

LAW, UTOPIA, EVENT

A Constellation of Two Trajectories

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Prelude

Ladies and gentlemen, about what am I actually speaking, when I talk from *this* direction and in *this* direction about the poem?

... the poem would thus be the place, where all tropes and metaphors want to be taken into the absurd.

Topos research? Surely. But in the light of that which must be researched. In view of the u-topos.

Meine Damen und Herren, wovon spreche ich denn eigentlich, wenn ich aus *dieser* Richtung, in *dieser* Richtung ... von dem Gedicht spreche?

... das Gedicht wäre somit der Ort, wo alle Tropen und Metaphern ad absurdum geführt werden wollen.

Toposforschung? Gewiß! Aber im Lichte des zu Erforschenden: im Lichte der U-topie.¹

I. INTRODUCTION

We begin with the prelude above because of Celan's invocation of the word "U-topie" in the last line. We do so because Celan's invocation of the word "U-topie" in this line reflects the fundamental transformation of the utopian imagination in the course of the

twentieth century. This transformation became abundantly evident in certain prominent trends in twentieth century philosophical thinking. Philosophy's role in this transformation was probably as performative as it was constative. Philosophy or at least some philosophy reflected or registered this transformation clearly but in doing so also contributed to it. The transformation of the utopian imagination was, however, not just the work of philosophers. It was also reflected in and effected by artistic and literary intuitions. Celan's lines cited above, the reflection of a poet on poetry, was surely an eminent case in point.

The trend of philosophical, artistic and literary thinking at issue here can be described, very broadly, in terms of a resistance to the way language and the exigencies of clear communication reduce the utterly incomparable uniqueness of *singular entities* or *persons* or *events* to repeatable and generic instances of fixed identity and stable meaning. At issue in this trend is what one might call, following Theodor Adorno, a negative-linguistic quest for the non-identity of singular existence that transcends or exceeds the identity-forging thrust of conceptual language. This negative-linguistic quest is utopian because of the way it contemplates the possibility of the impossible, as Jacques Derrida put it when he received the Adorno prize in 2001.² It contemplates completely non-instrumental relations between individuals that would not subject anyone to the systematic instrumentalisation at work in all generalising conceptual schemes.

The law, insisted Adorno, lies at the far end of this identity-forging thrust of conceptual language. According to him the law is evidently a kind of hyper conceptual language, the

extreme generic thrust of which ignores and suppresses the non-identity and irreducible otherness of singular existence. The quest for non-identity that is at issue in the thinking that Adorno called “negative dialectics” thus constitutes an endeavour to move as far away from the identity-forging quest of law and of all language that rests content with generic or generalising predication. Negative dialectics and the law thus move in opposite directions and it is exactly these opposite directions or trajectories of language, that Celan appears to contemplate with the invocation of two directions - from *this* direction and in *this* direction (aus *dieser* Richtung, in *dieser* Richtung). Section IV (The utopian response to the event) will return to Celan to elaborate this point further.

Why does one refer to the *transformation* of the utopian imagination in the philosophical, artistic and literary movements that have been announced here? In what way did philosophers like Adorno and poets like Celan change the utopian imagination? What was the utopian imagination like before twentieth century philosophy and poetry and art changed it? The utopian imagination began with Plato and endured for many centuries – in the thoughts of thinkers such as St. Francis, More, Rousseau and Marx – as a very topical and typical denunciation of private property. It typically viewed private property as the source of all social injustice and all forms of societal alienation. The utopian imagination thus became a very predictable and generic socialist resistance against the institution of private property before it turned, already to some extent in the work of Marx and then very evidently in the work of Adorno and other neo-Marxists, into a much more radical questioning of linguistic or conceptual propriety as such. This radical questioning of linguistic propriety – what Celan describes in the lines quoted above as the

wish of language itself to turn around and away from its regular quest for meaning so as to reach back into the absurd – was, however, surely not just a Marxist or neo-Marxist development. It reflected a broader movement in twentieth century thinking that was also clearly evident in the strands of twentieth century philosophical thinking that became known as phenomenology, post-structuralism and deconstruction. And, as already mentioned above, it was also clearly discernable in prominent literary and artistic sensibilities of the twentieth century. Section II of this essay (The transformation of the Utopian Imagination) will trace this development from Plato to Foucault (and Artaud) and ultimately to the Italian novelist Italo Calvino.

Italo Calvino's novel *If on a winter's night a traveller* is brought into the discussion of the transformation of utopian thought that follows because of the way it clarifies, along with Celan's invocation of the "absurd", what was ultimately at stake in this transformation. A utopian imagination that resists linguistic and conceptual propriety as such disqualifies itself logically from just pursuing an alternative conception of normative propriety. It can no longer entertain an alternative social vision that is more proper than ones that are currently deemed proper or improper. It cannot even contemplate the notion of non-alienated social relationships that are more *proper* to human existence than the societal alienation that results from private property relationships. At issue in this utopian imagination has to be something that can in no way be called "proper" or "more proper". This is why the notion of the *event* entered and changed the utopian imagination and why it still signals a core element of utopian thinking today. This is how the utopian imagination became radically non-normative. It

turned into a quest for any occurrence that disrupts propriety in every possible sense of the word. And it neither sought nor offered any justification for this quest. Silently but evidently, its concern with the event was simply assumed to resist the identities that social construction imposed on existence. “Madness beyond insanity”, Foucault calls it. Celan, we saw, makes mention of the “absurd”. Calvino, we shall see, calls it “an upheaval that still has no name [and] has not yet taken shape”. Following what one might loosely call the tradition of phenomenological thinking, I will rely on the notion of the “event” to denote this “upheaval with no name”, this “absurdity” and this “madness”.

However, the understanding of the event that will be elaborated in this essay will not be confined to the currency it received in the utopian imagination. In fact, it may well be the unwonted epistemological merit of the utopian imagination to have drawn social scientific attention to a concept that can be used as an analytical point of departure from where not only the utopian but also the non-utopian imagination can be described instructively. This is what will be done in this essay. Informed by a phenomenological concern with the event, the absurd appearance or emergence of singular existence, and informed by Celan’s prompt in the lines above, this essay will describe the relation between law and the utopian imagination in terms of an inception of two trajectories of responsibility. These two trajectories of responsibility, the legal and the utopian, take leave of one another from the moment that they emerge from the event that catapults *both* of them into existence. The utopian imagination does therefore not have an exclusive claim or relation to the event. The law too is fundamentally related to the event. The law is also a response to the event, albeit a very different response.

In other words, legal and utopian thinking have a *common point of departure*, departing from which they move in *opposite directions*. The relation between law and the utopian imagination can thus be described in terms of a *non-overlapping contiguity*. They touch one another, or may have touched one another once, for reasons of emerging from or having emerged from a common point of departure. But they then take leave and let go of one another, or have done so, for the sake of pursuing two different responsibilities or two different responses. Responses to what, may one well ask. Law and utopian thinking, phenomenology suggests, are two responses to the event from which they emerge. They are two modes of responsibility that emerge from and respond to a primordial event or happening. But they respond to the event from which they emerge in two very different ways.

It might help to contemplate here the picture of two wrist-locked trapeze artists flung into space from an origin of which they will henceforth only have a vague and ever vaguer memory. The relationship between them commences the moment their wrists unlock (all pluralities and all relationships can be said to commence with the “unlocking of wrists”). The relationship between law and the utopian imagination commences the moment they take leave of one another so as to summersault into two different trajectories. And the breath-taking questions will of course always be whether, when and how they might ever touch or be in touch again. Can they remain in some kind of orbit, perhaps orbiting around one another, sometimes coming closer, sometimes moving far apart, or must they simply move on and move off in completely different directions, ultimately becoming indifferent to and oblivious of one another?

It is along the lines drawn above that this paper will scrutinise the relationship between law and utopian thinking and the different trajectories that they must maintain should they seek to sustain some significant relationship between them. It will proceed to do so as follows. After the discussion of the transformation of European thinking in Section II, Section III will explain what is meant by the notion of the primordial event from which law and utopian thinking emerge and commence with their divergent trajectories. Section IV and V will look at the respective trajectories of utopian thinking, on the one hand, and legal thinking, on the other. Section VI thereafter explores the way in which the two trajectories of law and the utopian imagination can be considered to relate to one another. It does so by invoking the notion of a *Stoic difference* regarding the different trajectories of law and utopian thinking. *Stoic difference* concerns the way the different and divergent trajectories of law and the utopian imagination can be understood as a differential relationship that results from two different responses to significant events. The different trajectories of law and utopian thinking need not render them *indifferent* to one another. But the return of renewed wrist-locked continuities between legal and utopian discourses is no longer to be hoped for. The time for that kind of utopian thinking is over, at least in modern and postmodern societies that may wish to lay claim to the acrobatic act called liberal democracy. This act turns on the sustenance of an essential distance and difference between law and the utopian imagination.

II. THE TRANSFORMATION OF THE UTOPIAN IMAGINATION

The utopian imagination evident in More's *Utopia* is typical of renaissance humanism. More was a close friend of Erasmus, one of the most prominent humanists of the time, and *Utopia* is significantly influenced by core ideas of Erasmus. Crucial among these ideas were the identification and denunciation of private property as the source of most social ills. Erasmus' *Adagiorum chiliades* commences with two adages that he attributes to Pythagoras: "Friends have everything in common" and "friendship is equality". At issue in the text is a discussion of Plato's communist portrayal of the ideal society. The best kind of city and the finest laws, suggests Plato, are to be found where the Pythagorean adages are maintained throughout the city.³

The identification and denunciation of private property were, however, not the only and most likely not the most pervasive features of renaissance humanism. Renaissance humanism, at least as far as the history of legal theory is concerned, was pervasively informed by readings of the Stoic philosophers. And the teachings of the Stoic philosophers, and the broad legacy of these teachings in Renaissance and later Western legal thought, hardly require a denunciation of private property. They may well be understood to have sustained, quite to the contrary, the institution of private property.⁴ The difference between the utopian and the legal response to the event announced above can therefore be said to have found an early or prototype expression in the difference between a Platonic/Humanist denunciation of private property and the Stoic acceptance of the way private property appears to have become an inevitable social arrangement. One already notices here, in these two responses to property in Renaissance humanism, the emergence of the two opposite trajectories of law and utopian thinking.

A central feature of the Stoicism that Renaissance legal thinking rediscovered was the belief in a conception of universal human reasonableness that can be articulated positively and, at least ideally, positively embodied in personal ethics and social institutions. The rational school of natural law thinking of the seventeenth century (*Vernunftrecht*) can be traced directly to these Stoic roots.⁵ This humanist conception of reason as an intrinsic characteristic of human existence was pervasive during the sixteenth century. Influenced as it was by Stoicism, it was quite expectedly also markedly a-political and a-historical. Stoicism was from its very beginnings onwards an ethical or moral response to the pervasive political disempowerment of Greek citizens under the centralised imperial reign of Alexander. No longer able to take part freely in a political community that was sufficiently local to allow and require active participation in the life of the city, the Stoics sought and found existential meaning in a personal ethics and inner morality that turned on the idea of the natural rationality shared by all of humanity.⁶ The idea of moral universalism, the origin of which Alain Badiou would attribute to St. Paul,⁷ was already significantly present among the Stoics and it is plausible to accept that the Pauline universalism of early Christianity was a derivative of Stoic universalism.⁸ Moral universalism, however, is not a key element of the utopian response to the event that we are tracing. In fact, the moral universalism of the Stoics is in a fundamental way non-utopian. As will be come clear in the next section, and partly already in the next paragraph, the Stoic concern with moral universalism is much more characteristic of law's response to the event. It is characteristic of the decidedly non-utopian trajectory of the legal response to the event.

Pauline Christianity inherited a second characteristic from Stoic thinking. Alongside the moral universalism that it preached, Stoic thinking famously also contemplated and practised a dispassionate regard for the obvious imperfections of the human being. It understood that the very universalism that it contemplated was subject or exposed to these imperfections. The Stoics observed that universal rationality and reasonableness were constantly threatened and tarnished by human irrationality and unreasonableness. Their response to this constant standoff between the reasonable and the unreasonable was not to pursue the final triumph of the former over the latter. Their response to this standoff consisted in cultivating a dispassionate way of life that would ultimately contain instead of aggravate the threat that human imperfection posed to the moral universe to which all humans belonged. This dispassionate response had two sides, a personal or private and a public side. The personal side consisted in cultivating an inner calm that would not be upset by the unreasonable behaviour of others.⁹ The public side consisted, ultimately, in the articulation of a rational system of law that would prevent human imperfection and irrationality from ruining the minimum standards of rationality without which no human co-existence and commerce would remain possible.

Roman law was in fundamental respects a legacy of the Stoic concern with the minimum standards of reasonable sociability that sustain communal life. There was clearly a good measure of Aristotle in the mix of ideas that went into Roman law, but to the extent that the Aristotelian elements in Roman law comprised concerns that were not already assimilated by Stoicism (thus passing through Stoicism to Roman law), they were surely

not more utopian than the Stoic influences on Roman law. We shall return to the Stoicism embodied in Roman law and in law as such in Section VI. Suffice it now to make one last observation regarding the universalistic ethics and morality of the Stoics on which Roman law turned before we return to the trajectory of utopian thinking. This universalistic morality should not be confused with that which contemporary positivist theories of law may want to describe as a conflation of law and morality. Roman law maintained a tangible distinction and difference between law and morality.¹⁰ But it did turn on basic principles of universal reasonableness. As such it did turn on something akin to that which Hart described as the “minimum content of natural law” without which law can hardly survive as law.¹¹ That this conception of a *minimum* content of morality or natural law hardly confronts one with a utopian response to the event surely requires no further contestation.

The Stoicism that informed early Christian thinking received eminent expression in St. Paul’s instruction – in *Romans 13* – to the Christian community in Rome to respect and abide the laws of the emperor. Earthly rulers were ultimately appointed by God. This was the beginning of a line of Christian political and legal thought that would become central in the work of St. Augustine and would ultimately inform Luther’s denunciation of the peasant revolts of 1525.¹² Giorgio Agamben recently rearticulated this line of thinking in a brilliant reading of St. Paul to which we shall return presently. This line of thinking brought to the fore the Christian idea of two relatively separate spheres of existence, the earthly and the heavenly. St. Augustine articulated this idea in Books 18-20 of his major work *De Civitate Dei* in terms of the reign of two cities, the City of God and the earthly

city. In doing so, he bequeathed a form or mode of political thinking to European political thought that is crucial for any attempt to come to terms with the European tradition of utopian thinking and, more specifically, with the trajectory of the utopian response to the event that has been introduced above as the core theme of this essay. The crucial conception at issue here concerns the idea of *history* or *History*. Books 18 to 20 of *De Civitate Dei* relate the relation between the heavenly and earthly city in terms of a grand historical narrative. They relate St. Augustine's vision of history as the unfolding of God's eternal plan. The history of the world concerns the part of the plan in which the heavenly and earthly cities exist alongside one another in a constant state of conflict and tension. This phase of the plan, however, only prepares the way for the full revelation of God's glory and the final triumph of the heavenly over the worldly city at the end of time and history.¹³

Karl Löwith and Jacob Taubes observed more than half a century ago that the great modern philosophies of history of Hegel and Marx were secularised re-articulations of Augustine's grand Christian narrative.¹⁴ Their observations in this regard surely qualify Koselleck's understanding of history as a discovery of the modern age.¹⁵ The idea of linear *history*, as something qualitatively different from ancient *chronicles* that turned on cyclical or seasonal conceptions of time, surely already raises its head with Judeo-Christian Messianic expectations regarding a future king that would come to liberate and/or redeem the faithful from the woes of earthly existence. And St. Augustine's *De Civitate Dei* can surely be understood as the first grand philosophical and/or ontological articulation of this idea in European and Western political thought. Our present concern

with the trajectory of the utopian response to the event requires that one takes a closer look at especially the Christian idea of history, for there is an ambivalence in this idea of history that is crucial for the understanding of the difference between utopian and legal thought. This ambivalence would surface in the significant difference between the Hegelian and Marxist philosophies of history that would emerge from this Christian conception of history. The Hegelian narrative would sustain a Stoic element of Christian thinking that the orthodox Marxist narrative would abandon in no uncertain terms.

As already mentioned, St. Augustine justified the authority of earthly law and earthly rulers with reference to St. Paul's instruction to the Christian community to abide the laws of the secular sovereign. St. Augustine integrated the authority of secular law in God's overall scheme of the world on the basis of this instruction. God's greater wisdom ordained that the complete revelation of his glory first pass through a phase of partial and imperfect revelation, and this phase of imperfect revelation necessitated the institutions of earthly authority and earthly law.¹⁶ A thorough engagement with St. Augustine's oeuvre is not possible here. Suffice it therefore, for purposes of highlighting what one might venture to call an essential Stoic element in Christian thought, to rely briefly in what follows only on the instructive reading of St. Paul that Agamben articulates in *The Time that Remains*.¹⁷ St. Paul's letter to the Romans, argues Agamben, concerns an instruction how to live in *the time that remains* until the return of the Messiah and the final revelation of God's will and justice. St. Paul instructs the Christian community to respect the law, but also to live under the law *as if not* (ὡς μὴ) under the law. The messianic time in which the Christian community lives, pivots on this *as if not* experience. At issue in

this *as if not* experience of messianic time is not only a faithful refusal to identify earthly life with the fullness of God's glory, but also a resigned equanimity regarding the imperfections and evident injustices that prevail in this interim phase of God's ultimate plan.¹⁸ This resigned equanimity of the faithful vis-à-vis earthly imperfection can be highlighted as the crucial Stoic element in Christian thinking. The Stoics also had to come to terms with the evident contradiction that permeated their thinking. They had to reconcile their faith in the existence of natural reason in which all humans shared with the undeniable irrationality and failures of natural reason that often prevail in human affairs and consequently require regulation by coercive law.

The ambiguity regarding the possibility of earthly perfection evident in Stoic and Christian political thinking surely renders both these traditions of political thought significantly *non-utopian* or at least *incompletely utopian*. Both these traditions of political thought contained some "utopian" elements. Both entertained counter-factual notions (the redeemed Christian community, on the one hand, and the rational brotherhood of mankind, on the other). But they reconciled these "utopian" elements with the plain evidence of their imperfect realisation on earth. It is important to note, however, that certain trends in Christian thinking did at times edge closer to a full or fuller utopian imagination, especially when one takes the denunciation of the institution of private property as a key element of this imagination. Especially of note in this regard is the insistence of the followers of St. Francis that they never owned property. According to the Franciscans, they only used and consumed the clothes they wore and the food they ate. They never owned any of these goods that they used and consumed. For a while the

argument received papal protection under the *Exiit qui seminat* bull published by Pope Nicholas III in 1279, but it became increasingly exposed to critical refutation as the Franciscans became a powerful force in Catholicism that eventually controlled vast material resources. Especially Dominicans began to point out the hypocrisy evident in the Franciscan denial of ownership against a background of considerable affluence. Pope John XXII eventually withdrew the papal sanction of the Franciscan claim not to own property in his *Quia vir reprobus* bull of 1329. It is nevertheless important to note in this regard, how William of Ockham sought to justify the Franciscans' claim that they did not own property. The Dominicans accused the Franciscans of heresy, because the claim that Jesus and the disciples did not own property suggested that everything they used and consumed was used and consumed unlawfully. Ockham argued in response that Jesus and the disciples never claimed property rights of the goods they used and consumed under positive or earthly law (*ius fori*). They were never required to do so for no one ever contested their right to use and consume these essential goods. As such, they simply received the right to consume what they consumed from the law of the heavens (*ius poli*).¹⁹

The implication of the Franciscan claim and Ockham's defence of this claim was evidently that the Christian community could already begin to live a heavenly life on earth. The Franciscans clearly claimed that Christians could actually live *outside* the law or *without* law, not only under the law *as if not* under the law. Especially evident in this more radical Christian ethic is a watershed separation of the utopian and the legal, a watershed separation that would henceforth inform the markedly less ambiguous

conceptions of morality and ethics evident in especially Marxist philosophies of history. The central line in these Marxist philosophies would denounce property and the laws of the state that sustain property as functions of the phase of history characterised by class struggle. The classic line of Marxist thinking would regard property and law as functions of an interim fallen state of mankind that would come to the end with the proletarian revolution, the dismantling of the state, the dissolution of law and the inauguration of an administration of goods for which no law is required.²⁰ It is doubtful whether this Marxist vision still envisages any significant role for ambiguity and for Stoic resignation in the face of human imperfection in the post-revolutionary, post-historical, and therefore *futureless* “future” of redeemed humanity. Emphasizing such a continued need for Stoic resignation in the face of imperfection has nevertheless not been its conspicuous trademark. And it is a good question whether recognition of the need for Stoic resignation in the face of imperfection would not have blown the whole project with little delay, for it would surely have reintroduced recognition of the need for some form of coercive regulation of social co-existence that former times (times before the grand proletarian revolution) candidly called “law”.

The Hegelian philosophy of history is significantly different from the grand Marxist narrative in this regard. For Hegel the ultimate end of history would not deliver us from the need for law. For him, the ultimate goal of history was, in fact, the materialisation of a legal system based on the *idea* of individual freedom, not the materialisation of human freedom as such. There is enough textual evidence that suggests a significant measure of Stoic resignation regarding the gap between the historical *materialisation of the idea* of

freedom and the materialisation of freedom itself in Hegel's philosophy of history and law.²¹

The great European and Western philosophies of history would appear to have gone out of fashion for a considerable while now. One of the significant beacons in this change of fashion can surely be found in Jean-Francois Lyotard's annunciation of the postmodern condition of knowledge in terms of the end of the era of grand historical narratives.²²

What happened to utopian thinking in the wake of this postmodern turn? Did it disappear along with the grand modern narratives of history? It is in response to this question that this essay ventures one of its main theses or hypotheses: To the contrary, the European or Western utopian sensibility *radicalised* in the course of the postmodern turn in the sense of *returning to roots* that the great modern philosophies of history only served to obscure. One might say that the great European debate between those in favour and those against the institution of private property finally lost its fascination and gave way to a radically different understanding and exploration of the utopian sensibility in the Western imagination. In the process, an articulation of the utopian intuition came to the fore that was no longer content simply to denounce the institution of private property, but shifted its focus to a more radical resistance, namely, the resistance to the very notions of *propriety* and the *proper* that ultimately not only informed and conditioned the institution of private property, but also the rather *typical* and *topical* denunciations of property as *unnatural* and *improper* that have been around since Pythagoras and Plato and include among its legendary subscribers St. Francis, Erasmus, Rousseau and Marx. It is not entirely clear whether More actually belongs to this list or whether he articulated, instead,

significant incredulity regarding the insight into the impropriety of private property that ensued from utopian conceptions of true human nature.²³ Suffice it to say that More's *Utopia* provides one with a *typical* and *topical* articulation of the link between *proper human nature* and the *impropriety of private property* in Western utopian thinking, irrespective of whether he himself meant to endorse or satirise this link. And suffice it to observe further that a different line of thinking would emerge prominently in the second half of the twentieth century. This line of thinking would not only analyse private property, but all intimations of linguistic and normative propriety in terms of temporarily dominant and ultimately contingent outcomes of material power relations. Michel Foucault's inquiry into the constructed nature of the distinction between sanity and insanity and his invocation of a madness beyond this distinction as the real abode of liberty remains one of the principal beacons in this development. Friedrich Nietzsche's genealogical unmasking of the power relations that inform dominant conceptions of norms and normativity was of course a nineteenth century precursor of the postmodern turn against the grand narrative sustenance of propriety.²⁴ But let us stay with Foucault for a crucial statement regarding the literary and artistic turn to (an into) a madness beyond constructions of sanity and insanity, for one notices in this statement Foucault's lucid regard for this madness as a return to the beginnings of time and the primal emergence of worlds to which we turn in Section III below:

"It is indeed a question of that *Sleep of Reason* which Goya, in 1797, had already made the first image of the "universal idiom"; it is a question of a night which is doubtless that of classical unreason, that triple night into which Orestes sank. But in that night, man communicates with what is deepest in himself, and with what is most solitary."²⁵

“The madness of Nietzsche, the madness of Van Gogh or of Artaud, belongs to their work perhaps neither more nor less profoundly, but in quite another way. The frequency in the modern world of works of art that explode out of madness no doubt proves nothing about the reason of that world, about the meaning of such works, or even about the relations formed and broken between the real world and the artists who produced such works. And yet this frequency must be taken seriously, as if it were the insistence of a question: from the time of Hölderlin and Nerval, the numbers of writers, painters, and musicians who have “succumbed” to madness has increased; but let us make no mistake here; between madness and the work of art, there has been no accommodation, no more constant exchange, no communication of languages Artaud’s madness does not slip through the fissures of the work of art; his madness is precisely the *absence of the work of art*, the reiterated presence of that absence, its central void experienced and measured in all its endless dimensions.... By the madness that interrupts it, a work of art opens a void, a moment of silence, a question without answer, provokes a breach without reconciliation.... There is no madness except as the final instant of the work of art – the work endlessly drives madness to its limits; *where there is a work of art, there is no madness*; and yet madness is contemporary with the work of art, since it inaugurates the time of its truth. The moment when, together, the work of art and madness are born and fulfilled is the beginning of the time when the world finds itself arraigned by that work of art and responsible before it for what it is.”²⁶

We shall return below (Section IV) to engage more incisively with the key observations in this passage. Suffice it to only begin here with a general question: What was at stake in the pervasive twentieth century resistance to propriety and the proper and the very notion of sanity that underpins propriety and the proper? At stake was not only the resistance to the proper and propriety, but the most extreme resistance to the *topical* and *typical* that condition notions of propriety and the proper, an extreme resistance that borders on complete madness and opens up a void, a question without answer, a breach without reconciliation. To return to the lines of Celan with which this essay began: At stake was a

concern with the *u-topos* and the absolutely non-typical, the *absurd*. Ultimately at stake was a literary and artistic resistance to any language or idiom that has become current; a resistance against the reduction of language to currency, cliché and coinage. As far as Marxist or Neo-Marxist versions of this radical resistance against the proper is concerned, one might want to refer in this regard, following Jean-Luc Nancy, to *literary Marxist* resistances to the commodification of meaning, that is, to the primary *commodification of language* that underlie whatever secondary modes of commodification – economic, moral, etc. – take place in any society. At issue in this *literary Marxism* was or is a shift from typical and topical utopianism to a radical utopian concern with the *a-typical* and *non-topical*, that is, a shift from clichéd conceptions of socialist utopias that simply impute the same basic or natural needs to every individual, to an artistic and aesthetic exploration of the absolutely unique and singular manifestation and experience of existence.

Marx himself can surely be said to have made a crucial contribution to the opening of this *literary Marxist* register with his acute analysis of law in terms of the commodification, not only of labour, but also of the labourer him/herself. A crucial passage from the 1875 *Critique of the Gotha Programme* is especially significant in this regard. “Law”, wrote Marx in 1875,

“can by its nature only consist in the application of an equal standard, but unequal individuals (and they would not be different individuals if they were not unequal) can only be measured by the same standard if they are looked at from the same aspect, if they are grasped from one particular side, e.g., if they are regarded as workers and nothing else is seen in them, everything else is ignored”.²⁷

Adorno would re-articulate this thought 93 years later in *Negative Dialectics*, one of the pivotal texts in what one might call *the twentieth century turn from literal to literary Marxism*. Adorno wrote in 1968:

“Right is the primeval phenomenon of irrational rationality. It makes the principal of formal equivalence the only applicable norm. It cuts all sizes over the same last. Such equality, in which differences perish, surreptitiously privileges inequality”.²⁸

It is important to note the use of the word “particular” in the English translation of the passage from the *Critique of the Gotha Programme*. “Particular” would have been an apt literal translation for the German words “*partikuläre*” or “*besondere*”. But the word Marx used is “*bestimmte*”, the literal English translation of which would be “determined”. The degree of deviation from literal correspondence in this translation is felicitous, however, for it allows one to appreciate the *generically determined* nature of all particulars. It therefore also allows one to discern how ill suited the concern with *the particular* is as far as the radical utopian engagement with the a-typical, non-topical, the absolutely unique and absolutely singular is at stake. As Scott Veitch points out poignantly in his contribution to a highly instructive volume of essays on this thematic, the particular is always already a constructed or determined universal.²⁹ Jean-Luc Nancy’s exploration of a *Literary Marxism* similarly points out the array of surreptitious comparisons that always already inform invocations of the particular; hence his recourse to the word “singular” instead of “particular” for purposes of naming the key concern of the literary Marxist project.³⁰

It is therefore important to note in this regard that Marx's concern in the passage quoted above is not with *the particular*. At issue for him is *a critique of the particular*; a critique of the particular ways in which the law determines general categories of comparison. The passage reflects an acute awareness of the determined or generated and ultimate generic nature of any positive assessment of value and worth, however specified or specific such evaluation may strive to be. The roots of commodification can be traced to specification. Marx's and Adorno's concern in both these passages quoted above must therefore be with differences that cannot be specified or assessed positively. They are concerned, in other words, with *difference* that manifests as *difference* and nothing else. To come back to the central theme of this essay, the radical utopian concern with the a-typical, non-topical, the unique and the singular is thus a concern with *difference* that manifests itself as *difference* and nothing else. It is a concern with absolute non-identity, as Adorno put it.³¹ This of course implies that the radical utopian concern that has been announced so boldly here cannot be articulated positively. The radical utopian concern cannot be constative. Concerned as it is with difference that manifests itself as difference and nothing but difference, the radical utopian project can only allude to an elusive otherness that withdraws incessantly from all positively specified language. This is why the radical utopian project cannot be anything but a *literary project* that presents whatever it seeks to present (the word *representation* is deliberately avoided here) in an evocative form of non-contestation and non-predication. The radical utopian project must present itself as evocative and effective fiction that elicits an experience of difference and otherness without inviting comparison and without raising claims to comparable truths.

Difference that manifests as difference and nothing but incomparable difference is evidently what Italo Calvino is getting at in his enigmatic novel *If on a winter's night a traveller*. A crucial passage from the novel reads as follows:

“The book I would like to read now is a novel in which you sense the story arriving like still-vague thunder, the historical story along with the individual’s story, a novel that gives the sense of living through an upheaval that still has no name, has not yet taken shape....”³²

This passage calls for extensive commentary and we will return to pay more attention to it in Section IV below. Suffice it for now to only note well the notion of “an upheaval that has no name [and] has not taken shape” invoked in the last line. The cue that this invocation gives one is this: The literary utopian quest for the unnameable ends in a concern with nothing but a nameless and shapeless disruption of regular and predictable courses and patterns of existence that are well-known and well-named. If there is anything that is truly nameless and truly absurd, it is surely an upheaval or event that disrupts what we regularly know about and expect from the regular courses of existence. And if there is anything like a real event that is truly an upheaval with the disruptive force that merits being called an upheaval, it surely must remain absolutely nameless. Let us take a closer look at what is at issue when we invoke notions such as upheavals and events.

III. THE EVENT, THE COMMON POINT OF DEPARTURE OF LEGAL THOUGHT AND UTOPIAN IMAGINATIONS

We have it from physicists that the physical universe derives from something like a big bang.³³ Lack of expertise in this field of knowledge prohibits any closer engagement with this idea in what follows. Suffice it for now simply to point out some resonance between this natural scientific explanation of the origin of all things and the understanding of the origin or emergence of worlds in the tradition of philosophical thinking that Edmund Husserl called into social scientific currency with the philosophical method which he called phenomenology. One need not engage here with the structural mutations in the course of which Husserl's philosophical *method* transformed into a specific mode of philosophical thinking in the work of a number of key philosophers of the twentieth century, among the most prominent of whom are Martin Heidegger, Maurice Merleau-Ponty, Hannah Arendt, Jacques Derrida and Jean-Luc Nancy. The engagement with *the event of the world* is a prominent concern in the thinking of all these philosophers and the exposition of the event that figures as the common point of departure of the utopian and the legal in this paper draws deeply from the work of all these thinkers. No attempt will be made here to illuminate significant critical differences between them. At issue in what follows will simply be a thought that can be drawn from the work of all of them, namely, the suggestion that the human world does not just exist as a mode of a-temporal presence. The human world emerges *from* and *as* an event. Or, to put it more precisely and to register the irreducible plurality that is at play here: Human worlds emerge *from* and *as* events. They happen. They arrive. They do not simply exist in the a-temporal or significantly less temporal modes of presence that lay or everyday experience might attribute to sticks and stones and other inorganic entities, as if these objects might also

exist “beyond” or “outside” the human world (the grand epistemological puzzle of former times that current epistemology no longer considers meaningful).³⁴

What is the event? How does a world happen? How does it emerge from that which one may decide to call *nothingness* for lack of any word that would reach effectively into the abyssal linguistic void at issue here? Considering the way the event traverses a boundary that human comprehension and perception cannot cross, the event must be taken to comprise at least two basic components to which one can refer as the knowable and the unknowable or the known and the unknown. The event can accordingly be described as the very occurrence of the known and the unknown. The event produces an interface between knowledge and utter ignorance. It also produces a register of this interface. It brings forth renewed constellations of mute incomprehension and articulate understanding. The event is the differential hinge between the *sheer potential* of new registers and new constellations of knowledge/ignorance and comprehension/incomprehension that constitute human worlds. The event is also the very *emergence* of these registers and constellations. Utter ignorance and mute incomprehension are phrases that one may plausibly use to invoke the abyssal boundary of the event, the abyssal limit that emerges from the event or from which the event emerges. It is this abyssal boundary that Lyotard invokes when he suggests that no living person, not even survivors of the camps, really knows or knew fully what the holocaust was.³⁵ It is this same abyssal limit that Derrida invoked when he said that we shall never comprehend the meaning of 9/11.³⁶ The event, or the aspect of the event that produces knowledge and language, concerns a finite sip from infinite shorelines.³⁷ What

subsequently comes to be called “knowledge” retains, at best, an accurate after taste, or rather, an after taste the accuracy of which has not turned stale.

IV. THE UTOPIAN RESPONSE TO THE EVENT

We can now return to the three articulations of the utopian imagination invoked above, namely Foucault’s madness beyond insanity, Calvino’s nameless and shapeless upheaval, and Celan’s absurd poetry. For now that we have some idea of what is at issue when phenomenology invokes the notion of *an* or *the* event, we can also begin to fathom the transgression or transcendence of linguistic propriety that is at stake in the madness, absurdity and upheaval that Foucault, Calvino and Celan contemplate.

“By the madness that interrupts it, a work of art opens a void, a moment of silence, a question without answer, provokes a breach without reconciliation where the world is forced to question itself”, writes Foucault in the passage quoted above.³⁸ “There is no madness except as the final instant of the work of art – the work endlessly drives madness to its limits”, he continues. “[M]adness is contemporary with the work of art, since it inaugurates the time of its truth. The moment when, together, the work of art and madness are born and fulfilled is the beginning of time when the world finds itself arraigned by that work or art...”³⁹

Times begin and worlds commence to take shape in the intimate and close partnership between madness and art, suggests Foucault. “The world finds itself arraigned by and

responsible before” this partnership. And yet, art is not madness and madness not art. Art and madness are only contemporaries, contemporaries that accompany one another in that moment (that triple night into which Orestes sank [and still sinks]) when temporality commences, when time begins. But they are not the same, there is already a parting between them. “Artaud’s madness does not slip through the fissures of the work of art; his madness is precisely the *absence of the work of art.... where there is a work of art, there is no madness*”⁴⁰ Art is already sane and worldly enough (reasonable enough/presentable enough in public spaces) to be part of the world that is responsible before the partnership between art and madness. Art is already the *world’s* response to madness. It is itself part of the world’s “responsibility before” its partnership with madness. It straddles madness and the world that emerges from madness. Art is thus both arranged (part of the world that arranges it, notwithstanding the way it arraigns the world) and deranged (irreducibly in partnership with madness).

The poem, suggests Celan, likewise straddles meaningful language and an absurdity that is devoid of meaning. Celan tells us that the poem is the place – *der Ort* – where literary modes of language (tropes and metaphors – *Tropen und Metaphern*) want to be taken into the absurd. Alongside this first invocation of place as *Ort* he almost immediately introduces another word that signifies “place”, namely *topos*. He introduces *topos* in conjunction with research or *-forschung*. At issue is for him, then, is the research of place – *Toposforschung*. But the sense of the *place* that is at issue in this research of place understood as *topos* is evidently different from the sense of place that is denoted by the word *Ort*. The latter “place” invokes a locality, a spatial abode. At issue for him in the

research of place as *topos* is evidently a place in language, a linguistic place, in other words. European languages have been denoting this linguistic place, at least since Aristotle, with the word *topic*. A topic is a focus point of a discussion, conversation or text. It is also a *typical* focus point of a discussion. A topic is thus through and through a typical place *in* language and more specifically the form or mode in which this typical place takes place *in* language. Celan links *topos* or topic directly to tropes and metaphors. At issue for him are the modes and metaphors, that is, the ways in which language produces topics.

However, Celan is only concerned with tropes and metaphors and the ways of language in the light of that which is to be researched, namely, the non-place, the *U-topie*. The last line of the prelude starts in the form of an elliptic question: “*Toposforschung?*” The question at issue here is evidently this one: Is the poem the research of topos or topic[s]? Or, in view of the elaboration with which we have begun here: Is the poem or poetry the research of a typical place in language? Indeed/*Gewiß*, answers Celan, but only in the light of the non-place – *aber im Lichte der U-topie* – where the typical topics and typical tropes of language want to become completely untypical and non-topical. At issue for him in the abode of the poem is the non-place where language wants to become absurd – *wo alle Tropen und Metaphern ad absurdum geführt werden wollen*. Celan’s concern with the poem is clearly the concern with language that turns around and away from its identity forming typicality and topicality. It is time to turn around – *Es ist Zeit, umzukehren* – stresses a line that follows almost directly after the ones quoted above.

The about turn that the poem effects is nevertheless never complete. The poetic quest for the absurd that would turn completely away from language, from typical enough tropes and metaphors, would become unreadable. It would cease to be poetry. Celan is duly aware of this. The poem that would reach the absurd that it sets out to reach – the complete or absolute poem – does not exist.⁴¹ The poem that exists, the readable poem, is ultimately a failed attempt at straddling utopian absurdity and typical and topical language. In the language of Foucault invoked above: The poem is ultimately too much part of the world to sink completely into the madness of Artaud and the triple night of Orestes. The readable poem, however couched in a distant and strange self-designed darkness⁴² is still too intelligible to embody the very idiocy of Goya's *Idiot*. It cannot become this “shrieking and twisting” convulsion that, according to Foucault, “promises the birth of the first man and his first movement toward liberty.”⁴³

One will never name it, but one might be edging here – via Foucault and Celan – towards a sense of what might be at stake in Calvino's invocation of “an upheaval that still has no name” in *If on a winter's night a traveller*. Calvino himself stresses that the novel that he contemplates does not name anything. It only “gives the sense of living through an upheaval that still has no name”, that is, of living through something that cannot be named. It is important to reflect carefully on this *giving of a sense that does not name*, for not only is the straddling of language and absurdity – in Celan – and language and madness – in Foucault – again at stake here. It is also at stake in a way that throws more light on the enigmatic boundary that is crossed and not crossed in this straddling. One must begin by noting the tautological character of the whole phrase “give a sense of

living through”. “Sensing” is the essence of “living through.” “Living through” is first and foremost a matter of *sensing*. *Giving a sense* or *giving sense* therefore already facilitates or constitutes an instance of “living through”. At issue in the novel or in the response to the novel is therefore *not an imagination* of living through something. At issue is not an “as if” we are living through some event. The novel *gives* the sense. It gives, affords and facilitates nothing less than *an actual living through*. The novel allows for living through an event. As such, it does not concern the mere imagination of an event. It does not concern or entail an “as if” experience. As far as any *as if* experience is at all relevant here, it is the negation or the inversion of the *as if* that is really at stake in the novel. The real sense or experience of the novel is, in fact, an *as if not* experience. Reading entails vivid and visceral experience, as vivid and visceral as any other bodily experience; as vivid and visceral, perhaps, as a nosebleed. Sometimes it might take nothing less than a nosebleed to disrupt the experience of reading. Engaged reading produces the momentary sense of no longer being tied *by* the language *to* which reading is irreducibly tied. The actual experience of reading is therefore a matter living under (the law of) language *as if not* living under language.

The objection that the opposite is true, the objection that reading is an imagined experience and therefore an *as if* experience and not an *as if not* experience, contemplates a disembodied imagination from the perspective of which the very real existential threshold- or boundary-crossing experience of reading and the profound utopian role that this experience plays in human existence cannot be appreciated. The utopian and redeeming force of reading literature that Agamben attributes to literature in *The Time*

*that Remains*⁴⁴ is incomplete but real.⁴⁵ Literature produces par excellence the *as if not* or ὥς μὴ experience of messianic time, the experience of living under the law *as if not* living under the law. Reading *is* the redemption that takes place in the midst of and under law, the redemption that renders the experience of law unreal. What law? In the case of literature it is the general laws of language and linguistic reference that are concerned. It is the liberation from these laws that opens up a utopian or u-topical space that delivers the reader from the constraints of typical and topical language.

This redeeming utopian experience nevertheless remains incomplete. The sense of an upheaval that has no name and cannot be named, produced or induced by reading, remains irreducibly clouded in mystery. It is always inaccurate or untrue in a fundamental sense. Literature, suggests another passage from *If on a winter's night a traveller*, is irreducibly *apocryphal* in the double sense of the word. Not only is true literature “false” or falsifying. It is false and falsifying because it derives from a mystery that cannot be revealed. Calvino writes:

“Apocrypha (from the Greek *apokryphos*, hidden, secret): (1) originally referring to the “secret books” of religious sects; later to texts not recognized as canonical in those religions which have established a canon of revealed writings; referring to texts falsely attributed to a period or to an author....Perhaps my true vocation was that of an author of apocrypha, in the several meanings of the term: because writing always means hiding something in such a way that it then is discovered; because the truth that can come from my pen is like a shard that has been chipped from a great boulder by a violent impact, then flung far away; because there is no certitude outside falsification.”⁴⁶

The work of art does not embody madness, wrote Foucault with reference to Artaud. The truly absurd poem does not exist, insisted Celan. The novel derives from the secret, but falsifies it, suggests Calvino here. But the falsification at issue here is crucial for the utopian experience. The secret does not have an independent existence that then becomes falsified by language so as to only leave the reader with a sense of mystery. No, it is the other way round. The falsification wrought by language produces the mystery. The secret has no place of its own. It is not a place. It is the non-place, the *u-topos*. The irreducible falsification effected in language and art calls forth the u-topos, the split and threshold between Artaud's madness and the work of art, the poem and the absurd, the novel and its apocryphal origins.

We commenced with the proposition that the event is the common point of departure of both legal and utopian discourses. These discourses take leave of one another, we contended, because of the way they respond to the event in radically different and in fact in directly opposite ways. The utopian and the legal take leave of one another because of the fundamentally opposite or inverse trajectories of their respective responses to the event. It should now have become clear that utopian discourses concern an origin-oriented concern with the very event from which they emerge. As such, they entail much more than mere attempts to step away from privatisation and private property, as the classical history of utopian discourses would suggest. The radical utopian discourses of the twentieth century make clear that they seek to step back from the very notions of propriety and the proper that inform and condition discourses of private property in the first place. They do so in the hope of sustaining an experience with the absolute

singularity and ineffability of the event. The *absurd*, Celan calls it. *Madness* is Foucault's word for it. Calvino calls it *an upheaval with no name*. *An upheaval with no name* is an apt denotation for the ineffable event or the ineffability of the event that precipitates the beginnings of time and the origin of worlds.

The trajectory of literature, that is, the radical utopian trajectory of literature, consists in an incessant return to the nameless event from which this trajectory itself emerges like a shard flung forth from a violent impact. Literature is the incessant obsession to return to the event from which it derives. It is the utopian obsession to return to the event that flung it into language but to which it cannot return fully without losing its status as language completely. As Celan explains with reference to Buchner's *Lenz*, it simply seeks to return to or recall a date – Lenz's journey through the mountains – that it cannot recall from the inside of language from where it is doomed to commence.⁴⁷ That is why serious poetry and serious literature always put their linguistic status – their status as language – at risk. Not being able to return fully, however, literature ultimately remains the obsession to maintain sufficient proximity to the event. It is the obsession to maintain at least such proximity to the event as would still allow for the real sense of living through, living or reliving the event. This is where significantly a-typical and non-topical u-topian sensibilities have arrived today. This is the trajectory of its response to the event. The time has come now to look at the very different trajectory of the law's response to the event.

V. LAW'S RESPONSE TO THE EVENT

If it is correct to say that the trajectory of law's response to the event is the exact inverse (180°) of the trajectory of the utopian and literary response to the event, and if it is also correct to say that literature shares with the experience of messianic time the experience of living under the law (living under the law of language, in the case of literature) *as if not* under the law, the following statement should offer an accurate assessment of the law's response to the event: Law responds to the event by acting *as if* it is law. Law's response to the event is not really or is surely not fully *an instance* of law. It is much rather a matter of staging itself or styling itself as law. The question whether all of this is correct or not need not be addressed directly in what follows. Suffice it simply to say for now that the assessment of law that has just been offered here is exactly the assessment of law's status that one finds in Hans Kelsen's pure theory of law. According to Kelsen, law never quite exists. The existence of law cannot be posited or asserted (*gesetzt*). The existence of law must be presupposed (*vorausgesetzt*). One must deal and work with the law *as if* (*als ob*) it exists.⁴⁸ And this is so, argues Kelsen, exactly because of the way the law is, in the final analysis, always a response to an event.

Why does Kelsen argue in this way? He argues thus because of the problematic and ambivalent status of the foundational norm or *Grundnorm* in his pure theory of law. The pure theory of law requires that every legal norm in the hierarchical system or pyramid of the law be fully validated by a higher norm. This would appear to be reasonably feasible in a legal system where one apparently already has legal norms in place that can and must be invoked as validation for all other legal norms lower down in the system of law. The

problem is, however, that the foundational norm or Grundnorm at the apex of the legal system that is required to validate the rest of the legal system, itself lacks a higher norm that could validate it. The foundational norm thus remains fundamentally *invalid* or *unvalidated* (as opposed to invalid and invalidated). And if the foundational norm remains invalid, the whole system of law supposedly validated by the foundational norm also remains fundamentally invalid. Not only can a pure theory of law thus not assert the validity of the foundational norm. A pure theory of law cannot assert the validity of any legal norm. A pure theory of law must therefore rely on a whole series of presuppositions through which the law is held to be law. The pure theory of law deals with non-law and works with non-law *as if* it is law.

In what sense can and must one say that all of this is the inevitable consequence of the law's response to the event? One can and must say this because of the way real or empirical legal norms are always a response to some or other urgent historical exigency. This is true of national constitutions (or trans-national conventions or treaties) – the empirical or impure instantiation of what should have been a pure foundational norm – and all other legal rules that are based on such national constitutions or trans-national conventions. National constitutions or transnational conventions assess and respond to a historical situation that calls or at least appears to call for the inauguration of a new jurisdiction and the installation of a new legal system. What happens in this historical moment of assessment and response can obviously not qualify, *ab-initio*, as valid. The assessments and responses that take place here eventually receive validation in the course of an extended process of non-legal intervention and/or lack of intervention. The validity

that eventually emerges from a function of a mixture of historical and sociological commitment, contentedness, acquiescence and adequate familiarity that usually goes by the name of “legitimacy”.

Compared to validity, legitimacy is a vague and diffuse notion. It is therefore also a highly contentious notion. Legitimacy can therefore not be invoked under circumstances where some or other crisis or conflict demands recourse to the constitution or convention as an instance of law that everyone can be expected to abide, for the contentiousness of the situation will most certainly spill into, contaminate and inundate whatever “legitimacy” may have existed or may have appeared to exist before and up to the moment of crisis. Every instance of significant crisis would therefore reopen the initial assessment of and response to the historical exigency that the constitution or convention *was supposed* to have settled. The enduring existence of constitutions and constitutional law surely depends on sufficient degrees of legitimacy (contentedness, acquiescence, familiarity) as Hart points out well with the assertion that the effective survival of legal systems depend on sufficient levels of *internal aspect*.⁴⁹ But it should also be clear that no constitution would constitute law and found law if such constitution and foundation of law were to depend on legitimacy. Legitimacy (sufficient commitment, contentedness, acquiescence, familiarity) is exactly what is in question or in crisis when we seek recourse to law. Legitimacy can therefore not be invoked as an answer to legal questions for law is exactly that to which we turn, not to answer or resolve questions of legitimacy, but to terminate them. We terminate a question of legitimacy by *supposing* or *presupposing* that we have law that terminates the question.

This is the crucial move of Kelsen's pure theory of law. The pure theory of law turns on the presupposition of valid law and legal validity that never exists in or as fact. Factually or empirically speaking, "law" or what was or is supposed to be "law" will always run the risk of disintegrating and evaporating in the face of legitimacy questions. Law only exists as long as adequate numbers of sufficiently powerful individuals continue to *presuppose* the *prior, a-priori* and therefore *precedent* existence of law (which of course would historically only happen – this is Hart's point – as long as adequate levels of legitimacy or adequate levels of *internal aspect* prevail). The pure theory of law considers law to pivot on the act of purification that takes place when questions of legitimacy are terminated or substituted by presuppositions of validity. This act of purification is the sacrificial heart of law. The ancient rites of sacrifice were essentially rites of purification and law will never sever its definitional ties with these rites.⁵⁰

What happens at the level of constitutional law also happens at every lower level of law that depends on the constitution. Constitutional questions may sometimes appear to be settled. A legal dispute may appear only to involve the contentiousness of some or other lower level rule of law, say some rule of private law. The identification of a valid and applicable private law rule again turns invariably on a sacrificial act of purification that settles the dust and impurity of some social ambiguity. There would have been no dispute or conflict had there not been ambiguity. Ambiguity is the essential impurity that law has to terminate. The sacrificial termination of ambiguity is the essential purification that produces pure law. The impurity of social ambiguities that informs private law disputes

had better be dealt with adequately at the level of private law adjudication, for this impurity surely harbours the potential of contaminating the whole system of law right up or into its constitutional roots. The need to do so has never been addressed adequately in the pervasive literature on the so-called horizontal application of constitutional rights.

The event – a date; an occurrence; a sudden irruption of discontent; the irruption of ambiguity that conditions discontent – is the essential impurity to which the sacrificial purification of the law responds. It should already be clear that the trajectory of this purification is one of *distancing*. Law distances itself from the event. It takes leave of the event. Its trajectory is exactly the opposite of the literary utopian or radical utopian response to the event. Law and radical utopian literature constitute two opposite responses to the event. As such, they relate to one another by taking leave of one another. They only begin to relate to one another when they begin to take leave of one another. Those who would wish to propose a different, closer, overlapping, mutually informative or wrist-locked relation between law and utopian literature should first try to imagine the dark eye of an ancient and eternal hurricane, the *u-topos*, the pure impurity of the event, the nothingness in which all is still one and nothing relates to nothing.

VI. STOIC DIFFERENCE AND INDIFFERENCE – SOME CONCLUDING THOUGHTS

Martha Nussbaum's work *Upheavals of Thought* presents her understanding of emotions as upheavals of thought as a neo-Stoic position.⁵¹ She takes from the Stoics the

conviction that emotions are evaluative cognitive appraisals. But in doing so she also takes leave of two fundamental tenets of Stoicism. The first concerns the conception that the cognitive content of emotions is invariably misleading. The second concerns the ethics of emotional indifference that the Stoics developed on the basis of their general distrust of emotions. She rejects both these positions and seeks to develop instead a more nuanced view that recognises the way emotions can lead moral judgment astray, but also realises that they remain indispensable for sound moral judgment.⁵² We are moving to the end of this essay and the short engagement with her formidable argument that follows cannot do justice to it. However, it is instructive to briefly compare the key arguments in *Upheavals of Thought* with the assessment of the relation between law and the utopian imagination that has been articulated in this essay.

In contrast to the Stoic denunciation of the distorting role of emotions in moral deliberation, Nussbaum seeks to rehabilitate emotions as an instructive source of moral deliberation. According to her, emotions provide sound moral deliberation with an essential relation to reality without which moral judgment would not even become the existential issue that it is for humans. Emotional responses provide moral deliberation with an indispensable *aboutness*. They render moral deliberation reality- or object-related.⁵³ They are the upheavals that call forth moral deliberation. In this regard her thoughts would seem to resonate strongly with the engagement in this essay with Calvino's invocation of an *upheaval with no name or shape*. However, Nussbaum's concern is surely not with the literary utopian return to this nameless and shapeless upheaval. The trajectory of her thinking in *Upheavals of Thought* is evidently the

trajectory of law, the trajectory through which the law distances itself from upheavals or events. Her concern is not precisely with legal judgment but with moral judgement, but the crucial thrust of moral and legal judgment is the same as far as their respective relations with the utopian imagination are concerned. At issue in both is the articulation of sound acts of generalisable judgment (at which all reasonable people should eventually arrive) with recourse to which one can extract and distance oneself from the immediate chaos of the event.

Forceful emotions enter the hurricanes with which worlds begin and end and they draw us into their obliterating chaos. Only when they subside do we find ourselves able and necessitated to withdraw from the event and re-establish degrees of equilibrium by means of sound moral and legal judgement. Utopian literature resists this withdrawal and seeks to re-enter the event. It continues to live through and in the upheaval or seriously attempts to do so. It pivots on a relentless and obsessive *aboutness*. One might diagnose it psychoanalytically as a serious case of melancholy, if not hysteria.⁵⁴ Law prudently departs from the *aboutness* of the event. Law is not *about* the event. It relates to the event by leaving it behind. Whether it does this with some regret depends on the extent to which it consciously recognises that it does so, as Kelsen's pure theory of law does.

Nussbaum's assessment of the relation between law and literature is quite in line with the trajectory of her thought in *Upheavals of Thought*. According to her, good literature can contribute to good legal judgment. It is a source of sound legal insight. It moves in the same direction in which the law moves. Her views in this regard are not implausible.

There may well be a genre of “literature” that is simply aimed at moral enlightenment and legal instruction. Such “literature” would indeed move on parallel lines and in the same hermeneutic direction that law moves. But this kind of “literature” would surely not be helpful as far as the attempt to understand the relation between law and the utopian imagination is concerned.⁵⁵ It would not be concerned with the shapeless and nameless *aboutness* that Celan discerns in Lenz’s journey through the mountain. It would be concerned with re-establishing desired degrees of stability and equilibrium in the wake of the devastation that results from this shapeless and nameless *aboutness*, not with this *aboutness* as such. In this respect, Nussbaum’s engagement with the relation between law and literature is surely not utopian.⁵⁶

Be it as it may, a reassessment of the legacy of the Stoics indeed appears uncircumventable for any thorough engagement with the relation between law and utopian thought. The thoughts that have been developed in this essay nevertheless call for a reassessment of Stoics ethics that differs significantly from the one on which Nussbaum embarks in *Upheavals of Thought*. It calls, in fact, for the question whether the concept of Stoic indifference was not in fact informed or at least accompanied by a radically differentiated ethics that one may plausibly call *Stoic difference*.

The massive hermeneutic weight and textual evidence that inform the concept of Stoic indifference is undeniable. At issue in this concept is the common reading and conception of Stoic ethics that has prevailed for millennia, namely, the conception that Stoic ethics turn on the ability to remain calm in the face of the painful imperfections of this world.

Stoics reconcile themselves with the world and with fate.⁵⁷ In this respect they are fundamentally non-utopian. This assessment of Stoicism is accurate, but it fails to do justice to its complex legacy. We already noted the ambiguity of the Stoic mind-set above. We noted the Stoic conception of and faith in universal reason that informs Stoic visions of natural law. But we also noted that the Stoics entertained no illusions regarding the actual materialisation of this universal reason. From this perspective, at least, it seems wrong to impute *indifference* to them. Indifference may well be imputed to the Cynics, a school of philosophy closely related but significantly different from Stoicism, but not to the Stoics themselves. Considered carefully, the Stoic regard for universal reason and natural law, on the one hand, and human imperfection, on the other, may well justify an understanding of Stoic philosophy in terms of an acute regard for the fundamental tensions, differences and differentiations that condition human existence. It is instructive to highlight two of them:

1) Human existence is conditioned by faith in universal principles of reason, on the one hand, and a pervasive failure to comply with them or to articulate them consistently, on the other.

2) Human existence is conditioned by profound yearnings for existential fulfilment, on the one hand, and acute wariness regarding the disastrously destructive potential of these yearnings.

These two tensions may well be counter sides of the same coin. Quests for existential fulfilment may well be the root cause of disastrous and destructive failures of reason. Attempts to maintain or restore compliance with principles of reason may well stem from wariness regarding the catastrophes to which quests for existential fulfilment may lead. Should there be any substance to the way the relation between law and utopian aspirations has been articulated in this essay, it may well be because law and utopian aspirations represent the quintessential trajectories along which compliance with principles of reason and quests for existential fulfilment take leave of one another. John Rawls' distinction between public reason and comprehensive world views and his articulation of the tensions between them may well be one of the most incisive articulations of this insight in contemporary political and legal theory. Rawls is acutely aware of the way compliance with principles of public reason frustrate deeper or fuller existential quests. He writes:

“As institutions and laws are always imperfect, we may view that form of discourse as imperfect and in any case as falling short of the whole truth set out by our comprehensive doctrine. Also, that discourse can seem shallow because it does not set out the most basic grounds on which we believe our view rests.”⁵⁸

Must one conclude with Rawls that law, in comparison to utopian aspirations or comprehensive worldviews,⁵⁹ is existentially shallow? Not necessarily. Rawls, in any case, does not suggest that law *is* shallow. It only *seems* shallow, he writes. Considering the remarkable *existential* achievement that becomes evident when relatively faithful compliance with law and relatively effective sustenance of legal systems manage to steer clear of the disastrous abyssal nothingness or u-topos to which utopian quests incline, law

can hardly be deemed shallow. Law is existentially conditioned and marked by the abyssal depths from which it manages to steer clear. A regard for the vertiginous cliffs from which the law has managed to step back is enough to make one realise that the law is far from shallow. Its apparent shallowness is, in fact, an inverse depth. It moves along the same trajectory of profound utopian quests and aspirations, but does so in the opposite direction. The more profound the utopian aspirations become with which law has to contend and compete in the wake of abyssal events, the more profound becomes the law's inverse depth.

The relation of law to the literary radicalisation of utopian sensibilities that this essay articulates should be understood in the same way. The more the generalising language of law and general legal concepts can retain a memory of the way they take leave of the radical literary concern with the abyssal mystery of existence and the non-generalisable singularity of the event, the more will their unique achievements – their inversely singular achievements – become evident. Law need and must therefore not be informed by utopian literature. It must be informed and remain informed about the way its own trajectory relates to the historical events from which it too is flung into existence. And a regard for this trajectory demands or consists in an acute awareness of how the law differs from and takes leave of utopian literature.

The twentieth century radicalisation of the utopian discourse that required or precipitated its turn into a literary discourse, that is, into a suggestive, experimental and ultimately sublimely poetic discourse (as opposed to typical predicative or propositional discourses

about ideal social arrangements) can be understood as a response to the disastrous totalitarian political projects of the twentieth century that resulted from propositional, predicative or literal utopian discourses.⁶⁰ Whether this response has turned utopian thinking into a private concern with no political and therefore no legal significance, and whether there might not be some indirect feedback loops between the opposite trajectories of utopian literature and law, feedback loops that may indeed lead back to the realm of politics, is a different question that one must reserve for another inquiry.⁶¹ One must also reserve here for another inquiry the question whether the twentieth century transformation of the utopian imagination described in this essay – its radical turn away from the resistance to private property and towards a more fundamental resistance to linguistic and normative propriety – has not in fact contributed to a global entrenchment of existing property relations in the course of the twentieth century. Suffice it to conclude for now that the literary utopian turn surely effected a certain de-politicisation of utopian thinking. But suffice it also to suggest for now that this de-politicisation of utopian thinking may well have been a response to a political exigency, a response through which politics, at least in some parts of the world, became liberal politics by ridding itself of destructive obsessions with ultimate origins and ends. Cast in the terminology of physics and the scientific discourse about the primal event that flung the universe into existence, the literary utopian turn may well have been a felicitous development that temporarily and precariously stabilised the irreducible exposure of *matter* to *anti-matter* and rendered possible, for a further while at least, the option of muddling through on this careening mud ball called earth.⁶²

Does the description of the constellation of *law, utopia, event* and the two trajectories on which this constellation pivots ultimately turn on little more than a Stoic endorsement of liberal politics? The invocation of Rawls' thoughts on the relation between public reason and comprehensive worldviews in the previous section surely seems to suggest so. One cannot address the question here whether this same constellation might not also account for the essential tensions that are bound to inform political and legal dispensations that are definitively non-liberal. My suspicion is that it does indeed. My suspicion is that any non-liberal political dispensation, say any fundamentally Marxist or communitarian political dispensation, would only be able to stabilise itself institutionally to the extent that its literal utopian imaginations can be displaced by literary utopian imaginations.

Be it as it may, if it is a liberal politics that happens to be endorsed and stabilised by the *law, utopia, event* constellation elaborated in this essay, it is surely a ruefully respectful liberalism that is at stake here, a liberalism that recognises profoundly the extent to which it suppresses and takes leave of the primordial *aboutness* that catapults it into existence. Political liberalism generally aims to be a level headed and dispassionate affair. Hysteria is not its way. However, as long as it continues to find the question regarding the relation between liberal democratic law and the utopian imagination compelling, liberalism's Stoic prudence will remain tangibly haunted by nagging melancholy. And at times this Stoic prudence and nagging melancholy will hardly be distinguishable. This should not be surprising. Notwithstanding the two very different and opposite directions of their respective trajectories, law and the utopian imagination continue to traverse the same contaminated and contaminating space that opens up in the wake of the event.

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¹ Paul Celan, *Der Meridian*, in Celan, *Gesammelte Werke* (5 vols, Frankfurt a.M: Suhrkamp, 1983) III, 199.

² Cf. Jacques Derrida, *Fichus* (Paris: Galilée, 2002) 19.

³ Cf. David Wootton's introduction to Thomas More, *Utopia* (Cambridge: Hackett Publishing, 1999) 8.

⁴ Michel Villey, *La Formation de la Pensée Juridique Moderne* (Paris: Quadrige/PUF, 2009) 420.

⁵ Villey, *La Formation ...533* : "Si Grotius mentionne les thèses d'Aristote, le plus souvent pour les combattre et sans les avoir bien comprises, on constatera que Cicéron prévaut dans son système et qu'il transporte surtout la morale stoïcienne dans le droit."

⁶ Alisdair MacIntyre, *A Short History of Ethics* (London: Routledge, 1966) 121-145.

⁷ Cf. Alain Badiou, *Saint Paul – La fondation de l'universalisme* (Paris: PUF, 1997).

⁸ Cf. Everett Ferguson, *Backgrounds of Early Christianity* (Grand Rapids, Michigan: William B. Eerdmans Publishing Co, 2003) 368.

⁹ The quintessential articulation of Stoic indifference to things beyond one's power or control can be found in the *Enchiridion* of Epictetus. Epictetus wrote: "If [something]

concerns anything beyond our power, be prepared to say that it is nothing to you.” For this quotation and its source, cf. Ferguson, *Backgrounds of Early Christianity* 366.

¹⁰ Villey, *La Formation* 84-85.

¹¹ H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) 189-195.

¹² Cf. Macintyre, *A Short History of Ethics*, 121-145; Quentin Skinner, *The Foundations of Modern Political Thought* (2 vols, Cambridge: Cambridge University Press, 1978) II, 18.

¹³ Cf. St. Augustine, *The City of God Against the Pagans* (7 vols, Loeb Classics, Cambridge Mass: Harvard University Press, 1960) VI, 253-258, 265-275 (Book XX, paragraphs 2 and 5). Cf. especially 267 (referring to the “intermingling of good men and wicked men, and of their separation hereafter, which will certainly take place on the day of judgement”); 271 (referring to Matthew’s invocation of the “separation of the good and the wicked by the most immediate and final judgment of Christ ... [w]hen the Son of Man shall come in his glory ... and all the angels with him, then shall he sit upon the throne of his glory, and before him shall be gathered all nations, and he shall separate them from one another, as a shepherd divides the sheep from the goats ...”; 253-257 (“Meanwhile, however, we are learning both to bear with equanimity the evils that good men also suffer and not to make too much of the good things that wicked men also acquire.... For we know not by what judgement of God this good man is poor and that the wicked man is rich ... why an innocent man leaves the court room not merely unavenged but actually condemned, to a mass of false evidence, while conversely his guilty adversary goes not merely unpunished but even adds insults to injury by his vindication.... [W]e know not by what judgment all these things are brought to pass or

permitted to come to pass by God, in whom there is the highest virtue, the highest wisdom, the highest justice.... But when we shall have arrived at that judgement of God the time of which is in a special sense called the day of judgement, and sometimes the day of the Lord, then it will be seen that God's judgements are utterly righteous, not only judgements as shall then be pronounced, but also judgements as have been pronounced from the beginning or are hereafter to be pronounced from now till doomsday."

¹⁴ Joseph Taubes, *Abendländische Eschatologie* (Bern: A. Francke Ag. Verlag, 1947) 149-191, especially 184 ("Das gesamte sozialökonomische Inventar der Analysen von Karl Marx instrumentiert nur das Thema der Selbstentfremdung, den Fall in die Fremde und den Weg zur Erlösung"); Karl Löwith, *Weltgeschichte und Heilsgeschehen – Die Theologische Voraussetzungen der Geschichtsphilosophie* (Stuttgart: J.B. Metzler, 1983) 42-68, especially 47 ("Diese Philosophie des Proletariats als eines auserwählten Volkes"), 51 ("Das Proletariat rettet die ganze menschliche Gesellschaft") and especially 55 (...der kommunistische Glaube [ist] eine Pseudomorphose des jüdisch-christlichen Messianismus"). For further insightful discussions of these sources, cf. Reinhart Koselleck, *Vergangene Zukunft* (Frankfurt a. M: Suhrkamp Verlag, 1979) 77, Odo Marquard, *Schwierigkeiten mit der Geschichtsphilosophie* (Frankfurt a. M: Suhrkamp, 1973) 13-33.

¹⁵ Koselleck, *Vergangene Zukunft* 38-67.

¹⁶ St. Augustine, *The City of God Against the Pagans*, II, 243, 249-253 (Book V, paragraphs 19, 21). Cf. also Koselleck *Vergangene Zukunft* 211-258 regarding the two worlds conception of history from St. Augustine to Schmitt.

¹⁷ Giorgio Agamben, *The Time that Remains* (Stanford: Stanford University Press, 2005) 33-43.

¹⁸ For a further discussion of this *as if not* existence of the Christian community, cf. Van der Walt, *The Shadow and its Shade*, *South African Public Law*, 24 (2009): 269-96.

¹⁹ William of Ockham, *Opus Nonaginta Dierum*, in H. S. Offler, ed, *Guilelmi de Ockham Opera Politica* (Manchester: Manchester University Press, 1974) 306; Villey, *La Formation ...* 202-268

²⁰ Cf. Karl Marx, *The German Ideology*, in David McLellan, ed, *Karl Marx: Selected Writings* (Oxford: Oxford University Press, 1977) 168-71.

²¹ Cf. G.W.F Hegel, *Grundlinien der Philosophie des Rechts*, in Hegel, *Werke in 20 Bänden* (20 vols, Frankfurt a. M: Suhrkamp Verlag, 1970) VII, 26-27: “Die Vernunft als die Rose im Kreuze der Gegenwart zu erkennen und damit dieser sich zu erfreuen, diese vernünftige Einsicht ist die *Versöhnung* mit der Wirklichkeit” The emphasis on *Versöhnung* (reconciliation) is Hegel’s own.

²² Jean-Francois Lyotard, *La Condition Postmoderne, Rapport sur le Savoir* (Paris: Les Éditions de Minuit, 1979) 7 (“...on décide d’appeler “modern” la science qui [se réfère] ... à tel ou tel grand récit, comme le dialectique de l’Esprit, l’herméneutique du sens, l’émancipation du sujet raisonnable ou travailleur, le développement de la richesse...”, “... on tient pour “postmoderne” l’incrédulité à l’égard des métarécits ... qui implique une philosophie de l’histoire” – this citation scrambles Lyotard’s text somewhat for the sake of conciseness). Odo Marquard’s *Schwierigkeiten mit der Geschichtsphilosophie*, published seven years earlier (see note 13 above), addresses the same “taking-leave of the

philosophy of history” (Abschied von der Geschichtsphilosophie – cf. 20-23) – with cutting wit and insight.

²³ Cf Wootton’s observation in his introduction to More, *Utopia*, 11.

²⁴ Friedrich Nietzsche, Zur Genealogie der Moral, in Giorgio Colli and Mazzino Montinari, eds., Kritische Studienausgabe (14 vols, Berlin: Walter de Gruyter, 1990) V.

²⁵ Michel Foucault, *Madness and Civilisation* (London: Tavistock Publications, 1971) 280.

²⁶ Foucault, *Madness and Civilisation* 286-289.

²⁷ Karl Marx, “Critique of the Gotha Programme”, in Marx/Engels Collected Works (50 vols, Moscow: Progress Publishers, 1989) XXIV, 86-87. Also available at

<http://www.marxists.org/archive/marx/works/1875/gotha/index.htm>, last accessed 20 July

2013, The original German text reads: “Das Recht kann seiner Natur nach nur in Anwendung von gleichem Maasstab [sic] bestehn; aber die ungleichen Individuen (und sie wären nicht verschiedene Individuen, wenn sie nicht Ungleiche wären) sind nur an gleichem Massstab messbar, so weit man sie unter einen gleichen Gesichtspunkt bringt, sie nur von einer *bestimmter* Seite fasst, z.B. im gegebenen Fall sie *nur als Arbeiter* betrachtet, und weiter nichts in ihnen sieht, von allem andern absieht.” Cf. Karl Marx, “Kritik des Gothaer Programms”, in Karl Marx and Friedrich Engels, Gesamtausgabe (Berlin: Dietz Verlag, 1985) XXV, 14.

²⁸ Translated from Theodor W. Adorno *Negative Dialektik* (Frankfurt a.M: Suhrkamp Taschenbuch, 1975) 304: “Recht is das Urphänomen irrationaler Rationalität. In ihm wird das formale Äquivalenzprinzip zur Norm, alle schlägt es über denselben Leisten. Solche

Gleichheit, in der die Differenzen untergehen, leistet geheim der Ungleichheit

Vorschub.”

²⁹ Scott Veitch, “A very unique case; Reflections on Neil MacCormick’s Theory of Universalization in Practical Reasoning”, in Zenon Bankovski and James Maclean, eds., *The Universal and the Particular in Legal Reasoning* (Aldershot: Ashgate, 2006) 143-158.

³⁰ Cf. Nancy, *La communauté désœuvrée* (Paris: Christian Bourgois, 1999) 184 where Nancy comments on a passage in which Marx rather romantically exults the particularity (as opposed to the generality or generic nature) of work in traditional communities: “La communauté signifie ici la *particularité* socialement exposée, et s’oppose à la généralité socialement implosée qui est celle du capitalisme. S’il y a eu un événement de la pensée marxienne, et si nous n’en avons pas fini avec lui, il a lieu dans l’ouverture de cette pensée.... Dans le mythe, ou dans la littérature mythique, les existences ne sont pas offertes dans leur singularité: mais les traits de la particularité contribuent au système d’une ‘vie exemplaire’ d’où rien ne se retire, où rien ne demeure en deçà d’une limite singulière, où tout se communiqué, au contraire, et s’impose à l’identification.” (emphasis added)

³¹ Cf. Adorno, *Negative Dialektik* 398.

³² Italo Calvino, *If on a winter’s night a traveller* (Vintage Paperback Ed, 1988) 72.

³³ I have no training let alone expertise in physics or astrophysics and am relying for these basic references to the *big bang* theory on the scientific journalism published in *GEOkompakt* 29: *Der Urknall ... und wie die Welt entstand*, December 2012. The editors of this magazine nevertheless assert that all the articles in this fascinating edition that

were not themselves written by practising scientists were thoroughly checked by experts. It is also doubtful whether the minimal references to and assertions with regard to the *big bang* theory in this essay allow any scope for significant error. Apart from the brief invocation of one detail of the theory right at the end of the essay, I am only relying on the basic hypothesis that the matter and eventual order of the universe emerged from a gigantic explosion of sorts.

³⁴ One can refer here to countless titles from the vast oeuvres of these thinkers, but quintessential engagements with the event among them would be Martin Heidegger, *Zur Sache des Denkens* (Tübingen: Max Niemeyer Verlag, 1976); Jean-Luc Nancy, *Une pensée finie* (Paris: Galilée, 1990); Nancy, *Le Sens du monde* (Paris: Galilée, 1993); Nancy, *Être singulier pluriel* (Paris: Galilée, , 1996); Derrida, *Donner Le Temps 1. La Fausse Monnaie* (Galilée: Paris, 1991); Derrida, *Spectres de Marx* (Paris: Éditions Galilée, 1993); Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1989); Arendt, *On Revolution* (Penguin Books 1999). This essay does not claim to be exegetically faithful to any of these texts. The description of the event that it ventures will surely not be found in any of them. It only claims to have been inspired and informed by them and wishes to recognise its debt to them.

³⁵ Jean-Francois Lyotard, *The Differend* (Minneapolis: University of Minnesota Press, 1988). Cf. also Giorgio Agamben, *Remnants of Auschwitz* (New York: Zone Books, 1999) 15-39.

³⁶ Cf. Jacques Derrida and Giovanna Borradori “9/11 and Global Terrorism. A Dialogue with Jacques Derrida” <http://www.press.uchicago.edu/books/derrida/derrida911.html>, last accessed 20 July 2013: “But this very thing, the place and meaning of this ‘event’,

remains ineffable, like an intuition without concept ... We do not in fact know what we are saying or naming in this way: September 11, *le* 11 septembre, September 11.”

³⁷ Cf. Nancy, *Une pensée finie* (Paris: Galilée, 1990).

³⁸ Cf. Foucault, *Histoire de la folie à l'âge classique* (Paris: Gallimard, 1972) 556: “par la folie qui l’interrompt, une œuvre ouvre un vide, un temps de silence, une question sans réponse, elle provoque un déchirement sans conciliation où le monde est bien contraint de s’interroger”

³⁹ Cf. Foucault, *Histoire de la folie* 557: “IL n’y a de folie que comme instant dernier de l’œuvre – celle-ci la repousse indéfiniment à ses confins ... [L]a folie est contemporaine de l’œuvre, puisqu’elle inaugure le temps de sa vérité. L’instant où, ensemble, naissent et s’accomplissent l’œuvre et la folie, c’est le début du temps où le monde se trouve assigné par cette œuvre, et responsable de ce qu’il est devant elle.”

⁴⁰ Cf. Foucault, *Histoire de la folie* 555, 557: “La folie d’Artaud ne se glisse pas dans les interstices de l’œuvre; elle est précisément *l’absence d’œuvre là où il y a œuvre, il n’y a pas folie* ” (original italics).

⁴¹ Celan, *Der Meridian* 199: “Ich spreche ja von dem Gedicht, das es nicht gibt! Das absolute Gedicht – nein, das gibt es gewiß nicht, das kann es nicht geben!”

⁴² Celan, *Der Meridian* 195, referring to the darkness of poetry as “ein vielleicht selbstentworfenen Ferne oder Fremde zugeordnete Dunkelheit.”

⁴³ Foucault, *Madness and Civilisation* 281. Cf. Foucault, *Histoire de la folie* 551: “l’Idiot qui crie et tord son épaule pour échapper au néant qui l’emprisonne, est-ce la naissance du premier homme et son premier mouvement vers la liberté...”

⁴⁴ Agamben, *The Time that Remains* 75, 77.

⁴⁵ The common sense objection may want to insist that the novel only gives a partial *sense* and *experience* of living through, a partial sense or experience of living through that is accompanied and complemented by an additional awareness of not really living through. This additional sense is marked, for instance, by the awareness of the familiar room in which the reading takes place, an awareness that takes the reader miles away from the imaginary reality evoked by the text. The partial sense of *living through* that reading produces, the objection may continue, is accordingly always checked by this additional sense. It is always checked by the sense that we are not *really living through* but *only reading*. And this recollection that one is *only reading* shows up the experience of reading as merely an “as if” experience. This common sense objection, however, is informed by the experience that ensues when reading is interrupted, not by the experience of reading. It is informed by what happens when the novel or text momentarily fails to give the sense of living through for reasons of failing to fascinate and grab the reader completely. The common sense assessment of reading as an *as if* experience thus relies rather peculiarly on this *non-reading experience* or lapse in the reading experience to make its point. The sustained reading experience, however, is a real experience, a really *sensed* instance of living through. It is thus not an *as if* experience, but an *as if not* experience – as if we are not in the room, as if we are not on this side of the film of language.

⁴⁶ Calvino, *If on a winter's night a traveller* 192.

⁴⁷ Cf. Celan, *Der Meridian* 201: Und vor einem Jahr, in Erinnerung an eine versäumte Begegnung im Engadin, brachte ich eine kleine Geschichte zu Papier, in der ich einen Menschen ‘wie Lenz’ durchs Gebirg gehen ließ. Ich hatte mich, das eine wie der andere

Mal, von einem ‘20. Jänner’, hergeschrieben.” Cf. also Derrida, *Schibboleth* (Paris, Galilée, 1986) 11-28.

⁴⁸ Hans Kelsen, *Reine Rechtslehre* (Aalen: Scientia Verlag, 1994) 66-67.

⁴⁹ Hart, *The Concept of Law* 88-89. Hart’s “internal aspect” is of course narrower than the broad description of legitimacy elaborated above.

⁵⁰ René Girard, *La Violence et Le Sacré* (Paris: Editions Bernard Grasset, 1972) 38-40.

⁵¹ Nussbaum, *Upheavals of Thought* (Cambridge: Cambridge University Press, 2003) 4:

“The view that emerges may justly be called neo-Stoic, and I shall often use this term.”

⁵² Cf. Nussbaum, *Upheavals of Thought*, especially chapter VII.

⁵³ Cf. Nussbaum, *Upheavals of Thought* 16.

⁵⁴ Consider in this regard the connection that Freud observed between literature and hysteria. Hysteria, Freud first believed, is a symptomatic return to an early experience that in most cases occurred during childhood, whereas the enjoyment of literature concerns a non-symptomatic and sublimated equivalent of this return. Cf. Sigmund Freud, *Der Dichter und das Phantasieren*, in *Gesammelte Werke* (18 vols, Frankfurt a.M: Fischer Verlag, 1999) VII, 213-223, especially at 221. It is important to note here Freud’s invocation of an experience that *mostly* belongs to childhood - “ein meist der Kindheit angehöriges Erlebnis”. This *mostly* surely implies a “not only” that allows one to read “childhood experiences” broadly so as to include all eventful or life-changing experiences that disrupt mature and settled worlds and expose them to the infancy or nascence that marks all new beginnings. To the extent that Freud also took leave of the seduction theory of hysteria (analyses of many cases moved him to recognise that the traumatic event most often never took place in fact) and moved towards a psychoanalytic

(instead of a psychogenetic) theory that found the cause of hysteria to inhere in libidinal energies that the individual fails to integrate into an equilibrium of mature and settled sexuality, one can interpret hysteria as a symptomatic instance of the utopian resistance to mature and settled worlds and an obsessive return to the upheaval of awakening or unsettled sexuality. Hysterical individuals continue to live in the event or the infantile emergence from the event and fail or refuse to arrive in established worlds of mature and settled sexualities in which perversities are not repressed, but either do not exist or become well accommodated as part of the healthy sexual self. And should one under this post-seduction theory of hysteria continue to maintain Freud's earlier link between hysteria and literature, the constellation that emerges is one in which literature is an engagement, not with a specific or nameable past event, but with the interminable and unnameable upheaval of unsettled sexuality that vaults individuals into existence. Unsettled sexuality is of course not the only primordial *aboutness* that energises the human individual, but only one of many strong emotional or libidinal responses that beckon individuals away from the established worlds of settled and transparent legal and moral normativity and towards unsettled and troubled (pre-worldly) regions of existence. But it remains one of the more forceful unsettling energies in human existence; hence also its prominence in probing utopian literature. Cf. in this regard Milan Kundera's observations in the interview with Philip Roth published as an afterword to Kundera, *The Book of Laughter and Forgetting* (Penguin Books, 1983) 236-237: Cf. further the illuminating discussion of Freud's observations regarding hysteria and literature in Philippe Van Haute and Tomas Geyskens, *A Non-Oedipal Psychoanalysis?* (Leuven: Leuven University Press, 2012) 11-72 to which this footnote is much indebted.

⁵⁵ Cf. Nussbaum, “Equity and Mercy”, in Alan John Simmons et al, eds., *Punishment: A Philosophy and Public Affairs Reader* (Princeton: Princeton University Press, 1994) 167, 172 – 175, 180 – 81. For two previous engagements with Nussbaum on this count, cf. Van der Walt, “Law and the Space of Appearance in Arendt’s thought” in M. Goldini and C. McCorkindale (eds), *Hannah Arendt and the Law* (Oxford: Hart Publishing, 2012) 63-88; Van der Walt, *Agaat’s law: Reflections on Law and Literature with reference to Marlene van Niekerk’s novel *Agaat**, *South African Law Journal*, 126 (2009): 695-739.

⁵⁶ This also explains the way Nussbaum shares Ismene’s assessment of Antigone (“you have a warm heart for the cold”). Cf. Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy* (Cambridge: Cambridge University Press, 1986) 64-67. For Nussbaum Antigone does not have eros because of her “single minded identification with duties to the dead”. But “we admire Antigone, nonetheless, in a way that we do not admire Creon”, argues Nussbaum, because there is some complexity and conflict in her single mindedness when, before the moment of her death, she recognises her loss and compares herself to Niobe (“wasted away by nature’s snow and rain”). In other words, it is Antigone’s brief moment of sanity (when she experiences conflict as others would) that redeems her for Nussbaum, not her mad obsession with burying Polinices. In terms of the radical literary turn in the utopian imagination described in this essay, Antigone’s mad obsession with the singularity of her dead brother (she can have children again, she can have another husband, but she cannot have another brother – cf. Sophocles, *Antigone* (Cambridge, Massachusetts: Harvard University Press, 1994) 87 (905-910) – makes her the archetypal utopian heroine.

⁵⁷ Cf. again fn. 9 above.

⁵⁸ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996) 243.

⁵⁹ All comprehensive worldviews are plainly “utopian” in some respects. They are patently counter-factual and never correspond with the world as we know it.

⁶⁰ Cf. in this regard the poignant discussion “Konservative Politik, Arbeit, Sozialismus und Utopie heute” between Jürgen Habermas and Hans Ulrich Reck in Jürgen Habermas, *Die Neue Unübersichtlichkeit*, (Frankfurt a.M: Suhrkamp, 1985) 73-76.

⁶¹ Such an inquiry could begin with the explorations of the role of literature in the formation of human rights cultures that eventually result in the development of law in Lynn Hunt, *Inventing Human Rights* (New York: WW Norton, 2008) and Richard Rorty, “Human Rights, Rationality and Sentimentality” in Stephen Shute and Susan Hurley (eds), *On Human Rights: The Oxford Amnesty Lectures* (New York: Basic Books, 1993). Rorty writes: “Like everyone else, I too should prefer a bottom-up way of achieving utopia, a quick reversal of fortune which will make the last first. But I do not think this is how utopia will in fact come into being A better sort of answer is the sort of long, sad, sentimental story which begins “Because this is what it is like to be in her situation – to be far from home, among strangers...” (I relied on <http://web1.uct.usm.maine.edu/~bcj/issues/three/rorty.html> for this quote and I am indebted to discussions with Sibylle van der Walt for this point and these references.) That literary accounts of suffering can change social sentiments that lead to positive social developments such as the rise of human rights cultures is plausible. It is also plausible that the literature that brings about such transformations may have a real

utopian thrust before the normative sedimentation sets in that may lead to the establishment of positive normative cultures. It is nevertheless important not to confuse the subsequent formation of normative cultures such as a human rights culture with utopian imaginations, as Rorty appears to be doing here, and as Habermas surely does when he refers to the “realistic utopia of human rights”. Cf. Habermas, *Zur Verfassung Europas – Ein Essay* (Frankfurt a.M: Suhrkamp, 2011) 13 -38. Human rights cultures and law may indeed be the result of social upheavals precipitated by literary utopian explorations, but they largely serve to settle these upheavals and lay them to rest. It is up to significantly probing and experimental literature to sustain these upheavals and to resist the generic cultural and legal norms that ultimately curtail and even suppress rather than promote the singularity of human dignity, integrity and autonomy that is supposedly promised, for instance, by the notion of human rights. The notion of a “realistic utopia” (Habermas) makes no good sense, nor does the notion of “utopia ... [coming] into being” (Rorty), at least not from the perspective of the radical literary understanding of the concept of utopia that has been developed in this essay.

⁶² For this reference to the discourse of physics on matter and anti-matter I rely on Martin Paetsch, “Das Rätsel der zwei mächtigsten Kräfte im All”, *GEOKompakt* 29 (2011) 74-81. The metaphor of the “careening mud ball” is pinched from the epigraph in Ted Leason, *The Habit of Rivers* (New York: Lyons and Burford, 1994).