THE LIBRARY OF ESSAYS IN CONTEMPORARY LEGAL THEORY
– SECOND SERIES

LEGAL THEORY AND THE HUMANITIES

VOLUME V

MAKSYMILIAN DEL MAR
AND PETER GOODRICH

Legal Theory and the Humanities
Volume V

Edited by

Maksymilian Del Mar

Queen Mary University of London

Peter Goodrich

Cardozo Law School, USA

ASHGATE

Published by
Ashgate Publishing Limited
Wey Court East
Union Road
Farnham
Surrey GU9 7PT
England

Ashgate Publishing Company
110 Cherry Street
Suite 3-1
Burlington, VT 05401-3818
USA

www.ashgate.com

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library.

The Library of Congress has cataloged the printed edition as follows:
Legal theory and the humanities / edited by Maksymilian Del Mar and Peter Goodrich.
p. cm. – (The library of essays in contemporary legal theory – second series ; v)
Includes bibliographical references and index.
ISBN 978-1-4094-5223-2 (hardback : alk. paper) 1. Law and the humanities. 2. Law–Philosophy. I. Del Mar, Maksymilian, 1979– editor of compilation. II. Goodrich, Peter, 1954– editor of compilation.
K487.H86L44 2014
340'.1–dc23

2014012782

ISBN 9781409452232

MIX
Paper from responsible sources
FSC® C013985

Printed in the United Kingdom by Henry Ling Limited,
at the Dorset Press, Dorchester, DT1 1HD

Acknowledgements

Ashgate would like to thank the researchers and the contributing authors who provided copies, along with the following for their permission to reprint copyright material.

The Australian Feminist Law Journal Inc. for the essay: Marett Leiboff (2012), 'Ghosts of Law and Humanities (Past, Present, Future)', *Australian Feminist Law Journal*, **36**, pp. 3–17. Copyright © 2012 The Australian Feminist Law Journal Inc.

Harvard Law Review Publishing Association for the essay: Pierre Schlag (2002), 'The Aesthetics of American Law', *Harvard Law Review*, **115**, pp. 1047–118. Toni M. Massaro for the essay: Toni M. Massaro (1989), 'Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?', *Michigan Law Review*, **87**, pp. 2099–127. Copyright © 1989 Toni M. Massaro.

MIT Press journals for the essay: Cornelia Vismann (2003), 'Tele-Tribunals: Anatomy of a Medium', *Grey Room*, **10**, pp. 5–21. Copyright © 2003 by Grey Room, Inc. and the Massachusetts Institute of Technology.

Sage Publications for the essay: Julie Stone Peters (2008), 'Legal Performance Good and Bad', *Law, Culture and the Humanities*, **4**, pp. 179–200. Copyright © 2008 Association for the Study of Law, Culture and the Humanities.

Springer for the essays: Ian Ward (2002), 'The Echo of a Sentimental Jurisprudence', *Law and Critique*, **13**, pp. 107–25. Copyright © 2002 Kluwer Law International; David Evans (1999), 'Theatre of Deferral: The Image of the Law and the Architecture of the Inns of Court', *Law and Critique*, **10**, pp. 1–25. Copyright © 1999 Kluwer Academic Publishers.

Taylor & Francis for the essay: William P. MacNeil (2005), 'PreCrime Never Pays! "Law and Economics" in *Minority Report*', *Continuum: Journal of Media and Cultural Studies*, **19**, pp. 201–19. Copyright © 2005 Taylor & Francis Group Ltd.

University of California Press for the essays: Desmond Manderson (2000), 'Prelude: Senses and Symbols in Aesthetic Experience', in *Songs without Music: Aesthetic Dimensions of Law and Justice*, Berkeley and Los Angeles: University of California Press, pp. 3–24. Copyright © 2000 by the Regents of the University of California; Peter Goodrich (2009), 'Screening Law', *Law & Literature*, **21**, pp. 1–23. Copyright © 2009 by the Cardozo School of Law of Yeshiva University.

University of Chicago Press for the essays: Martha C. Nussbaum (1995), 'Poets as Judges: Judicial Rhetoric and the Literary Imagination', *University of Chicago Law Review*, **62**, pp. 1477–519; James Boyd White (1984), 'The Judicial Opinion and the Poem: Ways of Reading, Ways of Life', *Michigan Law Review*, **82**, pp. 1669–99. Copyright © 1984 James

Boyd White. Also appeared in *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*. Madison: University of Wisconsin Press, 1986; James Boyd White (1985), 'Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life', *University of Chicago Law Review*, **52**, pp. 684–702. Also appeared in 'Heracles' Bow', *Essays on the Rhetoric and Poetics of the Law*. Madison: University of Wisconsin Press, 1986; Peter Goodrich (2013), 'Visiocracy: On the Futures of the Fingerpost', *Critical Inquiry*, **39**, pp. 498–531. Copyright © 2013 by the University of Chicago. All rights reserved.

University of Pennsylvania Law Review for the essay: Sanford Levinson and J.M. Balkin (1991), 'Law, Music, and Other Performing Arts', *University of Pennsylvania Law Review*, **139**, pp. 1597–658.

Yale Journal of Law & the Humanities for the essays: Robert A. Ferguson (1990), 'The Judicial Opinion as Literary Genre', *Yale Journal of Law & the Humanities*, **2**, pp. 201–19. Copyright © 1990 Robert A. Ferguson; Peter Brooks (2006), 'Narrative Transactions – Does the Law Need a Narratology?', *Yale Journal of Law & the Humanities*, **18**, pp. 1–28.

Brian Dilg for the image: Gerard Legh, The Accedens of Armory (London: Totell, 1576).

Thomas Kist for the image: Still from *Submission* (dir.Theo van Gogh, 2004).

Every effort has been made to trace all the copyright holders, but if any have been inadvertently overlooked the publishers will be pleased to make the necessary arrangement at the first opportunity.

Publisher's Note

The material in this volume has been reproduced using the facsimile method. This means we can retain the original pagination to facilitate easy and correct citation of the original essays. It also explains the variety of typefaces, page layouts and numbering.

Series Preface

What are the new frontiers of contemporary legal theory? What new problems, new methods and new objects of study do the next thirty years hold for legal theorists – and how can the last thirty years help us explore them? The three volumes in *Contemporary Legal Theory, Series 2* offer answers to these questions. In so doing, these three volumes build on, and complement, the volumes in *Contemporary Legal Theory, Series 1* (2010).

Each volume in the series tackles the relationship between legal theory and another discipline: 1) legal history; 2) the humanities; and 3) the natural sciences. In each case, the co-editors have sought to identify the key themes at the intersection of these relationships – often also the key obstacles to collaboration between them. A special effort has been made not to assume that the relationship is or ought to be a collaborative one – for example, the volume on legal theory and legal history recognizes that many (theorists and historians alike) have radically distinguished between the tasks of legal theory and legal history, and thus have been sceptical about the plausibility and fruits of any dialogue between them. Nevertheless, each volume has also attempted to move beyond territorializing in scholarship, to offer ways and examples of how productive dialogue is possible.

The issues explored in these volumes are richly varied, as is appropriate given the specifics of each of the above relationships. Nevertheless, they constitute a coherent whole, for they mark the exciting changes that have taken (and are still taking) place in contemporary legal theory. Arguably, the future of legal theory lies not in the exclusive and illusory bastion of the law: it lies, at least in part, in law's complex and dynamic relations with the past and the diverse ways in which we can explore it; with our aesthetic sensibilities and the bottomlessness of human imagination; and with the challenges posed to our most familiar evaluative concepts by the natural sciences. The essays selected for these volumes look squarely at the glare of these challenges.

MAKSYMILIAN DEL MAR
Queen Mary University of London, UK
Series Editor

Introduction

The project of legal theory is that of adumbrating the trajectory and purposes of the practice of law conceived as a form of life. Bound in origin and concept to the Renaissance reception of the humanistic disciplines and cognate with the classical definition of legal science as an artistic pursuit, *ars iuris*, the defining feature of the theoretical approach to law is that of its openness to the liberal sciences, to the humanities as part of the necessary foundation of legal subjectivity. The rhetoricians used to portray logic and by extension the scientistic conception of legal practice as a closed fist, the *pugnus manus* of a supposedly exclusive and autonomous discipline. Law was to exist alone. The humanities, and specifically forensic rhetoric, were by contrast portrayed by an open hand and with it the embrace and welcome of both legal subjectivity and the disciplines of the arts. Rhetoric was the vital and active art of engaging, persuading, connecting and moving to action in the sense of performing justice.

Logic, *stricti iuris*, the literal restraint of legal decision to the supposed letter of the law, in sum formalism, we will argue, exists in a productive tension with the openness of humanism and its concern to address the questions of justice that exist everywhere though they are not always apparent in the practice of law. As T.S. Eliot puts it, 'other echoes inhabit the garden' and this volume collects those humanistic spectres, those repressed disciplines, as they press against the repression barrier of law and, despite the lawyer's resistance to theory, inform the path of the law.

Our selection of theoretical and humanistic exemplars is ordered loosely on the basis of the classical division of rhetoric. Aristotle insists that the orator starts by proving her character, her qualification to speak on the topic at hand. In consonance with that dictate we start with the particular, the subject as imaginative and emotive being and so with the insistence that aesthetics and intuition, subjectivity and feeling are at the root of legal judgement. We move next to invention, to the choice of topic, theme and voice, and to disposition, the narrative ordering of argument, by means of which the auditor is to be drawn through the stages of the case to its persuasive and most just conclusion. The consequences of such persuasion in turn invoke our third division and theme, that of elocution and delivery, the embodiment of law as something more than mere speech, as the enactment of justice. The audience has both to hear and to see, and according to the rhetoricians it is seeing justice being done, the swiftness of visual apprehension, the theatrical dimension of law as image, that is most likely to persuade and carry the auditor to do what is just. This latter visual dimension of persuasion leads to our final theme, which is that of the theatricality of all legal practice. The last section of this collection thus attends to the potential and role of music, architecture and performance in the enactment of justice and the transcending of the literalist conception of the autonomy of a merely utilitarian law.

Imagination, Emotion and the Particular

The place of feeling and imagination in legal reasoning has long been suppressed in legal theory. The discipline of law is the graveyard of poets, the death of experience, a site of neglect, forgetting and masking – the accumulation of abstract debris on top – of distinct individual experience. Each of the three essays in this section speaks to the tendency of legal theory to hide away from imagination, emotion and the particular – and the role of the humanities in drawing legal theory out of its closet.

Of course, to so remind legal theory is not to ignore the arguably peculiar features of the process and functions of law. Chapter 1, by Toni Massaro, offers, then, a welcome warning against certain naïve uses of empathy and storytelling. Massaro recognizes, certainly, that there is an 'intuitive and immediate appeal' in a call for 'more "empathy," more human "stories," and more liberated "voices"' (p. 10). Her concern is with those uses of these concepts that caricature the law – attacking, for example, simplified models of the rule of law and thus failing to acknowledge the legitimate presence of non-empathic and non-story-like elements in the legal process. Deploying these concepts in a critique of the law should not make us forget that 'rules are guidelines that establish spheres of relevant conversation, not mathematical formulas', and that law in general is 'a dynamic body of policy determinations constrained by certain guiding principles' (p. 15). Drawing on these concepts, then, should not, and need not, induce us into an easy target – one, for example, which suggests that rules themselves somehow '*mandate* a particular (unempathetic) response' (p. 15). Empathy should not, Massaro insists, be seen to be 'the natural enemy' of legality (p. 17).

An important step in not idealizing empathy is noticing that its use is by no means politically or ethically neutral. Thus, Massaro argues that 'the empathy discourse implies a political and ethical agenda, which involves making choices among competing values or sets of feeling', representing, for example, 'a hope that certain specific, different and previously disenfranchised voices – such as those of blacks and women and poor people and homosexuals [sic] – will be heard, *and will prevail*' (p. 17; original emphasis). Massaro also argues that there is an 'inevitable link between discretion and empathy', observing that a call for more empathy in judging often amounts to the claim 'that judges should focus more on context – the result in *this* case to *these* parties – and less on formal rationality – squaring this result with results in other cases' (p. 20; original emphasis). Promoting empathy, then, is promoting a certain kind of legality – it is not an a-legal or anti-legal stance.

In Chapter 2 Martha Nussbaum offers in part a corrective to Massaro, but also in part an embrace of the compatibility Massaro urges between empathy and legality. Thus, although she sets out to defend the vital role of the imagination in legal judgement, Nussbaum insists, like Massaro, 'that technical legal reasoning, knowledge of law, and the constraints of precedent play a central role in good judging and supply constraints within which the imagination must work' (p. 36). A real-life judge must have a variety of abilities and knowledge and 'is constrained in many ways by her institutional role and by the demands of statute and precedent, which already establish what she may and may not consider salient' (p. 38). But Nussbaum goes further: feeling and emotion are important, though this is not a kind of windswept identification with the actors involved (for example the parties to the dispute or a certain witness). It is, instead, a 'detached evaluation' (p. 42). Nussbaum draws heavily here

on Adam Smith's notion of an impartial spectator, using it to emphasize precisely that vital importance of detachment in judgement (see also MacCormick, 2008; Del Mar, 2012).

Having qualified her endorsement of imagination and sentiment, Nussbaum argues forcefully that 'In order to be fully rational a judge must be capable of literary imagining and sympathy' (p. 75). For example, 'if one cannot imagine how women suffer from sexual harassment on the job, one cannot have a vivid sense of such harassment as a serious social offense that the law should remedy' (p. 44). To reiterate, this does not mean that one identifies with or stops with 'the experience of the other person's pain' – what it does mean is that the judge must ask, 'from the spectatorial viewpoint, whether that pain is appropriate to its target, whether it is such pain, or anger, or fear, as a reasonable person would feel in those circumstances' (p. 44). But before the more general reflection can be introduced, there must be a genuine willingness and ability to imagine what the person in question really experienced. And if this, in turn, is accepted, then so ought to be a programme of education in which this 'capacity for humanity' is developed among lawyers side by side with the development of 'her technical capacities' – which means, says Nussbaum, 'that literary art is an essential part of the formation of the judge – and, more generally, of the formation of citizenship and public life' (p. 75).

Ian Ward, in Chapter 3, endorses and further develops Nussbaum's call for a 'new' humanism in both domestic and transnational legal and political order. He does so by helpfully placing what he terms 'sentimental jurisprudence' in the context of the history of ideas, beginning with John Stuart Mill's concerns about Bentham and 'Benthamism'. According to Ward, Mill:

> feared that political and legal science might become rather too wedded to Benthamism, to the idea that law was an instrument of utility, a matter of rules, indeed, and rather too detached from the counter-vailing appreciation that justice is as much a matter of compassion and humanity. Thus, whilst he [Mill] admired the iconoclast in Bentham, he feared the 'interminable classification' in his jurisprudence, the determination to reduce everything to a 'science', the apparent absence of a moral dimension, and the inability to account for 'moral approbation or disapprobation'. (pp. 78–79; internal quotes are from Mill)

Like Nussbaum, Ward also draws heavily on Smith. For Ward, Smith's idea of 'sympathetic feeling' represents the 'most original contribution to the inherited philosophy of classical humanism' (p. 83). Ward notices that as important as detachment is in Smith's image of the impartial spectator, it is sympathy that is the driver: 'we crave sympathetic treatment, and so we crave sympathetic relations', and 'In this way we learn to judge sympathetically, judiciously' (p. 84). Because we are 'intensely dependent on our reciprocal relation with others', so we recognize that 'we can conceive of neither morality nor politics outwith this condition' (p. 85). This has, of course, profound consequences for our understanding of law: law comes to be seen as that which protects the quality of those relations, providing 'the necessary conditions within which love and compassion can flourish' (p. 85). Further, this brings law much closer to home:

> Justice becomes more than a matter of judging guilt or innocence. It becomes a matter of entering into the dramatic life of a community. It thus becomes a necessarily democratic facility too. Law is no longer the possession of judges and jurors, but the moral and political expression of that community of sympathetic 'spectators'. (pp. 87–88)

Crucial for the good of that community is a conversation 'about what it means to be human' (p. 88) – a conversation that is in large part about enabling both the telling of and the listening to stories. Justice, on this view, is (quoting Antje Krog, 1999, p. 259) 'quilted together from hundreds of stories' (p. 89). The humanities, in this sense, are an education of humanity – of a conversation about what it is like (what is the experience of) being human, and the bottomless diversity of that. So conceived, humanities ought to be at the heart of any theorizing about law.

Voice, Perspective and Community

Who is the law for? In whose name does it purport to speak? Whose view does it describe/prescribe, while (often) presenting it as a view from nowhere? What are the various devices – rhetorical, narratological, dramaturgic – via which perspectives are or are not given voice? Should we, and with what end in mind, introduce these devices into legal education? These are the questions tackled by the essays in this section. Their very posing of them offers an agenda for legal theory.

The two essays by James Boyd White (Chapters 4 and 5) both explore connections between law and literature (poetry and rhetoric, respectively), with profound consequences for how we conceive of and also teach law. In Chapter 4, and drawing on his own experience as a student of law and literature, White argues that there are connections between 'the ways in which we are habituated to read texts' of poetry and law, and 'between the dilemmas that confront readers and critics in each field' (p. 99). White highlights the active making and remaking of language in learning to read the central texts of law and literature: 'The sort of education of which I speak, in law and literature, constantly tells us to recognize that we are makers of texts and remakers of culture' – indeed, this is 'the major lesson' of this education (p. 106). In addition to reading actively, this kind of education emphasizes reading for complexity: it is 'never enough', says White, 'to read a poem or an opinion for its main idea' (p. 109) – instead, one must pay attention to the tensions and contraries within any poem and opinion. White suggests that we ask not only whether we agree with an opinion, but also 'What do I think of this opinion *as an opinion*, as a piece of lawmaking?' (p. 110; original emphasis). In an illuminating passage, White further elaborates on what it is to approach an opinion with this question in mind:

> To look at the opinion this way is to open a set of questions about 'excellence' in the judicial opinion as a form of thought and life, on such topics as fidelity to facts and to law; openness to the contraries in the case, and hence to what can fairly be said against one's own result; the processes of reasoning by which the past is interpreted and brought to bear on the present; the degree to which the court recognizes the legitimacy and humanity of the litigant (especially the losing litigant) and fairly judges the legitimacy of his point of view; the way the court defines the legislature, the lower court, the jury, and the lawyer, and the sort of relations it establishes among them; and so on. From this point of view the most important 'result' in an opinion is not the judgement it reaches on a particular issue but the character the court gives itself in its writing and the opportunities for thought and community that it creates. The truest meaning of the opinion is not its message, but the experience of mind it holds out as a model of legal thought: the language it makes as it places one item next to another. (pp. 110–11)

The passage is striking in part for how it links both writing and reading an opinion with its 'cultural and communal life' (p. 99). This comes through clearly, for instance, in the responsibility the above passage points to in recognizing the many voices in any dispute, and the emphasis it places 'against monotonal thought and speech, against the single voice, the single aspect of the self or culture dominating the rest' (p. 116). What White is doing here is reconstituting the practice of law as a communal art of protecting diversity – of the practice of law precisely 'as one of the humanities' (p. 117). There is, for him, an intimate connection between how we conceive of (legal) meaning and (legal) language, how this translates into practices of reading and writing, and the quality of a community's openness to diversity:

> Many-voicedness; the integration of thought and feeling; the acknowledgement of the limits of one's own mind and language (and an openness to change them); the insistence upon the reality of the experience of another person, and upon the importance of her story, told in her words – these values, implicit in the kind of reading I have described above, are all in fact essential to our own best ideas of justice. They are political as well as intellectual and aesthetic virtues. And they are political virtues not only in the reading and writing of law, but in the reading and writing of anything … When we thus teach law properly, we teach a kind of literature as well; and both activities can be seen as serving the same values, under the same standards. (p. 125)

A similar picture of law as a 'central art by which community and culture are established, maintained and transformed' (p. 131) is the theme of the second essay by White (Chapter 5). The driver, this time, is not poetry but rhetoric. Presenting law as part of the rhetorical tradition allows White to distance himself from two dominant pictures of law: law as authority and law as 'a system of institutionally established and managed rules' (p. 132). There are three aspects to understanding law as a rhetorical activity: first, this activity is a creative one; second, it is one in which 'the lawyer must always be ready to try to change' the language of the law; and third, it is an activity that is 'socially constitutive' (p. 137). In short, on this view, 'law is an art of persuasion that creates the objects of its persuasion, for it constitutes both the community and the culture it commends' (p. 138). It is 'not merely a bureaucracy or a set of rules, but a community of speakers of a certain kind: a culture of argument, perpetually remade by its participants' (p. 138).[1] The following passage summarizes the agenda for a legal theory based on the communal arts of rhetoric:

> From this point of law, the law can be defined as the culture that we remake whenever we speak as lawyers. To look at law this way is to direct one's attention to places that are normally passed over: to the way in which we create new meanings, new possibilities for meaning, in what we say; to the way in which our literature can be regarded as a literature of value and motive and sentiment; to the way in which our enterprise is a radically ethical one, by which the self and community are perpetually reconstituted; and to the limits that our nature and our culture, our circumstances and our imagination, place on our powers to remake our languages and communities in new forms. (p. 143)

As with the first essay by White, this one also carries important implications for legal education:

[1] There may be some fertile links here between White's account of the rhetoric of law and Gerald Postema's account of common law reasoning (2003a, 2003b).

> The law we teach would not be regarded as a set of institutions that 'we' manipulate either to achieve 'our policies,' as governors, nor 'our interests,' as lawyers, but rather as a language and a community – a world, made partly by others and partly by ourselves, in which we and others shall live and which will be tested less by its distributive effects than by the resources of meaning it creates and the community it constitutes: who we become to ourselves and to one another when we converse. (pp. 146–47)

Where White looks to poetry and rhetoric to reconstitute our understanding of law, Robert A. Ferguson (Chapter 6) draws on the notion of 'genre', identifying 'the driving impulses' (p. 154) of the modern judicial opinion. These impulses 'convey the tonal, methodological, and rhetorical life of this kind of writing (p. 154). Ferguson identifies four such impulses, and analyses each in turn: first, the monological voice; second, the interrogative mode; third, the declarative tone; and fourth, the rhetoric of inevitability in judicial writing. For Ferguson, these driving impulses of the judicial opinion 'are the grammar of judicial decision-making', and understanding them can lead to greater appreciation of such vital features of opinions as 'the nature and development of questions asked [by judges] ... uses and abuses of history ... judicial self-fashioning ... and ... the hidden perspectives and project certitudes in the judicial voice' (p. 166).

The theme of voice is particularly interesting in Ferguson's account – interesting because he focuses less on the law's ability to hear the voices of those who come before it and more on the voice of the judge. For Ferguson, this voice is 'profoundly monologic ... and ideological' (p. 155). This voice 'works to appropriate all other voices into its own monologue', subsuming difference as it does so (p. 155). As monologic as it is, it nevertheless seeks to present itself 'as if forced to its inevitable conclusion by the logic of the situation and the duties of office, which together eliminate all of thought of an unfettered hand' (p. 157). The voice may speak alone, 'but the persona behind it accepts and moves on a stage of perceived boundaries, compelled narratives, and inevitable decisions' (p. 157). This tension between the voice and the personal in judicial decision-making is just one of a number identified and analysed by Ferguson. Together with his pointing to the importance of the kinds of questions asked by judges (in the interrogative mode) and the use of hyperbole, certitude, assertion, simplification and abstraction (as part of the declarative tone), what Ferguson offers is a 'knowledge of form in judicial writing' (p. 166). This approach cuts across many debates in theories of adjudication: the focus is less on the justifiability of particular decisions and more on the language used by judges. What we need first, says Ferguson, is 'a better understanding of the complex and often contradictory workings of judicial discourse; how judges work within barely acknowledged constraints that they also shape; how courts construe a shared genre from different venues and levels in the judicial hierarchy; [and] how rhetoric and dogma conspire under pressure' (p. 169) – the point being that it is only by focusing carefully on the discourse that insights into these elements of legal judgement can be enabled.

Attention to the (literary) forms of judicial decision-making also characterizes Chapter 7: Peter Brooks' plea for paying 'more attention to narratives, to narrative analysis and even narrative theory' in theories of adjudication (p. 173). Brooks asks of the legal judgement the questions posed by narratology: 'what narrative is, how it works, what its parts might be, and how they might go together' (p. 174). This involves, for instance, paying attention to how a judge might construct a narrative of a party, or a witness – sometimes 'substituting the constructed narrative for the questions and answers of the hearing' (p. 178). By paying attention to the devices and strategies of such construction, one can pay more careful and

critical attention to how the voice of the party or witness is being inevitably selectively represented – to precisely the sense in which any 'narrative discourse is never innocent but always presentational and perspectival' (p. 195).

The virtue of Brooks' analysis is in his intimate reading of a number of opinions – and this cannot be reproduced here. What is of general import is the inextricability that Brooks points to between the commonly recognized 'tools of [legal] reason and [legal] analysis' and narrative (see p. 193). This is a matter of looking at 'legal plumbing' (p. 198) but through the eyes of the narratologist, who can help us spot, for instance, 'the initiation and completion of an action', the use of 'stock' narratives, 'the movement of a narrative through a state of disequilibrium to a final outcome that re-establishes order', seeing 'who sees and who tells', and noticing 'the explicit or implicit relation of the teller to what is told' and 'the varying temporal modalities between the told and its telling' (p. 194). Legal theory informed by the humanities in that sense offers a picture of the deep narratological dynamics of legal reasoning.

The final essay in this section offers both a look back and a look forward to the relationship between law and the humanities. Marett Leiboff (Chapter 8) recounts the story of Otto Kahn-Freund's lecture at the London School of Economics in 1965, but with a view to reminding us, and promoting the centrality, of 'the broadest conception' of the humanities: 'of the human, of the civil, and the civilising' (p. 213). Key to this account is Kahn-Freund's use of the concept of 'Bildung' or 'formation', which for Kahn-Freund signalled the importance of a lawyer being educated in law and the humanities. Properly understood, *Bildung* points to the recall of 'the shared and collective histories and memories that are integral to humanity and the humanities' (p. 213). It reminds us of the importance of associating the human with humanities – to put it differently, of humanizing the humanities. That this needs to be remembered is illustrated powerfully by the figure of Carl Schmitt who 'shows us … that it is possible to be uncivil and inhumane and to have knowledge of and an understanding of the humanities – as a scholarly exercise' (p. 209). If, then, law and the humanities is to have a future, it must be one built on a past that speaks 'to humanity, the humane and the human' (p. 209). In advocating this archaeology of the human, Leiboff's essay neatly rounds off the above essays' insistence on the vital role of the humanities in helping us to see the connection between the most technical aspects of law and the ethical quality of communal life.

Image, Vision and Pattern

The essays in Part III point to a robust new area of growth in theorizing about law, namely the understanding of law through visual studies. This is a multifaceted enterprise, combining – to mention but three possibilities – analysis of (still and moving) images of law, the use of images in law and the different ways of visually modelling legal knowledge.[2] The four essays in this section offer but a small and exemplary taste of this living feast.

The first of these, by Pierre Schlag (Chapter 9), is a much-admired tour de force of four different kinds of aesthetics: the grid aesthetic, the energy aesthetic, the aesthetic of perspectivism and the dissociative aesthetic. Schlag draws on each to point to certain aesthetic differences between practices and theories of law and legal reasoning. It is important to

[2] All three are present in the latest collection to explore these themes (see Wagner and Sherwin, 2014).

underscore Schlag's approach to aesthetics, for he is careful to assert that his notion is 'neither confined to the realm of art nor preoccupied with questions of beauty' (p. 220). Instead, Schlag understands the aesthetic to pertain 'to the forms, images, tropes, perceptions, and sensibilities that help shape the creation, apprehension, and even identity of human endeavors, including, most topically, law' (p. 220). Each aesthetic points to perfectly recognizable concepts – for example the grid aesthetic identifies 'bright-line rules, absolutist approaches, and categorical definitions', while the energy aesthetic points to 'conflicting forces of principle, policy, values' and precedents expanding or contracting (p. 221) – but what is novel are the explanatory tendencies and difficulties that Schlag points out are the consequences of the particular aesthetic adopted. Schlag brings to the surface what legal theorists and lawyers may have been unconsciously influenced by: as he points out, 'the aesthetic operates through us – choosing us, enacting us, directing us', for it is, according to Schlag, the aesthetics that 'help shape the cognitive, emotive, ethical, and political preoccupations, goals, values, and anxieties of legal professionals' (p. 223).

To take one example, Schlag characterizes the aesthetics of the grid in concrete terms as being 'framed as a field, a territory, a two-dimensional space that can be mapped and charted' (p. 225). What is appealing about it is its 'stability, predictability, and uniformity' (p. 225). Those working within the grid work tirelessly to divide and subdivide, classifying and reclassifying, replicating the structure into 'ever smaller, more precise, more exact determinations' (p. 226). There are advantages to be had here – Schlag says that the grid 'enables microthought', as well as 'the segmentation of discrete parts from what might otherwise look like a seamless web' (p. 228) – but he also points to what are commonly seen to be its dangers and resulting difficulties: its rigidness, intransigency, inflexibility (p. 231); it being so obsessed about maintaining its aesthetics that it does so 'regardless of its effects on "real world" transactions' (p. 232); and its inability to answer the 'old, and apparently persistent question' about how the law changes – a problem for this aesthetic, for the grid is immobile, and is thus an obstacle to representing motion, change or action (see p. 235). What it is crucial to see here about Schlag's approach is that he identifies these dangers and difficulties as the result of an aesthetic: each aesthetic is committed to a certain kind of spatial integrity – in the grid's case, to 'the semblance of order, stability, and fixity' (p. 236) – and it is this that in effect *creates* a problem for any approach operating within that aesthetic.

Interestingly, Schlag also draws on each aesthetic to discuss certain features of jurisprudential debates – pointing to, for example, the grid-like debates over soft and hard positivism, or inclusive and exclusive positivism (see p. 239). What legal theorists can find here, then, is not only a tour through styles of legal reasoning, but a tour through styles of theorizing about law. Further, as Schlag notes, these styles carry with them certain 'political or ethical tendencies' (p. 280), though it may be that the very relationship between aesthetics and, say, politics, can be approached in different aesthetic ways (see p. 281).

In Chapter 10 Cornelia Vismann allows us to approach the intersection between law and the visual in a different way – though still by making a connection between the aesthetic and the legal. Vismann explores the resonances and dissonances between televised hearings and courtroom trials, though with a twist concerning the prospects and effects of bringing television cameras into courtroom proceedings. In doing so, Vismann is able to demonstrate the possibility of a specific kind of materialist jurisprudence: one that studies the mechanics and dynamics of justice through their representations/explorations in a variety of media.

Vismann compares two specific instances: a televised hearing in 1954 of an investigative committee into certain military practices, featuring Joseph McCarthy and Joseph Nye Welch, and Otto Preminger's depiction of a murder trial in *Anatomy of a Murder* (1959). The contrasts between the two are informative: the physical environment of each enables and (often, though not always) rewards certain styles of advocacy – thus although the televised hearing would ordinarily tend to favour the 'antagonistic, aggressive and no-holds-barred' style sported by McCarthy, it was, on that occasion, Welch's adoption of the 'role of sovereign judge', refusing to participate in the duel, that carried the day (see p. 293). *Anatomy of a Murder*, in turn, 'illuminates the machinery of legal justice by cinematic means', pointing to, for example, the fragility of 'the edifice of truth – so carefully constructed from the witness statements, cross-examinations, and expert testimony', doing so by a scene towards the end of the trial that shows a glimpse of the outside (p. 297). What Vismann sets up, in effect, is an analogy between the aesthetics of television and cinema on the one hand, and that between the tribunal and the courtroom trial on the other (see p. 298). The point is that paying attention to those aesthetics allows us to analyse and see the different ways in which authority is established and maintained, but also all too easily undermined.

The remaining two essays in this section both continue in this materialist, archaeological vein – the first, by William MacNeil (Chapter 11), looking contemporaneously to cinema (see also MacNeil, 2007, 2012) and the second, by Peter Goodrich (Chapter 12), looking back to the emblematic tradition in the sixteenth and seventeenth centuries (though not without linking this, too, to images in the present day) (see also Goodrich, 2013).

MacNeil analyses the 2002 Stephen Spielberg film *Minority Report*. Building an analogy between the film's 'depiction of a future in which murder is thwarted by a Department of PreCrime before it occurs in fact but not in thought' (p. 307) and the search for a predictive theory of law (to some extent in the work of the American Realists but mainly in the Law and Economics movement), MacNeil offers a simultaneous critique of both. The place of law in both the film and Law and Economics is as a moving target: on the one hand, both can be seen as 'articulating a kind of counter-jurisprudence, even anti-jurisprudence which writes the law – its rules, its processes – out of the picture' (p. 310). On this view of it, 'both are committed to pre-empting the law through prediction, thus enabling the address and redress of a potential legal problem before it occurs' (p. 311). The fantasy they enact is that of 'a world without right, and without the law, because prediction has rendered it irrelevant' (p. 313). On the other hand, this 'anti-jurisprudence is … an intensely jurisprudential move' (p. 311). There are, MacNeil argues, 'more radical … kinds of law circulating through their respective margins', a 'repressed form of law which is precisely that which supports and sustains the fundamental fantasy, present in both the film and Law and Economics, of a world without law' (p. 313). The law in question is the law of desire: the desire of a consumer in a capitalist paradise, an 'America as Mall, in which a "free market" of relentless exchange prevails, and in which everything and everyone – real and virtual – is up for sale and consumption' (p. 315). The law here forces us to choose: it becomes not a 'process of right, let alone justice', but rather 'a tool, even a weapon of executive *diktat*, carrying out the ukase to be "free" … to choose anything and everything, *as long as one chooses*' (p. 315; original emphasis). Depicting this bleak possibility, this nightmare in which law signifies the absence of justice, is the 'real challenge' of the film, thereby also enabling a powerful critique of Law and Economics:

> the real challenge issued by *Minority Report* is for nothing less than a reclamation, on the part of legal critique, of the subject-centred humanism it has so long disavowed and decried. That humanism – and the jurisprudential tradition of civil liberties it stands for – is more necessary now than ever … If this challenge to human rights is to be thwarted, if *Minority Report* is to be prevented from materializing not only in America but also elsewhere … then legal critique must go beyond the mere combustion of the logic of prediction and the rationality of utility which is its avatar. It must reconstruct a positive jurisprudential alternative as much as deconstruct its anti-jurisprudential predecessor, asserting – contra *Minority Report* and its cognate, Law and Economics – the primacy of the human … To argue otherwise risks replicating rather than rebuking the reason that underwrites prediction and authorizes efficiency … namely, *that it knows the price of everything but the value of nothing*. (pp. 319–20; original emphasis)

Goodrich may look further back than MacNeil, but not, as noted above, without articulating a critique of the present. The emblematic images he looks to 'lurk', he says, 'behind their reproductions in the modern and ultramodern image archive' (p. 349), which makes it all the more important that legal scholars become skilled in the long-forgotten and much-neglected *mens emblematica*, the emblematic tradition at the heart of the Renaissance *ars iuris*. The echoes of the gestures of old (especially in hands and the positioning of fingers) appear in contemporary photographs of legal figures (law deans, professors, judges). Lawyers and even students of law are drawn to and carried by these echoes, perhaps even more than they realize – scholars are needed to bring these echoes to the surface of awareness, if only to take a little sting out of their magic. To make this argument is to run counter to centuries of antagonism to vision in legal scholarship and legal education.[3] As Goodrich notes, the 'ceremonial, triumphal, and sartorial dimensions of law are generally assumed, somehow taken for granted, and thus overlooked or at best seen as something glimpsed, lateral to legal action' (pp. 329–30). Lawyers, then, need to be reminded of just how much of the visual they have inherited – in addition to the usual acknowledgements of 'rule books and statutes' (p. 330).

One methodological point that is important here is to notice what is unique to the visual. For instance, one needs to acknowledge the 'accessibility' of the visual – in a way that contrasts with the often obfuscatory and alienating effect of legal language (see p. 339). The visual in this sense 'unites', whereas language 'divides': 'The visual is in classical emblematic terms universal, undivided, free of the chaos that Babel inflicted upon language' (p. 337). There are dangers, of course, that come with this accessibility – the power and ideology of the visual may be all too easily missed. To say this is, of course, but to reiterate the crucial need for visual literacy in legal academies, including in the rather text-imprisoned domain of legal theory.

Space, Music and Performance

Vision is not the only new source of methodological revolution in contemporary legal theory: recent decades have also seen recognition of the importance of the spaces in which the legal

[3] For a recent attempt to change the tide in legal education, see Bankowski *et al.* (2013) and Bankowski and Del Mar (2013). See also Del Mar (2010).

operates, of the physical performance of law and of the links between law and music. The five essays in this final section all speak to these relatively new themes.

Opening this section is an essay by Sanford Levinson and J.M. Balkin (Chapter 13). Levinson and Balkin ask the following question: 'What do we expect from the legal performer faced with giving meaning to the ink on the page, and how, beyond the obvious difference in subject matter, would those expectations differ from those directed at the musical performer?' (pp. 365–66). In exploring this question, the anchor for their essay is a review of *Authenticity and Early Music* (Kenyon, 1988), a collection of essays on debates concerning what is an 'authentic' performance of early music. Of course, Levinson and Balkin are very aware of the idiosyncratic move of reviewing such a book in a law journal; their justification, a pragmatic one, is that the interplay they are promoting between musical and legal interpretation offers a 'practical aid' to those concerned with legal interpretation (p. 370). These two domains, they insist, 'share enough similarities to make comparison useful' (p. 372). For example, what Levinson and Balkin find striking is that if 'one looks at any musical score, one is faced … with … command … a series of *directions* concerning tempo, meter, pitch, rhythm, attack, and orchestration that are to be carried out over time by a group of performers' (p. 374; original emphasis). This characterization certainly makes it sound akin to the task of legal interpretation, at least on a certain understanding of that process.

Justifications for the comparison in place, Levinson and Balkin turn to consider how interpretation in music works, and what this might tell us about legal interpretation. They report that for most of the contributors to Kenyon's collection aiming for and asserting the capture of authenticity is very problematic. Instead, they speak of the 'living tradition' of 'participants who feel … comfortable engaging their own interpretations, their own transformations of the materials that constitute their identity'; or of 'a collaborative relationship among composer or playwright … director, actors and singers, and audience' (p. 389). Some contributors are particularly critical of the idea that an authentic performance is one that realizes the composer's intentions, asserting that such intentions cannot be known, and that once released, the composer of the piece becomes one of the listeners (see pp. 390–91). Many of the contributors, then, are pluralists and pragmatists with respect to musical performance, arguing that an interpretation works when 'it produces a pleasing and satisfying experience to the persons of our own era' (p. 392). Readers will already discern that the step from these insights into legal interpretation is not too difficult to take – especially if one is already sympathetic to qualms about authenticity, authorial intention and the associated legal discourse of originalism.

Chapter 15, the other essay in this section that speaks to music (though by no means restricted to that medium), is an excerpt from Desmond Manderson's book *Songs without Music* (2000). Manderson opens unabashedly with a musical score and his aim is to plumb the depths of the experience of the aesthetic, with a view to building a bridge to law:

> In the pages that follow I explore how our experience as aesthetic beings is an aspect of our understanding of the world and the law; how there is a way in which aesthetic discourse, and the experiences which underpin it, can enrich and make more complex our often crudely dichotomous understanding of the relationship between legal order and social conflict. (p. 452)

Manderson takes us through a brief history of the aesthetic, especially its long-standing 'desire for objective truth' (p. 456), which Manderson urges us to place aside, and with it, any dream