



## Addendum

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## Addendum

Iris van Domselaar, 'On tragic legal choices' (2017) 11 RLAH 184, 204

When the article was published, sections 3.1.3 and 3.1.4 were missing. Below are the full texts of these sections.

The judge may hold that from the viewpoint of political morality, Mr Hampton has a right to a social minimum, given what has happened to him, but at the same time he may feel duty bound to honour the procedural rules, as a case-by-case assessment of whether these should be upheld or not would undermine their rationale. The judge will then be faced with a genuine conflict between judicial commitments that he cannot exhaustively resolve by a better understanding or grasp of the legal merits of the case.

### 3.1.3. Conflicting commitments to law and unique citizens

A third category of genuine conflicts between judicial commitments are those between the judge's commitment to law and his commitment to respecting the concrete, embodied citizen(s) involved in the legal proceeding. In order to grasp the nature of the latter, Emmanuel Levinas' ethics of Alterity and the notion of the Other will prove instructive.

Explaining the idea of the Other, Levinas brings into play the phenomenology of the face because of its uniqueness, indeterminateness, continually changing character and its inescapable normative appeal. 'The face opens the primordial discourse whose first word is obligation, which no 'interiority' permits avoiding', he states.<sup>1</sup>

Drawing upon this phenomenology of (confronting) the face, Levinas holds that the mere fact of the encounter with another person makes us inescapably responsible. This responsibility cannot be reasoned away or put between brackets, it simply happens to us and is not the result of our will or our voluntary application of abstract concepts or of any prior norms.<sup>2</sup>

Being a responsible person entails that one is duty bound to not reduce another person to a stable general meaning or to an intelligible essence

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<sup>1</sup>E. Lévinas, *Totality and Infinity* (Duchesne University Press, 1969) 200–201.

<sup>2</sup>C. Douzinas and R. Warrington, *Justice Miscarried: Ethics, Aesthetics and the Law* (Harvester Wheatsheaf, 1994) 16.

and it also means to avoid causing suffering on the part of the person whom one is confronted with.<sup>3</sup> As to the latter, this 'pathetic imperative' is beautifully expressed by Adorno: '[t]he physical moment tells our knowledge that the suffering is not to be, that things should be different.'<sup>4</sup>

If we include these insights in our understanding of adjudication, a judge will be duty bound to pay respect to the parties involved, in all their concreteness and hence their irreducibility. A responsible judge will make an effort not to use rules, precedents or principles of valid law in a way that leads to the appropriation or 'digestion' of the uniqueness of the citizens involved. He will use a 'mimetic capacity', a capacity 'to identify with the other, in sympathy and in appreciation', over and against his ability to look through the lens of rules, precedents and principles.<sup>5</sup>

Surely, these ideas are far from radical or new and they fit with the 'tragic consciousness' that the Greek tragedies convey, most clearly where the sensitivity for suffering and the ethical import of the unique person is concerned. Julian Extabe for instance takes this duty of the judge to fully open himself to the case at hand directly as a lesson from the Greek tragedies: "[t]he judge must tune into the complexities of the case without making interpretative decisions that would foreclose any real consideration of the issues [...]".<sup>6</sup>

The focus on and the demand of respect for the irreducibility of the individual who is involved in a legal proceeding, also find expression in documents of judicial ethics, for instance in a rule that says that judges must show respect to human beings, which means 'having regard to the totality of their characteristics whether physical, cultural, intellectual, or social, as well as the race and gender of the person' and 'take into account the human dimension in his decisions.'<sup>7</sup>

However, for a responsible judge it is far from easy to reconcile the commitment to respecting the concrete citizens with his commitment to settled law, the idea of equal treatment under the law included. Because of all kinds of factual contingencies that characterize a particular case, situations may arise in which a judge will not find a way to treat the citizen before him both as entitled to equal treatment on the one hand and as a concrete, embodied and thus unique person that 'commands the response of ethical asymmetry' on the other.<sup>8</sup>

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<sup>3</sup>For the term 'pathetic imperative' I am indebted to A. H. Hawkins, 'Ethical Tragedy and Sophocles' *Philoctetes* (1999) 92 *The Classical World* 337, 350.

<sup>4</sup>T. W. Adorno, *Negative Dialectics* (Continuum, 2007) 203.

<sup>5</sup>D. Cornell, *The Philosophy of the Limit* (Routledge, 1992) 23.

<sup>6</sup>J. Extabe, *The Experience of Tragic Judgment* (Routledge, 2013) 85.

<sup>7</sup>Judges for Judges, *Matters of Principle. Codes on the independence and impartiality of the judiciary* (Raad voor de Rechtspraak, 2012), 66–77, online version available at: [http://www.rechtersvoorrechters.nl/media/matters\\_of\\_principle/Rechters-voor-Rechters\\_Matters-of-Principles.pdf](http://www.rechtersvoorrechters.nl/media/matters_of_principle/Rechters-voor-Rechters_Matters-of-Principles.pdf) (last visited 28 November 2017).

<sup>8</sup>Cf. D.J. Schmidt, 'Can Law Survive: On Incommensurability and the Idea of Law' (1994) 26 *University of Toledo Law Review* 147, 151.

Let me illustrate this by the case of *Mister Wood*, a Vietnam veteran, who because of his experiences during the war, suffers from a posttraumatic stress syndrome. Mister Wood, now in his seventies, married and father of three and grandfather of two, decided earlier in life not to think and speak about his war experiences and refused treatment because he did not believe that psychiatrists could help him.

Things went wrong when his wife got Alzheimer. She got suspicious and read Mister Wood's behaviour as proof that he was seeing somebody else. Mister Wood tried hard to convince her of his innocence and that he loved only her, but to no avail. According to the doctor the Alzheimer caused the suspicious, paranoid attitude of his wife.

After his wife wanted a divorce, Mister Wood became deeply stressed and emotionally instable. He desperately tried to convince his wife that a divorce would not be the right solution, but in vain. When she filed for divorce, he lost all hope and came to think that it would be best to kill his wife and commit suicide. After writing his testament, he indeed killed his wife by stabbing her in the chest and suffocating her with a cushion. He thought this to be the least painful way. He subsequently took an overdose of sleeping pills, loaded his wife's body in his car and drove to a canal, intending to drive his car into the water. However, Mister Wood fell asleep and the police found him in his car, still alive. He stood trial for murder and the public prosecutor demanded twelve years of imprisonment.

In this case a responsible judge will not 'hide' behind legal rules and principles. In his 'open' encounter with Mister Wood the judge may become convinced that he really loved his wife and that he indeed acted out of anxiety over the disease of his spouse. In view of the psychiatric reports the judge could come to the conclusion that Mister Wood's behaviour can at least to some extent be explained by his traumatic war experiences, for which he never received treatment. He may also appreciate the burden of Wood's suffering because of the death of his wife and his feelings of guilt towards her and their (grand)children.

Confronted with Mister Wood in all his particularity the judge may hold that the ethical demand for respect implies that he should not sentence him to imprisonment, and that given his age and bad physical condition imprisonment would not make sense. It would merely add to his suffering and would mean that he would be unable to mend his relation with his (grand)children.

But the judge may also feel committed to upholding criminal law and to public norm endorsement. He may think that society would not approve if Mister Wood were to go free. To act upon the ethical demand for respect would boil down to jeopardizing the value of justice and his commitment to settled law and its background principles. It would possibly violate the legitimate claims of the 'third', i.e. the public at large. Save for the ethical demand

that the judge experiences, he may have difficulty to find an objective reason to treat the case of Mister Wood as an exception. He will experience a genuine conflict between judicial commitments; honouring one will mean having to sacrifice the other.

#### **3.1.4. Conflicting commitments due to epistemic uncertainty**

The last category of genuine conflicts puts the seeming clarity of the categories discussed above in perspective. So far it was assumed that the values involved were determinate and intelligible at the moment of choice. However, part of what the tragic tradition in philosophy teaches us is that in the practical world it is not only difficult to see 'clearly', but also that the full moral bearing of a choice might not be intelligible at all at the moment of choice.

Despite the fact that, because of all his qualities, a judge may be in a relatively 'good condition' to understand what is at stake in a legal case, and despite the range of other expertise and technical devices of help to him in this regard, he can nonetheless experience serious difficulties in grasping the bearing of the case. Competent judges may be confronted with legal cases that to some extent are beyond what they can genuinely make sense of. In these situations of radical epistemic insecurity, a judge will also be confronted with a genuine conflict. On the one hand his sense of epistemic insecurity will give him a strong reason not to make a judicial choice at all. On the other hand, it is precisely part of his professional duty to do make a choice, and to do so to the best of his ability -he cannot just flip a coin or refuse to decide. Said conflicts are most likely to arise in domains of law where reality itself is indeterminate or uncertain due to all kinds of factors, such as the unpredictability of consequences of certain choices, or the limited knowledge about the people, situations or objects involved that must be judged.

Let me illustrate these conflicts by the case of *Joan Gibbs*. Joan was prosecuted for murdering her three babies immediately upon birth. She declared that she was scared that her parents, her husband and the villagers would find out about her being made pregnant by a colleague, not being her husband.

In her file the judge finds a wide range of support for the picture that Joan is a heartless killer who acted in a callous, calculating and cold-blooded manner, fully aware of what she did. But from Joan's testimony arises an image of a woman who has repeatedly given birth in extreme solitude, who has killed out of pathological desperation and insecurity and who wanted her babies close by and therefore hid the corpses in her parents' house. If forensic psychiatrists disagree about how to diagnose and evaluate the personality of the accused, the judge may be knee-deep in doubts and experience a deep sense of conflict about what to do. He may feel torn

between not wanting to make a choice because of a lack of epistemic certainty and his judicial duty to make a choice.

And thus we have the different categories of conflict for which the concept of tragic legal choice has potential relevance. Note that all the attention paid to the conflictual character of adjudication does not refute that due reflection can in fact often reveal that the conflict under consideration is indeed nothing more than a *prima facie*, or *apparent* conflict. The judge's expertise will prove crucial in showing that his judicial commitments can in the end be tailored in a way that makes them compatible with each other. Again, an emphasis on the hazard of genuine conflict within the domain of adjudication does not negate the inherent value of legal reason. Acceptance of the possibility that genuine conflicts may arise between competing judicial commitments is not tantamount to a plea for laziness, fatalism or despair in relation to the use of reason.