

What are Aesthetic Critical Legal Approaches Trying to get us to

Understand about Law?

David Slomianski

### Introduction

In Horace's *Ars Poetica*, the phrase 'as painting, so poetry' [*ut pictura poesis*] presupposes an equivalent aesthetic freedom between both poet and painter.<sup>1</sup> Albeit with a different objective, Critical Legal Studies (CLS) aim at a similar outcome to Horace's attempt; in relation to law—a connection between the individual and juridical rules—an intellectual evaluation or critique anent to a subjective perception that unifies law and aesthetics.<sup>2</sup> With the groundwork provided by post-modernists largely empathetic to the Marxist and, in some cases, anarchistic cause, CLS scholars maintain an oft-repeated interpretation of classical as well as modern texts in view of notions apposite to social inequality or state oppression.<sup>3</sup> Yet, by and large, the deep thought cascade extends to themes within the Frankfurt School, feminism, queer theory, legal realism (more pertinent to US' CLS), amongst other approaches.<sup>4</sup> The bulk of this paper will aim at a clear-cut inquiry into the intersections between the aforementioned CLS approaches, aesthetics and law.

---

<sup>1</sup> Charles Smiley, 'Horace, Satires, Epistles, and Ars Poetica, with an English Translation. H. Rushton Fairclough' (1929) 23 *Classical Journal*.

<sup>2</sup> John P. McCormick, 'Three Ways Of Thinking "Critically" About The Law' (1999) 93 *American Political Science Review* 413.

<sup>3</sup> G. Deleuze. and F. Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (University of Minnesota Press 2005). Or Althusser, L, *Ideology and Ideological State Apparatuses* (New Left Books 1971) 127-188.

<sup>4</sup> C. Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Haymarket Books 2005) 47.

**'As painting, so law' [*ut pictura lex*]**

CLS scholars' ongoing project antecedes to a common dissatisfaction with the underlying principles of law, i.e. 'what law stood for'.<sup>5</sup> As a new theory, the pioneering ideas and techniques of CLS led to a 'rebellious' appraisal of traditional jurisprudence (analytical jurisprudence, legal realism, Langdellian methods of education, et cetera).<sup>6</sup> A *heterogeneous*, as opposed to concrete study of the law.<sup>7</sup> As such, insofar as CLS scholars employed this methodology, they metamorphosed to a polymathic dimension by way of a pedagogical analysis of the law, and its intersections with social relations rather than concepts of rules or commands.<sup>8</sup> Yet, within this dimension, CLS' *raison d'être* encompasses *inter alia* the visual *persona* of the law, its mask and dress, the plastic art or the *ut pictura lex* in lieu of Lessing's *Laocoön*.<sup>9</sup> Without the 'painted law', Peter Goodrich observes, 'it is impossible to comprehend either the method of Law—its *hermeneutic* (my emphasis)—or the procedures by which Law as judgment and measure [*ius est ars boni et aequi*] inscribes itself upon everyday life'.<sup>10</sup>

---

<sup>5</sup> Marett Leiboff, and Mark Thomas, M. *Legal Theories: Contexts and Practices* (2<sup>nd</sup> edn, Thomas Reuters 2014) 475.

<sup>6</sup> *ibid.*

<sup>7</sup> C. Douzinas, and R. Warrington, *Justice Miscarried: Ethics and Aesthetics in Law* (Harvester Wheatsheaf 1994) 172. Derrida, J. 'Force of Law: The 'Mystical Foundation of Authority' *Acts of Religion* (Routledge 2002).

<sup>8</sup> Marett Leiboff, and Mark Thomas (n 5) 325, Marett Leiboff, and Mark Thomas (n 5) 369.

<sup>9</sup> P. Goodrich, 'Specula Laws: Image, Aesthetic, and Common Law' *Law and Critique* (1991) 2, 235. G.E. Lessing, *Laocoön: An Essay on the Limits of Painting and Poetry* Translated by E.A. McCormick (Johns Hopkins University Press 1984) xi.

<sup>10</sup> Goodrich (n 9) 235-238.

**'Signs of the soul' [*notae animi*]**

Typically, for CLS scholars, the aesthetic perception of the law emanates *ex hypothesi* from reading legal texts, yet because deconstruction's credo in itself concerns with, roughly, 'what we want to say and the *signs* (my emphasis) we use to express our meaning' the semiotic dimension, and therefore the power of imagery within these texts is imperative.<sup>11</sup> The violence of the text, its *anima* and hidden meanings.<sup>12</sup> Furthermore, the imagery's phenomena, is not confined to the reader's 'reverie' of legal texts, it is *rhizomatic*—a *dispositif* of both the physical as well as the non-physical aspects of the law.<sup>13</sup> As an epitome of this dichotomy, Goodrich illustrates the term 'legal presence'; a *locus* being both the 'place of the Court and of the Law'.<sup>14</sup> For CLS, the aesthetic characteristics of such spaces are rather pertinent to the credo of their producer; a being that in Gilles Deleuze's opinion does not work for pleasure.<sup>15</sup> Instead, (*exemplum*) it is a panoptic view of a city, or of a prison which emphasises the practical use of the architectural structure, viz., Jacques Ranciere's first artistic regime.<sup>16</sup> Ranciere's *aesthetic* regime intersects with its *ethical* counterpart; Ranciere, like Deleuze portrays the work of Robert Bresson as such intersection. Put starkly, Bresson's ascetic minimalism, for Ranciere is a paradigmatic example of a Kantian or Nietzschean

---

<sup>11</sup> M.J. Balkin, 'Deconstructive Practice and Legal Theory' *Yale Faculty Scholarship Series* (1987) Paper 291, 3.

<sup>12</sup> P. Goodrich, *Oedipus Lex: Psychoanalysis, History, Law* (University of California Press 1995) 32.

<sup>13</sup> G. Deleuze, and F. Guattari (n 3) 8. M. Foucault, *Power/knowledge: Selected Interviews and Other Writings* (Pantheon Books 1980) 194-228.

<sup>14</sup> P. Goodrich (n 9) 240.

<sup>15</sup> Gilles, *The Act of Creation* (FEMIS Paris, May 1987). Cf Spaulding, W. Norman, 'The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial' *Yale Journal of Law and the Humanities* (2012) 24, 311-343.

<sup>16</sup> J. Ranciere, 'Politics of Aesthetics: the Distribution of the Sensible' *Continuum International Publishing Group* (2011) 23. M. Foucault, *Discipline and Punish: The Birth of the Prison* (Vintage Books 1995) [195]-[228]. M. De Certeau, *The Practice of Everyday Life* (University of California Press 1984) 93.

'genius'—a cinematographic piece with a purpose—a produce without the artifice of acting.<sup>17</sup>

### Ranciere's Aesthetic Regime

From a psychoanalytical perspective, Bresson's idea of a film or Marcel Proust's idea of a book resembles Erich Fromm's *idée fixe* of *full productiveness*—Man's ultimate relatedness with the world—the character expressed through a relation with objects, the environment, space, ideas and others of his kind.<sup>18</sup> Fromm, however, differs from Ranciere and Deleuze inasmuch as he argues that only exceptionally skilled fictional and mythological characters (e.g. Howard Roark, Aeneas, Faust) accomplished, or at least tried to distance themselves from social norms and state institutions (the Church, schools or other apparatuses like the Army) in order to truly achieve *full productiveness*, and therefore less impotency.<sup>19</sup> Plus ça change. In the *prisca theologia* of aesthetics, on the other hand, *full productiveness* takes form by what Hegel defines as the Spirit [*geist*] and the spiritual unity or recognition [*anerkennen*]<sup>20</sup>—a process of true self-consciousness.<sup>20</sup> Hegel's phenomenology sees art's purpose as a sensuous expression of the true character, being *ipso facto* a creation of beautiful objects rather than 'full productiveness'.<sup>21</sup> Hence, it is only through the *anerkennen* and the *ethical* regime that

---

<sup>17</sup> J. Ranciere (n 16) 23. Deleuze's (n 15).

<sup>18</sup> E. Fromm, *Man for Himself: An Enquiry into the Psychology of Ethics* (Routledge & Kegan Paul 1975) 54-107.

<sup>19</sup> *ibid* 93.

<sup>20</sup> G.W.F. Hegel, *Phenomenology of the Spirit* Translated by Miller, A.V. (OUP 1977) 111.

<sup>21</sup> S. Houlgate, 'Hegel's Aesthetics' *The Stanford Encyclopedia of Philosophy* (Spring 2016 edn) <<https://plato.stanford.edu/archives/spr2016/entries/hegel-aesthetics/>> Accessed December 2<sup>nd</sup> 2016.

the ‘painted law’ or its *locus* can be truly understood, i.e. to ‘discover the spirit of the law’, its hermeneutics or the *notae animi* of Renaissance lawyers.<sup>22</sup>

### Conclusion

To conclude, when unifying the objectives of the so-called ‘Crits’—their manifest, is that of an intelligentsia which at its axis possess a nigh-universal goal—the romantic truth hidden within, or behind the law.<sup>23</sup> So too, within the law, the reader of legal texts ought to understand the *signs*, through the *horror vacui*; what is being said is thus a matter of interpretation—an aesthetic exegesis insofar as it seeks the truth, its unconsciousness or *anima*. Behind its *mask*, the mimesis [μίμησις] of law’s institutions, with their *rhizomatic* imagery, allude to ideologies or apparatuses within and outside the texts *ab antiquo*. Physical as well as non-physical expressions of the law, its *locus*, the structure’s use, all within the regimes of aesthetics. The polymath’s task, therefore, is to find the aesthetics within the law, the ‘painted law’, its Hegelian roots, Orwellian depictions, Freudian interpretations—aesthetics and law analysed with the same devices; *ut pictura lex*. Yet, the caveat surrounding the CLS scholar concerns the quality of the critique. Deconstruction, for instance, is not just ‘a fancy way of sticking out your tongue’, rather a tool for the legal critic to engage with the texts, meaningfully.<sup>24</sup>

---

<sup>22</sup> Goodrich, P (n 12) 32.

<sup>23</sup> S. De Beauvoir, *The Mandarins* (Harper Perennial 2005) 328.

<sup>24</sup> J.M. Balkin, (n 11) 2.