AGAAT'S LAW

Reflections on Law and Literature with reference to Marlene van Niekerk's novel *Agaat*

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Son of man, you cannot say, or guess, for you know only
A heap of broken images, where the sun beats,
and the dead tree gives no shelter.

T.S. Eliot *The Waste Land*

For *Irene Grootboom*, the big tree that almost gave shelter...

INTRODUCTION

This article is based on a public lecture that I presented at the University of the Witwatersrand in August 2007. The lecture formed part of my teaching and research involvement with the Wits Law School as a Bram Fischer Fellow during the month of August 2007. The invitation to become a Bram Fischer fellow and to give a public address in memory of Bram Fischer posed a daunting challenge. How is one to honour the memory and legacy of Bram Fischer, Bram Fischer the *boere* communist, after long reigns of communisms that, instead of vindicating the thinking of Marx, only served to discredit it; instead of destroying the state, only served to inflate the state and entrench it in every imaginable walk of life; instead of terminating the law in the name of a classless humanity, only served to dehumanise the law?

It is clear that this question haunts and perhaps even dominates the last pages of Stephen Clingman's biography of Fischer. Having lent credence to Laurens van der Post's comments on the "unreality of communism" and the "unreality of Fischer" regarding this unreality of communism, Clingman imputes a certain moral blindness and lack of understanding to Fischer regarding the "morally compromised ideology" of communism.

"If the judgment is purely historical – that Bram was wrong because communism failed – it will be contingent and superficial: change the result and we would have to change the verdict. A more telling version is the moral one: Bram's flaw was that he was swayed by a morally compromised ideology, and the specific absolutism it induced produced his particular tragedy. After all, moral blindness is one consequence of the classic tragic flaw, and given the Soviet show trials, the gulag, the invasions of Hungary and Czechoslovakia, perhaps it captures Bram's one failing. Or perhaps, with some greater nuance, Bram's flaw was one of *understanding*, in that he did not fully comprehend the wider resonances and implications – the essential fatalism – involved in his choices."[1]

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[1] Clingman *Bram Fischer Afrikaner Revolutionary* (1998) 450-1. My copy of the book has an inscription with good wishes for my birthday in 1998, signed by André and Christa van der Walt. It is marked thus by a friendship that would in the ten years since then inform much of the thinking that

Alas, there is no nuance here, only complacent moralism. It should be noted that no argument is offered on any of the preceding or subsequent pages regarding communism being intrinsically "a morally compromised ideology" and not just an ideology with an incidentally bad historical record (that may or may not have improved in times to come). Clingman pulls a vulgar Fukuyama stunt here that is not in keeping with the rest of his exquisite narrative of Fischer's life.[2]

To be sure, no argument will be offered in what follows regarding the moral superiority or inferiority of communism. The position taken in this essay turns on the conviction that debates regarding the normative or moral superiority of capitalism or communism do not stand a reasonable chance of ever leading to a decisive conclusion, however strong personal convictions may be in favour of the one or the other. The problem with this kind of debate relates to the way the conflicting contentions take their respective points of view *literally* as if the language they employ somehow captures the truth or essence of human existence. The aim here is on the contrary to honour the legacy of Bram Fischer by shifting the focus away from *literal understandings* of Marxism, which incidentally indeed went a long way towards discrediting themselves in the eyes of the world, even among those most socialistically inclined. The aim is to shift the focus away from these *literal communisms* to that which Jean-Luc Nancy calls *literary communism* (*le communisme littéraire*). This literary communism is not directed at the construction of fictitious myths about the true society, but at the relentless disruption and interruption of these myths (*le mythe interrrompu*).[3]

By shifting the focus away from the essentialism of the *literal*, the thoughts that will be developed here aim to direct attention to the *literary* as that which restlessly, relentlessly and irrepressibly explores the evanescent and *errant*[4] particularity and

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went into the Bram Fischer lecture at Wits and into this essay. Many other friends and colleagues have contributed to my thoughts over these years. I trust they will forgive me for naming here, for the sake of the specificity of this essay only Willie Burger, Emilios Christodoulidis and Lindsay Farmer. Not only does this essay rely heavily on Burger's essay "Deur 'n spieël in 'n raaisel: Kennis van die self en die ander in *Agaat* van Marlene van Niekerk" 2006 *Tydskrif vir Taalonderrig* 178-194.
It also relies on numerous insightful discussions with Burger about Van Niekerk's work. I read and taught the essay of Martha Nussbaum's on which the central argument in this essay turns with Emilios Christodoulidis in the course *Law, Justice and Morality* that we co-teach at the University of Glasgow. And conversations with Lindsay Farmer pointed my attention to his excellent essay "Criminal Responsibility and the Proof of guilt" in Dubber and Farmer *Modern Histories of Crime and Punishment* (2007) 42 – 65, the reading of which was crucial for the thoughts I develop in part IV of this essay. I am also indebted to Carrol Clarkson, André van der Walt, Henk Botha, Karin van Marle, Wessel Le Roux, Stewart Motha and Melodie Nöthling Slabbert for critical and encouraging comments on previous drafts of this essay. Responsibility for all scholarly shortcomings of course remains strictly mine.

[2] Cf. Fukuyma *The End of History and the Last Man* (1992) for the quintessential celebration of the conclusive moral victory and superiority of the ideology capitalist liberal democracy over socialism.

[3] Nancy *La communauté désoeuvrée* (1999). See especially the essays "Le Mythe interrompu" and "Le communisme littéraire".

[4] The word "errant" has two meanings, one of which is stressed in this essay without ignoring or discounting the other. "Errant" is used firstly to denote a constant "taking leave", "journeying" or "travelling", thus stressing its link with the Latin *iterare* which stems from *iter* (*way* or *road*). Stressing this "journeying" or road-bound (dis)orientation of "errant" cannot completely de-link it from "*way*-wardness" or from "being off-target" and thus from "erroneous" and "error". Prioritising its "journeying" and "road-bound" aspect nevertheless severs "errant" from "error" to the extent that the latter evokes if not invokes notions of ultimate "correctness" and "accuracy" that must fall by the *way*-

singularity of unique lives or life stories without ever attaining to normative assessments of these lives or stories, normative assessments that would be nothing more than over-arching myths.[5] There is no moral to the errant stories of the *literary*.

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side of a constant journeying or travelling. If the condition of existence is that of the wayfarer who is constantly road-bound and therefore always wayward and off-target, nothing can ever be on-target. *Ithaca* is no longer an option. This is the distinction between the Odyssey and the tales of *errant knights* that would, with Cervantes introduce the modern age and the European novel. Milan Kundera describes this introduction in incomparable fashion: "As God slowly departed from the seat whence he had directed the universe and its order of values, distinguished good from evil, and endowed each thing with meaning, Don Quixote set forth from his house into a world he could no longer recognize. In the absence of the Supreme Judge, the world suddenly appeared in its fearsome ambiguity; the single divine Truth decomposed into myriad relative truths parcelled out by men. Thus was born the Modern Era, and with it the novel, the image and model of that world … To take with Cervantes, the world as ambiguity, to be obliged to face not a single truth but a welter of contradictory truths (truths embodied in *imaginary selves* called characters), to have as one's only certainty the *wisdom of uncertainty*, requires [heroic] courage. What does Cervantes' great novel mean? Much has been written on the question. Some see in it a rationalist critique of Don Quixote's hazy idealism. Others see it as a celebration of that same idealism. Both interpretations are mistaken because they both seek at the novel's core not an inquiry but a moral position. Man desires a world where good and evil can be clearly distinguished, for he has an innate and irrepressible desire to judge before he understands. Religions and ideologies are founded on this desire. They can cope with the novel only by translating its language of relativity and ambiguity into their own apodictic and dogmatic discourse. They require that someone be right: Either Anna Karenina is the victim of a narrow-minded tyrant, or Karenin is the victim of an immoral woman; either K. is an innocent man crushed by an unjust Court, or the Court represents divine justice and K. is guilty. This 'either-or' encapsulates an inability to tolerate the essential relativity of things human, an inability to look squarely at the absence of the Supreme Judge. This inability makes the novel's wisdom (the wisdom of uncertainty) hard to accept and understand." Cf. Kundera *The Art of the Novel* (1988) 6-7. The exploration of the relation between law and literature in this essay turns on the difference between the literary and judgmental sensibilities that Kundera highlights here, but also staggers it exponentially. Pure literature or the purely literary sensibility would surely turn on the sheer errancy of all things human and pure law would certainly turn on a categorical "judgmentalism" that would have things be either right or wrong. But errancy also permeates this very relation between the literary and the legal. The human being, for now at least, cannot simply choose between the literary and the legal. It is still irreducibly exposed to the claims of both. And the thoughts that are developed in this essay deviate from much that represents the "law and literature movement" (the movement that suggests that law and literature learn from one another) in the way they culminate in an insight that the human being's errant existence between the legal and the literary (between the need for secure "truths" and the libidinal desire for adventurous departures from the security of "truths") is not always matter of edification, constructive learning or "better understanding". Sometimes it is that, but very often, if not indeed more often than not, it is itself a matter of destructive errancy. In the final analysis, for better or for worse, the literary, more often than not, does seem to have the last say in the current state of human affairs, even when this last say (again more often than not) comes to us all robed-up and wigged, that is, in the legal state of utter self-denial.

[5] Nancy, commenting on a passage in which Marx rather romantically exults the particularity (as opposed to the generality) of work in traditional communities, writes (*La communauté désoeuvrée* (fn. 3 above)184, emphasis added): "La communauté signifie ici la *particularité* socialement exposée, et s'oppose à la généralité socialement implosée qui est celle du capitalisme. S'il y a eu un événement de la pensée marxienne, et si nous n'en avons pas fini avec lui, il a lieu dans l'ouverture de cette pensée." Nancy ultimately finds the word *particularité* problematic and replaces it with the word *singularité* for purposes of avoiding the slippage between particularity and generality in the construction of ordering myths and mythological literature. "Dans le mythe, ou dans la littérature mythique, les existences ne sont pas offertes dans leur singularité: mais les traits de la particularité contribuent au système d'une 'vie exemplaire' d'ou rien ne se retire, où rien ne demeure en decà d'une limite singulière, où tout se communiqué, au contraire, et s'impose à l'identification." Nancy thus seeks to displace the particular which already constitutes an "exemplary identity" beyond the sheer discursiveness or errancy of singular exposures of identities to one another. This transformation of "the particular" into generality is an important feature of the law that haunts Marx's thought even when he moves to salvage the particular from the general, as we shall see from the passage from the *Gotha Programme* quoted below.

They simply keep on (keeping on) exploring the errant vicissitudes of human existence. Nancy explains this irrepressible errancy with reference to the notion of writing or *écriture* in the work of Derrida.[6]

On another occasion one could explore the considerable extent to which Bram Fischer's own life story - the story of a member of a racist Afrikaner elite who as a young man shuddered at the thought of shaking hands with black men but ended up sacrificing his life for their freedom[7] - evinces traits of the sheer errancy that Nancy associates with the *literary*. In doing so one would have to take leave of Clingman's invocations of Bram's "flaws" and "failure of understanding", but simply contemplate the way his life traversed, in sublime and ultimately tragic fashion, a selfless and indeed self-destructive exposure to the devastating contradictions of the period of South African history in which he lived. The constraints of present concerns do not allow for this exploration here. I shall instead take up the challenge of severing Bram Fischer's legacy from the cruel legacies of *literal Marxism* by relating it to the concern with the unique, the particular or the singular that Nancy associates with a *literary Marxism*.[8] This *literary Marxist* concern with the unique particular, we shall see, goes to the heart of a *critique of law* if not a *critical aversion to law* that reverberates throughout the work of Marx and significant revisions of Marxism in the course of the twentieth century.

This essay explores the relation between law and literature with reference to Marlene van Niekerk's novel *Agaat*. And given the undeniable and irreducible tension between law and any thinking that can truly be called Marxist, the literary Marxist exploration of the relation between law and literature that will be at issue here necessarily remains sceptical of any insistence on the edifying or mutually beneficial relationship between law and literature. In a way, the thoughts that will be explored in what follows resonate in an interesting and perhaps surprising way with Richard Posner's insistence that law and literature constitute "an unruly team".[9] From a literary Marxist perspective, the relationship between law and literature is as destructive as the relation between law and Marxism. The idea that law can gain *constructive* normative insights from literature is indeed a shallow and facile one.[10] Posner cannot be faulted on this

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[6] Nancy *La communauté désoeuvrée* (fn. 3 above) 178, n 74, invoking "l'interruption, le suspens et la 'différence' du sens dans l'origine même du sens, ou encore l'être-trace (toujours-déjà trace) du 'présent vivant' dans sa structure la plus proper (c'est-à-dire jamais structure de proprieté) constituent, s'il est besoin de le rapeller, les traits fondamentaux de ce que …. Derrida a pensé sous les noms d''écriture' ou d'archi-écriture'.

[7] Cf. Clingman *Bram Fischer Afrikaner Revolutionary* (fn. 1 above) 51.

[8] That the notion of a *literary Marxism* indeed points to a productive way of severing the legacy of Marx from the abusive empire of Soviet communism is corroborated by Milan Kundera's insight that this empire represented the death of the European novel. Cf. Kundera *The Art of the Novel* (fn. 4 above) 14.

[9] Posner *Law and Literature* (1998) 326, responding to James Boyd White and Thomas Grey: "White, like Thomas Grey… loves literature and knows law and wants to yoke them; but they can be an unruly team."

[10] It reduces literature to a source of moral insights, or to be more precise, to a source of moral insights that one likes or finds useful. As David Gorman ("Review of *Poetic Justice*" (1997) 21 *Philosophy and Literature* 98) puts it: "Nussbaum fails to persuade, here as in her previous work, that her concern with literature is a concern with something more than drawing a moral lesson from it." And the consequence of this approach to literature is that one has to reduce the whole genre of literary works to the few items that fit into the framework of one's moral convictions. Those literary works that significantly challenge these convictions will have to be ignored and discarded. On this, cf. also Posner *Law and Literature* (fn. 9 above) 324 – 332 from which pages (at 330) I also drew the reference to Gorman.

count. Martha Nussbaum nevertheless takes a markedly different stance in this regard. She contends that judges can learn from literature a narrative imagination that prepares them for the mercy and equity required to do justice to a case.[11] The following passage embodies one of her crucial statements in this regard:

"I shall develop a general thesis concerning the connection between the merciful attitude and the literary imagination….The Greco-roman tradition already made a close connection between equity and narrative. The person who 'reads' a complex case in the manner of the reader of a narrative or the spectator at a drama is put in contact … with two features of the equitable: its attentiveness to particularity and its capacity for sympathetic understanding. This means that the spectator or reader, if he or she reads well, is already prepared for equity and, in turn, for mercy."[12]

This essay will indeed take Nussbaum's link between literature and mercy as its central concern. But to the extent that it will engage with this concern from a literary Marxist perspective, it will argue for a de-constructive regard for the deeply destructive relations between mercy and law and literature and law. An edifying understanding of the relation between law and literature that ignores or underplays the destructiveness of this relationship is neither *Marxist* nor truly *literary*.[13] And it may

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[11] She insists that this view of the relation between law literature and mercy is fundamentally different from Posner's. Cf. in this regard her contentions regarding Holmes', Posner's and Justice Scalia's the severance of law and mercy in Nussbaum "Equity and Mercy" in *Punishment: A Philosophy and Public Affairs Reader* (1994) 172 – 175, 180 -181. Although still critical of Posner's position (associating his economic analyses of human life with the Gradgrind reduction of life to economics that Dickens portrays in *Hard Times*) one year later in her book *Poetic Justice – the Literary Imagination and Public Life* (1995), she now appears to have soften her stance toward him (at xii). This softened stance appears to be more personal than argumentational, for it does surely does not contain an essential correction of her views in "Equity and Mercy" that was and is surely due. Posner's take on the relation between law and mercy and law and literature is much more nuanced than Nussbaum makes it. It is simply wrong to assert that Posner espouses a view of law as devoid of mercy. He makes it abundantly clear that the very idea and practice of law turns on a "mixture" of law and mercy. Cf. Posner *Law and Literature* (fn. 9 above) 121. This is also true of the earlier *Law and Literature: A misunderstood relation* (1988) to which Nussbaum refers. In this earlier edition (at 109) Posner writes: "No society has ever embraced the legalistic conception in its full rigor, though many lawyers and judges have given it lip service and nineteenth-century American legal formalism made it the official legal ideology. Every society softens the rigors of strict legalism…. It is false that law is not law unless it banishes every human, mitigating, discretionary, or "feminine" characteristic. The choice between rule and standard… is a choice within law rather than a choice between law and not-law." He makes the same point in the later edition (at 121), now introducing a distinction between primitive and mature law: "Both the extreme of hyperlegalism and the opposite of extreme of a purely discretionary system of justice are found only in primitive societies. Mature societies mix strict law with discretion….The mixture is not inconsistent with the idea of law; it *is* the idea of law."

[12] Martha Nussbaum "Equity and Mercy" (fn. 11 above) 167.

[13] Having noted that the law and the very idea of law accommodates rather than excludes mercy (see fn 11), Posner makes a remarkable point regarding the cause of the unruliness between mercy and law and literature and law in the 1988 edition of *Law and Literature* which is rather unfortunately omitted in the 1998 edition: *It is literature that seeks to establish a divide between law and mercy. It is literature that makes law the merciless villain for the sake of a good story*. As Posner (*Law and Literature* (fn. 11 above) 10) puts it: "It is noteworthy that [in the *Merchant of Venice*] Portia distinguishes mercy from law rather than regarding it as a part of law; for her as for Shylock, law is the domain of strict rules, strictly enforced. This is the usual way in which law is presented in literature, partly because the harsh, legalistic, rule-dominated side of law is the side that produces surprise, abrupt reversals of fortune, and cruel destinies – and all these are the stuff of literature." This is a crucial point that moves Posner's reflection on literature in the direction of the sublime insight that Derrida articulates with reference to Artaud: Pristine theatre is the staging of cruelty for the sake of soliciting (*rendering present* instead of *representing*, to be sure) the once off, unique and singular manifestation of existence. Cf. the essay *Le théâtre de la cruaté* in *L'Écriture et la Différerence* (1967) 341 – 368. Taking one's cue from this essay one can say that it a "cruel" deconstructive concern if not obsession with the unique and the

well come to serve a notion of mercy that excuses and underpins the harshest of laws in the same breath that it excuses something or someone from those laws, as Douglas Hay points out in an essay to which we return shortly.[14] The literary Marxist concern with mercy is a different one. It is a concern with mercy that seeks to destroy both the laws of class domination and the *non-literary* literature that invariably informs these laws.

It must not be forgotten that it is from the Victorian novel that the law of criminal procedure may well have received its strongest incentive for the confident conviction that it can fathom the mind of the accused. Lisa Rodensky argues that it is in the narratives of Dickens and especially Eliot that the narrator begins to adopt an omniscient third person perspective that knows the mind of the characters through and through. Post-Foucaultian literary critics like D.A. Miller and John Bender have pointed out that this "cognitive privilege" of the Victorian and other realist narratives of the late eighteenth and nineteenth century rendered their characters transparent and directly accessible and in this way facilitated the culture of surveillance that informed the new police, penitentiary and other disciplinary institutions of the time.[15] Instead of a merciful sensibility, the Victorian novel provided the law with an example of an unforgiving judgmentalism. Yeats, praising Balzac for his consistent disinclination to judge, observed with regard to George Eliot:

"Great literature has always been written in a like spirit, and is, indeed, the Forgiveness of Sin, and when we find it becoming the Accusation of Sin, as in George Eliot, who plucks her Tito in pieces with as much assurance as if he had been clockwork, literature has begun to change into something else. George Eliot had a fierceness one hardly finds but in a woman turned argumentative, but the habit of mind her fierceness gave its life to was characteristic of her century."[16]

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singular that also inspires the *literary Marxist* engagement with the potential of literature to subvert law for the sake of a forceful mercy. This thought leaves one with the task to ponder the conundrum of having to be cruel to be merciful with which Derrida's whole oeuvre confronts us (hence perhaps also the utilisation of the phrase "forceful mercy" in this essay). Present concerns do not allow for doing this here. But Nussbaum may well want to interpret the apparent convergence on this count between the politically and economically conservative Posner and the "supposedly" left wing Derrida and *literary Marxists* as a vindication of her claim (cf. Nussbaum "Skepticism about Practical Reason in Literature and the Law" 1994 *Harvard Law Review* 714 – 744) regarding the telltale alliance between the left and the right that results from their respective deconstructions of normative reason. If so, it would be a vain little victory. Literary Marxists will continue to regard Posner (the conservative capitalist legal theorist) as an opponent or enemy (depending on the level of cruelty they manage to stage/not to stage) and are not embarrassed by the fact that this opponent or enemy shares with them some of their most inspiring insights. They are simply puzzled by the idea that the sharing of some insights or convictions renders the non-sharing of others insignificant. However, this concession to Nussbaum's vain little victory (if it is one) is not at all a concession to the accuracy of her 1994 comparison of "deconstructionist" and "law and economics" approaches to law and legal theory. Present concerns do not allow for addressing this here either, but it warrants mentioning that her reading of Derrida distorts his thinking (also the "early" thinking before the switch in his thinking which she invokes to cover her against invocations of arguments from his later works) beyond recognition.

[14] Cf. note 18 below.

[15] Cf. Rodensky *The Crime in Mind* (2003) 11. The matter may well be more complex that Rodensky presents it here. Carrol Clarkson has pointed out to me that Eliot and Henry James in fact criticised Dickens for focusing too much on the external traits of his characters and for not developing their internal words sufficiently. But apart from calling for a closer assessment of Dickens in this regard (cf. also my qualification below at fn. 54) this point seems to confirm rather than contradict Rodensky's essential argument regarding the Victorian narrative sensibility.

[16] Cf. Rodensky *The Crime in Mind* (fn. 15 above) 136.

Should one wish to endorse Nussbaum's contention that literature and a literary sensibility can inform judges and lawyers with a merciful consciousness, one would clearly have to distinguish between different kinds of literature. And the question arises as to what exactly informed the fierce judgmentalism of nineteenth century English literature. Foucault would stress that that the eighteenth and nineteenth century's judgmental access to and surveillance of the soul of the accused and the prisoner was not concerned with harsh punishment for its own sake, but ultimately with discipline. And one of the key factors that he highlighted to explain the rise of this disciplinarian consciousness was the emerging need to protect property against theft in ways that had never been considered necessary before.[17] His arguments in this regard thus ultimately turned on a Marxist linking of property law and criminal law and, of course, between law and the class struggle. Douglas Hay again points out this link by highlighting the role of capital punishment in this disciplinarian ways of capitalism. In these disciplinarian ways, even mercy had its allotted role:

"A ruling class organises its power in the state. The sanction of the state is force, but it is force that legitmized, however imperfectly, and therefore the state deals also in ideologies. Loyalties do not grow simly in complex societies: they are twisted, invoked and often consciously created. Eighteenth-century England was not a free market of patronage relations. It was a society with a bloody penal code, an astute ruling class who manipulated it to their advantage, and a people schooled in the lessons of Justice Terror and Mercy. The benevolence of rich men to poor, and all the ramifications of patronage, were upheld by the sanction of the gallows and the rhetoric of the death sentence." [18]

Not only does one need to distinguish between different kinds of literature, one clearly also needs to distinguish between different kinds of mercy. Nussbaum does not provide us with these distinctions. We shall take her point regarding the relation between mercy and literature in what follows, but we shall soon move on to make and pursue these further distinctions. Again, the mercy at stake in a *literary Marxist* engagement with literature turns on a quest for a *forceful mercy* that does not inform the law in order to re-instate and reinforce its maintenance of class and property relations. The mercy at stake in a *literary Marxist* engagement with literature, should it *materialise*, would inspire a deep questioning of these legal relationships and render them unstable, however modestly so. This is indeed also the aim of the engagement with the novel *Agaat* in this essay.

All of the above of course culminates in the suggestion that *Agaat* is a Marxist novel. I would indeed like to contend that *Agaat* constitutes an instance of Marxist *literature*, at least from a *literary Marxist* point of view. I shall nevertheless not labour the point. From the perspective of *law* and the *laws* of literary criticism in particular, the suggestion that *Agaat* is a Marxist novel cannot but remain irreducibly contentious. The notion that *Agaat* is a Marxist novel must thus ultimately remain a *literary* assumption. But a basic argument can be offered in this regard: To the extent that *Agaat* invites one, as I shall contend it does in this essay, to resist the *speculative imaginary consciousness* that reduces the unfathomable secrets of others to the transparent and thus thoroughly knowable mirror images of the self, it also calls one to resist the merciless, accusatory and disciplining techniques that today still make a mockery of the normative (private or human rights) discourses that accompany and often legitimate the *speculative capitalism* of our time.

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[17] Cf. Foucault "Truth and Juridical Forms" in *Power: Essential Works of Foucault Vol III* (2002) 68-69.
[18] Hay "Property, Authority and the Criminal Law" in Hay et al *Albion's Fatal Tree* (1975) 62 - 63.

I. THE LITERARY MARXIST CONCERN WITH THE UNIQUE PARTICULAR

Law, wrote Marx in his *Critique of the Gotha Programme* of 1875,

> "can by its nature only consist in the application of an equal standard, but unequal individuals (and they would not be different individuals if they were not unequal) can only be measured by the same standard if they are looked at from the same aspect, if they are grasped from one particular side, eg, if they are regarded as workers and nothing else is seen in them, everything else is ignored".[19]

This thought, indeed this critique of the law and the language of rights, goes to the heart of Marx's critique of exchange value and would reverberate in all the critical revisions of Marxist thinking in the course of the 20th century, through George Lukács' critique of reification,[20] right up to Adorno's critique of the logic of identity that underlies instrumental rationality.

Dwelling on this history would lead us too far away from present concerns, so let us move directly to Adorno to pick up on the resonance of the *Gotha Programme* in a passage from his main work *Negative Dialectics* that appeared in 1968. Note that Adorno's text again points our attention to the language of law and rights. He writes:

> "Right is the primeval phenomenon of irrational rationality. It makes the principal of formal equivalence the only applicable norm. It cuts all sizes over the same last. Such equality, in which differences perish, surreptitiously privileges inequality".[21]

At issue in this essential thought of the Marxist and neo-Marxist tradition is a critique of the law's logic of analogy, comparison and equation that destroys or ignores difference, destroys or ignores the unique singularity of the individual and the particular. How can one terminate this logic or escape from it in a time that, probably for both good and bad reasons, no longer convincingly affords one the grand historical narrative of the abolition of the state and law? Is there another narrative or kind of narrative that can deliver us from the law's compulsory comparisons?

Adorno's thinking took an aesthetic turn in the wake of a realisation that philosophical or systematic thinking cannot save us from *the logic of identity*, as he called this logic of comparison, analogy and equation that destroys the unique singularity and non-identity of the particular. According to Adorno, philosophical and systematic thinking was itself a product of this logic of identity. He therefore turned to art to explore the possibility of retrieving or salvaging the non-identical uniqueness of the singular from the devastating conceptual equations of law and philosophy.[22] Nussbaum's argument that literature can inform lawyers and judges with a literary imagination that will enable them to do justice to the specificity of a particular or individual case appears to have much in common with Adorno's turn to

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[19] Marx *Critique of the Gotha Programme* in Marx/Engels *Selected Works, Vol III* (1972) 13-30. Also available at http://www.marxists.org/archive/marx/works/1875/gotha/index.htm.

[20] Lukacs, *History and Class Consciousness* (1968) 83–222.

[21] Translated from Adorno *Negative Dialektik* (1973) 304: "Recht is das Urphänomen irrationaler Rationalität. In ihm wird das formale Äquivalenzprinzip zur Norm, alle schlägt es über denselben Leisten. Solche Gleichheit, in der die Differenzen untergehen, leistet geheim der Ungleichheit Vorschub."

[22] Adorno *Ästhetische Theorie* (1980).

aesthetics to escape from the generalising logic of identity in law and philosophy. This essay ultimately contends that this is not the case. If it is mercy towards the singular and the specific that Adorno contemplates with his aesthetics of non-identity, it is surely not just a mercy that briefly suspends and softens the law only to reinstate its harsh material substructures, but a forceful mercy that aims to shake the very foundations of law. It is doubtful whether Nussbaum's invocation of mercy has any real foundation-shaking aspiration in mind. But there is a curious slippage in her essay "Equity and Mercy" that does point us, perhaps unwontedly, towards something much more fundamental than a mere suspension and sweetening of the law. Let us revisit the last sentence of the passage quoted above:

"[T]he spectator or reader, if he or she reads well, is already prepared for equity and, in turn, for mercy".[23]

This is a curious sentence that merits close scrutiny. It does not read, as requirements of logic and semantics may have required it to do, as follows: "The spectator or reader, if he or she *looks* or reads well, is already prepared for equity and, in turn, for mercy." No, the sentence provides one with non-synonymous alternatives as far as the subject, but not so as far as the verb is concerned. The effect of this curious sentence is that Nussbaum is turning the spectator into a reader. The spectator at a play is not someone who looks at a spectacle, but one who reads the textual construction of the tragedy or the tragic. And it is this reading that prepares him or her for equity and mercy. Perhaps one should question whether the use of the word "spectator" is at all apt here, whether it is at all fit to denote those who attend the performance of a tragic play. This is in fact one of the crucial themes in Marlene van Niekerk's novel *Agaat*. As will become clear as we move on, *Agaat* confronts us with the irreducible difference between spectators and readers. And in doing so, the novel also provides us with a fictional suspension and disruption of the law, a fictional disruption of the law that is not just fictitious. If a reading of *Agaat* can point us to an equitable and merciful sensibility that not only reinstates the law after a superficial challenge (perhaps with a softening of sentence), but incisively and consistently questions the law's speculative foundations and merciless capitalist substructures, it will surely invoke a justice beyond law. In true Marxist or Marxian fashion it will have pointed us to the end of law, the termination of law that is also *the end of law* in another sense: *the termination of law that is also the very point purpose and aspiration of the law.* One should therefore not underestimate the revolutionary force – the state and law disrupting force - of that which Nancy has come to call *Marxisme littéraire*. At issue in this literary Marxism, we have seen above, is an errant writing that constantly disrupts the state and all states of affairs, legal states of affairs included, for the sake of the unique particularities and singularities of existence.[24]

Is *literary Marxism* offered here as a substitute for real political and revolutionary action? Surely not. On the contrary, it seeks to inspire significant political action. It seeks to precipitate the first stirring and awakening of the critical imagination that conditions such action.[25] But it also seeks to inform the political action that it inspires

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[23] Cf. note 12 above.
[24] Cf. notes 4 and 5 above.
[25] As such, it already constitutes political action. Rosemarie Buikema makes this point well in her reflection on the poem-like "miniatures" in Agaat: "[T]he power of *Agaat* lies in the unprecedented abundance of poetic language, in linguistic associations and stylistic experiments, in the deployment of

and precipitates with a *literary* sensibility that would prevent it from taking itself too *literally*. To the extent that all political and all revolutionary action aims at founding a new polity or community and a new social organisation, it cannot escape from the need to lay down rules that will have to be enforced for that community to function. And this will often take place with painful coercion that will surely deny again the uniqueness and singularity of the one who wishes to make an exception for him or herself by not playing by the rules. A Marxism that turns on the notion that the law will disappear after "*the*" revolution or one that contends that whatever rules will have to be maintained then, will be respected and obeyed out of revolutionary love and fervour, takes itself too seriously and too literally.[26] It is a cruel myth, a myth that needs to be interrupted with a regard for the sheer errancy and non-conformity of human desire. Such a literal Marxism, should it ever again materialise, would be merciless, for it would not be able to imagine in a literary fashion the story of the unique and singular desire that moves the deviant to fall out of the "love" others hold in common. For this errant desire, the "common love" of others will have turned again into the *formal equality* demanded by an *overlapping consensus*. It will have turned into *the same standard and the same last over which all sizes are cut without regard for the exceptional*. This will be so irrespective whether the causes for falling out of love are sublime (continued or renewed revolutionary, political or artistic fervour) or banal (merely selfish and criminal). But the literal Marxist will of course not be able to distinguish thus between the sublime and the banal.

II. LAW AND LITERATURE: A TALE OF TWO NARRATIVES

Approaching the law from the point of view of literature or invoking literature or literary studies in order to understand law better is no longer a novel undertaking. The genre or subdivision of legal studies known as 'law and literature' has established itself well in law journals and other law publications. Many prominent law journals have in recent years dedicated special issues to this field of inquiry and some expressly present themselves as fora for this strand of legal theory.[27] And it is crucial to take into account here that one of the most celebrated legal theorists of our time, Ronald Dworkin, views the law as a kind of chain novel in the writing of which all judges who do their work well, participate.[28]

According to Dworkin, judges who judge well contribute new chapters to a novel that other judges have started before them. Their task is always to continue the story in the

novel words, images, and streams of consciousness. Every little miniature … shows that this novel does not lend itself to a univocal identity-constituting appropriation. At the same time, the experimental style and the poetic language demonstrate that in a context of racial and patriarchal violence, literariness and politics do not constitute separate domains." Cf. Buikema "Theft and Flight in the Arts" *European Journal of Women's Studies* (forthcoming December 2009). Thus do beauty and the poetic constitute the very inception of political action, the sharp thin edge of the wedge without which political action becomes a blunt instrument that destroys more than it can hope to create.

[26] For an exemplary case, cf Badiou *St Paul- La Fondation de l'universalisme* (1997) 83-84. Not even the noble Buenaventura Durruti and the anarchist movement in Spain could avoid the fate of having to impose the ground rules of the movement on members who soon after their first victories began to abuse their newly-gained power for personal and selfish reasons. For a narration of these events, cf. Enzensberger *Der kurze Sommer der Anarchie: Buenaventura Durrutis Leben und Tod: Roman* (1972). I am indebted to Emilios Christodoulidis for bringing this sublime novel to my attention.

[27] For the breadth of this movement and references to the key publications that constituted it, see the discussions in Posner *Law and Literature* (fn. 9 above) vii-viii; Ward *Law and Literature* (1995) 3-27.

[28] Dworkin *Law's Empire* (1986) 228-238.

best way possible, without prejudicing the integrity of the already existing narrative. Continuing the novel in the best way possible means continuing it in the best way possible in view of the specific narrative criteria of the law; criteria such as justice, fairness, reasonableness, fidelity to principle, and so forth. Style, rhetoric, and linguistic or poetic sensitivity may contribute marginally to the excellence of this narrative, but surely does not play a central role in it. Crucial to Dworkin's legal narrative is in fact exactly the identity logic from which Adorno sought to escape with his turn to aesthetics. Dworkin's chain novel requires that the law stays essentially the same through all the twists and turns that it may take in the face of new circumstances. The Dworkinian chain novel must maintain its essential identity. It does not offer us an escape from the identity logic of the law. For such an escape we would have to turn to a completely different kind of novel, an errant novel that constantly takes leave of its beginnings, a novel that does not construct its characters in a coherent fashion, but one that deconstructs them in a way that exposes them to the irreducible surprise of their existence. For what else can be at issue in the singularity and uniqueness that Marx and Adorno pursued, than an openness to the surprise of existence that ultimately subverts all categories of equation and comparison? What else can be at issue in the mercy that Nussbaum pursues, than an openness to the surprises of existence that are often also painful and destructive, often devastating and unforgivable?

What kind of novel would reflect this errant narrative that, unlike Dworkin's principled chain novel, constantly takes leave of itself, relentlessly opens new spaces and thus frustrate any desire for a return to an essential identity? Italo Calvino's *If on a winters night a traveller* is a good example of a novel that aspires to such an errant narrative. It does not attain to the pure errancy to which it aspires, for it returns to itself in crucial passages which do reflect hermeneutical or juridical statements about the point or possible point of the novel. But the overall thrust of Calvino's narrative is surely that of a fragmentary opening of new narrative spaces, spaces that only hang together in a juxtaposed fashion. The fragmentary character of the narrative is already clear from the already halfway or underway ring of the title that also constitutes the first sentence. The novel thus starts without a proper origin by taking its lead from a conditional: *If on a winter's night a traveller*. And from then on it simply persists with inconsequential sequences. When the reader has read through a good number of pages of this continuing juxtaposition of narrative fragments, she might quite understandably begin to experience a nagging desire for some narrative continuity. The inception of this desire is the inception of the juridical or the legal. It is the inception of a desire for an account and an assessment of a narrative coherence and integrity à la Dworkin. Calvino understands this and therefore comes to the reader's avail by inserting, among several, the following illuminating passage into the novel's string of non-consequential sequences:

"The book I would like to read now is a novel in which you sense the story arriving like still-vague thunder, the historical story along with the individual's story, a novel that gives the sense of living through an upheaval that still has no name, has not yet taken shape…."[29]

This is one of the most juridical or hermeneutic points in the novel. One can say it constitutes a juridical lapse into a hermeneutic circularity (in terms of which it returns to itself and assesses or judges its own meaning) in an otherwise purely literary or

[29] Calvino *If on a winter's night a traveller* (1982) 61.

errant narrative. But this juridical point or lapse clearly speaks against itself, against this illuminating closeness to itself. It articulates a desire for the remote and the vague, the far off thunder that has not taken shape and has no name yet. And as a juridical point it is correct or just. It describes the novel aptly. *If on a winter's night a traveller* is indeed a novel that leaves the reader with an experience of "living through an upheaval that still has no name, has not yet taken shape….". It leaves the reader indeed with an experience of shards and chips that fly in all directions, chips that fly from a violent chiselling from which no image becomes apparent. It leaves one with the sense of a secret that is happening and keeps on happening. Everything that Calvino offers the reader remains hanging or flying. Nothing alights, touches down, or comes to rest again. It simply remains suspended like chips sent hurtling from a secret divide that remains irreducibly undivided. The shards simply remain suspended. Calvino's novel thus does not constitute the splitting of the universe (the ultimate secret of things) by one little chisel.[30] No, the novel only constitutes the flying shards that point to a still un-split secret in a falsifying and apocryphal way. As Calvino explains this in another self-resisting juridical lapse, about ninety pages onwards:

"Apocrypha (from the Greek *apokryphos,* hidden, secret): (1) originally referring to the "secret books" of religious sects; later to texts not recognized as canonical in those religions which have established a canon of revealed writings; referring to texts falsely attributed to a period or to an author….Perhaps my true vocation was that of an author of apocrypha, in the several meanings of the term: because writing always means hiding something in such a way that it then is discovered; because the truth that can come from my pen is like a shard that has been chipped from a great boulder by a violent impact, then flung far away; because there is no certitude outside falsification."[31]

From a purely *literary* point of view, the crucial lack evident in Dworkin's integrity centred understanding of the law in terms of a neat and coherent chain narrative is exactly that it does not appreciate what it means when the chips are really flying. This lack of appreciation is evident from the way the chain novel claims to put together seamlessly the shards and fragments of lives sent hurtling by legal conflict between two individuals or between an individual and the state.[32] Dworkin's understanding of the law just does not appreciate that the eruption of conflict sends fragments of life hurtling into empty space and ends in irredeemable loss, irredeemable loss of living matter, be this loss glaringly obvious and heartbreaking– recall *Soobramoney v Minister or Health*[33] - or microscopically small, just grains of failed aspirations that disappear in the mundane dust of the quotidian (take any "minor" private law dispute that ends in a lower court and leaves one party the winner and the other the devastated loser). It has no regard for the fact that the remaining pieces have jagged edges that

[30] Cf. "*Die Beiteltjie*" in N P Van Wyk Louw *Versamelde Gedigte* (1981) 186.
[31] Calvino *If on a winter's night a traveller* (fn. 29 above) 152.
[32] Cf. Ronald *Dworkin Taking Rights Seriously* (1978) 116. The law may not really be that seamless, but this is nevertheless how judges should assume it to be.
[33] Cf. *Soobramoney v Minister of Health, KwaZulu-Natal* (1997) 12 BCLR 1696 (CC). The case concerned Mr. Soobramoney's claim in the Constitutional Court of South Africa that the rights to life and healthcare entrenched in the South African Constitution obliged the government to provide him with urgently needed kidney dialysis treatment for which he could not pay himself. The health authorities of Kwazulu Natal (the province in which Mr. Soobramoney lived) argued in response that resources were limited and that kidney dialysis treatment had to be restricted to patients whose overall health condition justified the treatment. Mr. Soobramoney had a serious heart condition on top of his kidney problems which disqualified him from receiving the dialysis treatment from the state. The Constitutional Court accepted the arguments of the health authorities and dismissed Mr. Soobramoney's claim. Mr. Soobramoney died a week after the judgment was passed.

cannot be measured and fit into a fine jig saw puzzle that reconstructs the whole in seamless or nearly seamless fashion. It has no regard for ruins, let alone a love of ruins.[34] In contrast to this comparative, analogical and principled Dworkinian chain narrative that confidently claims to reconstruct the shattered whole without scars or seams remaining, the literary narrative reminds us more of the dissociating chain narrative that children develop in the "little telephone" game they often play, softly whispering a message into the ear of the next one in line only to marvel at how and where the message ends up when the last in the line comes to reconstruct it. And this errant narrative, I wish to claim, is much more intact with the reality of law and the legal resolution of conflict, than the Dworkinian one that always remains intact with its origin, or claims to do so, notwithstanding the new narrative turns it takes to meet circumstantial exigencies.

It is important also to note the different timeframes that characterise the Dworkinian and the pure literary narrative exemplified or at least approximated by Calvino's *If on a winter's night a traveller.* The successful reconstructions of the law in the Dworkinian narrative imply effective terminations of the divisive conflicts at issue. Things – frustrations, failed aspirations, unsatisfactory resolutions – come to rest in the legal resolution of conflict and thus allow us to begin again with a clean slate. Under the auspices of this narrative, conflict is always new conflict that results from someone simply failing anew to subscribe to the established reason of the law. That new conflict is invariably a matter of old conflict not properly resolved and not properly understood – an event still nameless and shapeless - is something the Dworkinian narrative cannot contemplate. Such contemplation would destroy its confident claim of having reached right answers in view of the just and equitable rules, principles and founding morality of the law. The Dworkinian narrative tells the story of an initial state of innocence suddenly destroyed by the eruption of the unreasonable. At issue in this story is not necessarily a grand myth of a golden time at the beginning of history, but surely a small cousin of this myth that seeks to establish the notion of relative states of innocent reasonableness in the wake of judicial resolutions of conflict. It is a myth of a legal society that always manages to return to its original and exemplary form and identity. It is the myth of a social space where nothing happens apart from minor unfortunate incidents that never really threaten the coherence of this space.

The story Calvino wants us to read, in contrast, is one that relates "an upheaval that still has no name" and "has not yet taken shape". At issue in Calvino's literary narrative is an event that is still happening and never ceases to happen. It is a story of chips being flung away continuously and never coming to rest again. It relates the event as an upheaval "through which we are still living" and therefore has no name and shape yet. Dworkin's narrative, on the other hand reduces the event to an occurrence that belongs to an unhappy past, a past that the law has helped us and will always help us to overcome.

Viewed, indeed *viewed* as a past occurrence, the event and the law that settles the event become something that can be looked at, something of which we can form an image, something with regard to which we become spectators. Dworkin's narrative

[34] Cf. Derrida *Force de Loi: Le 'Fondament Mystique de L'Autorité'* (1994) 105; Vismann "The Love of Ruins" (2001) *Perspectives on Science*: *Historical, Philosophical, Social* 196; Van der Walt *Law and Sacrifice* (2005) 197.

may require us to compare and trace a series of judicial and legislative images through which the law comes to the fore, but the way it allows the judge to extract from his reading of the law a clear and conclusive understanding of the law, reduces or transforms his reading into a picture that can be viewed. Dworkin reduces the history of law to a series of well-formed images. His theory is ultimately a picture theory of the law, irrespective of the interpretive, hermeneutic or Wittgensteinian turn that his theory claims to represent. He turns the reader into a spectator. Let us retrace our steps and recall in contrast that Nussbaum's concern with mercy and equity requires the transformation of even the spectator into a reader, not readers into spectators. This is so because mercy, like the act of reading, remains irreducibly suspended in a state of disarticulation, a state of living through an upheaval that has no name and form yet. It does not afford us a picture of things.[35]

In which regard is *Agaat* faithful to Calvino's rather to Dworkin's chain novel?

Agaat reminds us of a difference that cannot be compared to anything else, a difference that continues to upset the comparative strategies through which the human individuals constantly seek to maintain and restore a lawful or legal space between them. This difference subverts and unsettles all these comparative strategies and whatever stable existence may be achieved through them. The difference at stake in *Agaat* allows not for a comfortable and serene co-existence. It is a difference that comes to the reader by way of an interminable upheaval, one that ultimately cannot take shape or receive a name, one that remains an irreducible secret. This then is the reading of *Agaat* to which one is invited here: *Agaat* is an apocryphal narrative of an unfinished upheaval.[36]

This reading of *Agaat* must, however, anticipate and elementary objection. Although *Agaat* is to some extent written in a fragmentary manner, although the story line is constantly disrupted by shifts between detailed descriptions of the bodily process of Milla de Wet's dying in the present, on the one hand, and her troubling memories of the past, on the other, the novel is not nearly as enigmatic and fragmentary as *If on a winter's night a traveller*. *Agaat* allows the reader to make herself at home fairly easily amid these switches between past and present. And one might add that this kind of narrative is hardly uncommon in contemporary and even not so contemporary

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[35] This reading of Dworkin is not only informed by Calvino. It is also informed by the critique of the metaphysics of presence, representation and picturing that is articulated in the works of Heidegger, Derrida, Nancy and several other significant thinkers of our time. For one of the most poignant articulations in Heidegger's work, cf. the essay *Die Zeitalter des Weltbildes* in *Holzwege* (1950). For some of Derrida's most forceful articulations, cf. again the early essay *Le théâtre de la cruaté et la clôture de la représentation* (fn. 13 above) and the his sublime essay on Célan in *Schibboleth* (1986) as well as *Force de Loi* (fn. 34 above). This is the also main concern of all the major themes of Derrida's later work – justice, hospitality, friendship, impossibility, event, ghost. All these themes involve Derrida's work in the *phenomenological* articulation (*epokhé*) of an irreducible conflict between the concern with spectral *phenomena* that *render present* but are never present themselves and cannot be represented, on the one hand, and the need to sacrifice this concern for its own sake to the representational dynamics of meaningful language and communication, on the other. Hence also the centrality of the notion of sacrifice in his work. Cf. in this regard the significant remark in *Voyous* (2003) 205 n. 1: "Qaunt à la notion du *sacrifice* … j'en ai tant écrit qu'une page de références n'y suffirait pas."

[36] This reading of *Agaat* is deeply indebted to another reading of *Agaat* by Willie Burger

literature.[37] Irrespective of the unavoidable suspense or state of suspension, the sense of having to remain in degrees of teasing ignorance while the plot unfolds that accompanies the reading of the most simple of narratives, the reader hardly ever has a disturbing sense of really not knowing what is going on while reading *Agaat.* The narrative evinces much greater coherence and is much more assessable than *If on a winter's night a traveller*. Does this greater coherence not bring *Agaat* much more in line with Dworkin's seamless chain novel and quite out of line with the narrative that seeks to live through a shapeless and nameless upheaval?

No. An errant narrative need not be fragmentary, puzzling or confusing. One can say a novel need not be cryptic to be apocryphal. Consider the narrative in Umberto Eco's *The name of the rose*. It is surely intricate and complex, but all in all, reasonably straight forward. And yet, the closing lines of *The name of the rose* indicate clearly that this narrative should ultimately also leave us pondering an impenetrable secret.

> "[I]t is hard for this old monk, on the threshold of death, not to know whether the letter he has written contains some hidden meaning, or more than one, or many, or none at all….Where are the snows of yesteryear? The earth is dancing the dance of Macabré; at times it seems to me that the Danube is crowded with ships loaded with fools going to a dark place. All I can do now is be silent….I leave this manuscript, I do not know for whom; I no longer know what it is about: Stat rosa pristina nomine, nomine nuda tenemus."[38]

Agaat surely provides the reader with enough information for the purposes of constructing a coherent plot. In what sense can it then still be regarded as apocryphal, as an inevitably falsifying engagement with a secret, with an upheaval that cannot be named yet? What is *Agaat's* secret, the secret with which the novel engages with so many names and words but cannot name? What in *Agaat* is the pristine rose of which we only retain the bare name?

III. AGAAT'S SECRET

Juridically speaking *Agaat* is the story of a white Afrikaner woman who is accompanied and cared for on her death bed by a coloured woman who has been her domestic aid for many years, to put this employment relation in terms of the rather euphemistic post-apartheid idiom. The woman's name is Milla de Wet (born Redlinghuys). The servant is Agaat. Milla suffers from Charcot's disease or Amiotrophic Lateral Sclerosis (ALS) as it is also known. The disease destroys the

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[37] To give just a few examples that come to mind from recent readings, cf. W.G. Sebald *Austerlitz* (2003), Max Frisch *Stiller* (1954), Anne Michaels *Fugitive Pieces* (1996), Karel Schoeman *Die Uur van die Engel* (1995).

[38] Eco *The Name of the Rose* (1984) 501-502. See also the resonating passage in *Foucault's Pendulum* (1989) 619-620: "We invented a nonexistent Plan, and They not only believed it was real but convinced themselves that They had been part of it for ages, or rather, They identified the fragments of their muddled mythology as moments of our Plan, moments joined in a logical, irrefutable web of analogy, semblance, suspicion….A plot, if their is to be one, must remain secret. A secret that, if we only knew it, would dispel our frustration, lead us to salvation; or else the knowing of it in itself would be salvation. Does such a luminous secret exist? Yes, provided it is never known." And *The Island of the Day Before* (1995) 511-512 also attends the banquet of irreducible historical latency, errancy, and imminence: "He realized now that in a less specific, less obviously theatrical fashion, experienced through little surprises day after day, this sensation of Repose Denied was something he had known first in Provence, then in Paris, where everyone he encountered somehow destroyed a certitude of his, each proposing a different map of the world, but the various proposals never cohered into a finite design."

nervous system, progressively causes the complete paralysis of the body and bodily functions and usually leads to death within three years of its inception. *Agaat* is the story of the last phase of Milla's paralysis during which she can only move her eyelids and still later only one eyelid.

Milla discovered Agaat on the 16th of December 1953 hiding like a little wild animal in the hearth of a dirty and dilapidated dwelling for workers on her (Milla's) mother's farm. She was a five or six year old girl then (her parents were no longer sure whether she was born in the winter of 1947 or 1948). Her one arm was badly misformed and the one foot turned towards the other. The narrative suggests that this malformation of her body was caused by her father having kicked her mother in the stomach on several occasions during her pregnancy. When Milla discovered her, Agaat was already seriously neglected, maltreated and sexually abused. Milla took her to her home on the farm Grootmoedersdrift where she started caring for her and also broke through her animal shyness with forbidding and often unforgiving persistence, so as to literally turn her into a human being again. She taught Agaat, who initially responded to her with little more than hissing sounds, to speak again. She taught her basic toilet and bodily hygiene and clothed her properly. At first Agaat lived like a child in her house, but when Milla gave birth to a son seven years later (August 1960) after even many more long years of yearning for a child, she moved Agaat out to a servant's room outside the house and indeed started treating her like a servant.

Agaat initially resisted Milla's training and instruction, but aided by the *Hulpboek vir Boere in Suid-Afrika* Agaat's competence and skills as a servant and farm worker eventually attained mythic proportions. There was almost nothing she could not do or deal with. There was no animal disease she could not treat and cure, no *tulpsiek* Simmentaler bull which she could not single handedly – remember her misformed right arm – lead into a head vice so that sweet coffee could be forced down its throat so as to stop it from dying; no fine and complicated embroidery stitch she could not manage; no *galjoen* that she could not catch; no sudden crisis that she could not handle. Her skills were bewitching and this adjective is surely not without substance. On more than one occasion the narrative intimates a witch-like dark side to Agaat. At least twice Milla oberves, spying on her from afar, how Agaat dances a peculiar and sinister dance. Aware of this strange other side of Agaat, she also starts wondering whether one of the big crises that Agaat dealt with so masterfully, the fire in the barn on the evening of her son Jakkie's 25th birthday celebration, was not in fact caused and orchestrated by Agaat. And already much earlier Milla realised that she "was afraid of Agaat, more afraid when she was right in front of her than when she was behind her back". Be it as it may, it is this extremely competent but somewhat sinister woman who later cares for the dying Milla with infinite patience and forbidding persistence; patience and persistence equal to the patience and persistence with which Milla raised the little Agaat; patience and persistence that enable Milla to communicate right to the end with the faint movement of a single eyelid.

Willie Burger's brilliant reading of *Agaat*[39] illuminates two interconnected themes in the narrative. According to Burger the novel can first be read as an exploration of death, death being the absolute difference and opaque otherness that sets a limit to the

[39] Burger "Deur 'n spieël in 'n raaisel: Kennis van die self en die ander in *Agaat* van Marlene van Niekerk (fn 1 above) 178.

apparently transparent self-knowledge of the living self. This opaque otherness and impenetrable difference can only be explored by way of mourning. Burger points out how Jakkie, thinking about the deaths of his parents (Milla and Jak de Wet), realises that mourning (*'n stuk treurwerk*) is all that remains to be done.[40]

The second theme that Burger points out is closely connected to the first. It concerns the many mirrors that figure in the unfolding of the narrative. Among them two are of specific significance, the mirror into which Jak de Wet looks during his fitness exercises and by means of which he sustains the image of an athletic "gentleman farmer" who is good enough for Milla; and the mirror in Milla's bedroom, the only piece of furniture that Agaat did not remove from her room so as to allow her to look at herself right to the end. Burger relates this play of mirrors in the novel to Jacques Lacan's theory of the mirror phase in the child's development in the course of which individuals begin to recognise themselves as mirror images of other individuals around them. Thus does the child develop an image centred or imaginary self-understanding that can develop into serious psychotic tendencies and other psychological deviations if the mirror phase is not displaced gradually by the symbolic order of inter-subjective language. Simplifying somewhat, one can say that Lacan conceives of psychological health in terms of the complicated structures of a language-constituted self that refuses or resists the understanding of the self and others in terms of immediately or readily present images.

The person who is enmeshed in an imaginary self-understanding ultimately also understands other people in terms of mirror images of the self. The otherness of others thus gets reduced to mirror projections of selves who are already reduced to images that derive from the premature self-understandings of children or pre-adult individuals. The imaginary self can therefore never have real relations with others. The imaginary self's interaction with others takes place on the basis of an imaginary world that does not allow for real knowledge of either the self or the other. According to Burger, *Agaat* is the story or at least partly the story of the lives of two people, Jak and Milla de Wet, for whom the imaginary phases of their personal development have not been displaced sufficiently by the symbolic order of linguistic discourse.

People like Jak and Milla who are stuck in their imaginary views of themselves and others usually *remain* stuck in these imaginary views. And since these imaginary views are little more than self-projections or little more than the self's projections of itself, they remain stuck in their own selves. They never have an experience of otherness. The only window onto otherness that can open for them comes with the experience of death, for death is the opaque and radical difference or otherness of which no image can be formed, at least not when the self truly begins to experience the limits of existence in the face of death. Jak's encounter with death comes too quickly for him to escape from the imaginary views that constitute his self-understanding, but Milla has a prolonged and agonising experience of her impending death. Her painfully slow death and the way it forces her to rely on a painfully slow and limited medium of communication, the letter to letter spelling of words by the increasingly difficult movement of her eyelids and later still, of a single eyelid, leads her to the realisation that only the cumbersome and imperfect medium of language allows the self and the other to get to know one another as different for one another.

[40] Burger 179.

And only this experience of difference or otherness makes it possible to say something *to* one another. Milla's excruciatingly limited eyelid language thus becomes a metaphor for linguistic discourse that always, even under the most conducive of circumstances, only allows for slow, difficult and imperfect communication. Such difficult and imperfect communication is nevertheless real communication, for it does not rely on images that the self constructs in its own mind and simply expects the other to also see clearly because the other is viewed as similar to or even the same as the self. Burger refers one to the following musing of the already close to death Milla:

"Privately you thought if the new heaven and the new earth were to be an empty, light place without discord or misunderstanding, then you would in spite of everything prefer life on Grootmoedersdrift with Agaat to beatitude, and surrounding you, instead of the heavenly void, the mountains and rivers and humped hills of the Overberg. And you would between yourselves devise an adequate language with rugged musical words in which you could argue and find each other. The language of reeds and rushes ['a riet en ruigte taal' reads the text in one of the most unforgivable but also most poetic languages on the face of the earth]. For, you thought, what would be the joy of finding each other without having been lost to one each other."[41]

When one draws together both themes highlighted in Burger's reading of *Agaat* the connection between them becomes evident. The process of maturing through which the infantile and facile mirror imagery of the infant (infans – literally those who cannot speak yet) gets displaced by the complexity and difficulty of linguistic understanding and communication, is inextricably linked to the process of dying through which the self increasingly experiences the unimaginable otherness of death. This deepening encounter with the unimaginable otherness of death unlocks the self. It thus allows for and conditions the experience of the differences between selves and others. The experience of death and mortality conditions the experience of the irreducible otherness of the other, the irreducible secret of the other that renders all mortal language and all non-imaginary and non-fantasy novels apocryphal. Considered from the space articulated by such language and such narratives, there is an inseparable connection between the experience of mortality and the sharing of real

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[41] Burger (fn. 1 above) 189, referring to Van Niekerk *Agaat*, translation of Michiel Heyns (2006) 555. The Afrikaans text (*Agaat* (2004) 574-5) reads: "Heimlik het jy gedink, as die nuwe hemel en die nuwe aarde 'n leë ligte plek sou wees sonder wanklank of misverstand, dan sou jy ten spyte van alles die lewe met Agaat op Grootmoedersdrift verkies het bo die saligheid, met rondom julle, in plaas van die hemelse leegte, die berge en riviere en die heuwelrûe van die Overberg. En julle sou onder mekaar 'n genoegsame taal uitwerk met geharde musikale woorde waarin julle kon argumenteer en mekaar kon vind. Riet- en ruigtetaal. Want, het jy gedink, wat sal die geluk wees van mekaar vind sonder dat julle vir mekaar verlore was?" Beautiful as it is, the passage also becomes questionable where it invokes a "finding" after "having been lost" towards the end. A consistently literary Marxist and Derridean (see footnote 6 above) emphasis on the irreducible errancy and mystery of the self precludes notions of intersubjective finding that suspend and terminate, albeit only temporarily or provisionally, the mystery or otherness of the other. On this count the closest to finding the other that one ever gets, consists in the truly perplexing/amazing experience of the other's unfathomable difference. Derrida has indeed criticised Lacan for sometimes invoking an authentic language that reveals the true self. The literary Marxist position developed in this essay surely does not endorse this element in Lacan's thinking. Its endorsement of the distinction between the imaginary and the symbolic in Lacan is not an endorsement of a distinction between "lost" and "found". It is an endorsement of an ethics of living hospitably with the irreducible and interminable secret of the self and the other, an ethics of resisting as far as is humanly possible the very human temptation and inclination to reduce the self and the other to facile images. I am indebted to Carrol Clarkson and André van der Walt for pointing out the risk of a psychologically or epistemologically still too optimistic reading of *Agaat* in this regard. Cf. also note 79 below.

human relations, that is, human relations that are not based on false images of one another.

Agaat's secret? We are not there yet and will never get there. For the real reader *Agaat* will remain an upheaval that has no name. But we might stay in touch with this nameless upheaval from afar by working through the infinite apocryphal falsifications that it renders possible, however finite this working through will always remain. We shall attempt to work through one of these falsifications towards the end of this address. But now we must first look at the narrative of the law again, the narrative of the law that, in compliance with Dworkin's demand, always remains a true reflection of itself and of course of others. There is nothing that this legal narrative cannot claim to know. The law does not engage with secrets. Its narrative thus does not allow for apocryphal falsifications. It only allows for errors that must be discarded so that its transparent coherence and self-transparent integrity can be advanced.

IV. THERE IS NOTHNG THAT THE LAW DOES NOT UNDERSTAND

Mercy in criminal law

Taking our cue from an incident that allegedly (most likely apocryphally so) came to pass in the court of the late Judge Gert Coetzee, a message transmitted in a court room by the almost invisible movements of an already half paralysed eyelid, could meet with interesting responses. After having found the accused guilty of the charges brought against him, the late Judge asked him whether he wanted to say anything to the court. "Nothing," came the barely audible reply, voiced in a very low voice as if meant for the ears of the accused himself only. Startled for a moment the judge asked one of the court officials who happened to be closer to the accused at that moment. "What did he say?" "Nothing, your Honour" came the reply. "My word", responded the Judge, "I could swear I saw his lips move".[42]

The mutation of meaning that comes to pass in this little story points our attention to something that happens on a daily basis in court rooms. Judges and magistrates rely daily on semantic constructions on the basis of which words, gestures and even the silence of an accused are raised to juridical meaning. An abyssal gap thus opens between the words of the accused and the understanding of the judge, a gap that allows the words or gesture of the accused to disappear into nothingness. In the little story at issue here, that which the accused seeks to express with a muted "nothing" – desperation, aggression, rebellion, a last communication of difference and otherness (or non-indifferent indifference) - mutates into nothingness, into a failure to speak.

There are countless ways in which this mutation of meaning in the semantic construction of juridical meaning can be illustrated, but the simple construction of "intent" in a criminal trial is surely one of the most obvious and most significant examples that one can contemplate in this regard. No system of criminal procedure can escape the crisis of the abyssal gap between the forensic construction of a crime and the inner reality of the mind of the accused, the inner reality of the will to act

[42] One does not want to use crude language here but replace in your minds the "nothing" uttered here with a word beginning with the 6th letter of the alphabet and you will know the original version of the story.

unlawfully, the inner reality of knowledge of unlawfulness, the inner reality of criminal accountability, the inner reality of remorse or lack of it. We saw in the introduction above that the Victorian novel played a significant part in the rise of a culture that in so many ways claimed to see through and know the criminal mind. Nineteenth century criminal procedure in England nevertheless resisted this "privileged epistemology" for a considerable time. English law has for most of its existence endorsed the fifteenth century dictum of Justice Brian that "the thought of man is not triable, for the devil himself knoweth not the thought of man".[43] The new disciplines of psychology and psychiatry of the Victorian age sought to dislodge this centuries old endorsement, but Justice Coleridge still reminded his jury in 1849 that "no one can see into the mind of man" and thus resisted the claims of medical experts that this could be done.[44] The instruction to the jury incidentally did not raise the possibility of the accused saying "nothing", but it did invoke the possibility of the accused *saying nothing*:

"The inquiry into intent is far less simple than that as to whether an act has been committed, because you cannot look into a man's mind to see what was passing there at any given time. What he intends can only be judged by what he does and says, and if he says nothing, then this act alone must guide you to your decision."[45]

This resistance to the privileged epistemology of the Victorians would nevertheless not survive for long and its collapse would be abundantly evident in an influential essay that J.W.C. Turner published in 1936. It will soon become clear that signs of the collapse were already evident in 1891, but let us begin with the view Turner articulated in 1936:

"Now it is obvious that it is impossible really to know for certain what was passing in the mind of the accused person; it can only be surmised by a process of inference from what is known of his conduct. Of course in early times the difficulty felt in ascertaining the mind of man and the rule that a prisoner could not himself give evidence tended to produce the practice of imputing *mens rea* from certain given sets of circumstances. In more modern days the difficulty has not been regarded as insuperable."[46]

By 1952 when Turner published the 16th edition of *Kenny's Outlines of Criminal Law* he had obviously become bolder than he was in the 1936 essay. Marginalising or for all practical purposes ignoring the long history from Justice Brian to Justice Coleridge that clearly emphasised the inability to put the mind of the accused on trial, Turner now claimed the following:

"By the end of the Middle Ages the courts had abandoned the notion that the mind of man cannot be investigated. Bowen L. J. in 1891 declared such a principle to be fallacious and said 'so far from saying that you cannot look into a man's mind, you must look into it, if you are going to find fraud against him; and unless you think you see what must have been in his mind, you cannot find him guilty of fraud.' Once it had been admitted that some degree of wickedness was a requisite in criminal guilt, it

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43 Rodensky *The Crime in Mind* (fn. 15) 27, quoting from the *Vide Yearbook* of 1477 (17 Edward IV 1).
44 This was in the case of *R v Monkhouse* 1859 4 Cox 55. Cf Rodensky *The Crime in Mind* 181.
45 Ibid (for both references in note 44).
46 "The Mental Element in Crimes at Common Law" in Radzinowicz and Turner (eds) *The Modern Approach to Criminal Law* (1945) 199. The *Cambridge Law Journal* originally published the essay in 1936. See also the quotation and discussion of Turner's remark in Farmer "Criminal Responsibility and the Proof of Guilt" (fn. 1 above) 42-65. I am indebted to Farmer's essay for many of the key references to the history of English criminal procedure on which this essay relies.

followed logically that *mens rea* must eventually become a subjective matter of an increasingly subtle kind.[47]

Turner's thinking in this regard marks or accompanies a fundamental shift in English criminal procedure. Earlier criminal procedure recognised the impossibility of knowing the mind of the criminal and ultimately had to rely on presumptions to establish *mens rea*, central to which was the presumption that the accused must have intended the criminal consequences of the *actus reus* when these consequences were the natural and inevitable result of his conduct. The new or modern criminal procedure would rely increasingly on extensive evidence to actually determine or reconstruct the subjective state of mind of the accused and confidently claimed the capacity to do so. The normative argument or justification that accompanies this turn in criminal procedure, holds it to reflect increased respect for the autonomy and liberty of the accused, punishment of whom could not be justified without establishing the truth of his or her criminal intent. A more realistic and more respectful regard for the impenetrable secret of the accused's mind need not dismiss this normative argument completely. Respect for the autonomy and liberty of the accused surely requires the most extensive proof of *mens rea* that systems of criminal procedure can afford. But no quantitative and qualitative extension of proof warrants the ultimate leap from the arguably "valid" *presumptions* that extensive forensic evidence affords criminal procedure to an *assumption* that the subjective state of mind of the accused is conclusively assessable. And as long as this leap remains unwarranted, the normative arguments that accompany the reconstructive trial should always remain subject to a critical regard for the abyssal hiatus between the legitimating functions of normative arguments and the ultimate lack of legitimacy from which the limits of human knowledge cannot save them.[48] The more legal consciousness complacently ignores this hiatus, the more its normative underpinnings turn into empty ideology.

The debate between the respective exponents of the *normative* and *psychological* approaches to criminal law is still with us, also in South Africa.[49] The psychological

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[47] Turner *Kenny's Outlines of Criminal Procedure* 35 as quoted by Rodensky *The Crime in Mind* (fn. 15 above) 27.

[48] Cf. in this regard Farmer's Foucaultian argument ("Criminal Responsibility and the Proof of Guilt" (fn. 1 above) 44, 58) that the rise of the reconstructive trial was not so much an expression of the normative liberal values regarding individual autonomy and dignity as it was a vehicle for new forms of governance the new constructions of subjectivity.

[49] However, the subjective or psychological approach is clearly still dominant in South Africa. Cf. Burchell and Milton *Principles of Criminal Law* (2005) 459-460; Snyman *Criminal Law* (2008) 188-190. Snyman "The Tension Between Legal Theory and Policy Considerations in the General Principles of Criminal Law" (2003) *Acta Juridica* 2-3 relates the preponderance of the psychological or subjective approach to criminal culpability in South African law to the influence of De Wet and Swanepoel's *Strafreg* (first published in 1949). De Wet was strongly influenced by the classical school in German and Dutch criminal law theorists which included authors such as Von Liszt-Schmidt, Von Hippel, Beling, Zevenbergen, Von Hamel, Pompe and Vos. This school stressed the subjective requirements for liability, lumped these requirements under the concept of culpability (*Schuld*) and developed the so-called "psychological theory of culpability". This classical understanding of criminal law and its *psychological theory of culpability* dominated the theory of criminal law in Germany and other continental European countries till the 1920s, but were then replaced by new approaches among which the *normative concept of culpability* was prominent. The objective test for culpability in terms of which intention could be linked to "conduct which could reasonably be expected by an ordinary person" came into vogue. However, De Wet stuck to his "subjective view of culpability" in all later editions of *Strafreg*, right up to the fourth and last edition that appeared in 1985, despite the fact that

approach demands that criminal intent be proved by establishing the subjective state of *mind* of the accused. The normative approach concedes that proof of criminal intent must ultimately reconcile itself with a normative assessment of criminal *conduct* that relies fundamentally on the presumption or maxim that the accused "must have" intended the natural and inevitable consequences of his or her conduct. (*The normative approach must not be confused with the "normative arguments" invoked in the previous paragraph. Those normative arguments in fact endorse the psychological proof of criminal intent and consider the normative approach to this proof mentioned in this paragraph unsatisfactory*).

The normative approach surely causes fundamental problems for conceptualist understandings of criminal theory, given the way it ultimately collapses the conceptual distinction between the *unlawfulness* of the conduct and the *culpability* of the accused. It surely also poses serious questions to the political liberal justification of criminal procedure. After all, foregoing the proof of subjective intent leaves one with the disconcerting realisation that one's system of criminal procedure turns on nothing more than arresting, prosecuting and convicting the suspect forensically proven to have been closest to the scene of the crime. But a critical or self-critical adoption of the normative approach that remains acutely or sufficiently aware of the epistemological limit to which this approach subjects criminal procedure, surely evinces a deeper respect for the unfathomable secret of the subjective state of mind of the accused.

Nussbaum simply misses this point in her critique of Justice Holmes' resistance to "mentalist and intention-based notions of punishment". Holmes argued in *The Common Law*, perfectly in line with Justice Brian to Justice Coleridge, that "far from considering the condition of a man's heart or conscience" in making a judgment, we should focus on external standards that are altogether independent of motive or intention."[50] He endorsed this principle in a steadfast fashion that Nussbaum finds merciless, but he did so to steer away from the merciless retributivism that sought to punish the insides of the wrongdoer. "The desire for vengeance", he wrote, imports an opinion that its object is individually and personally to blame. It takes an internal standard, not an objective or external one, and condemns its victim by that."[51]

In response to Holmes, Nussbaum articulates an unabashedly and quite relentless mentalist approach to criminal procedure. The attitude of her ideal judge is "unashamedly mentalistic":

> "It does not hesitate to use centrally the notions of intention, choice, reflection, deliberation, and character that are part of a non-reductive intentionalist psychology. Like the novel, it treats the inner world of the defendant as a deep and complex place, and it instructs the judge to investigate that depth."[52]

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the German literature on which he referred in the later editions evinced a fundamentally different view of criminal culpability. And De Wet's views regarding culpability remained the dominant influence on South African courts, especially in key decisions of the former Appellate Division.

[50] Nussbaum "Equity and Mercy"174 referring to Holmes *The Common Law* around 253 (check reference xxx).

[51] Holmes *The Common Law* 247 as quoted by Nussbaum 174 (check reference).

[52] Nussbaum "Equity and Mercy"173.

Nussbaum's thus clearly aligns her concern with mercy rather paradoxically with the merciless omniscience of the Victorian narrative that ultimately triumphed over the significant remnant of epistemological reticence in Victorian criminal procedure as still evinced in Justice Coleridge's instruction to the jury in *R v Monkhouse.* It triumphed thus when modern criminal procedure and the reconstructive trial commenced to claim the capacity to prove the subjective state of mind of the accused. Nusbaum's alliance with this development is confirmed with her choice of instructive literature. Where others - Rodensky, Yeats[53] - sense Victorian literature to be typical of the unforgiving judgmentalism of the time, she selects a Victorian novel - Dickens' *David Copperfield* - as one of the exemplary novels from which we stand to gain a merciful sensibility. This paradox confronts one with a question. Is *David Copperfield* an exception to the rule or are the views of Rodensky and Yeats regarding the judgmentalism of the Victorian age just too generalising?

One need not attempt to answer this question here. Stating it and leaving it hanging suffice to draw the contrast between a *literary Marxist* and an edifying understanding of the relation between law and literature. The *law and literature* approach at issue in *literary* Marxism calls for a fundamental resistance to the triumph of the omniscient Victorian narrative in the history of English criminal procedure, irrespective of the question whether there were exceptions to this omniscient judgmentalism in Victorian literature *and irrespective of the question whether this "omniscient judgmentalism" in Victorian literature is itself a literary construction.* It need not prove the literal truth of its assertions (it would be out of character). It does, however, need to keep on reading and rereading, also Victorian literature, so as to further enrich its narrative (for instance by eventually articulating a persuasive assessment of Dickens' narrative[54]) and remain in the business of effective story telling. But the

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[53] Cf. fn. 16 above.

[54] Insufficient familiarity with Dickens' work prohibits me from offering such an assessment here, but one small point may perhaps be risked. Nussbaum's assessment of the novel *David Copperfield* as one from which lawyer's can learn mercy turns on Copperfield's "non-judgmentalism" vis à vis his friend and former schoolboy hero, James Steerforth . This non-judgmentalism is supposedly evinced by Copperfield's avowal never to think of Steerforth in terms of "his best" or "his worst", but simply in terms of a love "that loved equally" through good and bad. When he ultimately sees the "gentlemen" and "Oxford man" Steerforth's corpse washed ashore, after the latter had earlier rather brutally broken up the relationship and wedding plans between the "commoners" Emily and Ham without being able to offer Emily a future as a lady, as she imagined, Copperfield ultimately still ends up exclaiming, that he had always thought of Steerforth in terms of "[his] best". One does not want to spoil a sweet story - *David Copperfield* is surely an entertaining read and quite a tear-wrench towards the end and Dickens surely portrays Copperfield as a likable, decent and benevolent man - but there are big questions lurking behind this apparent benevolent and merciful character. Why does Copperfield's benevolence and mercy not extent to the "consummate villain" Uriah Heep whom Dickens portrays, through the disgusted and horrified emotions of all the "decent characters" in the book in relation to Heep, Copperfield's first in line? To answer this question one has to pay due attention to the role of Heep in the narrative. He is another commoner, who unlike the good ones – Pegotty, Barkis, Ham, Mr. Pegotty – does not humbly and joyfully accept their inferior social position, but fakes his "umbleness" while gradually working his way into a position where he can blackmail and defraud decent ladies and gentlemen (Betsy Trotwood and Mr. Wickfield) out of their property and well-earned careers. Property and the maintenance of property relations surely play a central role in *David Copperfield*. The decent and gentlefolk ultimately get all their property back from the "damp fishy fingers" of Heep without losing anything, and Heep justly ends up in jail towards the end of the novel. And the interim "loss of property" (Betsy Trotwood's ruin as a result of Heep's blackmailing and defrauding of Wickfield) ultimately serves as the important test through which Copperfield proves himself through enduring and dedicated hard work and talent. Ultimately the decent gets everything back and more. This complacent ethic turns into a rather tangible smugness when Copperfield observes that Traddles, who earlier

responsibility to read on does not disqualify it from calling, during the irreducibility of interims, for an experience with the errant and apocryphal narrative of the accused which ultimately cannot but subvert fundamentally the core epistemological claims of modern criminal procedure and the systems of value and property relations that ultimately inform this epistemology.

The merciful subversion of modern criminal procedure by an errant and apocryphal *literary* sensibility is of course partially already embodied in criminal jurisdictions in which capital punishment has been abolished. Criminal jurisdictions that avail themselves of capital punishment constitute brutal endorsements of the epistemological hubris of modern criminal procedure. The absolute irreversibility of capital punishment turns any reliance on it into an unforgiving epistemological hubris. At issue in this assertion is not only the so-called "fallibility of prosecution" argument to which abolitionists frequently turn.[55] At issue is the much deeper reaching question regarding the moral legitimacy of linking the inner state of mind of the accused to the juridical constructions of intent and eventually convicting and sentencing the accused on the basis of this link. This link remains deeply questionable even under circumstances where the forensic construction of the case can "for argument sake" be

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married before he could buy decent silver cutlery and had to make do with "Britannia metal", through his hard work can end up sitting "like a Patriarch" at the end of a long table lined with exemplary children and friends, a long table surely "not glittering with Brittania" metal". Apart from a last invocation of Copperfield's deep love for his Agnes, this scene of decent bourgeois familial bliss and patrimonial success basically ends and crowns a huge and masterfully developed narrative. Calvino (*The Uses of Literature* (1986) 190-192) surely only had Dickens' mastery as far as vivid portrayal of characters and scenes ("his sense of theatre") in mind when he called Dickens the master of spectacle. But *David Copperfield* surely leaves one with some reason to believe that this mastery regarding spectacle and the spectacular scene is accompanied by the speculative capitalist mindset and economy that Derrida and Battaille identified in Hegel's speculative dialectics. Cf. Derrida *L'Écriture et La Différence* (1967) 369-407. In short, why is Copperfield's compassionate embrace of the moral ambiguity of his fellow gentleman Steerforth not accompanied with some thought as to how an unforgiving society can turn some individuals into slimy and "fishy fingered" plotters of wicked schemes and ultimately into "consummate villains"? Even when Dickens come closest to recognising systemic violence, he still resorts to writing Heep off as one of the rotten apples brought forth by a particularly wicked family. Consider Heep's description of his upbringing: "Father and me was brought up at a foundation school for boys; and mother, she was likewise brought up at a public, sort of charitable, establishment. They taught us all a deal of umbleness – not much else that I know of, from morning to night. We was to be umble to this person, and umble to that; and to pull of our caps here, and to make bows there; and always to know our place, and abase ourselves before our betters. And we had such a lot of betters! Father got the monitor-medal-medal by being umble. So did I. Father got made a sexton by being humble. He had the character, among the gentlefolks, of being such a well-behaved man, that they were determined to bring him in. 'Be umble, Uriah', says father to me, 'and you'll get on'. It was what was always being dinned into you and me at school; it's what goes down best. Be umble,' says father, 'and you'll do!' And really it ain't done bad!" Copperfield surmises in response: "It was the first time it had ever occurred to me, that this detestable cant of false humility might have originated out of the Heep family. I had seen the harvest, but had never thought of the seed." Quoted from Dickens *David Copperfield* (Penquin Popular Classics 1994) 471. That the Heep family itself was also a harvest and not the first seed, does not appear to be part of Dickens' and surely not of Copperfield's thinking. Nussbaum acknowledges Dickens' class consciousness (his anti-unionist sensibilities) in *Poetic Justice* (fn. 11 above, at 33, and 70) and sympathises with Orwell's criticism of Dickens in this regard. Cf. Orwell *Dickens, Dali and Others* (1946) 1-75 - check reference xxx). But this acknowledgement and sympathy do not point to a critical regard for the underlying economics that conditions the narrative in *David Copperfield.*

[55] The weakness of the infallibility and other abolitionist arguments is pointed out in Derrida and Roudinesco *De quoi demain…Dialogue* (2001) 225 – 251. Cf. also the discussion of these arguments in Van der Walt *Law and Sacrifice* (fn. 34 above) 107 -108.

said to have been absolutely fool proof. All findings of *mens rea* ultimately lack the sub-nano psychometric calibrating on the basis of which sentencing can be considered perfectly and appropriately. No conviction and sentence can claim to assess the singular otherness of the accused, that is, the unfathomable secret of the accused's mind. This being so, all "approximately just" systems of criminal procedure should assess themselves in terms of a *justifiable pragmatic injustice*, a *justifiable pragmatic injustice* that must remain exposed to the possibility of continuous revision and justification, a *justifiable pragmatic injustice* that must itself remain an upheaval with no conclusive name and no conclusive shape.[56] Capital punishment obviously does not allow for this and thus does not even comply with the modest demands of an approximate justice. Jurisdictions that avail themselves of capital punishment thus inevitably end up wallowing in glaring injustice. The only escape from the glaring injustice of such jurisdictions turns on the institution of clemency. The only way that judges in such jurisdictions can retreat from a death sentence after a finding of first degree murder is to offer the convict clemency. Clemency or mercy thus becomes the only way out of the epistemological hubris that forged a link between the mind of the accused and the circumstantial evidence of her conduct.[57]

The role of mercy in the administration of criminal justice should therefore be clear. It is an expression of a narrative respect for the unfathomable otherness of the accused. But the scope of the narrative demands of grace, mercy and equity upon the law is surely not restricted to criminal law. And it is not surprising that a penal system that not so long ago availed itself of capital punishment also turned out to be unforgiving in its private law jurisprudence. It is not surprising that its private law jurisprudence would turn out to know the secrets of others in most minute detail, even when it paid lip service to the fact that it does not. A brief look at what must count as one of the saddest moments in the apartheid history of the South African law of delict surely underlines this.

Mercy in private law

The central aim of the law of delict is the assessment of an amount of compensation that must be paid to a person to whom damage has been caused in a wrongful and culpable manner. In the case of patrimonial loss thus caused, the amount of compensation that the court must award to wronged persons must be calculated to put them in the patrimonial position in which they were before the damage was caused. This approach to the assessment of damages is generally known as the concrete approach. The courts simply assess the negative difference between the claimant's patrimonial position before and after the damage causing event and take this as the loss that must be compensated. Courts sometimes also take recourse to a more hypothetical approach. In terms of this approach the court takes the negative damage between the actual patrimonial position of the claimant and the patrimonial position in

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[56] On this notion of *justifiable pragmatic injustices*, cf. further Van der Walt and Botha "Democracy and Rights in South Africa: Beyond a Constitutional Culture of Justification," *Constellations* 7 (2000): 341-362; Van der Walt "Rawls And Derrida On The Historicity Of Constitutional Democracy And International Justice" *Constellations* 16 (2009) 22 – 42.
[57] See Nussbaum "Equity and Mercy" (fn. 11 above) 145-187.

which the claimant would have been had the damage causing event not occurred.[58] South African courts usually resort to the first mentioned concrete approach. However, in cases where future damages must be assessed the courts invariably follow the latter, more speculative approach. The very nature of future damages, especially future loss of income, involves the court in speculations regarding the hypothetical earning capacity the claimant would have had, had the damage causing event not occurred. In the past, motor vehicle accidents that left victims incapacitated and unable to work required courts regularly to speculate in this way about the loss of future income caused by the accident.

Apart from the component of future of loss of income, courts also often have to determine amounts of compensation for pain and suffering and lost amenities of life caused by wrongful and culpable conduct. It should be obvious that courts surely find themselves on thin ice as far as the assessment of both loss of future income (or earning capacity) and compensation for pain and suffering and lost amenities of life is concerned. They are consequently not averse to concede lack of conclusive knowledge and accuracy with regards to these assessments. Consider the following dictum of Justice Nichlas:

> "Any inquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of loss."[59]

That this concession is often a matter of mere lip service and not an indication of true epistemological modesty is clear from the very case in which it was made, namely, the South African Appellate Division's assessment of Danderine Bailey's claim for damages against *Southern Insurance Association* in the mid-eighties of the previous century. The then Appellate Division is today known as the Supreme Court of Appeal. All of this sounds so long ago, but it really is not. The shadow of this case still hangs over the South African legal system and it just gets longer as the time passes.[60]

Danderine Bailey was run over by a motor vehicle on the 26th of December 1978. The case report relates what came to pass immediately after the accident as follows:

> "She immediately became unconscious. While lying at the side of the road before the ambulance arrived, she had an epileptic seizure. She was taken to hospital and treated in an intensive care unit until 5 February 1979. It was only on 29 January that she regained consciousness. Her progress was slow and it was not until October 1979 that she could leave hospital and go home."[61]

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[58] These two approaches to the assessment of damage are respectively called the "concrete approach" and the "sum-formula approach". Cf. Neethling et al *Law of Delict* (2005) 205; Van der Walt and Midgeley *Delict Principles and Cases* (1997) 31-32.

[59] *Southern Insurance Association v Bailey NO* 1984 (1) 98 (A) at 113G. The discussion of the case that follows copies liberally from my earlier discussion of the case in "The language of jurisprudence from Hobbes to Derrida (the latter's quest for an impossible poem) 1998 *Acta Juridica* 61-96.

[60] And those who read on beyond this point may well want to note again T.S. Eliot's ominous invitation in *The Waste Land*: "Come in under the shadow of this red rock [where *the dead tree* gives no shelter], And I will show you something different [from all the shadows you have known and will know]. I will show you fear in a handful of dust." Quoted and partly paraphrased from T.S. Eliot *Collected Poems 1909-1962* (1963) 63-64.

[61] *Southern Insurance Association v Bailey* (fn. 59) 107H-108A.

In his final report of 18 December 1981 Professor Rose-Innes, the neurosurgeon who examined her and testified in the trial court, articulated the following findings:

"The functional defects that have resulted from this brain injury remain, in summary, very severe intellectual and emotional retardation, and an inability to control her bladder and bowel functions; further there remains generalised clumsiness and spasticity of limb movements more marked on the left side with residual weakness here as well which may be attributed to injury to the cerebral hemispheres and possibly also in part at brain stem level; the injury to the right third cranial nerve resulting in the right eye tending to squint outwards slightly and for the pupil to be enlarged and unresponsive to light[,] remains as before and this injury is located either in the nerve itself or in the brain stem."[62]

In the conclusion of his report Prof. Rose-Innes also observed that her condition had essentially remained unchanged since his previous report.[63] A paragraph of that report brought the following observations to light:

"Further it should be noted that, in my opinion, she will have sufficient insight into her condition as she develops in future, so that she will be aware of her physical and mental disabilities by comparison with normal people, so that this will be a permanent source of painful frustration and suffering to her."[64]

Danderine's father had filed a claim for damages in the then Cape Provincial Division against the insurer of the vehicle with which she was run over wrongfully and culpably. The insurer, *Southern Insurance Association*, initially denied all liability, but later accepted liability and only disputed the amounts of compensation to be paid. In the end, the trial court awarded an amount of R 68 696 on the basis of an actuarial calculation and an amount of R 50 000 for lost amenities of life. It is for reviewing the assessment of these two amounts that *Southern Insurance* then appealed to the Appellate Division.[65]

Chief Justice Rabie and the Judges of Appeal Wessels, Corbett and Hoexter all concurred with the decision of Judge of Appeal Nicholas that both amounts should be reduced; the amount of R 68 696 for future loss to R 58 000 and the amount of R 50 000 for lost amenities of life to R 35 000. They consequently upheld the appeal with costs.[66] The order for costs of course meant that several thousand rand more were skimmed off the compensation awarded to Danderine Bailey in order to pay the advocates and attorneys of *Southern Insurance*.

The first question with which this decision leaves one does not concern its correctness. The way the supplementary order for costs already distorts significantly whatever "correctness" may have been at issue, renders this question meaningless. The first question that strikes one about this unanimous judgment concerns the nerve and conviction that moved the judges to visit the details of this dispute a second time. The question concerns the epistemological conviction that there was something that could be assessed here with sufficient precision to render the trial court assessment of damages incorrect enough to uphold an appeal against it. Sustaining appeals against trial courts is something appeal courts only do when they have substantial grounds to do so.

[62] Ibid op 110B-D
[63] Ibid op 110G
[64] Ibid op 111B-C
[65] As it was known then. Today it is the *Supreme Court of Appeal*.
[66] *Southern Insurance Association v Bailey* (fn. 59) op 121A-C

But further questions follow immediately. How is it possible that five judges of appeal could agree so unanimously regarding the precise amendment of the amounts of compensation at issue? Was this unanimity not perhaps motivated by the realisation that any difference of opinion regarding the assessment of the compensation to be paid would only reveal the irredeemable impossibility of any correctness under the circumstances, thus rendering the amendment of the trial court assessment highly dubious?

And just how did the judges attain to their unanimous assessment of the lesser extent of Danderine Bailey's loss?

Nicholas AJ provides no meaningful information as regards the reduction of compensation for lost amenities of life from R 50 000 to R 35 000. He simply regarded it to be fair and equitable that the amount be reduced thus. The case report nevertheless provides the following information regarding the reduction of future loss of income from R 68 696 to R 50 000. The initial amount of R 68 696 was determined by first calculating the total sum of future loss of income and then reducing it by 10% to make provision for contingencies. Courts consider such contingency deductions in order to take into account the fact that claimants would not only have received benefits in the course of their future lives. They would also have been exposed to possible misfortune that would have affected their expected income negatively.

Counsel for *Southern Insurance* argued that the 10% contingency deduction was much too low. Danderine was after all still small. For the whole duration of her life would she have been exposed to a broad spectrum of possible misfortune. Stated brutally: The accident that hit her now could quite possibly have hit her some years later. Thus did *Southern Insurance* argue that the trial court should have allowed a contingency deduction of 50%. The court's response to this argument was that life is not just exposed to the risk of misfortune, but also to the possibility of unexpected benefits. But in the end they did raise the contingency deduction from 10% to 25% and thus reduced the trial court's assessment of the loss of future income from R 68 696 to R 50 000. Why so, could one ask with considerable justification. After all, once one has assumed that the degree of contingency of future fortune and misfortune is more or less the same, an assumption that is surely not excessively rosy, one really has no ground for making any contingency deduction whatsoever.[67]

But until now, we have not at all looked at how the trial court determined the initial amount of R 76 328 which they then reduced to R 68 696 with the contingency deduction of 10%. For purposes of calculating Danderine Bailey's future loss of income, the court took her mother's income as their point of departure. Danderine Bailey's mother worked as an apple grader on an apple farm in the Southern Cape. She earned R 36 a week for grading the quality of the apples that the farm supplied to

[67] As Dendy "The law of delict" 1984 *Annual Survey of South African Law* 233-234 observed: "But then the court went on to increase the trial court's deduction of 10 per cent for contingencies to 25 per cent. *Sed Quaere*? One would have thought from the above remarks [that it is erroneous to regard the fortunes of life as being always adverse] that Nicholas JA would criticize the trial court for making a deduction at all rather than actually increase the percentage deducted." Indeed, if it is assumed that there is an equal chance of loosing and gaining in the course of life, one has no ground on which a deduction for contingencies can be based.

the market. Danderine Bailey's loss of future income was calculated by taking this amount and multiplying it by the number of weeks she would have worked in the course of her life time. By calculating her future income in this fashion, the court reconciled itself with reducing her life chances to the typical fate of non-whites subject to the apartheid labour market of the 1980s. The judges realistically left her to the unforgiving fate of an apartheid economy that would surely not grant her any aspirations that would exceed the modest expectations of her mother. And one should probably commend them for at least not accepting the argument of counsel for *Southern Insurance* that it was not certain at all that she would get as good a job as that of her mother.

That this apartheid labour economy and the whole apartheid system would be dismantled ten years later was something they could not contemplate in their juridical and actuarial calculations. That Danderine Bailey may well have had education opportunities on the basis of which she could have become anything from a farm worker to a secretary to a medical doctor, advocate or chartered accountant, and that they may have calculated a more realistic average expectation on the basis of this broader spectrum of professional possibilities, were things they could not count on juridically in the mid eighties. That she may have had natural talent that could have catapulted her out of her modest background irrespective of a lack of educational opportunities – that she may have become a beloved actress, dancer, singer or model - they of course could have contemplated even less. Whatever kind of narrative the law aspires to be, it is surely not a "from rags to riches" fairy tale. Juridically the judges felt compelled, perhaps quite "correctly" so, to equate her life chances with those of her mother, with those of a farm worker caught up in an unforgiving racist economy. The law compared and equated her with someone whom she was not. It was not her unique life chances that the court sought to assess in order to determine her loss. The court brutally imposed on her the already brutally imposed life chances of another. One cannot imagine a legal system ever to exemplify more harshly the irrational rationality that Adorno and Marx impute to law in their respective reflections in *Negative Dialektik* and *The Gotha Programme.*

It should nevertheless be clear that one cannot fault the judges *juridically* for their strictly legal assessment of Danderine Bailey's life chances. To make a different assessment they would have had to imagine the end of apartheid in an almost fictional manner, something that was hardly possible amidst the still prevailing hell of the 1980s. They would have had to contemplate, by grace of a truly epic sensitivity, the possibility that that hell had to end one day. Or, lacking any epic or literary hope regarding the end of apartheid, they would have had to fantasise about the fairy tale escape of a dancer or actress or singer from the harsh realities of her childhood. In short, they would have had to resort in some way or another to the mercy that Nussbaum links to the literary sensibility. The strictly juridical paradigm of the law offered them no such recourse at the time.

One critical observation must nevertheless be made with regard to this unforgiving legalism. Many legal theorists argued during and after the apartheid era that the substance of South African law was never tarnished by the stain of apartheid. This stain was confined to apartheid politics and the statutory law that resulted from this politics. The proud tradition of Roman Dutch law, especially Roman Dutch private law, the law of contract, delict, insurance, and so forth, never took part in the hell of

apartheid South Africa, averred these theorists.[68] Again, one cannot blame the judges in the *Bailey* case *juridically* for their strictly juridical mentalities. But the *story* or *narrative* of Danderine Bailey does place an *enormous* question mark behind the political innocence of South Africa's proud Roman Dutch tradition. Yet, more is at stake here. Any *literary* narrative or story that would seek to register the singularity of Danderine Bailey's life, the life of a two year old girl who was run down on the 26th of December 1978, lost her consciousness, suffered an epileptic fit while still lying on the pavement, came to only weeks later with serious brain injuries, uncontrollable bodily spasms and an eye staring blindly into empty space, and who was eventually doomed, by demand of an insurance company and by order of a court, in finest detail to the racist economy into which she was born, surely requires that one maintains a firm distinction between law and literature.

V. *AGAAT* AND THE STORY OF POST-APARTHEID LAW

Agaat and Burger's reading of *Agaat* clearly constitute a pertinent critique of the imaginary world of apartheid law, the law that so easily assumed that the life chances of one individual were equal to those of another, not only because they were workers, as Marx taught us, but also because they were black or coloured workers or born into a family of such workers, as Bram Fischer understood so selflessly. The *Bailey case* confronts one with an imaginary world, a world in which the unique otherness and living secret of one individual is displaced by the mirror image of another, a mirror image that derives in turn from the spectacular totality or total spectacle of mirroring effects produced by the speculation of apartheid capitalism.

One need not only refer to Bataille and Derrida[69] to trace the etymological link between mirroring and speculation embodied in the Latin *speculum*. Calvino's *If on a winter's night a traveller* also makes this link clear in a shattering parody of the endless play of mirroring in the human mind.[70]

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[68] For the now classic statement of the critique of this mentality, cf. André van der Walt "Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law" 1995 *South African Journal on Human Rights* 169-206. Cf. in this regard also his more recent "Legal History, Legal Culture and Transformation in a Constitutional Democracy" 2006 *Fundamina* 1-47. Cf. further his arguments regarding the constitutional review of constitutionally unsound remnants of apartheid private law in the South African legal system in "Transformative Constitutionalism and the development of South African Property Law" 2005 *Journal for South African Law* 655-689, 2006 *Journal for South African Law* 1-31.

[69] Cf. Derrida *L'Écriture et La Différence* (fn. 13 above) 369-407.

[70] Cf. Calvino *If on a Winter's night a traveller* 161-168 "Speculate, reflect: every thinking activity implies mirrors for me. According to Plotinus, the soul is a mirror that creates material things reflecting the ideas of the higher reason. Maybe this is why I need mirrors to think: I cannot concentrate except in the presence of reflected images, as if my soul needed a model to imitate every time it wanted to employ its speculative capacity. (The adjective here assumes all its meanings: I am at once a man who thinks and a businessman, and a collector of optical instruments as well.) …. For this reason, if I were not afraid of being misunderstood, I would have nothing against reconstructing, in my house, the room completely lined with mirrors according to Kircher's design, in which I would see myself walking on the ceiling, head down, as if I were flying upward from the depths of the floor…. These pages that I am writing should also transmit a cold luminosity, as in a mirrored tube, where a finite number of figures are broken up and turned upside down and multiplied. If my figure sets out in all directions and is doubled at every corner, it is to discourage those who want to pursue me. I am a man of many enemies, whom I must constantly elude. When they think they have overtaken me, they will strike only a glass surface on which one the many reflections of my ubiquitous presence appears and vanishes….Ever since it became clear to me that my kidnapping would be the exploit most desired not only by the

This endless mirroring can be described in terms of the shallow reflections of wishful or wish fulfilling imagery that prevents the self from ever engaging with the real otherness of the other or the real otherness of the self. The otherness of the other and the irreducible otherness of the self as other thus get lost in an infinite hall of superficial mirroring. The English language suggests two things about beauty. Beauty is but skin deep and beauty is in the eye of the beholder. The first suggestion intimates that beauty is as shallow as skin. But we have learned from Jean-Luc Nancy's exquisite ex-*peau*-sitioning thought that the skin is not shallow. It is only a certain beholding of skin that is shallow, an imaginary beholding.[71] The essence of apartheid lay and lies in such a shallow beholding, a beholding that turned on a superficial regard for others on the basis of an outer pigmentation of skin, a superficial regard on the basis of which a whole world of mirrors could be imagined, a world of white governments, white judiciaries, industrious white factory owners, crafty white businessmen, on the one hand, and black workers, black servants, unemployed blacks, lazy blacks, stupid blacks, etc, on the other. Stark, fixed, repetitive and unforgiving was apartheid's endless hall of mirrors. The assessment of Danderine Bailey's life chances in the *Bailey* case was nothing but another brutal flash in this self-mirroring of apartheid.

That the underlying apartheid of a perpetual imaging of workers, on the one hand, and factory, farm and other property owners, on the other, still prevails in South Africa more than ten years after the end of statutory and institutional racial discrimination, needs little contention. The years of statutory and institutional racism in South Africa were, from this perspective, a cruel black and white caricature of the divisive apartheid logic that still prevails in South Africa (in many respects, moreover, still rather black and white), but also elsewhere in the capitalist economies of the world. The rise of freedom of contract and alienable property, the cornerstones of modern and post-modern law, embodied an emancipatory promise in early modern law, the promise of a free and varying exchange of social status that would replace the fixed states or estates of feudal society with a free and open society. Anyone not easily duped by spectacular and speculating illusions, knows how little came of this emancipatory promise. As long as social immobility remains a fundamental characteristic of capitalist economies, the capital conserving and promoting speculation of legal reasoning that marks the Bailey case will keep the poor mercilessly "in their place". The Constitutional Court's decision in the *Grootboom*

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various bands of specialist crooks but also by my leading colleagues and rivals in the world of high finance, I have realized that only by multiplying myself, multiplying my person, my presence, my exits from the house, and my returns, in short the opportunities for an ambush, could I make my falling into enemy hands more improbable, So I then ordered five Mercedes sedans exactly like mine, which enter and leave the armoured gated of my villa at all hours, escorted by the motorcyclists of my bodyguard, and bearing inside a shadow, bundled up, dressed in black, who could be me or an ordinary stand-in….But I had not taken into consideration [the concomitant multiplication of my enemies] and a third kidnapping plan arranged by persons unknown. By whom? …. To my surprise, instead of taking me to a secret hideaway, my kidnappers accompany me to my house, lock me in the catoptric room I had designed with such care from the designs of Athanasius Kircher. The mirror walls reflect on my image an infinite number of times. Had I been kidnapped by myself? Had one of my images cast into the world taken my place and relegated me to the role of reflected image? Had I summoned the Prince of Darkness and was he appearing to me in my own likeness?

[71] For these thoughts, cf. Nancy *Corpus* (2000).

case[72] was hailed as a progressive breakthrough in the socio-economic jurisprudence of South Africa. One must, however, not forget that it ultimately did little more than overturn the truly progressive judgment of a courageous trial judge.[73] It did not afford Irene Grootboom the house she claimed was her due in terms of article 25 of the Constitution of South Africa. Irene Grootboom died at the age of 39 on 30 July 2008, still without a reasonably windproof and rainproof dwelling.[74] She still lived in a makeshift shack in Wallacedene as she did shortly before she approached the court in 2000. As long as this merciless capitalist logic prevails even in "progressive" judicial decisions, the merciful escape from it advocated by Nussbaum will have to rely on a literary sensibility that undertakes the symbolic and communicative task of exploring the unique, fragile and mortal otherness of selves and others in a much more revolutionary way than she appears to be contemplating.

It is in literature that the juridical may come to discern the signs of a free libidinal economy of the non-possessive and non-judgmental sensual exchange with others that always gets repressed in the property and propriety based economies of bourgeois capitalism. This repression is also central in the sad narrative of Milla de Wet's life. Her mixed farming and fine knowledge of the soil and the principles of soil preservation are surely not comparable to the rapacious extraction of spectacular force-fertilised harvests with which Jak de Wet turns potentially fertile stretches of land into devastated deserts. But she too represses the promise of a sensual exchange with things and people for the sake of a bourgeois image of successful farming and an exemplary family farm. It is for the sake of this image that she persists with a loveless and abusive marriage, the lack of love and abusiveness of which ultimately permeate and determine her relation with *Agaat*. *Agaat* portrays Milla as someone who is split or torn between a loving and sensual openness to things and people and the loveless repression of this openness. With this narrative of a person split between a repressive economy of fixed or closed images and a libidinal, sensual and loving concern with

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[72] *Government of the Republic of South Africa/The Premier of the Province of the Western Cape/Cape Metropolitan Council/ Oostenberg Municipality v. Irene Grootboom and Others* (2000) 11 BCLR 1169 (CC).

[73] Section 26(1) of the South African Constitution states that everyone in South Africa has the right to adequate housing. It does not state that this right is subject to available resources. Again following Aquinas, one could say article 26(1) simply requires that we take resources from those who have a surplus and use it to provide housing to those in need of it. Yet, in the case of *Government of the Republic of South Africa and Others v Grootboom and Others*, the Constitutional Court again subjected the right in section 26(1) to the provision in section 26(2) that stipulates the state's duties vis à vis the right in section 26(1). The rather absolute statement that "[e]veryone has the right to access to adequate housing" thus came to be read to say that everyone has a right that the state "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right." In *Grootboom* the Constitutional Court went so far as to state that a housing scheme that does not provide for immediate relief in desperate cases (the *Grootboom* case was a desperate one) cannot be said to be reasonable. The court nevertheless did not order the government to provide the relief needed so desperately. It in fact explicitly overturned the courageous decision of the trial court that had indeed ordered the government to provide the relief required. Cf. *Grootboom* par 95 (at 1208G-H): Neither section 26 nor section 28 entitles the respondents to claim shelter or housing immediately upon demand. The High Court order ought therefore not to have been made."

[74] Cf. Francis Hweshe "Heroine dies while still waiting" *The Argus* 4 August 2008, also available at www.abahlali.org/node/3860. She spoke to *The Argus* two days before her death and observed: "When it rains, water seeps through every crevice. I try to repair but I cannot do much. I was supposed to get a house but I am still in a shack with my sister in law and her three children. They keep promising us. I am sick and tired of the whole thing."

others, *Agaat* intimates traces of a radically different economy, an economy, however, that is never consummated, never takes shape, remains unnamed to the end.

That the unique characteristics and differences between individuals could give rise to a free exchange of social roles and positions is not thinkable in the imaginary worlds of apartheid. That the living secret of each individual could give rise to ever-changing and therefore infinitely finer, infinitely more differentiated and therefore infinitely more interesting narratives of human co-existence, could not be imagined. It could not be imagined because worlds of infinite change and infinite variations can never be imagined. They can never be pictured. They can only be read on a day to day basis, for they always come as a surprise. The story of post-apartheid South Africa will therefore always remain to be read. One can only prepare for this reading, but the reading itself will remain a surprise.[75]

Such reading offers us the only chance of human co-existence. Not only was apartheid a case of a mirroring imagination. Mirroring imaginings are the essence of all apartheids, the essence of all worlds in which individuals never meet, never reach the threshold of otherness. Calvino's ingenious parody of the author who built a wall of mirrors to protect himself from kidnappers narrates this thought masterfully. In the end the author realises that he has all along been imprisoning himself without the aid of kidnappers.[76] Very close to her death, Milla de Wet realises that she were all along a prisoner of her own projections of Agaat. Only in the face of death and through the real contemplation of her own death, of her self as indeed dead, does she realise that she never knew Agaat. Only then, when she imagines Agaat alone on Grootmoedersdrift after the burial, after all the guests had left and Jakkie had also left for Canada, only then does it become possible for her to sense the secret of Agaat's otherness on which she has brutally imposed herself and her view of things. And for the first time she experiences a sensual closeness to Agaat. Here too imagination and the imagery of the past are rife, but it is fragile and mortal now. It begins to give way to sheer language, to poetry.

I see her standing at the gate when the last guests have left, when Jakkie's gone back to Canada. The gate will hold her, its silver inner cross, the tensed wires and the pipes of which it's constructed.

She won't be able to turn back immediately.

She'll feel the clasp with the fingertips of the little hand, even though she knows it's in place, feel the black iron ring, the double iron ring, the double wire hook over which it slides. Her other hand, the strong one, will enclose the upper pipe, let go and grasp again so that the knuckles show white.

It won't be the first time. So she stood every day when Jakkie went to school by bus, and every time after that when he went away after weekends or holidays. Then I had to go and fetch her there, or call her back from the stoep.

She will stand there and nobody will call her.

The dogs will sniff at her hems. They will press their wet muzzles into the back of her legs. Jump up against her so that she'd be thrown slightly off balance.

The gate of Grootmoedersdrift.

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[75] Cf. Van der Walt *Law and Sacrifice* (fn. 34 above) 234.
[76] Cf. note 70 above.

Gate of Agaat's world.

She'll lift the black iron ring off the hook and let it drop back.

The gate is closed, the road is white, its way is back and forward. And even further back to its unfindable starting point like all ways. Through the unknown, remembered gate, when the last of earth left to discover is that which was the beginning.

Oh, my little Agaat, my child that I pushed away from me, my child that I forsook after I'd appropriated her, that I caught without capturing her, that I locked up before I'd unlocked her!

Why did I not keep you as I found you? What made me abduct you over the pass? What made me steal you from beyond the rugged mountains? Why can I only now be with you like this, in a fantasy of my own death?

Why only now love you with this inexpressible regret?

And how must I let you know this?

See, in the twilight I lead a cow before you, a gentle Jersey cow, the colour of caramel, the colour of burnt sugar, she smells of straw and a cud of lucerne. I place your hands on her nose, your palm on her lips. You are the eye reader. There it is, bucketfuls of mercy in those defenceless pupils.[77]

- *emmers vol genade in daardie weerlose pupille.*[78]

In this fantasy of her own death Milla at long last finds the grace and mercy to understand the terrifying loneliness of Agaat's whole life, a loneliness that not only starts with Milla's death, but with Milla's discovery of Agaat in the hearth on the other side of the Skurweberge, the life long loneliness of empty mirror images that Milla imposed on Agaat. It is, however, not only Agaat that is set free by this mercy. The bucketfuls of mercy that Milla receives in this fantasy of her own death also rid *her* of the imagery that kept her imprisoned in herself. Faced with her own death, she can really be *with* someone, *with* Agaat. *Why can I only now be with you like this, in a fantasy of my own death?* For a rare moment she experiences *a togetherness of two that matters*.[79]

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[77] Selectively quoted from Van Niekerk *Agaat* (2006) 538-540, original text in Roman fonts.

[78] Van Niekerk *Agaat* (2004) 560, original text in Roman fonts.

[79] Cf. Van der Walt "The Impossibility of two together when it matters" (2002) *Journal of South African Law* 462-478. The "togetherness of two that matters" that is invoked here must be understood duly in view of the caution expressed in footnote 41 above. The togetherness that matters is not one of having found the other, but the togetherness indirectly afforded by the excruciatingly regretful insight, in the face of imminent death, not only of never having found the other during life, but also of not even having approached the limits of one's imagery regarding the other and thus not even having reached the threshold where an experience with the other's difference could have commenced. The togetherness at issue here does not suspend its irreducible impossibility, for it becomes possible only through an experience of death and mortality. In a previous draft of this essay I suggested that this was the first such experience in Milla's life. I am indebted to Melodie Slabbert's insightful essay "Justice, Justification and Justifiability in Marlene Van Niekerk's *Agaat*: A Legal-Literary Exploration" 2006 *Fundamina* 236-250 (at 243 fn 39) for pointing out an earlier such close-to-death experience during which Milla also experienced a certain togetherness with Agaat, namely, during the birth of her son on the mountain pass. But here too, as Slabbert also points out well, the truth of this momentary and mortal togetherness only lasts to the extent that it reveals its own absence; to the extent that it briefly informs an awareness that the "togetherness" with Agaat is/was predominantly an empty or false togetherness based on the re-making of Agaat in Milla's image (of Agaat and of herself). At issue here is not really a relation between two, Milla and Agaat, but a relation between Milla and her own projection and re-making of Agaat.

For the first time Milla is able to accompany Agaat, not with the cold and formalistic images of the *Hulpboek vir Boere in Suid-Afrika,* but with the earthly warmth and vulnerable sensuality of a Jersey Cow. This is surely one of the most tender, most touching and most upsetting moments of the novel. If bucketfuls of mercy is to be introduced into Dworkin's chain novel, it may well take its cue from this passage in *Agaat*. Perhaps it should venture as far as to graft, in un-Dworkinian fashion, the narrative of *Agaat* onto the narrative of the law, even if only to redeem for a fictional moment the history of the South African law of delict in the time of apartheid. One can follow Dworkin in one respect though. One can write *Agaat* further as if it were a chain novel (surely rushing in like a fool where angels should fear to tread), for in fact, that is what it also is, a chain novel that leads back, among others, to T.S Eliot and through Eliot to Dante. The gate of Grootmoedersdrift at which Milla envisages Agaat standing after her burial is taken from the last stanza of *Little Gidding*.[80] The last lines of the stanza invoke a wellness of things and of the manner of things, a wellness that turns on the unification of fire and the rose in Dante's *Paradise*.[81] Let us return to the gate of Grootmoedersdrift then, and the gate of *Little Gidding*, and open them for the arrival of another one who would speak to Agaat with tapping eyelids. Let us turn *Agaat* into a narrative of purgatorial fires, a narrative without which nothing will be redeemed and no manner of thing shall be well, a narrative without which the story of *post*-apartheid law will remain nothing but a legal fiction. Let us turn it into a story of *sacer facere* in which sacrifice will not be denied yet again.[82]

She stood there at the gate. Nobody called for her. She lifted the black iron ring of the hook and let it drop back.

The gate was closed, the road was white, its way leads back and forward. And even further back to its unfindable starting point like all ways. Through the unknown, remembered gate, when the last of earth left to discover is that which was the beginning. [But even further back, from behind its unfindable starting point, a minute black spot appeared on the white dirt road. It became bigger; came closer].[83]

And then she was there. The brown woman in her mid-thirties, with one eye staring blankly into space, with her legs and arms jerking with every movement she made, and one eyelid that winks and blinks wildly; wink-wink, blink wink-wink-wink, wink…. And further, just incomprehensible groaning and moaning.

"But woman, are you spelling something with that wild eye? Not so fast, I can't keep up. Milla did not prepare me for this."

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[80] Cf. Eliot *Collected Poems 1909-1962* (1963) 222: We shall not cease from exploration/And the end of all our exploring/Will be to arrive where we started/And know the place for the first time./Through the unknown, remembered gate/When the last of earth left to discover/Is that which was the beginning[.]

[81] Cf. Eliot *Collected Poems* (fn. 80 above) at 223: And all shall be well and/All manner of thing shall be well/When the tongues of flame are in-folded/Into the crowned knot of fire/And the fire and the rose are one. Cf. also Dante *The Divine Comedy*, Paradise, Canto XXVIII, 73-96.

[82] *Little Gidding* still: Water and fire succeed/The town, the pasture and the weed./Water and fire deride/The sacrifice that we denied./Water and fire shall rot/The marred foundations we forgot.... Cf. Eliot *Collected Poems* (fn. 80 above) at 216. This refusal to forget and deny sacrifice will of course have to turn on a critical regard for the irreducible link between purgatory and paradise....

[83] Cf. again fn. 77, text in square brackets now added.

But still the flurry of winks continued: Y.o.u. . a.r.e. . A.g.a.a.t.. w.h.o. r.e.a.d.s. e.y.e. . l.a.n.g.u.a.g.e., grasped Agaat.

What is your name, she asked the woman and repeated after another salvo of winking and blinking:

"D-a-n-c-e-r-i-n-e"

The woman shook her head wildly, her urgent face nevertheless evincing a faint smile. It took time, but in the end, Agaat understood. There was an accident many years ago after which she never spoke again. There were some efforts to teach her to write, but her spasticity always interfered and after a while everyone gave up. The gifted section of her brain that remained functioning nevertheless refused to give up. It found a detour to her living eye and eyelid and she started writing like a hurricane compelled to express a lifetime of meaning in one spiraling eruption. But still no one understood. "T.h.e..b.l.o.o.d.y.. i.d.i.o.t.s…a.r.o.u.n.d..m.e d.o n.o.t k.n.o.w. h.o.w. c.l.e.v.e.r. I. s.t.i.l.l. a.m", grasped Agaat after some more blinking. No one understood. And then she heard of Marlene van Niekerk's novel *Agaat* and wondered whether there was any truth in the story. She went looking for Grootmoedersdrift and here she is now. "Danderine" is her name, but the "Dancerine" is actually very fitting for people deridingly started calling her "Ballerina" because of her spasticity.

"Good, Danderine or Dancerine, let us go and wash and eat something – there is a lot of food left from a burial we had here today. And then we might even dance a little tonight."

After their meal they made fires, in the middle of the rooms and in the passages of the old farmhouse like veritable Mau Mau. Agaat still had a particular love for fire. The whole house was alight like the library in *The name of the rose* or the barn on the occasion of Jakkie's big birthday celebration. There was a lot of smoke. And in the glow of the fire and the smoke the two brown women danced; Danderine's spasticity breathtakingly sexual, her blind eye staring wildly away, beautiful like nocturnal insanity, her skin the colour of a Jersey cow, *the colour of caramel, the colour of burnt sugar*.

And Agaat also danced, danced with a new joyful urge breaking into or out of her caramel flesh, flesh covered not with a stiff white uniform but a loose white dress that simultaneously veiled and unveiled her body as she danced. She danced the dance that Milla once saw her dancing on the mountain top and again on the beach some time later:

Sideways & backwards knees bent foot-stamping jumping on one leg jump-jump & point-point with one arm on the ground. Then the arms rigid next to the sides. Then she folded them & then she stretched them. Looked as if she was keeping the one arm in the air with the other arm & waving... Hr head in the air, looking up at hr little arm as if it's a stick. Walking stick, fencing foil? Then again held still in front of hr, palm turned down palm turned up. Judgement? Blessing? Over the hills over the valley along the river? A farewell ritual [turned into a gay dance of love]*?*[84]

[84] Van Niekerk *Agaat* (2006) 150-151, text in square brackets added.

But Agaat did not only know how to start fires. She also knew how to extinguish them. So the old farmhouse of Grootmoedersdrift never burnt down.[85] Besides, there is no fire that can burn down Grootmoedersdrift, just like there is no fire that can burn down the library in *The name of the rose*. This is so because this house and this library were not built but written. With every new reading of *Agaat* and of *The name of the rose* the library and the old farmhouse will always first be there again. And should *this* reading of *Agaat* ever be read again, Agaat and Danderine Bailey will always again begin their fire dance on the polished floors of the old *opstal*.[86] This is so because fiction, to the extent that it is lasting, exposes us to a secret time zone, the time of the perpetual event, the time of the perpetual upheaval that never has a name as yet.[87] And so does the law, as a matter of fact, but it always does so in a state of denial. For it is in the inevitable nature of law to conclude and give a name to the event, except to the extent that it is sometimes interrupted by mercy.

Grimm meets Goth in the Overberg[88] and a mysterious grace gathers like fog around its towering cliffs. Agaat and Danderine Bailey are dancing the dance of Macabré and I must stop. It is getting late and my story is all too obviously an apocryphal falsification of both law and literature.

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[85] The *begrafniskos* (burial food) did not last though. So they started cooking again. Agaat's old favourite, *soet pampoen* (sweet pumpkin) was still there, but now especially enjoyed with the fried brains and insides of the little veld animals which Danderine caught and killed so dexterously with her bare hands. Her spacticity, or something in her, always just had the better of them. Agaat smiled when she saw this. It reminded her of her *galjoene*. They should really go to the sea one day, she thought. And whenever this happened close to a certain big tree in the garden of the old *opstal*, they both had to look up in surprise and search the area around them. It was if someone in or behind the tree had uttered a joyful little giggle. During the days Agaat also taught Danderine to read and write and speak as well as do some embroidery, just like Milla had taught her many years ago. But the reading, writing and embroidery were not concerned with edification and exemplariness. It was just a way of giving their hands something to do (which amazingly brought Danderine's spastic hands to rest during these quiet afternoons) while they chatted about all that came to mind as they sat flat on their behinds with their legs stretched out straight before them (as if stiff hamstrings were a white man's disease only) in one of the cool shades of Grootmoedersdrift's garden. *As dit nie so snaaks geklink het nie sou mens kon sê dat hulle hier 'n spesifiek vroulike gebied betree het.* If it did not sound so funny, one could have said that they found themselves here in the domain of the specifically feminine. (Cf. Betsie Verwoerd's words quoted in the second epigraph to *Agaat* 2004/2006 from Hetsie van Wyk's *Borduur Só* [*Embroider Like this*] (1966)). And here too, during these afternoons of endless conversation in the cool shades of Grootmoedersdrift, especially when it was the shade of one specific big tree in which they sat, they constantly had the impression that there was another woman with them, one that sometimes even ventured an opinion on a point of discussion. They then laughingly referred to themselves as the three witches of Grootmoedersdrift. "Hail Macbeth", they would shout with abandon, "thou shallt not be King". "No man shall". "But this mysterious one with us shall become the shade that shelters the law of this land, as well as the eternal shadow that hangs over it."

[86] It is fair to assume that it will have started to smell a little *strooiserig* after a while.

[87] Does this not again point to an anti-revolutionary and unpolitical acquiescence, a resignation in the face of the *status quo*? No. The story may remain the same but its future readings may well hold and precipitate surprises, for instance - who knows - the real resurrection of *Mau Mau* practices in the proud old colonial homesteads of the Cape. God forbid, but who knows …. (Surely, if it is part of the business of a *literary Marxism* to decolonise, it has to contemplate hospitably the absolute freedom of the colonised, the only available register of which is the coloniser's most imaginative or *imaginary* - take your pick - fears. And it along these lines that one can begin to search for a certain resonance between *Agaat* and J.M. Coetzee's *Disgrace* and thus for a certain mercy, grace and graciousness in the latter.)

[88] Van Niekerk *Agaat* (2006) 692, (2004) 718.

ABSTRACT

This essay explores the relation between law and literature from the literary Marxist position that Jean-Luc Nancy develops in his work *La Communauté Désoeuvrée.* It does so with specific reference to Marlene van Niekerk's novel *Agaat* and to the Lacanian problematic of imaginary selves caught up in the confines of their speculative or mirroring images of others which Willie Burger points out as a central theme in the novel. It takes leave of approaches to law and literature studies such as Martha Nussbaum's in terms of which literature can be invoked to edify or improve the law. It argues that law and literature can both benefit from a comparative exchange, provided this exchange takes seriously the fundamental and irreducible tension and hiatus between characteristically "legal" and characteristically "literary" discourses.