LAW AS SACRIFICE

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Author's Note

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"Numberless conformities, large and small abandonments of self to others, are the price of what freedom we experience in society. And the price is a high one. Through our existence as members of collectives, we impose on others and have imposed on us hierarchical structures of power, welfare, and access to enlightenment that are illegitimate, whether based on birth into a particular social class or on the accident of genetic endowment."

Duncan Kennedy "The structure of Blackstone's Commentaries" 1979 *Buffalo Law Review* 212.

I. INTRODUCTION

The inquiry into *law as sacrifice* that follows is again prompted by the question of plurality and the political. Once again we take our cue from Hannah Arendt:

"[P]lurality is specifically *the* condition - not only the *conditio sine qua non*, but the *conditio per quam* - of all political life."[1]

In what follows, we shall again pursue the matter of politics and plurality in terms of the *coming together* of *more than one.*[2] We shall be scrutinising two moments of the political, the moment of *coming together* and the moment of *the more than one*. We shall be scrutinising the movement that *lets be and abandons* these moments, in one movement.

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* Professor of Law, Rand Afrikaans University. This paper relies heavily on an article co-authored by Henk Botha and myself (cf. "Democracy and Rights in South Africa: Beyond a Constitutional Culture of Justification" 2000 *Constellations* 341-362). I therefore gladly acknowledge Botha's contribution to the thoughts developed here. I am also indebted, as always, to comments by and conversations with many friends and colleagues. I shall refrain from the injustice of naming only some of them here. Specific indebtedness to someone for a particular point made is nevertheless reflected in the footnotes. Responsibility for shortcomings and errors remains solely mine.

1 Arendt *The Human Condition* (1989) 7. This sentence of Arendt also constituted the pivotal point of my arguments regarding plurality in "Die onderskeid tussen die publieke en die private in die lig van die horisontale werking van die grondwet I en II" 2000 *Journal for South African Law* 416-427, 605-618 as well as in "Piracy, property and plurality: Re-reading the foundations of modern law" 2001 *Journal for South African Law*.

2 Cf. Piracy, property and plurality" (fn. 1).

And again we take Kant's definition of law as our point of departure:

"The law is the general system of rules on the basis of which the external liberty of one individual could be reconciled with the external liberty of other individuals."[3]

If we follow Kant, we should understand law as a socio-political endeavour to maintain or preserve plurality. Kant clearly defines the law in terms of a systematic reconciliation of plural liberties. Plurality is undoubtedly a pivotal element of this definition of the law. Fundamentally at issue in this definition of law is the liberty of more than one legal subject. And yet, the inquiry into law as sacrifice that follows, will reveal that law is in fact fundamentally a matter of destroying plurality. Law does not reconcile or resolve conflicting social interests. It always sacrifices one interest in favour of another in the pursuit of a social goal in a way that can be expected to maintain good order and peace. My paper begins with an analysis of the ways in which the law brings about these sacrifices. The analysis shows that legal systems do not face up to their sacrificing practices. Legal systems endeavour to establish their legitimacy by insisting on the fairness and justness of the rules they comprise. The balancing of interests required when the law is called upon to resolve social conflicts is thus also presented in terms of a just resolution of the conflict. The South African Law of Delict (Tort Law), for instance, presents the balancing of interests required to establish the lawfulness or unlawfulness of conduct as an expression of the *good* morals of society, the *boni mores*.

The theoretical notion of "*balancing* interests" masks the reality of that which really takes place whenever conflicting interests have to be resolved in order to maintain the good order of society. It obfuscates the sacrificial practice at the heart of "balancing". "Balancing" suggests that every interest involved in a social conflict can expect to receive the recognition due to it when a judge completes the task of "balancing" interests. This would imply that the law leaves no injury lying in its wake. Both parties to a legal dispute ought to leave the court room happy in the knowledge that the ruling of the court is an expression of the good morals of society. The loosing party is to realise that she was simply mistaken to take the case to court. By the end of the case, the reasoning of the judge will have convinced her that her case had no merit.

We know, however, that this is not the way losing parties feel about lost cases. They generally feel disappointed if not outright outraged that the judge did not see their view of the case. Is this disappointment and/or outrage merely a reflection of the foolhardy refusal to see reason? Or is it concrete evidence that the "balancing" of interests expressed in the ruling of the court is much rather a matter of sacrificial expedience, sacrificial expedience that is quite understandably hard to swallow for the one who has to carry the burden of the sacrifice? There will undoubtedly always be examples of law suits in which litigants really appear to go to court in a foolhardy fashion, that is, without an honest belief in the merit of their case. However, the possible occurrence of such cases, does not afford us a general conclusion that losing parties generally should have known better than taking a

[3] Kant *Metaphysik der Sitten* in *Werke in 10 Bänden* (Weischedel edition 1983) Band 7, 337.

claim or a defence to court that deserved to fail. One need not search far to come up with examples upon examples of cases in which the losing party can clearly be seen to have taken their cases to court in good faith and with good reason to believe that they would be successful. To tell someone under such circumstances that her claim is or was simply not an expression of the good morals of society, is to add insult to injury. On top of having her honest expectations frustrated by a judicial decision, that person is also deprived of her honest expectations. She is told to let go of them. They are simply wrong. This amounts to nothing less than banishment. To the extent that a person is not prepared to see reason, she simply does not share in the good morals of society. She is not a good member of society. This is expulsion.

A judicial decision that sacrifices the interest of one party for the sake of the larger interests of society, inevitably has the effect of an expulsion. Judicial reasoning should not ratify this banishing effect by invoking a rhetoric of justice. It should mark a certain resistance to the expulsion that the decision effects by acknowledging the unjustness of the sacrifice that it exacts. An acknowledgement that a balancing of interests involves a sacrifice would have the effect of *re-introducing* the person into the society from which the judicial decision expelled her. It would have the effect of acknowledging the legitimate standing *in society* of the very expectations that society chooses not to tolerate. It would acknowledge the failure of society to accommodate these legitimate expectations and this acknowledgement would, paradoxically, constitute an oblique accommodation, an accommodation in the wake of and despite the failure to accommodate.

This article explores the oblique hospitality to dissident voices embodied in the judicial acknowledgement of sacrifice. It explains why notions such as the good morals of society or the *boni mores* tend to constitute a ratified and therefore double expulsion of the dissident voice. In other words, the article aims to expose the inhospitable character of the good conscience. It aims to show that the hospitable society would be a society able to take leave of a good conscience, a society able to live with a constant sense of debt (which may but need not always include a sense of personal guilt). It aims to clarify the crucial role judicial decisions can play in this regard. To do so, it traces the development of the doctrine of *damnum absque iniuriam* (damage without wrongfulness) in modern legal theory. It highlights in this regard the particular recognition of *damnum absque iniuriam* in the work of Wesley Hohfeld. It then briefly expounds the disregard for *damnum absque iniuriam* in the legal theory of Ronald Dworkin and in the economic analysis of law. It then turns to the significant but ultimately also insufficient regard for sacrifice in the work of Duncan Kennedy. Finally, it explores the inevitability of sacrifice as an indispensable aspect of the political as the movement between oneness and plurality.

II. THE DOCTRINE OF DAMNUM ABSQUE INIURIAM (4)

Kant's definition of law quoted above shows no regard for the sacrificial nature of legal principles and rules. It suggests that the freedom of one legal subject can indeed be

reconciled with the liberty of other legal subjects within a general system of law. The extent to which the freedom of one may clash fundamentally with the freedom of others is thereby relegated to the sphere of the illegal, the prohibition and suppression of which is the very purpose of law. This is clear from Kant's subsequent observation that any interference with a liberty guaranteed by the general system of law, must be unlawful or wrongful.[4] At issue here is Kant's faith that a legally sound liberty cannot clash with another legally sound liberty. This faith is itself probably also reflection of Kant's as yet unshaken faith in the liberty enhancing quality of the free market that the general system of law would make possible.[5] As far as Continental legal theory is concerned, a clear consciousness of the liberty-destroying potential of the free market would only come to the fore in Hegel's *Grundlinien der Philosophie des Rechts*.[6] Hegel's insights in this regard would nevertheless never have a significant impact on European legal thought.[7] Hence the eventual failure of the general systems of law of Europe to come to terms with economic dis-equilibrium and the social crises to which it gave rise. Hence the increasing need for particular legislation to regulate social welfare that finally gave rise to the social welfare state towards the end of the nineteenth and beginning of the twentieth century. Hence also the growing concern of formalist legal theorists with the increasing materialisation of law in the course of the twentieth century.[8]

This development of European law somehow managed to obscure the sacrificial nature of legal rules and principles from Continental legal theory. One can venture to say that the sacrificial nature of law came to be addressed by national legislation. It never came to be thought through in theory. In fact, it is only the legislative response to the sacrificial nature of the law that came to be addressed as a theoretical problem, namely, the materialisation of law and the juridification of society to which it gave rise.[9] The development of common law systems is of course not all that different from that of civil law systems sketched above. The formal legal principles of nineteenth century common law theory eventually also had to be supplemented by material legislation to counter-act the liberty-destroying tendencies of the free market, a development that would come to a head with Rooseveldt's New Deal policies. This need for legislative supplementation of the common law can also be seen to have developed against the background of a recalcitrant legal theoretical formalism and conceptualism that refused to acknowledge the sacrificial nature of general legal principles and rules. However, a regard for the sacrificial nature of law did come to the fore in common law theory with the increasing regard in late nineteenth and early twentieth century legal theory for the pervasiveness of

[4] Cf. Kant *Metaphysik der Sitten* (fn. 4) 338: "Wenn also meine Handlung, oder überhaupt mein Zustand mit der Freiheit von jedermann nach einem allgemeinen Gesetze zusammen bestehen kann, so tut der mir unrecht, der mich daran hindert; denn dieses Hindernis (dieser Widerstand) kann mit der Freiheit nach allgemeine Gesetzen nicht bestehen."

[5] Cf. Habermas *Strukturwandel der Öffentlichkeit* (1990) 188-189.

[6] Cf. for instance Hegel *Grundlinien der Philosophie des Rechts* in *Werke in 20 Bänden* (Theorie Werkausgabe Suhrkamp 1970) par 130, par 238.

[7] Wieacker *Privatrechtsgeschichte der Neuzeit* (1967) 415.

[8] Cf. Habermas *Faktizität und Geltung* (1992) 541-563.

[9] Cf. the essays collected in Teubner (ed.) *Juridification of Social Spheres* (1987); Habermas *Theorie des kommunikativen Handelns* II (1988) 527-532.

legally inflicted harm or *damnum absque iniuria* in general social life. This theoretical development was crucial for the rise of the legal realist movement in the United States. Let me briefly expound the key aspects of this development.[10]

Classical liberal legal theory pivoted on an effort to mediate the contradiction between two fundamental socio-political concerns, the concern with liberty and the concern with security. Liberal societies wish to promote the liberty of individuals, but also need protection from the social dangers that this liberty poses. Hence John Stuart Mill's classical maxim of liberal political theory: The individual should be free to do anything that does not harm other individuals.[11] Hence also Mill, Bentham and Austin's understanding of legal liberties as permissions by the sovereign to engage in *self-regarding acts*, that is, acts that did not harm others. This understanding of legal liberties constituted the cornerstone of the classical school of liberal legal thought that includes not only Mill, Bentham and Austin, but also Henry Terry, John Salmond, Frederick Pollock, Sheldon Amos, Christopher Columbus Langdell and John Chipman Gray.[12] These theorists, argues Singer, fundamentally failed to see the extent to which the law does in fact allow people to harm each other. They took the harming of another person to be generally proscribed by law. They failed to recognise the pervasiveness of *damnum absque iniuria* in socio-economic interaction. They either ignored it and obscured it, or regarded it as an anomalous but marginal phenomenon.[13]

However, just as the self-regarding theory seemed to become well established in legal thought, legal theoretical attention increasingly began to focus on the anomaly. In the process it became increasingly clear that it was not just a marginal phenomenon. The turn can be said to have taken place between 1880 and 1920. The publication of Edward Week's book *The Doctrine of Damnum Absque Iniuria Considered in its Relation to the Law of Torts* in 1879 and Oliver Wendell Holmes' essay *Privilege, Malice and Intent* in 1894 were important markers in this regard. These works highlighted instances of *damnum absque iniuria* such as injuries accompanied by contributory negligence, trifling injuries, injuries committed through necessity, injuries inflicted in the wake of consent, injuries justified on the basis of public policy, the development of property that within reasonable limits diminishes the enjoyment or potential enjoyment of adjacent property and the exercise of riparian rights that within reasonable limits diminishes the potential use of those rights by other riparian owners.[14] By this time, the regard for *damnum absque iniuria* also came to receive attention from theorists such as Terry and Salmond who formerly belonged to the classical school. Terry and Salmond highlighted the harm caused by legal economic competition.[15] Harm inflicted without the mental disposition (negligence or intent) required for liability under the particular tort had already been

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[10] I shall do so on the basis of Joseph Singer's brilliant essay "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" 1982 *Wisconsin Law Review* 975-1059.
[11] Cf. Mill *On Liberty* (1874 edition) 21-22.
[12] Cf. Singer (fn. 10) 985, 995-1025.
[13] Singer (fn. 10) 1024-1025.
[14] Cf. Singer (fn. 10) 1026-1031.
[15] Singer (fn. 10) 1031-1032.

highlighted in Homes's essay *Privilege, Malice and Intent*. Terry and Salmond would also come to pay attention to non-negligent causation of injuries in terms of *damnum absque iniuria*.[16]

The upshot of all this was a pervasive recognition in early twenty century American legal theory that the law was not simply a matter permitting self-regarding acts and proscribing harm to others. The law clearly permitted many instances of causing harm to others. It did not *generally* hold persons liable for causing harm to others. Salmond articulated this most strikingly in the second edition of his treatise on Torts:

"Since, therefore, all harm is not actionable, it is necessary to ascertain whether liability for harm is the general rule, subject to specific exceptions based on definite grounds, or whether, on the contrary, the general rule is one of exemption from liability save in those specific instances in which the law declares that particular kinds of harm are wrongful. In other words: Does the law of torts consist of a fundamental general principal that it is wrongful to cause harm to other persons in the absence of some specific ground of justification or excuse, or does it consist in a number of specific rules prohibiting certain kinds of harmful activity, and leaving all the residue outside the sphere of legal responsibility? It is submitted that the second of these alternatives is that which has been accepted by our law. Just as the criminal law consists of a body or rules establishing specific offences, so the law of torts consists of a body of rules establishing specific injuries. *Neither in the one case nor in the other is there any general principal of liability.*"[17]

A further consequence of this insight into the pervasiveness of *damnum absque iniuria* was the insight that the liberties granted by the legal system were not all corroborated by duties on others to refrain from interfering with those liberties (as the classsical school believed). Legal liberties are often unaccompanied by the right to prevent others from interfering with those liberties. People often have *no right* to prevent the *liberties* of others from interfering with their own liberties. This was the crucial insight that Wesley Hohfeld would eventually express with his jural correlatives *privilege* and *no-right.* The law, Hohfeld argued, not only provides for *rights* corroborated by *duties* to respect those rights. It also provides for *privileges* or liberties which cannot demand the *duty* of respect and thus for *no-rights* that cannot legally fend off the *privileges* of others.[18] In other words, the law exposes a great deal of social interaction to a blatant power struggle in which the interests of the vanquished are sacrificed in view of the greater benefits that society stands to gain from this struggle.

The significance of Hohfeld's theory, argues Singer, is that it forces us to faces up to this power struggle and the sacrifices it involves. It forces us to consider honestly and responsibly the reasons for maintaining the power struggle in the way we maintain it.[19] It no longer affords us the classical liberal optimism and complacency shared by Kant, Mill, Bentham and Austin. The law does not always proscribe harmful interference with legally sound liberties as wrongful or unlawful. The law most often promotes such harmful interference. Legal theory should take stock and give responsible account of this harmful interference.

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[16] Singer (fn. 10) 1032-1033.
[17] Salmond *Torts* (2nd ed 1910) 8-9 as quoted by Singer (fn. 10) 1052.
[18] Singer (fn. 10) 986-989, 1053-1059.
[19] Singer (fn. 10) 1056-1059.

Economic competition is the most pervasive example of this fact. The history of the capitalist economies made possible by modern law certainly does not tell us the story of increasing mutually beneficial or symbiotic co-existence on the face of the earth. It relates the story of rather heartless sacrificial practices in pursuit of even further heartless, if not senseless sacrificial practices. The sacrificial practices of modernity took a turn towards the nonsensical and the meaningless with the trench warfare of World War I. The historical links between between laissez-faire capitalism and the rise of imperial warfare towards the end of the nineteenth century should never be forgotten.[20] I live in country in which a revolutionary movement with a clear socialist agenda adopted a Thatcherite free market macro-economic policy within years after it came to power. This government is also currently buying arms from international arms manufacturers for an amount in excess of 5 billion US Dollar. The immensity of the task of socio-economic reconstruction which the South African government faces and the dismal shortage of resources that frustrates this reconstruction are clear for all to see. The military threat this government faces, is rather less clear.

III. THE RENEWED OBFUSCATION OF SACRIFICE AFTER THE AMERICAN REALISTS

Current legal theory can be divided into trends that seek to cover up the evidence of *damnum absque iniuria* that came to the fore in the work of Hohfeld and the American Realists and trends that endeavour to keep the regard for *damnum absque iniuria* alive. In other words, there are legal theoretical currents that continue to deny the sacrificial nature of the law and currents that appear to square up to the sacrificial nature of the law. Prominent amongst the former are the constructive interpretative legal theory of Ronald Dworkin and the similarly "constructive" legal theory of the law and economic school. As regards currents that square up to sacrificial nature of the law, one thinks of the various branches of critical legal theory spawned by the Critical Legal Studies movement of the nineteen seventies.

One need not again engage in extensive argument to show that the legal theory of Dworkin denies the sacrificial nature of the law. The foundational principle of this legal theory, the notion of a non-contradictory and homogenous deep morality that informs all legal principles and rules, certainly reflects no regard for the fact that social co-existence often sacrifices very fundamental social interests in the pursuit of selected social goals.[21]

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[20] Cf. Habermas (fn. 6) 229. Locke already recognised the link between the wealth produced by a free market economy and imperial military potential. Cf. Locke *Second Treatise of Government* sec. 42. And so did Kant. Cf. Kant *Mutmasslicher Anfang der Menschengeschichte* in Kant *Werke in 10 Bänden* (Weischedel edition 1983) Band 9, 98. Cf. also Rose "Ancient Constitution Versus Federalist Empire: Antifederalism from the Attack on 'Monarchism' to Modern Localism" in *Property and Persuasion Essays on the History, Theory and Rhetoric of Ownership* (1993) 80.

[21] Cf. Van der Walt and Botha "Democracy and Rights in South Africa: Beyond a Constitutional Culture of Justification" 2000 *Constellations* 352.

The law and economics school's notion of *maximised efficiency* or *social utility* as the overriding criterion for juridical deliberation shows as little regard for the sacrificial nature of law as Dworkin's deep morality. The construction of *social utility* or *efficiency* is fundamentally informed by sacrifice. Its very purpose is to *fashion* a lesser interest that can be discarded. The law and economic school's regard for externalities (transaction costs), the regard for the need to compensate the discarded interest and the need to include externalities and compensation in the utility equation (Kaldor Hix efficiency), do reflect some recognition that social interaction does not entail a plurality of self-regarding acts. It does reflect an acknowledgement that social conduct generally harms others.[22] This acknowledgement, however, does not resolve the sacrificial practice of legal deliberation. In fact, the notion of due compensation and the notion of assessable externalities invoked by the language of economic analysis serve as second round obfuscations of the way economic language (the language of efficiency) excludes otherness and reduces plurality to sameness. The optimism of the economic analysis of law turns on the confidence that the discarded other has been well accounted for in the efficiency equation. Is this confidence well-founded? Certainly not in cases of real conflict. In cases of real conflict, compensation inevitably remains a matter of shallow solace. There simply exists no payment that would adequately compensate violations of bodily and/or psychological integrity and nobody knows where exactly the distinction must be drawn between this fundamental integrity and lessor personal interests. Only in the most simple cases of patrimonial loss does damage clearly not concern the destruction of the unique that cannot be replaced.

The economic analysis of law must either hold that conflict is never so real that the vanquished cannot be compensated or it must acknowledge the possibility of irredeemable loss in legal and social interaction. The former position would take it right back to the classical liberal theory of self-regarding acts. The latter position would spell the ruin of the project. It would require economic analysis to face up to the impossibility of compensation and infinite transaction costs.

The project would not let itself be ruined though. The economic analysis of law is not concerned with real efficiency. A concern with real efficiency would confront it with the reality of loss that exceeds the possibility of equation. It therefore works with constructed notions of efficiency that ultimately turn on *moral* reductions of incongruent aspirations. The claim that economic analysis turns on an a-moral imitation of market forces (preferences out there) is simply not true. Imitation needs a basis of comparison. Conflicting preferences must be interpreted in terms of a comparative scheme if the muteness of conflict is to rise to the level of language. To compare two things that are truly two and not one, a third term must be introduced that makes them one and the same in some respect, that is, some moral or normative respect.

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[22] Cf. the discussion of these tenets of the economic analysis of law in Coleman "Economics and the law: a critical review of the foundations of the economic approach to law" 1984 *Ethics* 649-679. The principles developed by the law and economic movement rely fundamentally on the arguments and analyses of Ronald Coase in "The problem of social cost" 1960 *Journal of Law and Economics* 1-30.

From the perspective of a radical concern with the possibility of a *non-economic* encounter with an other that would not reduce the other to the interests of the self, from the perspective of a radical concern with a *political* encounter with the other that would turn on the otherness that constitutes plurality, the economic analysis of law is as moral a reduction of otherness as Dworkin's deep morality is an economic reduction of otherness. In both cases, the otherness of the other is reduced to the concerns of the self or the same.

The reduction of the other to the same cannot be avoided. The concern with the otherness of the other that would allow for a difference between the self and the other, a difference that would institute *plurality* as the *coming together of more than one*, requires that the muteness of difference, otherness and conflict rise to the level of language. Muteness has no regard. It shows or discloses nothing. It therefore also shows no (regard for) otherness. This is the cinch. Otherness and plurality are dependent on moral languages that inevitably destroy it.

This brings us to critical legal scholarship. The bravest jurisprudential attempt to come to terms with the crisis of plurality is reflected in Duncan Kennedy's notion of the fundamental contradiction: My freedom is both dependent on and threatened by your freedom.[23] My freedom is not your freedom and your freedom is not mine. This tragic insight into the irreconcilable difference between your and my freedom, reflects a regard for more than one freedom. However, the remarkable step that Kennedy takes with his articulation of the fundamental contradiction is all too soon eradicated by the very next step he takes. The first step indeed concerns a certain descent into the muteness of conflict. To be sure, this descent into the muteness of conflict allows for a formal utterance of difference and plurality: You are not me, I am not you. But this formal utterance does not *reveal* the coming together of more than one. It does not yet reveal *the issue of coming together* or *that which is at issue in coming together.* Plurality cannot be grasped in terms of "difference only".[24] It must be understood in terms of an approach, approximation or narrowing of distance that *reveals* or *shows* difference. Kennedy does not address the narrowing of the approach that would reveal difference. Hence the muteness of the plurality which the articulation of the fundamental contradiction promised jurisprudence for the first time in history. For Kennedy, this muteness translates into the incompatibility of two languages (egoism and altruism) which leaves jurisprudence fundamentally indeterminate. According to him, the response to this indeterminacy should consist in an existentialist choice in favour of the one or the other.

This is the point where unacknowledged sacrifice re-enters Kennedy's jurisprudence. He should nevertheless be commended for having held out significantly longer than others.[25]

The muteness of conflict into which the fundamental contradiction descends and the existentialist choice that Kennedy offers as a response to it, is well illustrated in his

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[23] Kennedy "The structure of Blackstone's Commentaries" 1979 *Buffalo Law Review* 213.
[24] This abstraction is spurious (as this very point aims to make clear), but must be entertained for a moment (to make the point that it is spurious).
[25] Cf. the epigraph above.

dialogue with Peter Gabel in “Roll over Beethoven”. Conflict becomes beautiful non-conflict, “intersubjective zap”, that we should simply “be doing”:

"You are betraying our program by conceptualizing it. To accept or even sympathize with a statement like `the goal is to return to the unalienated situation...'"

"Sometimes it sounds like `all these things can be reduced to the single master concept of unalienated relatedness that is immanent in our current situation'."

"Why can't I just call it a yearning? What's wrong with calling it intersubjective zap? Or making the kettle boil? What's wrong with calling it..."

"I don't want to construct a philosophy [not even of intersubjective zap]."

"I think you're stuck in your dialectic of clarity and lucidity versus being turned into a pod. That dialectic, that tragic situation which you find yourself in, is the position of the philosopher, which I don't want to be in, and I believe you don't have to be in it."

"*We* should be *doing* that stuff rather than talking about unalienated relatedness. Unalienated relatedness is not a phenomenological anything."[26]

The editors of the *Stanford Law Review* explain "intersubjective zap" as follows:

"‘Intersubjective zap’ is a sudden, intuitive moment of connectedness. It is a vitalizing moment of energy (hence `zap') when the barriers between the self and the other are in some sense suddenly dissolved. Reflective understanding of another person is *not* what is meant by the phrase.”[27]

These passages undoubtedly count among the most interesting gestures to be articulated in the course of twentieth century jurisprudence. However, its *anti-theoretical* fervour must be confronted with the *theoretical* question regarding legal relations that would allow for the liberty of *more than one*. This question requires us to scrutinise carefully the relation between *doing* and *zap*. The simple “*we* should be *doing*”, the *activist* un-doing of conflict is the second step that destroys the promise of plurality that the notion of the fundamental contradiction holds. The beauty of zap obscures the sacrifice of otherness that it too, inevitably, effects. And this happens every time an exponent of critical legal scholarship makes the manly point that law is nothing but “politics”, the point that the law should be used to promote *our* political preferences, certainly, *our* understanding of zap. “*We* should be doing zap”. These exponents of critical legal scholarship should nevertheless be understood to say that law is nothing but *economics*. Politics and the political are terms we must reserve for plurality, the coming together of more than one, not the (always economic or expedient) sacrificial reduction of plurality to the one and the same.

The consistent recognition of sacrifice and the promise of plurality that this recognition holds would give a *different*, un-Sartrean (and therefore un-Schmittian) reading to the fundamental contradiction: My freedom is not your freedom, your freedom is not my

[26] Cf Gabel & Kennedy “Roll over Beethoven” 1984 *Stanford Law Review* 1, 4, 6, 8. Emphases added.
[27] Cf Gabel & Kennedy (fn. 26) 4.

freedom and *I* do not *have* the sovereign right or existential liberty to choose or decide what we are to do about this. The question is how to take this thought further. What will make it more revealing? Indeed, how can this still very mute promise of plurality be turned into a disclosure of the coming together of more than one that will not again affect a reduction of the one to the other?

IV. THE INEVITABLE SACRIFICIAL CHARACTER OF HUMANITY

Kennedy's notion of "doing zap" requires him to renounce the fundamental contradiction.[28] In the process, he ends up well on his way to yet another obfuscation of the sacrificial logic of deliberation. This becomes clear when we relate the two elements of "doing" and "zap" to their Sartrean roots. "Just doing things", just acting upon our convictions (without rationalising too much) is central to Kennedy's concern with Sartre's existentialist freedom, that is, the freedom to decide the terms of one's life without succumbing to the bad faith of adopting roles cut out for us by society. The concern with this existentialist freedom underlies the ontology that Sartre elaborates in *Being and Nothingness*. The central tenet of this ontology is the *annihilation* through which phenomenological consciousness produces reality (the negation or *nothingness* through which consciousness constitutes *being*).[29] This annihilation wrought by consciousness ties in fundamentally with the *objectifying* function and action of the eye (the look of the other). "Just doing things", in other words, relates directly to the objectifying or annihilating action of the eye. It should be obvious that "inter-subjective zap" is hardly reconcilable with this objectifying action of the eye. In Sartre's social ontology, everyone is either free subjectivity or reified objectivity. One's liberty is always denied by someone looking (towards) one as a father or a mother or a friend, etcetera, or one denies the liberty of others by looking (towards) them as a father, mother, friend, etcetera.[30] The only way that non-objectifying zap enters Sartre's ontology is through

[28] Cf. Gabel & Kennedy (fn. 26) 4.

[29] Sartre works with the basic categories of Hegel's logic here. The fundamental categories in Hegel's *Wissenschaft der Logik* is "Being" (*Sein*) and "nothingness" (*Nichts*). The completely abstract and undetermined category *Sein* cannot be *Sein* unless it becomes the *Dasein* (particular or determinate being) of finite beings. For *Sein* to become *Dasein* it must become determined. Working with Spinoza's principle that all determination is a matter of negation (*Omnis determinatio est negatio*), Hegel argues that *Sein* must be subjected to the dialectic encounter with *Nichts* to become determined. Cf Hegel *Wissenschaft der Logik* in *Werke in 20 Bänden* (Theorie Werkausgabe Suhrkamp 1970) 121-123. Sartre's argument is that it is the annihilation that existentialist consciousness wreaks that brings about the encounter with nothingness which makes it possible for Being to become the being of distinct beings. Cf Sartre *Being and nothingness* (1966) 56-85. Consciousness can of course negate itself as the nothingness which lies at the heart of Being by annihilating itself into an object, by assuming for itself a specific role, such as the waiter in the cafe who plays at being a waiter in a cafe or anyone who assumes for him- or herself the role to which public opinion wishes it to conform. However, Sartre calls such a negation of one's own nothingness "bad faith". The ontology of Sartre's existentialist phenomenology implies a fundamentally subjectivist (self-deciding) ethics. It requires that one never relinquishes the liberty to continue inventing one's existence by never conforming or resigning oneself to a specific role. Cf Sartre *Being and nothingness* (1966) 33-112.

[30] Cf. in this regard Sartre's analysis of "the look". Looking or "the look" is for him an exemplary instance of pure consciousness (pure non-being) which reduces the other to an object (a being). He illustrates this principle with the description of a person who is caught looking through a keyhole. While looking through the keyhole, such a person is at first nothing but an act of *looking* ("all eyes" so to speak). But when that

blindness. The eye no longer objectifies or annihilates the other when people are blindly in love.[31] However, Sartre leaves the two modes of the eye (the objectifying look and blindness) hanging without explaining the relation between them. He merely juxtaposes them and thus leaves the sacrificial dynamic that links them unexplained.[32] However, the sacrificial dynamic of the movement between the two modes of the eye becomes clear when one relates it to the logic of primordial sacrifice expounded by the anthropologists such as Lucien Lévi-Bruhl, Karl Leenhardt, Levi-Strauss and Roger Caillois and the critical theorists Theodor Adorno and Max Horkheimer.

"Being blindly in love" evokes a state of being immediately immersed in the otherness of the other. This, on the one hand, is pure bliss and beauty. On the other hand, it spells utter self-destruction and terror. Being blindly in love concerns an existential overload that cannot be allowed to last, in any case, not if one hopes to make a decent living that will afford one a degree of comfort and equilibrium. Hence the need and necessity to gradually extract oneself from the blindness of love, despite the loss of exhilaration this entails. This is also the story of humanity's transcendence of myth (in the singular, signifying an animal immersion in nature) through myths, rituals and religious practices.

Myths, rituals and religious practices constitute the primordial ascent from *animalitas* to *humanitas*. The early, "pre-human" existence of "mankind" is characterised by an immersion in the sacred that is both "absolutely fulfilling" and "absolutely destructive" and therefore "absolutely terrifying".[33] Myths, rituals and religious practices delimit or restrains the sacred in ways that opens up a less-charged space in which the more leisurely and dignified existence of *humanitas* becomes possible. Myths, argues Horkheimer and Adorno, are the first instances of enlightenment. Their well-known argument is of course that enlightenment dialectically relapses into myth again. The European Enlightenment, instead of allowing us a dignified and leisurely human existence, again immersed us in a general mythical bondage dictated by technological and bureaucratic exigencies.[34]

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person suddenly becomes aware of being looked at, he himself or she herself is immediately reduced to an object or thing. Cf Sartre (fn. 29) 348-350.

[31] Cf. Sartre (fn. 29) 481.

[32] Responding to the question whether human beings can establish no relations which would not amount to mutual objectification, Sartre answers that human beings can unite in a communal subjectivity. He uses the disconcerting example of the individuals in a theatre who are united in a communal subjectivity by their common "looking" at the same objects on stage. Cf Sartre (fn. 29) 535. Sartre's further argument is that a community can also be reduced to an object by the look of a third, especially by the look of an oppressor. Fortunately, contends Sartre, since existentialism takes the absence of God as its fundamental premise, there is no ultimate subject whose gaze upon mankind can reduce humanity conclusively to an objective "us", that is, to a human essence. Earthly oppressors, on the other hand, who attempt to objectify humanity and reduce it to an essence can always be acted upon. Communal human life can always restore itself as a "we" by breaking down the "us" into which oppression would mould us. Cf. Sartre (fn. 29) 534-556. The question whether the communal look of the "we" could not itself be fundamentally oppressive, does not interest Sartre.

[33] I put these terms in brackets because they are anthropological *constructions* (myths). One should not read them too literally.

[34] Horkheimer and Adorno *Dialektik der Aufklärung* (1988) 9-49, especially 42-43.

Sacrifice is the essential dynamic of the mythical, ritual and religious emancipation of humanity from myth, from the blissful but terrifying immersion in natural existence. Sacrifice entails the way the human *self* constitutes itself by outwitting the absolute demands of the sacred. Sacrifice is the way the self originates by holding back, by not giving itself entirely, by giving less than is demanded from it. Sacrifice turns on substitution and metonomy. Instead of offering the whole self to the demands of the sacred, only a part of the self is given, an animal, some wealth, even a child, as in the case of Abraham. Horkheimer and Adorno refer in this regard to the cunning of sacrifice. This cunning forges a controllable distance between man and nature or man and the sacred. It establishes a *legal relation* between man and nature.[35] When we think through the matter incisively enough, we are not only required to come to terms with an insight into "law as sacrifice". We are also required to come to terms with "sacrifice as law", sacrifice as the origin or original institution of law.

At issue here is of course also the essential dynamic of all economic competition: self-constitution or self-preservation by holding back, by giving less than is received. This is the "good policy reason" for the pervasiveness of *damnum absque iniuria* in our social exchanges to which Singer refers.[36] Indeed, the sacrificial "nature" of human existence, or rather, the sacrificial *culture* (cultivation) of humanity cannot and should not be denied, especially if we are concerned about the political as *the coming together of more than one*. The pre-sacrificial existence of mankind can only be described as a kind of terrifying *animalitas*, however exhilarating the promise of fulfilled desire this *animalitas* holds for us. We shall return to this promise shortly. Let us first look at the terrifying nature (indeed nature) of this *animalitas*.

The immersion in pre-sacrificial myth (again myth in the singular, signifying the ubiquity or *overall oneness* of the sacred) is extraordinarily fearful and terrifying because it is the initial, most incisive refusal or destruction of selfhood and otherness and thus of plurality. The fearfulness of existence immersed in myth relates to the utter loneliness of being the only one in the ubiquitous face of the sacred. Man immersed in myth is the loneliest creature conceivable. He is the narcissist for whom the world is himself. Needless to say he is not a "political animal",[37] not if the political concerns plurality and the coming together of more than one.

So sacrifice is the device through which plurality first becomes a possibility for man. This would mean that sacrifice is a precondition for the political. Sacrifice is the way

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[35] Cf. Horkheimer and Adorno (fn. 34) 65: Aber in der mythisch vergegenständlichenden Übertragung hat das Naturverhältnis von Stärke und Ohnmacht bereits den Charackter eines Rechtsverhältnisses angenommen."
[36] Singer (fn. 10) 1012,1032.
[37] How could Aristotle be oblivious to this nonsensical term? Animalitas cannot be political. The nonsense at issue here underlies, of course, all talk about natural virtues.

humanity extracts itself from myth.[38] Sacrifice draws the line between the self and the other. It opens the first divide between selfhood and otherness. This takes place when the self begins to conserve and preserve itself by not giving himself completely to the demands of the sacred. This is achieved by holding something back, by giving less than the self, by giving the sacred *something else* instead of the self (one could also say "by giving the sacred *someone else* instead of the self" if this way of putting it would not too early or quickly invoke a plurality that is unwarranted here).[39] Sacrifice creates the first divides that conditions plurality. It is not preceded by plurality.

This however, negates everything said above about sacrifice. Up to now sacrifice has been expounded in terms of the economic destruction of plurality, the economic reduction of the other to the concerns of the self. We seem to be stuck in contradiction: Sacrifice is the condition for and the destruction of plurality. Can this paradox be resolved? Can we for instance distinguish consistently between the sacrificial withdrawal from oneness which allows for plurality (let us say "good" or "plurality constructive" sacrifice) and the sacrificial destruction of otherness that negates plurality ("bad" or "plurality destructive" sacrifice)? The endeavour to draw such a distinction, would, if at all possible, constitute the heart of responsible legal theory. However, part and parcel of legal theory's responsibility thus conceived would be a regard for the fundamental instability of such a distinction. The distinction at issue would always be fundamentally unstable because both moments, the withdrawal from oneness and the destruction of otherness belong fundamentally to the movement of sacrifice. We stated at the outset that we shall be scrutinising plurality and the political in terms of a movement that *lets be* and *abandons* two moments, the moment of *coming together* and the moment of *the more than one*. This movement that gives (and takes) the political and plurality is closely tied to the movement of sacrifice. At issue is perhaps nothing but two directions within a singular movement. At issue is the political as the interminable retreat of the political, the political as the desire for fulfilment that energises as much as it destroys plurality, the political that must therefore also resist the desire for fulfilment. What is left to explain is this paradoxical relation between the political as the desire for fulfilment and the political as the postponement of fulfilment and the frustration of desire.

The immersion in pre-sacrificial myth holds the promise of fulfilled desire, the unrestrained spending of the self in death. Hence the institution of the feast that undoes the sacrificial ordering and postponement of desire in mythical cultures.[40] Hence also Horkheimer and Adorno's quite evident lamentation of the postponement of natural oneness, the postponement of fulfilment that constitutes Odysseus as a surviving subject (not yielding to the bliss of lotus-eating or the enticing songs of the sirens).[41] The utopian promise of fulfilled desire is also the driving force that guides Adorno's negative

[38] Cf. Leenhardt *Do Kamo - Person and Myth in the Melanesian World* (1979) 186-190; Lévi-Brühl *The Notebooks on Primitive Mentality* (1975) 1-3; Caillois *Man and the Sacred* (1980) 54-56; Gusdorf *Mythe en Methaphysica* (1963) 20-44.
[39] Cf. Horkheimer and Adorno (fn. 34) 55-57.
[40] Cf. Caillois (fn. 38) 112.
[41] Cf. Horkheimer and Adorno (fn. 34) 65.

dialectics.[42] This promise underlies also the concern with a mimetic or non-instrumental relation to nature that runs through his aesthetics.[43] Horkheimer and Adorno always seem to be locked in equivocation between the Enlightenment hope for deliverance from myth and the desire to return to the primordial exposure to the sacred.

The desire for immersion in pre-sacrificial myth, I would venture to claim, also guides the Levinasian impulse in Derrida's concern with hospitality.[44] Derrida recognises the sacrificial dynamic of human culture in no uncertain terms.[45] An yet, he consistently invokes as a counterpoint to this inevitably sacrificial dynamic of culture, a clear concern with a non- or pre-sacrificial encounter with otherness. Hospitality concerns the general (unlimited) economy of absolute expenditure. It requires giving oneself completely to the demand of otherness. Indeed, a certain convergence between Bataille and Levinas is evident in the notion of hospitality that Derrida develops.[46] Consider in this regard the distinction he draws between generosity and hospitality. Generosity concerns the subject that gives from a position of consolidated strength, a subject that can give because he has much to give. Generosity concerns the subject that holds back enough or more than enough in the very act of giving. The generous subject gives only a part of himself, that is, a metonomic substitution of the self. The generous subject is still very much a sacrificial subject. One cannot even talk about the "hospitable subject". Hospitality, if there is such a thing, destroys subjectivity. It destroys subjectivity by demanding that the subject give what it cannot give, what it does not have to give:

"What is terrifying about this logic of the gift (and) of hospitality, is that even the value of generosity is rendered suspect by it. If I receive the other out of generosity, because I have a good nature, even a superabundance of things to give and because I can receive him, it is no longer hospitality that is at issue. We know this well: Countries enact legislation that welcomes strangers when they have the economic, psychological and sociological capacity to do so. Levinas says that there is hospitality when I receive over and above, beyond my capacity: one must give what one does not have….Hospitality does not exist within the parameters of my generosity, it exists beyond my good nature."[47]

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[42] Cf. Adorno *Negative Dialektik* (1973), especially the critique of the coercive suppression of the inner self of the reasonable subject in Kant's conception of moral autonomy in part three.

[43] Art argues Adorno, can give us an intimation of a non-instrumental and non-sacrificial reconciliation of inner and outer nature, but can nevertheless only do so by also disclosing that the reconciliation it intimates is not real. In other words, art must also communicate its own falseness, that is, the fact that the reconciliation between inner and outer nature that it evokes, has no bearing on the social reality of humankind. Cf. Adorno *Ästhetische Theorie* (1980) 193, 197, 231, 251.

[44] This is itself a sacrificial reduction of the "meaning" of the work of a thinker who would always resist such a reduction to meaning. However, I hope Derrida's own acute regard for the inevitability of sacrifice (even for those or *indeed* for those who would pursue a non-sacrificial hospitality) will leave me off the hook for a moment.

[45] Cf. Derrida *The Gift of Death* (1995) 85-86.

[46] This means also that the Derridean concern is as aesthetic as it is moral, or rather, as un-aesthetic as it is a-moral (as destructive of available aesthetics as it is of available morality).

[47] Translated from "Débat: Une Hospitalité sans Condition" in *Manifeste pour l'hospitalité* (1999) 140-141: "Ce qu'il y a de terrifiant dans cette logique du don, de l'hospitalité, c'est que même la valeur de générosité est suspecte. Si j'accueille l'autre par générosité, parce que j'ai une bonne nature, voire une surabondance de choses à donner et que je peux l'accueillir, ce n'est plus de l'hospitalité. Nous connaissons bien cela: des pays se dotent d'une législation accueillante au moment où ils en ont la capacité économique, psychologique et sociologique. Levinas dit qu'il y a hospitalité lorsque j'accueille *plus que* je ne peux

Hospitality is therefore quite understandably not something decided or initiated by the subject. Hospitality befalls subjectivity. Hospitality overcomes subjectivity. Hospitality is an event that surprises subjectivity.[48] Derrida is of course quite aware that political theory cannot leave the matter with a political ontological (quasi ontological) regard for the hospitality that befalls us, the hospitality that overtakes us and throws our sacrificial practices into disarray. A politics *consistently* concerned with hospitality must return to the practical business of sacrifice. It requires the design and improvement of hospitable institutions that inevitably require a certain conservation of a self.[49] Indeed, Derrida is well aware of the paradoxical and tragic self-destruction of hospitality required by hospitality itself.[50]

One can hardly find a better example of the self-destruction of hospitality than the socio-economic rights jurisprudence recently developed by the South African Constitutional Court.[51] Section 27 (3) of the South African Constitution of 1996 stipulates that "[n]o one may be refused emergency medical treatment". The provision is rather absolute. It does not state that the right to emergency health care is subject to available resources or that only those healthy enough to make good use of it have this right. Following Thomas of Aquinas, one could say article 27(3) demands that we simply take resources from those who have a surplus and give it to those in need of it. In the case of Soobramoney, however, the Constitutional Court argued that a prudent concern with this right would require that we use available resources in a way consistent with the *most effective*

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accueillir, au-delà de ma capacité: il faut donner ce que l'on n'a pas….[L]'hospitalité n'est pas dans ma générosité mais au delà de ma nature."

[48] Derrida et Wieviorka "Accueil, Éthique, Droit et Politique" in *Manifeste pour l'hospitalité* (fn. 47) 151-152: "Tel est bien, en effet, le paradoxe de la décision: bien qu'elle m'engage et qu'elle définisse ma responsabilité, ma décision est une décision de l'autre en moi. Pour qu'il y ait décision (s'il y en a), il faut qu' elle déchire le cours du temps, qu'elle soit irruptive. Elle ne saurait être le simple dévelopment de ce dont je suis capable, une simple explication de mes potentialités. La décision est tellement radicale qu'elle ne peut venir que d'un autre en moi. Je suis libre et pourtant je suis passif par rapport à cette décision qui me déchire, qui interrompt ma propre continuité. Le paradoxe est que lorsque surgit la décision, on est à la fois fondamentalement responsable et non responsable: la décsion est prise. D'où l'idée qu'elle est *de l'autre*. De même, donner de soi dans l'hospitalité c'est décider de s'exposer de s'offrir, de se donner, mais cette décision ne peut rester mienne parce que si je reste maître de cette décision, je ne donne rien. La décision me transporte, elle me porte plus loin que moi."

[49] Cf. Derrida "Responsabilité et Hospitalité" in *Manifeste pour l'hospitalité* (fn. 47) 114: Naturellement la responsibilité politique ne consiste pas à la faire une seule fois (ce qui relèverait de la grâce et non de la politique) mais à créer des situations juridiques relativement contrôlables, normées, stables pour que ces inventions soient plus faciles, que le croisement des différences trouve unce chance plus favorable."

[50] Cf. Derrida "Une Hospitalité à l'Infini" in *Manifeste pour l'hospitalité* (fn. 47) 100: "Les situations de pure hospitalité comportent donc une tragédie interne. Le passage au droit, à la politique et au tiers constitue, d'une certaine manière, une sorte de chute, mais, en même temps, c'est lui qui garantit l'effectivité de l'hospitalité."

[51] The following discussion of the decisions of the South African Constitutional Court in the cases of *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC) and *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) relies on insights gained in the course of many conversations with André van der Walt as well as from access to as yet unpublished writings of his on the social rights jurisprudence of the Constitutional Court. Cf. also the discussion of the *Soobramoney* decision in Van der Walt and Botha (fn. 21) 356-358.

recognition of the right (as implemented by the experts in the field of health care) of everyone in society to health care services stipulated in section 27(1). This right, the court argued, does itself not apply absolutely. It is subject to the provision in section 27(2) that stipulates the duties of the state vis à vis the rights in section 27(1) and (as the court's reasoning implies) 27(3). The right to emergency medical treatment and general health care was thus reduced to a right to "reasonable legislative and other measures, within [the state's] available resources, to achieve the progressive realisation of these rights."

Needless to say, this approach disqualifies the claim to expensive albeit life-saving/prolonging[52] kidney dialysis under circumstances where general healthcare is already under stress and the claimant, on top of everything, has a serious heart condition and is bound not to survive for very long in any case.

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.[53] It simply ordered the government authorities to redesign the housing scheme in order to also make provision for desperate cases. The court did rely on a deal (rather behind the scenes) with government that the immediate relief ordered by the trial court would nevertheless be granted, but would not commit the law it laid down to express a right to such immediate relief. It thus again inscribed a sacrificial legal logic into the abyssal encounter with the other, one that reduced the right to housing to the right to an efficient and reasonable housing scheme. The Court clearly adopted the language of efficiency, the language of economic sacrifice. The *extent* to which it did so, and really had to do so, can and must be scrutinised more carefully. This is the task of legal theory alluded to above. Far be it from

[52] Utility requires interpretative strategies. Life-prolonging is logically or analytically always a matter of life-saving, but not so, argued the court, when the exigencies of a healthcare system already under stress for lack of resources are to be taken into account. Cf. par 13 (at 1701H) and par 19 (at 1703H)

[53] 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."

me to say, on the basis of the meagre analysis offered here, that these cases were decided incorrectly. Suffice it to say that these decisions clearly illustrate the inner destruction of the demands of hospitality articulated in the South African Constitution.

V. CONCLUDING REMARKS

We need to re-think the plurality of the political in terms of the coming together of more than one, the coming together of at least two irreconcilable liberties. Merely expounding the juxtaposition of two, I and You, whose liberties cannot be reconciled (however irreconcilable they in fact are), does not suffice in this regard. It is *the coming together* of the irreconcilable that the political requires us to contemplate. We therefore have to think through the fundamental contradiction more fundamentally that it has been done hitherto. In this regard, we also need to come to terms with Kennedy's retraction of the fundamental contradiction in favour of *zap*. We need to distinguish clearly and understand incisively the relation between *doing* and *zap*. Doing always entails the sacrificial reduction of life chances that creates a particular political reality. Zap would seem to refer to a non-sacrificial exposure to otherness, a non-sacrificial otherness. It should be clear from the above that these two modes of coming together are not reconcilable. Sartres' political ontology, Kennedy's framework of inspiration, simply juxtaposes them without explaining the dynamic of the coming together of more than one. Sartre gives us only the objectifying, annihilation of otherness through which phenomenological consciousness or existential choice (ultimately the same thing) fashions its world, on the one hand, and blind and therefore un-objectifying love, on the other. The coming together of more than one that constitutes the political can simply not be thought on these juxtaposed positions.

The problem lies with a deep a-historicism in Sartre's work. His existential subject is the agent of his history and therefore fundamentally a-historical. The eventfulness, that is, the trans-subjective historicity of the encounter with otherness, finds no place in his thought. The central focus of Sartre's existentialism is the subjective freedom that makes history without succumbing to bad faith. He shows no regard for the free reign of historicity, the free reign of freedom itself (as Nancy might put it) that befalls subjectivity. What Derrida says about Schmitt's decisionism, is true also of Sartre's existentialist choice. Nothing happens to it.[54] Everything is the doing of the subject. *If this is so, how could blind love and/or intersubjective zap be anything but another mode of doing, another sacrificial objectification of otherness, a sacrificial denial of otherness, moreover, that denies its own sacrificial nature, a sacrificial denial of otherness that simply swallows the other with love, seemingly, without sacrifice?*

If zap would in anyway relate to an encounter with otherness or the coming together of more than one, it stands its only chance in the surprising event of hospitality, the surprising historical event which for reasons unbeknown to us, overcomes subjectivity and subverts the sacrificial arrangement of preferences of a present status quo. It is the

[54] Cf. Derrida *Politiques de l'amitie* (1994) 87.

surprising event or advent of hospitality, the event of a (new) desire for otherness, that allows us to contemplate a moment of law that exceeds and/or transcends economic preference and current sacrificial practices. Derrida would refer to this as the law's encounter with justice. We can call it zap if we wish. I have also referred to it as an encounter with a non-normative or e-normous human dignity. There are no special names. All of these terms hope to express a concern with the unfathomable and therefore nameless historicity of human existence.

An honest concern with the unfathomable historicity of human existence must acknowledge and remember that the moment or event of hospitality, zap, justice or e-normous dignity is the law's moment of lawlessness. It is the un-arranged feast that easily turns into a season of terror and rape.

Hospitality is therefore not something we can or should decide to do. It is something that we must deal with when it comes, and wisely so. Responding wisely to the law's moment of lawlessness would entail much more than a single elaboration can hope to do. I shall nevertheless attempt to articulate a certain guideline. "Responding wisely to the law's moment of lawlessness" would at least require a clear regard for the two extreme options that becomes possible in the moment of hospitality. On the one hand, the moment of hospitality confronts us with the chance of a reckless and spendthrift expenditure of the self that could lead to bankruptcy and ultimately to a lawless season of terror and rape. Who, who does have a heart, would not experience for a moment the rebellious thought that the claims of Thiagraj Soobramoney and Irene Grootboom should have been granted, that an infinitely higher claim should have been granted to Danderine Bailey,[55] *pereat mundus*? Who, who does have a heart, would not experience for a moment, in spite of Robert Mugabe's self-serving opportunism, a certain sympathy with the land-grab in Zimbabwe? But who, who does have a heart, would not be immensely disconcerted with the potential heartlessness of submitting to this rebellion, this "heartfelt" encounter with the event of hospitality and the demands of otherness?

On the other hand, who, who has a heart, would ever be able to simply turn away from the encounter with hospitality, the unfathomable and chaotic historicity that brings us face to face with the demands of the other on the self? Who, who has a heart, would simply opt to expediently maintain the self-serving economies of good order? Who would submit to the ultimately self-preserving demands of economic order without acknowledging the sacrificial denial of the other that this economic order involves?

These contradictory and paradoxical sinews of the heart that allow for the contracting and releasing rhythm of historicity and the encounter with otherness, constitute the precarious, elusive, and ultimately "completely" spectral abode for the *coming together of more than one*. As we have seen above: Plurality stands no chance without sacrifice, but plurality does not survive sacrifice. The political, conceived as the *coming together of more than*

[55] Cf. the discussion of *Southern Insurance v. Bailey NO* 1984 (1) SA 98 (A) in Van der Walt "The language of jurisprudence from Hobbes to Derrida (the latter's quest for an impossible poem)" in Bradfield and Van der Merwe (eds.) *Meaning in Legal Interpretation* (1998) 61 at 87-96.

one, would seem to depend on the ghostly apparition (appearance/disappearance) of the heart. But how does one contemplate a heart? *"Mais comment penser un coeur…?"*, asks Jean-Luc Nancy.[56] Perhaps in terms of the elusive moment of plurality, the spectral interim between self-destruction and the destruction of otherness that alone would signify the *coming together of more than one*.

This is the high drama of historicity, the advent of the political, that could come take place whenever common law or constitutional law jurisprudence engages in proportionality or balancing procedures. At issue in these proportionality or balancing procedures, to the extent that they do offer the political a chance, is an interim horizontality of mortals (fathomless like *psyche*)[57] that would expose the irreducible disproportion of the hierarchies to which we always return. In this regard, proportionality or balancing procedures can never be what they claim to be. They always end up re-instituting hierarchy and the precedence of the self over the other. Consider in this regard the intimate relation between *S v Goliath*[58] and *Soobramoney v Minister of Health, KwaZulu-Natal.*[59] However, balancing procedures could retain the memory of *an interim horizontality*, *an interim equality before the law* by owning up to the sacrificial return to hierarchy that they effect. As memory of sacrifice would they obliquely preserve the political as the coming together of more than one. Only thus can the law become *political* in a way that transcends the reduction of law to the dominant *economic* interests of the day: By risking and remembering (in its inevitable retreat) *the coming together of more than one legitimate interest* without which no significant legal dispute would ever exist.

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[56] Cf. Nancy *L'expérience de la liberté* (1988) 149 n 1.
[57] Cf. Derrida *Le toucher, Jean-Luc Nancy* (2000) 21, 254. Cf. also Van der Walt "Piracy, Property and Plurality" (fn.1): Re-reading the foundations of modern law" 2001 *JSAL* fns 70 and 83.
[58] 1972 (3) SA 1 (A), judging that it would be unreasonable for the law to expect a person to value the life of an other higher than his or her own.
[59] Cf. fn. 51.