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Reciting Law After Auschwitz

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Abstract: This paper reads in parallel two specimens of jurisprudence and literature that were republished in the aftermath of Nazism and the Holocaust. Hans Kelsen's *Reine Rechtslehre* ('Pure Theory of Law') (1934/1960) and Maurice Blanchot's *La Folie du jour* ('The Madness of the Day') (1949/1973) are historicized to unfold the ineffaceable traces, and public demands, of the mid-twentieth-century catastrophe. Between the postulate of purity and the law of recitation, it is the latter effect of our present anamnesis, I suggest, that undergirds and affirms the historical turn of legal theory.

Keywords: Jurisprudence; Law and Literature; Holocaust; Hans Kelsen; Maurice Blanchot

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by Benjamin Goh

1. Introduction: Historicizing Jurisprudence with Literature

The historical turn in which legal theory now finds itself promises to restore the field to the humanities, in ways that exceed the remit of analytic philosophy.[1] In 1934, Hans Kelsen authored the first edition of the treatise which sought to exclude from jurisprudence 'everything not belonging to its object of cognition, precisely specified as the law,'[2] on the grounds that these 'foreign elements'[3] from the surrounding disciplines obscured the scientific study of legal norms. Today, when courses in legal theory center upon legal positivism and its dealings with natural law, before acquiescing to hear one or two marginal voices in the critical and so-called postmodern traditions, it is as if Kelsen's methodological 'postulate of purity'[4] continues to govern law schools despite the planetary calls to reimagine university education across the disciplines.

Looking outside the fortress of analytical jurisprudence, particularly into the past and at other exilic authors of Kelsen's milieu, we could glean alternative ways of approaching legal theory that take history seriously. Similarly persecuted for his race but failing to escape from Nazism, Walter Benjamin recognized the totalitarian suspension of rights and liberties in the Third Reich to be but the latest episode of an historical series of legal complicity with lawless violence:

> The tradition of the oppressed teaches us that the "state of emergency" in which we live is not the exception but the rule. We must attain to a conception of history that is in keeping with this insight. Then we shall clearly realize is that it is our task to bring about a real state of emergency, and this will improve our position in the struggle against Fascism.[5]

Over against the Nazi regime's attempted rewriting of history to justify its genocidal barbarism, Benjamin perceived one's vigilant attendance to those fleeting, perilous images of truth in history to be at the heart of historical materialism.[6] Fascism is perhaps best resisted not by accepting its totality, but by inhabiting those pockets of experience that elude its reach, in which to recount alternative stories of the past that disclose the contingency of contemporary states of affairs, including that of the discipline responsible for relaying the best of legal-theoretical knowledge to successive generations.

As a heuristic exercise, I would slightly revise Benjamin's text by way of nominal substitution. What if it were 'law' rather than 'history' that needed to be reconceptualized in order to reckon fully with the limits and potentiality of our legal inheritances, particularly our

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[1] For signs of this historical turn in legal theory, see Maksymilian Del Mar and Michael Lobban (eds), *Law in Theory and History: New Essays on a Neglected Dialogue* (Hart Publishing 2016); and two special issues on the nexus of jurisprudence and history in Virginia Law Review (Volume 101(4), 2015) and Critical Analysis of Law (Volume 2(1), 2015).

[2] Hans Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* (Bonnie Litschewski Paulson and Stanley L Paulson trs, Oxford University Press 2002) 7.

[3] ibid.

[4] Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 1.

[5] Walter Benjamin, 'Theses on the Philosophy of History' in Hannah Arendt (ed), Harry Zohn (tr), *Illuminations* (Schocken Books 1969) 257.

[6] 'To articulate the past historically… means to seize hold of a memory as it flashes up at a moment of danger. Historical materialism wishes to retain that image of the past which unexpectedly appears to man singled out by history as a moment of danger': ibid 255.

laws and their constitutive knowledge-practices? What imaginable futures of legal-theoretical research and education could this rethinking of law in historical terms anticipate? To advance the inquiry, this paper reads in parallel Kelsen's *Reine Rechtslehre* ('Pure Theory of Law') (1934/1960) and a short story by Maurice Blanchot, *La Folie du jour* ('The Madness of the Day') (1949/1973).[7] These specimens of jurisprudence and literature are read as exemplary, albeit ultimately divergent, responses to Nazism and the limit-event of the Holocaust. Whilst appearing in the separate genre of literary fiction, Blanchot's text is replete with figures of the law – including the 'day',[8] the 'eye doctor'[9] and accompanying 'specialist in mental illness',[10] and the feminine 'silhouette of the law'[11] – that profoundly bear upon Kelsen's theory of law. In terms of publication history, Blanchot's text parallels Kelsen's in that it was likewise published twice, in slightly different editions, within three decades surrounding the mid-twentieth-century European catastrophe. This literary fiction is a form of 'jurisliterature',[12] or literature of law, that deals with history and law differently from the juristic treatise commonly affirmed to be one of the greatest works of analytical jurisprudence. These two works lend themselves to be read as materials for our present reflections on what the memory of Auschwitz demands of jurisprudence, including the discipline's selection of objects for study.

In what follows, I first review the historical and ethical dimensions of Kelsen's pure theory of law, suggesting that its methodological postulate of purity should be read not only within the history of ideas, but also against the backdrop of Nazism and its aftermath. Then, I turn to the publishing history of Blanchot's *récit* and its surrounding intertexts, reconstituting its traces of the historical catastrophe. After reciting Jacques Derrida's prior reading of Blanchot's text,[13] whose idiom of contamination acts as a provocative counterpoint to Kelsen's postulate, I advance the inquiry into literature's contribution to the endeavor of historicizing jurisprudence by revisiting Blanchot's reflections on the form of the *récit* in *Le chant des Sirénes* ('The Song of the Sirens') (1959).[14] I propose 'the law of recitation', a radically historical law emerging from this parallel reading of Kelsen and Blanchot, at once urging our assiduous attendance to, and suspension of, the historical conditions on which legal studies proceed. I suggest that it is this emergent law that undergirds and affirms not only the historical turn of legal theory, but also our ethical commitments to the memory of Auschwitz.

2. Purity amidst Catastrophe

'[A] glance upon the traditional science of law as it developed during the nineteenth and twentieth centuries clearly shows how far removed it is from the postulate of purity; uncritically the science of law has been mixed with elements of psychology, sociology, ethics, and political theory'.[15] *Uncritically*: the adverb registers an intellectual history, namely, Kant's critical philosophy, from which Kelsen's methodological postulate extends. Rhetorically, Kelsen's

[7] Maurice Blanchot, 'The Madness of the Day' in Lydia Davis (tr), *The Station Hill Blanchot Reader: Fiction & Literary Essays* (Station Hill Press, Inc 1999).
[8] ibid 195.
[9] ibid 199.
[10] ibid.
[11] ibid 197.
[12] See Peter Goodrich, *Advanced Introduction to Law and Literature* (Edward Elgar Publishing 2021) 3. Goodrich traces the concept of jurisliterature back to the writings of French legal historian Anne Teissier-Ensminger: see, for instance, Teissier-Ensminger, *Le Droit incarné: Huit Parcous en jurislittérature* (Classiques Garnier 2013).
[13] Jacques Derrida, 'Law of Genre' in Derek Attridge (ed), Avital Ronell (tr), *Acts of Literature* (Routledge 1992).
[14] Maurice Blanchot, 'The Song of the Sirens' in Charlotte Mandell (tr), *The Book to Come* (Stanford University Press 2003).
[15] Kelsen, *Pure Theory of Law* (n 4) 1.

subtractive understanding of purity in his legal theory all but mirrors Kant's positing of the possibility of disembodied cognition in his transcendental philosophy. Before Kelsen did in respect of jurisprudence, Kant had framed his critique of pure reason as a science that excluded from its domain certain elements viewed to be extraneous to its object of analysis:

> Now from all this there results the idea of a special science, which could serve for the critique of pure reason. Every cognition is called *pure*, however, that is not mixed with anything foreign to it. But a cognition is called absolutely pure, in particular, in which no experience or sensation at all is mixed in, and that is thus fully *a priori*.[16]

Sensory experience was deprioritized in favor of the system of concepts underpinning cognition with which Kant's first critique was concerned. In the same spirit, the wider cultural, social, and historical matrices in which Kelsen himself recognized law to be embedded were delineated as 'alien elements'[17] from which his theorized system of norms had to be freed to preserve its purity.

Leading commentaries on the 'purity' of Kelsen's legal theory have focused on the legacy of transcendental philosophy, alongside the discourse of jurisprudence (including works that focus on the natural-theological and psycho-sociological dimensions of legality), that visibly informs the jurist's purist aesthetics.[18] The proper names of 'Immanuel Kant', 'Hugo Grotius' and 'Georg Jellinek' recur across Kelsen's oeuvre, varyingly affirmed and negated as key interlocutors from whom his science of legal cognition acquires its ideal form. For instance, in 'The Natural-Law Doctrine Before the Tribunal of Science' (1949), whose title alludes to Kant's classic tribunal of reason,[19] Grotius' equation of nature with God as the fundamental source of reason and law is cited by Kelsen as a natural law doctrine that erroneously reduces the normative fields of ethics and jurisprudence to nature's principle of causality.[20] For Kelsen, the natural law tradition commits the fallacy of inferring the 'ought' from the 'is', mistaking the prescriptive norms of human action to be explainable in terms of cause and effect.[21] In Kelsen's norm-scientific inquiry into the basis of legal authority, it is rather the *Grundnorm* ('basic norm') at which he would arrive to account for the hierarchical ordering of laws, including the imputation of sanctions to unlawful behaviors, which is a functional connection distinct from causation.[22] Likewise, as Stanley L. Paulson has shown, Jellinek's emphasis on the psychological and sociological dimensions of law, including the social composition and implications of the state, has been criticized by Kelsen since before the first edition of *Reine Rechtslehre* (1934) for denying the normative significance of law, that is, the legal system's prescription that one ought to act in particular ways even if one might not in fact abide by it.[23] By the second edition of Kelsen's treatise (1960), only Kant's name would endure in the text as the material index of a secondary 'author-function',[24] ratifying the intellectual successor's transcendental grounding of jurisprudence.

The historicization of Kelsen's postulate of purity has proceeded by way of an idealist mode of intellectual historiography, as if concepts evolved within a grand cerebral machine

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[16] Immanuel Kant, *Critique of Pure Reason* (Paul Guyer and Allen W Wood eds, Paul Guyer and Allen W Wood trs, Cambridge University Press 1998) 132.
[17] Kelsen, *Pure Theory of Law* (n 4) 1.
[18] See, for instance, Stanley L Paulson, 'The Purity Thesis' (2018) 31 Ratio Juris 276.
[19] See Kant (n 16) 100–101.
[20] Hans Kelsen, 'The Natural-Law Doctrine Before the Tribunal of Science' (1949) 2 The Western Political Quarterly 481, 482–485.
[21] See ibid 483–484.
[22] On Kelsen's differentiation of 'imputation' from 'causation', see Kelsen, *Pure Theory of Law* (n 4) 76–81.
[23] See Paulson (n 18) 291–292.
[24] See Michel Foucault, 'What Is an Author?' in Donald F Bouchard (ed), *Language, Counter-Memory, Practice: Selected Essays and Interviews: Selected Essays and Interviews by Michel Foucault* (Cornell University Press 1977) 125.

against which individual replicas are measured. The material and other densely historical dimensions of Kelsen's theory are underplayed as part of a biographical context that merely enabled the jurist's intellectual exchanges and debts. In regard to Paulson's recent article, when reference is made to the 'difficult political circumstances of 1934' in which *Reine Rechtslehre* was first published, Kelsen's ouster from his professorship in the University of Cologne pursuant to the anti-Jewish *Gesetz zur Wiederherstellung des Berufsbeamtentums* ('Law for the Restoration of the Professional Civil Service') is only mentioned in a footnote that begins with the phrase, 'It goes without saying that…'.[25] These rhetorical and bibliographical marks are the material practices by which publication history is diminished to project the apparent autonomy and priority of the ideal contents of the text. It is as if Fredric Jameson's 1981 injunction for all dialectical thought to proceed along resolutely historical tracks has failed to affect mainstream jurisprudence.[26] Only in the peripheries of legal thought do we see incipient labors to review the transactions between Kelsen's theoretical work and his exile under Nazi law.[27]

When Kelsen is introduced as one of the key voices in twentieth-century analytical jurisprudence within Anglophone legal curricula, it is often done in reference to the 1967 translation of the second edition of *Reine Rechtslehre*, particularly his presupposition of the ahistorical, transcendental *Grundnorm*.[28] But even this translated text bears material indices of the dense historicity that institutional gatekeepers have elided. The copyright notice reminds us that prior to the present 'second, revised and enlarged edition' there was the initial edition published by the Viennese publisher Franz Deuticke in 1934. The dates of the two editions are significant as temporal markers of the events leading up to the mid-twentieth-century European catastrophe that haunts his scientific theory of law. Despite holding a permanent position as Professor of Law at the University of Cologne from 1930, Kelsen was forced to leave for a teaching position at Geneva's *Institut universitaire de hautes études internationals* by the autumn of 1933 because of the newly enacted Nazi statute that expelled persons of Jewish ancestry from the German civil service.[29] The original *Reine Rechtslehre* was published after Kelsen's dismissal from Germany; predated his escape to the United States in 1940; and then acted as the primary texts from which to generate journal articles and lectures that relayed his pure theory of law to an Anglophone audience.[30] Throughout the five-year period in which the complex of camps called 'Auschwitz' operated, Kelsen had been working in exile on the other side of the Atlantic, consigned to master a foreign language in which to transmit the theory that had preoccupied him since 1911, well before the rise of Nazism.[31] It had been by virtue of Kelsen's account of jurisprudence as a normative science that the American legal theorist Roscoe Pound referred to Kelsen as 'unquestionably the leading jurist of the time'.[32] Having depended on Pound's support to join UC Berkeley's Department of Political Science as a Visiting Professor (and, later, a full Professor) in 1942, Kelsen would continue to work within

[25] Paulson (n 18) 281.
[26] Fredric Jameson, *The Political Unconscious: Narrative as a Socially Symbolic Act* (Routledge Classics 2002) ix.
[27] See, for instance, Reut Yael Paz, 'Kelsen's *Pure Theory of Law* as "a Hole in Time"' (2015) 7 Monde(s) 75; Martti Koskenniemi, 'International Law as Philosophy: Germany 1871-1933', *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press 2004) 239–249.
[28] See, for instance, the chapter on 'Kelsen's Pure Theory of Law' in Brian Bix's popular textbook: Brian Bix, *Jurisprudence: Theory and Context* (9th edn, Thomson Reuters 2023).
[29] See Nicoletta Bersier Ladavac, 'Hans Kelsen (1881-1973) Biographical Note and Bibliography' (1998) 9 European Journal of International Law 391, 392.
[30] See, for instance, 'The Pure Theory of Law and Analytical Jurisprudence' (1941) 55 Harvard Law Review 44; whose wording closely follows the opening chapter of the first edition of *Reine Rechtslehre*.
[31] Within Kelsen's oeuvre, Paulson traces the nomenclature of purity back to Hans Kelsen, *Hauptprobleme der Staatsrechtslehre* ('Main Problems in the Theory of Public Law') (J. C. B. Mohr 1911); see Paulson (n 18) 279.
[32] Roscoe Pound, 'Law and the Science of Law in Recent Theories' (1934) 43 The Yale Law Journal 525, 532.

the parameters of his legal science over the next two decades.[33] When the second edition appeared in 1960, published by the same Viennese publisher, then, it was very much an enlarged version of the earlier work, incorporating his postwar work on the United Nations and international law.[34]

Historical traces of Nazi fascism may be found in the textual bodies of both editions of *Reine Rechtslehre*, the recollection of which may offer us a sense of the pure theory's fraught relationship with the context of its articulation. Published a year after Kelsen's sufferance of the Nazi's seizure of power in Germany, the original theory registers the historical violence that he and his philosophical commentators insist on keeping at bay in their legal-scientific utopia. Consider the following passage from the 'Author's Preface' that foregrounds fascism as one of the divisive ideologies of Kelsen's time:

> [It] is said that the Pure Theory of Law is not in a position to fulfil its own basic methodological requirement, and is itself merely the expression of a certain political value. But which political value? Fascists declare that the Pure Theory is on the side of democratic liberalism, while liberal or social democrats regard it as a trail-blazer for Fascism. Communism writes off the Pure Theory as the ideology of capitalistic statism, while nationalists and capitalists write it off sometimes as Bolshevism, sometimes as covert anarchism…In a word, the Pure Theory of Law has been suspected of every single political persuasion there is. Nothing could attest better to its purity.[35]

Instead of underscoring Kelsen's use of an *ad hominem* fallacy in downtrodden times (as Paulson did[36]), we can stress the grossly oppressive political situation in which his text was published. His concluding affirmation of the text's purity marked his contempt for the degradations of the encroaching historical catastrophe. Indeed, Kelsen understood his so-called objective legal science to be a counter-praxis that refused submission to the prevailing powers and dictates of politics:

> [Our] own time [is] reeling from the World War and its consequences, a time in which the very foundations have been profoundly shaken, exacerbating in the extreme the tensions between states as well as within states. The absolute value of an objective science of law and politics has prospects of general recognition only in a period of social stability. And so nothing seems less opportune today than a theory of law that aims to maintain its purity at a time when other theories are willing to offer themselves to any and all powers, when one no longer shrinks from called loudly and publicly for a legal science that is political and then claiming that it is 'pure'—thus extolling as virtue what only the most acute personal exigencies could barely excuse.'[37]

Cognizant of the growing obsolescence of his legal theory amidst the rise of Nazism, Kelsen declared his belief in a future time of social stability when his notion of scientific objectivity may be recognized for its purported timeless value. At the date of its first publication, *Reine Rechtslehre* was addressed to an audience yet to come: 'For it is my firm conviction that in some distant future, the fruits of such a legal science will not be lost'.[38]

By the second edition of 1960, the 'Author's Preface' had been removed, as if reflecting the author's embarrassment at his impassioned plea to an imaginary public. Or perhaps the text

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[33] Ladavac (n 29) 393.
[34] On Kelsen's postwar contributions to international law, see ibid 393–394.
[35] Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* (n 2) 3.
[36] Paulson (n 18) 281.
[37] Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* (n 2) 4.
[38] ibid 5.

had arrived at that future point of social stability, such that the authorial paratext had lost its function.[39] Whilst the enlarged text maintains an austere tone ostensibly divested of emotion and personality, there remain scattered references to the totalitarian regime from which its author had survived. For a text that purports to depict a '*general* theory of law, not an interpretation of *specific* national or international legal norms',[40] one might expect there to be scant room for discussion of particular systems such as the Third Reich. But Nazi Germany does appear within pages of Kelsen's much-discussed opening chapter, albeit only in the dispensable form of an instance of a legal system that retroactively imputed sanctions in the form of state-executed killings to its subjects' actions:

> A legal norm may stipulate…that…a coercive act that actually has been performed in the past without being prescribed by a norm then valid, ought to have been performed; so that the character of a sanction is conferred upon this coercive act with retroactive force. For example: In Nationalist-Socialist Germany certain coercive acts which at the time of their performance were legally murder, were subsequently retroactively legitimized as "sanctions"; and the behaviour of the victim which elicited the murder was subsequently qualified as a "delict."'[41]

A palpable sense of the profound disturbances to domestic and international legal systems introduced by the World War spearheaded by Nazi Germany has given way to a phlegmatic presentation of the national socialist government's use of law to belatedly authorize the killings of its own subjects. In the time of Kelsen's second articulation of *Reine Rechtslehre*, the exceptional regime of lawless killings is but a possibility inherent in the legal order as a system of norms regulating human behavior. What was once observed by Benjamin to be an historical chiasmus of the legalization of lawless violence is, in Kelsen's view, a banal operation of the machinery that we call 'law'.

A comparison of two other junctures where Kelsen refers to Nazism without naming it points to a fundamental conflict at the heart of his theory, one that pertains to its relationship with totalitarianism. Kelsen notes time and again that the violence committed on subjects of totalitarian regimes are acts of coercion that emanate from within, rather than outside, the rule of law:

> The legal order of totalitarian states authorizes their governments to confine their governments in concentration camps persons whose opinions, religion, or race they do not like; to force them to perform any kind of labour; even to kill them. Such measures may morally be violently condemned; but they cannot be considered as taking place outside the legal order of these states.[42]

That extreme acts of moral perversion may be backed by the authority of law is but an accepted consequence of Kelsen's legal positivism. And yet, Kelsen would insist that the legal order may offer constitutional safeguards against the incursion of inalienable liberties such as those of religion and speech:

> Even under the most totalitarian legal order there exists something like inalienable freedom; not as a right innate and natural, but as a consequence of the technically limited possibility of positively regulating human behaviour. This sphere of freedom, however, can be regarded as legally guaranteed only to the extent that the legal order prohibits interference. In this respect the constitutionally guaranteed so-called civil liberties are politically particularly important. They are established by provisions of the constitution that limit the competence of the legislators to the extent that the latter

[39] On the link between the temporal and functional aspects of paratexts, see Gérard Genette, *Paratexts: Thresholds of Interpretation* (Jane E Lewin tr, Cambridge University Press 1997) 5–13.
[40] Kelsen, *Pure Theory of Law* (n 4) 1; my emphasis.
[41] ibid 13.
[42] ibid 40.

> are not authorized *(or so authorized only under exceptional conditions)* to issue norms that command or forbid a certain behaviour, such as the practice of a certain religion or the expression of certain opinions.[43]

The parenthetical qualification reflects Kelsen's brushing up against the ethical limits of his pure theory. Kelsen recognizes the law's role in protecting the fundamental liberties of its human subjects through the constitution, the highest norm below that of the *Grundnorm*. But he concedes that this bedrock of the legal system is no less capable of authorizing states of exception that suspend those constitutional safeguards. Formalist accounts of legal positivism provide no robust bulwark against totalitarian violence, of which Auschwitz and the Holocaust are but historical examples. Despite Kelsen's insistence on the 'purity' of his theory on the scientific level, it remains bound up with the barbarism that exiled him from Europe as one of its authorized possibilities, thereby rendering it resolutely impure in terms of ethics. Forcibly displaced from his home continent, and thereafter condemned to repeat a theory he had advanced well before the historical catastrophe that confirmed its ethical impoverishment, the Jewish émigré left behind in his publications material signs of the legally sanctioned violence that he had borne.

'There is no document of civilization which is not at the same time a document of barbarism'.[44] Whilst Benjamin was referring to the unnamed voices whose labors our prized cultural artefacts presupposed but elided, in the instance of Kelsen's *Reine Rechtslehre* we find two editions that indexed the violence to which their author had suffered. The expansion of a legal-philosophical treatise does not simply reflect the fulfilment of an intellectual project interrupted by unfortunate historical circumstances. Rather, it suggests the text's capacious materiality: its registration of the historical violence in which its author and work were doubly caught. Kelsen's postulate of purity is haunted by the historical contaminant of Nazism against which it had failed to guard. It is as if Benjamin's 'angel of history'[45] described, and foretold, the cumulative stacking of Kelsen's ruinous texts, and the numerous commentaries on it advanced in the name of 'progress'.[46]

3. Writing in the Aftermath

Publication history offers glimpses of the material conditions on which texts are presented to the public, suggesting that our interpretation of texts fundamentally depends upon the socio-technological machineries that (re)produce them.[47] In regard to Blanchot's *La Folie du jour*, a chance parallel may be drawn between the publication of the literary fiction and that of Kelsen's juristic treatise. Like Kelsen's text, Blanchot's was published twice, in two versions, in the author's lifetime, which was also that of Nazism and the Holocaust.[48] The fiction originally appeared under a different title, *Un récit*, as the third contribution to the May 1949 issue of *Empédocle*, a literary monthly edited by René Char, Albert Béguin, and Albert Camus.[49] In the second instance, it was published under the present title as a standalone volume

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[43] ibid 43–44; my emphasis.
[44] Benjamin (n 5) 257.
[45] 'This is how one pictures the angel of history. His face is turned toward the past. Where we perceive a chain of events, he sees one single catastrophe which keeps piling wreckage upon wreckage and hurls it in front of his feet': ibid.
[46] ibid 258.
[47] See Genette (n 39). On paratexts as material indices of literary assemblages, see Benjamin Goh, 'From Paratexts to Print Machinery' (2023) Law and Critique (Early View).
[48] Other than Derrida's analysis of the text's publication history (discussed below), see Leslie Hill, *Blanchot: Extreme Contemporary* (Routledge 2001) 95.
[49] For copies of the original front matter, see Jacques Derrida, *Parages* (Éditions Galilée 1986) 132–134.

in 1973.[50] In fewer than three decades of the initial edition, and still within close proximity to the mid-twentieth-century catastrophe, each author felt a need to reissue his text to the reading public. Not unlike Kelsen's, Blanchot's text has since attracted a sizeable number of commentaries, both within literary studies and in legal scholarship, though it has yet to be brought in conversation with the former's pure theory of law.[51]

Whilst Kelsen had opted to expand his jurisprudential treatise in 1960, the only revision that Blanchot would make to his 1973 text was to affix to it a new title that displaced its original, perhaps too unequivocal, generic classification. It was the nominal paratext, rather than the main text, that constituted the literary author's belated contribution, as if the narrative's re-entry into a 'new' context, two decades after Auschwitz, was at the heart of the author's intervention. Already in the original publication there were signs that the title betrayed, or at least failed to accurately announce, the fiction's ambivalent relationship with storytelling. Derrida recounted it well: before it was termed *La Folie du jour*, the text bore at least two titles.[52] The story's front page and the journal issue's contents page agree in calling the text *Un récit* ('A story'), differing only in the placement of the authorial name, 'Maurice Blanchot', below and above the title respectively. Whereas the author is foregrounded in the publisher's peritext,[53] it cedes priority to the title itself in the main text, as if subordinating the author to the work, or in this chiasmus disclosing their co-emergence in time. Prior to this threshold performance of material co-constitution, the journal issue's front page lists its contributing authors and titles. Blanchot's title stands out as the only one affixed with a punctuation mark that turns what would have been a firm generic classification into a question: '*Un récit?*'

In Derrida's contributing reading of Blanchot's text to a 1979 international colloquium on 'Genre', the initial title with the question mark was read as performing two related functions that disclose the juridical force of genre assignments.[54] First, the title asks whether the text named by the title is, indeed, an item that falls within the mode of genre or mode of writing that we called *récit*. It further excerpts, and promotes to the titular level, the very question raised by the narrating 'I' of the story, one based on the order issued by his interrogators, amongst whom include an ophthalmologist and a psychiatrist, to give an autobiographical confession that fell squarely within the short story genre of *récit*.[55] The closing sequence of Blanchot's text merits recitation:

> I had been asked: Tell us "*just* exactly" what happened. A story? [*Un récit?*] I began: I am not learned; I am not ignorant. I have known joys. That is saying too little. I told them the whole story and they listened, it seems to me, with interest, at least in the beginning. But the end was a surprise to all of us. "That was the beginning," they said. "Now get down to the facts." How so? The story was over!
>
> …
>
> A story? [*Un récit?*] No. No stories, never again.[56]

The title raises the question of the text's genre, precisely by citing from the text in which the violent demand for narrative production and classification is staged, then finally refused. In both illocutionary acts, the activity of genre assignment is suggested to be a jurisdictional

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[50] Maurice Blanchot, *La Folie Du Jour* (Fata morgana 1973).

[51] Other than the works discussed in this article, see Christopher Fynsk, 'Beyond Refusal: The Madness of the Day', *Last Steps: Maurice Blanchot's Exilic Writing* (Fordham University Press 2013); Patrick Hanafin, '"As Nobody I Was Sovereign": Reading Derrida Reading Blanchot' (2013) 3 Societies 43.

[52] See Derrida, 'Law of Genre' (n 13) 241; Derrida, *Parages* (n 49) 132–134.

[53] On 'the publisher's peritext', see Genette (n 39) 16–36.

[54] Derrida, 'Law of Genre' (n 13).

[55] On the *récit* as mode, genre, and form, see Timothy Clark, 'Blanchot: The Literary Space', *Derrida, Heidegger, Blanchot: Sources of Derrida's notion and practice of literature* (Cambridge University Press 1992); Lars Iyer, 'Blanchot, Narration, and the Event' (2002) 12.

[56] Blanchot, 'The Madness of the Day' (n 7) 199.

practice that presupposes, and reinstitutes, a symbolic order that separates texts into *récits* and *non-récits*, stories and non-stories. For Derrida, the initial title of Blanchot's text reflexively directs us to the legality of titles and genre demarcations as enforcing binary logics that the 'narrative' ultimately suspends.[57]

A supplement to Derrida's analysis: given that it is the *publisher's* peritext where the question mark is added to (and subsequently subtracted from) Blanchot's title, there might be an untold story of some key challenge issued to authorial prerogative, even to the myth of original authorship that continues to govern copyright law today, by the editors steering the print machinery.[58] Perhaps the editor had thought that Blanchot's story called into question the title that its author had given. Or perhaps both titles were devised by the editors for the untitled manuscript. In either of these instances, it would have been the editors, rather than the author, who named the text, giving it its legal identity in accordance with copyright law. In any case, the 'extraneous' intervention(s) appeared to have informed Blanchot's choice for a new title, *La Folie du jour*—one similarly drawn from *within* the story—when it reappeared in 1973.

Facing a fiction unmarked by dates (unlike Blanchot's *L'Arrêt de Mort* ('Death Sentence') (1948)[59]), it might be tempting to view *La Folie du jour* as a text written without regard for its encircling historical events.[60] On this perspective, the titular madness is essentially of a general, timeless character, and could be read as a figure for the limit-aperture in humanity's narrative projects. In Blanchot's story, the first-person narrator (grammatically ascribed the male gender) recounts some events of his life that have led up to his interrogation by the medical experts and his closing refusal to tell (further). In one selective ordering of these mnemonic fragments (the doing of which perhaps already places us in the position of the lawful interrogators exacting their demand for narrative coherence), the narrator was a city-dweller whose attraction to the law and demos drew him into some kind of public life.[61] This public fervor soon gave way to a weariness of the violence it entailed: 'I grew tired of being the stone that beats solitary men to death'.[62] Despite his claims not to have made any enemies, he suffered a blinding assault in the form of glass crushed in his eyes. During his period of convalescence, he underwent a surreal or irreal experience of confronting the light of seven days. This would lead to his coining the titular phrase: 'In the end, I grew convinced that I was face to face with the madness of the day. That was the truth: the light was going mad, the brightness had lost all reason; it assailed me irrationally, without control, without purpose. That discovery bit straight through my life'.'[63] The narrator is interrogated by the doctors, whose demand for an account of the foregoing events he acquiesces for the most part, but eventually still disappoints and is charged with evasion. At some point, behind the doctors' backs, he catches sight of 'the silhouette of the law'[64] (grammatically feminine), with whom he engages in various erotic games, including that of him touching her knee. Bearing the doctors' relentless questioning in the form of an 'authoritarian interrogation, overseen and controlled by a strict set of rules',[65] the narrator

[57] On the law of titles, see Jacques Derrida, 'Before the Law' in Derek Attridge (ed), Avital Ronell and Christine Roulston (trs), *Acts of Literature* (Routledge 1992).
[58] On print machineries and the myth of original authorship, see Benjamin Goh, 'Two Ways of Looking at a Printed Book' (2022) 85 Modern Law Review 697; Goh (n 47).
[59] Published a year before *Un récit* (1949), *L'Arrêt de Mort* (1948) begins by dating the account: 'These things happened to me in 1938'; Maurice Blanchot, *Death Sentence* (Lydia Davis tr, Station Hill Press 1978) 1.
[60] See, for instance, Levinas' commentary on Blanchot's text: 'These twenty-five pages, written shortly after the Liberation (in 1948 or thereabouts) do not bear the signs of the times in which they were written'; Emmanuel Levinas, 'Exercises on the "The Madness of the Day"' in Michael B Smith (tr), *Proper Names* (Stanford University Press 1996) 159.
[61] Blanchot, 'The Madness of the Day' (n 7) 193.
[62] ibid.
[63] ibid 195.
[64] ibid 197.
[65] ibid 199.

finally declines to give the *récit* that they demand. That our present recitation of the text is based on only parts of the text, rather than the entire text, attests to a certain futility in reducing its complexity to a coherent account. The text *performs* the narrator's refusal to present his interrogators with a unified narrative. The madness of the day that the narrator discovers is, precisely, the impossibility of representing events in ways that align with our legal-scientific sensibilities.

But this reading ignores the surrounding intertexts, authorial and not, that burrow their way into the narrative, illuminating the historicity subtly registered in the text. The 'public life'[66] of the narrator, if the narrator is taken to be at least a partial proxy for the author himself, takes the form of authorship. As conceived in one of the founding texts of the European Enlightenment, Immanuel Kant's *Beantwortung der Frage, Was ist Aufklärung?* ('An Answer to the Question: What is Enlightenment?') (1784), the public is the 'public of the world of readers'[67] (*Publikum der Leserwelt*) before whom one advances the project of social emancipation by boldly exercising one's own reason in the form of literary publications. Whilst the fiction's stress on blindness and madness at the heart of the day would suggest the author's withdrawal from any pure understanding of enlightenment (and, for that matter, pure jurisprudence), his activities as a producer of political articles alongside literary writings, leading up to and during the initial years of the World War, contributed to Franco-European public discourse. Indeed, Blanchot's polemical essay contributions to fascist and collaborationist journals such as *Combat* and *Journal des débats* during the late 1930s and early 1940s have been cited as evidence of the author's seduction by the totalitarian logics and rhetoric that yielded the war's genocidal terrors.[68] In that context, the narrator's self-criticism for once being the 'stone that beat solitary men to death',[69] each of whom he recognized to comprise 'an entire people',[70] might well index the author's shame at his former nationalist extremism.

Embedded in *La Folie du jour* is the very historical backdrop of the World War against which the story of Blanchot's narrator unfolds. This writing of madness is not removed from history, but rather emergent from it. Before the *day's* madness became the subject of the narrator's reflection, it was the *world's* madness whose rupture the narrator identified to be the senseless occurrence that disrupted his work: 'Shortly afterward, the madness of the world broke out. I was made to stand against the wall like many others. Why? For no reason. The guns did not go off. I said to myself, God, what are doing? At that point I stopped being insane. The world hesitated, then regained its equilibrium.'[71] That the world's madness might have stood for that of Second World War is suggested in another text authored by Blanchot, published four and a half decades after the initial edition of *La Folie du jour*. *I'instant de ma mort* ('The Instant of My Death') (1994) expressly sets the event recollected by the first-person narrator in France during the Second World War, particularly towards its end in the year 1944. In this memory, a young man of noble birth (apparently the younger narrator himself) had been made to stand in a row with other men before a firing squad led by a French-speaking Nazi lieutenant. Because of a supervening battle involving the burning of nearby farms (that led to

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[66] ibid 193.

[67] Immanuel Kant, 'An Answer to the Question: What Is Enlightenment? (1784)' in Mary J Gregor (ed), Mary J Gregor (tr), *Practical Philosophy* (Cambridge University Press 1996) 18.

[68] See, for instance, Jeffrey Mehlman, 'Blanchot at Combat: Of Literature and Terror' (1980) 95 MLN 808; Jeffrey Mehlman, 'Pour Sainte-Beuve: Maurice Blanchot, 10 March 1942', *Genealogies of the Text: Literature, Psychoanalysis, and Politics in Modern France* (Cambridge University Press 1995).

[69] Blanchot, 'The Madness of the Day' (n 7) 193.

[70] '[T]o me, each person was an entire people. That vast other person made me much more than I would have liked'; ibid.

[71] ibid 191–192.

the 'slaughter'[72] of three poor farmers' boys), the young man and the others were eventually spared. 'This was war: life for some, for others, the cruelty of assassination.'[73] Returning to *La Folie du jour*, the narrator's survival from unfired guns amidst the world's madness bears so uncanny a resemblance to that of the young man in *L'instant de ma mort* that it is tempting to view both narratives as centered upon the very same event of the Second World War. Indeed, the autobiographical status of both narratives is suggested by Derrida, whose commentary on the 1994 text includes a personal letter he had received from Blanchot, which identified 20th July 1994 to be the fiftieth anniversary of his escape from gun execution: 'July 20. Fifty years ago, I knew the happiness of nearly being shot to death.'[74] The author's correspondence with Derrida points to the historical priority of Nazi fascism in both fictions.

Though separated into the genres of jurisprudence and literature respectively, *Reine Rechtslehre* and *La Folie du jour* materially align as trace-repositories of the historical catastrophe that had engulfed the authors and Europe at large. The possibility, and desirability, of excluding politics, history, and other dimensions of society from the study of law defined Kelsen's postulate of purity, even as this methodological exclusion belied the collective trauma that marked both editions of the texts. The seeming timelessness and placelessness of Blanchot's story is but an artful dissimulation of the violent European history of which it was written, and (re)published, in the aftermath. In each instance, maintaining the purity of knowledge, be it 'legal' or 'literary', is shown to be an impossible project, that is, one incapable of effacing the historical conditions in which the text was produced. Ostensibly effaced from the domains of law and literature, history returns as the irrepressible assemblage of material practices from which these intellectual outputs acquire their significance.

It is part of the enigma of Blanchot's fiction that its writing in the aftermath of Auschwitz stages an implicit critique of, even a movement beyond, the binary logic of exclusion that distinguished Kelsen's pure theory. Recall that the 'authoritarian interrogation'[75] to which the narrator is subjected is conducted by doctors, whose commitment to causality, representation, and identity in the natural sciences drive their demand for a unified, and an exact, account of events leading up to his blinding encounter. Although Kelsen had distinguished jurisprudence (and its normative principle of imputation) from natural science (and its principle of causation), Blanchot's doctors act *as if* they are Kelsenian legal representatives policing the border between permissible and impermissible modes of narration. Signs of 'hiding'[76] or of 'silence'[77] are prohibited, expressly designated as an 'offence'.[78] Despite the questioners' jurisdictional enforcement, the narrator eludes capture, not by keeping silent, but through an incessant telling that discloses the constitutive silence of words: 'The words spoke by themselves. The silence entered them, an excellent refuge, since I was the only one who noticed it.'[79] Language, the communicative medium by which the legal representatives seek to make the interrogated subject submit to their dominion, becomes the refuge of the narrator and of the silence that had no place in law. What had been imagined to be excluded from the pure province of law reveals itself to be housed at the heart of its medium. The outside-within is that on which Blanchot's narrator, and the narration he tells, draws to refuse the law's demand for its total surveillance and discipline of the subject. In this staged refuge against the totalitarian violence of the camps

[72] Maurice Blanchot, 'The Instant of My Death' in Elizabeth Rottenberg (tr), Maurice Blanchot and Jacques Derrida, *The Instant of My Death / Demeure: Fiction and Testimony* (Stanford University Press 2000) 7.
[73] ibid.
[74] Jacques Derrida, 'Demeure: Fiction and Testimony' in Elizabeth Rottenberg (tr), Maurice Blanchot and Jacques Derrida, *The Instant of My Death / Demeure: Fiction and Testimony* (Stanford University Press 2000) 52.
[75] Blanchot, 'The Madness of the Day' (n 7) 199.
[76] ibid 197.
[77] ibid 199.
[78] ibid 197.
[79] ibid 199.

in which Jews and other marginals were caught, *La Folie du jour* demonstrates literature's strange radical power to accommodate the otherness that an ahistorical perspective of law would deny in the name of purity. Between the two forms of post-Holocaust writing, it is Blanchot's literature, more so than Kelsen's jurisprudence, that enfolds in itself the difference of history.

4. At the Heart of Literature

Idiomatically, Derrida's 1979 reading of Blanchot's fiction as enacting what he called 'a law of impurity or a principle of contamination'[80] directly opposes Kelsen's postulate of purity. Though not referenced by Derrida, Kelsen's purist legal aesthetics is obliquely critiqued as an instance of the titular 'law of genre' that forbids the intermixing of genres, be they categories of *phusis* (nature) or *nomos* (culture).[81] Prior and immanent to the normative and legal acts of circumscription that enforce the law of genre, Derrida suggests, is a 'counterlaw that constitutes this very law, renders it possible, conditions it and thereby makes itself…impossible to edge through, to edge away from or to hedge around.'[82] This prior 'law of the law of genre'[83] is simultaneously what enables the separation of texts into separate genres, for instance, *Reine Rechtslehre* into 'jurisprudence' and *La Folie du jour* into 'literature', and necessitates their traversal *across* the instituted distinctions. As Derrida puts it: 'I would speak of a sort of participation without belonging—a taking part in without being part of, without having membership in a set.'[84] On this perspective, it is by law that Blanchot's text partakes of jurisprudence without belonging to it, and Kelsen, of literature, though neither is fully a member of the genre at hand. Indeed, it is by virtue of such plural generic participation that neither text is an exclusive member of their ascribed genre: a text would not *belong* to any genre. Every text participates in one or several genres, there is no genreless text, there is always a genre and genres, yet such participation never amounts to belonging.'[85] Taxonomy is simultaneously rendered possible and impossible by the transgressive vitality of the texts that are brought under distinct categories.

Other than the first title (*Un récit?*) that acts as a textual portal between the diegetic and extradiegetic world of the fiction (which Derrida has reviewed at length[86]), *La Folie du jour* demonstrates the law of contamination by playfully instating and dismantling a male/female binary that emanates from our cultural imagination of sexual difference. The doctors qua legal representatives, like the narrator himself, are initially ascribed the male gender, not only grammatically, but also through their patriarchal, and appropriative, speech-acts: 'I liked the doctors quite well, and I did not feel belittled by their doubts. The annoying thing was that their authority loomed larger by the hour. One is not aware of it, but these men are kings. Throwing open my rooms, they would say, "Everything here belongs to us."'[87] Whereas the doctors deploy the legal idiom of prohibition and offence to discipline the narrator into submission ('"Hiding is forbidden, it is an offence," etc.'[88]), thereby demonstrating a fear of death qua disappearance that the narrator associates with men ('Men want to escape from death, strange beings that they are…Men are assaulted by terror, the night breaks through them, they see their

[80] Derrida, 'Law of Genre' (n 13) 225.
[81] ibid 224.
[82] ibid 226.
[83] ibid 227.
[84] ibid 227.
[85] ibid 230.
[86] See ibid 231–243.
[87] ibid 192.
[88] ibid 197.

plans annihilated, their work turned to dust.'[89]), women are viewed by the narrator as affirmative beings unafraid of death and life ('Yet I have met people who have never said to life, "Quiet!", who have never said to death, "Go away!" Almost always women, beautiful creatures.'[90]) Blanchot *almost* instates a gender binary. But it bears noting that the narrator himself transgresses this binary by demonstrating the very hospitality to death and life that he ascribes to femininity: 'I experience boundless pleasure in living, and I will take boundless satisfaction in dying'.[91] True to the law of contamination, the grammatical male exhibits a feminine trait that discloses the porousness of the boundary line that purports to separate the two.

Blanchot further splits the figure of law into *at least two*, thereby underscoring its immanent plurality that detracts from any unitary understanding of legality. 'Behind their [i.e. the doctors'] backs I saw the silhouette of the law. Not the law everyone knows, which is severe and hardly very agreeable; this law was different. Far from falling prey to her menace, I was the one who seemed to terrify her'.[92] A series of *amour fou* scenes, a play of simultaneously erotic and mad exchanges between the male narrator and the feminine silhouette of the law, literarily divert us from the violent interrogation conducted by the doctors. Instead of a total submission of the symbolically castrated narrator to the dominating interrogators, the fiction stages amorous 'games'[93] of gender reversals. At times, she subordinates herself to the narrator's sovereign authority: 'the law absurdly credited me with all powers; she declared herself, perpetually on her knees before me.'[94] At others, she acts as the master who critiques ('The law was sharply critical of my behaviour: "You were very different when I knew you before."' [95]) and orders him about ('Once she had made touch her knee—a strange feeling'[96]), seemingly for her own sexual satisfaction: 'This was one of her games. She would show me a part of space, between the top of the window and the ceiling. "You are there," she said…Suddenly she cried out, "Oh, I see the day, Oh God," etc.'[97] Mad love, appearing under the sign of a feminine law, displaces legal violence as the central action of Blanchot's fiction. Law itself fragments into irreconcilable figures that exceed the familiar binaries of our cultural imagination.

If Blanchot's fiction presents a *pluralist* jurisprudence that exceeds the *monism* of Kelsen's pure theory of law, that is because it takes literature, and the radical law emergent from it, seriously. Whereas Derrida had framed the law in terms of impurity, both the language of *La Folie du jour* and Blanchot's essay on the *récit* suggest that this law may be rearticulated under the sign of 'recitation', which presents a sharper account of literature's relationship with history and law. In *Le chant des Sirène*s ('The Song of the Sirens') (1959), the *récit* takes on not the form of a literary narrative like *La folie du jour*, but rather a song originally relayed in Homer's *Odyssey.*[98] The classic scene of Ulysses' attraction to the sirens' song is rewritten as a meta-allegory for the reader's enthrallment with a law, 'the secret law of the récit',[99] that drives the very narrative that s/he reads. Whilst we might tend to join the doctors of *La folie du jour* in stressing the meaningful, causally connected sequence of events in a narrative, as if it is the

[89] ibid 192.
[90] ibid.
[91] ibid 191.
[92] ibid 197.
[93] ibid 198.
[94] ibid 197.
[95] ibid 198.
[96] ibid.
[97] ibid.
[98] Blanchot, 'The Song of the Sirens' (n 14).
[99] ibid 7.

representable object of the narrative that guarantees its truth, Blanchot directs us to the narrative's disclosure of its own conditions of possibility:

> Narrative is the movement toward a point—one that is not only unknown, ignored, and foreign, but such that it seems, even before and outside of this movement, to have no kind of reality; yet one that is so imperious that it is from that point alone that the narrative draws its attraction, in such a way that it cannot even "begin" before having reached it; but it is only the narrative and the unforeseeable movement of the narrative that provide the space where the point becomes real, powerful, and alluring.[100]

Returning to the originary point of the narrative, that 'from…[which] the narrative draws its attraction',[101] is affirmed to be very movement of the narrative into which the reader is led. Whereas the legal representatives wanted the narrator to emerge from hiding and be fully present, Blanchot calls attention to the radically neutral point, also figured as the narrative's 'abyss',[102] in which the identity of the reader, alongside that of the narrator, disappears.

The essay stresses that it is the *exceptionality* of a past event, figured in the epic as Ulysses' encounter with the sirens, whose narrative impossibility discloses the deferral of the event from the present context in which it is recalled:

> [T]he nature of narrative is in no way foretold, when one sees in it the true account of an exceptional event, which took place and which one could try to report. Narrative is not the relating of an event but this event itself, the approach of this event, the place where it is called on to unfold, an event still to come, by the magnetic power of which the narrative itself can hope to come true.[103]

The experience of the impossibility of fully representing the event suggests not simply the failure of narration, but rather that the event itself was never fully experienced in the time of its occurrence. In this sense, the apparently past event has yet to arrive in the present and relies upon the narrative to relay its very deferral. In other words, the exceptional event is a *trauma* that a narrative might attempt to recount, but only succeeds in registering its absence from the present context of reading.[104] The law of the *récit* is the law of the event's withdrawal from narration, even as narration is the very activity that (re)stages this withdrawal in/from the here and now.

If *La folie du jour* surrounds not only an *imagined* traumatic assault (i.e.. the crushing of glass in the narrator's eyes), but indeed the *historical* trauma of Nazism and the Holocaust that condemned the narrator (and Blanchot himself) to execution, then it is the mid-twentieth-century catastrophe and its narrative impossibility that the fiction (re)stages before the reader. Read alongside the essay, the fiction presupposes, and demonstrates, that the exceptional historical event at the heart of its telling is never fully represented. Blanchot revisits the non-representability of Auschwitz, and its extreme challenge to the projects of historical anamnesis and meaning-making, in *L'écriture du désastre* ('The Writing of the Disaster') (1980): '*The unknown name, alien to naming: The holocaust, the absolute event of history—which is a date in history—that utter-burn where all history took fire, where the movement of Meaning was swallowed up…How can thought be made the keeper of the holocaust where all was lost, including guardian thought.*'[105] All history and meaning having been incinerated in the Holocaust, the absolute historical event itself defies narration. It is the non-representability of

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[100] ibid.
[101] ibid.
[102] ibid 4.
[103] ibid 6.
[104] On trauma theory and its interface with law and history, see Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Harvard University Press 2002); Cathy Caruth, *Unclaimed Experience: Trauma, Narrative, and History* (John Hopkins University Press 1996).
[105] Maurice Blanchot, *The Writing of the Disaster* (Ann Smock tr, University of Nebraska Press 1995) 47.

Auschwitz that *La folie du jour* discloses, over against the doctors' (and our) efforts to summon it for present judgment. In insistently eluding representational capture, the narrator anticipates, and joins, the collapse of a witness, 'K-Zetnik', whilst recounting his experience of Auschwitz during the 1961 Eichmann trial.[106] These infelicities of the fictional interrogation and the actual criminal trial attest to the impossibility of bringing to light the absolute historical disaster (the French *dés-astre* indicating the event's separation from any orienting star[107]).

Notwithstanding their emphasis on historical exceptionality, Blanchot's essay and fiction coincide in recognizing the non-representability of history to be not the exception, but rather the rule. The figures of 'inhumanity', 'abyss', and 'silence' are deployed to describe a void or absence at the heart of ordinary language and experience, rather than limited to that of the extraordinary:

> [B]ecause the Sirens, who were only animals, quite beautiful because of the reflection of feminine beauty, could sing as men sing, they made the song so strange that they gave birth in anyone who heard it to a suspicion of the inhumanity of every human song…There was something wrongful in this real song, this common, secret song, simple and everyday, that they [i.e.. the listening men] had to recognize right away, sung in an unreal way by foreign, even imaginary powers, song of the abyss that, once heard, would open an abyss in each word and would beckon those who heard it to vanish into it'.[108]

The exceptional song calls attention to the same structural feature of non-representability that defines everyday experience, disclosing the limits of language at large. In respect of *La folie du jour*, it is the silence harbored in the speech of the probing doctors that evidences the ubiquitous reach of the secret law of the *récit*: 'The words spoke by themselves. The silence entered them, an excellent refuge, since I was the only one who noticed it.'[109] In the face of the non-representability of the historical exception, it is *materiality* of language, rather than its *symbolic* function, that comes to the fore. All stories, be they of history or of law, incessantly withdraw into the material conditions of their (re)articulation. That nothing the narrator says could fulfil the doctors' command for him to be fully present attests to its futility.

Whilst signaling the deferral of absolute meaning, the abyss or void at the heart of literature is also the very structural opening through which works like *La folie du jour* travels across contexts. The text's recursive structure, both in the story it relays and in its non-identical reproduction(s), demonstrates an ethic of vital *affirmation* that leans towards the proliferation of meaning, rather than to its negation. As Derrida has already noted: the story's redoubled repetition of the phrase '*Un récit?*' ('A story?) within itself, in response to the doctors' demand for a story, creates two narrative 'loop[s]'[110] or 'pocket[s]'[111] by which the narrator eludes representational capture. The first returns to the beginning of the story that begins with the same three lines: 'A story? I am not learned; I am not ignorant. I have known joys. That is saying too little'.[112] The second presents an alternative in the form of an absolute refusal: 'A story? No. No stories, never again.'[113] It is by repeating the same command, reposed as a question, within the same story that the narrator generates two non-identical responses. In so doing, he restages the very possibility of the text's own re-entry into new meaningful contexts. Indeed, the authorized republication of Blanchot's text, its own retitling from *Un récit* (1949)

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[106] See Shoshana Felman, 'A Ghost in the House of Justice: Death and the Language of the Law', *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Harvard University Press 2002).
[107] Blanchot, *The Writing of the Disaster* (n 105) 2.
[108] Blanchot, 'The Song of the Sirens' (n 14) 3–4.
[109] Blanchot, 'The Madness of the Day' (n 7) 199.
[110] Derrida, 'Law of Genre' (n 13) 238.
[111] ibid.
[112] Blanchot, 'The Madness of the Day' (n 7) 199.
[113] ibid.

to *La folie du jour* (1973), replicates the fiction's internal duplication, re-enacting the text's structural potential to be recited in a new context. In the text's traversals *across* contexts, the possibility of rereading the text under different conditions, including that of Nazism and the Holocaust, is repeatedly posed. Rather than enacting a pure negative power, the law of the *récit* affirms the vitality of the text, enabling its very own renewal. Not simply pronouncing the inevitable regression of all meaning to senseless materiality, this law enables the proliferation of meaning. It is in this affirmative sense that Blanchot's law of the *récit* may be reformulated as the law of recitation: the law of the text's potential recitation in infinite contexts (or what Derrida has called the 'iterability of the mark'[114]).

Emergent from our present rereading of Blanchot's jurisliterature, the law of recitation offers itself as a version of the radically historical law that undergirds, and affirms, the (re)historicization of jurisprudence and literature. The structural openness of Kelsen's *Reine Rechtslehre*, no less than that of Blanchot's *La Folie du jour*, affords its interpretation as a text (re)produced amidst, and in the aftermath, of Nazism and the Holocaust. It enables our present recollection of the historical memory registered in Kelsen's *only seemingly ahistorical* text. By the same token, the law of recitation allows for, even prompts, the text's re-entry into other meaningful contexts. It is part of the historicity of the text that it incessantly escapes from the context of its (re)production, suspending those conditions to prompt further rereadings. This double movement explains the reproduction(s) of Kelsen's and Blanchot's texts, whilst affirming legal theory's (re)turn to history. In attending to it, we hear an echo of the narrator's double affirmation of life and death: 'But this is the remarkable truth, and I am sure of it: I experience boundless pleasure in living, and I will take boundless satisfaction in dying'.[115]

5. Conclusion: In Memory of the Dead

'Death is the sanction of everything that the storyteller can tell. He has borrowed his authority from death'.[116] In his 1936 essay on the nineteenth-century Russian novelist Nikolai Leskov, Benjamin proposed two senses in which to understand the death of storytelling in the twentieth century. On the one hand, he foregrounded the muteness that had befallen the veterans returning from the First World War, as if the traumatic bombardments had destroyed their ability to narrate the conditions that had robbed them of their voices.[117] On the other, he suggested that there could be no storytelling without the fragility of the bodies lost to history. It was in memory of the 'tradition of the oppressed',[118] the prostrate bodies over whom history's victors marched, that the literary critic articulated his counter-progressive view of history as a catastrophic accumulation of corpses. His own death, a suicide compelled by the untimely closure of the Franco-Spain border that forestalled his escape from Nazi persecution, led commentators like Shoshana Felman to re-narrativize his life and work as a singular force of transmission: the transmission of the memory of a German-Jewish intellectual who had been silenced, murdered, and disembodied by Nazi law.[119] No one today knows where Benjamin

[114] 'Every sign…can be *cited*, put between quotation marks; in so doing it can break with every given context, engendering an infinity of new contexts in a manner which is absolutely illimitable…This citationality, this duplication or duplicity, this iterability of the mark is neither an accident nor an anomaly, it is that (normal/abnormal) without which a mark could not even have a function called "normal"': Jacques Derrida, 'Signature Event Context', *Limited Inc* (Northwestern University Press 1988) 12.
[115] Blanchot, 'The Madness of the Day' (n 7) 191.
[116] Walter Benjamin, 'The Storyteller: Reflections on the Works of Nikolai Leskov' in Hannah Arendt (ed), Harry Zohn (tr), *Illuminations* (Schocken Books 2007) 94.
[117] 'Was it not noticeable at the end of the war that men returned from the battlefield grown silent—not richer but poorer in communicable experience?': ibid 84.
[118] Benjamin (n 5) 84.
[119] Felman (n 104) 10–53.

was buried.[120] In this present failure to locate the body of the persecuted Jew, Paul Celan's 'grave in the air'[121] acquires a troubling specificity that haunts our interminable efforts to work through the collective trauma of the Holocaust.

The memory of Auschwitz demands that the material texts emergent from the catastrophe be reread in the light of their historical conditions of possibility. In respect of Kelsen's and Blanchot's works, we have seen two forms of jurisprudence with two coincident, albeit ultimately divergent, responses to Nazi fascism. Whereas Kelsen was consigned to expand a pure theory of law that disavowed the historical densities in which law and theory remained enmeshed, Blanchot demonstrated the operation of a radically historical law that enabled the (re)production of both writers' post-Holocaust writings about law. It is the latter law of recitation, I suggest, that undergirds and affirms the present historical turn in legal theory. The historicization of law's texts implies a double movement: their recitation within the historical contexts of their (re)production, and their incessant escape into others that have yet to arrive. Neither should be ignored in our public acts of anamnesis, in jurisprudence nor in literature.

[120] ibid 49.

[121] '[T]his Death is *ein Meister aus Deutschland* his eye it is blue / he shoots you with shot made of lead shoots you level and true / a man lives in the house your *goldenes Haar Margaret* / he looses his hounds on us grants us a grave in the air': Paul Celan, 'Deathfugue' in John Felstiner (tr), John Felstiner, *Paul Celan: Poet, Survivor, Jew* (Yale University 1995) 31.