HLA HART, LON FULLER AND THE GHOSTS OF LEGAL INTERPRETATION

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Henry James' short novel The Turn of the Screw appeared in 1898. It is a ghost story, uncanny both in content and in form. It relates such uneventful events that the reader is left turning from interpretation to interpretation, trying to determine just what is going on. Yet like the ghosts themselves, wherever we look, there is nothing to see. Until the very last sentence of the book, which hits one like a fist, nothing happens, nothing is proved, and yet a palpable feeling of tension and anxiety builds. It is therefore not fanciful to suggest that the real power of the story lies not in its narrative but in its rhetoric. The book creates a mood of anxiety that infects the reader's reading. This is what one might call the 'performative' dimension of the story. James' tale constitutes a reader, alert but confused, who thereby experiences the feeling of being part of a ghost story rather than merely reading about one.

Sixty years later, HLA Hart and Lon Fuller likewise do not merely describe two different approaches to legal interpretation: in their style, rhetoric and structure they perform these approaches. This essay similarly wishes to connect its argument with its form and for this reason I have chosen to devote considerable space to discussing a work of literature. The Turn of the Screw illuminates certain essential features of the Hart/Fuller debate. Both are tales about law, interpretation, and ghosts. Through James, this essay argues that the debate between Hart and Fuller epitomizes legal interpretation as haunted. Rhetorically, they present two largely incommensurable visions of law. Yet their efforts to exclude the other's approach fails. But instead of choosing between Hart and Fuller we can gain a richer understanding of legal interpretation if we treat their performance as mutual and interactive. I do not mean that Hart and Fuller can in any way be reconciled through compromise or synthesis. I mean rather that each remains 'haunted', and therefore productively unsettled, by the perspective of the other. To be haunted is never to be comfortable with one's judgment or knowledge, never at peace. This may be 'a horror' in a story, but necessary in a legal system.

Le court roman de Henry James, The Turn of the Screw, est paru en 1898. C'est une histoire de fantômes, étrange à la fois par son contenu et par sa forme. Il raconte des événements si peu mouvementés que le lecteur se voit passer d'interprétation à interprétation, essayant de déterminer exactement ce qui se passe. Pourtant, comme pour les fantômes eux-mêmes, où que nous

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regardions, il n'y a rien à voir. Jusqu'à la toute dernière phrase du livre, qui frappe comme un coup de poing, rien ne se passe, rien n'est prouvé, et pourtant un sentiment palpable de tension et d'anxiété s'accumule. Ce n'est donc pas de l'imaginaire que de suggérer que la puissance réelle du récit se situe non dans sa narration mais dans sa rhétorique. Le livre crée une atmosphère d'anxiété qui imprègne la lecture du lecteur. C'est ce que l'on pourrait appeler la dimension «performative» du récit. Le conte de James constitue un lecteur, alerte mais confus, qui ressent ainsi qu'il fait partie d'une histoire de fantômes plutôt que de seulement en lire une à ce sujet.

Soixante ans plus tard, HLA Hart et Lon Fuller de la même façon ne font pas simplement décrire deux approches différentes à l'interprétation juridique : de par leur style, leur rhétorique et leur structure, ils mettent en œuvre ces approches. De façon semblable, cet article veut lier son argument à sa forme et c'est pour cela que j'ai choisi de consacrer considérablement de place à discuter une œuvre littéraire. The Turn of the Screw illumine certains aspects essentiels du débat Hart/Fuller. Ce sont tous les deux des récits au sujet du droit, de l'interprétation et de fantômes. Par le biais de James, cet article soutient que le débat entre Hart et Fuller fait voir parfaitement que l'interprétation juridique est hantée. Du point de vue de la rhétorique, ils présentent deux visions du droit largement incommensurables. Pourtant leurs efforts d'exclure l'approche de l'autre échouent. Mais plutôt que de choisir entre Hart et Fuller, nous pouvons en arriver à une compréhension plus riche de l'interprétation juridique si nous traitons leur performance comme étant mutuelle et interactive. Je ne veux aucunement signifier que Hart et Fuller peuvent d'une façon ou d'une autre être réconciliés par compromis ou par synthèse. Je veux plutôt signifier que chacun d'eux demeure «hanté», et donc productivement irrésolu, par la perspective de l'autre. Être hanté, c'est ne jamais être à l'aise avec son jugement ou ses connaissances, jamais en paix. C'est peut-être «une horreur» dans un conte, mais c'est nécessaire dans un système juridique.

I. PERFORMING STORIES, PERFORMING LAW

"If the child gives the effect another turn of the screw, what do you say to two children--?" "We say, of course," somebody exclaimed, "that they give two turns! Also that we want to hear about them."¹

Henry James' short novel *The Turn of the Screw* was first published in 1898, and since then it has attracted a steady stream of critical analysis. It is a ghost

1 Henry James, *The Turn of the Screw* (New York: Heritage Press, 1949) [1898] at 2.

story, uncanny not only in content but in form. In some ways it appears to defy analysis; the events it describes are so nebulous that the reader is left turning at each moment from theory to theory, from interpretation to interpretation, trying to pin down the events and the argument which the story narrates. Yet like the story's ghosts, wherever we look, there is no longer anything to see. "And what did this strain of trouble matter when my eyes went back to the window only to see that the air was clear again and – by my personal triumph – the influence quenched? There was nothing there."² This nothing is what is most troubling about James' ghosts; ironically, it establishes their presence and their menace. At least until the very last sentence of the book, which strikes one with all the force of a blow, nothing happens, nothing is proved, and yet a palpable feeling of tension and anxiety builds throughout the story. What is truly remarkable about *The Turn of the Screw* is that these nothings, these purely formal, empty words and ambiguous events, set in motion a great deal of action, not least the action of critics and theorists and readers who have for a century tried to work out just what the novel is about. Like the unconscious, they drive the action without ever being precisely attributable. It is therefore not fanciful to suggest that the real persuasive power of the story lies not in its narrative but in its rhetoric. The book creates a mood of uncertainty and doubt that does not merely describe a ghost story: it performs one – the shadows and puzzles of James' novella place the reader in the position of participating, alert but confused, in a ghost story rather than in hearing about one.

All texts – certainly all good texts – are performances as well as manifestoes. Their rhetoric and form (precisely a consideration not of what they say but of how they persuade) are key elements in our understanding of them. My case study (the method, I might note in passing, of both law and psychoanalysis) for this claim is none other than the celebrated debate between HLA Hart and Lon Fuller in the pages of the *Harvard Law Review*.³ The language and metaphors of that debate, the distinct rhetoric of the two authors, in each case performs the very conception of legal interpretation which they defend. In building this argument for the centrality of literary analysis to our understanding of jurisprudence, I have, in the pages that follow, frequent recourse to Henry James' novella. *The Turn of the Screw* brings together law and ghosts in a complex fashion. This may seem a trivial or fantastic digression. Yet there has been considerable recent scholarship which has sought to articulate this connection. Like James' book the present essay sets out to demonstrate how we might understand the Hart/Fuller debate, above all, as a ghost story.

This essay attempts to unpack the idea of legal interpretation as a literary endeavour and more specifically as a ghost story, in three steps. First, by looking at the performance and rhetoric of Hart and of Fuller as enacting two largely incommensurable visions of law. Secondly, by appreciating the ways in which their efforts to exclude and reject the alternative terms being presented to them

2 *Ibid.* at 140.

3 See Peter Cane, *The Hart Fuller Debate in the Twenty-First Century* (Oxford: Hart, 2010). An earlier and edited version of this paper appeared as Desmond Manderson, "Two Turns of the Screw" at 197. Permission to reproduce aspects of that chapter are gratefully acknowledged.

nevertheless conspicuously fail. And thirdly, by rejecting the necessity of choosing between Hart and Fuller and instead treating their performance as mutual and interactive. I do not mean that Hart and Fuller can in any way be reconciled through compromise or synthesis – standard moves in legal theory. Rather I have in mind a dynamic in which each remains “haunted,” and therefore productively and eternally unsettled, by the perspective of the other. To be haunted is never to be comfortable, never to be at peace. Though this may be horror in a story, it is necessary for a legal system.

So let us start by noting the ways in which the distinctive metaphorical language of our two authors is indispensably tied to their theoretical positions. Indeed, if here are uncanny parallels between the forces at play in James’ story and the circulation of ideas in the Hart/Fuller debate, this is not least because in Fuller’s article the metaphor of the “turn” is strangely prominent. Hart’s argument is linear and insists on clearing the ground, starting afresh, moving ahead. This rhetorical design, which aims to make simple and straightforward what has previously been only “dimly sensed,”⁴ corresponds to Hart’s notion of the function of law and the practice of legal interpretation. In Fuller, on the other hand, there is a sense of approaching the same question from different angles, of turning something around or over like an unusual object we are bent on studying. While Hart finds this odious and frustrating, it exactly corresponds to Fuller’s notion of the function of law and the practice of legal interpretation. Here too then we see that what counts as legal interpretation is intimately tied to how we talk about it.

When Fuller speaks of Hart as giving to positivism “a new and promising turn,” and then later speaks of Professor Hart’s argument as “taking a turn,”⁵ we are being encouraged to think of Hart’s own argument as being less linear than he would have us believe – as if Hart himself were being driven by the unexpected to turn in unforeseen directions. In just this way does Fuller believe our assumptions about meaning are themselves necessarily open to the work of the unexpected upon them. So too Fuller’s insistence that interpretation “turns” on this or that aspect appropriates a circular metaphor to capture the work of interpretation itself.⁶ “By pulling our minds first in one direction, then in another, these cases help us understand the fabric of thought before us.”⁷ This rhetoric surely reaches its pinnacle when Fuller finally concludes that positivism “takes a morbid turn,”⁸ again with its suggestion of a surprise which the process of interrogation and argument has somehow imposed on Hart against his will. So the elements of movement, discourse, and unease are bound up in Fuller’s use of the metaphor and in Fuller’s conception of what legal interpretation entails.⁹ That

4 HLA Hart, “Positivism and the Separation of Law and Morals” (1958) 71 Harv. L. Rev. 593-629 at 604.

5 Lon Fuller, “Positivism and Fidelity to Law” (1958) 71 Harv. L. Rev. 630 at 632-35; 649.

6 *Ibid.* at 662, 666.

7 *Ibid.* at 667.

8 *Ibid.* at 670.

9 In Hart’s essay, the word turn is used with dramatically less frequency and in virtually none of the senses I have discussed here. “Turn” or its variants are used five times in Hart, and seventeen times in Fuller. Of these, Hart twice says “let me turn to...” as a way of introducing

Hart's argument should end up allied to death rather than life is just another turn of the screw.

For Hart on the other hand, the "turns" of Fuller's prose are treated as merely obscure. Hart describes Fuller's position as "mysterious" and defends instead the merits of being prepared to "speak plainly."¹⁰ Further, Hart evokes a contrast between "reason" and "passion." Gustav Radbruch's argument against recognizing the legality of Nazi laws is presented in terms of a contrast between an "intellectual argument" and a "passionate appeal" that is "supported not by detailed reasoning" but reveals instead an "extraordinary naïveté" and even "hysteria."¹¹ What is interesting about these accusations is that there is so little evidence in Radbruch's texts of passion either derailing or depriving reason of its due. This is not to say that his arguments command assent, but they are neither devoid of reason nor unduly passionate in tone. Still less does the accusation of naïveté or hysteria seem remotely justified. Indeed, Hart himself initially defends the Utilitarians precisely because they united their "passion for reform" and their "passionate intensity" with "even-minded sanity."¹² It is one of the unusual features of Hart's argument that within the space of a few pages passion turns from praise to condemnation. Hart's claim is a rhetorical necessity rather than an accurate description. Its purpose is to label Fuller and Radbruch as muddled and cloudy: they have let their passion get the better of them and the result is something which is neither plain nor simple. And here too Hart's style of argument maps directly onto a theory of law which places great store in clarity and directness as necessary aspects of legal meaning "if we are to communicate with each other at all, as in the most elementary form of law;"¹³ and from which perspective passion has historically been the arch-enemy of law.

A further element of Hart's rhetoric is again tied closely to his approach to law. Hart insists that Radbruch's argument is tainted by hindsight: his "passionate appeal" is unduly influenced by "reminders of a terrible experience."¹⁴ Importantly here, Hart implies that it is through hindsight that passion leads us to draw false conclusions and to overstate the relationship of causes to effects. The atrocities of Nazi Germany, in leading Radbruch to renounce so comprehensively his previous support for legal positivism, have led him astray. Hindsight is of course one way of recasting Fuller's whole interpretative method, which invites us to re-think our understanding of the very core of legal meaning in the light of our experiences, terrible and otherwise. For Fuller, this "second opinion" is salutary and necessary. But for Hart it creates an emotional – a passionate – pull towards the problems of the singular instance rather than allowing us to focus on the obvious meaning of words, no matter the injustice that may cause

sections of his argument, but other than that the only metaphor that is used is the phrase "turn of the century" which also occurs twice. Moreover Hart never uses the word as a way of analyzing Fuller's argument where it is often precisely to analyze Hart's position that Fuller uses the metaphor of turning.

10 Hart, *supra* note 4 at 614-15, 620-21; see also 594.

11 *Ibid.* at 615-19.

12 *Ibid.* at 595-96.

13 *Ibid.* at 607.

14 *Ibid.* at 615.

on occasion. And this retrospectivity, as well as being morally and intellectually suspect, is simultaneously legally suspect since it offends against "a very precious principle of morality endorsed by most legal systems."¹⁵ Once again we can see Hart's refusal to look beyond the surface of the words in front of us, to wonder about whether what we think is obvious really is, as integral to the positivist approach to law.

The point of this analysis has not been to assess the merits of their two positions. It has been to demonstrate how the confrontation between them concerns the very terms on which the debate is to be discussed. Their differing rhetorical styles are not merely a means of winning an argument but a performance of the idea of law that they wish to articulate. For Fuller, reflection and circularity are the merits of legal analysis; for Hart they are demerits. For Hart, plain-speaking, simplicity and clarity are necessary "if we are to have law at all." Thus it is already an argument against Fuller that his theory "would seem to raise a whole host of philosophical issues before it can be accepted,"¹⁶ such issues "confuse one of the most powerful, because it is the simplest, forms of moral criticism."¹⁷ For Fuller, on the other hand, the problem lies in Hart's refusal to engage with just these issues, just this complexity. Law's besetting sin (and I mean that a desire to be resisted) for Hart is uncertainty, and its salvation lies in clarity. Law's besetting sin for Fuller is arrogance, and its salvation lies in humility. The shadows and puzzles of these two essays place the reader in the position of experiencing two distinct visions of what counts as good legal argument, rather than merely reading about them.

II. PERFORMING CONTRADICTIONS

As with James' novella, however, a strange sense of shifting ground accrues the longer we stare at Hart and Fuller. In the sections of Hart's essay concerning legal interpretation, there is a turn away from the very principle of legality he cherishes. The terminology of "penumbra" which Hart adopts is suggestive. For in order to protect the "core" of legal interpretation as something determinate, Hart abandons everything else to complete darkness. On Hart's theory, penumbral interpretation is not legal at all. Displaying a striking affinity with what will come to be known as critical legal studies [CLS], Hart insists that nothing but politics or discretion here guides the judge. The only difference between Hart's positivism and CLS lies in how socially significant or statistically widespread they take this penumbra to be. We begin to see why Hart insists, with considerable dogmatism, that the dilemma he presents has nothing to do with "the disposition of the ordinary case," and to accuse those who disagree with him of untruth and insincerity.¹⁸ In attempting to reject the grey areas that Fuller sees as permeating the whole of law, Hart's strategy is to bathe the core in a bright and pitiless light: and to cast into utter darkness the rest. Hart's strategy then in-

15 *Ibid.* at 619.

16 *Ibid.* at 620.

17 *Ibid.* at 620. Emphasis added.

18 *Ibid.* at 620.

volves two steps: first, to cauterize the problem of interpretative difficulty (only in the penumbra), and then to minimize it (the penumbra is small). But the first step is a high price to pay, and the second step, even if relevant,¹⁹ an assertion. So Hart and Fuller swap positions before our eyes. Hart begins to appear as the prophet of uncertainty, conceding not only that in such circumstances judges might be guided by the morality of law, but that they might just as easily be guided by something, anything, else.²⁰ By Hart's own logic, "the daily diet of the law schools"²¹ doesn't have much to do with law at all. On the other hand it is Fuller who attempts to bring some measure of stability back to the whole of law, insisting as Hart does not, that interpretation in both core and penumbra alike are guided by knowable principles of legality.

Furthermore, in performing a certain approach to law, Hart and Fuller each unconsciously perform its weaknesses. Let us take the discussion of Radbruch, which in some ways epitomizes their differences. Hart accuses Radbruch of naïve hindsight which undermines "a very precious principle of morality." But with respect to the charge that positivism was in some way complicit in Nazism's emergence, Hart's accusation is unjustified. No doubt Radbruch himself experienced a Damascan conversion. But long before the war many scholars in and from Germany were making similar arguments. Franz Neumann and Otto Kirchheimer, in a body of work going right back to the early 1930s very clearly warned that the "rule of law" was "under siege" in Nazi Germany precisely because, eviscerated of its liberal moral principles – principles with which Fuller would become strongly associated – positivism had become an empty and amoral vessel incapable of resisting National Socialism.²² In "The Rule of Law under National Socialism" Neumann wrote: "We therefore sum up: That law does not exist in Germany, because law is now exclusively a technique of transforming the political will of the Leader into constitutional reality. Law is nothing but an arcanum dominationis."²³ Such an argument, intimately close to Fuller's position, was intended to caution us against treating law as an infinitely elastic vessel limited only by its compliance with certain State-sanctioned formalities. Law, for Neumann as for Fuller and for Radbruch, demanded adherence to a base line of principles and in Nazi Germany the appropriation by the party of the mantle of law posed a terrible danger. If we dismiss Radbruch because he was too swayed by the aftermath of the war, perhaps we should listen instead

19 It is not clear to me that a legal system which gives judges' no guidance at all in 5% of cases might not be much more satisfactory, from the point of view of principle, than a system which gives judges' no guidance at all in 20% of cases, or 50% of cases. A system in which 5% of the population is enslaved is hardly a moral improvement on one in which 20% of the population is enslaved: see generally John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999).

20 Hart, *supra* note 4 at 607-8.

21 *Ibid.* at 615.

22 See e.g. the work originally published in the 1930s, collected in Franz Neumann and Otto Kirchheimer, *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*, William Scheuerman ed. (Berkeley: University of California Press, 1996); and the posthumous collection of the writing of Franz Neumann, *The Rule of Law Political Theory and the Legal System in Modern Society* (Leamington Spa: Berg, 1986).

23 Neumann, *ibid.* at 298.

to Neumann who was no less fearful of the consequences of positivism's failure to imagine that some "internal morality of law" was necessary to its definition. Otto Kirchheimer, in 1935, had no doubt as to where the responsibility for the events which ensued would lie. "Jurists of the Third Reich," he wrote, "will some day have to answer for these deaths."²⁴ Tell me, was this prediction, too, naïve, insincere, or hysterical?

As Fuller points out, Hart seems to treat the disposition of the "informant cases" during the war as the workings of a perfectly ordinary legal system which just happened to be devoted to odious purposes.²⁵ Hart describes what happened as follows:

The wife was under no legal duty to report his acts, though what he had said was apparently in violation of statutes making it illegal to make statements detrimental to the government of the Third Reich... The husband was arrested and sentenced to death, apparently pursuant to these statutes, though he was not executed but was sent to the front... The wife pleaded that her husband's imprisonment was pursuant to the Nazi statutes and hence that she had committed no crime.²⁶

In fact, as Fuller indicates,²⁷ Nazi courts operated without the clarity that Hart naively attributes to them. As Kirchheimer outlines, the use of secret and retro-active laws, the politicization of the judiciary, the abandonment of ideological neutrality, and so on, were already well in place by 1935.²⁸ Part II of the new Criminal Code read:

Punishment is to be inflicted on anyone who commits an act which has been declared punishable under the law or who deserves to be punished according to the fundamental principles of a criminal statute and healthy popular sentiment.²⁹

Of the actual operation of Nazi law and Nazi courts Hart is blissfully ignorant. Hart thereby unintentionally exposes the weakness of his approach to legal interpretation: this ignorance is not just coincidental; it is intrinsic to his positivist method. Hart repeatedly uses the word "apparently" to defend his superficial reading of the statutes in question. The man was "apparently in violation of statutes;" he was arrested and punished "apparently pursuant to these statutes." Fuller wishes us to appreciate that things were not as they appeared in Nazi Germany. But for Hart the appearance of something as law is all that matters.

²⁴ Otto Kirchheimer, "State structure and law in the 3rd Reich" in Neumann and Kirchheimer, *supra* note 22 at 147.

²⁵ Fuller, *supra* note 5 at 650.

²⁶ Hart, *supra* note 4 at 618-9.

²⁷ Fuller, *supra* note 5 at 650-55.

²⁸ Kirchheimer, *supra* note 24 at 145-47.

²⁹ Kirchheimer, *supra* note 24 at 146.

Politics and history are irrelevant to our inquiry. We rely on the surface and plain meaning of words, because that is simple, because that is clear – with the result in this case that we are seriously misled as to what those words actually meant to the people who were thereby sentenced to death or (since “sentenced to death” did not actually mean “sentenced to death”) sent to the Eastern front. At this point, simply as we read Hart’s account of the case, it surely begins to seem more than plausible that the Nazi regime in fact depended on a kind of legal apathy or incuriosity in order to gain institutional support for their actions. Hart himself does just that. He gives to Nazi jurisprudence a certain legitimacy by refusing to look behind the court’s statements and by treating as a legal reality the mere “tinsel of legal form.”³⁰ The positivism with which Hart approaches the informant cases not only separates “is” from “ought,” the morality from the facticity of law. By its interest in the form rather than the substance of legal processes, it prevents us from inquiring into those legal facts, and therefore from understanding just what that law “is.” That is perhaps the first turn of the screw. Hart’s positivism winds so tightly in on itself that it actually ends up demonstrating its own failure to account for legal facts.

The accusation of “naïveté” which Hart levels at Radbruch is surely better directed at Hart himself. Indeed, “naïveté” is for Hart positivism’s signal virtue: its refusal, when words “apparently” mean one thing, to wonder whether – not just in morality but in the real world – they might “truly” mean another thing. In consequence Hart weirdly believes a corrupt legal system when it “apparently” claims to have been merely applying the law. He is weirdly prepared to take these officials’ words for what the law “is,” and thus to give them a *prima facie* respectability which as Neumann and Kirchheimer show, and history has surely borne out, they did not deserve. This of course is exactly the danger which, according to Radbruch and Fuller, lies in positivist reasoning. Ironically, that is, unconsciously, Hart illustrates the very problem they are referring to.

But a second turn of the screw is not far behind. When we look at Fuller’s critique of the statutes in question, as at Kirchheimer’s, we find that their notion of the “internal morality of law” is based on procedure. Each writer lists principles such as judicial objectivity, legal clarity of expression, and the impropriety of secret or retrospective legislation. But are these not the virtues on which positivism, at least in Hart’s version, insists? Who better defends clarity and judicial objectivity against the murky mixity of law and morals? To take one example, Fuller analyzes the Act of 1934 under which the wife reported her husband for making “spiteful or provocative statements against...the leading personalities of the nation or of the National Socialist German Worker’s Party:”

Extended comment on this legislative monstrosity is scarcely called for, overlarded and undermined as it is by uncontrolled administrative discretion. We may note only: first, that it offers no justification whatever for the death penalty actually imposed on the husband, though never carried out; second, that if the wife’s act in informing on her husband made his

30 Fuller, *supra* note 5 at 660.

remarks 'public', there is no such thing as a private utterance under this statute.³¹

The problem for Fuller is this: can there be a rule of law without positivism? Fuller argues that the Nazi courts got it wrong. He suggests, in short, that there is a "core" of meaning to a word like "public" or a phrase like "the death penalty" which cannot be willed away. Furthermore, he rejects the idea that we might determine the meaning of these words by reference to the interpretative practices of the society in question.³² Thus Fuller believed that the words used in these laws must have had some objective and necessary content which the courts were willfully disregarding. In what way is this different from Hart's insistence that interpretation of any rule requires the determination of "some standard instance in which no doubts are felt about its application?"³³ To take another example, Fuller protests that the Nazi regime's resort to retroactive legislation, to untrammelled administrative discretion, and their willingness to "disregard any statute...if it suited their convenience," made impossible "a lawyer-like interpretation."³⁴ Fuller's criticism is not that the German regime was too positivist, but on the contrary that it was not positivist – "lawyer-like" – enough. A stricter, clearer, more accurate reading was possible and it was the courts' failure to attend to these techniques that undermined their claim to legality. What was wrong about law in Nazi Germany was that "all legal questions," as Hart might have observed, had become "fundamentally like those of the penumbra."³⁵

There is a second aspect to the instability of Fuller's position. While he marshals a much richer understanding of legal history than Hart's callow discussion of the informer case, his own historical reading is itself too limited. It may be said that Nazism exploited the German positivist tradition as a means to achieve its goals. Nevertheless, its own ideological roots lay in the New Romantics, a term introduced around 1900 by völkisch publisher Eugen Diederichs to characterize the great outpouring of German writing that was vehemently critical of "mechanism and positivism" and offered as its counterpoise the "longing of the soul towards unity." In writers like Diederichs, Lagarde, Langebehn, Schemann, the positivist tradition is explicitly rejected in favour of an appeal to nature, tradition, morality, and leadership.³⁶ This romantic desire to transcend soulless positive law found its most complete expression in the philosophy of Martin Heidegger and the jurisprudence of Carl Schmitt,³⁷ and its nastiest expression in the politics of National Socialism – in a criminal law based on the overriding authority of "fundamental principles" and "healthy popular sentiment"; in a legal system similarly based on "the spirit of the volk" and "the party in the

31 Fuller, *supra* note 5 at 654-5.

32 *Ibid.* at 654-5.

33 Hart, *supra* note 4 at 607.

34 Fuller, *supra* note 5 at 652.

35 Hart, *supra* note 4 at 615.

36 George Mosse, *The Crisis of German Ideology: Intellectual Origins of the Third Reich* (New York: Grosset and Dunlap, 1964) at 52-54.

37 See Pierre Bourdieu, *The Political Ontology of Martin Heidegger* (Stanford: Stanford University Press, 1991).

streets”; in a fetishization of personal authority which catastrophically embodied a government of men and not of laws. Positivism was the means, the “tinsel of legal form,” which clothed profoundly anti-positivist ends. And while Hart is oblivious to the dangers of positivist means, Fuller is equally oblivious to the dangers of anti-positivist ends.

Fuller’s response to this problem is surely awkward, especially with the hindsight of fifty years. He refuses to accept any “uniform principle of judicial interpretation” in Nazi Germany because those principles were themselves immoral. Indeed, throughout Fuller’s essay there is an unquestioning clarity about his distinction between “goodness” and “evil,” a word which he uses, in a relatively unproblematic way, over a dozen times. Little defence is made of this distinction except his bald assertion that “coherence and goodness have more affinity than coherence and evil.”³⁸

Accepting this belief, I also believe that when men are compelled to explain and justify their decision, the effect will generally be to pull those decisions toward goodness, by whatever standard of ultimate goodness there are. Accepting these beliefs, I find a considerable incongruity in any conception that envisages a possible future in which [law moves] toward a more perfect realization of iniquity.³⁹

Fuller does not seem to appreciate that Nazism’s use of the legal system was not merely a destruction of it, but a vision of it. Neither will he acknowledge that the problem for his model of morality is not that law-makers might develop an “immoral morality” or “a more perfect iniquity.” It is rather that we disagree about what goodness is. With this disagreement, about law and about laws, Fuller never grapples. By assuming a core of goodness and a core of evil, which can never be confused, he simplifies the problem confronting many societies, those who lived during the Third Reich not least.⁴⁰

Fuller’s argument therefore ultimately falls back into positivism in two related ways. First, he defends clarity and objectivity in law not only as a moral goal but as necessary to any “lawyer-like” interpretation. Second, confronted with the destabilizing idea that “morality” itself might have a profoundly different meaning in different societies or amongst different people, he appears to resort to a positivist clarity about morality which he had earlier rejected about law. There is an uncanny sense in which Hart and Fuller not only perform the weaknesses of their own position but in the process trade places. Like a screw, the movement away turns right back on itself.

III. A GHOSTLY PARADOX

The rhetorical structure of Hart and Fuller works by an unqualified rejection

³⁸ Fuller, *supra* note 5 at 636.

³⁹ *Ibid.*

⁴⁰ See Hannah Arendt, *Eichmann in Jerusalem* (New York: Penguin, 1963).

of the terms, the style, and the priorities of the other. This structure is simultaneously an argumentative strategy and a performance of their legal theories. But at the same time the effort to exclude the grounds of the other's argument collapses in both cases. It leads, particularly in the case of Hart, to increasingly hyperbolic rhetorical gestures, in which his opponents are accused first of passion, and then with steadily growing force, of naivety, obscurity, hysteria, a lack of candour, insincerity, and dishonesty. Even purely on the level of rhetoric, then we see how Hart's efforts to dislodge passion and institute a dialogue of pure reason turns right back on itself. If Fuller remains governed by the positivism he seeks to dethrone, Hart is governed in some ways by the passion he seeks to deny.

And this is where the metaphor of the ghost story starts to gain force. Each of our two writers is haunted by the other; each seems influenced by a nebulous sub-conscious power that governs their actions and shapes their responses – even as they deny its very existence. I am not alone in using the image of ghosts and of “traces” to describe the way in which arguments which present themselves as absolute often appear, on a close reading, to be inescapably haunted by the values or principles that the world of their arguments cannot accommodate. It is, in some ways I concede, a very conventional trope of deconstructive analysis.⁴¹ But the Hart/Fuller debate seems a particularly clear example of this perplexing dynamic. A conventional analysis of their arguments misses not only their internal inconsistencies, but the way in which, as the performance of a discourse, each needs the other while needing not to need it. Positivism returns to morality, and reason to rhetoric, while morality keeps falling back into positivism in turn. But this is not to say that some kind of “middle position,” compromise or balance, is possible. On the contrary. The positions they represent are and continue to be mutually contradictory – and yet both are necessary.

So Hart and Fuller perform a paradox. Theirs is not a debate in which one side emerges victorious and the other is vanquished. Neither does it yield to a resolution in which the two positions can be compromised or balanced with the other, since the commitment they demand is absolute: there is, I think, no such thing as positivism “now and then” or Fuller's moral purposivism “now and then” since it is precisely the problem of when is now and when is then that they aim to solve by advancing contrary methodological positions as to where to start. Nor is a synthesis possible since if we have one we necessarily do not have the other. Like an optical illusion, we need both positions to make sense of law, but at the same time it is impossible to see both at once. Instead what we experience is what we might call an “oscillation” from one incommensurable language and set of priorities to the other, and back again, and between which we cannot choose since our belief in these two aspects is neither synthesizable into a unity nor prioritizable into a hierarchy.⁴² The performance of and the contradictions

41 See Jacques Derrida, *Spectres of Marx*, trans. Peggy Kamuf (London: Routledge, 1994); Tatiana Flessas, “A house haunted by justice: Eichmann in Jerusalem” (2005) 9 *Law Text Culture* at 215; Shoshana Felman, *The Juridical Unconscious* (Cambridge: Harvard University Press, 2002); Sue Chaplin, *The Gothic and the Rule of Law* (London: Cavendish, 2009).

42 See Jacques Derrida, “Force of Law: The mystical foundation of authority” (1990) 11 *Cardozo L. Rev.* 919; Drucilla Cornell *et al*, *Deconstruction and the Possibility of Justice* (New York: Routledge, 1994).

within Hart and Fuller show them each as “haunted” by what they sense – even resort to – and yet cannot acknowledge without betraying their whole legal discourse.

What after all is a ghost? It is the unsettling figure of something inexplicable within a specific world-view, some thing hovering on the edge of our vision which we can neither accommodate nor ignore. I am by no means the first to make these connections in legal contexts. Derrida I will come to later. Emmanuel Levinas, too, specifically speaks of the relationship of ethics and law as haunted: since, for Levinas (as opposed to Kant), ethics is incapable of being rule-bound, every effort to translate it into legal rules must end in betrayal.⁴³ They exist in entirely different realms. But this does not make ethics irrelevant to law.⁴⁴ It remains like a “trace” (think of the footprints of an absent animal in the snow) or the voice of a guilty conscience which, never satisfied, continues unrelentingly to nag at us. Ethics is law’s ghost: something anomalous but necessary, the paradox of the impossibility of our ever fully accounting for it continually provoking us to action. Ethics and law – Fuller’s “morality,” Hart’s “rules” – inhabit irreconcilable realms, but they are still indissociable and necessary.⁴⁵ The irresolution occasioned by this paradox means that neither Hart nor Fuller are right; law is neither “moral” nor “amoral” but haunted. And, just as in a ghost story, being haunted gives rise to effects, even if we cannot explain them.

IV. CERTAINTY AND MADNESS

At last it is time to turn to Henry James’ tale. A young woman, after meeting a man suggestively called the Master, is engaged as the governess for two young children on condition only “That she should never trouble him – but never, never; neither appeal nor complain nor write about anything; only meet all questions herself.”⁴⁶ The generative anxiety of the story, like that of law itself, is built upon this underlying absence, this ineffability. The governess’ problem, just like the judge’s, is the necessary absence of any final authority, whether corporeal or textual, to whom or which appeal can unequivocally be made. In the presence of the law-maker there is no need for a judge. And it is the absence of this originating law-maker – the extension of law over time and over space – which makes judgment necessary. This then is law’s condition and the judge’s sub-conscious anxiety: never to bother the Master again.

Repeatedly, *The Turn of the Screw* echoes this theme of authority based on an incurable absence. Indeed, the story portrays the search for a definitive interpretation as something which excites our actions just because it eludes us. Having given his terrifying injunction, the Master forwards unopened a letter which hints at shameful behavior by Miles, the young boy under the governess’ care.

43 Emmanuel Levinas, *Otherwise Than Being*, trans. Alphonso Lingis (The Hague: Martin Nijhoff, 1981).

44 See Desmond Manderson, ed., *Essays on Levinas and Law* (London and New York: Macmillan, 2008).

45 Desmond Manderson, *Proximity, Levinas, and the soul of law* (Montreal and Kingston: McGill-Queen’s, 2006).

46 James, *supra* note 1, Prologue, 6.

This letter too provides no explanation but only an effect – the boy is expelled – and the governess finds herself charged to fathom these two secrets. More than two. Ghosts begin to surround the house and obsess her. But they are variously described as like “nothing” and “no-one,” and though they are “horrors,” they remain indescribable, their motives opaque, what it is that they want from her or the children unsaid. Here too the reader, like the governess, is left with an interpretative absence. The Master, the letters and the ghosts: all are “essentially figures of silence.”⁴⁷

When the governess, in a moment of desperation, breaks the only law she has been commanded to keep, and decides to write to the Master, Miles steals the letter. But if the reader had hoped at last to find some content to these circulating nothings, she would be disappointed.

‘You opened it?’
 ‘I opened it.’ ...
 ‘And you found nothing!’ – I let my elation out.
 He gave me the most mournful, thoughtful little headshake.
 ‘Nothing.’
 ‘Nothing, nothing!’ I almost shouted in my joy.
 ‘Nothing, nothing,’ he sadly repeated.
 I kissed his forehead; it was drenched. ‘So what have you
 done with it.’
 ‘I’ve burnt it.’⁴⁸

The indecipherable, silent and charred so that only a trace remains, has no determined meaning, but it nevertheless produces effects.⁴⁹ As Shoshana Felman insists in a marvelously complex reading of the story, to which I am heavily indebted,

We have seen how the letters become a crucial dramatic element in the narrative plot precisely because of their unreadability... [I]t is precisely because the letters fail to narrate, to construct a coherent transparent story, that there is a story at all: there is a story because there is an unreadable, an unconscious.⁵⁰

In other words, it is the governess’ frantic need to make sense of the impenetrable and enigmatic that drives her actions throughout.⁵¹ Again, the governess is positioned exactly as a judge. She cannot know, in any certain or absolute way, what is going on around her. Hints and mysteries dog her footsteps. But, also

47 Shoshana Felman, “Turning the Screw of Interpretation” (1977) 55/56 *Yale French Studies* 94.

48 James, *supra* note 1, c. 23-4, at 84-86.

49 See Jacques Derrida, “Before the Law” in *Acts of Literature*, ed. Derek Attridge (New York: Routledge, 1992).

50 Felman, *supra* note 47.

51 Edmund Wilson, “The Ambiguity of Henry James” in *The Triple Thinkers: Twelve Essays on Literary Subjects* (New York: Penguin, 1962).

like a judge, she nevertheless must know and decide, and this compulsion increasingly governs her theory – a theory in which doubt is expelled by necessity and those who oppose her certainty are treated as mad by definition.

Hart manifests an identical method to the governess. In relation to legal interpretation, he insists on the “core of certainty” if we are to have law at all.⁵² That which is not certain is for Hart not really law at all. The question of doubt becomes removed as a category of legal interpretation altogether – transformed on the one hand into legal certainty and on the other into an uncertainty which is no longer law. This move is performed with even more extremism in his own narrative, which takes certainty and plainness as the sole guiding criteria for the validity of an argument, against which any ambiguity is itself the best reason of all to simply dismiss it as mysterious, or dubious, or confused. In relation to Hart’s own style of argument, the penumbra is not simply redefined as irrelevant; it is not suffered to exist.

The strategy of the governess, like that of Hart, lies in characterizing doubt as an insupportable intrusion upon the necessity of clarity. Time and again, the governess insists on banishing ignorance, on the need to dogmatically know the truth, to “have mastered it, to see it all,” to “know everything.”⁵³ Throughout the novel her narrating voice firmly rejects any interpretative possibilities but hers. She is certain, she is beyond doubt. Events “can have but one meaning” – a core – “but one sane inference” – an even-minded sanity. “If I ever doubted,” she insists towards the end of the book, “all my doubt would at present have gone.”⁵⁴

“He was looking for little Miles.” A portentous clearness now possessed me.

“That’s whom he was looking for.”

“But how do you know?”

“I know, I know, I know!” My exaltation grew. “And you know, my dear!”⁵⁵

Indeed, the governess is well aware that she is in danger of going mad. “I go on, I know, as if I were crazy; and it’s a wonder I’m not. What I’ve seen would have made you so; but it has only made me more lucid, made me get hold of still other things.”⁵⁶ She believes that only her insistence on the certainty of what she knows and sees, on the definite “proofs” that she experiences, keeps her sane and allows her to “take hold” of the situation.⁵⁷ Her final insistence, and it seems to me very much Hart’s too, is that someone has to be mad: and it jolly well isn’t her.⁵⁸

I do not propose in this context to engage with the lengthy critical debate as to whether or not the ghosts that structure the action of the story and of the gov-

52 Hart, *supra* note 4 at 607.

53 James, *supra* note 1, c. 2, 13, c. 3, 17, c.21, 78, c. 24, 86.

54 James, *supra* note 1, c. 2, 11, c.4, 18, c. 20, 7. See also Felman, *supra* note 47 at 154-55.

55 *Ibid.*, c. 6.

56 *Ibid.*, c. 12.

57 *Ibid.*, c. 6. See also c. 20.

58 *Ibid.*, c. 12, 49-50; Felman, *supra* note 47 at 194-95.

erness are, within the framework of the story, “real,”⁵⁹ although to understand them as transferences of the governess’ own imagination is for me a compelling reading of the story. I wish rather to focus on the way in which the story itself, once again, performs and produces this uncertainty (these ghosts, we might say). For when I read this story, I realized only later that it had directed me throughout to repress my own doubts as to the reliability of the governess’ certainty. These doubts were the very ghosts which I never properly caught sight of and yet which had subconsciously structured my own anxious search – parallel to that of the governess – for an interpretative key to fully understand the story. No-one but the governess ever sees these ghosts. Yet the governess is strangely certain of – merely intuitively and insists on – a whole host of puzzling details: that the two ghosts have come back to claim the two children, Miles and Flora; that the children have seen them, though they deny it; that they are in communication with them; and that this communication will somehow destroy or kill the children. All this is merely posited by the governess to be the case. It was if she is privy to some logic, lore, or law of ghosts, unknown to her reader, but about which, we are given to understand, she is an authority.

But whence comes this authority? I just know, is the governess’ mantra throughout, and this dogmatic rhetoric dominates the text and quenches doubt just as it dominates Mrs Grose, the governess’s faithful though unseeing (indeed, illiterate) confidante. The governess knows, and tells the story from the point of view of that categorical knowledge, and Mrs Grose believes. Only in retrospect does the reader, or at least this reader, wonder why, having sensed that there was something unexplained in the governess’ account, he worked to repress those doubts and chose instead, like Mrs Grose, to believe everything he was told. It is in this way then that the ghost story is experienced by the reader: as a shadow of doubt and of unanswered questions which are sensed but never seen, felt but instantly repressed as belonging to some other and incommensurable story.

This is why Felman treats *The Turn of the Screw* as essentially a story about interpretation.

The governess’s whole adventure turns out to be, essentially, a reading-adventure, a quest for the definite, literal or proper meaning of words and of events.⁶⁰

This demand for a precise and determined meaning – at all costs – steers the story to its conclusion, in which Mrs Grose and Flora, having themselves been driven away (whether from fear of the ghosts or of the governess is again left ambiguous), the boy Miles and the governess are left finally to confront one another. The governess aims to extract from Miles, at last, the ultimate and most perfect form of knowledge: a confession of “everything” he knows. This confes-

59 See generally John J. Allen, “The Governess and the Ghosts in *The Turn of the Screw*” (1979) 1 *Henry James Review* 73; Duncan Aswell, “Reflections of a Governess--Image and Distortion in *The Turn of the Screw*” (1968) 23 *Nineteenth Century Fiction*: 49; Shlomith Rimmon, *The Concept of Ambiguity--the Example of James* (Chicago: University of Chicago Press, 1977).

60 Felman, *supra* note 47 at 153.

sion will – again, so the governess posits – establish her absolute authority over the child and destroy forever the hold the ghost exerts over him.⁶¹ “The child’s confession,” says Felman, “would thus constitute the crowning achievement of the governess’s enterprise of reading: the definitive denomination – by means of language – of both truth and meaning.”⁶² Felman powerfully shows us the violence of this “mastery” and in particular the repression of alternative possibilities which this insistence on knowledge of a single and unambiguous truth implies. A literal reading, a reading which denies the place of uncertainty in a text, insists on mastering it. And whether it is the mastery performed by the Master or by the governess or by the author or by the judge, this mastery requires of us blindness as to ambiguities we thereby exclude, and violence in the imposition of a single, limited, and exclusive frame of reference that we thereby impose.⁶³ Interpretation, understood as a kind of mastery in which we just know what words mean, is an exercise in rhetorical control – in power and in persuasion.

It is in fact, itself a kind of madness since, like all madness, it sees only a single point of view and rejects in advance all evidence that might contradict it.⁶⁴ Madness is the hysterical response of an anxious soul to doubt. From this point of view, the madness of the governess lies not in the ghosts she sees but in the exclusion of alternatives and the dogmatism to which her position as a judge – who must construct the truth from uncertain materials – leads her. It is the singular power of *The Turn of the Screw* that it persuades the reader to participate in that madness. The madness of Hart’s project seems to me somewhat similar, and he too uses all the force of his rhetoric to make us complicit in it.

The ghosts that the governess sees are the dead figures of Peter Quint, the estate manager, and Miss Jessel, the previous governess. Both, like the governess, were given free licence by the Master though we are told that both used that freedom for “evil” not for good. And now they are back from the dead.

“... They want to get to them.”

Oh, how, at this, poor Mrs. Grose appeared to study them!

“But for what?”

“For the love of all the evil that, in those dreadful days, the pair put into them. And to ply them with that evil still, to keep up the work of demons, is what brings the others back.”

“Laws!” said my friend under her breath.⁶⁵

The two ghosts are the mirror image of the governess. They provide knowledge which will corrupt; the governess wishes to protect the children’s innocence. But from the point of view of interpretation and its relationship to authority, the governess and the servants are two sides of the same coin. What haunts the governess is precisely the possibility of a different interpretation, of different

61 James, *supra* note 1, c. 24, 88.

62 Felman, *supra* note 47 at 160.

63 *Ibid.* at 190-92.

64 *Ibid.* at 194-95.

65 James, *supra* note 1, c. 12.

choices equally mandated by the Master's sphinx-like silence. In fact, the Master, that promise of a final and definitive interpretation of the law, is nothing but a ghost himself, whose spectral presence haunts the governess just because she can never prise an answer from him.⁶⁶ Thus haunted by uncertainty, Quint and Miss Jessel represent the excluded, the inexplicable, the unpredictable, the denied, the potential for error, the ever-present threat of difference – all those things which a dogmatic literalism rejects as quite impossible. Skepticism itself is the ghost which though rationally impossible, nonetheless continues to haunt all such discourses of closure.⁶⁷

If we therefore think of the two children in this story as the object in relation to which law's interpretative power is extended – for the “governess” is nothing but the government of the child – the narrator's strategy is to possess all knowledge herself and to repress all doubt. “It came to me in the very horror of the immediate presence [of the ghost]” writes the governess, “that the act would be, seeing and facing what I saw and faced, to keep the boy himself unaware.”⁶⁸ The governess is not horrified by her own vision of these dubious ghosts – she explicitly tells us that by dint of her own certainty of action she is able to master her terror⁶⁹ – but only by the horror that the children might possess knowledge she does not.

They know; it's too monstrous: they know, they know! ...
What it was the most impossible to get rid of was the cruel
idea that whatever I had seen, Miles and Flora saw more –
things terrible and unguessable and that sprang from dreadful
passages of intercourse in the past.⁷⁰

The whole point of confession, then, is to wrest that knowledge – of something unknown, of something untoward – from the child and thereby to allow the governess to maintain absolute possession of it. When, in the great final scene, she finally bullies some fractured information from Miles, her triumph and her reasserted control at “his supreme surrender of the name and his tribute to my devotion,”⁷¹ is visceral.

It was like fighting with a demon for a human soul, and when
I had fairly so appraised it I saw how the human soul--held
out, in the tremor of my hands, at arm's length--had a perfect
dew of sweat on a lovely childish forehead. The face that was
close to mine was as white as the [ghost's] face against the
glass, and out of it presently came a sound, not low nor weak,
but as if from much further away, that I drank like a waft of

66 Felman, *supra* note 47 at 207.

67 Levinas, *supra* note 43.

68 James, *supra* note 1, c. 24, 85.

69 *Ibid.*, c. 9; other references later in the novel.

70 *Ibid.*, c. 7, 45; C. 13, 52-3.

71 *Ibid.*, c. 24, 88.

fragrance.

"Yes – I took it."

At this, with a moan of joy, I enfolded, I drew him close...⁷²

Knowledge then is a mastery one achieves by dint of authority, and that one maintains against all the unsettling forces that threaten it. Listen – this is the point and this is why the analysis of rhetoric is necessary to the analysis of theory: to interpret is not a passive act of reception but a very active principle of control, discipline, limitation, and exclusion. It is a matter of establishing and policing boundaries of the normal, the normal case, the natural, the natural meaning. This is the process of meaning-making which the governess engages in throughout the book and which pits her against the secret knowledge held by her subjects and by the ghosts.

The act of reading, the attempt to grasp and hold the signified, goes thus hand in hand with the repression or obliteration of a signifier – a repression the purpose of which is to eliminate meaning's division... To see is therefore paradoxically not only to perceive but also not to perceive: to actively determine an area as invisible, as excluded from perception, as external by definition to visibility.⁷³

That is why positivism and willful blindness are one and the same.

V. THREE DIMENSIONS OF A DEATH

Nothing, however, can prepare the reader for the shock of the final page. I apologize to those of my readers who have not yet read *The Turn of the Screw* for I must spoil this effect by revealing it. Miles having admitted his knowledge and communion with Jessel and Quint, the governess is at last assured of her final victory over mystery, uncertainty, and the unknown. The penumbra shall be exiled from the law once and for all.

I was so determined to have all my proof that I flashed into ice to challenge him. "Whom do you mean by 'he'?"

"Peter Quint--you devil!" His face gave again, round the room, its convulsed supplication. "Where?"

They are in my ears still, his supreme surrender of the name and his tribute to my devotion. "What does he matter now, my own?--what will he ever matter? I have you," I launched at the beast, "but he has lost you forever!" Then, for the demonstration of my work, "There, there!" I said to Miles.

But he had already jerked straight round, stared, glared again, and seen but the quiet day. With the stroke of the loss I was

⁷² *Ibid.* c. 24.

⁷³ Felman, *supra* note 47 at 166.

so proud of he uttered the cry of a creature hurled over an abyss, and the grasp with which I recovered him might have been that of catching him in his fall. I caught him, yes, I held him--it may be imagined with what a passion; but at the end of a minute I began to feel what it truly was that I held. We were alone with the quiet day, and his little heart, dispossessed, had stopped.⁷⁴

In that last sentence is retroactively transformed our entire understanding of the book. The loss of the ghost is the death of the child. His little heart, dispossessed, had stopped. And it is at this point that our doubts, both about the governess and about these ghosts, flood in upon us with giddy force. It little matters whether the ghost has killed the child or whether the smothering embrace of the governess – “I held him – it may be imagined with what a passion” – was responsible. Either way we must see the governess’ insistence on a total possession of the child as ill-starred or unjust, and the ghost as in some way necessary to the child. The final turn of the screw bites the hardest.

A. The morbid turn

As we seek to comprehend the implications of Miles’ death, one dimension is that we are in the presence of what Fuller rightly called positivism’s “morbid turn.”⁷⁵ The effort to extract all doubt from the law, to demand that it give up its secrets, offers only the certainty of its death. A law which has been dispossessed of what is not strictly derivable from its own text, whether we call that its ghost or its morality or purpose, is a law no longer capable of movement. As J.M. Portalis, the principal author of the *Code Napoleon*, said in the celebrated *Discours Préliminaire* at which he presented the work of the government commission which had been charged with its drafting:

A Code, however complete it may seem, is no sooner finished than thousands of unexpected questions present themselves to the magistrate. For these laws, once drafted, remain as written. Men, on the other hand, never rest. They are always moving; and this movement, which never ceases and whose effects are variously modified by circumstances, continually produces some new fact, some new outcome.⁷⁶

Fuller describes as morbid and fearful positivism’s rejection of this idea of movement, of an interpretative mode which changes over time in the face of the never-ending challenge of complicated and ambiguous social facts and legal questions. Many writers over the past fifty years including Derrida, Levinas,

⁷⁴ James, *supra* note 1, c. 24.

⁷⁵ Fuller, *supra* note 5 at 670.

⁷⁶ JM Portalis, *Discours préliminaire au premier projet de Code civil (1801)* (Ottawa : Department of Justice of Canada, 1995) at 6.

Nonet and Selznick, and Ricoeur,⁷⁷ have elaborated on this unruly element and attempted to make the case, as Fuller managed only in the broadest of terms, for the necessity of some transformative engine within legal interpretation. But while the argument has been extended in many directions since 1958, it has not left behind Fuller's initial insight.

For Derrida, who uncannily brings together Fuller and James, the problem of interpretive doubt is not capable of being cauterized or bounded in the way that Hart believes. "The undecidable remains caught, lodged, at least as a ghost – but an essential ghost – in every decision, in every event of decision. Its ghostliness deconstructs from within any assurance of presence, any certitude or any supposed criteriology that would assure us of the justice of a decision, in truth of the very event of a decision."⁷⁸ So the metaphor of the ghost – "the ghost of the undecidable"⁷⁹ – describes how justice influences our reading of the law without ever being specifiable within the law, and in fact remaining incommensurable to it.⁸⁰

There are of course serious risks posed by such an approach to legal interpretation. To guard against these risks positivism responds with morbid fear.⁸¹ But "whoever sought to be just by economizing on anxiety?"⁸² The governess strove to keep her children safe and innocent forever, attempted to control and know everything, to remove all impetus for change or unsettling knowledge.

I was there to protect and defend the little creatures in the world the most bereaved and the most lovable, the appeal of whose helplessness had suddenly become only too explicit, a deep, constant ache of one's own committed heart. We were cut off, really, together; we were united in our danger.⁸³

In the process, she killed what she strove to protect. The risk posed by the ghost's evil, and the fear of uncertainty that lay over these events, she averted at the cost of Miles' life. As Felman points out, as well as being a ghost story, *The Turn of the Screw* is a murder mystery, with these differences: the crime is committed not at the beginning but at the end of the story, and the detective is the culprit.

The self-proclaimed detective ends up discovering that he himself is the author of the crime he is investigating: that the crime is his, and that he is, himself, the criminal he seeks... for if it is by the very act of forcing her suspect to confess that

77 See Derrida, *supra* note 42, Levinas, *supra* note 43; Manderson, *supra* note 45, Philippe Nonet and Philip Selznick, *Law and Society in Transition: Towards Responsive Law* (New Brunswick, NJ: Harper Torch Books, 1978), Olivier Abel and Paul Ricoeur, *La promesse et la règle* (Paris: Michalon, 1996).

78 Derrida, *ibid.* at 965.

79 *Ibid.* at 963.

80 Derrida, *supra* note 41 at xix.

81 Fuller, *supra* note 5 at 669-71.

82 Derrida, *supra* note 42.

83 James, *supra* note 1 c. 6.

the governess ends up committing the crime she is investigating. It is nothing other than the very process of detection which constitutes the crime. The detection process, or reading process, turns out to be, in other words, nothing less than a peculiarly and uncannily effective murder weapon... the crime of its own detection.⁸⁴

If that does not explain Fuller's assessment that positivism's desire to protect an interpretative innocence is death-dealing, in Nazi Germany and more broadly, I don't know what does.

B. Losing the core

A second dimension lies in reflecting not on the substance of *The Turn of the Screw* but on its form. The genius of James' story lies in its performative dimension: the ghostly effect it produces in the reader. This performance is all condensed into the last sentence, whose violent and unsettling effect on the reader threatens to unravel our understanding of all the events that preceded it. It changes everything, rewrites the story we thought we knew. I do not just mean here that the last sentence brings a surprising twist to the tale – another turn of the screw – though it does that. The sentence brought forth for me an awareness of the questions about the story which had hovered, spectral and unacknowledged, on the edge of my consciousness throughout, and which I had willfully or blithely dismissed from consideration. In retrospect I saw that I had already sensed what I didn't really know, but that by force of will I had repressed that very sensation of doubt – I had ignored the ghosts that haunted my own reading. That is what it means to read a story: to “suspend disbelief.” But I was certain of the core of my reading. I knew what disbelief I was supposed to suspend, and in this last sentence it was my own reading and my own certainty which suddenly took on a different cast. This is part of what James means when in the New York Preface to *The Turn of the Screw*, he declares he has created a trap “to catch those not easily caught (the fun of the capture of the merely witless being ever small).”⁸⁵

The power of James' last sentence lies not just in the way the unexpected event of which it tells requires one to retrospectively reframe all that has gone before, but in the awareness it provides that these alternatives are not the intrusion of some new circumstance but an intuition that had always been there, lying dor-

⁸⁴ Felman, *supra* note 47 at 175-76.

⁸⁵ Henry James, “New York Preface” to *The Turn of the Screw* (New York collected edition, volume 12, at 120); see Felman, *supra* note 47 at 185 et seq. Here a very brief personal reflection or perhaps, as the governess would have it, confession. The only other story to have had a like effect on me was *Sixth Sense* (M. Night Shyamalan, dir., 1999) – another ghost story whose shocking conclusion led me to a most embarrassing and, frankly, uncontrollable fit of crying. I think part of the trauma I experienced in watching this film is attributable in a similar way to narrative instability and the way in which it requires us to retell the whole story, from the beginning, in a new light. There is I think something traumatic in having one's interpretative confronted in this way. See also *The Others* (Alejandro Amenábar, dir., 2001) which is based, if thinly, on *The Turn of the Screw*.

mant. At that moment, core and penumbra trade places.

The question of retrospectivity lies potent but dormant in the debate between Hart and Fuller. Hart condemns retrospective legislation as the “odious” sacrifice of “a very precious principle of morality.”⁸⁶ Fuller likewise says that “it presents a real problem for the internal morality of law.”⁸⁷ Yet both, for different but equally instrumental reasons, would in fact have supported the use of such legislation to deal with Radbruch’s “informer cases.”⁸⁸ But the concern is much deeper for Hart. As we have seen, hindsight is integral to his criticism of Radbruch. Even more than that, it lies at the core of his disagreement with Fuller.

[Fuller ultimately asserts] that there is no central element of actual law to be seen in the core of central meaning which rules have, that there is nothing in the nature of a legal rule inconsistent with all questions being open to reconsideration in the light of social policy... Of course we might abandon the notion that rules have authority; we might cease to attach force or even meaning to an argument that a case falls clearly within a rule and the scope of a precedent. We might call all such reasoning “automatic” or “mechanical,” which is already the routine invective of the courts. But until we decide that this is what we want, we should not encourage it by obliterating the Utilitarian distinction.⁸⁹

For Hart, then, Fuller’s reasoning leads us to abandon the idea of a rule which is in some measure simply not “open for reconsideration.”

Hart is right to draw attention to this issue. For Fuller, all law is about our encounter with the unexpected, and in face of the unexpected even the so-called core of a legal provision may at any moment become subject to reconsideration on the basis of a broader interrogation of its goal or nature. In that way, Fuller insists that “core” and “penumbra” are not two mutually inconsistent categories but aspects of a continuum. In the language of Fuller’s article, the purpose of reflection on the penumbra lies not just in helping us deal with grey areas or with new circumstances, but in clarifying for us what the law was actually about all along.⁹⁰ This clarification may as readily change whether we think a “truck” is a “vehicle” as a roller blade. In short, there is, for Fuller, no “‘standard instances’ that remain constant regardless of context.”⁹¹ Without already engaging in the kind of interpretative enterprise he advocates, the very line between core and penumbra cannot be drawn.⁹²

86 Hart, *supra* note 4 at 619.

87 Fuller, *supra* note 5 at 651.

88 Hart, *supra* note 4 at 619; Fuller, *ibid.* at 661.

89 Hart, *ibid.* at 615.

90 Fuller, *supra* note 5 at 668.

91 *Ibid.*, at 663. Notice how Hart changes his position in *Concept of Law* referring strikingly not to “standard instances” but instead to plain cases which he repeated characterizes as “constantly recurring in similar contexts” (Oxford, 1961 at 123).

92 Once again, Hart comes close to making Fuller’s case for him. Hart writes of the formalist,

For Hart, what is at stake is the ability of the present (or the past) to control future decisions through “the notion that rules have authority” or “the scope of a precedent.” Law looks forward: it tells us what will be the outcome. For Fuller, what is at stake is the ability of the present (or the future) to re-interpret past decisions through the notion that rules have purposes which we do not already know and which are in some measure always only emerging. Law looks backward: it tells us what was the end. Our understanding of law is constantly being developed by looking in the rear-vision mirror. As we look backwards on our prior decisions in light of our present predicament, we get a growing and shifting sense of why we are travelling on this path and therefore where to go next. We notice things that in retrospect are crucial to our understanding of a word or a principle which we never noticed before. For Fuller, it would be entirely wrong to say that we “always meant” that a certain word meant such-and-such; it would be more accurate to say that this is what over time and upon reflection we have come to mean. Law does not tell us what to do; it is a process by which we learn – and keep on learning – what we are striving for.

Perhaps that is why Hart condemns “retrospective” laws and Fuller “retroactive” ones.⁹³ A retroactive law undermines the rule of law according to Fuller because it acts on past behaviour, changing the legal meaning of prior conduct. On the other hand, there is for Fuller something retrospective about all legal interpretation since our understanding of the meaning of even core terms depends on a process of constructive and reconstructive elaboration. The instance of the truck retrospectively transforms our understanding of what we previously *thought* we were sure we meant by “vehicle.” Nonetheless this distinction does not, on closer analysis, hold water. This new understanding of even core attributes emerges in a case, after all, in which prior actions of the parties are judged according to criteria that only emerge in a judicial decision long after the event. All judgments, then, to the extent that they modify or refine a rule or a definition retrospectively, apply that modification retroactively. In that sense, then, there is always about law what has been rightly termed a “fabulous retroactivity.”⁹⁴

“He either does not see or pretends not to see that the general terms of this rule are susceptible of different interpretations and that he has a choice left open uncontrolled by linguistic conventions. He ignores, or is blind to, the fact that he is in the area of the penumbra and is not dealing with a standard case.” Hart, *supra* note 4 at 610. The formalists’ problem is that he mistakenly treats the penumbra as if it were the core; but according to Hart this does not undermine the correctness of Hart’s analysis “in the core.” But on the next page Hart’s example of social and penumbral reasoning is Justice Peckham’s decision in *Lochner v New York* (1905) 19 US 45 (US Supreme Court). For Hart this shows that judges do, as they must and whether we like it or not, make “clear choices in the penumbral area to give effect to policy:” at 611. But this is just what Justice Peckham did *not* think he was doing at all. Rather he believed himself to be applying nothing but the unalterable and acontextual core of the legal regulation in question. Justice Peckham *believed* he had no discretion. If this shows anything, it shows that core and penumbra are never self-identifying, and that consequently the problem that Hart identifies as “formalism” – to be “blind to the fact that [one] is in the area of the penumbra and is not dealing with a standard case” is a much more significant and widespread problem than Hart acknowledges.

93 Hart uses “retrospective” three times and “retroactive” never; Fuller “retroactive” nine times and “retrospective” never.

94 Jacques Derrida, “Declarations of independence” (1986) 15 *New Political Science* 7.

I have belaboured this point because I find it difficult to articulate as clearly as I would like. *The Turn of the Screw* does a much better job in conveying to us how the core of a reading project can be overturned. James' telling of the tale implicates us in the arrogance which assumes that some questions can never be up for reconsideration, and in the humility or even trauma we feel when that arrogance is shaken. *The Turn of the Screw* does what Fuller only talks about. On the very last line, all our prior surety is – retrospectively – undone. The core of our interpretation (not its margins but its “standard instances,” its self-evident truths) is discovered, through this later experience, to have been deeply flawed; and this flaw, we furthermore perceive, was already immanent in our earlier reading, though repressed by it. This is Fuller's argument. Nothing is so core as to be unshakeable; doubt or uncertainty is the ineradicable ghost which necessarily haunts all reading and without which law's heart is stopped. Above all Fuller tells us and Henry James shows us that this unsettling discovery of something unexpected right where we thought we were most at home, is not an aberration or an anomaly. It is not the imposition of a social policy on the law, or the application of a new paradigm to it, but the unceasing revelation of an idea *within* it.

In *The Turn of the Screw*, even that moment of revelation arrives only in retrospect.

... I held him – it may be imagined with what a passion; but
at the end of a minute I began to feel what it truly was that
I held.⁹⁵

So sure is the governess that this hug, this love, is the “standard instance” of her goodness which no context could possibly undermine, that Miles is dead before she even notices it. Without the “negative capability” of doubt, without constant reflection, without a steady interrogation of our assumptions and a revision of our received interpretations – without attending to the ghost of the law which hovers unwelcome but insistent on our periphery – there can be no awareness and development towards a better reading, a better understanding of what it truly is that we hold. Keats called this negative capability a positive force that “went to form a man of achievement, especially in literature.”⁹⁶ Law and literature therefore find themselves possessed of the same “uncertainties, mysteries, doubts” and to the same ends. It is how each in their way hope to avoid morbidity.

C. The trap of interpretation

But as Felman elaborates, there is a third dimension to our experience, as readers, of the moment of Miles' death. If the insistence on certainty and the banishment of doubt are signs of the governess' madness, *The Turn of the Screw* entices us to succumb to that madness. One way in which it does that, as we have seen, is by inducing us to accept the governess' reading of events. Another

⁹⁵ James, *supra* note 1, c. 24.

⁹⁶ I am grateful to Peter Fitzpatrick for the allusion and the quote.

way is by inviting us to reject it. As Felman explains, to redefine the governess as mad – to insist on a deeper but no less infrangible truth below the textual façade – is only to repeat the governess' gesture, to replace one commitment to a categorical reading with another.

The reader of *the Turn of the Screw* can choose either to believe the governess and thus to behave like Mrs Grose, or not to believe the governess and thus to behave precisely like the governess... To demystify the governess is only possible on one condition: the condition of repeating the governess's very gesture. The text thus constitutes a reading of its two possible readings... James' trap is then the simplest and the most sophisticated in the world: the trap is but a text, that is, an invitation to the reader, a simple invitation to undertake its reading... It is the very gesture of exclusion which includes: to exclude the governess – as mad – from the place of meaning and of truth is precisely to repeat her very gesture of exclusion, to include oneself, in other words, within her very madness.⁹⁷

Felman targets those critics of James' tale, like Edmund Wilson, who attempt to reconcile all the contradictory elements of the text around a new and definitive interpretation.⁹⁸ James' "trap" is the trap of simplicity in which haunting disappears, subsumed into a material explanation on one reading, but equally into a psychic explanation on another.⁹⁹ We risk either believing the governess or replacing her (as she herself replaced the servants who now haunt her).

What accounts for the enduring fascination of *The Turn of the Screw* is that it does not replace one certain reading with another. Our reading remains in-eradicably haunted not only by the undecidability of our interpretation but by the strange way in which the different possibilities of the text seem to colour one another. A performance of the open texture of law remains the story's final and greatest gift. In that final passage and with enormous subtlety, James refuses to wrest from the reader his or her role in passing judgment. He will not give us "the truth."

But isn't this precisely what the Master does in *the Turn of the Screw*, when, dispossessing the governess of her Master (himself), he gives her nothing less than 'supreme authority'? It is with 'supreme authority' indeed that James, in deconstructing his own mastery, vests his reader. But isn't this gift of supreme authority bestowed upon the reader as upon the governess the very thing that will precisely drive them mad?¹⁰⁰

97 Felman, *supra* note 47 at 190, 196.

98 Wilson, *supra* note 51.

99 Felman, *supra* note 47 at 185-90.

100 *Ibid.* at 206.

On this point Fuller attempts to solve the problem of interpretation no less than Hart. He does so by recourse to a moral certainty which appears, quite frankly, even more implausibly determinate than does Hart's textual certainty. Fuller is guilty of repeating the gesture of the governor. He attempts to make the ghosts disappear, to bring them back to the land of the living, simply by replacing one "Master signifier"¹⁰¹ with another. At this moment as we have seen he falls back on positivism's insistence on mastery over meaning in both his treatment of legal texts and his treatment of moral intuitions. Fuller is caught in James' trap, which is to say in Hart's.

VI. FROM TWO PERFORMANCES TO ONE: SAVING LAW'S GHOSTS

How is it that we can preserve the ghosts of any reading – the possibilities that exist as shadows and doubts – without attempting either to deny the existence of those ghosts (as does Hart) or to accommodate them in the material world (as does Fuller)? What would it mean to preserve Fuller's haunting voice, those still, small, unassimilable and uncomfortable questions, as ghosts rather than merely redacting them, once again, into a new and perfected text?¹⁰² Throughout this essay I have insisted on recognizing James' tale as containing a performative and not just a constative dimension. And I have likewise sought to understand Hart and Fuller as each performing their separate theories of law: rhetorical performances in which each tried above all to radically exclude the other's language of law, and which each singularly failed to do. The answer to my question lies in understanding Hart and Fuller as providing us with a performance of law and legal interpretation – not separately but jointly, as two actors in the same play create a performance together and not in isolation.

Neither Hart nor Fuller is right. Nor is it a matter of mixing a bit of Hart with a bit of Fuller in some new (Dworkinian) balance. Rather the disagreement between them, and the oscillation and anxiety that disagreement forges, captures the nature and I would say the unique virtue of legal interpretation, eternally caught between two simultaneous, contradictory, and uncompromisable¹⁰³ goals: to be faithful to the rules before them and the promise behind them.¹⁰⁴ Henry James points us to an approach to literature understood as the preserva-

101 The phrase is of course something of a cliché within deconstruction and post-structural theory, but it is doubly apposite here in its precise reference to the interpretative theories at play in James' ghost story, and in its resonances with theories of law.

102 This is the difficult and fundamental question which arises in those attempting to relate Levinasian ethics to law: see Desmond Manderson, "Here I am: illuminating and delimiting responsibility" in Marinos Diamantides, ed., *Levinas, Law, Politics* (London & New York: Routledge-Cavendish, 2007) 145; Simon Critchley, *The Ethics of Deconstruction* (Oxford: Blackwell, 1992).

103 In *Law's Empire*, Dworkin recognizes that our goals are uncompromisable in discussing the problem with "checkerboard solutions." But his argument for "integrity" does not recognize that our legal goals are also contradictory: see Ronald Dworkin, *Law's Empire* (Cambridge, Mass: Belknap Press, 1986) at 178-84, 225-77.

104 Jean-Francois Rey Abel, *Levinas – le Passeur de justice* (Paris : Michalon, 1997); Critchley, *supra* note 102; Derrida, *supra* note 42; Jacques Derrida, *Gift of Death*, trans. David Wills (Chicago: University of Chicago Press, 1996).

tion of tension between different readings and not its resolution.¹⁰⁵ Of recent writers, Derrida explains the relevance of this tension to the act of judgment best. Legal interpretation requires of us neither textual or ethical fidelity, nor a cocktail of both, but an oscillation in which the ghost of conscience haunts the law, casts doubt upon it, and yet is continually being reified into textual terms which, failing to do justice to it, do not avoid being haunted in their turn. Each exists in a ceaseless dance with the other.

It wouldn't be effectively unconditional, the law, if it didn't *have to become* effective, concrete, determined, if that were not its being as having-to-be', and this even as 'the laws...deny it, or at any rate threaten it, sometimes corrupt or pervert it'. In sum, '[t]hese two regimes of law, of the law and the laws, are thus both contradictory, antinomic, and inseparable. They both imply and exclude each other, simultaneously. They incorporate one another at the moment of excluding one another, they are dissociated at the moment of enveloping one another'.¹⁰⁶

In another register and more specifically in writing about the decision of the judge, Derrida insists that we need to both suspend positivism and yet return to it on each and every occasion. The "ordeal of the undecidable," he writes, is not an idea but an experience – a performance – necessary for any decision; but we can't stay undecidable forever. All decisions must finally return, as does Fuller, to the proper application of a rule, whether a revised rule or the old rule, whose content will therefore continue to be imperfect and provisional and so continue to be haunted by this ordeal the next time around.¹⁰⁷

We see explorations of similar energy-giving relationships, called in deconstruction aporia, throughout Derrida's work.¹⁰⁸ Responsibility and accountability are not opposites or choices: they are incommensurable forces that provide us with a deeper understanding of each though we are constantly forced to betray them in attempting to realize them.¹⁰⁹ In language too, communication and expression are in just such a relationship of productive contradiction, pulling meaning in strictly opposite directions but paradoxically opening wide the warp of language to instability, dialogue, and change.¹¹⁰ Finally, in his late work on hospitality, he speaks of a "tension at the heart of the heritage" between forgiveness as the unconditional pardon of the guilty as such, and forgiveness as a conditional grant, as an economy of repentance.¹¹¹

105 Mikhail Bakhtin, *The Dialogic Imagination* (Austin: University of Texas Press, 1981).

106 Jacques Derrida and Anne Dufourmentelle, *Of Hospitality* (Stanford: Stanford University Press, 2000).

107 Derrida, *supra* note 42.

108 *Ibid.*

109 Derrida, *supra* note 104.

110 Jacques Derrida, *Of Grammatology* (Baltimore: Johns Hopkins Press, 1998).

111 Jacques Derrida, "Forgiveness" in *On Cosmopolitanism and Forgiveness*, trans. Mark Dooley and Michael Hughes (London: Routledge, 2002) at 34-5; see also the "Introduction" by Simon

These two poles, the unconditional and the conditional, are absolutely heterogeneous, and must remain irreducible to one another. They are nonetheless indissociable: if one wants, and it is necessary, forgiveness to become effective, concrete, historic; if one wants it to arrive, to happen by changing things, it is necessary that this purity engage itself in a series of conditions... It is between these two poles, irreconcilable but indissociable, that decision and responsibilities are to be taken.¹¹²

This seems to me particularly appropriate language to describe neither Hart nor Fuller but the strange ordeal of reading them both: they too represent “two poles, irreconcilable but indissociable.”¹¹³ How is it that two ideas can be both “irreconcilable” and “indissociable”? Justice, responsibility, language, hospitality, all provide us with examples of situations in which we find that we need two things that we cannot have at the same time, and find ourselves instead oscillating between them. In a specifically legal context, Hart and Fuller blindly¹¹⁴ perform another.

Legal interpretation can be understood only by reading Hart/Fuller together, giving in to neither of their partial and self-undermining nostrums, nor to any attempt at resolution or synthesis, but instead cherishing the anxiety that their contradictions produce in us. This anxiety is true fidelity to law, an anxiety which the governess ultimately tried tragically to eliminate out of fear. The preservation of this disagreement, and of the two incommensurable voices it describes is essential to the health of law. The ghost is a dynamic element – an ethic, a scruple – in what would otherwise be a static system. As we see in *The Turn of the Screw*, it is not a realizable truth or reality, but it generates effects in the same way that the unconscious, which can likewise never be understood by the rational mind, nevertheless generates profound effects. These effects are in law doubt, humility, reflection.

Even more than that, law itself becomes experienced as the forum for a conversation, a discourse, or an argument (which of course the pages of the Harvard Law Review faithfully perform). Hart and Fuller’s mutual slippage onto the other’s contradictory grounds points us to the ways in which, all their efforts to the contrary, both visions remain inescapably in play. It is because we cannot have them both, because these visions pull us in contradictory directions, that the argument will not go away. This is not an argument we should attempt to settle or else like the governess we will find we are holding nothing but a corpse.¹¹⁵ On the contrary, the more we hear these arguments in the law, the more anxious our judges are – the more haunted by doubt and torn by questions – the happier we should be. The disagreement between Hart and Fuller, the un-

Critchley and Richard Kearney for e.g. at x-xi. Emphasis in original.

112 *Ibid.* at 44-5.

113 *Ibid.* at 51, 54.

114 Paul de Man, *Blindness and insight: essays in the rhetoric of contemporary criticism* (Minneapolis: University of Minnesota Press, 1983).

115 Felman, *supra* note 47 at 173: “The grasp of the signified turns out to be the grasp but of a corpse.”

assimilable nature of Fuller's interpretative approach and therefore the effect of ghostly irritant he produces, and the effect that this haunting has on the everyday work of judges, is an enduring sign that the law is still learning something, rather than merely telling us what it already categorically knows.

Uncertainty and ambiguity are thus not the Achilles heel of law, but Hermes' winged heel, the crucial occasion the legal process provides for listening, communication, and responsiveness. Fidelity to law requires a legal system which continues to argue about questions that matter, that provides a forum for dissent, and in which our judges are still prepared to learn from the events they are called upon to decide, while being compelled in the end to give a ruling. Faced with such contradictory ambitions, how could a judge or a governess fail to be haunted?

What, after all, is a screw? For a screw, going round in circles is the whole point. The more it turns from side to side, the more it comes back on itself, the more resistance it encounters, the more firmly at each turn does it sustain the structure into which it is driven. Each turn, while it manifests a contradiction, simultaneously intensifies a commitment. Which is to say that the vibrancy of a legal tradition – of any tradition – is determined not by the answers it gives but by the questions it maintains.¹¹⁶ A tradition which no longer knows how to frame and invite questions and which has excluded doubt and disagreement might be thought of as a screw which has long since ceased to bite, bind, and hold a community. Let us hold fast to Hart and Fuller not as a choice to be made but as a tradition to be maintained every time we try uneasily to make a decision. That is the final turn of the screw. Hart/Fuller remain lodged in legal thought as ghosts, each for the other, and both of them for us. May our hearts not be dispossessed.¹¹⁷

116 Edward Shils, *Tradition* (Chicago: University of Chicago Press, 1981); H. Patrick Glenn, *Legal Traditions of the World* (Oxford, New York: Oxford University Press, 2010); Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962).

117 Emily Dickinson, *Complete Poems* (1924), LXIX in Stephen Axelrod *et al.*, eds., *New Anthology of American Poetry* (New Brunswick, NJ: Rutgers University Press, 2003) at 563:

One need not be a chamber to be haunted,
One need not be a house;
The brain has corridors surpassing
Material place...

The prudent carries a revolver,
He bolts the door,
O'erlooking a superior spectre
More near.