

# LIBERAL DEMOCRACY AND THE EVENT OF EXISTENCE, SEEN FROM A NOT-SO-RICKETY BRIDGE BETWEEN RAWLS AND MERLEAU-PONTY

A response to Tekin, Spindola Diniz, Christodoulidis, Michelman and Van Roermund

Johan van der Walt  
Professor of Philosophy of Law, University of Luxembourg  
Professor Extraordinarius, University of the Free State, Bloemfontein

## Abstract

The discussants of my book *The Concept of Liberal Democratic Law (CLDL)* in this issue of *Ethics & Politics* raise many important and challenging questions about key aspects of the book to which I respond as carefully as I can. My responses to all the questions raised ultimately converge, I believe, on the question of liberal democracy's relation to its own historicity, a historicity to which I eventually come to refer as "the event of existence." This question emerges from an engagement with the thoughts of especially John Rawls and Maurice Merleau-Ponty. Rawls and Merleau-Ponty are of course not often discussed together, but the combination of questions raised by several of the discussants expressly invite me to do so. In the endeavour to respond to these questions coherently (the endeavour to bring these questions together), I believe I managed to construct an elementary but "not-so-rickety bridge" between Rawls and Merleau-Ponty that offers one a unique point of access to the question of liberal democracy's relation to its own historicity.

## Key Words

Liberal democratic law, political liberalism, the event, Rawls, Merleau-Ponty, ancient Greek philosophy, the history of metaphysics, embodied and disembodied politics, cosmos, physis, nomos, law and poetry.

## I. INTRODUCTION

Let me begin by thanking Ferdinando Menga and the editorial team of *Ethics & Politics* most sincerely for hosting this discussion of my book *The Concept of Liberal Democratic Law (CLDL)*, and for bringing together a formidable group of discussants for this purpose. I also wish to express sincerest thanks to all the discussants, Serdar Tekin, Ricardo Spindola Diniz, Bert van Roermund, Emilios Christodoulidis and Frank Michelman. Each one of them bring a serious challenge or serious challenges to the discussion table that demand important further reflection and work on the concept of law that I put forward in *CLDL*. I also wish to thank each one of them for the friendly scholarly spirit in which they articulated their responses.

Of all five, Serdar Tekin's contribution to this discussion surely expresses the sharpest criticism *CLDL*. I will therefore first respond to him in order to get the most difficult work done at the outset (section II). I will then turn to Ricardo Spindola Diniz who also confronts *CLDL* (and my

earlier book *The Horizontal Effect Revolution and the Question of Sovereignty*) with a formidable question regarding the limit of liberal democratic tolerance. This question demands a very careful response and I try to offer one in section III. Emiliios Christodoulidis has some difficulty with CLDL's assessment of Greek history and philosophy, and considerable difficulty with the aesthetic unburdening of the political that CLDL extracts from its engagement with ancient Greece. I respond to these difficulties in section IV. Frank Michelman asks a pertinent question about CLDL's invocation of the "lifelessness" of liberal democracy in CLDL to which I respond in section V. Section VI turns to Bert van Roermund's phenomenological questioning of the disembodiment of the political in the work of Claude Lefort, and per implication, in CLDL. There will be some cross references between the various sections, because several of the contributions to this discussion also touch upon questions raised by one or more of the others.

## II. TEKIN ON POST-METAPHYSICAL, BUT NOT POST-NORMATIVE, LIBERAL DEMOCRACY

According to Tekin, CLDL is simultaneously too modest and too ambitious. CLDL is too modest because the concept of liberal democratic law that it offers reduces liberal democracy to a merely pragmatic *modus vivendi* with no normative foundation that renders it more defensible than other arrangements of political power.<sup>1</sup> CLDL's distillation of this all too modest concept of liberal democratic law from a long history of metaphysics is too ambitious, on the other hand, because it ultimately reduces this long history – in one generalising sweep – to a repetitive instantiation of essentially the same prototype metaphysical framework. It ignores the contextual specificity of the different epochs and times that it so brutally brooms into one heap. "Brutally brooms" is my expression. Tekin makes the point in fine and respectful scholarly terms that I respect.

The easiest way of clearing the field for a constructive discussion here, is to begin by admitting wrongfulness and culpability on both charges, "as charged." If the first charge is that CLDL offers no "self-evident" normative foundations that "evidently" render liberal democracy superior to other organisations of power, then CLDL stands guilty as charged. If the second charge is that CLDL wields a broom that sweeps Villey, Schmitt, Hitler, Bentham, Mill, Hegel, Savigny, the *Freirechtsschule*, the American Realists, Dworkin, Smend, and Schmitt again, either into the long shadow cast by the span of Aristotle's mighty wing, on the one hand, or into the equally long and even darker shadow cast by an ancient political realism or anarchism (associated with Plato's portrayal of brazen sophists like Callicles or Thucydides' portrayal of the Athenian envoys to Melos), on the other, then CLDL stands guilty as charged.

However, given the evident spirit of fairness in which Tekin lays his charges, I am sure he will also consider it fair enough if I would complicate matters at least somewhat from my side. I indeed hope to complicate them enough to make him at least consider the question of whether the charges as framed warrant a significant enough victory to push for conviction. I will start with the second charge and then turn to the first.

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<sup>1</sup> Serdar Tekin, *Between Modesty and Ambition: Remarks on The Concept of Liberal Democratic Law*

Two complicating observations appear pertinent to me as far as the “too ambitious” charge is concerned. The first concerns the significant range of thinkers – Sophocles and Protagoras, St. Paul, St. Augustine, Ockham and the nominalists, Rousseau, Lefort, Hart and Kelsen – that CLDL does not sweep in under the shadow of either Aristotle or the ancient political anarchism associated with brazen sophists and Athenian brutality during the later stages of the Peloponnesian war. Now, Sophocles and Protagoras can of course not so easily be swept into the shadow of Aristotle who was only born after they had died, but had CLDL seen a good point in doing so, it could have construed them both as predecessors of Aristotelian thought. That would have been a way of sweeping them in under the Stagirite’s wing. CLDL does not do that. Why not? And, if one does not want to sweep them in under the Stagirite’s wing, why not sweep them then into the other corner of Western metaphysics where political realists and anarchists have been gathering since the dawn of memory? And why not also sweep Ockham, Rousseau, Lefort, Hart and Kelsen into one or the other of these two camps?

I would like to think that these questions show that there is some kind of interesting differentiation afoot in CLDL. Does one not notice here the significant enough identification of unique elements or characteristics of thought that warrant grouping a wide range of thinkers under the wing of Aristotle, grouping another wide range of “non-Aristotelian” thinkers under the banner of political realism and anarchism, and then raking together a number of “outsiders” who do not seem to fit well into either of the first two groups. Does one not thereby begin to say something pertinent about the various intellectual roots that informed and still inform Western thinking? Or is the point – perhaps Tekin’s? – that a “duly historicist” regard for contextual specificity simply prevents one from drawing any such global or overarching distinctions?

If the “contextual specificity” point is indeed one that we cannot circumvent or escape from at all, one would have to conclude that intellectual inquiry must simply forego historical inquiry, considering that historical contexts are so thoroughly incommensurable that no significant assessment of enduring influences and enduring ways of thinking is possible. Intellectual inquiry would then have to be reduced to abstract conceptual analysis. Such is indeed the hyper-historicity that has always lurked in the annals of “pure” analytical philosophy and jurisprudence, the hyper-historicity that reduced the studying and teaching of the history of philosophy to a series of more or less flat statements: “Plato apparently said ‘a’, Aristotle said ‘b’, St. Augustine said ‘c,’” and so forth until one gets to “Hegel = ‘k’, Nietzsche = ‘l’, Marx = ‘m’, perhaps recognising something in ‘m’ that is reminiscent of ‘k’ and ‘a,’” etc.

CLDL evidently does not meet the demands of this hyper-historicity or hyper-contextualism. It does, however, also not endorse the idea of enduring cultural meaning or histories that survive through the ages without significant discontinuities, disruptions and mutations. It does not support the idea – associated especially with Gadamerian hermeneutics – of a classical tradition of universal meaning that does not unravel, but, instead, productively renews itself through the ages. And CLDL very definitely also does not ascribe to any kind of Whig historiography that explains the present as the teleological end of the past.

What does CLDL do then if it steers clear of hyper-contextualism, on the one hand, and Gadamerian hermeneutics and/or Whig-historiography, on the other? It assumes, quite realistically and unproblematically, I would think, that there are influential texts and oeuvres – indeed, “sweepingly” influential texts and oeuvres – in any intellectual history that induce enduring habits of thinking. These habits of thinking are conducive to certain further intellectual, cultural and social developments, and not conducive to others. CLDL identifies Aristotle’s texts (more specifically, his teleological metaphysics and the potentiality-actuality distinction on which it pivots) as sweepingly influential in the way described here, and it contends that his sweeping influence was definitely not conducive to a concept of liberal democracy that answers to the demands that social plurality and division make on contemporary politics. It surely also makes the additional point that all the intellectual positions that were clearly influenced by Aristotle, irrespective of whether they were consciously following him (like Aquinas) or consciously resisting his influence (like Smend), were likewise not conducive to a concept of liberal democracy that meets the demand of the political in a context of social pluralism and division. CLDL also identifies ancient anarchial and realist conceptions of politics and power as described by Plato and Thucydides (but surely not endorsed by them) likewise influential, and likewise not conducive to the arrangement of power that liberal democracy envisages.

Does this mean that CLDL regards all later “Aristotelian” positions as simply Aristotelian and nothing else? Or all later political realists as political realists – bland endorsers of irrational power-play – and nothing else? Would it be fair to read CLDL in this way, that is, as a set of simplistically reductive statements about political cosmology and anarchy in Western philosophy? Let us consider four of CLDL’s key focus points as far as the cosmological and physiological (realist/anarchist) lines of thinking are concerned, namely Schmitt, Hegel, Smend and Kennedy. Among these four figures, Schmitt is bound to strike one as the most representative of the physis or anarchy approach to the political. CLDL nevertheless points out carefully – citing his doctoral student Ernst Rudolf Huber – that Schmitt tried to straddle the cosmological and physiological lines of thinking bequeathed to him by a long line of intellectual influences. It accordingly detects an ambiguity in Schmitt’s thinking and traces this ambiguity all the way to an irreducible ambiguity in Pindar’s *nomos basileus* poem. This ambiguity, CLDL avers, is the mark of a deep-seated instability in Western metaphysics as regards the distinction between order and force, or cosmos and physis, that is evidently also at work in Aristotle’s potentiality-actuality distinction. Against this background of ambiguity and instability, contends CLDL towards the end of chapter 5, Hitler’s depiction of cosmic order in terms of physiological force should not strike one as all that surprising. After all, Thucydides’ depiction of the Athenian envoys to Athens had more than two millennia before already provided the clearest example imaginable of this conception of force as order or order as force.

CLDL stresses the point. The Athenians did not tell the residents of Melos that there was no order – no *nomos* and no *kosmos* – in the universe. They just insisted that force is the essence of this order. It is against this background that CLDL considers Schmitt’s observation in *Der Nomos der Erde* regarding “the greatest order of which human force is capable” (*höchste Form der Ordnung, deren menschliche Kraft fähig ist*) deeply instructive, and why it considers Schmitt

as one of the most accurate readers of Western metaphysics (CLDL 46 – 49, 100). Come to think of it, is there any physicist of note out there who would not, in some way or another, come to the conclusion that order is a phase of force? Even scientific thinking is deeply embedded in this language of force and order, and Alain Supiot is quite correct to stress the close connection between scientism and totalitarian politics.<sup>2</sup> This is the challenge that the concept of liberal democracy and liberal democratic law ultimately has to face. It has to resist the most deeply rooted and most common metaphysical and scientific language on which we rely on a daily basis.

A different ambiguity burdens the thought of Hegel. In the final analysis, CLDL surely considers Hegel's thinking undoubtedly to fall into the mould of Aristotelian metaphysics. But it distils from Hegel's philosophy his acute insight – with specific reference to his *Differenz* essay – into the divided status of life. "Divided-life" becomes one of the key elements of the definition of liberal democratic law offered at the end of CLDL. Let us put the essential ambiguity at play here in a nutshell: Aristotle is the thinker of holistic cosmic unity. Ultimately, CLDL certainly brooms Hegel in under the Stagirite's wing. However, it does so highly tentatively and with an express caveat: "It is probably impossible to know exactly where Hegel stood ..." (CLDL 234). This is so because Hegel, notwithstanding his formidable quest to rearticulate the Aristotelian emphasis on the harmonic unity of all things, is all too aware that he is doing so in a time – a very different historical epoch called Modernity – in which this unity is no longer as evident as it appears to have been to Aristotle and his contemporaries. During his Tübingen years, Hegel, together with Schelling and Hölderlin, still celebrated the unity of all things with regard to which every individual could enjoy a tangible sense of belonging. This celebration was already an euphoric endeavour to still the modern sense of alienation and separation from life that was beginning to haunt young intellectuals and artists of the time. By the time Hegel finds himself in Jena, however, he could no longer deny the sense of alienation, separation and division that burdened modern societies. He began to face it squarely. He did not, from then on, desist from thinking the Aristotelian thought regarding the unity and harmony of the whole, but he incorporated into that thought such a clear sense of modern alienation and lack of belonging that it became very difficult to say where exactly he stood in the end. He wrote in the *Phänomenologie des Geistes*: "The life of Spirit ... gains its truth only through finding itself in the absolutely torn state of its existence" (*Er gewinnt seine Wahrheit nur, indem er in der absoluten Zerissenheit sich selber findet* – see CLDL 144). Was the Absolute the Absolute because it finally overcame its torn existence, or because it managed to accept and reconcile itself stoically with the absolute condition of being irremediably torn? From the space that this ambiguity in Hegel's thought leaves open, the very un-Aristotelian definition of liberal democratic law offered at the end of CLDL extracts a thought from a thinker that fervently and perhaps desperately stuck to his Aristotelian roots.

One can go faster now with regard to the exposition of Rudolf Smend's thought in CLDL. Smend was evidently aware that Aristotle's naturalist concept of the political was no longer fit for understanding the process of active historical integration through which modern societies had

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<sup>2</sup> Alain Supiot, *Homo Juridicus*, (London/New York: Verso, 2007), p. 32.

to overcome their divisions (see CLDL 210). But Smend obviously considered Hegel's historical revision of Aristotle's metaphysics an adequate response to the latter's ancient naturalism. Hegel's dialectics accordingly became the cornerstone of the concept of historical integration that is central to Smend's theory of law and the state. Smend's Hegel, however, was a very revised Hegel that no longer sustained the deep ambiguity of Hegel's thought. Whether a regard for the irremediably torn status of modern existence is still as thinkable in the case of Smend as it is in the case of Hegel is doubtful. The concept of integration that he begins to wield appears too successful in the end. All existential and societal divisions yield in the face of the formidable process of integration that Smend expressly associates with healthy life – *gesundes Leben* (see CLDL 211). It is here – with reference to healthy life and the religious or theological convictions that sustain healthy life – that Smend moves much closer to Aristotle than he thinks, claims CLDL. And it is also here that the contemplation of the concept of liberal democratic law in CLDL takes leave of him.

Duncan Kennedy once proclaimed that he found Schmitt's concept of the political most instructive. On the basis of this proclamation and other elements of Kennedy's thought, CLDL reflects expressly on the Schmittian and anarchic elements in Kennedy's work. CLDL nevertheless does not leave Kennedy effectively or simplistically broomed into the anarchist corner. It leaves the question about Kennedy's place in the long history that it constructs expressly open to further questioning. There are other theoretical positions discussed in CLDL in which the strategy of discussion is similar to the one that is central to the four examples outlined above. CLDL tests them all in a similar way for elements or traces of cosmological and/or physiological patterns of thought. Its conclusion with regard to all of them – whether they end up under Aristotle's wing or in the corner of the anarchists and physiologists – remains qualified by a regard for historical and semantic ambiguities of the kind that is evident in the four examples above. I cannot show this in more detail now. It is time to return to my suggestion above. Yes, there is a forceful generalising sweep in CLDL, and if that is the charge against it, it surely stands guilty. But considering the level of specificity of context and of oeuvre that CLDL does sustain in its reading of the history of Western thought, is it really so devoid of nuanced instruction and content to make the charge worthwhile, or to warrant turning it into a conviction? Judging by the fair academic spirit of Tekin's engagement with CLDL, I trust that he will not be averse to at least considering the question.

This brings me to Tekin's second "charge": The concept of liberal democratic law that CLDL puts forward is normatively "too modest." It presents CLDL as a prudent *modus vivendi*, and deprives it of a normative foundation on the basis of which one could consider it superior to other arrangements or power. Tekin's challenge in this regard is theoretically refined and nuanced. He comprehends and appreciates the "post-metaphysical" thrust of CLDL, but this "post-metaphysical" thrust, he believes, turns into a "post-normative" stance that he finds disappointing. We have learned from thinkers such as Rawls and Habermas that "post-metaphysical" does not have to imply "post-normative," he avers. It is in this regard that he offers what I consider his most stinging criticism of CLDL: How is it that this book, that took the time and effort to engage so extensively with the history of political metaphysics, ended up not discussing Rawls and Habermas, or at least one of them? I must once more concede: "guilty as

charged.” And I fear, this time I do not have much to offer to relativise or question the purchase of the charge. The criticism is pertinent and I have little to say in defence. To the extent that CLDL sustains some readership in future, it will always be burdened by the question why a book concerned with a post-metaphysical concept of liberal democratic law – one that is adequately distilled from the thick soup of metaphysics from which it emerged – did not engage with the two major “post-metaphysical” theorists of liberal democracy of its time.

One can rephrase the point by highlighting the irony that attaches to it: Why would a book on liberal democratic law pay such extensive attention to Carl Schmitt, and none to Rawls and/or Habermas? In a very obvious sense, this is an unpardonable shortcoming of CLDL. And the logistic excuses that I can raise – constraints of time and volume – of course offer no solid grounds of justification. I will therefore just offer, instead, two pleas for some extenuation. The first is that amends will very soon be made. In another discussion of CLDL that is forthcoming in the *Netherlands Journal of Legal Philosophy* I have already committed myself (in arrangements with the editors) to a leading article on Rawls, Habermas and liberal democratic law. I also hope that my reply to Frank Michelman below will show the first signs of these future amends. The second consideration concerns the need to insert the word “express” into the charge as formulated above, at least as far as Rawls is concerned. CLDL does not engage *expressly* with Rawls (not counting a couple of references to his work that I consider important, especially in the discussion of utilitarianism in chapter 7). But no one with an inclination to also read between the lines would have missed the Rawlsian thrust of the key arguments in CLDL. If I may revert to a Derridean phrase, I would go so far as to say that the “spectre of Rawls” is haunting CLDL from the first to the last page. Frank Michelman generously responded to a request for comments on a pre-publication draft of chapter 8 of CLDL. One of his first observations was that “this sounds a lot like Rawls to me.” His response to CLDL in this volume certainly indicates that this first impression became a lasting one. I will return to this point in my reply to Michelman below and I hope Tekin will see that reply as a continuation of this reply to him.

### III. SPINDOLA DINIZ: THE LIMIT OF LIBERAL DEMOCRATIC TOLERANCE, THE CHIASMIC INVERSE OF ANCIENT GREEK ABSTRACTION

As I read it, Ricardo Spindola Diniz’s response to CLDL pivots on three essential points. He first picks up the key contemplation of history as an on-going and relentless process of denaturalisation. He then plays this thought off against another element of CLDL, an element which he also identifies in my earlier book *The Horizontal Effect Revolution and the Question of Sovereignty* (HERQS). This other element pointed out in CLDL and HERQS appears to contradict the conception of history as a process of denaturalisation, and thus also appears to return to the essential fold of Greek thinking from which it seeks to dissociate itself through a process of distillation. The distillation process fails in the end. The ethereal essence of liberal democratic law falls back into the ancient soup of Greek metaphysics from which CLDL seeks to distil it. The only thing that CLDL manages to do in the process, is to highlight the one characteristic that

ultimately distinguishes the life and time of liberal democracy from the life and time of the Greeks, namely its grey lack of heroism.<sup>3</sup>

Spindola Diniz' argument is forceful, well-constructed and beautifully written. I wish to begin to simply yield to its cogency and force. The point is actually already conceded on the final pages of CLDL. The final passages state clearly that the essence of liberal democracy can ultimately not be extracted from the ancient soup of metaphysics. The question is ultimately whether the distillation process has been conducted thoroughly and consistently enough to allow for a *conceptual construction* – perhaps one should call it a conceptual glimpse – of the liberal democracy from which liberal democrats will never withdraw their precarious and indeed always to some extent self-contradictory commitment. *Self-contradictory* commitment? Indeed. I shall come back to this point towards the end of this response to Spindola Diniz, for everything turns, in the final analysis, on a political capacity to sustain a precarious self-contradiction in a way that is not so non-sensical as it may appear at first glance. Let me nevertheless first unpack the three moves on which his argument turns in some more detail.

Spindola Diniz's first move need not detain one for long. It simply consists in highlighting one of the central themes in CLDL: Instead of considering history a teleological process in the course of which the essential nature of all things passes from a state of imperfection to state of perfection (Hegel is the obvious reference), CLDL considers it an on-going process of denaturalisation. CLDL retreats from the Platonic faith in natural essences that defy time and history. It also retreats from the Aristotelian and Hegelian versions of this – essentially still Platonic – faith according to which natural essences employ time (Aristotle) or history (Hegel) to sustain or perfect itself. According to CLDL, history is ultimately always the sole survivor of history. Whatever comes across as a natural essence in the course of history, is nothing but an instance of longer than average survival in a relentless process of evanescence. Whatever seems to have a "nature" loses it soon enough in the course of time. That is why CLDL considers history a process of on-going denaturalisation.

Spindola Diniz nevertheless believes CLDL's insistence on this on-going de-naturalisation is not consistent. CLDL all too clearly withdraws the concept of liberal democracy itself from history because of the way in which it constructs its own readership and limits its interlocutors. This is the second point that he makes. He refers here expressly to the following passage from CLDL:

[C]riticism of the thoughts developed in this book would only be interesting if they were to aim at improving the liberal democratic purport of these thoughts. They would cease to be interesting if they were to suggest the fundamental principle of liberal democracy endorsed here itself merits dismissal. In that case, the discussion would simply have to stop. We would have nothing more to say to one another."<sup>4</sup>

He also links this passage with eagle-eyed percipience to an earlier formulation of the same thought in the context of the horizontal effect of constitutional rights, in HERQS. There I wrote:

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<sup>3</sup> Ricardo Spindola Diniz, "Rational Necessities: On the Silence of Liberal Democratic Theory in front of the Unreasonable Other," this volume, p.

<sup>4</sup> Johan van der Walt, *The Concept of Liberal Democratic Law*, (Abingdon/New York: Routledge, 2020), p. 11.

There may be people who would want to claim that stripping someone of the liberty to create a racially segregated private sphere also strips that person of an element of his or her fundamental liberty. That is their problem and a theory of liberal constitutional democracy cannot solve it for them. They entertain a concept of liberty that is irreconcilable with liberal democracy and irrelevant to liberal democrats. A theory of liberal democracy can only speak *meaningfully* to people like Seidman and Tribe who evidently are liberal democrats but struggle to make sense of some of liberal democracy's troubling complexities.<sup>5</sup>

I would like to begin my response to the point Spindola Diniz is making by first thanking and commending him for highlighting these passages and the very evident link between them so astutely and forcefully. Both passages go to the heart of the political and political-theoretical stance that I attribute to liberal democrats and I consider it crucial to reflect carefully on them. I can also see how someone can read these passages as endeavours to shield the concept of liberal democracy from the denaturalisation that history wreaks on everything which CLDL claims to affirm. And, to go very quickly, I can also see how one could link this refusal "to discuss further" to the unheroic drone strike that plummets from the air to simply annihilate difference that it is no longer prepared to tolerate, thereby coldly refusing to engage in the slightest element of historical risk, the slightest threat to its own denaturalisation.<sup>6</sup> And I can also clearly see how one can link this cold and chilling "refusal" to expose oneself to the denaturalisation of history to Rawls' sober recognition that the survival of liberal democracy comes at the historical cost of eliminating other forms of life and other organisations of power. It is worthwhile quoting the key passage of Rawls again here:

No society can include within itself all forms of life. We may indeed lament the limited space, as it were, of social worlds, and of ours in particular; and we may regret some of the inevitable effects of our culture and social structure. As Berlin has long maintained (it is one of its fundamental themes), there is no social world without loss: that is, no social world that does not exclude some ways of life that realize in special ways certain values .... But these social necessities are not to be taken for arbitrary bias or injustice.<sup>7</sup>

Not only eagle-eyed, but also eagle-winged is the Brazilian scholar. With astounding alacrity and precision, he sweeps over a canyon of two and a half millennia and forcefully points out the undeniable resonance between this passage of Rawls and the discourse of the Athenian envoys in Melos in 416 BCE, in terms of which a weaker instance of life must simply yield to a stronger. Hence his conclusion that political liberalism ultimately remains caught in the fold of a quiet violence, "the violence of primitive and prelogical silence."<sup>8</sup> Liberal democracy is not a game-changer in the end. It just replaced the "holy pathos" and "heroism" of the Greeks with a grey lack of heroism that Hegel already recognised as the reasonable and rational fate of the constitutional state. Like a computer-steered missile, it silences the other without risking its own blood. This is what Spindola Diniz senses to be at work in the passages from CLDL and HERQS quoted above: a refusal of the historical risk that one takes whenever one engages in

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<sup>5</sup> Johan van der Walt, *Horizontal Effect and the Question of Sovereignty*, (Berlin/Boston, Walter de Gruyter, 2014), p. 189.

<sup>6</sup> Spindola Diniz, p.

<sup>7</sup> John Rawls, *Political Liberalism*, (New York: Columbia University Press, 1995), p. 197

<sup>8</sup> Spindola Diniz, p.

serious and open discussion. The scholarly intuition at work here is razor-sharp and I will not endeavour to refute it. I will, however, insist on subjecting it to some qualification.

No doubt, my wordless shrug of the shoulder in response to that which I consider the undemocratic and unreasonable other in the passages from CLDL and HERQS highlighted above not only resonates firmly with the passage from Rawls that Spindola Diniz invokes. It evidently also breaks away from the Derridean questioning of Rawls in which I engaged in 2009, as he also points out. There I indeed considered Rawls' position as one which ultimately "terminate[s] questions of responsibility and justice and switch[es] to a discourse of sovereign self-justification and self-assertion."<sup>9</sup> There I indeed endorsed a "deconstructive" resistance to meaning that avoids the termination of responsibility and the switch to sovereign self-assertion and self-justification that I discerned in Rawls' position. My construal of an unreasonable other in CLDL and HERQS in response to whom I am not prepared to reconsider the worth and essence of liberal democracy, or the essence of liberal democratic horizontal effect jurisprudence, surely points to a suspension if not termination of this infinite responsibility vis à vis the "other," a suspension and termination that actually begins the very moment that one draws the distinction between the reasonable and unreasonable other. It would indeed appear that I am now, having retreated from the Derridean critique endorsed in 2009, seeking to safeguard some meaning – the essence of liberal democracy – from the deconstructive and denaturalising flux of history. Do CLDL and HERQS do this, and if so, how do they do this?

I will answer yes in a way that raises the stakes of Spindola Diniz's question even further than he may have contemplated to raise them himself. Yes, CLDL and HERQS indeed do this because this is what the best of liberal democracies cannot avoid doing in the final analysis. They cannot avoid identifying "unreasonable" others and silencing them. In fact, they often silence "others" without even considering them "unreasonable."<sup>10</sup> However, both CLDL and HERQS are informed by a clear sense that liberal democracies can only continue to identify and silence "unreasonable" others as long as they are powerful enough to do so. Liberal democracy is not in command of its own history and therefore not indefinitely in command of anyone. The opening pages of CLDL make it abundantly clear that the conditions that sustain liberal democracy are never guaranteed. They refer expressly to revolutionary circumstances under which insistence upon liberal democratic principles and practices simply becomes "unrealistic." (See CLDL 11). There is, in other words, nothing "natural" about liberal democracy to which history is subject or subservient. It is, quite to the contrary, liberal democracy that remains subject to history. I will stress this point again in my response to Emiliios Christodoulidis.

Considered from this angle, the refusal in CLDL and HERQS to put liberal democratic principles "up for discussion" clearly does not involve a "naturalizing" move in the cosmological sense of the word "nature" that CLDL discusses at length. But this does not yet refute Spindola Diniz's

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<sup>9</sup> Johan van der Walt, "Rawls and Derrida on the Historicity of Constitutional Democracy and International Justice," *Constellations*, 2009, 16 (1), p. 23 – 43, 2009, p. 30, 40, note 16.

<sup>10</sup> Consider the narrative that unfolds in Ayten Gündoğdu, *Rightlessness in an Age of Rights. Hannah Arendt and the Contemporary Struggles of Migrants*, (New York: Oxford University Press, 2015).

point. His point is ultimately that CLDL contains a “naturalising move” in the other sense of the word “nature” that it discusses at length. It is “naturalising” in the in the physiological or “natural force” sense of the world. Of concern is a silencing of the other that pivots on the physical power or force to do so. And this is what Spindola Diniz considers CLDL’s sober, dispassionate and unheroic return to the impassionate heroic world of the Greeks from which it aims to distance itself. The only significant difference at stake here concerns the passion and the heroism. Where the Greeks subjected “the other” – or one another! – they did so man to man and with “holy passion.” Contemporary liberal democracies are content to do so with cold calculation and the computerized infliction of death that keeps the self’s own blood out of play. An even more damning allegation can be added, in fact. Indeed, CLDL appears to rely on the very passion of Greek poetry – a stunning translation of Homer’s magnificent description of Sarpedon’s death at the hand of Patroclos – to channel away from the frontline of the political, not to mention the frontline of war, whatever passion is left in contemporary societies.

The author of that translation – a real Greek, no less – also has serious qualms with this channelling away of passion from the frontline of the political. We turn to his qualms presently. Suffice it to conclude with regard to Spindola Diniz: If his argument is to be accepted as correct and compelling in all respects, CLDL indeed must be deemed to present liberal democracy as nothing but another power-player in an ancient chain of power-playing. In this regard, his ultimate contention comes very close to Tekin’s: CLDL’s portrayal of liberal democracy does not disclose any grounds on the basis of which one can consider it normatively superior to any other organization of power. In fact, Spindola Diniz appears to raise Tekin’s stakes. Not only does CLDL not portray liberal democracy as normatively superior to other organisations of power, it also portrays it as aesthetically inferior to other forms of power. It is a grey an unheroic form of power, the kind of power that Hegel already associated with the modern state.

Both these readings of CLDL – Tekin’s and Spindola Diniz’s – are much too careful and accurate to simply dismiss. Too much of what they highlight as problematic in CLDL goes to the heart of its argument. The only thing that I can do is to complicate and qualify that which I cannot avoid conceding. The full extent of the complication and qualification that I have in mind will only become apparent in my response to Frank Michelman. For now, I will just briefly offer two complicating observations in response to Spindola Diniz. The first observation concerns the difference between a refusal to discuss *the essentials principles* of liberal democracy with interlocutors who are evidently not only not committed to those principles, but overtly hostile to them, on the one hand, and refusing to discuss with illiberal and non-democratic interlocutors whatever conflict of interests may be of concern between them, on the one hand, and liberal democrats on the other.

The former refusal simply reflects the realistic political sense or “savvy” that there is little point in discussing essential principles of anything with anyone who has no commitment to those principles and even appear hostile to them. No one has endless time and it would be a sign of political naivety to believe everything is – from the bottom to the top – up for discussion in politics. This simple realism is, moreover, the flip side of the political skill and tact that CLDL

associates with liberal democracy and finds lacking, for instance, in Dworkin's *Justice for Hedgehogs*. There is as little point in telling a circle of reverent Stalinists that Stalin had a bad life (or that Stalin did wrong), as Dworkin appears ready to do (see CLDL 195 – 196), as there is in listening to a bunch of Stalinists instructing one on the flaws of liberal democracy. If one wants to get on with a much-needed discussion, it is only common sense to sustain the political skill and courtesy not to discuss things that are obviously pointless to discuss. This is the realist, pragmatist and adequately historicist approach to arduous political exchange. There is nothing naturalising – not even in the physiological sense of the word – in this common-sense avoidance of vast differences of belief and conviction.

The latter refusal invoked above, the refusal to enter into discussions relating to conflicting interests, is something quite different. Haste to quit or refuse discussions of this kind would indeed smack of the “silencing of the other” that Spindola Diniz has in mind. No doubt, the more difficult and intractable discussions of this kind become, the more do they have the tendency or potential to gravitate towards deep differences of commitment that are no longer up for discussion. And when intractable conflicts gravitate towards deep differences of commitment that are no longer up for discussion, the silencing of the other that may potentially result from this breakdown of communication may well turn out to be a rather unheroic and purely technical affair. But this is not a definitive characteristic exclusive to liberal democracy. No contemporary form of power is going to expose itself to risks that technology can spare it. The same is true of ancient forms of power. For all their passionate invocations of holy battles between man and man, the Greeks would also have relied on the invincible Achilles, had they been able to do so as Agamemnon is said to have done.

The definitive characteristic of liberal democracy concerns its claim to be the form of power that is the least inclined and the slowest to gravitate to the technical silencing of the other. CLDL draws a distinction between conflicting opinions and conflicting convictions to cast light on the different kinds of differences that inform political tension and conflict. It describes the liberal democratic ethic in terms of the constant endeavour to prevent the second kind of conflict (conflict of opinion, informed by a conflict of interest) from collapsing into the first kind of conflict (conflict of deep conviction). No doubt, no one can realistically claim the capacity to avoid this collapse absolutely or completely. That is indeed why I can ultimately not refute Spindola Diniz's argument. But I can qualify or complicate it, and can hopefully also do so to the point where it does not seem all that important to hold on to it, notwithstanding its obvious cogency.

Spindola Diniz seems to simply identify liberalism with the ultimate inability of all organisations of power to avoid the collapse of conflicting opinions into conflicting convictions, following which the physical and forceful silencing of “the other” is the predictable outcome. I identify liberalism, instead, with its consistent ethical endeavour to avoid this collapse for as long as possible, notwithstanding its realistic knowledge that it cannot do so without failure and never even does so with consistent success. In the final analysis, my argument is that liberal democracy should be identified with its ability to meaningfully sustain the irreducible contradiction between that what it endeavours to achieve, and that what it invariably ends up

achieving. One can articulate this point with reference to Böckenförde's famous assertion that liberal democracy lives from grounds or conditions that it cannot guarantee (see CLDL 5 – 6). One can do so even more convincingly with reference to Lefort, as CLDL does at length (104 – 111). But perhaps one also does well to simply remember in this regard the systemic hypocrisy to which all good-willed or decent politics ultimately condemns itself (see CLDL 245). I will return to this point in my response to Professor Christodoulidis, my Greek friend who also finds my separations of passion and the political, poetry and the political, and conviction and opinion, deeply bothering.

#### IV. CHRISTODOULIDIS: THE GREATER UNITY OF THE POLITICAL AND THE POETIC IN ANCIENT GREECE, AND THE DEBILITATING REDUCTION OF POLITICS TO OPINION

Apart from two hindering misunderstandings, all thoughts developed in CLDL with which Emiliios Christodoulidis takes issue are accurately and respectfully reflected in his response. In all respects, the tenor and spirit of Christodoulidis' response to CLDL are in keeping with the long scholarly and personal friendship between us.<sup>11</sup> I will push back in what follows with regard to some elements of the "all-too-brief rerun of the genealogy of the articulations and alignments of the three terms ... kosmos, physis, nomos." I will also express doubt whether this re-run – or anything else for that matter – really "teaches us ... that Greek thought sustained a deeper unity that does not transfer readily across to modern dilemmas."<sup>12</sup>

I nevertheless wish to make clear that my "push-back" is also guided by the spirit of the long friendship between us. In the classes we taught together in Glasgow between 2007 and 2011 (also mentioned in Christodoulidis' response), we often astounded our students by getting involved in fiery debates about some or other point at issue. Such debates constitute the exhilarating core of scholarship when they sustain instead of destroy the condition of scholarly friendship, and I think our students ultimately learned more from the fact of those debates than from their contents. Such debates are of course only possible as long as no one can and no one does lay claim to a conclusive answer to the question at hand, considering that the subject matter in discussion does not allow for any conclusive statements. The study of ancient Greek culture, history and philosophy is surely such a subject matter. The doubt that I raise in what follows with regard to elements of Christodoulidis' response to CLDL is therefore surely not raised in a spirit of superior insight or knowledge. It is raised in the spirit of keeping an alternative perspective pertinently alive in the contemplation of the complex matters that we are contemplating. As Christodoulidis himself observes, "these are contested histories, and [his]

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<sup>11</sup> Professor Christodoulidis sometimes switches to a first-name mode of address in his comments on CLDL. That is of course in keeping with our long friendship that, I wish to add, has over twenty years become a very definite source of inspiration and learning without which my life and scholarship would have been considerably poorer. I shall nevertheless retain the formal mode of address (only taking the liberty to omit his professorial title from now on) until close to the end of this response to his comments for the sake of sustaining the same form and tone in my response to all my interlocutors in this exchange. When I finally change the mode of address towards the end of my response to his comments, the depth of my indebtedness to his friendship should have become abundantly clear.

<sup>12</sup> Emiliios Christodoulidis, "Kosmos, Nomos, Physis and 'the Concept of Liberal Democratic Law,'" in this volume, p.

contribution here aims only at a staggering of those trajectories in a way that adds to the complexity, that strengthens the thread of continuity that is occasionally too speedily sacrificed to rupture in [CLDL's] narrative." My push-back will seek to sustain the complexity at large here, by emphasizing again the thread of discontinuity and rupture that CLDL associates with 5<sup>th</sup> century Athens and more specifically with the figures of Protagoras and Sophocles (and the other tragic poets, for that matter).

*Two qualifications of CLDL's physis-nomos-kosmos genealogy*

Let me begin then with the two "hindering misunderstandings" in Christodoulidis' response to which I must object. His "re-run" of CLDL's kosmos-physis-nomos genealogy implies two qualifications of this genealogy. The first concerns the suggestion that CLDL imputes an elevation of nomos to kosmos to 5<sup>th</sup> century Athens. The second concerns the suggestion that CLDL equates the "physis" of the sophists with the "physis" of Hesiod and Homer. Here are the two key statements:

It is thus not the achievement of 5<sup>th</sup> century Athens to *elevate* nomos to kosmos."<sup>13</sup>

But ... the 'physis' of Thrasymachus and the Sophists ... is still a 'law' of the strongest, and is not the narrative of the Heroic epic that *strains at meaning*; it is not the telling of the *Theogony* or of the *Iliad*, incapable of drawing any clear border between what can be rationalized and what cannot."<sup>14</sup>

Let me begin with the achievement of 5<sup>th</sup> century Athens: There is no suggestion in CLDL that this achievement consisted in "elevating nomos to cosmos." CLDL makes it quite clear that the time or such an elevation was long over by then and makes Protagoras one of its main "witnesses." Here is what I consider the key passage in this regard:

Protagoras – almost a century before Aristotle wrote the *Nicomachean Ethics* – evidently had little hope that the crucial elevation of *nomos* to *kosmos* that underpinned earlier Greek societies was still an option for fifth century Athens. On the contrary, the way in which *nomos* ended up unmasked in his time (the way in which its cosmological pretensions became reduced to arbitrary convention), convinced him that *kosmos* was all along a product of *nomos* and that *nomos* could claim no independent anchorage in existence that would afford it self-evident validation. This was what Protagoras' *homo mensura* argument was ultimately about. (CLDL 66)

What was the achievement of 5<sup>th</sup> century Athens, then, according to CLDL? In a passage from which Christodoulidis graciously also quotes the last line, the following suggestion comes to the fore:

Schmitt ... attributes the *nomos-physis* debate in fifth century Athens to the dawning sense among many Athenians that the *nomos* of Athens was just arbitrarily posited law. It posed no constraint on *physis* and came across as an incidental and fleeting manifestation of *physis* itself. For all its pretensions to establish *kosmos* and *xora*, order and place, *nomos* remained *physis*, it remained nothing but a temporary manifestation of the ageless flux of physical force. This is the devastating experience of reality that the "weeping philosopher" already articulated in Ephesus in the sixth century BCE. It is the experience from which Athenian civilisation and democracy endeavoured to offer

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<sup>13</sup> Ibid, p.

<sup>14</sup> Ibid, p.

respite and sanctuary in the fifth century, only to be swept away by it again when the ageless sun set on that brief and briefly beautiful century.

The last sentence makes clear that 5<sup>th</sup> century Athens “endeavoured to offer respite” from the experience that *nomos* was nothing but *physis*. 5<sup>th</sup> Century Athens may have offered some “pretensions to establish *kosmos* and *xora*,”<sup>15</sup> states the second sentence, but for them too, like for the 6<sup>th</sup> century philosopher Heraclitus, *nomos* ultimately remained nothing but manifestations of “the ageless flux of physical force.”

What was “briefly beautiful” about that “brief century” then? What was remarkable about 5<sup>th</sup> century Athens, according to CLDL? The answer to this question is twofold. On the one hand, Athens did manage for a while to engage in the kind of modest but careful democratic and rhetorical practices that Protagoras had in mind for establishing a “human measure,” a “human measure” which, irrespective of the pretensions it may have had (irrespective of the mythological or cosmological tropes on which it may well have relied still) could no longer claim secure foundations by force of these tropes. These practices helped the Athenians to cope with a void, not to fill that void (see CLDL 67). And indeed, a certain excellence in civil cooperation differentiated itself from competitive excellence during this time, as Christodoulidis observes well, and Protagoras consciously engaged with this difference (see CLDL 67, fn. 29).

This brings one to “the other hand,” the other element of the 5<sup>th</sup> century achievement. Of concern is what I concede to be one of the most audacious moves made in CLDL. In order for civic or cooperative virtue to obtain a significant place in 5<sup>th</sup> century Athens, goes the argument, something had to be done to limit and “contain” the competitive excellence on which earlier Greek societies thrived unreflectively and perhaps even uncomprehendingly, as Christodoulidis’ second qualification of CLDL’s *physis-nomos-kosmos* genealogy (to which I turn presently) suggests. The claim that CLDL makes in this regard concerns the role that athletics and poetry played (or must have played) to accommodate the competitive spirit of the Greeks, and to accommodate the yearning to touch base with “the ultimate ground of existence” that lurked in that competitive spirit, the ultimate ground of existence that political rhetoric in its cooperative mode could no longer accommodate. This is indeed an argument about “compensation,” as Christodoulidis observes well towards the end of his response, or about “unburdening,” to invoke the remarkable term (*Entlastung*) that Schmitt employs rather shockingly in *Der Nomos der Erde* (see CLDL 48, 54, 59, 244). There is an element of modern functionalism in this argument about the “compensation for” or “unburdening of” politics in 5<sup>th</sup> century Athens, and about the incorporation of this argument into the concept and definition of liberal democratic law that CLDL puts forward in the final chapter. Christodoulidis objects to this imputation of modern functionalism to the ancient Greeks. He insists that “Greek thought sustained a deeper unity” that “[held] the practical, the ethical, and the aesthetic together in a mutually constitutive way.” It “is the ‘achievement’ of modern thought to tear them radically apart.”<sup>16</sup>

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<sup>15</sup> The English transcription of χώρα should be chôra. I thank Christodoulidis for pointing this out.

<sup>16</sup> *Ibid*, p.

It was, however, not “modern thought” that tore the “deeper unity” of 5<sup>th</sup> century Athens apart. That unity of the practical, the ethical, and the aesthetic was much too short-lived to consider it a significant “unity,” let alone a “deep” one. Of concern, it would seem in distant retrospect, was a precarious “togetherness” of different societal elements that was briefly – and beautifully so – *held together* for a while by a very modern kind of thinking that can fairly be associated with Protagoras. It is also does not seem to be an over-statement to say that Protagoras’ philosophical thinking may have had an active hand in holding Athenian democracy “together” for a while. Protagoras actively collaborated with Pericles in the years between 463 and 458 before a quarrel between them led to his banishment.<sup>17</sup> Relying especially on a fine article of Laszlo Versenyi, CLDL considers Protagoras a precursor of Lefort (see CLDL 64 - 68). For him, myth and knowledge were no longer the foundation of the political, but inventions of the political. Appeals to myth and claims to knowledge would of course not go away during this time, but, at least for a while, they would appear to have left the foundation of power empty enough to sustain “an opening” in which Athenian democracy could be held together.

All too soon, however, a very different kind of thinking tore this togetherness apart again, a different kind of thinking that need not be equated with the old conceptions of *nomos*, *logos*, and *physis* that informed 7<sup>th</sup> and 6<sup>th</sup> century Greece, but was surely highly reminiscent of them and probably not completely unrelated to them. This brings us back to Christodoulidis’ second qualification of CLDL’s *physis-nomos-kosmos* genealogy. He insists on a significant difference between “the law’ of the strongest” advocated by the Sophists and the narrative “telling of the Theogony or Iliad.” The former is already the product of rational or secular construction. The latter concerned a narrative comprehension that was not yet capable of “drawing any clear border between what can be rationalized and what cannot.” I do not see any reason to dispute this claim, and I do not think there is anything in CLDL that comes close to contradicting it. CLDL does invoke a link and a resemblance between the former and the latter and observes that this resemblance may have struck Aristotle as pertinent. This is the key statement:

Aristotle may well have considered the sophists advocates for the return to this Pre-Socratic world, this world in which the elements just burned off and allowed nothing to anticipate or pursue, let alone attain, fruition. [He must have considered] this world doomed to a perennial potentiality incapable of actualisation – “ἦν ὁμοῦ πάντα δυνάμει ἐνεργεῖα δ’ οὐ” (CLDL 75).<sup>18</sup>

This Aristotelian vision of the Pre-Socratic would seem to contradict Christodoulidis’ identification of the rise of the concept of *kosmos* in the thought of Anaximander. This is not the case. Werner Jaeger already referred to the Pre-Socratics philosophers as the first cosmologists (see CLDL 75, fn. 15). It is nevertheless important to keep in mind that this was still a very thin concept of *kosmos* that can hardly be distinguished from a rather anarchic vision of *physis*. It is doubtful whether Anaximander’s famous invocation of justice or *dike* (in terms of the penalty that all elements of existence pay to one another in accordance with proportionate

<sup>17</sup> See Davison, “Protagoras, Democritus, and Anaxagoras,” *The Classical Quarterly*, 1953, 3 (1), pp. 43 – 53, at 37.

<sup>18</sup> It is interesting to note that Foucault considered “the sophist [...] the little representative, the continuation, and the historical end ... of the figure of the tyrant” of the sixth and seventh centuries. See Foucault, *Essential works 1954 – 1984*, Penguin Books 1994, p. 31.

duration in time) offers any vision of cosmological order that is significantly more stable and richer than the bare equilibrium between warring elements that Heraclitus described in terms of “eternal ups and downs that remain the same” – ὁδὸς ἄνω κάτω μία καὶ ὡστή (CLDL 43). These first cosmological visions of the 6<sup>th</sup> century contribute little to any contemplation of the political that does not abandon politics to eternal blind conflict and the un-comprehended fate that Christodoulidis associates with the world of Homer and Hesiod. From this perspective, the “co-originality link” that Christodoulidis draws between Anaximander and the legislation of Solon appears somewhat idealized. Solon argued for his reforms by invoking a cosmological poetry that was not unlike Hesiod’s. His social cosmology surely turned on the idea of an “equilibrium of social forces,” which Christodoulidis explains breathtakingly. A certain social realism should nevertheless keep one alert to its limited ideological purport. Solon’s legislation was important and surely “wise,” but it was also dictated by gaping social inequality (dysfunctional levels of hopeless indebtedness that allowed for the enslavement of some citizens by others) that threatened to tear Athens apart. The relief that it brought was at best partial and formal. The knowledge of the day was still much too implicated in power, as Foucault observes acutely.<sup>19</sup> Much needed further relief only came with the reforms of Cleisthenes at the end of the 6<sup>th</sup> century, and we know, moreover, that ancient Athens and Greece never dispensed with the fundamental distinction and inequality between citizens and slaves.<sup>20</sup>

What Solon surely achieved, at least, is to terminate the enslavement of citizens that resulted from indebtedness. From then on, the Athenians had to obtain their slaves from “the foreign market”, so to speak, through purchase or warfare. Similar histories played out centuries later in Rome. The social crises of debt and inequality that informed them was mostly only relieved (never resolved) under threat of complete social disintegration. CLDL pays quite a bit of attention to these Roman histories of social crisis to question Villey’s idealization of Roman law as a system of wise and just distribution and redistribution, an idealization that is all too pervasive among scholars of Roman law. My admiration for the ancient Greeks and their modern descendants is too deep for this kind of idealization. I love the Greeks like they were and how they are, and for the way they gave us and still give us a language in which we can think, even when we need to think against the grain of their own thinking. I am not thinking here only of Christodoulidis, to whom my own thinking owes so much (as will presently become clear), but also of another Greek colleague – Thanos Zartaloudis – who published one of the

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<sup>19</sup> See Ibid: “In the seventh and sixth centuries, the tyrant was the man of power and knowledge, the one who ruled both by the power he exercised and by the knowledge he possessed. [The tyrant] was the great historical personage that actually existed, though he had been absorbed into a legendary context – the famous Assyrian king. ... What occurred ... at the origin of the Greek age of the fifth century, at the origin of our civilization, was the dismantling of that great unity of a political power that was at the same time, a knowledge – the dismantling of that unity of a magico-religious power which existed in the great Assyrian empires.”

<sup>20</sup> I rely mostly on Böckenförde, *Geshichte der Rechts- und Staatsphilosophie* (Tübingen, Mohr Siebeck, 2002) pp. 26 – 38, for the points that I am making here, and my understanding of this history is certainly not steeped in extensive reading. And the specific point about social realism is more mine than Böckenförde’s. I nevertheless consider it an important point that should inform one’s understanding of the ancient world as much as it informs one’s understanding of modernity and our own age.

most stunning books on the “birth of nomos” just before CLDL was submitted for publication.<sup>21</sup> The line of thought started in CLDL goes against the grain of Zartaloudis’ work and will probably continue to do so. It will also do so with the deepest admiration. And no doubt, CLDL would have benefitted immensely from Zartaloudis’ insights had it had more time to do so.

### *Drawing public reason lessons from Antigone*

In one of the most intriguing parts of his response to CLDL, Christodoulidis very subtly points out an element of ignominy that is lurking in “lesson for public reason” that CLDL takes from Sophocles’ *Antigone*. CLDL discusses the *Antigone* for purposes of distinguishing and separating, as far as possible, the poetic from the political. It articulates this distinction in terms of the uncompromising poetic quest and longing for the primordial source of existence, on the one hand, and the political (public reason) concern with practical compromises, on the other. CLDL invokes in this regard the tightrope between the poetic and the political that Sophocles and Protagoras drew tight for Aristotle, and suggests that Aristotle ultimately did not have the nerve to walk this tightrope.<sup>22</sup> He resolved the aporetic tension between the poetic and the political with his potentiality-actuality distinction. The percipience and poignancy of Christodoulidis’ response to this (admittedly rather risky) move in CLDL consists in the way in which it repeats the Aristotelian resolution of the contradiction between the poetic and the political. He specifically takes issue in this regard with the metaphor of the tightrope that CLDL invokes. By invoking this metaphor, CLDL translates “contradiction into tension.” It thus allows for a passage where there is none. The ignominy that lurks here consists in the way this passage is reserved from the citizen who can learn from *Antigone*’s excess, but not for *Antigone* herself. Christodoulidis writes:

Because a tightrope affords passage, however fraught. It shows the way to the citizen *but* (or maybe even *because*) to the tragic heroine it denies passage. Suspended taut over the ‘abyss’ it offers her no register of recognition: devastatingly the lesson that *Antigone* can offer to a concept of liberal democratic law is not the truth of her conviction, but the mistake of holding on to it.

This devastatingly accurate, acute and beautiful observation points out a mistake or an inaccuracy in CLDL from which future thinking about this contradictory or aporetic constellation of the poetic and the political will have to retreat. The traversal that the tightrope metaphor renders possible – “however fraught” – brings about a hermeneutic mediation between the political and the poetic that CLDL endeavoured to avoid at all costs (all hermeneutic costs), so to speak. CLDL endeavoured to articulate an aporia – a non-passage – that ultimately deprives the citizen (as citizen) from the poetic, as much as it deprives the poet (as poet) from the political. Of concern is not a crude or simplistic Platonic banishment of the poet from the city, but a very different “twofold” banishment. It invites the poet to live her exiled existence within the protected interior of the city (where her poetry is still seen or heard), but it banishes the

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<sup>21</sup> See Thanos Zartaloudis, *The Birth of Nomos* (Edinburgh: Edinburgh University Press, 2019).

<sup>22</sup> I will presently point out that the tightrope metaphor is misleading because it suggests a “passage” that I did not want to suggest. One can perhaps avoid the misleading aspect of the metaphor by referring to a “never-ending” tightrope, thus invoking a mode of existence defined by an interminable traversal.

“poetry” of the poetically ungifted citizen (for whom strife and warfare offers the only access to the poetic encounter with the foundation and abyss of existence, to invoke already here the words of Hermann Heller to which I return after my response to Bert van Roermund) from the affairs of the city. It bans the existential thrill of raw belligerence to the far side of the Rubicon, as CLDL puts the matter with reference to the beginning of the end of the Roman republic – see CLDL 59).

Only when this double exile has been more accurately articulated, that is, only when it has become clear that it is as much the citizen’s banishment from the poetic as the poet’s banishment from the political that is at stake here, might the “learning from the exiled poet” that CLDL invokes become less scandalous. To be sure, the scandal will never go away completely. A remainder of positive learning from that which has been exiled negatively will persist. And any poetically ungifted citizen whose poetic compulsion drives her to commit murder and mayhem in the city will remain duly suppressed (as she would by all political forms, not just liberal democracy), until such time as a real poet effectively and convincingly restyles her as an Antigone, or a Medeia. To be sure, this constellation would not have helped Ulrike Meinhoff, Böll’s Antigone, according to Christodoulidis. It would always have condemned her. But it would have – depending on the power of the poetry – afforded her a disturbing place in the memory of citizens through which they, too, could have come to experience the dark abyss of existence that once drove Meinhoff out of her mind, the dark abyss of existence that should stir every living soul faced with, for instance, the devastating poverty that persists undiminished in the midst of the massive accumulation of wealth in “liberal democracies.”<sup>23</sup> But that is where she would have had to stay, incarcerated in the dark recess of a poetic memorial. Hers would have remained “the objection that cannot be heard.”<sup>24</sup> Not even Böll “heard” her objection. He found her war of 6 against 60 000 000 intolerable and never really resorted to any significant poetry to redeem her.<sup>25</sup>

Of concern is again the point made in response to Spindola Diniz above. Like all organisations of power, liberal democracy will undoubtedly also end up silencing voices that it cannot continue to tolerate. Its distinguishing characteristic does not consist in an insistence or intention never to silence dissent. But neither does it lie in the silencing of dissent. Its distinguishing characteristic consists in its insistence to tolerate dissent as long and as far as possible. I come back to this point in my response to Frank Michelman below. Suffice it just to note that the “as long as possible” and “as far as possible” invoked here are vague terms that are surely open to abuse. No doubt, they are the principal hosts of the systemic hypocrisy that liberal democracy – exactly because of its sincere claims to decency – cannot avoid (see again CLDL 245). And it is here, in this systemic hypocrisy, that the citizen’s exile from poetic “truthfulness” or “faithfulness” becomes most apparent.

<sup>23</sup> I had a weaker example here. I am indebted to Christodoulidis for this one.

<sup>24</sup> See Christodoulidis, “The Objection that Cannot Be Heard: Communication and Legitimacy in the Courtroom,” in Duff, A., et al (eds.), *The Trial on Trial Volume 1: Truth and Due Process*, (Oxford: Hart, 2004) pp. 179-202.

<sup>25</sup> Heinrich Böll “Will Ulrike Gnade oder freies Geleit?,” *Der Spiegel* 3/1972. See <https://www.spiegel.de/politik/will-ulrike-gnade-oder-freies-geleit-a-f5d05401-0002-0001-0000-000043019376?context=issue>

It is indeed from Christodoulidis' poetry – his Greek retelling into English of Homer's ancient tale about the death of Sarpedon at the hands of Patroklos – that CLDL draws the strength – the strength of a savagely non-hypocritical language – to bring its most complex thought to some sort of simplified conclusion (see CLDL 239). It leads CLDL to ask whether poetry can spare liberal democracy the political pursuit of the ground and abyss of existence that Heller found lacking in the democratic politics of his time. The question is pertinent, because liberal democracy indeed demands a certain "severance" of political opinion from the deep existential convictions that spring from and reach back into those grounds. The question is whether poetry can sustain the link with this existential ground that liberal democratic politics cannot sustain, and can therefore do so "on behalf of" politics. This brings one to the concluding passage of Christodoulidis' response to CLDL.

*The severance of opinion from conviction*

Christodoulidis brings all the themes touched upon above together in the last paragraph of his response to CLDL. There he writes:

Van der Walt's prescription for the exercise of public reason is one that flows from but cannot restore the unity from which it emanates. Instead it is condemned to the interstice between the political and the poetic, but having lost the unity of experience and action that underlay them both in Ancient Greece, must now recast them in a compensatory modality. Which means that the poetic and the political correlate to conviction and opinion respectively, in a division of labour of sorts. The problem of this fragmentation and separate deployment is not that opinion loses its basis in conviction or that it is thinned out in the way that 'preferences' are for MacIntyre. It is rather that the circulation and competition of claim and counterclaim cannot (as it is meant *not* to) engage the comprehensive theories of justice that justify them, which means that the opinion 'we owe duties of justice to others' counters as equal the opinion 'I care little for justice to others'. When the political is floated as opinion in the shallow circuits of competition, it becomes increasingly difficult to sustain a substantive theory of justice. If the all-too-brief rerun of the genealogy of the articulations and alignments of the three terms – kosmos, physis, nomos – teaches us something it is that Greek thought sustained a deeper unity that does not transfer readily across to modern dilemmas. Ancient thought holds the practical, the ethical, and the aesthetic together in a mutually constitutive way, and it is the 'achievement' of modern thought to tear them radically apart.

I believe my response to the last lines of this rich passage has already been offered above. Christodoulidis' "rerun of the genealogy of the articulations and alignments of ... kosmos, physis, [and] nomos" does not convince me of "a deeper unity" of the "practical, the ethical, and the aesthetic" in Greek thought that can be traced from the 6<sup>th</sup> to the 5<sup>th</sup> centuries, let alone 7<sup>th</sup> to 5<sup>th</sup> centuries. The notion of such a long-sustained unity strikes me as an overburdened idealisation. As has been clarified above, CLDL does not find any such unity in the fifth century. And to the extent that such a "unity" may have been effectively sustained in sixth century Greece, it was conditioned by the fundamental lack of significant societal, political and cultural differentiation of early societies, societies that still find themselves held together in the grip of elementary-poetic and rudimentary-philosophical conceptions of the political in terms of blind conflict and fate. It was during this early time that an elevation of *nomos* to *kosmos* was still possible in Greece. When the 5<sup>th</sup> century dawned, Greece was already in the grips of social, cultural and political differentiations that rendered this elevation impossible. Aristotle sought

to rehabilitate this elevation in the 4<sup>th</sup> century, but by then the idea of this elevation had begun to manifest all the trappings of a melancholy longing for an irretrievable past. Greece was by then already well baptised in a first but short-lived experience of “modernity.”

“Modernity” indeed reflects an experience of reality as “radically torn apart.” CLDL articulates this insight with specific reference to Hegel. It is indeed under such torn conditions that one would typically find oneself faced with an unresolvable stand-off, not only between contradictory opinions, but also and especially between contradictory convictions. Since the dawn of modernity, Western societies have not only relentlessly been caught in the unresolvable stand-off between “the opinion that we owe duties of justice to others” and “the opinion that we [don’t].” They have also relentlessly been caught in nothing less than the stand-off between the *convictions* that “we owe” and “don’t owe” these duties. Liberal democracy is the organisation of power that is guided by the anticipation of the disaster that looms whenever these convictions are unleashed upon one another without first translating them into opinions from which one can retreat when the stakes appear to get too high. This organisation of power surely reconciles itself with a thick margin of “unnecessary suffering,” were one to equate “unnecessary suffering” with suffering that can at least logistically and technically be avoided.<sup>26</sup> This reconciliation is either guided by the vague anticipation of the greater suffering that will ensue from unforgiving endeavours to restrict suffering to the “absolutely unavoidable,” on the one hand, or informed by the epistemologically modest insight that the concept of “absolutely unavoidable suffering” is one that mortals cannot define with adequate precision.<sup>27</sup> Either way, there can be no doubt about the burden that the liberal democratic arrangement of power heaves upon its own conscience because of its expansive caution and prudence. The liberal democratic law described in CLDL dare not have angelic pretensions. Angelic pretensions would render its systemic hypocrisy (CLDL 245) sickening.

Considering the looseness of the screws that hold it together, liberal democracy can also not claim that it will always be the uniquely correct or appropriate arrangement of power. Its assessment of “unavoidable suffering” can easily become too tolerant from the perspective of those subjected to this suffering. There is nothing that shields liberal democracy from sufficiently explosive revolutionary situations in which it will be too late to hope for the translation of conviction into opinion. When that happens, liberal democracy or that which still presents itself in its name is as likely to be terminated, or at least suspended, as any other political form. It must consider itself as exposed as any other form of politics to the formless, boundless and reckless sovereignty of a revolutionary event (see CLDL 11). And no doubt, liberal democracy should always consider the likeliness of such an event directly parallel to the level of its tolerance of “unnecessary suffering.” That is why CLDL considers elementary socio-

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<sup>26</sup> See Christodoulidis, “Social Rights Constitutionalism: An antagonistic Endorsement” *Journal of Law and Society*, 2017, 44 (1), p. 145, referring to Maurice Glasman.

<sup>27</sup> Nothing justifies using this modest epistemology as a “liberal democratic” excuse. It should, instead, be considered the liberal democratic imperative always “to discern in the situation the antinomy that might acquire hermeneutic traction, be signified as injustice, and acted on as such, as Christodoulidis puts it (see *ibid*). And he continues: “It is here that the constitutional contradictory iteration of social rights constitutionalism against market thinking, and the former’s unwavering insistence on solidarity, may provide the leverage.”

economic guarantees a definitional component of liberal democratic law (see CLDL 244). It is simply so that liberal democratic law has to put up with – and even respect the rights of – a large contingent of citizens who are convinced that they “don’t owe duties of justice to others.” This contingent of citizens often – much too often – form legislative majorities that frustrate the duties of justice that some of us believe we owe to others. The more this happens, the more does liberal democracy expose itself to the imminence of revolutionary disruption. It cannot assume that it will be forgiven indefinitely for its continuing sustenance of majorities that “don’t care for justice to others.” This is all I can say in response to Christodoulidis’ duly disturbing observation regarding the liberal democratic reduction of the political to the “float[ing] of opinion in the shallow circuits of competition.” No political form will in the long run be forgiven for such a reduction of the political. For that, all of us are all too constantly exposed to the imminence of that which Christodoulidis calls “the event.”

Does the notion of “faithfulness to the event” that Christodoulidis invokes with reference to Badiou add something significant to the conception of the political? I have my doubts. The notion of faithfulness to the event does not strike me as a concept that any realistic theory of politics needs to consider seriously. It strikes me as the latest attempt to provide politics with a metaphysical or mystical foundation. An event is an event. It occurs. It passes. Its conceptual purport points to something that is significantly devoid of conscious human agency. By the time any notion of “faithfulness to the event” begins to go around, the event is evidently already over. Historically, this has always been the moment when a belated revolutionary fervour turns exponentially more murderous than it needs to be.

However, the notion of “faithfulness to the event” does strike me as a concept that is indispensable for a theory of poetry. This is one of the key thoughts that I am developing in current work on liberal democracy law and literature to which Christodoulidis refers to the end of his response in most friendly, generous and endearing first name terms. And it is at this point that I also wish to change the mode of my address in acknowledgment and acceptance of the friendship and generosity that his whole response to CLDL has come to convey. Poetry is the mode of language that is conditioned by the yearning to return to the event. Law is the mode of language that seeks to retreat from the event. I accordingly consider my friend Emilios’ concern with faithfulness to the event a poetic concern, not a jurisprudential or political one. And perhaps it is indeed from Emilios’ pertinent poetic concerns, and indeed his poetry, that the theory of liberal democratic law stands – perhaps still ignominiously so – to learn the most. Some of these concerns I will take over into the response to Frank Michelman to which I turn now. I therefore hope Emilios will also see my response to Michelman as a continuation of my response to him.

## V. MICHELMAN ON THE LIVELINESS – AS OPPOSED TO THE LIFELESSNESS – OF LIBERAL DEMOCRACY

The crux of Professor Michelman’s response to CLDL concerns the resonance that he discerns between the “separation or law from life” that the concept of liberal democratic law put

forward in CLDL seeks to articulate, on the one hand, and John Rawls' conception of the political-liberal ideal of law as "freestanding" from comprehensive world views, on the other.<sup>28</sup> Michelman first points out the specific points of resonance between Rawls' "free-standing" conception of political liberal law and the separation of law and life for which CLDL argues. He then moves on to pose questions about the possible dissonances between these two endeavours to understand political-liberal law. Rawls goes quite far down the line of separation that CLDL envisages, but he still retains a certain link between law and life that he considers indispensable for his understanding of liberal democratic law, argues Michelman, a link that CLDL appears to sever and cast off as well.

In response to the question whether political-liberal law should be considered as uprooted from life as CLDL contends, Michelman answers: "Yes and no[.] It depends on how widely and thinly we will spread the mantle of life." And no doubt, there is a concern from his side that CLDL spreads that mantle not wide enough. The concept of life contemplated in CLDL does not seem to recognise the undeniable element of life that ultimately sustains the ethic of liberal democracy or political liberalism. This concern finally surfaces in the discomfort that he expresses with regard to the notion of the "lifelessness" of liberal democratic law that CLDL invokes on a number of pages from chapter 7 onwards. I wish to make clear from the beginning that I consider this concern well-founded. A very definite rephrasing is due as regards the separation of law from life that CLDL aims to articulate. This is not only so because of a relatively small dissertational lapse, namely, an inadvertent omission of a crucial set of cautioning quotation marks in two of the four cases where the term "lifelessness" is invoked. CLDL is burdened by a bigger omission in this regard. It fails to register an irreducible element of "liveliness" of liberal-democratic law that Michelman not only recognises in Rawls' description of the key issues at stake in political-liberal law, but also discerns most generously in another essay on political liberalism – "The Gift of Time and the Hour of Sacrifice" (GTHS)<sup>29</sup> – that I published more or less at the same time that CLDL appeared.

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<sup>28</sup> I will address Professor Michelman in formal academic style and terms until close to the end of my response, only taking the liberty of omitting his professorial title from now on. As already mentioned in my response to Prof. Christodoulidis, I decided to do this in order to keep the style and tone of my responses to all five my interlocutors in this exchange relatively similar. I of course feel a strong inclination to respond in kind to the endearing informality of Professor Michelman's address, since I have exactly the same reasons that he has for doing so. The twenty-five years of friendship that Professor Michelman mentions in his footnote 2 also constitute the background and context of this response to him, with one not so small difference. When we met more than twenty-five years ago, Professor Michelman was already well recognized across the world for ground-breaking scholarship in constitutional and general legal theory, while I was writing my PhD thesis. That necessarily meant that in the "sometimes quite intense intellectual exchange" (mentioned in his footnote 2) that was to follow quite frequently in the twenty-five years to come, I not only benefited from a fellow scholar and friend, but also from an experienced and most generous mentor. For his friendship, but also for his mentorship, I will never be able to thank him enough. His profound influence on the thoughts developed in CLDL cannot be overstated.

<sup>29</sup> See Van der Walt, "The Gift of Time and the Hour of Sacrifice: A Philosophical-Anthropological Analysis of the Deep Difference between Political Liberal and Populist Politics," in Brian W. Nail and Jeffrey A. Ellsworth (eds), *Law's Sacrifice, Approaching the Problem of Sacrifice in Law, Literature, and Philosophy*, (New York, Abingdon: Routledge, 2019), pp. 113 – 149.

The element of “liveliness” that Michelman discerns in GTHS prompts him to underline a point of close proximity between Rawls’ and my thinking about political-liberal or liberal democratic law. Of concern for him is a crucial element of political liberal “striving towards freestandingness from *divided life*” on the “precariousness and humility (but not the lifelessness)” of which, he suggests, both Rawls and I can perhaps “stand.” I could not agree more. I also see the unique “liveliness” of this political-liberal “striving” that Michelman stresses. This liveliness, I will continue to insist (with the full agreement of Michelman, I believe), is something very different from the concept of life adrift in the soup of metaphysical vitalism from which CLDL seeks to distil the concept of liberal democratic law. But that is no reason for calling it “lifeless.”

These are the key points that I will unpack towards the end of this response to Michelman’s comments. Before I get there, however, I will do two things. I will briefly recall Michelman’s line-up of the resonating or corresponding elements of the free-standing status of political liberal law that Rawls stresses, and the separation of law from life that CLDL underlines. I will thereafter retrace the essential steps of Michelman’s analysis of Rawls’ conception of political-liberal law. I will do so for purposes of stressing the non-metaphysical concept of political-liberal law that Michelman discerns in Rawls’ work, thereby also clarifying the way in which I read this non-metaphysical concept of political-liberal law in Rawls from my side.

*Rawls’ freestanding liberal law and CLDL’s separation of law from life*

Michelman identifies four points of resonance between Rawls’ conception of political-liberal law as freestanding from comprehensive world views, on the one hand, and the elements of the separation of law from life argued for in CLDL and GTHS.<sup>30</sup> I will list them as A1 to A4 to distinguish them clearly from the lists B1 to B5 and C1 to C4 that follow later:

A1) The social fact of pluralism (Rawls) – Life externally divided (CLDL).

A2) The constant tension or contradiction between the motivated citizen’s impulse to act in the cause of true justice and her impulse to cooperate with free and equal others on terms all can accept (Rawls) – life internally conflicted (CLDL in combination with GTHS).

A3) The ideal of political-liberal law as freestanding from comprehensive world views (Rawls) – the uprootedness of liberal democratic law from life (CLDL).

A4) A call to or duty of civility that sustains the ideal of political-liberal legitimacy (Rawls) – the indispensable moment of “graciousness” or “the gift” that sustains liberal democratic law (GTHS).

I wish to underwrite all four points of this alignment completely. I wish to add that I find point 2 especially illuminating for my own understanding of CLDL. Although there is surely enough

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<sup>30</sup> See Michelman, “Civility to Graciousness: Van der Walt and Rawls,” pp. 2 – 4.

textual evidence in CLDL of this “life internally conflicted” (notably, the discussion of Duncan Kennedy’s fundamental contradiction which Michelman also cites), this point was not quite as clear and upfront in my own mind when I was writing CLDL, as Michelman makes it in his response. I think Michelman sees this as clearly as he sees it because of the way he reads CLDL and GTHS together. As already pointed out above, I did not consciously think about the link between CLDL and GTHS when I was writing CLDL, and I realise now that the omission to do so actually leaves me – or confronts me – with a big question with two dimensions. The first dimension concerns the unique liveliness of liberal democratic law to which I return in the last part of this response to Michelman. The second concerns the relation between this liveliness of liberal democratic law and the compensatory poetic fictions that sustain it according to CLDL. I return to this second dimension at the end of my response to Bert van Roermund. Suffice it to put it in this nutshell for now: What remains of the compensatory function of the poetic fictions invoked in CLDL when one begins to recognise that liberal democratic law turns on an exchange of gifts that is by far not as “lifeless” as CLDL portrays it to be? For what – if anything – do these poetic fictions still compensate if they no longer compensate for the “lifelessness” of LDL? When I return to this question in my response to Van Roermund, I will of course also be returning to the questions about “poetic compensation” posed to me by Christodoulidis above.

Having paired-up the key elements in Rawls’ and my conceptions of political liberal or liberal democratic law in the way shown above, Michelman moves on to unpack the Rawlsian elements in some more detail. He highlights in this regard the following five points that I will number B1 to B5:

B1) The constitutional democratic tradition pivots on two fundamental ideas:

a) The severalty of persons with a higher-order interest in exercising their moral agency (which is always a separate moral agency).<sup>31</sup>

b) Society as a scheme of cooperation between these moral agents based on terms all can accept.<sup>32</sup>

These two ideas end up in serious tension with one another whenever political decisions lead to the exercise of coercive powers by some moral agents over others, as happens constantly in liberal democratic societies characterised by reasonable pluralism (societies composed of moral agents who end up differing with one another with regard to important issues that stand to be decided, without anyone of these moral agents exercising his or her moral agency unreasonably). This is *the* problem of political liberalism according to Rawls.<sup>33</sup>

B2) This key problem of liberal democracy demands the articulation of a “liberal principle of legitimacy” (LPL) in terms of which coercive governmental powers can only be exercised in ways

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<sup>31</sup> Michelman “Civility and Graciousness,” p. 4.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid, pp. 4 – 5.

that all the moral agents making up a political-liberal society can endorse as reasonable and rational, notwithstanding the fundamental moral dissent that conditions their sense of being coerced.<sup>34</sup>

B3) The institutional implementation of LPL turns on a deflection of all serious cases of moral dissent regarding appropriate principles of cooperation to the positive principles of cooperation entrenched in a “justification-worthy” constitution.<sup>35</sup>

B4) The justification-worthy constitution demanded by LPL contains “a ledger of guaranteed basic liberties” that complies with a Goldilocks demand to be neither too thin, nor too thick. Both the ledger as a whole and the individual basic liberties that it contains must be “thin enough” to allow the separate and several moral agents invoked above to rely on their own moral agency to decide matters of utmost moral importance to them. They must nevertheless be “thick enough” to proscribe governmental exercises of moral agency which other moral agents consider irreconcilable with their own moral agency, and to prescribe governmental exercises of moral agency which all agents consider indispensable for their moral agency.<sup>36</sup>

B5) The high stakes involved in this constellation of social cooperation among these “several and separate” moral agents are clear. Of concern is a constant deliberation whether their respective levels of governmentally-granted “moral fidelity” and governmentally-imposed “moral infidelity” are accurately enough assessed to sustain continuing cooperation between them. There can be no doubt that this endeavour to reconcile adequate moral faith with adequate social cooperation involves a highly complex and precarious practice. It is very likely that even those moral agents fully intent on cooperation are bound to arrive at very different resolutions of the tensions they need to resolve, different resolutions that may well come to burden their willingness to cooperate. Hence the institution of a forum in political-liberal societies – mostly a high court – that can be trusted to perform the required resolutions consistently enough to encourage instead of discourage general willingness to cooperate. The officials who staff the forum – usually judges – are well-recognised as reliable experts (constitutional experts) regarding all applicable principles of cooperation. That is why their assessments of the implications of the applicable trust-worthy constitution can likewise be considered trust-worthy, notwithstanding the fact these experts are themselves also “several and separate” moral agents subject to the same contradictory imperatives of moral faithfulness and social cooperation.<sup>37</sup>

These five conditions for political-liberal law are only realistically pursuable when circumstances prevail that one might call a “realistic utopia,” to use an expression that Rawls used in *The Law of Peoples* (1999). This “realistic utopia” prevails when the following four motivational features characterise a society:

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<sup>34</sup> Ibid, p. 5.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid, pp. 5 – 6.

<sup>37</sup> Ibid, p. 7.

- C1) a political conception of the reasonable<sup>38</sup>
- C2) allowance for burdens of judgment<sup>39</sup>
- C3) liberal toleration coupled to the idea of the “at-least reasonable”<sup>40</sup>
- C4) a call to civility<sup>41</sup>

The political conception of the reasonable reflected under C1 concerns a distillation of “basic ideas implicit in the public culture of a democratic society.” These basic ideas correspond with those listed above under B1 to B5, only adding to them the idea of “authorship of the laws by their addressees.” In other words, all five characteristics of political-liberal law listed above can be said to reflect or emanate from the “political conception of the reasonable” under C1.

Here – at C1 – is where I shall interrupt my further elaboration of Michelman’s analysis of LPL for a moment, because it is exactly at this point where he interrupts his own exposition of Rawls’ position with a double barrel question (posed in two sets of parentheses) to me: Do the invocations of a “realistic utopia” (a society where the characteristics B1 to B5 are considered “possible” and therefore worthy of pursuit) and an idea of the reasonable “implicit in the public political culture of a democratic society” (invoked under C1) already involve more rootedness in life than CLDL’s distilled concept of liberal democratic law can accept? It strikes me as interesting that Michelman should ask these questions at exactly this point of his response. He is clearly sensing that I may have some doubts about where things have been going until now. And he is right. Had I had to answer his questions on the basis of the information conveyed by B1 – B5 and C1, I would have indeed had to answer: Yes, the link between law and life is becoming too thick. And I would have added that the “realistic utopia” invoked here is not realistic at all. Elaborated in more detail, I would have put matters as follows:

The resolution of the problem of LPL expounded under B1(a & b) and B2 assumes the squaring of a circle that mortals cannot square. It effectively demands from them the “reasonable acceptance” of the “morally unacceptable.” Three compelling considerations demand this observation:

- i) None of these mortals subject to LPL-justified governmental coercion will, from any of their respective moral perspectives, be engaged in the “reasonable acceptance” of the “morally acceptable” or “morally still acceptable,” for this would no longer count as a case of coercion.
- ii) None of them will be engaged in the “reasonable acceptance” of the “morally unacceptable,” because none of them will be considering their own moral convictions unreasonable or irrational. One can and must assume they all will be considering their own comprehensive

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<sup>38</sup> Ibid, p. 8.

<sup>39</sup> Ibid, p 10.

<sup>40</sup> Ibid, p. 11.

<sup>41</sup> Ibid.

world views coherent and non-contradictory, thus containing no gaps between morality, reason, and rationality.

iii) Given their respective assessments of their own comprehensive world views as coherent and non-contradictory, all governmental constraints on their moral convictions will be experienced as both “unreasonable” and “immoral.” To the extent that they accept to live with instead of resisting the coercion, they will consider themselves unfaithful to the moral imperative to reject the unreasonable.

Rawls of course seeks to resolve the problem reflected in ii and iii with his introduction of a distinction between public reason and comprehensive worldviews, thereby separating the rational and the reasonable, on the one hand, from complete morality, on the other. He seeks to resolve the matter with recourse to the idea of a freestanding body of public reason that is not rooted in the comprehensive morality of any of the moral agents involved. But this does not help. Not yet, in any case. Not as long as B1 and B2 remain the only information available regarding LPL. As long as B1 and B2 indeed remain the only information available regarding LPL, all subscribers to comprehensive views – those who cooperatively endorse Rawls distinction between public reason and morality included – will continue to reflect the purport of freestanding public rationality and reason through their own moral convictions. Considered strictly in terms of the information provided by B1 and B2, this will remain their basic hermeneutic reflex. As long as this basic hermeneutic reflex remains in place, the introduction of the public-reason/comprehensive-morality distinction will not dispel the problem reflected in ii and iii. The distinction itself will simply fall prey to it again. Everyone will continue to insist on the coherence of their own and separate public-reason/complete-morality constellations. And no doubt, they will understand and present these separate constellations as “acceptable to all.” For B1 and B2 not to translate immediately into a very unrealistic utopia, something very significant and decisive will have to be added to them, something that can break this spontaneous reflective link between public reason and moral conviction.

Now that the problem of B1 and B2 lies spread out on the table, the others can be pointed out very succinctly: Once their conception of a perfectly valid link between their moral conviction and the demands of public reason is rejected by the judicial or other forum (B5) with reference to the justification-worthy constitution (B3) and its ledger of neither-too-thick/nor-too-thin principles of cooperation (B4), the mortal moral agents whom we have been considering so far are bound, either to revoke any trust they may have invested in the forum, or to consider the constitution unworthy of justification because its principles of cooperation are either too thick or too thin, or both (distrust the forum and reject the constitution). Up to this point, might one say, it would seem as if Rawls is simply not realising that the distinction between cooperative public reason and comprehensive morality brings one nowhere, considering that every comprehensive morality will have its own filter through which that very distinction will be reflected. The whole institutional system of LPL – the constitution, its ledger of principles, and the forum responsible for applying them – will be torn apart because of the many different filters through which it will have to pass. Considered as a set of dominoes, the whole set will come tumbling down.

Why does this toppling of dominoes B1 to B5 point to a conception of law that is too rooted in life from the perspective of CLDL? Well, exactly because LPL, as described thus far, seems to pivot on the conception of a utopia that either actually exists or can actually come to exist when pursued purposefully enough. In other words, LPL appears to turn on the conception of an actual *form of life* – present or future – generally capable of squaring the circle that LPL (B1 and B2) demands. The squaring of the circle is assumed to actually happen, and to happen regularly enough to keep the system stable enough “for the right reasons,” perhaps allowing for some occasional and rather exceptional hiccups. This is not a utopia that I would call “realistic.” Put in terms that I consider more accurate, it is not even a realistic eutopia.<sup>42</sup> The same applies to “the idea of the reasonable implicit in the public political culture of a democratic society.” The assumption that the “public political culture” of any realistically conceivable “democratic society” provides one with cultural and social norms with reference to which the circle of LPL can be squared regularly enough to render that culture stable enough “for the right reasons,” evidently considers such a democratic society *a form of life* that renders political-liberal law possible. Up to this point in Rawls’ argument, he would indeed seem to be contemplating a concept of political-liberal law that is very much rooted in life.

C2 and C4 change the information we have considered up to now fundamentally. C3, however, contains a degree of equivocation that again clouds the clear rupture that C2 and C4 bring about. Before turning to the equivocation discernible in C3, I first wish to explain the rupture or “circuit-breaking” that C2 and C4 perform with regard to the B1 and B2, a circuit-breaking on the basis of which I do believe one can begin realistically to consider the full set of dominoes B1 to B5 at least relatively shielded from the always-imminent threat of toppling over. I have already touched upon this “always-imminent threat of toppling over” in my response to Christodoulidis by referring to liberal democracy’s irreducible exposure to the imminence of “the event,” and I will return to it below (where I bring some elements of my response to Christodoulidis and Michelman together).

The “form of life” imputed above to Rawls’ conception of LPL (and, by implication, to the whole distinction between public reason and comprehensive morality that he introduces as an enabling condition that renders LPL possible), concerns the adequate and regular *conformity* between principles of social cooperation and moral conviction that B1 to B5 appear to assume. *Conformity* – the consistently spontaneous or spontaneously consistent repetition and sustenance of form – would surely be the essence of anything to which we might refer a “form of life.” Rawls, at least at times, indeed seems to contemplate an adequate *conformity* between principles of cooperation and moral conviction in societies characterised by reasonable pluralism. When he does so, he seems to suggest that all subscribers (barring a small number of

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<sup>42</sup> Political theorists often use the term “utopia” rather loosely and Rawls also appeared to have done so in *The Law of Peoples*. As regards the importance of a more rigorous use of the concept of “utopia,” and a proper distinction between utopia and eutopia, see Van der Walt “Law, Utopia, Event. A Constellation of Two Trajectories” in A. Sarat et al (eds), *Law and the Utopian Imagination* (Stanford, Stanford University Press, 2014), pp. 60 – 101; Van der Walt, *The Literary Exception and the Rule of Law* (forthcoming Routledge 2022), chapters 2 & 7.

unreasonable ones) to the various comprehensive views in a reasonably pluralist society will find adequate normative resources within their respective comprehensive views on the strength of which they can support the principles of cooperation assembled under the banner of public reason.<sup>43</sup>

Far be it from me to deny that such wide-spread conformity never exists. To the contrary, there are vast aspects of social life that empirical sociologists may well be able to describe as areas of spontaneous social conformity that are not limited to specific cultural and political affiliation. Huge contingents of Moslems, Jews, Protestant Christians, Catholic Christians, and atheists or agnostics of many colours, not to mention free-market capitalists, socialists, communists and nationalists, (among all of whom one is likely to find hetero-, homo- and trans-sexual individuals) do not sense any clash between their principles of social cooperation and any of their moral convictions when it comes to, for instance, their highly energised support for some or other football team or a beloved rock star. These areas of spontaneous conformity, however, do not offer any significant challenge to LPL as described in B1 and B2. To the contrary, they would seem to render LPL superfluous. From the perspective of these vast pockets of actual social cooperation that do not clash with any moral convictions, LPL appears to be a non-problem. But Rawls knows all too well that LPL is a real problem (that is why he wrote *Political Liberalism* and constructed the constellation of B1 – B5 in the way he did), and that is exactly why his reliance on “adequate conformity” between all principles of cooperation and all moral conviction in pluralist societies to describe LPL appears questionable from the perspective of CLDL, as Michelman notices correctly. As described up to now with reference to B1 to B5 and C1, LPL does seem to entertain the real possibility of a form of life that renders the aporetic relation between B1 and B2 non-aporetic. It seems to turn on the assumption of adequate conformity between all the different comprehensive moralities envisaged by LPL, adequate conformity that renders LPL unproblematic in a way that Rawls knows it is not.

The idea of the reasonable, C1, standing on its own, does not alleviate the problem. It compounds it. It is important to note here the essential characteristics that one generally associates with reason and the reasonable. Key among them are notions of consistency, coherence, adequate transparency and non-contradiction, all four of which evoke the *conformity* of reason and the reasonable with itself. Of concern is the natural, spontaneous and apodictic conformity of reason with itself (perhaps even the pre-natural and pre-spontaneous apodictic conformity of reason with itself that some of the German Idealists and ancient

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<sup>43</sup> See Michelman’s description of Rawls’s position in “Civility to Graciousness” pp. 11 – 12 and Rawls *Political Liberalism* New York, Columbia University Press, 1996, 253: “Certain reasonable comprehensive views fail to do this in some cases but we must hope that none that endure overtime in a well-ordered society is likely to fail in all or even in many cases.” This statement appears to marginalize quite drastically the “central place of the duty of civility as an ideal of democracy” that Rawls emphasizes in the very next sentence, referring to the § 2 of the chapter on “The Idea of Public Reason.” It suggests prevalence of adequate conformities most of the time, thus marginalizing the need for a “gap of concession that this reasonability cannot cover,” as Michelman puts it with precision (at 12). The word “hope” in the first line of the quote does bring some ambivalence into the statement, but I do not think the message here is that one must hope for something that generally does not prevail. The purport of the statement is that one must (and can) hope that that which generally prevails in a well-ordered society will continue to prevail.

theological traditions appeared to have had in mind) that has informed both the cosmological and the physiological traditions of natural law with which CLDL takes issue. From this perspective, it is just *natural to spontaneously* insist on the *conformity* of one's principles of cooperation and one's deepest moral convictions, and to consider *any* governmental interference with this conformity unreasonable. The natural and spontaneous conformity of a form of life with itself embodied in the idea of the reasonable would indeed appear to be written all over B1 to B5 and to C1, when one considers them in isolation from C2 to C4.

In other words, by relying on the *idea of the reasonable*, as Rawls does up to the point in his reasoning that we have labelled C1, he would appear to be falling back on this ancient mode of natural law thinking. And when one falls back on this tradition, it immediately becomes a question whether one is falling back on its cosmological or physiological version, and whether one can ultimately avoid the always imminent collapse of the distinction between them. The suggestion here is not that "the idea of reason" should be discarded. The idea is only that it should be severed from the assumption of natural conformities and correspondences with which it is all too often associated. For that to happen, something must be introduced into the very concept of reason that ruptures the concept's conformity with itself, thereby also rupturing the hermeneutic circle between principles of cooperation and moral conviction that will always be naturally or spontaneously at work in B1 and B2. Something will have to break the filtering of principles of cooperation through moral convictions that render the former either "actually" or at least "potentially" conform to the latter, and vice versa, to resort for a moment to Aristotle's ancient formulation of the matter. It will have to disrupt or interrupt the spontaneous hermeneutic reflex invoked above. It will have to put in its place a different kind of filter that allows for the sustenance of a B1 – B2 constellation, and for that matter a whole B1 – B5 constellation, that fully incorporates the non-conformity between B1a and B1b that spills into B2. That something comes to the fore with C2, the principle in the LPL scheme that "allows for burdens of judgment." *Allowing for burdens of judgment* must include, as I understand Rawls and Michelman, all of the following 3 elements:

C2.1) Accepting the fact that everyone party to the process of LPL will spontaneously and "naturally" understand the common principles of cooperation, that everyone is supposed to share, *in conformity* with their own particular moral convictions and moral experiences.

C2.2) Accepting the fact that, if everyone is going to do this, there will be no common rules of cooperation.

C2.3) Understanding the need, therefore, for stepping back, quite deliberately and consciously (and therefore not naturally and spontaneously), from one's intuitive sense of the "natural" conformity of reasonable principles of cooperation and deep moral conviction.

All three these elements of C2 are crucially important if a framework of cooperation is going to become possible at all, but it should be clear that C2.3 is the critical (and crisis) element – the critical step – that breaks the conformity filter and allows for its replacement by a different filter. That different filter is labelled above as C4: the call for civility, the call for the willingness

to cooperate. One can see now how closely C2 is connected to C4. It is also clear now how the whole LPL scheme, beginning with B1 to B5, and continuing into C1, actually pivots on C2 and C4. And the important thing to remember here is that Rawls does not consider C2 and C4 a supplement or addition to B1 – B5 and C1. He expressly considers it part and parcel of B1 – B5 and C1, as Michelman points out clearly.

Critics of Rawls may want to ask why he leads his readers up the garden path for so long before he turns to the key point. Those more sympathetic to him (those who comprehend his achievement) may well respond: Goodness, one cannot say everything at the same time. But there indeed lurks a question here that I believe all scholars of Rawls should ask themselves: If it is so that Rawls is all too often accused of a liberalism that is, after all, more metaphysical than historical, is that not perhaps due to a neglect among Rawls scholars to emphasize the way C2 and C4 holds up the whole scheme of LPL, all the way from B1 right down to C2 and C4? If Rawls' liberalism is "historical" and "not metaphysical," it is not because it is a hermeneutic interpretation of the key values of a historical tradition, adequately sensitive to the linguistic turn, etc. It is because the whole system of reasonable cooperation that it contemplates is ultimately conditioned by a constant (indeed daily), self-consciously precarious, modest and unassuming historical act, an act of civility. Indeed, a gracious act of civility. This may be "my Rawls" (Johan's Rawls), as Michelman puts it so endearingly. I have no doubt in my mind, however, that it is the Rawls that he has taught me see.

However, the Rawls that Michelman has taught me to see, and to look for even further, does not appear to me in need of the one ingredient of LPL listed above to which we have not paid attention yet, namely C3, the idea of the "at-least reasonable." Invocations of the "at-least reasonable" always strike me as endeavours to shy away from the radical historicity of LPL reflected in Rawls concepts of "burdens of judgement" and the "call to civility." It appears to me as an endeavour to re-install the filtration of principles of cooperation through principles of moral conviction, a filtration, in other words, that re-establishes a conformity between the former and the latter, albeit a thinner or weaker conformity. The idea that comes to the fore here is that of an imperfect but still acceptable conformity, adequately assessable as substantively "still acceptable."

As I see it, this language invokes all the vagaries of Aristotle's potentiality-actuality distinction (partial perfection/full perfection). It again obfuscates what is really at stake in the relation between moral conviction and principles of cooperation. It again transforms the ethical and critical historical relation at stake here into a natural or quasi-natural reality. It again invokes the idea of a social plurality conditioned by "forms of life"; forms of life that are concededly different from one another, but also sufficiently the same to sustain a confident assertion that the ideas of "the reasonable" entertained by each one of them separately are sufficiently close to one another to assume the mutual and reciprocal assessment of all of them by all of them as "at-least reasonable." Unless one is prepared to return boots and all to ancient traditions of natural law, and to all the metaphysical assumptions on which they turn, there is nothing that warrants this anthropological or quasi-anthropological assumption. Had this assumption been warranted, Rawls would not have written *Political Liberalism* in the way he wrote it. He may not

have written it at all. It is important to recall here that LPL does not deal with unserious social differences with regard to which individuals or even groups of individuals shrug off their circumstances as non-optimal but still acceptable. As I read Rawls, LPL deals with cases where a government official effectively tells someone that his or her moral expectations can currently not be accommodated in the framework of cooperation in which everyone takes and must take part. If one wants to incorporate into this communication the notion of the “at-least reasonable,” this government official will effectively be telling that person: *Your moral expectations do not meet the demands of the “at-least reasonable.”* How can one, under these circumstances, consider it either likely or appropriate that that person might come to accept as “at-least reasonable” this very rejection of her own expectations as “not at-least reasonable.” The invocation of the “at-least reasonable” simply relaunches, from the top to the bottom, the whole problem and conundrum attached to B1 to B5 and C1 from which C2 and C4 can be argued to offer some escape, however precarious and modest.

How can one rephrase this idea of the “at-least reasonable” for purposes of understanding the governmental message that we have just considered in a way that does not drag one squarely back into the conundrums that result from B1 to B5, and C1, when they are not filtered through C2 and C4? I believe Hans Kelsen offers one language that can be considered adequately stripped off all unnecessarily vexing metaphysical rests that may come to trouble the clarity of the simple message that has to be conveyed in this regard. He would encourage our government official – most likely a judge responding to a constitutional complaint – to phrase the matter thus: *The constraint that the exigency of social cooperation imposes on your moral expectations has not yet been assessed to be unreasonable or unacceptable within the institutional system of decision-making (the system of validation) currently in place.<sup>44</sup> This institutional system or another one (in the wake of a revolutionary replacement of the whole system) may or may not come to grant you your expectations in future (one never knows), so you are not in the very least being told that you are wrong or unreasonable.*

This is how Kelsen would beckon one to transpose the idea of the “at-least reasonable” into the “not-currently-deemed unreasonable.”<sup>45</sup> What does liberal democratic law gain from this transposition? To put it in terms that Christodoulidis offers us, it allows every liberal democrat to “to discern in [every] situation the antinomy that might acquire hermeneutic traction, be signified as injustice, and acted on as such.”<sup>46</sup> I believe Michelman has something very similar in mind when he ponders Justice Brennan’s willingness to consider his court a site of irrepressible

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<sup>44</sup> See Hans Kelsen, *Reine Rechtslehre*, 2<sup>nd</sup> edition, (Tübingen, Mohr Siebeck, 1960, Studienausgabe of 2017), pp. 472 – 490. Kelsen’s understanding of legal interpretation found firm support in the work of Michel Troper in France in recent years. See Troper, *La théorie du droit, le Droit, l’État*, (Paris: PUF, 2001), pp. 173 – 193; Troper “Une théorie réaliste de l’interprétation” in Olivier Jouanjan (ed) *Dossier Théorie Réalistes de droit constitutionnel*, Dalloz, Paris, 2000, pp. 51 – 64.

<sup>45</sup> This transposition has a clear connection with the “de-legitimation” argument with which I responded to Michelman in an earlier article, but it also brings about a much-needed simplification and refinement of that argument. See Van der Walt “Delegitimation by Constitution? – Liberal Democratic Experimentalism and the Question of Socio-economic Rights,” *Critical Quarterly for Legislation and Law*, 98 (3) 2015, 303 – 333.

<sup>46</sup> See note 16 above.

and even unruly contestation (invoking Brennan’s “tolerance for disorder,” “solicitude for agitators and disrupters” and “disparagement of bureaucratic interests.”)<sup>47</sup> This is what Kelsen’s pure theory of law offers us in the final analysis. It allows for a duly explicable coercive system, but it proscribes the normative silencing – in the name of the “reasonable” or “at-least reasonable” – of anything coerced under that system. It is this proscription that renders liberal democratic law the most tolerant of unruliness of all legal frameworks known on earth, the most accommodating of “[discernments] of antinomies that might acquire hermeneutic traction, be signified as injustice, and acted on as such.” It is wise not to try your luck with unruliness or “[the discerning of antinomy] in every situation” in an unliberal court, not to mention an unliberal democracy.

In other words: The normative agnosticism of the pure system of law contemplated by a pure theory of law is exactly that which renders the political possible. Kelsen makes this point emphatically and repeatedly,<sup>48</sup> thereby beating Lefort with half a century to the key insight regarding the political that becomes possible on account of the irreducible emptiness of the political. Transposing this point back to Rawls now, one could rephrase it as follows: The normative agnosticism to which B1 to B5 and C1 – to which we can now also add C3 – evidently lead (the insight that the combination of B1 and B2 demands a squaring of a circle that B3 to B5, C1 and C3 cannot square), not only demands the retreat from this demand that takes place in C2 and C4, it also makes that retreat possible, at least in principle (it remains precarious). Had B1 to B5, C1 and C3 not repetitively posed the same irresolvable problem, C2 and C4, the truly political and historical elements of LPL, would not only have been an unnecessary addendum to the whole LPL framework, it would have constituted an annoying and frustrating interference with the functioning of the framework. For anyone who would believe B1 to B5, C1 and C3 can accomplish LPL on their own, C2 and C4 must come across as a pointless “discerning of antinomies” that do not exist.

### *The unique “liveliness” of liberal democratic law*

The active regard for burdens of judgement (C2) and the duty of civility (C4) that LPL demands are the essential loci of the “liveliness” of liberal democratic law upon which Michelman prompts me to reflect more carefully than I did in CLDL. Liberal democratic law is, he suggests, not quite the “lifeless” grey end of history that CLDL portrays it to be. To the contrary, it all “sounds pretty lively” to him. As already indicated above, I take the point and see the need to retreat from this invocation of lifelessness. It crept into CLDL because of two omissions, one minor and one that I consider major. The first concerns the omission of a set of quotation marks that accompanied the first two occasions in which I resorted to the term “lifeless” (CLDL 139, 140), on two later occasions (CLDL 204, 244). I believe the first two quotation-marked invocations of the term reflect a complex but clear enough element of derision, aimed at

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<sup>47</sup> Michelman, *Brennan and Democracy*, (Princeton, Princeton University Press, 1999), pp. 71 – 89.

<sup>48</sup> Kelsen, *Reine Rechtslehre*, 1<sup>st</sup> edition, (Aalen: Scientia Verlag, 1934, second print of 1994), pp. 12 – 18; 2<sup>nd</sup> edition (fn. 37 above), pp. 137, 595, 609.

Nietzsche and Schmitt, both of whom CLDL associates with a metaphysical vitalism (the physis-strand of Western metaphysics).

I consider this element of derision “complex,” because it is clearly accompanied by a positive appreciation of the accuracy with which both Nietzsche and Schmitt articulate the metaphysical background that inform their thinking. In fact, the whole argument regarding compensatory poetic fictions that might help liberal democracy to cope with its own “lifelessness” is clearly an attempt to respond to the compelling questions with which Nietzsche and Schmitt confront any liberal democratic endeavour to come to terms with “the political,” that enigmatic concept around which, remarkably, both Schmitt’s and Lefort’s thinking turn. It is in the course of CLDL’s response to the pertinent questions that it discerns in the legacies of Nietzsche and Schmitt that it begins to omit the quotation marks that accompanied its first two invocations of “lifeless” or “lifelessness,” thereby creating the impression of taking over what it only meant to take seriously. This, however, was a matter of mere and relatively slight oversight (but so are Freudian slips, in the rule, so there is nothing to be complacent about in this regard.)

The more worrying and perplexing oversight that accompanies the invocation of “lifelessness” in CLDL concerns the fact that I was working on a very different response to the questions that Nietzsche and Schmitt raise, at the same time as I was finishing CLDL. Of concern is my essay GTHS that Michelman reads in combination with CLDL, and against the background of which he expresses his doubt about the invocation of “lifelessness” in CLDL. In the last part of his response, Michelman links my invocation in GTHS of “the gift” and the “graciousness” on which liberal democracy turns, “on a daily basis,” to Rawls’ “call to civility.” He notices that this “on a daily basis” expands Rawls’ “call to civility” quite dramatically and appears to go along with that. He concludes by noticing or suggesting a common “striving” between the daily graciousness and gift invoked in GTHS and the duty of civility that Rawls invokes in *Political Liberalism*, a “*striving toward* freestandingness from divided life” on which both Rawls and I “can stand,” on first name terms, like friends. This is the biggest compliment that anyone could have given to the thoughts that Michelman extracts from his combined reading of CLDL and GTHS, and I accept it with profound gratitude, endorsing every element of it. And now, to get to the crucial point: It is precisely with regard to this common “striving” that I consider such an honour to share with Rawls that Michelman asks me why I do not recognise the profound liveliness of all of this. I believe it is only apposite that I now also address my mentor as the magnanimous friend that he also is, and has been for so many years, and answer pointedly: Yes, Frank, I see the liveliness of all of this, and I recognise the failure in CLDL to make this clear enough, and the serious misunderstandings to which this failure can lead. I hope the “pressing on” of the “*Soldiers of Salamis*” invoked in the second last line of CLDL makes some amends for this failure, but I also accept that “some amends” only add to and do not erase the ambiguity of the message with which CLDL leaves one on this point.

And yet, I do not consider this recognition of the liveliness of liberal democratic law a reinstatement of *nomos* as one of its definitional elements. I would prefer to leave *nomos* debunked (along with *physis* and *kosmos*) as CLDL leaves it. The unique liveliness of liberal democracy must be contemplated without recourse to *nomos*. The reasons for insisting on this

“debunking of *nomos*” are already contained in the arguments above about the relation between B1 to B5 and C1, on the one hand, and C2 and C4 on the other. The concept of “nomos” signifies a historical form of life. It has always done so. It relates to some or other positive ethos. My whole analysis above of the relation between B1 – B5, C1 and C3 to C2 and C4 suggests clearly that LPL cannot be a concern with a positive historical form or ethos. It is an ethical response to the absence of such form or ethos.

No doubt, liberal democracy and LPL are and can be associated with historical forms of life, historical forms of life that ultimately also constitute forms or organisations of power that are inextricably embroiled, like all other organisations of power, in the quest to prevail. Liberal democracy does not understand itself as a suicidal pursuit of defeat, as I have already stressed above in my response to Spindola Diniz. Of concern in that part of my response to him was his reference to Rawls’ blithe acceptance that political liberalism necessarily implies a pursuit of a form of life that may render other forms of life extinct. But the essence of liberal democracy, I already argued then, does not consist in this pursuit of a form of life (naturally at the potential cost of others) and the organisation of prevailing power that it implies. It lies, to the contrary, in the way it can be said to resist this inevitable formation of life and organisation of power; in the way it sustains an internal contradiction. LPL concerns an endeavour that ethically resists its own “formation” because of its awareness of the perennial disruption of form to which its opening gambits B1 (a & b) and B2 commit it, a commitment that is expressly conceded, confirmed and embraced in C2 and C4. It is this ethical resistance to any positive form with which it may be associated, which demands our attention when we wish to understand the unique liveliness of liberal democratic law. Hence the reading of LPL as “historical” as opposed to “metaphysical” already put forward above. LPL is not historical because it turns on a hermeneutic interpretation of a historical form (past or present) of life. LPL is historical because it is itself a historical act of non-interpretation or negative-interpretation (or inverse interpretation) that takes place in resistance to all historical forms of life, also those forms that “resemble it the most.”

Non-interpretation? Negative-interpretation? Indeed. Of concern is the circuit-breaker that disables the hermeneutic reflex that tends to filter all social cooperation through moral conviction, and vice versa, so as to make sense of everything we do. It concerns that critical act of cooperation that lets go of the seemingly natural need to make sense of everything. The ethics of liberal democratic law turns on the acceptance that we sometimes just need to get over our differences without the luxury of mutual-understanding, and without the luxury of feeling “duly understood.” There is one of Frank’s sentences that I have always understood in this way. The constitution does not resolve our differences, he writes, “it helps us to get over them, vault us past them.”<sup>49</sup> If the duty of civility contains a truly historical, ethical and political challenge, it concerns this exigency of letting go of hermeneutic luxuries when cooperation demands that.

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<sup>49</sup> Frank Michelman, “Constitutional Legitimation for Political Acts,” *The Modern Law Review* 2003, 66 (1), pp. 1 – 15.

The duty of civility – the duty to forego hermeneutic luxuries when cooperation demands that – should nevertheless not be confused with a lax disregard for hermeneutic needs or necessities. There is of course no magic formula that affords liberal democrats an accurate distinction between hermeneutic luxury and hermeneutic need. Had there been one, one would have been able to solve the whole problem of LPL in one quick sweep. The lack of such a formula is nevertheless no excuse for laxness regarding this distinction. Of concern is again the points made above in response to Christodoulidis’ concern with “the event” and the concept of “unnecessary suffering.” We have no epistemological criteria for assessing the essential properties of the concept of unnecessary suffering. But laxness regarding the experience of unnecessary suffering – or laxness regarding the distinction between hermeneutic luxury and hermeneutic need – is bound to heighten liberal democracy’s irreducible vulnerability to historical developments that are likely to ruin the whole framework of LPL on which it pivots. It is bound to raise liberal democracy’s exposure to the irreducible imminence of “the event.” That is the crucial reason why it should remain especially tolerant of the political insistence “to discern in the situation the antinomy that might acquire hermeneutic traction, be signified as injustice, and acted on as such.” Tolerance of unruly contestation of the kind Frank attributes to Justice Brennan is liberal democracy’s only way of monitoring the immeasurable gap between hermeneutic luxury and hermeneutic need.

The question of the form and life of liberal democracy comes squarely to the fore again in the questions that Bert van Roermund raises in response to CLDL. Prof. Van Roermund’s questions, to which I turn now, would seem to change the field of inquiry that we have traversed up to now considerably. They demand that we step away from Rawls so as to turn – via Pierre Manent – to Claude Lefort, Merleau-Ponty and the European tradition of phenomenological inquiry associated with the work of Edmund Husserl. The language of phenomenology indeed requires that one assemble a set of concepts that is very different from those that we have been employing up to now. In the final analysis, however, I do not consider the step from Rawls to Merleau-Ponty and the tradition of phenomenological as long as it may appear at first glance. I will make this clear at the beginning of my response to Prof. Van Roermund by constructing an elementary bridge between the thoughts he brings to the table, and those already raised by Michelman. This bridge will indeed be elementary, but I am convinced it will turn out much less rickety than one might expect.

## VI. VAN ROERMUND – BETWEEN EMBODIED AND DISEMBODIED POLITICS

Bert van Roermund begins his response to CLDL with Pierre Manent’s critique of the European Union’s formless expansion into crowd.<sup>50</sup> Manent asks, as quoted by Van Roermund: “Who can

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<sup>50</sup> Professor Van Roermund is also an old friend. As in the case of Professors Christodoulidis and Michelman, and for the same reasons, I will nevertheless continue to address him in formal scholarly terms, omitting only his professorial title. I will, however, extend a more personal note of thanks to him close to the end of my reply to his comments on CLDL.

live in a human world deprived of any form?” Van Roermund responds to Manent’s question as follows:

The rhetorical question not only suggests the obvious answer ‘nobody’; in the background there is also the belief that there is always already a *nomos* underlying the process of political communication ushering in a *demos*.

With this short comment on Manent, Van Roermund already underwrites the link between *nomos* and historical forms of life that I make towards the end of my response to Michelman. The suggestion is clear: *Nomos* provides the form without which one cannot live in a human world. And it does not stop here. *Nomos* also underlies the “political communication” that “usher[s] in a *demos*.” Why so? Well, because form and *nomos* must be represented, and this representation of form and *demos* is performed by a sovereign, a sovereign gathering “in which all agents regard each other as involved in actual *participation* before they can be represented as governors and in government.”<sup>51</sup>

Whatever happens at the level of politics and government in terms of consent is already preceded by *nomos* and sovereignty, according to Manent, as Van Roermund explains:

The democratic principle of consent only becomes operative within a political framework, a body politic that is not itself the result or the product of a consensual and deliberative process.<sup>52</sup>

This is the point where Van Roermund links his engagement with Manent directly to CLDL. He continues:

To this, Van der Walt’s diagnosis will be, I expect, that it takes us right back to a path of arguments we should avoid: Carl Schmitt and his tripartite notion of *nomos*: *Nehmen, Teilen, Weiden*.<sup>53</sup>

Van Roermund is correct. This is the diagnosis of Manent’s position at which I arrive on the strength of this brief exposition. I have not read Manent myself and will certainly do so with little further delay, for I can see the forceful questioning of the thoughts developed in CLDL that Van Roermund recognises in Manent’s work. It must be stressed, however, that Van Roermund is not relying on Manent’s thought to arrive at a quick dismissal of CLDL for purposes of a return to Schmitt’s *nomos*-sovereignty constellation from which CLDL seeks to retreat as far as one might. For that, Van Roermund finds himself much too much in agreement with a lot that is going on in CLDL. He stresses his appreciation for the “disembodiment” of liberal democratic law (and politics) for which CLDL argues and for which it draws key insights from the work of Lefort. For Van Roermund, Lefort is the clearly visible beacon of the wide area of common ground between his own thinking and the thinking developed in CLDL. The question that he commences to ask with reference to Manent is clearly a question that he also considers crucial for rethinking his own reliance on Lefort. In other words, the question that he is posing is not only directed at CLDL. He is clearly also posing it for and to himself – and even to Lefort – in the

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<sup>51</sup> Van Roermund, “The case for Embodied Democratic Law-Making” in this volume, p. xx.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

profound scholarly spirit and ethic that readers of Van Roermund will recognise as the hallmark of his scholarship.

Put in a nutshell, the question Van Roermund is posing to me and to himself is this one: Is it possible to contemplate an adequately embodied politics that may offer a satisfactory response to the questions that Manent raises, on the one hand, but would not fall prey, on the other, to the metaphysical constellation of nomos and sovereignty that Schmitt offers one, and would thus not simply ignore again all the insights that our understanding of the political can be said to have gained from Lefort? In other words, is it possible to contemplate an adequately embodied politics, without thereby flooding or clogging up, once again, the crucial opening in which society all societies are held and the crucial emptiness of power without which power itself cannot become power, according to Lefort? It is for purpose of pursuing this question that Van Roermund turns to Merleau-Ponty, the phenomenologist and close friend of Lefort whose thinking intrigued Lefort sufficiently to dedicate a whole monograph to it, and to edit his posthumous work.

Before we turn to Van Roermund's exploration of Merleau-Ponty's work to explore the question he is posing, let us first look at the close proximity or parallel between this question and the reading of Rawls that Michelman's response to CLDL prompted me to elaborate above. The elements of LPL (liberal political legitimacy), tagged B1 to B5, C1 and C3, above, ultimately confront one with contradictions and tensions that cannot be resolved, I argued. The crucial irresolvable issue of LPL is already contained in B1. It concerns the unresolvable stand-off between the principles of cooperation (B1a) and moral conviction (B1b). From thereon, the irresolvable tension within LPL just cascades all the way down to B5, C1, and once more to C3. As long as LPL is understood to sustain and not to resolve this tension between cooperation and conviction, it evidently does not resolve into any positive normative "fullness." To the contrary, it contains no definitive or conclusive normative content. Despite all the normative considerations that it raises, it remains normatively empty, given the irresolvable tension that it leaves standing between all these considerations. Many normative sounds may be reverberating through the "liberal space" that LPL announces, but the space itself is not filled by any one or any combination of them. LPL ultimately denotes an empty space, an empty space that one may, borrowing from Lefort, consider the opening in which political-liberal societies and politics are held. It is for this reason also a disembodied space.

As long as the disembodied space of LPL remains nothing but this space, it may well come across as a bodyless, lifeless space (an old decaying labyrinth haunted by the legend of an unvanquishable minotaur where no living soul still dares or cares to venture). Whence, then, the liveliness of this space that Michelman persuaded me to concede and affirm? It comes from C2 (the appreciation of burdens of judgements) and C4 (the call to civility), I argued. C2 and C4 animate LPL. Does it also provide it with a body-politic? Does it also *embody* LPL? Perhaps. It depends on what one means by embodiment. Before we pursue this question further, let us now take a closer look at the non-metaphysical embodiment that Van Roermund discerns in the work of Merleau-Ponty. Suffice it just to note at this stage, the parallel lines – the enigmatic constellation of disembodiment and embodiment – between the question that Van Roermund

explores, and the question to which the analysis of LPL elaborated above leads one. It is here, in this parallel, I believe, that one already gets a glimpse of the not-so-rickety bridge I invoked at the end of my response to Michelman, the not-so-rickety bridge between Rawls' analysis of political liberalism, on the one hand, and the phenomenological contemplation of the political, on the other.

*Nomos and Nehmen: Coming to grips instead of pointing*

The *nehmen* or "taking" at work in Schmitt's concept of *Landnahme* or land-taking, and therefore of *nomos*, is essentially a matter of the *pointing* that Rousseau associated with civilisation and colonisation, argues Van Roermund. The concept of taking (*saisir*) or touching (*toucher*) that one finds in the work of Merleau-Ponty is indeed very different from this "colonising" pointing. *Il faut donc admettre que « saisir » ou « toucher », même pour le corps, est autre chose que « montrer »*, writes Merleau-Ponty.<sup>54</sup> As Van Roermund explains in two concise pages of haute cuisine phenomenology, Merleau-Ponty's "taking" is a matter of a primordial "coming to grips" with the world in which the self emerges "as a self" in its relation to the world. Of concern is the original (in the sense of "close to" or "at the source") emergence or occurrence of an interface between the self and the world in which the self becomes a self and the world becomes a world, every time "for the first time," so to speak.<sup>55</sup>

The "self" that Merleau-Ponty contemplates is therefore not an already consolidated or civilised subject that points a finger at the world from afar. The self becomes a self from a close-in encounter with a world that likewise also becomes a world in that encounter. There is no representational logic or symbolic consciousness – *conscience symbolique* – involved in this encounter, no taking of something "as something." The close-in encounter with the world concerns a "a bodily entrenched intentionality" that takes place without any representation, *sans aucune représentation*, explains Van Roermund.<sup>56</sup> And the question that he asks is whether this non-representational and non-symbolic emergence of an interface between a self and its world can guide our understanding of the political, "in contrast to" the *conscience symbolique* that CLDL "appreciates in Lefort's conception of democracy."<sup>57</sup> "How should we conceive of this interface if the self is a plural self ... acting jointly," he asks.<sup>58</sup> And it is in response to this question that he refers to Merleau-Ponty's statement on European identity after the Second World War at one of the Round Tables of the *Rencontres internationales de Genève*. He observed then that one should avoid conceiving Europe in terms of "properties and values." One should instead contemplate a Europe in action – *l'Europe en acte*.

Van Roermund finds "more than a hint" of this embodiment "*en acte*" of the political in the concept of labour in the early Marx, and in Merleau-Ponty's engagement with "Marx's concept of history and revolution." I sense no reason to doubt this. However, if I may return to the not-

<sup>54</sup> Maurice Merleau-Ponty, *Phénoménologie de la perception*, (Paris: Gallimard, 1945), p. 133

<sup>55</sup> Van Roermund, "The case for Embodied Democratic Law-Making" in this volume, p. xx.

<sup>56</sup> Ibid,

<sup>57</sup> Ibid,

<sup>58</sup> Ibid,

so-rickety bridge between Rawls and phenomenology that I invoked above, I would like to add that I also find “more than a hint” of this embodiment “*en acte*” of the political in the active regard for burdens of judgement and the acts of civility that have to rescue, resuscitate and reanimate the representational scheme – the “properties and values” of LPL – from the *rigor mortis* and *rigor mortifer* (the deathly and deadly stiffening of oppositions) into which its own irresolvable contradictions must otherwise descend. Of concern is the unique “liveliness” of LPL with regard to which Michelman prompted me to discern the liveliness of liberal democracy. In fact, there is something on Rawls’ side of this not-so-rickety bridge that I find lacking on Marx’s and Merleau-Ponty’s side, as far as a consistent and adequately thorough contemplation of this embodiment *en acte* of the political is concerned. This “something” that I find lacking on Marx’s and Merleau-Ponty’s side of the bridge concerns the very *conscience symbolique* that CLDL appreciates in Lefort’s concept of the political, as Van Roermund points out correctly, and which he contrasts expressly with the non-symbolic and non-representational “coming to grips” with the world that Merleau-Ponty contemplates.

Van Roermund himself relates Lefort’s crucial concept of the *staging* of the political – its *mise-en-scène* – to Merleau-Ponty’s interfacial conception of “taking” and “touching” *in the event* of which the self and the world emerge jointly in and as a self-world-relation. The political conceived in terms of a *mise-en-scène* must concern a joint political act, he writes. Lefort, however, does not remove the symbolic completely from this staging of the political. It remains crucial to it. He just stresses the importance of severing the symbolic from the real, the importance of never confusing the latter with the former. It is clear, Lefort does not contemplate the political in strictly non-symbolic and non-representational terms, as Merleau-Ponty does. Why not?

The answer to this question must surely be that Lefort did not think the political can be contemplated in strictly non-representational terms. From his perspective, Merleau-Ponty’s endeavour – or any Merleau-Pontian endeavour such as Van Roermund’s – to contemplate the political in strictly non-representational terms ignores something crucial about the political, something that the phenomenological reduction of the political to an interfacial enactment of a self-world-relation cannot reflect. The interfacial enactment and emergence of a self-world relation only becomes political when it enters the stressful or conflictual zone of competing interfacial enactments of self-world-relations. It is this stress and conflict that necessitate representational and symbolic gestures, gestures that all raise the claim, from their respective angles, to represent *the* correct self-world-relation, a self-world relation which, of course, is by this time far removed from the close-in emergence of the self-world-interface that Merleau-Ponty contemplates. Van Roermund relates this close-in interfacial emergence of the self-world-relation expressly and instructively to the way a sportsman and an artist merge with the world, the way a singer “becomes the music,” the way in which an instrument “becomes an extension of a musician’s hand,” the way in which a racquet becomes a lengthening and broadening of Roger Federer’s or Rafael Nadal’s dexterity, which, in crucial moments, are indistinguishable from the incredible in-touch-ness with the world of their right hands.<sup>59</sup>

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<sup>59</sup> See Van Roermund, p.

It should be noted that CLDL also puts forward an argument about the importance of this interfacial in-touch-ness with the world *for* the political (see CLDL 57 – 58). I will come back to this importance presently. Suffice it to note well that the political is never *part of* this in-touch-ness. Taking Van Roermund's example of art and athletics again, one can say that the political begins when two artists or two athletes descend into a quarrel about something that is no longer "determined" or "dictated" by the art or the game that brings them together. Such a quarrel necessitates recourse to representational terms that can take the place of the original interfacial closeness with the world (and with one another) that both parties to the quarrel have obviously lost when they are in the throes of their dispute. They will be talking about the rules or principles of their art, or their contest, or of something else (perhaps their conflicting interpretation of the rules of the road after a car accident). In other words, they will be talking about the very "values and the properties" that Merleau-Ponty suggested a future Europe should shun for the sake of a *Europe en acte*, as if any future Europe or any future polity could ever become one intrinsically non-conflictual act, a spontaneously understood "common act" or "act in common" in no need of representational terms.

The problem is, of course, that the existentially "distant" realm of the symbolic, and of representational "values and properties," can never pretend or hope to restore the interfacial close-in and close-up relation with the world and with others that Merleau-Ponty's *toucher* and *saisir* invoke. That is why the symbolic and the real should never be conflated with one another, stresses Lefort. Democracy is the only organisation of power that recognises the incommensurability between the symbolic and the real, and the political exigency of never confusing the one with the other, he **argues**. Should one look back now to Rawls' side of my not-so-rickety-bridge, it is exactly this insight that we also find there. The "properties and values" of LPL are not going to restore the existential closeness with the world and with others that may have existed before some quarrel ruined this closeness. But these "properties and values" of Rawls' conception of LPL offer two crucial elements of the political that the Merleau-Ponty's side of the bridge do not seem to offer or take seriously. In the first place, they offer terms (B1 to B2) with reference to which, and institutional settings and procedures (B3 to B5) on the basis of which, those who have fallen out of existential or interfacial closeness can have a decent quarrel. In the second place, they also offer an ethic of being mindful of just how differently they understand things (C2 - the regard for divisive burdens of judgement) and an ethic of graciously getting on with things again, an ethic of letting go of quarrels (C4 – the duty of civility), that they know, in view of C2, they will never resolve.

Thus does the Rawlsian side of the bridge offer the political crucial "values and properties" that might sustain a secondary "togetherness" that can substitute the primary togetherness and closeness that Merleau-Ponty invokes with the concepts of *saisir* and *toucher*. CLDL failed to make this argument firmly enough, as I had to concede to Michelman above. But CLDL does put forward another argument with reference to Johan Huizinga that pivots on something crucial that one clearly only finds on Merleau-Ponty's side of the bridge that I have constructed here between him and Rawls. This argument concerns the way in which athletics and poetry may stand in for the existential closeness to the world that the secondary togetherness offered by

liberal democratic law cannot hope to offer. I come back to this point in my concluding remarks below. Suffice it to just stress here how much this argument benefits from the thoughts of Merleau-Ponty that Van Roermund brings into this discussion of CLDL. The specific pertinence of the thoughts he raises concern all the key questions that have been raised in this discussion. The complex “embodiment/disembodiment” constellation of the political that he invites us to contemplate evidently also goes to the heart of the “separation from divided life/liveliness” constellation that Frank Michelman’s comments on CLDL bring into this discussion. And it just as evidently concerns the discomfort that Emiliios Christodoulidis expresses regarding the poetic compensation for the liberal democratic severance of the political from that which Badiou calls “the event.”

I believe it is fair to say that all these questions reflect different ways of engaging with the ultimately unfathomable relation between law and “history in its state of being born,” *l’histoire à l’état naissant*, as Merleau-Ponty puts in the breath-taking introduction to his *Phénoménologie de la perception*.<sup>60</sup> Of concern is the relation between law and the very “event of existence,” might one say. In this regard, the tradition of phenomenological inquiry, and the work of Merleau-Ponty in particular, offers one a particularly promising entry into the kind of questions that need be asked to pursue this engagement further. Merleau-Ponty also makes it clear that the kind of thinking that is demanded here leads one into the zone of existence where poets and artists dwell. I can therefore only endorse Van Roermund’s intuitions in this regard and follow-up work that I will be doing in this regard will certainly reflect this endorsement.

I wish to conclude with a personal word of thanks. For that I will again take the liberty of suspending the formal terms of scholarly exchange for a moment. Bert’s contribution to this discussion is not only that of a profound scholar and generous colleague. It is also that of a friend from whom I have learned much over many years. For that I can also not thank him enough.

## VII “POST-NORMATIVE” LIBERAL DEMOCRACY AND THE EVENT – CONCLUDING REMARKS

I hope my response to Michelman, but also to Spindola Diniz, Christodoulidis and Van Roermund, will have made some amends for CLDL’s failure to engage with Rawls’ and Habermas’ “post-metaphysical” but “not post-normative” conceptions of liberal democracy, noted by Tekin. Habermas has still proved to be a bridge too far for now, but I hope the engagement with Rawls in my response to Michelman will serve as a substantive enough first statement of the way I perceive the relation between the inquiry that I launched in CLDL and the “post-metaphysical” liberal democracy that Tekin discerns in the work of Rawls.

It should be clear by now that the reading of Rawls that I elaborated in response to Michelman contains a certain twist in the tale as far as Tekin’s “not post-normative” assessment of Rawls is concerned. The emphasis that I put on Rawls’ invocation of “an appreciation of burdens of

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<sup>60</sup> Merleau-Ponty, *Phénoménologie de la perception*, p. 22.

judgment” and “call to civility” suggests that there is something significantly “post-normative” at work in his concept of political liberal legitimation. The norms and principles that Rawls lists as key ingredients of LPL, tagged B1 – B5 and C1 in my analysis, lead the LPL process into insurmountable trouble that necessitates the retreat from these norms effected by the ideas of “burdens of judgment” and the “call to civility,” tagged C2 and C4. C2 and C4 evidently entail a “post-normative” supplementation of the normative principles contained in B1 to B5 and C1.

This, however, does not render Rawls’ concept of LPL *non-normative*. The suggestion is by far not that C2 and C4 can carry the whole LPL process on their own shoulders. LPL remains fundamentally hitched to the norms listed in B1 to B5, notwithstanding its reliance on C2 and C4 to come to the rescue of B1 to B5. This is especially clear, I believe, from the insights developed in my response to Van Roermund. When the non-symbolic and non-representational embodiment of the interfacial self-world or self-other relation contemplated by Merleau-Ponty falls apart as a result of the eruption of conflict, I argued, representational and symbolic terms become indispensable for the proper and decent processing of that conflict. Once sufficiently serious conflict erupts, one can no longer rely on spontaneous self-world relations to resolve it. Of concern here is the essential “deflection” that takes place and must take place in the process of political-liberal legitimation, that Michelman stresses in his response to CLDL. A symbolic or representational framework or a set of norms becomes indispensable for processing any conflict that disrupts a spontaneous self-world or self-other relation of the kind that Van Roermund contemplates with reference to Merleau-Ponty. It is this referral of the conflict to norms that Michelman calls “deflection.”

My concern now is to look briefly (and highly provisionally) at the whole sequence of “normative” and “non-normative” elements that demands attention in view of the considerations above. Both the existential moments that one may identify prior to the normative deflection of conflict, the non-conflictual unfolding of a primordial life-world relation and the conflict which disrupts this relation, can be explained in terms of that which one could call “the event of existence.” The “event of existence” is that which sustains primordial self-world relations, disrupts them, and even sustains them by disrupting them. As Van Roermund and Merleau-Ponty make clear, there is something profoundly poetic – artistic or athletic – in the unfolding of an interfacial self-world-relation, that is, in the moment that we engage face to face with the event of existence, the event of our own existence. The disruption of this event that ensues when conflict erupts does not terminate this poetic encounter with our own existence. It is, at least at first, deepened and heightened by it. It is then that the poet, artist or athlete that lives in every human being’s engagement with the event of his or her own existence turns into a warrior-poet, a warrior-poet for whom the engagement with existence becomes complete, a matter of life and death, so to speak. It is then that the event of existence becomes “abyssal” in the sense that Hermann Heller used this word to describe that which he considered the existential deficit of modern democracy, namely, its inability to put the human being in touch with the constitutive foundation and abyss of life – [*die*] *Beziehung zum Absoluten, zum Tragenden Grund und Abgrund des Lebens* (see CLDL 243).

Heller was a liberal, not a fascist. The fact that he, of all the Weimar scholars of the time, articulated a phrase like this that could, in a blindfold test, easily be mistaken as one of Schmitt's, offers some explanation why CLDL ultimately considered a thorough engagement with Schmitt – and the metaphysical tradition for which he stood – more urgent than engaging with Rawls and Habermas. I hope this observation casts some light on the awkward concessions that I had to make in my response to Tekin. But this is beside the point now. Of direct concern is Heller's testimony regarding the human being's yearning to be in touch with the foundational and abyssal event of his or her own existence. War has as long as human memory reaches back always been considered the ultimate game that puts us in touch with the "ground and abyss" of our existence, Johan Huizinga tells us. Our relation to the event – the extent to which it sustains or disrupts self-world relations – ultimately turns us into warrior-poets. Or so it did in ancient Greece, as Christodoulidis retelling of the death of Sarpedon reminds us (see CLDL 239).

It is doubtful, however, whether the warrior-poet option is still available to us, argues CLDL in view of the unheroic, mechanised and computerised elimination and slaughter that war has become. In fact, it is a good question whether war has ever been the ideal and ultimate access to existence that prominent strands of Western metaphysics and poetry have always construed it to be. Huizinga also tells us that war has always been too sordid a game to ennoble the access to the event of existence that it offers. It is only in the language of the poet that war becomes noble (see CLDL 247). It is directly from Huizinga and indirectly from Heller that CLDL took the instruction to introduce "poetic fictions" that may compensate for liberal democracy's existential deficit – its grey lack of heroism – into the definition of liberal democratic law. It is with regard to this definitional element of poetic fictions that the engagement with Merleau-Ponty in Van Roermund's response to CLDL offers profound new insights. Unlike Van Roermund, I do not consider the embodiment that he discerns in Merleau-Ponty's phenomenological analysis of the self-world relation directly pertinent to a liberal democratic conception of the political. The liberal democratic conception of the political must remain "disembodied." However, Van Roermund's insights certainly explain why the kind of embodiment that one experiences in art and athletics can indeed render the service of compensatory embodiment that CLDL assigns to it. Art and athletics certainly offer an intimation of the fullness of existence that the liberal democratic conception of the political can never hope to offer. It is of course exactly with regard to this compensatory poetry, art and athletics that Christodoulidis and I still have a long discussion ahead of us, for it is evident that we have not reached common ground on this point. A very similar discussion – perhaps even the same one – also lies ahead of Spindola Diniz and me. And it is quite possible that Van Roermund himself will consider this discussion far from over.

**In contrast to poetry, art and athletics**, symbolic or normative representation – that which Michelman calls "deflection" – evidently concerns an endeavour to retreat from the event of existence. The language of law is the essential register of this "deflective" retreat from the event. This is why I have been insisting on in a number of writings that law and poetry respectively relate to two completely opposite trajectories of language.<sup>61</sup> Poetry returns to the

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<sup>61</sup> Van der Walt "Law, Utopia, Event," (fn. 35 above).

event, remains faithful to it. Law retreats from it, as far as it can. This is also the essential line of thought that I am pursuing in my forthcoming monograph *The Literary Exception and the Rule of Law*. One of the key concerns that I have been pursuing in this regard concerns the question whether one should consider the law “shallow” when one compares it to the “profoundness” of poetry. As I have shown on a number of occasions, Rawls himself is concerned about the possibility that public reason might be perceived as “shallow because it does not set out the most basic grounds on which ... our [comprehensive] views rests.”<sup>62</sup> The answer to this question on which I have been working and am still working turns on the intuition that the law is “not shallow.” The law’s depth concerns the very same profoundness that we attribute to poetry and art. The language of law registers the same depth of space that opens up between poetry and the event. It just registers that space negatively or inversely, because of the opposite trajectory that it traverses, that is, because of the way the law retreats from, instead of **returns** to, the event.

Much more need to be said about this than can be said here.<sup>63</sup> Suffice it to end by just observing how the key element of my exchange with Michelman seems to confirm the accuracy of the intuitive assessment of the law as inverse or negative poetry. The “deflective” mode of legal language, I argued in response to Michelman, only becomes complete or effective when it begins to retreat from its own symbolic and representational logic, as it does when the normative principles of liberal democratic law (tagged B1 to B5 and C1) begin to give way to the gracious, magnanimous and surely not “lifeless” appreciation of burdens of judgment and the call to civility (tagged C2 and C4). Is this not also a uniquely poetic sequence? Is this not the sign of the law’s uniquely negative or inversely poetic response (perhaps even *inversely-heroic-because-modest* response) to the event of existence? These reflections clearly lead one back to the second dimension of the big question that opened up when I first conceded to Michelman that liberal democratic law is indeed not the “lifeless” undertaking into which CLDL appears to turn it: Does liberal democracy still need the compensatory poetic fictions that CLDL considers definitive of the concept of liberal democratic law?

For what must these poetic fictions still compensate, now that it has become clear that liberal democracy has its own life and its own poetry? Can we not now drop “compensatory poetic fictions” from the definition of liberal democratic law and leave them to the entertainment industry? If the future course of civilisation finally manages to kill the warrior-poet in all of us, we may well arrive at a positive answer to these questions, who knows? We may arrive at the point where we can indeed drop these “compensatory fictions” from the definition of liberal democratic law, and perhaps even banish them from the entertainment industry (lest they give us bad ideas again), as Plato once considered necessary in Athens. It could also be, however, that we will become even more dependent on these fictions the more civilised we become, and the more liberal democratic law comes to comply with the duty of civility that Rawls assigns to it. For now, however, it is fair to assume that the constellation of law, poetry and the event – the constellation that no serious phenomenology of law can ignore – will at least for a while

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<sup>62</sup> Rawls, *Political Liberalism*, (fn. 4 above) p. 242.

<sup>63</sup> A fuller account can be found in Van der Walt “Law, Utopia, Event,” (fn. 35) above.

continue to expose us to the two opposite trajectories of human language, the language that seeks to connect with a savage memory of the ancient and timeless abyss of existence, and the language that retreats from this memory for the sake of civility. It is this constellation of the two opposite trajectories of language – this critical crossing in the landscape of the human imagination – that demands the not-so-rickety bridge between Rawls and Merleau-Ponty that all my interlocutors in this inspiring exchange have so generously helped me to construct.