Early Common Law’ (1987) 14 *Journal of Law and Society* 422; *Languages of Law: From Logics to Monadic Masks* (London: Weidenfeld & Nicholson, 1990); *Oedipus Lex: Psychoanalysis, Law, History* (Berkeley: University of California Press, 1995).

ungovernable and distant authority. To argue, on the other hand, for a retreat to 'politics' is simply to replace one discourse and cultural form with another. Against the illusion *and* disillusion of faith alike, the apocrypha offers an antidote to nostalgia named history, and an antidote to despair named hope. For these writers, as for Maurice Blanchot, law's irony arises "not because hope is condemned but because it does not succeed in being condemned... There is no end, there is no possibility of being done with the day, with the meaning of things, with hope."<sup>33</sup> This possibility is itself immanent in the very law which attempts, through rhetorical strategies of power, to foreclose it.<sup>34</sup>

## Aesthetics

The shared belief by both orthodox and heresy as to the nature and purpose of law is remarkable. It reflects their unity as to what counts as an appropriate question. For both, as is made perfectly clear by Lucy's book, law is fundamentally "the practice of adjudication".<sup>35</sup> Its purpose is to resolve conflicts by the application of rules, its locus is the superior court, and its practitioners are judges. The disagreement as to whether this application is or might be successful has concealed a deeper consensus; that is, that jurisprudence is about determination: the justification of authoritative interpretation of the meaning<sup>s</sup> of words. The determinacy/indeterminacy debate assumes that this is the right place to look in order to understand what is central to the functioning of and thinking about law.

Let us leave aside both feminist and critical race theory, as deserving its own genre. Let us leave aside the whole literature on sociological approaches to law, whether interpretative or Foucauldian: on the ways in which the practice of law at different levels, within communities, and by bureaucratic and other officials, works in profoundly different ways from those that a study of certain appellate cases would suggest. Let us further

<sup>33</sup> Maurice Blanchot, *The Work of Fire*, trans. Charlotte Mandel (Stanford: Stanford University Press, 1995), pp. 8-10.

<sup>34</sup> Peter Goodrich, 'Rhetoric as Jurisprudence' (1984) 4 *Oxford Journal of Legal Studies* 88.

<sup>35</sup> Lucy, *op. cit. supra*, p. 16. The title, of course, is *Understanding and Explaining Adjudication*. Naturally, it is hardly appropriate for me to chastise the author for failing to discuss other issues. But throughout, there is the strong implication that this is the core (to borrow Hart's term) of jurisprudence and the core of these writers. What is in some ways a question of topic selection disguises a more important normative claim, that is, that determination is the essence of jurisprudence. The relegation of the apocrypha to a footnote on page 7, and the treatment of post-modern writing exclusively as it addresses these questions, both suggest that what is excluded from consideration is in fact of merely penumbral relevance.

by-pass the rapidly developing literature on legal pluralism, on the multitude of different ways in which communities and societies of all kinds interpret, use, ignore, and interact with norms of all kinds, including but not limited to formal legal texts<sup>36</sup>—pausing only to note that this reconfiguration of the boundaries of law has been influential in the work of several apocryphal writers, notably Peter Fitzpatrick.<sup>37</sup> Clearly such an approach multiplies the acknowledged interpreters of law, multiplies the sources of law, and multiplies the discourses by which those laws are to be judged.<sup>38</sup> It highlights the extent to which the argument as to determinacy *presumes* a background of discourse in which the sources and authorised exponents of law are already tightly circumscribed.

On the one hand, perhaps the definition of law, as the orthodox and the heretics alike imply, *is* a system of norms accompanied by procedures for their authoritative interpretation in the resolution of conflicts: “the union of primary and secondary rules”, as Hart had it, or the “empire” of principles of which judges are the ruling “princes” on Dworkin’s view.<sup>39</sup> On such a view, the question of determination in the context of adjudication is crucial. But why should issues of definition describe law’s interest, or its purpose, or its power? The mistake is similar to that made by evolutionary psychology in conflating nature and purpose, biology and destiny. Whatever the minimum conditions for that structure called law, its importance in particular human cultures is far more complex and contingent. And if so, it is the complexity and the contingency of law’s meaning to that community that cries out for exploration. Song, too, may have a specific evolutionary definition; or maybe it is an early version of some superseded linguistic function which, like the coccyx, nevertheless survives vestigially. But this hardly captures the broad range of meanings and purposes it performs in any particular society now, nor indeed why we should *care* about it. Music has flourished—not simply existed—only because it is a medium whose open-textured form and ambiguous

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<sup>36</sup> Central texts include John Griffiths, ‘What is Legal Pluralism?’ (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1; Sally Falk Moore, ‘Law and Social Change’ (1973) 7 *Law & Society Review* 719; Austin Sarat and William Felstiner, ‘Law and Strategy in the Divorce Lawyer’s Office’ (1986) 20 *Law & Society Review* 93; Clifford Geertz, ‘Fact and Law in Comparative Perspective’ in *Local Knowledge* (New York: Basic Books, 1983), p. 167.

<sup>37</sup> Peter Fitzpatrick, ‘Law and Societies’ (1984) 22 *Osgoode Hall Law Journal* 115; “‘The desparate vacuum’: Imperialism and Law in the Experience of Enlightenment’ (1989) 13 *Droit et Societe* 347.

<sup>38</sup> Boaventura de Sousa Santos, ‘Law: A Map of Misreading’ (1987) 14 *Journal of Law & Society* 279.

<sup>39</sup> Hart, *op. cit. supra*, p. 79 et seq; Dworkin, *op. cit. supra*, p. 407.

signification is capable of being imbued with maximal as well as minimal meaning; law is not different.

Cover made a persuasive argument for maximal law as a constitutive narrative.

Law is a resource in signification that enables us to submit, rejoice, struggle, pervert, mock, disgrace, humiliate, or dignify... Law is a force, like gravity, through which our worlds exercise an influence upon one another, a force that affects the courses of these worlds through normative space.<sup>40</sup>

Neither, for Cover, is the judicial office final or authoritative in its interpretative role.

The resistance of a community to the law of the judge, the community's insistence upon living its own law or realizing its law within the larger social world, raises the question of the judge's commitment to the violence of his office. A community's acquiescence in or accommodation to the judge's interpretation reinforces the hermeneutic process offered by the judge and extends, in one way or another, its social range. Confrontation, on the other hand, challenges the judge's implicit claim to authoritative interpretation.<sup>41</sup>

On such a view, the determination of law—the assertion of meaning by such and such an authority, in such and such a case—is only a moment in an on-going and precisely indeterminate discourse. It happens because it must happen. But of more interest to the apocrypha are the other, broader, elements of the genre of law. Law is a little like figure skating. It happens on ice; it is not figure skating if it is not done on ice; its icy context cannot be gainsaid. But if all you are looking at is the ice, you're missing the point.

This is the aesthetic turn. The mere diversification of disciplinary frameworks indicates the arc it has traced. The analysis has returned law to the humanities. Much apocryphal writing has been devoted to connecting our understanding of law with our understanding of other plastic cultural forms: history of course, but also the literary analyses of writers like Bill MacNeil and Adam Gearey,<sup>42</sup> and the art theory of Costas Douzinas, in

<sup>40</sup> Robert Cover, 'Nomos and Narrative' (1983) 97 *Harvard Law Review* 4, pp. 8-10.

<sup>41</sup> *Ibid.*, p. 53.

<sup>42</sup> William MacNeil, 'The Monstrous Body of Law: Wollstonecraft v. Shelley' (1999) 12 *Australian Feminist Law Journal* 21; 'John Austin or Jane Austen? *The Province of Jurisprudence Determined in Pride and Prejudice*' (1998) 4.2 *Law Text Culture* 1; Adam Gearey, 'Death and the Law Between James Joyce and Pierre Legendre' in *Courting Death*, 194-215; Brook

works such as *Justice Miscarried* and *The Law of the Image*.<sup>43</sup> Not even music has proved irrelevant to this reinvention of legal scholarship through the lens of culture.<sup>44</sup> But unlike much of the more orthodox law and literature scholarship, particularly as practiced in the United States, this methodology emphatically does *not* claim to these disciplines an authority or truth claim which it would somehow lend to law.<sup>45</sup> Clearly, the theoretical paradigms used by these writers would forbid such a heliotropic movement of privilege.<sup>46</sup> Through the analysis of legal and non-legal texts, jointly not severally, we are invited to learn more about the relationship of the discourse of law to the cultural framework in which it is embedded; about the society through which both law and non-law emerge; about the mutual constitution of values and concepts through the dialogue which these social structures sustain.<sup>47</sup> This does not treat 'law' and 'literature', for example, as nouns one of which might tell us something about the other, but instead as verbs active, by their very nature, in each other's worlds.

Where successful, the approach relies on an analysis which works both metaphorically and metonymically—in other words it relies on both an

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Thomas, *Cross Examinations* (New York: Cambridge University Press, 1987).

<sup>43</sup> Costas Douzinas, *Justice Miscarried: Ethics, Aesthetics, and the Law* (Hemel Hempstead: Harvester Wheatsheaf, 1994); Costas Douzinas, Shaun McVeigh, and Ronnie Warrington, 'The Alta(ers) of Law' (1992) 9(4) *Theory Culture and Society* 193; Piyel Haldar, 'In and Out of Court: On Topographies of Law and the Architecture of Court Buildings' 7 *International Journal for the Semiotics of Law* 185; Costas Douzinas and Lynda Read, eds., *The Law of the Image* (Chicago: University of Chicago Press, 1999).

<sup>44</sup> See Manderson, 'Beyond the Provincial' (1996) 20 *Melbourne University Law Review* 1048; 'Et lex perpetua', *op. cit. supra*; *Songs Without Music, op. cit. supra*; *Modes of Law: Music and Legal Theory – An Interdisciplinary Workshop* (1999) 20 (5-6) *Cardozo Law Review* 1325-1694.

<sup>45</sup> Compare Martha Nussbaum, *Poetic Justice* (Boston: Beacon Press, 1994); James B White, *Heracles' Bow: Justice as Translation* (Chicago: University of Chicago Press, 1990); Richard Weisberg, *Poethics and other Strategies of Law and Literature* (New York: Columbia University Press, 1992); Ian Ward, *Law and Literature: Possibilities and Perspectives* (Cambridge: Cambridge University Press, 1995).

<sup>46</sup> Jacques Derrida, 'The Law of Genre' in *Acts of Literature*, trans. Derek Attridge (New York: Routledge, 1992), p. 221; the metaphor of the heliotrope or sunflower is developed by Derrida in 'White Mythology', in *Margins of Philosophy, op. cit. supra*, pp. 207-71.

<sup>47</sup> The influence here for the mutual constitution of cultural forms is Foucauldian as much as Derridean: see, for exemplary instances of this approach, *The Order of Things* (New York: Vintage Books, 1973); *The Archaeology of Knowledge* (New York: Pantheon, 1972).

historic and analogic fit between the texts (broadly understood) it uses. So too it draws implicitly on a theory in which metaphor is not just a way of communicating concepts developed by abstract thought. To say A is like a lion is to communicate imaginatively something one already knows about A. Here, the metaphor transmits the idea. In the debates in the Christian church on the role of polyphonic music in liturgy, the question drew precisely on this issue of whether the ornament of transmittal facilitated understanding (as Aquinas argued) or polluted thought (as Plato, for one, insisted). The Catholics eventually allowed the former while the Orthodox Churches accepted only the latter.

But this would only offer an apology for metaphor and not a defence. On the contrary, metaphor *is* thinking, and in particular, it is a way of exploring the ramifications of a parallel to both terms.<sup>48</sup> In the process we will learn more about both A and lions—and indeed the whole infinite context which the parallel invites—than we ever knew before. Hence the metaphor transforms the idea and literature transfigures law. It may well be argued that the selection of appropriate texts through which to accomplish this sea-change is, of necessity, shockingly partial, relentlessly high-culture, and even whimsical. Why *this* text rather than others, this painting not that one? Ultimately the answer to this problem rests not on any claims of statistical relevance or cultural importance but on something much more basic. Do these gestures towards the tropes of culture and the culture of tropes, show us something which we might not otherwise have seen?

## Tragedy

Perhaps, on the other hand, this argument concedes too much. To most people most of the time, law is not a procedure or a case or a matter to be decided according to whatever principles happen to be operative. Law is not about determination because that is law's medium but *not* its function. Rather, law is mythical. This is not myth in Roland Barthes' sense of a benumbed lie, a bourgeois deception befrocked in the garb of eternity.<sup>49</sup> On the contrary, it is closer to Levi-Strauss' understanding of a narrative framework which both structures questions and understandings about the social world, and which thereby actively *constitutes* communities and subjectivity.<sup>50</sup> Myth "constellates our grasp of reality."<sup>51</sup> The stars are real but meaning comes from the imaginary lines we draw between them.

<sup>48</sup> Paul Ricoeur, *The Rule of Metaphor* (Toronto: University of Toronto Press, 1977); Derrida, 'White Mythology', *op. cit. supra*.

<sup>49</sup> Roland Barthes, 'Myth Today' in *Mythologies* (Frogmore: Paladin, 1972), pp. 131-37, 142-45.

<sup>50</sup> Claude Levi-Strauss, *Myth and Meaning* (Toronto: University of Toronto Press, 1978); *The Raw and the Cooked*, trans. J. & D. Weightman (London: Jonathon Cape, 1970).

Again, one might want to begin with Clifford Geertz, who noted that law “is a distinctive manner of imagining the real”,<sup>52</sup> or with the work of Robert Cover whose *nomos* is to the imagination of law, as the *cosmos* is to stars.<sup>53</sup> But for the apocrypha, the idea of ‘law’ is given an extremely broad meaning far removed from the doctrinal scholarship engaged in by both orthodox scholars and their heretic counterparts. Instead there are new focuses. First, with the *origins*—mythical as well as actual—of common law. These claims are of course integral to any mythological system, and to the legitimacy through which it claims an authoritative voice in setting down narrative and structure. Several apocryphal texts have been important in exploring these claims and demonstrating the complexities inherent in law’s pretence to be a myth without myth, an origin without origin, and force without force. Through a meditation on how law emerges, Jacques Derrida’s ‘The Force of Law’ has spawned a vast literature deconstructing the relationship of law and violence.<sup>54</sup> Peter Fitzpatrick’s *The Mythology of Modern Law*<sup>55</sup> analyses the colonial implications and derivations of the myth of Western law’s emergence and necessity, emboldening a literature of enduring significance in countries, like Australia and South Africa, still grappling with its legacies.<sup>56</sup> If the former is philosophical and analytic and the latter historical and contingent, they unite in their effort to explore the implications of law’s story of itself in ways which remain untouched by the interrogations of the orthodox heresy.

Secondly, to conceive of law’s narrative as a regulation of subjectivity, a constitution of community, or a stellar imagination, is to break down once and for all the independence of legal discourse, although not its distinctive features. Clearly this follows from the theories of legal pluralism and literary theory I have noted above.<sup>57</sup> Not just that law ought

<sup>51</sup> Jamake Highwater, *Myth and Sexuality* (New York: Meridian, 1990), p. 12.

<sup>52</sup> Geertz, *op. cit. supra* p. 184.

<sup>53</sup> Cover, ‘*Nomos and Narrative*’, pp. 4-6.

<sup>54</sup> Jacques Derrida, ‘Force of Law: The Mystical Foundation of Authority’ (1990) 11 *Cardozo Law Review* 919; there is fine commentary on this piece collected in Drucilla Cornell, et al, eds., *op. cit. supra*. For further on violence and law, see Austin Sarat and Kearns, eds., *Law’s Violence* (Ann Arbor: University of Michigan Press, 1992).

<sup>55</sup> Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992), esp. chapters 1 – 2.

<sup>56</sup> Colin Perrin and Scott Veitch, ‘The Promise of Reconciliation’ (1998) 4.1 *Law Text Culture* 232; see also Colin Perrin, ed., *In the Wake of Terra Nullius* (1998) 4.1 *Law Text Culture*.

<sup>57</sup> Clearly too it suggests a suspicion, at least, with not only legal formalism but legal autopoiesis. I have asked in this essay what has become of CLS since the canonical writings of the late 1970s and early 1980s. One could ask similarly what has become of the orthodoxy since the canonical literature of Hart, Dworkin and MacCormick relied on exclusively by Lucy.

to be *analysed* by disciplines like literature and religion, but that its function and power are *engaged* in the mutual operation of all these spheres of the creation of the subject. Undoubtedly the apocrypha challenges the discrete charms of the law. But there is a crucial addition here—a focus on the subconscious as providing explanations for both individual relationships to law and the legal structure itself. A great deal of work in recent years has focussed on the relationship between ‘legal law’ and those other laws which structure and constitute us: laws of the body, laws of desire. Couched in the language of Jacques Lacan, in particular, a psychoanalytic framework has offered to scholars as diverse as Slavoj Zizek, Pierre Legendre, Peter Goodrich, David Caudill, Jeanne Schroeder, Alison Young and Bill MacNeil new ways of explaining what law expresses, how it functions, and how people understand it.<sup>58</sup> Although there is a great danger here of personifying the object ‘law’, of putting it too literally on the analyst’s couch, there is also the promise of an entirely new way of thinking through questions of desire, authority, obedience, repression, and language. Although there is similarly a danger in equivocating the subject ‘law’, there is also the possibility of seeing afresh the connection between previously unconnected modes of regulation, repression, and rebellion.

This is the tragic turn. Legal liberalism, to put it most generally, is imbricated with individual autonomy, and therefore with the language of power and choice and action. These concepts are necessary in order for law to develop frameworks of culpability and responsibility *at all*.<sup>59</sup> But the tragic conception draws attention to the ways in which this explanation is inadequate to human experience and to the concept of fate.<sup>60</sup> The genre of

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The answer would direct us precisely to the deep waters of autopoietic theory: see Gunther Teubner, *Autopoietic Law: A New Approach to Law and Society* (Berlin: de Gruyter, 1988); Arthur Jacobson, ‘Autopoietic Law: The New Science of Niklas Luhmann’ (1989) 87 *Michigan Law Review* 1647.

<sup>58</sup> See in particular the symposium issue, *Law and the Postmodern Mind* (1995) 16 (3-4) *Cardozo Law Review* 699-1444; Slavoj Zizek, *The Plague of Phantasies* (London: Verso, 1997); Goodrich, *Oedipus Lex*, *op. cit. supra*; Pierre Legendre, *Law and the Unconscious*, trans. P Goodrich (London: Macmillan, 1998); Jeanne Schroeder, *The Vestal and the Fasces: Hegel, Lacan, Property and the Feminine* (Berkeley: University of California Press, 1998); Jeanne Schroeder, ‘The Four Discourses of Law: A Lacanian Analysis of Legal Practice and Scholarship’ (2000) 79 *Texas L. Rev.* 15; David Caudill, *Lacan and the Subject of Law* (New Jersey: Humanities Press, 1996); William MacNeil, ‘Monstrous Bodies’. The predecessor of all these may well have been Jerome Frank, *Law and the Modern Mind* (New York: Brentano’s, 1930).

<sup>59</sup> Desmond Manderson, ‘Tales from the Crypt’ in Desmond Manderson, ed., *Courting Death* (London: Pluto Press, 1999), pp. 1 - 15.

<sup>60</sup> Anthony Kronman, ‘Amor Fati’ (1995) 45 *University of Toronto Law Journal* 163.



tragedy addresses the experience of a lack rather than a loss of human control.<sup>61</sup> It does so in two distinct ways. First, by drawing our attention to the ‘tragic flaw’ nestled deep within the hero’s psyche at a level far *below* his ability to choose his actions: the King’s pride, and the Moor’s passion, bring about their doom. Secondly, by drawing attention to the forces of fate and power which limit our action far *above* it. A.C. Bradley writes,

What, then, is this “fate” which the impressions already considered lead us to describe as the ultimate power in the tragic world? It appears to be a mythological expression for the whole system or order, of which the individual characters form an inconsiderable and feeble part; which seems to determine, far more than they, their native dispositions and their circumstances, and, through these, their action; which is so vast and complex that they can scarcely at all understand it or control its workings<sup>62</sup>

The tragic vision thus ranges disciplines of destiny—the psychoanalytic, the mythological, and the structural—against disciplines of autonomy. Influenced by ancient Greek sources, on the one hand, and Nietzsche on the other, apocryphal writers like Costas Douzinas (as well as those mentioned above) focus precisely on the operation of these elements in what we mean by law and the levels on which it governs out experience.<sup>63</sup>

In this regard, William Lucy, for example, is entirely correct to note the orthodox commitment to the “sovereign individual” and that of the heresy to the “sovereign structure”.<sup>64</sup> But there is a subtle difference here as to what is understood by structure. The orthodox-heresy alike share, by and large, a conception of *sovereignty*: a belief in independent and directed sources of control or agency, albeit understood at two different levels. Undoubtedly the concept of ideology would appear to release structure from the straitjacket of motive and allow its operation discursively.<sup>65</sup> But there is still, as Lucy argues, a fundamentally critical element to the discussion here,

<sup>61</sup> Zizek, *op. cit. supra*, pp. 194-97.

<sup>62</sup> A.C. Bradley *Shakespearean Tragedy* (NY: Penguin, 1966), p. 21.

<sup>63</sup> Friedrich Nietzsche, *The Birth of Tragedy* (New York: Vintage Press, 1967); Sophocles, ‘Antigone’ in *The Three Theban Plays* (London: Penguin, 1984). See Costas Douzinas, *Justice Miscarried*, *op. cit. supra*, pp. 25-92; and ‘Law Deathbound: Antigone and the Dialectics of *Nomos* and *Thanatos*’ in Desmond Manderson, ed., *Courting Death*, *op. cit. supra*, pp. 163-80.

<sup>64</sup> Lucy, *op. cit. supra*, Chapter 3, pp. 93-134, and Chapter 6, pp. 249-94.

<sup>65</sup> Jack Balkin, ‘Ideology as Cultural Software’ (1995) 16 *Cardozo Law Review* 1221; Lucy, *op. cit. supra*, pp. 227-39; David Kairys ed., *The Politics of Law* (New York: Pantheon, 1982); D. Manning, ed., *The Form of Ideology* (London: Allen & Unwin, 1980).

according to which ideology has a particular source and is perpetrated by particular groups for specific ends. The construction of legal subjectivity out of subconscious narratives in productive tension—myths of origin, psychoanalytic forms, *aporia*—is an entirely different way of approaching the question of power and change than through the social sciences of sociology, politics, or economics. Furthermore, for the apocrypha, the myths, narratives, and psychological states of and through the law are constitutive of both individual selves *and* the structures in which they are embedded. To speak of them as if they were in conflict is to miss their deeper symbioses.

## Ethics

Orthodox and heterodox share a profound distrust of undecidability, of *aporia*, of fundamental contradiction, and both use these words as the ultimate critique of the others' position. Duncan Kennedy and Mark Kelman, for example, use the "fundamental contradiction" of legal liberalism as the trump card of critique.<sup>66</sup> Ronald Dworkin and Ernest Weinrib, of course, are strongly and explicitly committed to the integrity and coherence of law, and Dworkin strongly argues, or rather strongly asserts, that legal principles are not contradictory but merely competitive.<sup>67</sup> For them, it is precisely the negativity of the other side which rules them out.<sup>68</sup> Indeed, the most commonly put argument against relativism or what Dworkin terms "external scepticism" is the incoherence of holding as 'true' a position which denies the transcendental status of truth. But for the apocrypha, crucially, undecidability and contradiction provide the conditions of possibility of discourse, of language, and above all, of ethics, exactly because they provide the possibility of their betrayal.<sup>69</sup>

<sup>66</sup> Duncan Kennedy, 'The Structure of Blackstone's *Commentaries*', *op. cit. supra*; 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685; Mark Kelman, *op. cit. supra*, pp. 62-63, 79-82, 234-37. See in particular Denise Meyerson, 'Fundamental Contradictions in Critical Legal Studies' (1991) 11 *Oxford Journal of Legal Studies* 439.

<sup>67</sup> Dworkin, *op. cit. supra*, pp. 269-71; For Ernest Weinrib, indeed, coherence is the principal perhaps the sole justification of law: see for example, amongst a large literature in which the theme of internal coherence is always dominant, "'Legal Formalism": On the Immanent Rationality of Law' (1988) 97 *Yale Law Journal* 984. See the critique of the concept of coherence in Stephen Perry, 'Professor Weinrib's Formalism: The Not-so-empty Sepulchre' (1993) 16 *Harv JL & Pub Pol* 597.

<sup>68</sup> Dworkin, *op. cit. supra*, pp. 271-75.

<sup>69</sup> Jacques Derrida, 'Force of Law', *op. cit. supra*; *The Gift of Death* (Chicago: University of Chicago Press, 1992); see also 'Différance' in *Margins of Philosophy*, *op. cit. supra*, pp. 1-27. The argument for the ineluctable responsibility for a decision-making process which cannot be grounded in

This perspective, which has been developed in some of the more recent work of Derrida, argues for the inevitable singularity of the “madness of decision”, and consequently the impossibility of grounding the experience of justice within a framework of rules. A rule can never capture the complex judgment which responsibility requires, and which must always be experienced as both bound and unbound, unique and universal.

In short, for a decision to be just and responsible it must in its proper moment, if there is one, be both regulated and without regulation: it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, remystify it, at least reinvent it in the reaffirmation and the new and free confirmation of its principle.<sup>70</sup>

So much, perhaps, was also perceived by Justice Harry Blackmun, in the powerful dissent to *Callins v. Collins* which marked a dramatic turnaround in his position on, and earlier support for, capital punishment. The essence of discretion is its sensitivity to a unique and changeable context. The incessant rule is iterable—it functions similarly in every different case. We ask of a just legal system that it be at one and the same time reliable and flexible, consistent and individualised. Thus Justice Blackmun conceded that “both fairness and rationality cannot be achieved in the administration of the death penalty.”

[D]iscrimination and arbitrariness could not be purged from the administration of capital punishment without sacrificing the equally essential component of fairness—individualized sentencing.<sup>71</sup>

A step towards consistency is a step away from singularity, yet of justice we demand both.<sup>72</sup>

This is the ethical turn. The vision here outlined, so anathema to the orthodox commitment to a justice determined and realised through rules, and the heretical counterpart of a justice determined and realised through politics,<sup>73</sup> gives rise to a unique perspective, greatly influenced by

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some rational system of self interest owes much to the earlier work of Emmanuel Levinas, *Otherwise Than Being, or Beyond Essence*, trans. Alphonso Lingis (Pittsburgh: Duquesne University Press, 1998). See Jacques Derrida, *Adieu to Emmanuel Levinas*, trans. Pascale-Anne Brault & Michael Naas (Stanford: Stanford University Press, 1999).

<sup>70</sup> Jacques Derrida, ‘Force of Law’, *op. cit. supra*, p. 961.

<sup>71</sup> *Callins v. Collins* (1994), 510 U.S. 1141, 1155, per Justice Blackmun (citations omitted).

<sup>72</sup> *Ibid*, 1149.

<sup>73</sup> Recall that Ronald Dworkin’s heroic judge goes by the name of Hercules; that of Allan Hutchinson is Left J: see *Law’s Empire*, *op. cit. supra*, p. 239;

Emmanuel Levinas. In writers such as Cornell, Douzinas, Marinos Diamantides, David Fraser, and in some of my own recent work, the nature of an ethical responsibility for the other has steadily gained prominence.<sup>74</sup> It evokes “the aspiration to a non-violent relationship to the Other, and to Otherness more generally, that assumes responsibility to singularity.”<sup>75</sup> It suggests that such a responsibility must be accepted but cannot be defined; it must arise like a compulsion from within and not as a norm imposed from without.

Whether this critical perspective has the capacity to transform our understanding of the discourse of legal judgment so as to provide a greater capacity for the ethics of singularity, remains an open question. Lucy is entirely right to argue that at the moment the case has not been made out.<sup>76</sup> “How can this affirmation or any injunction to respect the particularity and uniqueness of the Other, help one to decide particular cases?” he asks, concluding that “the generality of these rules and their comparative, synchronising thrust apparently guarantees conflict with the ethical relation, understood as respect for difference and particularity.”<sup>77</sup>

But this is entirely the point. The apocrypha is not interested in a *solution* to the ‘problem of adjudication’ or ‘the plurality problem’ but rather in exploring its parameters within and beyond the confines of legal judgment. The discussion focuses on what is missing from a certain conception of law, about the resources that yet remain within it to speak of these absences and failures, and about drawing our attention to how and where law gives out. A judgment of judging in terms of its ethics, including not least the ethics of interpretation that govern it, may not tell us how adjudication might be framed in the future (although it might)—but it tells us something distinct and interesting about the social, cultural, and even ontological meanings of law in particular cases. In understanding more, perhaps, we may find ourselves increasingly unable to provide categorical answers. That is the risk you take when you eat the fruit of the tree of knowledge.

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*Dwelling on the Threshold*, *op. cit. supra*, p. 215

<sup>74</sup> Drucilla Cornell, *The Philosophy of the Limit* (New York: Routledge, 1992); Douzinas, ‘*Nomos and Thanatos*’, *op. cit. supra*; Marinos Diamantides, ‘The Ethical Obligation to Show Allegiance to the Un-Knowable’ in Desmond Manderson, ed., *Courting Death*, pp. 181-93; David Fraser, ‘Dead Man Walking: Law and Ethics after Giorgio Agamben’s Auschwitz’ (1999) *International Journal for the Semiotics of Law* 397; Desmond Manderson, ‘Tales from the Crypt’, *op. cit. supra*. See also Simon Critchley, *The Ethics of Deconstruction: Derrida and Levinas*, 2<sup>nd</sup> ed. (Oxford: Blackwells, 1999).

<sup>75</sup> Cornell, *The Philosophy of the Limit*, *op. cit. supra*, p. 62.

<sup>76</sup> Lucy, *op. cit. supra*, pp. 315-27.

<sup>77</sup> *Ibid.*, pp. 318, 326.

## Style

There are stylistic elements to these aspects of apocryphal jurisprudences which mark out its contributors as speaking in, no less than about, 'a different voice' (to borrow a phrase). They flow directly from the substantive elements sketched above. The theme of discourse is reflected in a concern to present alternative possibilities of analysis, and to open the authorial text itself to variant readings. The theme of aesthetics is reflected in a genuine love of language, and a commitment to the layering of complex formal resonances amid modes of expression careful, imaginative, and elegant. The firm rejection of any idea of text as simply the neutral medium of thought, at best translates into a belief in the value of writing *qua* writing, and at worst degenerates into opacity *qua* opacity. The theme of tragedy is reflected in an ironic distance which might be mistaken for disinterest. Finally, the theme of ethics is reflected in the very specific focus of many of these works. They are intent on unpacking in great detail the complex discursive ramifications of particular legal circumstances. It is often impossible to generalise from the utter specificity of these discussions. Theoretical implications are rarely proclaimed and more typically emerge from within the multifaceted analysis of particular instances.<sup>78</sup>

Here, too, nothing could be more distinct from the orthodox derivation of principles or the heretical declamation of manifestos. The exploration of contexts in ever-widening helices underlies the ethical and rhetorical strategy adopted by the apocrypha. The very marginality of these texts gives them a freedom to be singular and manifests not just an argument for the justice of instances, but an exemplification of it. Ultimately, it must be said, the apocrypha is not a canon, but a collection of unusual documents that speak and only speak for themselves.

## The problem of our laws

Cathedrals, too, have windows. Grand and ornately stained, one cannot look out of them. On the contrary, they are meant to let the light in but to cloister the soul. The orthodox are within, knees bent in prayer. The heretics are without, hammering their theses to the door and noses pressed to the glass. But what, I wonder, would be the view, across the glebe and into the fields beyond? In this short concluding section, I want to intimate how one might approach a familiar case from the standpoint of an apocryphal temperament.

In *Kruger v The Commonwealth*,<sup>79</sup> several aboriginal applicants sought to maintain the Constitutional invalidity of the Northern Territory *Aboriginals Ordinance* 1918. This Ordinance had clothed in authority the

<sup>78</sup> This paper must be taken as an exception to the general rule.

<sup>79</sup> (1997) 146 ALR 126.

removal by government officials of generations of aboriginal children from their families, and their transfer to mission stations, orphanages, and foster families. These events, and the devastating consequences they entailed for many of these aboriginal and part-aboriginal children, and for their mothers, families, and communities, has only fully come to light over the past ten years. The work of discovery and communication was especially accomplished through the testimony gathered and recorded in a powerful report issued by the Human Rights and Equal Opportunity Commission in 1997, entitled *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*.<sup>80</sup> Yet at the same time, there continue to be many people in Australia—including the conservative Federal government elected in 1996—who simply refuse to believe these events, consider them self-serving, and who wish to minimise the scope and the effects of these policies. It has always been the Australian way to conceal the past or to hide from it, especially with respect to our treatment of indigenous peoples. *Kruger's Case* arose in the highly charged environment of a battle for the Australian soul, waged between acknowledgment and secrecy, apology and amnesia, shame and silence. It is about the status of a particular set of stories within a community.

The plaintiffs wished to demonstrate that the Commonwealth government, which had legislative authority over the Northern Territory throughout the period in question, had acted illegally. The argument was made in several different ways. One important strand was that the Ordinance was unconstitutional because it authorised genocide in the specific sense of the destruction, over time, of aboriginal heritage. Indeed, the *Genocide Convention 1949*, ratified by Australia in 1951, specifically encompasses the practice of “(e) forcibly transferring children of the group to another group.”<sup>81</sup> This argument the High Court of Australia, sitting in Canberra, unanimously rejected.

From an orthodox perspective, the dispute is about the very limited meaning of particular words. Justice Dawson provides the clearest example of this approach, arguing as he does from a position as to the innate and unequivocal sovereignty of law. On this basis there is an insoluble problem with the applicants' case. The Ordinance was passed by the Commonwealth

<sup>80</sup> Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Chair: Sir Ronald Wilson) (Sydney: Government Printer, 1997). See also Henry Reynolds, *Why Weren't We Told?*

<sup>81</sup> *Genocide Convention 1949*, enacted by *Genocide Convention Act 1951* (Cth).

Parliament which, under s.122 of the Constitution is, with respect to the Territories, entirely to free to enact whatever law it chooses<sup>82</sup>

The legislative power of the parliament to make laws for the government of the territories is sovereign and...there is nothing which places rights of any description beyond its reach.<sup>83</sup>

On this approach, even genocide does not lie beyond legal government action. For Justice Dawson, and for Justice McHugh, even a genocidal law would be legally enacted.

A somewhat heretical position is adopted by several of the other judges. In particular, Justice Gaudron begins from a radically different theory as to the origin of law. For her, in an heretical move, the legitimacy of law derives not from its unquestionable sovereignty but from its putative democracy. Since law gains its authority only from the legitimacy of its origins, its status must always be an open question. And in this particular case, Justice Gaudron found the condition of the Northern Territory at the time of the enactment of the Ordinance significant. The Northern Territory had no sovereign parliament of its own; the law was passed by the Commonwealth Parliament, to which at the time the Northern Territory had no contribution. As explained by Justice McHugh (ironically in order to demonstrate that citizens of the Northern Territory are ill protected under the Constitution),

[i]t was not until 1922 that the Northern Territory had any representation in the House of Representatives. Moreover, its member was not given a vote on any question arising in that House. In 1936, the member was given the right to vote on any motion for the disallowance of any Ordinance of the Northern Territory and on any amendment of such motion. In 1959, this right was extended to any question "on or in connexion with" a proposed law that was determined to relate solely to the Northern Territory. It was not until 1968 that the member for the Northern Territory was given the same "powers, immunities and privileges" as those enjoyed by members representing State Electoral Divisions.<sup>84</sup>

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<sup>82</sup> *Constitution of Australia*, s.122.

<sup>83</sup> *Ibid.*, 163 per Dawson J.

<sup>84</sup> *Ibid.*, 219 per McHugh J. *Northern Territory Representation Act 1922* (Cth), s 5; *Northern Territory Representation Act 1936* (Cth), s 2; *Northern Territory Representation Act 1959* (Cth), s 3; *Northern Territory Representation Act 1968* (Cth), s 4.

It could not be said, therefore, that the law was an expression of democratic will by those subject to it. In the face of this democratic deficit—which would not have applied, it must be noted, to any similar laws passed by the parliaments of the several self-governing States—Justice Gaudron argued that

persons resident in a Territory have no constitutional right to participate in the democratic processes and, thus, have no protection on that account in the event of an abuse of power. I would consider that that approach requires that s.122 should be construed on the basis that it was not intended to extend to laws authorising group violations of human rights and dignity...<sup>85</sup>

Nevertheless, Justice Gaudron did not find in favour of Kruger. The problem was that the Ordinance provided only in the most general terms that

The Chief Protector shall be entitled at any time to undertake the care, custody, or control of any aboriginal or half-caste if, in his opinion it is necessary or desirable in the interests of the aboriginal or half-caste for him to do so, and for that purpose may enter any premises where the aboriginal or half-caste is or is supposed to be, and may take him into his custody.<sup>86</sup>

Nothing in this Ordinance specifically authorised genocidal acts and ought not thus to be interpreted. The Ordinance was *constitutional*. If any officers intended the genocide of aboriginal peoples under its mantle, they were themselves acting *ultra vires* and illegally.<sup>87</sup> The appropriate cause of action was therefore against any unauthorised acts of genocide which may have been committed, and not against the enabling legislation itself. Justice Gaudron therefore defers the question of genocide to another occasion and, implicitly, to the political process. In this double deferral, of constitutional interpretation to democratic theory, and of statutory interpretation to democratic process, her Honour shows an heretical faith in politics as a means of resolving social issues.<sup>88</sup>

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<sup>85</sup> *Ibid.*, 189 per Gaudron J.

<sup>86</sup> *Aboriginals Ordinance* 1918 (NT), s. 6(1).

<sup>87</sup> But not necessarily. It would seem that a *bona fide* exercise of statutory powers, even if mistaken, does not give rise to an action in negligence, misfeasance in public office, or any other tortious action: *Northern Territory v Mengel* (1995) 129 ALR 1 (overruling *Beaudesert Shire Council v. Smith* (1966) 120 CLR 145).

<sup>88</sup> In particular see Unger, *Knowledge and Politics*, *op. cit. supra*; *Politics: A work in Constructive Social Theory*, *op. cit. supra*.



Undoubtedly, heretical scholars would have much more to say about this. Indeed, Gaudron's theory of democratic legitimacy might have been taken so much further. She treats "persons resident in a Territory" as the relevant constituency in relation to the Ordinance, disenfranchised by the operation and structure of the Constitution itself. But surely the Ordinance was limited in its scope to *specific* individuals and not all citizens. "Aboriginal and half-caste" residents subject to the Ordinance were hardly part of the democratic framework of the Commonwealth even in the limited way extended to white Territorians. Throughout the life of the 1918 Ordinance, "aboriginal natives of Australia" were not entitled to vote.<sup>89</sup> Where then was the social contract in the enactment of the Ordinance? Where the consent? If one takes Gaudron's own theory seriously, the 'democratic deficit' of aboriginal peoples in the Territory requires a level of protection from the tender mercies of Commonwealth administration far more rigorous than that acknowledged by Gaudron.

But from a critical legal studies perspective, it is the linguistic theory of the Court that is most interesting. The word 'care' is treated by the High Court in a manner befitting HLA Hart, as embodying a literal core which is not open to question.<sup>90</sup> To the High Court, 'genocide' and 'care' are mutually exclusive. Logically, therefore, the Ordinance is constitutional and perhaps even admirable; any genocidal acts done under its authority would, on the contrary, be *ultra vires*. But let us accept, with Lon Fuller, that no word can be understood without reference to its context. Fuller gives a telling example. In a provision which states 'All improvements are to be reported to...' how, he asks, are we to determine even core instances of the word 'improvement' without reference to whom the report is to be made?—a nurse, a professor, an inspector. The purpose of the section will affect both its content, and its value (an 'improvement' to a heritage building may very well be illegal).<sup>91</sup>

The section considered in *Kruger* is even more indicative of Fuller's argument. What if the phrase "shall be entitled at any time to undertake the care, custody, or control of any aboriginal or half-caste" were said in reference to a Fuhrer, or a prison officer, or a slave owner? Would not the very word 'care' then take on an ominous hue? Even the word Protector

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<sup>89</sup> *Commonwealth Electoral Act 1918* (Cth.), s 39(5), as amended by *Commonwealth Electoral Act 1925* (Cth), s 2; *Commonwealth Electoral Act 1949* (Cth), s 3; *Commonwealth Electoral Act 1961* (Cth) s 4; *Commonwealth Electoral Act 1962* (Cth), s 2. See also *Constitution of Australia*.

<sup>90</sup> See Hart, *op. cit. supra*, pp. 124-41; H.L.A. Hart, 'Positivism & the Separation of Law & Morals' (1958) 71 *Harvard Law Review* 593.

<sup>91</sup> Lon Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630, pp. 661-69.

does not have an entirely unblemished English history, evoking as it does that other Protector, Oliver Cromwell, with all the authoritarian hectoring that Puritanism instigated. Would not a section which spoke of persons being entrusted to the care of such officials, *on its very face* be indicative of bad intent and even, in certain circumstances, genocide?<sup>92</sup> On such an argument, the meaning of this provision of the Ordinance simply cannot be read literally: its core meaning cannot be determined without reference to the very context of official acts and behaviour the Court simply refuses to acknowledge.

The question is not whether the Ordinance ought to be read as including an authorisation of genocide. The question is rather whether the most limited construction of the section possible—home invasion and abduction—could be Constitutional. In 1937, A.O. Neville, Chief Protector of Aborigines in Western Australia, described the operation of a similar provision thus:

We have power under the act to take any child from its mother at any stage of its life.<sup>93</sup>

How could a theory of law constrained by principles of democracy justify such a law against a group of persons who had *no* say in its enactment, and who were in fact legal objects but not legal subjects?

The applicants in *Kruger* faced a further and compelling difficulty. The word ‘genocide’ was defined under the *Genocide Convention* as requiring “intent to bring about the destruction of the group”.<sup>94</sup> The argument of the Court, Dawson aside, was that that intent was not manifest in the Ordinance and therefore any genocidal acts were not authorised by it. As Justice Toohey explains,

There is nothing in the Ordinance, according to it the ordinary principles of construction, which would justify a conclusion that it authorised acts “with intent to destroy, in whole or in part” the plaintiff’s racial group. Once again, at the risk of undue repetition, it is necessary to keep in mind that it is the validity of the Ordinance, not any exercise of power under the Ordinance, which is the subject of these proceedings.<sup>95</sup>

On this point, the High Court is distinctly orthodox: the purity of the law is rescued by carefully distinguishing it from the behaviour of officials.

<sup>92</sup> Many thanks to my students in the elective unit *Law & Discourse* at the University of Sydney for their help in developing this argument.

<sup>93</sup> *Sydney Morning Herald*, April 4 2000, p.1.

<sup>94</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 1949, Article II.

<sup>95</sup> (1997) 146 ALR 126, 175 per Toohey J.

The heretical response would be to reject such an intellectual *apartheid*, and to insist on reading the core meaning of the section in relation to its social context. Chief Protector Neville asked,

Are we going to have a population of one million blacks in the Commonwealth or are we going to merge them into our white community and eventually forget that there ever were any Aborigines in Australia?<sup>96</sup>

These statements are surely the context which tells us *exactly* what the section intended when it was written and when it was enforced. This intention cannot be read simply with the aid of a dictionary; it requires a knowledge of social background which the Court is at pains to disavow. The focus on words removed from practices ultimately begs the question.

But the orthodox/heresy's focus on the meaning of words—on the interpretation of 'care' and 'genocide' and the contextual or acontextual reading of the Ordinance—focuses our attention on the question of judicial determination at the expense of other issues. In contrast an apocryphal approach analyses the discourse of the High Court in terms of a more general framework of implications.

Firstly what is disturbing about this case is its steadfast refusal to listen, specifically to listen to the evidence of the applicants concerning what actually happened to them under the Ordinance. The Court did not reject the argument of genocide; rather it deferred its consideration to another day. Given the impossibility, at this late stage, of gathering evidence as to exactly which officials involved in the forced relocation of children and families actually 'intended' 'genocide', this deferral was not *sine die* but unto death. Indeed, in the recent case of *Cubillo*,<sup>97</sup> several plaintiffs attempted to bring legal actions concerning their own removal and were faced with insurmountable obstacles pertaining to memory and evidence. It seems unlikely that any could now succeed. The Constitutional argument, general and not particular, was denied the stolen generations by *Kruger*; the way there left open to them would appear to have little hope of success after *Cubillo*. Maurice Blanchot wrote that despair comes "not because hope is condemned but because it does not succeed in being condemned."<sup>98</sup> It is just this twilight which the Court accomplishes through its radical separation of meaning and practice.

The discourse of the Court communicates not a specific content marked by the dyad legal/illegal, but rather a message of power over the aboriginal applicants by maintaining its authority over the promise of a

<sup>96</sup> *Sydney Morning Herald*, April 4 2000, p.1.

<sup>97</sup> *Cubillo & Gunner v. Commonwealth* [2000] FCA 1084.

<sup>98</sup> Maurice Blanchot, *The Work of Fire*, trans. C. Mandell (Stanford: Stanford University Press, 1995), p. 7.

future litigation which will never come. Franz Kafka's 'Parable of the Law', that apocryphal mainstay, is surely apposite.

Before the law stands a doorkeeper. To this doorkeeper there comes a man from the country and prays admittance to the Law. But the doorkeeper says that he cannot grant admittance at the moment. The man thinks it over and then asks if he will be allowed in later. 'It is possible,' says the doorkeeper, 'but not at the moment.' ...The doorkeeper gives him a stool and lets him sit down at one side of the door. There he sits for days and years. He makes many attempts to be admitted, and wearies the doorkeeper with his importunity.

...The man, who has furnished himself with many things for his journey, sacrifices all he has, however valuable, to bribe the doorkeeper. The doorkeeper accepts everything, but always with the remark: 'I am only taking it to keep you from thinking you have omitted anything.'<sup>99</sup>

It is not the Court's decision, the determinacy or otherwise of its interpretations, which places us all before the law, but rather its refusal to decide.

The story of these maneuvers would be merely an account of that which escapes the story and which remains finally inaccessible to it. However, the inaccessible incites from its place of hiding... It is [the law's] discourse, rather, that operates at the limit, not to prohibit directly, but to interrupt and defer the passage, to withhold the pass... which in fact tells him or lets him know: do not come to me. I order you not to come yet to me. It is there and in this that I am law and that you will accede to my demand, without gaining access to me.<sup>100</sup>

Secondly, in the Court's refusal to listen lies an ethical failure of responsibility. In its obsession with the semantics of adjudicative function, *Kruger* abjures—literally, to swear as to an eternal absence—any other function: constitutive, jurisgenerative, discursive, public. It diminishes itself as well as those who found no place to stand before it.

The case is framed by multiple layers of *différance*, in the mutually implicated senses of a creation of differences accompanied by a deferral

<sup>99</sup> Franz Kafka, 'The Parable of the Law', in *Collected Stories*, *op. cit. supra*, pp. 173-74.

<sup>100</sup> Jacques Derrida, 'Before the Law' in *Acts of Literature*, *op. cit. supra*, pp. 191, 203.

towards the absent<sup>101</sup>—of context to meaning, of the present to the future, of law to politics, of ethics to law, and of responsibility to accountability. But this deferral succours a betrayal of both the applicants and of the law's best practice. If the court has an ineluctable responsibility in the precise sense of a duty to provide a *response* to the individual circumstances before it, then its refusal to decide and its refusal to listen take on a most injudicious cast. The deferral was a legal avoidance but an ethical abandonment. One may argue from this position that ethics and justice necessarily take place outside the law.

As I see it, the central aporia of deconstruction ... concerns the nature of this passage from undecidability to the decision, from the ethical 'experience' of justice to political judgment and action.<sup>102</sup>

Axel Honneth neatly paraphrases Lyotard's discussion concerning

the injustice of the untranslatability of one language game into another: the survivors of Nazi concentration camps, whose moral grievances are gradually being silenced, because they do not find an appropriate medium of articulation in the genre of discourse constituted by formal law... Because in our society certain genres of discourse, particularly those of positive law and economic rationality, have achieved an institutionally secured predominance, certain language games with a different kind of validity remain almost permanently excluded...<sup>103</sup>

Nevertheless, I believe that the better view is that this ethical moment of decision must lie *within* law, not outside of it. Difficult as it is, there is no law without the ethics that exceed it. One thing the court cannot do without abrogating its fundamental responsibility to those before it, is stop up its ears. As I recently wrote elsewhere, drawing on Derrida's 'Force of Law' and *Gift of Death*:

Justice is the expression of a responsibility to others which must take place outside the principles of law. It is the code beneath the code of law. The explanation for our actions by reference to a rule or a process—which is what law sets out to describe—is a necessary element of social relations but, in the case of burial, charity and beyond, it is never sufficient. Responsibility is the

<sup>101</sup> Jacques Derrida, 'Différance' in *Margins of Philosophy*, *op. cit. supra*, pp. 1–27, 7–9.

<sup>102</sup> Simon Critchley, *The Ethics of Deconstruction*, 2<sup>nd</sup> ed. (Oxford: Blackwells, 1999), p. 275.

<sup>103</sup> Axel Honneth, 'The other of justice' in *The Defense of Modernity* (1995), pp. 293–94.

*supplement* which law requires for its functioning but cannot constitute.<sup>104</sup>

This is an ethical critique of the tragedy of justiciability as it was understood by the High Court. The very narratives that motivated the plaintiffs to bring a legal action in the first place are neither accepted nor denied; rather they are refused the respect and attention of an audience. Consequently, the experiences of the stolen generations remain beyond the pale of white consciousness exactly as they have been throughout the past century, unspoken and forgotten, and therefore, in the eyes of an orthodoxy whose power to label is absolute, trivial at best and doubtful at worst. Without a place to stand, and the courts of Australia have continued to pull the rug from under them, the stories of the stolen generations will remain for too many white Australians, apocryphal, a self-serving fiction. And for those who experienced the pain and cruelty of separation themselves, their stories are still *apokrupto*, clouded in secrecy and silence.

Thirdly, the question of genocide raises disturbing issues. The Court focuses on the meaning of an “intent to destroy” under the Genocide Convention. One might wonder whether such a focus on intent, both that of the Court and the Convention, truly captures what is so abhorrent about genocide. Hannah Arendt characterised the crime slightly differently:

[y]ou supported and carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of other nations—as though you and your superiors had any right to determine who should and who should not inhabit the world.<sup>105</sup>

In light of the statement of Chief Protector Neville and those others like him who administered it, how could one not see the plain words of the Aboriginals Ordinance as conspiring to just such an end? And how could the resolute severance of its plain words from the meaning of those who *actually* read them, interpreted them, and used them, amount to anything other than a wilful blindness? The problems of orthodox discourse are here exemplified. As Lon Fuller argued in relation to the Third Reich, the positivist theory of reading rendered genocide more possible by sundering meaning from the richer realms of context and of morals.<sup>106</sup> It is not simply the High Court’s failure to address these issues which sends a message about the dangers of certain discursive moves. It is rather their *complicity*, through their interpretative strategy, in the very same genocidal errors of the past.

<sup>104</sup> Manderson, ‘Tales from the Crypt’, *op. cit. supra*, p. 12.

<sup>105</sup> Hannah Arendt, *Eichmann in Jerusalem*, quoted in Raimond Gaita, *A Common Humanity* (Melbourne: Text Publishing, 1999), p. 148.

<sup>106</sup> Fuller, *op. cit. supra*, p. 659.

*Kruger's Case* insists on an unbridgeable gulf<sup>107</sup> between 'genocide' and 'law'. The two cannot exist together, either because it is unfathomable (for Justice Dawson) or unconstitutional (for Justice Gaudron). But genocide, if it is anything, is a crime of law. It is not solely a matter of murders or massacres, and death may not even be its nadir.<sup>108</sup> It is the imposition of a system, of rules and policies and regimentation, onto the business of elimination; and further, of a system which treats people purely generically, without individual respect and simply as part of a class subject to the expedience of a social policy. As Raimond Gaita argues, what is wrong is the denial of the uniqueness of human beings.<sup>109</sup> The genocidal policy is by its nature abstract: it looks at people and sees them only as a class marked out for destruction. It denies the uniqueness of human subjectivity. It denies the relevance of individual context. It denies the moral consequences of its interpretations. It is murder, but it is murder made law.

The real difficulty is that if genocide takes place, it takes place *as* law and not simply *disguised* as law—law understood as a system of meaning and a social practice, and not just as a semantic game. From within its logic, it will not look like genocide at all: it will look just like any other law. Lon Fuller, with his contagious optimism for the ability of the legal system to look evil in the face, would not own up to this. The Chief Protector crossed the line when he (and the government in general) decided that a whole class of aboriginal and part-aboriginal children were to be removed from their families, simply because of they belonged to the class of aboriginal children and regardless of their individual circumstances or needs. But the High Court fared little better. On the contrary, by their denial of responsibility the Court refused to hear the stories of individuals at all. They therefore re-enacted the very process of definition and ignorance which, on one level, allowed children to be taken from crying mothers all those years ago. Further, the semantic strategy of literal meaning *abstracted* from social context prevented the court from hearing the very evidence that may have made them think differently about the relationship of law to text of which they were so sure. *Kruger's* gestures replicate the strategies which lie behind any legal genocide: the abstraction of persons from their individual experiences, the treatment of meaning as removed from context, the deferral of moral consequence to some other time and place. It is not to the point to argue as to whether or not the Court might have found differently—that is only one dimension of the lesson of the case. The ontological dimension lies in the incapacity of the law to understand the

<sup>107</sup> See the use made of this phrase by the Privy Council: *In re Southern Rhodesia*[1919] AC 211, p. 233.

<sup>108</sup> See Fraser, *op. cit. supra*.

<sup>109</sup> Gaita, *op. cit. supra*, pp. 59-60.

relationship of law to genocide or to respond to it directly, and therefore to be destined never to escape from the legal conditions of its possibility.

Here too, then, the crucial issues raised by *Kruger* remain steadfastly apocryphal: the relationship of genocide to law is excluded by definition, unable to be represented, relegated from a kind of knowledge of the dangerous and ever-present possibilities of law, to an impossible and incomprehensible fiction. Law's power lies in its ability to hide its implications from view, and then to conceal the evidence of their concealment.

## Conclusion

The apocryphal attempts to reclaim those aspects of law hidden by law's power to name and unname. And it attempts to do so through a variety of perspectives and techniques themselves hidden by mainstream jurisprudence. This implies an approach to law motivated by certain concerns. As discourse, I am interested in the broader implications of the form and structure of law and not merely the correctness of a decision (political or otherwise) within a structure of rules. As aesthetics, I am interested in using alternative genres (literary or otherwise) to deepen our engagement with legal materials. As tragedy, I am interested in what lies outside the autonomous reasoning of the court, via the myths of origin which are marshalled by it, and the *aporia* which come to frustrate it. As ethics, I am interested in the relationship between law and justice implied by the Court's methodology, both for those who came to it as supplicants, and for the very nature of law itself. The *aporia* of undecidability is not only the tragedy of law, but the possibility of ethics. As style, I am interested in how the Court's arguments and rhetoric on one level, reveal the problems they would perhaps most like to avoid. In *Kruger's* case, for example, the conceptual denial and practical deferral of genocide sets the scene for the re-enactment of genocide as law. The Court ultimately manifests what it makes such an effort to defer and conceal.

The apocryphal also implies an approach to law directed towards certain subjects. It is interested in the marginal, in voices excluded by normative law, and by the complex layers of that exclusion. In that sense, there is a harmonic resonance between method and subject matter, form and content, between apocryphal jurisprudence and the jurisprudence of apocryphas. Indeed, *Kruger's Case* marks not only territory which an apocryphal reading might explore; it serves also to demonstrate the relationship of power between margin and authority which is implicit in the word and its history.



These elements and the interaction of these elements represent different ways of exploring law and judgment that are too often ignored by the presentation of the orthodox heresy as if it were the alpha and omega of legal theory. The question of adjudication and the well-trodden positions of these schools are, of course, a tradition of enduring interest. But there are other questions outside this shared framework of assumption. Such questions are equally jurisprudential, and they can no longer be ignored. The Apocrypha is not a school or a movement. There is no political agenda or even any necessary intellectual coherence. What these writers share, instead, is temperament and imagination. Above all, the Apocrypha have shown a passion for, and at times no doubt an indulgence in, writing, which extends not only to their own work but to the care and particularity with which their chosen texts and fields of interest are treated.<sup>110</sup> Arguments, like justice, cannot be generalised—as we have seen, that is the grave peril to which law and theory both tend. Such general truths as there may be must be discovered, anew, in every distinct act of interpretative care. The practice of writing and reading, then, should not just be about law but about justice; and more, it should not just be about justice but an effort to do it, there and then.

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<sup>110</sup> Lucy, *op. cit. supra*, p. 15, speaks of “a relatively lax attitude to the ‘surface’ of the legal text. The text is not taken too seriously because any and all judgments or statutes embody the rational and evaluative defects that arise from the general issues of language and value indeterminacy”. If is intended by this the familiar jibe not just of heretical but post-structural theory—that meaning is up for grabs and interpretation is therefore arbitrary—nothing, repeat, nothing, could be further from the truth.

