Fragments of Nature glimpsed from the criminal legal text

by Seonaid Abernethy

Sources of the Legal Text

Regardless of its antecedents, the drama in an everyday criminal court enshrines a paradox: the accused is embodied as a physical presence while also simultaneously disembodied by the conceptual framework of legal reasoning that is textual, self-referential, and necessarily eradicates the context of the offense.[1]

Illich begins his account of the modern text by walking carefully through the history of divine reading. He sees the *telos* (end) of monastic reading as that wisdom in which stands the form of the perfect Good, as a window on God and Nature. By the twelfth century, the text lifts itself from the page, arising to be a distinct object. The text as an object distances the reader from nature and encases both the world and the reader in information. As Illich wrote, "With the detachment of the text from the physical object, the *Schriftstuck,* nature itself ceased to be an object to be read and became an object to be described. Exegesis and hermeneutics became operations on the text rather than on the world. Only now, with nature reconceived as encoded information, can the history of the readability of the world become an issue for study."[2]

Within criminal law, the reader is transformed into a

1 In Goodrich's view, Nietzsche implies that the tradition of law " depends as much on embodiment as upon codification," see P. Goodrich, M. Valverde Eds *Nietszsche and Legal Theory Half-Written Laws* (2005) p.14.

2 I. Illich, *In the Vineyard of the Text* (1993) pp.117-118. Also pp. 9, 113. Further, "All nature is pregnant with sense and nothing in all of the universe is sterile" quoting Hugh of St Victor, 118-119.

Seonaid Abernethy, seonaid@seonaid.co.nz
Abernethy, S. Fragments of Nature glimpsed from the criminal legal text. Conspiratio, Fall 2024, p. 237-252

subject of the text; he or she is understood as a 'free individual' who is necessarily the 'legal person,' the cipher in a legal code based on a truth obligation. To shorten the centrality of truth in the history of modern law, I refer to Illich[3] and Agamben,[4] both of whom identify the act of recognizing something as true and the oath, where the latter is understood as the archaic origin of pre-law whence magic, religion, and law are completely intertwined. Agamben traces an evolution of these elements by way of a complex weaving of the truth obligation, implicitly, as a dissymmetry in the relation between the I and the Thou,[5] leading ultimately to an immeasurable grace.[6]

In other words, the oath pronounced with an object in hand, weighs the statement to the truth. The oath, says Agamben, then becomes a statement of loyalty (to another). There are two elements to this: the faith or trust that one places in another and the credit or authority that the latter enjoys as a result. But this relationship is unequal. Following Beveniste, Agamben notes that the one who holds the *fides* (faith) placed in him by a man, has this man at his mercy. He goes on to say that this is why the theme of grace must lie alongside the idea of faith. Moreover, this question of the oath, loyalty, faith, and its breach can be saved by grace alone. It reveals a fracture with the law because the law is explained by "obligations of counter service and command." Illich more clearly and succinctly says the same thing in his description of the I-Thou relation. For Illich, this relationship is exemplified by the Samaritan but not confined to it.

3 I. Illich and B. Sanders, *ABC The Alphabetisation of the Popular Mind* (1988) pp. 32-35; D. Cayley, *Rivers North of the Future* (2005), pp. 85-86

4 I infer this from G. Agamben *The Time That Remains* (2005), pp 113-114 ,119.

5 Ivan Illich identifies the I and the Thou relation in Cayley, *Rivers North of the Future* at pp 51-53, 55-56.

6 Illich and Agamben both reach this conclusion, see: In *Rivers North of the Future* at p. 227 and in T*he Time that Remains* at pp 114-116, 119-120.

The turning to someone cannot be explained rationally and is "arbitrary from everyone else's point of view." Since it is unknowable from the outside, it cannot be the subject of a norm, rule, or law although it may break the legal code.

Referring to a long history in the Western tradition, Agamben acknowledges the written law demands a legal conception of the physical person. Moreover, this legal person is tied back to the physical being through "processes of subjectivization [that] bring the individual to bind himself to his own identity and consciousness and, at the same time, to an external power."[7] This means that despite the impenetrable singularity of the I-Thou relationship described by Illich and Agamben, the rule of law is addressed to legal persons who are ghostly abstractions of embodied persons. Agamben thereby demonstrates that democratic, human rights-oriented, rule-of-law regimes are organized around an empty throne—because no natural being can be identified with the fiction of the legal person.[8]

The depth of this irresolvable ambiguity between the legal person and the physical person is often instantiated by the accused with great confusion, discomfort, and sometimes rage.[9] The ambiguity is fostered, as Illich argues, by "…the relationship between the axioms of conceptual space and social

7 I infer this from G. Agamben *Homo Sacer* (1998), pp. 1-5.

8 This appears as Agamben's thesis, in *Homo Sacer,* especially, pp. 8-10, 181 et seq. Citing *Homo Sacer*, and linking historically, the legal person, the "liberal subject of rights," to property, Anna Grear argues further that the *UN Declaration of Human Rights* is now "re-rendered as a paradigm of trade-related market friendly human rights." She states that "International human rights law…should be understood as protecting human beneficiaries understood in all the radical particularity of fully embodied life." She sees the refugee, the asylum seeker as the most juridically naked and as the bottom line in the standard for human rights which should rest upon "embodied vulnerability" of the human. Otherwise, the domination of every social sphere by the "logics of commodification" raises the question as to whether human rights can survive. See A. Grear, *Redirecting Human Rights, Facing the Challenge of Corporate Legal Humanity* (2010) pp 152-153, 65, 201-202

9 The charging of the offence itself, is often felt as an in-erasable political stigma.

reality insofar as this interrelationship is mediated and shaped by the techniques that employ letters. This history focuses on the thing that has been shaped by letters, the *Schriftstuck*; it studies the behavior this object defines, and the meanings which are given— class specifically—to this object and this behavior. We study the thing, as it has variously congealed the nature, source, and limits of an epoch's understanding of the world, society, and the self."[10]

The Barrier to an Outside

The congealing of behavior and understanding, by police, lawyers, and judges, in the world of the criminal text is revealed in the prosecutorial process. Law is the enterprise of subjecting behavior to rules, on the assumption an individual acts with reasoned intent toward an explicit goal. Law becomes "a rigidly scientific and peculiarly rational enterprise in the exegesis of legal texts."[11] According to this methodology, the nature of absolute or qualified prohibitions, which carry a penalty of imprisonment, has been traditionally opposed by certain 'human' rights,[12] based on the norm of the freedom of the individual.[13]

The exegesis process[14]culminates each time in a new decision, which means the law is written and re-written in

10 Illich, *In the Vineyard of the Text,* p.4

11 P. Goodrich, "Law and Modernity," (1986) 49 *MLR* p.545

12 I. Illich, *Gender* (1983) p.113 et seq and fn 82-84 – the reduction of the separate worlds of women and men to a uni-sex 'human' ignores the historical probability that in a gendered community, women and men may have faced different penalties for different offences which themselves were incommensurable.

13 A. Denning, *Freedom Under the Law* (1949) p.5.

14 The process itself comprises co-relative rules of analysis. See W. Hohfeld, "Some fundamental legal conceptions as applied in judicial reasoning" *Yale Law Journal* (1913), 12(1) pp.16-59 . I outline the basic scheme in Appendix C.

a doctrine of compellable precedent.[15]Judicial reasoning on the text continues in its traditional language in 2024 but is rivalled now by the linguistic changes flowing from the exponential rise of information technology which codes behaviors as computer algorithms. For example, the former English Supreme Court Justice, Lord Jonathan Sumption, in a 2023 lecture to New Zealand lawyers, titled his speech "How the rule of law intersects with human rights," in which he is reported as saying, "the question is what rights are truly fundamental to the subsistence of civil society so that they should be placed beyond the reach of political choice."[16]Contrast Lord Sumpters 'rights talk' with the following observation on contemporary legal technique actually:

> Law no longer provides either the language or the conceptual structure of subject and sociality. Its displacement is effected by systems and technologies of communication that are independent of individual subjects and that are regulated by manipulation of economic and statistical indicators rather than by ethical criteria or subjective right. The principle of paternity gives way to that of providence, legal rationality to actuarial calculus, and subjects to autopoietic systems.[17]

There are some of the accused who try to resist their disembodiment by both the traditional legal reasoning and the contemporary algorithmic legal process, by trying to establish an 'outside' to the law. Accordingly, they say the courts

15 "Within the Western tradition, it is not enough for the law to be written, it has to be written and re-written again so as to engender an iconic status or priority of the one law over the many it displaces." P. Goodrich and M. Valverde Eds, *Nietzsche and Legal Theory* (2005) p.10

16 Auckland District Law Society, *Law News*, Nov 3 2023, pp. 6-9

17 P. Goodrich, "Social Science and the Displacement of Law" (1998) 32, 2, *Law and Society Review*, pp. 473-492 at p 479. Review of WT Murphy book, The oldest Social Science? Configurations of Law and Modernity (1997)

have no basis to judge them since they are outside the jurisdiction of law. These attempts have always failed. As Agamben notes, modern governmentality aims at total control of biological life and as such admits to no outside to itself. In this sense, legal persons are those who have no rights beyond the reach of the law.

Popular Push to an Imaginary 'Outside'

I confine myself to one type of law—criminal law—and to only that part of criminal law where the forbidden act addresses a physical person as a 'legal person' who acts against another physical person; or, one who violates the rules while engaged in acts of subsistence livelihood. The range of what is comprehended by criminal law now extends beyond violent altercations because of the expanding reach and control of the money-based market economy on water and land use.[18] For example, both punching one's neighbor and hunting on reserve land with no license now require the accused to appear in court.[19] It is no surprise that in a country like New Zealand, which has had written texts only for roughly the last 180 years, there are popular struggles against the conceptual grid of text culture on the grounds of an imagined 'Outside.'

18 G. Dalton. (Eds) *Primitive Archaic and Modern Economies Essays of Karl Polanyi* (1968), pp 3-37 and 78-115.

19 This scenario is complicated by the legally accepted Hohfeldian analytical technique whereby there are 8 co-relative concepts which express the basic relations of people within any government system. Four express capacity (right, privilege, power, immunity) and four express restraints (duty, no-right, disability, and liability). The co-relativity of this legal reasoning technique undermines the wild earth /eco-jurisprudence movement which seeks to give rights to nature. See WN Hohfeld, "Some fundamental legal conceptions as applied in judicial reasoning' Yale Law Journal , 23(1) :16-59 , Nov 1913; cited in R. Dawson, *The Treaty of Waitangi and the Control of Language*, Institute of Policy Studies VUW Wellington 2001, pp.16-39, and implied by Kirsten Anker when she says "while we can recognise the rights of nature semantically, a forest cannot recognise ours, nor be considered to have breached our human rights if we suffer harm at the hand of the 'forces of nature'." See K. Anker "Law As … Forest: Eco-logic, Stories and Spirits in Indigenous Jurisprudence". In *Law Text and Culture* (2017) 21, p.207

The first of these struggles recounted below, show simplistic efforts to escape the definitions in the Code, and to reach a place 'outside' the criminal law by using legal reasoning itself.

Popular Resistance to the "Legal Person'

Between 1995 and 2022, one hundred judicial decisions were appealed all the way up to the New Zealand Supreme Court by criminal defendants contesting the legal jurisdiction of the Court to decide the charges.[20] The alleged crimes ranged from attempted murder and drug manufacture/dealing to assault, theft, driving without a license, and illegal parking. The common ground for these appeals was that 'the Court has no jurisdiction.'

A popular starting point of such resistance is that the accused says to the police and court, "I am not the person you have charged." That is, the accused denies the identity imputed to him/her *qua* 'legal person.' In a recent case before the High Court in Wellington, the appellant said, "I am not the legal person, 'Scott Larsen' that you have written in your text as having assaulted the police officer. I am not that legal person, I am the living breathing human being, Scott of the House of Larsen, so therefore, your law does not apply to me."[21] Such arguments have always failed. One's legal identity is nailed to one's flesh like a brand to a hide.

The Social Contract and/or the Indigenous Maori claim to be outside the jurisdiction

Another attempt to reason a way out of the jurisdiction of the court is to invoke the "social contract" in criminal

20 District Court decisions are not normally part of this statistics which means there may be many more than 100

21 Larsen v Police [2020] NZHC 2520

law.[22] By this reasoning, because the accused has not contracted with the Court officials, the legislation the Court is using does not apply to the accused, who should therefore be released from the power of the Court. An alternative to the 'social contract' language, is the accused who says his tribe did not sign the Treaty of Waitangi (an essential constitutional component of the New Zealand legal system) and he is therefore not bound by NZ legislation enacted based on that Treaty. All such arguments also always fail.

Existential Moments within the Legal Grid: Restorative Justice

Criminal Justice/Violence: A drunken Methe punches the drunken Bibesia in the face 4 times. Methe is charged with assault which carries a penalty of imprisonment for 1 year.
Restorative Justice: It is the night after New Year's Day. Methe, aged around 25, is inebriated outside a bar at 2 am with her equally drunk husband. They have driven three hours from their country home to the town to party and dance at a bar. This is the first time they have been out at night in eighteen months. They get into a fight with drunken strangers–of which Bibesia is one.

Methe's husband is knocked to the ground and Methe sees blood on his face. Methe is also knocked to the ground and hits her head. Methe gets to her feet; she is a bit dazed, but Bibesia pulls Methe's head sharply backward by the ponytail and laughs at her husband in his suffering. Methe, enraged by her sore neck and head, and thinking she is defending her husband, punches Bibesia 4 times in the face. Bibesia's tooth is knocked out, her lip is badly cut, and she suffers a badly bruised face. She is off work for three weeks.

Methe is charged with common assault which car-

22 Usually, Hobbes, Locke and Montesquieu are not cited as authority and in one case, when I tried to discuss them with one accused, she had never heard of them while insisting there was no contract between her and the Court.

ries a maximum penalty of one year imprisonment. She has never been before a court before. She may have recourse to the legal defense of self-defense. She comes before her lawyer in tears. She confesses that she does not know what has come over her to do this; she confesses she was drunk. She does not want to go to a criminal trial on the basis it may have been Bibesia who knocked her and her husband to the ground. Methe wants to admit her wrongdoing immediately and be punished that day. But, when she looks at the maximum of one year's imprisonment sentence, she weeps desperately again and pleads not to be sent to prison. Bibesia has lost two thousand dollars due to her injuries which are the repair to her tooth, and loss of wages.

Methe tells her lawyer, that she gave birth to her son about six months ago and is still breastfeeding and thinks she was overcome at seeing her husband on the ground with blood on his face. She says she is hyper-vigilant because of the breast-feeding. She says through her sobbing, "If the wind changes, I start crying. I cry at everything – if the door slams; if I drop something; I cry. I think it's the breastfeeding. I think I'm oversensitive." Methe's doctor confirms that Methe has come to her clinic and disclosed that she cannot sleep because of this crime. An alcohol counseling clinic assesses Methe as low risk of re-offending and confirms she is very sorry for her actions.

The lawyer asks her where the baby was on the night, and she answers, "Oh he was with my mother, and he has started on solid food, but I've left bottles of breastmilk with my mother." If Methe is convicted of this assault, she will find it very hard to get another job. She will be labeled a violent criminal. Her current boss says he will dismiss her. No employer wants to hire a violent criminal. But Methe doesn't want to go to trial and have the police prove beyond a reasonable doubt that she is guilty.

Methe enters a guilty plea to assaulting Bibesia, and

her lawyer asks the Judge to order Restorative Justice. Only the Judge can order Restorative Justice. This is directed by 42A of the Sentencing Act 2002 (Appendix A). If Methe tries to approach Bibesia privately to apologize and seek forgiveness, she will be in breach of her bail which requires her not to contact Bibesia. This is because such contact would be a perversion of the course of justice, in that Methe might try to influence Bibesia. Thus, restorative justice is directed and controlled by the Court. The lawyer also asks the Court to not convict Methe but to discharge her without being labeled a violent criminal.

The Government agent arranges and supervises the Restorative Justice meeting between Methe and Bibesia. There are rules which must be followed by everyone in achieving this meeting. Methe explains why they were in town that day, and why they got drunk. She says she didn't mean to hurt Bibesia and says she is sorry. Bibesia is moved by what Methe has said—she also knows one can be hungry when breastfeeding, and the night of alcohol on top of that makes one a little crazy! Methe is shamed, confesses guilt, and expresses remorse.

Bibesia forgives her and admits her part in the event. Bibesia confesses to Methe she too was drunk. She had just broken up with her boyfriend and she says she hit Methe's husband because she was very angry with the world, especially men. Bibesia says she also contributed to the argument, so it wasn't all Methe's fault. Bibesia apologized for pulling Methe's hair so sharply. She excuses Methe from any payment. She says she doesn't want Methe to go to prison. Both Methe and Bibesia cry, they hug one another while they're crying.

This weeping embrace between two wrongdoers is a moment of transcendence. As David Cayley puts it, the transcendent is "the opposite and other of this world with which it was understood to be radically discontinuous."[23] It is the moment

23 David Cayley Blog June 11 2021, "Concerning Life: An Open Letter to Jean-Pierre Dupuy and Wolfgang Palaver " https://www.davidcayley.com/blog2021/6/11/concerning-life-1) accessed 1/6/24

of emotional confession and forgiveness that lies outside legal rationality. This moment between the two women was the moment of truth and transcendence, though within the legal grid.

The facilitator writes up an account of this meeting in a Restorative Justice report saying that Methe expresses true remorse and Bibesia has forgiven her. Back in court, Methe is standing in the dock. It is humiliating. She is in full view of the public, while the judge reads out the story of her attack on Bibesia. Then the judge adjusts the relative merit and wrong between her and Bibesia and determines her punishment. This is just part of the penalty of the law. It must be borne.

Methe is standing in the dock crying and the security guard gives her the whole box of tissues to use as one won't be enough—the tears are falling quite fast. The Judge mentions the good restorative justice report and discharges Methe with no conviction but orders her to pay seven hundred dollars to Bibesia, towards her expenses.

Unlawful Hunting - Subsistence Livelihood without a License

Paul is found in the State Forest with his dogs, a bag with fishing gear, some small trout (not an indigenous fish), large bloody knives, and a dead pig beside him. There is a river nearby, where trout swim and which can only be fished with a license. The ranger arrests him and takes him 50 km to the nearest police station. Paul is charged with unlawful hunting and fishing without a license, which carries a penalty of two years imprisonment. Paul says he was pig hunting and fishing for a family gathering. He lives on nearby Māori land, which has belonged to his tribe as ancestral land since before colonization (about 1840). Paul doesn't work in paid employment. He hunts, fishes, and maintains his ancestral land for his family. It is his wife who works for money, as an ambulance driver in the town. The boundary between the ancestral land and State Forest land is not clearly marked. Paul's dogs had barked

and chased a large boar across the boundary. Paul followed and killed the boar, but it died on the wrong land. He has no hunting license and no fishing license. If the boar had been on his ancestral land, he would not need a license. Paul should have been carrying a GPS (Global Position System) device.

Paul goes to trial saying he had no criminal intention, but the Judge finds him careless and says that carelessness is a type of criminal intention. He is found guilty, and the sentencing begins. For his sentence, Paul is allowed to make a cultural submission under S27 of the Sentencing Act 2002 (Appendix B). S 27 sets out a list of topics within which Paul must fit himself, to show how his cultural background is linked to the crime. He must give the Court advance notice of the time this will take so they can allocate an hour or so for the cultural submission. The Court fixes time according to a schedule, in with other sentences. Paul requests an hour in the schedule. He begins this with his identity speech.

"It is Tongariro the Mountain, It is Taupo-nui-a-tia the lake, It is Tongariro, the river, it is YY the Canoe, Ngāti X the tribe, it is Rangiatua the family…and I am Paul…"

In a rhythmic chant, he has named the significant mountain, lake, river, and canoe that brought his ancestors here from Raiatea / Hawaii up to a millennium ago. He continues by locating himself by name, within the lineage of which he is a part and to which he belongs: his tribe, his family…his ancestors. The moment he begins to identify himself this way, the smell and look of the mountain, river, and lake, come crowding into the courtroom. Judges, police, and lawyers are obliged to remain silent. This is a moment, traveling back in time and spirit to those physical locations of mountain, lake, river, distant land, ancestor, and journey. That old history gives meaning to the hunt in the forest while standing in the courtroom.

Three distinct times come together as one. This is a moment of transcendence from the legal frame, for the defendant and his tribe, and for those who have ears to hear and feel it.[24]

In sentencing such cases, the Judge usually allocates ten percent off the sentence for the Cultural report. The legal process continued. The full sentence was for ten months imprisonment, which means nine months with the cultural discount applied and since a nine-month prison sentence could be converted to a fine and community work, Paul was not sent to prison. He was convicted of criminal trespass, fined seven hundred dollars, his knives were confiscated, he was required to engage in forty hours of community work, and warned that a repeat offense would likely mean imprisonment.

Conclusion

Such existential moments represented by the stories of Methe and Paul are fleeting. They allow for transcending the Law by suspending the legal frame of property allocation or resource management under the assumption of market economics. Such gaps in the grid of criminal law reveal moments whereby a litigant suspends his status as a legal person and becomes a person by stepping outside legal time.

Something called law has persisted since antiquity. But what it is now must be distinguished sharply from that truthful promise, the oath—its breach, the remorse of the accused, and forgiveness of the injured. Modern law governs land and subsistence. Escape from that totalizing grip may only be by way of memory, song, and the oral word—unless

24 In the indigenous worlds that appear when the Law gives it room in the court, the spirits of the earth find a kind of legal standing. Kirsten Anker, "Law as Forest : Eco-logic, Stories and Spirits in Indigenous Jurisprudence" (2017) 21 *Law Text Culture*, p. 191, 203. Reciting one's lineage in a criminal court by reference to mountain, river, lake and tribe is a form of 'minor jurisprudence' which names the kinds of law which promote "existential modes of inhabiting institutional space" Peter Goodrich, "How Strange the Change from Major to Minor" in (2017) 21, *Law Text and Culture*, p 30.

something called "resource management" can miraculously re-wild again, rediscover the nurturing wilderness outside the law, over the rainbow.

APPENDIX A

New Zealand Legislation Sentencing Act 2002

Sentencing Act 2002 No 9 (as of 01 March 2024), Public Act 24 Adjournment for restorative justice process in certain cases

Sentencing procedure

24A Adjournment for restorative justice process in certain cases

(1) This section applies if-

(a) an offender appears before the District Com at any time before sentencing; and

(b) the offender has pleaded guilty to the offence: and

(c) there are one or more victims of the offence; and

(d) no restorative justice process has previously occurred in relation to the offending; and

(e) the Registrar has informed the court that an appropriate restorative justice process can be accessed.

(2) The court must adjourn the proceedings to--

(a) enable inquiries to be made by a suitable person to determine whether a restorative justice process is appropriate in the circumstances of the case, taking into account the wishes of the victims; and

(b) enable a restorative justice process to occur if the inquiries made under paragraph (a) reveal that a restorative justice process is appropriate in the circumstances of the case.

Section 24A: inserted, on 6 December 2014, by section 4 of

the Sentencing Amendment Act 2014 (2014 No 38). Section 24A(l)(a): amended, on l March 2017, by section 261 of the District Court Act 2016 (2016 No 49).

APPENDIX B

New Zealand Legislation: Sentencing Act 2002

Sentencing Act 2002 No 9 (as of 01 March 2024), Public Act 27 Offender may request the court to hear the person on personal, family...

27 Offender may request the court to hear the person on the personal, family, whanau, community, and cultural background of the offender

1) If an offender appears before a court for sentencing, the offender may request the court to hear any person or persons called by the offender to speak on-

a. the personal, family, whanau, community, and cultural background of the offender:

b. the way in which that background may have related to the commission of the offence:

c. any processes that have been tried to resolve, or that are available to resolve, issues relating to the offence, involving the offender and his or her family, whanau, or community and the victim or victims of the offence:

d. how support from the family, whanau, or community may be available to help prevent further offending by the offender:

e. how the offender's background, or family, whanau, or community support may be relevant in respect of possible sentences.

2) The court must hear a person or persons called by the offender under this section on any of the matters specified in subsection(!) unless the court is satisfied that there is some special reason that makes this unnecessary or inappropriate.
3) If the court declines to hear a person called by the offender under this section, the court must give reasons for doing so.
4) Without limiting any other powers of a court to adjourn, the court may adjourn the proceedings to enable alternative arrangements to be made to hear a person or persons under this section.
5) If an offender does not make a request under *this* section, the court may suggest to the offender that it may be of assistance to the court to hear a person or persons called by the offender on any of the matters specified in subsection (I).

Compare: 1985 No120 s16