Writing Beyond Distinctions

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Legal research is increasingly moving beyond traditional distinctions between socio-legal and critical legal thinking, black letter law and legal context analysis, 'practical' law and 'theoretical' justice, 'objective' and 'subjective' modes of writing and so on. Large parts of new legal research are moving towards an emplaced, embodied and material understanding of law that is both about the law itself and its theoretical and social context. In this chapter, I argue that this move should also be reflected not just in what we write but also in the way we write. I offer some observations on why these distinctions have already become obsolete in legal writing practice, despite the fact that they are unconsciously still practiced by most of us. I then suggest a few ways in which legal writing can move further in this theoretically rich yet emplaced and contextualised direction. Some of the most important steps are: to rethink of the essay as truly an essay (i.e., trial, experiment); to take risks by not striving for consistence above all but by allowing the text to unfold as a body in itself and a legal agent; to reserve a prominent position for the 'I' in its affective, multiple presence; and to embrace the collective urge towards a more just law. I conclude by summing up the most important distinctions that we need to overcome, and by revisiting perhaps the ultimate distinction between law and justice.

1. How to write beyond distinctions?

Writing is all about distinguishing, not least what to include and what to leave out. So this chapter is not about writing without distinctions, but about becoming aware of the distinctions we habitually employ when writing about the law, and then making an

[1] This text partly draws from my 2018 text 'To Have To Do With The Law: An Essay' - my first ethnographic attempt and conscious writing on writing.

effort to move beyond them. In what follows, I will be urging readers to leave behind at least a couple of distinctions. The first one, of a more formal nature, is that between socio-legal and critical legal writing. The second, referring more to the substance, is the distinction between text and context, or to put it somewhat differently, law and matter (and with it, other disciplines, space, human and nonhuman bodies, objects, even ideas).

Ignoring at my peril Margaret Atwood's sound advice ("Writing itself is bad enough but writing about writing is surely worse, in the futility department." 2002: xvi), this chapter is about writing. The idea is to explore ways in which we can open up our writing practices beyond formal distinctions of who is what, or substantive distinctions of law on the one hand, and all other things on the other. We have been conditioned for too long to think, write and act according to turf-divisions. These are insidious practices, employed in our writing in an often unthinking way, and embodied in the choice of authors we read, the conferences we attend, the law schools we seek employment in. Even the most progressive of us regularly indoctrinate our students with such distinctions.

This, however, is not just about writing. Legal research can never be 'just' writing. There is always a horizon, legal, political, social at large, and we are all gearing towards it. I assume here that the readers of this volume all share a broader horizon: the desire for a more just law. By artificially placing boundaries between, say critical and socio-legal, interdisciplinary and disciplinary-focused, or personal ethnographic and 'objective' analysis of law (even in context), we debilitate the possibility of the united front we need to present in view of all the rather extreme challenges we are currently facing as scholars. These challenges are well known, and appear equally on a micro (managerialism in universities, marketisation of research, quantification of teaching) and a macro level (global disregard of law, new geopolitical balances, insular nature of global political scene in terms of aid, environment and refugees, ecological degradation, and so on).

In the following two sections, I look into the above distinctions and the reasons for which they should be considered obsolete. I then (section 4) point to our frequent reluctance truly to leave these behind and move into what Adorno has called the law of the essay, namely a manner of writing that allows for previously invisibilised elements to come forth. To do that, I argue we need to resist the urge for resolution (section 5) and treat the essay instead as a body with its own, indeed legal agency (section 6). One way of doing this is by insisting on using the 'I' both as a semantic of personal

responsibility but also as an indication of a collectivity (section 7). Another way is by allowing the text to unfold – indeed we need to 'listen' to the text rather than always trying to impose a form on it (section 8). In section 9, I sum up our responsibilities as legal scholars and writers, and I conclude with a listing divagation (section 10) and a reminder of what is, hopefully, the most important reason for which we write: to allow for the emergence of a more just law.

2. Have we ever not been critical?

Let me start with the first distinction, that between socio-legal and critical. My argument is that the maintenance of the distinction does a disservice to both critical and socio-legal writing (traditionally understood). It implies that socio-legal writing cannot be critical, namely theoretically informed with strong critical inclinations and potentially even a horizon-embracing vision of the future; and, respectively, that critical cannot be socio-legal, namely pragmatically contextualised, in touch with an ever evolving society the study of which often necessitates a broadly understood empirical approach. There is no doubt, of course, that several theoretical publications pay scant attention to how theory is translated into practice, and how, more broadly, theory can make a difference; likewise, a considerable amount of applied research is not interested in the benefits that more extensive theorisation brings in terms of diagonal, creative and unhinged thinking. But things are rapidly changing: a burgeoning number of scholars in the last decade or so have resisted such hardlines and have produced work that theorises practice and applies theory, if not in equal measure, at least without falling in an old-fashioned binary (out of a large body, see indicatively Perry-Kessaris, 2017; Grabham, 2016; Bottomley and Wong, 2009).

The distinction (and others along the lines of 'high theory' versus grounded thought, concreteness versus abstraction, utopia versus pragmatism and so on) has outlived its usefulness, its relevance now only useful as a tool for turf-preservation. It is perhaps time to understand that there is good legal thinking that is aware of its potential effect on reality and works on this in order to give direction to its theoretical development; and then, there is not so good legal thinking that remains unconnected to reality and deliberately ignores its own transformative potential. Unless broadly understood as contextualisation, affective engagement and personal involvement, neither empirical studies nor mere theoretical work have a monopoly on reality.

In response to this, I have tried to sketch the concept of ‘critical sociolegal’ research (2015), and more recently the practice of ‘law and theory’ (2018) as ways of moving beyond distinctions. This text is a continuation of the same project. It is my hope, however, that increasingly, any need to come up with a category for the kind of research we are engaging, both in this volume and increasingly in the wider academia, will eventually become obsolete.

3. What is the context of the law?

Considering the readership of this volume, there is no need to emphasise how a doctrinal focus on the letter of the law fails to understand what the law is. Context to the law is not what broccoli is to the tofu steak - the optional green bits. Rather, law’s context makes the text of law, imbues it with relevance, links it to reality, fleshes it with matter, gives it a body and positions it in space and time. Context is text, and the distinction between the two is increasingly becoming outdated, whether we are talking about socio-legal, critical and/or interdisciplinary research. The relevant question now is, how best to include context when writing about the law.

The question bears considerable gravity: it has increasingly become the main challenge and responsibility of a legal researcher. Ethical approval of empirical work is precisely about the careful filtering of the context into the text. Likewise, the question of which theory to choose and how to apply it is increasingly important, not just on a PhD level in terms of theoretical framework but even earlier on in terms of undergraduate work that claims to engage with contemporary life. Theory needs to be there, not only because it strengthens the legal argument but also because it enriches it and opens it up to potential conflicts which the law habitually excludes. Finally, other disciplines enter legal thinking in the form of economics, gender, politics, or perhaps less traditionally in terms of space, time, corporeality, and so on.

The plethora of these considerations and the particular urgency in which they emerge (especially political, geopolitical and environmental issues) leaves us with two options: either we carry on lamenting the loss of (a fantasy of) disciplinary sovereign of law and resist the tide by reinstating the boundaries of law along traditional lines; or we accept that law is changing in line with reality, theory and other disciplines, and becomes all the richer for this. In reality, I only see one option here.

Yet, there is one proviso: law's function remains distinct from other disciplines. However much we enjoy law's engagement with, say, anthropology, we are also aware of the fact that legal research is not anthropology. Rather, it can aspire to become a kind of, say, legal anthropology. This means that the text (in this case, the law) re-emerges from within the context: text and context, although in many ways identical, do not become one. Law's social function of binding expectations in terms of what is allowed and what not, is an important one. While no doubt in a continuum with cultural, anthropological and sociological normative considerations, the law (the way understood in law schools) is still recognisable and can still be differentiated from other kinds of norms. Let us not become arrogant though: this is a spectrum, and law is only a form of intensification of the normative, often aided by spatial (say, in a court of law) and temporal (say, in times of terrorist amber alert) conditions. What is deemed 'merely' cultural, often ends up becoming 'solid' law, and vice versa.

4. Why do we all fail?

In what follows, I would like to zoom in the writing, especially legal essay writing, and the ways in which it can move beyond the above distinctions. I refer here predominantly to the art of scholarly essay writing, the type of writing we all engage with when reading or contributing to volumes such as this. There are of course other types of legal writing: case commentary, reports, textbooks, "scholarship" writing, even funding applications. The kind of essay I am thinking of, however, is not limited to a formal understanding of an essay, whatever that might be, but potentially includes even the above kinds of writing and extends to any form of writing that analyses the law and its context. In that respect, all writing is essay writing – an attempt or a trial for both form and content.

This, however, is uneasy territory, since it upsets most of the ideas we have of what a legal essay is or should be, and consequently leaves us a little adrift, somewhat fumbling for the form we knew and trusted. Formlessness, however, has traditionally been considered an integral characteristic of the essay form, ever since Michel de Montaigne invented the term and to some extent the form of the 'essay' (*essai*, often translated as 'trial'). A lawyer by formation, Montaigne fought against the law with characteristic vehemence. While his thoughts on law were convincing in many respects, it is our challenge to fight against some of these distinctions as well. In particular, Montaigne maintained that law cannot generate justice ("even our system of law, they say, bases

the truth of its justice upon legal fictions" Montaigne, 1991: 603), in so doing maintaining a distinction between law and justice. And while there are different kinds of justice, and not every kind comes from law, we should also accept that there are different kinds of law too, and that the connection between them needs to be instated.

In order to reinstate this connection though, as I hope to do at the end of this essay, we need to think more broadly. The German philosopher Theodor Adorno (1984: 171) concludes 'The Essay as Form' with these words:

> the law of the innermost form of the essay is heresy. By transgressing the orthodoxy of thought, something becomes visible in the object which it is orthodoxy's secret purpose to keep invisible.

In other words, orthodoxy of thought keeps things invisible (presumably out of a desire to maintain status quo and disciplinary lines) whereas heresy, the law of the essay, brings these to the fore. But is this really how we think of our writing? Does the law of the essay really apply to essays on law? Do we really write essays (etymologically, trials and experiments) or do we sometimes feel as if we are filling in preformulated word documents (I do)?

Without wanting unduly to challenge our volume editors (although I would like to challenge them a little), all contributors received, in good time, a very detailed outline of how the individual chapters should be formatted. I am not talking about referencing style etc., but about the questions that each contribution is to be pondering on, neatly separated in easy to follow sections (an example: Section II of each contribution is to be "Analysis of one or more aspects of your experience applying this socio-legal theory/method…We do encourage contributors to take a reflective and reflexive approach, considering e.g.: What was your project and how did you use this theoretical/methodological approach? How did you use this theory/method and what would you do differently in the future? How were your research choices and outcomes shaped by aspects such as your positionality as a researcher and ethical implications/choices? What are the implications of your work for the development of this theory/method?") This is no doubt an expert editing attempt at making our (contributors) and their (editors) writing lives easier, and at achieving a much-valued consistency of outcome. Cheekily, however, my text is an ungrateful attempt at making my writing and their editing lives harder. I do not follow the suggested format, I answer only indirectly some of these questions, and I end up ignoring others. I hope I am not misunderstood as an

arrogant trouble-maker: the above questions are excellent. Indeed, the editors ask for personal and textual positioning, future projections, practice-oriented facts – they ask of us to be *present* in what we write. But at the same time, despite the fact that they explicitly state that they "do not wish to be prescriptive about the content", and I believe them, they fail.

But we all fail. Let us go back to something even more basic: the writing of our students. While the emphasis of my text here is not student-writing, I employ it as an unambiguous indication of what we more or less impose on ourselves (as well as our students) as the 'appropriate' way of writing. So, to recall Adorno and the law of the essay: do we encourage, or at least tolerate heresy? I have worked my way through many first-year student essays, the explicit objective of which is not so much the chosen topic but essay-writing as such, researching and expressing, in short a first soft plunge in the world of academic writing. Year in, year out, they are asked to choose out of a list of topics (role of the judge, law and morality, statutory interpretation and so on), and every year the absolute majority chooses the topic of juries. The majority amongst that majority forms their topic along the lines of a seminar question in their handbook: "What are the advantages and disadvantages of the jury system? Identify 2 or 3 points on each side of the debate." The admittedly well produced (not by me) handbook provides clear guidance on essay writing. For the introduction for example, the main requirement is to "set out your approach to answering the question by mentioning briefly the issues you will cover. If you cannot do this then you are not clear on how you are going to approach answering the question. Go back to the question." Following on, "at the beginning of each paragraph state what the issue is." And as for the conclusion, emphatically "do not introduce new ideas!" One of the oral instructions to students, about which I have an extended exchange every year with the programme responsible, is not to use the first person personal pronoun. Passive voice, impersonal constructions ("it is submitted") or at the very worst, 'we' is preferable.

Students (we!) mostly follow the guidelines, good students at least (we on what we think is a good day), and produce balanced, reasonably-argued although understandably often hesitant and slightly wooden essays on juries. What is worrying though is that they regularly stop short from taking any position with regards to their chosen two or three points, and nearly always end up with a conclusion (and a whole text, for that matter) that does not introduce any new ideas (exclamation mark). I imagine that the argument is similar to that other argument that says you have to be

able to master figurative painting first in order to move on to abstraction. I am certain that this is no longer considered valid, at least in trendy fine art schools, but there is something not altogether unattractive to it. You must first learn the basics, and only then fly. And naturally, I am all too aware of the problems of incipient writing, and I have often found myself imparting to students but also early career colleagues, the usual essay writing steps as if they were the truth.

But then, what do we sacrifice when we desire an essay to be merely an attempt and not a veritable trial? A trial of error and of bravado perhaps, but also a trial of judgement, of personal exposure and risk-taking? What do we lose when we only encourage well-formed, section-arranged consistency?

5. Why must legal essays be disappointing?

The essays we write about the law have a choice: they can either submit to the compulsion of the law to deliver a binary resolution: yes/no, guilty/not guilty, legal/illegal; or they can flow along the other, perhaps more honest aspect of the law that never quite decides. This is that part of the law (or the essay) that lies in waiting for its interpreter/reader: as we said, law is inert until thrown into a context which animates it and indeed *makes* it the law. While the former way of thinking about the law is the big adversarial spectacle, in the mode of dramatic trials and netflix shows; the latter is the way law attempts to capture the future without, however, being able to dictate it. It is the law in its full potential: an opportunity to reinterpret reality. The choice of the legal essay and its author, to put it differently, is either to erect a fortress of a text along the lines of the court trial (an enclosure, a theological metaphor, a final testament[2]); or to assemble a text that is akin to a veritable *trial*, an experimentation with formats, ideas, facts, theories and disciplines. In short, a text that takes risks.

How can an essay achieve this? By allowing the writing to breathe. This potentially means many things, but for legal thinking specifically, it means not being geared towards resolution but towards the unfolding process of writing. In other words, it means to

[2] “Enclosure not only symbolized the independence of law from political, commercial, and social space; it served to restrict access, limit vandalism, minimize the disruption of trial, and, perhaps above all, encourage deference to the administration of justice in a democratic society perpetually anxious about the authority of law and lawyers.” (Spaulding, 2012: 316).

side with new forms of law that are not adversarial but open, mediated, discursive, linked to practices of restorative and distributive justice rather than the still potent retribution models; and in so doing to take an implicit but sonorous distance from the usual patriarchal structures that demand authorial stance and other delusions of control. It is not enough to pronounce such goals in our texts. Our texts need to perform them too: we need to produce less “hierarchical” texts, as Andrea Lunsford calls the texts that are "rigidly structured, driven by highly specified goals, and carried out by people playing clearly defined and delimited roles" (1990: 133).

We can draw inspiration from Montaigne’s essays, famous for hardly ever culminating in a closure, a grand finale or morale, in short, a definitive conclusion. As Philip Lopate (2013: 105) puts it, “Montaigne’s attraction to open-endedness or “endlessness,” if you will, has a great deal to do with his seeking a balance, through the sifting of long experience and the acceptance of imperfection. Montaigne was a master of equilibrium; and equilibrium such as he advocated does not drive toward apocalypse or closure of any kind…He chose the essay as a form to develop, in part, because it offered him a way to circumvent too-hasty resolutions.”

It is not merely a question of conclusion but of overall structure. Lopate (2013: 211) again: ““if you know already what all your points are going to be when you sit down to write, the piece is likely to seem dry, dead on arrival.” Why is that? Because then, the whole focus would be on the resolution. And we often conflate academic rigour with this need for resolution. It is impossible to perambulate, and thus take risks productively and creatively, if everything is predetermined. Direction, political views and ethical positions, yes; but perfectly pre-planned analysis neatly and descriptively laid out should not become the fate of academic writing.

An essay should harbour for the reader surprise, delight and disappointment, all at the same time. Surprise at the choice of topics, the way they have been approached, the new connections with which they have been endowed. Delight at the same, but also at the turn of the phrases, the choice of guiding metaphor or metaphors that will allow the essay to speak in other disciplinary languages and with a bifurcated force, a common front formed by reasoned argumentation and metaphorical completeness.

Above all, every essay must disappoint: if it is to be a trial, the essay needs to be the exact opposite of a court trial. It needs to remain incomplete and to embrace this very incompleteness with pride. This is because “the usual reproach against the essay, that it is

fragmentary and random, itself assumes the giveness of totality and thereby the identity of subject and object, and it suggests that man is in control of totality." (Adorno, 1984: 159). It is important that we relinquish the idea that our essays are little stabs at totality.

So, for a writing beyond distinctions, one needs to follow the desire of the essay. Fragment, open up, refuse to pass judgement! But: take position, thump on the side of the object in order to upturn it, flood it with other voices, break it up – and in the process, break yourself up too.

6. The essay as body?

A good essay is not of course all fragmentation and incompleteness. There is something emerging from it, a discreet body of thought. On the back cover of his book *Essayism* (2017), a book that inspired me to think about writing, Brian Dillon writes

> Imagine a type of writing so hard to define its very name means a trial, effort or attempt. An ancient form with an eye on the future, a genre poised between tradition and experiment. The essay wants above all to wander, but also to arrive at symmetry and wholeness; it nurses competing urges to integrity and disarray, affection and fragmentation, confession and invention.

This distinctly unlegal-sounding schizophrenia of aims is the core of an essay: both ancient and future, wandering wholeness, an emerging body of integrity amidst its own fragmentation. This is, therefore, another step towards an essay that moves beyond distinctions: the essay must emerge as an agent. Out of its words and phrases, a material body needs to be assembled. In other words, we need to understand that our writing lives beyond our intentions. It is prone to different readings, appropriations and misappropriations. It is in a continuous process of *becoming* – and that's ok.

Adorno (1984: 161) again: "In the essay discreet separated elements enter into a readable context; it erects no scaffolding, no edifice. Through their own movement the elements crystallize into a configuration." The configuration is nothing other than the much-praised *consistency*. In order to be thought of as a material body and an agent that interacts and affects the way other agents (the law being one of them, but also the lawyers, the scholars, other disciplines, the planet as a whole), the essay needs to have a shape,

an outline, both figuratively and in essayistic terms. A tidiness of sorts that to some extent subscribes to the order of wholeness and perhaps symmetry. Ever body has a contour – we forget though that this contour can be fluid and ever-changing.[3]

An essay worth its tentative name is a distinct body which, however, also forms part of a larger body, a collective effort to think and make the law more just. For this, the essay must engage with the space and time of its object: “the essay comes so close to the here and now of the object, up to the point where that object, instead of being simply an object, dissociates itself into those elements in which it has its life.” (Adorno, 1984: 162). Bring the object to life by pulverising it into zillions of particles of life-affirming materiality. Will life into the body of the essay by bringing its matter forth, even if this entails its disassembly, and link it up to other streams of thought and ideas that might not be obviously contiguous. This means: go deep into the legal technicalities and study the way the minutiae of law deposit themselves on every aspect of life in particular spaces and particular times. At the same time, do not lose sight of the larger task an essay sets out to fulfil: expose the coercive power of the law and embrace its transformative potential, *make* law and *live* law as part of our lives on this one planet that we have.

7. How many am I?

Should I be me when writing? The question is no longer whether research writing can present objective facts/truths (no), or whether bringing the ‘I’ in (in terms of pronoun and subject matter) renders the whole thing subjective (and therefore, irrelevant or at best partial) (yes, no, so what). Nor is the question whether the law can be approached from the point of view of the ‘I’ (yes), or whether the ‘I’ must sublimate itself to the ‘common person’ (what is that).

The question rather is whether the ‘I’ can move away from the atmospherics of the old distinctions, namely bubbles of isolation that decree one’s affiliation, readership, reference base and publication

[3] How legal all those bodies of law, the *corpora juris* that pulsate with “text, territory and terror” (Goodrich, 2006: 33), always channelled through sections and paragraphs. Goodrich has repeatedly shown us how text is body, and how what seems like mere legal textuality is a corporeal explosion. Matter is, after all, inescapable.

avenues; and into the collective body (of which the essay is part) that has the same desires as the author.

Once again, and at risk of simplifying, I would say that the desire of the wider critical socio-legal body is to make law more just, regardless of affiliations and modes of writing. Old distinctions can be things of comfort, zones of familiarity and tested grounds. But this is not an essay. One has to come out and reach for the identity of desire across the spectrum. This is the collective body that matters.

The only way of doing this is by remaining personal when writing (to recall our, wise after all, editors' suggestions, "How were your research choices and outcomes shaped by aspects such as your positionality as a researcher and ethical implications/choices?") But we can go further: the body of the author has to become the text. For what is the law if not an embodiment? How can the law be understood unless through the bodies that make and undo and interpret and resist and ignore the law? And how better to communicate what we want to say, if not through the community of our bodies? This is the way to reach the wider body of desire for a more just law.

The 'I' is never in isolation but always part of a wider collectivity. The 'I' is multiple. Internally, "the 'I' is both contained and provisional – just as important, it is *dispersed*." (Dillon, 2017: 18). We are never just one body, operating in a single lawscape, in some sort of illusion of permanence. We are always multiple and dispersed. But this dispersion, seemingly a weakness, can be strategically enlisted. Use your dispersion, spread horizontally, take up your minoritarian positions and break free from the thinking that allowed the law to distance itself from its context. And follow the same strategy textually too: think of Bruno Latour's thick description of the Conseil d'Etat (2009), and its gravitational attraction for seemingly un-legal, unimportant details. This deliberate dispersion, this absent-minded focus, those centre-stage curios: often an effective way to flesh out the body of the law (see, e.g., Carr, 2016).

8. What comes first, the idea or the writing?

Time for a bit of sculpture: a good carver does not try to give a piece of wood a predetermined shape. Rather, she follows the waves of the wood, allowing for the shape to emerge from within its matter. Deleuze and Guattari write: "it is a question of surrendering to the wood, then following where it leads by connecting operations to a

materiality, instead of imposing a form upon a matter: what one addresses is less a matter submitted to laws than a materiality possessing a *nomos*" (1988: 451). The same can be said of writing. We regularly forget that the text is also material. We must respect the materiality of our texts. We cannot just impose our enlightened selves on them. Listening to the *nomos* (i.e., the internal, rules) of materiality rather than imposing the law on matter means: use matter (the wood, the text), not by submitting it to a law (of predetermined structure and conclusion) but by allowing *through it* an emergence.

Listening to the object and its conditions of emergence is our way, as writers, to flesh out the strains, marks and wounds of the object itself: its gender oppression, its colonial exploitation, its heteronormative persuasion, its paternalistic force, its racial exclusion, its class slippage, its shaded mirroring of our own little worlds.

Listening to the text seems to be the exact opposite of the way we are taught (and the way we teach) to write. Unless you know exactly what you want to say, do not even start. Go back to the question. But how to know where the text will take you before you enter it? How to leave behind the all-consuming atmosphere of preconceptions, if not by listening to something else, something other?

In many respects, this is similar to the previous suggestion of letting the writing breathe – but with one important addition: the 'I' needs to be put aside for a moment. Losing the 'I' means surrendering fully to the text and its law, accepting vulnerability, facing our fragility before the law, and becoming aware of it. Effectively, facing one's vulnerability means becoming stronger, knowing one's context and dealing with it.

Once this has happened, the 'I' needs to be reinstated. It is needed in order to channel the elements of the text, to bring in consistency, and to link up to the multiplicity of the community of the 'I'. In reality, of course, the 'I' never leaves the text – it just allows momentarily for a different priority. This 'I', now collective, immersed in the text, returns and takes up its responsibility.

9. The responsibility of writing beyond distinctions

At this point, as a summary before moving to the final part of the text, I would like to offer a list of suggested steps towards writing

beyond distinctions on the basis precisely of these distinctions. These are not just pronouncements of ‘what one should do’ but lessons emerging from the current literature that tries to do exactly this, namely write beyond the standard distinctions and move into slightly unchartered territories of thinking about law. This is generally a more material, embodied and spatialised literature, often of feminist, queer or ecological persuasion.

So, with apologies for the inevitable violence of generalisation:

a. writing beyond distinctions is not about ignoring distinctions but about actively engaging with them and questioning their relevance at all times.

b. the first distinction that needs to be confronted is that between critique and sociolegal positioning. At its most impoverished, this distinction refers to theory v. empirical studies. At its most nuanced – and closest to reality - this distinction is about the way in which our writing enters the world: an embracing of law’s transformative potential and a problematisation of law’s inherent inequalities, and an assembling of a common front, both theoretically and empirically engaged, against the various challenges that we are facing.

c. the second distinction that needs to be confronted is that between text and context. It is important that we understand law as material, embodied and spatialised, rather than only as textual, abstract and historicised. It is further important to remember that text partakes of materiality, is in itself material. A method of writing that makes use of the semantic and experiential ‘I’, fleshes out the embodiment of the law. (Legal) agency is a composition of the material and discursive, and in that sense, an essay that engages with both these can be thought of as (legal) agent in itself. As a legal agent, the essay should be allowed to unfold, guided by its own materiality (including its occasional desire to remain incomplete and therefore disappointing) and not only by the author’s intent.

d. the third distinction is that between legal technicalities and life (see also the following section on this). Law’s embodied nature means that there is no matter without law, and no law without matter. The usual jurisprudential distinctions between norms/rules/laws are of limited use when it comes to thinking of the law as a spectrum. The input of other disciplines, such as anthropology, sociology, geography, and so on, is invaluable in rethinking this distinction.

e. the fourth distinction is that between writing and the idea of writing. It is important of course to have strong positions and concrete ideas when starting to write. It is very important to express these succinctly and clearly. At the same time, however, we should not be dealing with the text in an adversarial way, the sort of thing that must be fought and conquered in order to express our ideas. A text needs to be allowed to unfold creatively, without the constant vigilance of our preconceived, well-researched ideas. A text needs to perambulate in order to discover itself and the ideas (the ones we thought we had and others we did not expect we had) *while* being written.

f. the fifth distinction: the individual and the collective 'I'. Every 'I' is multiple. It always forms part of a larger body, that of a collectivity that shares the same desire. The writing 'I' needs to be fully personal and at the same time aware of the connection with other 'I's that desire that the law become more just.

g. the sixth distinction is that between law and justice.

(I used to despise bullet points or lists of any sort when I would come across them in an essay. They would interrupt the flow and would introduce a staccato movement that had usually nothing to do with the way I wanted the rest of the text to be read. Perhaps they were a little too black-letter law for me, a little too theological even.

Recently, however, I started listing things. I started appreciating the reading rhythm of the bated breath. I felt a playfulness in the promise of completeness, and indeed of education, instruction even, in terms of 1. 2. 3., sections and paragraphs, this archetypically legal form. Maybe, I thought, I am coming closer to what everyone seems to think that the law is. But the playfulness I found most attractive was not the (subversive even) promise for completeness but exactly the opposite. Dillon (2017: 27) puts it well: "The list, if it's doing its job, always leaves something to be invented or recalled, something forgotten in the moment of its making…something to be desired." This space of 'to be desired' is also the space of other desires that upset our best laid plans, and a *memento vanitatis* of our supreme delusion, very legal too, that we can list and contain everything neatly.

I felt another playful attraction to lists, that was marking another delusion. Dillon (2017: 24) again: "the appearance of a list in an otherwise narrative or polemic piece of prose introduces – more or less violently – a sudden verticality in the horizontal flow of the

text.” This verticality, a habitual sign of authorial hierarchy and authoritative announcement (Braverman, 2016a), was playing directly with my own sense of authority as an author, of which I’ve never had a particularly high opinion (‘death of the author’ etc.). So I started appreciating the awkwardness with which that vertical pole of 1. 2. 3. protruded in some sort of hypermasculine self-assertion from the horizontal and occasionally even deliberately poetic, whatever that is, flow of some of my texts, reminiscent of a shipwreck’s mast sticking out of a flat sea. Lists became my own footnote for the alien authority we are supposed to feel when we write essays on law meant to instruct, educate, transform, help.)

10. What was the final distinction again?

Writing, in the ways I have tried to discuss so far, is an experiment, potentially personally exposing, treading on uncertain ground between and above disciplines, plunging in legal technicalities yet being conversant in theory, experimenting with formats, structures and given instructions, and in general challenging the law, not only in terms of content but also in terms of the text’s format. The law of the essay is still a law: how to write a legal essay is often a blueprint exercise once the research has been done. But this is only the law that we have been accustomed to follow – the law that journal reviewers demand (but who are the reviewers if not us), that the Research Excellence Framework panels in the UK want to read (and again, who are they if not us), that our universities’ internal committees expect and explicitly ask for. But one thing we must realise: that the law does not exist outside ourselves, our eyes that read and our fingers that type our reviews. Next time we ask for more ‘consistency’, let’s think a bit about why we are asking for it. Are we not embodying a law (the law of textual orthodoxy) that serves a specific disciplinary technique and a disciplinary closure that goes against anything that is actually happening, not only ‘out there’ in the ‘real’ life, but even in law: anyone who has sat through a trial will know that the law is always an interdisciplinary excursus, moving from history to geography, biology to psychology, economics to ethics, science to media studies, gender studies to race theory (to mention just a few examples), and all that often in the ambit of a single argument.

As writers, we need to do justice to the law of the essay. We need to allow it to reveal the things that orthodoxy, to recall Adorno, wants to keep invisible.

Montaigne, as we have seen, believed that law cannot generate justice. Yet we know otherwise. We have seen, time and again, law delivering something akin to justice that can be peace, psychological closure, belonging, access to what is important to us, and so on. We have, however, also seen that often law does not deliver justice –on the contrary, it sides with the fundamentally unjust and serves as a tool of oppression. Or perhaps that what the law delivers is justice only in name, and in practice is a bitter victory for all involved. This, however, does not interrupt the continuum between law and justice. We look into law in order to deliver something that feels just; that tries to guarantee that the same crimes will not happen again; that people will know what they can claim and will be empowered to claim it. We write about these instances because it is important.

A way to reinstate our faith in the connection between law and justice is by having one foot on the realistic (critiquing law, being harsh with its faults, catching out its foundational inequalities), and the other foot on the, broadly understood, utopian (embrace law's transformative potential, see its rhetorical and actual power, think theoretically about where it stands in relation to the rest of the world, consider the planet in all we think and do). Law's delivering justice is not a guarantee; nor however is a utopia. Justice itself is not utopian. On the contrary, justice is right here – but we need to open up to the possibility of seeing its connection to the law, and encouraging it.

Justice has been considered a bit of a dirty word, especially in some socio-legal circles that had enough with the impossibilities of deconstruction and the fuzzy talk of things to come. But we need to divest justice from its messianic layer, and focus on its everyday emergence as a thing that actually does occur. Justice is little more than an ethical positioning with regards to the issues at hand – as Jane Bennett (2010) writes, it is our responsibility to move away from noxious assemblages that compromise our ethics. This is what ethics is: a withdrawal and a subsequent debilitation of noxious assemblages and a move into assemblages that have the potential of delivering justice. Following this, our responsibility as writers beyond distinctions is not only to withdraw from and resist problematic assemblages, thereby causing their destabilisation; but also to embrace such ethical moments where justice emerges.

Still, there is no final repose for a writer. While rendering some things visible, other things necessarily become invisible. The essay constructs its own atmospherics of control, assembled by the collective desire of the writing 'I's to carry on (critiquing,

constructing, transforming, analysing). Heresy can also become orthodoxy. It is hard to withdraw from this. It is lamentably comfortable, it is what the REF wants, it is what one's readers expect, and so on. But at those points, when the 'I' begins getting too comfortable, the 'I' needs to return and start *essaying*.

This is when the law of the text generates justice: when the text never rests and more invisibilities are always revealed, especially the ones that were generated by our previous, well-meaning heresies. This is why our texts do not belong to us but to the readers who see our texts' invisibilities. The essay must never rest, the 'I' must never get complacent. This is not a shock strategy, or a marketing scheme to keep your readers reading. This is, simply put, our responsibility.

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FURTHER READING

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