THE MORAL IMAGINATION AND THE LEGAL LIFE

Beyond Text in Legal Education

Edited by
ZENON BAŃKOWSKI and MAKSYMILIAN DEL MAR

EMERGING LEGAL EDUCATION

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Introduction

Zenon Bańkowski and Maksymilian Del Mar[1]

General Introduction to the Two Volumes

This present volume is one of two volumes of papers flowing from a project, 'Beyond Text in Legal Education', hosted by the School of Law at the University of Edinburgh. The aim of the two volumes as a whole is to contribute to the reinvigoration of legal education, primarily in law schools but also extending to law firms. We attempt this reinvigoration by introducing the importance and usefulness of pedagogical resources that go beyond text, i.e. resources from the visual and movement arts. Taken as a whole, the two-volume work explores the use of these non-textual resources for legal education and legal scholarship. It is not restricted to any area of law or to any particular form of going beyond text. It includes contributions that explore different ways of visualizing legal knowledge, different ways of designing and interacting with spaces for exploring legal issues, as well as different ways of performing a variety of legal problems. The premise of the work is that the teaching and research of law can be experienced in ways that do not depend exclusively on text, but that have recourse to the full range and diversity of the sensory capacities of teachers, students, professionals and scholars. In that sense, we also recognize that different persons all have different sensory strengths and weakness, that is, that we all experience in different ways and thus also learn via different sensory pathways.

The project that is the subject of this book was part of a UK Arts and Humanities Research Council (AHRC) funding programme called 'Beyond Text in Legal Education'. This funding programme recognized that non-textual material and communication through visual, oral and sensory means were an important part of our culture. We now have the means to reach many quickly and communication becomes rapid and in some cases transitory. The aim was to create a research programme where scholars could study the issues concerning the non-textual dimensions of culture. This would involve, *inter alia*, a study of the material conditions of these non-textual means and also their control and dissemination. Further, it would look at the technology itself and how this impacted upon the culture and tradition. Out of these issues, of particular importance to our project were questions of performativity, of how we transmit multimedia non-textual

1 Our thanks to Martin Taggart for assistance with the finalization of the text of both volumes.

objects, and the impact upon traditional methods of cognition in the transmission and remembering of culture. This implied looking at learning and teaching and the way we might be able to use non-textual methods even in areas that are primarily textual. What would be important here would be the mediation between the text and the non-text aspects, the imagination that would be brought into play and the use that imagination could be put to. How do these new modes that use all the bodily senses play on the imagination and what does that imagination do in helping to create an embodied knowledge?

The role of the imagination in teaching and learning, and the way in which these can be enhanced and enriched by the use of non-textual resources, is a key aspect of the 'Beyond Text in Legal Education' project. Although 'imagination' was understood broadly, one of the most important features of the project was to consider how the ethical or moral imagination could be developed through a combination of text-based and (especially) non-text-based resources properly incorporated into tertiary and professional legal education curricula.

Law is very much a text-based discipline, both in its practice and its education. Legal education, both at the tertiary and continuing professional levels, has been and continues to be dominated by recourse to textual resources. Law students and legal professionals are taught to learn and understand general rules and principles, and apply them to pre-manufactured factual scenarios. This is no different when it comes to the education of legal professional ethics, where, typically, moral theories are presented as consisting of general axioms that allow students and professionals to rationally resolve traditional problem cases (pre-articulated factual scenarios that are designed to produce moral dilemmas). The pursuit of professional integrity is dominated by promoting the ability to use complex systems of ethical postulates to justify the making of a certain decision in relation to a pre-determined set of facts.

There is no doubt that the development and use of text-based resources facilitates the exercise of skills that are important to the ethical development of law students and legal professionals. Learning how to better articulate and justify one's reasoning by reference to complex systems of normative languages is important. However, the exclusive emphasis on textual resources, on languages and their manipulation, carries with it significant dangers. Such an exclusive focus can be restrictive in that it can result in law students and legal professionals never acquiring the skill of coming to see and recognize the ethical complexity of any given situation; it places at risk their ability to overcome the limitation of the categories with which they are working, particularly when the particular situation itself puts into question those categories. Coping with this limit requires the exercise of the (ethical) imagination. Such an exercise enables the person to respond to the complexity and particularity of the situation, and to come up with just and imaginative ways of going forward.

There is a considerable amount of work in this context that has been, and continues to be, conducted by those who emphasize the value of the 'literary imagination' and the use of literature for these purposes. Some of this work has

found its way into the post-professional education programmes of major law firms, principally in the USA. While the invocation of the literary imagination in this context is important, it is still too heavily text-based. What the 'Beyond Text in Legal Education' project aimed at was creating a space where the (ethical) imagination can be inculcated and the movement beyond can be experienced in non-textual ways. The project does not wish to suggest that non-textual resources should replace textual ones. It goes beyond text, but does not leave it behind completely. Rather, it seeks to provoke reflection upon the value of non-textual resources in developing imaginative (ethical) perception amongst law students and legal professionals.

In these two volumes, then, it is recognized that legal education and legal practice are both steeped in specific texts and institutions. These texts and institutions define the profession; they orient us; their categories and pathways give us a structure within which we not only participate but also evaluate each other. Yet it is also recognized that the complexity of moral life, and professional life more generally, is not reflected by any one set of texts and institutions. Indeed, it is argued that what is needed, at those moments in which already-existing categories and pathways run out, is the exercise of the (ethical) imagination. However, this (ethical) imagination cannot be understood too cognitively or too rationally; nor can it be said to exist in the manipulation or reorganization of already-existing categories and pathways. This (ethical) imagination is, instead, better understood to be embodied, situated, affective and creative. In constructing this approach to the (ethical) imagination, these two volumes draw on a number of theoretical traditions, including embodied and situated cognition, philosophy of the emotions, theology, aesthetics, and legal and moral theory.

The aim of this volume is to contribute to legal education in a general way, i.e. to the learning and teaching of any area of the law. This volume also includes some chapters that introduce and discuss general resources and issues concerning non-text-based reasoning and non-text-based resources. The remaining chapters in this volume focus on exploring the pedagogical and, to some extent, moral value of non-textual resources in legal education. The companion volume builds on this one and focuses in more detail on the potential contribution of non-text-based resources to moral education in law schools and law firms. The contributors to both volumes include a wide range of theorists and educators, including legal educators in the UK and the USA working in both law schools and law firms, some of whom have used such resources before, and others who did so as a result of the 'Beyond Text in Legal Education' project.

The project started from this thought and this 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 object without text, to use their imagination to let the object speak to them and not be subsumed by the text. Lawyers face an analogous situation when they encounter events that require decisions to be made; too often they look to the text and do not experience the particularity of the

situation by letting it speak for itself. Part of the aim, then, practically speaking, was to explore – by working together with an art gallery – this analogy. We wanted to provide a space – literally, a gallery space – where law students and lawyers would be able to experimentally explore legal and ethical skills in unfamiliar ways, precisely by means of non-text-based activities and relying only on non-text-based resources.

Prior to this experiential workshop (about which we will say more below), we held, on 8 November 2008, a one-day workshop, involving a small group of philosophers, theologians and lawyers, who met to discuss the conceptual, ethical and practical implications of this view of law and cognition. These issues were discussed specifically against the backdrop of a provisional programme of activities for the experiential workshop. This initial conference helped us further refine the activities and aims of the experiential workshop.

The experiential workshop itself was the centrepiece of the project. It was held over two days, 7–8 December 2008. The workshop programme and its delivery on the two days was primarily the responsibility of three artists, a visual-based artist (Alicja Rogalska), a movement-based artist (Keren Ben-Dor) and a curator (Zoë Fothergill, who is an artist in her own right). The workshop was held, in large part, in the Talbot Rice Gallery, which is the gallery based at Old College, University of Edinburgh. The participants included legal professionals, legal scholars and legal education (both tertiary and professional) policy makers from the UK and the USA. The artists were all experienced in working with persons who have had no or little exposure to the production and/or appreciation of visual and movement-based art.

The aim of the workshop was in line with the above-described aims of the project, i.e. it aimed to develop non-textually the skills that may enable lawyers to engage the (ethical) imagination, to experience the particularity of the situation and the vulnerability of those in it, and to allow that situation to speak and help them move beyond the law by transforming it, but not destroying it. The experiential workshop, then, delivered on our objective to create a space for legally trained people to explore the production of visually and movement-based art, and also to explore non-textually affective experience and practice in law. It was most certainly a highlight of our project. It was highly risky and experimental. We did things that took us well out of our comfort zones. But the careful planning and skill of the artists made it highly successful both as an event and as a learning experience. The group dynamics that began in this workshop carried over for the whole of the project. We built reflexivity into the workshop so that throughout there was time to reflect together on the exercises and how we felt. The reflexivity included, for instance, randomly placed voice-recorders upon which participants could verbally record their reflections.

The workshop programme has been included as the Appendix to this Introduction. The workshop was also filmed. We hired a film maker, Robert McKillop, who was with us for the entire two days. The film was not a mere record, but was also an artistic outcome in its own right. It also fed into the research itself

in that it became part of the research process and interacted with it, and it played an integral role in the succeeding seminars and in our thinking as to how to go forward with the project. In that sense, the film highlighted the 'Beyond Textual' nature of the project and unexpectedly transformed our conception of research method.

After the experiential workshop, we organized two further reflective workshops. The first, held on 6 March 2009, was a small workshop entitled 'Understanding Transformation'. Here, we studied the underlying ethical issues, though more in the context of physical and social processes, bringing together a group of sociologists, philosophers and cognitive scientists with some knowledge of neuroscience to look at the cognitive and sociological processes involved. We looked at the *embodied* nature of what was happening, at the physical and other processes that are involved here, especially legal visualization and what might be called multi-sensory law. We asked: how does the experience of encounter, seeing and vulnerability get played out on the body?

Our second reflective event was a major two-day conference, held on 20–21 June 2009. This conference included some experiential elements, including interactive theatre, but the focus was on the theoretical and practical reflections of participants in the experiential workshop. It is the papers presented at this conference, together with a number of extra specially invited additions, which constitute the chapters published in these two volumes.

Chapters in this Volume

This volume contains nine chapters. The first two, by **Zenon Bańkowski** and **Maksymilian Del Mar** respectively, focus on what happens when we move out and beyond language. In doing so, they set the scene for the remaining chapters in this volume. Both Bańkowski and Del Mar emphasize that they do not want to throw away language, but instead to provide resources when we are in what Bańkowski calls the 'Space to See', that space which is for him ever-present in law but which tends to get overshadowed by language. For Bańkowski, that space is where one develops the moral imagination and encounters the vulnerability of the other. What is vital here for both Bańkowski and Del Mar is how we come to 'see' this vulnerability in the encounter.

For both authors, an arresting image comes from Raimond Gaita's *A Common Humanity* (1996), where Gaita describes and explores the quality of the interaction of a nun with the inmates of a mental hospital. The way the nun relates to the inmates puts, Gaita says, him and others, liberal or not, to shame. For Gaita, the nun treats the inmates differently because she 'sees' something about them which the others miss and it is this which informs the encounter. In confronting this image, Del Mar looks to art and theories of moral perception and shows how the exercises in the experiential workshop were attuned to this process of educating attention and encounter. Bańkowski, on the other hand, confronts the image by

looking to analogies with legal reasoning and how movement and patterning help to move the legal narrative imaginatively along.

The next two chapters reflect on these general propositions. In Chapter 3, **Julian Webb** explores further the ideas of attention and encounter and their relationship to text in law. He looks at the relationship of text to 'beyond text' and proposes three broad phenomenological relationships between the self and text that help us better to understand the openness necessary to moving beyond text while not losing it. These are: 'being without text', 'being-with text' and 'being beyond text'. In his commentary on the chapters by Bańkowski and Del Mar, he emphasizes the importance of the 'Beyond Text in Legal Education' project to legal education and the possibility of this helping to achieve justice by transforming not just knowledge but the knower.

In Chapter 4, **Anthony Bradney** locates the arguments about the value or otherwise of the notion of 'Beyond Text' in the context of legal education and especially of law schools in the UK. His claim is that the history of debates about the role of the law school reveals that among the vast majority of legal academics there is now a consensus that the law school is to provide some sort of liberal education. British law schools are now 'intellectually cosmopolitan places' drawing from many disciplines and new ideas and approaches. He does, however, urge caution. First, he argues against Bańkowski's and Del Mar's implicit view that the cultivation of the ethical imagination – and thus in a way a form of moral education – is integral to law and its teaching. Though law and morality are connected and looking at these connections is an important and necessary part of legal education, one does not have to make law students good people. Second, because of the nature of the academy, and given the structural position of law in society, law students and law academics are not going to be a ready audience for this type of beyond-text approach, and the preference in the academy and outside will still be based upon essentially text-based skills.

In Chapter 5, **Paul Maharg** views 'Beyond Text' in the context of the notion of democratic professionalism, a practice that is built around models of active and collaborative democratic change. He argues that Dewey's form of educational praxis is one method by which we can encourage democratic professionalism. He argues, further, that a key element of our approach should be the Deweyan concern with 'associated life' and 'associated thought', namely the cultural and social forms of professional association, and the forms and patterns of social thinking that professionals undertake in practice. Here, learning also includes developing the moral imagination and Maharg seeks to explore the nexus of learning, lived experience and imaginative action. For Maharg, the Internet offers us significant opportunities to engage in new forms of social and educational engagement, and particularly in online games and forms of social software. Two case studies are offered. The first describes a regulatory initiative to embody Deweyan forms of associated life, while the second describes an educational initiative that attempts to embody Dewey's value of associated thinking.

In Chapter 6, **Clare Sandford-Couch** approaches the topic by looking at the different way we move beyond text in the use of visualization in law teaching. She explores the concepts of legal visualization, games, films and television and other non-verbal forms. All of this is for her central to developing wider engagement with legal and moral issues in the education of lawyers. For Sandford-Couch, Mary Warnock sums it up thus:

> It is the representational power of the imagination, its power actually to form images, ideas or likenesses in the mind, which is supposed to contribute to our awareness of the world. (Warnock 1976: 33)

In Chapter 7, **Thomas Wm. Mayo** presents a detailed study of his course 'Law, Literature and Medicine'. Though this course consists in large part of reading various literary materials, it concludes with students creating works of art for their final projects and so it is also in part moving beyond text. This moment beyond is also valuable because for him empathy is an important professional trait and his course aims, through the encounter with art and literature, to model empathy and, through this iterative process, to enhance empathetic abilities.

We come finally to two chapters where aspects of the performative become important. In Chapter 8, **Randy Gordon** shows how law and legal education, because it can benefit from a narrow instrumental way of teaching law, prioritizes rules and familiar forms of legal narrative, which might not in the end be sufficient for legal education. For Gordon, teaching and learning law with contextual-historicist tools provides a way out of this deadlock. He illustrates this by looking at, *inter alia*, cases of self-defence in respect of 'battered women'. But this is more than the still textual way of looking at the material in a historical and literary context. The emphasis on this form of teaching is to provoke the moral imagination that, as Shelley shows, cannot be separated from empathy – something seen in the theoretical context by Neil MacCormick when he crafts Kant on to Smith's sympathetic morality and the 'impartial spectator' (MacCormick 2008). In terms of pedagogy, what is important here is seeing learning and teaching as something that Dewey calls a 'dramatic rehearsal'. This can be extended not only by looking at great drama but also by incorporating play-acting into the learning and teaching process.

Gillian Calder takes this further and discusses how in the context of the University of Victoria's first-year orientation programme one can use the work of Augusto Boal and the Theatre of the Oppressed and Forum Theatre. She shows how in the context of the law school, a relationship between performance and pedagogy, games and exercises, can help in developing the skills of lawyers and teachers of law. This can be used as a means of 'rethinking the relationship between lawyers, legislators and citizens', of helping to develop the empathetic imagination of those who will act for and on behalf of others.

Conclusion

The aim of the two volumes in this 'Beyond Text in Legal Education' series has been not only to stimulate debate in what might be called 'multi-sensory jurisprudence', but also to foster and give examples of pedagogies which involve and enhance the use of the ethical imagination. The development of the ethical imagination, including its empathetic dimension, is something that we think is vital if law is able to structure our life and society in a way that is responsive to vulnerability, not being afraid to go beyond text but at the same time not destroying it.

References

Gaita, R. 2006. *A Common Humanity*. London: Routledge.
MacCormick, N. 2008. *Practical Reason in Law and Morality*. Oxford: Oxford University Press.
Warnock, M. 1976. *Imagination*. London: Faber & Faber.

Appendix

DAY 1

11.00 am Welcome
11.10 am Statement from film maker
11.15 am Ice-breakers led by all three facilitators

1) The name game (15 mins)
2) Visual expectations (15 mins)

11.30 am Warm-up activities with Keren Ben-Dor

1) Familiarity with the space, focus and general awareness
2) From self to other
3) Mutuality, trust and non-verbal listening
4) Directionality. Giving and receiving guidance. Promoting trust
5) Movement witness

12.00 pm Drawing activity with Alicja Rogalska – The space in-between
12.30 pm Movement activity with Keren Ben-Dor – The law of the dance
1.00 pm Sculpture/mixed-media activity with Alicja Rogalska – From textual to visual
2.00 pm Responsive activities with Zoë Fothergill

1) Describe and draw (20 mins)
2) Viewpoints (40 mins)
3) String theories (30 mins)

3.45 pm Installation art activity with Alicja Rogalska – Mute negotiations
4.15 pm Movement activity with Keren Ben-Dor – The great game of power
5.30 pm Informal discussion

DAY 2

10.00 am Movement activity with Keren Ben-Dor leading – Stop and listen
10.30 am Digital photography activity with Alicja Rogalska leading – Respond and capture
11.30 am Movement activity with Keren Ben-Dor leading – Action/reaction and role reversal
12.00 pm Movement activity with Keren Ben-Dor leading – Group response
1.00 pm Visual activity with Zoë Fothergill leading – Visual essays
2.00 pm Visual activity led by all three facilitators – Drawing movement
2.45 pm Visual activity led by all three facilitators – Display time
3.30 pm Reflective activities led by all three facilitators – Creative reflection

1) Drawing activity led by Alicja Rogalska – Visual reflections
2) Combined visual and movement activity led by Zoë Fothergill – Highlights

Performative movement activity led by Keren Ben-Dor – Parting gift

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Chapter 1
The Space to See: Law and the Ethical Imagination

Zenon Bańkowski

Introduction

'Beyond Text in Legal Education' was a project designed to see how we could use other resources than text in legal education to 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. First, 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. Initially, 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. This sort of question involves comparisons with other lives and careers: teachers, plumbers, doctors, businessmen and judges. 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 armies might point to different possible answers. Thus, for example, having a career as a soldier in a peace-keeping army, such as a UN army, 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 lawgiver 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 this 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.

Second, 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 some reference to the text.

Law is the secular religion.[1] 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'

1 Fitzpatrick 1992.

and that defines our identity, whether through a 'constitutional patriotism' as in the USA and proposed for Europe by Habermas,[2] or in the self-identity of the 'common law'.[3] 'In the beginning was the Word' is still the case, but that word is Law. As Carl Schmitt (1985) pointed out, much theorizing in constitutional law is secularized theology, the conceptual problems being of a similar order. Theological questions, as Hegel says, are ways of looking at important philosophical questions. And, in the West, the connection between the two discourses has been close and mutually reinforcing.[4] For Hegel, the Incarnation was the theological way of looking at the central philosophical problem of the relation between the universal and the particular. Similarly, questions around the paradoxes of God's omnipotence can be seen as theological ways of looking at paradoxes of sovereignty in the realms of constitutional theory.

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, as this makes it easier to guide our life by the originary 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 for 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.

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 to 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 organized and timeless categories, do not go beyond language and the text in their efforts to ameliorate this.

2 See Breda 2011.

3 See for example Collins 1995 and Legrand 1996.

4 See Nicholls 1995.

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 require decisions to be made; 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 parables, and specifically the parable of the Good Samaritan. This is so for a variety of reasons: first, for the Hegelian reason outlined above; and, second, 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.[5] This then is the site where the universalism of the

5 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

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 making a decision based on 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 of the legal system, helping to regenerate and renew it.

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. (1978: 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. (1978: 457)

There are two points to be borne in mind here. First, 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

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discourse where norms are justified and where the criteria of universalizability are applied – so norms are justified by the Habermasian universalizing criteria. The other 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 making the decision.

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 realize 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 'All 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 operationalize 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? As such, 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 recognizes that the nun acts in the way she does because she can see something that he and the others were not able to and that this transforms her interaction with the inmates. Here we can see the influence of Simone Weil. Weil (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 should 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 1988: 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 this 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 unself-conscious, 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 straight away, but should wait for it to grasp them. However, this is not just a sort of active contemplation. Although, as Dietz says, a significant element of it comes from the French connation of *attendre*, to wait for, to expect, to long for, it also has the other connotations of paying attention to and 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.[6]

6 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

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.

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. This patronizes them and sees them as

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categories. Collins (1990) makes this clearer when discussing digitization 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 50 pence coin gets slightly worn, as it will still retain its face value.

A book and writing can be viewed as digitized 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 a 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 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 digitized 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 in grained 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 digitized 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 one around the church and thus facilitating the contemplation of the sacred with a sacred space.