Visions of Fact; Languages of Evidence: History, Memory, and the Trauma of Legal Research

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AUSTIN SARAT AND THOMAS R. KEARNS, EDS. *History, Memory, and the Law*. Amherst Series in Law, Jurisprudence, and Social Thought. Ann Arbor: University of Michigan Press, 1999. Pp. 328. $57.50.

I. REASON AND FACT IN LAW'S COMMEMORATIONS

In Catholic doctrine, St. Lucy is the patron saint of the blind and of authors. According to legend, Lucy lived in Syracuse under the reign of Diocletian in the fourth century A.D. In one story, her mother, afflicted by a flux of the blood, is miraculously cured after Lucy keeps vigil at the temple of St. Agatha. Once healed, her mother assents to Lucy's desire not to wed her pagan betrothed. Diocletian, however, learns of her faith and sends his army to capture her and force her into prostitution. When they attempt to do so, they find Lucy immovable, like a mountain, and immune even to fire and boiling oil. They are able to gouge out her eyes, however, and they rape her and slit her throat. During the rape, and before she dies, mute from her wound, she silently cries out to God, who causes her eyes to appear, whole and flawless, on a metal plate nearby. The new eyes witness her martyrdom. In another story, Lucy gouges out her own eyes so that her suitor will not recognize her. The suitor betrays her to the army, and again, at her rape and martyrdom, her eyes miraculously reappear outside her body to bear witness.

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The contemporary California artist Kim Stringfellow's *Self-Portrait as St. Lucy* captures Lucy in the act of self-immolation, recalling the second tale in the context of the rape narrative. She is surrounded by peculiarly fleshy everyday objects in states of decay and states of preservation—bottles of preserved fruit on the bottom of the composition together with a frog in a jar; cucumbers, flowers, and rotting fruit around her head. Framed by bare tree branches sprouting eyeballs, Stringfellow looks out with one whole eye and displays the open and bleeding wound where the other used to be. Commenting on Stringfellow's compositions in general, art critic Berta Sichel (1997) writes, "the objects included in [Stringfellow's] photographic constructions—corn kernels, ants, bottles of pollen, eyeballs—[each] replaces something that is too vast to be included inside the box's physical frame."

Austin Sarat and Thomas Kearns's edited collection *History, Memory, and the Law* leads me to reflect on the mythic coordinate system of memorialization that animates the St. Lucy stories. Along one axis lie the themes of decay and preservation, loss and recording, transience and permanence. This axis could be said to map onto memory on one end and historiography on the other, as these terms are conventionally understood. Along the other axis lie the human acts of sight and speech, witnessing in the visual and verbal senses. This axis could be said to map onto seeing on one end and testifying on the other. Perpendicular to both axes lies the law; in particular, its questions of evidence (what does St. Lucy "see"?), its formations of testimony (how does St. Lucy bear witness?), and its relation to the crime (why does the witnessing of martyrdom matter? what does it accomplish?). St. Lucy and Stringfellow evoke what Sarat and Kearns call the "complex and multidirectional" relationship of law to history (pp. 3–4), while at the same time evoking the relation between law and the "slippery terrain of memory" (p. 3).

The eleventh volume in the Amherst Series in Law, Jurisprudence, and Social Thought, *History, Memory, and the Law* consists of an enframing introduction by Sarat and Kearns followed by six meaty chapters by respected figures in law and literature. With the exception of Dominick LaCapra's chapter on the trials of Flaubert and Baudelaire in nineteenth-century France ("Memory, Law, and Literature: The Cases of Flaubert and Baudelaire"), all the essays deal with case material from the United States, with a very strong emphasis on U.S. Supreme Court doctrine. Although the volume's organizing thematic of history and memory guides the chapters, there are striking parallels around the topics of gender and race in nearly all the chapters of the volume. The one exception is G. Edward White's chapter on the regulation of film and radio speech ("Analogical Reasoning and Historical Change in the Law: The Regulation of Film and Radio Speech"), which, transported into late-twentieth-century debates on micro-broadcasting and

crackdowns against "guerilla radio," could easily be brought to bear on the topic of racial inequality and injustice in the contemporary United States. Most of the chapters are resolutely "historical," dealing with long past events, but Shoshana Felman's ("Forms of Judicial Blindness: Traumatic Narratives and Legal Repetitions") brings us to the O. J. Simpson and Rodney King trials, while Joan Dayan's ("Held in the Body of the State: Prisons and the Law") takes us into the Arizona state prison system and its revivification of the chain gang in the 1980s and 1990s. Two (Felman and LaCapra) deal with literary events (Felman lingering over Tolstoy's *Kreutzer Sonata*). Reva B. Siegel's chapter on the Nineteenth Amendment looks to Supreme Court reasoning over the question of sex discrimination ("Collective Memory and the Nineteenth Amendment: Reasoning about 'The Woman Question' in the Discourse of Sex Discrimination"); Brook Thomas's chapter on race in American legal history looks to Supreme Court metaphorics of racial marking ("Stigmas, Badges, and Brands: Discriminating Marks in Legal History"). Joan Dayan's chapter on Arizona prisons is the only quasi-ethnographic of the chapters, based on interviews and firsthand observations, but it also revolves around the 1996 Supreme Court ruling in *Lewis v. Casey*, 116 S. Ct. 2174 (1996), that instated a form of inmate civil death.

Like the other books in the Amherst Series, this volume presents thoughtful essays that carry forward somewhat disparate intellectual agendas. Nonetheless, as with the essays in the other volumes, these are connected by their commitment to a set of related (albeit contested) theoretical positions: critical legal studies, critical race theory, feminist legal theory, and sociolegal studies and law and literature, broadly conceived. They are also linked by their overarching engagement with the politics and rhetoric of law. Nancy Weston argued in her review essay of Sarat and Kearns's various offerings from the early to mid-1990s that "the editors largely make good on their claim to present the avant-garde of current scholarship" (Weston 1997, 735). The same is true here.[1] If this fine collection has any flaw, it is that, as with all edited volumes, the editors' efforts to weave the contributions into a single fabric proves difficult at times.

In her earlier review essay, Weston reflected on the way the Sarat and Kearns series opened, in an almost retrospective mode, "our relation to law and our understanding of it," giving not only a vantage point on the course of legal thought and the quest for an encompassing theory of law, but also a sense of "where this course has brought us." She describes this "destination" at which we have arrived as a "destiny for us" that "invites us to wonder, finally, at the task itself" (Weston 1997, 734). Like Weston, I am concerned

1. Weston's review essay of the earlier Sarat and Kearns edited collections has had a strong influence on what I write here. As the reader will see, however, my line of inquiry is at right angles to hers.

with the relationships between truth and right at issue in what Weston labeled the "postmodern" "tone and outlook" that occupies the authors here (1997, 736). In an earlier Sarat and Kearns collection, Robin West argued that postmodernism has "exploded" the idea that "reason can give us morality" and that "there are empirical . . . 'truths,' or facts about human nature, that can, in turn, ground a knowable conception of the human good, and that can itself then be used as a standard against which to judge particular laws or particular legal systems" (West 1991, 120–21). Weston, lingering over these apparent dismissals of reason and truth, writes, "What is understood to be now lost to us, in sum, is reason's access to truth of a certain absolute and universal character, and also reason's usefulness in yielding determinate answers to the questions we put to it" (Weston 1997, 741).

I am less interested in the dismissals of reason and empiricism than I am in their articulation to the sense of wonder Weston witnesses. In the seventeenth-century transformation of natural science and legal reasoning, wonder had to do with the order of the miraculous, the world where eyes can appear on silver platters to bear a kind of witness. Wonder lay at the heart of the valorization of "facts" that supposedly existed apart from divine or miraculous proofs. Facts, "deracinated particulars" that exist in themselves before they are enlisted as "evidence" for a particular theory or history, are a peculiar invention (Daston 1991). They came into being in an unsettled relationship to the miraculous, the singular events that, in its Enlightenment reformulation, came to constitute the evidence of experience that demonstrated what Roger Bacon termed "true axioms" (see Dear 1995; Poovey 1998, 96). Understanding postmodernism's apparent dismissal of reason and empiricism entails renewed attention the intertwined practices of fact making and evidence in regimes of truth and right. Doing that, in turn, leads back to the founding of Enlightenment legalities and the figuring of history and memory in the law.

It also calls for a reevaluation of the practice of sociolegal scholarship, in three particular modes suggested by the chapters in this volume. First, how do we situate law "in context," as White asks in his contribution? Standard approaches put forward law as a "mirror of society" on the one hand, or law as "relatively autonomous" on the other (p. 284–85). If we take seriously the need to account for methods of fact making and evidence both in the law itself and in its analysis, however, can the distinction between law and context be sustained? Or does the distinction lead to questions about the boundaries of (legal) text and (social) context that are ultimately unanswerable? Addressing this problem requires attention to the implicit theory of language in theorizations of law and its contexts.

Second, how does law and its critique rely on certain kinds of evidence based on a particular concretization of "fact," and one that is specifically tied to sight, witnessing, "giving to see" (in Felman's phrase, p. 61)? In the

distinction between memory and history, for example, history is presumed to consist of certain self-evident facts that simply are (or were). Such facts subsequently become enlisted as evidence for particular theories, particular historiographies, or grist for the memory mill. Once rendered evidence they can become "distorted" or twisted away from their original figuring as mere fact. Addressing the problem of fact making in relation to memorialization, however, those fraught, partial, and always interested claims of memory against true or accurate history begs the question of historical facts' initial grounding in the real. It is not merely a question of the limits of empiricism, but the constitution of empiricism as an activity rooted in a particular set of human acts—acts of sensory perception and experience, with sight generally dominant above the other senses. (Think classic Perry Mason: "Can you tell us what you saw when you entered the abandoned warehouse?"). Felman's provocative account of "judicial blindness" in the O. J. Simpson trial, where the jury did not "see" evidence of a long-standing pattern of spousal abuse, and in the Rodney King case, where the jury "saw" Rodney King as a threat to the officers who were "subduing" him, demands a critical account of sight and its relationship to facts and evidence.

Third, querying the linguistic and the visible leads me to pay particular attention to Felman's intriguing discussion of trauma, in order to ask whether trauma points up other kinds of fact making and evidence than that suggested by empiricism and its forms of reason. Trauma suggests other kinds of history besides that which is grounded in the ostensibly, sensibly real, and puts in evidence memorializations that are not limited to those accessible to language. Felman argues that historic trials take on the structure of trauma. Following Freud, she argues that a traumatic event is "inherently dual in nature," in that its founding occurrence or status as event only registers in memory and in history in its traumatic repetition, a return of the repressed (p. 40; Freud [1939] 1967). Trauma suggests other forms of history besides the straightforward relating of experience and reference. How, then, does trauma trouble the historical referencing to which memory lays claim? Another way of putting the same question is to ask, how is factual history itself the product of what Cathy Caruth has called "the curious dynamics of trauma" (1991, 185), and why should it matter for analyses of history, memory, and the law? How is legal research itself a repetition of the founding trauma of fact making and evidentiary experience in the law?

II. LANGUAGE AND LAW'S CONTEXTUALIZATION: WHAT DOES LAW SAY?

Sarat and Kearns open their volume by challenging approaches to history, memory, and law that view the latter as passively responding to change. "Legal history," they write, is often "regarded as the study of the

forces that have shaped law" (p. 1). In contrast, they propose an "internal" perspective that explores how law "uses and writes history" as well as how law "becomes a site of memory and commemoration" (p. 2). With the ambivalent exception of Felman's chapter, the contributions to this volume generally adopt the internal perspective. In this section, I will argue that the denomination of these contending perspectives as external and internal is itself a problem that urgently needs to be addressed. The overarching issue, it seems to me, has to do with the delineation of insides, outsides, and linkages or relations between these two apparent domains. The overriding obstacle has to do with the implicit theory of language and law that permits such delineation in the first place. My own critique is itself an "internal" one, deriving from the constitutive and internal limits of the chapters themselves. These are limits, not in the sense of shortcomings or failings, but in the productive sense of functions and organizing principles that generate higher-level patterns, reiterations derived, as it were, from a founding trauma. I will argue that this founding trauma is a failure of language.

Consider Brook Thomas's analysis of the use of metaphor in U.S. Supreme Court cases that invoke or criticize racial classification. In reviewing the Court's use of metaphors of racial marking, Thomas points toward the divergent uses of legal history by both sides of the affirmative action debate. Invoking history to argue for or against affirmative action has repeatedly entailed becoming mired in doctrinal metaphorics of race as marker. Both pro– and anti–affirmative action positions hinge on the potential for racial classifications of any sort to "stigmatize," the metaphor from Justice Taney's notorious opinion in the 1857 *Dred Scott* case. Justice Brennan's opinion in the *Bakke* case of 1977, upholding the University of California at Davis's Medical School affirmative action policy, explicitly worried whether efforts to "ameliorate the effects of past discrimination" would "create the same hazard of stigma" (quoted in Thomas, p. 251).

We are not necessarily trapped by our metaphors, however, for metaphor itself "allows for innovative interpretations that paradoxically claim to stay true to the meaning of the text at hand" (p. 254). Judges can give new meanings to old metaphors, and judges can use new metaphors to give new meanings to old and apparently fixed precedents. At the same time, argues Thomas, metaphors "give the law a sort of memory that cannot simply be erased. Thus it should come as no surprise that the history of attempts to get out from under the history of racial discrimination is marked by metaphors from the history that it would escape" (p. 254). There are limits to the pliability of metaphors, and "boundaries to their authority" (p. 274). Thomas here invokes Pocock: "The politics really begins once we attempt to establish what those boundaries are, and who has the authority to determine them" (p. 274, quoting Pocock 1992, 29).

We are immediately thrust into the domain of the political, an "outside" called forth by attention to the linguistic work going on "inside" the law. The law here has a degree of internal autonomy, but it is relative autonomy nonetheless. This perspective toward law allows G. Edward White, in his chapter on radio and film speech, to attempt to provide a "sketch of the relationship of the social meanings of events . . . to the legal meanings of those events" (p. 285). In examining the discursive practices of the legal profession, White lingers over, not metaphor, but analogy, particularly in the principle of stare decisis. Analogical reasoning depends not simply on logic, but "policy choices, since the decision to treat a new case as 'like' or 'unlike' an existing one is a decision to follow or to avoid the rule governing the existing case" (p. 286). Here, too, the language of law falls into the politics of its surroundings.

Reva B. Siegel's chapter in *History, Memory and the Law* is helpful for the point I am making. Although it is not explicitly theorized as such, Siegel's call to attend to the "habits of reasoning" around gender and race in Supreme Court cases directs our attention to the metapragmatics of fact making and reference, thereby revealing the limit of referential claims for language and textuality.[2] In brief, her argument is that Supreme Court claims about race generally refer back to past constitutional history in the context of a political history and changing norms. Claims about gender, meanwhile, generally refer to "consensus and custom rather than coercion and conflict." This makes gender relations not political facts but facts of nature and choice, and renders the Nineteenth Amendment a "rule" absent its historical and "semantically informing context" of struggle and normative transformation (p. 133). While not discounting that "semantic" context, I believe the real insight here has to do with the ways in which certain habits of reasoning depend on and call forth certain kinds of "facts," or in other words, the ways in which fact making relies on metapragmatics that "warrant" a certain reality (Toulmin 1958 via Mertz 1996). What Siegel finds in Supreme Court opinions is not so much a semantics or metaphorics of gender oppression, as it is a *repression* of "the possibility that conflict or coercion has played a role in defining women's lives" (p. 139). This repression allows the reiteration of certain fact-making practices. Those

2. Michael Silverstein has introduced the concept of metapragmatics into the field of linguistic anthropology, via his readings of Jakobson, Tarsky and Bakhtin, in a series of articles and book chapters (beginning with Silverstein 1976). Where Chomskyian linguistics had consigned the acts of speaking subjects to the garbage-can category of "pragmatics," and instead focused on the formal properties of language, Silverstein opened up the trash bags, as it were, and pushed linguistic anthropology to grapple with the complex metapragmatics warranting not just the relation between language and culture but the boundaries of language and culture as semantic and analytical domains. This essay leans heavily on Silversteinian approaches. However, my own reading of Silverstein owes much to Elizabeth Mertz's various reformulations and clarifications in the law and society scholarship, as well as numerous conversations with Tom Boellstorff and Richard Perry.

pragmatics of fact making permit certain claims and stabilize certain realities. We end up with a world where gender is nonnegotiable and race is flexible, a world where certain kinds of questions are askable and others are given over to silence.

Silence is a theme in Joan Dayan's chapter about the reinstitution of the chain gang in Arizona and the civil death of prisoners in the wake of *Lewis v. Casey*, 116 S. Ct. 2174 (1996). One of Dayan's interviewees, the director of the Arizona Department of Corrections, explains the absence of talking inmates in a film about prison work programs by stating they he wanted to present "mythical inmates" instead. These appear in the form of photographic stills. As he put it, "What can inmates say? They're liars, they're thieves, they're cheats. Who would believe an inmate, anyway?" (p. 190). The Special Management Units, cages that dehumanize inmates and that manage them through "administrative" rather than "disciplinary" segregation, make Dayan herself "mute" (p. 201); but she "find[s] a voice, a way of speaking about the unspeakable, in the law" (p. 201–2). At the same time, however, the law's language is uncontrollable once unleashed. As Dayan demonstrates, the language of the law in the prisoners' rights movement "actually provided the terms by which conditions of incarceration could, by miming the language of the law, assure that old abuses and arbitrary actions" could continue. Defining the everyday realities of prison life became a means for penal bureaucrats to muster arguments from "necessity" to legitimate their actions and procedures (p. 203).

Those arguments from necessity require, in turn, factual data about prison realities. Those data come in the form of "institutional-risk scores" based on behaviors that cause inmates to be issued "disciplinary tickets." Too many tickets and you end up with a high score, and that classification as high risk puts you into a Special Management Unit. From the point of view of prison employees who make the decisions to place certain inmates into such units, however, discipline is kept distinct from classification. As one put it, "We're not involved in that disciplinary process at all. That's a completely separate, independent process. We respond only to documented behavior." To Dayan's statement of the obvious, that there is a tight connection between classification and discipline, this interviewee countered, "Classification is nonpunitive in every single way. . . . We don't have any punitive measures anywhere in the classification system" (p. 210). He is, of course, correct: classification relies on empirically observable "facts"—numbers of disciplinary tickets—and results in a stand-alone datum: a risk score. Those facts and that risk score are absolutely nonpunitive in nature. They are just "there." They do not, in themselves, punish. Rather, they become enlisted as evidence by other penal bureaucrats who *use* them to make decisions about discipline. What Dayan's material reveals is the regime of fact making that permits both the facts and the statements about those facts to

be made, or a metapragmatics of fact versus evidence. What we see, as it were, is a nonlinguistic grid of intelligibility that permits facts, evidence, and their effects to be disaggregated from one another, and from their "contexts," in the maintenance of a particular kind of prison order and, indeed, world.

That world includes closing down inmate access to the law, rendering them again mute in the face of the prison system. Their silence is in the service of the regime of facticity. In "Inmate Legal Access to the Courts," a memorandum to all inmates, the director of the Arizona Department of Corrections writes, "The new inmate legal access to court system will be a 'fact-based system' with heavy reliance on 'forms' rather than a generalized legal research system with heavy reliance on law books" (quoted by Dayan, p. 244). Denied forms of legal reasoning through language and argument, and instead offered the forms of bureaucratic rationality, inmates are compelled to enter the pragmatics of fact making that silenced them and to reiterate their silence through their self-transformation and entextualization into entries on a predetermined page.

In her commentary on earlier volumes in the Amherst Seminar series, Nancy Weston argues that it is "no happenstance"—that is, that it is not contingent, but necessary—that the volume following *The Fate of Law* (for which Robin West's chapter on querying reason and empiricism, right and truth, stands as exemplar) was *Law's Violence* (Weston 1997, 744). In their introduction to that volume, Sarat and Kearns maintained that in the absence of "imaginings and threats of force, disorder, and pain . . . there is no law" (Sarat and Kearns 1992, 1). "Law," writes Weston, summarizing the thrust of that volume and indeed, in her view, the entire series, "is nothing but force" (1997, 744). There is a "unity of an outlook centered on the struggle for power" in the Amherst Seminar series, Weston maintains (1997, 755). Take, for example, another volume in the series, *The Rhetoric of Law*. Here, Weston argues, "Speech is understood as wholly strategic, a means to the end of enlarging, reinforcing, or resisting power" (1997, 762).

The argument from necessity uncannily repeats the logics of needs called forth in the new prison systems described by Dayan. Thus, I would argue the case somewhat differently from Weston. The collapse of law into politics, and language into strategy, is only apparent if we accept the framing of the problem in the first place. If we take "the law" and "its context" as stable and given, we are bound to repeat the founding myths of Western, bourgeois legalities. As anthropologist Marilyn Strathern pointed out, and my colleagues and I have reiterated, bringing together "law and society" as part of a research agenda assumes a place in something called "society" for something called "law" (Strathern 1985; see Collier, Maurer, and Suarez-Navaz 1995). Worrying over such analytic (and native) terms is not simply a semantic problem, but a problem having to do with the (con)texts of the

terms' use. This is a *metapragmatic* issue that draws attention to the background assumptions and practices that warrant the very distinction between text and context, not to mention fact and evidence, nature and politics, law and society (Toulmin 1958 via Mertz 1996; for fact and evidence, see Daston 1991and Dear 1995; for nature and politics, see Shapin and Schaffer 1985).

Consider Elizabeth Mertz's (1996) analysis of the use of texts in the law school classroom. In legal education, the legal text becomes a peculiar object whose reading is at odds with conventional understandings and practices of engagement with a text. Legal texts are not read for literal or referential meaning; it is not their semantics that matter, but rather what Mertz calls their "metapragmatic structure." This structure is dual in nature, "indexing both the context of prior cases in the textual tradition now reanimated as precedent for [a] particular case, and the interactional context of [a] particular case in its prior transformations" (1996, 236, via Silverstein 1976). The very distinction between text and context, in other words, becomes the site of debate, discussion, and reformulation in the legal classroom and the grounding of an approach to textuality where it is not "semantic 'meaning' [that] is what a text is all about," but rather "their pragmatic orientation[,] which teachers impart" in the praxis of the law classroom (Mertz 1996, 246).

I am not suggesting that our analytical approach to the text/context issue should mirror the metapragmatics of the law school classroom. In fact, the complicity between legal education and critical analysis on the problem of textuality itself suggests a consideration of the metapragmatics of entextualization and contextualization as simultaneous and co-constitutive processes (Silverstein and Urban 1996). This applies even more so if our idea of context explicitly references textuality, as in the Ricoeurian or Geertzian moves since the 1970s to "read" culture or society *as* a text.

Indeed, the whole question of "reference" is crucial here. Challengers to the linguistic and poststructuralist turns in the human sciences have worried that the break with a theory of language as transparently referencing reality "seems to amount to a claim that language cannot refer adequately to the world and indeed may not truly refer to anything at all" (Caruth 1990, 193). As Cathy Caruth argues, following Paul de Man (1986), this worry about reference only makes sense if reference is understood according to the principles of "natural law" or "perception" (1990, 193). In other words, this concern over reference is only a concern if referring to things is taken on the model of the transparent identification and indexing of facts in the world, facts understood to be deracinated particulars that exist in themselves apart from their linguistic or performative mediations—facts like those that are purely "classificatory" and not "disciplinary," as in the eyes of the prison administrator quoted above.

In short, the concern over language's referentiality is only a concern if language is reduced to pointing, with words, at things that the senses transparently perceive. Analyses of law that remain wedded to the relationship between law's texts and its contexts, I am arguing, unwittingly repeat this logic of fact making and habit of reasoning. You don't need to be a fancy linguist to make the claim that the natural-referential theory of language is inadequate; Magritte long ago poked fun at it (*Ceci n'est pas une pipe*). To rephrase Brook Thomas's cogent observation: it should come as no surprise that the history of analytical attempts to get out from under the practices of fact making that discipline subjects and cover over oppressions is tinged by the metapragmatics from the history that it would escape.

III. VISION AND EVIDENTIARY FACTS: WHAT DOES LAW SEE?

Magritte's painting is a funny sort of trompe l'oeil. Generally, trompe l'oeil painting plays tricks upon visual perception. The trick in *Ceci n'est pas une pipe* is that the painting conveys to the eye, self-evidently, a pipe, as in any representational and realist painting. And yet, "this is *not* a pipe" at all; it is a painting of a pipe. The trick works at another remove from visual perception as well. It is not only that this is not a pipe, but that it is not a painting of "a" pipe, either, since the pipe portrayed in the painting does not necessarily have any real referent in the world of pipes at all. It could have been painted from memory. It could have been wizarded up out of Magritte's prior encounters with pipes of various sorts. Or it could simply have been started as a random sketch that subsequently reminded (called to memory) Magritte of pipeness. The trick in *Ceci n'est pas une pipe* is that there apparently *is* no trick. The joke is on the very idea of visual perception transparently recording real things in the world that can then be represented in referential painting or speech (see Foucault 1983). The joke is akin to the miraculous vision of St. Lucy, whose "sight" gives witness to her martyrdom. Her vision captures the sublime, not the real.

It was a concern over realism against the service of the sublime that Dominick LaCapra demonstrates animated the trial of Flaubert over *Madame Bovary*. In the court's eyes, "the mission of literature must be to enrich and to refresh the spirit by improving the understanding and by perfecting character, more than to instill a loathing of vice by offering a *picture* of the disorders that may exist in society" (quoted by LaCapra, p.102, emphasis added). Furthermore, "it is not permitted, under the pretext of *painting local color*, to reproduce in all their immorality the exploits and sayings of the characters *the writer has made it his duty to paint* . . . . Such a system . . . would lead to a *realism* that would be the negation of the beautiful and the good" (quoted by LaCapra, p. 102, emphases added). Such realism makes it

impossible "to know what the author's conscience thinks" (quoted by LaCapra, p.109), in the words of Flaubert's prosecutor, because in simply rendering a painting of things as they are, so to speak, Flaubert had removed any "Archimedean point" (p. 109) from which to condemn the actions of the novel's protagonist. The author's conscience, his faculties for moral judgment, were set aside in the service of realism.

Such is the case for the conjuring of facts as deracinated particulars in law and science. Judgment takes a back seat to straightforward experiential sense perception: "Just the facts, ma'am." What is so fascinating about the trials of Flaubert and Baudelaire explored by LaCapra is the variable and shifting understandings of their works as alternately hyperbolically realist and resolutely experimental. Their very hybridity (LaCapra, p. 118) makes the separation of the real and the referential from the ideal and transcendent a point of legal, historical, and literary debate (see LaCapra, pp. 128–29). The legal realm of evidence is replete with such debates, crystallized in arguments over probabilistic and/or quantifiable evidence, on the one hand, and legal reasoning and logics of proof, on the other (see, e.g., Bentham [1827] 1978; Tribe 1971; Wigmore [1913] 1988; Lempert 1988; Seigel 1994; Twining 1994). One way of cutting through these debates is to summarize them with the following formula: Do the eyes see, or do the eyes judge? Is sight a passive reflection of the real, or is seeing an active metaphysical and moral accomplishment?

Shoshana Felman's chapter on the O. J. Simpson trial and *The Kreutzer Sonata* highlights the ocular in regimes of evidence. "Any court decision," she writes, "is a historical decision about the significance, the meaning the community derives from its spectatorial stance with respect to various happenings and, more generally, from its spectatorship of history" (pp. 60–61). Evidence, besides, is "based on seeing. The strongest proof admitted by the court is proof corroborated by the eye: the most authoritative testimony in the courtroom is that of an eyewitness. Every trial, therefore, by its very nature as a trial, is contingent on the act of seeing" (p. 61). My one addendum to this statement would be to emphasize that the act of seeing is itself contingent. Indeed, Felman's chapter gives an account, not of the facts provided by the passive act of spectatorship, but rather of a "blind spot," "[s]omething that could not be seen" and thus could not be entered into evidence in the O. J Simpson trial: the "invisible relation between marriage and domestic violence" (p. 58). Felman's analysis calls to the mind's eye Kim Stringfellow's haunting painting of St. Lucy's self-immolation, her (quasi-oedipal) self-blinding, which "gives to see" something that cannot be seen through realist or referential modalities of perception.

Felman follows Althusser on the limits, the internal ideological exclusions, of frames of reference used to define and structure the visible and invisible:

> The invisible is defined by the visible as *its* invisible, its prohibited sight. . . . To see this invisible . . . requires something quite different from a sharp or attentive eye; it takes an *educated eye*, a revised, renewed way of looking, itself produced by the effect of a "change of terrain" reflected back upon the act of seeing. (Felman, p. 63, quoting and translating Althusser)

Like the limits of language, the limits of sight call attention to the metapragmatics of world making. What can also not be seen in standard accounts of legal evidence is the tight relationship, indeed, the constitutive ties between certain forms of reason and certain regimes of fact. It is not just the texts of Flaubert and Baudelaire that are hybrid, but the fact and regimes of evidence built up from it, too. The work of the law and science is the work of purification, the attempt to wrest the fact as a deracinated particular from the fact as always-already evidentiary of a moral and metaphysical order (see Latour 1993).

As Lorraine Daston (1988), Barbara Shapiro (1991), and Steven Shapin and Simon Schaffer (1985) have observed, legal reasoning and scientific empiricism emerged in tandem and in close dialogue in seventeenth-century Europe. Daston argues that "more than any other single factor, legal doctrines modeled the conceptual and practical orientation of the classical theory of probability at the levels of application, specific concepts, and general interpretation" (1988, 6). Daston's account is important because it draws attention to the interconnected acts of perceiving, enumerating, and fact making. "Recasting ideas in mathematical form," she writes "is a selective and not always faithful act of translation" (1988, 5).

It is not faithful, not merely because a "world of continua spanning rest and motion, certainty and ignorance does not look like a world of sharp either/or oppositions" (Daston 1988, 5), but also because a world of countable objects divorced from perceptual acts of judgment rather than passive perceptual registering does not look like a world where the very act of judgment defines the limits of facticity. In Barbara Shapiro's account of the law of evidence, "the English jury had replaced the perfect fact-finder, God" (1991, 241). And the facts God found were facts written on the soul, "texts" that could never be detached from their (spiritual and empirical) "contexts." The separation between fact and evidence, or memory and history, thus, can not be sustained, nor can that between passive sight and informed judgment. On the always-already moral-judicial form of mathematics, incidentally, we would do well to dwell on Immanuel Kant, for whom Euclidean

geometry "was inherent in the structure of the mind itself as a divinely implanted intuition" (Burton 1985, 552).

IV. TRAUMATIC REPETITIONS IN LEGAL RESEARCH

In her chapter on judicial blindness and the traumatic repetitions of the law's grounding in gender and race violence, Felman argues that the truly "historic" trial is one given to a particular "propensity to repetition or legal duplication." Great trials, she writes, "make history . . . in being not merely *about* a trauma but in constituting traumas in their own right; as such, they, too, are open to traumatic repetition" (p. 40). Felman borrows this conception of traumatic repetition from Freud, whose classic enunciation of the problematic of trauma appeared in his speculative history of the origins of the Jewish people, *Moses and Monotheism* (Freud [1939] 1967). The Freudian conception of trauma holds that a founding act of violence or an originary wound, while covered over in its immediate occurrence, returns as symptom. And it does so repeatedly, playing out the dynamics of subject-constitution that the originary trauma permitted, reiterating them and thus stabilizing them—to the extent that traumatic repetition could be called "stable"—in regular symptomologies. In *Moses and Monotheism*, Freud provided the following illustration:

> It may happen that someone gets away, apparently unharmed, from the spot where he has suffered a shocking accident, for instance a train collision. In the course of the following weeks, however, he develops a series of grave psychical and motor symptoms, which can be ascribed only to his shock or whatever else happened at the time of the accident. He has developed a "traumatic neurosis." (Freud [1939] 1967, 84)

The interval between the initial trauma and the onset of symptoms is a period of latency, during which the "damage often remains hidden" (Felman, p. 34 n.10). Felman argues that "trauma—individual as well as social—is the basic underlying reality of the law" (p. 35 n.10).

If trauma is the basic underlying reality of law, then it does not just structure historic trials, but indeed, all trials. Indeed, if we view the separation of fact from evidence, and history from memory, discussed above, as a traumatic event in the Freudian sense, then the very metapragmatics of facticity and world making in their Western, bourgeois form hinge on the repetition, the reiteration of practices of purification that render facts deracinated particulars (Latour 1993). All trials thus repeat the structure of the founding legal-scientific trauma. So, too, does all sociolegal research that repeats the structure of the traumatic separation of fact from value, or

history from memory. Cathy Caruth is again instructive: "The experience of trauma, the fact of latency, would thus seem to consist, not in the forgetting of a reality that can hence never be fully known, but in an inherent latency within the experience itself. The historical power of the trauma is not just that the experience is repeated after its forgetting, but that it is only in and through its inherent forgetting that it is first experienced at all" (Caruth 1991, 187).

"Factual history" is itself the product of the curious dynamics of trauma. The very idea of the historical fact "before" it becomes distorted or filtered by memory demands the traumatic separation of words from things, deracinated particulars from moral commitments, and the repression of that separation—or, better, the reterritorialization of that repression into the familiar (Western, bourgeois) separation of subjects from objects—the commodity form, the form of the fact, the neatly purified world of words and things to which they refer (Deleuze and Guattari 1983). I am not merely suggesting that history "is always a matter of distortion, a filtering of the original event through the fictions of traumatic repression, which makes the event available at best indirectly" (Caruth 1991, 185). Rather, attending to the founding and impossible separation of fact from value compels knowledge to confront its limit. What is knowable, here following Caruth's reading of Kant, is not knowledge of objects as such, things in themselves, but knowledge's *relation* to its objects.[3] "To know [philosophy's] limits is to know that its knowledge of an object is always relational, a relation between the object and itself" (Caruth 1988, 19). As Kant queried, "what is the attitude of our reason in this connection of what we know with what we do not, and never shall, know" (quoted by Caruth 1988, 28)?

Near the end of her review article about the earlier volumes in the Amherst Seminar series, Nancy Weston contended that the task of sociolegal research now "is to think anew, not only about law" but about "what it is to think of law" at all, as something "already existing apart from us as an object of study, advocacy, or pliable trade, ours freely to take up and examine or employ" (Weston 1997, 803). Further, Weston called us to "wonder as well at who *we* must be to think of law" in the analytical terms suggested by the Amherst Series: terms of power, of politics, of texts and their contexts (Weston 1997, 805). Rethinking the terms of history, memory, and the law, as Sarat and Kearns's eponymous volume calls on us to do, requires grappling with the possibility of nonreferential history—a history that is not based on "simple models of experience and reference" but one that, like St. Lucy's vision, has resituated the place of reference "in our

3. In a recent manuscript, Elizabeth Mertz (forthcoming) argues that it would be a mistake to fall into the false choice of adopting the relativity of vision, on the one hand, or the fixed points of a presumably "shared" vision of a collectivity. Rather, she suggests an analytical strategy involving a "calculus of relationship and effect" (Mertz 2001, personal communication) in any attempt to bring trauma into the domain of the thinkable.

understanding, that is, of precisely permitting *history* to arise where *immediate understanding* may not" (Caruth 199, 182).

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