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### What is the Matter with Antigone?

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## Chapter 4

# What is the Matter with Antigone?

Emily Albrink Hartigan

### Prelude

The conceptual world of the West has been dislocated—by globalism, by the “rest” of the world, by postmodern deconstruction of our “knowing” and by science itself. This would be good news to Antigone, whose allegiance to the unwritten, unknown sacred law already provided a creatively unstable basis for Western law. Because of this classic paradoxical and dynamic tale of a law laced with the Dionysian dance related by the haunting feminine presence of Antigone, we can trace the legacy of faithful unlaw through Enlightenment disenchantment, Newtonian physics, and secular epistemologies into a perpetually uncertain, generative law that can resonate in both the pragmatic present and the uncodifiable eternal law.

Contemporary physicists delight in the uncertain and paradoxical, using imagination to move beyond the false knowability of Newtonian science. Creationists challenge that outdated science, inadvertently illustrating its inadequacy (even as some attempt to claim a wooden knowability through unidimensional Biblical reading, while others tap the mystery of God). The law in the United States has not yet retrieved Antigone’s constitutive instability or the power of the feminine spirit, but it has been forced to engage creationism, and will be unable to evade the epistemic revolution that contemporary quantum physics and cosmology have wrought. Matter itself has been shattered (literally and theoretically) and law will have to take account of how the default categories of Western white male secular scientism are simply dissolving. The tragic figure of Antigone, with her counterpart Creon the sovereign, can help us re-enchant the post-Western legal world from within.

### Antigone

Who is Antigone? Is she the feminine mirror of the patriarchal ruler, Creon?<sup>1</sup> His antagonist? Is she fatally flawed? Does she inhabit the female body of the law? Does the unwritten law she attends to exist in the symbolic realm, the chthonic,

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<sup>1</sup> George Steiner refers to Creon as a “commensurate counterpoise” to Antigone, each character reading the self in the other, in a dynamic symmetry (Steiner 1986: 184).

the imaginative, the Dionysian, the divine? Why has her story been so central to Western thought about law for two-and-a-half millennia?

This unruly daughter of her own grandmother is *the matter* indeed, inhabiting her body with an animating spirit that confounds her literalist king, transforming the very atoms of the feminine subject of the law. She is no less humanly fallible than Creon, but also no less necessary to the body politic.

Antigone is a figure who moves my students in unpredictable ways, embedded, as she is, in a narrative that forever haunts the law in the West. And, in my view, she manifests the renamed, reimagined Spirit-Matter that modern secularism became unable to see, inevitably opening her classic narrative back into the radical unknown that the postmodern knows is forever Other. In tandem with a reintegration of the spirit after modernist skepticism comes a revision of what "matter" might be, so that the tale of this ultimate material girl signals the prescient Athenian anxiety that the patriarchy would devalue the Other side of reason and male dominance, what Nietzsche identified as the Dionysian. And yet on the face of the play, Antigone stands as a grounded, particular woman,<sup>2</sup> unnerving Creon with her unpredicted resistance.

The power of imagination in the presence of the divine is a category of knowing that I would find my existence poorer without—but those who do not find God-talk meaningful still often speak and write and act in love and beauty and human goodness. As my tradition has a distinct incarnational slant, that humanly imagined love and goodness cannot evade what I call God. But the attempt not to rely (or the inability to rely?) on what has been overtly theological, perhaps a bit like the compensatory heightened senses of the blind person, may produce an intensity of immanence even as it ignores the use of God-talk in the original text of Sophocles' play. Antigone was not a modern, and did not think she was likely deluded in her experiences of the deities so alive in Greek narrative, in Sophocles as well as in Plato. Thus engaging with Judith Butler's commentary on Antigone, *Antigone's Claim*<sup>3</sup> will involve a dance of respect, listening, critique and, I hope, newness emerging from a very old story.

2 Strikingly, Carol Greenhouse sees her as half of woman in a sense, more complemented by her sister than her king: "I read Ismene and Antigone as the doubled figure of a woman" (Greenhouse 1994: 1234).

3 Among the many commentaries on Antigone, I will concentrate on Judith Butler's for several reasons. First, it fulfills my reflective need for that which is not my primary discourse, another way of seeing so if I truly attend with more than mere critique to Butler, I will learn. Second, Butler is complex, subtle, academic, and nearly totally removed from my students' ways of seeing, so that reading this text which I have shared for many years with lively minds and spirits close to the law from such a different lens, I may be able to help them learn also. And, third but related to the first, I believe that there is a paradox about what many call God: reading attuned to the sacred should also read as if nothing is not sacred, even that which attempts to proclaim the "empirical" secular alone, or that simply eschews the language and discourse of spirit. The many attempts to define or categorize or even just describe the secular run up against a version of this paradox (i.e. if there is an

Ironically, Butler's text also engages in a rationalistic if allusive discourse that fails the material, that impoverishes "matter" by failing to imagine it as alive with energy, uncertainty, entanglement and mystery—in short, with something akin to spirit. The world alive has been devalued by modernist discourse as a version of superstitious animism, rather than as a cosmos "blooming, buzzing" with vitality and a micro-activity. We will always pursue beyond the already fantastic realm of quarks and bosons. Spirit is banished as pre-modern fancy while matter is treated as inert and dead. The reintegration of the wild and dark, the Dionysian, with the reasoned and light-illuminated, the Apollonian, brings greater abundance to both thought and matter; Antigone, the out-of-control lover of blood kin and earth-covered dead bodies, is a necessary character in a true story of law.

#### *What is the Matter—Why a Second Burial?*

*Antigone* can be read in dualisms. Creon, whose name means ruler, can be the masculine, political, patriarchal, rule-bound Apollonian man of rationalizing pride and insular decree. Antigone, whose name is more variable in its readings, can be the feminine, kinship-honoring, emotional Dionysian woman of family relationship and intuitive spiritual morality. Creon can be monomaniacal for public state stability, Antigone, passionate only for the unwritten law. But of course the narrative takes on its momentum when those apparent dualisms collide and fragment. Creon prohibits the burial of the losing brother, Polynices, in the just ended civil war, leaving his corpse to rot. Antigone covers it in dust, stealthily. No one knows who did it, though Creon immediately suspects that someone was paid to defy him, fearing money's corrupting power but failing to imagine Antigone's version of piety. Antigone has performed the requisite ritual for her brother. What more does she need to do? Play over?

Creon orders the corpse uncovered—but he can only dig up a body that was already accorded the dignity of burial. Antigone has accomplished her sacred ritual task. Why would she persist in her outlawry? She gave her brother his due—grave desecration by the sovereign is an entirely different matter than failure to bury. I concur with Butler that what Antigone does that is intolerable to the law is to insist on being public in her defiance. She buries not only a brother (a private family matter), but also a leader of the losing of the warring factions, and she freely admits the transgression that becomes public because she repeats it. Relegating Antigone to private kinship fidelity misses her intentional, in some sense gratuitous, repetition in the face of certain apprehension.

Creon has made his first decree after the brothers killed each other in a civil war in order to demarcate the enemy as so Other that even though Polynices is

omnipresent God, that God is fully present in secular discourse). Two close corollaries of the paradox are first, if there is a God, all is shot through with God's presence definitely, including the allegedly atheistic, godless, or secular, and, second, all belief in God is inexorably shot through with ignorance and doubt of God.

Creon's nephew, he has forfeited his humanity. Antigone in her despair defies the "masculine power" that her sister Ismene says she is too weak to resist ... but Antigone has buried the body. The Messenger has told Creon of the burial after much palaver, and when Creon rails like a dangerous tyrant, the Messenger ironically tells Creon that not only did he initially fear telling Creon the bad news but also that he, the Messenger, is unlikely to return because the newly-minted ruler has, for his second decree, proclaimed that if the Messenger comes back without the culprit of the first burial, he will be killed. The essence of the politics of the play is played out already: Creon cannot force total obedience by decrees punishable by public stoning (the penalty for burying Polynices), and he cannot even ensure that his every Messenger will say (much less enact) that he will return for his own punishment. Sheer power cannot create sovereignty, even if the ruler was legitimately installed in his position of authority. The early, telling interlude with the Messenger is the only comic piece in the play, performing in ludic style the futility of mere physical force. The Messenger's honest proclamation that he will not return after banter with Creon (an everyman palaver that belies mere craven fear) illustrates the farce that bald assertions of raw power make of sovereignty. The decrees of the would-be ruler must make basic political sense, not to mention theological sense, to carry the moral obligatory heft of law. So why is the play not over?

Creon would collapse by his own absurdity, in a foreshortened narrative, were Antigone not after something Else, something More. There is one dualism Antigone mouths that may be her aspiration, although in her flawed humanity, she may be unable to embody it fully: finally, after her back-and-forth with Creon as she is brought before him to account for the second burial, she says she was made for fellowship in love, not hate. She cannot abide her brother's banishment from humanity. And this radically inclusive sense of personhood, transcending the dehumanization of the "enemy" that political statehood might seem to require, is premised on her belief in the piety of the unwritten law, the realm of the final Other, the Wholly Other, the unknowable Other, who decrees for all ages that all human bodies are human.

Butler suggests that what Antigone sought was recognition by the state, citizenship as personhood, a status denied at that time to women and now to many marginalized groups. For Butler, Antigone's obvious melancholy and yen towards death comes from radical exclusion; she is

... surely dying from lack of recognition, dying, indeed, from the premature circumscription of the norms by which recognition as human is conferred, a recognition without which the human cannot come into being but must remain on the far side of being ... a melancholy of the public sphere ... (Butler 2000: 81).

For Butler, the male public-sphere's refusal to acknowledge Antigone's voice renders her without recourse to the full humanity she somehow yearns to experience. Thus, Creon repeatedly conflates her speaking up, owning and repeating her deed,

with her being the man and his being the woman. Creon's sense that any speech/action by Antigone would erase his potency arises from the male monopoly of public voice.

Scholars have argued that the Greek city-states instituted patriarchy in a region previously including many matriarchal and matrilineal societies, restricting the franchise to property-owning citizens (non-alien males), consigning women to kinship and household. *Antigone* is not alone in warning the polis thus configured against failure to honor the feminine. Aeschylus' *Oresteia* ends with a covenant with the Furies (the "steering spirits of the law") in which the now-sequestered feminine must be acknowledged and affirmed (Lattimore 1960: 33: 804–5, 38: 929, 39: 961). The paradoxes of hiddenness (not the least of which is the duress under which the covenant is forged, as Athena has reminded the decision-makers of the thunderbolts she has at hand ...) are not resolved by the Furies' final procession underground, (Lattimore 1960: 33: 804–5, 38: 929, 39: 961) but are central to the uneasy contract between the masculine and feminine. Key to the feminine that these tragedians paint is the spirit: the uncontained, uncodifiable force of religious and familial piety without which humanity cannot sustain itself, much less thrive (Hartigan 2000).

Only if public voice were the sole desideratum of recognition would Butler's analysis work—and yet the final costs to Creon demonstrate that it is the "both/and" of the creative tension between and including the public positive law and the sacred unwritten law that is sufficient to point towards the "excess" of meaning that Antigone pursues. Creon is deaf to the feminine, the holy, and the familial, and that made him, as he says at the end, no one. It empties him of both meaning and the dynamic wholeness necessary for a fulsome public sphere and a wise sovereignty. If Antigone has no public voice to enact the divine and Creon has no private sensibility to hear what Antigone, the Senators, Haemon and Tiresius say, the law will be a rigid, desiccated claw that threatens to shred the sails of the "ship of state" to which Creon is dedicated.

#### *The Unwritten Law*

The fluid notion of a law that exists before all attempts at codification, that is beyond time, seems to be what Antigone believes she is faithful to—even if it cannot be expressed in publicly accessible terms. It is the law of the gods, of Zeus, of ultimate justice. The never-exhausted natural law, the higher law, the divine law—all these are gestures toward that unknowable yet regnant "law" beyond/behind/above/beneath the positive law in which Creon must operate. In the end, he refers to this overarching law as "the old appointed ways" and "the laws of old tradition" (Grene 1954: 197), and "the established laws" (Thomas 2005: 54).

Another view of this mysterious stratum of law is explicated in Robert Cover's iconic *Nomos and Narrative*, a reflection on the role of story in the context of the prevailing mores of a polity.

A great legal civilization is marked by the richness of the *nomos* in which it is located and which it helps to constitute. The varied and complex materials of that *nomos* establish paradigms for dedication, acquiescence, contradiction, and resistance. These materials present not only bodies of rules or doctrine to be understood, but also worlds to be inhabited. To inhabit a *nomos* is to know how to *live* in it (Cover 1983: 6).

Cover's analysis suggests that the way to navigate the something "more" about law is to inhabit the world of living law. Despite his brilliant, ringing text on *nomos*, Cover cannot settle the nature of this sense of law that suffuses a "great legal" civilization. The dynamic that allows law to traverse time and place always exceeds the already, the known, and yet cannot be merely aspirational, living as an ideal only in the yet-to-be. The unwritten law is always writing itself. Yet the law coming into being makes mistakes, as Creon did in assuming that the gods could not condone the honor of burial for an enemy of the state. These (mistaken) attempts at positive law are not self-correcting, so how does the polity ensure that the process of law-making will defer to the unwritten law? At one level, this is the issue of constitutive law, of constitutions that regulate the creation of law—but these meta-processes are themselves fallible as any scholar of U.S. constitutional law can attest.

In *Antigone*, Sophocles gives Creon repeated opportunities to hear the need for modification of his decree. Creon remains unmoved in ways the audience cannot ignore, beginning with the comical Messenger who portrays the baldest resistance to overly autocratic law. Tapping an almost juvenile "you can't make me" strain of critique-by-exit, the Messenger vexes Creon, who literally cannot comprehend how he can prattle on so. Creon's simplistic sense of decree is deconstructed at the outset by the simple servant of the ruler, yet Creon fails to register the blatant statement that the Messenger will not obey such a perverse demand.

This and subsequent opportunities for dialogue, for communication, for discourse in the making of law all point to the touchstone for the unwritten law: it is at the least something that emerges from a complex process, from dialectic and reflection. As Haemon tells his father, law from one person is not law. The unwritten becomes evident through the movement of human discussion among constituents of the community meant to be ruled. The hermeneutic of an unwritten text cannot reside in any single perspective.

Does the sovereign have some sort of privileged perspective on the unwritten law? Butler operates as if there is a set of "rules that govern cultural intelligibility but are not reducible to a given culture" (Butler 2000: 17), but wonders if such rules are subject to critical assessment. She plays with the notion that such rules both codify—and exceed/defy—a postmodern "both/and" based on Foucault's analysis of the attempts of structuralism to identify such rules. Unless the sovereign is constitutively postmodern, Creon's dilemma may not arise from a fatal personality flaw but from something that flows from the nature of law itself. All the writing in the world can never capture what law intends, much less what it cannot know.

In attempting to portray this moving, unstable postmodern take on law, Butler seeks to pass beyond Lacan's "law beyond laws" as something that "will finally put an end to the anxiety produced by a critical relation to the final authority that clearly does not know when to stop" (Butler 2000: 21). There is no rest for the law. (As the French feminists Cixious and Clement put it, finally only sister Electra "orests" in a play in which the weak brother is absolved of mother-murder (Cixious and Clement 1986: 105).) Augustine's maxim comes to mind: restless until it rests in God, the heart and its laws are never guaranteed except through the peace that surpasses understanding. Lacan's oeuvre (Butler's book), and even Sophocles' play (and certainly this chapter) can only allude to the final "stability" of justice.

The resistant stance Antigone embodies seems constitutive of the postmodern, as does the inevitable emergence of the Other in the face of positive laws. Although there seems to be a corresponding search for a Golden Rule (the one Western culture enunciates, or some other), the wisdom traditions seem to contain koan-like paradoxes in their sacred narratives while postmodern discourse is overtly deconstructive. An allusive tilt toward some underlying or overarching Truth may be unavoidable, but it does not seem to hold redemptive promise in Butler's version. If what Antigone "lacks" is less than ultimate absence, and more like political recognition than something transcendent of the very business of politics, Butler's take seems to suggest the obvious solution of female enfranchisement. We are well past women's suffrage, and the tantalizing movement of postmodern fragmentation begs for more than public recognition or political voice for women (Butler 2000).

Ironically, Butler's analysis may be too tame. Creon fears in a way he does not fully recognize that which the Chorus names repeatedly in its rich, persistent call on the Bacchic, the Dionysian, the outlawed night chaos of which law must somehow take respectful account. Antigone's love of her brother and fealty to the gods are not subject to rational encapsulation. When Robert Bolt's Thomas More says "... finally, it's not a matter of reason; finally it's a matter of love" (Bolt 1960: 81), he is making an ontological and epistemic claim about a force that will always exceed and destabilize law, but one without which law has no human meaning. Creon's attempt to enact law to put the enemy beyond humanity produces frenzy that deprives him of both family and an heir, in addition to any meaning. When, through wild, suicidal losses, he has let go of meaning, the Chorus suggests that he has finally come to wisdom.

This wisdom is not codifiable. The loss of kinship and meaning is the threshold into the unwritten, the unwritable—perhaps only that absence is sufficient to render law possible. The temptation of those who write texts is to imagine that they can contain the unwritten.

#### *Public and Private "Force"*

A temptation of the public sphere is to suppose that it contains all human meaning. The construction of humanity, Butler seems to say, is the work of the political. "The slaves, women and children, all those who were not property-holding males

were not permitted into the public sphere in which the human was constituted through its linguistic deeds" (Butler 2000: 82). Despite seemingly critiquing Hannah Arendt's "problematic" distinction between public and private in Greek life, Butler relies on this distinction. Her analysis seems to accept the private as mute and helpless within a despotic patriarchy, and argue that entry into the public sphere by those excluded would change the nature of the "human" being constructed<sup>4</sup> (Elshtain 1981). This suggests a devaluation of the private sphere, a failure to value the transgressive as endemic to that feminine private realm. Yet the dances in the woods at night and the Dionysian rites overflowed with power.

Antigone's actions reconfigured the public. She alone had the courage to voice what Sophocles represents as the general view of the populace (the male senators very much included) that Creon's edict was unholy. Creon's fear, that she be the man and he the woman, comes to pass. She is more of a "man" than the Greek men, and Creon's inability to do the (more feminine) receptive task of listening creates a crisis for the state he is attempting to protect. Thus, the trajectory of power in the play belongs to the allegedly disenfranchised woman who refuses to be closeted in private, but openly follows the law of love.<sup>5</sup>

The nature of Antigone's love is confounded by her allegiance to the general unwritten law of the gods at the same time she was honoring her peculiarly particular brother. On the one hand, all human bodies were to be buried. On the other, only his sister elected to perform the required ritual affirming this very public male's humanity. Even if Polynices' challenge to the "rightful" sovereign made him anathema to the state, he should have been covered by a burial taboo that extended to those not normatively, publically human; women and children, slaves, non-property-owners, all merited burial. Antigone, from the realm of the public nonentities, pushed her brother back into the public sphere only because Creon tried to deny him even the allegedly diminished humanity of the private sphere. In this act, Antigone demonstrated that not having political franchise did not erase the private from political potency. Because the men had ceded all sovereignty to Creon,<sup>6</sup> only a woman who had not given away her power was able to act with sovereignty.

4 Elshtain's book centered this topic in contemporary modernist discourse, leading to a discussion of whether "moral" women would indeed make a dent in the "immoral" public sphere.

5 Antigone's actions can be read as contrary to caring relationship, of course. Thus, Judith Leonie Miller concludes that "[a] wholly contextual, wholly relationship-oriented person, one who sought to 'avoid harm and preserve relationships,' would have chosen to preserve familial ties among the living, rather than insisting upon the law of the gods with respect to the dead" (Miller 1990: 464).

6 The first response to the decree, from a senator is this: "It is your sovereignty's prerogative to pass with absolute freedom on the dead, and us, who have survived them" (Steiner 1986: 9).

This capacity for affecting the public sphere so dramatically arises from the nature of "private" power. From the outset, the Chorus signals the presence of the Dionysian, calling for the "night-long chorus" of the Theban boy divine, Bacchus. But at that very "strange unwonted hour," they are summoned by Creon (Steiner 1986: 7), who does not know what he is doing, or when, coming at the time of unreason to attempt state-enforced reason. The man who presumes to risk uninvited intrusion into the wild rituals of the night risks dismemberment. And the ruler who fails to attend to the feminine Other cannot survive, as Aeschylus warns in the *Oresteia*. There, the Furies, the daughters of the night, agree to pass underground out of the private gaze but the play explicitly concludes that they must be honored for the polity to thrive.

Thus there is both a distinction and a unity, in the public and the private. The gravamen of *Antigone* is similar to that of religious faith—to remind us that there is true power in Spirit that we can never comprehend. Spirit is an ontological, epistemic, and causal force. Butler longs for public power and recognition for Antigone, and so she seems to miss the force of mind/spirit/soul. Richard Rohr reminds those from my tradition that the Gospel, the Good News, keeps trying to retell that story. Reflecting on Jesus' entry into Jerusalem on Palm Sunday, Rohr notes that "the capital city hardly notices this kind of power, as we probably wouldn't have either" because it is "political power that fascinates us, not men on donkeys" (Rohr 2002: 180). We also may fail to notice that while the lone women of "precipitant" spirit, like the man on a donkey, may have to pay a high price for resistance, still their power in service of divine law is remarkably effective.

This failure to acknowledge the causal impact of (women's) spirit comes from an outdated perspective that Marilynne Robinson, Pulitzer Prize winning author of *Gilead*, explores in her stunning *Absence of Mind*. The contemporary phenomenon of mental reductionism that subtracts mind and soul from the concept of the human can only fall short (Robinson 2010). Robinson observes that such a restricted sense of humanity comes from "the positivist rejection of metaphysics" and an assumption, historically conditioned, that religion is the enemy of true understanding (Robinson 2010: xiv, xv). Her exquisite text proceeds to unveil the poverty of such an account and the dazzling array of even scientific accounts of "reality" that render human life so much more meaningful than the positivist thread that still haunts the academy and much public intellectual commentary.

One of Robinson's main points is that the very science that Western rationalism created has escaped the conceptual confines that Newtonian, modernist worldviews created. Science is now much more like the wondrous, mysterious world we can never fully comprehend, now illuminated by the imaginative edges of physics and cosmology so that, for example, "[g]ranting evolution, its materials can only have been the stuff in which a brilliant complexity would have inherited since long before the first generation of stars, to choose a date at random" (Robinson 2010: xv). No longer can modernist secular accounts claim epistemic (not to mention poetic) superiority while bypassing the realm of mind and soul.

One of my favorite moments in Robinson's analysis is when she tracks cutting-edge neuroscience through to the seeming physical location of decisions in the brain. At the point that the nanoscience of synapses might reveal what a decision "looks like" in the material realm, the uncertainty principle of particle physics has been reached. The "thing" that science is pursuing is scientifically indeterminate. Robinson portrays this kind of conundrum as constitutive of the true "material"—a category that modernity has emptied of its magic through blunt, inadequate over-analysis. "Matter", as feminist theologians have known for some time, is much richer than a dualistic view of it suggests. "Matter" and mater and mother and gaia are all forces to be reckoned by another medium than mere quantification and empirical rendition. The positivist attempt to make phenomena "subject to materialist explanations," as Robinson paraphrases it, fails because phenomena like "dark" matter and energy "demonstrate, as physics and cosmology tend to do, that the strangeness of reality consistently exceeds the expectations of science" (Robinson 2010: 124). The ten or eleven dimensions of contemporary physics and its parallel universes combine to render a view of "reality" that is truly bizarre—and that is Western science. The very large and the very small become relevant for important things like the "location" of decision-making in the brain and the origins of "the" universe, and these liminal realms are populated by uncertainty, indeterminacy, and the majority of "reality's" very unknowability or "darkness." The scientific examination of the texture of the material has revealed a world of not only wildly implausible, but also nearly incomprehensible constructs of mathematics and imagination.

Modern thought, in contrast, offers such devices as "natural selection" and "selfish genes" that determine human destiny by operating beyond the conscious life of the persons involved. Robinson muses that "... one might wonder if some unacknowledged metaphysics lurks behind the para-scientific positing of those immortal, incorporeal destinies that possess us to their own inscrutable ends, rather in the manner of the gods of Greek mythology" (Robinson 2010: 70). In terms of epistemology, whatever the source of these "immortal, incorporeal" forces, they are the functional equivalent of God. They cannot be proved or made manifest in some irresistible self-evident guise; they are the objects of faith based on richly complex experiences and hypotheses that produce plausible, useful stories of things like evolution. They are not, however, sufficient either to provide plenary (or redemptive) meaning to human life, or to supplant the life of spirit and the hitherto hidden feminine face of law.

#### *Law, Religion, and Science*

Some of the paradoxical tensions among law, religion, and science create stories. In these next stories, a rejected "right-wing" religious scholar's perspective contains pearls of reason, a Supreme Court justice is too weary to deal with those who listen to God, and the contested knowledge claims of the disciplines (science, law, theology, the academy) all blink when they should embrace their own fallibility.

As with all human story-telling, my version must also be only partial. But the two main motifs—the temptations of Knowledge (for all—science, law, and religion alike) and the destructiveness of forbidding religious speech—need particular scrutiny. We consider here the law's rigidity in the face of faith, and suggest that the cat is out of the bag, so that the law has no viable alternative: it must begin to include even what sound to some like yowls in its discourse. As it is, the current discourse of law is "hyper-formal" and incapable of reaching the real dilemmas of governance. The unbagged cat, the feline (even feminine?) presence, is the Sacred. We are in times of "reenchantment" after the inevitable failure of orthodox secular discourse. The cat is about in the courthouse, yet judges ignore the possibility of incorporating the persistent reality of faith into their law talk. They both fail to accord a role to the other ways of knowing that persons of faith claim, and to realize the double-bind they have created by demanding purely secular discourse and then calling "dishonest" any attempts to translate faith-based views into "secular" language.

#### *Other Ways of Knowing*

The need to avoid religious talk in the public sphere and particular in legal discourse is often motivated by a troubling pragmatic calculus. This calculation about what is really going on and what may be said haunts the courts' treatment of religion and is salient in the law's treatment of how we account for the origins of life.

As Arthur Leff long ago remarked, opinions may be morally correct even if they aren't rationally well-argued (Leff 1979: 1233). The Republican women in my neighborhood are, according to the "wisdom" of the Gospel and Plato, sometimes privy to what is "hidden from the learned and the wise," who think they know. Not that my neighbors' politics don't tend to drive me crazy.

This discussion takes place in the post-secular, the time after Enlightenment Reason when those who conceived of themselves as more thoughtful could claim the high ground of truth. Included in the dethroned sovereigns of Knowledge is the old version of Western science. Ironically, the most advanced scientific thought takes account of the Unknowable, of Chaos, of Uncertainty, and of parallel universes and dark matter. Yet much of what we accept as public political discourse is stuck in out-of-date science and the conception that all people of faith are pre-secular. There is a fundamental lack of both respect and intellectual acumen in addressing faith and those who confess to it.

Western science at its margins and the most compassionate reflections of believers have begun to cross and interweave, blurring boundaries of categories of knowing (Geertz 1983). But Anglo-American law courts, designed to handle disputes as radically disjunctive, as either/or, have not been flexible in response—a result of the desiccated legal language of late secularism in the United States. The law in the United States is currently unable to accommodate the state of "reason"

that is left after secularism has been deconstructed, unable to incorporate Socrates' insight that wisdom begins in knowing that we don't know.

The litigation surrounding Intelligent Design (ID) and evolution highlights the current inability of U.S. law to handle the fragmentation of knowledge that post-modern thought highlights, and to acknowledge the breakdown of the "wall of separation" between so-called "science" and so-called "religion" in a post-Enlightenment world. The "fringe" of what has been called scientific thought has for some decades ranged beyond the modest claims of nineteenth century empiricism into the realm of quarks and string theory and an embrace of uncertainty and chaos. The core of initial literalist Christian intransigence in the face of a stunningly complex Scripture has also expanded into an array of sophisticated portraits of a God Who may have created the cosmos, but Who did so in a way that reinforces Christianity as one of the world's great Mystery religions.<sup>7</sup> Theology now elides into postmodern philosophy, celebrating with deconstruction the necessary iconoclasm in the growth and even "evolution" of human consciousness and unconsciousness.<sup>8</sup>

Cases such as *Kitzmiller v. Dover Area School District*,<sup>9</sup> struggling over the inclusion of what proponents experience as scientific views on creationism, involve legislative attempts to open up the closed camp of science, and have resulted in generally divisive analyses. In *Dover*, parents sued the school district over its mandate that intelligent design be included in the science curriculum that covered evolution. Requiring students to learn what the court viewed as a form of creationism was found to be a violation of the Establishment Clause. In the "origins of the world" controversy, even those suggesting that Intelligent Design is an alternate world-view to evolution must ground out in solely secular language because of legal strategy and must capitulate to a modernist dualism between science and religion, when they do not believe in the language they are forced to use. The answer to this root tension is neither a free fall into theology nor is it a continued dictatorial segregation of what was once called "science" in school classrooms. Our children need an explanatory conversation that reflects the complexity and paradox of dark matter and black holes (and the epistemic fragility of any account of "reality") along with the "dark" forces of the religious Other.

### *Some Intellectual History*

With the advantage of European perspective, philosopher Leszek Kolakowski anticipated the postmodern epistemic move that the US has yet to embrace, finding in Western philosophy the pre- and post-analytic threads of religion

<sup>7</sup> An early harbinger of the inter-faith implications of each tradition's mystical strands was Thomas Merton (1968).

<sup>8</sup> For a prominent contemporary practitioner of this philosophy at work, see Taylor (1993).

<sup>9</sup> *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005).

hiding in the allegedly secular utopian systems like Marxism. Kolakowski's and others' renditions of the inseparability of religion and philosophy reveal the intellectual limits of the blunter versions of science and rationality of the legal system. John Gray, commenting on Kolakowski's latest translated work, *Why is There Something Rather than Nothing?*, observes philosophy itself is reluctantly loitering on the old ground of "reason" as the courts themselves are not even glancing around to new ground. For philosophy, "... religious experience has rarely been given much attention, and aside from the few who devote themselves to antireligious polemics it seems tacitly agreed by most philosophers that religion is not a worthwhile subject of inquiry" (Gray 2008:43).

As Gray concludes, reason has run the course of its pose as the unnamed god (and, I suggest, the "invisible hand") and both philosophy and the law premised on what philosophy offers for knowledge-bases must acknowledge the idol's fall in order to make human sense: "Whether learning the limits of reason does lead to faith—and if so, what kind of faith—may themselves be questions that cannot be answered" (Gray 2008:43). Yet, a familiar skepticism that poses as "no one has been smart enough to portray the Truth in a way I can't demolish" seems more comforting to academics and judges than mysticism, which poses with humility in the face of the other.

Working with changing ideas of knowledge is the task facing the law and it is no less intimidating to law—premiered on notice, generalization, and knowledge—than the title of Jacques Derrida's classic, first presented in a U.S. law school, may suggest: "The Force of Law: The Mystical Foundations of Authority" (Derrida 1990). No judge wants to acknowledge that his or her authority is so, well, subject to deconstruction (the public in the United States is on to them, however). In an area where the outcome of the formal process is allegedly to speak the truth—the literal meaning of verdict—such epistemic ambiguity is not easily smuggled into judicial needs for certainty, authority, and repose. Yet the violence that dwelling in the adversarial edge of law engenders mirrors the either-or mentality circling the evolution debate. Judges like Jones in the *Dover* case banish the other, and "assert that this one is law and destroy or try to destroy all the rest," as Robert M. Cover's iconic article, *Violence and the Word*, lamented (Cover 1986: 1608–10).

Crucial to a more fully human and inclusive discourse in the law is the proviso that paradox is not sheer relativism or incoherence—discourse after paradox is always haunted by the necessary-but-not-sufficient dualisms that converge into creative discord, and the contribution of reason is never irrelevant. Nor is what Emerson called the Oversoul and Freud the Unconscious. Reason itself is, as is whatever we may call soul-work, necessary but not sufficient.

The creationism-intelligent design cases illustrate the false modesty of the legal system's treatment of other ways of knowing. With Justice Black's observation that no-religion has become the religion of the law ringing in the background,<sup>10</sup>

<sup>10</sup> "America has long been drawn to what the Stanford religious scholar Frederic Spiegelberg called, sixty years ago, the 'religion of no-religion'" (Cover 1992: 38).



the courts have persisted in a solo parochial epistemic theme parading as mere practicality and “what can be proved” without acknowledging the ground on which they stand—they stand isolated in Modern Western “reason” in a plural world of truth claims. To fail to engage the epistemologies of others including the religious, even the religious Right, is to condemn law to irrelevance because the secular discourse is radically under-inclusive.<sup>11</sup> Not surprisingly, compliance studies concerning how the Court’s disrespect of religion have affected the ordinary world of practice show that the law cannot force what citizens know to be illegitimate. At the end of the *Dover School District* case, one advocate asked if the fight would be resurrected in the guise of “emergence” theory—how will it not? How does law expect to silence the soul? Or even the 90 percent of people in the U.S. who say they believe in God? If there is a God, it makes a difference—even if we cannot agree on what that means. I and others believe that agnostics and atheists are part of the apophatic tradition of theology, of a God who exceeds naming. Thus, it is not that those like Sandy Levinson who profess a lack of spiritual sensibilities are left out of the conversation. They may perhaps lack a bit of “soul”—and perhaps not (Levinson 1992).

As early as 1946, political theorist Hans J. Morgenthau used the term “scientism” to criticize modernist rational empiricism in *Scientific Man versus Power Politics* (Morgenthau 1946). In 1989, James Boyd White’s elegant essay challenging Posnerian social scientific economics recited the overwhelming intellectual acceptance of a complex and contingent science, and then noted that “the fact remains that despite this outpouring of work of the highest quality, the image of thought and discourse with which I began—we might call it ‘scientistic’—is deep in our minds and culture, as a kind of instinctive habit we can hardly imagine giving up” (White 1989: 2017).

Scientism is the edge of science that resembles “the enemy”: those rigid fundamentalists. It is an “instinctive habit” much as unexamined religion (or any other belief system) becomes. Such unmodulated views of science have themselves been assailed by science.<sup>12</sup> Recent books by scientists both challenge and relocate evolution in such a way that the necessity for us to imagine ourselves as undetermined and creative arises from scientific, reasoned imagination. In a book named for an engineering term for an *ad hoc* solution (akin to deconstruction’s bricolage), *Kluge*, Gary Marcus of NYU argues that evolution has not followed

11 Pico Iyer suggests that both religion and non-religion can become false idols, unexamined belief systems (Iyer 2008: 38).

12 They are also assailed by the rest of non-science; as James Boyd White notes, “the use of science as a model for thought about human life and society has been under attack for some time, and from a wide range of directions. To think only of recent work, and only of Americans, there is Rorty in philosophy; Geertz in anthropology; Becker in linguistics; McCloskey in economics; Booth, Fish, and Poirier (among many others, and themselves in very different ways) in literary studies; Havens in psychiatry; Gilligan in psychology; Goffman in sociology, and I am sure many more” (White 1989: 2017–18).

some smooth incline towards “progress” but rather, because human memory developed in our prehomimid ancestry to respond with immediacy rather than accuracy, has produced persons who are not primarily elegant logicians but complex, quirky actors. While Marcus seems to consider the resulting human beings to be “contaminated” by emotions, one need not follow his puritanical-rational evaluations to use his insights about the less-than-linear-logical nature of evolution.

Perhaps more centrally, Bruce Lipton, a cell biologist who teaches at Stanford, directly challenges the traditional theories of evolution (Lipton 2005). By focusing on the newly-ascertained location of the “brains” of cells in their membranes rather than in their nuclei, Lipton argues that the direction of human mutation is not determined by the environment and reactions to it, but by the organism where it meets its environment. This relocation of agency and, thus, causation at the cellular level puts in question the very notion of evolution as we have known it. It suggests something about spirit, although Lipton, a former non-believer, has a difficult time coming right out and saying so in a way traditional religionists might recognize. It is not surprising that a scientist would find it hard to accede to the power of traditions that have been the historical foes of science, but Lipton’s opening of the cellular level of science to what has been called spirit is irreversible.

In *Bodies and Souls, or Spirited Bodies?*, Nancy Murphy (2007) takes a “physicalist” stance but argues that the approach from a material point of view does not trump spiritual versions of life. Murphy identifies as empiricist in some final analysis, but does not make that commitment inconsistent with the possibility of something about the inner, about consciousness, that is not exhausted by physicalist explanations.

### *God Told Me To*

In the Spring semester of 2008, Justice Antonin Scalia visited our law school. He responded to a particularly gifted student who tried to call for the enforcement of rights by in essence calling him undemocratic. (“Get a law passed” Scalia admonished him, in order to be democratic.)<sup>13</sup> A follow-up question noted the Court had been unwilling in *Oregon v Smith* (the peyote case, in which a Native American fired for ceremonial use of peyote was denied unemployment compensation)<sup>14</sup> to enforce, not a new-fangled penumbral right, but a very original enumerated right, the right to free exercise of religion.

13 Scalia’s rhetoric is notorious. Marie A. Failing has addressed him as a person of belief in her gentle but incisive style (Failing 2003), but less gentle is Stephen A. Newman’s, *Political Advocacy on the Supreme Court: The Damaging Rhetoric of Antonin Scalia* (Newman 2007b).

14 See *Employment Div., Dep’t of Human Resources of Oregon v. Smith*, 494 U.S. 872, 890 (1990).



splits the dominant scientific paradigm to create space for feminist science, while MacIntyre faces the fragmented epistemic bases of ethics by proposing a discourse that does not pose as “rational” in any determinate sense. There are no unchallenged unitary explanations left.

The default rationalism of scientific intellectual isolation has been fractured by

“postmodernism” whose self-declared radicalism has recently included making common cause with various forms of religious “fundamentalism” in trying to undermine the authority of science. Clearly lost on [mainstream science and law] is the synergy that the original Enlightenment enjoyed with the first wave of evangelism, what in the American colonies was called the “Great Awakening” ... an opportunity to rekindle that synergy remains in the two-thirds of Americans who claim to believe in both divine creation and evolution (Fuller 2005).

This last set of observations are from Steve William Fuller, the *Kitzmiller* expert who, although he does not subscribe to Intelligent Design, respects the epistemic impulse from which it arises.

Evolution without acknowledgment of what cannot be discarded would be a fatal deviation, as Antigone knows in some elemental way. The metaphysics of “evolution,” as Robinson has so deftly identified them, must give appropriate deference to Other metaphysics.

#### *“Force” of Law*

Force of spirit and force of law are interconnected and one of the threads between them is violence. Jacques Derrida explored this in his reflection/deconstruction of Walter Benjamin’s writing about the divine “violence” that instituted law. Before law was instituted, there was no law—and the initial proclamation of law had the force of violence (there could have been no prior notice). The monopoly of legitimate violence as the definition of law/polity is an acknowledgment that coercion is inherent in human law. The promise of many spiritual traditions is that the law is merely the right relationship of our very being with the Supreme Being. Postmodern thought moves beyond being into something that acknowledges that what we have conceived as being is beyond us, ever-moving in construction and deconstruction, in iconoclasm and worship. Law then is lawless and law-seeking, always moving toward justice knowing that it will never succeed. That constitutive imperfection of law is the correlate of “epistemic humility”—the realization that law in human life will never instantiate perfect law. As part of that restless, ever-incomplete dynamic, Antigone, the mysterious feminine Other, moves according to the dictates of the unwritten law known only to what some call God.

Is the very constitution of our humanity a mere act of violence and coercion, an inherent stamp of *imago dei* (the image of God) on us that we cannot resist or transcend? Or is the image of God the very blueprint of creativity? Is it that we must

long always for God, or that truly somehow in some final sense, it is the beauty, the goodness, the justice, the supreme balance and peace of Godliness that are what we long for because they are both infinitely valuable and never predetermined? Are we just programmed to love God, to have our hearts rest only in God—or is it that “rest” itself carries that meeting only after the unfolding of what could not be programmed, including our irreplaceable participation in the cosmos? In a cosmos of ten or eleven dimensions, space-time continua, and parallel universes, I’m betting for unfolding unknowns.

Antigone enacts an unfolding unknown. Creon, an earnest ruler, is on guard against corruption due to money and perhaps even nepotism, but he cannot anticipate fidelity based on the “old, appointed ways” because he imagines he is beyond that. With a pride of self-consciousness we can recognize, Creon thinks to move beyond the beliefs of his fathers and mothers into a worldview corrected by reason and reflection. With a trailing “anxiety of influence” akin to Harold Bloom’s insights about “new” literary creations and Kuhn’s new paradigms, Creon thinks he can move beyond the universe in which Oedipus ruled and failed. Creon cannot imagine a “both/and” that both respects the weirdly faithful/fallible reign of his predecessor and moves beyond it, so as to learn from the past without presuming to erase it. The daughter, by honoring the last male scion of her parents, tenaciously affirms relational ties with what has come before. The hubris of reflective thought believes that it has killed the father, while the faithful daughter knows that new knowledge is inadequate and impossible without respect for its never-fully-known antecedents. As women move from the Greek public sphere at the outset of the patriarchy, their “knowing” becomes that much more essential.

Creon’s law is arguably the result of the patriarchy’s attempt to reform its antecedents in the name of an all-male “new public rationality” that tragically sought to erase the “old appointed” ways of the people (Steiner 1986: 182). Reform through force of law that fails to respect the value of widely held intuitions of spirit, even as it hopes to better that existing world view through reflection, does violence. The turn of analytical or critical thought cannot think to erase what has been. Rather, it may hope to renew and even reform. A legal process that cannot take account of the way the populace has lived their lives is one that can rely only on violence and a presumed superior insight, a dangerous stance indeed. The cries at the time of the civil rights movement in the mid-twentieth century that “you can’t legislate morality” were both right and wrong, as mere political power is insufficient to change hearts and patterns of obedience through moral suasion rather than mere threat of enforcement. Political power may have political legitimacy, but that does not translate automatically into an obligation to obey the law. Antigone represents a millennial stance of resistance to mere edict. Even though her accounts of why she disobeyed are in tension in terms of reason, they play the chords of underground forces of kinship, loyalty, humanity, feminine insight, and love in the face of political consolidation. That aspect of the human that remains forever elusive tends to dwell in the feminine, the so-called private,

the Dionysian, the spiritual. Without it, law is letter only, a mere literal gloss on the armies of the sovereign.

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