

# The Origins of Legal Rules

Bert van Roermund<sup>•)</sup>

## Introduction

Towards the very end of *The Expression of Emotions in Man and Animals* (1872) Darwin appears to be well aware that expression is a two-way street. Under appropriate circumstances, expression can be the effect as well as the cause of emotions. Referring to Shakespeare – ‘(...) who from his wonderful knowledge of the human mind ought to be an excellent judge’ – he observes: ‘The free expression by outward signs of an emotion intensifies it. (...) Even the simulation of an emotion tends to arouse it in our minds.’<sup>1</sup> That is to say, we not only experience that such emotions occur ‘in the world’, but we recognise them as genuinely ‘ours’. In still other words, the origin of expression hovers between outside and inside, or between the world and ourselves. Human action is always caught in between these two origins. This paper argues that the same is true for those devices that are expressive of how a legal order attempts to govern our actions in society: legal rules.

Law rules by rules. As agents in modern society, we always encounter law under this specific guise: as doing things with rules, over and against alternative formats of prescription like commands, commitments, conditions or constraints.<sup>2</sup> The celebrated expression, ‘the rule of law’, which is alleged to capture the ruling of a legal order, only reiterates the point. I shall accept this thesis as my point of departure, rather than argue it at any adequate length.<sup>3</sup> Instead, I would like to focus on what seems to be key in making, obeying, applying, enforcing and reviewing the rules of the law, namely ‘interpretation’. Interpretation is mostly understood as ‘retrieval of meaning’<sup>4</sup> previously stored in the rule, the retrieval being

---

<sup>•)</sup> A first draft of this paper was presented to The Species of Origin Project, Workshop B, Philosophy and Ethics, Glasgow, 13-14 December, 2007, convened by Andrew Patrizio and Emiliios Christodoulidis. I am indebted to them and to the participants in this workshop, as well as to my colleagues at Tilburg University (cf. <http://www.uvt.nl/rechtsfilosofie>). I also owe Bonnie Honig for generously sharing her thoughts with us in a workshop on a few draft chapters of her book on Emergency Politics, in April, 2008, from which I profited a great deal. I thank Phyllis Lewis (Windsor, Ont.) for correcting linguistic errors.

<sup>1</sup> (Darwin 1965 [1872]): 365.

<sup>2</sup> Hence the relevance of (Twining and Miers, 1991) for law students. This paper takes up the challenge with regard to interpretation which the authors of this book are aware of (cf. p. 174: “We are now sailing near some very deep waters. What is involved in ‘understanding’ a situation, a rule, or the law is a central, and extremely problematic, question of social theory.”)

<sup>3</sup> Others have done this, and I am happy to rely on such powerful expositions as, for instance, Hart, 1994 (when it comes to rules and commands) or Atiyah, 1981 (when it comes to rules and commitments). I argued the point in more detail in (Van Roermund, 1997a), and I criticised the view that seeing law as ‘doing things with rules’ amounts to legalism in (Van Roermund, 1997b), Chapter 6.

<sup>4</sup> Critically: (Raz, 1995).

performed by a mental operation. From a rule such as ‘no vehicles in the park’ – to take up Hart’s worn-out example – we retrieve a semantic range which we then go on to ‘apply’ to new situations. We might represent the range in this case as a deontic operator F (Forbidden) taking on n-tuple action predicates as arguments (Enter <Vehicles, Park>). Felicitously, or so we add, we do not apply the rule ‘blindly’: We constantly monitor whether or not we get where we want to be by following the rule. If necessary, we divert from the rule to what we think best or better. For instance, proudly pushing Friso’s pram, which clearly is a vehicle, I feel free to ignore the rule that seems to forbid us to enjoy the beautiful day in the park. Thus, equity has always been the critical companion of the law. Or, what amounts to the same thing, the spirit always takes priority over the letter of the law.

I will not deny that there is law and equity. But I think their relationship is poorly accounted for by this dualistic view of interpretation. I even venture that the account is a dangerous one, amounting to eliminating rules altogether.<sup>5</sup> This is not how we do things with rules. If we did, we would, in fact, always go by our own judgment, unless of course we would decide to do whatever some specific other would decide to do. Sadly enough, ‘Sarah lovers’<sup>6</sup> have loomed large in the course of political history, to the detriment of freedom.<sup>7</sup> I will submit an alternative account which will allow me to say that by pushing Friso’s pram through the park I happily follow rather than discard the rule. At the core of this alternative is the thesis that interpretation of rules is similar to being guided by ‘perspective’.

How are we guided by perspective? My answer will be based on a perhaps unorthodox<sup>8</sup> mixture of Wittgenstein’s and Merleau-Ponty’s ideas on interpretation: by the bodily intertwinement of eye-point(s) and vanishing point(s), as two different species of origin that are mutually conditional. And, although I will quickly depart (in the second section) from the biases that perspective equals one-point linear perspective and that perspective is limited to pictorial art, it is from linear perspective in painting that I would like to take my cue (in the first section). The third section of my argument will explain how this theory of interpretation is relevant to law. Thus, the argument aims at defending the view that all rules can be regarded as pictures, rather than that some pictures can be regarded as rules. But let us first assess how we are guided by pictures in ways similar those in which we take guidance from rules.

## 1. Perspective

---

<sup>5</sup> Cf. (Twining and Miers, 1991) 175: ‘(...) it is tempting to treat exegesis and literal interpretation as superficial, and liberal and hermeneutics approaches as profound. (...) “the letter killeth, but the spirit giveth life”. This is an attractive view, but it involves assumptions that are both superficial and dangerous.’

<sup>6</sup> Cf. (Dworkin, 1985) 361 ff.

<sup>7</sup> Cf. already (De la Boétie, 1577 [1993]).

<sup>8</sup> Although there are others: cf. (Damisch 1995 [1987]): ch. 2.

Allow me to start with a Dutch example, Rembrandt's *Staalmeesters* from 1662.<sup>9</sup>



The painting is well-known for several reasons (to which I will return), but one is surely that the perspective is allegedly flawed, in particular with regards to the edges of the table. Also, the composition of the five gentlemen<sup>10</sup> is somewhat inelegant, as they seem to be minding very different things. Now it is unlikely that Rembrandt would make such primitive mistakes or bad compositions. Indeed, it has been a received hypothesis among experts that the painting was probably meant to hang quite high up on a wall. Recently it was discovered precisely where and how, by way of an experiment with a real-sized photocopy of the painting.<sup>11</sup> The reproduction was fixed high above the fireplace in the Staalhof, where the Guild resided at the time. And behold, the edges of the table were just right, the gentlemen seemed really to be gathered around the same table minding a common interest, and they even seemed united in looking back at the spectator. So *there* we are. Some 350 years after it was created, this picture is actually able to command us to the place from where it *should* be observed, not necessarily the Staalhof, but surely a place from far below. If we want to see for ourselves, we have to move our bodies, guided by the perspective of the picture as it is governed by its vanishing point. Note also that the vanishing point is not part of the picture.

<sup>9</sup> The Syndics of the Drapers Guild.

<sup>10</sup> The sixth man in the background without a hat is a clerk, rather than a member of the Guild. Note that the reproduction printed here is already corrected for flaws in perspective by the camera standpoint; which only proves my point.

<sup>11</sup> [http://www.volkskrant.nl/kunst/article342850.ece/Rembrandt\\_kon\\_wel\\_in\\_perspectief\\_schilderen](http://www.volkskrant.nl/kunst/article342850.ece/Rembrandt_kon_wel_in_perspectief_schilderen)

It remains virtual, a coherence function of the various shapes we see. I say shapes, not lines. For lines are only one kind of the shapes we see. Look also at the shades of colour in various shapes contributing to the suggestion of depth. Look at the whites of the jabots and the whites of the hands. We see one hand of each man, together forming one body with five arms or functions. These hands also partake in the virtual vanishing point that lends coherence to the whole. We may even say that these hands form a *movement* of various shades of white, as the table cloth does in showing different shades of red. The whites of the jabots and the hands trace a sort of curved line around a centre. We see movement in these whites and in these reds, a movement that sustains the suggestion of a vanishing point out there. Gradually this vanishing point (to which we have to relate our eye-point) becomes far more than the mathematical crossing of lines. If we would have to capture under one heading the various movements we sense, we would probably say that what we see is the movement of the paint rather than anything else. We start to move our seeing after this movement of the paint, in the triple sense that 'after' can take here: We move in response to, and therefore later than, the movement in the painting, we merge our body with the movement already going on there, and we feel drawn into it as if we were chasing that movement.

In an interview,<sup>12</sup> the Rembrandt expert Rudi Fuchs, former director of the Stedelijk Museum in Amsterdam, let us catch a glimpse of how we are situated by the painting in a much deeper sense: To look at it from below is only the first step in looking at it from a point of view that is *right*. He thinks *De Staalmeesters* is Rembrandt's preeminent painting, as it produces maximal effects by minimal means, steering away from tricks and symbols. Fuchs not only retrieves meaning from this painting, for instance by explaining how each hand has a different function, but also shows us how to move 'after' the painting by teaching us how Rembrandt painted. He confesses that he was able to do this only after a sustained observation of painters at work.

'Without these visits to studios I could not have written *Rembrandt spreekt*. There I saw how painters work, and thanks to them I can imagine how Rembrandt must have painted. I know how a hand holds the brush and, often with no more than a tiny bend of the wrist or a minimal movement of the finger, realises precisely that bit of extra nuance in the paint. Thanks to this experience I look at the table clothing of *De Staalmeesters* with more accuracy. That is the paint that Rembrandt manipulated and worked until it had the intensity he was looking for.'<sup>13</sup>

Fuchs does not advise us to follow the movement of the wrist or the hand. Rather, he advises us to forget about the hand and the wrist and to follow the movement of the paint, as

---

<sup>12</sup> Linda Huysmans at , published 15 July 2006, accessed on 10-10-2007.

<sup>13</sup> My translation [BvR]. See (Fuchs 2006).

Rembrandt did. What he means is that this is what constitutes a good painter: that he moves with the paint, feels with the paint, feels the paint from the inside, so to speak, as if he had become paint himself, or as if paint had become part of his 'self'. By the same token, this is what constitutes a good spectator of pictorial art. This is what Merleau-Ponty calls the 'entrelacs' between the visible and the beholder: '(...) il faut que celui qui regarde ne soit pas lui-même étranger au monde qu'il regarde.'<sup>14</sup> In other words –my words– what we are looking at, in the final analysis, is paint rather than the message conveyed by the paint. Or again, the message conveys what paint is and how it matters: paint-as-it-touches-us. We do not stop after having travelled from the paint to what is painted, but by doing so we travel in the opposite direction as well. This is the only way to see us seeing, in contra-distinction to seeing ourselves.

I am inclined to go beyond the limits of this paper by now arguing that these observations exceed the confinements of (one point) linear perspective, or for that matter, Rembrandt's art.<sup>15</sup> I am tempted to illustrate that they also apply, for instance, to Lyonel Feininger's translucently coloured planes suggesting infinite depth, or to his quasi-cubistic inversions of linear perspective.<sup>16</sup> If we would turn from one-point linear perspective to 'windowing', we would multiply, but not at all complicate or abrogate, the relationship between vantage point and vanishing point.<sup>17</sup> I would submit that my ramifications even pertain to the efforts of cubism to represent a plurality of perspectives by shifting the intertwined origins of eye-points and vanishing points from space to time. Then I would go on to generalise this to a theory of depth-clues suggestive of movement, and test it against how

---

<sup>14</sup> (Merleau-Ponty 1964) 177.

<sup>15</sup> Rembrandt is not the first painter who played games with the eye of the beholder. Hans Holbein's *The Ambassadors* (1533) has a rather strange object in the foreground that appears to be a skull only if you approach the painting very closely at the utmost right side. And we are familiar with the Renaissance techniques of 'distorting' heads and bodies in ceiling painting. Recently I saw the statue of 'le Grand Dieu de Théroutane' in the cathedral of St. Omer (Fr) dating from the 13<sup>th</sup> (!) century, which was meant to hang at a height of 20 metres (at the frontispiece of the church at Terwaan, destroyed in 1553 by Charles V). One has to take that into account in order to judge (see) the proportions correctly..

<sup>16</sup> 'In Feiningers Kunst sind transparente Flächenpläne fein geschichtet, es entwickeln sich geometrisch stilisierende, kubisch aufgebrochene Architekturporträts. Er überzieht seine Gegenstände mit einem abstrakten Liniennetz und kehrt die perspektivische Linienführung um, so dass statt der Gebäudekörper abstrakte Würfelgebilde aus der Bildfläche hervortreten scheinen. Aber eines tut Feininger nicht: diese zerschlagen, was für seinen 'Kubismus' typisch ist. Sein eigener unverwechselbarer Stil charakterisiert sich durch die geometrische Komposition des Bildraumes, die kristalline Auffächerung transparenter Flächen und die Reflexivität von Licht, Raum und Farbe. Seine Gemälde sind aus prismatisch gebrochenen, überblendenden Farben und Formen komponiert.' See (Lützenkopf). I owe Dr. Heidrun Peters for drawing my attention to Feininger's art. One could also think of Anish Kapoor's darkening monochromes as cases of perspective.

<sup>17</sup> "'Windowing" is the artist David Hockney's term for a perspective-violating technique in painting, amply evident both in the Renaissance and in the modern era well before Cezanne's more drastic departures. (...) There is in such paintings no single privileged vantage point but a number of them, to which the eye (or the imagination) adjusts smoothly as it moves around the scene.' (Van Fraassen 2004) 802. I owe Paul-Antoine Miquel (Aix-en- Provence) for the reference.

we read poems and hear music.<sup>18</sup> I would put forth the view that if there is aesthetics, it is on the basis of kin-aesthetics.<sup>19</sup> But as I said, this would exceed the limits of this paper. Let me just emphasize, in closing this section, that such a view would acknowledge that the sensitivity for specific depth-clues is deeply entrenched in the bodily make-up of human individuals, and that it is unevenly distributed among them. Not everyone is (with the same intensity) touched by colours or lines, sounds or tastes, and although this sensitivity can certainly be cultivated, there is no point in persuading people who are unable to hear intervals to appreciate what happens in Beethoven's late string quartets, no more than there is in denying that it takes more than these neuro-physiologically based 'gifts' to become an artist.

Be that as it may, I retain three conclusions:

- A. Appreciating 'depth' in a work of art is predicated on the intertwinement of two species of origin: viewpoint and vanishing point.
- B. This intertwinement is mediated by the human body being able and susceptible to movement.
- C. Only part(s) of this intertwinement can be accounted for in terms of advanced measurement and corresponding mathematics. Even then we should bear in mind the general thesis that measurement is perspectival.<sup>20</sup>

## 2. Rules in perspective

As aesthetic experience is predicated on these conditions, it is in some respects paradigmatic of understanding in general, in particular with regard to the experience of 'being guided' by rules. Wittgenstein, in his later works, focussed on our understanding of rules in order to come to grips with understanding in general. His paradigm of rule-following is meant to show that our usual account of knowledge – and of parental terms like identity ('the same') and truth ('real') – is profoundly wronged by the idea that understanding boils down to storing and retrieving a 'representation' of a world 'out there', either as it is or as it should be. Even the overtones of the word 'interpretation' are suspicious to him for that very reason. Let us try and summarise at least the drift of his argumentation, which is admittedly rather complex and scattered.

---

<sup>18</sup> The latter I tried to do in a modest way in (Van Roermund 2002), which is largely a discussion with (Scruton 1997).

<sup>19</sup> Which is not to say that the only thing there is to aesthetics is kinaesthetics. We are talking necessary rather than sufficient conditions here.

<sup>20</sup> 'We should recognize this as a crucial general observation concerning all measurement: measurement is perspectival. The content of any measurement outcome, whether a proposition or a diagram, is indexical, it is not how things are but how they look "from here". (Van Fraassen 2004) 797.

What fascinates Wittgenstein is how we can know to be bound or, for that matter, guided, by a rule although the rule provides (a) neither a pre-existing framework of meanings, (b) nor a sufficient reason for action. Of course, this question implies a two-pronged negative thesis. The first prong is the easiest one: like following a signpost, following a rule is not the application of pre-established meanings (as if we were constantly scanning our situation by running an algorithm). Similarly, enacting a rule is not the distribution of defined signs for future usage. The latter is obvious, as it would boil down to superimposing a rule on a rule, yielding an infinite regress. The former is less obvious: therefore Wittgenstein prefers to reveal it by a paradox that is at the heart of all of his remarks about rules:

‘This was our paradox: No course of action could be determined by a rule, because every course of action can be made to accord with the rule. The answer was: If everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here.’<sup>21</sup>

If a rule would embody a pre-established connection between a state of affairs and a course of action it would not work because it can never specify the types of circumstances without restricting its descriptions to the spatio-temporal particulars at hand. Unless one already knows how rules achieve what they are supposed to achieve in future, a rule does not point beyond the contingencies of its own formulation. This is the second prong.

Now it is tempting to solve the paradox by retreating to intuitive foresight: We may claim to intuitively grasp the correspondence between the general picture of the world that a rule provides and the actual state of the world in which we are supposed to act. The everyday slogan that ‘we’ll know it when we see it’ may come in handy to support this view on the matter. But Wittgenstein undercuts this escape as well:

‘It is no act of insight, or intuition, which makes us use the rule as we do at the particular point of the series. It would be less confusing to call it an act of decision, though this too is misleading, for nothing like an act of decision must take place, but possibly just an act of writing and speaking. And the mistake which we here and in a thousand similar cases are inclined to make is labelled by the word ‘to make’ as we have used it in the sentence ‘It is no act of insight which makes us use the rule as we do’, because there is an idea that ‘something must make us’ do what we do. And this again joins on to the confusion between cause and reason. We need have no reason to follow the rule as we do. The chain of reasons has an end.’<sup>22</sup>

---

<sup>21</sup> (Wittgenstein 1953) par 201.

<sup>22</sup> (Wittgenstein 1969) 143; cf. (Wittgenstein 1967), par. 301.

So if it is true, for all practical purposes, that ‘we know it when we see it’, the question still is how we know. Wittgenstein takes an interest in different accounts of ‘seeing’. As a first approach to the problem, we are asked to pay attention to what ‘seeing a sign’ is as distinct from ‘seeing an object’. Seeing a sign is not just ‘seeing an object plus the meaning of the object’. It is a different way of seeing, as it asks for bodily engagement (‘possibly just an act of writing and speaking’) showing ‘how to proceed’.<sup>23</sup> This is why Wittgenstein is suspicious of the term ‘interpretation’; it does not acknowledge the practice that gradually teaches us how to look at specific signs, for instance signposts. Most Wittgenstein readers emphasise the *conventional* aspect of such a practice. They believe to find support in his celebrated idea of language games, tacitly assuming that games are conventional by definition. My view is slightly different. Firstly, Wittgenstein explicitly rejects the thought that ‘playing’ and ‘playing a game’ are the same. He refers to children playing with a ball, denying that they are playing according to ‘strict rules’<sup>24</sup>, i.e. that they are playing a game. People may play – and make up the rules as they go along.<sup>25</sup> The point is not that they are playing according to soft rather than strict rules, but that they mutually understand what they (are supposed to) do without rules. Playing a game is only the conventional sediment of playing, and playing (in a much broader sense than the conventional one) is what Wittgenstein had in mind.<sup>26</sup> Secondly, to engage in playing is to engage in a *bodily* practice rather than a conventional one. Better perhaps, any conventional form of playing (playing a game) should recognise that it builds on a more basic layer of playing which entails bodily engagement. By engaging the practice one gradually learns how to take steps, how to do it better, how to do it without the help of others, and finally how to do it in a new way. This is why Wittgenstein sometimes calls it ‘Abrichtung’<sup>27</sup>, a term mostly used for drilling animals. This is also, however, why he wants to describe ‘understanding’ as ‘being able to take the next step (or to continue a series)’. In order to be able to take the *next* step on one’s own account, one has to have set oneself already on a path of stepping-stones laid out by others, pick up the ‘groove’ of the movement, identify oneself with it and move after it. And these others, in laying out the stepping stones, will have anticipated how people will step from one stone to the other given

---

<sup>23</sup> Cf. (Wittgenstein 1967), par. 303: “‘He grasps the rule intuitively.’ – But why the rule? Why not how he is to continue?”

<sup>24</sup> ‘We are unable clearly to circumscribe the concepts we use; not because we don’t know their real definition, but because there is no real “definition” to them. To suppose that there must be would be like supposing that whenever children play with a ball they play a game according to strict rules.’ (Wittgenstein 1969) 25. Cf. (Wittgenstein 1953), par. 66: ‘In ball games there is winning and losing; but when a child throws his ball at the wall and catches it again, this feature has disappeared,’

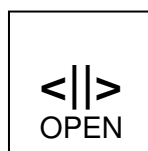
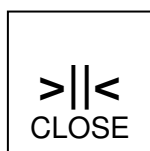
<sup>25</sup> Cf. the scene described in (Wittgenstein 1953), par. 83.

<sup>26</sup> Note that the German ‘Spiel’ (as the Dutch ‘spel’) is ambivalent between ‘play’ and ‘game’. I am often inclined to think that part of Wittgenstein has got lost in translation.

<sup>27</sup> For instance, to give just some salient examples, in (Wittgenstein 1953), par. 86 and 630.

the make-up of human bodies. Thus, there is a dual origin of movement: one from which one is moved, one from which one moves.

Let me clarify what Wittgenstein is up to by giving an example of my own invention, very much based on what he says about grasping the possible movements of a machine.<sup>28</sup> Most people can operate elevator doors in perfect accordance with their wishes to have them opened or closed, as the case may be, by pushing either one of two buttons. Not uncommonly, these buttons have the following icons: >||< and <||>. Perhaps the reader belongs to the happy majority of people who see immediately which button to push in order to have the doors opened or closed. I do not. More: I manipulate these buttons in exactly the opposite way as most people do, feeling pretty sure that I do it right, or even that *this time* I'll do it right. My colleagues--who are all normal--keep telling me that this is what the manufacturer had in mind:



On closer examination I even discover these words being clearly written on the buttons. But the icons suggest that I can afford to skip the reading and go by the drawings. That, after all, is what icons are for. However, every time I trust the suggestion, my hand goes to the button which makes the doors move in the direction I do not want them to move in.

To strengthen my self-confidence in the face of such an abnormality I have framed an explanatory hypothesis, which allows both normal people and me to emerge as perfectly reasonable beings. Here it is. Normal people see the icons > and < as arrows. The force that should open or close the doors comes from the direction opposite to that in which the arrow points. For the happy majority this is the more adequate picture:

<--||-->      and      -->||<--.

So <||> pushes the doors away from each other, thus opening the doorway, while >||< pushes the doors towards each other, closing it. My handicap is that I have a different reading of the characters < and >. I happen to see them not as arrows, but as brackets, in more or less this way:

---

<sup>28</sup> Cf. (Wittgenstein 1953), par. 194.

--<||>--            and            >--||--<

Now, brackets include and exclude. They hold together and separate. At least in logic or arithmetic or computer manuals they do.<sup>29</sup> And if you do not like to see doing logic and operating elevators conflated, there is plenty of other pictures to read into > and <. One of my other favourites is to see them as the slightly curved lines of hands in profile. No doubt hands hold together and separate in a straightforward sense. Still another possibility is to read > and < as a stylized comic drawing of the impact of some force: They indicate the effect rather than the cause. Whatever picture you prefer, it boils down to an image in which the force originates from the direction to which the tips of < and > point. That is why I recognise <||> as 'pushing the half-doors together'; consequently, I operate the corresponding button in order to close the doors. With >||<, it is the other way around: The 'hands' separate the half-doors, suggesting to me that they are capable of opening them.

The intriguing part of this explanation is not so much the difference between normal people and me. It is, rather, the striking similarity in the way we all seem to relate to these symbols, a similarity that is borne out only by our differences. The similarity is threefold.

(1) Both normal people and I work with the same category of 'power' or 'moving force': the power that makes elevator doors open and close. We believe that the symbols refer to such a phenomenon.

(2) We both localise the origin and the orientation of this power, as coming from and going into different directions. When 'normals' are in the lift, they locate the origin of power where the asterisk is in scheme [1]:

[1]     <|\*|>            \*>||<\*

Apparently, I myself localise it in the opposite way [2]:

[2]     \*<||>\*            >|\*|<

(3) We imagine *ourselves* at the place of the asterisks in [1] and [2]: It is *our* opening and closing the doors of the lift. If power is involved in these kinds of actions, we see ourselves as the source of that power. Indeed, the icon seems to invoke our projecting ourselves on to that particular spot within its own framework. The icon is a mirror, and we are prompted to step 'through the looking-glass': from a place in front of (and external to) the icon, to a place

---

<sup>29</sup> Hans Lindahl (conversation 13 Dec. 2007) observed that French publishing houses use << ...>> as quotation marks, while the German publisher Suhrkamp uses >> ...<<, undoubtedly indicating different ways of separating and joining texts.

in the framework of (or internal to) the icon. In a more technical vocabulary: there is a form of reflexivity involved in understanding the icon—a form of auto-reference very different from the one Luhmann introduced into jurisprudence.<sup>30</sup> This triad of reference, localisation and identification is what I would like to call a prompt.<sup>31</sup>

There is still another amazing thing, apart from the difference between ‘normals’ and me: on second thought, we cannot do without each other’s prompts. Depending on where we locate our respective standpoints, the other prompt gets some legitimacy, as it fills in for what our own standpoint is not able to account. I may be perfectly right in seeing the prompts as hands that push the doors together till they close; but, as there are two hands involved in this case, that takes for granted the different directions from where the forces come. Inversely, the ‘normals’ may be right in seeing the prompts as arrows indicating from where the forces come; but they, in turn, take for granted that these forces are guided, or coordinated, in order for the doors to meet at one certain point. One who favours ‘direction of forces’ still has to account for coordination, and one who is impressed by ‘coordination’ still has to account for the different directions of forces. So, we should all be lucky, and acknowledge that prompts do not replace or exhaust arguments; on the contrary, they allow us to see arguments and to discover that the validity of arguments is dependent on the prompt you are invited to follow.

Even that is not all there is to my puzzling buttons. I would like now to draw attention to the text printed underneath them, which is supposed to clarify their operative force: the words OPEN and CLOSE. With regard to these words I’m normal: I have no hesitation what they mean and I am convinced that all reasonable people I know are willing to join my interpretation. But that, I dare say, is quite astonishing, given the fact that the words are elliptic. They are short for some more complicated utterance. But we are pretty sure that [3], [4], [5] and [6] – though possible readings in other contexts – are poor candidates for clarifying OPEN when we are in an elevator:

- [3] The door is open.
- [4] If the door is open, then push this button.
- [5] Open the door!
- [6] If the door is closed, then push this button

Reading [3] misses the point by taking the text in the alethic mode, whereas it is deontic; [4] is an advice contrary to what is meant, since you are expected to push the button in question when the door is not open; [5] is wrong in many ways, one of which is that it is categorical

---

<sup>30</sup> Cf. (Luhmann 1979; Luhmann 1986). In Luhmann’s theory *autos* translates as *idem*, in mine as *ipse*. For distinctions in a similar vein, cf. (Perry 1998), distinguishing between ‘knowledge of the person I happen to be’ and ‘knowledge of the self’.

<sup>31</sup> It comes close to what (Döpke and Schwarze 1981) 21f called ‘localisation actantielle’.

instead of conditional, and [6] is downright dangerous, especially when the elevator is an antique one which opens between floors. What we ‘read’ in OPEN is something like [7]:

[7] If the door is closed and you want it open, then push this button.

Phrase [7] features a condition which is a conjunction of a statement of fact and a wish, followed by a directive how to act. I submit that this is a good candidate for the general structure of what we call rules. Now, Wittgenstein’s thesis is that it is rather immaterial whether a rule has a pictorial, a verbal or a numerical form. It has to be understood from the self-projection into the icon it conveys. To follow, indeed to interpret a rule is not to apply a syllogism or an algorithm to one’s situations, but to step through the looking-glass, i.e., to project oneself as an observer in front of the rule to a form of behaviour as an actor from the perspective to which the rule is prompting. In order to ‘interpret’ the rule, one has to relate one’s origin in the sense of its vantage-point to the origin of the rule in the sense of its vanishing-point. Note, to repeat, (i) that these are equi-primordial: The vanishing point yields the vantagepoint, which yields the vanishing point in infinite intertwinement; (ii) in order to ‘get the picture’ of the rule, we have to recognise ourselves as *bodies* (or some body as *our* body) involved in that intertwinement;<sup>32</sup> (iii) which can only be partly accounted for in mathematical projection or measurement.

Whether or not recognition occurs is contingent upon various factors, ranging from neuro-physiological to social ones. I referred already to (unequally distributed) neuro-wiring of our bodily make-up. That social factors play an analogous role in our bodily intertwinement with the world is beautifully captured by Joel Fisher in his ‘Gender Paintings’.<sup>33</sup>



<sup>32</sup> These are two reasons why I prefer Merleau-Ponty’s account of interpretation over Gadamer’s idea of ‘Horizontverschmelzung’.

<sup>33</sup> I felt very privileged and grateful to Joel Fisher for making and offering me these paintings during the Species of Origin Workshop (see footnote 1) after reading the first draft of this paper. I also thank him for permission (25-04-2008) to reproduce them here in this way.

Here is Fisher's short story: 'Some years ago I was watching a movie in a cinema in Poland when I had to go to the bathroom. The facilities were downstairs, where I hit on two doors with these symbols. I could not decide where to enter, stumbled back to the theatre and kept my legs crossed for one more hour.' Apparently, if you have no access to Polish conventional 'subtitles' with regard to these pictures and have to go by the pictures themselves, i.e., by how you see your body reflected in these pictures, male and female can recognise themselves in either picture, and the rule about the use of the bathrooms loses its guiding potential. This is what one could call the Darwinian slant of Wittgenstein's argument. In his book on expression, in particular, Darwin is at pains to explain what precedes conscious interpretation, what precedes habit, what precedes instinct, without getting reductive about these various dimensions of explanation. On the contrary, he is always looking for inversed causal effects, missing links, underdetermined states of affairs. But this remains his ultimate fascination when it comes to expression and interpretation: 'It has often struck me as a curious fact', he says, 'that so many shades of expression are instantly recognized without any conscious process of analysis on our part.'<sup>34</sup>

### 3. The Origins of Legal Rules

How does the account of rules given above work out with regard to legal rules? How can they be said to have a vanishing point that somehow determines our vantage-point, and vice versa? What does it mean to say that we are related *bodily* to legal rules? Let me begin by observing that rules come in clusters. They never stand alone, in spite of the fact that, for educational purposes, they are often set apart and quoted in not-so-splendid isolation. The per mille norms regulating the maximum blood alcohol content during driving, for instance, are part and parcel of traffic law: It is only in this so-called 'context' – a rather evasive notion itself – that their point becomes clear. We are able to understand what should happen in the case where someone would be caught with a permillage that exceeds all permillages found

---

<sup>34</sup> Cf. (Darwin 1965 [1872]) 359.

before, only because we grasp the general picture of such a cluster of rules. We will immediately punish more severely, and not decide that the law is silent on the matter because it does not mention the exact permillage. We will say, for instance, that this general picture of alcohol restrictions is all about 'safety on the roads', and that this is a feature which these regulations have in common with other rules of traffic law; for instance, those regarding technical requirements of vehicles. Often enough, such a general point expressing what a whole cluster of rules is all about is captured in a more or less explicit statutory clause. For instance, article 5 of the Dutch Traffic Bill (1994) explicitly states that it is forbidden for anyone 'to do anything that may endanger the safety on the roads'. At other times, however, it is stated as the *ratio decidendi* of a judiciary decision, as, for instance, in Judge Earl's opinion in Elmer's case to the effect 'that no one should profit from his own wrong.'<sup>35</sup>

Here, something remarkable happens. Supposedly, traffic law developed because society wanted to solve a safety problem on the roads. It aimed to do so by making laws that forbid certain forms of conduct that could jeopardise our lives when we are driving, riding or walking around. We expect the law to stipulate how we should behave. But at the end of the day, a cluster of legal rules like traffic law turns the tables by a general provision, to the effect that we, legal subjects, should decide what would count as jeopardising behaviour, and what would not. So, in response to our expectation to learn from *the law* how we should behave, the law teaches us to behave as *we* judge we should behave--which is a rather circular instruction. Obviously, the law of traffic *does* instruct us what to do in remarkable detail, but its bottom line is that it is we, not the legislator, who should make out what to do. Similarly, the 'principle' that no one should profit from his own wrong remains remarkably tautologous as long as we expect to discover its meaning in the law. A wrong in law is what the law sanctions by penalty, and a penalty is a means to deprive you of any profit you may have usurped without taking lawful interests of others into account. A wrong is *defined* as something you should not get away with, i.e. not profit from, as far as the law is concerned. Thus either the law tautologously says that one should not profit from what one should not profit from. Or it draws into the whole picture of the law by virtue of all sorts of elements that function as depth clues that produce a vanishing point: the statute of wills, the criminal code, the Bill of human rights, etc. In Elmer's case, Judge Gray turned to the law in order to learn if it excepted murderers as lawful inheritors of their victims. He found that there was nothing 'wrong' with murder as far as the statute of wills was concerned, although he must certainly have conceded that there is a lot 'wrong' with it according to the criminal code. He did not acknowledge, as Judge Earl did, that the law leaves it to legal subjects to make the

---

<sup>35</sup> As described in (Dworkin 1986) 20, discussing *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889).

connection between the criminal code, the statute of wills, and quite a few other elements of distributive and retributive justice, from the specific vantage point of the case at hand: Elmer having murdered his grandfather in order to profit from the testator's then valid will. Correlate with this vantage point is the vanishing point offering coherence to the law in this case: no man should profit from his wrong.

We might be tempted to regard such very general provisions as a safety net meant to serve as a supplementary device to catch all those cases which would escape detailed regulation. However, here as elsewhere, the supplement is the core: It is what the regulations in the cluster are all about. The supplement is not the fringe, but the heart of the matter<sup>36</sup> - the vanishing point of this area of law. Rather than catching unruly remainders, it captures what more specific rules intend to govern. Traffic law is, indeed, all about preventing careless behaviour on the roads. So, the very point of traffic law is contained in this one phrase from which the whole of traffic law seems to emanate. And yet we are not staring into a looking glass, we are stepping through it. When we follow the rules of traffic law according to their 'spirit' we feel we're entering into a new realm. This is because the spirit is not available apart from the letters, much like the vanishing point is not available apart from the depth clues in the picture. These clues point to it as they meet the eye of the beholder from her or his viewpoint. As in the cases of the Staalmeesters, the elevator buttons and Fisher's Gender Paintings, it is reflexivity that is involved here<sup>37</sup>, not circularity. In Merleau-Ponty's terms, there is intertwinement between our vantage point and the vanishing point of traffic law, which is as much a function of the specific rules as it makes these rules function.

It will come as no surprise that this feature of reflexivity in legal rules is not at all restricted to traffic law. A good deal of tort law, for instance, shows similar intertwinements. Take, for instance, the formula of 'the foresight of a reasonable man' regarding liability in tort. Tort law is supposed to mark the difference between what is reasonable and unreasonable (negligent) behaviour when it comes to, let's say, non-solicited social relationships. Reflexivity emerges when, in the final analysis, the reasonable man and his foresight are the very criteria that determine the content of tort law. Although the law is supposed to demarcate what is unreasonable, it responds by saying that we should refrain from doing what we think is unreasonable. In pointing to the law, we point to ourselves. Similar observations apply to 'the good employer' (or, for that matter, the good employee) in labour law, to 'the principle of good book keeping' in economic law, to the idea of 'the caring

---

<sup>36</sup> Cf. (Derrida 1979) 207ff.

<sup>37</sup> In narratology: *de te fabula narratur* – you are figuring in this rule.

physician' in medicine law, and to other creatures that inhabit the realm of equity over and against the application of legal rules.<sup>38</sup>

The last step of the argument is to show in what sense this intertwinement is bodily mediated in law. One more time I have to go back to aesthetic experience. To have an aesthetic experience you have to stand in front of the paintings. You will not have the experience while reading the catalogue of the exhibition.<sup>39</sup> Of course you may be reminded of it, or be preparing for it, through reproductions. But the experience itself is tied up with standing before the real thing. The same goes for the elevator buttons: They become clear (though perhaps in an unintended way) if and when you are in front of them. In a similar way, you have to stand before a decision about how to act *in a certain situation*, in order for you to appreciate and interpret a legal rule. Here I propose to follow two lines of argument. My first line of argument is an empirical one, and it dovetails into two branches, one from legal anthropology, another one from legal education. The former is based on reports from European judges trying to apply indigenous *adat* law in Indonesia, in the days of colonisation. They followed the usual method by submitting cases to heads of tribes who apparently were in charge as judges, asking them what they would decide if so-and-so would happen. Often enough, they did not receive an answer, because these judges, in spite of all their experience, could only give a decision if and when they were really hearing a case. They could not pretend, but had to actually feel the responsibility of having to decide on it.<sup>40</sup> The latter branch of the empirical argument derives from western legal education which is almost exclusively based on training students to answer questions about what they would decide (or advise) if so-and-so would happen. It looks very different from the anthropological reports on foreign legal cultures referred to above, but in an important sense it is very similar. The difference is of course that these students are asked to *pretend* that they are standing before a decision, but the similarity is that standing before a decision is what they have to pretend in order to be guided by the rule of a statute or the *ratio decidendi* of a precedent. To this one may add the experience of many law students that not until they participate in moot courts or legal clinics will they learn how legal rules really work.<sup>41</sup>

---

<sup>38</sup> Schmitt was very right in pointing to these 'pictures', but very wrong in hypostatizing them as 'konkrete Ordnungen', thus ignoring their reflexive character. Cf. (Schmitt 1934).

<sup>39</sup> Similarly, you have to watch the movie or see the play in the theatre rather than at home on television. Music seems to be different in this respect (although one would like to see evidence of the fact that appreciation of music is possible without the experience of a live concert at all), because the world of sounds is different (cf. (Scruton 1997), ch. 1). But the similarity immediately returns if one realizes that the correct analogy here would be to have the score in front of you.

<sup>40</sup> Cf. (Scholten 1974 [1931]) 127, quoting B. Ter Haar, *De rechtspraak van de landraden naar ongeschreven recht* (1930, p. 11).

<sup>41</sup> Bonnie Honig's new book *Emergency Politics: Paradox, Law, Democracy* (Princeton, forthcoming), Ch. 3, analyses the story of U.S. Assistant Secretary of Labour, Louis Freeland Post, exercising discretion in favour of numerous alien workers by applying the letter of very strict deportation law under the First Red Scare. When we had the privilege to discuss part of the manuscript in Tilburg, it

My second line of argument is a conceptual one. Some depth clues in works of art appeal to ‘our body politic’ rather than ‘my body biotic’, and it is very difficult to tell where the latter ends and the former starts. My body, as experienced from a first-person point of view, certainly does not coincide with the perimeter of my skin, as my skin folds around spaces external to my skin but very much inside of me. To take the most obvious example, under normal circumstances I experience my nostrils as parts of my body, not as part of the space around me, even if they are external to my skin. In a similar vein, I experience lots of things – again: under most circumstances – as parts of my body although they are external to my skin, e.g. quite a few prostheses I have got used to, the clothes I am wearing, the piano I am playing. Even the bike I am riding or the car I am driving I feel ‘from the inside’. When their house is broken into, people feel anger in ways similar to normal reactions to bodily assault. The least we can say is that the *biotic* conditions of our lives are governed by *sym-biotic* parameters.

But we can, and should, say more. Even the most sophisticated econometrics cannot deny that, in the final analysis, economics is about the economy, and the economy is about reproducing one’s life in symbiotic exchange with the environment, given conditions of scarcity. The very notion of scarcity presupposes an awareness of the needs of other beings, and of the world as a limited reservoir of possibilities to satisfy these needs. It does not mean anything without the (implicit) awareness of our being-in-the-world-with-others and, thus, without a more or less articulated ordering response<sup>42</sup> to that awareness which we call politics. Thus, we understand that ‘my body’ is not just the organism performing the biotic operations that keep me alive, but rather, the sum-total of chiasmic intertwinements between the self and the world, including the social world. Deliberately, I resist the innuendo of a certain idiolect to set up the self over and against the world ‘out there’. ‘Body’ as in ‘my body’ is precisely this oscillating tension between me and other that makes me alternate between being a body and having a body, living from it and dying from it, enjoying and suffering. One more step and we may acknowledge that relationships to other people, in various ways, are involved in these chiasms, as well. The reciprocity that constitutes the core of ‘doing things together’, of ‘shared intentions’ or of ‘shared responsibilities,’<sup>43</sup> does not only pertain to the exchanges between individuals which may take place. It works already at a more basic and less sophisticated level. It pertains, first and foremost, to the experience of at-one-ness with the world around me – a *reflexive* experience that is already broken up the moment we get

---

occurred to me that Post’s ‘doing things with rules’ excellently illustrates the intertwinement between vantage point and vanishing point (by which I do not imply that professor Honig would share this view).

<sup>42</sup> For an extensive analysis of the various modes in which we are involved in responses to the world, see (Waldenfels 1994), which will shortly appear in translation with Northwestern University Press.

<sup>43</sup> Cf. (Bratman 1999), in particular Chapters 5-8.

*reflective* about it.<sup>44</sup> To the extent that these ‘social’ body parts appear susceptible to orderings, the contours of a ‘body politic’ which is me/mine begin to emerge. If Kantorowicz was right we may perhaps add that, not only the king but also his subjects always have had two bodies.<sup>45</sup>

In an inspiring essay<sup>46</sup> Carrol Clarkson has offered some illuminating examples of how artworks relate to an emergent body politic, thus actually making that body politic emerge. She refers in particular to some installations by the South African artist Willem Boshoff, like *The Blind Alphabet ABC* (1991-2000) and *The Writing in the Sand* (2000). These are a sort of three-dimensional dictionaries: ‘(...) sequences of words in wood, sand or stone, with definitions or translations that prescribe the limits to the meanings of the words, but in a way that also serves as a disconcerting reminder of the linguistic boundaries that actively divide speakers within the *polis*.’<sup>47</sup> These works prompt the viewers to interactions they would normally not easily engage in, by remaining inaccessible to those who do not seek help from others, in particular those who belong to non-dominant groups in society.<sup>48</sup> Much as we have to look up high if we wish to properly see Rembrandt’s *Staalmeesters*, we would have to talk to people present there and then who (we think) know Braille, or to people who (we think) know an indigenous African language in order to appreciate Boshoff’s works. Since we rarely know in advance who knows what, we have to prudently go about addressing people, taking chances on the basis of their looks, exposing our prejudices, etc. As Clarkson put it: ‘The shift in emphasis from an interaction with the work itself, to the interactions the work causes between its viewers, deepens the ethical and political engagements of Boshoff’s art, especially since these works are so relentlessly preoccupied with the question of a readable language.’ Now it is neither Clarkson’s nor my suggestion that we better turn to art than to law when it comes to ordering a society. The point, at this last stage of my argument, is that the chiasm between eye-point and vanishing point is predicated on bodily movement and that this is how constituent and constituted power in a polity are intertwined.<sup>49</sup> In other words, the point is to understand how the body in the broad

---

<sup>44</sup> See also Van der Walt, ‘The Impossibility of Two Together When it Matters: a Law and Literature Excursion’, in (Van der Walt 2005) 251 ff. The experience described here is acknowledged in different cultures in different ways. I submit that it lies at the heart of ‘ubuntu’ as a key term in the South African political process after apartheid. I tend to be very critical of the account of this term within Christian morality.

<sup>45</sup> Cf. (Kantorowicz 1997 [1957]).

<sup>46</sup> (Clarkson 2008) (to appear). I quote from the manuscript with Clarkson’s permission.

<sup>47</sup> Ibid.

<sup>48</sup> ‘Boshoff is preoccupied with the very earliest meaningful marks. A grapheme’s being understood as meaningful or not sets the perimeter to the work’s “responsive range.” It draws the line between those who are included or excluded from that mark’s address, which has momentous socio-political implications.’ Ibid.

<sup>49</sup> ‘I do not wish to make a crude claim that law and art operate in exactly the same way, but the movement of convergence is towards this point: both the force of law and the force of art reach out for the creation of a new semantic articulation.’ Ibid..

sense of a ‘body politic’ is involved in this intertwinement between, on the one hand, rules and institutions of law being inherently constitutive of political relationships (and are not just their sediment) and, on the other, politics being able to deploy constituent legal power in a society only by representing itself as constituted power.<sup>50</sup>

Tocqueville—who should perhaps be honoured as the Rembrandt of democracy<sup>51</sup>—was very much aware of this, and Claude Lefort – a student of Merleau-Ponty’s – explains in detail what is ‘bodily’ about this intertwinement. Like Rembrandt, Tocqueville wishes ‘to paint and to judge’.<sup>52</sup> He not only describes democracy as an institution achieved, but also as an institution achieving, with all the ambiguities of what is achieved and achieving. But the crucial thing is that, like in Boshoff’s art, democracy achieves things not only in the direct relationship between the viewer and the work, but also, and primarily, in the relationships between the various groups of people inhabiting contiguous spaces.

‘This ceaseless agitation which democratic government has introduced into the political world enters civil society. I am not sure that, on the whole, this is not the greatest advantage of democratic government; and I would praise it more for what it makes do than for what it does.’<sup>53</sup>

Tocqueville regards this ‘agitation’ as a productive sort of disquietude which spreads through the whole of the social body:

‘Democracy does not give the people the most able government, but it produces what the ablest governments are often unable to create: namely, an all-pervading and restless activity, a superabundant force, a sort of energy, all of which would not exist without it and which may, however unfavorable the circumstances may be, bring about wonders. These are its genuine advantages.’<sup>54</sup>

Lefort prefers to use Merleau-Ponty’s term of ‘the social flesh’ (*la chair du social*) in order to point to a dimension of the social sphere where latent differentiation and fragmentary sensibilisation of its constituent parts can already be perceived prior to being conceived by virtue of an order (to be) established, i.e., prior to political intervention. Institutions and rules take effect in this dimension. Imagine, for instance, majority rule, in whatever format one may think of. Let us suppose that it says no more than that the majority will be allowed to pursue

<sup>50</sup> On this thesis see also (Lindahl 2003; Lindahl 2007).

<sup>51</sup> (Lefort 1992) 57 (‘Tocqueville est un maître dans l’art du contraste.’); 61 (‘Tocqueville n’a pas seulement l’art des contrastes, il a l’art de surprendre par des renversements de perspective qui dérobent des vérités qu’ on croyait fermement établies.’).

<sup>52</sup> ‘peindre et juger’. Cf Lefort, *ibid.* 57; (Tocqueville 1835-1840 [1981]) I, Introduction, p. 69: ‘Mon but était de peindre (...).

<sup>53</sup> ‘plus à cause de ce qu’ il fait faire que de ce qu’ il fait’. (Tocqueville 1835-1840 [1981]), I, 2, ch. 6, p. 340. My translation [BvR]

<sup>54</sup> *Ibid.* My translation [BvR].

its preferences at the cost of the minority. Prior to any further organisation of society, prior even to a further delimitation of the whole of which minority and majority will be parts, this rule will cause people to behave in certain ways that are all 'horizontal'. They will have to estimate how to avoid what will look like extreme positions in the eyes of others, since they know beforehand that extreme positions will end up as minority positions. Furthermore, they will have to prepare for compromise, give and take, revision of means and ends, etc., because these are ways to form powerful majorities. Finally, not knowing beforehand whether they will end up in a majority or a minority, they will mutually agree on a new rule, namely that the majority should never inhibit the minority to become the majority.<sup>55</sup>

Another example would be the rule or principle of the separation between Church and State. This rule does not tell us anything with regard to specific problems such as, for instance, whether we should allow people in public functions to wear symbols of their religious convictions, like a headscarf for Muslim women, a yarmulke for Jewish men or a crucifix for Christians. We may either argue that the State should not interfere with these allegedly deeply motivated ways of behaviour, or we may argue that officials should symbolise the 'religion civile' of the state rather than their private faiths. In a sense, this is immaterial for one who wants to capture the meaning of the rule in this situation. Both lines of argument are dead ends. If, on the one hand, we leave things to deeply felt convictions, we will be asked what we think of burqas, swastikas and Ku-Klux-clan outfits. If we would allow all of these ideologies in the name of religion, we would in fact give up on the State. If, on the other hand, we want the State to have a say in this, we trust the State to tell us not only what a religion is and what is not, but also what is essential in each specific religion.<sup>56</sup> We would give up on the Church. We can be sure that either way of taking the separation of Church and State to the extreme will leave us with no separation of Church and State at all. So the only sensible attitude to take with regard to this rule is to see it as a prompt for members of civil society to exercise self-restraint with regard to expressions of religious belief, thus steering away from state intervention in the religious realm. Here again, the rule works through how it makes us move, rather than through what it says.

Of course nothing good or just in the moral sense is gained by these effects: As we all know, both majorities and minorities may advance the most terrible things; compromise is not a secure way to attain anything worthwhile; and some minorities should be prevented from ever becoming a majority, if not in the theory then in the practice of justice<sup>57</sup>, and for believers it is ridiculous to ban religious belief to the private sphere. Nevertheless, these effects amount to 'potential differences' in a population, social potentials as an analogy to

---

<sup>55</sup> Which belongs to the core of democracy according to (Kelsen 1933 [1968]) 1929; 1940.

<sup>56</sup> Cf. (De Beer 2007).

<sup>57</sup> See (Hong 2005).

potentials in physics, which makes the population<sup>58</sup> sensitive to political orderings and which in turn, are necessary for administering justice.<sup>59</sup> Note, however, that they are triggered by the dual origin of rules in the first place, so that, indeed, we should speak of an intertwining of cause and effect. Rousseau captured this phenomenon masterfully in his observation that men should be prior to law-giving what they have yet to become through law-giving.<sup>60</sup> For Darwin legislation was probably just one more case in point of his general theory of expression: it is not only the effect of what we are already but ever so often also the cause of what we are yet to become.

### References

- Atiyah, P. S. (1981). *Promises, Morals and Law*, Oxford, Clarendon Press.
- Bratman, M. E. (1999). *Faces of Intention. Selected Essays on Intention and Agency*, Cambridge, Cambridge University Press.
- Clarkson, C. (2008). Drawing the Line. Justice and the Art of Reconciliation In D. B. F. and A. Du Bois-Pedain (ed), *Justice and Reconciliation in Post-apartheid South Africa*. Cambridge, Cambridge University Press: (to appear).
- Damisch, H. (1995 [1987]). *The Origin of Perspective*. Transl. John Goodman. Cambridge (Mass.) etc., MIT Press.
- Darwin, C. (1965 [1872]). *The Expression of the Emotions in Man and Animals*. With a preface by Konrad Lorenz, Chicago - London, University of Chicago Press.
- De Beer, P. (2007). De overheid moet principieel weigeren zich uit te laten over godsdienst. *NRC Handelsblad* 27-8 October: 13.
- De la Boétie, E. (1577 [1993]). *Discours de la servitude volontaire*. Prés. par Simone Goyard-Fabre, Paris, Garnier-Flammarion.
- Derrida, J. (1967). *De la grammatologie*, Paris, Minuit.
- Döpke, W. and C. Schwarze (1981). Le rôle des prépositions locales dans la constitution sémantique de la phrase In C. Schwarze (ed), *Analyse des prépositions*. Tübingen, Niemeyer Verlag: 19-28.
- Dworkin, R. M. (1985). Do we have a right to pornography? In *A matter of principle*, Cambridge (Mass.)- London, Harvard University Press: 335-372.
- Dworkin, R. (1986). *Law's Empire*. Cambridge (Mass.), Harvard University Press.
- Fuchs, R. (2006). *Rembrandt spreekt*, Amsterdam, De Bezige Bij.
- Hart, H. L. A. (1994). *The Concept of Law*. 2nd ed., with a Postscript edited by P. Bulloch and J. Raz, Oxford, Oxford University Press.
- Hong, Q. L. (2005). *The Legal Inclusion of Extremist Speech*, Nijmegen, Wolf Legal Publishers.
- Honig, B. (2007). 'Between Decision and Deliberation: Political Paradox in Democratic Theory.' *American Political Science Review* 101(1): 1-17.
- Kantorowicz, E. H. (1997 [1957]). *The King's Two Bodies. A Study in Mediaeval Political Theology*, With a new pref. by W.Ch. Jordan, Princeton, Princeton U.P.
- Kelsen, H. (1933 [1968]). Staatsform und Weltanschauung In (ed), *Die Wiener rechtstheoretische Schule, Bd. 2*. Wien, etc., Europa Verlag etc.: 1923-1942.
- Lefort, C. (1992). *Ecrire. A l'épreuve du politique*, Paris, Calmann-Lévy.
- Lindahl, H. K. (2003). 'Dialectic and Revolution. Confronting Kelsen and Gadamer on Legal Interpretation.' *Cardozo Law Review* 24(2): 769-798.
- Lindahl, H. K. (2007). Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood In M. Loughlin and N. Walker (ed), *The Paradox of Constitutionalism*. Oxford, Oxford University Press: 9-24.

<sup>58</sup> Indeed, the population rather than the people, the latter already being a body politic.

<sup>59</sup> I argue that political ordering (entailing self-inclusion) is entailed in the very principle of justice 'to give everyone his/her due' in (Van Roermund 2006)

<sup>60</sup> (Rousseau 1762 [1964]) II, ch. 7. See also (Honig 2007).

- Luhmann, N. (1979). 'Selbstreflexion des Rechtssystems, Rechtstheorie in gesellschaftlicher Perspektive.' *Rechtstheorie* 10: 159-185.
- Luhmann, N. (1986). The Self-reproduction of Law and its Limits In (ed), G. Teubner (ed.): *Dilemmas of Law in the Welfare State* (European University Institute, Series A 3), Berlin-New York, De Gruyter: 111-127.
- Lützenkopf, A. "Lyonel Feininger (1871- 1956)." \* Retrieved 11 Oct, 2007, from [http://www.uni-stuttgart.de/idg1/aquarell/Seminarbeitraege/Feininger\\_17.html](http://www.uni-stuttgart.de/idg1/aquarell/Seminarbeitraege/Feininger_17.html).
- Merleau-Ponty, M. (1964). *Le Visible et l'Invisible*. Suivi de notes de travail. Texte établi par Claude Lefort, accompagné d'un avertissement en d'une postface, Paris, Gallimard.
- Perry, J. (1998). Myself and I In M. Stamm (ed), *Philosophie in synthetischer Absicht. Festschrift Dieter Henrich*. Stuttgart, Klett-Cotta: 83-103.
- Raz, J. (1995). Interpretation Without Retrieval In A. Marmor (ed.), *Law and Interpretation*. New York, Oxford University Press: 155-176.
- Schmitt, C. (1934). *Ueber die drei Arten des rechtswissenschaftlichen Denkens*, Hamburg, Hanseatische Verlagsanstalt.
- Scholten, P. (1974 [1931]). *Algemeen Deel*, 3e druk, met feitelijke gegevens aangevuld door G.J. Scholten, Zwolle, Tjeenk Willink (Asser-serie).
- Scruton, R. (1997). *The Aesthetics of Music*, Oxford, Oxford University Press.
- Tocqueville, A. d. (1835-1840 [1981]). *De la démocratie en Amérique I-II*, Paris, Garnier-Flammarion.
- Twining, W. and D. Miers (1991). *How To Do Things With Rules. A Primer of Interpretation*. 3rd ed., London, Weidenfeld and Nicholson.
- Van Fraassen, B. (2004). 'Science as Representation: Flouting the Criteria.' *Philosophy of science: official journal of the Philosophy of Science Association* 71(5): 794-804.
- Van der Walt, J. W. G. (2005). *Law and Sacrifice. Towards a Post-Apartheid Theory of Law*, London, Birkbeck Press.
- Van Roermund, B. (1997a). *Het verdwijnpunt van de wet. Een opstel over symbolwerking van wetgeving*, Deventer, Tjeenk Willink.
- Van Roermund, B. (1997b). *Law, Narrative and Reality. An Essay in Intercepting Politics*, Dordrecht - Boston - London, Kluwer Academic Publishers.
- Van Roermund, B. (2002). 'Muziek. Tussen lijf en wereld.' *Filosofie Magazine* 11(9): 42-48.
- Waldenfels, B. (1994). *Antwortregister*. Frankfurt a.M., Suhrkamp.
- Wittgenstein, L. (1953). *Philosophical Investigations / Philosophische Untersuchungen*, Oxford, Blackwell.
- Wittgenstein, L. (1967). *Zettel*. Ed. by G.E.M. Anscombe and G.H. van Wright, Oxford, Blackwell.
- Wittgenstein, L. (1969). *The Blue and Brown Books. Preliminary Studies for the 'Philosophical Investigations'*. 2nd. ed. Oxford, Blackwell.