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### Unlaw

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# Unlaw

EMILY ALBRINK HARTIGAN†

I don't care about the word postmodern. I do care about the shift to the other and not the self. The shift is about undoing the arrogance and limits of modernity, especially reason. In this shift, the category of the impossible is again very important.

David Tracy<sup>1</sup>

But faith purged of myths, the monotheist faith, itself implies metaphysical atheism.

Emmanuel Levinas<sup>2</sup>

The deadly seriousness that prevails in the early twenty-first century is appalling to those women who can see this as a sign of spiritual decay. . . . [We need "Elemental Laughing" as] a declaration of independence from the prevailing mentality.

Mary Daly (self-proclaimed revolting hag)<sup>3</sup>

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1. Lois Malcolm, *An Interview with David Tracy: The Impossible God*, 119 THE CHRISTIAN CENTURY, Feb. 13-20, 2002, at 24, 24-25, available at <http://www.religion-online.org/showarticle.asp?title=2269>.

2. EMMANUEL LEVINAS, TOTALITY AND INFINITY 77 (Alphonso Lingis trans., Duquesne Studies Philosophical Series No. 24, 1969).

3. MARY DALY, AMAZON GRACE: RE-CALLING THE COURAGE TO SIN BIG 37 (2006).

## INTRODUCTION

We are in the times of “unlaw.” Our “official” cultural/political/legal realm has simply bottomed out. Unable to contain the deliberate manufacture of non-realities masquerading as true,<sup>4</sup> unable to fathom the dilemma between religion and politics,<sup>5</sup> while trapped in a resolutely “secular” legal language of patently contradictory “reasoning” in its “highest” law, and unable to stem the sheer antinomianism of an Attorney General who justified torture because no “quaint” law could restrain him, we are lawless.

The academic term is “antinomian”—against or without law. But we are in a time both antinomian and unprecedented, a time I call “unlaw” because it is both a point in circular time, the time of eternal return,<sup>6</sup> and a point never before reached.

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4. For example:

In an October 14 interview from Iraq, [First Lieutenant] Lyle Gilbert announced that a major U.S. military operation was under way in Falluja—three weeks before the offensive that eventually recaptured the city began. A senior Pentagon official told CNN that Gilbert's remarks were “technically true but misleading.” It was an attempt to get CNN “to report something not true,” the official said.

*Pentagon Debate Rages over “Information Operations” in Iraq*, CNN.COM, Dec. 2, 2004, <http://www.cnn.com/2004/US/12/02/pentagon.media/index.html>.

5. For the view that U.S. Christians correctly perceive as anti-religion, see, for example, Adam Piore, *A Higher Frequency*, MOTHER JONES, Dec. 2005, at 47, 47-48. Piore “reveals” this pernicious plan: “[S]preading the word of the Lord and offering an alternative to the creeping secularism that they see as responsible for America’s moral decay. ‘When you secularize a culture,’ says [Salem Communications co-founder Stuart] Epperson, ‘you lose your moral compass.’” *Id.* Unfortunately, Piore, and most self-styled secular commentators, are unable to distinguish between what the late Eric Hoffer used to call “true believers” and people of faith. ERIC HOFFER, *THE TRUE BELIEVER: THOUGHTS ON THE NATURE OF MASS MOVEMENTS* (1966). The former exist in all stripes, from atheist to fundamentalist.

6. For notions of return, see generally CHARLIE SAVAGE, *TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY* (2007), and Lois G. Forer’s rich post-Nixonian *THE DEATH OF THE LAW* (1975). Forer’s sense of law’s demise was based on “scofflaws” both in the population and in the government, and a disregard of the Constitution, particularly separation of powers and civil rights. See LOIS G. FORER, *THE DEATH OF LAW*, at xiv (1975).

This unlaw infuses both the practical, applied, experiential world of politics, and the intellectual world of “philosophy” and “theology” as well as “political theory.” In “reality” as many commentators see it, and in the realm of human attempts to reflect on that reality, the old laws are dead. If, in the West, we have moved “beyond good and evil” as Nietzsche put it,<sup>7</sup> it is hardly surprising that we have moved beyond law.

Meanwhile, in this state of non-law, we incarcerate a higher percentage of people than any other developed nation, and pose as the ultimate legitimate force in the world. The indices of force, internal and external, to conscious compliance with authority without violence, has become so absurd that prison-building is one of our fastest-growing industries, and tax-evasion a fact of open popular culture. Citizens, aghast at the “illegal” immigrants who “broke the law,” are willing to visit severe penalties, vigilante (that is, unlawful) justice, and 700-mile fences (for a more than 2000 mile border) on our neighbors. Supreme Court justices, contrite and law-affirming in their confirmation hearings, subtly renege on promises not to overturn precedent in central cases. The President denies that Congress has oversight authority, and the Vice-President declares that he is a legislator (if so, how can he be under executive privilege?). The press notes the absurdity of such shell games. We move on. The President declares that we will not torture when we supposedly never had (when did we stop beating our wives?). Our national “Justice” Department falls apart under the helm of a remarkably bad liar and the author of our legal declaration that we are a nation that affirms torture—by law.

We are in the time of unlaw. None of the top alleged state defenders or enforcers of law behave as if law did not come out of the barrel of a gun. Partisans on both ends of the political spectrum decry the loss of Constitutional governance, but impeachment is deemed politically impractical. We claim to value money so much that it is speech, and thus free under the First Amendment, and so we block election reform in an admittedly “broken” electoral system, yet we are in increased deficit spending, our

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7. FRIEDRICH WILHELM NIETZSCHE, *BEYOND GOOD AND EVIL* (Rolf-Peter Horstmann & Judith Norman eds., Judith Norman trans., Cambridge Univ. Press 2002) (1955).

national debt primarily beholden to those wicked folks around the globe, the Chinese. Our stock market fluctuates wildly and we know that there is no new world order on the horizon. Our “war” on terror is bankrupting us as we horrify the world with our usurpation of international authority. And we are losing that “war” as we feed its partisans. We are not doing well by anyone’s lights.<sup>8</sup> Gays are still living in sin and Jesus is not on the dollar bill. We are not even pragmatically unlawful.

When our primary institutions of law are brazenly unlawful—even anti-law (why bother with draconian spy legislation like the Patriot Act, when the decider-in-chief is going to violate even them?)—what are we to do with the ensuing parody of law? One option might be to use Freud’s “joke work” strategy<sup>9</sup> and join in the aspects of popular hostility to law that contain some truth. Collect lawyer jokes. Wallow in irony. Dress like Duncan Kennedy (if we are white, so our race privilege can carry us through<sup>10</sup>). Ask for forgiveness, for pardon (if we are inner operatives for the President or the husband of a major contributor to a Presidential campaign). What form might a redemptive move to humor, a move beyond mere irony, take?

A major temptation is outlined in Peter Goodrich’s *Satirical Legal Studies: From the Legists to the Lizard*.<sup>11</sup> Peppered with examples such as the lament that the *Buffalo Law Review* has “no studies of buffalo law.”<sup>12</sup> This article records the legacy of commentary on law that exceeds the merely humorous or even parodic, and thus of its nature is biting. At its best, Goodrich proposes, “satirical legal scholarship enlivens argument with the political scintilla of humor; in doing so, it offers the persuasive force of a theater of reason that is willing to cross boundaries,

8. It is too silly to count Halliburton’s increasing profits now that it is located in Dubai.

9. Homi K. Bhabha, *On Cultural Choice*, in *THE TURN TO ETHICS* 181, 194 (Marjorie Garber et al. eds., 2000) (quoting SIGMUND FREUD, *JOKES AND THEIR RELATION TO THE UNCONSCIOUS* 156-57 (1976)).

10. I owe this observation to a well-dressed African-American at the AALS many years ago, who opined that he wished he were free to dress as casually-grungy as Kennedy.

11. 103 MICH. L. REV. 397 (2004).

12. *Id.* at 402 (citing Eric M. Jensen, *A Call for a New Buffalo Law Scholarship*, 38 U. KAN. L. REV. 433 (1990)).

subvert disciplines, mix genres, and break laws.”<sup>13</sup> Legal satire is unlaw, also.

This is what Derrida suggests in proclaiming that his book on love, *The Post Card*<sup>14</sup> “had to be farci”<sup>15</sup> of its very nature. Tom Shaffer has put it this way: to speak of ethics, one must “speak as a fool but . . . speak anyway.”<sup>16</sup> To speak of anything fundamentally (or floatingly)<sup>17</sup> important, one must risk satire.

Goodrich assures the reader that none of the satirical barbs are aimed at the reader, however: “The mirror of satire has been shown to reflect every face except that of the viewer.”<sup>18</sup> Concerning a medium that purports to have political force and, well, “satirical bite,” Goodrich’s ploy seems a tad disingenuous. Are we not all somewhat touched by the human frailties of the objects of satire? If not, our enterprise seems mean-spirited, redolent of “we-they” mentality, and impervious to real change of heart or mind (or both).

In the end, Goodrich does not leave the reader (or writer) in such impunity. The play of satire takes place in the paradoxical realm of human fallibility, but with an intimation of Something More:

The philosophical theme of satirical legal studies is thus a modest one. It proposes an effort to give up on the judgment of God while knowing full well that there is a time at which such determination is inevitable. The satirist in that sense behaves badly or at least irreverently, and endeavors to hold open the site of judgment . . .<sup>19</sup>

13. *Id.* at 409.

14. JACQUES DERRIDA, *THE POST CARD: FROM SOCRATES TO FREUD AND BEYOND* (1987).

15. Jacques Derrida, Jacket Comment on *id.*

16. THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT* 227 (1981).

17. This refers to the unanchored discourse of postmodernism that Patricia J. Williams so winningly evoked by her enigmatic response to her sister in *THE ALCHEMY OF RACE AND RIGHTS* 7 (1991).

18. Goodrich, *supra* note 11, at 411.

19. *Id.* at 512.

The satirist is “uncertain about uncertainty”<sup>20</sup> in his view, and at the same time tries to reconnect the seeming nonsense of legalisms with the world they are supposed to govern. But God, fundamentally uncertain, remains. Satire is not holy, or wholly, serious.

However, “law” and unlaw both inhabit terrain that some consider deadly serious. The iconic Robert Cover wrote of law and violence, reminding us that law operates with the force of life and death, custody, and freedom.<sup>21</sup> And in such a public realm where life and death are at stake, legal commentators are loathe to risk discourse that would give less than full dignity to the awful matters at hand. One major attempt to rid legal commentators of this unnecessary contingency was the Enlightenment project, intent on making law reasonable. In contrast to reason was faith. With good reason, commentators fear the potentially lethal work of religion, ignoring or failing to anticipate the equally lethal work of non-religion (Stalin, Hitler, Halliburton).

### I. UNSMILEY FACE

“On one shore, political institutions are conceived in terms of divine authority and spiritual redemption; on the other they are not. And that, as Robert Frost might have put it, makes all the difference.”<sup>22</sup> In a recent *New York Times Magazine* article, Columbia University Humanities Professor Mark Lilla sets up this unfortunate (rude, even)<sup>23</sup> dichotomy after an arresting opening: “The twilight of the idols has been postponed.”<sup>24</sup> Yet he concludes with a relentlessly anti-religious pessimism about a world “where faith still inflames the minds of men.”<sup>25</sup> Apparently, he has not heard of Mao or Stalin or Hitler or Pol Pot or the openly

20. *Id.*

21. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1616-18 (1986).

22. Mark Lilla, *The Politics of God*, N.Y. TIMES, Aug. 19, 2007, § 6 (Magazine), at 30.

23. See Goodrich, *supra* note 11, at 469.

24. Lilla, *supra* note 22, at 30. I love how the secularists know more about God than we doubter-believers; they even know “His” politics.

25. *Id.* at 55.

secular Saddam Hussein. Apparently, the best the *New York Times* can come up with in its consideration of religion and politics is pre-Enlightenment stereotypes that divide humanity into the enlightened and the unenlightened, and we “religious” folk know which bunch we belong in. Neither gods nor ungodly fare too well with satire. Professor Lilla should try it. Even Scripture does not do too well with humor. In my tradition, the one human emotion missing from the Good News is laughter—Jesus weeps, shouts, curses, and proclaims, but never even chuckles. Given that Jesus’s most constant target was lawyers (also included in the scribes and Pharisees), those of us in the justice business might hope for a little satirical dispensation.

What of the other traditions concerning laughter? The wonderfully complex writer, Emmanuel Levinas, wrote philosophical texts that do not betray a sense of humor, but a relentless sense of responsibility.<sup>26</sup> A prominent Talmudist and also a philosopher in the phenomenological tradition, Levinas was Jacques Derrida’s mentor. Derrida was patently playful (I recall the time that his presentation consisted of reading the copyright law aloud), but also radically faithful to conversation with Levinas and those of the continental tradition considering ethics as primary. So what of Levinas’s famous “face of the Other”<sup>27</sup> and the farce that Derrida invokes? How can they aid the Anglo-American narrative of law and unlaw? Crucial to Levinas’s enterprise is that he intended to portray a notion of “religion entirely different from that which the secular fight . . . .”<sup>28</sup> Perhaps with Levinas we can slip the spiritual camel’s nose back into the political tent (where it has been all the time).

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26. This concept is pervasive in Levinas’s thought. It is endemic, for example, in EMMANUEL LEVINAS, *OTHERWISE THAN BEING OR BEYOND ESSENCE* (Alphonso Lingis trans., Kulwer Academic Publishers 1991) (1974) [hereinafter LEVINAS, *OTHERWISE THAN BEING*]. A relatively straightforward entre to Levinas’s thought for those not familiar with the Continental and phenomenological tradition or postmodernism is contained in EMMANUEL LEVINAS, *ETHICS AND INFINITY: CONVERSATIONS WITH PHILIPPE NEMO* (Richard A. Cohen trans., Duquesne Univ. Press 1985) (1982) [hereinafter LEVINAS, *ETHICS AND INFINITY*]. The chapter that deals most directly with the primordial responsibility to the Other is entitled *Responsibility for the Other*. *Id.* at 93-101.

27. LEVINAS, *supra* note 2, at 24.

28. Emmanuel Levinas, *Franz Rosenzweig*, *MIDSTREAM*, Nov. 1983, at 35.



### A. *Interlude*

As part of an interlude before I examine Levinas, Derrida, and unlaw in greater detail, let me mention that my students tell me that they watch Jon Stewart on the *Daily Show* for news, and that most young people get more information from *The Colbert Report* and Stewart than from the so-called mainstream media. Survey data from places like the Annenberg School of Communication at the University of Pennsylvania show that viewers of Stewart and Colbert know more substantive political information than those who use ordinary news sources.<sup>29</sup> This tells us that satire or comedy does not necessarily obscure information, but rather may make it easier to process. It also suggests that the younger generation already understands that law and politics are in some important sense impossible.

So it should not be surprising that thinkers who show the impossibility of what is truly human might strike resonant chords with those who otherwise would find their rhetoric impenetrable.

### B. *Pre-Impenetrable Rhetoric Interlude*

Among many, two figures haunt my sense of the unlaw in which we now live: Richard Cheney and Lia Lee.<sup>30</sup> One is the Vice-President of the United States of America, and the other is a Hmong young woman whom the Western medical establishment called brain-dead.

Lia's family believes that her soul has fled and has not returned home to her body. She had, from age three months until her most severe seizures (caused by septic shock, not her main malady) what the doctors called epilepsy and the Hmong called "the spirit catches you and you fall down."<sup>31</sup> Now she has no discernible cortical activity that the doctors

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29. See Bryan Long, "Daily Show" Viewers Ace Political Quiz, CNN.COM, Sept. 29, 2004, <http://www.cnn.com/2004/SHOWBIZ/TV/09/28/comedy.politics/> ("Daily Show' viewers know more about election issues than people who regularly read newspapers or watch television news, according to the National Annenberg Election Survey.").

30. See generally ANNE FADIMAN, THE SPIRIT CATCHES YOU AND YOU FALL DOWN (1997) (presenting Lia Lee's story).

31. *Id.* at 20-22.

would call consciousness, yet her former doctors have learned that she is not, as they once said, dead. “The Lees taught me about life and death,” says Dr Neil Ernst—he and his wife, Dr. Peggy Philip, were Lia’s primary physicians during her epilepsy.<sup>32</sup> The Lees also taught author Anne Fadiman about love, she recounts, and something about the relationship between life and the soul.<sup>33</sup>

Richard Cheney is of the camp that did not take the Terri Schiavo case to heart in the way many conservatives did, but indicated disagreement with the Florida judges’ decision to allow her life to be ended.<sup>34</sup> Would Cheney consider Lia Lee to be alive? Capable of consciousness? Being without a soul? The question arises in my mind: Is Cheney alive? Has his soul left? Is he inhabited by a *dab* (pronounced “da” but in one of the eight tones of the Hmong language, the one indicated by the final consonant, in this case a “b”), an evil spirit? Then I think: He is God’s child, as is she—why do I have such dismissive thoughts about him? The doctors could not see something about Lia, and I find it difficult to see something about Cheney. Once again, I

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32. Ellen Chrismer, *Fadiman Visit Stirs Emotions, Understanding*, DATELINE U.C. DAVIS, Dec. 6, 2002, at 1, available at [http://www.dateline.ucdavis.edu/120602/dl\\_bookcampus.html](http://www.dateline.ucdavis.edu/120602/dl_bookcampus.html); see also Kathy Lammert, *When Epilepsy Goes By Another Name* (Sept. 15, 2003), [http://www.epilepsy.com/articles/ar\\_1063680870.html](http://www.epilepsy.com/articles/ar_1063680870.html) (containing a question and answer session with Anne Fadiman).

33. See Lammert, *supra* note 32.

34. See, e.g., Mike Allen & Brian Falter, *Cheney Opposes Retribution Against Schiavo Judges*, WASH. POST, Apr. 4, 2005, at A4. The following gave a particularly enlightening glimpse into Mr. Cheney’s stance on the subject:

Vice President Cheney says he opposes revenge against judges for their refusal to prolong the life of the late Terri Schiavo, although he did not criticize House Majority Leader Tom DeLay (R-Tex.) for declaring that they will “answer for their behavior.”

Cheney was asked about the issue on Friday by the editorial board of the New York Post. He said twice that he had not seen DeLay’s remarks, but the vice president said he would “have problems” with the idea of retribution against the courts. “I don’t think that’s appropriate,” he said.

I may disagree with decisions made by judges in any one particular case. But I don’t think there would be much support for the proposition that because a judge hands down a decision we don’t like, that somehow we ought to go out—there’s a reason why judges get lifetime appointments.

realize how radically difficult it is to see the Other.

What can we do if the Other destroys the law? Do we stand on a plain (or place, or *chora*<sup>35</sup>) of violence, or is there something impossible yet possible to hope for, something that turns unlaw back toward that law of which the excellence is justice? For this, my thoughts turn back to the nameable presence-and-absence who haunts the haunting of my writing: Jacques Derrida. According to the normal protocols, Derrida is now dead. Yet he is not absent. Can the law die? If God is dead, why not law and its concomitant possibility of justice?

In 1989, Derrida came to the university where I was teaching, and those of us who were to be in a roundtable with him the next day joined him for dinner. At one point, he asked me about an idea I had recently crafted into an article—law as invitation. How, he wanted to know, could law possibly take account of the incommensurable particularity of a person, as the law must be general? By pointing toward the particularity, I answered, thinking primarily of the role of equity in the Anglo-American system of law. That aspect of the law is far from a shoddy answer, but there must be something even more pervasive than the equitable, the “roving commission to do good”<sup>36</sup> that our law can affirm. It has something to do with the encounter with the Other. In my article on law as invitation,<sup>37</sup> I could only express it fully by referring to what David Tracy calls the “Impossible God.”<sup>38</sup> In a situation of sufficient complexity (which every situation is, if examined fully enough), no rule ever applies itself. No law comes with an exhaustive set of rules-to-apply-the-rules (ad infinitum), yet somehow the particular instance of the application of the law takes place. We can never spell out fully how that can happen, and so must rely on the place where only paradox and silence (and love?) can operate. And paradox and silence (and love) are key things to

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35. JACQUES DERRIDA & PETER EISENMAN, *CHORA L WORKS* (Jeffrey Kipnis & Thomas Leiser eds., 1997).

36. *Bisciglia v. Kenosha Unified Sch. Dist. No. 1*, 45 F.3d 223, 228 (7th Cir. 1995).

37. Emily Fowler Hartigan, *The Power of Language Beyond Words: Law as Invitation*, 26 HARV. C.R.-C.L. L. REV. 67 (1991).

38. Malcolm, *supra* note 1, at 24.

remember about multicultural meetings, the true facing of the Other.

If paradox and silence, if the unexplainable (love), must have a place in law, then how can I accuse Cheney of unlaw? Perhaps because he has gone somewhere that has made him no longer a member of my clan, my people, my polity, as I recognize it. Further, he has gone beyond the reach of meta-law, of international law, of aspirant law. And he has done it with power that he claims that I, and you, gave him. I see him as having usurped that power. Am I dead to him, and he to me? There is a way in which I cannot recognize him as a political actor within any rule of law I know.

If the law that does not deny radical specificity is one of love, can there be unlaw, or simply, like the death of God, the end or limit of the law we thought we knew? Beyond that comes God-beyond-God, the Impossible God, the impossible law of both generality and particularity. But who is to tell the authoritative story of that God, of that law-beyond-law? And on what basis would we hope for its advent?

## II. THE FACE AND THE FARCE

A crucial version of the radical specificity of an individual is in Levinas.<sup>39</sup> Perhaps the most salient image that his phenomenological account has produced is the face-to-face encounter. In it, the Other is the Face who calls you to radical responsibility. Even if it is the face of Richard Cheney.

The key to the nature of the Other, known at some "primordial" and pre-conscious level according to Levinas,<sup>40</sup> is the Other's unknowability. The moment I try to know or reflect on or comprehend the other, I objectify him or her as some projection of what I know of myself, not as radically unique. Thus, my incomprehension of Cheney uncannily fits Levinas's criterion<sup>41</sup>: somehow I do not know him, yet I

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39. While there is no possible single citation for this idea, a sense of it is found in LEVINAS, *supra* note 2, at 300-01.

40. *Id.* at 220, 251.

41. EMMANUEL LEVINAS, *TIME AND THE OTHER* 112 (Richard A. Cohen trans., 1987).

recognize him primordially as one to whom I am responsible. Levinas, as he indicates, philosophized in the time after a particular "historical event"—the Shoah, which both he and Derrida endured under French rule. Levinas, an officer in the French Army, was held as a prisoner of war, while Derrida, still a teenager, underwent the strictures against Jews in French Algeria. Levinas argues that one cannot murder the Other, because when one sees the face, one is bound by infinite responsibility.<sup>42</sup>

This notion of infinite responsibility has echoes of the infinite that theists might recognize, and necessarily taps the kind of obligation that law involves. God and law lurk in the idiosyncratic yet evocative realm of the "face-to-face" and the turn of philosophy from its Western obsession with an abstract being towards ethics. For Levinas contends that ethics is primary in philosophy.<sup>43</sup> The nature of the "always already" ties that bind us before thought, is ethical.

Yet Levinas cannot avoid the dilemma inherent in the issues of particularity and law, of the specific and the general. Try as he might, he is in some sense back with Spinoza and Leibnitz and Western philosophy, describing the subjectivity of individual "windowless" monads opaque to one another, yet somehow also bound to one another.<sup>44</sup> The classical philosophical doctrine involved is that of "internal relations"—are relations internal to their terms, or external? Are they constitutive of their terms, or is there some untouchable core to the individual, the monad, that relations only touch externally? The sense of duality generated by the either/or of "internal" or "external" relations resides in the visage of Western thought that centers on a certain version of logic: the either/or of the principle of non-contradiction. According to Aristotle and mainstream philosophical thought, reality is constituted and thought about as ruled by the dictum that something cannot be both A and not-A at the same time in the same place in the same way. Levinas deals in a realm in which the unknown is so central that such a non-contradiction principle is in a sense a figment of our imagination. Certainly, it is secondary to the primordial. Thought is not

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42. LEVINAS, ETHICS AND INFINITY, *supra* note 26, at 105.

43. LEVINAS, *supra* note 2, at 304.

44. *Id.* at 274-75.

primary; ethical binding is.

This makes social or political thought impossible in some sense. As we are, pre-consciously, unique and unknowable yet tied, how can our reflective activity (political thought and institutions, laws, philosophy as we have known it) be anything but objectifying and inauthentic? Should we try a joke here, perhaps one about angels dancing on the heads of pins?

Without abandoning the suggestion that clarity through humor may be our most productive tack, I should note that the implications of what comes first, the relation or the term, are traditionally these: if relations are internal to terms, then all terms are interconnected and the cosmos is a monism; if the relations are external to their terms, then there is true pluralism, and the cosmos is a plurality. For the theologically-minded, this may remind you of the conundrum of how to imagine “heaven” or the Otherlife—a drop in the great ocean which is somehow still a drop, is one metaphor that tries to straddle the paradox of unity with God while preserving individual identity. One reason we need to retain the individual identity is that without it, we cannot think (thinking is experienced as necessarily subjective—even Descartes started with “*I think*”<sup>45</sup>). Levinas wants to retain this identity (even at some inchoate, primordial level) so that we cannot kill one another—at a minimum.<sup>46</sup>

Levinas in effect creates a plurality-in-monism by rendering the ties between and among us primordial and unknowable.<sup>47</sup> This would be much like an unknowable

45. Emphasis added.

46. Some commentators believe that Levinas also wants to do it because the Hebraic evolution (and return) of Western thought that he seeks makes “the People Israel” all humankind. This would be a major move in Judaism.

47. Part of the power of this unlogic is the poetry of Levinas’s writing:

The ethical relation, the face to face, also cuts across every relation one could call mystical, where events other than that of the presentation of the original being come to overwhelm or sublimate the pure sincerity of the presentation, where intoxicating equivocations come to enrich the primordial univocity of expression, where discourse becomes incantation as prayer becomes rite and liturgy, where the interlocutors find themselves playing a role in a drama that has begun outside of them.

LEVINAS, *supra* note 2, at 202.

God, but he attempts to base his philosophy on an unknowable Other, a face. This might not be too different from seeing Christ in one another.<sup>48</sup>

What then happens to law? Well, one move is shared by Levinas, Derrida, and Saint Paul: the letter of the law kills, but the Spirit gives life. The paradox (one face of the infinitely variegated paradox) is that the Spirit is the Spirit of the Law. Recall that Levinas was a renowned Talmudist. Derrida related to the law somewhat differently, but as I recounted above, he did not (at least to me) deny the possibility of a law that points to the individual. How law can do both—point to the individual and to the community, to the particular and the general, to the unique and the same—remains the project at hand.

Or perhaps such a “logical” reconciliation is not what law is about. Perhaps such reconciliation is not what Levinas is about, either. He ends up with a social and political commentary, yet the radical individualism of the primordial face-to-face is not sufficient to populate the world of ethics.

Transcendence is the spontaneity of responsibility for another person. It is experienced in concrete life and expressed in a host of discourses, even before a *de facto* command is actually received from that other. This curious proposition hearkens to the much debated meaning of “receiving the Torah before knowing what was written in it.”<sup>49</sup> Levinas calls this sort of responsiveness the “Good beyond Being.”<sup>50</sup> Responsibility enacts that good, that trace of the infinite, because such instances of answering to or for another are everyday events, even though they are not typical of natural, self-interested behaviors. We do not choose to be responsible. Responsibility arises as if elicited, before we begin to think about it, by the approach of the

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48. I continue to struggle with the timing of sectarian plurality in writing, that is, such comparisons could also be drawn to Islam (particularly Sufism), Hinduism, Buddhism, Shamanism, and many other faith traditions. But I am in the end a Christian—although I left it for nearly fifteen years—and perhaps a primordial Christian. My belief is that Levinas’s attention, and Derrida’s, to the Other and the Wholly Other mimic mine and mine mimics theirs, because something else besides mimesis is going on.

49. EMMANUEL LEVINAS, *DIFFICULT FREEDOM: ESSAYS ON JUDAISM* 59-96 (Sean Hand trans., Johns Hopkins Univ. Press 1997) (1963).

50. LEVINAS, *supra* note 2, at 293.

other person. Because this theme is found in both his philosophy and his interpretations of Talmudic passages, Levinas's thought has, at times, left both Talmud scholars and philosophers dissatisfied.<sup>51</sup>

### III. BLACK FACE?

How is the face that Levinas makes so central to be humorous? His writing is quite serious, although Derrida actually engages in the play of farce. One major cultural move into humor is what has been termed "noir." William Brevda notes that the genre of noir (perhaps best known from "film noir") "is what Bakhtin would call a 'carnavalesque' genre that reverses distinctions between up and down, the 'official' and the 'profane.'"<sup>52</sup> Brevda categorizes Sartre and Camus as writing noir, into the absurdity of existence, into the question of why one should live.<sup>53</sup> The answer is, in one sense, "why not?" One lives in an impossible future, one without justification.

Noir is on the edge of what Brevda calls "The Joke" of the universe's answer to the individual's question of "why me?"—"why not?"<sup>54</sup> This cosmic joke is always a variation on the "long-drawn joke" of the noir, but it is not necessarily "merry, vibrant, and alive" as a good joke should be.<sup>55</sup> Or perhaps vibrant and alive, if not merry in any simple sense.

One face of noir that is vibrant (if dead-pan) and alive, is Guy Noir, private eye. When Garrison Keillor riffs on the noir genre during his radio show, we have what Brevada has suggested by the phrase a "Lazarus smile"—that is, something that has a sense of having cheated death, but with an almost bumbling set of moves, rather than some elegant chess game.<sup>56</sup> Mr. Noir never gets the girl, but continues to pursue the answers "to life's persistent problems" in a way that is fetchingly human. "Anxiety,

51. Bettina Bergo, *Emmanuel Levinas*, STAN. ENCYCLOPEDIA OF PHIL., Mar. 18, 2007, <http://plato.stanford.edu/entries/levinas>.

52. William Brevda, *Is There Any Up or Down Left?: Noir and Existentialism*, 89 SOUNDINGS 321, 332 (2006).

53. *Id.* at 333-35.

54. *Id.* at 338.

55. *Id.*

56. *Id.* at 343.



alienation, absurdity, death, nothingness—these ideas, outlined in chalk on the sidewalks of noir, always return with a Lazarus smile.”<sup>57</sup> This is the “cosmic joke” that theologians identify as the Resurrection within the genre of comic eschatology. Within the Christian tradition, perhaps there should have been more jokes in the post-Resurrection appearances of Jesus—fish jokes, perhaps. Or, given his persistent riding of lawyers and scribes and Pharisees, redemptive lawyer jokes?

Paul’s writings on the law certainly skirt the absurd, playing with its creation of sin, which did not exist before the law came.<sup>58</sup> The post-Resurrection is rife with the absurdity of law itself. Perhaps the apostle Paul has been underrated as a comic.

Contemporary post-catastrophic writing has been more overt. After the Shoah, finally Jews have begun to laugh about Hitler. *The Producers* was a huge hit in Israel, where audiences laughed out loud.<sup>59</sup> The notion of “Springtime for Hitler” as a hit show had them rolling in the aisles.

If one major tradition (and the dominant one in Anglo-American law) has already been told by its pre-eminent evangelist, Saint Paul—that law is a joke, a set of contradictions, something that kills and created sin<sup>60</sup>—how could we have taken so long to know that unlaw is necessary? Perhaps we failed to listen to those who were here first, and to honor the Trickster. Native Americans know that Coyote is sly beyond all categories, and that when Coyote runs past and into the distance, there always comes Anotherone.<sup>61</sup>

After unlaw, perhaps there is Anotherone. This law after unlaw would be like God after the Death of God:

57. *Id.*

58. *Romans* 5:13 (“[B]efore the law the law there was sin in the world, even though sin is not imputed when there is no law . . .”).

59. “Springtime for Hitler” . . . in Israel, CNN.COM, Jan. 31, 2006, <http://www.cnn.com/2006/SHOWBIZ/Music/01/31/theater.hitlerinisrael.ap/index.html> (“Bringing ‘The Producers’ to Israel might seem like just another plot twist to Mel Brooks’[s] Broadway musical about getting rich off a surefire theatrical flop. But it’s for real, in Hebrew, and playing to packed houses.”).

60. *Romans* 7:7-25.

61. See, e.g., Coyote and Anotherone, [http://coyoteandanotherone.com/susindex\\_page.html](http://coyoteandanotherone.com/susindex_page.html) (last visited Oct. 23, 2007).

Impossible. What besides an impossible law could redeem legal torture, the suspension of habeas corpus, and an executive that exceeds all boundaries?

#### IV. JOKE WORK

Freud, according to Homi Bhabha, wrote of the power of self-parody.<sup>62</sup> When oppressed by stereotypes, one tactical stance is to use the satirical view of oneself in order to disarm it, to defuse it. If you can't have a little humor, you're lost.<sup>63</sup> In Bhabha's view, the target must embrace the very insults aimed at him or her.<sup>64</sup> Done well, this stratagem turns the insult-maker into a parody of self-congratulation. This is a delicate business. Just as the subhead above suggests, the idea of "Black Face" is potentially incendiary. When Whoopi Goldberg's beau, Ted Danson, accompanied her to a costume party in black face, the ensuing controversy ended their relationship.<sup>65</sup> When cops got together to poke fun, even at themselves, the use of stereotypes seemingly offended rather than amused.<sup>66</sup> The police chief called a spoof video "egregious, shameful and despicable"<sup>67</sup> while an attorney defending the video-makers saw it much as Freud described.<sup>68</sup> Speaking of the scene that the mayor found most disgusting, the attorney painted a different picture of the video:

[T]he perception that police officers would run somebody over and not care is how the community often feels about officers. That's an acknowledgement of that fact. It's honest. It's brutal. It's meaningful that a police officer could put that out there and say, "Wow, if we had that attitude, that's bad."

And then again, when the woman gets up and curses, "You white blah, blah, blah," the officers feel badly. "We're here to serve. Don't

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62. Bhabha, *supra* note 9, at 198.

63. See *THE UMBRELLAS OF CHERBOURG* (Parc Film 1964).

64. Bhabha, *supra* note 9, at 193-98.

65. See, e.g., Ian Fisher, *Racial Jokes Spur Apology from Friars*, N.Y. TIMES, Oct. 10, 1993, § 1, at 37.

66. *Racy Police Videos Defended*, CBS NEWS, Dec. 9, 2005, <http://cbsnews.com/stories/2005/12/09/earlyshow/main1110798.shtml>.

67. *Id.*

68. See Bhabha, *supra* note 9, at 193-98.

people understand that? Don't just stereotype us."

It puts on the table a critical point in that community and gives us a chance to move together to fix it. Unfortunately the mayor and the chief have turned it into a politically correct, "That's a racist video." It's not. It's the truth. It hurts. Let's fix it.<sup>69</sup>

The attorney argued that the video was made by officers of many races and genders, and that they shared a desire

to laugh at themselves, share humor and go ahead with the job that is both dangerous and often gets them very little thanks from both the public and certainly no thanks from their chief, who ignores this police station, but spends a lot of time walking around and doing politics.<sup>70</sup>

The article reporting this noted that "all the officers involved, including a captain, worked at the Bayview Station in the city's roughest section, an industrial area with a large minority population and high crime rate."<sup>71</sup> The video, seen in this light, was unlaw at its best.

So perhaps those of us who think the Constitution is crucial are the deluded. Perhaps there is something else going on that is more important, more elemental. Perhaps "time is not the achievement of an isolated and lone subject, but that it is the very relationship of the subject with the Other."<sup>72</sup> Time as relationship of one human to another? This is about the difference between diachrony and synchronicity. The former is about time punctuated by the unpredictable; the latter about time as conceived as scientific, as in the same plane and always and only repeated. Perhaps all is eternal return, as Nietzsche suspects.<sup>73</sup> But perhaps this continued pageant of the Same is interrupted by the difference of the always already love of the Wholly Other, which some might call grace. The characterization of time, diachronic time, that Levinas uses

69. *Racy Police Videos Defended*, *supra* note 66.

70. *Id.*

71. *Id.*

72. LEVINAS, *supra* note 41, at 39.

73. FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* 194 (Bernard Williams ed., Josefine Nauckhoff & Adrian Del Caro trans., 2001).

resounds in the title of one of his short books, *Time is the Breath of the Spirit*.<sup>74</sup> Taken loosely, this would mean that the only time that really counts is the becoming time of spirit, the time of encounter, of meeting, of Buber's *I and Thou*.<sup>75</sup>

One potential joke of Levinas's thought is the clear parallel between the Wholly Other and what some call God. With Levinas, "the other par excellence is the feminine."<sup>76</sup> Most of us have heard of the joke even unto bumper sticker: God Is Coming, and She is Pissed. Levinas's sly insight into the corpus of the patriarchy of the last two millennia may be far from superficial. The notion that the Female Imaginary is non-existent is about the written record that is valorized, not about the reality of the interior life of women. The phallogocentric, as Derrida calls it, is the recorded narrative of the patriarchy.<sup>77</sup> But the next thing is what some call Matriaxial Feminine<sup>78</sup>—not a matriarchy to reinstitute dominance but this time by the feminine, but the return to the template of the femine *after* the dominant inscriptions of the phallogocentric.

## V. UNCREON

In *Antigone*, the rigidity of the law untempered by true encounter with the Other leads to death, and finally wisdom.<sup>79</sup> Creon, whose name means "ruler," cannot bend to a woman, and thus he loses his entire family in the ensuing tragedies. He is undone. In the synchronic time of science and eternal return, we have known for millennia what Levinas tries to argue: that the interpretation of the Greek tradition that omits the feminine will produce a lethal law. Sophocles warned us long before the Common

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74. EMMANUEL LEVINAS, *TIME IS THE BREATH OF THE SPIRIT* (Joseph Simas & Carolyn Ducker trans., 1993).

75. MARTIN BUBER, *I AND THOU* (Walter Kaufmann trans., 1970).

76. EMMANUEL LEVINAS, *EXISTENCE AND EXISTENTS* 85 (Alphonso Lingis trans., 1978).

77. JACQUES DERRIDA, *POLITICS OF FRIENDSHIP* 168 n.25 (George Collins trans., 1997).

78. See Bracha L. Ettinger, *Art and Healing Matriaxial Transference Between the Aesthetical and the Ethical*, in *ARS 06: SENSE OF REAL*, 76-81 (2006).

79. SOPHOCLES, *ANTIGONE* (Andrew Brown trans., 1987).

Era. There is a joke in this: we have known it all along. What Levinas said is both radically original and nothing new. He would say that it is the saying, not the said, that counts.<sup>80</sup> For us, it is the reading, the saying, and perhaps joking our way to resurrection and redemption.

We will persist in unlaw and in error. One of the opening quotations is from a sophisticated article that persists in bifurcating belief and unbelief, in valorizing the secular instead of imagining that the virtues of the Enlightenment need not negate God. These virtues can inform us of the always already joke that God will always be beyond our conception—the thought of the Infinite is impossible, Levinas would say<sup>81</sup>—and thus that the “unbelievers” are also right about God. But they are not right about religion because they try to stand outside it, and cannot: before the law, there is the primordial relationship Levinas so insistently outlines.<sup>82</sup> We are always already, and yet “to come,” as Derrida puts it,<sup>83</sup> bound together again. That is the etymology of the word “religion” (re-ligare: to bind together again<sup>84</sup>) and it is the redemption of “unlaw”—unlaw is necessary. To paraphrase Anotherone called Julian[a] of Norwich, unlaw is necessary and all will be well and all will be well and all manner of thing will be well.<sup>85</sup>

For Professor Lilla and other secularists who fear the inflammatory power of religion on the apparently flame-retardant mind, there is good news and there is bad news. Levinas was a phenomenologist, and that school of continental thought considered itself particularly rigorous. They wanted to avoid all constructions that constrained human experience of truth, and the approach through the

80. This is a radical emergent thread in the works of Levinas; he simplifies it in LEVINAS, *ETHICS AND INFINITY*, *supra* note 26, at 88. See also LEVINAS, *supra* note 41, at 22.

81. LEVINAS, *supra* note 2, at 78.

82. *Id.* at 48.

83. Interview by Lieven De Cauter, Project Initiator, The Brussels Tribunal, with Jacques Derrida, *Philosopher* (Feb. 19, 2004).

84. The American Heritage Dictionary of the English Language 1474 (4th ed. 2000).

85. JULIAN OF NORWICH, *SHOWINGS* 225 (Edmund Colledge & James Walsh trans., 1978).

subjective was the most honest and difficult route. With a scorching sense of removing pretense, Sartre (whom Levinas introduced to phenomenology) and many other philosophers of the absurd and the existential would consider Professor Lilla naïve. Levinas would consider him human. For Levinas's project, according to some in his tradition, was no less than to open the People Israel to all humanity, to bring God to the mind—as the mind is a beautiful but partial and secondary aspect of the human. The kind of enlightenment Levinas wrote to reveal was more like that of Gautama Buddha than of Descartes. Thus the term *unlaw*—a bit of play that came from one evening with Christians and Jews and Buddhists and Confucians and atheists, during which even a rock from the parking lot became of infinite value (and was revealed as also an “unrock”—as indeed it was, for it was a chip of macadam, and not a Peterlike stone). For the mind is deadly serious, an infinite tangle where we are to show glory, and a place of redemption, play and revelation. Levinas's God is very much a fan of the mind, and of the Book. This is how he ends *Time and the Other*: “But also, with the putting into me of the idea of the Infinite, the prophetic event beyond its psychological peculiarity is the throbbing of primordial time where, for itself, of itself, deformalized, the idea of the Infinite signifies. God-coming-to-mind as the life of God.”<sup>86</sup>

Perhaps the joke is that Professor Lilla, in his fidelity to the mind, is precisely faithful to the Impossible God, and to *unlaw-unto-law*.

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86. LEVINAS, *supra* note 41, at 138.

