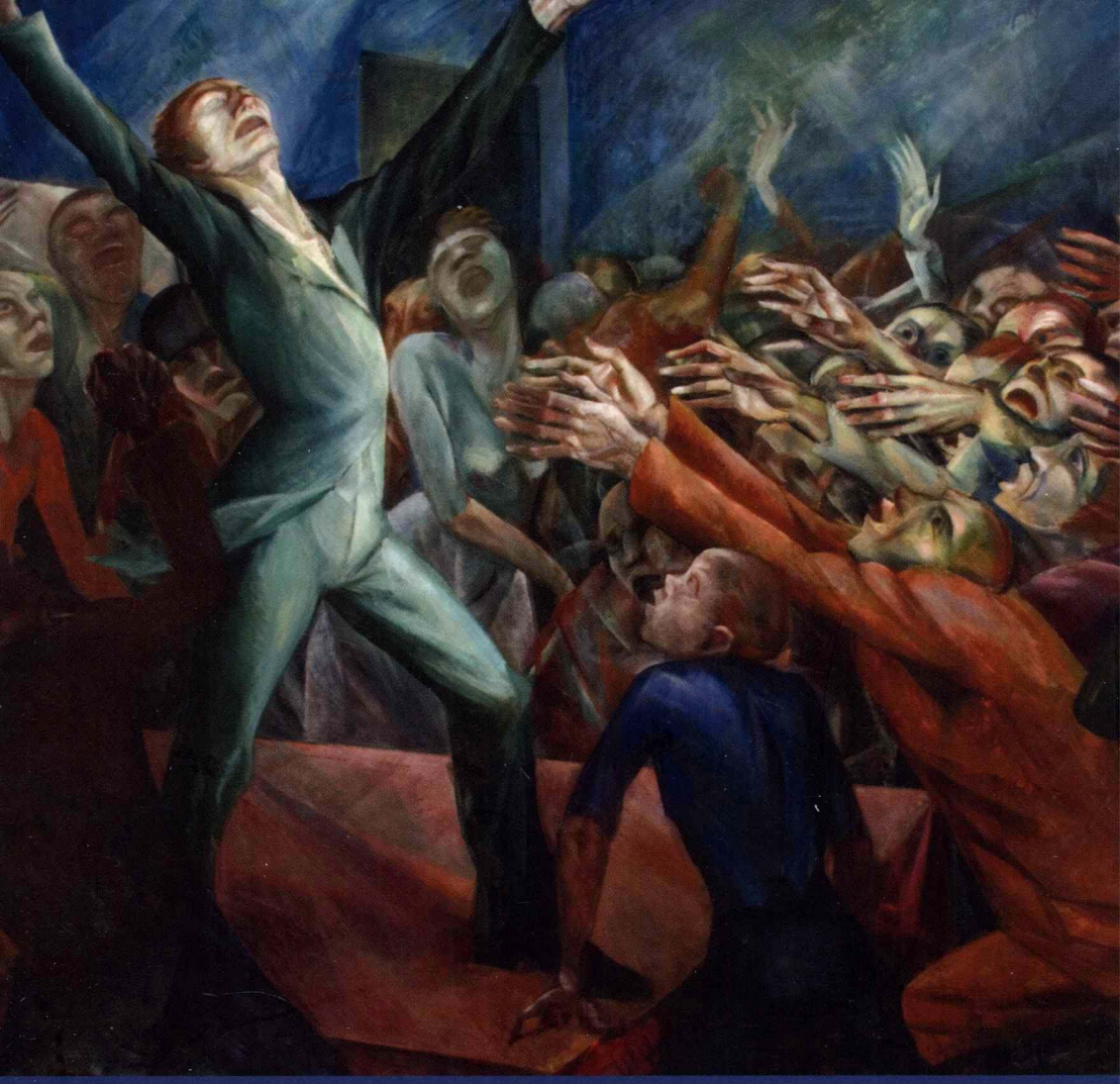

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Kangaroo Courts and the Rule of Law

The Legacy of Modernism

Desmond Manderson

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Acknowledgments

This book began when I presented a paper to the Legal Intersections Research Centre (LIRC) at the University of Wollongong in 2006. While flying back to Australia – back to Wollongong and Thirroul where I used to live – I decided it was about time I read the one book I knew had been written about the place: DH Lawrence's *Kangaroo*, a Penguin paperback first edition of which I had just picked up for £1 in Portobello Road. Of course, £1 was worth a lot of money in those days but still it was a pretty good investment. I was astonished at how intimately the book spoke to all my concerns about law and literature, and about the rule of law in a post-positivist age. I rewrote the paper I was to give, on the plane.

In addition to LIRC, versions of this paper were delivered as a keynote address to the *Rights, Ethics, Law & Literature International Colloquium* organised by Professor Melanie Williams at the University of Wales, Swansea, at the *Association of Law Culture and the Humanities Annual Conference* in Washington DC and as a seminar to the faculty of law at McGill University. I am immensely grateful for the feedback and response I received there. I am grateful also to my discussions with Roger Berkowitz over the years. His fine book *The Gift of Science* has been a constant provocation to me, which I hope he will take for the praise it is. Over the past year or so Richard Mohr, Andre Furlani, Rod Macdonald, Colin Perrin and Peter Goodrich have all read detailed drafts and provided extensive feedback – indeed, on occasion quite above and beyond the call of duty. Their generosity and acuity has done much to save this book from some of its more egregious errors and omissions. I remain intensely aware of its many and serious imperfections, its dogmatism and its crudeness, for which I am entirely responsible. I can only say that if this book functions as a polemic, an inducement to response and to resistance, it will have done its job.

Modified versions of parts of this book have appeared in 'Mikhail Bakhtin and the Field of Law and Literature' in (2012) 8 *Journal of Law, Culture, and the Humanities* (including parts of chapters 2 and 6), 'Between the Nihilism of the Young and the Positivism of the Old – Justice and the Novel in D.H. Lawrence' in (2012) 5 *Law and Humanities* (including parts of chapter 4, 6, 7, 9), 'Modernism, Polarity, and the Rule of Law,' in (2012) 24 *Yale Journal of Law and Humanities* (including parts of chapters 3, 5, 8, 9), and 'Modernism and the Critique of Law and Literature,' in

(2011) 35 *Australian Feminist Law Journal* (including parts of chapters 2 and 3). None of these articles corresponds simply to a particular chapter; each takes a specific theme explored at various points in the book and presents them as a coherent topic. I am most grateful to these journals for the interest they showed in my work and for their kind permission to republish it in this book.

McGill University has always been a wonderful place to work and its law faculty shows an inspiring commitment to richly various legal scholarship. The stimulation of the university and the people in it, both at the Faculty of Law and through the Institute for the Public Life of Arts and Ideas, has meant a very great deal to me. In addition, I have in the past year been lucky enough to enjoy the subtle research assistance of Lilia Kraus, without whom this book would have stumbled at the final hurdle. I also wish to thank my good friend Colin Perrin whose intelligence and support at Routledge made all the difference, and to Melanie Fortmann-Brown for her skilful editorial assistance. And though it goes without saying, I will say it anyway: on this long journey, the love and support of Jackie and Laurence made every day possible.

This work has taken me too long. I hope it is the better for it but I don't know whether *I* am. Nonetheless, I have learnt a very great deal in researching and thinking about this book. As I set about turning my notes into a text it grew and grew and spun and turned. I started by situating my reading of the novel in Lawrence's *oeuvre*, and then that in the literature of the time and then that in the whole context of modernism and the end of the Great War. Each circle exposed me to a more complex and, I thought, a more interesting web of associations and resonances. This book is an effort to make sense of that web. I have never been more conscious of Derrida's warning that *il n'y a pas de hors-texte*: behind every context is another and another, and no place to stop without an arbitrary and indiscriminate violence. So, painfully conscious of that violence, I stop.

Desmond Manderson
McGill University, Montreal &
Australian National University, Canberra
March 2012

Contents

Chapter 1

Introduction

> The sea too was very full. It was nearly high tide; the waves were rolling very tall, with light like a menace on the nape of their necks as they bent, so brilliant. Then, when they fell, the fore-flush in a great soft swing with incredible speed up the shore, on the darkness soft-lighted with moon, like a rush of white serpents, then slipping back with a hiss that fell into silence for a second, leaving the sand of granulated silver. . . . Incredibly swift and far the flat rush flew at him, with foam like the hissing, open mouths of snakes. In the nearness a wave broke white and high. Then, ugh! across the intervening gulf the great lurch and swish, as the snakes rushed forward, in a hollow frost hissing at his boots. Then failed to bite, fell back hissing softly, leaving the belly of the sands granulated silver.[1]
>
> – D.H. Lawrence, *Kangaroo*

The little seaside town of Thirroul, Dharawal in the local aboriginal language, sits with the ocean on one side of it and cliffs on the other, 40 miles south of Sydney. I used to live there. This, *this*, is what the breaking waves are like: what they feel like, what they sound like, their intensity. But the author was not an Australian. David Herbert Lawrence visited the town with his wife Frieda for six weeks in the winter of 1922. It scarcely seems credible that in six weeks he drafted a novel of 150,000 words: veritable torrents of Lawrence. Everything he had seen and thought and heard seems captured here, eloquent and half-digested, from the sounds of the ocean and the silence of the bush to the modes of speech and the brittle humour of those who lived next to them. But *Kangaroo* is not just a stunning evocation of place. I want to bring this novel – ultimately, indeed, this very passage – to bear on the relationship between literature, justice and the rule of law.

The rule of law is a global issue of both theoretical and practical importance. One aspect which has long been of interest to me, and which underscores the discussion of this book, involves the question of what it means to talk about justice in the context of formal legal judgments. This is a critical aspect, of course, of the rule of law: the notion of how judicial decision-making should be understood, the extent to which and in what ways we are right to think of it as constrained, and whether 'the rule of law' thus furthers or, on the contrary, inhibits the realisation

of justice. Justice, it surely goes without saying, involves much broader issues than this, including questions of social, distributive and collective justice. My focus here is the relationship between rules, judgments and justice as one central component of what we mean when we talk about the rule of law.

The rule of law is in crisis: on that point, many scholars agree.[2] On the one hand, it is imperiled by the resurgence in our politics of a Hobbesian conception of untrammelled sovereignty which insists that the State's executive power should or must be given free rein in the treatment of those who are considered the nation's enemies – that is, that the rule of law can and must be ignored by an executive power prior and superior to it.[3] 9/11, terrorism, security, immigration and refugees provide relatively familiar examples of the phenomenon. On the other hand, the rule of law is said to be imperiled by those many critiques, including post-modernism, relativism and post-colonialism, which have steadily undermined our belief in the orthodox assumptions of legal positivism, according to which rules and laws are clear, certain, objective and therefore capable of constraining such power.[4] All this is relatively familiar too. Some indeed allege that these two dimensions, the one political and the other theoretical, are mutually enabling: the undermining of meaning by the latter facilitates its cynical manipulation by the former.[5] Eventually, even something as objective as where someone was born collapses in a rhetorical and ideological slurry of claims and counter-claims.[6] The theoretical 'left' is accused of facilitating the political 'right'. By working so avidly to destabilise texts and institutions, key movements in contemporary legal theory and philosophy – not just in the recent past but since the dawn of modernism 100 years ago – seem fatally to undermine the tenets of the rule of law.

Many scholars, among whom Brian Tamanaha is exemplary,[7] simply reject what has been called the 'post-modern' critique of the rule of law. They argue that some version of positivism must be maintained if the rule of law is to continue as a bulwark against abuses of discretionary power. Important challenges to conventional approaches to meaning and certainty in law are thus either ignored altogether or attacked on purely normative grounds;[8] derided or dismissed just *because* the rule of law could not withstand such a critique. But this dialogue of the deaf between those who care about the rule of law and those who are interested in cultural, social and legal theory cannot go on – it shows a wilful blindness in the former and dooms the latter to irrelevance. Instead, I start from the position that the critiques of 'rules', language and meaning that have been accumulating not just since 1968 but for 100 years or more, cannot be wished away. The challenge – a real political as well as intellectual challenge – is to address more seriously their implications for the rule of law.

In rising to this challenge I want to address a major fault-line in contemporary writing in law and the humanities between writers who have been influenced in some ways by Heidegger on the one hand and by Derrida on the other. That is a pretty crude generalisation but it will do. The shared heritage and orientation of these philosophers, their shared distance from the analytic tradition, have largely concealed the fact that they suggest profoundly divergent responses to questions

about the nature of legal judgment and the future of the rule of law. I want to sharpen the debate and clarify an under-appreciated distinction. The pragmatism that I take from Derrida gives us resources through which to re-imagine the rule of law while Heidegger's does not. In particular, there seems to me powerful echoes in the latter of a jurisprudential tradition in which the idea of rules would be superseded or perfected by an entirely unbound and unlimited justice. Indeed, as we will see, this idea of justice as something that transcends and opposes the rule of law is common across a wide spectrum of legal writing. We hear it in the cultural study of law, where 'literature' is so often the cavalry which arrives to oppose and complete the law by incorporating those 'essential human insights lost to formal thought'.[9] In a lot of other legal theory too, such as in the critical legal studies movement, the word 'politics' performs a similar function; 'politics' which *solves* the problem of justice that the various critiques have shown that a structure of legal rules cannot. More recently the word used has been 'ethics'; again too often a black box which points to something outside of the parameters of legal rules but which can, mysteriously, redeem the law and finally achieve justice.[10] Throughout this book, I use the terms 'romantic' and 'romanticism' to identify this appeal to some transcendent idea or ideal capable of overcoming, exceeding or curing the law. There are then two foils in this book: positivism on the one hand, and the romantic impulse against which it has so often been pitted on the other. *Kangaroo Courts* asks what it means – particularly in relation to the rule of law – to cleanse our palette of both.

In fact these themes and controversies are not new. They converged at a moment in our intellectual and social history that remains critical for any understanding of them: modernism, specifically in the context of the aftermath of the Great War of 1914–18. Modern*ity* and modern*ism* are related, but they are not the same thing. This book considers what has often been called 'the crisis of modernity' and attempts to show how modernism – the outpouring of creativity in thought and in the arts which responded in various ways to that crisis – has continuing implications for how we understand the relationship between judgment and the rule of law, and between law and literature. And here, as will become apparent, the influential work of Mikhail Bakhtin and D.H. Lawrence, serve as my lodestars. Neither has received much attention in legal studies. Yet they speak directly to the problem of justice and of judgment in the wake of modernism, and they each endeavour to show the importance of literature in leading us through the very impasse which remains evident today – even in something as mundane as the rule of law. No less than Lawrence in the wake of the Great War, we still face the terrible problem of what to do once we can no longer believe in our old habits of thought: for belief has died though the habit of believing lingers on. This problem is not to be faced by attempting, through an act of will, to *resuscitate* our old beliefs or romantic notions; but rather by working out how to keep going without them. Lawrence wanted to know if the twentieth century had rendered politics outmoded or irrelevant. I want to know if the rule of law has likewise been rendered 'quaint', 'outmoded'[11] or irrelevant.

Kangaroo Courts and the Rule of Law: The Legacy of Modernism thus reflects my efforts to bring together three questions in legal scholarship which have become increasingly urgent in the last few years: a substantive question – what is the future of the rule of law?; a theoretical question – what is the difference between two main threads in what is now called 'law and the humanities'?; and a methodological question – is the study of law and literature still relevant? These questions are critically important and interrelated. Each gives us resources to better understand and answer the others. The fundamental question seems to me to be whether we can recast the rule of law *in light of* the critical turn of the past century, rather than being steadfastly *opposed* to it. This book tries to build a distinct conception – a truly modernist conception, and ultimately a literary conception – of a post-positivist and post-romantic rule of law. In the process I hope to change how we understand the practice of law and literature, and to reframe what we understand to be the goals of legal judgment.

D.H. Lawrence offers an uncanny point of entry into all these interrelated issues of politics, philosophy and writing – indeed a subterranean warren that secretly connects them. That Lawrence was an unusually beautiful writer is not in doubt. But Lawrence's fertile visit to Australia coincided with an explosive outburst of writing about politics, about psychoanalysis and about literature that placed Lawrence at the heart of the currents of change and anxiety transforming all these

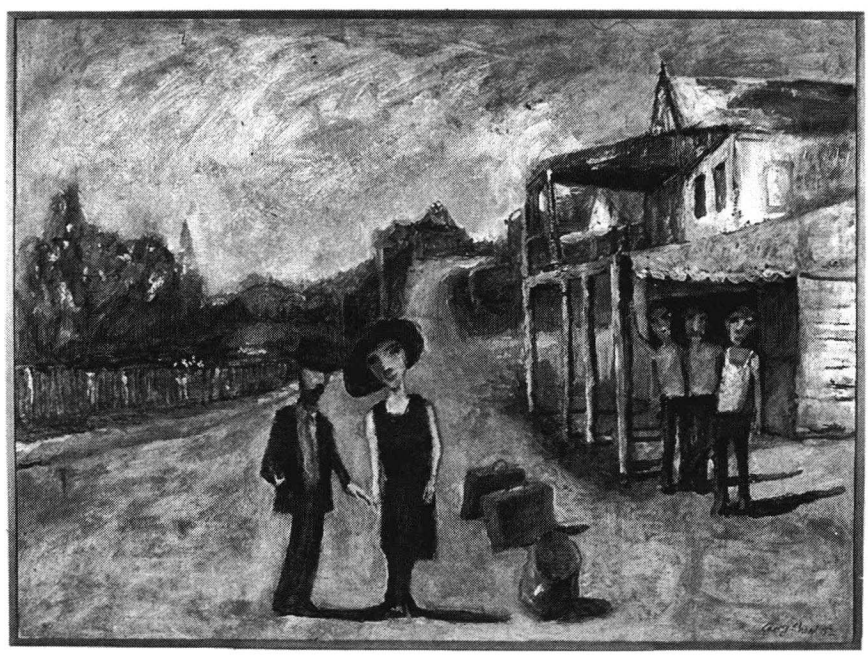

Figure 1.1 Garry Shead, *Thirroul* (D.H. Lawrence Series[12])

fields. *Kangaroo*, written in 1922 and published the following year, is the strange and misunderstood apotheosis of this work and this moment: it brings together a theory of literature with a theory of politics and a theory of psychology at a critical juncture in the history of all three: on the very cusp of modernism in literature and just when the search for a way to break through the impasse of modernity was most keenly and widely felt. He saw the crisis of literature and the crisis of authority as interconnected, and he was right.

Chapter 2 provides a preliminary overview of the domain of law and literature and argues for its reconfiguration. In some ways the rest of the book is a case study intended to expand the methodology introduced here. Chapter 3 sets Lawrence's work against 'the crisis of modernity' which engulfed the European imagination at the end of the Great War. This crisis, as an aesthetic, a religious, a legal and a political phenomenon, Lawrence saw all too clearly and felt all too keenly. In a very real way, the crisis was for Lawrence personal. *Kangaroo*, which I introduce in Chapter 4, was the novel he wrote that best attempts to come to terms with it.

Chapter 5 sees recent debates about judgment, justice and the rule of law as the aftershock of this cataclysm. In its thorough-going rejection of positivism, recent work whether influenced by Derrida's 'Force of Law'[13] or by Heidegger and Levinas[14] hearken back not only to a shared philosophical lineage via Nietzsche but to all those writers – Simmel, Weber and Collingwood as well as Schmitt, Lawrence and Bakhtin – who during and after the War already saw the limitations and blind spots of positivist thought. At least some of these writers, then and now, came to dismiss the rule of law as a *perversion* of justice. Yet, while Derrida and Heidegger offer a sceptical argument against the positivist rule of law and both render it vulnerable to attack, there is a crucial difference between them. Although not everyone will agree, this difference lies in Heidegger's romanticism and transcendentalism as opposed to Derrida's pragmatism and humanism: the enchantment of the one and the disenchantment of the other. Kindred in many ways, these two strands of contemporary anti-positivist legal theory offer very different resolutions to the problem posed by the critique of the rule of law.

Chapters 6 and 7 argue that D.H. Lawrence is a perfect interlocutor between these two trajectories, for Lawrence was neuralgically poised between his romantic temperament and heritage, and his experience of the modern world. No one was more torn between the unquenchable desire for enchantment and the undeniable reality of disenchantment. As a young man he was steeped in German Romanticism, and more particularly the post-Nietzschean New Romanticism whose relationship to Heidegger's thought is well known. Much of Lawrence's writing – the more political of the non-fiction pieces and the 'leadership novels'[15] in particular – shows the enduring influence of romanticism on him. But while *Kangaroo* faithfully depicts those ideas, it recoils from them. *Kangaroo* may be read as a commentary on the loss of certainty and of belief in orthodoxy, a loss which the Great War had profoundly and disturbingly instilled in Lawrence and his

generation. The novel may be read as a commentary on the romantic seductions of authority as they both attract and repel its characters. *Kangaroo* does not disparage the yearning and the despair that grounds the romantic attack on rules: Lawrence lived it and understood it. That is what makes the book so interesting and so relevant. But in the end Lawrence shies away from a politics that appeals to the mystical, a law that unleashes the transcendental. The experience of the Great War, as *Kangaroo* makes explicit, had made Lawrence as allergic to the new romanticism as he was to the old patriotism.

In Chapter 6, I explore the *Kehre* or turn that Lawrence undergoes in the pages of *Kangaroo*. With the aid of Bakhtin's theories of the novel, I argue that literature itself, Lawrence's understanding of it and the nature and style of his writing, were critical forces in this change of heart. In Chapter 7, I further develop this argument in order to show the ways in which the modernist novel embodies and realises a distinctive relationship to the outside world which allowed Lawrence to explore and critique his own experiences of the war and his own ideas in particular ways. In and through *Kangaroo*, Lawrence begins to intimate an alternative vision of judgment and justice that was decisively influenced by the currents of post-war modernism and by the perspective of literature. The novel, in its form, style, language and syntax, and in the auto-critique intrinsic to its dialogic and poly-vocal structure, provides the reader and the writer with a transformative vision of justice. *Kangaroo* records this transformation on the page. The novel does not talk about justice – does not, indeed, mention it at all. Instead, it provides the reader with a literary *experience* of justice, which the author lived through writing the book, and which changed him as much as it changed his readers. This experience shattered the romantic dogmatism that is the book's principal foil and hints at ways in which we might still find some meaning in the rule of law despite our having lost faith in the old and rigid ways of defining it.

Chapter 8 attempts to describe what kind of alternative path Lawrence, albeit tentatively, imagines. The Lawrence of *Kangaroo* is most emphatically not a crypto-fascist, or a little Englander, or a socialist. He is a writer and the *literary* experience of the novel is central not only to its design but to its outcome and to the ideas about law and justice it suggests. Lawrence's views foreshadow Derrida's themes on the relationship between literature and justice. But Lawrence's invocation of the key term 'polarity', which he gleans from Coleridge and ultimately from Heraclitus, both clarifies this argument and serves more sharply to distinguish his position from that of the romantics and the positivists alike. In the notion of polarity – of the continuance rather than the dissolution or resolution of contradiction – we can discern traces of an alternative understanding, a very modernist understanding, that represent the multi-vocal experience and unresolved contradictions of human discourse not just as the fate of law but as its most important asset. Lawrence's 'polarity' presents judgment in politics, law and literature as genuinely *committed* to undecidability, corrigibility and constant renewal.

Chapter 9 then connects these philosophical and literary ideas back to an idea of the rule of law that is most emphatically neither positivist *nor* romantic.[16] If we

might understand the orthodox movement of legal thought (both in the twentieth century and the twenty-first) as the effort to heal the relationship between law and justice in some way, polarity refuses to either amputate the relationship or to harmonise it. Polarity instead sees their relationship as antagonistic but nonetheless productive. A rule of law which embraces the spirit of polarity recognizes as inescapable and irrevocable the contradictory directions in which justice pulls, and therefore the necessary imperfection of our decisions. In line with other writers on politics who have been influenced by deconstruction, such as Richard Beardsworth and Simon Critchley,[17] I argue that this openness to conversation, revision and to judgment as a process of learning through discourse, does not destroy the rule of law but gives it a new honesty, a new dignity and a new legitimacy. These qualities the old positivism has long forfeited and the new romanticism cannot provide. Like the lapping waves on Thirroul beach, ceaseless movement and chronic instability do not mark the collapse of the rule of law. It is its – and our – predicament and virtue.

Law and literature emerges transformed by the insights of modernism and by *Kangaroo* and, in turn, transformative of our ideas about justice and the rule of law. It provides us with a way to talk about these profoundly important issues, in the absence of old beliefs and myths about them. Due to his intense engagement with the place in which he briefly lived, through the novel's unusual form, and in its striking meditations on power and authority, Lawrence's brief sojourn in Australia offers us a theory of justice born of the crisis of modernity and forged in the practice of literature.

Notes

1 D.H. Lawrence, *Kangaroo*, The Cambridge Edition of the Works of D.H. Lawrence, ed. B. Steele, Cambridge: Cambridge University Press, [1923] 2002, 340.

2 E.g. B. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law*, New York: Cambridge University Press, 2006; E. Kennedy, *Constitutional Failure: Carl Schmitt in Weimar*, Durham, NC: Duke University Press, 2004, 3; D. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, Oxford: Oxford University Press, 1997, 218.

3 G. Agamben, *State of Exception*; trans. Kevin Attell, Chicago: The University of Chicago Press, 2005; M. Gani (ed.), *Fresh Perspectives on 'The War on Terror'*, Canberra: ANU Press, 2008; K.J. Greenberg and J.L Dratel (eds), *The Torture Papers: The Road to Abu Graib*, Cambridge: Cambridge University Press, 2005. Other material on the 'emergency' in law, e.g. T. Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy*, London: Routledge-Cavendish, 2004.

4 B. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge: Cambridge University Press, 2004. See for classic statements of the CLS version of these critiques, the symposium issue of *Stanford Law Review* 36, 1984.

5 J. Balkin, 'Deconstruction's Legal Career', *Cardozo Law Review* 27.2, 2005, 719–40 at 719; J. Balkin, 'Transcendental Deconstruction, Transcendental Justice', *Michigan Law Review* 92.5, 1994, 1131–86.

6 J. Corsi, *Where's the Birth Certificate? The Case that Barack Obama is not Eligible to be President*, Washington: WND Books, 2011.

7 B. Tamanaha, *Law as a Means to an End.*

8 In addition to Tamanaha, see William Scheuerman's work on Carl Schmitt, in particular W.E. Scheuerman, *Carl Schmitt: The End of Law*, Lanham MD: Rowman & Littlefield, 1999; and W.E. Scheuerman, 'Legal Indeterminacy and the Origins of Nazi Legal Thought', *History of Political Thought* 17.4, 1996, 571–90. See also J. Gardner, 'The Legality of the Law', *Ratio Juris* 17.2, 2004, 168–81 at 178; A. Marmor, 'The Rule of Law and Its Limits', *Law and Philosophy* 23.1, 2004, 1–43; T. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law*, Oxford: Oxford University Press, 2001; J. Waldron, 'Is the Rule of Law an Essentially Contested Phenomenon?', *Law and Philosophy* 21.2, 2002, 137–64; B. Tamanaha, *Law as a Means to an End*; J. Balkin, 'Deconstruction's Legal Career'.

9 M. Williams, *Secrets and Laws*, London: UCL Press, 2005, 38.

10 M. Diamantides, *Levinas, Law, Politics*, London and New York, Routledge-Cavendish, 2007; E. Levinas, *Autrement qu'être ou au-delà de l'essence*, Paris, Kluwer, 1974; E. Levinas, *Otherwise than Being: or Beyond Essence*, trans. A. Lingis, Pittsburgh, Duquesne University Press, [1974] 1998. This critique I develop at greater length in D. Manderson, *Proximity, Levinas, and the Soul of Law*, Montreal and Kingston, McGill-Queens University Press, 2006. For all its strengths, Susanna Lindroos Hovinheimo seems to treat ethics in just this redemptive but inexplicable fashion: *Justice and the Ethics of Legal Interpretation*, London, Routledge, 2012.

11 A.R. Gonzales, 'Decision re Application of the Geneva Convention re Prisoners of War' (Memorandum for the President #7), 25 January 2002, in K.J. Greenberg and J.L Dratel (eds), *The Torture Papers: The Road to Abu Graib*, Cambridge: Cambridge University Press, 2005, 118–19. See also D. Cole, *Justice at War: The Men and Ideas that Shaped America's War on Terror*, New York: New York Review Books, 2008.

12 Garry Shead, *Thirroul*, oil on composition board, 91.5 × 121 cm, 1992. Reproduced by kind permission of the artist.

13 J. Derrida, 'Force of Law: The Mystical Foundation of Authority', *Cardozo Law Review* 11, 1990, 919–1045. Final version in J. Derrida, *Acts of Religion*, ed. G. Anidjar, New York: Routledge, 2002, 228–98.

14 See, for example, work by Mark Antaki, Marianne Constable, Richard Weisberg and P. Nonet, 'Antigone's Law', *Law, Culture and the Humanities* 2.3, 2006, 314–35.

15 Leadership novels: D.H. Lawrence, *Kangaroo*; D.H. Lawrence, *The Plumed Serpent*, London: Wordsworth Editions, [1926] 1995; D.H. Lawrence, *Aaron's Rod*, Charlston, SC: Nabu Press, [1922] 2010.

16 Nor, as in Richard Weisberg's references to a Nietzschean 'good code', some purée of the two: R.H. Weisberg, 'It's a Positivist, It's a Pragmatist, It's a Codifier! Reflections on Nietzsche and Stendhal', *Cardozo Law Review* 18, 1996, 85–96; R.H. Weisberg, 'Text Into Theory: A Literary Approach to the Constitution', *Georgia Law Review* 20, 1985, 939–94; R.H. Weisberg, 'Nietzsche's Hermeneutics: Good and Bad Interpreters of Texts', *Cardozo Legal Studies Research Paper No. 99*, 2004. Online. Available HTTP: <http://ssrn.com/abstract=622402> (accessed 5 July 2011).

17 R. Beardsworth, *Derrida and the Political*, London: Routledge, 1996; S. Critchley, *Infinitely Demanding: Ethics of Commitment, Politics of Resistance*, New York: Verso, 2008.

Chapter 2

The Irony of Law and Literature

> Indeed, practically all metaphors for style amount to placing matter on the inside, style on the outside. It would be more to the point to reverse the metaphor. The matter, the subject, is on the outside; the style is on the inside . . . To treat works of art [as statements] is not wholly irrelevant. But it is, obviously, putting art to use – for such purposes as inquiring into the history of ideas, diagnosing contemporary culture, or creating social solidarity . . . A work of art encountered as a work of art is an experience, not a statement or an answer to a question. Art is not only about something; it is something. [1]
>
> – Susan Sontag, 'On Style'

Before I launch into the textual and historical analysis that will take me several chapters, let me stand back a bit. My argument here has particular ramifications for the law and literature movement. I want to demonstrate in this chapter how, despite its enormous successes in the past generation, this movement continues to be plagued by two enduring weaknesses: first, a concentration on substance and message and, secondly, a salvific belief in the capacity of literature to cure law or perfect its justice. The first fails to question the aesthetic ideal, which goes back to Plato, that the purpose of art is mimetic, that is, to accurately reflect the world. This concern with 'what' a particular piece of literature talks about rather than with its voice or style or form, I call the 'mimetic fallacy'. The second fails to question the aesthetic ideal, central to the notion of romanticism which I refer to throughout this book, that the purpose of art is to heal the world's wounds.[2] The idea that art can save the day or complete the law, I call the 'romantic fantasy'. In this chapter I will try to show how even some of the best recent work in the field falls into one or both of these traps. Too often in opening a dialogue with law we fail to capture the real experience or worth of literature – a worth irreducible to either the morality it 'stands for', or to the coherence or harmony it promises. Indeed, the aesthetic ideals of modernism, which I begin to draw on in this chapter and then explore in more detail in the next, stand exactly against these two claims. Instead, modernism asks us to understand art or literature as an exercise in style, form and language, and in the diversity of voices and perspectives it opens to us. In both ways we might say that modernism rejected the upright aesthetic ideologies