NAVEIÑ REET:
Nordic Journal of Law and Social Research

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NNJLSR aims to publish original and innovative legal scholarship in the diverse fields of law. NNJLSR is keen to publish interdisciplinary socio-legal research that examines the interface between law and political science, economics, sociology, philosophy, anthropology, ecology, feminism and legal institutions.

The journal further aims to share research and ideas about legal matters of concern which are common to developing countries; to encourage research in these fields; and to build conventions of academic discourse and publication. The journal encourages work which sees law in a broader sense, and so sees legal matters as including cultural diversity and plural legal realities all over the world.

Moreover, journal aims to function as a platform for communication on legal matters of concern among the powerless and those who struggle to access justice.

The journal welcomes contributions from judges, lawyers, academics and law students. In addition, given its policy of encouraging interdisciplinary scholarship, it welcomes input from specialists belonging to other disciplines. Contributors are welcome to address issues from national, comparative and international perspectives.

Contributions may be in the form of articles, book reviews, case comments or other forms.

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Special Issue on Law and Art (Volume 2)

Edited by: Rubya Mehdi & Hanne Petersen

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Introduction

Hanne Petersen & Rubya Mehdi

This is the second volume on Law and Art of *Navein Reet. Nordic Journal of Law & Social Research.* The first volume was primarily the outcome of a workshop held in Copenhagen in December 2013 on *"Law and Art: European and Global Perspectives."* We announced already in the 2014-volume that we would need to publish a second volume because of the considerable interest in this topic. This volume demonstrates both this interest and the quality of the contributions and reflections on this topic.

In the introduction to Vol.1 we speculated about the reason for the interest for this topic, which surely cannot be said to be mainstream – so far – and we wrote the following:

> "One reason for the growing interest to integrate law with various art forms perhaps has emerged from a necessity of understanding plurality in the globalized world. The language of art can be interpreted in multiple ways regardless of linguistic, literacy and professional skills. Thus they may give more space to law professionals to open up for diversities. Art has the potential to help in comprehending the complex human experience of law and legal process in a globalized world. And it may give voice to experiences of (in)justice and ambivalence as well as to many other emotions, which may have difficulties in reaching the ears of professionals and of normative institutions."

Several of the articles in this volume deal with the relation between and combination of law and images and imagery – be that in paintings, sculptures or films. Others focus on the performing arts such as dance and music. Images are perhaps particularly receptive to interpretation regardless of linguistic and professional skills, and in a time of globalized social media, they have also become accessible to a degree yet inexperienced. Image and representation via images are also closely connected with ambiguity.

This introduction is written in the early fall of 2015, where Europe is overwhelmed by images on all types of media witnessing the plight of refugees fleeing from especially the 'civil war' in Syria, but also from the seemingly never ending atrocities in Afghanistan, as well as the authoritarian regimes in Eritrea to name just some of the areas the refugees are coming from. Elsewhere in the world, Muslim minorities have been fleeing Myanmar – although this is not something often portrayed in the Western press.

We are witnessing the biggest numbers of refugees in the world since World War II – in an era, where the role and impact of the image has probably never been stronger. We are not dealing in this period with images, which are necessarily 'artistic', but clearly with images which are contributing to contested processes of witnessing of suffering and injustices in the world.

The actual massive movements of people and the photographic representations on different media platforms – which may be as well symbolic as iconic and strategic – have so far also moved considerable parts of civil society in Europe. Communities in European societies and national and European politicians have been moved and have been reacting and have demonstrated not only fear, xenophobia and exclusion, but also empathy, openness and hospitality. The present situation seems quite chaotic and overwhelming. Practices and rules are breaking down, and several of them may probably not be reestablished again, but have to be transformed and adapted to the global challenges.

This issue presents several articles, which deal with a combination of artistic and legal/normative approaches to 'dark sides' of societies, communities and their law. 'Law' and 'art' supports certain groups and interests in writing and imagery in times of both peace, civil war, founding of states, decolonization and (ecological) transformation. A legal and social order needs to (re)interpret itself continuously to face the challenges ahead. Individuals and artists are perhaps more important participants of these processes today than legal professionals have so far acknowledged.

Sionaidh Douglas-Scott in her article on ***Law, Justice and the Pervasive Power of the Image*** considers law a cultural entity, as much an art as a science and in her article she focuses especially on the power of the image, which she holds may help us to clarify legal meanings. Images, often strongly grounded in our emotions, provide very powerful arguments for action – regardless of whether these images are in fact trustworthy, or form the basis of a sound argument, as the power of advertising illustrates. Through history, the practice of law has been manifested in images, by way of custom, usage, practice or precedent. Law's own aesthetic is a form of cultural experience that shapes and enforces our cognitive and emotive understandings of law. However, law also manipulates its images, rather than permitting a dialogue with them. Alison Young has asserted that the relationship between art and law is one of *co-implication*, a notion which Douglas-Scott uses as the basis on which law and the image interact, her argument being that, while law's own management of images must be scrutinized with care, law itself may be illuminated, enhanced or undermined by the work that images do, and our own understanding of law thus enriched, or even destabilized. Douglas-Scot uses images to understand law, and

especially the rule of law, including the 'dark side' of 'the rule of law', which undeniably has a connection with a certain type of liberalism, which renders it amenable to criticism. The rule of law offers protective functions for business, sheltering trade against political arbitrariness, or expropriation of property rights, and has sometimes served as an ideal partner for market capitalism. She discusses a ceiling painting by De Lairesse from 1672 "Allegory of the Freedom of Trade" in the Peace Palace, The Hague, as an example of 'pictorial capitalism' intended to glorify free trade and link it to peace, liberty and justice through its iconography.

In a section called "From the Rule of Law to the Survival of the Fattest" she mentions the spread of neoliberal reforms across the world, in what has been described as an 'economic constitutionalism'. These 'reforms' supposedly reproduce the economic and legal conditions of the developed world, but in actual fact the countries undergoing these reforms have not flourished. In this context she discusses a sculpture called 'Survival of the fattest' by Danish sculptor Jens Galschiøt, depicting a grossly obese western *Justitia* on the shoulders of an emaciated African boy. The fat lady holds up diminutive scales as a meagre mockery of justice. According to the artist the sculpture represents the 'self-righteousness of the rich world,' which sits on the backs of the poor while pretending to do justice. This modern Justitia brings not 'freedom' with trade but harm, not peace and security but profit for the already rich, at the expense of the very poor.

Monica Lopez Lema discusses ***Ethics of Non-violence in Guillermo del Toro's Pan's Labyrinth*** in relation to Francoism and the Spanish Civil War in her article. *Pan's Labyrinth* is a film from 2006, set in 1944 which combines the imagery of dark fairy tales with images of torture and murder in a retrospective reflection on anti-Francoist guerillas from the perspective of a Francoist captain, Vidal; a women, Mercedes, involved with the resistance; and eleven year old Ofelia, whose mother follows Vidal. Ofelia lives in a world of both fantasy and history. The film has been associated with contemporary legislative and civic efforts in Spain to recover the historical memory of the victims of Francoism and to revisit what has been referred to as the "pact of forgetfulness" or "oblivion" reached during the transition to democracy from 1975-1978.

The author actually lives in Finland, where Swedish-Finnish fiction author, Kjell Westö in 2014 received the Nordic Literature Prize for a novel called *Mirage 38* taking place in 1938 with a lawyer and his secretary as the main characters – illustrating the painful heritage of the much earlier and shorter, but also very violent Finnish Civil War from January to April 1918 – a Civil War, which has until very recently remained a taboo in

Finland. At present a Civil War is going on in Syria, which is also very violent and tragic, and which may very well leave traumas and traces for a long time to come.

Violence is an important element of the film, *Pan's Labyrinth,* and the author asks how images of violence shape our views and attributions of responsibility, blame and (in) justice. In her perspective *Pan's Labyrinth* constructs responsible witnessing. The film uses three different but interconnected cinematic techniques: narrative reversal (the story is told 'backwards'; third person voice-over, and direct address. A reverse chronology (also used in *Mirage 38)* has a destabilizing effect; the third-person voice-over frames the entire film as a fairy tale, placing the viewer as an invited confidant,; and the direct address parallels a face-to-face encounter with a world of Francoism, a world of resistance and a world of fairies and monsters.

The Franco regime used a strategy of a 'hunger-pact', a food rationing system, which ensured that families of fighters had no work and went hungry (again with certain parallels in Mirage 38). The film turns the defeat of the resistance into a narrative of 'heroic memory' that presents the guerilla fighters and their supporters not as helpless victims but rather as fighters and heroes. Monica Lopez Lema emphasizes that the fairy tale framing of the film enables construction of vigilant and ethical witnessing. The vigilant perspective is constructed by a double mediation, where history is mediated by fantasy and fantasy is mediated by history. The film blurs the Manichean binaries of fantasy vs history, good vs evil, and challenges viewers to rethink their own implication in the scenes of violence. By merging past and future, the film compels viewers to acknowledge the effects of past harms in the present for the sake of a better future. The film constructs a position for viewers that enables them to self-critically reflect on their own act of witnessing and to take responsibility for it, and thus moves beyond suffering.

In his article ***Power, Violence and the Paradox of Founding in John Ford's The Man Who Shot Liberty Valance: An Arendtian Approach***, Danish based American lawyer **Russell L. Dees** presents an analysis of John Ford's film *The Man Who Shot Liberty Valance*, widely regarded as one of the director's best and darkest films and as a deep meditation on the American foundation myth. According to Dees an Arendtian approach provides new insights into the message of the film, and the film provides concrete illustrations of concepts developed by Arendt in her writings on the distinctions between power and violence. There is general agreement that the message Ford is trying to convey in his film is variation on the so-called 'paradox of founding': the establishment of any legal order, of whatever doctrine must be illegal, violent, unjust and brutal, and a society must

find a way to represent that fact to itself as a national memory, which is usually done by mythologizing.

The film presents education as an American utopia and as the basis of law and order – education that is of all ages, genders, and races, which mix together harmoniously to learn about American constitutional government. In the film the townspeople of Shinbone are going to elect two delegates and the people they elect are "representatives of what were traditionally believed to be the cornerstones of American democracy – the rule of law (Ranse Stoddard) and a free press (Dutton Peabody): the lawyer and the newspaperman, professions that depend on words on persuasion. (One cannot help but contrast the contempt with which both lawyers and journalists are held in the US today). In Arendtian terms, this truly is an exercise of 'power' as opposed to violence."

However, in order to secure the election of these representatives the lawyer accepts a duel with Liberty Valance, whom he at first mistakenly thinks he kills. It is however another man, Tom Doniphon, who shoots Liberty Valance, and tells Stoddard this, meaning that Stoddard is basing his later career as a (pompous and self-important) senator, governor and ambassador – and as 'the man who shot Liberty Valance' on a lie. But it is the killing of Liberty Valance, which lays the real foundation of the city, "the constitutions of a public space where freedom could appear", in a quote from Arendt. Dees writes that "The 'real' America is an America of violence. And when the truth is known, the comfort of the legend is preferred, " comparing the film with Hannah Arendt's very controversial book on Eichmann in Jerusalem, where she claimed that the Jewish councils who cooperated with the Nazis were somehow complicit in the Holocaust. Arendt's friend, Karl Jaspers, explained that her critics were upset because the book was an act of aggression against 'life-sustaining lies'.

Marrett Leiboff is an Australian, who has a background in both theatre and law. She presents an essay which 'proceeds in an unlikely manner, drawing on diverse and unlikely sources based in theatre theory of a kind rarely if ever used in legal theory.' Through these intriguing combinations her article ***Towards a jurisprudence of the embodied mind,*** uses the Danish television series, *Forbrydelsen (The Killing)* and the lead actor, Sarah Lund as an example of the importance of 'the mindful body'. Leiboff claims that we in law prefer to imagine that our bodies are surplus to the real task of endeavours with word and thought. This is not the conception in certain forms of theatre, which only need a body, a space and another body. Sarah Lund is the example of somebody whose body in space, 'with an often expressionless face that appears emotionless' encapsulates what we really need to pay attention to when watching this series. Leiboff links the thoughts and

practices of physicist Niels Bohr with the theories and work of Eugenio Barba, founder of the international Odin Theatre based in the Danish provincial town Holstebro, who was again inspired by the Polish theatre theorist and director Jerzy Grotowski, whose practice according to Leiboff suffuse the TV-series *Forbrydelsen* and the main character Sarah Lund. Leiboff writes that law and its jurisprudences are based in theologically grounded ontologies, which treat the *body of the scholar*, the interpreter, as an unwanted intrusion into the mind. Its practices seek to render the body, with all of its foibles, mute. Law insists on and valorises the dis*embodied mind.* She quotes Peter Goodrich, who writes that Christian doctrine prohibited tears, and expression of emotion was to be covered. Law sees the body as something unworthy and untrustworthy. Bodies are even dangerous and uncontrollable in Christianity and law. A Danish reader may almost be reminded of the way the (present) Danish female minister of immigrants, integration and housing has been acting during the present refugee crisis. She has been described as tough and ice-cold – epithets often associated with especially female politicians – and she is a member of a minority government, which has explicitly declared itself Christian. According to Grotowski *the embodied mind* also holds and expresses *embodied virtuous morality*, something which Sarah Lund represents in *Forbrydelsen.* "Words, logic, rationality are confounded by our bodies, which do far more thinking for us than we would like to believe. Even in law."

Afshin Akhtar-Khavari is another Australian based contributor to this issue, whose article on ***Fear and Ecological (In)Justice in Edvard Munch's*** **The Scream of Nature t**ouches on several of the concepts and perspectives already addressed in other articles in this issue but in a very different and interesting way. The article argues that the capacity to appreciate the nature of the kind of ecological justice that is needed in the Anthropocene Era, which we are now living in. requires that we pay closer attention to our emotional esperiences and fear in particular. Edvard Munch's painting, which is often referred to in English as *The Scream of Nature,* provides intrinsic symbolic support for and expression of the potential of fear to expose the reality of the impact of ecological injustice on human beings. The author reflects on the contributions of 'wild approaches to the natural environment', on 'new materialism', which provokes and encourages us to rethink and explore new ways of seeing our interactions with physical and biological matter and processes. Our senses, emotions and feelings are critical to ways in which we experience and shape the world materially, and the article particularly discusses the emotional experiences of fear in a world of matter to help further illuminate the discussion of the connections between our experiences of the Anthropocene Epoch and ecological justice. In this context fear is not understood as a highly negative experience, as is often the case, they are more nuanced emotional experiences sometimes emerging

from breaches of planetary boundaries. Fear is an important emotion for understanding our relationship to the natural world and the capacity to experience fear is important for understanding ecological justice, but context is important to give expression to this idea. In her discussion of Edward Munch's painting she quotes a comment by the painter, who 'felt a great scream pass through nature' when he was perhaps inspired to paint on of his paintings on this topic of *The Scream.* Akhtar-Khavari argues that despite alternative interpretations of *The Scream* the world of Munch can be said to be about matter, materiality, and the human emotional engagement with it. "The painting most importantly conveys the potential fear that one will experience should nature's scream emerge from the injustices we commit against it." It makes a valuable contribution to understanding the place of the human species in a world of matter.

Merima Bruncevic is a European and Swedish based legal academic, who defended her dissertation on access to art and the cultural commons at the University of Gothenburg in 2014. In this article she analyses the possibility of constructing a legal concept of the cultural commons - ***We need to talk about the cultural commons: Some musings on rhizomatic jurisprudence and access to art***, and reflects on a theory of rhizomatic jurisprudence, inspired by Deleuze and Guattari. The notion of the common is presented as a concept used to describe one of many categories of co-ownership, of resource distribution, allocation and management. It has usually been linked to nature and in Sweden especially to the concept of *Allemannsrätten* (the right of everybody to access and roam in nature). A concept of cultural commons according to Merima Bruncevic does not have to presuppose the removal of entitlements or the restriction of individual rights as intellectual property rights. It has to do with conceiving of an economically, culturally and democratically *sustainable management* of the cultural commons that comprises of cultural resources and cultural heritage, and that takes into consideration all types of interest – be it owners, users, state, public, future generations and so on. Such a concept can be envisioned by employing the rhizome theory.

The rhizomatic approach encompasses the possibility of revealing the potential of law and conceiving of alternative jurisprudential concepts and tools. The notions of connectivity, heterogeneity and multiplicity are especially important here and allow for a move from an either/or thinking (eg. owner/non-owner) to a both/and model. The rhizomatic approach to legal reasoning opens up the possibility to conceive of concepts that may handle the public and private together as an alliance in law.

Stine Simonsen Puri is Danish and trained in anthropology. She writes about ***Formal and informal laws of 'temple dance' in India***. The aim of her article is to examine moral boundaries tied to the female moving body in India. She deals historically with the Devadasis, who were women often of low social status, who would be dancing in front of temples in especially southern India. This was understood as close to prostitution especially by the British, and in 1947 before independence an Act was passed banning the dancing of women in front of Hindu temples. However, donations and dancing would also give women certain privileges at these temples, such as rights to own property, adopt children as single women, and give their property to their daughters instead of their sons. Becoming a temple woman could become a way to climb the social and economic ladder. The British saw this practice as proof of Hinduism being a degenerate religion as opposed to Christianity, and this influenced the views of the Indian Westernized elite. In this context law was used to uphold (colonial) morality. However, as part of a growing wish to lead the sub-continent out of colonialism after 1947, there was a search for a common cultural heritage, and as part of this search, arts became of great political significance, as they were to define a common cultural ground for the subcontinent. In this process, regional traditions were primed as representation of this common culture, and dance became one of the signifiers of a national culture and identity, which came into the spotlight among the Indian elite. Thus the devadasi dancing was transformed into Bharatanatyam – a form of dance used for these purposes. Anthropologists of dance emphasize how dance can both incorporate and communicate basic ethical codes of society – as well as challenge these. Contemporary middle class dancers of Bharatanatyam are in a seemingly difficult position. The transformation from Devadasi to Bharatanatyam poses moral dilemmas to the performers. Whereas the law meant a marginalization of the Devadasis, who were banned, while not offered alternative life paths, the cultural coded part of the 'laws' for the Bharatanatyam dancers has meant a specific framing of the dance as a spiritual practice beyond economic and erotic realms. The dancers nevertheless move in an ambiguous space, similarly to the Devadasis, where they balance a role of independent erotic career-seeking women, with that of a dependent traditional religiously devoted woman – which continues to put them in the spotlight of moral negotiations.

In the first volume on Law and Art, we published an article law and music dealing with the view of lawyers in Western opera, written jointly by a lawyer and an opera singer, who were old friends. In this volume we are pleased to present another jointly written article by two Chinese authors, **Qi Xiong and Jie Fan**, who are a couple, one of them a lawyer, the other a practicing musician. They are writing about especially Western and German law and Western theory about music in their article ***Legal and Musical Interpretation – On the historical and systematical elements in the interpretation of law and music***,

but they are also drawing some interesting comparisons with Chinese normative and legal culture. One of the most important "internal" similarities between (Western or westernized) music and law is that they both treat rationality and order as some of their merits so that the manifestation of both (Western modern) law and music requires strict formalization. In this issue, this is also underlined in another context in the article by Marrett Leiboff. The "texts" of both law and music are generated by a series of regulations with tight logic: "Since early times, music has been associated with order, and from there it has often been equated with law". According to the authors the wisdom from music can be helpful for legal interpretation in the sense that if an interpretation seems at first glance "superfluous" in the legal system, it does not necessarily mean it is redundant and must be avoided. On the contrary, it might be a hint that it is an "attentional" provision, which has its own value in the legal system, just like the attentional symbols in music, which can be very important reminders to performers. This view is particularly related to an indirect comparison with Chinese legal culture, where the link between the two disciplines is different. Although Chinese modern legal system has to a large extent been "westernized" , some of the legislative and interpretive techniques of Chinese law still have inherited several important characteristics from Chinese traditional culture, which make modern Chinese law system (and its legal practice) quite different from its Western counterparts.

This has its roots in the aesthetics of Chinese traditional culture. The convention that the detailed formal elements have often been deliberately omitted in the (Guqin's) music notation system is very similar to the traditional Chinese painting skill of "blank leaving", which requires the artist intentionally leave some places on the canvas untouched. According to the traditional Chinese art philosophy, to leave blankness in appropriate spaces in a picture will considerably promote its aesthetical taste. This phenomenon has something to do with Chinese philosophical worldviews. In the basic Taoist thoughts, the "image out of the image" as well as the "ideas not expressed by the texts" are pursued; consequently, the rhythm and tempo of a music piece need not be "strict" – on the contrary, just like the "hidden meaning" of life, the appropriate rhythm and tempo of a piece are to be freely explored by each interpreter. However, according to the Confucian doctrine of the "golden mean", the right tempo and suitable rhythm should not be too far from the conventional standards even if it is unsaid.

The last article in this volume deals with an issue of considerable importance for the future of the world – the development and supply of energy for communities in the world. **Bent Ole Gram Mortensen** writes about ***Hans Christian Andersen and the Blue Flame***, combining the world of fairy tale with that of modernization. One could perhaps describe Hans Christian Andersen as a re-interpreter of the genre of fairy tales at a period

of social transformation, where the society he lived in was moving from absolutist to constitutional monarchy and from a feudal to a 'modern' industrialized economy, where sources of energy were becoming cheaper and more readily accessible. Andersen was an avid supporter of modern technology as well as of modern development and speed – for instance in the form of the rapid steam trains. This article gives an idea about the interrelationship between the change of social and economic conditions of increasing importance (in an ever more energy hungry world) and the optimism about development of technology, which was common among artists in the late 19th and the early 20th century. As Afshin Akhtar-Khavari writes in her article not everybody may have shared that optimism, which is probably met with much more ambiguity in many parts of the world in this century.

Finally we present a book review written by Stig Toft Madsen of a book by Osama Siddique, who wrote an article in the first volume on law and art. In that article Siddique dealt with the traumatic outcomes of the partition of India in 1947, as expressed by an important short story writer Saadat Hasan Manto. In his book on Pakistan's Experience with Formal Law: An Alien Justice we witness Franz Kaka resonated in a system that is simultaneously familiar and alien; a very critical perspective on experiences with post-colonial law in Pakistan.

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Law, Justice and the Pervasive Power of the Image

Sionaidh Douglas-Scott[1]

Law and the image

Rescuing and redeeming law

It is not commonplace for works of legal scholarship to make use of images to aid and clarify their analysis of law.[2] Indeed, it has been remarked that characteristic responses from lawyers and judges to such efforts 'range from bewilderment, disbelief and passive aggressive indifference to more open attacks and withering denunciations that dismiss work that touches on the visual aspects of law as esoteric, trivial, "not law"' (Moran, 2012: 43). Notwithstanding, I have incorporated images in some of my work, which ranges from legal theory, through human rights law, to writing about EU law (Douglas-Scott, 2011, 2012, 2013). My use of images is grounded in the belief that the study of law is enlightened by reflection on other socio-cultural phenomena that generate legal meaning. Such socio-cultural influences are vital in the production and portrayal of law. Indeed, the use of images, far from clashing with or being irrelevant to, legal meanings, actually helps us to clarify them. Law is a cultural entity, as much an art as a science. It is rooted in images as firmly as in rules. Yet this relationship is sometimes ignored or even denied. It is more usual to affirm a strong affiliation between law and reason, science, and deduction, rather than with art and the imaginary. These latter are portrayed as imprecise, fanciful and permeated with subjective emotions that undermine law's perceived need for certainty. Moreover, certain jurisprudential schools, such as legal positivism, assert specific connections between law and science, often claiming a corresponding separation of law from art, as well as from morality.

However, on the contrary, art may function to rescue and redeem law (Boyd White, 1973). It enriches the legal imagination. This is no anodyne, trivial function. Understanding law in this broader way, and relating it to art or literature, expands our sympathetic identification with those in very different contexts and experiences. It contributes

1 I am grateful to the editors of the special issue of this journal, two anonymous reviewers, and participants at the University of Copenhagen seminar May 2014, Hart Workshop 2014, and Critical Legal Conference in Belfast 2013 for very helpful comments on aspects of this article.

2 Notable and rare exceptions are the works of Costas Douzinas, Peter Goodrich, Desmond Manderson, Leslie Moran and a few others. However, even if legal scholarship does not warm to visual culture, it has become more and more frequent for images to be employed in lectures and powerpoint presentations – an under-observed phenomenon, which suggests that lawyers do find images to be a valuable resource in explicating the law.

an imaginative empathy, by which the self, with its all too human attributes, may be recovered from the more formal, rational language of the law. A turn to art presents a different language by which to assess the experience of law, as well as providing some resistance to law's often coercive constructions. It provides a means through which we learn to improve the law and become better lawyers.

Moreover, law is not the autonomous discipline it presents itself as, animated only by its own forms and creations. The increasing growth of interdisciplinary approaches and journals acknowledges this.[3] The porosity of law to other areas of knowledge has long been acknowledged in the course of a lengthy relationship between law and the humanities, in which many of the most famous philosophers – Plato, Aristotle, Hobbes, Kant, Hegel, for example - have either been students of law, or possessed a rich knowledge of it (Douzinas, 2011) and recognized law as irrevocably tied to society and morality, as both productive of culture and shaped by it. Law is not a self-contained discipline - indeed the law is anything but a law unto itself.

The power of images

In this cultural context, the image is particularly powerful: 'In its ability of disclosing things, the image is promiscuous and forceful' (Douzinas, 2011). For John Berger, 'It is seeing which establishes our place in the surrounding world; we explain that world with words, but words can never undo the fact that we are surrounded by it' (Berger, 1972:7). Images perform a vast array of functions – they help organize our mental representations, excite our imagination, and support all types of experience, both poetic and prosaic. I interpret the concept of an image broadly in this article, as encompassing not only the 'high' art of famous artists and art galleries, but also the commonplace and the workaday - the advertisement, the photograph, the cartoon - such images as are all around us. Berger's definition might serve as a rough guide: 'An image is a sight which has been recreated or reproduced' (1972: 9). I work with the term 'image', rather than the more restrictive 'representation' (which allows less scope for the impression of the perceiver) or the more loaded, term 'art'. The philosopher, Morris Weitz, described art as an 'open' concept,[4] namely one in which the necessary and sufficient conditions for the operation

3 For example, the following journals: *Yale Journal of Law and the Humanities*, founded in 1988; *Law, Culture and the Humanities* (Sage) founded in 2005, and *Law and Humanities* (Hart) founded in 2007. There also exists a Law and Humanities blog at http://lawlit.blogspot.co.uk/

4 M Weitz, 'The role of theory in aesthetics', in Neill and Ridley eds., *The Philosophy of Art: Readings Ancient and Modern* (New York: McGraw-Hill, 1995) 183-191.

of a concept cannot be given because new and unforeseen cases may arise that do not share any asserted common denominator. I prefer to avoid the philosophical and disciplinary quandaries of what might constitute art. 'Image' is sufficiently malleable to connote both imaginary and concrete phenomena, and thus takes us further than 'representation', while avoiding the value-laden quandaries of the concept of art.

The power of images is no passive, inert phenomenon. Images are objects that speak back to us, as did the cake that urged Alice to 'Eat Me' in *Alice in Wonderland*. Most vigorous are the images in film, that animate law in representing it, that literally speak back to us, even if more ephemerally than solid objects such as paintings. Society has been disturbed, perplexed and provoked to violence by images.[5] Plato wished to banish painters and poets from his ideal Republic, believing the influence of art to be potentially subversive. Actions such as bans on tobacco advertising, the toppling of statues of former dictators, or the slashing by suffragette Mary Richardson, of Velazquez's *Rokeby Venus*, illustrate the power of images, and for that reason, society has over time sought to use, misuse or ban images altogether.

Member of the Fraternity of S. Giovanni Decollato in Rome with tavoletta

5 For example, on the opening day of a notable exhibition of 'Young British Art', titled *Sensation*, at the Royal Academy in London, a portrait of the notorious child murderer, Myra Hindley, entirely compiled in paint using the handprints of small children, was attacked and a can of paint thrown at it, and had to be removed from the display.

One of the most striking examples of the power of images is that given by Freedberg (1989, 7) of the *tavoletta*, a small painted image, part of an institutionalised practice offered as an instrument of consolation to the condemned in the last moments before their execution in 14th – 17th century Italy – indeed held very closely to their faces up to the moment of their death (*Fig 1*). These devotional images were painted on one side with scenes of the Passion of Christ and on the other with a depiction of martyrdom akin to that which the prisoner was likely to face. As Freedberg (1989: 5) writes, 'What comfort could anyone conceivably offer to a man condemned to death in the moments prior to his execution?' - any attempt at consolation might seem futile. Yet records suggest that this practice did provide solace and spiritual comfort to at least some condemned – evidence of the extraordinary power images may possess.

Therefore, notwithstanding that western law has tended to oppose reason and emotion, it is the case that images, often strongly grounded in our emotions, provide very powerful arguments for action – regardless of whether these images are in fact trustworthy, or form the basis of a sound argument, as the power of advertising illustrates. The ubiquitous, pervasive, presence of images provides a particularly powerful cultural reference for law.

Law's institutionalization of images

But the role of images clearly exceeds that of the rescue and redemption of law. For law is itself a 'deeply aesthetic practice' (Douzinas and Nead, 1999). Law institutionalizes images as official ways of seeing (Berger, 1972) bringing into being or affirming particular ways of living. Indeed, it has been argued that 'Law's force depends partly on the inscription on the soul of a regime of images . . .' (Douzinas and Nead, 9). As much as the violence and power that underpin law, images play their part in enforcing and maintaining the law. Through history, the practice of law has been manifested in images, by way of custom, usage, practice or precedent. This point is surely uncontroversial and is clearly illustrated through more specific examples. Law's passion for images has been expressed through an iconography of justice (Resnik and Curtis, 2011), by the architecture of the law, in the courts and their organization and design, and by official representations of Justice itself (see further below) that construct and reinforce the appearance of official authority, and draw on an aesthetic of harmony and order. A further artillery of images imposes legal authority - wigs, robes, sword and scales of justice, gavel, black cap, prison bars, judicial portraiture, all constitutive of a particular sensory perception of the world which law itself has created, and embellished, to ensure esteem and respect for itself. Those familiar concepts of the law – the 'reasonable man', or 'the officious bystander', impress themselves as images by and upon the legal consciousness. Law determines what images we will

consider pornographic, and what fecund, image-laden actions, such as cross burning, flag burning or poppy burning, will be classified as 'symbolic speech' and thus protected as freedom of expression. Therefore, should law deny any explicit connection with images, or with art more generally, such a denial is undermined by the pervasiveness of law's own aesthetic. This legal aesthetic is a form of cultural experience that shapes and enforces our cognitive and emotive understandings of law.

However, any relationship openly acknowledged by law with the image is one of *control* and manipulation. We can draw comparisons with religion, which has manipulated images – by banning them (as have Judaism, Islam, Protestant Reformation and Catholic Counter–Reformation at various points) or strictly controlling them, as in medieval Christian art (through an iconography in which every element has a specific permitted meaning, every saint an allotted 'attribute'[6]). Likewise, law polices its own image by filtering it through its own iconography - the forms of authority, justice, sovereignty, rationalism, legality and order, precedent and res judicata, bar and bench, and so on. Law manipulates its images, rather than permitting a dialogue with them. Yet why should we allow law to dominate the relationship in this way?

'Co-implication'

To sum up then: Law's relationship to the image is therefore complicated. Law may itself be interpreted as an art form, one of the liberal arts, but that is not all that it is. Law makes use of images, but is not reducible to images. Nor can art be straightforwardly compared to law. There exists no unambiguous analogy between art and law, and there are of course many points of difference between them. Peter Fitzpatrick (2005: 2) suggested the relationship between law and culture was an uneasy one, with an 'edgy quality', and the same might be said of the relationship of law and image. To be sure, one should not make inordinate claims for an approach that seeks to understand law in terms of a relationship between law and the humanities, culture and art. We cannot equate the creative process for judges, who write judgements, with that of literary authors, who write fiction, or artists who paint legal scenes. Rhetoric and cultural issues bestride these two domains, but artists are not practising law, nor are great judgements literary novels.

6 Even if Art has sometimes resisted this control, as, for example, in Caravaggio's use of realism in the depiction of biblical subjects. Caravaggio's original painting of *St Matthew and the Angel* for the church of S Luigi dei Francesi in Rome was rejected by the religious establishment for portraying a peasant-like St Matthew, with dirty feet.

Alison Young has asserted that the relationship between art and law is one of *co-implication*, 'in which law and image are enfolded within each other, their contours and substance passing through and around each other,' a relationship that 'interrupts any straightforward story of legal governance'. This relationship is one of entanglement and implication, 'a responsive dance' (Young 2005: 14). In this article, I adopt the notion of co-implication as the basis on which law and the image interact, the argument being that, while law's own management of images must be scrutinised with care, law itself may be illuminated, enhanced or undermined by the work that images do, and our own understanding of law thus enriched, or even destabilised. To understand it through the medium of images adds a density and a complexity to our comprehension of law, and reveals tacit assumptions, incongruities and solecisms in the workings of the law.

Using images to understand law

There are many ways in which one can write about law and image. In those rare cases in which it has acknowledged the significance of images, legal theory has tended to focus on law's relationship to visual culture generally, investigating the role that the visual can play in our understanding of law – and, as such, these studies are part of a broader theorizing about law. However, in my work, I have tended to focus on specific legal concepts – for example, aspects of human rights and EU law - and used images to enhance understanding of them, without overtly interrogating the nature of this relationship, partly because the images are capable of doing their own work without further pedagogic treatment.

In this article, I look at one particular and very familiar legal concept – the rule of law – to illustrate the work that images may achieve in furthering and enriching our understanding of law, but I also take a step back and look at the relationship of law to image more generally. Indeed, I believe the rule of law to be particularly apposite for investigation through visual resources, as it is a concept assumed by many – laypersons and lawyers - to be at the heart of legal aspirations, often venerated, sometimes seen as so basic and familiar as to need little explanation. As a recent commentary states: 'If celebratory rhetoric is to be believed, or money devoted to a cause regarded as a sign of its success, ours is the era of the rule of law. No one will be heard to denounce it, leaders of countries all round the world claim to have it, vast sums are spent to spread it' (Krygier, 2008). For many people, the rule of law *is* simply law. Everyone has some sort of image of it in their mind. One need not be a legal specialist to have at least some sense of its import.

The rule of law as a particular aesthetic of law

The image below, or something like it, should be familiar to anyone reading this article. Such images abound, usually in the vicinity of law courts. The figure of Justice, carrying the scales aloft - sometimes blindfolded to suggest it is fair and uncorrupted by bias - is usually portrayed in classical mode as is this one, which has its origins deep in the canon of western sculpture, a lofty canon which the law is keen to embrace. The figure is emblematic, easily read as Justice, often taken to be synonymous with law. It connotes the very values of the rule of law – a domain of law and not despotism and bias.

A Familiar Image of Justice

The rule of law is what many theorists understand by the concept of 'legal justice', thus asserting the possibility of justice *within* the law, a promise of the law to do justice, rather than separating law from justice. The rule of law is not merely one set of legal rules but instead could be seen as constituting the legal self-understanding of communities (Kahn, 1999). It is a pervasive concept. It has been described as a 'meta rule' about the importance and priority of legal rules (Palombella and Walker, 2009). Yet what exactly is the relationship of the rule of law to law, and to justice? What do we understand by this vague, overused term?

This discussion will of necessity be brief and I have written at much greater length about the rule of law elsewhere (Douglas-Scott, 2013). However, most would agree that the rule of law has traditionally required state action to rest on legal norms that are general in character, relatively clear, certain, public, prospective, and stable, as well as recognizing the equality of subjects before the law (Raz 1997, Fuller 1958). It stresses the fixed and stable enforcement of general principles - legitimate expectations, formal rights of access to the courts, equality before the law - a predictable mapping of the world in legal terms. Its benefits can be stated simply. It restricts the abuse of power. Observance of the rule of law enhances certainty, predictability and security both among individuals and between both citizens and government, as well as restricting governmental discretion. Thus it has both private and public law functions – an attraction in the world of growing legal pluralism.

Citizens are able to interact together, knowing in advance which actions are permitted and which prohibited, and what rules will regulate conflicts, should there be any.

These are perceived to be formal requirements of law, rather than substantive content which might derive from a particular theory of justice.[7] Max Weber believed that what he termed 'formally rational', i.e. modern law, derived its legitimacy not from any substantive morality (a shared, common morality being hard to achieve in times of contested moral pluralism) but formally rational propositions. The rule of law, which presents itself as impartial, is appropriate in today's landscape of moral and legal pluralism. Adherence to the rule of law is perceived as necessary to ensure the legitimacy of law. Legitimacy thus overtakes morality as a significant benchmark of law.

In sum, we might say that these features (generality, clarity, neutrality, publicity etc.), together with the common official image of Justice with the scales, contribute to and affirm an official *aesthetic* of the rule of law.

The 'dark side' of the rule of law?

Yet the rule of law is clearly not without its detractors. There is what Tamanaha has described as 'a dark side to the rule of law' (Tamanaha 2008, 516). Earlier in his career, Alan Hutchinson attacked it in the following words: 'The rule of law is a sham; the esoteric and convoluted nature of legal discourse is an accommodating screen to obscure its indeterminacy and the inescapable element of judicial choice . . . legal discourse is only a stylised element of political discourse' (Hutchinson, 1988 at 40). Hutchinson's critique interprets law as a function of power and politics, and warns us not to be beguiled by the apparently 'neutral' objective nature of the formal rule of law. Indeed, jurists have tended to take polarized views of the nature of the rule of law, viewing it either as ideal or ideology, good or bad. The rule of law undoubtedly has a powerful legitimating function. As such, it may be manipulated by cynical governments, who play lip service to its tenets while in fact flouting them. Such cynicism 'tarnishes' the rule of law, debases its value and undermines the official aesthetic of the rule of law.

It is also undeniable that the rule of law has a connection with a certain type of liberalism, and this connection also renders it amenable to criticism. As Judith Shklar has suggested, the rule of law has tended to be seen as 'a football in a game between friends and enemies

7 Although some theorists, such as John Finnis, argue for a substantive understanding of the rule of law. For further on this, see Douglas-Scott 2013, chapter 7.

of free market liberalism' (Shklar 1987, 40). A trajectory can be mapped out from John Locke through Karl Marx and Max Weber to Friedrich von Hayek, which posits an 'elective affinity' between the rule of law and capitalism (Scheuerman 1999, 208). (And capitalism of course has its dark side too.) In the case of English law, this link can be dated back to the 17th century, and the connection drawn between law, government and property. [8] The rule of law has played a historical role in protecting private property and freedom of contract (Ferguson, 2012), especially when it was used to support a fundamental right to accumulate private wealth.

Both liberal and critical accounts highlight certain features as indicative of this connection between capitalism and the rule of law. For example, it might seem that capitalism and economic development require certainty, predictability and security in order to flourish. [9]

Gerard de Lairesse, Allegory of the Freedom of Trade, 1672, Ceiling painting, Peace Palace, The Hague

8 The English common law courts have a long tradition of protecting property. Sir Edward Coke appealed to the common law as a traditional barrier to the interference by government with the economic and other 'freedoms' of the individual (Jacob Viner, 'The Intellectual History of Laissez Faire', (1959) J. L. & Econ 45, 55). The willingness of the common law courts to protect freedom of enterprise, and the development of the rule of law in this way, may also go some of the way toward explaining Weber's 'England problem' – namely, the question of how the stability and clarity in law necessary for the progress of capitalism could be provided by the uncodified common law system.

9 But for a somewhat different account see Scheuermann 1999 and 2008, Douglas-Scott 2013, chapters 7 and 8.

By securing these measures, it is possible to ensure the stability of contract law and predict the costs and benefits of particular transactions. The origins of the EU can at least partially be explained in this way. Ordo-liberals justified the creation and existence of the EU by its capacity to support free market rights, guaranteeing private property and exchange of goods, based around the economic nexus, or even 'constitution', of the Treaty of Rome (Ipsen, 1987). The rule of law offers protective functions for business, sheltering trade against political arbitrariness, or expropriation of property rights, and has sometimes served as an ideal partner for market capitalism. Thus capitalism is able to focus on commerce rather than on shielding its existing efforts from capricious conduct.

The *Allegory of the Freedom of Trade* painted by the 17th century Netherlands artist, Gerard de Lairesse, captures these links very appositely. De Lairesse's painting, illustrated in Fig 3 above, is intriguing, because the figure of trade it depicts employs much of the iconography of justice and the rule of law. The female figure, representing trade, sits on high, in much the glorious way in which justice is usually portrayed, in one hand a merchant's hat balanced on a stick in sceptre-like fashion, in the other a baton held up like a torch of freedom. Winged cherubs rush to place a naval crown (symbolizing the freedom of the seas, very important to Dutch trade at the time) on the figure. Interestingly, this painting, once displayed in a wealthy Dutch burgomaster's house, is now located in the Peace Palace in The Hague, thus identifying international trade not only with justice but now also with peace – indeed, security is a theme in the other two panels of the ceiling of which this work forms a part.[10] So capitalism, the freedom of trade, is portrayed as an allegory of the just society, bringing with it security and peace. However, the mercantilism that brought so much trade and prosperity to Holland in its Golden Age - a global commerce that was one of the earliest examples of modern capitalism, and whose produce was so ably illustrated in the still life paintings of the Dutch Golden Age - also had its dark side. Investment in the Dutch West Indies company fuelled the slave trade. Arguably, it was exploitation that propelled this Dutch commerce, and Karl Marx reproved the Dutch Republic as an example of early capitalism much as he was later to castigate England for the full-blown version. De Lairesse's picture is a form of 'pictorial capitalism' (Hochstrasser, 2008) intended to glorify free trade and link it to peace, liberty and justice through its iconography. But a closer look undermines this reading.

10 Lairesse named the triptych: *Allegory of Concord, Freedom and Security*. The triptych has been known for some time as the *Triumph of Peace*, although actually represents an allegory of the city of Amsterdam as a protector of freedom. Further information available at http://www.triomfdervrede.nl/

Yet the capacity of trade to function as an allegory of freedom continues to this day – for example, the Twin Towers of the World Trade centre destroyed on 11th September were sited next to 'Liberty Plaza,' and One World Trade Center, the building which replaces the twin towers in New York, and now the tallest building in the western hemisphere, is colloquially known as the 'Freedom tower'. However our contemporary free trade has its dark side too.

From the Rule of Law to the Survival of the Fattest

The rule of law is certainly not without its detractors in the contemporary international setting. The Marxist critique of the rule of law sees law as underpinning the ideology of capitalism. This critique finds close allies among those who argue that global injustice results from the manipulation of law applied globally by the capitalist 'Washington consensus.'[11] The last half century has witnessed the spread of neoliberal reforms across the world, in what has been described as an 'economic constitutionalism'. Loans to developing countries from the IMF or World Bank have been conditional on those countries undertaking reforms linked to so-called 'good governance', such as reducing market and trade barriers, undergoing privatisation, the protection of property and enforcement of contracts, as well ensuring the free flow of capital. Indeed, 'Rule of Law' is often used as a general term to describe such programmes. These 'reforms' supposedly reproduce the economic and legal conditions of the developed world. Yet this has not been the result, and most of the countries undergoing these programmes have generally not flourished. As has been pithily remarked, 'You buy habeas corpus and end up with Habitat Corporation' (Nicolaidis, 2008: 143).

Fig 4 presents the work of the Danish sculptor Jens Galschiøt. This piece is entitled 'Survival of the Fattest',[12] and it was displayed in Copenhagen harbour in December 2009 at the time of the G15 climate change summit, along with several other large cast iron sculptures by Galschiøt (it was also earlier displayed in London, during the European Social Forum in protest against the evils of free trade and globalization).

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11 'The Washington Consensus' was an economic plan proposed by the World Bank and IMF in 1990, supposedly as a template for economic reform in Latin America and elsewhere. See, for a general account David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005).

12 To be accurate, 'Survival of the fattest' was jointly created by Galschiøt and fellow artist Lars Calmar in 1992.

'Survival of the fattest' by Jens Galschiøt - An allegory of free trade for our times? (Courtesy of www.aidoh.dk)

It depicts a grossly obese western *Justitia*, bearing the scales of justice, borne on the shoulders of an emaciated African boy. The sculpture is accompanied by this text: 'I'm sitting on the back of a man. He is sinking under the burden. I would do anything to help him. Except stepping down from his back.' According to Galschiøt, the sculpture represents the 'self-righteousness of the rich world,'[13] which sits on the backs of the poor while pretending to do justice. Galschiøt deliberately positioned 'Survival of the Fattest' beside Edvard Eriksen's statue of 'The Little Mermaid' (Copenhagen's prime tourist attraction) in Copenhagen harbour, so as to ensure maximum attention, both in Denmark and internationally. In doing this, Galschiøt contrasted Hans Christian Anderson's fairy tale with the shameful but indisputable actuality of his own work, as if perhaps to suggest that the objectives of the wealthy nations at the G15 climate change conference might be little more than fantasies and make-believe. 'Survival of the Fattest' is a striking work, beautiful in its way, but borne out of a compulsion to change things, to shock people into doing justice. The chimneys at the other side of the harbour, billowing out smoke, also add to the irony, conveying an image of a duplicitous west, profiting off the backs of the poor, and polluting the environment at the same time, while appearing to work hard to prevent global warming.

This work provides a poignant contrast to the earlier allegory of trade by de Lairesse. It also confronts our beliefs as to the value of the rule of law, justice, and 'free' trade, raising the prospect of the smug assumption of a western 'Justitia,' or rule of law, as positively damaging to other communities and parts of the world. This work has none of the positive (and perhaps unjustified) optimism of de Lairesse. This modern Justitia brings not 'freedom' with trade but harm, not peace and security but profit for the already rich, at the expense of the very poor.

Galschiøt has used this figure of Justitia, the 'Survival of the Fattest,' on a number of occasions. In this next illustration (Fig 5), we see the work close up, away from its location in Copenhagen harbour.

13 Galschiøt's comments are available at http://www.aidoh.dk/new-struct/About-Jens-Galschiot/CV.pdf

At the centre is the same obese 'Justitia', her eyes closed, rather than blindfolded, illustrating a degraded justice that refuses to notice obvious injustice at her very feet, holding up the diminutive scales as a meagre mockery of justice. Behind her, this time, stand an oversized set of scales, 8 metres high. On one side of these scales hangs a dead cow, suspended by its legs, and on the other a number of emaciated developing world people, outweighed by the ponderous, corpulent, dead cow. Galschiøt's point here is, as he writes, 'the grotesque fact that each cow in the EU receives a subvention of 800 US dollars to block the poor countries from selling their products on the European market . . . In the rich part of the world our main scourge is obesity due to overconsumption while people in the third world are dying of hunger. The misery is creating floods of immigrants. In a desperate attempt to entrench ourselves and preserve our privileges we resort to measures so harsh that we betray our ideals of humanism and democracy.'[14] This sculpture confronts our notions of justice and rule of law head on, and reveals their hypocrisy.

I employ these works to illustrate how visual perception has an important role to play, how images can inspire and engage us, in our understanding of law. Galschiøt uses his sculptures to fight injustice in the world, to provoke strong emotion, and to motivate the

Survival of Fattest – again (Courtesy of www.aidoh.dk)

14 See 'Jens Galschiøt, Portrait of a Sculptor' available at http://www.aidoh.dk/?categoryID=1

apathetic, or disengaged, to action. He encourages viewers to use their own imagination to work with the art works, as part of a fight against injustice, writing 'In my work with sculptures and happenings, I try to ask why and how our ethical and moral self understanding is connected to global and local reality. I leave it to the spectators to work out the answers for themselves.'[15] This is a good example of the capacity of the image to challenge or expand our ideas.

Such art works, by engaging our sympathy in lives very different from our own, force us to confront these ideas through powerful, passionate, inspiring images, thereby countering Weber's dismal characterization of modern times – 'rationalization and intellectualization and, above all . . . the disenchantment of the world' (Weber 1946, 155). They increase our imaginative capacity, better equipping us to make the judgements that public life requires of us, forcing us through imaginative reception to change our attitudes in radical ways.

Works such as Galschiøt's force us to confront our assumptions about certain fundamental concepts, such as the rule of law, freedom of trade, or justice. If we take a standard image of justice, such as that above in Fig 2, in traditional form, and readily associated with the rule of law, we see an image that the law itself is happy to acknowledge, one that it has made its own. An image of harmony, authority and order. But why should we allow law to control our visual perceptions of justice? Why should justice always be associated with idealised Caucasian looks deriving from ancient sculptural canons in any case? Why should we allow an unrealistic ideal of harmony and order to dominate our perceptions of justice when law fails to deliver them? In contrast, in works such as the *Survival of the Fattest*, 'Art subverts the dominant consciousness, the ordinary experience' (Marcuse 1979, ix). For justice as it exists in the world is not just a matter of harmony, authority and order. Law, and its institutions and personnel, perpetuate injustice as often as justice. The rule of law is often the mis-rule of law, even in those contexts which present themselves as the very haven of justice and order, as where the US administration used its own lawyers to devise a definition of 'torture' that would not include waterboarding.[16] Galschiøt's works highlight this mis-rule and hypocrisy all too effectively, undermining our assumptions about law and justice, while at the same time captivating our imagination and motivating us for something better than lies, fairy tales or official ways of seeing.

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15 'Jens Galschiøt, Portrait of a Sculptor'.

16 Memorandum from Jay S. Bybee, Assistant Attomey General, Department of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), available at http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogation-memo20020801.pdf

There is a broader significance in the pairing of law and images here. If the rule of law is to endure, then it must be valued and have some resonance over and above the anaemic, spiritless, familiar representations of justice. There is a blandness and impersonality in too many understandings of law and justice. They fail to motivate, leaving us disaffected and estranged. If the rule of law and justice are to be meaningful then they must animate and rouse citizens, so that we care if they are being undermined in practice and we strive to recover and amend them. Images of law and justice provide the necessary motivation to reimagine and transform our perceptions, and thus are crucial assets, not to be ignored (see also Manderson, 2012) - contrary to the popular reactions to the pairings of law and images cited at the outset of this article.

Enriching the legal imagination

I conclude by recapitulating in a more general form the argument already made for the relevance of art, and the image, to law, to stress the role that cultural influences play in fashioning law and the ways in which we understand it.

Law may be interpreted as a symbolic form (Kahn 1999, Cassirer 1965) that attempts to construct its own domain of meaning. It asserts its intrinsic ways of seeing, and in so doing, aims to structure our consciousness, and create specific ways of being in the world. I have argued that, while it is crucial to comprehend law in a broader cultural context, law's own aesthetic should not simply be taken at face value. Law should not always control the interpretation of its images. In this context, academics have a particularly important role, given that they can write about law without regard for the constraints that practitioners and judges face - such as client pressures and demands, and the burden of legal forms and precedents – and thus academics can be alert to the sometimes pernicious nature of the legal aesthetic, without fear of compromising professional standing.

It is often said that the postmodern condition is one in which there exists a crisis of values, and a loss of faith (Lyotard, 1979), created by the dissipation of traditional forms of value and traditions. In this situation, an economic, instrumentalist logic, a creature of capitalism, has tended to dominate and function as a place marker for legitimacy. Law has frequently adopted this logic, as well as its technical reason, its reliance on contract and property (the attributes of commerce) and its belief in the 'rational actor' of the law and economics doctrine, and, as I have tried to show above, all of these often come together in that most foundational of legal concepts, the rule of law. Although a well functioning economy may help create the prosperity necessary for human freedom and well-being, there are many types of human flourishing and other understandings of

law that do not rely on market relations, and this reductionist (albeit far from neutral) model, limiting complex human behaviour to the maximisation of preferences, must be rejected. There has too often existed an unhappy alliance between law and capitalism. An interdisciplinary approach, looking to law's undeniable relationship with a broader culture, is a way of resisting this reductionist approach to law and also the acontextual and unhistorical view of law as doctrinal science.

Therefore, in conclusion, I argue that an interdisciplinary, contextual approach, one that shapes our understanding of law in its cultural context, and one alert to the huge significance of images as a critical and highly relevant cultural asset, furnishes not only an important form of resistance against a contemporary drift, but also provides a richer understanding of law – indeed, one that aids us in our search for justice.

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Witnessing Francoism: Ethics of Non-violence in Guillermo del Toro's *Pan's Labyrinth*

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Guillermo del Toro's *Pan's Labyrinth* (*El laberinto del fauno*, 2006) combines the imagery of dark fairy tales with images of torture and murder to look back at the Spanish post-Civil War years and the resistance of the anti-Francoist guerrillas. Set in 1944, five years after the end of the Spanish Civil War (1936-1939), the film tells the story of eleven-year-old Ofelia, who is forced to move with her pregnant mother Carmen to a remote military post where her new stepfather, Francoist Captain Vidal, has been assigned to exterminate the guerrillas. In parallel, the film shows Ofelia's scary fairytale world,[1] where she encounters the Faun, who tells her that she is the reincarnation of a lost princess and that if she wants to recover her true identity she must fulfil three dangerous tasks before the moon is full (to retrieve a magic key from the entrails of a giant toad; to retrieve a golden dagger from a child-eating monster; and to shed a drop of her innocent newborn brother's blood). The film testifies to the horrors of these two worlds (the historical world of Francoism and the fantasy world of fairies and monsters) and challenges viewers to reflect upon their own responses to them.

Film critics such as Paul Julian Smith (2007), Mercedes Maroto Camino (2010) and Irene Gómez Castellano (2013) associate *Pan's Labyrinth* with contemporary legislative and civic efforts in Spain to recover the historical memory of the victims of Francoism and to revisit what has been referred as the "pact of forgetfulness" or "oblivion" reached during the transition to democracy (1975-1978).[2] The release of the film in 2006 coincided with Spanish Parliamentary debates around the so-called *Law of Historical Memory*, enacted in favour of those who suffered persecution or violence during the Civil War and Franco's dictatorship (1939-1975).[3] In parallel, grassroots organizations such as the Association for the Recovery of Historical Memory (*Asociación para la Recuperación de la Memoria*

1 Only Ofelia sees and experiences the fairytale world; the rest of the characters either dismiss or deny its existence or are unable to see it.

2 After Franco's death in 1975, the prominent political forces of the transition agreed that securing a successful and peaceful transition required leaving the past behind. In the name of national reconciliation, a parliamentary majority passed the Amnesty Law of 1977 covering all "political crimes" committed before 1976 and precluding their prosecution.

3 Ley 52/2007, de 26 de diciembre, *por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura*. 53410, 27th Dec. 2007. BOE n. 310. See López Lerma: 2011.

Histórica) lodged an official request to open a criminal investigation to identify and exhume thousands of corpses that still today remain in unmarked mass graves.

In 2008, in response to that request, Investigating Judge Baltasar Garzón opened a criminal investigation into 114,266 cases of enforced disappearance perpetrated by Franco and his supporters during the Civil War and the early years of the dictatorship (1936-1951).[4] In his decision, Garzón accused Franco and thirty-four of his high commanding officers of designing a "preconceived and systematic plan" to end the "legitimate government of the Second Republic" (1931-1936) and to exterminate political opponents through mass killings, torture, exile, and enforced disappearance (illegal detentions). Yet on 3 February 2010, following a complaint filed by three far right wing organizations, the Supreme Court decided to prosecute Garzón for the crime of *prevaricación* (knowingly issuing an unjust decision). According to the complaint, Garzón had knowingly violated the principle of legality by applying international human rights law to circumvent the Amnesty Law of 1977.[5] Although Garzón was eventually acquitted on 12 January 2012, the decision of the Supreme Court closed off the possibility of investigating those crimes on the grounds that the Amnesty Law had already settled the issue, which is highly problematic from the perspective of the victims of those crimes. Indeed, in a preliminary report issued on 3 February 2014 by the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff bemoaned the "immense distance" between the position of state institutions and victims.[6] He found it especially troubling that state institutions had not done more for the victims, considering the absence of risks to the stability of the democratic order, and recalling that "genuine reconciliation" requires giving full effect to the victims' rights to truth, justice, and reparation.[7]

The aim of this article is not to argue that *Pan's Labyrinth* makes the injustices committed by Francoism visible and thus participates in the recovery of the memory of the victims, as demonstrated by former analyses of the film. Rather, the aim here is to rely on *Pan's*

4 Baltasar Garzón, Auto del 16 Octubre 2008. Diligencias Previas Proc. Abreviado 399/2006 V, Juzgado Central de Instrucción No. 5, Audiencia Nacional, 5.

5 See above n. 2 and accompanying text.

6 See UN preliminary report: "Observaciones preliminares del Relator Especial para la promoción de la verdad, la justicia, la reparación y las garantías de no repetición, Pablo de Greiff, al concluir su visita oficial a España," 3 February 2014. http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14216&LangID=E.

7 Ibid. See also "Spain should trust its democracy and work for victims' rights" – UN expert on transitional justice. http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14220&LangID=E

Labyrinth in order to show how the representation of graphic violence and the affective responses elicited in the viewer (i.e. outrage, fear, guilt, pleasure, contempt) invite viewers to interrogate the very *frames* through which violence is authorized and legitimized. This article is thus less concerned with what the content of these graphic images is, than with *how* this content is shown and witnessed.

Questions about violence and witnessing are gaining urgency at a time when ever more images of suffering and death are being shown worldwide, whether on TV, cinema, video-games, internet, or the courts (i.e. Abu Ghraib torture pictures, war atrocities, decapitation of civilians, terrorism trials).[8] These images raise a host of issues: What kind of subjects do they show and address? What kind of gaze and perception do they create? What kind of affective responses do they produce? What kind of judgements do they invite? What sense of (in)justice do they create? Do they generate desensitization towards violence so that it would be preferable not to show or see them? Scholars such as Kelly Oliver (2007), Judith Butler (2009) and Alison Young (2010) have pointed out that these questions must be addressed in order to understand how these images shape our views and attributions of responsibility, blame, and (in)justice. What is needed, these scholars claim, is to create forms of responsible witnessing that enable viewers to self-critically reflect on how they engage with these images and to take responsibility for what and how they see (or do not see). In their view, only this kind of self-interrogation opens up the possibility for an ethical way of looking.

This article takes up that task by showing that *Pan's Labyrinth* constructs responsible witnessing. The film's graphic images of torture and murder may shock or disgust, stir feelings of pity or of revenge, but they always push viewers to reflect about the narrative and visual frames that delimit seeing or not seeing, the subject position and agency (or lack thereof) of victims and perpetrators, as well as their own investment in the scenes of violence. Rather than leaving viewers with a raw emotional response or ready-made value judgments, *Pan's Labyrinth* encourages viewers to adopt what feminist philosopher Kelly Oliver calls "vigilant witnessing" —"an ongoing process of critical analysis and perpetual questioning that contextualizes and recontextualizes what and how we see" (Oliver: 2007,

8 Critics such as Roger Luckhurst (2010) and Frances Pheasant-Kelly (2013) locate the film in a post 9/11 context and the global War on Terror. Guillermo del Toro himself has stated that the film is inevitably addressed to a post 9/11 audience (del Toro: 2006b). For an analysis of the impact of visual culture in the courts see Douglas 2001; Sherwin 2011; Delage & Goodrich 2013; Delage 2014.

106).[9] Through a close analysis of the film, the goal is to explain in detail how the film accomplishes this. The analysis itself seeks to contribute to an understanding of how violence is (re)presented and how this (re)presentation affects viewers' responsiveness to it, and responsibility for it.

For these purposes, I have organized the analysis into five sections. Section I, focuses on the film's opening tittle sequence to examine the viewing position the film constructs. Then, I analyze the graphic images of violence and the kind of responses viewers are invited to make in the three main normative orders represented in the film: Vidal's world of Francoism (Section II), Mercedes's world of resistance (Section III), and Ofelia's world of fairies and monsters (Section IV). The article concludes by exploring the kind of responsible witnessing the film requires from viewers.

Viewers as Witnesses

From its opening title sequence, *Pan's Labyrinth* confronts viewers with images of suffering and death and emphasizes the significance of witnessing. The sequence opens with a black screen, with the sound of a child struggling to breathe and a female voice (Mercedes) humming a lullaby in the background.[10] Superimposed white titles set the historical context of the story: "Spain, 1944. The Civil War is over. Hidden in the mountains, armed men fight the new fascist regime, military posts are established to exterminate the resistance."[11] As the titles fade away, the camera rotates clockwise to reveal a close-up of Ofelia's face lying on the ground and "a thick ribbon of blood running backward into her nostril" (del Toro: 2006a). The moment the last drop of blood disappears back into her nose (the scene is shot in reverse), Ofelia looks directly at the camera to the viewer and a third-person male voice-over (which is later recognized as the Faun) begins the fairy tale narrative. Then, the camera zooms in to an extreme close-up of Ofelia's eye, plunging the viewer, both narratively and visually, into two worlds at once: the fantasy world of Ofelia/Princess Moanna and the historical world of Francoism.

The title sequence is crucial to situate the film's stance towards the scenes of violence and the relationship it invites the viewer to establish with them, through the use of three

9 This article draws on Kelly Oliver's definition of witnessing, by which she means both: the juridical sense of testifying as an eyewitness testimony to what one knows from firsthand knowledge and the political sense of bearing witness to something that cannot be seen, something that is beyond knowledge and recognition (Oliver: 2007, 160).

10 For the role of the lullaby in the film see Gómez-Castellano 2013.

11 All quotations from the film come from the script (del Toro: 2006a).

different but interconnected cinematic techniques: narrative reversal, third-person voice-over, and direct address (when a character looks directly into the camera at the viewer). First, through narrative reversal, the film tells the story "backwards": that is, it opens at the moment of Ofelia's death, which will take place in the future (in the final scene of the film). Then, in a single flashback of events it merges this moment with the events narrated in the present until the story reaches the scene shown in the title sequence, when the cause of the blood of Ofelia's nose is finally revealed. In this way, the title sequence does more than look back in retrospect at events; rather, it activates or sets them in motion. As Alison Young notes in another context, such a reverse chronology "has a destabilizing effect on the viewer," for the events are displayed "not just out of order but in a manner that calls into question the sense of linear temporal and causal progression relied on by the conventions of storytelling" (Young: 2010, 63, 65).

Second, through the third-person voice-over the title sequence frames the entire film as a fairy tale. The voice-over tells the story of Princess Moanna, who dreamt of blue skies and sunshine and escaped the Realm of the Underworld to join the human world above. Once outside, however, she was blinded by the brightness of the sunlight that erased all memory of her past, later suffered "cold, sickness, and pain," and she eventually died. The voice-over also tells that "[h]er father, the King, always knew that the Princess would return, perhaps in another body, in another place, at another time…[and that] he would wait for her." As the voice-over speaks, the camera follows the tiny figure of Princes Moanna (Ofelia) ascending circular staircases to the outside human world. Then, as she reaches the top, a blinding light occupies the entire screen—reproducing the moment Moanna/Ofelia loses her vision as she confronts the devastating reality of the outside world: bombed-out buildings, ruins, and human skulls on the ground. The sequence closes with an image of a caravan of cars bearing fascist symbols approaching the emblematic war wreckage town of Belchite (Smith: 2007, 14).[12] The fairytale framing device (which opens and closes the film) affects the viewing experience as follows: On the one hand, it sets the film as a deliberate tale told from the Faun's omniscient perspective, where "the viewer is placed less as a voyeur and more as an invited confidant" (Kozloff: 1989, 129). On the other hand, it draws attention to the double-layering of the story—reality and fantasy, history and myth, image and voice, sight and blindness, memory and forgetting, forcing viewers to take a critical distance from which to question what (and how) they see and hear.

12 At the end of the war, Franco, who had won a victory over the Republican forces at Belchite, ordered that the town should be left untouched in memory of his triumph and declared a nationalist monument. Today, Belchite remains in ruins, kept as a historic site dedicated to reminding future generations of the legacy of the Spanish Civil War and its aftermath.

Through the third and final technique of direct address, the film produces a face-to-face encounter between Ofelia and the viewer, parallel to the Levinasian face-to-face encounter between the self and the other, that establishes the conditions for ethical witnessing.[13] For Levinas, ethics originates in the encounter with the face (*visage*) of the other. The face is neither the assemblage of brow, nose, eyes, and mouth, nor the representation of the soul, self, or subjectivity. As Levinas puts it, "one can say that the face is not 'seen.' It is what cannot become a content, which your thought would embrace; it is uncontainable, it leads you beyond" vision and knowledge (Levinas: 1982, 86-87). In the face-to-face encounter, the other always appears in the uniqueness of her face and imposes an inevitable and asymmetrical ethical demand: "[it] asks me not to let [her] die alone, as if to do so were to become an accomplice in [her] death. Thus the face says to me: you shall not kill" (Levinas: 1986, 24). Such an obligation is not a matter of imposing a moral obligation to act but of taking responsibility for the singularity of the other.

Through the technique of direct address, the film implicates viewers ethically in the scene of violence, in three interconnected ways: First, by looking back at viewers, Ofelia openly acknowledges their presence and challenges the idea of the viewer as voyeur.[14] In presenting Ofelia as able to exchange gazes with the viewer, the film prevents reducing her to a mere image to be looked at, while putting the viewer's "all perceiving" self in question. That is, the film challenges the illusory totality of the viewer's act of perception. Second, in returning her gaze to the viewer, Ofelia imposes herself as a speaking subject, challenging an objectifying and compassionate gaze at her suffering. Third, by directly addressing viewers (for there is no other addressee in the diegesis), Ofelia places them in the position of addressees of her suffering, that is, as witnesses to her testimony to which they must respond beyond vision and knowledge.

With the help of these three cinematic techniques (narrative reversal, voice-over, and direct address), the film constructs a position for viewers that enables them to return to the scene of violence as active witnesses, rather than as mere passive observers, of the

13 In "Reality and its Shadow," Levinas deprives art of ethics and responsibility. In his view, art consists in replacing the object with its image (a shadow, a caricature, a neutralizing vision of the object) (Levinas: 1982, 106, 112, 111. For discussions on the ethical dimension of art from a Levinasian perspective see, among others, Cooper 2006; Gerbaz 2008; Saxton 2008; and Panu 2008.

14 As Christian Metz argues, the voyeur possesses the privileged position of watching without being noticed (the object of perception does not know that it is being watched). For Metz, "[t]he practice of the cinema is only possible through the perceptual passions: the desire to see (= scopic drive, scopophilia, voyeurism)" (Metz: 2004, 827).

three normative orders it represents: Vidal's world of Francoism, Mercedes's world of resistance, and Ofelia's world of fairies and monsters.

Vidal: Franco's "Politics of Revenge"

> *I choose to be here because I want my son to be born in a new, clean Spain. Because these people hold the mistaken belief that we're all equal. But there's a big difference: the war is over and we won. And if we need to kill every one of these vermin to settle it, then we will kill them all, and that's that.*
>
> Captain Vidal

Set in 1944, five years after the end of the Spanish Civil War (1936-1939), *Pan's Labyrinth* portrays the post-war years not as "the beginning of peace and reconciliation" but as a "continuation of the war by other means," what historian Paul Preston has called "politics of revenge" against the defeated (Preston: 1995a, 36, 29). After his victory in 1939, Franco himself defined the Civil War as a "national crusade" to liberate Spain from the public chaos of a Republic led by "evil and degenerate Marxists," and devoted his efforts to eradicating the values and institutions of the Second Republic (1931–1936). To keep the spirit of the crusade alive, Franco divided Spain into "victors" and "losers," "Spain" and "Anti-Spain," "patriots and traitors," a sharp division that would be the basis "for the most sweeping physical, economic and psychological repression" (Preston: 2005). Approximately 20,000 Republican men and women were executed after the war; tens of thousands died in prison and concentration camps because of the appalling conditions (overcrowding, malnutrition and disease) (Preston: 2012, xi, 477); many others committed suicide after suffering torture, maltreatment and humiliation (Richards: 1998, 11). In addition, more than half a million survivors were forced into exile. As historian Michael Richards puts it, Franco's "violence amounted to a brutal closing down of choices and alternatives" for the defeated (Ibid.). The vast majority "had no choice but to accept their fate": at worst prison, torture or execution; at best, a life of fear, humiliation, and hunger (Preston: 1995b, 230). Those few who decided to continue to fight against the regime (small guerrilla groups that launched occasional attacks against *Guardia Civil* barracks) had little option but to seek refuge in the mountains, having to prioritize survival over political activity (Richards: 2013, 110). Because the guerrillas depended on the support of the civilian population for their survival, the latter became the target of the regime's general retaliation (Ibid.).

One of the strategies that the regime used to subjugate the guerrillas, and which is alluded to in the film, was the so-called "hunger pact." During the post-war years (also known as

the "years of hunger" (Arroyo: 2006, 66)), as part of the regime's new economic policy of "autarky" or "self-sufficiency" an extended food-rationing system was imposed that gave local authorities unprecedented powers of social control (del Arco: 2010, 460). Through rationing, the authorities could control the food supply of particular hostile municipalities, and, just "as 'war zones' were decreed by the regime, a 'hunger pact' would be imposed to ensure that the families of fighters had no work and went hungry" (Richards: 2013, 110). In the film, a hunger pact is decided over the copious dinner that Vidal organizes with the representatives of the local authorities (among others, the Mayor and his wife, the Priest, the *Guardia Civil* captain and Doctor Ferreiro, who happens to be secretly helping the resistance), all of which underscores the divide between social classes and between the victors and the vanquished. At dinner, Vidal explains his strategy to his guests: to cut the supply to one ration card for each family (rather than one card for each individual), in order to prevent "anyone sending food to the guerrillas in the mountains" and force them to come down to the village. After examining the ration cards, the Mayor asks whether one card would suffice for an entire family. The priest replies, as he helps himself to another serving: "If people are careful, it should be plenty." The priest assures that "God has already saved their souls. What happens to their bodies, well, it hardly matters to Him."[15] Like the other guests, the Mayor too offers his support ("We'll help you in any way we can, captain").

In a subsequent scene, Vidal himself is seen supervising the distribution of food. Each ration is contained in a brown bag with a printed legend that the *Guardia Civil* captain reads aloud to a large crowd of people queuing for their ration with cards in hand. The legend, which reproduces real war propaganda, reads as follows: "This is our daily bread in Franco's Spain! Which we keep safe in this mill. The Reds lie when they say there's hunger in Spain. Because in a united Spain, there's not a single home without a warm fire or without bread." An image of Mercedes looking at the mountains, however, reminds viewers of the starving guerrilla fighters.

This paternalistic image of the Francoist State "'feeding Spaniards'" (del Arco: 2010, 460), is in direct contrast with the language Vidal uses throughout to depict the defeated as subhuman: "motherfuckers," "pricks," "bastards," "losers" and "vermin"; language

15 Del Toro explains that the Priest's words "are taken verbatim from a speech a priest used to give to the Republican prisoners in a fascist concentration camp. He would come to give them communion and he would say before he left, "Remember, my sons, you should confess what you know because God doesn't care what happens to your bodies; he already saved your souls" (Davis: 2011).

that justifies the need for a "new, clean Spain," as Vidal tells his dinner guests.[16] Two specific scenes exemplify the violence carried out against the defeated in the name of "purification." The first scene involves the brutal killing of two starving farmers, father and son, who were hunting rabbits in the forest and are captured on the assumption that they are resistance fighters. In one of the most graphic and violent close-up scenes of the film, Vidal is shown repeatedly smashing the son's face with the bottom of a bottle (until no nose is left), for the simple reason that he has disobeyed his orders to keep silent. Then, he shoots the father twice in cold blood and turns to the son again to shoot him dead. A long shot reveals Vidal's soldiers watching the "spectacle" of power and victimization impassively.[17] The soldiers' impassivity contrasts with the horror and outrage that the scene provokes in the viewer, which foreshadows their different viewing positions: one complicit, the other condemnatory. After killing the farmers, Vidal finds the dead rabbits (proof of their innocence) in one of their pouches, but rather than showing regret, he takes the rabbits with him and scolds his subordinates who should "learn to frisk these motherfuckers" before bothering him, which illustrates that the murder of innocent civilians is inconsequential under Francoism (Davis: 2011).[18]

The second scene of violence involves the torture of a guerrilla fighter captured by Vidal's troops after an attack on the food storehouse. The scene opens with Garcés, Vidal's subordinate, tying the terrified prisoner to a post in the middle of a now empty storehouse. Vidal displays the "instruments of torture" and explains their uses and effects to the prisoner, while delivering the following routine: "At first I won't be able to trust you. But when I use this one [the hammer] you'll own up to a few things. When we get to this one [the pliers] we'll have a closer relationship, almost like brothers. You'll see. And when we get to this one [a blade] I'll believe everything you tell me." A series of reverse shots incorporates shifting points of view, so that viewers experience both the victim's powerlessness and fear, and Vidal's coldness and cruelty. Viewers' anxiety increases when

16 See Preston 2005. The justification for "purification" was provided by Antonio Vallejo Nágera, Director of Military Psychiatric Services and of the Psychological Research Bureau during the dictatorship. Vallejo Nágera claimed to have demonstrated through psychological experiments the infrahuman, dangerous, and evil condition of the Republican enemies (Ruiz Vargas: 2006, 325-328).

17 As Scarry explains, torture denies, falsifies "the reality of the very thing it has itself objectified by a perceptual shift which converts the vision of suffering into the wholly illusory but, to the torturer and the regime they represent, wholly convincing spectacle of power" (Scarry: 1985, 27).

18 Del Toro explains that he based this scene on "an oral account of a post war occurrence in a grocery store, where a fascist came in and a citizen inside didn't take off his hat; the fascist proceeded to smash his face with the butt of a pistol and then took his groceries and left" (Davis: 2011).

Vidal offers the prisoner, who turns out to be a stutterer, a deal: if he can count to three without stuttering he can go free. With much self-control, the prisoner manages to count until two, although he is finally unable to overcome his anxiety and fails to say number three without stuttering. The scene closes with the sound of a sickening thud and a blank screen, leaving the viewer with a nauseous feeling of realization and horror.

Even though viewers are spared most graphic details of the torture, its dreadful consequences are not, making it hard to dismiss the pain of the victim (and the sadism of the torturer): a series of close-ups shows the prisoner's body curled up on the ground—his battered face with swollen eyes and a trickle of blood flowing from his lip, and his bloody and badly deformed hand. The prisoner is now desperately begging doctor Ferreiro to kill him because he has given up some information. This transformation from victim to "traitor" is the ultimate spectacle of power of Vidal, and of the regime he represents, where the prisoner is now "speaking their words" and, moreover, "is to understand his confession as it will be understood by others, as an act of self-betrayal" (Scarry: 1985, 36, 47). Viewers find themselves relieved when the doctor acknowledges the prisoner's pain and, with great risk to his own life, helps to euthanize him ("You won't feel more pain" he tells him). When Vidal learns that the doctor has disobeyed his orders to keep the prisoner alive and asks him why he disobeyed, the doctor responds with a sentence that effectively seals his fate: "To obey, just like that, for the sake of obeying, without questioning...That's something only people like you can do, Captain." As the doctor turns his back on Vidal as though trying to leave his presence, Vidal shoots him in the back, re-establishing his authority (Hanley: 2008).

While on a superficial, non-attentive reading it would be easy to impute Vidal's violence to individual symptoms of pathological evil, the fact is that they are the result of a planned and systematic effort to persecute and annihilate the defeated. The film situates Vidal's actions in the context of the collective conditions that structure and motivate them, which enables viewers to assess the causes, and not just the consequences, of violence. At the same time, the film neither exonerates Vidal nor excuses his actions by presenting them as part of impersonal social forces, for he remains responsible for the (sadistic) violence he inflicts on his victims. By granting individual agency to Vidal in the midst of the social conditions that frame his actions, the film enables viewers to witness, interpret, and judge the acts of violence he performs.

Mercedes: The "Heroic Memory" of the Resistance

That's why I was able to get away with it. I was invisible to you.

Mercedes

The second part of the film shows how the guerrilla fighters are still able to maintain their humanity and dignity despite the brutality of the regime. It is no coincidence that the story is set in 1944, when thousands of *maquis*—Spanish Republicans who had fought in the French resistance—returned to Spain to continue their fight against fascism, hoping that with the end of World War II the Allies would join them in their struggle against Francoism (Maroto: 2010, 51). In October 1944, approximately 7,000 well-trained, well-armed men entered Spain through the Pyrenean Aran Valley with the aim of triggering off an uprising of the anti-Francoist resistance and establishing a Republican government (Preston: 1995b, 233); the invasion was called, not without irony, "The Reconquest of Spain." Although the *maquis* managed to take several villages and towns, the vast numerical superiority of Franco's troops forced them to retreat (Preston: 1995b, 233). Despite their defeat, many of the guerrilla fighters refused to return to France and opted instead to penetrate the interior, where they could either reinforce existing guerrilla bands or create new ones with more military experience (Anonymous: 1996, 25). The incursion of the *maquis*, together with the strong belief that the downfall of Hitler and Mussolini would also bring Franco's downfall, raised the morale of the guerrillas and reactivated their struggle (Ibid., 24). The peak of the guerrilla action took place between 1945 and 1947. After that, as it became clear that the Allies' assistance would never materialize and Franco's repression would intensify, the guerrillas gradually disintegrated until their disappearance in the 1950s (Moreno: 2012, 4: Maroto: 2010). By the end of Franco's dictatorship, most of the guerrilla fighters had been incarcerated, executed or forced into exile.

Pan's Labyrinth turns the defeat of the resistance into a narrative of "heroic memory" that presents the guerrilla fighters and their supporters not as helpless victims but rather as fighters and heroes (Maroto: 2010, 49). To construct this "heroic memory," the film uses two interconnected strategies: First, it locates the historical narrative "in a moment of choice between surrender, death or exile" (Hanley: 2008, 39). This momentous decision is made explicit in a conversation between Doctor Ferreira and Pedro, Mercedes's brother and leader of the guerrilla band. Pedro tells the Doctor that they will "soon have reinforcements from Jaca" and then they will be able to "go head to head with Vidal." The Doctor is skeptical: "And then what? You kill him, they'll send another just like him. And another … You're screwed, no guns, no roof over your heads… You need food, medicine. You should take care of Mercedes. If you really love her, you would cross the border with

her. This is a lost cause." Despite the logic of the doctor's argument, Pedro concludes: "I'm staying here, Doctor. There's no choice," thereby choosing to fight before surrender or exile.

Second, the film transforms the seemingly futile choice of the guerrilla fighters into a heroic (albeit transient) triumph. Two important scenes exemplify this: first, Mercedes' unexpected escape from Vidal, after he discovers that Mercedes has been secretly helping the resistance and detains her for questioning; and second, the final confrontation between Vidal and the guerrilla fighters, when Vidal is shot dead in the end. What is crucial about these two scenes is how staging, cinematography and editing both mirror and invert the two previously analysed scenes of violence, and are meant to provoke opposite reactions from the viewer.

The first scene opens with Vidal's subordinate Garcés tying Mercedes to the same post as the stuttering prisoner. Vidal orders Garcés to leave because "she is just a woman," to which Mercedes replies: "That's why I was able to get away with it. I was invisible to you." The rest of the scene works to prove Vidal wrong, highlighting how "the very core of the masculinity-power association is what makes it vulnerable" (Hanley: 2008, 41). Mercedes manages to cut her ropes with a kitchen knife she had hidden in her apron while Vidal prepares his instruments of torture. As he begins to recite the same torture routine he employed with the stuttering prisoner, she interrupts him by stabbing him repeatedly (Orme: 2010, 230). Caught by surprise, Vidal falls to his knees, and she sticks the knife in Vidal's mouth. Replicating his torture narrative, she says: "You won't be the first pig I've gutted!" With a brutal slash from the inside out, which the viewer is forced to see, Mercedes slices Vidal's mouth open, drawing a grotesque joker smile on his face.

As in the previous torture scene, a series of reverse shots incorporates shifting points of view, so that the viewer can experience both the power and agency of the victim, now turned torturer, and the powerlessness and objectification of the torturer, now turned victim. In contrast to the stuttering prisoner's battered face, which encouraged the viewer's identification with him, Vidal's grotesque face "represents that for which no identification is possible, an accomplishment of dehumanization and a condition for violence" (Butler: 2004, 145). By depriving Vidal of humanity, the film provokes a double effect upon the viewer: it desensitizes viewers to Vidal's suffering and legitimizes Mercedes' "spectacle of power."

This desensitization is further reinforced in the second of the scenes, the final confrontation between Vidal and the resistance fighters, who surround him right after he shoots Ofelia.

Surrounded by them, Vidal hands over his newborn son to Mercedes. Then, while holding his father's pocket watch in his hand, Vidal asks them to tell his son the time of his death, trying to perpetuate his father's legacy. Despite this being Vidal's only "humane" moment in the film (Maroto 2010, 59), Mercedes interrupts him once again and denies him his last wish: "No. He won't even know your name" and then Pedro shoots Vidal in the face. A long shot reveals the resistance fighters looking at Vidal's dead body impassively, just as Vidal and his troops had looked at the bodies of the two starving farmers at the beginning of the film, which accomplishes a reversal of the initial power relations and provides viewers with a sense of just punishment and closure.[19]

The comparative analysis of the scenes of violence of these two normative orders shows how viewers' capacity to respond either with outrage and horror or else with indifference to the suffering of others depends on the narrative and visual frames through which violence is authorized and legitimized. Theses frames not only function as markers of what is visible or invisible, what can be heard or not, who is included or excluded, who counts as a subject or not, whose voices are significant or insignificant. They also map a repertoire of appropriate or inappropriate affects (either encouraging, or repressing them) in response to certain images, sounds, and narratives. As Judith Butler points out, paying attention to these frames may help us to acknowledge that moral horror in the face of violence is not a sign of our humanity, because "humanity" is actually divided between those for whom "we feel urgent and unreasoned concern and those others whose lives and deaths simply do not touch us, or do not appear as human at all" (Butler: 2009, 50). Therefore, as viewers, we have to ask ourselves how these conceptions of justified and unjustified forms of violence are built into the narrative. In this vein, it can be suggested that the film's "domain of justifiability is preemptively circumscribed by the definition of the form of violence at issue" (Ibid., 155). While inviting viewers to condemn Vidal's brutal process of national purification as abhorrent, the film justifies the counter-violence of the resistance, including Vidal's cold blooded execution, as "punishment," "justice" and even "heroism."

The analysis thus far raises serious ethical questions, including whether such a desensitized view of the gutting and death of Vidal is compatible with *ethical witnessing*. Is there something in the film that saves it from becoming a Manichean reversal of good and evil, humane and monstrous, legitimate and illegitimate, innocent and culpable,

19 As Hanley points out, viewers familiar with Spain's recent past "know that the historical moment is located at the beginning of Franco's dictatorship and that the triumph of the resistance in the historical realm becomes a fantasy itself" (Hanley: 2008, 39).

justified and unjustifiable violence? Furthermore, if the film seems to engage the viewer in the objectifying logic it tries to criticize, to what extent is a critical and responsible view of the title sequence even possible? In the following section, I suggest that, through the fairytale world of Ofelia, the film constructs a position for viewers that enables them to engage in vigilant witnessing.

Ofelia: The Two Worlds and Vigilant Imagination

> *I'm Princess Moanna and I'm not afraid of you. Aren't you ashamed of eating all the pill bugs and getting fat while the tree dies?*
>
> Ofelia

Pan's Labyrinth presents Ofelia's two worlds—the fantasy world of fairies and fauns and the historical world of Francoism and the anti-Francoist resistance—interlaced in such a way as to make it impossible for the viewer to understand either without taking the other into account. Parallel editing reinforces this interconnection (Smith: 2007). Ofelia's incursion into the muddy and insect-infected roots of the tree to confront the giant toad during her first task is crosscut with Vidal's incursion into a forest cave where he expected to find the guerrilla fighters. At the same time, the tasks that Ofelia must perform in the fairytale world parallel the "tasks" that Mercedes must carry out in the "real" world of the resistance (Smith: 2007; Picart et al.: 2012). For instance, the magic key, which Ofelia must retrieve from the entrails of the giant toad in her first task in order to save an ancient fig tree from dying, evokes the secret key to the warehouse that Mercedes retrieves from Vidal to save the resistance fighters from starving. Similarly, the golden dagger, which Ofelia must retrieve from the Pale Man's den in her second task, echoes the knife Mercedes retrieves from Vidal's kitchen, and will later use to slice his mouth open.

Parallelisms can also be drawn at the level of the characters, for example between Vidal and the Pale Man (Smith: 2007). Like Vidal, the Pale Man sits at the head of a large table with a cornucopia of delicious food he uses to lure innocent victims—children, as evidenced by the piles of children's shoes on the floor.[20] Vidal and the Faun are also presented as parallels (Picart et al.: 2012; Maroto: 2010). This is most evident in the scene

20 This image makes a clear historical reference to the Holocaust (Picart et al.: 2012, 274). Two mirror-like scenes further emphasize this parallelism: Lured by the Pale Man's food, Ofelia disobeys both the Faun's and the fairies' warnings not to eat anything from the monster's table, which awakes the Pale Man, who, after placing his eyeballs into his palms, begins to gauchely chase her down to the hallway, devouring two of the three fairies before Ofelia manages to escape. Moments later, Vidal, with the ghastly joker smile on his face, is also seen gauchely chasing Ofelia through the labyrinth.

in which Ofelia refuses to follow the Faun's orders to relinquish her newborn brother to him to complete her final task. The Faun angrily reminds her that she had promised to obey him blindly. Is she "willing to give up her sacred rights for her brother, who has caused her such misery and humiliation?" he asks. At this moment, Vidal enters the labyrinth and sees Ofelia standing alone, speaking to no one. A reverse shot visually places him in front of the Faun as if mirroring each other. Ofelia reaffirms her decision: "I will," she says. The Faun disappears into the darkness and Vidal takes his son from Ofelia and shoots her.

Film critics and scholars have differently interpreted the role and significance of the fairy tale in the film. For some, the fairytale world is just a reflection of Ofelia's personal and psychological experience, a fantasy created by a child, either to respond to (Hodgen: 2007), or to escape from (Cochrane: 2007, Arroyo: 2006), the brutality of the "real" world. A second group of scholars views the fairy tale not as fantasy but as a form of resistance. Kuhu Tanvir, for instance, reads the imaginary world as "an extension of the [anti-Francoist] revolutionary forces" (Tanvir: 2009, 2). In her view, the fairy tale "facilitates and almost demands disobedience" of Vidal's fascist order (Ibid.). Jennifer Orme sees the fairy tale as disobedient both to the audience's expectations of the genre as entertainment, as well as to "the rigid totalitarian narratives of fascism and patriarchy" (Orme: 2010, 232).

A third group of scholars argues that the significance of the fairy tale lies in its ability to render visible the invisible and to speak the unspeakable. In this vein, Laura Hubner claims that the fairytale elements function "as subversive allegories for the taboo" (Hubner 2010: 54). Likewise, Kim Edwards suggests that the fairy tale undermines Vidal's authority "by exhuming that which has been hidden and silenced" (Edwards: 2008, 144). In turn, Jack Zipes argues that del Toro uses the fairy tale "to penetrate the spectacle of society that glorifies and conceals the pathology and corruption of people in power," offering "a corrective and more 'realistic' vision of the world" (Zipes: 2008, 236).

A fourth and final group of critics calls attention to the ideological purposes of the fairy tale. According to Enrique Ajuria Ibarra, in the ideological "exposition of fairy-tale universal values of good and evil and moral doings and wrongdoings" the film undergoes a careful process of mythification of the horrors of Francoism (Ajuria: 2014, 161): "Vidal embodies Francoist hegemony as a realist monster whose ogre-ization has been naturalized with the significative thrust of the fairy tale" for the audience's enjoyment (Ibid., 161, 163). In a more positive reading, Janet Thormann suggests that Ofelia's fantasy "becomes the vehicle for the film's vision of redemptive history, and the film

presents itself as the transmission of the unfulfilled potential of the past to the generation of the future" (Thormann: 2008, 176).

Whereas critics debate the role of the fairy tale in the film—either fantasy, resistance, disclosure, or ideology—I want to emphasize differently that the fairy tale enables construction of vigilant witnessing, which is underlined from the outset. *Pan's Labyrinth* opens with an image of Ofelia and her pregnant mother, Carmen, travelling in one of the cars shown in the title sequence. Ofelia is reading a book with an illustration of a little girl playing with flying fairies. The mother scolds her because she is "too old to be filling [her] head with such nonsense." When Carmen asks to stop the car because she feels nauseous, Ofelia takes advantage of this to walk into the woods. There, she stumbles upon a stone that resembles a human eye and finds an ancient Celtic stone sculpture with a missing eye and the mouth wide open. Ofelia puts the missing stone eye back into the sculpture, at which point a large insect emerges from the sculpture's mouth and looks at her. A reverse shot shows Ofelia's face from the insect's point of view. Ofelia identifies the insect as a fairy—who will guide her through the labyrinth to meet the Faun. The sequence closes with a camera-angle from the insect's perspective, as it looks at Ofelia and her mother returning to the car and follows them to Vidal's military post. While as explained in the first section the title sequence had invited viewers literally to enter the two worlds through Ofelia's eyes (engaging viewers in what she sees and experiences), this sequence encourages viewers to adopt the vigilant perspective of the insect-fairy and critically examine both worlds.

This vigilant perspective is constructed by a double mediation, where history is mediated by fantasy and fantasy is mediated by history. On the one hand, Ofelia's experiences in the fairy tale are located in the historical and political context where she is situated. As an eyewitness, Ofelia occupies a particular subject position in a concrete socio-historical context: She is the daughter of a Republican father killed in the Civil War and is forced to move to a remote military post with her pregnant mother (who has remarried) and her new stepfather Vidal, whose mission is to exterminate the Republicans and subjects her to cruelty and humiliation. Ofelia's mother dies in childbirth and, as a result, she becomes responsible for her new-born brother. Ofelia only finds solace in Mercedes, who becomes her surrogate mother (Thormann: 2008, 177). As an eyewitness, Ofelia testifies to what she sees and experiences as a (Republican) child under Francoism, including what she sees and experiences in the fairytale world. By locating her fairytale experiences in the concrete historical context in which they take place, the film presents them neither as a mere fantasy, nor as a way of coping with the "real" world, but as part of the same way of seeing and interpreting it, that is, as part of her individual eyewitness experience. This requires

viewers to critically examine the ways in which her specific socio-historical circumstances mediate her fairytale world.

On the other hand, Ofelia's experiences in the historical world are located in the realm of the fairy tale, forcing viewers to pay attention to the ways the fairytale world affects and transforms such experiences. It is in and through the fantasy world that Ofelia reasserts herself as both subject and agent: She confronts the giant toad ("I'm Princess Moanna. I'm not afraid of you") and successfully retrieves the magic key from his entrails; she manages to retrieve the golden dagger from the Pale Man's den; and she disobeys the Faun by not shedding the blood of her innocent brother. The reassertion of her sense of agency allows her to intervene in history (Thorman: 2008, 179), which becomes most significant during her last task: Using a magic chalk she manages to escape from her guarded room, enter Vidal's, drug him with her mother's sleeping medicine, take her baby brother from him and bring the baby to the Faun in order to complete the task. Ofelia's final decision to both take the baby from Vidal and refuse to spill her brother's blood as the Faun demands, marks her resistance to the two worlds (Lapolla: 2011, 74). In doing so, Ofelia refuses to allow Vidal and the Faun to determine her and her life in terms of violence and victimization. At the same time, her final choice of nonviolence differentiates her from Mercedes, and therefore from the kind of resistance the latter represents. By distancing Ofelia from the violence of both the fairytale world and the historical world of Francoism and anti-Francoist resistance, the film blurs the Manichean binaries of fantasy vs history, good vs evil and challenges viewers to rethink their own implication in the scenes of violence. It is precisely such a rejection of violence that the film encourages viewers to reflect upon in its closing scene.

Conclusion: The Return

In its closing scene, the film returns to the title sequence to show Ofelia lying on the ground, her face looking at the viewer, and with the blood running (this time naturally) from her nose, while Mercedes kneels next to her humming a lullaby. A voice commands Ofelia to rise, and as she comes to life, a blinding golden light occupies the entire screen. Once viewers recover their sight, Ofelia is seen standing in a spacious and sumptuous hall where her mother Carmen, her newborn in her arms, and her father, are all alive and well sitting on golden thrones. Her father, the King, says: "It was your blood and not that of an innocent that made you worthy of the throne. It was the last task. The most important one…" The Faun, who stands to the right of the King, adds: "and you chose well." "So, come sit by your Father's side, my child? He's been waiting so long", says her mother, now Queen of the Underworld. The three fairies, alive again, celebrate Ofelia's return by flying

around her, as in the book illustration she saw at the beginning of the film. A large crowd surrounds them and applauds their reunion. Ofelia smiles and the blinding golden light reappears and then fades away to merge with a close-up of Ofelia as she dies in the "real" world. The camera then cuts to an image of Mercedes crying over her dead body. The voice-over of the title sequence tells that the Princess "went back to her father's kingdom. And that she reigned with justice and a kind heart for many centuries. …And like most of us, she left behind small traces of her time on earth. Visible only to those that know where to look." As the voice-over speaks, the camera shows the fig tree she saved flowering again and the insect-fairy vigilantly looking at it.

The closing sequence brings back the three cinematic devices of the opening title sequence (narrative reversal, direct address, and voice-over), reframing the scene of violence in such a way that opens up a space for viewers to rethink their position as witnesses. First, the fact that Ofelia's death is merged with her return to the Realm of the Underworld (not with her escape from it as in the title sequence), implies a "reverse causality," whereby the image of a future has the ability to affect the past through witnessing (Oliver: 2001, 136). Second, through the face-to-face (re)encounter with Ofelia's death (now finally revealed on screen), the film constructs a position for viewers that enables them to critically self-reflect on their own act of witnessing and to take responsibility for it. Finally, through the voice-over and the image of the insect-fairy that accompanies it, the film encourages viewers explicitly to look both for the causes of Ofelia's death and for the "traces" she left in her life on earth. By merging past and future, fantasy and reality, the film withdraws from viewers the senses of causality, moral certainty, and closure of the given normative world. Instead, Pan's Labyrinth posits imagination, responsibility, and self-reflection as necessary to ethical witnessing: one that challenges the subject-object relationship and moves beyond the spectacle of suffering.

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Power, Violence, and the Paradox of Founding in John Ford's *The Man Who Shot Liberty Valance*: An Arendtian Approach

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Abstract

John Ford's The Man Who Shot Liberty Valance *is widely regarded as one of his best and darkest films and as a deep meditation on the American foundation myth. This article examines issues raised by John Ford's film through distinctions Hannah Arendt developed between 'power' and 'violence' in her 1969 essay "On Violence" and through her analysis of foundation myths in her 1963 book* On Revolution *and places them in a broader context of political philosophy. Through this conceptual apparatus, we may gain new insight into the way John Ford's film grapples with issues of law and politics. Moreover, the film provides concrete illustrations of some of the more abstract concepts in Hannah Arendt's writings.*

Over the past decade or so, a growing number of scholars have recognized that the Western films of such directors as John Ford, Howard Hawks, and George Stevens offer serious meditations on issues of political philosophy. The American Western film is "an inherently political genre" (Brody 2013).[1] Moreover, "the Western is the chief realisation of the American foundation myth" (Tait 2008). And one particular subgenre of the Western provides rich provender for contemplating the myth of foundations because it grapples with a 'tragic' confrontation of lifestyles – the classic conflict between so-called 'cattlemen' (who pioneered the land, cleared it of 'hostile Indians', and created a prosperous life for themselves on the 'open range') and so-called 'sodbusters' or homesteaders (who, thanks to the 'taming' of the wilderness, follow in the wake of the cattlemen to plow fields, put up fences, etc., all of which destroy the 'open range'). This confrontation is depicted in such films as Elmer Clifton's 1918 silent picture *Winner Takes All*, George Stevens' 1953 *Shane*, and Michael Cimino's notorious 1980 *Heaven's Gate* (testifying to its persistence as a theme). The irony in the subgenre is rich (the cattlemen, having stolen the land from the Native Americans, resent having it re-stolen by homesteaders), but it is usually implicit or unacknowledged in such films.

1 For a more general analysis of the 'Western,' see Slotkin 1993 with excellent analyses of John Ford's films *Stagecoach* and *The Searchers*, among others.

The Man Who Shot Liberty Valance (1962)[2] – widely-acclaimed as John Ford's 'final masterpiece',[3] although he directed several later films (including an 'anti-Western' *Cheyenne Autumn*) – is a prominent example of this subgenre. Along with *The Searchers*, it is generally regarded as one of Ford's 'darker' films,[4] which were made after the director's experiences during World War II. The film is also widely recognized as a complex meditation on legal and political issues and has been analyzed from a variety of political and philosophical perspectives.[5]

I propose to examine some of the issues raised by the film through concepts developed by the political theorist Hannah Arendt in her book *On Revolution* (1963) and her 1969 essay "On Violence." I do not mean to suggest any causal connection in either direction. Obviously, Arendt was writing *On Revolution* when John Ford's film came out. Her work

2 The film is based on a short story by Dorothy M. Johnson, published in 1949. However, Ford deviated from the original plot in a number of ways that deepen and enrich themes touched on in the story.

3 For a sampling of the praise critics have had for *The Man Who Shot Liberty Valance*, see O'Neill 2004:472-73.
Although the film was a success in 1962, critics have noted that it seems odd for a John Ford movie. For one thing, it is a very 'meta' film – a film about film. It references many of Ford's earlier pictures. For example, the plot is practically the inverse of his 1946 *My Darling Clementine* in which Henry Fonda as Wyatt Earp plays the marshal who brings law and order to the town of Tombstone (which the town of Shinbone echoes in *Liberty Valance*). It also recalls Ford's early Western, *Stagecoach* (1939), with John Wayne. Andy Devine (who plays the stagecoach driver in the early film and the ineffective marshal in *Liberty Valance*) is married to a Julietta in *Stagecoach* and has a daughter Julietta in *Liberty Valance*. John Wayne's character in both films has built a half-finished cabin, and the villains in both films die shortly after getting the Dead Man's Hand of aces and eights in a poker game.
Ford's 1956 *The Searchers* famously opens with a shot of the wide, open spaces of western Texas (actually, Arizona) framed by the darkness surrounding a doorway of a cabin interior and ends with the same framing of the Indian-hating protagonist Ethan Edwards (John Wayne) walking away, unable to participate in the bliss of domestic life. Almost unique in Ford's *oeuvre*, *Liberty Valance* remains claustrophobic, virtually without exterior shots. The black-and-white film is shot in a German Expressionist *kammerspiel* fashion – dark interiors, irregular angles, no landscape vistas. See Matheson 2012:363-64; Barr 2011:162-179.
A frequent criticism of *Liberty Valance* is that most of the actors – especially, Jimmy Stewart and John Wayne – seem to be 10-20 years too old for their parts. "Ford's detractors found this to be the limit of absurdity, as if the old man had slipped into dotage. But we are not seeing the characters as they were in the past.… They are the people of the film's present projected back into the past, acting out its fateful moments but incapable of altering them." McBride and Wilmington 1988:178. The staging is 'artificial' with a 'theatrical' feeling. The dialogue also seems 'stagey.' My view is that Ford consciously made *Liberty Valance* as a parable. It is supposed to be 'unrealistic.' Everything is exaggerated, larger than life – from the caricatured sets to John Wayne's ten-gallon hat to the enormous steaks served up at the restaurant, Peter's Place. This is as close as Ford ever gets to *Verfremdung* techniques.

4 For an interesting interpretation of Ford's increasingly dark films in a law and literature context, see Böhnke 2001.

5 To mention just a few: Koch 2008 (Platonic interpretation), Livingston 2009 (Straussian/ Lockeian perspective), O'Neill 2004 (utilizing Isaiah Berlin's two concepts of liberty).

could not have had any influence on John Ford; nor can I find any evidence that Arendt saw John Ford's film as she was composing her book. Nevertheless, the ideas Arendt was developing resonate with the message of the film in ways that enrich our understanding of both and clarify the relevance of the film in a law and literature context. Thus, an Arendtian approach provides new insights into the message of the film, and the film provides concrete illustrations of concepts developed by Arendt in her writings.

Hannah Arendt's political theory

A crucial element in Hannah Arendt's political theory[6] is that she revitalizes – some would say, idealizes – the ancient Greek concept of the *polis* in her definition of the 'political'. The word *polis* usually gets translated into English as 'city-state', but that does not quite catch the full meaning of the term.[7] Aristotle famously called man 'a political animal' by which he meant that what it means to be a human being is to be a part of a *polis*, part of a specific kind of community of human beings. And one of the fundamental things that make man a 'political animal' is that he alone possesses speech – that he is capable of communicating with his fellow creatures to form a community. Anyone who is either incapable of participating in such a community or is self-sufficient and needs no community to "live well" Aristotle says is "either a beast or a god" (*Politics* 1253a29).

What it means to live in a *polis* is to live as a community in accordance with the rules we have imposed upon ourselves. For Arendt, this is the essence of the 'political' – what she calls the public realm, which is (in her view) the realm of freedom.[8] This is where politics takes place. In the public realm, we meet (as equals) to debate how we as a community should realize the conception of some public good we can agree upon. The realm of necessity is the *oikos*, the household, the private sphere, where we are engaged in whatever we have to do to sustain ourselves physically – literally, the *oikos* is where economics is relevant. The ancient Greeks, Arendt says, kept these two spheres separate; and, by mixing them up – mixing the private up with the political, the Modern Age has gone terribly wrong.

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6 My exposition of Hannah Arendt's ideas is necessarily tentative and incomplete. As Marie Luise Knott has recently said, "Arendt's texts are inexhaustible; they unfold more and more with each new reading. One suspects that as our present becomes ever more distant from the historical circumstances that originally gave rise to her thought, Arendt's works will turn out to have new and quite different things to say to us." Knott 2011:xiii. On Hannah Arendt's life and thought generally, see Young-Breuhl 1982. See also Bernstein 2011.

7 See, for example, Hansen 2006 and Kitto 2009:64-79 on the *polis*.

8 Needless to say, Arendt's view of freedom is in the Aristotelian/Hegelian tradition of 'positive' freedom – as opposed to 'negative' freedom, as Isaiah Berlin famously formulated it. See Berlin (1958).

A corollary, one might say, of Arendt's conception of the 'political' is the distinction she makes between power and violence. As Arendt explains it: "Power and violence are opposites; where the one rules absolutely, the other is absent. Violence appears where power is in jeopardy, but left to its own course its end is the disappearance of power. This implies that it is not correct to say that the opposite of violence is nonviolence: to speak of nonviolent power is actually redundant. Violence can destroy power; it is utterly incapable of creating it" (Arendt 1970:56). Power is the capacity for acting in concert for public purposes. In other words, power is something that exists when we act together as a community. And how do you achieve community? Though communication, through persuasion. Speech, therefore, is essential to the public sphere. Language articulates the meaning of our actions and coordinates agents of the community. "Power," she says, "springs up whenever people get together and act in concert, but it derives its legitimacy from the initial getting together rather than from any action that then may follow" (Arendt 1970:52).

Violence is mute, Arendt says. It belongs outside the political sphere. For example, in ancient Greece, violence was either a tool of the private sphere (the *oikos*) since slaves were ruled by necessity, i.e., by violence, or it was a tool of foreign affairs (i.e., outside the *polis*) to be used against other cities. Violence appears, says Arendt, when power fades. The extreme form of power is All against One; the extreme form of violence is One against All (Arendt 1970:42). This is what a tyranny (and, later, a totalitarian regime) does – it uses violence to destroy our ability to work in concert. Power stands in need of legitimacy – that is, in order to act as a community, we must act in accordance with the rules we have created for ourselves as a community. Violence can be 'justified' but never 'legitimate.' Arendt says that any resort to violence is, in effect, a return to the 'state of nature' – that is, it is outside the sphere of politics. As Arendt puts it: "Power is indeed of the essence of all government, but violence is not. Violence is by nature instrumental; like all means, it always stands in need of guidance and justification through the end it pursues" (Arendt 1970:51). The relationship between power and violence plays a crucial role in Arendt's analysis of the so-called 'paradox of founding,' discussed below.

The Man Who Shot Liberty Valance

In *The Man Who Shot Liberty Valance*, we see the distinction between power and violence acted out and played upon in a variety of ways. A brief summary of the plot will make this obvious as well as the film's relevance in the law and literature context. Attorney-at-law Ransom (Ranse) Stoddard (played by Jimmy Stewart) comes west from 'back East' with his law books – ostensibly, to earn his living as a lawyer but, symbolically, to

bring order and civilization to the Old West. He encounters a primitive community generally governed by the code of personal vengeance. On the way into the town of Shinbone, Stoddard's stagecoach is waylaid. The lawyer is robbed and nearly beaten to death by the outlaw Liberty Valance (played by Lee Marvin), who is also a hired gun for the cattlemen in the territory.[9] Stoddard is found and brought into town by the tough-minded, independent rancher Tom Doniphon (played by John Wayne) – who claims to be the only man in the territory tougher than Liberty Valance.[10] Stoddard reports the crime and expects Liberty Valance to be arrested.[11] Doniphon scoffs, "I know those law books mean a lot to you, but not out here. Out here a man settles his own problems." He means – you settle your problems with a gun.

Although he persistently declines the option of violence throughout much of the movie, Stoddard eventually does confront Liberty Valance in a gunfight and miraculously comes out alive, leaving the gunslinger dead in the street. By facing down the outlaw on the outlaw's own terms, Stoddard eliminates the threat of 'lawlessness' and makes the community safe for 'law and order'.[12] To this extent, the story echoes themes with which we are familiar from ancient epic poetry and drama – for example, the transition in Aeschylus' *Oresteia* from a code of personal honor and vengeance to the establishment of the 'rule of law', a more impersonal legal order, in the *polis*. The parallels between the Old West and ancient heroic culture have been noticed by any number of critics.[13] However, *The Man Who Shot Liberty Valance* has a twist that puts the tale in a more Machiavellian

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9 Liberty Valance acts out (or tries to) the famous line in Shakespeare's *Henry VI,* Part II, act IV: "The first thing we do, let's kill all the lawyers," which is spoken by Dick the Butcher. It is a line quoted often these days by lawyer bashers. However, in the context of Shakespeare's play, it is clear that this would be a bad thing – Dick the Butcher was part of an "army of rabble", bent on disorder and anarchy. If it is intended, this is only one of a number of Shakespeare references in the film. It is also noteworthy that Valance halts the stagecoach with the words "Stand and deliver", which is the standard phrase of an English highwayman, not an American bandit. See Matheson 2012:361.

10 Doniphon is and remains symbolically outside the *polis* like Aristotle's beast or god. He acts when something is 'personal', not for the greater good of the community. For example, he confronts Liberty Valance in the restaurant, Peter's Place, not when Valance hijacks another customer's steak but when Doniphon's own dinner gets knocked to the floor. Doniphon refuses nomination to the territorial convention for 'personal' reasons – his intention to marry Hallie. He exits from the film past a banner that opposes statehood for the territory.

11 At the beginning of the movie, Stoddard repeatedly asks: "What kind of men are you?" "What kind of a community is this?"

12 Robert Pippin puts it well: "Valance must be killed by a representative of a new order; his death must *mean* that." Pippin 2010:81. The film calls this meaning into question and makes the need for it problematic.

13 See, for example, Hosle and Roche 1994; Blundell and Ormand 1997:533-569; Myrsiades 2007:279-300; Cantor 2012; and Bazin 1971 (vol. 2):148 ("the migration to the West is our Odyssey").

light. It transpires that, having arrived in the nick of time to save Stoddard during the gunfight with Valance, Doniphon, hidden in the darkness of an alleyway, fires his rifle at the outlaw just before the lawyer shoots his weapon. Doniphon is the real killer of Liberty Valance – "cold-blooded murder, but I can live with it."

Many years after his confrontation with Liberty Valance (the film's story is told in flashback), Stoddard – now a respected Senator and former governor – returns to Shinbone for the funeral of Tom Doniphon, who (except for Stoddard and his wife) is mourned only by his faithful black companion/servant Pompey. Pressed for an interview by the local newspaper, Stoddard finally reveals the truth of who killed Liberty Valance. The newspaper editor reacts with the most famous line in the movie: "When the legend becomes fact, print the legend." Almost everyone agrees that the message Ford is trying to convey is a variation on the so-called 'paradox of founding': "the establishment of any legal order, of whatever doctrine, even liberal-democratic humanist, must be illegal, violent, unjust, and brutal, and a society must find a way to represent that fact to itself as a national memory. It usually does this, as in this movie, by lying, by a distorting mythologizing" (Pippin 2009:227).

The 'paradox of founding'[14] has several variations in the history of political philosophy. For example, Rousseau's political philosophy posits that good laws make for good citizens, but you must have good citizens in order to make good laws. Good laws will provide for the education of good citizens, but citizens must already be educated in

14 Hannah Arendt noted one form of the paradox in *On Revolution* in the way the revolutions that overthrew absolute monarchies sought "to find an absolute from which to derive authority for law and power" (Arendt 1963:160). In analyzing Abbé Sieyès' attempt to resolve the problem, Arendt observes that

> [an absolute] was needed to break two vicious circles, the one apparently inherent in human law-making, and the other inherent in the *petitio principii* which attends every new beginning, that is, politically speaking, in the very task of foundation. The first of these, the need of all positive, man-made laws for an external source to bestow legality upon them and to transcend as a 'higher law' the legislative act itself, is of course very familiar …. Sieyès … broke the vicious circle, and the *petitio principii* of which he spoke so eloquently, first by drawing his famous distinction between a *pouvoir constituant* and a *pouvoir constitué* and, second, by putting the *pouvoir constituent*, that is, the nation, into a perpetual 'state of nature' (Arendt 1963:160-61).

Of course, Arendt observes, "it is obvious that Sieyès solution for the perplexities of foundation, the establishment of a new law and the foundation of a new body politic, had not resulted and could not result in the establishment of a republic in the sense of 'an empire of laws and not of men'(Harrington)." Arendt 1963:163. Arendt praises the American Revolution for having succeeded in creating such an 'empire of laws' as opposed to the French Revolution, which – unfortunately, in her eyes – became the model of future revolutions.

order to promulgate good laws.[15] The paradox of founding is often said to be mirrored in Machiavelli's notorious chapter 15 of *The Prince*: "for a man who wishes to profess goodness at all times must fall to ruin among so many who are not good. Whereby it is necessary for a prince who wishes to maintain his position to learn how not to be good and to use it or not according to necessity" (Machiavelli 1964:127).[16]

The paradox of founding: violence

Early in *On Revolution*, Hannah Arendt says, "whatever political organization men may have achieved has its origin in crime" (Arendt 1963:11). All political regimes begin with violence. She says (and she gets this from Machiavelli, among others): "Cain slew Abel, and Romulus slew Remus; violence was the beginning and, by the same token, no beginning could be made without using violence, without violating" (Arendt 1963:10).[17] Wars and revolutions are characterized by violence, Arendt says, and this is because both of them take place outside the *polis*, outside the political realm strictly speaking. States go to war with each other because, in theory, states are in the 'state of nature' vis-à-vis each other.[18] Revolutions are outside the political because they are, so to speak, what founds (or re-founds) the political. Revolutions create the space for the creation of a public realm.

Arendt says the 'state of nature' is just "a theoretically purified paraphrase" (Arendt 1963:11) of the crime of Romulus and Cain. If you take the 'state of nature' concept seriously, how do you escape it? You impose a political regime on a territory and thereby

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15 See *On the Social Contract*, Book II, chap. 7: "In order for an emerging people to appreciate the healthy maxims of politics, and follow the fundamental rules of statecraft, the effect would have to become the cause….." Rousseau 1978:69.

16 See Arendt 1977:137-39. Of course, there are many readings of Machiavelli. This one is congruent with the theory that the greatest thing a prince can do is to found a republic. See Rousseau, *On the Social Contract*, Book III, chap. 6; Benedict de Spinoza, *A Political Treatise*, Book V, sec. 7. One may also find the paradox in Plato's *Republic* on how a philosopher may be compelled to rule, which also mirrors the paradox in Plato's *Meno* as to whether virtue can be taught.

17 Cain founded the first city in the Bible, Enoch. Romulus, of course, founded the city of Rome. Both figures slew their brothers.

18 The 'lawlessness' of what is outside the *polis* is highlighted by the robbery incident in *Liberty Valance*. Stoddard's stagecoach is robbed by Liberty Valance outside the city. When Stoddard first speaks to the buffoonish town marshal about arresting Valance, the marshal objects that he lacks the jurisdiction. The robbery, Stoddard then concedes, might be a "territorial offense" outside the marshal's jurisdiction. Later, of course, after he has done some research, Stoddard finds that the marshal does have jurisdiction and can arrest Valance as soon as he comes to town – to which the marshal replies, "Just when I was starting to get my appetite back."

violate someone else's 'rights' in the 'state of nature'. Hobbes called the state of nature the war of all against all. How do you get out of it? You band together in order to impose some kind of order – backed up with violence. Once a 'public space' is created, the *modus vivendi* becomes persuasion, and violence returns you to the state of nature. Arendt observes that, "under certain circumstances violence – acting without argument or speech and without counting consequences – is the only way to set the scales of justice right again" (Arendt 1970:64, citing the example of Billy Budd, the mute sailor who can only lash out physically at the unjust accusations of his superior; see the discussion below). This is precisely what happens in *Liberty Valance*. How and why this is the case is the crux of the message in the film, and it requires more explanation of the context in which the gunfight between Stoddard and Valance takes place.

The paradox of founding: Education is the basis of law and order

As we saw in the example of Rousseau's paradox of founding, education has played a crucial role in democratic theory (think only of J.S. Mill or John Dewey, for instance). In my reading of the film, the pivotal scene of *Liberty Valance* takes place in the schoolroom. Hallie, who is the romantic interest in the movie (the woman Tom Doniphon intends to marry but who winds up marrying Ranse Stoddard) is illiterate. Stoddard offers to teach her to read. This offer eventually leads to the establishment of a school, located in a room attached (significantly) to Dutton Peabody's newspaper office. As John Ford sets the scene, the schoolroom into which Stoddard strides is an American utopia. All ages, genders, and races[19] mix together harmoniously to learn about American constitutional government. On the blackboard behind Stoddard is written "Education is the basis of law and order." Link Appleyard's daughter Julietta, whose mother is Mexican, is the star pupil. Tom Doniphon's black 'servant' Pompey (played by Woody Strode)[20] is present,

19 Interesting is the total absence of Native Americans in this film. Ford's 1956 *The Searchers* dealt with themes of racism and genocide, shocking in 1956 as it implied that the American founding was based on both. It is as though the work begun in *The Searchers* has been completed by the time of *Liberty Valance*.

20 The character of Pompey is rife with tension and ambiguity. It is uncertain what his relationship with Tom Doniphon is, but it smacks of a master/slave relationship. (It is worth remembering that John Wayne's character in *The Searchers* – with whom Tom Doniphon has parallels – was a Confederate soldier who never surrendered.) The name – Pompey – implies a slave name. Southern plantation owners often named their slaves for ancient Greeks and Romans in homage (or unconscious mockery) of ancient learning. Pompey is certainly loyal to Doniphon – even when he might be appalled by what Doniphon does. Watch the expression of dismay on Pompey's face, for example, when Doniphon, pretending to teach Stoddard how to shoot a pistol, instead shoots the paint cans Stoddard is setting up as targets, spilling paint all over Stoddard's suit. Stoddard then punches Doniphon in the jaw – eliciting the first true respect Doniphon shows for the lawyer. Only after Doniphon has been decked does Pompey begin to laugh at the incident. The figure of Pompey also implies the

along with various other adults. The comic character Kaintuck is there because he 'lost' at the cut of the cards as to who would have to go to school from the ranch where he works.

However, the scene is not merely for comic relief. Ford is working on a number of levels here. Bear in mind that, in 1962, the United States was far from a model of racial harmony. This was the height of the civil rights movement. Rioting took place that year in Oxford, Mississippi over the admission of a black man, James Meredith, to the University of Mississippi. Eight years had gone by since the United States Supreme Court's ruling in *Brown v. Board of Education* (1954), overturning racial segregation in education, but little had happened to resolve the race question in the United States. Ford is quite consciously contrasting the ideals of American government with its reality. Already at this point in the film, Ford is poking holes in the fabric of mythic memory in which American audiences like to wrap themselves.

Most tellingly, as the lesson progresses, Stoddard calls on Pompey (passing over Julietta) to explain what the basic law of the land is. Pompey eventually replies correctly that it is the Constitution, which he says was "writ" by Thomas Jefferson (mixing it up with the Declaration of Independence) and began with the words "We hold these truths to be ... uh … self-evident …." Pompey cannot complete the quote, so Stoddard finishes it for him: "That all men are created equal." Pompey says, "l knew that, but l plumb forgot it." Stoddard replies, "A lot of people forget that part." What is striking about this exchange (besides Stoddard's condescension[21] and the scene's obvious didacticism) is that, when the camera is on Stoddard, there is visible behind him a portrait of George Washington, the father of his country but also a slave owner. When the camera is on Pompey, a portrait of Abraham Lincoln is visible. Ford clearly intends to stress the unfulfilled promise of American democracy, but there is something else going on here as well. The exchange reflects an ongoing debate in American constitutional law on the relationship between the Constitution and the Declaration of Independence. Technically speaking, the two documents stand in no legal relationship to one another. The Constitution supersedes the Declaration. However, Abraham Lincoln famously called the Declaration of Independence an apple of gold in a frame of silver (the Constitution) – that is, the Constitution should be interpreted in accordance with the goals set forth

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dependency of 'white' America on 'black' labor – virtually unacknowledged either in the film or history. See Pippin 2010:78. For an exposition of Pompey's character and role in the film, see the excellent article by Horne 2012:5-27.

21 Compare this scene with one of the final scenes in the film in which Senator Stoddard awkwardly slips Pompey some "pork chop" money.

in the Declaration, goals as yet unfulfilled. Stoddard is teaching his students what the American regime *should* be, not what it *is*.[22]

Reality sets in abruptly. After his colloquy with Pompey, Stoddard lectures his students on a draft editorial written by Peabody about the importance of voting to make the territory a state. Tom Doniphon interrupts the class, looking for Pompey. "Why have you been wasting time here? Get to work. Your schooling's over," Doniphon says to Pompey.[23] Although Stoddard protests, Pompey leaves the schoolroom immediately. Doniphon then says, "The good editor here has written some noble words, and you read 'em good, but if you put that paper out, the streets of Shinbone will be running with blood." He relates that, at the behest of the cattlemen, Liberty Valance has been gathering hired guns and has already murdered some 'sodbusters' south of the Picketwire River. The class breaks up in fear and turmoil. Stoddard turns and erases from the blackboard the statement: "Education is the basis of law and order." This is where we learn Stoddard may be in doubt about his ideals, that he has been secretly practising with a gun in case he has to face down Liberty Valance. Education may be the basis for law and order in the *polis*, and law may ensure the public space for political action, but neither of them creates that space.

Ford's film has set up the problem admirably. Stoddard, representing the ideals of democracy and education, now seems to be coming to terms with the reality that his ideals may be lacking. At the very least, he should be prepared to act in his own defense since there is no true public realm to which to appeal. It is not yet enough, however, to make him actively resort to violence.

Power and violence

What does make Stoddard resort to violence relates to how 'power' (in an Arendtian sense) is established in the film. As the classroom scene indicated, even before the gunfight, the community of Shinbone is in the process of acting in concert – exercising their 'power'. Two delegates are to be elected at an assembly of the townspeople to the territorial convention, which is to determine the matter of statehood. The voting is

22 "And many have imagined republics and principalities that have never been seen or known to exist in reality; for there is such a gap between how one lives and how one should live that he who neglects what is being done for what should be done will learn his destruction rather than his preservation." Machiavelli 1964:127 (Chap. 15).

23 Doniphon acts in just as high-handed a manner with Hallie, telling her to "go where you belong. I don't want you in no shooting gallery." Hallie, by contrast, protests Tom's bullying. There seems to be both a critique and a subtle acceptance of race and gender roles in the film.

to take place in the saloon, where Pompey notably waits outside – as do the women of the town. Liberty Valance arrives to intimidate the townsfolk to vote for him as the cattlemen's representative. He warns them not to vote together in a way they will regret when they are alone. Valance fails. It should be noted that he fails because Tom Doniphon's reputation with a gun, which is also backed up by Pompey's shotgun outside the saloon doors,[24] forces him to accept the outcome of a fair vote. Instead, the townspeople elect as their delegates representatives of what were traditionally believed to be the cornerstones of American democracy – the rule of law (Ranse Stoddard) and a free press (Dutton Peabody): the lawyer and the newspaperman, professions that depend on words, on persuasion. (One cannot help but contrast the contempt with which both lawyers and journalists are held in the US today.) In Arendtian terms, this truly is an exercise of 'power' as opposed to violence.

Yet, as Arendt observes, violence can destroy power, and Liberty Valance makes good on his threat of violence. After his attempt to disrupt the election fails, Liberty Valance calls Stoddard out. "You got a choice, dishwasher [Stoddard]. Either leave town," he says, "or tonight be on that street alone. You be there, and don't make us come and get you." Stoddard apparently decides to leave. He does the dishes at the restaurant, Peter's Place, to settle up his debts, while Pompey waits to escort him out of town. However, Liberty Valance intervenes. Valance and his 'myrmidons'[25] (as Peabody calls them) beat the newspaper editor just as savagely as Stoddard was beaten at the beginning of the movie. This is the act that finally convinces Stoddard to face down Liberty Valance in the street. This is the film's dramatic climax.[26]

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24 Echoing a confrontation between Doniphon and Valance at the restaurant, after Valance tripped Stoddard as he was serving Doniphon's steak, and anticipating the final showdown when Valance is killed.

25 The henchmen of Achilles, another classical reference. The reference by Ford here is deliberate – Achilles is the pinnacle of 'heroic' virtue – virtues that are admirable in a savage society but not the refined culture of the *polis*. We are in awe of him in Homer's *Iliad*; we are appalled by him in Shakespeare's *Troilus and Cressida*. It is worth noting that, just before Peabody enters the newspaper office where Liberty Valance and his henchmen are waiting for him, Peabody is quoting to himself the inspirational St. Crispin's day speech from Shakespeare's *Henry V* – giving himself courage for the battle he fears he must face. Just before being beaten, Peabody utters a line that reproduces the ambiguities inherent in the concept of 'liberty' – with its associations to both freedom and license (and Berlin's sense of 'negative liberty'): "Liberty Valance taking liberties with the liberty of the press?"

26 Here, too, what actually motivates Stoddard is somewhat puzzling. He must know that it is suicidal to face Liberty Valance in a gunfight. One of the subthemes in the film is what it means to be 'a real man.' The film wavers between Tom Doniphon's bravado and machismo and Ranse Stoddard's mature restraint. Has Stoddard accepted Doniphon's version of 'manhood'? After the gunfight, Hallie confesses that she was disappointed in Stoddard's decision to run away but cannot bear the thought of the outcome that was more likely. The ambiguity remains in the awkward silence between the couple at the very end of the film.

If the homesteaders are to be secure from the ranchers 'north of the Picketwire,' they must neutralize the violence of the cattlemen represented in the form of Liberty Valance. Although Stoddard has been practicing with a handgun, he is hopeless at it. As the feckless town marshal Link Appleyard says to Liberty Valance, Stoddard could not shoot the hat off his own head with the gun right in his hand. It is Doniphon's violence, not Stoddard's, that determines the outcome. In Arendtian terms, Doniphon's crime is 'justified' in that it prevents a clear injustice and paves the way for a new and better community and legal order. It could never be 'legitimate' – not even by the Old West's code of honor. Doniphon, for example, could have stopped the gunfight by calling Liberty Valance out – giving him a fair chance to draw; may the better man win, so to speak. Doniphon does not. Instead, his "cold-blooded murder" re-enacts the "primordial crime" of Cain and Romulus. It is 'justified' by the 'civilization' it institutes. Yet, the 'crime' is covered up. Why that is requires some explanation.

Smoke gets in your eyes

In the film, the story of Liberty Valance is related by Ranse Stoddard many years after his confrontation with the outlaw – and after he has had a distinguished career as governor, senator, and ambassador. He and his wife Hallie have returned to the definitively civilized town of Shinbone (a town now with a railroad, telephones, and no hint of Mexican *cantinas*)[27] to attend the funeral of Tom Doniphon, a now forgotten and obscure figure who has not worn a gun in years. When the reporter from Peabody's old newspaper, the *Shinbone Star*,[28] discovers Stoddard's presence, he insists on an 'exclusive' (and is soon joined by the editor of the paper). Stoddard agrees in order "to mend some political fences." Stoddard speaks in a pompous, self-important fashion (that recalls – or, rather, anticipates – the tone of the cattlemen's mouthpiece, Cassius Starbuckle, at the territorial convention late in the film), and he wears a large white hat with a black band – the same kind of hat worn by Wild Bill Hickok (who was famously murdered while playing poker, holding the Dead Man's Hand, aces and eights – the same hand with which Liberty Valance wins a poker pot, the silver from which spills onto the street after he is killed). In the flashback scenes, Stoddard never wears a hat – in stark contrast to Liberty Valance's black hat and Tom Doniphon's ten-gallon white hat.[29] By wearing the same hat Wild Bill

27 Pippin notices this as well. See Pippin 2010:72-73.

28 The irony becoming clear over the course of the film that Dutton Peabody would never have suppressed the story Stoddard gave the newspaper.

29 Perhaps, an indication of a lack of 'manliness.' On hats in *Liberty Valance*, see Matheson 2012 and Barr 2011. Jimmy Stewart recalled that, in the first film he did for John Ford, the two men had a dispute about his character's hat. As a result, Ford would not allow him to wear a hat in *Liberty Valance* – an anecdote that cannot be all there is to the story. See James Stew-

Hickok wore, Senator Stoddard has symbolically assumed the character of the gunslinger hero of the Old West. He has assumed the identity (or, at least, the trappings) of and built a reputation as 'the man who shot Liberty Valance.'

After the gunfight, unaware that it was Doniphon who killed Valance, the bandaged and wounded Stoddard and Peabody attend the territorial statehood convention. Peabody nominates Stoddard as the territorial delegate to Congress. In his speech, Peabody acknowledges the role of the cattlemen in opening up the West. They

> seized the wide-open range for their own personal domain, and their law was the law of the hired gun. But now, today have come the railroads and the people. The steady, hard-working citizens, the homesteader, the shopkeeper, the builder of cities. We need roads to join those cities, dams to store up the waters of the Picketwire, and we need statehood to protect the rights of every man and woman, however humble.

Stoddard, says Peabody, "came to us not packing a gun, but carrying instead a bag of law books. Yes. He is a lawyer and a teacher…. But more important, he's a man who has come to be known throughout this territory in the last few weeks as a great champion of law and order." Here is the beginning of the legend that will buoy Stoddard's career, eliding and distorting a gunfight into some act of law enforcement. The cattlemen's mouthpiece, Major Cassius Starbuckle, rises to object: "l can't believe my eyes. ls it possible that such a representative body of honest, hard-working Americans can endorse a candidate for the Congress of our beloved country whose only claim to the office is that he killed a man?" The statement causes a furor, but it appears to provoke a crisis of conscience in Stoddard, who walks out of the convention.

Now why Stoddard walks out of the convention and why he walks back in after a conversation with Doniphon (who, in a cloud of cigarette smoke, informs Stoddard that he was not the one who killed Liberty Valance) is something of a puzzle.[30] However, it makes more sense in the context of Arendt's conceptual framework. The territorial convention is an exercise of power. It is *political* in every sense of the word, and it depends on persuasion, on words, on rhetoric – *not* on violence. In the context of the

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art, *A Wonderful Life* (documentary film 1987).

30 Doniphon implies he should do it for Hallie, the woman Doniphon had been planning to marry but who is apparently in love with Stoddard: "Go on back in there and take that nomination. You taught her how to read and write. Now give her something to read and write about!" A number of critics have wondered whether this is sufficient reason for Stoddard to accept the nomination.

polis, Stoddard's ostensible act of violence against Valance is shocking, inappropriate, disqualifying in some way. In terms of the 'rule of law' he values, Stoddard has acted outside of it. He has, as Starbuckle says, taken the law into his own hands, acted as judge and juror.[31] From the perspective of the *polis*, which Major Starbuckle feigns, what Stoddard did was to eschew the 'rule of law' by killing Liberty Valance.

The tragedy of the second-best regime

In an interesting interpretation, Getrud Koch speculates that Stoddard's ostensible 'betrayal' of the law is eating at him. On one level, Stoddard agrees with Starbuckle's assessment. He does not want political power from an "illegal act." According to Koch, once Stoddard decides to face down Liberty Valance, "he has violated his platonic understanding of law" (Koch 2008: 687), which is why he takes down his bullet-ridden sign from Peabody's office. His 'Platonic' vision of himself is sullied. Only when Doniphon explains that Stoddard did not kill Liberty Valance does he consent to enter politics. He retains his personal sense of integrity, but this does not expunge the public deception.

> The popular power he receives as The Man Who Shot Liberty Valance may have been gained legally, but the inhabitants of the cave have not been freed, they are applauding the state of law founded by force, not the state of law in its pure form. As a Platonist, Stoddard has failed miserably; in the end, as a politician, he has become a man of deception, but the person he is, however, seems unchanged (Koch 2008:687).

This is an intriguing conceptualization with much explanatory power with respect to Stoddard's personal motives. Its implications are congruent with the pompous Senator Stoddard who returns to Shinbone for Doniphon's funeral.[32]

However, I think Koch's reading is off the mark and may be properly supplemented with a common, popular interpretation of Stoddard's feelings. This view holds that, however

31 Notably, Starbuckle says 'the mark of Cain' is on Stoddard.

32 It also provides an intriguing modern variation of the Platonic 'noble lie,' which has the good effect of making people more inclined to care for the *polis*. Plato, *Republic* 415c-d. The echo is there as well of the Platonic paradox of founding – how can a philosopher come to rule in a city in which his descriptions of truths outside the cave will sound like the ravings of a mad man to the inhabitants of the cave. See *Republic* 517d-e. In Koch's interpretation, however, it is a tragedy of realism: "Had the law remained platonic instead of becoming practical, Stoddard would have been shot by Valance without his as much as turning a hair, the truth of reason of the system of law would never have had any effect, and neither would it have gone to the dogs of politics" (Koch 2008:690).

legally dubious[33] it may be for Stoddard to have killed a man in a gunfight, it would still arguably be self-defense (and, thus, 'justified'). If Doniphon killed Valance in cold blood, he is guilty of murder – at least, as seen through the eyes of the *polis*.[34] Stoddard realizes that, if he does not pick up the burden of the killing, he may be risking the life of the man who saved him and did the citizens of Shinbone a tremendous good.[35] When he realizes what the consequences might be for Doniphon, Stoddard accepts the lesser evil. The question is: is it unjust to judge Doniphon by the very standards his actions helped make a reality?

An Arendtian perspective illuminates this question. The political realm, the realm of freedom, in Arendt's conceptual apparatus echoes the 'tragedy' of the 'second-best regime' in ancient Greek political philosophy. The best regime, according to Plato and Aristotle, is the rule of the wise king (the philosopher-king we know from Plato's *Republic*). Such a king would be able to discern true justice and apply it as individual circumstances require. The second-best regime is the 'rule of law'. The rule of law is second-best because even the most enlightened laws by their nature must be general. But infractions are individual – there are always extenuating circumstances that the law cannot (necessarily) take into account. Law can never provide 'true' justice – only the philosopher-king could theoretically do that. Law can only approximate a kind of rough-shod justice.[36]

In her analysis of Herman Melville's *Billy Budd*, Arendt comments:

> The tragedy is that the law is made for men, and neither for angels nor for devils. Laws and all 'lasting institutions' break down not only under the

33 Dubious depending on the legality of duels. On the legality of the gunfight, see Lubet 2000-2001. However, Lubet mistakenly says that Ranse Stoddard calls out Liberty Valance. *Ibid*. at 358. It is, rather, Liberty Valance who makes the threat right after the vote on the delegates. Valance is later told that Stoddard is out on the street with a gun, which he then claims makes his action 'self-defense.' But nowhere in the film does Stoddard explicitly call Valance out.

34 Doniphon's act may be interpreted as 'murder' in a number of ways: as a violation of 'natural law' or as a violation of the 'code of the West.' The extent to which it is a violation of the positive law of the *polis* (Shinbone) may be problematic, as indicated below. However, as the Starbuckle character indicates, this is how Doniphon's act would likely be interpreted since Shinbone is ostensibly under the 'rule of law' – however ineffectively administered.

35 In the law and literature context, one is reminded of the end of Harper Lee's *To Kill a Mockingbird*, which was released as a film in the same year as *Liberty Valance*. There, it was thought that Atticus Finch's son Jem killed the evil Bob Ewell in self-defense although he was actually killed by the reclusive Boo Radley. The Maycomb county sheriff (with Atticus' tacit consent) refuses to allow the truth to come out, as it would be a "sin" to expose Radley "with his shy ways" to public scrutiny. Koch also acknowledges this. See Koch 2008:690.

36 Compare Abensour 2007.

> onslaught of elemental evil but under the impact of absolute innocence as well. The law, moving between crime and virtue, cannot recognize what is beyond it, it cannot but punish elemental goodness even if the virtuous man, Captain Vere, recognizes that only the violence of this goodness is adequate to the depraved power of evil (Arendt 1963:79).

In the eyes of the *polis* under the rule of law, Doniphon's action can only look like a crime – just as, in Melville's novella, Billy Budd's accidental killing of John Claggart looks like a crime.[37] Stoddard presumably understands this. Thus, Stoddard does not fall from a 'Platonic' idea of law, as Koch would have it. Rather, he acts in accordance with a (non-political) Platonic idea of justice, which can only ever be imperfectly realized in law. On this reading, Stoddard understands that to apply the letter of the law to Doniphon's actions from the perspective of the 'rule of law, the 'second-best' regime, would be to commit an injustice.

Moreover, it would fail to recognize the "verità effetualle" of things, as Machiavelli put it in Chapter 15 of *The Prince*. As opposed to the English warship in *Billy Budd*, the town of Shinbone is only ostensibly under the rule of law. The law and order of Shinbone – represented by the marshal, Link Appleyard ("the jail's only got one cell, and the lock's broke, and I sleep in it") – is as good as having no law and order at all. In effect, Shinbone is in the state of nature, in the war of all against all. Doniphon's action may not be sanctionable in a truly founded *polis*, but no true public realm has been instated in Shinbone. The killing of Liberty Valance lays the real foundation of the city, the *constitutio libertatis*, "the constitution of a public space where freedom could appear" (Arendt 1963:258). In Arendtian terms, by accepting the nomination as territorial delegate, Ransom Stoddard has the opportunity to bring about "lasting institutions" to constitute a proper public realm. It is a 'revolution,' founded on the 'crime' by Tom Doniphon.[38]

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37 The killing was accidental; the act of violence was not.

38 But the paradox of founding is irresolvable. Arendt's *On Revolution* is in many ways an extended meditation on remarks she made in her earlier treatise *The Human Condition*: "It is in the nature of beginning that something new is started which cannot be expected from whatever may have happened before….The new always happens against the overwhelming odds of statistical laws and their probability, which for all practical, everyday purposes amounts to certainty; the new therefore always appears in the guise of a miracle." Arendt 1958:177-78. It may also appear in the guise of a 'crime.'

Print the facts, including the legend

Many viewers and critics see the ending of *Liberty Valance* as dark and melancholy, and so it is in many ways. In the closing scene of the film, Stoddard and Hallie are sitting on the train – speaking haltingly, almost stonily, not looking directly at each other.[39] They talk of returning to Shinbone and construct a fantasy of living life like it was in the old days. The melancholy atmosphere seems to imply that this can never happen. It is a melancholy of nostalgia.[40] The scene is punctuated by the final line of the movie, when the train conductor says to Stoddard, "Nothing's too good for the man who shot Liberty Valance." The lie on which Stoddard has based his career lives on, unchallenged.

Some read the ending as 'dark' because the film is thought to expose the seedy underside of American democracy. All its ideals of freedom and equality are just so much smoke – like the smoke Tom Doniphon exhales to fill the screen introducing the flashback within the flashback. The 'real' America is an America of violence. And when the truth is known, the comfort of the legend is preferred. It is not hard to recall here the controversy surrounding the publication of Hannah Arendt's *Eichmann in Jerusalem*. According to her critics, the book shockingly implied that the evil deeds perpetrated by the Nazi Adolf Eichmann were "banal" and that the Jewish councils that cooperated with the Nazis were somehow complicit in the Holocaust. Arendt's friend, Karl Jaspers, explained that her critics were upset because the book was an "act of aggression against 'life-sustaining lies.'"[41] The implications of the book were too cruel, some believed, to be spoken of. Arendt emphatically denied the charges against her, insisting that her critics were misreading her, but she steadfastly championed the pursuit of truth, wherever it led. Similarly, *Liberty Valance* seems to be an attack on the "life-sustaining lies" of the American republic. However, this does not mean that the film itself is endorsing the lie. As director Peter

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39 They leave before Doniphon's funeral actually takes place. Why this happens is never explained – one of a number of things that remain unexplained in the film. As Stoddard walks away, he notices the cactus flower on Doniphon's coffin, left by Hallie – like the cactus flower Tom Doniphon gave her early in the film. Stoddard realizes that Hallie still loves Doniphon. The symbolism of the cactus rose is quite rich. After Doniphon presented Hallie with the cactus rose, Stoddard asked Hallie whether she had ever seen a 'real' rose (as though a cactus rose was not 'real'). The roses Stoddard had in mind could only be cultivated in Shinbone if the river were dammed and a system of irrigation instituted. This is what Senator Stoddard is about to accomplish at the end of the film – transforming a "wilderness" into a "garden." Hallie asks him, "Aren't you proud?" He never replies to her question. Does Stoddard regret his actions? If so, does he regret *how* the wilderness was transformed into a garden or *that* it was?

40 Their conversation reveals that they do not communicate their own deep feelings to each other.

41 Letter from Karl Jaspers to Hannah Arendt, 16 November 1963, Arendt and Jaspers 1992:531. For a brief overview of the controversy surrounding *Eichmann in Jerusalem*, see Amos Elon's introduction to Arendt 2006, but the controversy is still raging.

Bogdanovich has pointed out, John Ford did not 'print the legend' – he exposed the "verità effettuale" behind it (Bogdanovich 1978:34).

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Towards a Jurisprudence of the Embodied mind – Sarah Lund, Forbrydelsen and the Mindful Body

Marett Leiboff [1]

Abstract

As Erika Fischer-Lichte remarked, the great Polish theatre theorist Jerzy Grotowski redefined the notion of the body of the actor as an embodied mind, as a responsive and responding self. Conversely, law abjures the body, its interpreters – lawyers and scholars – inured in practices of rationality, reason and logic, or mindful disembodiment. Travelling through the Danish capital, encountering Danes real and fictitious to illustrate how much we function through our bodies, this essay suggests that we are better and more effective legal interpreters as embodied minds, rather than disembodied minds. But this is not mindless embodiment, a mere reflex or bodily outburst. The embodied mind is self-aware (physically, socially, intellectually) and possesses the same embodied virtuous morality held by Grotowski's actors. Reminiscent of Kierkegaard's uniting of the mind-body divide, this connected mind and body challenges the Augustinian negation of the body and associated interpretative assumptions inherited over centuries of legal thought.

Prelude

This essay proceeds in an unlikely manner, drawing on diverse and unlikely sources based in theatre theory of a kind rarely (if ever) used in legal theory and serendipitously, finds itself beginning and ending in Denmark. This piece could not have been written without the insights that come from encountering Danes and Denmark, real, fictitious, theatrical and philosophical, but it is written by an Australian, in a singular act of taking coals to Newcastle. I wish to thank the reviewers of this essay for their insights – one for realising that speaking of theatre theory without the pull of recognition is a challenge to readers not used to it, and the other, who realised I had missed one key Dane, generously pushing me towards Kierkegaard, who had not been considered in the original article at all. I am grateful for such generous counsel.

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Chora

If you have never thought of yourself as someone who thinks through their body, then prepare to be startled, because I wish to take you beyond that which behoves the law and its actors, back to our bodies and their obduracy, for our bodies do much more for us than we realise, than we perhaps want to realise. We in law prefer to imagine that our bodies are surplus to the real task of our endeavours with word and thought. This may even mean that my as yet undefined reference to theatre theory may have already been coded and recoded, recalibrated to fit a familiar, comfortable conception of theatre – the play with its words, the space with its dimmed lights and convivial intervals, the image of the world as theatre, the courtroom as stage, the spectator or critic or play or drama as jurisprudence (Tontti 2004, pp. 162-167).

But this is not the conception of theatre with which this essay is concerned. Theatre only needs a body, a space, and, for completeness, someone with whom that body and space encounters – another body. This concept of space and encounter is neatly contained within Kristeva's conception of *chora*, 'a logical or pre-logical 'space' that gives room to the play of being and becoming of all reality' (Lehmann 1997, p.56) ('play' here not meaning a script but existing and moving through space). Conceived out of Plato's problematising of space, something and somewhere 'apprehended without the senses by a sort of spurious reasoning and so is hard to believe' (Plato *Timaeus* 52 in Lehmann 1997, p.56), this ineffability is odd, primal and precognitive, lacking the thing we want most in law – logic, rationality, reason. This is the stuff of our cases and case law, our interpretative practices, and our interpretative method. But *this* theatre bears none of those traits and characteristics. It is nothing but an empty – an unformed - space (Brook 1997), in which bodies respond and react with other bodies – before logic, before words, before reason kicks in. This is not a space of exception, but one most of us enter and negotiate and encounter every day, of a kind that the great Søren Kierkegaard experienced on his regular ventures through the streets of Copenhagen (Pattison 2010, p.14). We can read of Kierkegaard's walks, through the Copenhagen of the second quarter of the 19th century, but it is not quite the same as being there, feeling the looks, the gazes, the responses he got from those who passed him by. To walk the street well, and effectively, demands of all of us the pre-logical, the intuitive, that only comes through the understanding of the body and the ability to respond to the bodies of others. What this means for law will come later, but like most lawyers (and like Plato) you will find this 'is hard to believe', then it might be easier to *watch* another Dane, albeit fictitious, a televisual phenomenon, who also walks the streets of Copenhagen as an often silent, wordless presence, to show us just how much we use our bodies to think - even lawyers.

Meet Sarah Lund, the central character of the hit Danish police/political television series *Forbrydelsen* (*The Killing* in many English speaking countries). Each series concerns a single horrific murder, and intertwined personal, political and social stories, while each individual episode exists as a single day in the process of solving a crime over the 20 or so weeks each series runs. As the Australian TV critic Doug Anderson remarked 'waiting for each chapter as it comes and enjoying the accumulation of clues as the story … unfolds, is the way it was intended to be seen' (2013). This sense of immediacy is not accidental. An inheritor of the stripped back style of filmmaking of the Danish *Dogme* movement (founded by Lars von Trier in the mid-1990s) (Jackson 2012), which itself had been influenced by the great Polish theatre theorist, Jerzy Grotowski (Schepelern 2005) (to whom I will return later in this essay), the creator and screenwriter, Søren Sveistrup, left everyone in surprise. The actors only received scripts on an episode-by-episode basis, just moments before shooting was scheduled to begin, and were not told who committed the crime or where the plot was going, though the actor who played Sarah Lund was allowed to know that her character was not the killer (Anthony 2011). Just like real life, where the narrative has not yet been written, this functions as the theatrical *chora* par excellence, with actors and audiences responding to and through an authentic sense of fear, trepidation, hesitation and the confounding and perplexing sense of never being aware of what might be 'just around the corner'.

The experience worked. First broadcast in 2007 in Denmark, the series went on to become a hit on the BBC in the UK, and was then taken up throughout most television markets, except the US, taking Australia by storm (Turnbull 2014). Parody is the best measure of success, and Sarah Lund's alter ego, actor Sophie Gråbøl, appeared in character on the cult UK series *Absolutely Fabulous* Christmas special in 2011, sending up the novelty of the UK public watching a Danish series subtitled into English and a new found love of all things Danish. Watching *Forbrydelsen* is inevitably different for a Danish audience than other audiences. Like the British, Australians have to rely on subtitles, but that means we also have to *really* watch Sarah Lund. Australians are practiced at watching subtitled television. *The Killing* followed repeat seasons of *Unit One* (*Rejseholdet*), *Nynne* and more recently *Borgen*, and like all foreign language programming in Australia was broadcast on the government funded multicultural Special Broadcasting Service or SBS. We, like the British, must be careful to snatch the bites of text (expertly created by SBS's in house subtitlers) only long enough to keep our eyes on what happens, or more particularly on Sarah Lund, as much as possible. For it is her body in space, with an often expressionless face that appears emotionless, that encapsulates what we really need to pay attention to when watching this series. As a British critic observed:

> What I really like is when Lund turns that laser stare on suspects, the eyeballing intensifying into what could be mistaken for amusement, a half-smile lighting up her eyes when the interviewees begin to leak clues. I started thinking of it as The Look. (Gilbert 2011)

What Gilbert calls, The Look, is Sarah Lund's *embodied mind*, functioning as *chora* on her part - and our minds and bodies responding accordingly. She can be read by all of us without the need for words, without the need for subtitles. The storyline is something different of course, but we do not mistake her, even in her silences and her blank expression. Sarah Lund reminds us that even when absent words, speech, voice, substance, our bodies can read and can be read. But we misread her silence if we interpolate silence as an absence, expecting to hear words or see action that grips a storyline. We misread these silences and the bodily presence as something that is *not* revealed, not trusting the space created by the absence, and not registering the textual depths involved that reveals everything. Other than turning our face from the screen, turning down the sound, and intentionally ignoring anything other than the subtitles, we must know that everything happens in those absences. If you find yourself gritting your teeth, frowning to yourself as you read this, or smiling and nodding – then you have responded - again - through your body. Watch yourself do it (not literally, unless you would like to record yourself). Without meaning to, without being consciously aware of it, you have responded, as an embodied mind, through your body. I now turn to some other Danes to take this further.

Niels Bohr, Eugenio Barba and the Western

The great Danish physicist, Niels Bohr, was fascinated by Westerns. He applied his intellectual curiosity to one seemingly odd phenomenon: in a shoot-out, the person who went to shoot first (usually the villain) would inevitably be shot by his opponent (inevitably the hero). Bohr thought there was a psychological explanation for this seeming oddity, suggesting that: 'Since the hero never shoots first, the villain has to *decide* when to draw, which impedes his action' (Gamow 1966, p. 56). In 1928, while visiting Bohr's Institute in Copenhagen, his younger colleague George Gamow challenged Bohr's hypothesis and Bohr responded by testing his theory empirically - using water pistols. Taking on the role of hero, Bohr killed off all the villains, his students, including Gamow (Gamow 1966, p. 56). His instinct about the shootout was correct, that the *moment of thinking* was fatal.

This charming story of the shootout is contained in Gamow's own memoirs, but the story has circulated beyond the scientific community. Also familiar with it is the acclaimed Italian-born Danish theatre director and theorist, Eugenio Barba, the founder of the

Odin Theatret in Holsterbro (via Norway in the mid-1960s). Barba is renowned as the creator of a mode of physical theatre practice called theatre anthropology, which he developed through the International School of Theatre Anthropology he also founded in Holsterbro, in 1979 (Barba 1995, p. 34, and note 24, p. 174). Unlike Bohr's psychological explanation for the hero's success against the villain, Barba reads the shootout in physical terms, suggesting that Bohr wanted to 'find if some physical truth' sat behind the shootout oddity (1995, p. 34). Bohr's own putative explanation – psychology – is unconvincing for this theatrical great, who accentuates the *physical* aspect of this account for good reason. Bohr's experiment only makes sense within the theatrical if it is conceived of as an encounter between the *embodied mind* (that of the hero) and a mind that *lacks connection* with the *physical* body (that of the villain).

Bohr's story is included in Barba's pathbreaking 1995 tract *The Paper Canoe*, where he set out the principles, philosophies and practices of theatre anthropology. He claims that all theatrical traditions draw upon a heightened physicality in performance and in performance training, which eschewed a conventional theatrical emphasis in the West based around word, motivation, psychology, and mind. This concept of the theatrical does not, patently, mean dramatic narrative texts, or plays; instead, the techniques and practices form part of foundational grammatical practices of the 'liveness' of the theatrical event and encounter, for both actor and for audience. Barba found a commonality of practice and method across a range of cultures, from Indian, Japanese and Chinese practices to the work of Barba's own teacher and mentor, the visionary Polish theatre theorist and director Jerzy Grotowski, with whom Barba studied in the early 1960s. Grotowski, too, was fascinated with Bohr and his Institute (1968, p. 127). Grotowksi's brother, Kazimierz, a physicist, may have told him of the work of the Bohr Institute where Kazimierz had apparently worked. Grotowski's work, from the 1950s until his death in the 1990s, in particular his account of the 'poor theatre', or the theatre stripped back to the bare bones of audience and actor (Brook's 'empty space'), irrevocably changed theatre practices within broadly Western conceptions of theatre – including Australia, where I first came across Grotowski, Barba and Theatre Anthropology, while undertaking an MA in Theatre Studies in the mid-1980s. Grotowski's techniques are now so imbued within the theatrical consciousness that they are now grammatical, and through Barba, permeated the Danish theatrical consciousness. Indeed, as noted earlier, *Dogme's* practices of film production as 'impoverished art' has Grotowski's poor theatre as its predecessor (Schepelern 2005, pp. 82-83). These 'poor artist initiatives' produced an 'aesthetic cleansing and ascetic production apparatus' (Schepelern 2005, p. 84), seeking the best for actors (Schepelern 2005, p. 102), and by focussing on the actors, *Dogme* practices

discovered a human aspect to the creation of film (Schepelern 2005, pp. 103-104). Grotowskian practice suffuses *Forbrydelsen* and Sarah Lund in more ways than one.

At the heart of Grotowski's reconception of the theatrical was the redefinition of the actor as an *embodied* mind, who '… no longer lends his body to an exclusively mental process but makes the mind appear through the body, thus granting the body agency' (Fischer-Lichte 2008, pp. 82-83). It is this concept, too, that animated Barba, and marked a key shift in the practices of Western theatre (and subsequently film), away from the word towards the body. Bohr's story, within the ambit of theatre theory, confirms that the hero's body is *present and alert as embodied mind*, while the villain's sluggish body, beset by the mind, *is betrayed by thought*. In Barba's terms, the latter exemplifies what he terms a state of 'to be decided' – and this is precisely what leads to the downfall of Bohr's villains. To be left in, or remain in a state of 'to be decided' is deadly, literally, for those villains, but it is also *deadly* for actor and theatrical encounter (Barba 1995, p. 32, p.34). Try imagining an actor who processes through their mind what they intend to 'do' next – do I step forward, do I look to the ceiling – before making the move. This this kind of exaggerated thought process might be helpful if an actor needs to learn some physical characteristics of a person with a physical impediment, but if not, the actor would seem ridiculous. We too would look ridiculous if we thought of each step involved in walking before making a movement. We would seem a very different person from our actual selves, and the actor would not be 'believable'. On the other hand, the actor who 'is decided', decides *through their body*, much like the hero Bohr studied. Sarah Lund decides through her body too. We too are decided through our body if we watch Sarah Lund and understood what her body tells us. It would be odd indeed if we described her every move, her every action to ourselves as we watch her. We would, quite literally, lose the plot if we were to watch her in the state of 'to be decided'. The pain and anguish and frustration of Sarah Lund's silences are the perfect form of 'is decided', the embodied mind in action, and that sense of being in the state of 'is decided' suffuses the physical response we have when experiencing each episode of *Forbrydelsen*.

Law and the Body

Yet from the standpoint of a discipline and practice like law and its jurisprudences, based in and around the mind (reason, will, rationality), Barba's reading of Bohr's shootout, and this explanation of the theatrical, must seem like nonsense. Analytically, Plato-like, law will treat the shootout from the standpoint of Bohr's hero as an act that must be *based in the mind*, based in some kind of *belief or reasoning* that it is necessary to shoot in order to protect his or her life. For instance, the *Criminal Code* of the state of Queensland in

Australia provides for a defence of self-defence where a person has a *reasonable apprehension* of death or grievous bodily harm through an assault which induces 'the person to believe, on reasonable grounds' that it is necessary to use force to preserve their own life (s 272). These are all functions of the mind, and the concept of *apprehension*, as characterised by the *Oxford English Dictionary* includes amongst its meanings: 'The action of grasping with the intellect; the forming of an idea; conception; intellection', 'The representation to oneself of what is still future; anticipation; *chiefly* of things adverse', 'Fear as to what may happen; dread'. The defence splits the mind from the body, and in Barba's terms, requires that you are 'to be decided'. Contrary to Bohr's experiment, for law, the body must *wait* for the mind to direct it to respond, 'to be decided'.

In addition to its doctrines and assumptions, law is predisposed against the body in another, perhaps surprising way. It is altogether unacceptable for the lawyer, the interpreter of law, the jurist, the legal theorist, to be beholden to *their* body (Olson 2012). Figuratively speaking, lawyers do not have bodies. The bodily self is effaced by robe and wig, suit and gown, literally of course, so that viewers cannot 'see beneath the silk and the suit' (Watt 2013, p. 119; also Moran 2013; Herz 2012, pp. 11-14). But those suits of legal armour signify more than a mere covering or hiding the body. They remind us that law is an interpretative discipline ordered against the possibility that its interpreter's *bodies* might be tempted *to decide,* or as Peter Goodrich puts it: 'tears are external to juristic cognition and irrelevant to a critical reading of a normative text' (2010, p.378). Tears, after all, 'are in and of the body, a property, a mark, a sign of the affect of presence and meaning' (Goodrich, 2010, p.378), but almost beyond the point of a body which 'is decided', representing a physicality overwhelming the conscious mind. The mind (that which is *to be decided*), can only ever catch up afterwards, in an attempt to stem the tide of those tears, forever a marker of the unruly body. But tears remind us, one way or another, just how much our bodies are decided, do react, before our reasoning minds have a chance to respond.

This rupture and disruption reminds us why law cloaks itself behind word, girding itself with doctrine, principle, modes of reasoning and jurisprudence that are all designed to negate the possibility that the unruly body will 'speak', and in doing so, reveal too much. Law and its jurisprudences, even of the critical variety, are based in theologically grounded ontologies which treat the *body of the scholar*, the interpreter, as an unwanted intrusion into the mind. Its practices seek to render the body, with all of its foibles, mute (Leiboff 2010).

In short, law insists on and valorises the dis*embodied mind*. This disembodied mind is, however partial (in both senses of the word) and necessarily incomplete, but implicitly trusted by law to provide a full and meaningful account of human conduct and unbiased and objective decision-making, slicing and segmenting the myriad forms of encounter into clear and distinct steps. But neurobiological developments have confounded the seeming clarity of this Cartesian divide. Mind and body are not separate things. Bodies affect minds, and minds bodies (Damasio 2000, 2004, 2006; Johnson 2006). Surprisingly, the intuitive insights of the theatrical rest on solid physiological and neurobiological foundations (albeit recognised *ex post facto*), and for law, these developments reveal the contradictions that inhere in its steadfast insistence on obscuring the bodies of its interpreters and fabricating the processes of the physical and embodied by interposing an unconnected reasoning mind. Theatre had to do this too, in its shift from the rich theatre to the poor theatre, that is, the theatre of embodied mindfulness:

> We abandoned make-up, fake noses, pillow-stuffed bellies … We found that it was consummately theatrical for the actor to transform from type to type, character to character, silhouette to silhouette - while the audience watched - in a poor manner, using only his own body and craft. The composition of a fixed facial expression by using the actor's own muscles and inner Impulses achieves the effect of a strikingly theatrical transubstantiation, while the mask prepared by a make-up artist is only a trick (Grotowski 1968, pp. 20-21)

But still, law imagines the theatrical as surface, and the theatrical account of an *embodied mind,* a mindful physicality that registers in and through the body, is counter-intuitive for law on all levels, foreign and misunderstood, not least because it inevitably amplifies the one thing that law insists on damping down - the body and the bodily response, as Peter Goodrich has so elegantly uncovered (2010). But for law, the mind and body division is not simply based within a rationalizing Cartesian split, but is grounded in a theological inheritance, via Plato, as a deep and abiding Augustinian repugnance of the physical and corporeal, and its influence on law's Christian foundations (Russell 2009). Plato famously distinguished the imperfect, mutable physical and tangible from the perfect, immutable intangible idea or form, taken up by Augustine in a Christian form. For Augustine:

> the sensible world is one of transitory objects, whereas the intelligible realm contains abiding realities [*De Libero Arbitrio* II.6]; the sensible world is subject to the consumptive effects of temporality, whereas the intelligible realm is characterized by an atemporal eternity wherein we are safely removed from the

> eviscerating prospect of losing what and whom we love [*Confessions* XI.xxxix.39; see also *Confessions* IV.xii.18] (Mendelson, 2000)

The Platonic mistrust of the physical becomes Neoplatonist dogma: the perfected soul caught in imperfect and corrupted body, exemplified through the erosion of reason or will in particular through sex, 'the body stirred when the will and reason do not want it, or vice versa, obliterating rational thought' (J 4.71) (Chadwick 2001, p. 120). It is not surprising that Augustine ranks the temporal, including the human body, low on the scale of values (Nahmod 1987, p 228). But it is in Augustine predecessor, Tertullian, that the danger of the physical, in particular that of an expression through the body, that stamps its mark on Christian doctrine, and ultimately, law:

> Christian doctrine prohibited tears. That expression of emotion was to be covered. Thus for Tertullian, for example, author of *De Spectaculis*, to laugh and to weep, both sources of tears, were alike impermissible in Christian worship. His text is an early condemnation of theatre, games, spectacles and 'public shows' more generally ... Laughter, jesting, tears and dance were all deemed excessive in a religious tradition that demanded silent, and above all, serious worship, both quietude of the body and composure of the mind (Goodrich 2010 p. 377)

Indeed, this image of the negation of the body is deeply imbricated within the structures and patterns of the philosophical generally, and deeply shapes law's negation of the body. As Rovira neatly put it:

> The medieval view of human beings as a synthesis of body, soul, and spirit supported a view of human growth as successive orientations toward each, the most immature individuals being bodily oriented while the most mature are spiritually oriented. (2010, p.60).

Law, grounded as it is in the theological, and the philosophical, inevitably sees the physical, the body as something that is both unworthy and untrustworthy. Theatre, reliant on bodies, is rendered dangerous through its profound physicality and what that physicality represents. Actors working with and through their bodies are rendered immature, failing to function at the higher plane of intellect and mind, rendered childlike and irresponsible - 'play' in more ways than one. That the actor's embodied mind has a better claim to a thoughtful responsiveness over the disembodied mind of the lawyer subverts the natural order of things as inherited into legal thinking, countenancing the 'spurious reason' of the pre-logical over formal reason, and must seem very strange indeed.

The Embodied Mind: for law and jurisprudence

It was an easy manoeuvre, intellectually and theologically to trace a movement from the body to the spirit as one of movement from immaturity to maturity, but one which demanded an abnegation of the body and all it represented. If bodies are immature, they are also dangerous and uncontrollable. The concept of an embodied mind and its manifestation as something that 'is decided' is inevitably counter-intuitive for law because law has been grounded within the mode of 'to be decided' as a theological and philosophical imperative, as a manifestation of the spiritual and of the mind. It is inevitable that lawyers will be attracted to Barba's lesser 'to be decided', and will be sceptical and negative towards 'is decided', assuming that 'is decided' is mere reflex and thoughtlessness, even though Bohr's experiments reveal this is precisely how an action in self-defence, say, actually plays out. It is a mistake to imagine that Barba's explanation of the hero who 'is decided' is simply doing something as a mere physical reflex. Something else needs to be understood which reveals that 'is decided' is a culmination of something more than a mere bodily response, and consonant with Damasio's findings.

Law's preference for 'to be decided' is based on, ultimately, a misconception that results from a careless – or legally interpolated - reading of 'is decided', assuming that it is a reflection of immaturity, and merely an unthinking reflex at work. 'To be decided' is consonant with what we already know, so appears to be an exercise in thought*ful*ness. But if 'to be decided' is conceived of by law as a thinking mind divorced from the body, as a separate entity, it represents a response that is unconnected, unfeeling, and unresponsive to those around her or him. Instead, counter-intuitively for law, that state of being that 'is decided' is not a body without thought but is the embodied mind which functions as an *embodied virtuous morality* of self and self-awareness. The actor or performer is never and *could never be* a 'mindless' body, just as Bohr's hero is never just a mindless gunslinger. Instead, the actor's body functions through a heightened state of self-awareness, just as the hero functions within a mindful, conscious state of self-awareness. Maybe that is what Bohr meant when he described this encounter in psychological terms. The concept of this kind of *embodied virtuous morality* is deeply indebted to Grotowski, constructed physically through and of the bodies of its actors at all levels but based in a deep understanding of place and space, from the most basic (being aware of the person next to them, not falling off the stage), to a higher sense of consciousness and awareness of self and others, a mode of responsibility and responsiveness to a community of interests. But at its highest level, it demands self-awareness and self-understanding:

> It is the act of laying oneself bare, of tearing off the mask of daily life, of exteriorizing oneself. Not in order to "show oneself off", for that would be exhibitionism. It is a

> serious and solemn act of revelation. The actor must be prepared to be absolutely sincere. It is like a step towards the summit of the actor's organism in which consciousness and instinct are united (Grotowski 1968, p. 210).

Curiously, or perhaps not curiously at all, Kierkegaard says much the same thing. In uniting the mind-body divide through a synthesis 'of the psychical [soul or mind] and the physical [body]; however, a synthesis is unthinkable if the two are not united in a third. This third is spirit.' (Kierkegaard, 1980a, p. 43 in Rovira 2010, p.67). This sounds theatrical, and indeed, Kierkegaard draws on the experience of being in the theatre, watching actors and watching the audience to help explain the relationship what happens in an absence of spirit on the part of an audience: 'In a state of being, body, mind, and spirit continually relate the same way, while in the process of becoming, these interrelationships change …' (Rovira 2010, p.67). In Kierkegaard, there is no need to disavow the body, but more importantly that it is necessary to recognise that bodies are part of us, and we of them.

And that is what being able to enter the state of 'is decided' involves – not an absence but a heightened presence, and deep understanding of both self and of others. As Kris Salata, another of Grotowski's students puts it: 'I am not merely trying to understand what Grotowski was doing, but rather what his doing does to understanding something about *being* and the *human encounter* (Salata 2013, p. xiii). Or as a younger successor of Grotowski's methods puts it, the 'performer's consciousness should … move away from orthodox notions of being and move towards ontology wherein the execution of a technically exacting mind–body activity becomes a performer's *modus operandi*' (Krpič 2011, p. 168). On the other hand, a mindless body (an exhibitionist or show pony, ham actor, up-stager, or a person on the street who does what they want without considering others) is an absent body, just as the disembodied mind that is law's assumed position is an absent body. Both are always in a state of 'to be decided'. In law, this is deadly, self-focussed and technocratic in one, just as theatre is deadly if it lacks understanding of self and surroundings, always 'to be decided'.

Coda

I haven't mentioned it yet, but you may have noticed that I said, earlier in this essay, that in most English speaking countries *Forbrydelsen* is known as *The Killing*. Except in the US. That is because the US did not – does not - show subtitled programs, by and large, though there is some access to *Forbrydelsen*. Generally, programs are remade, not just so they are in English, but so that they meet the expectations of a market that is directed

inwards – even programming from English speaking countries like Australia. So in the US *The Killing* is an American program, with differently named characters and storyline but based on the original. Sarah Lund becomes Sarah Linden, Copenhagen becomes Seattle (though filmed in Vancouver in Canada), the investigation involving Nanna Birk Larsen transformed into one involving Rosie Larsen. But there is something that is not quite right with this version of *The Killing*. The US remake did not last, cancelled in 2012, then reinstated briefly, and then cancelled again, 'dumped in a trunk to die like Rosie Larsen, [while] its progenitor, Denmark's *Forbrydelsen*, continues to slay viewers around the globe …' (Lacob, June 2012). Jackson compares the Danish original with the 'underwhelming' American remake of *Forbrydelsen*:

> Most people abandon it after the first episode. The Danish actors underact brilliantly and the American actors altered their style to emulate the Danish performances but what had been a subtle approach in Denmark became vacant in the American show (Jackson 2012).

He is wrong to suggest the Danish actors underacted. They instead represent the *embodied virtuous morality* of self and self-awareness that we find in Kierkegaard, in Grotowski, in Barba. In the actor, Mireille Enos, playing Sarah Linden, we see an actor acting 'vacant', processing through her mind that she must show no emotion. And that is what we see, what I saw in the promos of the program, the bits and pieces on YouTube, what I saw on US TV in 2012. It is not the same as the Sarah of Sophie Gråbøl, in whom we see an actor who 'is decided', who grips us, who takes us with her, while in Enos we see an actor who is 'to be decided', whose mind is on 'vacant', whose body registers vacant, who does not understand herself or her surroundings, a mindless body or a disembodied mind, it makes no difference. It is deadly theatre. Watch the two different Sarahs and you will see what I mean. Words, logic, rationality are confounded by our bodies, which do far more thinking for us than we would like to believe. Even in law.

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Fear and Ecological (in)Justice in Edvard Munch's *The Scream of Nature*

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Introduction

Can art help us to think critically, creatively, ethically or politically about the concepts or ideologies within international environmental law? Scholars (e.g. Baudot 2010) have argued that art contributes to international politics in instrumental, extrinsic and intrinsic ways. Certainly, art is important – both symbolically and ideologically – in helping us to understand our relationship with nature by providing a richer and alternative ontological context. Art can singularly reflect ideas about matter and the natural environment by depicting these as vibrant (Bennett 2010a) and allowing us to be enchanted by them – not so much in a romantic sense, but rather through appreciating their ontological significance for our lives.

The expression and symbolic depiction of less anthropocentric conceptions of matter and the natural world through art can also give real form and perspective to important foundational questions in international environmental law, including environmental and ecological justice. The doctrine of 'ecological justice', compared with 'environmental justice', is increasingly being used to evaluate the impact of human beings on the natural world (Bosselmann 2008, esp. Ch. 3; Schlosberg 2009). The term 'environmental justice' is more commonly used as a way to describe the distribution of interests that humans have in relation to one another regarding their use of the natural environment (Gonzalez 2012). Achieving ecological justice, on the other hand, requires that we take our presence within the natural world into account, but that it is our impact on it that has to be assessed in the context of ensuring justice in relation to the world of matter itself. Access to ecological justice, as opposed to simply environmental justice, raises important questions as we look to the future in the Anthropocene epoch, given that our impact on the natural world is no longer as benign consumers, but rather has irreversible long-term geological repercussions.

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In this article, I argue that Edvard Munch's painting, *Der Schrei der Natur* (referred to in English as *The Scream of Nature*, or simply *The Scream*), can be reinterpreted as a depiction of a personality deeply enmeshed in the fear and anxiety of the natural world he is experiencing. Munch's painting provides symbolic support for and expression of the personal and embodied experiences of fear. In this paper, discussions of fear of the natural world is used to reveal the layers of emotional experiences that are important for us in appreciating and understanding ecological (in)justice in the Anthropocene epoch.

We are accustomed to thinking about fear simply in terms of immediate or significant sensorial experiences – like coming face to face with a snake – but this has simply dulled our capacity to appreciate nuanced cognitive and temporal dimensions of emotional experiences of fear. In the Anthropocene epoch, the collective impact of our experiences and their impact on the ecology of planet Earth are important. However, instead of addressing the emotional reactions to being materially embedded, we often separate ourselves from this situation – both cognitively and emotionally. This article argues that our capacity to appreciate the kind of ecological justice that is needed in the Anthropocene epoch requires us to pay closer attention to our emotional experiences – particularly fear. In this context, Munch's painting provides intrinsic symbolic support for and expression of the potential of fear to expose the reality of the impact of ecological injustice on human beings.

Part I - Fear and ecological justice

Emotions in a world of matter

Over the last few years, the idea of the Anthropocene epoch has been taken increasingly seriously (Crutzen 2002; Robin and Steffen 2007; Steffen, Crutzen & McNeill 2007). The concept of the Anthropocene epoch is used in the geological sciences to describe the end of the Holocene epoch, which was an interglacial break within a much wider geological period known as the Quaternary (Whitehead 2014). The Anthropocene epoch represents the idea that human beings are now central to determining how earth systems function (Steffen, Crutzen & McNeill 2007). For instance, carbon dioxide emissions influence the biosphere and impact climate systems. Taken alone, the idea of the Anthropocene epoch does not necessarily have ethical implications for human beings' centrality in the functioning of various earth systems; however, in scientific terms, it identifies what the social science scholars have been describing as the dramatic, catastrophic and dire impact of human beings on the natural world (e.g. McKibben 1989).

Our impact on earth Systems and the natural environment more generally has resulted in a growing number of scholars talking about establishing a robust reciprocal partnership or symbiotic relationship with the natural environment around us. These discussions are complicated and sometimes thwarted by the deployment of concepts that often simply mediate or facilitate what is desirable for human welfare. Concepts used in environmental law, like 'conservation', 'preservation' and 'protection', establish a hierarchical, controlling and normative relationship with nature, which ultimately protects and benefits human populations. Even popular concepts like ecosystem services, which seek to value nature's contribution, do so in the context of their significance for human welfare rather than for earth Systems more generally.

Concepts that have a controlling or regulating element or dimension to them traditionally have sat alongside and in opposition to notions of the 'wild' or 'wildness' (Turner 1996, 1998). Wild approaches to the natural environment are determined less by a desire to control our surroundings. However, given the current impact of climate change and other anthropogenic harms, the notion of something as wild is a mere wish or fiction rather than as existing outside the influence of earth systems that are directly and indirectly influenced by human beings (e.g. Marris 2013).

Arguably, our ability to live symbiotically with and within nature is significant for the Anthropocene epoch, but it is affected by our deep institutional, cultural and theoretical commitments to anthropocentrism, which ultimately supports the growth and prosperity of the human species. There is much scholarship on the anthropocentric nature of our approaches to the environmental governance and law (e.g. Grear 2011). Such critiques have had wide-ranging impacts on ecological thought and scholarship. For example, Neimanis (2014) has criticised how we have come to conceive of water simply in terms of its use and as a resource for human consumption. This means that we have failed to realise that, by privileging it in relation to human bodies, we have ignored the vast network of relations that also need to be sustained by water for it to benefit us as well as nature in the long run.

Over the past two decades, a range of scholars have been working on developing alternative ontological explanations and narratives of matter and the human body as materially embodied (e.g. Abram 1996). However, instead of focusing on the 'wild' in an abstract sense, approaches more generally referred to as 'new materialism' have identified the potential of matter in the light of its alternative agency as subject rather than object (e.g. Coole & Frost 2010a), in order to generate new political and ethical commitments (Bennett 2010b). This intellectual movement is still not cohesive, although its various

strands emerged from a general criticism of the Cartesian–Newtonian way of identifying matter as inert and operating mechanistically. The Cartesian–Newtonian way of seeing matter means everything in the natural world has been 'identifiably discrete' and explained through a 'linear logic of cause and effect' (Coole & Frost 2010b: 7).

In characterising matter in these narrow terms, scholarly traditions ranging from the sciences to cultural theory have come up with 'predictable, controllable, and replicable' conceptions of the natural world, which seem to 'obey fundamental and invariable laws of motion' (Coole & Frost 2010b: 8). The important point here is that seeing matter as inert has meant that 'thought' or human 'agency' has become the dominant motif for being able to claim superiority and domination over the natural world. Descartes' *cogito* (the thinking subject) has become identified as 'ontologically other than matter', and is therefore seen superior to it (Coole & Frost 2010a: 8).

Scholars challenging the orthodox view of matter as inert have also characterised its potential consequence for how we understand human beings and also the natural world in different terms.[2] For example, Coole and Frost (2010a: 7), writing from a new materialist perspective, characterize critiques of Cartesian–Newtonian views of the world as being united by their 'emphasis on materialization as a complex, pluralistic, relatively open process and their insistence that humans, including theorists themselves, be recognized as thoroughly immersed within materiality's productive contingencies'. A wide range of scholars can be identified as materialists, including Hobbes and Spinoza, Deleuze and Serres, along with the Nobel Prize-winning novelist Le Clézio. Despite their shared concern in terms of breaking down traditional dichotomies and binaries such as human/non-human and rationality/matter, they approach their subject in different and complex ways. Hobbes, for instance, has built his approach to politics from a critique of the possibility of causality – that is, he posits that uncertainty in the way that x can determine y means that one cannot rely on causality, thus undermining the determinism that is associated with the Cartesian approach to the world of matter (see Frost 2008).

More recently, Barad (2012: 16) has offered a scientifically literate account of the potential of matter to surprise us beyond the dominant mechanical and causally driven approaches to it. Writing about the idea of nothingness, suggests that nothingness 'is not absence, but the infinite plentitude of openness'. Barad's conceptualization of the world of matter as being filled with possibilities, potential and vibrancy is dependent on it being seen as

2 This literature is wide-ranging. This work draws on engagements with this subject from those who pursue phenomenology or adopt techniques of eco-psychology. On this subject and relationship see Vakoch and Castrillon (2014).

'ontologically indeterminate', 'radically open' and with 'infinite possibilities' (2012: 16). The significance of Barad's account of what she calls 'mattering' (as a dynamic process) is becoming increasingly relevant, but it is not necessarily unique. Related views are offered by other New Materialists. Bennett (2010b), for example, argues that matter is much more complex and porous – 'lively' – exhibiting more 'agency' than we have come to assume from it. From the viewpoint of such theorists, an emphasis on matter should be on its unpredictability and the indeterminability of processes in the natural world – with profound relevance for a range of human social processes: Bennett (2010b), for instance, identifies how 'non-human materialities' have agency, alluding to the impact that this ontological viewpoint could have on politics.

This ontologically driven approach provokes and encourages us to rethink our interactions with physical and biological matter and processes, and to explore new ways of seeing them. It separates us from other significant theoretical movements, like postmodernism, by emphasising that the world does not simply revolve 'around words' (Paulson 2009: 216). An important consequence of thinking in this way is the possibilities to which it gives rise in broadening or reshaping debates about how we approach our relationship to the natural world. As an example, Michel Serres (1995), in his view on the new materialism, argues for a symbiotic partnership between human beings and the natural world. In this passage from the concluding paragraph of *The Natural Contract*, Serres contemplates his experience of what Ian Tucker (2011: 149) terms the 'materiality of the human condition':

> That's why I tasted joy during the earthquake that terrified so many people around me. All of a sudden the ground shakes off its gear: walls tremble, ready to collapse, roofs buckle, people fall, communications are interrupted, noise keeps you from hearing each other, the thin technological film tears, squealing and snapping like metal or crystal; the world, finally, comes to me, resembles me, all in distress. A thousand useless ties come undone, liquidated, while out of the shadows beneath unbalanced feet rises essential being, background noise, the rumbling world: the hull, the beam, the keel, the powerful skeleton, the pure quickwork, that which I have always clung to. I return to my familiar universe, my trembling space, the ordinary nudities, my essence, precisely to ecstasy.
>
> Who am I? A tremor of nothingness, living in a permanent earthquake. Yet for a moment of profound happiness, the spasmodic Earth comes to unite herself with my shaky body. Who am I, now, for several seconds? Earth

> herself. Both communing, in love she and I, doubly in distress, throbbing together, joined in a single aura. (Serres 1995: 123)

Here, Serres discusses the intense emotional experiences of being materially embodied. He describes his fears alongside the experiences of uncertainty, love and respect for the natural world. It isn't so much that that matter, objects or the natural world are vibrant, present and open to change; human emotions and senses are also central to his appraisal or description of what is being experienced. Drawing inspiration from Serres, it is arguable that the way we understand our relationship with nature or matter more generally is not just through abstract conceptions using our thoughts and language, or in terms of new materialism's extrapolation of the world as matter. Our senses, emotions and feelings are also critical to ways in which we experience and shape the world materially. Descartes' influence on science, which Serres also fights against, is his separation of the world of thought from matter. In this vein, Damasio (1994) has famously argued that it is 'emotions and feelings, along with the covert physiological machinery underlying them' that 'assist us with the daunting task of predicting an uncertain future and planning our actions accordingly'. He maintains that emotions, feelings and biological regulation all contribute to what is human reason. Serres states that certain kinds of emotions emerge from or exist only in our symbiotic integration in and with the natural world. If the world of matter is ever present, integrated, vibrant and ontologically indeterminate, as Barad (2012: 16) suggests, then our emotional makeup may also be more complex than Damasio suggests. Our emotional and sensorial makeup or experiences are therefore not as independent, isolated and capable of individualist appraisal as some cognitive theorists and psychologists describe (e.g. Prinz 2004). Abram (1996: 33) gives voice to this point when he states:

> The world and I reciprocate one another. The landscape as I directly experience it is hardly a determinate object; it is an ambiguous realm that responds to my emotions and calls forth feelings from me in turn.

Abram's description of our engagement with matter suggests it can also elicit responses from us that are not just cognitive or innate, but emotionally embodied appraisals. The rest of this section discusses the emotional experiences of fear in a world of matter to help further illuminate our discussions of the connections between our experiences of the Anthropocene epoch and ecological justice.

Deep fears in eco-philosophy

The emotion of fear is commonly discussed in the context of state politics and also in relation to violence and death (Schall 1996). In our relationship with the natural world, fear is often associated with the vulnerability we feel from experiences like darkness, flooding, landslides, potentially dangerous insects, or the possible spread of a virus (Pain & Smith 2008). Traditional reactions to fear have either been to avoid or to escape an object that threatens us, and to do whatever is necessary until we become – or feel like we have become – invulnerable (Svendsen 2008: 31). We have established similar responses to fear in relation to the natural world, by damming rivers, creating forest reserves to house wild animals, getting rid of spiders and generally managing or domesticating our natural surroundings. We exclude the natural or wild world from our collective lives, and in this way enable our escape from the object of fear. What we usually fear about nature are those things that have direct impacts on us as human beings and make us vulnerable, and as such are often of the kind of objects of fear that Massumi (1993) characterises as capable of enabling high-intensity emotions. The challenge with discussions of fear in general, and also in the context of our relationship with nature, is that we presume that someone experiencing it is likely to want to escape from the circumstances or situations in which they find themselves, or they are likely to avoid it altogether (Svendsen 2008). This reaction presumes that fear is a highly negative experience, and that its consequences if the object of the fear is realized are likely to impact violently on the integrity of the individual concerned. This explains why the common synonyms for fear – such as apprehension, dread, panic, terror and trepidation – point to extremes of individual responses or feelings.

The consequences of seeing fear as a high-intensity emotion, or as distinctly separate from the ongoing presence of the world of matter in our sensorial and emotional reality and consciousness, don't acknowledge subtler, softer and more potent experiences of fear. These more nuanced emotional experiences include, for example, the likely and multifarious nature of the threats from climate change, biodiversity loss, ocean acidification and the many more huge environmental harms that are likely to emerge from breaches of what have popularly become known as planetary boundaries (see Rockstrom 2009). These harmful ecological events are different from those more sudden and impromptu events, such as a tsunami, which can immediately create victims. Their cause is also more likely to be multifarious. The idea of the Anthropocene epoch does not refer to tipping points, the loss of resilience or harm to earth systems, but it does suggest that collective human behaviour and our use of the natural environment are likely to bring us to these points more quickly.

However, the often physically, spatially and temporally distant nature of these more gradual and subtle threats of the Anthropocene epoch makes them different from the experience that we would have if we were to come face-to-face with a certain kind of threatening object, like a spider. This doesn't mean that breaches of planetary boundaries are unlikely to cause other more direct and severe natural conditions; these fears – although sometimes far removed from us – can be 'dramatic gestures' (cf. Little 2008: 94) or long-term waves of anxiety in our consciousness, and are often enlivened by smaller and localized experiences like flash flooding or the breakout of a virus. In this way, our experiences or feelings of helplessness around matter at the local level are intertwined with our responses to threats that are more distant – whether spatially or temporally. Research on fears or phobias about snakes shows they develop when someone is exposed to others who have experienced an adverse reaction to snakes at a particularly critical time (Mineka et al. 1984).

Another kind of nuanced yet challenging experience involves us emotionally embedding ourselves in, and experiencing the uncertainty, mystery or novel nature of, matter or the natural world – whether it be in a national park, on the high seas or in our own backyard. Damasio (2006) and others unpack a more deeply complex problem with common discussions of fear: the assumption that the world is experienced sensorially and emotionally, followed by cognitive appraisal. From this perspective, fear is the first reaction that someone has to certain things in the natural environment, which is then calibrated and contextualized cognitively (see Lockwood 2013). The problem with these liberal expressions of how emotions work is their claim that cognitive experiences can ultimately separate our experiences of the world of matter from emotional ones. In other words, the world of matter remains lifeless, ontologically determinate and not symbiotic in our experiences of fear and anxiety. This is not to suggest that we cannot or remain oblivious to the mental processing and social or cultural forces that shape how we experience nature. This experience of fear is more a recognition of the community of subjects and agents that are a part of our experience of the world and deeply embedded in it.

In this example, fear comes from how we engage or experience the object that enables our fear. Not everyone would feel fearful of not knowing what's in the soil that we dig into in our backyards and, although the experience of fear is universal, our interpretation of the object of fear isn't necessarily so – see Merleau-Ponty (1989: 189), discussing the cultural relativity of fear. Whereas we may all experience fear when face to face with a polar bear, this would not necessarily be a universal stimulus for everyone's experience of fear. However, research suggests that our experiences of fear can be normalised by our

urban experiences (Little 2008). Urbanized experiences of nature or scientific approaches to objects can discipline us to avoid seeing variation, possibilities and potential in the way that matter asserts itself on our consciousness. Although Kahn and Hasbach (2013) would see this as our potential to experience the wild in everything we do and everywhere we go, the argument here is much wider, suggesting that science and rationality have also disciplined our emotions so that we avoid feeling anxious or threatened by uncertainty or the unknown because otherwise the world around us would fail to be controllable or domesticated.

In both these examples, subtle, distant and material experiences generate a kind of fear that is not commonly discussed when we talk about our fear of nature. What enables this fear and deepens its impact on us is arguably the loss of 'control' we experience from being spatially or temporally distant from the threat to us, or being uncertain about things we are likely to experience because we cannot rationally understand or analyse them. Like 'wild' experiences of nature, its arguable that fear also 'fractures the foundations of modern conservation' in that its removes our ability to control matter (Turner 2013: 35). However, in every sense, this is central to what the new materialism stands for, in that physical or physiological borders, inertness and the logic of cause and effect are all ideas that enable us to control rather than understand nature in its reciprocal relationship to us. What enables the fear we feel is the need to be completely integrated and embedded in our experiences with matter, to the extent that we appreciate rather than feel threatened by the fear we experience.

The idea that, with a broadening of our conception of matter, our emotional and fearful reaction towards the natural environment can change, is a different way of expressing what Kahn and Hasbach (2013) also argue regarding fear of the wild being primal to human beings. They maintain that fearing the wild is an important feature of rewilding us as a species (Kahn & Hasbach 2013). They don't specify whether the emotion is physically, socially or biologically determined, but some scholars would disagree that it could be biological or 'natural'. This is an important point: if certain kinds of experiences of fear are purely a cultural and social construction, then their reality is something we have to strive directly to achieve. This would be different from simply reorienting the way in which we appreciate the natural world and then expect our more subtle experiences of fear to emerge from this.

In this context, Svendsen (2008: 24) notes:

> [W]hat we fear, and how strongly, depends on our conceptions of the world, of what dangerous forces exist in it and what possibilities we have of protecting ourselves against them. Our knowledge and experience of emotions are not independent of the social context in which they occur.

Svendsen does not rule out that fear of the wild is primal or natural to the human species, but also argues that 'fear' can potentially be both biologically determined and culturally situated. It is possible, argue Coole and Frost (2010b: 27), to 'accept social constructionist arguments while also insisting that the material realm is irreducible to culture of discourse'. This is the same as suggesting that the emotion of fear may be natural, but how and why we experience it can be either biological or culturally determined. This is important because if certain types of experiences of fear are culturally or socially determined, then whether matter's vibrant force can affect our consciousness is also constructed rather than natural.

Yet, in making these points, it is easy to lose sight of the purpose behind Kahn and Hasbach's (2013) argument, which is to revive our cultural engagement with wild nature by recognizing the role of fear in that process. The only problem here is whether we prefer to be ontologically correct or epistemologically normative. What is significant for this article is that if the objects we fear don't have to have either immense or any immediate biological or real consequences for us, then we have to work out how they culturally shape the way we perceive them in such terms. Heidegger (2010: 178–83) elevated 'anxiety' to a basic or fundamental mood that recognised fear as limited, in that it was only possible with an identifiable threat. This suggests that, for Heidegger, the fears described above would be anxieties, as the immediacy of harm required by fear is much more time sensitive.

The main problem with subtle and nuanced fears, as opposed to high-intensity fear, is whether or not they are real. Although one might argue that this is more a philosophical than a real question, it is important because phenomenologists like Maurice Merleau-Ponty (1989) would argue that the gesture expressing fear is what is real rather than the emotion behind it (1989: 184). In such instances, the forgotten or more subtle fears discussed above would not necessarily have gestures or physical embodiments that one would traditionally associate with more intense fears. This isn't an issue in relation to whether a person can feel fear, but still have care, compassion and a desire to conserve or preserve a natural environment. Kahn and Hasbach (2013) raise this in their discussion of rewilding the human species. Research on children's experiences of bats in the zoo shows that they were both fearful of them and also cared for them. Although they would

not choose to sleep near the bats, the children said they would be bothered if they could not see or experience bats in a zoo or in the wild (Kahn and Hasbach 2013: 207–32) This study suggests that some people may react rather problematically to spiders, but that doesn't mean their immediate response is to squash them or to eradicate the species completely. The significance of this point is that fear doesn't require an immediate gesture or reaction to it for us to make the argument that it is real.

In this section, the article has argued that fear is an important emotion for understanding our relationship with the natural world. Traditional approaches to fear have privileged a particularly anthropocentric and liberal approach to nature, and don't appear to have been predisposed to new materialist ontologies or interpretations of them that enable our emotions to be central to our role as the species dominating the Earth. Looking at fear from fresh perspectives directs us towards new ways of emotionally experiencing the natural world, as well as acknowledging that fear is an important way of dealing with the ecological challenges that are unique to the Anthropocene epoch. Although scholars have argued that the capacity to fear is important for rewilding the human species, this section has maintained that its importance is broader, in that it gives materiality credit in our emotional and cognitive experiences of the world around us. An understanding of why and how humans experience fear due to matter is critical for our symbiotic and integrated partnership with the natural world. The capacity to experience fear is important for understanding ecological justice, but context is also important in order to give expression to this idea. The next section explores this through the analysis of a painting.

A (re)interpretation of The Scream of Nature

In this section, the work of Edvard Munch in *The Scream of Nature* (see Figure 1) is discussed to describe the symbolic representation of fear in the context of experiences of ecological (in)justice. As will become apparent from the discussion that follows, the main character in this painting is not experiencing an immediate and high-intensity version of fear. It is therefore a useful symbolic depiction of fear, and suggests that there exists the possibility of (re)interpreting other common experiences in the natural world. Lockwood (2013) examines insects and our human relationship with them. He describes the centrality of grasshoppers and Salvador Dali's fear of them, and their expressions of this in his art (2013: 6–8). This section argues that the expression of fear of reverberations of ecological injustice in the world of matter is central to Munch's work in *The Scream of Nature.*

Figure 1: Edvard Munch's The Scream of Nature. This version appears in the Munch Museum in Oslo, Norway.

(WebMuseum at ibiblioPage: http://www.ibiblio.org/wm/paint/auth/munch/Image URL: http://www.ibiblio.org/wm/paint/auth/munch/munch.scream.jpg. Licensed under Public Domain via Wikimedia Commons - https://commons.wikimedia.org/wiki/File:The_Scream.jpg#/media/File:The_Scream.jpg)

Munch was a Norwegian painter whose work received world acclaim, and his *Der Schrei der Natur*, which translates as *The Scream of Nature* (hereafter *The Scream*) remains one of the most famous paintings in the world. The painting is also sometimes called *The Cry* (Lentz 2014). Munch was a prolific artist, with suggestions that he created '1,008

paintings, 4,443 drawings and 15,391 prints, as well as woodcuts, etchings, lithographs, lithographic stones, woodcut blocks, copperplates and photographs' (Lentz 2014). He decided to become a painter in 1880 (Heller 1984: 11, 20). Munch's life was filled with the sorrow of the passing of his mother, sister and others around him. He suffered from serious anxiety and hallucinations, as well as a range of other related forms of mental illness, and was one of the first people in Norway to receive shock therapy for his conditions (1984: Ch. 6). Munch's life is characterised by Heller as one of 'anarchic isolation and physical fragility' (1984: 20). Isolation and deep contemplation through reading and writing also occupied much of his time, especially towards the second half of it. Munch is well known for his love of books – particularly on physics and higher mathematics (Prideaux 2005 at vii). He died in 1944 on his 80th birthday.

Munch is said to have commented that much of his works were 'fragments of a great confession', and that 'his pictures fitted together 'like the pages of a diary' (Prideaux 2005: vii). His approach to art was to recognise that sometimes a piece revealed itself more clearly after a number of efforts (2005: viii). For instance, he painted six versions of *The Sick Child*, which he saw as his best work, and he painted *The Scream* four times between 1883 and 1910. His approach to his art was therefore different from those of other artists, who recognised that a painting was the culmination of the performance of the capacity and skills of an artist. Munch celebrated the work of artists: to him, they alone were capable of 'tearing off the mask of modern man to show his true face' (2005: 81). A commonly cited note from Munch's own diary captures this: '[W]e should no longer paint interiors with people reading and women knitting, they should be people who live, breathe, feel, suffer and love.' (Eggum 1992: 15)

Munch's substantive approach to his work is also reflected in the continuous evolution of his painting style. He was not a naturalist, a realist or an impressionist, and he never consistently adopted any other popular Norwegian approach to art. Munch's abandonment of the schools of art was due to his obsession with subjectivity, or finding the 'soul' in the subject of his paintings. For instance, he abandoned realism because he saw it as being concerned only with the 'shell of nature' (Prideaux 2005: 81). His approach enabled him to make wide-ranging comparisons with artists from other schools. Whereas Leonardo da Vinci 'studied the recesses of the body and dissected human cadavers', through 'self-scrutiny', Munch sought 'to dissect what is the universal in the soul' (Munch quoted in Prideaux 2005: 83).

Munch often painted a number of works around a particular theme. *The Scream* is embedded in his depiction of anxiety and despair. Included in this range, among others,

are works titled *Despair* and *Anxiety* (Wood 1992: 95–9). Munch used the background colours and themes in *The Scream* as the foundations for *Despair* and also *Anxiety*, which is why his works around that time are often used to interpret *The Scream*, as well as others in that collection. In *The Scream*, the background of the blood-red and yellow curves and arches dominates the landscape (see Figure 1). The gender-neutral 'figure in the foreground, the landscape, and the sky all seem caught up in one great swirling motion' (1992: 96). This feature of the painting is even more enhanced in a subsequent lithograph version. Messer (1985: 72) suggests that in the lithograph, '[T]he protagonist's body contour is here dissolved and her identity remains establishable only in the negative, as the area corresponding to her presumed existence merges with that of the immediate environment.' The background of the fjord used in *The Scream* is also the same one that is used in *Despair* and *Anxiety*, as well as other paintings created around the same period, although the ways in which the background is seamlessly embedded with the characters in the paintings differ significantly. In *The Scream*, the figure is deeply embedded into the background through the swirling motion of the brush. The figure is also separated from two people who appear in the background, although in another version of the same painting the characters separated from Munch are bowing their heads, and therefore more represented in the depiction of despair and anxiety than in the version shown in Figure 1.

Interpretation of *The Scream*

A variety of views exist on many aspects of this painting. Munch described the inspiration behind the painting:

> I was walking along the road with two friends. The sun set. The sky became a bloody red. And I felt a touch of melancholy. I stood still, leaned on the railing, dead tired. Over the blue-black fjord and city hung blood and tongues of fire. My friends walked on and I stayed behind, trembling with fright. And I felt a great unending scream passing through nature. (Heller 1984: 105) .

In a lithograph done on the motif of this painting back in 1895, Munch inscribed the following comment, which is also indicative of what he was experiencing: 'I felt a great scream pass through nature' (Wood 1992: 96).

Despite Munch's own views about the painting, a range of interpretations of this work point to the actual despair, turmoil and anxiety that he was experiencing at that time, due to his experiences with mental illness. Prideaux (2005: 137) suggests that the painting

has come to represent the 'dilemma of modern man, a visualization of Nietzsche's cry, "God is dead, and we have nothing to replace him"'. More simply, Jones (2012) describes the background and the distortion in the surroundings as representing the despair, fear and anxiety that the figure is projecting on its view of the world around it. The idea that Munch is portraying despair and anxiety, which is a personal, subjective and yet possibly universal depiction of the human condition, emerges from the suggestion that he was in fact reflecting on his sister Lara's incarceration in a mental institution on the other side of the path and the fjord. The figure, which is often suggested to be that of Munch himself, is also caught up in the experiences he had with mental illness.

An important feature of *The Scream* is the way in which Munch has managed to embed and integrate the figure into the landscape itself using a combination of swirls and the distortion in the figure, which aligns with that of the natural background. This style helps to separate the role of the figure used in *The Scream* and that in another painting of Munch's referred to as *Despair*. In *Despair*, the same background colours and structures are used, but the distinctly male figure appears markedly separate from his surroundings because this is a more traditional representation of a person. As a result, it is suggested that in *Despair*, 'the background operates as a reflection of the mood of the person in the foreground' (Wood 1992: 95). This is the case in *Despair* rather than *The Scream* because of the separation Munch has forced on the painting between the individual and the background in which he is embedded. Whereas in *Despair* nature is represented as the reflection of the figure's mood, this is not the case in *The Scream*, where the figure is completely embedded and integrated into nature itself.

Interestingly, much of the interpretation of Munch's work relates to it being a work of introspection built around his mental condition rather than a commentary on the figure's engagement in and appreciation of our experience of nature. This is surprising, given Munch's own comments, and it appears from works done on Munch that he was predisposed to critical readings of science, which is consistent with the approach of new materialism. Prideaux (2005: 81) comments that he wanted 'no part of the idea that science alone could, by revealing the nature of things, make the mechanical sequences of the universe omnipotent'. This comment sits significantly alongside Munch's more general critique of art as being concerned with the form things take rather than the soul. Echoing this point, but in the context of science, Munch commented that, '[T]hey [referring to scientists] have found bacteria, but not what they consist of' (cf. Prideaux 2005: 81).

The painting is as much a commentary on our materially embodied existence as it is about the incapacity of some to see, hear and be deeply integrated into their surroundings and the natural world. The figure of the person is embroiled in the story the natural world is seeking to tell by its representation through the swirls used to also capture the vibrant and extraordinarily colourful nature around it. The clothes on the figure are represented in the same colour as the river behind it, but in a way that suggests Munch and the river flow into one another. The distortions in the head of the figure and the opening of its mouth, which are central to the expressions on the face, capture the power of the scream of nature – not just on the mood, but on the total being of the figure. This suggests that the scream of nature and its power are not ordinary. This view is also further enhanced by the blood-red colour that appears in the sky (rather than the river, for instance), representing the stratosphere, which is the highest point on earth that human beings can visually experience.

This discussion can be extended to appreciate the normative aspect of the work. The orange and red in the sky are metaphors, and therefore suggestive of nature's blood that we have been responsible for shedding. In this painting, the disturbance, violence and sometimes chaotic presence of nature in our lives, which leads to our fearful posture and reaction to it, comes from the swirling lines, the appearance of the movement of the red colour along the railings that the figure is standing next to, and the appearance of the capacity of the noise and the acoustic forces to distort the body of the figure itself. Most significantly, the severe reaction of the figure in the painting to the scream of nature suggests that the extraordinary nature of this experience. Importantly, not everyone feels the impact of the scream of nature – in the first version of Munch's *The Scream*, the other human personalities in the image are not responding to anything. This interpretation of the painting leaves us with the distinct impression that the 'subject' in the painting is not just the figure but also the natural surroundings. Arguably, the scream 'passing through nature' is the real subject of this painting.

The positioning of the other two characters in the painting, who are well dressed and appear to represent the aristocracy, suggests that whatever has caused the scream or the scream itself is of no concern to them, whereas Munch's figure is distorted and experiences intense fear anxiety. The representation of wealth and the economy in the aristocracy distances the figures. The fact that the two people behind the main figure (supposedly of Munch himself) cannot hear the scream of nature is itself part of the experience of injustice that the painting depicts. Additionally, the swirls through the painting connect – literally and also metaphorically, by not imposing borders or barriers – the past and the present, the local and universal, and the mild and severe experiences of nature itself. The

scream of nature reverberating through the landscape and the figure itself is represented not just as a single incident, scream or observation, but as 'something' that has been continuously building to become the symbolic representation in the painting of injustice that the figure feels so strongly.

This section has argued that, despite alternative interpretations of *The Scream*, the work of Munch is about matter, materiality, and the human emotional engagement with it rather than cognition and the mental projections by the figure of his or her mood. Significantly, it is also about the symbiotic engagement of human beings with the natural world. As such, it can be read as a powerful depiction of the capacity of the natural world to protest about its experience of injustice. Although one could argue that the painting has nothing else to say other than the fact that the scream flows through nature, this is not the case when the various nuances in the work are analysed with an eye to justice. Munch manages to convey to the viewer the emotional experience of injustice against the natural world. Most importantly, the painting conveys the potential fear that one will experience should nature's scream emerge from the injustices we commit against the natural world.

Analysis and Conclusion

In the early 1990s, the idea of intergenerational equity defined and gave creative impetus and direction to scholarship on international environmental law and politics (Brown Weiss 1989). The concept has morphed into something larger and broader: the idea of environmental justice, which is concerned with the just access of present and future generations to environmental goods. The problem that new approaches to materialism seek to highlight is our near-universal assumption that the world of matter needs us, or its destiny is fully understood and determined by us. It is arguable that, in the Anthropocene epoch, symbiosis rather than individualism better explains what is going on. In this sense, it arguable that the concept of ecological justice is a less anthropocentric doctrine to use in understanding our symbiotic relationship with the natural world. This doesn't mean that we forget about human beings in our normative dealings with the environment, but rather that we have to assess our significance in a new light. Serres (1995: 16) refers to human beings as the 'dense tectonic plates of humanity', to distinguish us as materially embodied species from what we have come to know as 'man as an individual or subject'. Even from this simple view of human beings, we can argue that we are deeply embedded and integrated into experiences of ecological justice and injustice.

This is certainly what *The Scream* suggests, and a reinterpretation of this painting using ontologies that don't have human beings as the dominant feature in the world makes this

more apparent. *The Scream* also makes the experience of ecological injustice the subject of the painting by vividly portraying the flow of the scream through both the entire landscape and the main figure in the painting. The anomaly is the two characters on the bridge, who are at a distance from the main figure and don't experience the vibrant force of the scream. However, the discussion in the first section of this article indicated that the subtle and nuanced experiences of fear are central to the rewilding of the human species, recognizing that we occupy an 'ineluctably material world' (Coole & Frost 2010b: 1). However, Coole and Frost make the point that, 'for the most part we take … materiality for granted, or we assume that there is little of interest to say about it' (2010b: 1). The fear of someone else's loss is not always a high priority, unless it is somehow directly connected to our own experiences. We may even seek to do economic cost-benefit analysis as to whether we should protect nature for the present or future generations (Baumgartner et al. 2012). Returning to the paradox in *The Scream*, the two aristocratic and wealthier people on the bridge are not susceptible to the same experiences of matter as the main figure, who is deeply impacted by the scream to which they are witness.

Baudot (2010: 6) argues that art can have instrumental, intrinsic and extrinsic effects on international politics. This article maintains that fear in human beings is an important feature of the experiences of and concerns for achieving ecological justice. It is also important for understanding the deeply symbiotic rather than liberal relationship that we have with the natural world. A (re)interpretation of *The Scream* is an important step in this process, by drawing on its popularity as a piece of art to inspire people to reconceptualize their relationship with the natural world. Most importantly, it has intrinsic value in that the 'charismatic power of the work of art itself' can 'enoble and inspire political thinking and action' (Baudot 2010: 2). However, this article has also shown that *The Scream* makes an extrinsically valuable contribution to understanding the place of the human species in a world of matter. It helps us to explore how fear emerges not just from the individual's experience of an object that is apart from them; rather, the human is part of and integrated into the experiences of nature. This is a critical and important argument that the work of Munch describes vividly once it is reinterpreted. The painting can arguably sit alongside Serres' (1995) *The Natural Contract* as a contribution to our understanding of eco-philosophy by combining a critique of scientific rationality with a new approach to the ontological in cultural and social philosophy.

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We Need to Talk About the Cultural Commons: Some Musings on Rhizomatic Jurisprudence and Access to Art

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This article analyses the possibility of constructing a legal concept of the cultural commons in order to facilitate access to art. The concept of the cultural commons is here connected to the Swedish legal principle "*allemansrätten*". It is argued that in order to imagine and construct such a concept, legal reasoning must reach beyond certain opposite based dichotomies particularly public-private and open-closed. These dichotomies can be found in for instance intellectual property law. The article argues that a legal cultural commons can be envisioned by applying the rhizome theory developed by Gilles Deleuze and Félix Guattari. The notion of the cultural commons is placed within the Deleuzeoguattarian forms of possession. Keywords: Cultural Commons – Access to art – Gilles Deleuze – Félix Guattari – Rhizome – Jurisprudence

That the Rosetta Stone is probably one of the most important items of cultural heritage for our civilisation is an undisputed fact. Dating back to 196 B.C. it has provided scholars with a key to reading Egyptian hieroglyphs, which in turn has opened up for a wealth of knowledge in terms of the ancient world, as well as to understanding our own society and its past and current structures.

In the year of 2013 the British Museum, the establishment that currently houses the Rosetta Stone among thousands of other pieces of cultural heritage, attracted 6,8m visitors.[2] The museum generated in that same year around £67m in income. The tourism body *Visit Britain* has approximated that Britain's major museums and galleries, including

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2 Since 2003 Egypt has been requesting the repatriation of the Rosetta Stone, claiming that it is part of Egypt's cultural heritage and serves as an "icon of Egyptian identity" and must therefore be returned to Egypt, its source country. The British Museum, together with some other internationally leading museums, have generally and as a matter of principle claimed that certain cultural heritage items like the Rosetta Stone, on the contrary are now part of our common global identity and as such these items can be attributed to the human kind as a whole. The museums have even issued a joint statement claiming that "objects acquired in earlier times must be viewed in the light of different sensitivities and values reflective of that earlier era" and that "museums serve not just the citizens of one nation but the people of every nation". See e.g., Bailey (2003).This article will not directly address the issue of ownership, and to whom these items of cultural heritage belong. This article addresses the *access* issue, i.e. how making items of cultural heritage open to public access through a legal concept of the cultural commons does not equate depreciation or loss in value in terms of the underlying resource and/or ownership rights connected to it.

the British Museum, earn the UK £1bn a year in revenue from overseas tourists only. This can be compared to the profit that Volvo made in the second quarter of the year 2013, which came in at around £35m. A new Volvo car costs around £30k. A visit to the British Museum is free of charge. In fact, for the last 225 years the British Museum has adhered to the principles of free public access. How is it possible that it can have a comparable turnover to Volvo while remaining free of charge to the general public? It will be proposed here that a simple answer to that question is that while Volvo is structured like a private company, the British Museum is structured and governed like a *cultural commons*.

As part of the 2014 election campaign a Swedish political party released posters where the political "slogans" were only made up of excerpts from pop songs such as Beyoncé's *Who Run the World (Girls)* [sic] and Dolly Parton's *Working Nine to Five.* The copyright holders were quick to protest – the right to use the lyrics in this context had not been cleared, they claimed. This use of their works was not fair use and it constituted infringement of copyrights, they claimed further. The copyright holders had not in any way agreed to be associated with any one political party. A number of Swedish intellectual property scholars were asked to comment on this issue, and they stated without any hesitation, that activities like this are typical cases of infringement of copyright laws. The political party in question retracted, and withdrew the posters.

The intellectual property scholars were probably right in asserting that this was not fair use and that the posters therefore constituted infringing use. However, it can be argued that this occurrence could have perhaps been the perfect opportunity to re-instigate the discussion concerning the scope of fair use when it comes to utilisation of copyright protected works within the contexts of freedom of expression, such as in connection with political utterances. This could have also been the golden opportunity to discuss what constitutes copyright protected works and in turn what constitutes the unrestricted free expression *now,* in the globalised, media saturated, branded, knowledge society. Perhaps it could have been in order for someone to raise the argument that the world is in constant change, and so is our way of communicating, and as such the legal constructions of closed copyrights versus open free expressions as a dichotomy needs to be addressed. Today, as part of our everyday communications, we constantly make references to songs, brands, popular culture, current events – it has become part of our daily language. Our multi-media, connected, network based existence is loaded with copyright protected works and trademarks that have worked their way into our patterns of communication. We say that we "google" when referring to conducting searches on the internet, regardless of which search engine we are using, we "facebook", we "tweet", we "xerox" and so on. We do all this, fully oblivious to the fact that we are in fact using (and diluting!) copyright

protected works and trademarks, that we are engaging with the fair use and public domain principles, and all other activities permitted and not permitted through the constructions of intellectual property laws. It could have therefore, perhaps, been warranted to at least ponder the argument that this is how we communicate, by referencing content, by re-locating and re-using, *repurposing,* each other's expressions. It could have been argued that this is the very language of the digital media knowledge society, it has become part of our language and it has become our way of interacting with each other, of expressing ourselves. So when the political party retracted and withdrew their posters it could have, perhaps, been argued that the freedom of expression was limited a little by claiming that this was infringing activity, full stop. Perhaps, at least a (rhetorical) question would have been in order, to ask, whether this potentially also could mean a restriction on freedom of expression.

Often, private ownership laws such as intellectual property laws are pitted against issues of access or freedom of expression, very much like in the two instances described above. The one has to benefit at the cost of the other. It has now come a time when we need to talk about a legal field where these two interests can converge into an alliance: within the scope of a legal cultural commons.

This article analyses the possibility of constructing a legal concept of the cultural commons. Such a concept can and will be connected to the Scandinavian legal principle "*allemansrätten*" below. It will be argued that in order to imagine and construct a legal cultural commons, we must reach beyond certain (stifling? false?) dichotomies, such as public-private, and allow for a reasoning that is open to multi-layered, constellation-based legal concepts. An attempt to do just that will be done below by applying the rhizome theory developed by Gilles Deleuze and Félix Guattari.

The commons and "*allemansrätten*"

When we talk about "the commons" what is most often discussed, at least in legal studies, are the natural commons and access to it (e.g. Valguarnera 2013a, see also Valguarnera 2013b) - i.e. access to open fields, wide landscapes, green pastures, lakes, rivers... One may also be referring to the resources tied to this category of commons such as irrigation water, clean and fresh air, fisheries or berries. The commons, it is often assumed, has to do with distribution and allocation of (natural) recourses. It can also be a question of access to nature and land that might be owned by some, and that may, under limited forms be accessed by the wider public (Hyde 2012). In connection to the right to access nature, the Scandinavian customary legal principle, which can be described as a right to roam,

called "*allemansrätten*"[3] has been developed.[4] *Allemansrätten* has for a long time been acknowledged as a *bona fide* legal principle by for instance the Swedish Supreme Court (*Högsta Domstolen*) and is today also inscribed in the Swedish constitutional law[5] and in the Swedish Environmental Code (*Miljöbalken*).[6] In broad terms, the principle grants the public a right to access and roam in nature, which means, generally speaking, that everybody may, for a limited time and on certain terms and conditions,[7] dwell in nature, hike, camp, swim in lakes, pick berries, and so on.

The right to roam in and access nature has in Scandinavia traditionally been considered to be of particular significance since it is directly connected to the public health and wellbeing. The wellness produced by continuous and frequent access to nature ought to be, it is argued, secured and safeguarded. This wellness that access to nature gives rise to has thus been given a legal status and transformed into a public right. *Allemansrätten* as a legal construct connotes a reasonable and limited access to nature, under terms and conditions, and has never been of such legal character that it encroaches on the underlying ownership of e.g. the land. The limitations to *allemansrätten* are often described in the following manner: the public may roam in the woods but may never enter the fenced off private garden or the family home on the same land. The public may thus dwell in nature but this comes with the obligation not to disturb private life, not to litter or damage the land, nature, animals or crops.

The phenomenon that we call *the commons* is a complex concept and not always directly connected to e.g. rights to access or rights to roam such as the *allemansrätten* legal principle. Instead, the notion of the commons is presented as a concept used to describe one of many categories of co-ownership, of resource distribution, allocation and management. It is often connected to a space or a realm where resources are co-owned, held and managed in common. In recent research it has been shown that such a space must not necessarily

3 This principle also exists in various forms in the other Scandinavian jurisdictions, e.g. in Norway where it is called *"allemannsrett"* and codified in the Norwegian Outdoor Recreation Act (*Friluftsloven*). A similar principle exits in Finish customary law, "*jokamiehenoikeus*", but while it is not directly codified it is mentioned in the Finish Nature Conservation Act (*Luonnonsuojelulaki*) and Criminal Code (*Rikoslaki*).

4 It can be compared to the Anglo-Saxon "right of way".

5 Swedish Constitutional Law (*Regeringsformen*), 2:15.

6 Mainly in chapters 2 and 7.

7 While the term "*allemansrätten*" is not defined in law, initially being a customary legal principle, it is usually interpreted in the following manner: Short-term stay usually means a 24 hours stay. The public is allowed to pick berries, flowers, mushrooms, cycle, hike, swim, etc. The public may not do any harm to the nature, land, crops, animals, and so on. The public may not disturb the private residences.

be a physical space. As such, the concept of commons is typically nowadays divided in two – the *natural commons* which consists of nature and the resources in nature such as land, water, air; and the *human* or *cultural commons* which consists of the man-made, intellectual and cultural resources and comprises broadly of language, knowledge, ideas, images, rites, expressions, styles, beliefs, etc. (Hardt 2010. See also (eds.) Bertacchini, Bravo, Marrelli & Santagata 2012). Thus, there are (at least) two types of commons: the natural commons and the human made, cultural commons. Within the second type of commons, namely the cultural, we find the aesthetic expressions, cultural heritage and works of art.

In economic terms the commons is often presented within a "prisoner's dilemma" setting, that is, as a paradox where property that is somehow managed in common also produces free riders and as a consequence may result in an over-use and eventual peril of the underlying resources, depreciation of value, and that it therefore can undermine individual ownership rights. This tendency can lead to the so-called *tragedy of the commons.*[8] This is part of a larger argument that makes the claim that resources will always be best managed in private, by virtue of the incentives bestowed on the individual owner by the private property rights as a legal and economical construction. Elinor Ostrom, the Nobel laureate in Economy, managed to show in her pioneering work *Governing the Commons: The Evolution of Institutions for Collective Action*, (Ostrom 1991) how this is not necessarily always the case and how the concept of the commons as a tool, *on the contrary*, can mean an optimal management of resources, particularly when it comes finite resources in nature (see also Lessig 2001: 94).

UNESCO divides world heritage in two categories: natural and cultural. If natural heritage is envisioned as a natural commons that partly can be governed by such a legal principle as the various forms of the Scandinavian *allemansrätten* it warrants the question whether this rationality can be transposed to the cultural landscapes? It can be discussed whether the same type of legal reasoning could also govern the *cultural* commons that

8 In the much discussed and nowadays legendary essay by Hardin, 'The Tragedy of the Commons' (Hardin 2009, [1968]) he envisions a pasture, where animals graze, that is open to all shepherds. Such an open pasture eventually prompts the egotistic shepherds to overpopulate it and overuse it, Hardin argues. The egoistic shepherds will be driven by the unlimited access to the pasture that will benefit them. This will in turn lead to overgrazing of the pasture, which in its turn will result in the destruction of an otherwise fertile land. Hardin thus concludes in a much-quoted passage: "Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all." (Hardin 2009:246).

comprises of the common cultural heritage that is (constantly being) created by the human intellect, knowledge, skill and ingenuity and resources connected to it such as cultural expressions and works of art. In order to provide an answer to this question we must now start talking about the legal concept of the cultural commons more seriously and ask whether a cultural *allemansrätten* can be conceived of legally. And could it, as with its natural counterpart, be inscribed in law, even constitutional law?

I propose that it is possible, provided that some dogmatic legal constructions and principles are reimagined in order to reach beyond certain obstacles that have so far hindered the construction of the legal cultural commons. Such obstacles are for instance the (false?) dichotomies e.g. the notion of the public and the private as opposites, or that ownership of cultural works can either be governed by a legal concept that is conceptually closed (e.g. individual intellectual property rights) or open (i.e. a reduction or removal of the intellectual property rights for the benefit of for instance freedom of expression, free open access, and so on).

Particularly in the Scandinavian legal traditions, we are quite accustomed to legal constellations such as *allemansrätten* as a right to *access*. Furthermore, the Swedish Environmental Code is based on principles and conceptions that are able to handle various seemingly different interests simultaneously (e.g. conservation of nature and the biospheres, as well as the interests of the land owners, the state, the public, future generations), in an economically and democratically sustainable manner. Could the same be done for the *cultural* environment?

It can be argued that today the natural and cultural resources can be equated. The public has a claim on the right to access both the natural and the cultural commons, a claim on both the natural and cultural spheres; a claim on equitable access to vital resources needed in order to feel well, partake in the democratic community, and simply lead a (perhaps Aristotelian?) good life. As opposed to the natural resources, the cultural resources are not, necessarily, dwindling. It means that at least Ostrom's conclusions can possibly be transferred to the cultural sphere (see also Hess & Ostrom 2007). I propose that a concept of the cultural commons, inscribed in law, does not have to presuppose the removal of entitlements, or the restriction of individual rights as intellectual property rights. On the contrary, it has to do with conceiving of an economically, culturally and democratically *sustainable management* of the cultural commons that comprises of cultural resources and cultural heritage, and that takes into consideration all types of interests (owners, users, state, public, future generations and so on). Such a legal concept, based on the constellation

of a number of interests, can be envisioned by employing the rhizome theory developed by Gilles Deleuze and Félix Guattari and discussing a rhizomatic jurisprudence.

Rhizomatic jurisprudence – resolving the dichotomies

Gilles Deleuze wrote several books on art (Deleuze 2003; Deleuze 2009, Deleuze 2010, etc.). And a lot has been written on the subject of Gilles Deleuze and art (e.g. Sauvagnargues & Bankston, 2013). Perhaps an equally vast amount of studies have been conducted on the topic of jurisprudence and art (e.g. Douzinas & Nead 1999, Ben-Dor 2011). In recent research various interesting connections have even been made between Deleuzian philosophy and jurisprudence (Bruncevic 2014; de Sutter & McGee (eds.) 2012; Mussawir 2011a; Mussawir 2011b; Lefebvre 2009; Braidotti, Colebrook & Hanafin (eds.) 2009; Lefebvre 2007; Moore 2007; Lefebvre 2006; Lefebvre 2005; Moore 2004, Moore 2000). In *Fixing the Shadows* (Bruncevic 2014). I discuss how a Deleuzeoguattarian approach to jurisprudence can further enable access to art by envisioning and constructing a legal concept of the cultural commons. Some main arguments of that study are presented here.

Gilles Deleuze is one of the twentieth century's most important thinkers (if we are to take Michel Foucault's word for it). Together with Félix Guattari, he developed the concept of the "rhizome" (*le rhizome*) in their influential work *A Thousand Plateaus: Capitalism and Schizophrenia* (Deleuze & Guattari 2011). As a philosophical tool the rhizome is complex to outline by its very nature. The rhizome can be described as a concept that promotes connectivity, heterogeneity and multiplicity. The concept challenges cognitive hierarchical systems and binary reasoning. It describes alternative modes of organisation that are not dependent on, either metaphorical or actual, vertical hierarchies, that produce binary opposites that lock reasoning into paradoxes. Such vertical hierarchies are usually opposite-based, and can give rise to a steady decrease of possible alternatives in philosophy, or I as am exploring here, in jurisprudence.

The critique of systems and vertical hierarchies in legal philosophy is certainly nothing new or unfamiliar to the researchers in the realms of critical or alternative jurisprudence (Douzinas 2014). What the rhizomatic approach adds to the critical jurisprudence is a methodological possibility of providing both the critical as well as, in Deleuzian manner of speaking, the *clinical* (Deleuze 1998) i.e. the possibility of revealing the potential of law and conceiving of alternative jurisprudential concepts and tools. The particular theoretical tools that the notions of connectivity, heterogeneity and multiplicity produce enable the conception of such a legal concept as the cultural commons, a constellation concept that connects the private *and* the public, the open *and* the closed, the ownership

and the access. The rhizomatic approach allows the *or* to be turned into a performative *and* with the application of the Deleuzeoguattarian theory:

> "A rhizome has no beginning or end; it is always in the middle, between things, interbeing, intermezzo. The tree is filiation, but the rhizome is alliance, uniquely alliance. The tree imposes the verb 'to be', but the fabric of the rhizome is the conjunction, 'and... and... and...'" (Deleuze & Guattari 2011: 27).

The paradox of access to art has so far been this: artworks are legally conceived of as *either* privately closed off though e.g. intellectual property law and where access is granted case-by-case, often in a commercial manner. In such a case one or several individuals own the artwork and the person who can afford access is the one who is granted access: the artwork is seen as a commodity. *Or* the artwork is legally conceived as completely open, as a free expression or as part of the public domain, and as such it is un-owned or owned by everybody. In the cases where artworks are legally constructed as fully open or in the public domain the incentive to create and exploit one's intellectual works diminishes as this approach restricts or removes the individual ownership right, and this can lead to fewer works, less diversity and *ipso facto* become a *cultural* tragedy of the commons. The rhizome theory provides an alternative to this conundrum.

The core idea of the rhizome theory in law may be that it appears to be able to transcend these, admittedly false, dichotomies between e.g. public and private, open and closed, as it is stressing not the hostile opposites, but rather interlinkage, the and... and... and... (Deleuze&Guattari 2011: 27) and the potential of constructing legal concepts based on alliances rather than oppositions. Which means that a cultural commons as a concept can be formulated legally, with e.g. some inspiration from the Scandinavian *allemansrätten*. In this manner, as we shall see shortly, the principles of the rhizome do not *dissolve* but rather *resolve* the dichotomies so that a constellation based concept can be formulated legally, one that can tend to several different interests at the same time.

Therefore, jurisprudence may have rhizomatic qualities. The concept of *allemansrätten* is a prefect example of the rhizomatics of law, where the idea of the public and the private can co-exist and not necessarily form a hostile opposite. The concept of the cultural commons can thus be moved away from the prisoner's dilemma setting, from the tragedy of the commons, from being understood as paradoxical in terms of the private and public, or as only belonging to the extra-legal, political, sociological, or economical realms. The rhizome theory attracts legal attention as it disrupts the need for a distinction between

an inside and an outside of law, of describing public and private as each other's opposites, and it provides a legal alternative beyond the notion of ownership and access as each other's antitheses.

The cultural commons and the Deleuzeoguattarian forms of possession

The models of possession developed by Deleuze and Guattari, within the setting of the rhizomatic theory, can potentially handle a concept that is a constellation of private and public. These two models of possession are *the sedentary model* and *the nomadic model* respectively. Deleuze and Guattari distinguish the two forms of possession by claiming that the first is *territorialised* (i.e. within a known economical form of production and within a territorially defined legal order) and that the second is *deterritorialised* (i.e. the one that emerges from new modes of production, with e.g. new technology, new laws, new forms of management, the one that cannot instantly be recognised by any one readymade economical or legal principle only). The sedentary model is for instance dependent of stable forms of regulation, of defined territories and jurisdictions. This sedentary model presupposes *enclosure* or *exclusivity;* in order to possess material property the object has to be enclosed and governed by individual property rights. If the object of possession is immaterial it has to be enclosed conceptually by e.g. individual rights and exclusivity principles, for instance intellectual property law. Contrary to the focus on enclosure and exclusivity that are both tightly connected to the sedentary model, the nomadic model does not imply any such exclusion or stable territory-based possession (Mussawir 2011:107). Under the nomadic model, Mussawir writes, "possession implies a different kind of relation that *cannot sustain any of these elements of establishment, exclusion and lack*. Since possession does not imply division, exclusions or stable territory, [it] requires other factors altogether" (Mussawir 2011:107).

The sedentary form of possession is dependent on the possibility to divide and exclude – it requires a *striated space*, a territorialised legal order. The nomadic form of possession challenges the notions of division, exclusivity, territoriality and enclosure, it is a *smooth space,* not (yet) territorialised by the legal order. However, when Deleuze and Guattari discuss the nomadic forms of possession they do not present it as the opposite of the sedentary form. They write:

> "[W]e must remind ourselves that the two spaces in fact exist only in mixture: smooth space is constantly being translated, transversed into striated space; striated space is constantly being reversed, returned to

> smooth space [….] and the two can happen simultaneously." (Deleuze & Guattari 2011: 524)

It is this very continuity, the constant movement from one form to another, the unfinished transitions from the one form to the other, that must be understood and it is imperative that it be kept in mind when discussing the concept of the commons (natural as well as cultural). The concept of the (again, natural as well as cultural) commons can never be approached as a static, or *striated*, legal concept or form of possession. The concept of the commons must be understood as a deterritorialising, nomadic legal form of possession. However hard we might try, it is still for instance very difficult to territorially govern or enclose digital and dematerialised, cultural forms of expressions. Within the Deleuzeoguattarian theory, possession cannot be equated to 'ownership' either, at least not 'ownership' as we have come to know it. Rather, the modes of possession indicate that to possess does not necessarily equate 'to own'. As Leif Dahlberg argues with reference to digital media content and Roman Law:

> "[T]he concept of property is complex, and possession (possessio, *occupatio, usucapio,* or *detentio),* for example, does not automatically or necessarily lead to an exclusive and absolute ownership (*dominium*). Whereas in ancient Rome this distinction between possession and ownership generally applied to property in land, today it also bears on the ways in which media users may use the digital media content they have acquired or purchased." (Dahlberg 2011:264)

The concept of the cultural commons may appear to be as a 'the opposite of private' or as an equal to 'public' form of possession. But it is not. It is a moving, iterant nomadic form of possession. When Lawrence Lessig for instance comments on the cultural commons he claims the key issue is that commons are producing something of value. This value can be a resource e.g. in terms of decentralised or open innovation (Lessig 2001: 85). He argues further:

> "[Commons] create the opportunity for individuals to draw upon resources without connections, permission, or access granted by others. They are *environments* that commit themselves to being open. Individuals and corporations draw upon the value created by this openness. They transform that value into other value, which they then consume privately." (Lessig 2011:85)

An environment in which the open access and the private exploitation and consumption do not cancel each other out is precisely the rhizomatic quality of the Deleuzeoguattarian forms of possession that we need, one that opens the theoretical possibility of envisioning and formulating a legal concept where the two can be connected instead of presented as a false dichotomy. As such, it does not dissolve the dichotomies such as private and public, they remain separate. However, it *resolves* them, from being antagonistic opposite-based pairings, instead becoming an alliance in a rhizomatic concept within the nomadic form of possession.

A legal concept of the cultural commons as a "cultural *allemansrätt*" – a possibility

As we saw above, *allemansrätten* in nature comes with responsibilities in terms of the privacy and ownership; and the person who is given the right to access nature is also simultaneously given an obligation not to harm, disturb, litter, nor to damage the land, its resources, biospheres, the animals or the crops. When we finally arrive at *allemansrätten* in culture, it too must come with similar set of limitations, obligations and responsibilities, i.e. to not harm the underlying individual ownership right and the resources connected to it. A right that allows the public to, during a short term and under certain conditions, legally access the cultural landscapes and, *current* and future as well as older or even ancient, cultural heritage. This can be done through a legal constellation that focuses on sustainability of cultural heritage, both the heritage that has existed for centuries as well as the one that is coming into existence now and that is constantly being produced.

The rhizomatic approach to legal reasoning opens up the possibility to conceive of such concepts that can handle the public and the private together as an alliance in law. The sedentary and nomadic forms of possession indicate that there is a sliding scale between ownership, possession and access, and this can be upheld and recognised legally in a concept of cultural commons.

Enabling access to artworks through a legal concept of the cultural commons works thus *in conjunction with* current intellectual property and other private ownership laws. A lot of inspiration can be drawn from the institutions that are already somehow managed and governed as cultural commons such as our museums, libraries, archives, open access platforms, commons initiatives... They also show us that principles of free public access do not necessarily preclude profit.

Access to art through a cultural commons is the equivalent of the hiking, camping and the picking of berries in the cultural environment. The notion of "environment" is also what further enables the connection with the natural commons and *allemansrätten* to be made even more comfortably. It has to do with the public's cultural health and wellbeing. It certainly has to do with democracy. This approach is both an economically and democratically sustainable management of our common cultural resources.

The rationale of this article has been this, to present some musings on *the possibilities* in terms of rights to access that can be inscribed in law through a legal concept of the cultural commons. This potential is already there in many of our legal orders. I have presented *allemansrätten* as one such example. UNESCOs regulation of world heritage may be another. A commons-based access, as has been argued here, is capable of handling the private *and* the public simultaneously.

In critical legal studies the constructivist approaches to legal concepts are sometimes frowned upon, the critical is often favoured over the clinical. The Deleuzeoguattarian approach to legal philosophy allows for an alliance between the critical and the clinical. This is one among many connections that is enabled by the rhizomatic approach. *This is rhizomatic jurisprudence.* But the clinical presented here is only the beginning of this on-going approach. The next step is to go ahead and construct the legal concept of the cultural commons, one that can handle access to current as well as to ancient cultural heritage. It could maybe be formulated as the "cultural *allemansrätten*", or as a principle that is inscribed in the national laws of Europe? Or maybe as an EU directive? Or maybe… To achieve that, we have to acknowledge the possibilities of law and we now not only need to, we *have to*, talk about the legal concept of the cultural commons.

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Dancing Through Laws: A History of Legal and Moral Regulation of Temple Dance in India

Stine Simonsen Puri

Introduction

In 1947, in the state of Tamil Nadu in South India, an Act was passed, "The Tamil Nadu Devadasis (Prevention of Dedication) Act," which among other things banned the dancing of women in front of Hindu temples. The Act was to target prostitution among the so-called *devadasis* that were working as performers within and beyond Hindu temples, and who, according to custom also were ritually married or dedicated to temple gods. The Act was the culmination of decades of public and legal debates centred on *devadasis*, who had come to symbolize what was considered a degenerated position of women within Hindu society. Concurrent with this debate, the dance of the *devadasis* which had developed through centuries was revived and reconfigured among the Indian upper class; and eventually declared one of Indian national dances, called *bharatanatyam* (which can translate as Indian dance). Today, while parts of the *devadasi* tradition have been banned, *bharatanatyam* is a popular activity for young girls and women among the urban middle and upper classes in all parts of India.

The aim of this article is to examine moral boundaries tied to the female moving body in India. I do so by looking into the ways in which the regulation of a certain kind of dancers has framed the moral boundaries for contemporary young *bharatanatyam* dancers. A focus on legal and moral interventions in dance highlights the contested role of the female body in terms of gender roles, religious ideology, and moral economy. I argue that young *bharatanatyam* dancers deal with an ambiguity associated with the *devadasis*, as they act as both devotees and performers, for godly as well as human desires, motivated by tradition as well as independence. The article consists of two sections. In the first section, I give an overview of the history of the *devadasis*, in order to understand the background for the legal debates. This section also describes the concurrent revival of the dance of the *devadasis* in the form of *bharatanatyam*. The insight from this section has evolved out of the part of my research on dance, where I have focused specifically on 17th century temple women in Tamil Nadu and how foreigners encountered these women (Puri 2009, 2014). The second section of the article is based on fieldwork started in 2004 among dancers at a *bharatanatyam* dance institution in New Delhi. In this section, I focus on how the moral boundaries of the dance are negotiated through stage practice, personal narratives and visions relating to issues of gender, religion and economy.

A short history of the *Devadasis*

The history of the *devadasis* is a contested one. To begin with, it is questioned whether there is such thing as a history of the *devadasis* (Orr 2000, 5). The term *devadasi* is a Sanskrit version of the Tamil term *tevaratiyal,* which means a slave or servant of god. It was not until the 1920s that *devadasi* came to define a pan-Indian identity with a common heritage beyond local histories. This classification grew out of the legal debates targeted at the banning of women's ritual dedication to temples. Despite the fact that the *devadasi* identity is a constructed one, consisting of the history of multiple communities of performers and sex workers with ties to Hindu temples, I will provide a narrative of a development in the role of female dancers, based on existing in-depth research by Leslie Orr, Saskia Kersenboom-Story, Davesh Soneji as well as myself. This is in order to give the reader a sense of the historical and geographical contexts out of which the *devadasi* identity developed, which illustrates the ambiguous position associated with *devadasi* at the time the act was introduced. In between a devotee and a courtesan, the story I am going to tell starts around the 9th century in Hindu (at the time Agamic) temples situated in South India in the present day Tamil Nadu.

Based on research on temple inscriptions, according to American historian of religion Leslie Orr, during the Chola dynasty (approx. 850-1300), women could gain a special position inside the temples as devotees (Orr 2008). Women of low social status were able, through the giving of donations to the temples, to obtain the right to do services, such as cleaning, making garlands and taking care of the statues of the Hindu gods inside the temple. Also, a more prestigious task was to dance and sing in front of the statues of temple gods. This was the period in which the *bhakti* movement within Hinduism became more dominant in this area. The *bhakti* movement shortly described was a movement where salvation was sought not through priests, but by the establishment of a direct relationship with the gods. This relationship could for example be established by being seen by the gods and by serving them in their presence embodied in the statues. At the time, women could primarily gain status through marriage, as well as caste. However, these female donors and/or devotees through their gifts and ritual participation, gained social recognition for their honourable tasks and could also acquire land given by the temple patrons in return for their services. For widowers, divorcees and unmarried women from the lower castes, becoming a temple woman could thus be a way to climb the social and economic ladder (Orr 2000, 75). Dancing was a privilege that also enabled women of lesser means to dress as a wealthy woman or a goddess, carrying the expensive costumes owned by the temples, thereby improving their position in society.

Based on textual sources as well as the oral history of *devadasis* today, Dutch anthropologist Saskia Kersenboom-Story (Kersenboom-Story 1987), unfolds the development of the temple women where Orr left it, approx. 1300 and onwards. Being a temple woman at this time was not marked by her donations, but by a ritual through which she becomes married to the temple god, and also becomes a property, or at least some kind of permanent employee, of the temple. According to her, during the Vijayanagara Empire (1336-1646, also in present day Tamil Nadu) temple women had a number of roles, in addition to that described by Orr, which took the women out of the temple complex. At village ceremonies, such as weddings or naming ceremonies, they could protect the people from the divine forces of dangerous village gods. Also they protected the temple gods when their statues were taken outside for processions. Furthermore, they enhanced the god-like status of kings by dancing at their processions, at a time where the kings' power was maintained through their connection to the temple institutions (Kersenboom-Story 1987, 36). According to Kersenboom-Story, the temple women were present at all these different functions because they were considered auspicious, or "Nityasumangali" (Kersenboom-Story 1987, xix). In line with Amrit Srinivasanan (Srinivasan 1985), she emphasizes that these dancers were highly respected in the local communities (Kersenboom-Story 1987, xix).

During the time of the Nayak Dynasty of Thanjavur (1532-1673), temple dancers became increasingly connected to the royal court. The rulers of the Thanjavur Nayak Dynasty were known for their patronage of music and dance (Appadurai 1981, Asher and Talbot 2006), as well as for their *harem*. At this time there was a transmission of dancers between village temples, court temples, and the royal court in Thanjavur. Davesh Soneji, in his research has focused on the history of those women who were attached to the Thanjavur court from the 17th century and onwards (Soneji 2012). At this time, the ritual ceremony (*khumbhahahrathy)* in which they became married to gods did not mark a position of religious dedication, but was rather tying women to a sexual economy and courtesan lifestyle (Soneji 2012, 36). This was also the time when the dance which today is known as *bharatanatyam* was stylized. At the beginning of the nineteenth century, movements were choreographed and the 'Tanjore Quartet' composed music incorporating lyrics for dance at the Thanjavur court (Soneji 2012). The women were trained both in dance, music and in the languages of the lyrics. The dance consisted both of pure movements and of more narrative elements, where stories of the Hindu gods and goddesses where depicted. One of the dance pieces that were formatted at the time was the *varnam*, a central piece for today's performances, where devotional and erotic love to a god, often in the form of Krishna, is expressed. Kersenboom-Story argues that concurrent with the sexual economy, *devadasis* were further sacralised through the development of these

devotional dance items, while disconnected from their more pragmatic ritual role in the rural communities (Kersenboom-Story 1987, 178). Soneji furthermore maintains that the *devadasis* tied to the Thanjavur court were in an ambiguous position. On one hand the dancers of this time possessed a degree of freedom from the norms of patriarchal society as they lived in quasi-matrilineal communities, had non-conjugal sexual relationships with upper-caste men, and were literate as opposed to most other women at the time. On the other hand they were commodities acting to fulfil male desires in the roles of concubines, mistresses and "second wives" (Soneji 2012, 3).

This sexual economy developed in a cosmopolitan setting of colonialism, where both the *nayaks* (kings) and their foreign guests at the court were enjoying their artistic and erotic services. Sources by foreigners encountering dancing women both at temples and in the courts show fascination as well as a judgement of a religious institution that takes part in the ritualization of a sexual economy (Puri 2009; 2014, Bor 2010). When the British were exposed to the courtesans, they became known as the *nautch* girls. This is an anglicised version of the Sanskrit word for dance, *natya,* which nevertheless carries the connotations of harlots. The British saw these women, because of their ritualized connection to the Hindu gods, as proof of an inferior religion and a culture of loose morality. As India came under the British crown in 1857 a new phase in the British presence in India started. India was no longer simply a place of trade and enjoyment; India was to be governed. At this time the legal system became central for discussions on how to restructure society, not just through economic regulations, but also through the possibilities of removing the obstacles of "customs" to economic development and dignified lives (Birla 2009). One such obstacle was embodied in the *devadasi* dancer.

Dance legislation

Before 1857, the legal system was divided between Hindu, Muslim, and Christian law. Hindu law was based on Sanskrit texts, such as the *Manusmriti*, central to the upper-caste Brahmin interpretations of law, as well as customary law of specific castes or groups. However, after 1857, common law - and as part of this also criminal law under which issues of prostitution was to be dealt with - was established along with the apparatus of High Courts in the British presidencies. Issues that related to family such as inheritance, marriage, adoption etc., however, remained subject to Hindu, Muslim or Christian law. According to Jordan Kay, between the 1860s and 1880s when the cases concerning *devadasis* was first brought to High Court, it was the legal status of adoption in the community, which was in focus (Jordan 2003, 55). At the time unwanted girls from poor families were handed over to some *devadasi* communities. *Devadasis*, as per customary

law, unlike other women of society, were not only allowed to adopt children as single women, but also to give their property on to daughters instead of sons. In these ways, the *devadasis* were not fitting into the social structure of the surrounding society. In strictly legal terms supported by custom, the *devadasis* enjoyed certain economic privileges that other women under Hindu, Muslim and Christian law did not. However, these rights also enabled more young girls to be integrated into communities involved in sex work.

These concerns, however, did not in the first place lead to any legislation. British officials maintained that dancing girls dedicated to temples and performing at private family celebrations were to be considered a custom and also that the *devadasis* was to be considered a distinct caste. In those presidencies where there were no records of *devadasis* (Delhi, Punjab, Central Province and North-West Province), they were not so afraid to legislate against the *devadasi* custom. But for those presidencies where there were records of *devadasis*, they were opposing a legal interference based on the argument that banning the practice could cause local discontent. It was argued that banning adoption among *devadasis*, would not be the right way to eliminate the prostitution of minors, which was already banned in criminal law of 1861 (Jordan 2003, 43-61). Rather than introducing legislation targeted specifically at the *devadasi* "customs", the British led government encouraged the Indian Westernized elite to stimulate public support for social change in these communities, through social reform movements (Jordan 2003, 65).

In 1892 the devadasi tradition was for the first time critiqued by the just established Madras Hindu Social Reform Association. The association was part of a larger project in which reforms relating to Hindu women were instigated, which also involved the formation of an Indian feminist movement (Srinivasan 1985, 140; Hubel 2010). They organized campaigns against *devadasi* customs, along with the practice of *sati* (burning of widows on their husband's funeral fire), and child marriages, as well as other practices that had earlier been condemned by Christian missionaries (Bates 2007). The reform movements brought *devadasis* back into the courtroom, and instigated the so-called 'anti-*nautch* movement' focused specifically on the *devadasis*. This movement consisted of several Brahmin but also non-Brahmin Hindus, British missionaries, journalists and doctors, all part of the middle and upper class in India. The anti-*nautch* movement sought to illegalize all dancing in temples as a way of targeting prostitution that could be linked to Hindu temples. It was argued that customary law was protecting local practices, which corrupted a "pure" form of Hinduism. One of the arguments raised in court was that the *devadasi* custom was not a Hindu religious custom, even though they were dedicated to the Hindu temples, and therefore they ought not to be protected by customary law (Jordan, 2003). While following a brahmanical influenced value system, the reform

movement was also attempting at carving out a space for a more modern vision for India, where universal norms, yet defined from a Hindu ethos, ruled out the more "dirty" vernacular traditions. As part of the debate, questions were raised concerning what was to be considered "the real basis of religious life", and the values of chastity and purity were contrasted to "persons of loose character" (Jordan 2003, 83). In the debates, it was expressed that the *devadasi* tradition may have developed out of a dedication, but that this foundation had been corrupted. The *devadasis* thus became symbols of what could have been a unique Hindu temple practice, which nevertheless, some way along the line went wrong (Jordan 2003, 84).

In 1927, Muthulakshmi Reddi, the first female legislator (also part of the Women's India Association), proposed a bill, which was to illegalize females dedicated to temples:

> "This council recommends to the government to undertake legislation to put a stop to the practice of dedicating young girls or young women to Hindu temples which has generally resulted in exposing them to an immoral life" (Reddi 2010[1927], 115).

Reddi emphasize the morality of these women, as a part of the problem (which we will see becomes a central issue for the further development of the dance of the *devadasis*). As a response, a number of *devadasis* founded an association that was to represent their often over-heard voice in the debate. In 1928 the association published a document, signed by eight women, which represents the first record of a *devadasi* statement. Up till then, the history of the *devadasis* had been written by non-devadasis. In the document they argue against the proposal, and among other things highlight that:

> "2. Devadasis are not prostitutes […] 5. Real purpose of our caste is Religion and Service […] 9. Whole community cannot be condemned for sins of a few […] 13. Legislation increases tendency to prostitution" (Madras Devadasi Association 2010 [12928]).

These *devadasi* women emphasized that *devadasis* could not simply be considered one kind of occupational group working simply as prostitutes. They foregrounded their role as women doing religious services in and beyond temples, while also suggesting that illegalizing *devadasis* in temples would not necessarily help those women within their community who were sex workers. According to Judith Whitehead, the threat of the *devadasi* community not alone came from the reform movements, but also from within the community itself. The *devadasis* at the time had become increasingly polarized between

those who were recruited to the community as sex workers and those trying to uphold its ties to dignified services (Whitehead 2001). Part of the problem of the *Devadasi* Act was that it took part in the construction of a singular *devadasi* identity, when in real life they covered a very diverse group of women.

In 1934 an Act was passed in the Bombay presidency, which illegalized the ritualized connection of *devadasis* to Hindu temples. As the *devadasi* tradition was one associated with South and East India, and not Bombay, the Act at the time had little impact. The *devadasis* remained a contested issue in the Madras Presidency, with Thanjavur and its surrounding area in present day Tamil Nadu being a central area for the *devadasi* institution. Finally in 1947, not long before the birth of Independent India, the "Madras *Devadasi* (Prevention of Dedication) Act of 1947" was passed in an area with a large number of those categorized as *devadasis*, building upon the Bombay Act. In the Act it is stated as follows (here I have stressed those sections which specifically involve dance):

> "An Act to prevent the dedication of women as *devadasis* in the Province of Madras:
>
> Whereas the practice still prevails in certain parts of the Province of Madras of dedicating woman as *"devadasis*" to Hindu deities, idols, objects of worship, temples and other religious institutions; And Whereas such practice, however ancient and pure in its origin, lead many of the women so dedicated to a life of prostitution; And whereas it is necessary to put an end to the practice; It is hereby enacted as follows (…)
>
> [Section 3, subsection](3) Dancing by a woman, with or without *khumbhahahrathy* [someone ritually married to god], in the precincts of any temple or other religious institutions, or in any procession of a Hindu deity, idol or object of worship installed in such a temple or institution or at any festival or ceremony held in respect of such a deity, idol or object of worship, is hereby declared unlawful (…)
>
> [Section 4, subsection](2) Any person having attained the age of sixteen years who dances in contravention of the revisions of Section 3, subsection (3), or who abets dancing in contravention of the said provisions, shall be punishable with simple imprisonment for a term which may extend to six months, or with a fine which may extend to five hundred rupees or both" (Soneji 2012, 235-36).

With this Act, the 'dedication' of females to temples was made illegal in order to target those involved in prostitution. But not only that, all dances by *any* female was made illegal around religious institutions and in the presence of Hindu deities. This meant that if the *devadasi* dance was to survive at all, it would have to be staged far from the temple settings – and perhaps it would even have to be danced by completely different women.

The Staging of *Bharatanatyam*

Parallel to the anti-*nautch* movement that had led to the above Act, there was another movement of people of the Madras elite; known as the 'revivalists', who advocated for a revival of the dance of the *devadasis* disassociated from prostitution (Schechner 1985; Srinivasan 1985; Meduri 1988; Gaston 1996; O'Shea 1998; Parker 1998; Chakravorty 2000; Jordan 2003; O'Shea 2007; Peterson and Soneji 2008). In line with the mood at the time leading up to Indian independence, both the anti-*nautch* movement and the revivalists were concerned with identifying an Indian cultural heritage and national identity. Arts had become of great political significance, since regional artistic traditions were primed as representation of a common Indian culture. In this context, dance became one of these signifiers of a national culture and identity, which came into the spotlight among the Indian elite, who took a leading role in defining the new India.

In 1935, at a stage in the Theosophical Society in Madras, Rukimini Devi was the first Brahmin woman who performed what was then advertised as *nautch* dance. This marked the beginning of what may be seen as a reinvention of the *devadasi* dance tradition (Schechner 1985, 69), which was to take the dance from the temples to the stage of auditoriums; from the *devadasi*-community to the cultural elite; and from Tamil Nadu to the whole of India. Rukimini Devi was a Brahmin woman from upper-class Madras, who as part of her overseas travels, had become fascinated not only with ballet, but also with the orientalist representation of Indian dances (such as those of Ruth St. Denis) (Allen 1997). Furthermore, Devi was inspired by the theosophical society and involved in the neo-Vedanta movement of the 19th century, which puts emphasis on universal concepts such as unity and Hindu spiritual practices above localized belief systems. In the years to come, Rukimini Devi established a dance institution where she taught non-hereditary dancers as well as teachers, she designed a sari-based dance costume; she systematized the dance and she gave the dance a new name: *bharatanatyam* (which, as mentioned, can be translated into "Indian dance"). She was inspired by the fine art of ballet (Allen 1997); but also she framed *bharatanatyam* to be a highly spiritual practice, which had unity with god as its ultimate goal.

During this development, dancers of different backgrounds debated what the dance was and should really be about, and disagreed especially concerning what the role of eroticism was in the dance. The female dancing body thus continued to be central to debates on proper Indian womanhood, though not in a legal but rather in an artistic setting, as different dancers communicated and danced their visions of a revitalised temple dance. Tanjore S. Balasaraswati (1918-1984) was born in Chennai into a family with ancestors dancing at the Thanjavur court. Her first performance was at a temple site in Tamil Nadu in 1924. As the *devadasi* institution had lost its respect, neither Balasaraswati's mother nor grandmother had been dancing, yet her mother was trained in Carnatic music used for dance. In Chennai, however, Balasaraswati eventually entered the stage that was being set up for the revived *bharatanatyam*. Unlike most other *devadasis*, Balasaraswati had the resources to engage in a debate where she was challenging the image of the *devadasi* as an immoral victim. Mathew Allen has examined the opposing visions of Devi and Balasaraswati of the 1930s and 40s. The difference between Devi and Balasaraswati concerned the space for sensuality in the dance, and the connection between spirituality and eroticism. Whereas Devi was developing a dance, which with controlled movements and downplayed emotions was embodying respectability; Balasaraswati was emphasizing the importance of sensuality in the dance, as a central aspect of *sringara-bhakti* or devotional love part of the *bhakti* movement. The debate was simultaneously about the source, and thereby also ownership, of the dance. As a Brahmin, Devi emphasized the relevance of Sanskrit texts for the dance, and positioned the dance within Vedanta philosophy based on the Upanishad texts. Balasaraswati in contrast, as part of a *devadasi*-community, emphasized its connection to the region of Tamil Nadu in particular the Thanjavur court (O'Shea 2007). Out of the debate developed different dance styles within *bharatanatyam*, thus Rukimini Devi has become an exponent of the *Kalakshetra* (also the name of her dance institute which means "temple of art") style of Bharatanatyam, and Balasaraswati represents the *Thanjavur* style. Nevertheless, it was the discourse of Devi, which came to frame the significance assigned to *bharatanatyam* at the stages around the art centres of India.

Both the legal debates of the anti-*nautch* movement working for juridical interventions in the *devadasi* institution, and the concern of the revivalists developing a new stage tradition for the dance, illustrate the way that moral lines were drawn around the female body in public space. These moral lines meant a polarisation that deemed lower caste dancing women immoral, while upper caste dancing woman were considered "pure" and idealized as exponents of "classical" culture. To maintain this moral divide between the proper and improper dancers, the morality of the female dancer remains in focus for *bharatanatyam* dancers today.

Moral boundaries of contemporary *bharatanatyam* dancers

As we reach the present and the second section of the paper, I move from a historical approach, to an anthropological one. Anthropologists of dance and performance emphasize how dance can both incorporate, communicate and challenge basic ethical codes of society, and deals with dance both as a performative practice communicating to soceity and as an embodied practice central to the experience of the individual (Royce 2004, Spencer 1985, Reed 1998, Kaeppler 2000, Cowhan 1990, Thomas 1993) In *bharatanatyam* moral boundaries tied to the female body and gender are thus encoded and negotiated (Hanna 1998). Apart from the formal rules of law that concerns dance highlighted above, there are also informal moral ”laws” on how the female body ought to move. These two layers of regulation are interconnected, as I suggest that the moral codes framing the dance of contemporary young *bhartanatyam* dancers have developed out of the juridical debates conerning the interventions in the *devadasi* institution.

At the dance school, where I did fieldwork in 2004, more than 100 female dance students were enrolled between the age of 7 and 30. Most of the younger students came once a week for class after school, whereas a number of the slightly older students practised at the school daily. As part of my participant observation, I took dance classes, conducted interviews, attended performances, and spent time with the dancers in their homes and other contexts. I was particularly interested in the dance practice for those women who were between the ages of 16 and 25, who were dancing daily with hopes of taking up dance as part of their careers. The various fieldwork methods enabled me to explore the contradictions between these women as subjects, dancing for themselves; and as objects, aware of how others perceived their dance. In the following, I look into how the dancers face moral challenges in their dance. I do so by focusing on their perspective on *devadasis*, the interpretive framing and staging of the dance, their family relations, and financial background, which puts into focus questions that concern religion, gender and economy.

Overall, the dancers were aware of the history of the dance, as sketched out above. Yet when talking with the dancers, they insisted that the *devadasis* were foremost acting as devotees, and not as prostitutes. In fact, they did not clearly differentiate themselves from the *devadasis*. They claimed to be continuing the *devadasi* tradition and insisted on the respectability of their past. Some of the dancers had read the same historical texts as those referred to in this paper, such as the work of Kersenboom-Story, who emphasized the *devadasis* as auspicious and respected. What was interesting to notice was that the dancers in their imagination of the devadasis, often looked to the far past rather than from the 19th century into the present. Thus, I never heard mention of the ban during my fieldwork (and when I later asked a dancer who was also a law student, she too was unaware of

the legislation). This is because the dancers are mainly engaged with an idealized past in which the *devadasis* lived and studied in the temple complex, a past in which the dancers found inspiration. Even though it was in the royal courts that the dance became refined as an art form, the dance students are more interested in searching for a connection to the past through the temples. This is part of their focus on the devotional identity of the *devadasis*, in contrast to the part of the history of the *devadasis* that involves sex work. For some of the dance students, the sexual liberty of the temple women was not simply encountered as a question of loose morality, but of personal freedom. Some of the dance students in their late teens and early twenties, several of whom had relationships prior to marriage without their parents knowledge, emphasised the freedom that the *devadasis* had both in relationship to dance and to men, as opposed to other women of their time. They also dreamt of a life where dance would be a source of income in such a way that they would not have to give up their dance practice after marriage, which was otherwise in the cards for the majority of dance students. They even fantasised about a life of dedication to dance only, beyond familial obligations, where they would have the freedom to develop erotic relationships with men beyond the family sphere. Even though this might be a glorified version of a *devadasi* past, they nevertheless, through their personal narratives challenged the idea of the *devadasi* as a mere prostitute. The *devadasis* are mainly sources of inspiration at a subjective level, as the connection between the dance and the *devadasis* is not emphasized or verbalized when the dance is staged.

Noticing how the dance is framed when on stage brings insight into the moral boundaries that are set up around the dance in public. During performances, Janet O'Shea has noticed that since the 1990s, it has become common practice to introduce the dance items in English, as a way to gear the performances more towards a Western audience (O'Shea 2003). The Western audience in Delhi are made up of expats or those in the city on official visits that are encouraged to witness part of 'India's cultural heritage'. Also, there are travellers who have come to know of performances through listings in the city's weekly guides, and sometimes one fourth of the audience at the *bharatanatyam* performances in Delhi are Westerners. The English presentations of the dance, I suggest, not only invites this audience to follow the narrative of the dance items, it also downplays the erotic aspects by setting up an interpretive framework that emphasizes spirituality. The audience is told that when the dancer shows us how she erotically longs (in all the limbs of her body) for Krishna, it is a representation of the longing for a union with god. Having seen many dance performances in Delhi over the years, I have noticed that there are often very similar explanations, even similar sentences used to express the significance of otherwise different dance items. These English dance translations have further solidified the kind of interpretive framing of the dance that was highlighted by

Rukimini Devi, where the erotic aspects left in the dance are exclusively attributed to spiritual aspirations. In interviews with dancers, they told, with almost identical sentences as those presented on stage, that dance is a spiritual art, oriented at the unity with the divine. I am not indicating that this is not true, however, I am suggesting that there are many layers of significance of the dance for the dancers, several of which are not part of how the dance is framed on stage. During my fieldwork it took me a long time to get beyond these identical sentences, when asking about the significance of the dance for the dancers. However, when I experimented with using videos of their daily dance practices followed up by talks on their dance while watching the video together, I got closer to subjective experiences of dance. I came to know also from hanging out with the dancers, that for them, the dance was something spiritual, but it also represented opportunities for a career and was a way of exploring their own sexuality.

One dancer told me of how, when she was performing a dance where she was showing her devotion to Krishna, she was imagining her boyfriend, in order to portray authentic emotions (Puri 2011). In *bharatanatyam*, they can express parts of their sexuality in a public space without becoming too vulnerable, partly because of this framework that defines their sexuality as devotion. Religion thus provides them with a kind of symbolic, protective veil on the stage. The stage is marked as sacred space not only through language, but also through various symbols such as the statues of the Hindu gods, and practices such as the ways that those on stage move in-between the dance items (Puri 2011). Anne Marie Gaston has gone as far as to claim that the desire for the spirituality of *bharatanatyam* is actually a desire for social acceptance (Gaston 1996). I would rather suggest that there is space for many kinds of desires. But despite dancers' explorations of their sexuality through dance, where they for example take a dance item that involves Krishna to explore their fantasies about other males, many acted as strict moral judges in front of other dancers. When I attended dance performances with other dancers in the audience, I noticed how important it was for them that the stories were clearly represented as stories of devotional and not human love. If desires were shown in a 'too human' way they would judge them as 'vulgar' as opposed to the dancers who were 'subtle' and 'cute'. Furthermore, they would not only evaluate their relation to their dance but also their assumed intentions with the dance. Some would critique dancers whom they thought was motivated by fame and money, rather than respect for the art and spiritual development. Despite the differing narratives dependent on context, the dancers themselves took part in the discourse through which the dance is defined as a spiritual practice, rather than a form of entertainment, a career opportunity or personal enjoyment – especially when the dance is staged. As was the case in the 30s and 40s (with Devi and Balasaraswati, as the main performers) there was off course a difference of opinions, however, here I have

stressed those perspectives, which clearly show how moral boundaries are set up around the dancers; boundaries with ties to the history of the dance.

Despite the clear representation of the dance as purely spiritual, the stage is an ambiguous space. On stage, as opposed to in dance class, the dance is not simply a form of cultural education, but a space where the women invite others to observe them in their moves. Dancers explained how they felt that people generally looked on them with a great deal of respect as dancers. The same people, however, would not want a *performing* dancer as a wife or daughter-in-law. It is not dancing as such that is considered against the moral code for women, but dancing in public. *Bharatanatyam* is mostly respected as a kind of cultural education for young females, but not as a performing career path. For most *bharatanatyam* dance students today, the dance is an expense rather than a source of income. The economy of the dance is highly patronised by state institutions as well as by parents, and most dance performances can be attended for free. The closest dancers get to a compensation are flowers for the dancer handed over on stage, yet most often it is also the dancers presenting gifts to her teacher/guru on stage, and sometimes also serves food for the audience. Dance is thus emphasised as a donation rather than a source of income tied to material needs, not unlike the first signs of temple women, described by Orr. Dancing today shows that one has the money to dance (tuition alone was 500 rupees a month), rather than the need to dance for money. However, as middle class women are increasingly expected to join the work force, these dancers dreamt of a career path that involved dancing. One exception to the familial problems dancers might be facing when desiring a career in dance, was if they wanted to work as a dance teacher. The *bharatanatyam* teacher makes money off stage in the company with other women, rather than on stage. One dance student explained to me that her boyfriend had told her that in case they got married, he would support her in opening a dance school where she could teach and perform. However, he would not allow her to dance outside her dance school. Thus the problem with dancing as a profession is not simply dance as a means of income, but dance as a means of income in a space where her sexuality is the object of the male gaze.

Today, Hindu temple complexes form the background of a number of dance festivals, where dancers from all of India come to perform the various classical dances including *bharatanatyam,* for example, at the Mamallapuram Dance Festival, organized by the Department of Tourism of the Government of Tamil Nadu. With these resourceful women dancing it seems that the Act of 1947, which bans dancing around temples, is not relevant, as it was really directed towards the *devadasis*. The *bharatanatyam* dancers I spoke to saw the temple setting as the ultimate setting for their dance, since they felt a

heightened energy around the temples. Furthermore, some of these temples have images of female dancers carved into their walls, images from which present day dancers draw inspiration from for their own dance movements. This setting for the dance also takes part in framing the dance in a particular way that emphasis the dance as a spiritual practice with ties to the temple more than to the royal courts. In comparison, some dancers told me of experiences with dancing in other secular public places, where the stage had not been clearly demarcated. Here they had felt uncomfortable, as the audience was noisy and clapping, as opposed to the more demure audience of the temple dance festivals and in the national auditoriums. Here the ambiguity of the dancing woman, by many still associated with a loose character, became emphasized.

The above moral dilemmas mostly concern the dance as a performance practice. Performing dance is only a small part of the dance practice of these young women. For the most part, the dancers express how their daily or weekly dance practice empowers them both physically and emotionally. In dance, they feel a sense of freedom. Dancers thus simultaneously embody moral codes and explore individual freedoms through their dance.

Beyond the movements of *bharatanatyam*

In the above, I have showed how the ban against temple dance has had an effect on the foundations for *bharatanatyam* and its moral framework. But even more so, it has had an effect on the *devadasis* of various Dalit communities. Legislation involving the *devadasis* did not end at Indian Independence; however, it ceased to be a central political issue. The most recent update of the legislation was in the state of Maharashtra in 2005 "The Maharashtra *Devadasi* System (Abolition) Act, 2005". This Act focuses on the state's responsibility for offering rehabilitation schemes for *devadasis*. Furthermore, it pushes the *devadasi* towards the conventional marriage institution, as it states that co-habituation between a *devadasi* and a man "raise the presumption of legal and valid marriage subsisting between the two". Some of the problems of the *devadasis*, it seems, still concerns the difficulty of classifying them along dominant family patterns, as they in legal terms remain unmarried when married to god. Furthermore, the bans of dancing at temples have been left out from the most recent Act, perhaps leaving a legal space for *bharatanatyam* dance performances at some of the impressive temple complexes in Maharashtra.

It can be complicated to determine the effect the various stages of legislation have had on *devadasis*. One reason is that it is not that simple to figure out whom the *devadasis*

are. Among those women working as sex workers, it is difficult to determine whether and when sex work can actually be linked to a hereditary *devadasi* institution tied to a temple ritual (Orchard 2007). Existing research shows that some *devadasis* express that the conditions of their community has worsened with the legislative interference, as they have become stigmatized and do not perform the same variety of roles within the temple complex as they did in the past (Soneji 2012). Unfortunately, I do not have the same kind of ethnographic material on present day *devadasis*. In that sense, my own study supports the bias of history and of dance scholarship where the loudest voice has been given to the cultural elite and not the *devadasis* themselves (Soneji 2012).

The question is whether the laws against dance in one context have actually carved out a space for dance to flourish in another context. Judging from the number of *bharatanatyam* dance institutions located in the larger cities around India, their number today perhaps exceeds that of the *devadasis*, and those communities that do work similar to that associated with *devadasis*. Whereas the law meant a marginalisation of *devadasis*, whose occupation was banned while they were not initially offered alternative life paths, the cultural coded part of the "laws" for *bharatanatyam* dancers has meant a specific framing of the dance as a spiritual practice beyond economic and erotic realms. The dancers nevertheless move in an ambiguous space, similarly to many of those who have become classified as *devadasis*, where they balance a role of independent erotic career-seeking women, with that of a dependent traditional religiously devoted woman – which continues to put them in the spotlight of moral negotiations.

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Legal and Musical Interpretation – On the historical and systematic elements in the interpretation of law and music

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Abstract

Law and music have inner links in their logical structure and both of them need "interpretation" owing to the "gap" between symbolic system and performance as well as between past and present. In the realms of both Western law and Western music, there are different attitudes towards "loyalty" to historical "authenticity". On comparing the historical elements in law and music, it becomes clear that subjective historical interpretation is not useless in law and objective interpretation can be acceptable in music under some circumstances as in law. The wisdom from music can also be helpful for legal interpretation in the sense that, if an interpretation seems at first glance "superfluous" in the legal system, this does not necessarily mean it is redundant and must be avoided. On the contrary, it might be a hint that it is an "attentional" provision, which has its own value in the legal system, just like attentional symbols in music, which can be important reminders to performers. Finally, between Chinese traditional music and legal practice, there is an "inner link", although the formality and completeness of the symbolic systems are no longer common features of the two disciplines.

Introduction

The connection between law and music is a topic attracting more and more attention in the fields of both legal science and musicology. But the most discussed facets of this connection relate only to the "external" links between these two fields, while the "internal" links are less mentioned. For example, in recent decades the legal protection of the copyright of music works has been one of the most "popular" topics concerning both law and music (Grossfeld/Hiller 2008: 1147). Nonetheless the "music" concerned in these discussion is not the special art form itself whose medium is sound, but individual pieces of this kind of art. That is to say, it is not the music itself, but the musical products that are discussed in this sense. What this essay deals with is rather the "internal" common points of these two disciplines, i. e. the common points of the structure and logic of law

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and music. Thus other kinds of relations between the external forms of music and law, such as the legal analysis of the texts of famous music pieces, the art-historical study of eminent musicians who received a legal education (e. g. *P. Tchaikovsky* and *R. Schumann*) and the legal protection of musical works are outside the scope of this essay.

In fact, one of the most important "internal" similarities between (Western or westernized) music and law is that they both treat rationality and order as merits, so that the manifestation of both (Western modern) law and music requires strict formalization. The "texts" of both law and music are generated by a series of rules with tight logic: "Since early times, music has been associated with order, and from there it has often been equated with law" (Grossfeld/Hiller 2008: 1148). Furthermore, the interpretation of the "texts" (Manderson/Caudill 1998-1999: 1327) of law and of music show similarities in their inner structures. On the other hand, some important differences between musical and legal interpretation should not be overlooked.

The Internal Links Between Music and Law in General

A. Inner Structures as Homogeneity of Law and Music

The focus of the following analysis being limited to the inner structures of Western, modern law and Western, classical music, it is relatively easy to find some real homogeneity between the two. Just consider that music is in Western culture widely recognized to be a quite special form of art with many of the characteristics of mathematics in its inner structure (Pahlen 2000: 12). That is to say, music is considered to be an art form with relatively strict logical rules and accurate precise system of symbols (Manderson 2000: 20)[3], especially in the eyes of modernists. In this sense, *Debussy* compared music to arithmetic: "Music is the arithmetic of sounds as optics is the geometry of light" (Huckvale 2013: 7), and *Honegger* even defined music as "geometry in time" (Huckvale 2013: 7)[4]. Similar ideal features can be found in the world of law, at least according to the legal formalists. Without obeying logical rules, neither the law itself nor legal practice could fulfill their social tasks; even "the idea of law in the sense of modern legal philosophy" is

3 "The scale system re-created the language of music […] in much the same way as hieroglyphics were replaced by a commodified alphabetic script." Since a new note ordering system was able to redefine the language of music, it is clear that this kind of art is tightly connected with symbol systems and formality. (Manderson 2000: 20)

4 Along this path, we can easily find more arguments showing the common points of both music and mathematics (Gelfand 2006: xiii). This path has a time-honored tradition. In the era of ancient Greece, Pythagoras already held that music and mathematics were inter-related (Wille 1985: 7).

only thinkable with the help of logic (Rödig 1980: 27). In this sense, music and law have the common characteristics that they both require strict rules and rigorous formalization internally and have both developed formal languages to match these requirements and to ensure that their inner orders remain logical. In law the essence of this kind of language system is the so called "legal syllogism" or "legal subsumption" (Neumann 2011: 299), as well as a theory governing the usage of this kind of language, i. e. legal dogmatics. In music the essence of this kind of language system is the modern musical notation system and the theories include those of harmony, counterpoint, musical forms, orchestration, etc. In a word, both music and law regard a set of formalistic regulations and modes of manifestation based on their inner logic as an essential part of their nature. In this way the "text" of music, as a product of artistic creation, be it in the form of musical notation recorded by written musical symbols or of the sound of live performances or recordings, always uses formalistic methods to represent the inner logic and regulations of music. Although music, like any other form of art, is to a large extent a subjective matter, the existence of regulations of its inner logic is undeniable[5]. According to the famous Russian musicologist *Skrebkov*, one thousand years of European music tradition show that a "really" artistic musical composition must embody principles such as thematic elements, musical language and composition structures (Skrebkov (Скребков) 2008: 4 ff.). Likewise, another musicologist has also pointed out that five features which are widespread throughout Western and even non-Western music make the sound of music in the sense of tonality[6]. In most cases[7], if a composition totally ignores these basic rules, it will not be accepted as a valuable musical work. In other words, the aesthetic judgement of a piece of music is more than just a "retreat" into personal taste (Manderson 2000: 23). Generally speaking, the "inner logic" of musical composition cannot be disregarded. On the contrary, it should be and in fact has been incarnated by the "text" of music.

Similarly, the "text" of law has long represented and in fact must represent an inner logic. No matter whether it is legislation or a written judgment, the legal text is always the result of logical thinking using methods of legal reasoning. Just as in the case of musical composition, if the process of law making totally ignores the basic rules of legal theory and the inner logic of law, this legislation will not be considered successful and will cause

5 "[I]f there are no rules in music, there can be no aesthetics of music." (Watt 1922: 349).

6 These five features are conjunct melodic motion, acoustic consonance, harmonic consistency, limited macroharmony and centricity (Tymoczko 2011: 4-5).

7 There have been some famous counterexamples (e. g. 4'33" composed by *John Cage*, in which the performers keep their instruments silent during the entire duration of the piece throughout the three movements) in music history. But they will not be discussed here because of their atypicality (Pahlen 2000: 625).

unnecessary "chaos" (Rieß 2007: 140). In short, legal texts ought to reflect the rationality of the law (Peczenik 2008: 194; Ellscheid 2011: 186)[8]. In this sense, "law has often been seen as a kind of social music" (Grossfeld/Hiller 2008: 1148), because the rationality concealed behind the legal text is the same as that hiding behind the tones and rhythms of music.

What Western law and music have in common is the existence in their inner structures of rules which are based on their own logic and rationality. Thus, on the one hand, we acknowledge that both music and law have something in common with "formalism". Especially for Western classical music, the importance of formality is undeniable. There are plenty of rules (about the usage of scales, keys, harmonics, orchestration etc.) that must be obeyed in a musical composition; otherwise the work will be seen as a failure. For some musicians, "the first and last duty of music is to be beautiful", and whether a piece of music is beautiful or not, is – as described above – not a totally subjective matter; there exist objective criteria as to this, namely, the forms, so "it must be remembered that in music the relation between form and idea is much more intimate than in literature" (Hadow 1897-1898: 31). Likewise, other music researchers hold that "music's meaning lies in its form" and "music is expressive of emotion in virtue of its formal characteristics" (Beever 2011: 216-217). It is true that the development of Western classical music itself is a history of the breaking of old forms and rules. For instance, during the classical period, it was hardly imaginable to write a symphony with more than four movements, but that has become increasingly common since the arrival of the romantic period. During the romantic era, new rules and forms were being established, and development in the 20th and 21st centuries continued this process, which means that the development of music does not have to go to the opposite of "formalism".

On the other hand, this argument should not be restricted to the relatively narrow understanding that the common feature of law and music is merely the "formalism" of both disciplines. In fact, this common feature extends further: it lies rather in the rationality or logic behind the formalism of both fields. In law the concept of legal formalism itself has something to do with the rationality. Legal formalism in the conventional sense means "belief in the availability of a deductive or quasi-deductive method capable of giving determinate solutions to particular problems of legal choice" (Unger 1983: 564). This is exactly a process of "formal rationality" in the sense of *Max Weber* (Eder 1981: 157). In a broader understanding, legal formalism asserts the possibility of a method of

8 It is also noteworthy that the rationality might be one of the conditions (*Vorgegebenheiten*) of legislation by *Kant*, too (Ellscheid 2011: 186).

legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life (Unger 1983: 564-565). In this conception, "law features a mode of rationality that is different in kind from the less determinate rationality of political and ideological contest" (Weinrib 1988: 953). Thus legal formalism postulates not merely the compresence of rationality, immanence and normativity, "but their mutual dependence and interrelationship in a single approach to legal understanding"; "[the law's] rationality, for instance, consists in its being immanent to the normative relationships that it orders" (Weinrib 1988: 955). Seen from the postmodernists' angle, the legal rationality could be an "illusion", which "never existed at all" (Manderson 2000: 96-153). But we should be aware that the postmodern critique of legal rationality is based on the background of a relatively highly developed legal system, where the concept of legal rationality has largely fulfilled its "original tasks" (for example, the "promise of an objective, rule-bound, certain interpretation of the law" (Manderson 2000: 96)) already, while the remaining unsolved problems require a new road. With the help of *Manderson*'s metaphor that the aesthetics of legal formalism is like geometry while the perspective of legal pluralism is like geography (Manderson 2000: 177), it is clear that these two viewpoints are not mutually exclusive. On the contrary, modern geography can hardly do without the support of basic geometric knowledge.

In music, especially Western music, the rationality behind the system of formal musical elements (such as harmonics, scales, keys etc.) has long been recognized. For instance, according to *Max Weber*, "the development of a comprehensive rational harmonic system is unique to Western art-music" (Martin 1996: 58). Whether this kind of "homogeneity" is a feature of Non-western music and law is another problem, which will be dealt with later.

B. The Need for Interpretation of Both Law and Music

The other side of the coin seems to be more complicated. Although rationality as well as inner order and logic are the basis of both law and music, neither the world of law nor that of music is exclusively made up of order, rationality, logical rules or other abstract principles[9]. The texts of both music and law must be interpreted (Grossfeld/Hiller 2008: 1150).

9 "… dass Logik sicher nicht alles ist, was es zum Recht zu sagen gibt…" (Joerden 2010: 2).

1. The "Gap" between Symbolic Systems and Performances

The fact that music has been widely recognized to be one of the art forms that are nearest to mathematics does not necessarily mean that the former can be considered equivalent to the latter. Music is an art form, not a branch of science. The formalization of the western musical symbolic system makes musical performance a highly standardized and precise art form. But there is still a "gap" between this kind of symbolic system and the actual musical performance (Kivy 1995: 271): The musical notes on the page are not the whole world of music (Balkin/Levinson 1998-1999: 1531)[10]. The world of law faces the same situation. The professional training and the appropriate use of legal methodology will make the processes of application and making of law rational, stable and predictable. These might approach the level of pure logical calculus, but can never reach it.

Since law cannot be perfect from the logical perspective, it must be interpreted in order to be put to practical use in society. One of the reasons why it cannot be logically perfect lies in the fact that the language of the law is not totally different from our everyday language. It is true that legal terms cannot be easily understood without special learning, but they are not written in mathematical formulae. Only artificially invented formulaic systems can totally avoid misunderstanding. So it is in a way inevitable that law texts will be misunderstood, and this is the reason why legal hermeneutics is a necessary "art" of law application (Schroth 2011:270). In other words, because of the limitation of natural human languages, law texts tend to contain vague or inaccurate statements. According to the dichotomy of *Savigny*, if law texts are mainly composed of such problematic statements, they should be classified as "unsuccessful laws" (Savigny 1840: 222). But even if the law is "successful" in *Savigny's* sense, it still needs interpretation (Schroth 2011: 279). An example is the legal concept of "social adequacy" (*Sozialadäquanz*) used by modern German criminal law. This shows expressly that in the real process of law implementation there will always be a gap between written legal texts (*Tatbestand*) and the goals behind these texts. This gap can be "filled" only by introducing this concept in instances where society might not treat minor conduct as a crime. Thus to give small presents to a postman on duty on Christmas Eve is viewed as natural and normal in Germany, despite the fact that the law clearly defines it as the crime of offering a benefit to a public official for the discharge of a duty, amountings to the crime of giving a bribe according to § 333 I German Criminal Code), while social opinion would regard the punishment of this conduct as unnecessary (Xiong 2012: 131-141). In other words, since some petty criminality still prohibited by the law may be "accepted" by society, the law

10 "A Beethoven symphony is more than a set of marks on a page" (Balkin/Levinson 1998-1999: 1531).

texts must be further interpreted in accordance with the concept of "social adequacy" so that the application of the law will not stray from the will of society, and this makes the application of law deviate from the literal meaning of written legal texts. In fact, this "gap" between the "signifier" and the "signified" of the legal text is made inevitable by the inadequacy of legislative techniques (Zipf 1975: 131-141): There is no perfect legislative technique which can differentiate between prescribed conduct with a defined state of mind legally treated as a crime and the same conduct with the same state of mind not legally treated as a crime owing to the lack of punishability and thus socially accepted (Kunz 1984: 128). Thus the concept of "social adequacy" plays the role of "interpretation helper" (*Tatbestandskorrektur)* of legal texts, which is necessary in the application of the law.

To summarise, the natural limitation of the world of law makes legal interpretation a necessity for almost every modern lawyer. For a similar reason, the world of music also needs interpretation. The symbolic system of musical notation is also not perfect[11].

2. The "Gap" between Past and Present

The other reason why both law and music need interpretation lies in the fact that the "original text" generated by the author and the real effect of its "performance" seem quite remote from each other (Godlovitch 1988: 259). In music, it is crystal clear that nobody knows how *Bach* or *Beethoven* played their own music, since the phonograph and other recording systems had not been invented at that time. It is also likely that the modern performance of their works would quite dissimilar to what *Bach* or *Beethoven* originally wanted. Moreover, we often hear declarations that the playing of some of our contemporary musicians is "authentic" or "convincing". Some cases of this "authenticity" are based on the technical revival of historical musical instruments, scoring and performance practices (Godlovitch 1988: 258). But in more cases, when music is played on a modern instrument that is technically totally different from its historical predecessor, such as when *Bach*'s piano works are played on modern piano by *Serkin,* we can still hear someone declare that a modern performance was "authentic" (Gradenwitz 1950: 279). In this case, the musician who wishes to be regarded as an authentic performer need not rely on the restoration of the old-styled instrument, but on the use of the old-styled technique, phrasing, ornamentation, rhythmic idioms, dynamics, tempo, etc. (Godlovitch 1988:

11 In the modern musical notation system, the main functions of the musical notes can only represent two qualities of music, namely the sounds with different pitches and time duration (Callcott 1817: 14). Yet the world of music consists of far more elements than these two qualities.

259). That is to say, what he relies on is the manner of "interpretation" of the music rather than corporeal instruments. Furthermore, we can even give examples of performances on modern instruments using modern technique, phrasing, ornamentation, etc., which are still estimated to be "convincing", though no longer "authentic". An illustrative example is *Yo-yo Ma*'s performance of *Bach*'s unaccompanied cello suites. Obviously he did not play these suites on a baroque cello, neither did he play the pieces in the style of the baroque era. On the contrary, he played this monumental work with his own emotions in a rather modern musical language (for example, playing with expressive and strong vibrato). He even added some elements of other kinds of art to his musical performance, such as playing with a dance accompaniment, which made his playing controversial but at the end widely accepted (Lesser 1997: 21). This case shows us clearly that it is a convincing interpretation that makes a musical performance acceptable, no matter whether the style of performance is authentic (i. e. an imitation of the way of playing in the past[12]) or modern.

A similar situation can be observed in the world of law. There is often a distance between the will of the historical law makers and the need of legal practice today, so that methods of legal interpretation must be put into use to bridge the gap. Someone who seeks answers to questions of his own era in the law, is engaging in interpretation of the law (Larenz 1991: 318).

The Historical Elements in Legal and Musical Interpretation

A. Musical Historical Interpretation Compared with Legal Historical Interpretation

Besides the grammatical, systematical and sociological-ethical interpretations, the historical interpretation (*historische Auslegung*) is one of the four "mainstream" methods of legal interpretation in the continental law systems, the aim of which is to ascertain the meaning of the legal concepts and statutory provisions from its historical development (Coing 1959: 8-9). There is no doubt that the carriers of the law makers' thoughts, such as the published record of the debates, committee reports, early bills and other materials, may be very important for the explanation of the legislative purpose, because they shed light upon what the legislature did and why.

12 Sometimes to imitate the way of playing music in the past is obviously senseless, when the "historic way" of playing is unrepeatable, for example the "Quartet for the End of Time" by *Messiaen* (Manderson 2000: 162).

As in the field of legal interpretation, the historical elements play a very important role in the field of musical interpretation. In a sense, they are even more important in the world of music, since the importance of the "creator" of a legal text is obviously not so high as the "composer" of a musical piece. It is a part of our general knowledge that it was *Bach* who composed the *Air on the G-String*, *Beethoven* who composed the *Moonlight Sonata*, *Shostakovich* who composed the *Leningrad-Symphony*. But normally no-one would be able to tell who "created" the Chinese Penal Code or the German Law of Narcotics. Even if there were a detailed list of the participants in the legislation, few people would care about it.

Owing to the importance of historical elements in the process of art recreation, in the world of music, different "schools" concerning the same issue came into being: We find different attitudes toward musical historical interpretation, namely the approaches of purism, liberal eclecticism and hodiernism (Godlovitch 1988: 260-73).

The word "purist" refers to a musician who plays musical instruments of an earlier age and builds their aesthetic appeal on the assumption that sounds originally designed to be heard under the technical conditions of the past can produce a comparable effect upon a large and varied audience in a modern concert hall (Cone 1995: 242). According to the purist, preference must be given to historical factors (Godlovitch 1988: 259). The word "hodiernist" refers to the opponents of purism, who argue that there are strong reasons favoring present day renditions of older music. "Liberal eclectic" refers to those musicians whose standpoint is between purism and hodiernism — they "allow on more-or-less equal footing a variety of options among which are included both historical and modern possibilities" (Godlovitch 1988: 259).

1. Different Answers given by Musicians and Lawyers to the Same Question

We are concerned here with comparable situations in historical interpretation. In both fields we have two opposites: for the legal, objective vs. subjective interpretation; for the field of music, hodiernism vs. purism). In each of these there is a standpoint of a relative compromise that is closer to one of the opposite positions than the other:(in the case of law, objectified-subjective interpretation, and in the case of music liberal-eclecticism. Taking these similarities as our starting point, we shall find that both worlds are trying to solve the same "ultimate" question by the method of historical interpretation. This is the question whether we should follow the intention of the historical composers and put the emphasis on their historical conditions, and if so, why? In the realm of music, this is the

controversy between purists and hodiernists. In the field of law, it is the debate between the subjective standpoint and the objective standpoint.

As shown above, the world of law has on the whole taken a negative attitude toward this question. "Mainstream" opinion holds that the will of historical legislators is relatively less important. According to this viewpoint, there is no clear reason that requires us to follow the view of the historical lawgivers. This opinion has resonance in the world of music. Instead of trying to reconstruct the historical conditions when playing older music, a hodiernist would rather play it in a modern way. This resembles the preference for the "will of the law itself" in the world of law. Just like the objectivists, who treat legal history as an independent process of "self-development" of legal concepts and institutions, the hodiernists treat some of the indications of composers in early music as historical relics and are not going to obey them. For instance, a hodiernist would ignore the indication on the score that a concerto was assigned to a baroque instrument such as a harpsichord, recorder or lute. Instead, he would rather play it on a grand piano, western concert flute or classical guitar. Similarly, a hodiernist cello player might ignore the indication on Suite V of the Unaccompanied Cello Suites of *Bach* saying that the A-string should be tuned down to the G tone (Bach manuscript 2011) and would still use the A-string in its normal pitch. It is noteworthy that hodiernism in this sense does not entail an arrogant attitude toward the historical sources of music. If a musician shows such an attitude toward the original scores and indications, it would be correct to call him an "only-instinct-musician" (Fabian 2001: 164).

The charges against purism laid by hodiernists include the following three points (Godlovitch 1988: 260-62). (1) The present day rendition of older music often promotes the technology of musical interpretation, because many old instruments are technologically inferior to modern ones. (2) It is logically impossible to go back to the historical conditions of performance, and the use of old instruments and techniques does not make a performance upon them genuinely historical. (3) Performance involving a studied attention to some interpretive and technical idiosyncrasies in order to make music sound historical is often artificial, and seems "derived, stilted, far too self-conscious". If we leave the technical problems of music performance aside, (and also do not discuss point three, putting the emphasis only on attitudes towards the past implied in the points 1 and 2, we find that these have much in common with the arguments that are used to refute the standpoint of subjective legal interpretation.

As for point 1, the development of modern technology is also often used as an argument against the search for the historical will of the legislators. It has long been claimed that

subjective interpretation could slow the pace of improvement of knowledge (Naucke 1969: 276), which is certainly a comprehensible claim. The historical lawgivers' intentions were naturally restricted by the limitations of their era. For instance, legislators in China when drafting the fraud crime clauses of the Chinese Penal Code (Art. 266, Art. 196, etc.) were not able to contemplate a situation in which automated vending or cash machines could be "cheated", e. g. by the illegal use of another's credit card which the owner had lost and which the finder used to draw money from an ATM machine; or by inserting coin-like metal slugs into a vending machine to obtain goods from that machine. Hence it can be argued that it makes little sense to seek what the historical lawgivers thought about this possibility because they did not think of it at all, and so they did not intend to extend the range of fraud crimes to such circumstances. However, if we followed closely what the historical lawgivers thought about this topic, we would have to give up the attempt to use Art. 266 in the cases of "cheating" of machines, and that would really hinder the development of society. The problem in the first situation (the illegal use of other's lost credit card to draw money from an ATM machine) was officially solved by a judicial legal interpretation issued by the Supreme People's Procuratorate of China in 2008, which said that in this case Art. 196 (on criminal fraud in the field of finance) should be put into use. The second situation (the insertion of coin-like metal slugs into a vending machine in order to obtain goods from it) was solved by another judicial interpretation issued by the Supreme People's Procuratorate of China in 2003 saying that in this case Art. 264 (on the crime of theft) should be applied. The theoretical problem remains unsolved, because these two self-contradictory official interpretations show that it is still unclear to the Chinese Supreme People's Procuratorate whether a machine can be "cheated" or not (Zhang 2011: 712-13). More important, it obvious that both solutions are built on something other than the will of the law makers.

The response from the world of music looks different. It is true that musical instruments are evolving from their ancient forms to more modernized forms, but this does not necessarily mean that hodiernism is superior to purism. For instance, from the point of view of today, recorders are technically inferior to modern concert flutes because of their technical disadvantages such as the inconvenience of their fingering systems, and their limited sound range and volume. But this does not entail that recorders have a lower artistic expressivity than modern flutes. On the contrary, it is widely accepted that "the recorder's tonal 'objectivity' is suited to music characterized by a higher degree of abstraction, a greater formality of structure" (Boeke 1982: 8). The same can be said of other musical instruments such as the viola da gamba and the valveless natural horn. A natural horn is doubtless technically awkward when compared with modern horns, because it can only play natural harmonics, which means it is almost impossible to play

a normal E Major scale on it. But even such a musical instrument with these visible "defects" can produce a sound of "delicate poetry, magic and drama all its own" (Stobart, 2000 (CD Notes)). A pithier refutation lies in the fact that electronic instruments are functionally superior to all modern acoustic instruments, in that they provide "the most reliable, the cheapest, the most effective means of music-making", but few hodiernists are prepared to throw away normal instruments (Godlovitch 1988: 261).

As for point 2, it is logically impossible as well as senseless for us to go back to the history of either music or law. With reference to law, it is widely accepted that the answers given by the historical legislators are no longer helpful to the solution of new legal policy problems (*rechtspolitische Fragen*) (Naucke 1969: 276). What is more, it is less and less helpful to search for the historical legislators' intention as time passes (Leisner 2007: 693). As for music, the question is almost the same. Even if we play baroque music instruments in the old performance style, we still cannot really experience the feeling of that era. So why bother to do it? The reply from the side of music is distinctive again: "When we use old instruments and former interpretive directives we're closer to the spirit of the past than if we neglect these altogether" (Godlovitch 1988: 262). On the one hand, we have to admit that to go back to history is illogical and senseless. On the other hand, the illogicality and senselessness arise from the extreme case of "going back to history". If we give up that impractical aim and set ourselves a goal of "approaching" history, this will be possible and meaningful at least in the world of music.

Concerning these two points, the responses from the world of music seem to be far more optimistic than those from the world of law, although both are facing the same "ultimate" question as to whether we should follow the intention of the historical composer and, if so, why? The main reason behind this phenomenon lies in the difference between the purposes of a legal historian and those of a legal dogmatist (Engisch 1997: 108). The historian is interested in searching the whole historical situation from which the law has developed, so as to understand the motives behind the law by researching the social and historical backgrounds, and also to understand the personalities and spiritual powers of the law makers. A legal dogmatist on the other hand rather concentrates on the substance of the law itself and tries to determine the application of a legal provision by analyzing the range and content of legal definitions in it (Engisch 1997: 109-10). In other words, for a legal dogmatist (as well as for a legal practitioner), the purpose of legal interpretation is to give instructions for solving actual problems. If the lawgivers did not think of a situation at the time of legislation, their wisdom would not help to solve the problem arising from that state today, so it would not be helpful to research the historical background to know why they had not thought of it.

The situation in the world of music is quite different. A performance conveying the atmosphere of the old era accords with an aesthetic taste. The authentic style of music performance is meaningful enough for many people, including the original composers (according to the purists), the players (especially the revivalists) and the audience (Bartel 1997: vii). For this reason, the technical awkwardness of a baroque wind instrument, the incompleteness of the musical scale playable on a valveless brass instrument, the gentle and mild (and thus less dramatic) sound of a string instrument of the gamba family are all meaningful for a musical performance. To be a part of history, or to approach the historical conditions of the composer in a musical performance, is therefore significant *per se*. However, it will never be the purpose of a law practitioner to go back to (or approach) the history of legislation.

Hence, the kernel of the question is the same whether it is to be answered in the world of music or law. That is, we are originally not aware of the importance of the historical conditions. Only if we ask a further question about the meaning and value of these conditions will we be able to give an answer to the kernel question. From the world of music comes a positive reply, because the attempt to go back is to a certain extent significant in itself for a musical performance.

Consequently, in the world of law it would be easy to jump to the conclusion that the will of legislators is in all respects and beyond doubt inferior to the will of law itself. The argument against the subjective legal interpretation, that the psychological will of the legislative organ does not really exist and the individual "objective" meaning of the law can be totally independent of the legislators' will, could be logically and legally wrong. This argument is not really "objective", but on the contrary, is no more than a "subjective" will of the legal practitioner (especially the judge) that is different from the will of the law makers, and this attitude is suspect of being inconsistent with the principle of legality (*nulla poena sine lege*) (Roxin 2006: 152). The more important question to ask is whether the investigation of the will of the law makers (subjective) or of the law itself (objective) can help us to solve the problem in front of us. According to this approach we should agree with the objectified subjective historical interpretation so far as no real intentions of lawgivers existed, or their intentions are not ascertainable, as when trying to answer the question whether an ATM machine can be "cheated".

In this regard, it seems to be true that there is little space left for the use of subjective legal historical interpretation, since the historical law makers did not even think of the situations which give rise to the most puzzling problems of legal application today. But that is still not the whole story. The German scholar *Naucke* holds that subjective

interpretation is useful on the following two grounds (Naucke 1969: 278-86, 282-83). (1) The subjective interpretation makes the correct conclusion expressible (*formulierbar*); (2) The subjective interpretation helps us to determine whether a law is exact or inexact, a determination which will help us to take an appropriate attitude towards it.

When talking about historical interpretation there are common points of music and law. There must be a reason why we need to "go back" to history when applying the law to solve a case of today or when playing for today's audience. In music, the reason is the aesthetic meaningfulness of historical conditions. In law, the reason is the fact that the investigation of the historical conditions (either the will of the lawgivers or the will of the law itself) can assist the legal practitioners who are trying to solve today's problems. *Naucke*'s viewpoint supports this conclusion by showing that the usefulness of subjective (historical) interpretation is that it keeps clear the border between the legislature and the judiciary.

2. The Boundary of Historical Interpretation in Music and Law

Thus far we have discussed the similarities and dissimilarities of attitudes toward the "gap" between past and present in the worlds of music and law. In other words, the discussion has been about why the "past" is important for music and law. But it is implied in this that the past is important. This implication should be examined carefully[13].

To begin with music, it has been mentioned that some musicians obviously ignore the historical conditions when playing music of an old style, but their performances are still widely accepted. Given the huge amount of transcribed musical works, it is not surprising that it is acceptable to play a work of *Bach* which was designated for harpsichord or clavichord on a modern grand piano,; or to play a work of *Handel* which was designated for recorder on a modern concert flute. Apart from the disregard of the composer's choice of instrument, if a performer intentionally ignores some of the old-styled techniques such as phrasing, ornamentation and rhythmic idioms, his performance may still be considered "convincing". An example is *Yo-Yo Ma*'s *Bach* Cello Suites, which are played with deep philosophical thought about the life and good taste of beauty of sound, but with little connection to the original baroque style of *Bach*'s era. Hence we can say that

13 Anyhow, modern performers "are free to choose among these instances in accord with their educated musical taste" (Hall 1998-1999: 1613). But the problem is still unsolved, because what is the "educated musical taste" is still unknown. Does paying attention to the original indications on the score belong to the "educated musical taste"?

what the composers have left us as historical legacy, namely, the designation of musical instruments, remarks and notes on the scores may be ignored under certain conditions.

On the other hand, it seems to be an inviolable commandment for all the musical interpreters that the historically original notation (not only the notes on the scores, but also all kinds of other remarks) must be respected, because they represent the will of the composers. The most impressive admonition on this was made by the famous conductor *Toscanini*, about whom it has been written: "He says, 'I want to hear the work as the creator of it conceived it, and in no other form' and to the conductor who maintains that it is his undoubted right to impregnate a performance with a strong injection of his own personality he replies: 'My dear fellow, you flatter yourself. Who are you to stand between me and *Beethoven*?'" (Turner 1937: 689) No doubt *Toscanini* was showing his respect for the composers who created the music. However, according to his description, the conductor seems more like a "living metronome" than an interpreter with his own feelings that can be transmitted to the audience. A good conductor's task is to give not only a correct but also an expressive performance (Mavrodin 1980: 68), and *Toscanini* over-emphasized correctness.

Thus musicians face the following problem: Where should the boundary be drawn between loyalty to the original scores (correctness) and the creativity of individual musical interpretation (expressiveness)? Regarding respect for the original scores and the marks on them, if a rule can be broken, which one should it be? Is disregard of the composers' dynamic marks forgivable? Or tempo marks, expressive marks or something else? In the eyes of a musician like *Toscanini*, any attempt to alter original marks on the score is a deviation from musical orthodoxy. In this regard, there is little space left for individual musical interpretation. However, to give up all possibility of (necessary) alteration of an original score in favor of "correctness" is like throwing away the apple because of its core: "To refuse interpretation is not to refuse the wrong meaning; it is to refuse meaning itself" (Kramer 2011: 173).

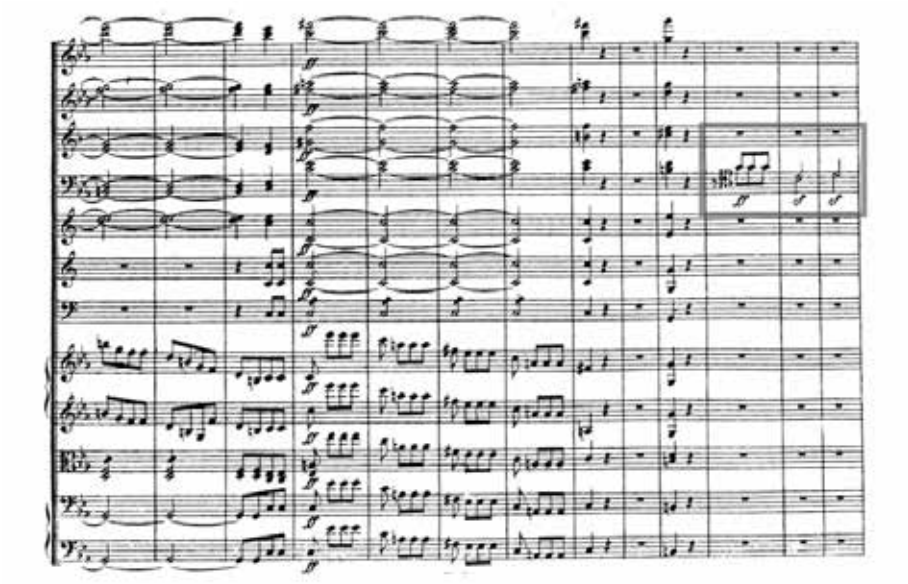
Since historical musical documents, such as scores and the marks on them, "authentically" represent the will of composers, it seems natural that they should be seriously obeyed by interpreters like *Toscanini*, i. e. they must be treated as "correct" in the eyes of interpreters. But this kind of "correctness" is often something "subjective" in the composer's mind. In the eyes of today's interpreters, it could be obviously "wrong" or "meaningless"; or there could be a necessity make some changes to render the performance (more) meaningful.

a) Where there is Something "Wrong" or "Meaningless" in the Original Indications

Apart from the transcription of musical works, after the classical period, whenever a certain instrument is designated to play a part in a piece of music, no change in this arrangement is generally allowed, because the orchestration is a very important part of a composer's will. But we can find some counter-examples, even in the performance of a *Beethoven* symphony.

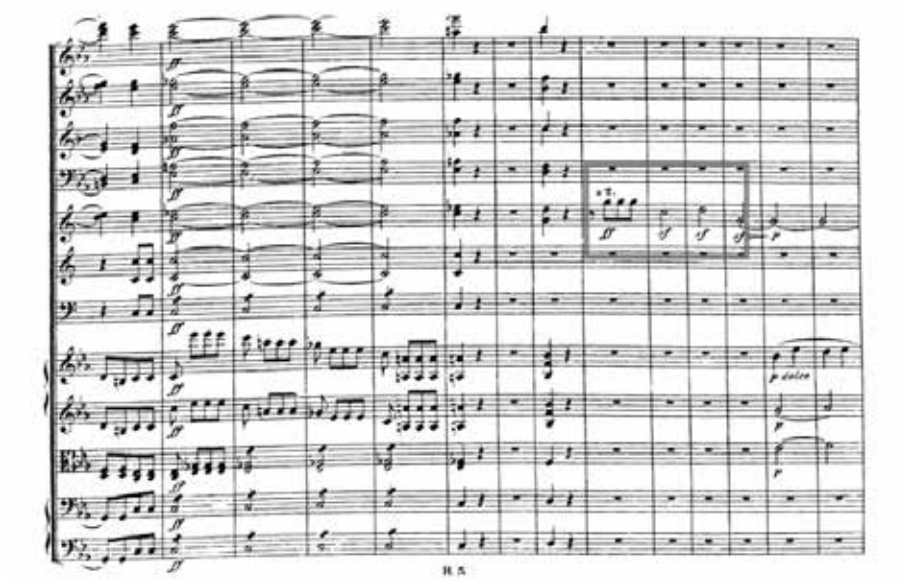
In the first movement of *Beethoven*'s 5th Symphony, at measures 303-306 (as shown in the example 1 below), a melody which appears several times is designated for bassoons, although previously it has been played on the horns (as shown in the example 2 below). What makes this situation special is that in many modern performances of this work (for instance, the version by the Berlin Philharmonic with *Furtwängler* of 1954, those of the Berlin Philharmonic with *Karajan* of 1962 and 1975-77, that of the London Symphony Orchestra with *Stokowski* of 1969, that of the Vienna Philharmonic with *Böhm* of 1977), the melody at measures 303-306 is played again on horns instead of on bassoons. This means the original orchestration of *Beethoven* has been changed, but this alteration has been widely tolerated.

Example 1:



(Version: Breitkopf und Härtel, Leipzig, "Beethovens Werke, Serie 1 Symphonien", 1862-1868)

Example 2:



(Version: Breitkopf und Härtel, Leipzig, "Beethovens Werke, Serie 1 Symphonien", 1862-1868)

The performers of the versions which use horns instead of bassoons are all serious musicians. This alteration must have been considered thoroughly. Thus there must have been a reason behind it. According to the authoritative musician and musicologist, the German conductor *Weingartner*, the use of bassoons instead of horns at measures 303-306 is the "best of a bad bunch" of choices at *Beethoven*'s time. To play them on horns in E-flat Major was at that time technically inconvenient owing to the difference of tonality, which would cause instability in the sound (Weingartner 1984: 67-68). *Weingartner* points out that the use of bassoons here is artistically regrettable or even comic, because the timbre of the bassoon is somewhat antic in nature. Thus their appearance here is like a clown's participation in an assembly of angels. It follows that it would be a "meaningless" interpretation to insist on playing these measures on bassoons nowadays when the technical problems of horns have been solved for years. What is more, according to *Weingartner*, *Beethoven* himself would have changed the orchestration at this point if the technically improved French horns had been introduced in his time (Weingartner 1984: 68).

If we draw comparisons with legal historical interpretations, we find that the attitudes of *Furtwängler*, *Karajan*, *Stokowski*, *Böhm* and others have much in common with those of the "objective" historical legal interpreters. Both think that the inner "logic" in the text

(either of legal provisions or of a musical score) is more important than what the original composers expressed as their will.

This situation could be a dilemma for an interpreter like *Toscanini* who thinks highly of historical authenticity. If he follows the original orchestration, the sound effect is "problematic", but to change the original orchestration would be against his faith in musical orthodoxy. Interestingly, *Toscanini* himself compromised on this. In his performance with the NBC Symphony Orchestra in 1952, he let the bassoons and French horns play these measures together (Zhou 2011: 146). Considering that the standpoint of *Toscanini* was normally extremely in favor of loyalty to historically original notation, we can understand what he really meant by letting bassoons and horns play together, so did the conductor *Baremboim* during his performance with the West-Eastern Divan Orchestra in 2012. On the one hand, they could not ignore the apparent "senselessness" in the score when bassoons continued to be used; on the other hand, they did not want to disobey the instructions in the historically original notation.

b) Where Changes Would Make the Performance More Meaningful

Sometimes changes made to the original notations could make a musical performance more meaningful, even though the original score with its marks and other indications is not problematic in today's view. This is often the case when music is rearranged. In the world of classical music, the rearrangement of music pieces is not only usual, but also necessary. Some instruments were less developed in the past, but now they have a potential expressiveness as high as historically more developed instruments. Because of this lack of expressiveness few composers were attracted by such instruments in the past. Now that the techniques and expression of these instruments have also been fully developed , it has become natural for their virtuosi to transcribe musical pieces for these instruments. For example, this has happened with the double bass, so we can hear many pieces originally written for violin and cello played on this instrument. Some of the transcriptions are remembered as historical breakthroughs, for instance, when *Karr* played *Dvorak*'s Cello Concerto on double bass, and *Azarkhin* played *Bach*'s Chaconne for solo violin on solo double bass. But more transcriptions are remembered because of their real success in the sense of musical aesthetics. For instance, *Karr* successfully rearranged and played *Paganini*'s Fantasia on "Moses" on double bass. This "good example" of transcription is said to remind us that "the biggest of our modern stringed instruments can be as light and nimble as its cousin the violin" (Harden, 1980). This kind of rearrangement does not make the original musical work more "correct", but widens its form of performance.

Another possibility arises when a performer seeks to change the "stereotype" of a kind of music by using unconventional expression techniques. Here the performer ignores authenticity in favor of producing a different effect. For example, the rockstar *Sting* once sang songs of the renaissance period using the singing techniques of rock music in an album, and a review acknowledged the success of this "innovative" idea. "*Sting* will single-handedly do more to make *Dowland*'s music widely known than all the 'early music' performances over the century", it was said (Knighton 2006: 531).

c) The Legitimacy of Musical and Legal Interpretation

From the two possibilities mentioned of deliberate disobedience to the historically original notation which can still make sense in a musical performance, we conclude that obedience to the original notation is not the only criterion, nor even the main criterion of "good" interpretation. Hence, a more important criterion should be put forward, namely the legitimacy of performance. If a performance is legitimate, it may be a good or at least an acceptable interpretation in the musical-aesthetical sense[14].

"Legitimacy" is again a rather vague concept, which can be understood too narrowly or too widely. It is understood too narrowly when it is believed that only a "loyal" performance without any infusion of the personality of the performer is legitimate: "Unless we are completely filled with the desire to know, feel and express what the composer has to say, to the exclusion of all personal motives, our performance will never carry conviction" (Turner 1937: 95; Hatten 1994: 276). In this sense, the word "legitimacy" is no more than a tautology of the criteria mentioned above such as "loyalty to history" or "authenticity". Legitimacy is understood too widely when it is given no clear, rationally justifiable boundary. However, as musical aesthetics change, increasing importance has been attached to the side of "ear" rather than to the side of "reason" since the 18th century (Bartel 1997: 25-27). In other words, if the rules of musical theory cannot tell us whether an "innovative" performance is acceptable, we should just follow our emotional feelings and use our own ears to determine the question.

Thus, the purist's performance is surely legitimate, because it is loyal to historical indications and is thus viewed as "correct", or because the old style of performing has an aesthetic meaning in itself. But the performance of liberal eclectics or hodiernists can also be legitimate, because disobedience to the historically original notation might be

14 The controversies about the role of Wagner's music in post war Germany and Israel suggests that the musical-ethical issues are also important for the acceptability of a musical performance.

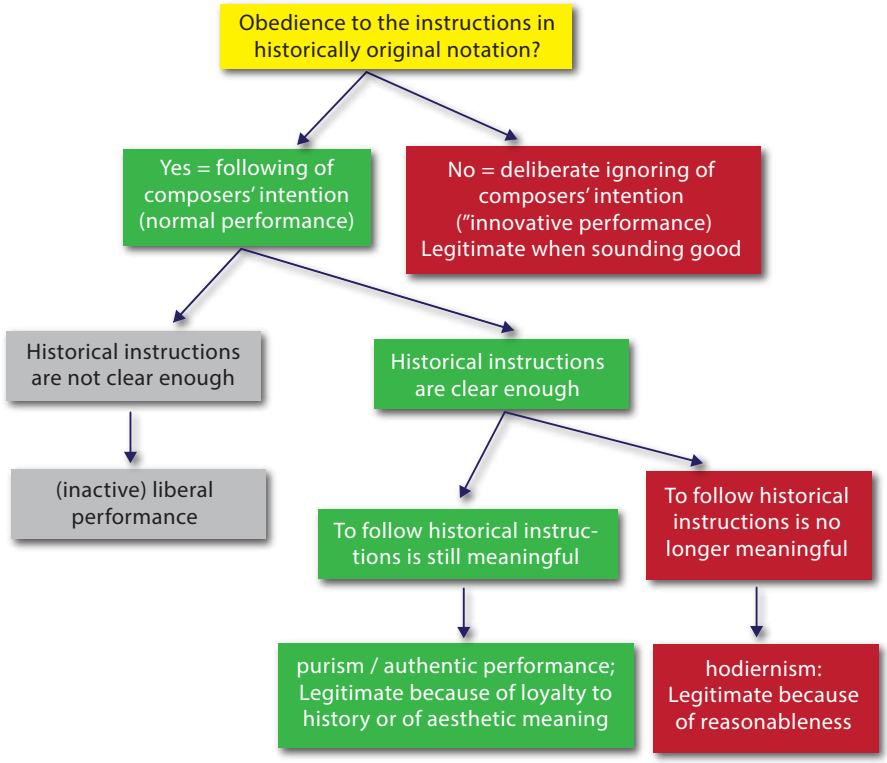
reasonable in the circumstances of today, or just because the "innovative" performance sounds good or at least acceptable. The whole situation is shown in the diagram below:

Thus historical interpretation in the realm of music has boundaries. To be loyal to historical elements does not always amount to being legitimate, since there are many cases where legitimacy can be built on other considerations. Exactly the same thing happens in the realm of law.

Firstly, according to some scholars, the "objective" historical interpretation or even the "objectified" historical interpretation can be outside the boundaries of real "historical" interpretation, because the method of interpretation has little to do with what is in the minds of the historical lawgivers. Furthermore, to investigate the historical purpose of the law does not help much, either (Lenckner/Eser 2014: § 1 Rn. 43). All that is important is how the law should deal with the actual problems of the world of today. This is clearly similar to the problem of whether to use bassoons or horns in the measures of *Beethoven*'s 5th symphony which we have considered. Even if we could know the reason why Beethoven used bassoons here, it is still musically acceptable (or even better) to use horns here nowadays, because the world of musical instruments has changed. In the realm of law, sometimes an interpretation can be legitimate even if we know that it is contrary to what the historical lawgivers thought. That is why it is called "objective" or "objectified".

Secondly, all types of historical interpretation can be restricted by other criteria when necessary. Historical interpretation is often used as one of the available methods among others. Sometimes other methods of interpretation, often a teleological interpretation, must be introduced to solve a specific problem in conjunction with an historical interpretation (Schroth 2011: 283). Only the legitimacy of an interpretation really matters. If the historical interpretation comes into conflict with a teleological interpretation, it is possible to follow either, but the choice must be built on "legitimacy". As in the realm of music, a legitimate legal interpretation can be found only after analyzing concrete situations in a specific case. As mentioned above, to be legitimate a subjective legal interpretation must often assume that the law is exact and the legal practitioner may not judge the law to be wrong. The legitimacy of an objective interpretation requires that change over time has *de facto* excluded the meaning of the original intentions of the lawgivers, or that a phenomenon appears which the historical lawgivers never contemplated.

Figure 1: The Different Legitimate Possibilities of Musical Interpretation



Systematic Elements in Legal and Musical Interpretation

A. Problems of Systematic Legal Interpretation and the Avoidance of Redundancy and "Attentional Provisions" in Legal System

Beside historical interpretation, systematic interpretation (*systematische Auslegung*) in law also belongs to the classical methods of legal interpretation, which have obvious features in common with the methods of musical interpretation. The key point of systematic legal interpretation is that the meaning of one legal provision can be investigated by comparing it with other legal provisions in the same legal system. The premise of systematic interpretation is the belief that there should be no, or as little as possible self-contradiction within one legal system (Schmalz 1992: 107).

Starting from this point, we may make the following deductions (Schmalz 1992: 108-09). 1) If a clause is a part of a chapter, the content of which is limited by its title, that limitation applies to this clause. 2) If a law uses a definition in different places, it can

be assumed that this definition has the same meaning everywhere. 3) If a definition is expressed in another way elsewhere, it should be assumed that these do not have the same meaning. 4) In case of doubt, a clause should not be interpreted in such a way as to make this or another clause "superfluous".

Since both the starting point and a major purpose of systematic interpretation is the exclusion of logical self-contradiction in law, the process must avoid redundancy of any specific legal provision, because redundancy in law can also be a form of logical contradiction. This is what point 4 just mentioned tries to tell us.

In contrast to these theoretical points, we find in the actual application of law many cases of redundancy in the legal system. Furthermore, some of the "superfluous" legal provisions have resulted from careful consideration by the legislators or interpreters. They may be "attentional provisions". An example is Article 247 of the Chinese Penal Code. This clause deals with the crime of torture: "Judicial workers who extort a confession from criminal suspects or defendants by torture, or who use force to extract testimony from witnesses, are to be sentenced to three years or fewer in prison or put under criminal detention. Those causing injuries to others, physical disablement, or death, are to be convicted and severely punished according to articles 234 and 232 of this law."[15]

A problem arises from the provision "those causing … to others … death are to be convicted and severely punished according to [article 232]". What does "causing death" mean here? Does it mean "to kill intentionally", or "to cause death negligently", or both? If we try to solve this problem by means of systematic interpretation, it should be admitted that the case "to cause death negligently" can be included. If the 1st case (to cause death negligently) is excluded, then only the 2nd case (to kill intentionally) remains, leaving a superfluous legal provision: Since the person committing intentional homicide is "originally" to be convicted according Art. 232 of the Chinese Penal Code,

15 Art. 232 of the Chinese Penal Code is a clause of intentional homicide: Whoever intentionally kills another is to be sentenced to death, life imprisonment or not less than 10 years of fixed-term imprisonment; when the circumstances are relatively minor, he is to be sentenced to not less than three years and not more than 10 years of fixed-term imprisonment. Art. 234 of the Chinese Penal Code is a clause of intentional injury: Whoever intentionally injures the person of another is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, or control. Whoever commits the crime in the preceding paragraph and causes a person's serious injury is to be sentenced to not less than three years and not more than 10 years of fixed-term imprisonment; if he causes a person's death or causes a person's serious deformity by badly injuring him with particularly ruthless means, he is to be sentenced to not less than 10 years of fixed-term imprisonment, life imprisonment, or death. Where this Law has other stipulations, matters are to be handled in accordance with such stipulations.

and this would be the case even if there were not such a clause in Art. 247, it follows that Art. 247 is totally redundant — it says something that it would have been needless to say. In this sense, the clause does not bring any new information, but reminds us of something that we already know (in this case, to convict an offender of intentional homicide according to Art. 232 of the Chinese Penal Code), and we may call such clauses "attentional provisions". If systematic interpretation requires us to avoid explaining a certain clause in such a way which makes it superfluous, it is clear that we should give up this interpretation.

The other possibility is to understand "causing death" as "causing death negligently". This interpretation undoubtedly brings new information. It provides that we should punish the offender who commits the negligent homicide according to Art. 232 of the Chinese Penal Code (intentional homicide) if he meets the other conditions of Art. 247. This does not state anything that we already know, because to punish a negligent offender according to a clause relating to intentional crime is something new to us — it is even something new to the entire Penal Code. To put it another way, according to this understanding, the last sentence of Art. 247 of the Chinese Penal Code introduces a "legal fiction" (Zhang 2011: 814), in the sense that it requires a form of unintentional criminal behavior to be punished as if it were intentional behavior.

In accordance with the principles of systematic interpretation, the "legal fiction provision" doctrine seems to prevail over the "attentional provision" doctrine, since the latter is in conflict with point 4 of systematic interpretation: it makes a clause superfluous.

However, the "legal fiction provision" doctrine has its own difficulties. It causes negligent behavior to receive the same punishment as intentional behavior, whereas the latter obviously means a greater social danger. Is this punishment still legitimate, especially when we consider that the highest punishment under Art. 232 of the Chinese Penal Code (for intentional homicide) is the death penalty? Is the avoidance of redundancy in the Chinese Penal Code so significant that we would rather risk the illegitimate use of the death penalty for a form of behavior for which this kind of punishment was seen as quite inappropriate (Ma 2014: 635)?

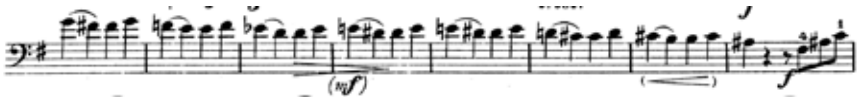
In this regard, wisdom from the realm of music can again be a guide. In the world of music, there are many cases similar to that of the "attentional provision".

B. Musical Systematic Interpretation Compared with Legal Systematic Interpretation

Compared with the realm of law, redundancy seems not so undesirable in that of music. On the contrary, because of its function as a reminder, a "redundant" indication in a score might sometimes be indispensable.

For instance, according to basic music theory, "accidental" flat and sharp symbols "only affect the notes which they immediately precede, and those of the same letter which follow them in the same measure"; but when the flat and sharp marks "are placed after the clef, … they affect all the notes of the same letter in every octave…" (Callcott 1817: 55). It follows that any sharp or flat symbol whose function is not described in either of these two rules is superfluous. But we can find such "redundancy" everywhere in musical works. For instance, *Brahms* used such *prima facie* superfluous accidental flat and sharp symbols in his scores many times, as shown in the example from his Sonata for Cello and Piano No. 1:

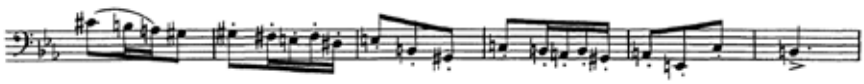
Example 3:



(Version: Mainz: B. Schott's Söhne, Ed.09494 & 09495/97, 1922)

As we can see, this movement is in E Minor, so that every F note must be played as F sharp, i.e. the sharp symbol in the 1st measure is obviously "superfluous". In the 5th measure, preceding the E tone there is a natural symbol indicating that this E must not be played either as E flat or as E Sharp. However, since this movement is in E Minor, the E note is always to be played as E natural, i.e. this natural symbol is "superfluous", too. In the following measure, *Brahms* used a natural symbol before the D note, but for the same reason the D note is always to be played as a D natural, so that this natural symbol is again "superfluous".

Example 4:



(Version: Paris: Durand & Cie., 1922. Plate D. & F. 10,155)

Similar cases have appeared in numerous other musical pieces. In *Saint-Saëns*' famous work "Carnival of the Animals", we find the same phenomenon. For example, a part of the double bass melody in the movement "Elephant" is:

As this movement is in E-Flat Major, the C note is supposed to be played throughout as C natural. However, before the first note of the 4th measure, a natural symbol is placed to indicate this is a C natural. Again this is "superfluous".

Since it is unlikely that the composers did not know these rules, and so could have avoided the mentioned redundancies, they must have had a reason, namely, to call the attention of the performers. In example 3, *Brahms* used many "superfluous" sharp, flat and natural symbols, because the tonality of this motive is unstable and in each measure the melody is in chromatic progression. So, to bring each semitone interval to the player's notice, *Brahms* used the accidental flat and sharp symbols uniformly in each measure, despite the fact that in some of them the symbols are grammatically necessary (in the 3rd measure, for example), while in other measures they are grammatically unnecessary. Similarly, in "Elephant" of "Carnival of the Animals", *Saint-Saëns* used a "superfluous" natural symbol to draw the player's attention to the C note, because before the 4th measure the melody is in E Major, where C is normally to be played as C sharp, but in the 4th measure, the melody is transformed into A Minor, where C is to be played as C natural. Thus the attentional mark, which seems redundant at first glance, is in this sense "useful" in that it reminds the performer that the melody here enters a new tonality and the marked note can easily be played wrongly. Both the examples of *Brahms* and *Saint-Saëns* tell us that a "superfluous" symbol can be significant to the performers if it draws their attention. That is to say, if a symbol is "attentional", it is helpful.

Wisdom from the realm of music could provide a salutary lesson for the realm of law. On the one hand, it is true that an "attentional" symbol does not give any new information, because it just emphasizes what a well-trained performer already knows, such as the use of accidental sharp and flat symbols. On the other hand, the "attentional" symbol can be crucial to the musical performance, because it reminds of what can be easily forgotten in the specific situation owing to the change of, for example, tonality of the melody.

In this sense, it is not unacceptable to interpret the last sentence of Art. 247, Chinese Penal Code as an "attentional provision". Because of its value, it is not against the basic principles of systematic interpretation to determine this clause to be an "attentional provision". After all, it is practically meaningful in China to remind legal practitioners of the possibility of punishing a judicial worker who intentionally kills during an inquisition by torture. Such cases are not rare, and it is likely that the offenders sometimes receive lighter sentences because of their special status of judicial officer, even if they commit homicide by (often indirect) intention during the inquisition. In this regard, it is not

inconceivable that Chinese legislators set up this "attention" provision by design (Ma 2014: 635).

It is true that this interpretation seems to be not perfectly compatible with the principles of legal systematic interpretation, which require that in cases of doubt an explanation of a clause in such a way as to make this or another clause "superfluous" should be avoided. Only when the last sentence of Art. 247, Chinese Penal Code is interpreted as a "fictive provision", i.e. as meaning that an inquisitor who unintentionally causes death during the torture is to be punished as if he had committed intentional homicide, is this sentence systematically meaningful (Zhang 2004: 264). But we should never forget what we are trying to weigh in the scales. On the one side, it is the neatness, completeness or purity of the legal system, but on the other side, it is the correctness of conviction and sentencing, which could determine the use of capital punishment. What is more, according to Art. 5, Chinese Penal Code, this kind of correctness is supported by the principle of responsibility. We should not sacrifice both the correctness of conviction and sentencing and the basic criminal legal principle in favor of "neatness" of the legal system, especially when there is a risk of using the death penalty incorrectly. In addition, we should not forget that there is a prerequisite for the avoidance of redundancy in the legal system, namely "in case of doubt". But the doubt does not exist in this case, because the only possibility of making the last sentence of Art. 247 of the Chinese Penal Code compatible with the basic principle of responsibility of Chinese criminal law is to identify it as an "attentional provision".

The Internal Link Between Chinese Traditional Music and Legal Practice: Features of Chinese Culture

The analysis above has considered mainly the common features of Western music and Western or westernized legal systems. Our starting point, that both Western law and Western art-music have formal rules in their inner structures, based on their own logic and rationality, seems at first glance inapplicable to traditional Chinese culture. On the one hand, the formality of the symbolic notation system of traditional Chinese music is, compared with Western counterparts, a well-known "weak point"[16]. On the other hand, although the Chinese modern legal system has to a large extent been "westernized"[17], some of the legislative and interpretive techniques of Chinese law have inherited important

16 As early as 1930, it was widely maintained by Chinese musicology academics that one of the reasons why old Chinese music pieces had been lost was the deficiency of the traditional notation system (Lin 2001: 44).

17 Or at least "russianized" (Chen 2012).

characteristics from Chinese traditional culture, which make the modern Chinese legal system and its practice quite different from their Western counterparts. The following part will focus on the possibility of a "general" internal link between music and law with a Chinese background.

A. The Notation Systems of Chinese Traditional Music and Their Cultural Characteristics

If we observe just a few bars of any piano score in modern Western notation form, we find the following merits: 1) The notes show their relative pitch and time duration; 2) The clef symbols indicate the absolute pitch of the notes; 3) The key signature indicates the key of the scales used in the score; 4) The meter signature specifies how many beats are to be contained in each bar and which note value is to be given one beat; 5) The tempo signature gives the speed or pace; 6) Articulation signatures give hints on performance technique. All these characteristics show that the modern Western notation system is a complete system. It successfully describes pitch, rhythm, tempo and articulation of the notes, that is, nearly all the formal essentials of modern Western art-music.

In contrast, the main notation systems of Chinese traditional music if treated as formal symbolic systems seem much more incomplete and less successful. This can be seen in the Guqin reduced notation system, which is used as a tablature system to indicate the finger positions and plucking technique of the Guqin, the plucked seven-string traditional Chinese musical instrument, which has something in common with the Western zither family:

Example 5:

(The first page of "Shenqi Mipu", the traditional Guqin notation, volume 2, 1425)

From the Western point of view, the notation system of Guqin should have the potential to give the player step-by-step instructions and descriptions of performance (Wikipedia, 2006). In fact, this is impossible in many cases, because the Guqin notation system does not record the rhythm or tempo, nor does it clearly indicate the pitch. Many of these indispensable formal elements in the Western perspective are not distinctly "given", but just "implied" or "insinuated" (Lin 2001: 44-45). The result is often that different "schools" have developed totally different performance methods when playing the same piece. This phenomenon has its roots in the aesthetics of Chinese traditional culture. For instance, the convention that the detailed formal elements are often deliberately omitted in the Guqin notation system is similar to the traditional Chinese painting skill of "blank leaving", which requires the artist to leave some places on the canvas untouched. According to the traditional Chinese philosophy of art, to leave blankness in appropriate spaces in a picture will considerably promote its aesthetical taste. The same applies to music: the missing tempo or rhythm markers are "blankness" left by design.

This phenomenon is related to Chinese philosophical worldviews. In basic Taoist thought, the "image out of the image" as well as the "ideas not expressed by the texts" are pursued; consequently, the rhythm and tempo of a music piece need not be "strict", but on the contrary, just like the "hidden meaning" of life, the appropriate rhythm and tempo are to be freely explored by each interpreter (Wang 2006: 8). However, according to the Confucian doctrine of the "golden mean", the suitable tempo and rhythm will not be too far from conventional standards even if they are unspecified, so in this sense these elements also are unnecessary (Wang 2006: 8).

This kind of aesthetic simplicity is also widespread in other Chinese traditional notation systems. In the notation of Chinese operas and folksongs only the main melodies are written down while the ornamental parts are left to the discretion of performers. All these phenomena show an important principle of Chinese culture: it is wiser to spare the dispensable details than to be absolutely precise on everything. Through this approach artwork concentrates on the object's soul instead of its exterior appearance (Wang 2006: 8-12).

B. The Aesthetics of Simplified Symbolic Systems and Chinese Legal Practice

Accepting that the law began not as an abstract theory, but an embodiment of existing custom, and that cultural trends can influence contemporaneous law (Richmond 2003: 814), we may recognise that a preference for the simplified symbolic system in traditional Chinese aesthetics has an impact upon Chinese legal practice. A long time ago, *Aristotle*

once argued that "a wise legislature will deliberately use vague and flexible standards" (Frank 1947: 1259). As seen above, this happens less often in the world of Western music and law, but in Chinese cultural and legal practice, it occurs quite naturally.

Firstly, the Chinese Penal Code officially encourages the use of flexible legislative techniques in relation to ethnic minority customs[18]. The background of this clause is the fact that China is a multinational country with 55 ethnic minorities. These groups have different religions (Islam, Buddhism, Christianity); their languages belong to different families (Sino-Tibetan; Altaic; Austroasiatic; Indo-European and others); and they have totally different cultures and customs. Thus, it would be practically very difficult for all ethnic groups to obey all the clauses of the same penal code. For example, the clause forbidding fornication with an underage girl (Art. 236 II of the Chinese Penal Code) could hardly take effect among ethnic groups which have the social custom of early marriage; the same would apply to the clause on illegal denudation of forest land (Art. 345 II of the Chinese Penal Code), if it were used among the ethnic groups in mountain areas which have no other source of income than lumbering; or to the clause prohibiting bigamy (Art. 258 of the Chinese Penal Code), if it is used among ethnic groups which have long treated polygamy as an acceptable custom (Wu 2004:3). In this respect, the original clauses of the Penal Code are similar to a score recorded in the Guqin notation. The main melodies (the main structure of clauses of the Penal Code) are given clearly, but the further performance indications (additional regulations to be used among ethnic group areas) are all flexible and left to the discretion of different players.

Secondly, from the 1950s to the 1980s, a principle called "to be general rather than to be detailed" dominated China's legislative activities, which required speed and quantity in legislation rather than quality. The main reason why this "principle" was so warmly advocated was that the level of legal research and practice at that time was much lower than today, so that "general" legal stipulations were more suitable (Lin 1999: 62-63). Moreover, the fact that this principle was at that time so quickly accepted by the whole nation must have has its root in the cultural background. In the traditional Chinese notation systems, it is widely recognized that composers only write down general

18 Article 90 of Chinese Penal Code: In situations where the autonomous areas inhabited by ethnic groups cannot completely apply the stipulations of this law, the people's congresses of the autonomous regions or of the provinces may formulate alternative or supplementary provisions based upon the political, economic, and cultural characteristics of the local ethnic groups and the basic principles of the stipulations of this law, and these provisions shall go into effect after they have been submitted to and approved by the National People's Congress Standing Committee.

indications at first and then let different players perform the details as they wish. This mode is based on trust in the artistic level of the performers.

In a word, a link between music and law has been observed even in the background of traditional Chinese culture. The Chinese traditional music culture did not breed high formality and rationality, and Chinese legal practice has something in common with this music culture.

Conclusion

Since there are common points in the structure and inner logic of both law and music, they both treat a set of rules and manifestation modes as an essential part. Nevertheless, neither is completely formalized, so that both of them need "interpretation" because of the "gap" between symbolic system and performance, and between the past and present.

In relation to historical elements, we have found inner links between historical legal interpretation and historical musical interpretation in the following respects. (1) In both realms there are different attitudes towards the idea of "loyalty" to the historically original notation. (2) Subjective historical interpretation is not useless in either the realm of music or that of law. (3) Under certain circumstances, objective interpretation can be acceptable in music as in law.

In relation to systematic elements, we have seen that wisdom from the realm of music can be helpful for the world of law in the sense that we should take the "redundancy" of a specific interpretation into consideration more carefully. If an interpretation seems at first glance "superfluous" in the legal system, this does not necessarily mean that it is totally "useless" and thus to be avoided. On the contrary, it may be a hint that the provision is an "attentional" provision, which has its own value in the legal system, just as attentional symbols in music, which can be important reminders to performers.

Finally we find that between Chinese traditional music and legal practice, an "inner link" also exists, even if formality and completeness of the symbolic system are no longer the common points of the two disciplines.

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Hans Christian Andersen and the Blue Light

Bent Ole Gram Mortensen[1]

Abstract

This article examines the development of energy law illustrated through the authorship of Hans Christian Andersen (1802-1875). The focus is on the implementing of city gas, which happened in the lifetime of H.C. Andersen. Based on the literary observations of H.C. Andersen the changes in the legal framework in energy law and other regulatory areas are analysed.

H.C. Andersen's references to gas lighting provides an emotional experience to change and an approach towards the empathetic understanding to make changing life recognizably human. With this reference I have availed of the opportunity to briefly describe the historical development of energy and laws which were introduced and developed into the modern legislation we now have. – Through his literary greatness H.C Andersen not only generates an attitude of respect toward energy but also widens horizons for lawyers when we look at the energy challenges on the global level.

Introduction

Hans Christian Andersen was born in the era of gas lightning – the 19th century, a time of great technological achievements, a time of transformation, socially, economically and politically. Furthermore it was culturally a golden age. Most notably it was a period in Denmark for the introduction of democracy (a constitutional monarchy) and transformation from a feudal to a 'modern' industrialised economy, where sources of energy were becoming cheaper and more readily accessible.

This article gives an idea about the interrelationship between the change of social and economic conditions of increasing importance and the optimism about development of technology, which was common among artists in the late 19th and the early 20th century.

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City Gas Supply[2] was the first energy supply to be transmitted by pipes to individual households. Later, conduction pipes and lines were used for electricity, natural gas and district heating and cooling. The introduction of city gas can be seen as the first step into a modern energy supply. The developed world we are living in today is a result of the 19th century development of an industrialised economy. Part of that development was dependent on an increased access to energy, one being that gas light made night shift work possible in many industries.

The municipalities were the main customer of city gas from the start. Before gas lights mainly oil lamps were used to light the streets in order to reduce crime and to make the streets safe for the citizens. Public street lighting quickly became a significant user of gas; and there was need for better street lighting. Lighting from oil lamps was of limited strength, and this was not always sufficient for streets with rough paving stones and open drains.

Gas lights soon found their way into the households of the middle class replacing candles and oil lamps. Later gas cookers and stoves were introduced. An efficient domestic energy supply had great importance for the increase in welfare for the population and for social behaviour. Better lightning increased the length of the day in winter times. Reading and social intercourse were facilitated. City gas was, however, just one of the many technological revolutions that happened in Andersen's century. The 19th century was also the century for machine power, transport and, with that, energy. Ever since then, the demand for energy has only increased.

Usually when new technology emerges the legal regulations are seldom in place. The 19th century legal regime governing such business then was very different from what we know now. This paper takes it basis in such a case, at the same time describing an interesting history of technology. And in the 19th century we had H.C. Andersen as an observer. H.C. Andersen's stories are a source of background knowledge for laws concerning energy. He describes changes in society and the human response to these changes i.e. his stories provide emotional experience to change. For empathetic understanding and to make changing life recognizably human he looks at life from the perspective of inanimate objects for example street lamps.

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2 City gas is also referred to as town gas. In urban areas it is supplied to the user via a piped distribution system.

We can see how the Literature of H.C. Andersen provides an interesting historical and human aspect of this development. This paper puts forward foresight of a brilliant author – his stories that created fantasies are the realities of today. H.C. Andersen provided an attitude of respect toward energy - It's a beautiful reminder for children and even grown ups who take energy (for example electricity) for granted. Literature can expand emotional horizons of legislatures.

In the first part of this article, H.C. Andersen and his literary observations of city gas is described. In the second part these observations and their legal implications are dealt with. The term blue light as used in the title is among the names that Andersen himself used about city gas.

H.C. Andersen – a man of progress

The fairy tales of H.C. Andersen are more than just fables and moral stories. He lived in a period of social transformation, and his stories express the optimism of his time regarding the development in technology. Andersen developed the genre of fairy tales when he at last found his own style. He was humane, romantic and welcomed development. It is beyond any doubt that Andersen had an eye for the changing times and for the change between technologies and their consequences. He welcomed development and allowed himself to be inspired by the arrival of new technology such as city gas.

Among the storytellers of the Danish introduction of city gas was another Hans Christian, H.C. Oersted – a Danish physicist,[3] who was very important for Andersen. Oersted attributed to himself the honour of being the first to see the genius in Andersen's fairy tales and thought that Andersen's stories would make him famous and his fairy tales would immortalise him. Oersted may have already developed a knowledge of gas as a light source prior to Andersen's birth. Oersted happened to pass through Paris in 1802. Here, he may have heard about the demonstrations led by Philippe Lebon the year before, in 1801, in relation to the use of gas as a light source.[4] The following year, it was discussed in the journal *Nyt Bibliothek for Physik*, 3rd binder, 1802 in pages 205-218. In 1819, the same year as Andersen moved to Copenhagen, Oersted participated in Steen A. Billes project in relation to the establishment of a gasworks to light the walking street, Strøget, in Copenhagen. Like other projects of the time, however, the gas project amounted to

3 In Danish: Ørsted.

4 Philippe Lebon held public presentations in 1801 at the hotel Seignelay to demonstrate the use of the thermo-lamp.

nothing. In 1848, Oersted became a member of a committee that was to put together a combined plan for Copenhagen's water, gas and sewerage systems. However, on account of his age, Oersted was forced to withdraw from his position before the first meeting. Oersted did not manage to experience public gasworks in Denmark (Hyldtoft 1994:7, 9 and 70ff.).

Oersted's work, "The spirit in nature", seems to have been an important source of inspiration for Andersen. In his story "Two brothers" from 1868, Andersen places H.C. Oersted on the shelves together with his brother, the important Danish lawyer and politician, Anders Sandøe Oersted. H.C. Oersted is also honoured in other places, such as in "Great-grandfather" from 1872, where twenty pounds are given to his monument and in "In a Thousand Years" from 1853, which talks about the country of Oersted, among other places.

City gas was, however, just one of the many technological revolutions that happened in Andersen's century. The 19th century was also the century for machine power and, with that, energy. In the fairy tale about "The Muse of the New Century" from 1861, Andersen places the muse's birth

> "in the midst of our busy time, noisy with machinery" … "We did not hear the sound of the cradle for the clattering of machines, the whistling of railway engines, the blasting of real rocks and of the old fetters of the mind. She has been born in the great factory of the present age, where steam exerts its power, where 'Master Bloodless' and his workmen toil by day and night."

This is how industrial work is described. Moreover, Andersen saw beyond just his own century. In the story "In a Thousand Years" from 1853 an invasion of American tourists was predicted: "Yes, in a thousand years people will fly on the wings of steam through the air, over the ocean!" Here, Andersen talks about "the ship of the air", "the air steamboat", "electro-magnetic wire under the ocean", yes, and even about a "tunnel under the English Channel, to France". It was the century of projects and visionaries. Through his literary works, Andersen seems to be among those who foresaw the later consequences of the technological achievements.

Gas was not the only energy form present in his work. Coal was described as well. Denmark was at the start of the 19th century very dependent on coal importation – English coal from Newcastle, direct from the "coal-island" as H.C. Andersen describes in "The Muse of the New Century" from 1861:

> "One beautiful morning in spring she will come rushing on her dragon, the locomotive, through tunnels and over viaducts, or over the soft strong sea on the snorting dolphin, or through the air on the great bird Roc, and will descend in the land from which her divine voice will first hail the human race. Where? Is it from the land of Columbus, the land of freedom, where the natives became hunted game and the Africans beasts of burden, the land from which we heard the song of Hiawatha? Is it from the Antipodes, the gold nugget in the South Seas the land of contraries, where our night is day, and black swans sing in the mimosa forests? Or from the land where Memnon's pillar rang and still rings, though we understood not the song of the sphinx in the desert? Is it from the coal-island, where Shakespeare is the ruler from the times of Elizabeth?"

H.C. Andersen and the blue light

When H.C. Andersen moved to Copenhagen in 1819, oil lamps still ruled the streets. He was witness to the beginning of gas lighting. Public gas supply had already begun in England, but on the Continent public gas supply did not arrive before 1820, when Paris opened the first gasworks (Thomsen 2003:87f).

At the time of Andersen's birth, oil (such as whale oil) was the streetlamp's normal energy source, though kerosene (also referred to as lamp oil paraffin) was used in some places (Lang 1922:346). In H.C. Andersen's birthplace in Odense, oil lamps had been used as street lighting since 1762 (Thestrup et al 1986:68). In smaller towns, street lighting began later (Thomsen 2008:12). The oil came from whale and seal catches in the North Atlantic (Thomsen 2008:12). From Denmark's perspective, the Greenlandic whale catch was especially interesting – an interest that, among other things, contributed to the establishment of the Royal Greenlandic Trade (den Kongelige Grønlandske Handel (KGH)) in the 1770s. We can only guess about the fate of the large whale species, had city gas not appeared.

H.C. Andersen described city gas in his fairy tales as well as in his diaries. In H.C. Andersen's diaries from his many travels, there are many references to the use of city gas,[5] both as street lighting and as lighting in buildings. Street lighting is frequently described in slightly poetic terms. In relation to a visit to London, it was noted in his diaries that he "…looked upon the lit-up shops; there were many gas flames burning…" and, "…on one street, one could see all of the winding flame contours of the gas streetlamps." In addition, it is mentioned in his diaries that "in one of the cities, a blue light was burning."[6] He had just passed through Manheim. Similarly, gas lighting in peoples' homes was described as "a beautiful winter garden in the house; lit up by gas and good paintings".[7] At other times, it was established, in less solemn terms simply that gas was used for lighting.

In his fairy tales city gas and streets lights are mentioned a few places. "The Dryad" from 1868, about the world exhibition in Paris in 1867, is almost bursting with references to gas rays, blue lights, gas lighting, gas stoves, gas flames, and gas pipes:

> "She reached the Boulevards; a sea of light streamed from the gas in the lamps, shops, and cafes. Young and slender trees stood here in rows; each one hid its Dryad from the beams of the artificial sunlight. The whole of the long, never-ending pavement was like one great assembly room; tables stood spread with refreshments of all kinds, from champagne and chartreuse down to coffee and beer. There was a display of flowers, of pictures, statues, books, and many coloured fabrics. From the throng under the tall houses she looked out over the alarming stream under the rows of trees: there rushed a tide of rolling carriages, cabriolets, coaches, omnibuses, and cabs, gentlemen on horseback, and marching regiments, it was risking life and limb to cross over to the opposite side. Now shone a blue light, then the gas-lights were supreme, and suddenly a rocket shot up; whence and whither? Certainly, it was the highway of the great city of the world."

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5 These references may be found in Andersen's dairies (in Danish), which are located in electronic form on the website of the Royal Library (*Det Kongelige Bibliotek*). Please see http://base.kb.dk/hca_pub/cv/main/Oversigt.xsql?nnoc=hca_pub

6 H.C. Andersen diaries at the website of the Royal Library (http://base.kb.dk/hca_pub/cv/main/Oversigt.xsql?nnoc=hca_pub) Dagbøger III 1845-1850, p. 216 and 239.

7 H.C. Andersen diaries at the website of the Royal Library (http://base.kb.dk/hca_pub/cv/main/Oversigt.xsql?nnoc=hca_pub) Dagbøger IV 1851-1860, p. 439.

Late in his career H.C. Andersen gives the experience of gas streetlamps special attention. In the contemporary story "Godfather's picture book" from 1868, Andersen starts out with "the memorable year when Copenhagen got gas in place of the old oil-lamps."[8] He did not provide any further detail, but gas lamps were lit in Copenhagen on the 4th of December 1857 (Hydtoft 1994:9), where 1600 oil lamps were replaced by 1800 new gas lamps.

> "The people walked up and down to look at the old and the new lighting. There were many people, and twice as many legs as heads. The watchmen stood about gloomily; they did not know when they might be dismissed, like the lamps; these themselves thought so far back they dared not think forward. They remembered so much from the quiet evenings and the dark nights. I leaned up against a lamp-post".

In the second last section of the story Godfather's Picture Book from 1868, H.C. Andersen lets Godfather say:

> "You are quite welcome to show your picture-book to one or another; you may also say that I have made, pasted, and drawn the whole work. But it is a matter of life or death that they know at once from where I have got the idea of it. You know it, so tell it them! The idea is due to the old oil-lamps, who just, on the last evening they burned, showed for the town's gas-lights like a Fata Morgana, all that had been seen from the time the first lamp was lighted at the harbour, till this evening when Copenhagen was lighted both with oil and gas."

Most of the old oil lamps were probably melted down by the iron-moulder. However, one was not. In "The old streetlamp" Andersen allowed a streetlamp to enjoy retirement together with its watchman. This fairy tale is from 1847, before city gas supply were established in Denmark, and Andersen describes as well the streetlamps, their connection to the municipality and the watchman corps. Further, this story provides emotional experience to change. He looks at life from the perspective of an inanimate object i.e. a street lamp:

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8 Most translations of the manuscripts of H.C. Andersen are based on the excellent webpage of Lars Bjørnsten (www.hcandersen-homepage.dk/). See especially the manuscripts at www.hcandersen-homepage.dk/?page_id=1162

"Did you ever hear the story of the old street lamp? It is not remarkably interesting, but for once in a way you may as well listen to it. It was a most respectable old lamp, which had seen many, many years of service, and now was to retire with a pension. It was this evening at its post for the last time, giving light to the street. His feelings were something like those of an old dancer at the theatre, who is dancing for the last time, and knows that on the morrow she will be in her garret, alone and forgotten. The lamp had very great anxiety about the next day, for he knew that he had to appear for the first time at the town hall, to be inspected by the mayor and the council, who were to decide if he were fit for further service or not; - whether the lamp was good enough to be used to light the inhabitants of one of the suburbs, or in the country, at some factory; and if not, it would be sent at once to an iron foundry, to be melted down. In this latter case it might be turned into anything, and he wondered very much whether he would then be able to remember that he had once been a street lamp, and it troubled him exceedingly. Whatever might happen, one thing seemed certain, that he would be separated from the watchman and his wife, whose family he looked upon as his own. The lamp had first been hung up on that very evening that the watchman, then a robust young man, had entered upon the duties of his office. Ah, well, it was a very long time since one became a lamp and the other a watchman. His wife had a little pride in those days; she seldom condescended to glance at the lamp, excepting when she passed by in the evening, never in the daytime. But in later years, when all these, - the watchman, the wife, and the lamp - had grown old, she had attended to it, cleaned it, and supplied it with oil. The old people were thoroughly honest; they had never cheated the lamp of a single drop of the oil provided for it."

Reorganising the Police in Copenhagen

In Copenhagen, oil streetlamps were introduced in 1681. No less than 500 were erected. Primarily, the aim was to try and limit the extent of robbery and assault on the streets at night (Redlich 1982:I:51). These oil lamps had to be both lit up and put out. Therefore, pursuant to a regulation of 26th July 1683 about Street Lamps and Night-watches in Copenhagen (Gade-Løgterne og Nat-Vægterne i Kjøbenhavn) a watchman corps was established with the primary objective being to operate the oil lamps. However, the watchmen were also given the police task of maintaining peace and order at night. For this reason, they had the power to withhold suspected offenders, possibly with the help of

the military watch, while the actual investigation was handed over to the police (Nielsen 1889). With the disappearance of oil streetlamps, a large part of the 162 Copenhagen night watchmen's work also disappeared. The watchmen belonged to a profession that by this time really belonged in the past and not the future. Back then as now, new technology demanded adjustments and, for those who could not cope with this, also victims.

With the passing of a law on 11th February 1863, regarding Copenhagen's Police Reorganisation (Københavns Polities Omordning), which came into force on 1st July in the same year, the watchmen were dismissed and the function was discontinued. H.C. Andersen's indication of the possible dismissal of the watchmen in the fairy tale The Godfather's Picture Book proved to be realistic. However, Andersen's presentation of dismissal was not a predictive figuration but a literary documentation. The Godfather's Picture Book was first published on 19th January 1868, nearly 5 years after the law about the reorganisation of the police. The adoption of gas lighting did lead to the reorganisation of the role of the police in Denmark.

With the dismissal of the watchman corps the law enforcement was concentrated at the police. During Andersen's lifetime uniformed police were municipal. Only in 1938, uniformed police became a state police, a system that still exists in Denmark. The police are now regulated by the Police Act, but the basic tasks are still the same. The police must work for the safety, security, peace and order in society, cf. section 1 of the Police Act.

Energy supply

Security of supply is a classic part of energy policy. The Danish energy supply situation at the beginning of the 19th century could have been better. At that time, English coal was rather popular. However, in Denmark, at the time of H.C. Andersen's birth, this was far from acceptable due to strife with England in connection with the Napoleonic Wars. The fear of a lack of energy security set in (Nielsen 1944:406 and Olufsen 1811: 147ff.).

In Andersen's time, the obvious Danish alterative to coal as the primary energy source was wood and peat; an inland energy sources that gave better energy security. Wood was an old and, at that time, still significant energy source for cooking and heating buildings, among other things. In the meantime, tree felling had violently degraded the extent of Danish forest (Bergsøe 1847:204, cited in Nielsen 1944:406). Firewood was not to be seen as securing the future's energy supply. An energy and resource revolution in the previous few centuries had replaced wood with coal as the main energy resource.

(Kjærgaard 1991:86ff.). Coal had to be imported, but peat[9] was also a domestic resource. Coal imports from England rose soon after the end of the war, and when the first gasworks with a view to public supply were opened in Denmark in 1853, they were mainly based on gasification of coal (coal-gas).

The pipeline network of city gas turned out to be a competitive way of distributing energy for many purposes. However other energy forms could be distributed by a physical network. The competition between the technology of the oil lamp, kerosene and city gas as witnessed by H.C. Andersen were not to become the last.

In the late part of the 19th century electricity became competitive also in Denmark. Since 1891, a watchmaker in Køge had owned a small generating station that could supply electricity to a limited circle of households by running cables over rooftops and through back gardens. If it was possible to avoid public roads, there was no need for public permission. And in 1907 the city of Køge entered into Denmark's first municipal electricity concession agreement.

When the electricity supply service came to Denmark, H.C. Andersen was dead. Thus, he never experienced the new struggle between the gas 'candelabra' and the new electric street lights. While it seems as though oil lamps had quickly lost the fight to gas lamps, the competition between electricity and gas for street lightning, as with many other usages, seems to have taken much longer. Furthermore, the use of city gas to fulfil many purposes other than lighting gave gasworks many good years. In Kolding, the last gas street lamps were extinguished in 1958, but gas sales first peaked in 1962 (Thomsen 2008:14 and 80). In fact, city gas is still used to a certain extent in relation to cooking (now in competition with electricity and natural gas), and even gas street lights still exist (Thomsen 2004:69), though more as a curiosity than as a practical measure.

Nowadays, the remaining city gas supplies are made use of in Aalborg and Copenhagen – natural gas thinned with air. Coal gas is no longer in use. Energy utilities are at present subject to extensive regulation,[10] which is due to the networks character of natural monopolies. The majority of regulation in the electricity and natural gas supply areas

9 Peat is a plant deposit that exists in moors, and is the first link in the chain to the formation of lignite and hard coal. From the late Iron Age until the middle of the 20th century, was not an insignificant energy source in Denmark. In particular, during the two world wars, Danish peat production rose as a result of the problem with importing other energy sources. Peat is still used to a larger extent, mainly in developing countries.

10 The Electricity Supply Act, the Natural Gas Supply Act, the Heat Supply Act and the Renewable Energy Act.

stemming from EU regulation. The security of supply aspect is thus included in the objects clause in the current four central Danish energy laws.

Private or public works –role of Municipalities

The establishment of the first gasworks were carried out by private interests. It was the general practice across Europe. From the start, Municipalities were large consumer of city gas for the purpose of street lighting. The significance of street lighting as a contributing factor, which made possible such a capital-intensive project as the establishment of gasworks with associated distributions networks, cannot be underestimated.

The establishment of the energy services, however, happened on the basis of municipal concessions. There were no actual laws in existence about the establishment and operation of city gas supply plants. If the piping network had to be installed across a third person's property, this required the owner's consent. This applied in the case of both private and public property and included the traversing of roads and railways. If the piping network had to run along or across public roads in towns, the municipality's permission had to be obtained.

These permits were granted in the form of concession agreements (*koncessionsaftaler)* In these agreements the municipality often gave exclusive rights to supply the relevant town or city over a stated period of time. In the absence of a risk of competition from other gas supply companies, the private investor could better secure the rate of return on his or her investment. The legality and, therefore, validity of these exclusive rights was extremely doubtful, and with the adoption of the Freedom of Occupation Act on 29th December 1857, came the question about whether the opportunity to claim this type of exclusive right had in reality disappeared. Ministerial approval from this period dealt to a greater extent with the municipality's relationship to the gasworks. It immediately came within the Ministry of the Interior's competence to consider, for example, the municipality's contractual obligations in relation to the purchase of gas for street lighting. In 1859, the Municipality of Frederiksberg tried to give the Danish Gas Company a 30-year exclusive right to supply the Frederiksberg township. The Ministry put the brakes on the agreement and would only accept an agreement in relation to the purchased of gas for the Municipality's own use (Hyldtoft 1994:85). However, where the distribution network had already been constructed, such an agreement, with the character of a natural

monopoly,[11] would quickly give the gasworks' owner an actual monopoly, regardless of whether or not assigned exclusivity was lawful (Hansen 1994:79ff.).

From 1856 onwards, many Danish works were established as municipal owned works. Today the Heat Supply Act regulates the involvement of the municipality as an owner of, among other utilities, city gas supply. Of more importance is the right for municipalities to own district heating, electricity and natural gas facilities. Energy supply has become a task of municipalities.

Concession fee

Concession agreements could also contain provisions requiring the gasworks owner to provide a concession fee to the municipality, or that the municipality could ensure 'remuneration' in the form of a special favourable price on its own gas consumption. The municipality's right to stipulate such fees was built upon the understanding that the municipality could exercise various ownership powers over public roads and also let out the right to deconstruct the associated pipes. To a certain extent, this was inspired by the so called municipal socialism that, following Prussian inspiration, allowed the municipality to earn a profit on public utilities including distribution of water, gas and later electricity, whereupon the funds could be channelled to other municipal functions (Spoerer 2010: 111). The opportunity to charge concession fees became accepted by the legislature with the borough tax reform that was put into action by the legislative act of 11th February 1863 about Municipal Tax in Boroughs outside Copenhagen and, in the case of the regional municipalities, with the Act about Regional Municipalities' Administration, known as the Regional Municipalities Act of 6th July 1867, as referred to below.

Today, municipalities cannot lawfully charge concession fees. The principle of cost zero regarding the municipality utilities now hinders Danish municipalities from supplementing tax income with revenue from supply activities (and supporting supply activities with tax-financed funding). The principle, therefore, involves a prohibition on cross-subsidisation of the tax-financed and the fee-financed parts of the municipal economy (Olsen 1999). In addition, it now follows from the road regulation's 'guest principle', that the municipality cannot charge payments for the presence of piping networks under the road space.

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11 A natural monopoly means that the costs of the necessary infrastructure for the distribution of, for example, energy services are of such a size that, on account of economies of scale, it is only cost effective to have one set of installations through which supply can be performed.

From free pricing to regulated prices

In opposition to the present regulation, city gas supply started as a nonregulated industry with competitive pricing.

The city gas pipeline system was a natural and legal monopoly. Only one gas supplier existed in each area. However, city gas was not without competitors in the 1800s. Kerosene, a fractional distillation of petroleum, dropped in price dramatically during the 1860s, concurrently with increasing petroleum production in the USA, and became a hard competitor for city gas.

Gasworks were able to meet the competition from kerosene by increasing income from the sale of coke, tar and ammonia (Hyldtoft 1994:103f.; Thomsen 2008:33f.). Over time, the value of gas as a source of light increased, with the introduction of new technology such as the gas incandescent lamp, which gave off a strong light through a net soaked in salt – 10 times stronger than other well-known fuels of the day (Thomsen 2008:47). The usefulness of gas expanded to industry, for use in motors, and to the kitchen, to replace old wood stoves.

Today, city gas typically consists of a blend of natural gas and air. This mixture is considered to be covered by the phrase "combustible gasses other than natural gas" and, is therefore, regulated by the Heating Supply Act.

Past, present and the future – the global challenges

The introduction of city gas is a lesson in the different interests that may be involved in energy supply. Although today's energy supply in many countries is much more developed, there are still major challenges. The issue of security of supply is still very much relevant. The role of Denmark as a net exporter of energy is coming to an end with the mature oil and gas fields in the North Sea, and large parts of Europe has made itself dependent on import of natural gas from Russia.

The municipalities established their role in energy supply during the introduction of city gas, as described above. This role they have preserved. The cost-zero-principle has stopped the municipalities to gain a profit from operating energy utilities or to demand a concession fee. However, many municipalities are in these years involved in strategic energy planning in order to reduce their CO_2 footprints. Their utility sector may be very relevant in that aspect.

City gas was introduced a natural monopoly as a distributor of energy. This had led to today's price regulation. The lack of legislation as described on the time of Andersen is today not possible.

New challenges had been added to energy supply. A significant part of energy policy relates in many countries today to the risks of future climate change. Internationally, climate policy has been only a limited success. A way to reduce these risks is to limit the use of fossil fuels. The promotion of renewable energy has been a common answer to that challenge. And renewable energy represents a win-win situation. Being a domestic resource renewable energy both works in favour of climate policy as well as security of supply. Another big challenge is an expected increase in demand from a growing world population and an increased demand for welfare. Even in a country like the United Kingdom we find significant problems with energy poverty and worldwide more than 1 billion people today lack access to electricity in their homes.

Had Hans Christian Andersen lived today, his optimism might have embraced the new era of energy advances. The many wind turbines which as tall white towers within only a few decades have come to dominate the Danish landscape would have suited his technique of making inanimate objects come to life. They are a result of modern energy legislation. He would probably also have spotted the solar panels on many Danish roofs and the district heating and natural gas systems that heats the majority of Danish homes. And would his humanism not have gotten him to describe the energy poverty which is reality for so many people in our contemporary society? We can only miss his pen.

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Book Review:
Pakistan's Experience with Formal Law: An Alien Justice

Osama Siddique, Delhi: Cambridge University Press, 2014, ISBN 978-1-107-63627-9, paperback, first published 2013, pp. xvii+469.

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This book ventures to lay bare the long-term history of Pakistan's tryst with formal or Western law up to and including recent attempts at law reform supported by the Asian Development Bank, the USAID and others. The author is fit for his ambitious project. As a consultant repeatedly engaged in reform projects, Osama Siddique has gained an insider's view of what he refers to as the "reform club", i.e. the circle of people who conceptualize, fund and monitor legal reform. The author also builds on his experience as a lawyer in appellate courts in Pakistan and in the USA. Thirdly, Siddique draws on his wide readings in the legal history of South Asia and on his interactions with sociologically inclined legal scholars in the USA, where he did his doctoral work under Duncan Kennedy at the Harvard Law School. The result is an impressive work, which is analytically powerful, empirically rich, and highly critical of the ongoing projects in which Siddique has himself participated. The author does not compare the process of legal reform with other reform processes, structural adjustments or innovative experiments taking placed in Pakistan with or without international development assistance. Hence, the book does not allow us to judge whether reform in the legal sector has been more of a failure than reform in other areas. The author also refrains from taking a close look at what appears to me to be the most pressing alternative to formal law in Pakistan, i.e. Islamist justice. Siddique's attention is not on the sharia until in the end of the book, where he discusses the rebellion in Swat. He only fleetingly discusses Afghanistan in the text, and the country does not even figure in the index. Had Siddique's focus been on Islamism and tribal law-ways, the book might have been more charitable towards what has survived of formal law in Pakistan. The mere fact that formal state law has been able to hold on to its domain in spite of Taliban's attempts to extend its rustic form of sharia justice, could be taken as a confirmation of the basic strength of formal law. Among Pakistan's neighbors, it is India, which attracts Siddique's attention. The two countries share a colonial legal history, and they have a surprisingly large part of their post-colonial legal history in common, too. However, they differ as regards the ability of religious law and of martial law to threaten and undermine the liberal legacy.

The Introduction of the book provides a "broad snapshot" of Pakistan, which takes us back to the time of those who created the formal law in British India. Were those early reformers to rise from the dead and visit a court compound today, they would recognize much of what they saw, Siddique observes.

Chapter 1 is an incisive discussion of the "narratives of colonial displacement." Rehearsing and elaborating on the discussions started by BS Cohn and others, Siddique distinguishes three views on the transition from Mughal to British rule, and on the displacement of Muslim criminal justice. In Chapter 2, the author jumps straight from the nineteenth century to an analysis of law as practiced in 2010-11 in the Lahore districts courts as revealed by a large survey of 440 more or less randomly selected litigants undertaken by Siddique and his team of students. The sample appears somewhat hazy in terms of ethnicity and caste, and even in terms of class (pp. 114-5). Nevertheless, it graphically portrays the "uneven playing fields" that the less fortunate litigants experience. Thus, the survey reveals that two-third of the rural litigants have experienced coercion, typically as threats of violence or as actual violence by their legal opponents (p. 129). As for the court language, more than half the litigants stated they were unable to understand court proceedings and legal texts, because these are largely in English. More surprisingly perhaps, almost half the respondents were unable to understand the technical Urdu used in courts proceedings (p. 139). While a number of litigants declined to answer questions relating to the judges, about one-third expressed doubts about the impartiality and integrity of the judges (p. 143). Not surprisingly, many litigants expressed preference for alternative fora of dispute settlement. They listed their preferences in the following order: family, neighborhood, caste, panchayat, local influential people, local large landholder, and lastly the local bureaucracy as preferred forum for conflict resolution (p. 173). The survey does not report any preferences for sharia courts of various ilk. One wonders whether the survey offered the respondents this option.

Chapter 3 broadens the scope from Lahore to the Punjab as a whole where some 2,108 households were asked about their perception of criminal justice. Their answers revealed a general sense of insecurity. Security was not primarily sought in state institutions. Instead, people put their faith in "personal influence", "influential relatives", "not falling foul of criminals or local powerful people", and on "having male children"! (p. 195). Chapter 4 reviews law reform approaches in Pakistan spanning from Zia-ul-Haq's Islamization drive on the one hand to the Pakistani form of Public Interest Litigation on the other. Notably, Siddique holds Public Interest Litigation responsible for judicial overreach and populism. In substance, his critique is not unlike Upendra Baxi's critique of reform attempts in

India. Baxi formulated his critique already in the 1980s. Perhaps, Siddique could have relied more on recent sources relating to India (pp. 253-5).

Chapter 4 serves as an introduction to chapters 5 in which Siddique gives the reader privileged access to the Asian Development Bank (ADB) sponsored "Access to Justice Program" which was implemented between 1998 and 2010. This program "remains to date the largest externally funded justice sector reform program in the world" (p. 263) costing around $350 million. The program had a large infrastructure improvement component, but apart from building better court houses, it largely aimed at making justice more accessible by "delay reduction in courts" (p. 263; p. 331, note 187). To evaluate the program, Siddique interviewed around fifty independent experts, reform consultants, donor organization officers, government officials, as well as judges and lawyers. Most of these interviews were conducted when he was a short-term consultant on these very projects (p. 271). This raises the question of the status of expert knowledge. In the UK this issue was raised by David Mosse's book *Cultivating Development* in which Mosse similarly redeployed the knowledge he had gained as a consultant for critical academic purposes. Although some of the stakeholders agreed with Mosse's conclusions and consented to the publication of his work, others did not (see Devi Shridhar's review of Mosse's book in *Anthropology Today* 21, 6, 2005). In the Introduction, Siddique dares the reader to sue him for his work. This shows that he knows he is on thin ice, but that does not prevent him from spilling the beans in later chapters. His justification for doing so is his conviction that legal reform should not be decided behind closed doors by an unaccountable "reform club", but by the wider circle of legitimate stakeholders.

The reform process led to some remarkable results. The number of female judges increased from 85 to 171 and the salaries of judges increased threefold. However, there were many flaws. While alternative dispute resolution mechanisms were created, the courts did not refer any cases to them. While it was decided that key laws were to be translated into simple Urdu, this was not done. Centers of excellence in legal education were to be established, but they were not. Importantly, the judicial process was to be accelerated by bringing the benches in various courts up to their full, sanctioned strength, but even if that were to happen every judge at the Supreme Court would still have 1,120 cases to decide upon, while every judge in the Lahore High Court would have 1,411 cases to deal with (p. 306). The ADB-funded program was mostly implemented during Pervez Musharraf's rule when terrorism in Pakistan had not yet turned inwards to the same degree as it did after Musharraf lost power. Hence, the project was carried out at a slower pace, which allowed the project authorities to ensure what they called "full compliance" with the 64 policy actions laid down. This situation changed and in Chapter 6 called

"Reform nirvanas and reality checks", Siddique paints a dramatic picture of the situation in Aidland after the Taliban started attacking the Valley of Swat in earnest. Thus, the reader learns about the "subtle institutional and individual political biases, agendas, blind spots, and idiosyncrasies that characterize important players in the reform discourse and process…" (p. 341).

In 2010, the USAID started working on a program worth $90 million to "Strengthen the Judiciary to Achieve Progress in Judicial Efficiency, Transparency, Accessibility, Independence and Accountability" (p. 342). The program was shelved but it was followed up by "Local Court Efficiency Assessment Program". Along the way, differences widened between the donors and the Pakistani lawyers, who were mobilizing against the government at that time. Differences also developed between the judiciary of the Khyber Pakhtunkwa province and the USAID wanting to focus on the Valley of Swat which the judiciary rightly considered atypical of the province as a whole (p. 349). As the goals of judicial reform were merged with the war on terror, local consultants were charged with studying out-of-bounds detention centers and to propose legal and constitutional amendments to handle the situation in Swat. The local consultants – including Siddique - were not inclined to venture that far and pointed out that this could cause a diplomatic row (p. 357, note 33). The project folded, but it was followed by the "ADB Post-Conflict Needs Assessment of FATA, PATA, and Khyber Pakhtunkwa" (the ADB PCNA). The period of two weeks allotted for collecting data for this difficult assessment was too short, and it was made even more unrealistic by the highly complex institutional setup embedding the project. Lawyers are generally considered tough people able to swallow a lot, but it seems Siddique was in for more than he could stomach (p. 368, note 60). As his team faced impossible deadlines, it was to allocate time for mandatory sessions with a "Conflict Sensitivity Advisor", a "Gender Sensitivity Advisor", and a "Development Deficit Assessment Expert" saying nothing which was not already stated in the Terms of Reference (p. 370). Finally, the "Results Expert" would descend upon the team. "It was the almost fanatical quibbling over mostly pointless details that diabolically sucked the soul and marrow out of the entire endeavor", Siddique concludes (p. 373). The ADB PCNA also petered out and was followed by other initiatives during which Siddique actually visited detention centers (p. 394, note 124) and spoke to a sensible person acting as the Anti-Terrorist Court Judge in Swat, "arguably conducting one of the most dangerous jobs in Swat, if not the country" (p. 393).

In his final chapter, Siddique sums up the existing approach to reform: He finds it too narrow and summarizes his wider and deeper approach to reform, which would focus on "the adequacy of the existing court structure and its ambit; a review of the process through

which judges are appointed, evaluated, and held accountable for their performance; a qualitative review of the judicial function and output; a more drastic review of procedural law and legal processes; and, finally, more meaningful and deeper legislation directed at substantive law reform, in order to address legal persecution and misuse of legal remedies" (p. 423).

Altogether Siddique's analyses and prescriptions appear relevant to legal reform of the formal law inherited from the colonial period and insufficiently revised since then. Siddique is evidently inspired by Indian attempts at law reform, but Pakistan is confronted not only with a colonial legacy in need of reform, but also with a range of problems arising after 1947. Though Siddique's canvas is very large, is does not cover all that should be covered.

SPECIAL ISSUE OF *NAVEIÑ REET:* NORDIC JOURNAL OF LAW AND SOCIAL RESEARCH: Law and Governance in Gilgit Baltistan, Pakistan

Call for Papers for special issue 2015

Edited by Livia Holden (Karakoram International University – Durham University)

***NAVEIÑ REET:* Nordic Journal of Law and Social Research (NNJLSR)** is a peer reviewed annual journal striving to improve the quality of legal education, encourage legal research, and build a strong tradition of vigorous academic discourse and publication in Pakistan. NNJLSR aims to publish original and innovative legal scholarship in the diverse sub-fields of law and social sciences. NNJLSR is also keen to publish interdisciplinary socio-legal research that explores the interface between law and political, economic, social and legal institutions.

NNJLSR invites contributions for a special issue edited by Livia Holden on *Law and Governance in Gilgit Baltistan, Pakistan*. Contributions will examine the processes of policy making, state and governance, ancestral rights and indigenous knowledge, law and development, recognition of rights, and judicial and extra-judicial dispute resolution. In particular this special issue will scrutinize the discourse on democratic empowerment and participatory governance in relation to law practices and local conceptualizations of legitimacy. It will address the stakes of institutional development within and outside the state as well as the increasing role of NGOs and civil society. Commentaries of policies, case law, and ethnographic case studies with broader focus will also be considered if they adopt a comparative perspective that draws on the similarities and differences with the cultural and/or geopolitical setting of Gilgit Baltistan.

Non-exclusive questions and themes for enquiry will be:

1) Practices of law and governance
2) The role of ancestral rights and older practices of law within the transition process of development, globalization and negotiation of territorial boundaries
3) Multiple registers of governance and the epistemic construction of law
4) Universalistic vs. context-sensitive interpretations of rights and governance
5) Law and governance and the neo-liberalism political agenda in a contested territory
6) Law and governance in conflict zones as a field of research
7) Rights, cultural heritage, traditional knowledge and their recognition
8) Traditional methods of imparting knowledge and solving disputes

9) Use of natural resources and indigenous rights
10) Key-concepts for policy writing

The above-mentioned themes are illustrative and authors are encouraged to submit abstracts on a greater variety of subjects related to law and governance in Gilgit Baltistan. This special issue also aims to provide opportunities for debating on the socio-political agendas revolving around indigenous knowledge and the stakes of preservation, cultural heritage and change, social theories of authority and representation, legal and social identity, and public policy. Papers based on first-hand research will be privileged but theoretical discussions, engaged social research, and legal commentaries are also welcome.

Multidisciplinary approaches from academicians in all domains are solicited. Authors may use a variety of methods non exclusively including qualitative, quantitative, historical, ethnographic, financial, economic, and management analysis. Abstracts between 500 and 1000 words plus a short bio should be sent to Livia Holden at liviaholden@kiu.edu.pk, livia.holden@durham.ac.uk, and liviaholden@insightsproduction.net by the 31 December 2014. The authors of selected abstracts will be invited to present their full papers at a workshop to be held either in Pakistan or in Denmark. Subject to availability of funds and exhaustion of other financial resources scholarships will be available for covering travels and accommodation.

SPECIAL ISSUE OF *NAVEIÑ REET:* NORDIC JOURNAL OF LAW AND SOCIAL RESEARCH: Law and Transitional Society: Chinese and Global Perspective

Call for Papers for special issue 2016

Edited by Rubya Mehdi, Ditlev Tamm and Bent Ole Gram Mortensen

Law, as a proudly social practice, has been undergone tremendous transformation in a transitional society. Both empirical evidences and theoretical research reveal that law plays a more or less significant role in a changing world with the rapid development of science and technology, growing market economy, decaying traditional values, increasing environmental contamination, even with our epistemological grasp of the topsy-turvy world. Societies change ruthlessly and almost every legal system is struggling to be responsive. This trend is true in a globalizing world and of particular relevance in a Chinese context.

Obviously, the Chinese society has been changing since its reforming and opening up in late 1970s. As an emerging global power, the Chinese legal system is inscribed in political, economic, cultural, social and legal practices throughout the past three decades, resulting at times in new, hybrid forms of laws and legal institutions, but also often triggering continuing struggles and conflicts.

This special issue wishes to explore how the Chinese legal system respond the social transition and shaped by it and what roles would China play in the global legal environment. while we aim to engage in the global dialogue on China's legal system both from insiders' and outsiders' perspective, we also wish to gather all the theoretical and practical issues of any other countries who have experienced or are experiencing a transitional society.

We welcome contributions that address transitional society in both Chinese and global contexts, highlighting the legal aspects and address legislation, law enforcement, legal institutions, legal history and legal cultures, as well as more theoretically and methodologically oriented discussions.

Non-exclusive questions and themes for enquiry will be:

– Transitional society and legal responsiveness
– Chinese legal system and Constitutional changes
– Environmental Changes and Chinese Law

– Economic law and globalization relating to China
– Transnational issues in changing society

The feedback workshop is jointly organized in December 2014 in Copenhagen and March 2015 in Wuhan

– Danish Forum for Chinese Law and Legal Culture, Centre for Studies in Legal Culture, Faculty of Law, University of Copenhagen
– The Department of Cross-Cultural and Regional Studies, University of Copenhagen, Denmark
– The School of Law, Wuhan University, China.
– The research program in law and Legal Consultant and Service at Wuhan University

Submission

Submissions should include the submitter's name, institutional address, e-mail address, short CV, and a 250-word abstract of the proposed paper and should be sent via e-mail to fxyxyw@whu.edu.cn and rubya@hum.ku.dk no later than April 30, 2015. Submitters will be notified of the outcome shortly after the deadline.

Publication

The papers of the workshop will be published in the special issue of NAVEIŃ REET: Nordic Journal of Law and Social Research 2015, www.jlsr.tors.ku.dk

Information for Contributors

Contributions must be complete in all respects including footnotes, citations and list of references.

Articles should also be accompanied by an abstract of 100-150 words and a brief biographical paragraph describing each author's current affiliation.

Articles usually are expected to be in the range of 3000 to 6000 words and presented double-spaced in Times New Roman 12pt. Longer or shorter articles can be considered.

Please use British English orthography (of course, do not change orthography in quotations or book/article titles originally in English). Use the ending –ize for the relevant verbs and their derivatives, as in 'realize' and 'organization'.

Italics are used only for foreign words, titles of books, periodicals, and the names of organizations in the original language (except when the original is in English).

Dates are written in this format: 11 April 2013.

For numbers please use the following formats: 10,500; 2.53 for decimals; 35%; 5.6 million.

If a footnote number comes together with a punctuation mark, place it after the mark.

Standards for Source Referencing

It is essential that source referencing provides full and accurate information so as to enable a reader to find exactly the same source that is being referenced. Equally there needs to be pedantic consistency of presentation.

Please use the Harvard system of referencing which has grown in popularity in academic writing in education and the social sciences. In the main text, a reference or quotation is annotated in parentheses with the surname of the author, the date of publication of the work and the page number from which the quotation was taken. The full bibliographic details are then provided in a list of the references at the end of the work.

Contributors are requested to submit a soft copy of their article and abstract to rubya@hum.ku.dk in Word format.