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This working paper has been produced for the Westminster Law School Weekly Seminar Series 2014. The full paper, with an analysis of the themes, is currently being developed.

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It's Good to be Square: The Kandinsky-fication of Law (Working Paper) ¹

Paresh Kathrani ²

"If he thought, or may have thought, that in throwing the child he was exposing him to only the slight risk of being injured, then you would probably readily conclude that he did not intend to cause serious injury, because it was outside his contemplation that he would be seriously injured. But the defence say here that he never thought about the consequence at all when he threw the child. He did not give it a moment's thought. Again, if that is right, or may be right, you may readily conclude that he did not appreciate that serious harm would result. It follows from that, if that is how you find, that you cannot infer that he intended to do Karl really serious harm unless you are sure that serious harm was a virtual certainty from what he was doing and he appreciated that that was the case." (R v Woollin) ³

1. Introduction: A Focus on Words

This working paper is about legal pedagogy. It considers one approach that is often taken to the study of law. This method focuses on legal terms in abstract. Important concepts such as 'foresight', 'reasonableness' and 'proximity' are often defined and focussed on in and of themselves, without reference to their various vibrations or stratum. As such, when these terms are applied to facts or considered in essays, the analysis is often not as detailed or deep as it could be if there were an absorption in the wider sounds of the concepts. Silence sometimes abounds, when there ought to be noise.

The case of *R v Woollin* provides a useful illustration. In this case, the House of Lords had to consider if the defendant, who had thrown his three-year-old son against a solid surface, had intended to kill or cause him serious injury. The Law Lords identified that intention in criminal law was not just limited to the defendant's

¹ This working paper has been produced for the Westminster Law School Weekly Seminar Series 2014. The full paper, with an analysis of the themes, is currently being developed.

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³ [1998] UKHL 28

primary aim, but could also exist when a particular outcome was a virtually certain consequence of the defendant pursuing his primary aim *and the defendant appreciated that*. This test, otherwise known as '*oblique intention*', constitutes one of the two legal tests for the mens rea of intention in English criminal law, the other one being 'direct intent'. As the definition of oblique intention in Woollin, the leading case, states, it is based, inter alia, on *an appreciation* of the risk. This imports the requirement that the defendant must have had some foresight of risk, which in turn can be related to the importance that criminal law attaches to the notions of agency and blame.⁴ The issue of whether a given defendant had an *appreciation or foresight of risk* requires one to put himself or herself in the position of the defendant. It necessitates a consideration of a multitude of different factors, including the characteristics of the defendant, his mood around the time of the offence, the circumstances in which he found himself and also his reactions to them. As such, the application of the concept of '*appreciation or foresight of risk*' is a composite one that takes in a complexity of many factors. However, going back to what was mentioned above, the concept of 'an appreciation or foresight' of risk has often been approached by some students in and of itself. The focus has every so often been on what do the words '*appreciation*', '*foresight*' and '*risk*' mean *per se*, devoid of context. This has on many occasions led to a narrow application of the law.

2. Ontology and an Argument for Emotive Feelings

Looking at new ways to study law is important, especially in terms of formative assessment.⁵ This paper posits that, ontologically, there should be no difference between how law students discuss situations outside of the law school environment and within. There is sometimes a tendency to perceive the law school as a closed system that is removed from other systems in their lifeworld. However, one of the bases of this paper is that these systems are, essentially, one ontological continuum. For example, arguably, at home, law students have been involved in disagreements. This will have involved the defence of some position. These positions will naturally

⁴ See Section 8 of the Criminal Justice Act 1967 on subjectivity

⁵ Feliú, Vicenç, and Helen Frazer. "Outcomes assessment and legal research pedagogy." *Legal Reference Services Quarterly* 31.2 (2012) p. 188

rest on concepts, such as 'right', 'fair' and 'wrong'. In the course of these arguments, the conscious focus will not be on the meaning of these concepts, but on creating a persuasive web out of the many different milieus that substantiate those concepts in their favour. One of the arguments of this paper is that law students should take the same, contextual and persuasive approach to their law studies, as opposed to the heavy emphasis on words in themselves.

This leads onto another argument of this paper. As mentioned, the primary assertion that is being made is that, ontologically, there should be no difference between how law students look at contentions issues outside of law school and within. Both call for a wider, contextual consideration of concepts. However, complex existential boundaries often arise (but certainly not in all cases). Students sometimes see themselves as different beings in law schools and on the outside. This raises the question as to why. One reason that will be postulated by the final paper is linked to emotions. It is posited that when a student, or indeed, anyone, is asked to defend a position *outside of the law school environment* then it is *emotive feelings* that propels them to fervently consider and bring in the many wider contexts – the moral, the social, the economic, the political etc – that supports *their* application of the concepts. It is *their own* personal investment *in the position being defended* that draws them away from the essential *vicinity of the concepts* to look further afield in support of their argument. That is not to say that some students do not get passionate about the law! But naturally law students differ. As Deborah Zalesne and David Nadvorney, for example, identify in their work on 'academic intelligence' and 'othering', students have different intelligences and will approach the study of law in many complex ways.⁶ For this reason, some students may strongly focus on a *need to understand the law* - as opposed to the many *impulses that underlie* the application of the law - and this may lead to a heavy reliance on just the words. This can also arise because of a misunderstanding with the taxonomy of legal education.⁷ Taxonomies generally arise when competencies are linked and classified according to objectives. It is, of course, important to identify learning outcomes on the basis of

⁶ Zalesne, Deborah, and David Nadvorney. "Why Don't They Get It: Academic Intelligence and the Under-Prepared Student as Other." *J. Legal Educ.* 61 (2011): p.265

⁷ For an interesting discussion on the growing taxonomy of legal education, see Feliú Op cit. p. 189

which curricula can be designed. But some students may focus heavily on the words that constitute the learning outcomes, as opposed to their application.

3. The Concreteness of Words in Contrast to Art

For this reason, this paper essentially posits that stimulating a *greater emotive attachment* to the law may foster a stronger contextual grasp. There is, of course, nothing novel in that! Every law lecturer endeavours to deliver a motivating and thought-provoking class. However, the full paper will contend that *art theory*, and in particular some of the artist, Wassily Kandinsky's, ideas, could constitute an *effective pedagogic starting point* in the study of law.

In furtherance of this, the full paper will develop and expand upon the notion of the *concreteness of words*. On a very broad level, words, of course, have a number of meanings. For example, the one word '*morality*' can be taken from a number of different viewpoints, including the consequential and deontological. Words change their meaning when they are added to other words, and even more so when different contexts are added. In short, words and the combination thereof are complex. This is something that will be explored in the larger work. There are obviously a multitude of other layers and nuances associated with words that will be looked at in the course of developing a larger paper, including 'alterity', and words' social, cultural and literary aspects, amongst others.

It is arguable that these semantic and literary gradations of words naturally provide some ground to encourage the emotive feelings that may facilitate the even deeper contextual analysis of legal concepts. That is, of course, true. However, in time, this paper will develop the claim that despite the many distinctions of words, they still *remain bound* by some *meaning* - and this may in some cases impede the emotive feeling needed to encourage that greater contextual analysis.

So why *art*? Art is the fulcrum around which the full paper will ultimately turn. For this reason, a strong and original pedagogic framework of art is being developed.⁸ However, in brief, the idea of art that is currently being looked at postulates that art is any sensational configuration whose **sovereignty of meaning**, by definition, resides elsewhere.⁹ One may have a cup of coffee on their table. Its drinker will perceive its lines, its shapes, and its handles as a receptacle for carrying coffee. They will most probably not even give it a second thought. While they remain unconscious of its essence per se it sits there - quietly. They then notice it; that it is round and they ask themselves why and conclude that it's most probably because it's conducive to drinking. At this point, it is not art. It is instrumental because the drinker lays claim to meaning. It is only when and if the drinker concedes that sovereignty of its meaning **must** rest with the originator and with the originator alone is it on its road to becoming art. Thus, art is a meaningful yet elusive search for meaning. For the artist, art is ownership and individuality.¹⁰ That is why this paper puts forward art as a pedagogic starting point. Art is different to words. Words sit within the structure of a lexicon. They often bind the writer or speaker. That is not to belittle words as a form of art. There have, of course, been countless awe-inspiring pieces of writing and plays, amongst other things, that have taken human feelings to many different, emotional levels. However, it is suggested that what made these '*words*' art was that the reader or listener could not claim any ownership over their meaning as it lay elsewhere. Can this, and more relevantly, should this apply to the study of law?

On one level, it can be argued that law should not be compared to art. This is because while the ambiguity of meaning is the very *raison d'être* of art, the exactness of words is the bread and butter of law. The very industry of law is confirming words that can then be applied to resolve legal disputes. It would be

⁸ As Richard Shusterman rightly identifies, it has been difficult to provide a definition of art: Shusterman, Richard "Pragmatic Ethics, Living, Beauty, Rethinking Art", Lanham, Rowman and Littlefield, (2000), p.34

⁹ This can be very broadly related to what Theodor Adorno says in 'Aesthetic Theory', 'Artworks detach themselves from the empirical world and call forth another world': Adorno, Theodor W. "Aesthetic Theory", London, Athlone Press, (1997) p. 1

¹⁰ Although a much wider aesthetic analysis will be undertaken for the final paper, for a good overall critique of art's autonomy see: Scrutton, Roger, "Art and Imagination: A Study in the Philosophy of Mind", South Bend, St Augustine's Press, (1998)

paradoxical if such words were open to different, subjective meanings as this would then prolong, as opposed to settle cases.

However, legal concepts are never as stagnant as that. They are always contextual. For example, if one were to take the legal concept of ‘appreciation of risk’ per se from *R v Woollin* it would require one to be cognisant of a number of wider nuances. Indeed, learning outcomes in law often talk about the need to understand the law in its wider contexts and this is an essential skill in working with the law.¹¹ However, as discussed, some law students cling tenaciously to words. Rather than venture out and explore law’s many diverse, contextual contours they prefer to stick closely to its literal interpretations. It is for this reason that the full paper will contend, as argued above, that the very empowerment that art affords is an effective means to motivate students to explore the contours of law.

The notion that students can explore the law with reference to art is not original. However, what the eventual paper will further argue is that *Kandinsky’s ideas on ‘the spiritual in art’*¹² can form the basis of a pedagogic approach to law. As discussed above, there is an ontological divide between how some students apply concepts within the law school and outside that environment. This paper posits that in some cases, although not necessarily all, this can be explained with reference to emotional attachments. As students feel more emotively connected to the use of concepts outside the law school environment, they feel much more positive taking their meanings for granted and, indeed, using their different connotations and nuances. They also spend more time and often take more care exploring the different perspectives and contexts that engage those concepts. That’s not to say that emotions are necessarily the direct reasons. However, there is often resonance and confidence that comes with making something one’s own. For this reason, the end paper will argue that *Kandinsky’s ‘spiritual in art’* can be used as a means to enable

¹¹ Lynch, Mary A. "Evaluation of Ten Concerns about Using Outcomes in Legal Education, An." *Wm. Mitchell L. Rev.* 38 (2011): p.987

¹² See Kandinsky, Wassily “Concerning the Spiritual in Art”, New York, Dover, (2000)

students to invest *themselves* in the law through art.¹³ It is this *personal investment* that will enable them take ownership and explore concepts. Rather than being bound by the concreteness of words, their conversion of the law into art and the ownership that this entails will stimulate them into looking at the complex nature of concepts beyond just a literal approach to words. The following *Kandinsky-fication of law* will explain why.

4. Kandinsky's Spirit

A more forensic and systematic examination of Kandinsky's work and ideas will form the basis of the larger paper. His art was mainly of an abstract nature. His later work did not always directly represent actual phenomena in the world. A symphony of points, lines, shapes and colours on a plane were used, which were often difficult decipher to begin with. What did Kandinsky mean by these images?

For Kandinsky, art was about spirit. A simple point, or mark on a canvas, was both silent and spoke at the same time because it did not necessarily represent anything in particular but was the language through which the artist could convey themselves. For example, they could move the point to make a line if they sensed movement. They could make it a horizontal line if they wanted to convey stillness, or a vertical line for anticipation. Diagonals represented a union of the two. Depending on how they felt, different forces could act upon their lines turning them into angles or curves – and shapes and space could also be used to display sensation. The width of lines, for example, could be used to represent sound.¹⁴ Here, it is important to note that *synaesthesia* was a crucial part of Kandinsky's art. '*Synaesthesia*' suggests a resonance in one sensation could trigger one in another. For instance, if one heard a sound then this may be perceived as a colour: colour played a crucial role in Kandinsky's work, particularly from a synesthetic perspective. This also tied into the general framework of Kandinsky's work. It was the way in which *all the senses*,

¹³ This can also be linked to what Patricia Easteal says about 'andragogy' and wider learning: Easteal, Patricia. "Teaching about the Nexus between Law and Society: From Pedagogy to Andragogy." *Legal Educ. Rev.* 18 (2008): p.164

¹⁴ Kandinsky, "Point and Line to Plane." New York, Dover (1979), p. 57

especially, for Kandinsky, sound and music, came together to propel points, lines, shapes and colour on a *living plane* that was important (but there is certainly more to Kandinsky than just this).

A more closer, detailed look at Kandinsky's work and ideas will be undertaken in the full paper. However, a survey of the artist's writing and work certainly shows that he felt that art was very much indicative of spirit. The notion of '*the spirit*' in Kandinsky's work, particularly his reference *to the soul*, does have specific theosophic qualities. For example, Vincent Tomas compares Kandinsky's synaesthesia to deeper, spiritual vibrations.¹⁵ However, what the full paper will argue is that Kandinsky's own wider pedagogic theory – he was a member of the Bauhaus art school – can be used to encourage a greater contextual understanding of law by motivating students to take ownership of the analysis of law.¹⁶

5. Drawing a Legal-Kandinsky

A detailed method will be provided in the final paper. However, by way of theorising its outlines here, if one were to take the test for oblique intention in *R v Woollin* above, namely:

"...you cannot infer that he intended to do Karl really serious harm unless you are sure that serious harm was a virtual certainty from what he was doing and he appreciated that that was the case."

Having been given some background on Kandinsky, student's would be, first and foremost, asked to sketch this test as a piece of art. Here, rather than focusing on the words such as '*appreciation*', '*foresight*' and '*risk*' per se, they would be encouraged to draw how *they feel* about the words as a piece of art. Being a piece of art, they would not be bound by meaning. Using Kandinsky, they would just draw to

¹⁵ Tomas, Vincent. "Kandinsky's theory of painting." *The British Journal of Aesthetics* 9.1 (1969): p.23

¹⁶ On Kandinsky's pedagogy at the Bauhaus, see Poling, Clark V. "Kandinsky's Teaching at the Bauhaus." *New York, Rizzoli* (1986), p.107

how they feel about the test. They would claim sovereignty. Here, wider sounds and notions of justice may come in. The personal investment that comes with a piece of art may encourage them to look at the nuances of the law that they may otherwise not do if they were just focusing on the words.

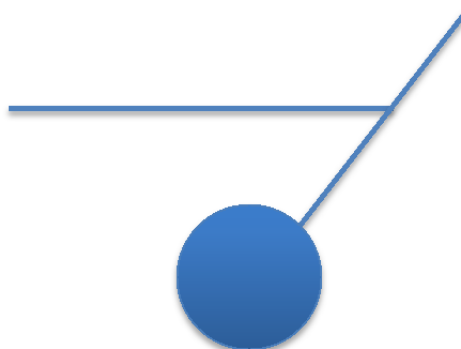
For instance, the 'you' in R v Woollin could be represented by a horizontal line:



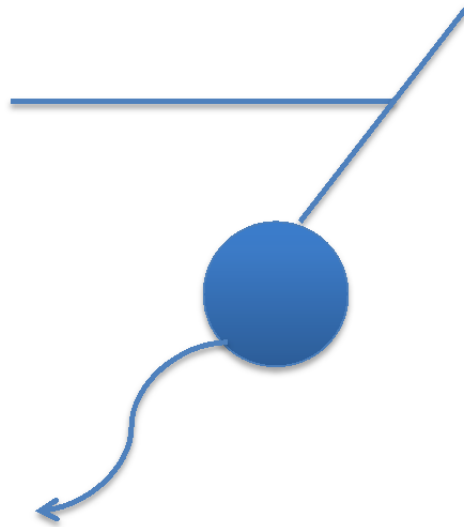
The word 'Inference' by a diagonal line conveying 'possibility'.



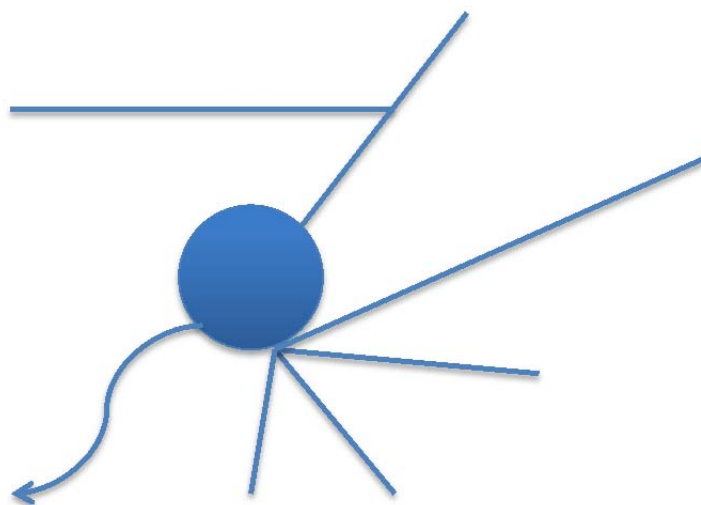
The consequence of 'serious harm' could be a circle with no end and beginning, signifying the complexity of harm:



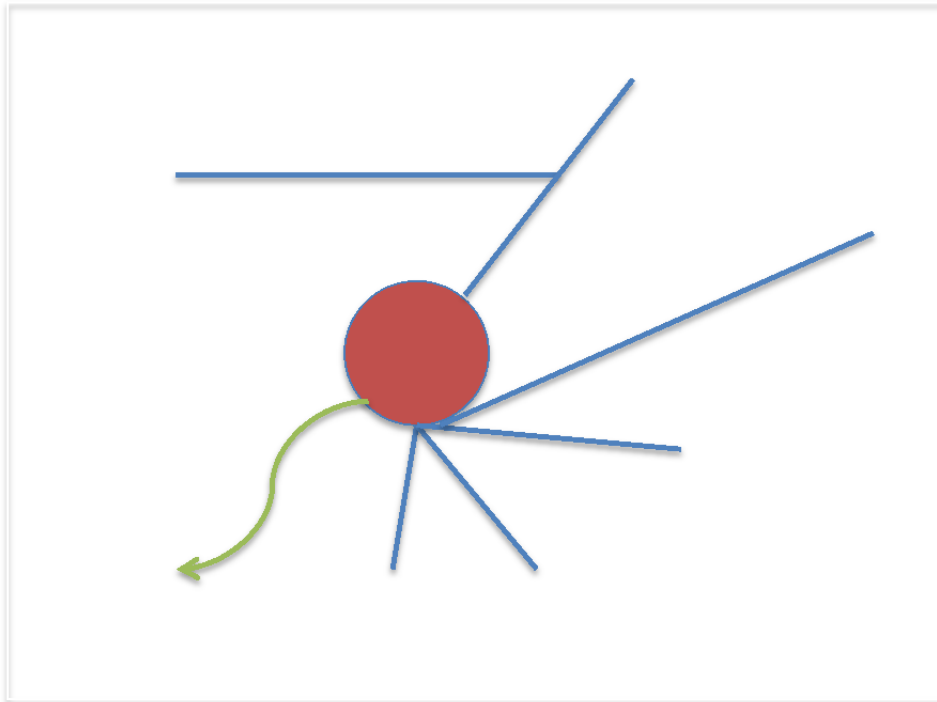
The notion that oblique intention is based on whether that serious harm was '*virtually certain*' could be shown by a wavy line representing the many forces that contribute to certainty; and



The requirement that the '*defendant also appreciated that risk was virtual certain*' could possibly be depicted by numerous diagonal lines:



Colour could also be added to suggest feeling or emotion: for example, *red* to represent 'serious injury', *green* on the flexibility of 'virtual certainty' and a *white* plane imbuing all with justice:



6. Conclusion: The Piano and Sounds of Justice

These pieces of art may then have legal resonance and meaning for students. In this way, students could use creations of art as a starting point to tackle and take in different legal concepts.¹⁷ The very freedom and sovereignty of meaning in the being of art may facilitate this, whereas often the concreteness of words may not.¹⁸ That is the basis on which this paper posits that *art theory* provides an effective, *pedagogic* starting point in studying law. Students in law schools begin their legal education with

¹⁷ This can be related to 'visual learning': DeGross, Eric A. "Training Tomorrow's Lawyers: What Empirical Research Can Tell Us About the Effect of Law School Pedagogy on Law Student Learning Styles." (2012). P.252

¹⁸ As Kandinsky himself said, 'There is no must in art because art is always free.' Quoted in Tomas Op cit. p.32

words. They enthusiastically tackle those words with great fervour and this often means they take a rich approach to the law. Many students maintain this energy and as such do extremely well. However, sometimes, the concreteness of words and a misconstruction of SMART learning outcomes ¹⁹ disrupts this flow and students begin to focus more *on the meaning of words*, as opposed to their deeper contextual application. It is argued that using art as a pedagogic tool may assuage this.

Moreover, this paper argues that *Kandinsky's ideas* are one approach to this as it enables students to fully engage with their emotive feelings in understanding the law. Kandinsky believed that when artists perceived the world their soul vibrated. These vibrations could then be drawn as points, lines and colours on a plane. In this way, art was a manifestation of how the world moved their soul. It encapsulated their spirit. As he wrote, *'the soul is the piano with the strings and the artist is the hands which by mean the tangents call forth the vibration of the human soul.'*²⁰ For him, art was the external expression of the internal. In the same way, students could essentially start by asking themselves what a law means *to them*: how it evokes the inner. Here, the full paper will explore in much more detail how student's works of art can give sound to *their inner piano of justice*, justice being, at least, a feeling: art will stimulate emotions within them and support deeper, contextual argument.²¹ It is hoped that this will give full voice to the orchestra of law that resides within them as opposed to just silence.

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¹⁹ For a discussion of SMART (specific measureable attainable relevant targeted) learning outcomes, see Feliú Op cit. p.190

²⁰ Ringbom, Sixten. "Art in 'The Epoch of the Great Spiritual': Occult Elements in the Early Theory of Abstract Painting." *Journal of the Warburg and Courtauld Institutes* (1966) p.400

²¹ This can and will related be related to what Kandinsky says about art having an 'inner' and 'external' nature Kandinsky, Wassily "Point and Line to Plane." Op cit. p.17

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