International Journal of Law in Context, 6,3 pp. 295–306 (2010) Cambridge University Press
doi: 10.1017/S1744552310000170 Printed in the United Kingdom

Unreal City, Unreal Law

Louis E. Wolcher
University of Washington

Abstract

The law of the city degrades time to the dimension of space. The cityscape replaces a horizon made by woods, fields and streams with a jagged silhouette of rectilinear buildings, lots and thoroughfares. Geometrically speaking, a city street is a line that has been transected into segments called blocks. Blocks, in turn, are further segmented by the placement of individual buildings, which are enumerated as 'addresses' in the manner of sequenced moments on the universal timeline. The city, like the law, is produced by human hands according to the logic of the conceptual pairs which the idea of linear time makes possible: 'cause and caused', 'ground and grounded' and 'means and end'. But there is something profoundly unreal about both of these institutional spaces: at the end of the day, the Unreal City mentioned in T. S. Eliot's The Waste Land *corresponds to a sort of Unreal Law. Both the city and the law manifest freedom's impossible attempt to realise its own antithesis by substituting space for time, being for becoming, reason for chance, justification for responsibility and redemption for tragedy.*

The city and the law

The law, like a city street, seems to follow *from* somewhere and lead *to* somewhere else. 'Streets that follow like a tedious argument / Of insidious intent / To lead you to an overwhelming question': thus does an image in *The Love Song of J. Alfred Prufrock* connect the space–time of the city to the space–time of the law (Eliot, 1934, p. 11). Whether tedious, insidious or otherwise, a good legal argument, like a good city map, purports to say what it knew in advance, before it began to speak. What the law asserts it always already knew in advance is the ground – the *ratio*, or reason – for what legal agents do to other people in the name of justice.

The will, inflamed by the suffering of desire, leaves a trace of itself in the writing of the law. The rule of law is quite literally a law of rules. Indeed, it is exactly analogous to Oswald Spengler's concept of the city: it 'develops a form-language that reproduces every trait of its essence – not the language of becoming and growth, but that of becomeness and completion . . . not now destiny, but causality, not now living direction, but extension, rules' (Spengler, 1928, p. 107). In the city, social relations are first and foremost problems to be solved through administration. Legal technology aspires to quieten legal questions with answers, transforming each well-defined pair of questions and answers into 'a patient etherised upon a table'. This shows why Eliot, for one, refused even to *pose* his poem's 'overwhelming question', preferring instead to guard it against any possible quotidian dissimulation by saying, 'Oh, do not ask, "What is it?" / Let us go and make our visit'.

The real is not the same as the true. The formless real of everyday experience – the anonymous and un-thematised background drone of existence that Lévinas (2001, p. 53) calls *il y a* – consists in a 'there is' that is undeniably here-and-now, in or with every breath we take, albeit not *as* something (or anything) in particular. The real in this sense lies outside the space of all mere information about *what* is real. To paraphrase Wittgenstein (1983, p. 205), the real includes what the eye does not see, and therefore what the heart does not grieve over. The true, on the other hand, delivers us good and right reasons for caring about this person or cause as opposed to that

https://doi.org/10.1017/S1744552310000170 Published online by Cambridge University Press

person or cause. Proportionally speaking, one might say that the true is to the possibility of justice as the real is to the possibility of compassion.

The real exhibits countless unnamed cruelties – including 'the tears that a civil servant cannot see' – which are terrible precisely because they proceed from the necessity of a reasonable order (Lévinas, 1996, p 23). In contrast, genuinely true reasons appear to vouchsafe the possibility of distinguishing between the lawful and the unlawful, or the just and the unjust. Thus, although the real lies outside the space of the law and the city, where the truth dwells, the true, in its turn, lies outside the space of living itself, where reality dwells. Given the unforgiving starkness of this paradox, one can be excused for wanting to transgress it by asking how the truths of law 'really' come to show themselves inside the courthouses of the city and the hearts of law-doers.

On the one hand, life (the real) is constantly falling short of its idea (the true), or at least the idea of its proposed transformation (the true-to-come), and thus life disappoints us in the way that a criminal disappoints the state by failing to comply with a legal norm. This is what Hegel meant when he said that tragedy is the representation of the absolute position, for the absolute position is unattainable except through the endless repetition of successive failures aimed at attaining it (see Hyppolite, 1996, p. 58).

But on the other hand, the idea (the true) is also continually falling short of life (the real) by failing to capture the particularity of a situation or experience that impossibly yearns to express just itself and nothing else. The real in this mode is frustrated not by its shabbiness in comparison with the true but by its lack of voice. It yearns to express itself as a kind of truth, if only in the form of what Lyotard (1996, p. 426) has called a 'little narrative' (*petit récrits*) – a tale that resists closure and totality, yet somehow manages to give definitive voice to what is most singular and unique about its theme. *This* sense of the shortfall between language and life reflects the impotence of a singular experience that hopelessly yearns to fix in language and thought, once and for all, what language and thought can only generalise and distort.

Thus, it would seem that: (a) sometimes life disappoints us when compared to the language of the true, in which case our suffering results from 'the want of proportion between what we demand and what comes to us' (Schopenhauer, 1969, p. 88); and yet (b) other times language disappoints us when compared to life, in which case our suffering results from the fact that 'words dilute and brutalise; words depersonalise; words make the uncommon common' (Nietzsche, 1968, p. 428). In the first case, life is hell and language becomes a kind of utopia; in the second case, language is hell and the concrete (life itself) becomes the utopia that language falsifies.

Those who fall silent, on this account, inhabit the purgatory of knowing that genuine communication between people is no longer possible, owing to a certain contradiction contained within modern language itself. On the one hand, the real can only be explained by recourse to the true, and thus as soon as we talk we merely express the universal or imagistic and not the particular that we would like to express (cf. Habermas, 2003, p. 143). But on the other hand, if we do not speak at all, no one will ever understand us (cf. Kierkegaard, 1995, pp. 52–53).

Truth and justification

When it comes to the law, the language of truth is essentially the language of justification: the justification of another's suffering at the hands of the law. In his famous statement, 'Soveraigne Power [is] not so hurtfull as the want of it', Hobbes (1914) squarely places both the existence *and* the non-existence of law into the category of things that hurt. In conceding that human beings suffer when law is present as well as when it is absent, *Leviathan* established the framework for all future political and legal theory by accepting and valorising the rule of law as the lesser of two evils.

https://doi.org/10.1017/S1744552310000170 Published online by Cambridge University Press

The lesser evil of law mimes the principal virtue of the city: it is the temporary coming to rest, in form, of contingency, violence, disorder and suffering in the minds of those who construct or accept it as binding. Legal form exiles all that is 'extraneous' in reality. Like a cookie cutter, legal form stamps the dough of everyday experience into reassuringly regular shapes, leaving the irregular marginal bits to fend for themselves. Legal form allows 'relevant' costs and benefits to be calculated and weighed, decisions to be made and actions to be launched. Ever since Hobbes's day, the overwhelming majority of political and legal theorists in the West have sought to perfect the form of law in this sense: to 'get law right' in one way or another.

In its relentless drive for closure, conventional political and legal theory conforms to Alain Badiou's startling definition of evil: it represents the will to name at any price, the desire for 'everything to be said' (Badiou, 2003, pp. 66–67). Alexandre Kojéve's description of the Hegelian 'Wise Man' makes this drive for closure explicit: 'that man is Wise who is capable of answering in a *comprehensible* or satisfactory manner *all* questions that can be asked him concerning his acts, and capable of answering in such fashion that the *entirety* of his answers forms a *coherent* discourse' (Kojéve, 1980, p. 75). The Wise Man's central aspiration is to theorise law and justice in such a way that, in the event the theory were realised, humanity's long history of injustices would come to an end and no one would ever again have to feel *personally* responsible for the suffering caused by the proper enforcement of just law. The Wise Man's promise of release from personal responsibility reaches its apex in Hegel's theory that punishment is self-chosen, since this idea makes the agents who actually snap law's whip look as benign and considerate as a dominatrix giving her customers what they want (Hegel, 1967, pp. 70–71).

The promise of release from personal responsibility through wisdom also seems to follow from what Robert Alexy has called, with breathtaking (and imperialistic) overstatement, 'the regulative idea of legal philosophy': namely, the idea of constructing a 'deeply founded and coherent picture of what there is [in law], what ought to be done and is good, and what we can know' (Alexy, 2003, p. 65). In principle, whatever particular instances of human suffering might remain after the legal regime has been theoretically delimited and purified in the ways Alexy suggests would fall into the category of the necessary and natural. More importantly, this determination of residual suffering's logical status would justify *viewing* it dispassionately – as dispassionately as we view the April showers that bring the flowers of May.

No wonder science has dubbed our species *homo sapiens* (Latin for 'wise man'): science, like traditional legal theory, proposes a philosophical anthropology in which the idealised ultimate end of humanity is or ought to be the kind of knowing that leaves absolutely no room for ignorance and uncontrolled passion, and hence no room for making mistakes about what justice requires. On this view, the jurisprudential purpose of human beings is to strive towards perfecting and realising the Idea of Just Law. No matter how many times traditional political and legal theory tries (and fails) to get law right, it always begins with the same attitude: the desire to lead self-interested elites and the benighted masses they dominate towards the light of a perfectly just (i.e. rational) social world.

Justice and truth

Justice is the name by which a philosophy designates the possible 'truth' of a political orientation (Badiou, 2003, p. 70). But when it comes to political action, truth can be a highly overrated value. Space is the form of *symbolic* relationships: in space the linguistic signs P, →, and Q will always stand next to one another in the perspicacious sequence 'P → Q'. Their always-standing-together-in-space *is* their one and only symbolic truth. But time is the form of all *real* relationships: the merely spatial side-by-sideness of P, → and Q does not of itself guarantee how the expression 'P → Q' will actually be employed by human beings. The Western political subject's self-certain

https://doi.org/10.1017/S1744552310000170 Published online by Cambridge University Press

belief in the truth of this or that symbolic political orientation (e.g. 'P → Q') produces approval without affirmation. Such a subject avoids affirming the ethical distress of naked temporal decid*ing* in order merely to approve what the true seems to require in advance (cf. Heidegger, 2006, p. 99).

It as if The True (or The Truly Just) were an incredibly distant star towards which a mighty intergalactic spaceship of law and politics is headed. The inhabitants of the spaceship – humankind's last and greatest city – are sophisticated enough to realise that they will never finally reach the star. Some of them are even wont to say that justice remains by coming (*la justice reste à venire*), that it is never 'here', never 'done', but always to come (*à-venir*) (Derrida, 2002, pp. 256–57). Nevertheless, they all experience *hope*, and their hoping leads them to continue to take their *bearings* from the star. They point the nose of their spaceship at the star and then proceed to run past (or over) anything that stands in their way. They merely *approve* of the direction that the star sets for them. They do not *affirm* each and every step in their journey as a new direction based on a new decision made in the upsurge of a fresh present.

The star-seekers are able to call themselves principled only because they have hypostatised what the verb 'to journey' signifies. Hypostasis 'designates the event by which the act expressed by a verb becomes a being designated by a substantive' (Lévinas, 2001, p. 83). To journey becomes 'the journey', as if the goal were already reached before the task of journeying is completed, or even begun. Hypostasis confuses time with space – juxtaposition (side-by-sideness) with succession – and it can be very dangerous, ethically speaking. Journeying towards the star of True Justice under the illusion that it is 'the journey' of (or to) justice itself makes it difficult to notice the fact that legalised justice is a violent affair by definition, and that its enactment always seems to 'disadvantage the unjustified advantages of some and provide advantages to the unjust disadvantage of others' (Jankélévitch, 2005, p. 51).

From the point of view of the singularity that every human being's presently existing life always is, 'The decisive moment of human development is continually at hand' (Kafka, 2006, p. 8). The reason that the critique of history is always only a critique of the present is because the only thing that ever really *touches* us concretely is what other people keep on doing (present progressive tense) in our midst, whether or not they are conscious of it and whether or not they take it to be justified. The dead cannot be made un-dead; the hungry, the homeless and the oppressed will always have been hungry, homeless or oppressed no matter how much their condition may improve; a tear that falls once will have fallen for all eternity. To believe in these obvious truisms too little is very dangerous: it can lead to the delusion that it is possible to end present human suffering by running away from a now-time that we will *never* escape, so long as we are alive, towards a glorious future that, like a mirage, keeps on receding into the distance with every step we take.

Time and space

What if we were to re-think temporality not as an ongoing event of containment – not as a dimension or 'field of presence' (Merleau-Ponty, 1962, pp. 415–16) – but rather as a chaotic maelstrom of colliding forces? What if we were to conceive of the present as arriving *later* than the future, because the 'now' springs from a struggle between forces which push on us from the past and forces that keep on coming at us from the future (cf. Heidegger, 1994, p. 40)? What if the words 'past', 'present' and 'future' did not name abstract parts of time, but rather certain concrete vectors of coercion and repression that we are constantly bringing to bear on ourselves and others *right now*, simply by virtue of being the kind of beings who must always be presently acting or reacting in some direction or other? And finally, what if the task of finding and applying the meanings of legal norms were conceived of in terms of violence and suffering instead of faith and reason? In that event, everything that happens would probably have to atone for the

https://doi.org/10.1017/S1744552310000170 Published online by Cambridge University Press

fact of having happened, as in myths (see Horkheimer and Adorno, 2002, p. 161), and a reflection on the temporality of the law would ultimately be the same as a reflection on law's ethically tragic dimension.

The idea that time is linear can be traced to Aristotle's determination ($219^{b}1$–$220^{a}9$) of time as number and enumerated movement with respect to bodies that retain their unity even though the 'now' in which they move is always different. Linear time portrays its subject matter as an endless series of arithmetically distinct 'moments' – represented as t_1, t_2, t_3, and so on – in which each particular moment, though undeniably unique in its individual being, is never content merely to lie down inertly between the moment before and the moment after, like a house between other houses. Instead, each moment vitally *connects* (somehow) with its predecessor and successor in such a way as to create the causal nexus. Kant famously, if dryly, describes our intuition of this sort of time in terms of a sequence of metaphorical points that exist successively on 'a line progressing to infinity, in which the manifold constitutes a series that is only of one dimension' (Kant, 1998, p. 163).

Considered from the point of view of linear time, human beings live their lives from moment to moment within a span or milieu of time-stuff lying on a universal timeline, where all 'events' have both a determinate temporal beginning and a determinate temporal end. Somewhere in this conception of time can be glimpsed the origin of calendars and clocks, as well as the plethora of human technologies for reckoning dates, eras, successions of events and causal relations. The radical humanisation of linear time, first clearly articulated by Kant, coincided historically with the emergence of Western capitalism and the widespread availability of clocks and watches designed to measure 'it' (i.e. time). In the modern era the idea that time is linear is thus ultimately technological: it serves to facilitate 'the reign of process and the linking of time to the logic of process and procedure' (Nancy, 2003, p. 21). In sum, belief in the unquestionable truth of linear time is intimately connected to the will to control and manage the earth, and with it, human life itself. Linear time is the very image of a well-ordered city block.

If, for the living, the ultimate point of the present is to be *experienced*, then in the concept of linear time the ultimate point of the present is to be *known* (cf. Nancy, 2002, p. 14). The idea that time is linear allows thought to imagine, and attempt to achieve, the identity of thinking and being: a dream (or nightmare) that is as old as philosophy itself, rooted as it is in Parmenides' iconic statement (1984, p. 56), that 'thinking and being are the same'. Linear time attempts to secure this possibility in advance by permitting time (and human effort) to 'pass' between a state of ignorance and a state of knowledge – a passage that it believes is vouchsafed by the existence of a pre-established harmony (*harmonia praestabilita*) between Matter and Mind, Being and Spirit, and the Real and the True (see Leibniz, 1934; Schopenhauer, 1974). In short, linear time gives reason the wherewithal to think not only that knowledge is the result of a process-in-time, but also that human thought is a glorious super-medium in which the real – *all* of the real – can and eventually will be caught like a fly in amber at the end of history (see Hegel, 1977).

Language works at a distance in linear time: legal norms are seen as having earlier acquired (past perfect tense) an authoritative meaning that somehow continues to operate in the present. Thus, for example Lucretius (1946, pp. 12–14), accounts for the growth and alterations of 'mortal substance' by appealing to the category of linear time, thereby assuring substance a definite sequence of moments within which it can be born, grow old and die. The concept of linear time does the same thing for the human practice of following norms: it transposes Lucretius's axiom (p. 28) that 'naught from naught can be begot' from mortal to moral substance. In this image, the past of linear time is seen as having mysteriously deposited a 'moral law within', as Kant (1996, p. 269) puts it, on the basis of which subsequent right action can and should be freely launched. This sort of freedom does not consist in being prevented from trampling on someone else's freedom, because at that point it would cease to be free; instead, its first criterion seems to be the ability to deprive others of their freedom according to the time-spanning 'meaning' of the law that it has posited for itself.

https://doi.org/10.1017/S1744552310000170 Published online by Cambridge University Press

In linear time, freedom of action is not really freedom as such, but rather its negation. The idea of existential freedom as mere possibility – *dynamis* or *potentia* – is utterly useless in linear time, whereas the un-freedom of raw actuality – *energheia* or *actus* – becomes the source of all concrete use-value. The very moment when the freedom of linear time chooses and acts it ceases to be free. Once tolled, the bell that freedom rings can never be un-rung. In linear time, as in the Newspeak of Orwell's novel *1984*, contingency is always necessity, and freedom is always slavery. The freely positing human being of linear time must somehow immediately *submit* to the meanings it keeps on positing for itself, thereby rendering itself un-free. If, as Lévinas (1998, p. 33) says, 'violence means ascendancy over a freedom', then the freedom of linear time is always first and foremost doing violence unto itself.

In conventional discourse, the concept of grounding is usually expressed in terms of will-governed obedience to a norm, and as such it presupposes a span of linear time during which the norm's commands can *first* be ascertained or legislated, and *then* acted upon. The image of a well-grounded beneficial change in the conditions of existence portrays human beings and their ideas as responsible co-creators of a world that is 'moving' in linear time. Thus, people's dissatisfaction with existing arrangements (at t_1) leads them to imagine a better world to come (at t_2). Sometimes this idea takes the form of a 'pictorial conception', and other times it shows itself as a compelling 'notion . . . free from all sensuous admixture' (Hegel, 1975, p. 130). Either way, eventually it comes to pass (at t_3) that the expressions of our ideas start to take on a life of their own: their 'meanings' blossom into the motive for, and ground of, purposive action aimed at producing change. As *motive* the meanings induce people to perform actions aimed at realising them. As *ground* they become what actors offer as the ultimate meaning of their efforts, and what they come back to by way of justification once their ideas become reality. According to this way of thinking, 'willing is striving and desiring, not a blind impulse and urge, but guided and determined by the idea of what is willed' (Heidegger, 1985, p. 95). The theory is that dreamed-of *image of X* can become *reality* X on the basis of the linguistic *ground* 'X'. Our actions move in linear time towards a pre-imagined state of righteousness or respect for law and justice in the way that the work of builders moves towards the completion of a building on the basis of a blueprint.

Simple observation will confirm that the words and images which express any given goal or end do not 'contain rules for their use like an object which is packed in a box' (Wittgenstein and Waismann, 2003, pp. 361–63). When it comes to jurisprudence, particular constellations of facts do not await us already labelled as instances of the governing legal rule, and no legal rule as such is capable of stepping forward to claim its own instances (Hart, 1961, p. 123). Despite these gentle metaphysical reminders, however, in linear time legal ends somehow come to be seen as enjoying a sort of present existence long before they arrive, like destinations on a city map; means, in turn, seem to perform their work in the shadow cast by the meaning body of the end they aspire to achieve. Means are directed at ends whose representation in language and images lets them enjoy a sort of virtual existence in the now.

This interpretation of grounding is deeply rooted in a linear conception of time. It construes freedom as the decision to construct or accept, and then follow or reject, an imagistic or textual ground of right action; and it construes logical necessity as the relation between a ground and the projects of those who 'correctly' follow it. In this picture of freedom's relation to grounding, human beings freely decide to subordinate themselves to an object – whether a sacred text such as the Torah or the Qur'an, or a secular text such as the US Constitution or the Universal Declaration of Human Rights – and this strange inversion of freedom into submission becomes the very definition of being righteous, principled and just.

Cause and ground

The noun 'reason' is ambiguous. A thing can have a reason, in the sense of a cause, without also having a reason, in the sense of a ground. That knowing and understanding have causes, no one

https://doi.org/10.1017/S1744552310000170 Published online by Cambridge University Press

doubts, and this seems sufficient to satisfy the demands placed on being by the principle of sufficient reason – the principle which says *nihil est sine ratione* ('nothing is without reason'). But if this is so, then why *must* actions which are believed by an observer to reflect the actor's knowledge and understanding also have 'rational grounds' that are somehow present inside the actor while he is acting?

'Not doubting' and 'the absence of doubt', as those concepts are used in describing the phenomenon of legal judgment (especially in the so-called 'easy case'), can best be characterised, both positively and negatively, in terms of the category of habit. William James, one of the greatest (and today, least appreciated) phenomenological observers who ever lived, was astute enough to notice that the phenomenal structure of habit in general consists in the sensation of *just having done* something that immediately triggers some other action, and not in the presence of some particular mental act preceding habitual action:

> 'In action grown habitual, what instigates each new muscular contraction [e.g. a judge announcing a result or signing a judgment] to take place in its appointed order is not a thought or a perception, but the *sensation occasioned by the muscular contraction just finished* . . . In an habitual action, mere sensation is a sufficient guide, and the upper regions of brain and mind are set comparatively free.' (James, 1904, i. pp. 115–16)

James's description allows us to catch sight of juridical habit's most important phenomenological feature: it *is* automatic behaviour in which no inner mental state of knowing or understanding appears. It *is not* automatic behaviour conceived of as acting in accordance with some amorphous inner state called 'automatic knowledge' or 'automatic understanding'.

Thus, the concept of an absence of doubt (or of not doubting) does not suggest that a mental event of not-doubting is present inside the legal actor, such that it (the event itself) becomes the ultimate ground of his action. Rather, it signifies that *no* interpretive event – not even meaning-recognition – transpires in consciousness at the very moment when any doubt that may have been harboured ceases and the unleashing of legal violence begins. In short, there is nothing mental, and certainly nothing 'rational', about the absence of doubt that I am attempting to describe here.

Nor is there anything mystical or ineffable about it. The phenomenon of not-doubting is a genuine *absence* of doubt unaccompanied by the presence of something else, something 'profound'. This sort of absence is not a Hegelian or Sartrean *nihil negativum*, or absolute nothingness at the heart of being. Instead, to describe it is to describe a *nihil privativum*: the simple negation of the presence of a ground at the very moment of decision.

Elsewhere, I have used the term *reception* to refer to this extraordinary passage or movement from the absence of doubt to the initiation of legal violence. Properly understood, the phenomenon of reception is an unmarked penultimate stop on a judicial journey that runs from a legal norm-sign to a legal sanction. It means, at once, the utter absence of a reason (from the internal point of view) and the utter irrelevance of any cause (from a phenomenological point of view). Seen in its own proper moment, either reception *takes the place* of reasoning (in easy cases), or else it brings interpretive reasoning to a full stop (in all other cases). It can be viewed as a kind of conditional reflex that is triggered by words, including our very own words of interpretation. In the phenomenon of reception, the linguistic sign that comprises the *final* interpretation of a legal norm (e.g. the sign 'Y' in the expression 'Legal norm X means Y') produces an automatic recognition and response, unmediated by rational calculation, which launches the force of law into the world.

Pavlov's dogs heard a bell and then salivated. Human beings look at a stop sign and then stop. Both cases can be analysed in terms of causes, should one so desire. Why, then, are we tempted to speak of a *ground* of stopping in the second case but not a ground of salivating in the first?

https://doi.org/10.1017/S1744552310000170 Published online by Cambridge University Press

Number line and timeline

Mathematicians sometimes describe the continuum of rational numbers geometrically by saying that rational points lay 'dense on [the number] line', by which they mean 'that within each interval, no matter how small, there are rational points' (Courant and Robbins, 1996, p. 58). Those who are attached to the foregoing picture of grounding right action in legal norms uncritically transpose this geometric metaphor from the number line to the timeline. This move authorises them to deny that there are any 'gaps' in existence that would render the *passage* between interpretation and action in any way problematical. For those who worship the timeline, the sequence *freedom→ground→freedom→action* appears utterly gapless: freedom posits its ground at moment t_1, freely understands what the ground requires of it at moment t_2 and then freely acts on its ground at moment t_3.

It is a fundamental postulate of geometry that an infinite number of points can be constructed between any two rational numbers, no matter how closely they may seem to lie together on the number line. In the process of grounding legal action on a norm, however, between any given *final* interpretation of the norm and the beginning of action to enforce it *nothing rationally constructible or ground-like can be found as a matter of principle*. The only things that can be found, if we choose to look for them, are *causes*, including hidden psychological and ideological influences over which the decision-maker has no immediate control.

When the very sense of the governing metaphor of rational grounding is thought critically, therefore, the analogy between the number line and the timeline breaks down. From the scientific premise that the world is fully determined, causally speaking, perhaps it does follow that there are no 'gaps' in time, and therefore that the number line and the timeline are completely homologous. But science takes an external point of view on nature, including human nature, and hence its premise of causal determinism can contribute nothing to the understanding of the phenomenology of legal and moral decision-making. Seen rigorously from an internal point of view, the self-showing intrusion of the phenomenon of judgement implies that the timeline (unlike the number line) is *discontinuous* when thought in terms of the 'meaning' of rational grounds. Wittgenstein (2005, p. 228e) draws essentially the same conclusion when he says that 'no image, not even a hallucination, can bridge the gap between image and reality, and no one image is better at this than any other'.

'Ideas in general can never implement anything; the implementation of ideas requires people, who have to apply practical force' (Marx, 1975, p. 140). While it is true that no freely constructed grounding image as such can span the gap between norm-sign 'X' and its implementation, a cause (e.g. a psychological or ideological influence on the decision-maker) surely can. If, for the sake of argument, it is not illicit to metaphysically 'straddle' the external and internal points of view, one might say that to follow a ground means *to let* this or that causally determined mode of reception of the sign that expresses the ground hold sway – to let oneself become a puppet of the way that history has constructed one's habitual reactions to language.

In linear time, freedom always turns into surrender and un-freedom because those who embrace the metaphor of the timeline cannot locate or construct any particular moment on the line when we are simultaneously free (to posit grounds) and bound (to implement those grounds). In sum, the conventional belief in the possibility of *freely* deriving right action from the *compulsory* meaning of a legal norm is the Achilles heel of linear time. Derrida has shown how vulnerable to attack this conceptual weak link truly is:

> 'Our most common axiom is that to be just or unjust, to exercise justice or to transgress it, I must be free and responsible for my action, my behaviour, my thought, my decision. One will not say of a being without freedom, or at least of one who is not free in a given act, that its

https://doi.org/10.1017/S1744552310000170 Published online by Cambridge University Press

> decision is just or unjust. But this freedom or this decision of the just, if it is . . . to be recognized as such, must follow a law [*loi*] or a prescription, a rule . . . [Thus, t]o be just, the decision of a judge, for example, must not only follow a rule of law of a general law [*loi*] but must also assume it, approve it, confirm its value, by a reinstituting act of interpretation, as if, at the limit, the law [*loi*] did not exist previously – as if the judge himself invented it in each case . . . In short, for a decision to be just and responsible, it must [*il faut*], in its proper moment, if there is one, be both regulated and without regulation, it must preserve the law [*loi*] and also destroy or suspend it enough to have [*pour devoir*] to reinvent it in each case, rejustify it, reinvent it at least as the reaffirmation and the new and free confirmation of its principle . . . [O]ne will not say of [a] judge who [acts like a "calculating machine"] that he is purely just, free, and responsible. But one will also not say this if he does not refer to any law, to any rule . . . or [if he] improvises outside of all rules, all principles. It follows from this paradox that at no time can one *presently* say that a decision is just (that is to say, free *and* responsible), or that someone *is* just, and even less, "I *am* just".' (Derrida, 2002, pp. 251–52)

For present purposes, Derrida's analysis of the paradox of legal judgment comes down to this: the idea of a singular moment 'on' the timeline that simultaneously contains *both* freedom and un-freedom is as self-contradictory as the equation 1.1 = 1.2. It is as if a mathematician were to say that between 1.1 (= the free positing of legal ground 'X') and 1.2 (= legal violence V) no rational numbers could be constructed because the points represented by 1.1 and 1.2 lie so closely together on the number line that they 'touch' one another. In that case, to say that norm-sign 'X' *requires* V (the concept of the rule of law in a nutshell) would be like saying that the numbers 1.11, 1.12 and so forth, not only do not exist, but also cannot be constructed.

Instead of proposing that human beings try to become radically free of *all* prior positive conceptions of themselves – as in Sartre's existentialistic notion (1956, p .629), of 'Being-for-itself' (*être-pour-soi*) – the traditional concept of grounding action in a norm encourages them to identify possibility with actuality, and freedom to posit X with servitude to the historically received customary reaction to the linguistic sign 'X'. On this view, any and all righteousness and justice in the world must accrue from on high, by grace of the 'meanings' of norms the necessity of which freedom is supposed to experience as more real and more compelling than reality itself. Little wonder, then, that the linear way of describing the practice of grounding right action in norms always seems to make the state of affairs called 'being principled' into the very antithesis of the feeling of freedom whereby we define and assert ourselves (cf. Nancy, 2003, p. 134).

Freedom and un-freedom

In sum, in the law, as in the city, we somehow keep on accomplishing a contradiction, namely: Freedom–Action–Un-freedom.

For those whose subjectivity is completely absorbed in the normalcy of the existing legal order, there is no contradiction. For them, the tale of law is one of epic grandeur: a dignified and heroic quest for justice. As storytellers, these people partake in the same reality as the story they tell, and thus have a strong inclination to parrot the law's official hagiologies. Given the opportunity, they would gladly celebrate 'Law Day' every day. They think that the linguistic signs which express the norms of law and justice generally mean in advance exactly what they have received or interpreted them to mean. And if they hear enough legal sheep bleating back the opinion that legal norm X clearly means Y, these storytellers inevitably follow their herd instincts and go along.

When the time comes for these well-adjusted law-doers to apply their understandings – when they actually lay on the lash in the name of the law – they somehow manage to convince themselves that the ink stains spattered on the pages of law books are doing all the work, bearing

https://doi.org/10.1017/S1744552310000170 Published online by Cambridge University Press

all the responsibility. In other words, when they finally get around to *acting* in law's name, they prefer to ride on the back of their own abstractions, like city-dwellers on an omnibus. What is more, after the legal deed is done, these quintessential agents of law and justice find that they are able to go home, enjoy their suppers, play with their children, make love and sleep like babies. They can do all these things in good conscience because, in one way or another, they have inwardly celebrated the performance of their legal and moral duties with a lavation symbolising their personal innocence – just as Pontius Pilate is said to have done outwardly when he symbolically washed his hands of Jesus's blood (Matthew, 27:24).

In contrast, only those whose subjective sense of life does not correspond to the norm – disillusioned outsiders or poorly adjusted insiders – can tell a truly tragic tale about the law's operations. Such people are not necessarily gloomy pessimists. But they do mistrust the cityscape. Their willingness to confront honestly the tragic aspects of law and justice stems not from hopelessness but from an inner sense of struggle between 'the delight of beauty and the horror of politics' (Marcuse, 2007, p. 170). Politics, in the largest sense of the word, has produced countless horrors over the past hundred years, and only some of these horrors are widely known or remembered: from brutal wars to terrible famines; from US-sponsored assassinations of democratically elected leaders in Iran and Chile to state-sponsored murders of journalists who dare to report too many facts; from the Armenian genocide to Auschwitz and from Auschwitz to the genocides in Cambodia, Rwanda and Darfur; from the camps of the Gulag to the camps at Guantánamo and Abu Ghraib; and from the Tuskegee syphilis experiment to death by lethal injection.

The disillusioned outsiders and poorly adjusted insiders mentioned above realise, at a level that is deeper than mere knowledge, that a billion tears fall and a million dreams are shattered in the matchless uniqueness of each and every moment. They fear that '[s]o long as the sufferings of a single human being are forgotten there can be no deliverance' (Löwy, 2005, p. 34). If the average agent of the law thinks 'Thou shalt not kill' means *Thou shalt not take affirmative steps to murder*, then these unfortunates are nagged by the disquieting possibility that the commandment might actually mean, *Thou shalt cause the other to live* (cf. Lévinas, 1999, p. 127). They suspect that the faithful performance of their legal and moral duties never completely washes the blood off their hands, no matter how much praise they receive for it from the chorus of legal sheep surrounding them. In truth, such individuals feel more like Lady Macbeth after Duncan's murder: for them the smell of blood lingers still (*Macbeth*,5.1).

In one way or another, *zakhor* (Hebrew for 'remember') is the motto (or the curse) that has forced this article's author to his desk: the imperative of noticing the distinction between those who are well adjusted and those who are poorly adjusted to the law's empire, and the imperative of bearing witness to the vast sphere of legalised human suffering lying just beneath the surface of this very distinction.

References

ALEXY, Robert (2003) 'The Nature of Legal Philosophy', *Associations: Journal For Legal and Social Theory* 7: 63–75.

ARISTOTLE (1984), *The Complete Works of Aristotle*, 2 vols, ed. Jonathan Barnes. Princeton: Princeton University Press.

BADIOU, Alain (2003) *Infinite Thought*, trans. Olver Feltham and Justin Clemens. London: Continuum.

COURANT, Richard and ROBBINS, Herbert (1996) *What is Mathematics? An Elementary Approach to Ideas and Methods*, 2nd edn, rev. Ian Stewart. New York: Oxford University Press.

DERRIDA, Jacques (2002) 'Force of Law: The "Mystical Foundation of Authority"', trans. Mary Quaintance in Derrida, *Acts of Religion*, ed. Gil Anidjar. New York: Routledge, 230–98.

ELIOT, T. S. (1934) *Selected Poems*. New York: Harcourt Brace Jovanovich.

https://doi.org/10.1017/S1744552310000170 Published online by Cambridge University Press

HABERMAS, Jürgen (2003), *Truth and Justification*, trans. Barbara Fuller. Cambridge, MA: MIT Press.
HART, H. L. A. (1961) *The Concept of Law*.Oxford: Oxford University Press.
HEGEL, G. W. F. (1967) *Hegel's Philosophy of Right*, trans. T.M. Knox. Oxford: Oxford University Press.
HEGEL, G. W. F. (1975), *Hegel's Logic*, trans. William Wallace. Oxford: Oxford University Press.
HEGEL, G. W. F. (1977) *Phenomenology of Spirit*, trans. A. V. Miller. Oxford: Oxford University Press.
HEIDEGGER, Martin (1985) *Schelling's Treatise on the Essence of Human Freedom*, trans. Joan Stambaugh. Athens, OH: Ohio University Press.
HEIDEGGER, Martin (1994) *Basic Questions of Philosophy: Selected 'Problems' of 'Logic'*, trans. Richard Rojcewicz and André Schuwer. Bloomington: Indiana University Press.
HEIDEGGER, Martin (2002) *The Essence of Truth: On Plato's Cave Allegory and Theaetetus*, trans. Ted Sadler. New York: Continuum.
HEIDEGGER, Martin (2006) *Mindfulness*, trans. Parvis Emad and Thomas Kalary. New York: Continuum.
HOBBES, Thomas (1914) *Leviathan*. London: J. M. Dent.
HORKHEIMER, Max and ADORNO, Theodor (2002) *Dialectic of Enlightenment: Philosophical Fragments*, ed. Gunzelin Noerr, trans. Edmund Jephcott. Stanford: Stanford University Press.
HYPPOLITE, Jean (1996) *Introduction to Hegel's Philosophy of History*, trans. Bond Harris and Jacqueline Spurlock. Gainesville, FL: University of Florida Press.
JAMES, William (1904) *The Principles of Psychology*, 2 vols. New York: Henry Holt.
JANKÉLÉVITCH, Vladimir (2005) *Forgiveness*, trans. Andrew Kelley. Chicago: University of Chicago Press.
KAFKA, Franz (2006) *The Zürau Aphorisms*, trans. Michael Hofmann. New York: Schocken Books.
KANT, Immanuel (1996) *Practical Philosophy*, ed. and trans. Mary Gregor. Cambridge: Cambridge University Press.
KANT, Immanuel (1998) *The Critique of Pure Reason*, ed. and trans. Paul Guyer and Allen Wood. Cambridge: Cambridge University Press.
KIERKEGAARD, Søren (1995) 'Fear and Trembling', in Charles Guignon and Derek Pereboom (eds), *Existentialism: Basic Writings*. Indianapolis: Hackett, 18–69.
KOJÉVE, Alexandre (1980) *Introduction to the Reading of Hegel*, trans. James Nichols. Ithaca: Cornell University Press.
LEIBNIZ, Gottfried (1934) 'The Monadology ', in Leibniz, *Leibniz: Philosophical Writings*, trans. Mary Morris. London: Dent, 3–20.
LÉVINAS, Emmanuel (1996) *Basic Philosophical Writings*, ed. Adriaan Peperzak, Simon Critchley and Robert Bernasconi. Bloomington: Indiana University Press.
LÉVINAS, Emmanuel (1998) *On Thinking-of-the-Other Entre Nous*, trans. Michael Smith and Barbara Harshav. New York: Columbia University Press.
LÉVINAS, Emmanuel (1999) *Alterity and Transcendence*, trans. Michael Smith. New York: Columbia University Press.
LÉVINAS, Emmanuel (2001) *Existence and Existents*, trans. Alphonso Lingis. Pittsburgh: Duquesne University Press.
LÖWY, Michael (2005) *Fire Alarm: Reading Walter Benjamin's 'On the Concept of History'*, trans. Chris Turner. London: Verso.
LUCRETIUS, Titus (1946) *On the Nature of Things*, trans. Charles Bennett. New York: Walter J. Black.
LYOTARD, Jean-François (1996) 'What is Postmodernism?', in Charles Guignon and Derek Pereboom (eds) *Existentialism: Basic Writings*. Indianapolis: Hackett, 425–37.
MARCUSE, Herbert (2007) *Art and Liberation*, ed. Douglas Kellner. London: Routledge.
MARX, Karl (1975) *The Holy Family*. Moscow: Progress Publishers.
MERLEAU-PONTY, Maurice (1962) *Phenomenology of Perception*, trans. Colin Smith. London: Routledge.
NANCY, Jean-Luc (2002) *Hegel: The Restlessness of the Negative*, trans. Jason Smith and Steven Miller. Minneapolis: University of Minnesota Press.

https://doi.org/10.1017/S1744552310000170 Published online by Cambridge University Press

NANCY, Jean-Luc (2003) *A Finite Thinking*, ed. Simon Sparks, trans. Edward Bullard, Jonathan Derbyshire and Simon Sparks. Stanford: Stanford University Press.

NIETZSCHE, Friedrich (1978) *Thus Spoke Zarathustra: A Book for Everyone and No One*, trans. Walter Kaufmann. New York: Penguin Books.

PARMENIDES OF ELEA (1984) *Fragments*, trans. David Gallop. Toronto: University of Toronto Press.

SARTRE, Jean-Paul (1956) *Being and Nothingness: An Essay on Phenomenological Ontology*, trans. Hazel Barnes. New York: Philosophical Library.

SCHOPENHAUER, Arthur (1969) *The World as Will and Representation*, 2 vols., trans. E. F. J. Payne. New York: Dover.

SCHOPENHAUER, Arthur (1974) *On the Fourfold Root of the Principle of Sufficient Reason*, trans. E. F. J. Payne. LaSalle, IL: Open Court.

SPENGLER, Oswald (1928) *The Decline of the West*, 2 vols., trans. Charles Francis Atkinson. New York: Knopf.

WITTGENSTEIN, Ludwig (1983) *Remarks on the Foundations of Mathematics*, ed. G. H. von Wright, R. Rhees and G. E. M. Anscombe, trans. G. E. M. Anscombe. Cambridge, MA: MIT Press.

WITTGENSTEIN, Ludwig (1984) *Culture and Value*, ed. G. H. von Wright and Heikki Nyman, trans. Peter Winch. Chicago: University of Chicago Press.

WITTGENSTEIN, Ludwig (2005) *The Big Typescript TS 213*, ed. and trans. G. Grant Luckhardt and Maximilian Aue. Oxford: Blackwell.

WITTGENSTEIN, Ludwig and WAISMANN, Friedrich (2003) *The Voices of the Vienna Circle*, ed. Gordon Baker, trans. Gordon Baker, Michael Mackert, John Connolly and Vasilis Politis. London: Routledge.

https://doi.org/10.1017/S1744552310000170 Published online by Cambridge University Press