

## **The Space to See: Law and the Ethical Imagination**

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When will we teach our children in school what they are? We should say to each of them: Do you know what you are? You are a marvel. You are unique. In the entire world there is no other child exactly like you. In the millions of years that have passed there has never been another child like you. And look at your body – what a wonder it is! You may become a Shakespeare, a Michelangelo, a Beethoven. You have the capacity for anything. Yes, you are a marvel. And when you grow up, can you harm another who is, like you, a marvel? (Casals 1970: 230)

### **Introduction**

‘Beyond Text in Legal Education’ was a project designed to see how we could use other resources than text in legal education, stimulate the creativity and ethical imagination which we felt was necessary for the life of law. The centre of the project was a set of experiential workshops which lasted two days. They were led by artists in the plastic arts and in movement. Lawyers, professional legal educators in the academy and outside, and legal academics took part; the aim being to use experiential and artistic methods to see if they could begin to provide modes to approach the law, other than the rich textual resources of the law itself. The point of this chapter is to consider whether we can in this way show the need for, and develop the necessity of, a space for the ‘development of moral sensitivity’ in law and legal education. We want to look at images and constructions of this space and how it forces us to consider modes of learning other than those of text.

There are two preliminary issues that need to be considered. Firstly, this demands a particular ethical vision of law as an institution. This is not something about acting morally rightly or wrongly rather it is about seeing what sort of life, viewed as a whole, is entailed by law as an institution which demands the practice of the moral imagination. Let us take an example to explain. When someone wants to make his career in the army, and wonders about the moral implications of doing so, he has to consider two different though in some ways related issues. Firstly there will be issues about what it is morally right to do in the context of army life; questions about the Geneva Convention, the validity of military orders, what counts as a civilian and the like. But there are further broader issues. These concern, not the quality of the moral decisions that might have to be made while in the army, but the moral quality of the choice to join the army. This raises questions about a way of life viewed as a whole and not as one composed of good or bad decisions within it. The issue here is how such a life contributes to someone's flourishing and to the good and flourishing of others. That sort of question involves comparisons with other lives and careers; teacher, plumber, doctor, businessman and judge. We are asking here about the life rather than the worth or not of the particular actions within it. A judgement about the former might be different from a judgement about the latter. Someone might have acted morally throughout their life but, considered as a whole, did not choose a particularly ethical way of life. For example, some people might think of the military as a regrettable necessity in our world but not the sort of life that one might ethically aspire to. Thus a person who has acted honourably in that career might still (justly) be compared

unfavourably against those who chose some other life. If we continue with the example however, we can see that there is much more to it than that. For the ethical value of the military life would depend upon what sort of institution (army) the military life was embedded in. Different kinds of army might point to different possible answers. Thus, for example, having a career as a soldier in a peace-keeping army, a UN army for example, would be something different from being a soldier in an imperialist or aggressive army.

Our project sees 'living the life of the law' as being embedded in a particular view of the law, one that is based on interactivity and not a top-down management of society. Here we do not think of law as a regrettable necessity, something we have to have because of the defects we have in the state of nature (as in the classical liberal story). Fuller (1969) sees the law as interactive and communicative – it is not as it is portrayed by positivism, which he sees as a unidirectional theory. The law giver does not only give. Her interaction with the law receiver also changes that law and it becomes a form of life which expresses solidarity through giving and taking. Here there is an emphasis on the mutuality of the interchange, of reaching and responding to the vulnerability and need of the other, and of taking the risk that entails. On this way of looking at it, law can be viewed as an essential part of the way we connect with others by stepping outside our closed and circumscribed confines and giving ourselves to them. In that sense it is a form of moral community, an enterprise of 'putting ourselves under the governance of rules.' The emphasis on enterprise is important since it has the connotations of a common journey, of something that we all take part in, more than just

the technical rational framework for all of us to achieve our individual goods. It becomes part of our common good as well.

Secondly, as befits a project called 'Beyond Text in Legal Education' we have to look at the constraints of the text and how law appears to be embedded therein. We can view law as a 'Religion of the Book', one of the Abrahamic Faiths which are based on sacred and defining texts that found their belief and practice. The foundational document then serves as a way of defining one's identity and what one has to do. So the word of God becomes solidified in the texts of the sacred scriptures. Of course this happens to a greater or lesser extent and there are different ways of reading and interpreting the texts, with tradition being an important aspect of it for some. Ultimately however, it all returns to the text. One cannot be a theologian in these traditions without reference to the text.

Law is the secular religion.<sup>1</sup> The rationality and order of God are replaced by law and our identity is defined in and through it. We are 'people of the law' and that defines our identity whether through a 'constitutional patriotism' as in the US and proposed for Europe by Habermas,<sup>2</sup> or in the self-identity of the 'common law.'<sup>3</sup> 'In the beginning was the Word' is still the case but that word is Law. As Karl Schmitt (1985) pointed out, much theorising in constitutional law is secularised theology, the conceptual problems being of a similar order. Theological questions, as Hegel says, are

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<sup>1</sup> Fitzpatrick (1992).

<sup>2</sup> See Breda (2011).

<sup>3</sup> See, e.g., Collins (1995) and Legrand (1996).

ways of looking at important philosophical questions. And, in the West, the connection between the two discourses has been close and mutually reinforcing.<sup>4</sup> So, just as for Hegel, the Incarnation was the theological way of looking at the central philosophical problem of the relation between the universal and the particular, questions of paradoxes of sovereignty in the realms of constitutional theory are replays of the paradoxes of the sovereignty and power of God.

Again, as in the religions of the book, the sacred scriptures of law are also counterposed to a greater or lesser extent by tradition and there are different ways, some stricter than others, of reading the text. But one cannot work as a lawyer without ultimate reference to the text, for it is by the text that ultimately we live. Text and law become synonymous for that makes it easier to guide our life by the ordinary experience to which we always have to refer. The logos becomes more stable when written down and for those that live by it that stability is vital for the security of the system and the way of life. And those who apply it and interpret it, the agents of the text become the text itself; have it inscribed on their bodies. Law, as a text-based discipline has both strengths and weaknesses. The strength is that it enables decisions to be transparent and constrained by the text. The weakness is that decisions tend to be dominated by text, and situations are shoehorned into the text with stultifying results. The answer is always sought within the text, viewing the situations law encounters through the optic of the text, thus manipulating them rather than transforming them, and not letting the situation speak to the text and the law.

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<sup>4</sup> See Nicholls (1995).

And of course, as inevitable in all of the 'Religions of the Book', texts run out and gaps appear. What do we do? We might ignore it and become fundamentalists dominating reality with the text. We might expand the gap too such an extent that text becomes irrelevant. Again, we might seek, in these situations, nuanced ways of interpreting the texts. We will however still be in thrall to the texts. We might think that text will run out at its extremities. There, imagination might be required but that would not be an all-pervasive feature of the system and any imagination required would be strictly confined to these liminal places. Many modern legal theorists, as Del Mar shows, even those who are worried by the stasis of meaning that the law produces when solidifying into this system of clearly organised and timeless categories, do not go beyond language and the text in their efforts to ameliorate this.

Our project seeks to go further. Let us take an analogy. When people view art objects in galleries, too often they rely on textual explanation, looking for the text in the catalogue to explain it and not letting the object explain itself. Some curators try to get people to engage the art without text, to use their imagination to let the object speak to them and not be subsumed by the text. Lawyers face a similar situation when they encounter events that need decision; too often they look to the text and do not experience the particularity of the situation by letting it speak for itself. If we want, as we do, to turn away from that, then the implication is that we should not confine the need for imagination to the liminal points that we detailed above, the space that the gap creates. Rather we should see the need for imagination as all pervasive, as an integral part of law, that there is always within law a need for a space for this imagination to

operate. So we should not think of it as a gap only when we approach the limits but rather as an all-pervasive space that is integral to the law, one that enables the exercise of the imagination and lets the outside in.

In writing about this space and this project, I will use as my organizing principle – parable; specifically the parable of the Good Samaritan. This is so for a variety of reasons. Firstly, for the Hegelian reason outlined above. Secondly, because parables in themselves are a sort of parabolic reasoning where paying imaginative attention to the story, to the narrativity, moves one into areas that did not seem possible. The Samaritan story in particular is about the imagination necessary to use the transformative power of attention and encounter to see through patterns and to move to a transformation, and thus regeneration, of present categories of the law. It is about a movement beyond, about the possibility and the potentiality of connection. Attention, encounter, education, and movement and patterns are what this project interrogates.

### **The space in law**

The space that this view of law entails has been variously described. Michael Detmold (1989) calls it ‘The Particularity Void.’ For him this is the ever present space that exists between the meaning of the law and its application. Ultimately the law asks what it is reasonable to do and that question is never, for Detmold, exhausted by the reasonableness of the rule. It might be unreasonable to do what is reasonable and reasonable to do what is unreasonable, the answer is never exhausted merely because the law is reasonable. Thus it is clearly unreasonable to apply the reasonable rule, ‘Do

not get off the bus while the vehicle is in motion' if the vehicle is hurtling down a hill into the sea. For though that rule is reasonable, it still has to be applied in the particular case and this must be separated from the justification of the rule itself.<sup>5</sup> This then is the site where the universalism of the law and the particularity of the object meet and feed off each other. Think of the trial or a decision-making organ as the site of such a space. What this does is to enable 'normative surplus' to be fed into the law because in making the particular decision, the decision maker is doing so for the particularity of the case. There, 'normative surplus' will be fed into the law. For in making the particular decision the decision maker, even though she refers to the general norms of law, is deciding for the particularity of the case and the needs of that particular situation. The decision is meant to solve that case and no other. But it will also generate material, 'normative surplus', which will feed back into the general legal norms legal system, helping to regenerate and renew it.

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<sup>5</sup> We can put this point more abstractly by following Klaus Günther (1993). For him, following Habermas, one must posit two different discourses. One is the justification discourse where norms are justified and where the criteria of universalizability are applied – so norms are justified by the Habermasian universalising criteria. The second is the application discourse, which decides whether or not a particular justified norm is to be applied. The criteria used here are different from those used in the justification discourse. One might say that a law has a meaning element, whether it is justifiable within the system and a jurisdictional element whether it ought to be applied in this particular case. It is as though I fire an arrow but I cannot be sure whether what I think of as the target is the target until I hear and examine it, until I let it speak to me. For it can always ask, 'Why me?' and that can only be answered at the time of decision.

Detmold takes this further. He takes us to a concrete example of the particularity void. He takes an example from Tolstoy's *War and Peace* and the confrontation therein between Pierre and Davout. Davout has been given orders to shoot Russian spies but he does not shoot Pierre. Holding his rifle, he looks at him, hesitates and does not fire. Tolstoy says that at the moment of hesitation many things passed through Davout's mind:

Davout lifted his eyes and gazed searchingly at him. For some seconds they looked at one another, and that look saved Pierre. It went beyond the circumstances of war and the court-room, and established human relations between the two men. Both of them in that one instant were dimly aware of an infinite number of things, and they realized that they were both children of humanity, that they were brothers. (1979: 457)

And so, though the moment may be for Detmold mystical, it is also the everyday experience of the law

I, the judge, and Davout, at the moment of practicality entered the unanswering void of particularity, the realm of love, about which only mystical, poetic things can be said... or nothing... Judges enter this realm every day. (1979: 457)

There are two points to be borne in mind here. Firstly for Detmold, this space, this meeting of meaning and application, of the universal and the particular is omnipresent in the law. It is about a moment of hesitation and encounter where attention is paid, and so it is about that ineffable moment. It is at that moment that Davout sees the particular Pierre – he sees through the enemy and he sees not a brother but someone who should be treated as a brother and then he imposes that category on him. He pays

attention to Pierre. In that moment of attention he comes to realise that he should not shoot him; he should not be instantiated in the rule, 'Shoot all enemies'; that will not be attached to him. The particularity void is thus both this ineffable situation and the idea that we have to start from a particular situation. We cannot let the rule make us forget that. Davout does not start from 'All spies should be shot.' He starts from meeting Pierre on a battlefield with all the attendant circumstances, including the rule, 'Spies should be shot.' And by paying attention to that he comes to see Pierre's pain. He sees his need and in doing so regenerates and expands 'All men are brothers and should be treated with compassion' to him.

It is important to stress that this space is not meant to throw away universality. Raimond Gaita (2000) makes this clear when he gives us a striking image of that space 'about which only mystical, poetic things can be said.' He talks of a nun he encountered while working as a student in a mental home. There, as was common in those days, the inmates were treated by the majority of the staff like animals. He and some of the staff tried to treat them, as he hoped, like human beings. But the nun, by the quality of her interaction with the inmates, put them all to shame. A large part of Gaita's book is devoted to seeking to understand the meaning and significance of this encounter and interaction, the quality of what he sees as the nun's love. Kant, he says, would deny that this is something upon which one can base an ethic and, of course, he would be right in that you cannot operationalise an ethical and institutional life by making us all like that nun. Why, however, he goes on, would we want to build societies that care and enable us to live together in peace and justice unless we were touched with something of what

that nun had? So one can see that at the centre of our Kantian legal universe is that space, the 'realm of love', which nourishes and sustains it.

### *Seeing and attention*

Gaita recognises that the nun acts in the way she does because she can see something that he and the others were not able and that this transforms her interaction with the inmates. Here we can see the influence of Simone Weil. She (1951) thinks that all humans have a power or faculty which she calls 'attention' that we should develop. It is a 'method of the exercise of intelligence which consists of looking' (1951: 111). It is both an internal mental state and something that goes outside. It prepares the mind in quietness and readiness but waits for something on the outside, which it will receive with compassion and help. The real key here is that we are to be still, open to that which is outside of us and which will move us in many ways. This can be shown in the way we find God. For Weil, it is not that we actively search for God, rather it is God who searches for us.

We do not obtain the most precious gifts by going in search of them but by waiting for them. Men cannot discover them by his own powers, and if he sets out to seek for them he will find in their place counterfeits of which he will be unable to discern their falsity (1951: 112)

We should not busily seek things out but rather rest and wait to be able fully to appreciate it and not busy ourselves in a futile effort to grasp that object.

The heat of the chase. We must not want to find: as in the case of excessive devotion, we become dependent on the object of our efforts... it is only effort

without desire (not attached to any object) which infallibly contains a reward...

By pulling at the bunch we make all the grapes fall to the ground. (Weil 1951: 106) quoted by Dietz (1998: 96)

For this you have to cultivate 'attention':

Attention consists of suspending our thought, leaving it detached, empty, and ready to be penetrated by the object; it means holding our minds within reach of this thought. (1951: 111)

This is both active and passive. We should be open to receive but that demands active concentration and intelligence. Though it is not a sort of flexing of the muscles that makes you feel that you have been working, to pay attention is the most demanding of things. One needs to be unselfconscious, not grasping but alertly and intelligently waiting. The key is openness and it is in these moments that one is open to illumination. Weil applies this to education where she argues that students should not struggle immediately to grasp what is being told – for that way they will lose it and not understand. Rather they should 'pay attention' and listen, trusting that the truth will come to them. They should not expect a result or outcome straightaway but wait for it to grasp them. But this is not just a sort of active contemplation. Though, as Dietz says, a significant element of it comes from the French connotation of *attendre*, to wait for, to expect, to long for, it also has the other connotations of paying attention to, caring for. What is its pay off? For Weil it is only in this way that we can connect with the reality of the world and our situation. Weil thinks of the world as a text which we cannot read because the symbols of which it consists are solidified and keep us from getting to and receiving its reality. Unless we are still and pay attention we will be swept along by

these solid symbols, the ‘force and gravity of the world’, unable to pierce through to the reality below.<sup>6</sup>

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<sup>6</sup> Though this metaphor of ‘reading the world’ might seem to clash with the idea of ‘beyond text’, it need not if we view it in the following way. The way the world becomes solidified in symbols is as though it becomes a text and an object of univocal meaning, forcing us within its univocal categories to read it as a book, thus staying within its categories. Collins (1990) makes this clearer when discussing digitisation and symbols. The meaning resides in the symbol which, within certain tolerances, will always stay the same. When a gold coin, for example, was worth its weight in gold, it mattered whether it was clipped or shaven because its condition affected its value. Now, when it is a symbol for a particular value, its condition is irrelevant. It does not matter if a fifty pence coin gets slightly worn, it will still retain its face value.

A book and writing can be viewed as digitised speech which has the effect of making that fluid and uncertain and interactive form (*parole*) clear and univocal by translating it into symbolic form by means of alphabets. And that is why Plato in the *Phaedrus* was against it. Collins (1990: 24) quotes Haugeland:

But the real importance of digital systems emerges when we turn to more complicated case. Consider for a moment, the respective fates of Rembrandts’ portraits and Shakespeare’s sonnets. Even given the finest care, the paintings are slowly deteriorating; by no means are they the same now as when they were new. The poems by contrast may well have been preserved perfectly... we probably have most of them exactly the way Shakespeare wrote them – absolutely without flaw. The difference obviously is that the alphabet is digital... whereas paint colours and textiles are not

He also uses a quotation attributed to Galileo used in Abode Systems advertising.

But above all astonishing inventions, what loftiness was that of the man who conceived of a way to communicate his most recondite thought to whatever other person, though separated from him by the longest interval of space and time! To speak with those as yet unborn, or to

For Weil, the spiritual and the political come together for it is, as she says in her essay 'On education', a way of coming to the love of God and to the love of the neighbour. It is the way we can be moved by and be able to help those in radical need; those whom she calls the 'afflicted.' Attention is a form of discernment; seeing what people are saying when they are hurt, seeing conditions of injustice and, above all, seeing myself as equal in affliction. It is a way of 'reading' others.

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be born perhaps a thousand or even ten thousand years hence! And with what ease! All through various groupings of twenty simple letters on paper. (Collins 1990: 24)

But, Collins goes on, things are not quite as simple. The Rembrandt can be viewed in a symbolic digitised way. It might be like money in that we can imagine a perfect Rembrandt forgery that would not be as valuable as an original in worse condition because in the end what is important is, like money, the certification of what it is rather than what it actually is. And the sonnet's meaning changes – it does not contain its meaning just in the symbol: 'What is it that makes us say that there is something uniquely unchanging about the words of the manuscript?' he asks. His answer is that 'it is the deeply ingrained and hard learned, almost reflex-like, ability to see written symbols as the same when we do not have a special reason to reflect on their differences.' (Collins 1990: 26)

And we regain what Plato thought we were losing by paying attention that becomes the 'special reason' – by being able to pierce through the digitised and solidified text of the world and let the meanings underneath move us. Imagine a long inscription around a church. One might try and walk around to try and grasp its meaning but if one were open enough one might pierce through that and see the point as taking you around the church and thus facilitating the contemplation of the sacred with a sacred space.

This is very far reaching. With attention the unafflicted help the neighbour, the one who is afflicted. Attention is hard. Self-regarding motives are not enough even if it is from a wish to help the poor. That patronizes them and sees them as a type, the poor, and not as people who are in pain. We have to be able to pierce through to that cry of pain and not mask it or hide it through, for example, rights talk. Talking of the rights of the afflicted is rather like saying to girls in a brothel that they have a right to a fair wage - it does not get to their pain. For Weil, affliction is contagious and we will do everything to avoid it. Much of our routines are aimed at avoiding that pain:

To put oneself in the place of someone whose soul is corroded by affliction, or in near danger of it is to annihilate oneself. It is more difficult than suicide would be for a happy child. Therefore the afflicted are not listened to. They are like someone whose tongue has been cut out and who occasionally forgets the fact. When they move their lips no ear perceives any sound. And they certainly soon sink into impotence in the use of language, because of the certainty of not being heard. (Weil 1990: 285)

We do not want the pain but it is only when we recognise it that we can do anything. It is to do with a respect for persons, but it is not Kantian. It is not to reduce everything to a rationalistic, objective standpoint. That is not engaging with the person rather it is thinking of oneself as superior, to bring them to where your superior knowledge and self already are. There should be no objective distance between myself and the afflicted.

Weil here makes an important point. She thinks that when the unafflicted truly pay attention to the afflicted, there is no distance between them and they also assume that other person. So Weil says that 'to project one's being into an afflicted person is to assume for a moment his affliction; it is to choose voluntarily something whose very

essence consists in being imposed by constraint upon the unwilling' (quoted in Dietz 1988: 130). As Dietz puts it

Attention towards others is not an act of impartial disengagement at all, but rather an act through which the unafflicted 'project their being' into the afflicted. Relatedly, she [Weil] insists that attention to the afflicted is not rooted in our recognition of any one attribute, like the rational dignity of man, but instead is consumed by the whole person, the 'neighbour' in his or her completeness.(Dietz 1988: 129)

For Weil, then, this 'projection' was literal, as her personal life clearly showed. When I project myself into that person I take on that person's affliction. Attention here then combines the spiritual and the political. The way you help your neighbour who is 'in pain' is by renouncing yourself and embracing their pain.

That is why for Weil the parable of the Good Samaritan was so important for it emphasises the creativity of 'attention' to the cry of pain, of 'affliction.'<sup>7</sup> It takes us on a journey where we are all potential victims, as oppressors and oppressed, and that these positions can change at any time. The Samaritan breathes life into he who 'has fallen among thieves' but at the same time takes on the affliction. For Weil, the parable of the Good Samaritan is not merely a matter of grasping what a neighbour is. It is also a constitutive act making the other a neighbour by the act of helping. This is an invitation to go on a risky voyage with the other and thus transform your world – the outcome of which is risky and unpredictable. What that does for Weil is literally to breathe life into

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<sup>7</sup> For her this was the key to Christianity – Christ taking on the pain of the world and redeeming it.

someone that was as stone, non-human in their affliction. It is an act of ‘creative attention’ (Weil 1951: 146-7, cited in Grote, 1990):

Christ taught us that the supernatural love of our neighbour is the exchange of compassion and gratitude which happens in a flash between two beings, one possessing and the other deprived of human personality. One of the two is only a little piece of flesh, naked, inert, and bleeding beside a ditch; he is nameless; no one knows anything about him. Those who pass by this thing scarcely notice it, and a few minutes afterwards do not even know that they saw it. Only one stops and turns his attention towards it... The attention is creative.

Let us go back to Gaita’s nun for it is she who exemplifies what is going on here. The point is that what makes her attitude one of ‘attention’ is that she does not feel different or distant from the inmates she interacts with. She embraces them as they are and becomes like them. And this, it seems to me, can be different to the disability approaches of, among others, Nussbaum. For they do not embrace the disabled, rather they want to make them like themselves – they have a cool rationality albeit full of compassion – their religion is Kant. They are not mutual partners in vulnerability and suffering but are there to help from their superior position. In doing it this way, however, they cannot see. They have empathy and ‘feel your pain’ but have none of their own.

### *Watchfulness*

We now move to examine more closely this space in law. What is the process involved here? It is instructive to look to Shytov’s (2001) view of legal reasoning. For him, this

involves what he calls ‘sympathy judgements’ which are the main determinant of agapic judgements. This is not about feelings that we might have about the feelings of those upon whom we pass judgement but our understanding of their feelings and of our own feelings. So ‘sympathy judgement’ requires from a judge both attentiveness to the feelings and experiences of the litigants, and to his. It is about grasping the situations in all its aspects, including the aspect that you are now in this situation and judging it; to use the Weilian term, ‘reading’ the situation piercing through to its core. But it is also a situation where there is certain reciprocity, where all must engage. Shytov explains this well by the ‘Good Shepherd’ imagery in the Bible. The good shepherd is not only the one who cares for his sheep and will lay down his life for them but the reason why he is heard and listened to, because the sheep recognise him as such. They listen to him and he to them.

This implies that the litigants’ expectations of the judge are important. The judge’s taking those into account implies understanding of how they might feel if the judgement goes against them and a sympathetic explanation of that. What is important for Shytov is not just feeling your neighbour’s pain but your experience of understanding it. And this is important because it implies that it is not just related to particulars and people with whom one might empathise and thus decide (correctly) in a particular way – it can also apply to principles and rules. Thus in *Brown v Board of Education*<sup>8</sup>, he claims that the judges decided in favour of Brown not just because of their empathy for the downtrodden, but because of their sympathy with the concept of

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<sup>8</sup> 347. U.S. 483 (1954).

harm, which was being done to them. It is in this sense that for him, sympathy does not dissolve into free floating feeling and intuition as it also applies to and is thus constrained by legal rules.

Shytov thinks of sympathy judgements as complex, requiring many skills and above all love for those affected (agapic judgements). But this and knowledge of the law, compassion etc. are not enough, a special virtue which can be seen as his version of Weil's notion of attention is also called for. He calls this virtue watchfulness:

Watchfulness means the willingness of the judge to listen to what are the others moral views on the due application of legal rules in the given circumstances. It is not merely listening but it presumes a readiness to acknowledge the rightness of another's moral perspective. Watchfulness is the result of the humility of the judge who having his own prejudices does understand them, and therefore is open to the different comprehension of the situation. A watchful judge is aware that his own legal reasoning is limited, his justification imperfect, because his knowledge of the facts can never be complete, and his interpretation of legal rules is only his own. (Shytov 2001: 137)

This virtue, as elaborated by orthodox theologians, originates in the *Philokalia*, a collection of writings of orthodox Greek monasticism. In this view it is a method which keeps one pure because it is internally watchful over oneself and is to be distinguished from a state like stupor, drunkenness, etc. It is of importance in looking at how a judge should examine herself in the struggle for a good conscience and the non-bias and non-prejudice of a decision. It is not just a look into one's inner world but it is also looking outside in order to help reach a just decision. It thus looks both at eliminating bias and

prejudice but also for the sources of the correct decision. It could be seen also as a sort of Yoga. This idea was developed monastically into a sort of self-examination through a quasi-Cartesian methodology.

Shytov develops the notion into something more positive, ‘the decision is based on the will to do good to those who are affected by it’ – it is a positive element looking outward and being inwardly receptive. One can compare this to ‘tuning a radio on the wave sought without necessarily listening to the voices on other waves’ (Shytov 2001: 135). It is also active in the sense that it is, as Weil also thought, a work of active intelligence and not something passive. Theophan the Recluse, a Russian Orthodox monk, says:

Attention to what goes on in the heart and to what comes from it is the chief work of a well ordered Christian life. Through this attention the inward and the outward are brought into due relation with one another. But to this watchfulness discernment must also be added so that we may understand aright what passes within and what is required by outward circumstance. Attention is useless without discernment. (quoted by Shytov 2001: 136)

As applied to judgements it implies that, when trying the case, listening to both sides means listening to what they are saying without making one’s mind up. This, as Shytov says, needs skill and attention, especially if some of the parties are not particularly articulate or clear as to what is going on. Weil (1990) talks about what it means not to listen and not to be engaged with the particular case. For then the law cannot hear the cry – it just hears the rights and entitlements and so the ‘vagrant accused of stealing a carrot’ stands before the judge who keeps up an ‘elegant flow of queries, queries and

witticisms while [he] is unable to stammer a word' (Weil 1990: 285).

Attention should be paid not only to what goes on inside the courtroom but also to the internal fears and perspectives of the participants. Shytov exemplifies this in *Remli v France*.<sup>9</sup> The French court did not take seriously, and discounted, a fear of racial bias on the part of Remli. This fear was occasioned by one of the jurors saying in public, 'I am a racist.' The ECHR found a violation of Article 6(1) of the European Convention on Human Rights which guarantees a fair hearing.

Finally Shytov claims, there is not just a listening to the applicants with equal sympathy for them. The judge also has to look through love to the principles of law and the love which will enable her to apply them correctly. One must note that there is a relationship between the judge and the litigants – they expect of her to give a decision and thus she must give reasons. This becomes a way of sharing with them her knowledge of the law and her love for them. This is important because what it shows is that the ethical life of an institution governed by watchfulness will be that interactive and connected view of law which we detailed above. Something at variance with the managerial and directive, that is part of people's good and not outside merely helping them to achieve their desires.

### *Insight*

For Bernard Lonergan (1922) what we have here is something he calls 'insight.' This idea forms the basis of his philosophy of science. Lonergan (1922: 3-4) defines insight

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<sup>9</sup> ECHR 23 April 1996.

thus:

In the ideal detective story the reader is given all the clues yet fails to spot the criminal. He may advert to each clue as it arises. He needs no further clues to solve the mystery. Yet he can remain in the dark for the simple reason that reaching the solution is not the mere apprehension of any clue, not the mere memory of all, but a quite distinct activity of organising intelligence that places the full set of clues in a unique explanatory perspective. By insight, then, is meant not any act of attention or advertence or memory, but the supervening act of understanding. It is not any recondite intuition but the familiar event that occurs easily and frequently in the moderately intelligent, rarely and with difficulty only in the very stupid. In itself it is so simple and obvious that it seems to merit the little attention that commonly it receives. At the same time, its function in cognitional activity is so central that to grasp it in its conditions, its working, and its results, is to confer a basic yet startling unity on the whole field of human inquiry and human opinion.

That insight is something that one sees but not something that is purely a subjective intuition. It is the ability to see that something makes sense, that it has its own integrity and that often precedes what we think are the principles that guide us in that decision. Thus *modus ponens* might be seen as the inference rule that licenses certain deductions in logic, but it might also be seen as a description of the insight that one has when one sees that Socrates is mortal from the conjunction of the propositions, ‘all men are mortal and Socrates is a man.’ It is something we can train ourselves in – it is not a just matter of introspection. The process has something in common with what

the legal realists called ‘hunching’; what cognitive psychologists think of as stages of incubation, preparation etc.

A lot of the activity here consists in a series of questions, an idea which Bruce Anderson (1966) develops. The basic types of insight are ‘direct’ and ‘reflective.’ The former is something that gets to see the relations between data and the latter reflects on that and tests it. They are the results of puzzling; of asking questions like ‘why?’ and ‘what?’ Practical insights give you possible courses of action which are then tested by reflective insight. In evaluating practical insights we look at the relations between our understanding of the event and the implications of the actions. I must have an idea of what sort of situation it is; that precedes my action – I see a situation as a case of delict and not contract and that makes the solution obvious, for example. There is an understanding phase and a testing phase. We might, says Anderson, think of that as the discovery and justification phases, but we ought not to since the creative act of insight occurs in both and it is to be seen as part of one whole process. We have these insights and cannot know about them but we can study them and have insight into our acts of insight. However, says Anderson, this is not to be something spontaneous and unreflective; we must pay careful attention to the various mental activities and describe them. He quotes Lonergan:

Since sensations can be produced and removed at will, it is a fairly simple matter to advert to them and become familiar with them. On the other hand, not a little forethought and ingenuity are needed when one is to heighten one’s consciousness of inquiry, insight formulation, critical reflection, weighing the evidence, deliberating, deciding. One has to know the precise meaning of each of

these words. One has to produce in oneself the corresponding operation. One has to keep producing it until one gets beyond the object intended to be the consciously operating subject. One has to do all this within the appropriate context, which is a matter not of inward inspection but of inquiry, enlarged interest, discernment, comparison, identification, naming. (Anderson 1966: 145)

We must, as Anderson says,

deliberately try to understand the unity and relations among the activities we have identified. We must come to understand, for example, how What-questions are related to sensible and imaginative presentations and to direct insights, how reflective insights related to presentations, direct insight and judgement.(Anderson 1966: 145)

What is important in all of the above comes from the detective story analogy, for it is a sense of how through wonder and the asking of particular questions one can understand the situation in its own terms. One can understand its internal logic or as Karl Llewellyn, says one develops a situation sense. William Twining (1973) in his intellectual biography of Llewellyn gives us the best discussion of this concept. Llewellyn, he says, quotes Levin Goldschmidt in his explanation:

Every fact-pattern of common life, so far as the legal order can take it in, carries within itself, appropriate, natural rules, its right law. This is a natural law which is real, not imaginary; it is not a creature of mere reason, but rests on a solid foundation of what reason can recognize in the nature of man and of the life conditions of the time and place; it is thus not eternal not changeless nor everywhere the same, but is indwelling in the very circumstances of life. The highest task of lawgiving consists in uncovering and implementing this immanent

law. (Twining 1973: 217)

## **Moving with the parable**

### *Pattern and judgement*

We might see this 'immanent law, internal logic' as a sort of pattern as in the detective analogy above. What is important here is not seeing legal reasoning as a form of pattern matching in the way that Bernard Jackson (1988) does. According to Jackson people match patterns against stock stories, and it is the stock story that drives the decision. Thus we must pay careful attention to the stories we have to match situations. But the stock story, however well-constructed, becomes a text. Just as text can be seen as the digitisation of parole, so can that stock story be seen as the digitisation or freezing of the numerous possibilities in the world (see my discussion of Collins, footnote 6). Rather what I have in mind here is the way that one might see that paying attention to the story can be an aid to the imagination, in the sense that it drives one to places unknowable in the text. The key is to pay attention; to let the story speak for itself and not be too quick to apply closure by imposing a principle or pattern on it.

Nussbaum (1999) exemplifies this point. She talks of when the novelist, Joyce Oates, came to her University to give a seminar on her book *Because it is Bitter and Because it is my Heart*. A student denounced one of the characters, Leslie, as a failure and blamed him for refusing to combat the racism in his family. Oates said, 'That's not the way I see it really.' She then, says Nussbaum, went through the story of Leslie's life in detail so that one could see what it was like to be him. Her judgement, which was

merciful, was given by telling his story. This is not just paying attention to the particularities but mixing in the concrete with the general principles of moral judgement. For her, you understand what people are and thus what judgement to make by paying attention to their story, by going through the twists and turns of it. It is on this imaginative journey that one gets a sense of a life and a situation and thus what to do. What is key here is the insight one gets from this journey.

### *Journey and exploration*

Back to parables again. We might, as Jülicher (1899) did, see them as simple stories, complexified by the synoptic Gospels, which essentially were there to give a straightforward moral message. Here they do not disturb what Donald MacKinnon (1974) in his essay on the parables called ‘the cake of custom’, there is always an answer that we can read off. Roger White (1989) argues that it would be banal to think that that is all they are; that the dark and complex stories of the parables are just that and something like the parable of the Good Samaritan could be reduced to the principle, ‘Love knows no limit.’ For MacKinnon also, they are not there to impose meanings on the world, universalised principles to be applied, but are invitations to embark on a journey which might lead to a radically different view of the world – a journey ‘beyond.’

What is important then is the idea of a journey and exploration. For, White says, we are invited not just to see illustrations of the Divine – a definition of the Divine and His will which we can then apply – but to take part in an exploration of the Divine

which is open ended, the results of which we cannot prejudge or pre-determine. The parables are there to produce something in the hearts and minds of the listeners. To get them ready for a journey which is itself transformed by their response. Hillis Miller says

A parable is a way to do things with words. It is a speech act. In the case of the parables of Jesus, however, the performative makes something happen in the hearts and minds of his hearers, but this happening is a knowledge of a state of affairs already existing, the Kingdom of Heaven and the way to get there. (1990: 135)

But for MacKinnon the destination is not given – the Kingdom is something to guide and transform the journey. It exists in the transformation of the journey and in that sense is in the ‘hearts and minds of his hearers’ – the Kingdom is something that transforms our lives (the journey) now and only exists in that transformation, in that opening to the beyond in our day to day lives. We do this, says White, by exploring in detail, by ‘paying attention’ to the realism of the stories by being taken through their twists and turns. One can never line up the answers easily; there are too many cross-cutting and even apparently blasphemous meanings. So the parables have the capacity to transform their mundane stories of day to day activity, transcending them and throwing us out and beyond on an exploration of the Divine. But they can only do that from a base in the ordinary world – where to however, we cannot tell.

Claire Henderson Davis (2005) develops this theme. We learn a skill like music by practising, repeating until we internalise it in such a way that we can go beyond and express in this language things as yet inexpressible, but which stir us from the outside. Someone skilled in law is much the same sort of person. They can express the

inexpressible of the outside they encounter:

Language moves because we experience the desire to express that which language cannot yet contain. This desire leads us to the limits of our present language, and at the edge, we find what is as yet unspoken within ourselves, within others, within our social world, within the physical world. Working at this edge puts us in touch with what is as yet unknown, where there are no straightforward rules to govern our work because we have exceeded the known territory of the law.

What Jesus teaches is a form of relationship to this outside, a form governed by love instead of judgement. When I judge someone or something, I apply existing categories to the situation before me. But if what is before me cannot be expressed within existing categories, then judgement is a form of violence enforcing conformity and doing nothing to expand my vision.

The love which Jesus teaches requires that I suspend my adherence to existing categories in order to allow space to the different reality before me. In this form of love, I am seeking to establish a new relationship where one doesn't yet exist. Not a relationship dependent on conformity, but one in which the difference I encounter is allowed to call my own language and vision into question.

Davis illustrates this in a discussion of the parable of the Good Samaritan. For what Jesus is doing there is helping, imaginatively, the lawyer to move beyond the limits of his language through love. Jesus does not answer the lawyer's question by straightforwardly saying it is the Samaritan one should love. That would not have given the lawyer the imaginative insight to go beyond, see the Samaritan as neighbour, and see inclusion as applying to enemies. The parable asks us, says Davis, to identify with

the lawyer, the one who is trapped in the old categories, who did not have the imagination to go beyond and let our attention to that story move us beyond.

### *The body*

We have been talking of patterns and have tried to move away from the cognitive activity of pattern matching to something more dynamic, to the way these patterns might move us, to their performative and embodied nature. The body is important because respect for persons is in some sense bodily. Shusterman (2006: 5) says

In a world where bodies were always mutilated starved and abused, our familiar concepts of duty, virtue, charity, and respect for others could get no purchase and make no sense. Moreover, bodily abilities set the limits of what we can expect from others and ourselves, thus determining the range of our ethical obligations and aspirations. If paralyzed, we have no duty to leap to the rescue of a drowning child. Virtue cannot require constant labour with no rest or nourishment because these needs are physical necessities.

It also brings us down to earth. It shows us that we are vulnerable beings; the immortality of our rationality, the universal *logos*, is grounded in a weak and finite body. Recall the nun again. She showed us that Kant is not enough; our bodies make us aware of that and the beauty of our mutual vulnerability.

Kant was marvellously near the mark. But he thought of freedom as the aspiration to a universal order consisting of pre-fabricated harmony. It was not a tragic freedom. The tragic freedom implied by love is this: that we all have an indefinitely extended capacity to imagine the being of others. Tragic because

there is no pre-fabricated harmony, and others are to an extent we never cease discovering, different from ourselves. Nor is there any social totality within which we can come to differences as placed and reconciled. We have only a segment of the circle. Freedom is exercised in the confrontation by each other of, in the context of an infinitely extensible work of imaginative understanding, of two irreducibly dissimilar individuals. Love is the imaginative recognition of, that is, respect for, this otherness. (Iris Murdoch 1959, quoted by Detmold 1984: 6)

There is a technique common in dance classes and something we did in the project. The participants walk ever faster in the room all the time trying not to get in each other's way. What they are learning to do, sometimes at a subconscious level, is to negotiate their space with someone else's space. To accommodate their body and its space to the other bodies and their spaces. Here respect for persons becomes embodied and we truly learn a form of liberalism.

Ethics and ideologies, he goes on, are inscribed on and through bodies. Ethical virtue will depend upon bodily dispositions. How can, he goes on, an act be charitable when it is done stiffly with an angry face? He cites Confucius as emphasising the importance of proper demeanour in virtue. Being inscribed thus they are much more powerful and do not need to be made explicit through laws, they are implicit in the body and automatically practised through it.

Confucius therefore insists that exemplarily virtue is somatically formed through 'the rhythms of ritual propriety and music' and wields its harmonizing power not by laws, threats and punishments but by inspiring emulation and love. (Shusterman 2006: 6)

We can also see this in the models of learning by, among others, Dreyfus and Dreyfus (1986), whose model of skill acquisition shows how rules feature in the early, less advanced stages of learning a skill. They become gradually embedded in the situation so that the rules are no longer a conscious part and are in essence discarded. Rules being invoked imply, on this view, lack of advanced knowledge.

### *The dance of life*

How do we marry pattern, movement and the body? Let us start with an analogy. What makes a good footballer is not just the skills that she has but also the ability to locate herself in time and space. What this means is that if you were to stop a game and blindfold her, she would be able to tell you where she was in relation to the rest of the players. And this is not only at one particular time, but also where the positions were before she was stopped and where the positions might be at some time in the future. What she is able to do is to see the game as an ever-changing diachronic matrix and everyone's respective place in it. Thus part of the training in football (at least in advanced clubs) consists in filming matches from above so that players can get a sense of the game as a pattern which is continually changing shape. But there is more to it than that. For what our player is also able to see in this ever-changing flux of players is connections and embodiments that can change the shape of the play or pattern. Thus the great pass is the ability to be able to see a connection which a lesser player might not have seen. But that pass, through seeing the potentiality of the connection, also unites you in some way with the receiver of the pass and you see yourself and your body as

connected with theirs. You and they become in some way part of each other. We can see that in the following exercise. A group sits in a big circle with a ball of string and begins a conversation. Every time someone speaks they throw the ball to someone else who then responds who then throws the ball to someone else and so on. At the end you get a visual representation of the connectedness of the arguments and the people with the string crossing between everyone in different ways.

We might then think of morality as a never ending dance of life and skilled players of it are exactly like our footballer; those who can easily move through the patterns and see connections and in seeing they can make them happen by passing the ball. All of which, to those less skilled, can be new and disturbing. But this is not a matter of just seeing something that is already there, some pattern that is already established and laid down. For the implication of that would be that what we really need to do is not to go 'Beyond Text' but to get to the bedrock foundation of the true text and the Religion of the Book really is the Religion of the Book.

I want to emphasise performance to show precisely why this is not the case. Take the Good Samaritan again. This and other parables always start in the context of the Law. Jesus is accused of being outside the law, by consorting with tax gatherers, prostitutes and sinners. His answer to the lawyer's question as to how to gain eternal life is impeccably within the law: 'Love God and thy neighbour as Thyself.' But the story He gives in answer to the follow up question, 'Who is my Neighbour?' is not necessarily a wider definition of 'Neighbour.' Rather He is asking for a performance. Make someone your neighbour by treating her like one. When you are enjoined to see

the ‘one who had fallen among thieves’ as your neighbour, seeing implies doing. You see the possibility of the connection and in so doing make it happen. In treating someone as your neighbour you make him one. The parable is, as Peter Winch (1987) says, both descriptive and performative. Think of the wave function collapse in quantum mechanics. One might think of our lives as a swirling mass of quantum possibilities, which on the interaction and intervention of an observer become just one state.

## **Conclusion**

This fits well into the particular ethical life of the institution of law that I said our project presupposed. The way in which law unites and structures our unity and interconnectedness is by seeing our moral life as a seething mass of possibilities, as a sort of dance in which we are all potentially connected and by its actions, with imagination, making these connections manifest. We can see this more prosaically in the case law. *Donoghue v Stevenson*<sup>10</sup> is the case that founded the Law of Negligence in the UK. It says that the manufacturer of a product is liable to the ultimate consumer for the negligent manufacture of a product.

What happened was that May Donoghue had some ice cream and ginger beer in which she found a snail. She felt ill and decided to sue. Within the seething mass of possibilities of the situation, the judges did not focus on the obvious one, the contractual connection between her and the owner of the café where she bought the drink. Rather,

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<sup>10</sup> 1932 AC 562.

they saw another possibility and potentiality, that of the manufacturer of the drink. Their intervention, their act of seeing, made that connection real. In terms of our earlier analogies this decision was the equivalent of the visionary player making the defence splitting pass.

The judges in that case made reference to the parable of the Good Samaritan:

The rule that you are to love your neighbour becomes in law: You must not injure your neighbour, and the lawyer's question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to me to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. (*Donoghue v Stevenson*: 580)

I have used it as a rather wider structuring device for this chapter because the parable talks of attention, encounter and the movement to connectedness, of how the sympathetic recognition of the pain of another moves to connect and help and transform us in our mutual vulnerability. The life of the law must always have a space within for the endless potentiality and possibility of connection which we can use to regenerate and transform its static part. Within that space we have to use, as our project in its experiential workshop did, methods other than textual ones. In that space at the heart of law one has to learn to see, encounter and move through the mass of potentialities and possibilities that is the never ending dance of life. It is that area 'beyond the text' that finds, regenerates and keeps in being the Text itself.

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