PSYCHE AND SACRIFICE
An essay on the time and timing of reconciliation

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Author's Note

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I. KANT

The issue of "reconciliation" is fundamental to the modern understanding of law. We can take the Kantian definition of law as our point of departure in this regard. The law, Kant avers, is the total set of conditions under which the external liberty of one individual can be *reconciled* with the external liberty of other individuals under a general law of liberty.[1]

The law does not require that one make the liberty of another the goal or maxim of one's conduct. This Kant argues, is required by the categorical imperative, that is, by morality, but he draws a clear line between morality and law.[2] The second maxim of the moral law or the categorical imperative requires that a human being must be treated as an end in him- or herself and never as a means to an end.[3] Full compliance with the categorical imperative and therefore also with this maxim, averred Kant, would require a holiness that is not possible for mortal human beings. Hence the postulate of the immortality of the soul to make possible an unending moral strive towards complying with the categorical imperative.[4] Moral fulfilment, according to Kant, *is never to come* for mortals.

However, the law, Kant argued, does not require full compliance with the categorical imperative. The law does not require that one make the liberty of another the goal of one's action. It only requires that one do nothing that interferes with the liberty of another. And this, Kant says, is quite possible. One can completely fail to consider the liberty of another in one's actions and even deliberately aim to undermine the liberty of another and still leave the other's liberty intact, that is, still act lawfully.[5]

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* Professor of Law, Rand Afrikaans University. The subtitle could also have been, had it not thus claimed much too much for itself, "An essay on Bartók's *String Quartets*". This essay was written for and developed further in the wake of two workshops on Time and Reconciliation organised by Emilios Christodoulidis, Scott Veitch and Bert von Roermond in Edinburgh in May 2002 and in Tilburg in May 2003. I wish to thank all the participants for insightful and helpful comments. I also wish to thank the Leverhulme Foundation for sponsoring the workshops. Peter Fitzpatrick and Ann Van Sevenant followed the development of the essay with generous attention. My thanks also to them for encouraging and insightful comments. As always, shortcomings and errors remain strictly mine. A French translation of this essay appeared in *Des Lois & des Hommes* 2003 (1).

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

[2] Kant *Metaphysik der Sitten* (fn.1) 324.

[3] Kant *Grundlegung zur Metaphysik der Sitten* in *Werke in 10 Bänden* (fn.1) Band 6, 61.

[4] Kant *Kritik der praktischen Vernunft* in *Werke in 10 Bänden* (fn.1) Band 6, 252-254

[5] Kant *Metaphysik der Sitten* (fn.1) 338.

In other words, the reconciliation at issue in Kant's definition of law does not necessarily concern a truly or deeply moral affair. The law does not require us to act morally, it just prevents us from interfering with the liberty of others. It would therefore appear that the Kantian definition of law demands much less of us than morality does. However, experience tells us that it still demands too much. Too be sure, Kant was quite convinced that the external or legal liberty of individuals could be reconciled under the law. But this conviction turned on his trust that the free market system would eventually reconcile the external liberties of all individuals.[6] Kant did not yet have an awareness that the minimum level of wealth required for basic moral or at least legal autonomy does not trickle down to everyone as free market theory holds or at least used to hold. We are bound to think otherwise in the wake of the disastrous crashes of free-market systems at the beginning of the twentieth century. We no longer have reason to trust that the free market will ever live up to its claim to eventually make possible the freedom of every individual. Had Kant experienced the failure of free market systems in the twentieth century, he may well have had to postulate the eternal life of the market too, had he wished to stick to his claim that the law can reconcile the external liberties of all individuals. The time of legal reconciliation would thus also have been relegated to an indefinite or eternal future that *is never to come* for mortals.[7] This seems to be all that free market theories can still claim today. And, this, we shall see, must not be confused with the notion of a reconciliation that *is always to come*, as Jacques Derrida might put it.[8] The reconciliation that is always to come would seem to be exactly the same as the reconciliation that is never to come, but it is not. So the question will be when and how reconciliation *comes in fact* when it *is always to come*.

II. KENNEDY

The historical encounter with the failure of the free market to make good its promise of social justice gives us reason to believe that Kant's definition of law is much more contentious than it appears at first sight. The definition turns on the assumption that the reconciliation between external liberties is possible. The historical encounter with the failure of free markets suggests that it is not. This does not apply only to the free market of commercial transactions governed by private law systems. It also applies to the free market of cultural expression and social or political identity in multi-cultural and multi-ethnic societies governed by systems of constitutional law.

We should therefore consider moving towards an understanding of law that pivots on the lack or absence of reconciliation. Duncan Kennedy's analysis of law in terms of the fundamental contradiction immediately comes to mind in this regard.

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

[7] But given his egalitarian leanings, he may well have heeded or considered seriously Marx's point of view that the law itself must come to and end for some sort of reconciliation to become possible between individuals.

[8] Cf. Derrida *L'autre cap* (1991) 76.

The fundamental contradiction holds that our freedom is both dependent on and threatened by the freedom of others.[9] From this Kennedy infers a fundamental indeterminacy of law that gives rise to legal principles and judicial decisions that express either egoistic or altruistic considerations. From this indeterminacy Kennedy further infers the political responsibility of judges and other lawmakers. The law never gives us a straight or unequivocal solution to legal disputes, it always equivocates between egoism and altruism and thus always requires judges to make a political choice in favour of the one or the other. However, the indeterminacy thesis and the political choice it gives judges are not the most interesting inferences to be drawn from the fundamental contradiction. We shall take our leave of this Sartrean Kennedy who insists on an existential choice, in good faith, as the solution to ambiguity, this Kennedy who ultimately renounces the fundamental contradiction in favour of a thoroughly wilful self.[10] More interesting to pursue is the insight that the fundamental contradiction denies the possibility of a stable or fully present reconciliation of liberties. When one takes the fundamental contradiction seriously, one has to conceive of reconciliation in a different way.

The fundamental contradiction entails two aspects: 1) Liberty is dependent on the liberty of others. 2) Liberty is threatened by the liberty of others. The first aspect implies that the liberty of others cannot simply be denied. This point does not turn on the recognition of a need for social co-operation. It turns on the insight that the simple denial of the liberty of others, the acknowledgement of the exclusive liberty of the self would also destroy the liberty of the self. The liberty of one (at the expense of the liberty of all others) would give rise to a capriciousness that cannot be regarded as liberty. One cannot be free alone.[11] Solitary freedom would turn on the *inevitability* and *necessity* of all actions being an expression of the will of the self. This would account for even seemingly altruistic or self-denying conduct of the solitary free person. Inevitable or necessary wilfulness would be as coerced as any conceivable denial of liberty. The freedom of the self can only be called freedom (from necessity) when the freedom of others poses a threat to the freedom of the self, a threat that may or may not materialise as a real curtailment or even destruction of the self's freedom. The *uncertainty* of liberty in the face of the liberty of others (to interfere with liberty), indeed a certain lack of liberty that deprives liberty of guarantees, is crucial for the *experience* of liberty that is indispensable for the idea of liberty as an eventful or chance allowance or granting of liberty.[12] To take our leave of Sartre again: If we were doomed to be free, our freedom would indeed be doomed.

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[9] Kennedy "The structure of Blackstone's Commentaries" 1979 *Buffalo Law Review* 213.

[10] Cf Gabel & Kennedy "Roll over Beethoven" 1984 *Stanford Law Review* 1, 4, 6, 8 and the discussion of these pages in Van der Walt "Law as sacrifice" 2001 *Journal of SA Law* 710, 718-719.

[11] According to Nancy freedom necessarily concerns the sharing of freedom. Cf. Nancy *L'expérience de la liberty* (1988) 91-97.

[12] Nancy *L'expérience de la liberty* (fn. 11) 16: Mais la liberté, si elle est quelque chose, est cela même qui s'annule à etre fondé…Ainsi, la fin de la philosophie serait *délivrance du fondement* en ce qu'elle retirerait l'existence à la nécessité du fondement, mais aussi en ce qu'elle serait *mise en liberté* du fondement, qu'elle livrerait à 'la liberté' infondée." And at 164: La liberté se détruit en tout liberté, comme une haine initiale d'elle-même. Cf. also 68, 73.

Liberty is not absolute or complete absence of coercion but incidental or chance absence of coercion. All of this must be read into the notion of the fundamental contradiction: The liberty of the self is dependent on the threat posed to that liberty by the liberty of the other. The word "threat" contains the word "perhaps". One can only conceive of liberty in view of a certain "perhaps".[13]

The idea of the "perhaps" or "chance" of liberty harbours the possibility of liberty as that that never fully is, but may happen or come to happen. Therefore the understanding of the reconciliation of liberties in terms of that *that is always to come*. Liberty itself is *always to come*. Reconciliation shares in the perhaps of liberty. The patently reconcilable is in no need of reconciliation. It is the irreconcilable that calls for and opens up the possibility or *perhaps* of reconciliation. Derrida writes that one does nothing if one does not do the impossible.[14] In the same vain: Reconciliation is no reconciliation unless it concerns the irreconcilable. The "perhaps" at issue when liberty and reconciliation is at stake is a loaded "perhaps". It does not simply concern the "may be or may be not" of that which is "likely" or "quite possible" to happen. It concerns the "may be" of the "unlikely" or the "quite impossible".[15]

We need therefore scrutinise the time of the *perhaps*. At issue is the persistent imminence of the unlikely that resists the *never* of that *that is never to come* and therefore *not imminent*. Without the persistent imminence of the unlikely, human language must forgo the notion of a future that is not to be understood as the mere extension or continuation of the present. But can one really sever "persistent imminence" from "never"? Is the former not a mere euphemism for the latter? We shall have to consider the institutional setting of legislative, executive or judicial law-making in this regard.

III MAINTAINING THE IMMINENT THREAT TO/OF LIBERTY

Kennedy's eventual renunciation of the fundamental contradiction is accompanied or even motivated by a re-introduction of the notion of reconciliation in the form of "intersubjective zap".[16] It culminates in the call that we must go and do "zap".[17]

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[13] Cf. Derrida *Politiques de l'amitié* (1994) for a treatise on the perhaps and the forgetting of the perhaps, *le peut-être* and *l'oublie du peut-être*; Cf. also Derrida *Schibboleth* (1986) 33 on the *perhaps* of dates in Celan: "Une date n'est pas puisqu'elle se retire pour apparaître, mais *s'il n'y a pas* de poème absolu *(Das absolute Gedicht - nein das gibt es gewiss nicht, das kann es nicht geben)*, dit Celan, peut-être y a-t-il *(es gibt)* de la date - et même si elle n'existe pas."

[14] Cf. Derrida "Débat: Une Hospitalité sans Condition" in Seffahi (ed) *Manifeste pour l'hospitalité* (1999) 141.

[15] In other words, the impossibility at issue is not a simple impossibility but *im-possibility*, that is, the possibility that derives from impossibility. At issue is the *enduring antinomy* (*l'endurance de l'antinomie* - cf. *L'autre cap* (fn. 6) 71) of possibility and impossibility.

[16] 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." Cf. Gabel & Kennedy (fn. 8) 4

[17] Cf. Gabel & Kennedy "Roll over Beethoven" (fn. 8) 8.

How would zap find expression? Not on the basis of the invisible hand of the free market, experience tells us. On the basis of a regulated economy? The one who would regulate the economy on the basis of some notion of zap would be claiming not to be subject to the fundamental contradiction. He or she would be claiming that no one's liberty is threatened by zap. Zap would entail the real or realised reconciliation of liberties and the real or realised liberty of reconciliation. All of this would entail that the freedom of the self is reconcilable and indeed reconciled. There is a huge problem in this regard. The problem, however, is not that social reality belies the reality of zap. This, in fact, is a promise, not a problem. The problem is that the reality or realisation of liberty and reconciliation would destroy all scope for liberty and reconciliation. As pointed out above, reconciliation and liberty turn on a lack of liberty and reconciliation that would allow them scope to come. Liberty must be at liberty to come or not. Liberty and reconciliation turn on a differential antinomy or transition. Liberty is fundamentally the *liberty of movement* or the *movement of liberty*. The one who articulates the claim that liberty and reconciliation have materialised and the terms of this reconciliation and liberty will silence or at least claim to have silenced the demands for liberty and reconciliation.

The indeterminacy or ambiguity of a differentially transitional or an antinomical liberty always turns on a lack of liberty and this lack of liberty gives rise to the irrepressible demand for liberty. The claim that the reconciliation of liberties have materialised would therefore silence the demand of liberty in favour of a univocity that would not be liberty for it would deny the liberty do deviate or move away from this liberty. Capricious and fortunate, perhaps, but not free is the one who gets to lay down or regulate the terms of this "liberty". Unfree and most likely unfortunate are the rest. The fundamental contradiction should not be renounced because it is true to the *unreality* of liberty on which the transition or movement, the *coming* of liberty and reconciliation turns.

Legal decisions, be they legislative, judicial or executive, endeavour and claim to arrest the transitional movement of liberty in order to establish and stabilise liberty. They too claim to effect the univocity of zap. They cannot avoid making the claim to articulate the terms on which everyone's liberty and therefore the reconciliation of liberties turn. They claim to articulate what is *right* for everyone under the circumstances. The idea of the right answer in law and the idea of zap can clearly be seen to be one and the same idea or very closely related to one another. This idea attributes the need for legal change or new law not to the lack of rightness for all of zap or the right answer, that is, the lack of reconciliation that they embody, but from changed circumstances external to zap and the right answer.[18] The insight that social circumstances change as much if not more as a result of tensions erupting from a lack of zap and right answers in law or legally enforced social dispensations as they do as a result of earth quakes, volcanic eruptions or other events external to law, does not feature strongly in these ideas.

Reconciliation and liberty, which exist and do not exist, which exist because they do not exist, will continue to escape from the grasp of legal theory and legal rhetoric as long as

[18] Cf. Horwitz "The Supreme Court 1992 Term, Foreword: The Constitution of Change. Legal Fundamentality Without Legal Fundamentalism" 1993 *Harvard LR* 30-115.

this theory and rhetoric continue to claim to establish or effect, *albeit provisionally* (under existing social and other conditions), the full, complete or unequivocal presence of liberty and reconciliation and hence continue to relegate the causes for legal change to factors external to law. The law should be understood as part and parcel of the transitional movement of liberty and reconciliation, a movement that is fuelled by the enduring antinomy that the movement itself harbours (and fails to harbour, hence its motion). Liberty and reconciliation *turn* (move) on the enduring threat to liberty and reconciliation articulated well by the fundamental contradiction.

The legal decision, legislative, executive or judicial, should not seek to establish liberty. It should seek to maintain the always-imminent threat to liberty on which liberty *turns*. It should seek to maintain the movement of liberty. To be sure, the decision does not establish but suspends liberty (the decision *deliberates*, it is a *de-liberation*, argues Nancy[19]) because it suspends for a moment the reciprocal threat that more than one liberty hold for one another. The decision goes against the liberty of one in favour of the liberty of the other and for a moment, appears to render the liberty favoured safe and unthreatened. It reduces the ambiguity of the enduring antinomy of liberty to unequivocal meaning. This should not, however, be considered to be the realisation of liberty but the extreme point, the sharp edge of the threat to and of liberty, the watershed or turning point of liberty turning against itself in one way or another, against the one claim to liberty and towards another claim to liberty. The decision is thus itself the greatest threat to and risk of liberty.

Maintaining the threat to and of liberty, maintaining liberty's incessant turning against itself (Nancy refers to the self-hate of liberty[20]), can only take place as long as the turn remains a turn, as long as it does not signify a terminal development of liberty in favour of one liberty and at the expense of an other, a terminal development that arrests the movement of liberty. For the decision to maintain the movement of liberty, the decision should communicate that the liberty denounced in favour of another liberty remains a real threat to the liberty temporarily favoured. The next decision can rehabilitate the freedom denounced at the expense of the one currently favoured. This rehabilitation, moreover, would not depend on or be explicable with reference to "changed circumstances" external to the decision. The liberty temporarily denounced should remain a real threat to the liberty favoured even if "external circumstances" should remain the same. The decision in favour of one at the expense of another itself creates "new circumstances", new tensions that revitalise the threat of the denounced liberty and preserve the imminence of its return, even if only for reason of having been denounced. Only thus could the liberty favoured also be "preserved" or maintained as liberty and prevented from terminating in solitary capriciousness (temporary or not).

Only by thus remaining the threat that liberty holds for liberty, the very threat on which liberty as liberties depends, can the legal decision reconcile liberties or reconcile liberty with itself. In other words, reconciliation itself turns on an irreducible lack of

[19] Cf. *L'expérience de la liberty* (fn. 9) 178-181.
[20] Cf. fn. 10 above. Cf. also *L'expérience de la liberty* (fn. 9) 164,166.

reconciliation. Again, liberty and the reconciliation of liberty/ies moves on the energy of the enduring antinomy intrinsic to reconciliation and liberty.

Institutionally, sociologically or anthropologically speaking, we are dealing with the dynamics of sacrifice. Sacrifice, Girard, avers, concerns an (inevitably violent) attempt to reduce the ambiguous to the unequivocal (only to substitute it with the ambiguity of sacrifice itself).[21] The legal decision entails the sacrificial reduction of an ambiguous liberty (constituted by competing or mutually threatening liberties) to an unequivocal articulation of liberty. Sacrifice, however, pagan as its origins are, does not concern a linear movement towards a final resolution (or solution to) of ambiguity. It concerns the rhythm of sociality through which society maintains and/or endures its antinomies and ambiguities. At no moment of time can sacrifice claim to unravel the antinomy and reduce the ambiguous to the unequivocal. Sacrifice concerns a cleansing that cannot rid itself of impurity. Sacrifice concerns a ritual crime, a transgression that cannot transcend its criminality. Sacrifice is the violation of the inviolable. This dual or ambivalent nature of sacrifice is emphasised throughout Hubert and Mauss' *Essai sur la nature et la fonction du sacrifice* up to the point where sacrifice can ultimately be understood to constitute the creation of the gods through killing them. The gods are created by their sacrificial destruction.[22]

The legal decision concerns the sacrificial violation of the inviolable. The legal decision de-liberates the equal liberty of all before the law in favour of one at the cost of another. It sacrifices liberty. Yet, it sacrifices liberty in order to maintain or re-create liberty. In order to do so, however, the sacrifice involved in the legal decision cannot be allowed to end in abjection. The sacrificed must be understood to remain insacrificable. The violated must remain the inviolable. It must remain clear (amidst an unfathomable and irreducible lack of clarity) that it may well be and often is the most beautiful that gets sacrificed, the beauty of which or whom must come back to haunt the one who conducts the sacrifice. The liberty denounced by the legal decision must be considered to maintain its legitimate claim to liberty, it must be considered to maintain its threat to liberty, the imminence of which may well come to a head with the very next legal decision. Liberty cannot be rejected. It can at most be suspended at the incisive risk of all liberties not suspended by the decision, the incisive risk that actually also suspends the liberty favoured by the decision.

The suspension of liberty effected by the legal decision does not reject the liberty suspended. The legal decision dismisses a claim for now, but cannot disqualify it. As

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[21] Girard *La violence et le sacré* (1972) 10-104. Cf. also Goosen "Deconstruction and tragedy: a comparison" in Bradfield and Van der Merwe (eds) *"Meaning" in legal interpretation* (1998) 24-25. I am indebted to Peter Fitzpatrick for stressing the importance of Girard's and Mauss' work (cf. the next footnote) for the questions I have been pursuing as far as law and sacrifice is concerned. In following up his generously given references, I rediscovered the significance of Goosen's essay (and some conversations that I was fortunate to have with him some years ago).

[22] Cf. Hubert and Mauss *Essai sur la nature et la fonction du sacrifice* in Mauss *Oevres 1. Les fonctions sociales du sacré* (1986). And so is the figure of the father created by murdering him. Cf. Fitzpatrick *Modernism and the Grounds of Law* (2001), especially 11-36.

such, but strictly as such, it holds open the space for its *re-turn*. The reconciliation of liberties, if at all thinkable, must be thought in terms, not of an established or present reconciliation, but in terms of the rhythm or syncopation of the *turns* and *re-turns* of liberties that, like all rhythms, cannot sustain themselves, not even for a present moment, as a solitary beat. Even the present moment of rhythm displaces the presence of the solitary beat by the tensions of time or timing.[23] Reconciliation indeed concerns time or timing. It does not, however, concern timeliness, that is, the positive timing that would consolidate a solitary beat of a rhythm, a solitary turn of liberty in a present moment that would be "in time". Displacement or negation remains the key to the rhythm through which the single turn of liberty receives its turn. Reconciliation should be understood as the negative, the deleting or depleting re-conciliation of suspension as tension, *Spannung*, *Gespanntheit* or *Spanne*.[24]

The time or timing of reconciliation can therefore not be thought in terms of presence. Nor can it be thought in terms of a future not yet present, a future that will become present. Nor should it be conceived in a utopian fashion in terms of a future that will never come or never arrive. It must be conceived in terms of the non-time or negative time between present and future, the non-time posterior to presence and anterior to the future. We can refer to it as the *future anterior* or even a *present posterior*, provided we do not read into this yet another positive or present consolidation of time or reconciliation.[25] At issue remains the emptying interval of a tension or *Spannung*. Reconciliation does not occur in the present. Not does it or has it occurred in the past, nor should we expect it to occur in the future. It occurs as the time or timing that holds past present and future in play. Reconciliation concerns the reconciliation of past, present and future liberties. If the emptiness of time can hold its positive moments together, generations will live with and succeed one another, not reconciled, but in reconciliation.

Reconciliation is always to come. This does not mean that it never comes. It only means that it never arrives. It comes and goes without arriving. Reconciliation shares this movement with the explosion of love, with the turning point of sexual pleasure, or rather, the turning without point of sexual pleasure.[26] Yes, we would always want to retain it, but retaining it would destroy it. It would no longer be a matter of coming.

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[23] Cf. Heidegger *Zeit und Sein* in *Zur Sache des Denkens* (1976).

[24] Derrida *Le toucher, Jean-Luc Nancy* (2000) 48 n. 3, referring to Heidegger's use of the word *Gespanntheit* and to Nancy's essay "*Spanne"* in *Le Sens du Monde* (1993) 105-109. Nancy (at 105) quotes Heidegger *Die Grundprobleme der Phänomenologie (Gesamtausgabe Bnd 24)* (1975) 375: "Die Zeit ist in sich selbst gespannt und erstreckt. Kein Jetzt und kein Zeitmoment kann punktualisiert sein."

[25] And we would have to take into account the negative traces of the past (the non-past) as well. Heidegger's essay on time (cf. fn 23) and the treatise on time in *Die Grundprobleme der Phänomenologie* (fn.24) are probably still the most thorough as far as an understanding of time as non-presence is concerned.

[26] Cf. Nancy *Une Pensée Finie* (1990) 262: "Jouir n'est pas un achèvement, et ce n'est pas un événement (ou de moins, cela n'a pas l'unité d'un événement: mais, cest peut-être ainsi le paradigme de l'événement). Pourtant, ça arive - et ca arrive comme ça part, ça arrive en partant et ça part dans l'arrivée, du même battement du coeur. Jouir, c'est la traversée de l'autre." 261: Et la traversée - le venir-et-partir, les allées-et-venues de l'amour - est constitutive de la survenue [de l'être]. And as a traversal, love and sexual pleasure are neither here, nor elsewhere (but also not nowhere). Cf. 242: L'amour n'est donc pas ici, et il n'est pas ailleurs." The French word "arriver" that Nancy uses above should not be understood exclusively in terms

IV FLIPPING OR JUGGLING COINS (THE LIGHTER -TOUCH- OF CATCHING AND THROWING) AND ACKNOWLEDGING SACRIFICE

Let us embark on an apparently less but perhaps even more erotic metaphor. Frank Michelman writes:

> "Rather than trying (hopelessly, she is convinced) to offset the growing legitimacy deficit by ostensibly shifting bill of rights interpretation to a forum closer to the people, the [certified moral philosopher] moves to offset it by shifting decision *away from* exhaustive, express deliberation about what justice and morality truly require. She will henceforth route matters of bill of rights interpretation to a forum that visibly decides them on a relatively artificial or conventional basis - *not a coin flip, but something that, in context, looks in that direction*. She will do so precisely because she sees that questions of what justice and morality require of human rights interpretations are ones that an intensely divided population has come to see as not authoritatively decidable by anyone for anyone else."[27]

Michelman is acutely aware of the impossibility of reconciliation in intensely divided societies. Elsewhere he articulates reconciliation in terms of a Kantian regulative idea, that is, something that we must pursue despite the insight that we cannot attain to it.[28] It would seem that Michelman also understands reconciliation as that that *is never to come*. Hence the suggestion above that the lack of reconciliation should perhaps be dealt with in the meantime by something like flipping a coin. However, dealing with the problem of reconciliation in the meantime is what really matters. Hence the interest in the flipping of the coin in what follows. It points to something important that may well be much more pragmatic (or at least *tactical* or *tactful*) than the regulative idea.

Why should we not conceive of the legal decision in terms of flipping a coin? Once we accept that there is nothing normatively necessary in the evolution of societies, that social development is a matter of chance or sheer historicity, the legal decision, however normatively founded in a particular social context, inevitably becomes a matter of chance. As far as the history of a society is concerned, the incidental factors pertaining to crucial legal decisions (legislative, executive or judicial) are so unfathomable as to be quite comparable to the flipping of a coin. The outcome of the decision, the question which side of the coin will end up as "heads" and which as "tails", depends on the questions which side of the coin (whose morals, whose interests) is facing upwards initially, who gets to flip and exactly how forcefully so? And all of this depends hugely on the previous flip of the coin, and so forth. But how could and why would one invoke this self-conscious arbitrary procedure as significant for the problem of reconciliation?

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of the English word "arrive". "Arriver" in French can always also signify the verb "to happen" which is "an arrival" of some sort, but always in a very incomplete sense.

[27] Cf. Michelman "Dilemmas of belonging: moral truth, human rights and why we might not want a representative judiciary" 2000 *UCLA LR* 1244 (emphases added).

[28] Cf. Michelman "Human Rights and the Limits of Constitutional Theory" 2000 *Ratio Iuris* 65. Cf. also Van der Walt "Frankly befriending the fundamental contradiction. Frank Michelman and Critical Legal Thought" (forthcoming).

The self-conscious arbitrariness of flipping a coin is significant for reconciliation because of the way self-conscious arbitrariness undermines arbitration, because of the way it concedes the inexhaustible undecidability of what is being decided. And no one who resorts to the flipping of the coin in order to address undecidability will be so shortsighted as to believe that a single flip of the coin will suffice as a substitute for reconciliation. If reconciliation were to remain the end or at least the impossible issue of flipping a coin, the agreement would have to be that the coins should have to be flipped again and again. *For reconciliation to remain the issue of flipping the coin, the coin would have to remain airborne as long and as often as possible.* The way the coin falls, indicating who wins and who loses, is not what promises reconciliation. The landing of the coin is in fact the danger point where reconciliation is most at risk. That that precedes and follows the falling of the coin gives reconciliation its chance, that is, the intermittent glinting of the one and the other side of the spinning coin as it catches the sun, and not the full sun on the one side and the darkness on (beneath) the other as the fallen coin lies still. Reconciliation is *aletheia*.[29] As such, however, reconciliation (and judgement) is not the revelation of a deeper or secret truth. It is simply the play of closure and disclosure or showing and hiding of a political reality that does not exist otherwise.[30]

For reconciliation to remain the issue of flipping the coin, the coin would have to remain airborne as long and as often as possible. For this reason, the metaphor of flipping a coin can be improved by calling for a lighter touch. Juggling, the art of incessantly catching and throwing so as to avoid the falling or landing of a single coin (or something more spherical - why should we conceive of the problem of social reconciliation in terms of only two rather clearly defined and not many more rather less clearly defined conflicting interests?), comes to mind. The art of incessantly catching and throwing, the art of touching only to release from touch, the art of the lightest touch or non-touching, the art of the foot-loose juggler herself drawn into the air, herself thrown about like one of the things she juggles, the juggling and the juggled becoming indistinguishable (rendering meaningless the metaphysical grammar that distinguishes between the active and the passive voice[31]), this is the life of *Psyche* who is (pure) extension and knows nothing thereof: *Psyche is ausgedehnt, weiß nichts davon*, wrote Freud a year before his death,

[29] Cf. Heiddegger *Wegmarken* (1978) 175-236 (The essays Vom Wesen der Wahrheit (1930), Platons Lehre von der Wahrheit (1931/32/40).

[30] At issue is the play of veiling and unveiling that Heidegger discerned in the Greek word for truth, *aletheia*. This play of veiling and unveiling should, however, not be understood in terms of the revelation or disclosure of a mystery or secret. At issue is merely the observation that existence does not disclose itself fully at once, the observation that there is an irreducible veiling concomitant to unveiling. Cf. Nancy *L'expérience de la liberté* (fn. 11) 123. Nancy refers in similar vein to the rhythm of existence, its coming to and withdrawal (going) from presence (l'allée-venue à la présence). Cf. *Corpus* (2000) 100, 104.

[31] Cf. Derrida's deconstruction of the active passive distinction with reference to the word *aimance* in *Politiques de l'amitié* (fn. 12) 23. Cf. also *L'autre cap* and other texts.

repeat Nancy and Derrida, repeatedly.[32] And Psyche is tangible, but untouchable, at least for Eros who has the art of the caress. [33]

Judging, then, is juggling. Alas, to have to conceive of all this under the strain of gravity, with *gravitas* in other words, for the law never touches so lightly. How could the legal decision that inevitably deprives the real and legitimate claims of some in favour of others, release from its heavy hands the desire of the deprived to take flight again? *Il faut la rhetorique!*[34] Required is the real rhetorical gesture to those against whom the decision turned that no more than *a turn* is at issue. Someone lost, not because he or she had no legitimate claim, but because the ambiguity of multiple desires and multiple claims had to be reduced, for a moment, by *sacrificing* some in favour of others. This moment should be portrayed to be so momentary as to be a non-moment. And this is exactly what the acknowledgement of sacrifice would suggest: The decision that goes against you does not go against you because it is the right one for the moment, thus reducing the need for possible reconsideration to a future change of circumstances.[35] The decision that goes against you is not even right for now. It does not address a present moment. It forges a moment where there is none. You are simply the chance victim of society's sacrificial attempt to reduce the ambiguous to the unequivocal. Your desire, albeit over your burnt and burdened body, remains untouched.

Psyche is tangible, but untouchable.

V *L'AU-DELÀ DE L'AU-DELÀ*: BEYOND SACRIFICE, THE SOVEREIGNTY OF BEING, PERHAPS BEYOND SOVEREIGNTY TOO

Psyche is unsacrificable.[36]

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[32] Cf. Freud *Schriften aus dem Nachlass* in *Gesammelte Werke* (1999) 152; Nancy *Corpus* (fn. 30) 22; Derrida *Le toucher, Jean-Luc Nancy* (fn. 24) 22. In the cases of Nancy and Derrida, these are just the first of many citations of the phrase.

[33] Cf. Derrida *Le toucher, Jean-Luc Nancy* (fn. 24) 79: "Dire de Psyche qu'elle est 'étendu', même si Éros a le tact de ne pas la toucher, c'est rappeler qu'elle reste ou devrait rester, en tant que corps, tangible….Tangible certes, mais intouchable. Du moins pour Éros. Du moins quand il a du tact. Et l'expérience, voire l'expertise de la caresse"

[34] Derrida *Le toucher, Jean-Luc Nancy* (fn. 24) 336.

[35] Cf. again Horwitz's critique (fn. 18) of the changing circumstances conception of law reform.

[36] Both Derrida and Nancy articulate a resistance to sacrifice and the sacrificial metaphysics of the West, but they both do so in recognition of an inevitable destruction and destructiveness of existence. Cf. for instance Derrrida *Feu la cendre* (1987) 21: "Pas de cendre sans feu. Cela se doit au feu et pourtant, si possible, sans l'ombre d'un sacrifice…." Cf. Nancy *Une Pensée Finie* (1990) 105: "L'existence n'est pas à sacrifier, et on ne peut la sacrifier. On ne peut que la détruire, ou la partager." There is an undeniable difference between the styles of the respective resistances to sacrifice that Nancy and Derrida articulate. I shall not address this difference in what follows, except for this one brief remark: When Derrida invokes an existence beyond sacrifice, he does so with reference to *the impossible*, as is the case when he invokes notions such as the gift, justice, hospitality and forgiveness. An existence beyond sacrifice is not a present reality or possibility. It concerns the slender chance of the impossible becoming possible. He therefore clearly acknowledges the reality of sacrifice. Cf. for instance the recognition "that we sacrifice in order not to be sacrificed" in *Donner la mort* (1999) at 119. Nancy, on the other hand, asserts that existence is not to be sacrificed and cannot be sacrificed. Existence is the unsacrificable (*l'insacrificiable*). One can perhaps

At least for Eros who touches without touching.[37]

Alas, to have to conceive of all this under the strain of gravity, with *gravitas* in other words, for the law never touches so lightly. The law is not very erotic. It has not the skill of Eros, in any case, not yet. It is still too much in the grip of the concept. Or it is itself *the grip of the concept - Begriffsjurisprudenz*.[38] And when it sheds its conceptualism, it opts for a no less heavy-handed sovereignty, the right to decide *the exceptional case*.[39] Not only the right to decide the exceptional case, but also the exceptional right to decide the exceptional case. This is the deadly logic of Bodin that Schmitt elaborates so decisively and incisively: The sovereign would not have been instituted had he been supposed to simply apply general rules and refer the exceptional case back to the people. The exceptional case, the critical case, requires the non-procedural, exceptional decision. That is why the sovereign is there. Had the people had the capacity to decide the exceptional case, the sovereign would have been redundant.[40]

This also goes to the heart of Schmitt's devastating point *vis-à-vis* conceptualist jurisprudence. Had the law simply been a matter of applying general principles, there would have been no need for sovereign judgment. No one disputes the general concept. It is always the application of a concept in the exceptional case that is disputed and this application cannot be decided by just anyone. Hence the appointment of one with the exclusive and therefore the exceptional power to decide.[41]

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take Nancy's position in this regard, and generally, to also invoke a certain "counter-factuality" that is not a reflection of actual political and social existence, but a critical reply to it, as is the case with Derrida. However, Nancy's strategy or rhetoric in this regard is markedly different. Instead of contending an existence beyond sacrifice to be impossible, as Derrida does, Nancy argues that sacrifice itself is impossible. Sacrifice for him is a futile attempt to heal a wound of existence that is not really there. And instead of healing this imaginary wound, sacrifice only manages to destroy existence. If we could forego the attempt at sacrifice, we could avoid the destruction of existence and begin to take part in it, sharing in it and thus *sharing it* (*la partager*), despite the inevitable crisis or painfulness of this sharing (the crisis and painfulness that led Western methaphysical and political thought to imagine the existence of a wound that must be healed.) Again: "L'existence n'est pas à sacrifier, et on ne peut la sacrifier. On ne peut que la détruire, ou la partager."

[37] Cf. Derrida *Le toucher, Jean-Luc Nancy* (fn. 24) 51, 59, 82, 94.

[38] *Begriffsjurisprudenz* is where the Kantian definition of law took legal science. Cf. Kiefner "Der Einfluss Kants auf die Theorie und Praxis des Zivilrechts im 19. Jahrhundert" in Blühdorn and Ritter (eds) *Philosophie und Rechtswissenschaft: Zum Problem ihrer Beziehung im 19. Jahrhundert* (1969) 5. Also in France. Cf. Bürge *Das französische Privatrecht im 19. Jahrhundert. Zwischen Tradition und Pandektenwissenschaft, Liberalismus und Etatismus* (1991) 15-16, 42-62. My understanding of this development from Kant's theory of law to the conceptualism of the 19th century will always be indebted to conversations with André van der Walt.

[39] Cf. Schmitt *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität* (1996), Kennedy "A Semiotics of Critique" 2001 *Cardozo Law Review* 1162-1167.

[40] Cf. Schmitt *Politische Theologie* (fn.39) 15-16.

[41] Cf. Schmitt *Politische Theologie* (fn.39) 13-14. To the extent that the principle of sovereignty survives in the liberal understanding constitutional democracy, it is restricted to the legislator and the executive. The judiciary is understood to have no sovereignty, no right to decide beyond the application of rules. It is to the credit of Duncan Kennedy and other exponents of the Critical Legal Studies movement in the United States to have cleared up this mystification, unfortunately, only to adopt the doctrine of sovereignty *uncritically*,

So it is true, the decision remains inevitable. And sovereign is the one who decides.[42]

But sovereignty also concerns an old cruelty, a cruelty older than man.[43]

Hence Derrida's suggestion that sovereignty is ultimately a psychoanalytical problem.[44] But politically and legally, we shall see, the question is this: How to decide in order not to add *human* to *inhuman* cruelty? How not to add capricious to inevitable cruelty? How to leave cruelty to Being, how not to add human cruelty to the inevitable cruelty of existence? How to abdicate the sovereignty of the subject? How to leave the decision to the sovereignty of existence, the sovereignty of Being?[45] How to decide in a way that would inaugurate a community beyond sovereignty and beyond sacrifice, for the two are fundamentally linked?[46] And then from there: How to move beyond the cruelty or the sovereignty of Being?

To be sure, if the pure decision of existence or of Being, the inhuman sovereignty that belongs solely to Being itself were to be or become possible, that is, if the human being or the human judge could decide in a way that would simply let Being be, let existence be without adding to the agony of existence, it would still not imply existence beyond pain. Nancy, we have seen, invokes the hate that liberty holds for itself when he writes about evil (*le mal*).[47] The sharing of liberty (*le partage de la liberté*) concerns de-liberation, decision, cutting of liberty, cutting off of liberty, cutting into liberty. Liberty cannot but remain in pain and painful. But perhaps with the passage from the cruelty of man to the cruelty that is older than man, with the passage from human to inhuman cruelty (cruelty that is no longer the cruelty of man), the wound (*la plaïe*[48]) could make way for injuries less gaping. The wound, the big wound dealt by sacrifice could make way for the inevitable injuries (*les blessures*) and pain *(le douleur)* of bodily existence.[49]
The laceration that cuts existence into the spheres or half-spheres of the sacred and the profane and thus necessitates incessantly the bloody sacrificial return from the profane to

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also for judicial decisions. The notion that law is politics, politics in the sense of the exercise of sovereign or subjective discretion, has become the hallmark of the movement. Cf. for instance Unger *The Critical Legal Studies Movement* (1986) 1-4.

[42] Cf. Schmitt (fn.39) 13.

[43] Cf. Derrrida *Êtats d'âme de la psychanalyse* (2000) 70.

[44] Cf. Derrida *Êtats* (fn. 43) 77-78.

[45] Cf. the essay *La décision d'existence* in Nancy *Une pensée finie* (fn. 26) 107-145. At issue in this essay is the attempt to articulate *the decision of existence*, the decision that is not made by a subject but issues from the event itself. Cf. especially xxxx. Not laissez faire

[46] Cf. Derrrida *Êtats d'âme de la psychanalyse* (fn.43) 35-36, paraphrasing and citing Einstein's correspondence with Freud: "Très lucide, Einstein note encore que la minorité au pouvoir, dans les États-nations, a la main sur lécole, la presse et l'Eglise et que si les populations répondent avec enthousiasme à cette minorité d'hommes de pouvoir, *au point de leur sacrifier leur vie*, c'est que, je cite, 'en l'homme vit un besoin de hair et d'anéantir'." (emphasis added)

[47] Cf. fn. 12 above.

[48] Cf. Nancy *Corpus* (fn. 30) 67-71.

[49] Cf. Nancy *Corpus* (fn. 30) 87.

the sacred could make way for the inevitable and inevitably painful self-*de*-struction and self-*con*-struction, the self-*deconstruction* of bodily life.

For the world is not created by sacrifice.[50] The world, the co-existence of many things or many beings, the existence in common (*en commun*) of plural singularities, dawns upon us. The world is given to us with the fundamentally non-sacrifcial and egalitarian break of day, the dawn, *l'aube*:[51]

"L'aube est juste: elle s'étend égale d'un bord à l'autre. Sa demi-teinte n'est pas le clair-obscur du contrast ni de la contradicition. C'est la complicité des lieux à s'ouvrir et s'étendre. C'est une condition commune: non les espaces mesurés, mais les espacements sont tous égaux, tous de même lumière. L'égalité est la condition des corps. Quoi de plus commun que les corps? Avant toute autre chose 'communauté' veut dire l'exposition nue d'une égale, banale évidence souffrante, jouissante, tremblante. Et c'est d'abord *ça* que l'aube soustrait à tous les sacrifices et à tous les fantômes, pour l'offrir au monde des corps."

The dawn makes no exception. Without exception does the dawn not make an exception. With or as every new day does it spread its half-light evenly between all things. But how to decide so as to light up the earth evenly? How to decide without terminating the intermittent glinting of both sides of the coin? Nancy's invocation of the justness of the dawn evokes the non-subjective sovereignty or non-sovereignty (because it is not exceptional) of natural law. Of course, not the natural law of Grotius and Hobbes that is all about subjective sovereignty, but the natural law of Aristotle, Thomas of Aquinas and, perhaps, Locke.[52] But *who* will decide without selection or selectivity, without human or subjective sovereignty? *Who* will decide without adding to the *evidence of banal suffering* that not even the evenly spread dawn can erase from the joy and trembling of those receiving its light? This is the question that the Aristotelian and Thomist natural law tradition never addressed. The question of sovereignty. So confident was it about the absence of performativity in pronouncing the rules and logic of natural law and natural life that the bio-political question at the heart of the problem of sovereignty, the right to decide over life and death, could hardly be expected to emerge as a critical issue. It nevertheless laid the metaphysical foundation for the bio-political question to surface as the crucial question of modern political thought.

The metaphysical thought that underlay Aristotelian traditions of natural law turned on the attempt to come to terms with the apparent self-division of natural or bodily existence, the division between potentiality and actuality, between the self and the other of the self or the not-yet of the self. The great sovereigns of our time would eventually take it upon them to heal this rift, only to inflict the deeper and more gaping wounds of sacrifice, *the* wound of sacrifice. To heal the rift they could only resort to the absolute and final destruction of the self's other. Through destroying the surplus or supplement of

[50] As Hubert and Mauss would suggest. Cf. *Essai* (fn.22) 298-299.
[51] Cf. Nancy *Corpus* (fn.30) 43-45.
[52] Cf. Van der Walt "Piracy property and plurality. Rereading the foundations of modern law" 2001 *Journal of South African Law* 524-544.

otherness would the body and the body politic become one with itself.[53] This is the metaphysical principle that informed and still informs the sacrificial bio-politics and sacrificial sovereignty of modernity.[54]

But psyche cannot be sacrificed, one can imagine Nancy to argue. She is sheer extension. She does not belong to the rift between the sacred and the profane and thus cannot be subject to sacrificial transportation or trans-appropriation. She is related thus to *homo sacer*, the one who can be killed but no longer sacrificed, the one who is subject to the law only as an outlaw, as the one who is beyond law. She is thus also related to the pirate, the one who traverses the high seas freely, beyond the law.[55] *And* she is related to the citizen, the citizen soldier, the one who lives under the law, the one who can still be sacrificed. Who will kill the pirate? Who will kill psyche? Who will sacrifice her, thinking that she can be sacrificed even though she cannot? Who will sentence her to

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[53] Nancy relates sacrifice expressly to this attempt of the body to become one with itself and thus a material symbol of an absolute self-relatedness. Cf. *Corpus* (n. 30) 70: "Sacrifice…dit (en principe) le passage d'un corps à une limite où il devient corps commun, esprit d'une communion dont il est leffectif symbole matériel (*hoc est enim…*), rapport absolu à soi du sens dans le sang, du sang dans le sens."

[54] This of course evokes the narrative that Giorgio Agamben relates, not always quite coherently and quite convincingly, but certainly most intriguingly and suggestively, in *Homo Sacer. Sovereign Power and Bare Life* (1998 transl. Heller-Roazen). But there is a crucial difference between the point made above and Agamben's narrative. Agamben relates sovereignty, not to sacrifice, but to the bare life of *Homo Sacer*, the one who cannot be sacrificed. The argument above, to the contrary, insists on the connection between sovereignty and sacrifice that Derrida can be argued to invoke (albeit only obliquely). Cf. fn. 46 above. To explain this I shall make (for now) just one critical point as far as Agamben's narrative is concerned. *Homo Sacer*, to be sure, could not be sacrificed, only be killed, but that is indeed because he belonged to the ban (or reign) of the law only by being banned (this point Agamben makes well). As such, he relates to sovereignty negatively only. However, sovereignty has only a non-relation to *homo sacer* for having already banned or abandoned him, for having once had a positive relation with him in which he could still, at the time, be banned. But, if one follows consistently the narrative that comes to the fore so firmly towards the end of Agamben's book, the moment of banning must have been one of sacrifice, one of making the body politic *one*, *whole* or *holy* by expelling the unholy, by expelling that which is not-one-with the body politic. *Homo Sacer* cannot be sacrificed for having been sacrificed already. He is already sacred, no longer party to profane life. All that remains is to kill him (if expedient). Or to put it simply in Agamben's own rhetorical gesture: *Homo Sacer* relates to sacrifice by not being sacrificeable in the same way he relates to the law and sovereignty by not being under the law. But this sentence become so much more intelligible by phrasing it thus: *Homo Sacer* relates to sacrifice by *no longer* being sacrificeable in the same way he relates to the law and sovereignty by *no longer* being under the law. One can say sacrifice or expulsion completes the law (perfects the law, gives a perfect tense to it) and thus opens up a sphere beyond law, opens up the sphere of the camp, to use Agamben's leading metaphor in this regard. A comparison between the death of a German soldier in the war and the death of the Jews in the camps might be illuminating in this regard. The soldier, still a member of the *Reich*, still under the law, still had to be sacrificed for purposes of the oneness to which the Reich still had to attain. The Jews killed in the camp, killed clinically without the least ritual and the least sense of sacrifice, as Philippe Lacoue-Labarthe puts it (Cf. *Heidegger, Art and Politics* (1990 trans. Turner) 36-37, must have been sacrificed earlier on. Is it imaginable that the regular German person (whom one can imagine not to have been devoid of all human decency) could have supported or at least acquiesced to the removal of Jews from society without first invoking some grand racist justification? And what about those who were not racist and yet acquiesced to the racism of the National Socialism? Imagine Heidegger, inspired by Husserl, in love with Arendt. What immense sense of "giving up the invaluable for purposes of trans-appropriating another level of existence" must not have guided his engagement with the Nazis?

[55] Cf. Van der Walt "Piracy property and plurality" (fn. 52) 524.

death? Who will take her to war? Or, quite beyond the scope of capital punishment and thus across the world, also in countries that abolished capital punishment, who will allow her to die in squalor in order to protect property and wealth? The one who may decide, of course, the sovereign.

But what if there is no sovereign, or if everyone is sovereign, if sovereignty is no longer the exception and therefore no longer sovereignty? The paradox at the heart of democracy, Claude Lefort would call this, "the sovereignty of everyone and no-one."[56] This is the impossible paradox that would have allowed the day to break evenly over each and everything, the impossible paradox invoking a sovereignty of Being that is no longer exceptional and therefore no longer sovereignty. This is the law without sovereignty and beyond cruelty, if such a law is at all possible. This is the law that Derrida invokes, dreams about.

This non-sovereignty would inaugurate a different politics of the body. It would inaugurate a community or non-community of non-sovereign exposures, as Blanchot might put it.[57] It would inaugurate a exposure and traversal of bodies that turn or hinge on an irreducible exteriority or otherness between the one and the other. This exteriority will not be annulled for it would be the very site of the traversals and exposures that constitute common existence or existence in common (*en commun*).[58] The body or body-politic of this common existence will never be one with or within itself. It will be the site or sites of plural singularities. Nancy has a vision of the law that would facilitate this politics of the body that, perhaps for the first time, would not be a bio-politics (in Agamben's sense). He writes:

"The model of the body (*corpus*) is the *Corpus Juris*, collection or compilation of the Institutions, the Digestes and other Codes of all the articles of Roman Law. It is neither chaos nor an oganism: the body bears itself, not really between the two, but rather elsewhere. It is the prose of an other space, not abyssal, not systematic, neither collapsing [without foundations], nor founded. This is the space of the law: its foundation steals away to find its place (*son fondement s'y dérobe à sa place*), the law of the law is itself always without law. The law oversees (literally: overhangs, *surplombe*) all cases, but it is itself the cases of its institution, as strange to God as it is to nature. The body obeys the rule that goes from case to case, discrete continuity of principle and exception, of exactitude and flexibility (*de l'exigence et de la dérogation*). Pronouncing the law (*juridiction*) consists less in announcing the absoluteness of the law, deriving therefrom the reasons [for the decision] than in saying what the law can be *here*, there, for now, in this case, in this place.…local pronouncement, spaced, horizontal…"[59]

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[56] Cf. Lefort *L'invention démocratique* ((1994) 92: "La légitimité du pouvoir se fonde sur le peuple; mais à l'image de la souveraineté populaire se joint celle d'un lieu vide, impossible à occuper, tel que ceux qui exercent l'autorité publique ne sauraient prétendre se l'approprier. La démocratie allie ces deux principes apparemment contradictoires: l'un, que le pouvoir émane du peuple; l'autre, qu'il n'est le pouvoir de personne. Or elle vit de cette contradiction."

[57] Cf. Blanchot *La communauté inavouable* (1983) 25: "La communauté n'est pas le lieu de la Souveraineté. Elle est ce qui expose en s'exposant."

[58] I use the word common existence or existence in common to avoid the tightness of the word "community", a word that Derrida too, for this reason, tries to avoid. Cf. *Politiques de l'amitie* (fn. 12) 56-57, 330-331.

[59] Translated from Nancy *Corpus* (fn. 30) 48.

This is also what the image above of the judge as coin flipper or juggler wants to suggest. She is the one who does not hold on to old laws, old rights and the old vested privileges concomitant to these old laws and rights. Too much would fall to the ground if she were to do this. On the other hand, she does not catch hold of new laws, new rights and new privileges to hold on to them indefinitely. She catches hold of them with the clear knowledge, in advance, of having to let go again, forthwith. She is never master of the situation. The rhythm of existence dictates to her what she is to do. In a way, she abdicates sovereignty. Or she lets be the non-sovereignty of Being. She can only say what the law is today. She thus respects the dawn of every new day. She only asks, like Derrida and Valery: What are we to do TODAY?[60]

With this respect for the dawn and the day comes the journal and freedom of speech, comes the republic and a tentative meeting of Lefort with Heidegger. The sovereignty of everyone and no one that renders sovereignty unexceptional and therefore obsolete relates to the public structure or de-structure of time:

"The accessibility of the present moment (the now) to everyone characterises time as public. The present moment gives everyone access, and therefore belongs to no one."[61]

But again: Even without human sovereignty and human cruelty, the time of the republic or the republic of time is bound to remain painful. There will still be evidence of banal suffering. But the pain involved will only have been inflicted because there was no other way. It will not be aggravated by sacrificial attempts to heal it conclusively. It will be due, not to the cruelty of humanity, not to the cruelty willed by humanity, but a cruelty from which humanity cannot (yet) escape, a cruelty still older than man. This cruelty will belong to time itself. Hence the need to call this "the time of reconciliation", for nothing will yet be reconciled. This, *perhaps* (per happening, per event, from event to event, from day to day), will be the time or timing of ongoing or coming reconciliation.

[60] Cf. the repeated words of Valéry "Qu'allez-vous faire AUJOURD'HUI?" and the constant concern with "aujourd'hui" in Derrida *L'autre cap* (1991). Cf. also *Politiques del'amitie* (fn. 12) 330: "[Q]ue faire politiquement, aujourd'hui …." Of course; *someone* will still have to decide what we are to do today. But at issue here will be a hyper-minimal sovereignty that is subject to the exigencies of the day, this day, that day, one honestly "imagining" the impossible, namely, what it is that *everyone* would decide (without the least cruelty) under the particular circumstances of the day.

[61] Translated from Heidegger *Die Grundprobleme der Phänomenologie (Gesamtausgabe Bnd 24)* (1975) 375: "Die Zugänglichkeit des Jetzt für jedermann…charakterisiert die Zeit als öffentliche. Das jetzt ist jederman zugänglich und damit keinem gehörig."