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MICHAEL FREEMAN

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Law and Popular Culture

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General Editor's Preface

This volume contains the product of UCL's seventh annual international interdisciplinary colloquium held in July 2003. I hope *Law and Popular Culture* will give scholars and students as much pleasure as was enjoyed by those participating in the colloquium.

I convened the colloquium but was able to call on the assistance of many colleagues, to all of whom I am grateful. I was also ably assisted by Lisa Penfold, the Law Faculty's events organizer, and by various secretaries including Alison Compton, Sarah Petrie, and Laura Smith. I am very grateful to Clintons who provided some much-needed financial support for the colloquium.

Future colloquia include Law and Sociology in 2004, Law and Psychology in 2005 and Law and Philosophy in 2006. Further details of these colloquia and the ongoing programme may be sought from Michael Freeman at Bentham House, Endsleigh Gardens, London WC1H 0EG (uctlmdf@ucl.ac.uk).

Michael Freeman

May 2004

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Law in Popular Culture

Michael Freeman

Law's engagement with popular culture goes back to the mists of time, to the Old Testament, perhaps beyond. There is much jurisprudence in *Genesis*, as George Fletcher reminds us.¹ 'Adam, Eve, Cain, Abel, the serpent—we could hardly think about good and evil, free will and determinism, crime and punishment without them.'² Just as significantly, nor could those to whom these stories were originally addressed. The story of the patriarch, Abraham, remains deeply embedded with today's cultural imagination.³ His haggling with God over the fate of the cities of Sodom and Gomorrah is a model of legal negotiation.⁴ His trial,⁵ the 'Akedah'⁶ (the attempted sacrifice of Isaac), has fired artists (Mantegna,⁷ Rembrandt,⁸ Chagall⁹ amongst many others), poets (think of war poet Wilfred Owen's savage subversion of the Biblical account,

But the old man would not do so, but slew his son, -
And half the seed of Europe, one by one, . . .),¹⁰

composers (Stravinsky wrote a ballad,¹¹ Benjamin Britten juxtaposed Owen's lines with those from the Requiem 'quam olim Abrahæ promissisti'¹² in his *War*

¹ 'The Jurisprudence of Genesis' (2003) 56 CLP 41–61. See also Ronald R Garet, 'Natural Law and Creation Stories' in J Roland Pennock and John W Chapman (eds), *Religion, Morality and the Law* (New York: 1988) 218–262.

² Fletcher, n 1 above, 41.

³ Note its influence, direct or indirect, in all three 'Abramaic' religions. Jews read the 'Akedah' on Rosh Hashanah and Muslims re-enact the event on the feast of the sacrifice at the end of the *Haj* rituals. For Christians it anticipates the Crucifixion and Genesis 22 is part of Easter week services.

⁴ Genesis 18: 22–23. This smacks of 'theological challenge and judicial debate' (*per* Stefan C Reif, *Judaism and Hebrew Prayer* (Cambridge: 1993) 32).

⁵ See Carol Delaney, *Abraham on Trial* (Princeton, NJ: 1998). See also David Lee Miller, *Dreams of the Burning Child* (Ithaca: 2003).

⁶ Literally 'the binding' [of Isaac]. See further, Shalom Spiegel, *The Last Trial* (New York: 1969). Muslims believe it was Ishmael who was the intended sacrifice, but see Reuven Firestone, *Journeys in Holy Lands: The Evolution of the Abraham-Ishmael Legends in Islamic Exegesis* (Albany, NY: 1990).

⁷ Painted about 1490 (it is in the Kunsthistorisches Museum, Vienna).

⁸ Painted in 1635 (it is in the Hermitage in St Petersburg).

⁹ Painted between 1960 and 1966 (it is in the Musée National Message Biblique Marc Chagall in Nice). Isaac in this painting has been sacrificed, presumably like Jesus. Alice Miller, *The Untouched Key: Tracing Trauma in Creativity and Destructiveness* (New York: 1990) critically examines a number of paintings of the incident.

¹⁰ Genesis 22: 1–14.

¹¹ *Abraham and Isaac* completed on 3 March 1963 and dedicated to the people of Israel.

¹² Which of old Thou didst promise to Abraham [and his seed].

Requiem,¹³ Bob Dylan too wrote a song—‘Highway 61 Revisited’—that imagined Abraham questioning God’s order¹⁴). It formed the sub-text for Woody Allen’s film *Crimes and Misdemeanors*¹⁵ and for Neil Gordon’s novel, *The Sacrifice of Isaac*, about the ambivalent legacy of the Holocaust.¹⁶ And, even if it passed Freud by,¹⁷ it has had enormous influence on later psychoanalysts.¹⁸ But why not, we may ask, on contemporary jurisprudence where there is so much concern with unjust law,¹⁹ civil disobedience,²⁰ even the ‘discretion to disobey’²¹? Or on family law? It raises issues of adult responsibility and care. What are Abraham’s obligations toward Isaac? Although Isaac is an adult, Abraham remains his father. To whom does Isaac belong? And where is Sarah?²² What her absence from the story tells us is obvious from today’s perspective, informed as it is with feminist insight. But how would those to whom the story was directed, thousands of years ago, have reacted? Where they would have taken the story literally—as many believers today still do—we, like Kierkegaard perhaps,²³ would see it as a story about the trials of faith and commitment, about trusting powers and purposes that lie beyond human understanding. And this remains relevant as we grapple to understand much beyond our comprehension: on one level disasters such as the Holocaust,²⁴ but rather more mundanely contemporary issues of life and death.²⁵ Richard Miller, I note, uses the Abraham-Isaac Midrash to offer insights into the trust we put in the medical profession in paediatric care.²⁶

Law’s engagement with popular culture reached a crescendo in Ancient Greece.²⁷ Kitto,²⁸ paraphrasing Pericles,²⁹ says of the Greeks that they ‘throw open to all our common cultural life, nor do we deny them any instruction or

¹³ Commissioned to celebrate the consecration of Coventry Cathedral in May 1962 (the original building having been destroyed by German bombs in 1940—a war crime passed over by Wai Chee Dimock (see p 520 below). I attended the second performance of this.

¹⁴ This was written as a protest to the Vietnam War.

¹⁵ The psychiatrist in this film is Martin Bergman, who subsequently wrote *In The Shadow of Moloch: The Sacrifice of Children and its Impact on Western Religions* (New York: 1992).

¹⁶ New York: 1995. The ‘Akedah’ had earlier been retold by Thomas Mann in *Joseph and His Brothers* (trans HT Lowe-Porter) (Harmondsworth: 1978) 64–67.

¹⁷ He wrote about Moses instead (see Yosef Hayim Yerushalmi, *Freud’s Moses: Judaism Terminable and Interminable* (New Haven, NJ: 1991)).

¹⁸ In particular, Erich Wellisch, *Isaac and Oedipus* (London: 1954), on which see n 5 above, 213–215 (who also considers Georges Devereux, David Bakan, Marie Balmory, Alice Miller and Martin Bergman (referred to at n 15 above)).

¹⁹ See David Dyzenhaus, *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: 1999).

²⁰ See, eg, Peter Singer, *Democracy and Disobedience* (Oxford: 1973).

²¹ Mortimer R Kadish and Sanford H Kadish, *Discretion to Disobey* (Stanford, California: 1973).

²² See n 5 above, 22–23. In the Muslim version, it is, of course, not Sarah, but Hagar.

²³ See *Fear and Trembling* (trans by Alastair Hannay) (Harmondsworth: 1985).

²⁴ Different views of which include Daniel Jonah Goldhagen, *Hitler’s Willing Executioners* (New York: 1996) and Götz Aly and Susanne Heim, *Architects of Annihilation* (London: 2002) (first published in German in 1991).

²⁵ See Michael Freeman, ‘A Time To Be Born and A Time To Die’ (2003) 56 CLP 603.

²⁶ See his *Children, Ethics and Modern Medicine* (Bloomington, Indiana: 2003).

²⁷ See Sir Arthur Pickard-Cambridge, *The Dramatic Festivals of Athens* (Oxford: 1968).

²⁸ HDF Kitto, *The Greeks* (Harmondsworth: 1951) 74.

²⁹ His funeral oration.

spectacle'. As Kitto explains, these words are 'almost meaningless until we realize that the drama, tragic and comic, the performance of choral hymns, public recitals of Homer, games, were all necessary and normal parts of "political" life'.³⁰ The theatre was popular culture, and through it the population was introduced to jurisprudential conflicts like positive law versus natural law, law and equity, rule versus discretion. The debates are reflected in many of the great tragedies. Thus, note the way Hecuba, in Euripedes' play of that name, implores Agamemnon to punish Polymestor, the King of Thrace, who had killed her son, Polydorus. She is a slave and therefore weak, but:

. . . the gods are strong, and over them
there stands some absolute, some moral order
or principle of law more final still.
Upon this moral law the world depends;
. . .
Apply that law to me. For if you flout it now, and those
who murder in cold blood or defy the gods
go unpunished, then human justice withers,
corrupted at its source.³¹

And observe also Agamemnon's response. He prays in aid expediency, pragmatism. The law should reflect public opinion. Posner sees a parallel in the judge of today who concedes the natural justice of a litigant's case whilst deciding against him on the ground that positive law, 'crystallised public opinion', entitles his opponent to judgment.³²

If Agamemnon was the first legal positivist, Creon (in Sophocles' *Antigone*) has some claim to be the second. When he orders that Polynices should remain unburied—a savage punishment in Greek theology³³—Antigone, his sister, defies the order and buries her brother. Her trial follows and contains her impassioned assertion of the primacy of divine law in language which has echoed over the millennia. *Antigone* is often performed when a country is in trouble.³⁴ Anouilh wrote an *Antigone* for occupied Paris in 1944.³⁵ In Brecht's version, Creon is a Fascist.³⁶ In Tom Paulin's *The Riot Act*, set in Northern Ireland, Antigone is a freedom fighter and Creon sounds like Ian Paisley.³⁷ And in Athol Fugard's *The Island*,³⁸ two prisoners

³⁰ See n 28 above, 74.

³¹ Euripedes, *Hecuba II*, 795–805. *Hecuba* may have resonated also with an audience of Shakespeare's day; note the allusion to the play in *Hamlet*.

³² *Law and Literature* (Cambridge, Mass: 1998) 95.

³³ It is to be found also in Homer's *Iliad* and in *Hecuba*. On disgust, shame and the law generally see Martha C Nussbaum, *Hiding from Humanity* (Princeton, NJ: 2004).

³⁴ See George Steiner, *Antigones: How the Antigone Legend has Endured in Western Literature, Art and Thought* (Oxford: 1984).

³⁵ First published in Paris 1946, in London in English in 1954.

³⁶ In *Die Antigone Des Sophokles*, written in 1948, and set after the Second World War. It is an adaptation based on Hoelderlin's translation.

³⁷ See Tom Paulin, *The Riot Act* (London: 1985).

³⁸ See Athol Fugard: *The Township Plays* (Oxford: 1993). The play was first performed in Cape Town in 1973.

perform *Antigone* in prison to preserve their sanity in the insane conditions of apartheid South Africa.³⁹

Perhaps the fullest exploration of justice in Greek literature is in Aeschylus' *Eumenides*. Aeschylus grapples with the notion of 'justice': what it is, how it is to be realized in the sphere of human activity, and what part the gods play in helping men to achieve it. In *Agamemnon* he has had the chorus in the first Choral Ode sing: 'Wealth provides no defence against greed for the man who kicks and obliterates the great altar of Justice'.⁴⁰ In *Eumenides* words derived from the root that designates 'justice' (*dik-*) occur with striking frequency.⁴¹ It is frequently used to refer to the state of affairs which parties who believe they are aggrieved wish to have restored. It is but a short step from this to the use of *dikē* with a specific, concrete legal or judicial connotation: 'prosecute at law', 'institute legal proceedings'. And as Podlecki notes,⁴² 'it is precisely this field of meaning which enables Aeschylus to bring Justice as an abstract concept or personification into the everyday reality of an Athenian law court'. But how would an Athenian audience have reacted to the trial in the play? As a reflection of contemporary legal practice or as a parody? Or both? Lebeck, I note, makes the point that 'accuracy is an essential ingredient of parody'.⁴³ Is the trial then a caricature of Athenian procedure, revealing both its strengths and its weaknesses? Orestes' acquittal, we observe, does not depend upon the trial but on divine will. Would the audience to whom the play was originally addressed have been as puzzled by the relationship of justice and injustice as some are today?⁴⁴ And how would they have reacted to many of the arguments which seem (to us) quibbling and trivial? One, which has always interested me as a student of parentage,⁴⁵ is that which proclaims the male as the true parent:

The so-called mother is no mother of a child,
but nurturer of a newly seeded embryo. The
parent is the one who mounts her . . .⁴⁶

The 'belittlement'⁴⁷ of the role of women in procreation makes Agamemnon's wrong (the killing of Iphigenia) seem less serious than Clytemnestra's in killing him and distinguishes parricide and matricide. But I doubt if an Athenian audience would have seized upon the belittlement or seen it as we do through feminist

³⁹ Could these only be brought to closure by truth and reconciliation? An *Antigone* to take account of this is still awaited. On this more generally, see Martha Minow, *Between Vengeance and Forgiveness* (Boston: 1998).

⁴⁰ *Agamemnon*, 381–384.
⁴¹ A point noted by Anthony J Podlecki in his Introduction to Aeschylus: *Eumenides* (Warminster: 1989) 42. Etymology connects this with 'the way' suggesting a common meaning with the Jewish *Halakhah* and Muslim *Sharia*.

⁴² See n 41 above, 43.

⁴³ Anne Lebeck, *The Oresteia—A Study In Language and Structure* (Cambridge, Mass: 1971) 135.

⁴⁴ eg, Austin Sarat and Thomas R Kearns, *Justice and Injustice in Law and Legal Theory* (Ann Arbor, Mich: 1996).

⁴⁵ Michael Freeman, 'Medically Assisted Reproduction' in I Kennedy and A Grubb (eds), *Principles of Medical Law* (Oxford: 2004) 639.

⁴⁶ In the translation by Christopher Collard, *Aeschylus—Oresteia* (Oxford: 2002) 103.

⁴⁷ See n 32 above, 65.