

# LAUGHTER, REFUSAL, FRIENDSHIP: THOUGHTS ON A “JURISPRUDENCE OF GENEROSITY”

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“There is great power in being able to see the world as one will and then to have that vision enacted. But if being is seeing for the subject, then being seen is the precise measure of existence for the object.”<sup>1</sup>

## 1 Introduction

The starting point for this note is previous reflections and contemplations on a politics of action, revolt, equivocation and risk.<sup>2</sup> The wider concern of all of this is a contemplation of life, death, politics and law after apartheid. The tentative exploration entails an ethical and political reflection on life (ways of living/being), death (dying) and the law. I am interested in the possibility of women’s subjectivity and agency – in women’s existence as subjects, and more than that: as subjects with the capacity to resist and to *refuse*. In South Africa it seems as if transformation, socio-economic reparation and other social problems like poverty, violence and disease are addressed mostly through law and human rights. But, as is often argued and exposed, law and human rights are lacking in the capacity to effect real change.<sup>3</sup> How can we find different ways to approach these issues in the face of the pervasiveness of law and human rights? I would like to repeat previous critiques on the continuance of the public/private dichotomy and ask (again) to what extent the “public” face of the new legal order (human rights and constitutionalism) is translated into the “private”.<sup>4</sup> This exploration also

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<sup>1</sup> Patricia Williams *The Alchemy of Race and Rights* 28.

<sup>2</sup> See Van Marle “Lives of Action, Thinking and Revolt — A Feminist Call for Politics and Becoming in Post-apartheid South Africa” 2004 *SAPL* 572-604; Van Marle “Broken Lives and Deaths and the Potential of Politics After *Makwanyane*” 2005 *SAPL* 244-252.

<sup>3</sup> This claim has been made repeatedly by US critical legal scholars: see, eg, Kairys (ed) *The Politics of Law* (1998) as well as European critical legal scholars: see, eg, Fitzpatrick & Hunt (eds) *Critical Legal Studies* (1987) and Douzinas *The End of Human Rights* (2000). For a recent South African example, see Madlingozi *Legal Academics and Progressive Politics in South Africa: Moving Beyond the Ivory Tower* (2005) Paper delivered at a research meeting of the Department of Legal History, Comparative Law and Jurisprudence (copy on file with author).

<sup>4</sup> Van der Walt “Law as Sacrifice” 2001 *TSAR* 710; Van der Walt “The Impossibility of Two Together When It Matters” 2002 *TSAR* 478; Van der Walt *Tangible mais Intouchable, le Loi du Tact, la Loi de la Loi: The Future and Futurity of the Public-Private Distinction in the View of the Horizontal Application of Fundamental Rights*” (2002) 101; Van der Walt “The Public Aspect of Private Property” 2004 *SAPL* 676; Botha “Equality, Dignity and the Politics of Interpretation” 2004 *SAPL* 724.

entails a challenge to and problematisation of current attitudes towards sex and gender from ethical and political perspectives, and exposes how these affect the lives and deaths of women. The issue of reconciliation or the absence of reconciliation between the sexes and genders and a transformation of sex and gender relations should also be raised.<sup>5</sup> What are the place and the role of the law in the context of sex and gender relations? I have previously considered the approaches of slowness and attention and recall them here in reflecting on women's lives and deaths.<sup>6</sup> My concern here is what kind of agencies/subjectivities could support living a political and ethical life and, given the reality of so many deaths in the present context, could support us in mourning and in death?

I will in no way even attempt to provide answers, solutions or conclusions to any of these questions. Not only because I don't have any to offer, but also because all attempts to answer, solve or conclude might have the effect of closure, of stilling urgent questions, difficult conversations and ongoing uneasiness. As Williams<sup>7</sup> notes:

"That life is complicated is a fact of great analytic importance. Law too often seeks to avoid this truth by making up its own breed of narrower, simpler, but hypnotically powerful rhetorical truths. Acknowledging, challenging, playing with these as rhetorical gestures is, it seems to me, necessary for any conception of justice."

Williams<sup>8</sup> refers to the notion of a "jurisprudence of generosity" as one response to the gap between theoretical legal understanding and social transformation. I find this suggestive for post-apartheid jurisprudence. What lies at the heart of the notion of generosity for me is the idea of unexpectedness that breaks with the formality and predictability of law.

I have previously drawn on aspects of Arendt's political philosophy, in particular her theory of action, Kristeva's support of ongoing revolt and Rose's notions of equivocation and risk.<sup>9</sup> Following on these thinkers and their ideas I draw on Cavarero's rereading of the acts of women and their political and (ethical) implications as well as Berkowitz and Cornell's reflections on masculinity and the possibilities of friendship.<sup>10</sup> What can the laughter of a "maidservant" from Thrace or the weaving and unweaving of Penelope reveal to women and men after apartheid? How can we translate what Berkowitz and Cornell call "the humility of friendship" to post-apartheid life and law? Arendt's action, Kristeva's revolt and Rose's equivocation intersect with Cavarero's refusal and

<sup>5</sup> As was raised forcefully by Du Toit in a doctoral thesis *The Making and Unmaking of the Feminine Self* (2005).

<sup>6</sup> Van Marle "Law's Time, Particularity and Slowness" 2003 *SAJHR* 239-255.

<sup>7</sup> *The Alchemy of Race and Rights* (1991) 10.

<sup>8</sup> *The Alchemy of Race and Rights* 8.

<sup>9</sup> Van Marle 2004 *SAPL* 572-604; van Marle 2005 *SAPL* 244-252. See Arendt *The Human Condition* (1958); Kristeva *Hannah Arendt. Life Is a Narrative* (2001); Kristeva *Revolt She Said* (2002); Kristeva *The Sense and Non-sense of Revolt. The Powers and Limits of Psychoanalysis* (2000); Rose *The Broken Middle* (1992); Rose *Mourning Becomes the Law: Philosophy and Representation* (1996).

<sup>10</sup> Cavarero *In Spite of Plato* (1995); Cornell "The Solace of Resonance" 2005 *Hypatia* 215-222.

laughter, Berkowitz and Cornell's humility, and Blanchot's refusal on the aspect of startling unexpectedness.

## 2 Action, revolt, equivocation

Before I turn to Cavarero and Cornell, let me briefly pick up traces of Arendt, Kristeva and Rose. I have previously relied on Arendt and Kristeva to illuminate one danger of a society overtaken by law, human rights and constitutional discourse, namely the result of a complacent society where political action, thought, eternal questioning and contestation are absent and replaced by an understanding of freedom as mere commercial/economic freedom and of thought as calculated and instrumental. I have relied on Rose to continue this call for politics, risk and sustained equivocation.

Kristeva<sup>11</sup> observes that life was central to Arendt's work not only because of her own circumstances that forced her to leave Nazi-Germany and flee first to Paris and later New York, but also because she always believed that life and thought cannot and should not be separated. Her work entails life placed at the centre of thought and thought put into action.<sup>12</sup> In *The Origins of Totalitarianism*, Arendt<sup>13</sup> equates Nazism and Stalinism on the grounds that both of these movements denied human life. She feared that modern times were haunted by a "radical evil", which denounces human life as "superfluous". Totalitarianism and its destruction of human life are continued by "automation" – by consumerism and technology. In *The Human Condition*,<sup>14</sup> Arendt redressed this destruction of human life by a "vehement defence of life". Arendt<sup>15</sup> places emphasis on the uniqueness of each and every human life, which she describes as "the miracle" that could save the world from its normal routine. The fact of natality (new beginning) can give us faith and hope. Kristeva mentions Arendt's critique on the metaphysical tradition that grants privileged status to the contemplative life. In contrast to this tradition's privileging of the contemplative life Arendt argues that "activity means life".<sup>16</sup> However, Kristeva also notes Arendt's strong rejection of life for life itself, which for her meant a kind of calculated way of living without thinking. Arendt praises the life that is "specifically human", that is, a life that can be told as a narrative and shared with other humans. By contending that the possibility of telling a story is what makes a life truly human, Arendt revives what Kristeva refers to as the "praxis of the narrative", thereby connecting life, narrative and politics. Narrative has a

<sup>11</sup> Hannah Arendt 4.

<sup>12</sup> Hannah Arendt 4.

<sup>13</sup> *The Human Condition* 459.

<sup>14</sup> 5.

<sup>15</sup> *The Human Condition* 247.

<sup>16</sup> See also 96-101.

twofold meaning – it refers to the duration and immortality of the work of art but also includes a historical narrative, the life of the polis.<sup>17</sup> Arendt’s insistence on narrative is taken further by Cavarero, to whom I refer below.

Kristeva<sup>18</sup> defines the 1968 social revolution’s understanding of freedom as “not freedom to change or to succeed, but freedom to revolt, to call things into question”. She argues that contemporary liberalism regards freedom merely as free enterprise, with the effect that the understanding of freedom to revolt does not exist in people’s minds anymore. For her, liberty as revolt is not just “an available option, it’s fundamental”.<sup>19</sup> Following Arendt, she states that without this notion of freedom neither life of the mind nor social life is possible, and explains that by life she does not mean mere maintenance, repetition and management: “[t]he telling moment in an individual’s psychic life, as in the life of societies at large, is when you call into question laws, norms and values”.<sup>20</sup> By putting things into question, by eternal contestation, you prevent values from becoming frozen and by questioning you give them new life. She contends that the events of the 20th century have shown us that political revolts (revolutions) betray revolt in the psychic sense. Revolt in a psychic sense “refers to a state of permanent questioning, of transformation, change, an endless probing of appearances”.<sup>21</sup> Recalling the etymological relation between revolt and return, patience, distance and repetition, Kristeva<sup>22</sup> understands revolt as not simply rejection and destruction, but also as about starting over. Commenting on thinking, she wants to consider it as “revelation, an exploration, an opening, a place of freedom”.<sup>23</sup> She argues against the “robotization of humanity” and follows Arendt’s call to “rehabilitate anxious thinking against calculated thinking that is just computerizing”.<sup>24</sup> With reference to Arendt, Klein and Colette, Kristeva<sup>25</sup> argues that women, like men, have a significant role to play in revolt. This idea is echoed by Rose in her discussion of Varnhagen, Arendt and Luxemburg as women who resisted and refused to be assimilated by the trends of their times and demands of their societies and, by living in the broken middle, sustained equivocation.

<sup>17</sup> Arendt *The Human Condition* 8.

<sup>18</sup> *Revolt She Said* 12. See also Kristeva *Sense and Non-sense*.

<sup>19</sup> Kristeva *Revolt She Said* 12.

<sup>20</sup> Kristeva *Revolt She Said* 12.

<sup>21</sup> Kristeva *Revolt She Said* 120.

<sup>22</sup> *Revolt She Said* 122.

<sup>23</sup> *Revolt She Said* 114.

<sup>24</sup> *Revolt She Said* 114.

### 3 Laughter, refusal and the humility of friendship

#### 3.1 Laughter

Cavarero<sup>26</sup> draws on the following passage from Plato:

“While looking at the sky and scrutinizing the stars, Thales fell into a well. Then a quick and graceful maidservant from Thrace laughed and told him that he was far too eager to find out about everything in the heavens, while things around him, at his feet, were hidden from his eyes.”

Cavarero<sup>27</sup> responds with the following:

“I am not sure that she was a servant or that she came from Thrace, but some woman laughed at the philosophers. A quick smile can often be seen on the faces of women as they observe the self-absorption of brainy intellectual men. Philosophers have put this down to biased ignorance, not realizing that it is the expression of a kind of detachment that locates the roots and meaning of female existence elsewhere.”

I want to put forward laughter and detachment as ways of resisting and refusing patriarchy by which women can seek to create their own spaces from where to engage in political ways of living. I regard laughter as a response of refusal, neither active nor passive, but a refusal nevertheless.

#### 3.2 Refusal

Following on action, revolt and equivocation, I want to think about refusal as suggested by Cavarero’s rereading of Penelope. The refusals illuminated by this are:

- A refusal of western’s philosophy’s association with death as it is challenged and resisted by Arendt’s notion of birth and life and taken further by Kristeva, Cavarero and Rose.
- Related to the former, a refusal of western philosophy’s withdrawal from politics – a theme that is prominent in Arendt, Rose and also Cavarero.
- A refusal of western philosophy’s association with mind and with a life devoid of hands.<sup>28</sup>
- Following from the former, a refusal of a patriarchal assignment of confined and predetermined oppressive spaces to women, in particular spaces that could be associated with a politics of refusal. Cavarero’s interpretation of Penelope and the link with another time in which the politics of the everyday, a certain slowness and attention to seeming insignificant things is acknowledged, is suggestive for thinking a “jurisprudence of generosity”.

<sup>25</sup> *Revolt She Said* 95.

<sup>26</sup> *In Spite of Plato: A Feminist Rewriting of Ancient Philosophy* (1995) 31.

<sup>27</sup> *In Spite of Plato* 50.

<sup>28</sup> The distinction drawn by Cavarero between the *what* and the *who* and the political potential of storytelling come to mind. Of interest in this regard is Cavarero’s ongoing discussion with Butler on the disjuncture between discourse and life. See the introduction to Cavarero *Relating Narratives*:

- A refusal of the pervasiveness of the economical, or instrumental, calculated mindsets that aim to prevent amongst other things any form of questioning, opposition or resistance.

Cavarero, in retelling the story of Penelope, portrays Penelope as creating a space for a refusal, other to both the world of men and the world traditionally assigned to women. In the weaving room, Penelope weaves during the day and unweaves during the night, thereby creating her own rhythm. She does not aspire to be part of Odysseus' world, but she also does not accept the role of women, producing clothes.

"On the contrary, by unraveling and thereby rendering futile what little she has done, she weaves impenetrable time . . . by doing and undoing Penelope weaves the threads of a feminine symbolic order from proportionate materials."<sup>29</sup>

Penelope's role (and the role of all Greek women of her time) is connected to the home and a time of "toil and caring".<sup>30</sup> Penelope, by unweaving and undoing, refuses the space and the role given to her by patriarchy. Recalling Arendt's distinction between labour, work and action, Penelope is challenging both the "natural" cyclical process of labour as well as the functionality related to work. Penelope and the other women are engaged in action and speech – the weaving room becomes a public space of political action, of refusal. Cavarero<sup>31</sup> describes the space assigned to women by patriarchy as one rooted in a belonging and infinite repetition. According to the conventional standards of men's time as well as women's time, Penelope's time is "empty" and "futile" and therefore "negative", "a pure denial".<sup>32</sup> However, when judged against its own standards, this space and time becomes a "feminine space where women belong to themselves. It displaces the patriarchal order, setting up an impenetrable distance between that order and itself".<sup>33</sup>

Cavarero,<sup>34</sup> by retelling Penelope's story, puts forward an argument central to also her later work, namely that philosophy (pure thought) often is a male activity, an activity "devoid of hands". For Odysseus as Greek male hero, death and adventure are what marks being. For Penelope, birth and rootedness are what matters. Cavarero<sup>35</sup> recalls western philosophy's insistence on the untying of the soul from the body, of which death is the best example – while living, pure thought could assist in untying the soul from the body. This results in the principle of

*Storytelling and Selfhood* (2000) vii-xxxi. See also Cixous "Without End No State of Drawingness, No, Rather: The Executioner's Taking Off" 1993 *New Literary History* 91-104.

<sup>29</sup> Cavarero *In Spite of Plato* 14.

<sup>30</sup> *In Spite of Plato* 15.

<sup>31</sup> *In Spite of Plato* 16.

<sup>32</sup> Cavarero *In Spite of Plato* 17.

<sup>33</sup> Cavarero *In Spite of Plato* 17.

<sup>34</sup> *In Spite of Plato* 18. See also Stone-Mediatore *Reading Across Borders: Storytelling and Knowledges of Resistance* (2003), and a review of the book by Babbitt 2006 *Hypatia* 203-206.

<sup>35</sup> *In Spite of Plato* 23.

“living for death” that Arendt rejects by insisting on birth.<sup>36</sup> The duality between soul and body, men’s association with the former and women’s association with the latter, establishes men’s claim to gender neutrality.<sup>37</sup> The untying of the body from the soul is what is aspired to, the body is seen as a negative, a burden and because the pure untying takes place in death, the concept of life is displaced.<sup>38</sup> And it is in her reaction to this that Penelope’s political action comes to the fore, in her reweaving, retying of soul and body:

“Penelope tangles and holds together what philosophy wants to separate. She brings back the act of thinking to a life marked by birth and death.”<sup>39</sup>

In another work, Cavarero<sup>40</sup> focuses on philosophy’s failure to see who someone is by showing concern only for *what* someone is. She puts forward a narrative politics that could reveal *the who*. Like Penelope’s unweaving and reweaving, the politics created by the concern with the who rather than the what could lead to a space of resistance in the face of patriarchal attempts – traditional and new ones in the guise of reform – to still all forms of difference and dissent.

Richardson,<sup>41</sup> in a paper in which she examines Cavarero’s work on Penelope and Elizabeth I and her take on the public, private and political, argues that these women represent the power of “non/differently political women”. Richardson envisages Penelope laughing like the maidservant of Thrace “at the conceits of patriarchal claims”.<sup>42</sup> She comments that these claims do not only include those claims of philosophers denying the world at their feet, or those of Kings (sovereigns) of their own immortality but also those of “common lawyers with their frozen, unchanging law that has existed since the beginning of the world”.<sup>43</sup>

Hanafin<sup>44</sup> recalls Blanchot’s act of refusal – his co-drafting of the Declaration of the Right to Insubordination in the Algerian War, commonly known as the Manifesto 21, which insisted on the right to refuse to go to war against the Algerian people. Hanafin<sup>45</sup> explains how in drafting the Manifesto, many of Blanchot’s other concerns were illuminated, for example “the contest between law and its other”; “the play between power and transgression”, and “the notion of responsibility”. Of concern for Blanchot was also the “(a)political role of the writer and the right to refuse the way in which legal language taxonomizes the subject”.<sup>46</sup> The writer has a responsibility, referred to

<sup>36</sup> Cavarero *In Spite of Plato* 25; Arendt *The Human Condition* 176-178.

<sup>37</sup> Cavarero *In Spite of Plato* 26.

<sup>38</sup> Cavarero *In Spite of Plato* 26.

<sup>39</sup> Cavarero *In Spite of Plato* 29.

<sup>40</sup> *Relating Narratives*.

<sup>41</sup> “Elizabethan ‘Spinning’ and Penelope’s Weaving” 2006 *Law & Critique* 135-150.

<sup>42</sup> 2006 *Law & Critique* 150.

<sup>43</sup> 2006 *Law & Critique* 150.

<sup>44</sup> “The Writer’s Refusal and the Law’s Malady” 2004 *Journal of Law and Society* 3.

<sup>45</sup> 2004 *Journal of Law and Society* 4.

<sup>46</sup> 2004 *Journal of Law and Society* 4.

as “a disastrous responsibility” by Smock, which amounts to an impossible responsibility. However, Hanafin<sup>47</sup> notes that one’s inability to be responsible makes it “all the more imperative”. He regards Blanchot’s involvement in the Manifesto as a response to the “very call to be responsible to an unknown other”.<sup>48</sup> Hanafin recalls Blanchot’s encounter with the law. The State prosecuted all the drafters of the Manifesto. Blanchot objected to the magistrate who summarised Blanchot’s words instead of allowing him to give testimony. Hanafin<sup>49</sup> notes the “reductive violence of legal discourse” that objectifies Blanchot – the law’s task is “to discipline, to suppress the unruly words of the citizen”. Hanafin connects the acts of Blanchot with Melville’s *Bartleby* – Blanchot as apolitical writer is urged by his responsibility towards the unknown other to speak up and challenge politics and law.<sup>50</sup> The words of *Bartleby*, “I would prefer not to” is connected to Blanchot’s acts, “his not saying, his passivity, his persistent just being there is enough to disrupt”.<sup>51</sup>

### 3 3 Humility of friendship

I turn now to Berkowitz & Cornell’s reflection on the Clint Eastwood film *Mystic River* and their comments as regards men’s role in the creation of a space where women can be seen and treated in ways that would refuse patriarchy. Like the law, men’s sovereignty must be exposed and refused. Berkowitz & Cornell<sup>52</sup> analyse the film in terms of the themes of revenge and masculinity. The three main male characters of the film, Dave Boyle, Jimmy Markham and Sean Devine, each undergo trauma in their lives and react to this trauma in three distinctive ways. The story starts when the three men are young boys playing street hockey in their old neighbourhood. The cycle of traumatic events is put in motion when one of the three boys, Dave, is kidnapped and thereafter sodomised by two men. The film continues years later when the three boys are grown-up men struggling with continued trauma. Dave lives with his wife and son in the old neighbourhood. Jimmy, with a daughter from a first marriage, his second wife and two more daughters, is also still in the old neighbourhood, trying to live a life within the law after having been in jail for a while. At the beginning of the film, Jimmy’s eldest daughter is brutally murdered. Sean is a detective and the only one of the three childhood friends who moved out of the old neighbourhood. The

<sup>47</sup> 2004 *Journal of Law and Society* 4.

<sup>48</sup> 2004 *Journal of Law and Society* 4.

<sup>49</sup> 2004 *Journal of Law and Society* 6.

<sup>50</sup> 2004 *Journal of Law and Society* 8; Melville *Billy Bud, Sailor and Other Stories* (1968). See also Agamben *Bartleby, or on Contingency* in Agamben *Potentialities* (1999) 243.

<sup>51</sup> Hanafin 2004 *Journal of Law and Society* 8.

<sup>52</sup> “Parables of Revenge and Masculinity in Clint Eastwood’s *Mystic River*” 2005 *Law, Culture and the Humanities* 316.



murder of Jimmy's daughter brings Sean back to the neighbourhood and into contact with Dave and Jimmy, whom he has not seen for years.

Berkowitz & Cornell<sup>53</sup> are interested in the film's exploration of revenge as a response to trauma and loss and its connection to violence and masculinity. They follow an argument of Horney in which she distinguishes between two alternatives to revenge. Revenge is described as a "fantasy of control" (by Berkowitz & Cornell) and a "value of vindictiveness" (by Horney). Two alternatives to revenge are "neurosis" and "becoming more human".<sup>54</sup> Berkowitz & Cornell follow these three possible responses to trauma, namely revenge, neurosis and becoming more human, in order to analyse the three main male characters. Dave, who was raped as a young boy, can respond to his trauma only by neurosis/collapse.<sup>55</sup> He survived the trauma, "but not as himself ... whoever got out of the basement was not Dave Boyle".<sup>56</sup> Later in the film, Dave encounters a man raping a young boy and he reacts by killing the man. He is incapable of relating these events, first to his wife and later again when confronted, to Jimmy, who suspects him to be the killer of his daughter. Jimmy and Sean and their responses relate directly to notions of sovereignty and friendship. Jimmy can't "admit his vulnerability to trauma".<sup>57</sup> He seeks to regain control of his life and accordingly his own finitude.<sup>58</sup> Living out this notion of self-sovereignty, Jimmy acts in revenge. He takes justice into his own hands and kills in an act of revenge. However, he kills the wrong person – Dave – instead of his daughter's real killer. Sean is traumatised by the event of his wife leaving him while she is pregnant with their child. As the film progresses, Sean, in contrast to Jimmy, slowly accepts his own limits and finitude. The authors describe Sean's choice of becoming more human as "a powerful counterweight to Jimmy's more traditional masculine heroism".<sup>59</sup>

Of significance is Jimmy's portrayal as being a "king", a sovereign.<sup>60</sup> His wrongful killing of Dave is seen as some kind of a royal prerogative grounded in love for his family.<sup>61</sup> His kingship (sovereignty) is seen as something natural and the right to revenge flows from that. As the authors put it, "Jimmy's claim to kingship and his arrogation of the right of revenge is grounded in nothing but his elemental and orgasmic fertility. *It is a right he has as the man he is.*"<sup>62</sup> This notion of masculine sovereignty reaches beyond the confines of *Mystic River* as "a tale of revenge". Man's sovereignty and its effect on everyday life are

<sup>53</sup> 2005 *Law, Culture and the Humanities* 316.

<sup>54</sup> Berkowitz & Cornell 2005 *Law, Culture and the Humanities* 317.

<sup>55</sup> Berkowitz & Cornell 2005 *Law, Culture and the Humanities* 317.

<sup>56</sup> Berkowitz & Cornell 2005 *Law, Culture and the Humanities* 321.

<sup>57</sup> Berkowitz & Cornell 2005 *Law, Culture and the Humanities* 317.

<sup>58</sup> Berkowitz & Cornell 2005 *Law, Culture and the Humanities* 317.

<sup>59</sup> Berkowitz & Cornell 2005 *Law, Culture and the Humanities* 317.

<sup>60</sup> Berkowitz & Cornell 2005 *Law, Culture and the Humanities* 323.

<sup>61</sup> Berkowitz & Cornell 2005 *Law, Culture and the Humanities* 324.

<sup>62</sup> Berkowitz & Cornell 2005 *Law, Culture and the Humanities* 328.

illuminated by the portrayal of Jimmy. What makes this more disturbing, is Jimmy's wife Annabeth's complicity in protecting his kingship. In contrast to the wives of Dave and Sean, Annabeth is a perfect example of the "dutiful and adoring" wife.<sup>63</sup> Dave's wife, Celeste, does not manage to comprehend his trauma and after suspecting him of killing Jimmy's daughter, she tells Jimmy. Laura, Sean's wife, leaves him in order to show him that she demands to be treated as his equal.

Sean's response to his wife's demand to be treated as an equal is seen by the authors as a sign of "some hope for the end of the cycle of violence unleashed by the traumatic event caught in the kidnapping of Dave Boyle".<sup>64</sup> In contrast to Jimmy, Sean does not aspire to live outside the law: he is not a king, a sovereign living a fantasy of infinitude. Sean responds to the trauma of his marriage by "becoming more human". He acknowledges his own vulnerability and by doing that opens himself up to regard his wife as his equal. By doing that, he is refusing masculine normativity and the conceits of patriarchal claims.

Berkowitz & Cornell<sup>65</sup> comment on the theme of fidelity in the film, a theme also taken up by Eastwood in another film, *Unforgiven*. They interpret the "promise of fidelity as a way in which the masculine persona resists (and refuses) the notion of the exchangeability of women" and regard Sean's fidelity as "one way a man can take the necessary first steps in creating an actual space to articulate a masculinity that does not have to define itself upon treating women as exchangeable objects".<sup>66</sup> Following a Freudian analysis, the authors show how Sean manages to shift from seeing Laura as a fetishised object to seeing her as a person.<sup>67</sup> Laura resists his reduction of her own understanding of herself by first leaving but later by responding to him in silence waiting for him to speak to her. The authors understand Sean's fidelity to her as a woman, even one that he fails to see as a whole woman, because of the repressed fear of what the female body represents (castration) as opening a first step for the possibility of transformation.<sup>68</sup> Both characters, Laura and Sean, by simply refusing the law as laid down by masculinity and patriarchy, create a glimpse of a possibility of reconciliation between, and of transformation of sex and gender relations.

#### 4 Conclusion

"and what can be more mysterious about human life than this yet . . ."<sup>69</sup>

"I was looking for a quiet place to die" is the first sentence of Auster's

<sup>63</sup> Berkowitz & Cornell 2005 *Law, Culture and the Humanities* 324.

<sup>64</sup> Berkowitz & Cornell 2005 *Law, Culture and the Humanities* 331.

<sup>65</sup> *Law, Culture and the Humanities* 329.

<sup>66</sup> *Law, Culture and the Humanities* 329.

<sup>67</sup> *Law, Culture and the Humanities* 329-330.

<sup>68</sup> *Law, Culture and the Humanities* 330.

<sup>69</sup> Auster *Brooklyn Follies* (2005) 276.

recent novel, *Brooklyn Follies*, which tells the story of Nathan Glass, his nephew Tom Wood, and other characters against the backdrop of contemporary America. The storyteller continues in the second sentence with: “Someone recommended Brooklyn, and so the next morning I travelled down there from Westchester to scope out the terrain.”<sup>70</sup> However, instead of finding a quiet place to die, Nathan rather finds reasons to continue living. But, typical of Auster, it is life, living always already in the presence of “yet”. Or what Butler<sup>71</sup> would call “precarious life”. Towards the end of the story we read the following: “It was eight o’ clock when I stepped out into the street, eight o’ clock in the morning of September 11, 2001 – just forty-six minutes before the first plane crashed into the North Tower of the World Trade Center . . . But for now it was still eight o’ clock, and as I walked along the avenue under that brilliant blue sky, I was happy, my friends, as happy as any man who had ever lived.”<sup>72</sup>

The theme of being with others, also present in other Auster novels, is central to Nathan, the main protagonist’s sticking to life in the face of having already succumbed to dying. However, or rather yet, the sense of “community”, if one could go as far as naming *the being together* described as community, is fragile and temporary. In *Smoke*, a film by Auster based on a short story *Auggie Wren’s Christmas Story*, community or being together only appears/happens when the characters are smoking. In the moment of the smoke before it disappears in the air one senses something of a temporary coming together. To my mind, Auster is saying something significant about life, living and being and the politics involved or the politics of it. Hanafin<sup>73</sup> recalls Auster’s response to the blackout in New York in 2003 as a “poetic response to disaster”. Hanafin<sup>74</sup> describes the reaction of the citizens of New York as a “temporary coming together, a provisional friendship created in times of adversity . . . an inoperative community in an inoperative city”.

I have previously drawn on *Auggie Wren’s Christmas Story* for its reflection on what I called, following Kundera, slowness. In the story, Auggie Wren shows the author the photos that he had been taking every day for the past twelve years on the same street corner at precisely seven o’ clock of precisely the same view.<sup>75</sup> At first the author finds the project odd. He pages rather hurriedly through the album until Auggie tells him,

<sup>70</sup> Auster *Brooklyn Follies* 1.

<sup>71</sup> *Precarious Lives* (2004).

<sup>72</sup> Auster *Brooklyn Follies* 303-304.

<sup>73</sup> 2004 *Journal of Law and Society* 14.

<sup>74</sup> 2004 *Journal of Law and Society* 14.

<sup>75</sup> Auster *Auggie Wren’s Christmas Story* 151-156. See also Auster *Smoke and Blue in the Face: Two Films* (1995). Auster (ed) *True Tales of American Life* (2001) xvi comments as follows on a compilation of stories edited by him that came about through the National Story Project. People were invited to contribute stories about their lives and experiences: “People would be exploring their lives and experiences, but at the same time they would be part of a collective effort, something bigger than just themselves. With their help, I said, I was hoping to put together an archive of facts, a museum of American reality.”

“You’re going too fast. You’ll never get it if you don’t slow down.” The author then realises, “If you don’t take time to look, you’ll never manage to see anything”. As he continues to page through the albums he starts to pay closer attention to details, taking note of the changes in the weather, the changing angles of light as the seasons advanced, the subtle differences in the flow of traffic, the changing rhythm of the different days. He starts recognising the faces of the people, “the same people in the same spot every morning, living an instant of their lives in the field of Auggie’s camera”.<sup>76</sup> The author then realises that Auggie is “photographing time . . . both natural time and human time”.<sup>77</sup>

These notions of slowness and the temporary fleeting coming together of community beckons a way of political living and of being with others that – when connected with the refusals of Penelope, Bartleby and Blanchot, the Thracian woman’s laughter, and Berkowitz & Cornell’s thoughts on friendship and fidelity – discloses possibilities for a “jurisprudence of generosity” from where to reflect on political and ethical life and death. I have previously referred to Mokgoro J’s judgment in *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*<sup>78</sup> as an example of a jurisprudence that reflects something beyond the confines of traditional law, maybe the beginning of a jurisprudence of generosity. The same might be said of Sachs J’s recent decision in the defamation case of *Dikoko v Mokhatla*.<sup>79</sup> Sachs J argues that the almost exclusive preoccupation with monetary awards in defamation cases is unsuitable to restore the damage in question in such a case, namely damage to a person’s reputation. He suggests a development of defamation law that would rather encourage apology with the aim of reparation than punishment:

“There is a further and deeper problem with damages awards in defamation cases. They measure something so intrinsic to human dignity as a person’s reputation and honour as if these were market place commodities. Unlike business, honour is not quoted on the Stock Exchange.”<sup>80</sup>

He further refers to the constitutional value of *ubuntu* and proposes that the key features of *ubuntu* – encounter, reparation, reintegration and participation – will contribute to resolve disputes and reconcile parties in a face-to-face public encounter that will contribute to restoration.<sup>81</sup> However, following critical responses on the impossibility of being responsible to the (unknown) other, on law’s “reductive violence” (its incapacity to be generous?) and the notion of the inoperative community, one might regard Sachs J as being overoptimistic about law’s ability to restore and reconcile. For this reason refusal must be placed at the centre of a “jurisprudence of generosity”. As Hanafin<sup>82</sup> notes:

<sup>76</sup> Auster *Auggie Wren’s Christmas Story* 152.

<sup>77</sup> *Auggie Wren’s Christmas Story* 152.

<sup>78</sup> 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC).

<sup>79</sup> CC 2006-08-03 62/05.

<sup>80</sup> Par 109.

<sup>81</sup> See also *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC); 2004 12 BCLR 1268 (CC).

<sup>82</sup> 2004 *Journal of Law and Society* 14.

“The right to refusal calls us to think beyond the state and our role in the biopolitical matrix. It involves a questioning of why it is that the law presumes to be in control of language. It involves a certain refusal to submit to the law, to be insubordinate. It is that other law of writing that is without foundations as opposed to the writing of law, which purports to found the community. It is a call to suspend the dialectical closure of representational politics, as well as the essential complicity of government and legal opposition deriving from it, to affirm a different kind of politics, no longer dependent on the law of possibility.”

### OPSOMMING

Hierdie bydrae is gemoeid met die gedagte van ’n “*jurisprudence of generosity*”, met ander woorde ’n benadering wat die allesoorheersende aard van die reg, en spesifiek die menseregtediskoers, kan uitdaag deur ’n ander politiek en etiek te bedink. Die uitgangspunt is vroulike subjektiwiteit en vroue se potensiaal om bestaande ordes in ’n post-apartheid konteks te weier. Nou verbonde aan weiering is die idees van aksie, opstand, dubbelsinnigheid en risiko. Hierdie gedagtes word oordink en bespreek met verwysing na aspekte van die werk van Hannah Arendt, Julia Kristeva, Gillian Rose, Adriana Cavarero, Drucilla Cornell en Roger Berkowitz, sowel as Patrick Hannafin, wat op Maurice Blanchot steun. Die outeur soek vir spore van ’n “*jurisprudence of generosity*” in onlangse grondwetlike hofbeslissings. Die onverwagse en onvoorspelbare wat sentraal is tot “*generosity*”, aksie, opstand, dubbelsinnigheid, risiko en weiering, is wat ’n ander politiek en etiek sou kon oopmaak.