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Richard Mohr
University of Wollongong, rick_mohr@uow.edu.au

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Abstract
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Identity crisis: Judgment and the hollow legal subject

Richard Mohr

A modern malaise

In this article I will be suggesting that there is a problem with the modern legal subject. There is something missing, a gap in the middle of that subjectivity, which clouds our judgment. This split had its origin in the Enlightenment, its first effect being the separation of knowing from doing. Our experience of the world could only be mediated through self-conscious sense data and thought, without our being in direct contact with the satisfaction of our needs or the consequences of our actions. This new conception of subjectivity has become an impediment to judgment, since splitting the actor from the spectator, and the judge from the life of the community, results in a denial of the capacity to interpret facts in the light of experience.

These broad claims are in urgent need of illustration; justification will take a little longer. Let me begin by illustrating my concerns with a well known contemporary instance. This is an account of a discussion between a journalist, Ron Suskind, and a White House aide, presumed by Walker to have been Karl Rove.

> The aide said that guys like me were 'in what we call the reality-based community', which he defined as people who 'believe that solutions emerge from your judicious study of discernible reality'. I nodded and murmured something about enlightenment principles and empiricism. He cut me off. 'That's not the way the world works anymore', he continued. 'We're an

> empire now and when we act we create our own reality. And while you're studying that reality – judiciously as you will – we'll act again, creating other new realities, which you can study too, and that's how things will sort out. We're history's actors and you, all of you, will be left to just study what we do' (Suskind in Walker 2006).

The context of this exchange, the White House under George W. Bush, flags the themes of responsibility for actions and allocation of liability or blame. These were illustrated by a *New Yorker* cover at the time of the 2006 Congressional elections which highlighted the carnage in Iraq, showing Bush in a ruined antique shop, broken china everywhere, protesting his blamelessness to an appalled proprietor. In Suskind's account, the aide has split action off from a prior understanding of reality to promote a triumphalist decisionism. One can *study* reality judiciously, the aide says, whereas action takes place *ahead of judgment*. I am also intrigued by Suskind's own murmurings about enlightenment principles. Is this really an account of enlightened empiricism versus a post-enlightenment imperial will-to-power? I will show that this split between actors and spectators, doers and knowers, has deep roots in modern soil which can be traced to origins in the Enlightenment. Earlier conceptions of judgment, which involved the capacity to act wisely, were overtaken by notions of taste and discernment: to judge was to pass judgment upon some external reality. This introduced a split which fundamentally compromises our capacity to gauge the wisdom of our actions in the light of desire, context and experience. Investigating the roots of this problem entails a critique of the conception of the legal subject.

Yes, the journalists, commentators and academics can make disinterested empirical studies, but what is to guide our judgment and our actions in a complex political or ethical environment? The same White House administration, represented by Colin Powell at the United Nations Security Council on 5 February 2003, used an unmediated empiricism as the basis of its argument for the invasion of Iraq: 'My colleagues, every statement I make today is backed up by sources, solid sources. *These are not assertions*. What we are giving you are *facts* and conclusions based on solid intelligence' (Powell in Latour 2005: 18).[1]

Latour highlights Powell's denigration of argument in the face of 'the undisputable power of facts', presumed to speak for themselves. To find an alternative to this 'worn out cliché', Latour (2005: 19) looks to Aristotle's rhetoric and its proofs appropriate to 'things contingent and uncertain such as human actions and their consequences' (Aristotle 1960: 5).

We will need to dig down to this ancient layer in the archeology of knowledge, but not just yet. First it is necessary to address the terms of this inquiry into the legal subject, whose responsibilities are more relevant to everyday life than are those of the White House. Each of us, president or citizen, must have ways of working out the right course of action. The question underlying this inquiry is: How can the legal subject decide the right way to act and to face responsibilities? That cannot be done by neglecting either experience or persuasive argument, yet these are the elements missing from each of the above contemporary examples. In this article I hope to identify the shortcomings of a legal subject cut off from sound judgment, to explore the origins of this gap, and to try to grasp some alternative conceptions which could reunite knowing and doing, responsibility and action, experience and judgment.

The legal subject

The very notion of the legal subject presents some difficulties which must be excavated before moving on to a wider analysis. I address this problem by inquiring, first, into some narrow conceptions of the legal subject as a pure creature of law. Then, through an analysis of the nature of subjectivity and the subject more broadly, I will show that the very notion of the subject derives from legal conceptions of our domination by authority. That notion of the subject was overtaken, in Enlightenment thought, by a conception of the thinking subject, the ego cogito. I draw on Agamben's (2001) critique of this subject detached from experience to rediscover a 'thick' notion of subjectivity, further elaborated in recent work by Ricoeur (2004) which attributes responsibility and recognition to subjects.

Legal subjects appearing in the thin world of modern jurisprudence can be dismissed as 'unreal fictions, artificial semantic products ... of classical jurisprudence' (Teubner 1989: 743). In a similar vein Goodrich (1986: 222-3) sees the legal subject as having 'only one biography', determined by a series of definitive moments. To this specifically legal and one-dimensional subject, he contrasts the subject of modernity whose multifaceted subjectivity is interwoven with history, whose individuality is always involved with collectivity. By using the term 'legal subject' in a sense related to the fictitious concept of the 'person'[2], Kelsen (1967: 168) ties it to the artificial nature of a legal fiction which can as easily apply to a corporation as to a man (if less certainly to a woman, according to a contemporary Australian legal dictionary[3]).

I propose a broader view of the legal subject, not least because the very notion of legal subjectivity is deeply bound up with our notions of responsibility and judgment, as will be seen more clearly below. Kerruish (1996: 96) helps us along this path by identifying the active element in subjectivity, if not specifically legal subjectivity, as a corrective to the 'bare abstraction' of the legal person from the living being, interchangeable with any other legal person, lacking individuality or will. While we may note that Kerruish's legal person echoes Goodrich's determinate legal subject, she reserves the word 'subject' itself for a more active role.

In the modern usage of the term 'subject', which Williams traces to classical German philosophy, the subject, far from being 'cast under' the domination of a sovereign (in the root sense of the word), takes on the properties of the 'subject' of the verb, the acting 'I'. This shift in meaning from subordination to self-initiated action is at the heart of the 'profound difficulty' Williams finds in the term (Williams 1983: 308-12).

Another way of analysing the legal subject is by asking what the 'legal' adds to, or subtracts from the subject itself. Let us begin by accepting that the subject, deriving from the notion of subjection, can also be understood in modernity as a self activating and self conscious being. Such a subject has a capacity for self actualisation which may

be inhibited or enhanced by the law. Kelsen notes the law's ability to set a limit to any self determination by limiting the rights the subject can claim, even in civil (private) law, through the regulation of property and the limits to contractual freedom (Kelsen 1967: 170-1). Benjamin (1986: 283) also identified the limiting effect of law, noting the 'tendency of modern law to divest the individual, at least as a legal subject, of all violence, even that directed only to natural ends. Because law is founded or preserved through violence, the state resists the capacity of the legal subjects to wage war or go on strike. In recognising this capacity of the legal subject not just to resist the law but even to found new law through insurrection or revolution, Benjamin (1986: 284ff) places huge (proto-)legal power in the hands of the subject, whose legal limitations are then mediated by forces within and beyond the power of the state.

Ricoeur offers a more positive assessment of the capacity of the legal subject: indeed, 'the invention of the legal subject ... imports the idea of mutual recognition into our conceptual history' (Ricoeur 2004: 270). I will travel further down the 'path of recognition' with Ricoeur[4] later in this article, but for now I simply note that his legal subject is the one who is responsible for actions, to whom blame or praise may be allocated, who may be held to account, through punishment or liability (Ricoeur 2004: 173-4). Far from being a passive subject of legal domination, or a mere legal fiction, here we find a legal subject upon which can be built our very conceptions of recognition and responsibility.

To sum up my understanding of the legal subject, then, let me clarify the stretched and sometimes antagonistic meanings of these words. The subject was originally 'cast under' the domination of an authority, from which it was but a short step to being under the authority of law. As the notion of the subject and subjectivity took on new meanings in opposition to objects, so to be a subject was to be an active, thinking agent. Yet the concept of the legal subject survived from earlier notions of subjection, even as it took on new capacities as the one responsible for actions. Subjectivity may now be seen as an active principle that can be limited by law and at the same time held accountable for those

actions which may be imputed to it. This conception brings with it a far deeper conception of what it is to be a legal subject than the thin definition that confines itself to jurisprudence. I accept, and will elucidate, Ricoeur's contention that legal concepts including the legal subject flowed into modern practices of knowledge[5] in the notion of recognition.

The new subject of the Enlightenment

The shift from the old legal subject to the subject of modernity took place from the 17th to the 18th century. The invention of modern subjectivity can be seen to bring with it a new self-consciousness side by side with a limitation of our responsibility for actions. This is a limitation imported from the new conception of the thinking subject. It can be traced in the passage of western philosophy from Descartes to Kant, whereby the self-conscious subject, the ego cogito, became split off from its physical self. This was announced by Descartes' separation of esprit from res extensa, of the mind as subject from the body as a thing that simply took up space like other objects. I referred at the outset to the broader implications which flowed from this split, limiting the capacity for judgment, responsibility and experience. In following sections I will deal with these topics in turn, considering their expression by Kant, their implications for the legal subject, and a critique which seeks a new foundation for legal identity.

I have referred in passing to 'practices of knowledge': constellations or patterns of thinking and acting which are maintained by disciplines, institutions and the habitus of our daily lives. These patterns may be found in numerous cultural manifestations, the most stable and easily cited including philosophy, law and literature. While philosophy elaborates a tradition of thought, and is the form in which we may most easily discuss or dispute such matters, literature (like art in general) can operate as a vanguard, outlining new directions whose form may only later be analysed in more detail. Those outlines, sketchy and evocative as they are, speak to us in a different way from the formalised and consistent structures of the philosophers. Law offers an insight

into some of the deep structures connecting thought and action. It has coexisted with and perhaps outlived religion as a formalised unifying component of our ethical and practical social life.

The method I follow here, then, tacks between literary, philosophical and legal analysis. My first illustration drew on accounts of public life in the White House in the early 21st century. I now propose a literary illustration, dating from four centuries earlier, which precedes the philosophical elaboration of the problem.

Consciousness and experience in *Don Quixote*

> Don Quixote, the old subject of consciousness, was enchanted and can only make (fare) experience without ever having it. By his side, Sancho Panza is the old subject of experience, who can have experience without ever doing it (senza mai farla) (Agamben 2001: 18).

These few tantalising lines from Agamben identify the split between experience and consciousness which appear in 'the first modern work of literature' (Foucault 1994: 48), introducing the Baroque's break with all previous systems of representation. These two literary characters from the dawn of modernity prefigure the new trope of the subject split off from experience, of 'receptivity and spontaneity' those 'two sources of human knowledge', originally differentiated in philosophy by Kant (Ricoeur 2004: 96). Publishing the first book of *Don Quixote* in 1605, Cervantes preceded by a generation Descartes' 'cogito ergo sum' and Gracián's identification of taste as the foundation of judgment. I will elaborate on these elements after taking a short ride with Don Quixote and Sancho Panza.

Don Quixote gains all his understanding of the world through reading romances about knights and chivalry, to the extent that his brain is addled, his judgment gone.[6] He is so bedazzled by these stories that he barely feels the pain of his beatings and he lives his life according to the laws of chivalry. Bereft of needs or wants, he adopts Dulcinea as his 'lady' without ever seriously desiring her. He judges with no knowledge of circumstances or of consequences. Having heard the

cries of the servant Andrés who is being beaten by his master in the wood, Don Quixote concludes that they 'belong to some gentleman or lady in need who requires my assistance and help', and thanks heaven for giving him the opportunity to fulfil his calling as a knight. Don Quixote orders the man to stop beating Andrés, and pay him all the servant says he owes him. Believing that this decision will be respected, merely because he has uttered it, Don Quixote leaves the two. We are not surprised to discover later in the story that Andrés was beaten even more severely as a result of Don Quixote's intervention (Cervantes 2003b: 35-7, 264-5). Quixote typifies pure agency which is incapable of learning from experience. In reply to Don Quixote saying, of one of their misadventures, 'let it be a lesson for the future', Sancho replies, 'Your grace will learn the lesson ... the same way I'm a Turk' (Cervantes 2003b: 173).

The squire Sancho, on the other hand, feels pain without reflecting on the injustice: 'it doesn't hurt at all to think about whether the beating they gave me was an offence or not, unlike the pain of the beating ...' (Cervantes 2003b: 107). Later, after another beating, Don Quixote again muses on the causes of Sancho's pain.

> The cause of this pain no doubt must be ... that since the staff they used to beat you was long and tall, it hit the length of your back, which is where the parts that pain you are located; if it had hit more of you, more of you would be in pain.
>
> 'By God,' said Sancho, 'your grace has cleared up a great doubt, and said it so nicely, too! Lord save us! Was the cause of my pain so hidden that you had to tell me I hurt where the staff hit me? If my ankles hurt, there might be a reason to try and guess why, but guessing that I hurt where I was beaten isn't much of a guess' (Cervantes 2003b: 643).

Sancho differs from Don Quixote in desiring food and other material things like money. Over a huge rabbit pie and an excellent wine, Sancho and the squire of another knight[7] marvel at the 'rules' and 'knightly laws and opinions' of their masters, which confine them to eating hazelnuts, dried fruits, thistles and roots.[8]

Sancho is no fool when it comes to judgment. His capacities are illustrated in several passages, the first in the context I have just mentioned, eating pie and drinking wine.[9] Sancho's tastes are gluttonous but certain: discerning that the wine the other squire provided comes from Ciudad Real, he reacts to the other's 'Bravo! What a winetaster!' with this explanation:

> You can't fool me! ... You shouldn't think it was beyond me to know about this wine. Does it surprise you, Señor Squire, that I have so great and natural an instinct for knowing wines that if I just smell one I know where it comes from, its lineage, its taste, its age, and how it will change, and everything else that has anything to do with it? But it's no wonder, because in my family, on my father's side, were the two best winetasters that La Mancha had in many years ... (Cervantes 2003b: 537).

His judgment of the wine is as incontrovertible in its certainty and its corporeality as it is irrational.

These vignettes from *Don Quixote* introduce the gaps that I want to explore in the modern legal subject. Don Quixote judges on the basis of the romances and fables contained in his books. Reality must conform to his preconceptions, so that things appearing as they are and not as he imagines them can only be 'enchanted'. Bodily experience is a trigger for reflection rather than a source of pleasure, pain or satisfaction. Because he is unable to relate his experiences to his thoughts, or his judgments to their consequences, his ineptitude is unchecked and his actions reckless. Sancho, Agamben's 'old subject of experience', knows things in their visceral immediacy. Totally lacking self-consciousness, he sees no point in reflection, but is in tune with his pain, his desires and their objects.

Judgment

The diverse subjects of Don Quixote and Sancho approach judgment in two entirely different senses in the above discussion. Don Quixote judges the dispute between Andrés and his master by reference to his own preconceptions of knightly virtue, rather than by the relevant events. He perceives Andrés as a gentleman rather than a servant, and

his master as a knight. All the notions he applies come from his romances, the books which his friends subsequently have walled up in his library to avoid any further damage. Judgment in this sense is derived from abstract and elaborate systems and may be called 'a priori judgment', since it is applied without regard to consequences any more than to circumstances.

At the other extreme is Sancho's judgment of the wine, which is entirely free of any reflection or preconception. It is visceral and corporeal, following immediately on Sancho's ingestion of the wine. This may appear to be judgment of an odd sort, since it is based purely on taste, in the narrow sense. In today's world we might associate such judgment with wine tastings and the prizes and consumer tips associated with them. Yet taste itself formed the basis of a long tradition of theorising about judgment, which began with Gracián (1601-58), another Spanish writer of the early 17th century (Gadamer 1989: 35). At the basis of this conception of judgment was the idea of discrimination, of separating what pleases from what disgusts, the beautiful from the ugly.

The two approaches to judgment, of Don Quixote and Sancho, are so different that they seem to be entirely diverse activities. One seeks to apply some abstract principles to a situation that is beyond comprehension by the senses, the other responds with pleasure and discrimination to an immediate sensation. One is directed to righting wrongs and flows from an idealistic calling and desire for the good ('mis buenos deseos' 55), while the other satisfies appetites and elicits vulgar oaths in its appreciation.[10] Yet these two activities came to be called by the same name, and their two strands were elaborated into theories of judgment, most famously by Kant.

That such diverse actions can be brought together requires some analysis. Taking the reductive path typical of the Enlightenment, Kant built his theory of judgment in general on the immediacy of judgments of pleasure and displeasure. The difficulty of this position is that personal perceptions of taste may not be universal or communicable. Such immediate reactions are essentially indisputable, so that if I don't like oysters it will not be possible for an oyster lover to convince me

how good they are. There is, for Kant, no language for a communal debate over matters of personal taste.

Kant's reductive individualism led him to overlook an older notion of the relation of taste to ethics. Gracián, no doubt familiar with *Don Quixote*, had revived the idea that taste should be cultivated and educated within a humanist tradition owing much to Greek philosophy. Based in Aristotle's practical reason of appetites and desires (to which I return below), 'Greek ethics ... is in a profound and comprehensive sense an ethics of good taste' (Gadamer 1989: 40). This lends itself to development as we mature and learn wisdom. Here again we find Sancho to be 'the old subject of experience', with his innate and inherited sense of taste. His unself-conscious judgment is not tainted by that reflexive consciousness of modernity which, by the time of Kant was established at the heart of judgment. After Kant, judgment is based in transcendent justification of universal aesthetics no less than of reason.

Kant saw the need for universal agreement in judgment so that, 'The judgment of taste requires the agreement of everyone, and he who describes anything as beautiful claims that everyone ought to give his approval to the object in question and also describe it as beautiful' (Kant 1951: §19). Kant recognises the difficulty presented by various assessments in matters of taste and he later notes that we make claims for universality of judgment 'just as if it were objective' (Kant 1951: §32). He attempts to overcome the gap between the individuality of taste and the universality required of judgment by introducing the notion of taste as a kind of 'common sense', a sensus communis (§40). He builds up the commonality of this sense by means of a set of theoretical propositions or rules for thinking. Two of these formal rules are entirely individualistic: 'to think for oneself', and 'always to think consistently'. It is only through the principle of 'enlarged thought', 'to put ourselves in thought in the place of everyone else' (§40), that we can move outside the confines of our individual and personal tastes and thought processes. Yet even this movement towards a community or social collectivity is to be achieved formally and by working outwards from the mind of the judging individual.

This theoretical and formal means of working from the immediacy of perception and thought to the universality of a 'common sense' makes a complete break with an older Roman tradition of the sensus communis compatible with the socialising and educative role of Aristotelian ethics (Gadamer 1989: 33). For Kant, deprived of any social conception of habits or categories of thought,[11] judgment must work upwards from our immediate perceptions to find a common principle or rule under which it can be placed. For judgment to be determinant in Kant's terms, one must give priority to the objectivity of the original experience and then 'one "seeks" the appropriate rule under which to place the singular experience' (Ricoeur 2000: 95).

That which Cervantes parodied as the enchantment of outdated romances ushers in the modern era of the thinking subject, the ego cogito, the esprit split off from the res extensa, the mind from the body (Agamben 2001, Descartes 1965). Kant systematised the ethics and epistemology inherent in this world view in his three 'critiques', of pure reason, of practical reason, and of judgment. Kant's conception of practical reason recalls Don Quixote, lost in books, applying universal laws — 'supersensuous' and 'in abstracto' — to a sensuous world that swirls around him. The world of action is 'only empirical and can only belong to experience' (Kant quoted Benhabib 1996: 187).[12] It is Sancho's world, or the world of Andrés beaten by his master. Benhabib points out that this lands human actions in the same empirical world as natural events, thus depriving us of an opportunity to understand them 'with reference to reasons' (Benhabib 1996: 188).

Here we have taken a leap from the personal immediacy of Sancho's experience and sense of taste to the abstract rules of Don Quixote. For rational disputation and determination, we must have 'a theoretical and practical use of reason' (Gadamer 1989: 40), yet to make a judgment we must have the immediate experience of taste. Kant elevated the axiom of non-contradiction to the status of his highest ethical principle, while we step outside ourselves and our own thought processes only in order to place ourselves in the position of others. This suggests to Arendt that Kant's general (or 'enlarged') standpoint was 'merely the standpoint of the spectator', in which she sees a basis for 'the seeming contradiction

between his almost boundless admiration for the French Revolution and his equally boundless opposition to any revolutionary undertaking on the part of the French citizens' (Arendt 1982: 44).

Kant elaborated the distinction between 'the engaged actor and the judging spectator' (Arendt 1982: 48) by reference to aesthetic judgment in distinguishing between the taste of the judge and the genius of the artist. The latter produces art, just as the revolutionary acts on the political stage. The former judges the acts of the latter, finding them pleasing or displeasing but, having taste rather than genius, the judge as spectator can never act. This brings us back to the ethic of the Bush White House, where actors create a reality that can only be observed — 'judiciously as you will' — by commentators, journalists or citizens.

I hope by now I have succeeded in showing the links between the Enlightenment critique of judgment found in its highest form in Kant and the ethic of the White House aide, assumed by Suskind to oppose 'enlightenment principles and empiricism'. The difficulty for Suskind is that while he may have found an adequate basis for empirical judgment of truth in the Enlightenment, the nexus between perception and action is too readily reduced to the contradiction between taste and genius, the spectator and the actor. He has not found a basis for judging actions within the political sphere. Worse still, when triumphal imperialism sets itself above the need to judge the prudence, morality or even the legality of its actions, and acts merely to create a new reality, that reality itself becomes a terrifying space dominated by the will to power.

Responsibility for actions

The legal subject must be capable of acting and of judging actions, must be prudent for the future and responsible for the past. She or he must have experience and must learn from it. That must be experience that takes account of the way the world is, not, like Don Quixote's, dismissing as 'enchanted' anything that does not jibe with the romances of the opinions, laws and orders we found in books, nor, like that of the White House, turning its back on the circumstances in which it finds itself in order to create its own reality.

Nor does Sancho provide an alternative model for a legal subject. However satisfying his judgment may be to the appetites, he does not (unlike Don Quixote) have *projects*. He cannot decide how to act in order to achieve any particular outcome, because he simply reacts to those stimuli that are presented to him. As Agamben noted, he has experiences without ever doing (or 'making') them. As the 'old subject of experience', Sancho represents a way of being in the world that is about to be superseded by the reflective, self-conscious subject of modernity. That subject, as seen in Kant, is well suited to judging events as a spectator but, being split between judgment and action, theoretical and practical consciousness, it is lacking a sense of responsibility.

Having identified responsibility as a crucial element to be rediscovered for modernity, Ricoeur looks back to the ancient Greek epics and tragedies in search of a recognition of self as a 'recognition of responsibility' which predates the modern 'reflexive consciousness of self involved in this recognition' (Ricoeur 2004: 149).

The Greek heroes may lack the modern self-consciousness of reflection, yet they are recognised by their actions in numerous narratives of ethics, revenge and providence. Actions, motivations and justice are seen in ideas of responsibility for acts which are respected and admired. The 'acting and suffering man recognises that he is capable of certain accomplishments' (Ricoeur 2004: 122). We may have trouble determining whether Oedipus was fully conscious of his actions: did he do them wilfully or was he acting out a plan of the gods? 'It is enough,' concludes Ricoeur of Oedipus, 'that this message remains: it is the same man suffering who we recognise acting' (Ricoeur 2004: 135).

Aristotle described this responsibility for the ethical decision as being at the basis of the human capacity to develop from bare life, which we share with animals, to the good life, lived in the polis. This is not a life lived in the mind: 'the happy man lives and fares [or acts] well; because what we have described is virtually a kind of good life or prosperity' (Aristotle 1976: I viii, 78). We make these decisions using the sort of practical reasoning that Aristotle called *phronesis* or

prudence. Aristotle's practical reasoning flows from desire and intention. It is wise to satisfy our appetites, but this wisdom comes from knowledge, and tempers the incontinence that may lead us to eat too much unhealthy food (Anscombe 1963: §33; Tredennick 1976). As McDowell (1996: 109) puts it, in 'Aristotle's conception of human beings, rationality is integrally part of their animal nature'. Just as recognition looks outward from the body to understand others in their physicality as well as their responsibilities, so also we reason in a body which has desires, needs and appetites.

Experience and the body

The importance of the body and the continuity of identity are the foundation of a profound sense of responsibility in Greek epics. Whether they are punished by men or by the Gods, whether or not they were fully aware of their transgressions, the heroes of these stories act and then face the consequences of those actions. The link between responsibility and physical identity is well illustrated in Homer's telling of Odysseus's homecoming.

Odysseus returns to his home in Ithaca disguised as an old beggar. The disguise is very effective, as one would expect since it was the work of the goddess Athene. Neither his son nor his wife, Penelope, nor any of the suitors of Penelope who have taken over his house, recognise him. The first to recognise Odysseus is his old dog, Argos, who, having seen his master again after nearly 20 years, suddenly dies (Homer 1980: XVII 209). The next to recognise Odysseus is the old woman Eurycleia who had nursed him as a child, who knows him by a scar on his thigh (XIX 239). The climax of the story follows rapidly: Odysseus takes vengeance on the suitors, slaughtering them in the dining hall. When he is revealed as Odysseus and reunited with the household, 'a tender longing came upon him to sob and weep, because he knew all of them once more, knew them from the heart' (XXII 276).

The centrality of the body is crucial to each of these events: Athene changes the bodily appearance of Odysseus; Argos recognises him in some sensual, doggy way; Eurycleia knows him by an old scar on his

body; the bloody slaughter, while it has a deep moral resonance, is enacted in physical struggle; and it is Odysseus's heart which is touched at the recognition of his household. When Homer recounts Eurycleia's recognition of Odysseus there is a long digression into the events and actions which led to his wounding in a hunting accident (XIX 237-8). Experiences leave their marks like the scar of Odysseus. The body takes its central place in the narrative as the subject of identity and the predicate of experience.

What was hollowed out from Don Quixote, as from the Kantian subject, was the capacity to *have* experience. It is missing because, if we only think inside our consciousness, we are sceptical about the knowability of the world we live in. Deprived of a social and empathetic understanding of other people, and split off from the consequences of our actions, the representations of things are privileged over their external in-itself reality, since in that interior monologue we think 'with' representations rather than thinking real, material things.

Phenomenology was to show that our mode of representation of the object derives from the various horizons of our own intentionality, announced as the 'ruin of representation' (Lévinas 1959: 115, 117).[13] Despite the sense of loss conveyed by this phrase, the rediscovery of intentionality and of desire suggests to me more hope than despair. This is particularly so in regard to law and the legal subject. The legal subject who reunites agency with experience acts in a world which is responsive, in which actions are rewarded or frustrated by other people and by material objects. The theatre of our action is no longer a shadow-play on the walls of a cave, but one lived out in a world of material things and shared attention.[14]

We cannot go backward to an age of unself-conscious innocence, whether that of Sancho Panza or of Aristotle.[15] But in following the thread of Sancho's appetites or Aristotle's desire we are led back to a world that feeds us, frustrates us or satisfies us. Aristotle's is not a world of pure representations nor one of private and selfish greed, but a shared social world that does not separate virtue from pleasure. He illustrates this point by quoting an inscription from the entrance to a temple:

> Justice is loveliest, and health is best,
>
> But sweetest to obtain is heart's desire (Aristotle 1976: I viii 79).

McDowell takes up the challenge to found a new subjectivity on the acceptance of the immediacy of our animal nature, together with that Aristotelian development of ethical responsibility called *Bildung* in German. McDowell sketches out this subjectivity:

> An experiencing and acting subject is a living thing, with active and passive bodily powers that are genuinely her own; she is herself embodied, substantially present in the world that she experiences and acts on. This is a framework for reflection that really stands a chance of making traditional philosophy obsolete (McDowell 1996: 111).

More than a framework for mere reflection, it is also a framework for action and responsibility, for experience and judgment. As such it may also make the traditional legal subject obsolete. I conclude by considering one or two practical implications that may flow from such a revised conception of the legal subject.

Identity and interpretation

The legal subject, as established at the outset, derives from our subjection to the authority of law. The Enlightenment and classical German philosophy brought a new, active sense to the subject. Now the subject is set against objects; it is the 'I' which postulates itself as the subject of the verb. Yet this discovery was made from inside the reductive consciousness of the 'I think' ('therefore I am'), which brought with it a separation from the social and the material world. The subject was liberated from daily dealings with authority at the expense of its integration with action, responsibility and judgment. As Agamben (2001: 26) puts it, the thinking I (io penso) was cut off from the empirical I (io empirico), the subject of consciousness split from the subject of experience.

While conceptions of the legal subject may retreat into legal fictions and jurisprudential niceties, I have drawn here on a tradition which reconfirms the responsibility of the subject within a legal context.

Benjamin (1986: 300), that old horseman of the Apocalypse, approached this by postulating a legal subject capable not only of conforming to the law but even, under revolutionary conditions, of founding new law. Ricoeur recovers a subject who interacts with a social and material world, and not only with representations of it. By going beyond 'recognition' of the object represented, Ricoeur opens the possibility of self-recognition. This reintroduces the subject's responsibility for acting, and so places the body at the centre of agency and of identity.

I explore the practical consequences of this identity of the legal subject first, before turning to the implications of its capacity to learn from experience which flows from the corporeal responsibility for action.

The legal subject must be identified in order to attribute blame, responsibility or rights to particular people. While the Roman persona could be exchanged depending on the role of the subject, like the theatrical mask from which the term derives, the responsible subject must have continuity over time. Whoever signed the contract or wielded the knife then must be the same one who is held accountable now. Legal administration guarantees that continuity through physical records, like identity cards, which collect data such as height or date of birth, as well as physical traces such as signatures[16] and fingerprints. These partial records seek to capture certain physical characteristics of the subject. They return us to the other side of the split between consciousness and the body, esprit and res extensa. Physical identification relies on characteristics selected so as not to change over time, like Odysseus's scar. To the extent that they are attributable to a unique individual they capture one person's characteristics. When they are also used to allocate individuals to groups or to presumably exclusive categories, they essentialise identity as a blurred realm between the physical and the social: male or female; black, white or Hispanic (to use US categories); 'of Middle Eastern appearance' (to use a descriptor popular with the New South Wales police). These categories are derived from the politics of sex or race in specific communities, so the salient categories cease to be unique identifiers, instead grouping people forensically, into categories of 'suspects'.

While the scar may be a useful identifying feature, the vulnerability of the body to changes wrought by violence or by more slow-acting ravages of time limits its identifiability over long periods. With the passage of time we change physically and personally while we continue to act and experience life. Time and experience leave their marks on our bodies, to be sure, but they also impact on our identity in a deeper sense. In rediscovering a legal subject who integrates the mental and the physical, the social and the material, we recognise the capacity for change over time. 'Identity' ceases to be a definitive category and we are forced to recognise that today's self is not identical to yesterday's.

The key difference between the legal subject split between agency and experience and this 'new' legal subject is in the expanded possibility of interpretation. We learn the consequences of our own actions and the meaning of other people's through experience. The legal subject of modernity must be capable of interpreting universal rules: in this sense, 'interpretation' means interpreting the law. This one sided interpretation neglects the hermeneutics of the experience of living. This is evidenced in the denial of the experience of the judge, which legitimises only the interpretations which flow from the invisible life, the disembodied judge. Judges whose lives and hence experiences give them access to alternative interpretations are denigrated and investigated, as in the case of the Indigenous NSW Magistrate Pat O'Shane (*Sydney Morning Herald* 18 January 2007; Khalilizadeh 2007), or overturned on appeal, as in the Canadian case of *R v S (R D)* in which the first instance judge from a minority group understood the evidence of underprivileged young people in their own terms, giving it credence denied by the police. Those judges are seen to be embodied in a way that the majority are not (Nedelsky 1997).

The legal subject I imagine is the embodied legal subject, black *and* white; victim, defendant *and* judge. Judgment, as is clear in Kant's *Critique of Judgment*, is not the exclusive preserve of the judge. Every legal subject needs the interpretive skills of everyday life to make continuous ethical and legal judgments. And judges, just like other legal subjects, need the experience of life to enable them to interpret actions, and not just laws (Mohr 2005). We must go beyond Kantian

judgment, however, if we are to find a way of judging which can inform our actions, and not just our opinions as spectators. Neither judges nor presidents are exempt from the responsibility we all share as legal subjects, the responsibility for our actions.

Notes

1 Latour's emphasis.

2 Kelsen (1967: 168) appears to use the terms interchangeably in the heading to section 33 of *Pure Theory of Law*, 'The Legal Subject; The Person'.

3 A contemporary Australian legal dictionary defines person: 'A separate legal entity, recognised by the law as having rights and obligations.' Even more revealing, it goes on, 'See also Association; Company; Incorporation; Incorporated association; Man; Unincorporated association.' (Nygh and Butt 1998: 334). And make no mistake about the gender-specificity of 'man': at 281 it is defined as a 'person of the male sex'.

4 The translations from *Parcours de la reconnaissance* and from Agamben's *Infanzia e storia* are my own. I cite the English translations in the reference list, to enable readers to do their own cross referencing (with apologies for any difficulties in matching up page references), but I have not had an opportunity to refer to them prior to publication. My reference to travelling down the 'path of recognition' with Ricoeur alludes to a possible translation of his title, but not the one chosen by Pellauer.

5 I intend this phrase to refer to the ways of thought and action, including Foucault's discipline and Bourdieu's habitus, which make us who we are through knowing and doing.

6 'rematado ya su juicio' (Cervantes 2003a: 38). Henceforth all page references to Spanish quotations are to this edition. All page references to English quotations are to Grossman's translation (Cervantes 2003b).

7 This 'knight' and 'squire' turned out to be neighbours from La Mancha, but that (as they say) is another story.

8 'opinión que tiene y orden que guarda' ... 'sus opiniones y leyes caballerescas' (628).

9 The second (in chapter 44 of the second book) shows a different side of Sancho, when he is installed as governor and must adjudicate a number of bizarre disputes. These judgments are essentially canny ways of getting to justice in a roundabout way, highlighting the importance of deception and ruse. This curiously Baroque formula would require a longer analysis which may explore its echoes in Gracián's attachment to dissimulation and ruse (Droit 2005). Several chapters later Sancho applies a version of the law of equity.

10 On tasting the wine Sancho exclaims, '¡Oh hideputa, bellaco, y como es católico!' (628) (which Grossman translates as, 'O whoreson, you damned rascal, but that's good!' 537).

11 Durkheim's later attempt to 'socialise' Kant's category of the 'synthetic a priori' is far from anything Kant dreamed of. Compare Taussig's critique of this move (1992: 126ff).

12 The direct quotes are taken by Benhabib from Kant's *Critique of Practical Reason*.

13 Ricoeur (2004: 95) reprised Lévinas' title as that of a chapter of *Parcours de la reconnaissance* .

14 McDowell (1996: 35-6) notes that thinking about thinking often leads to a 'sideways-on understanding of our own thinking' which fails to see the centrality of 'shared attention to the world'.

15 Compare: 'I am not urging that we should try to regain Aristotle's innocence. It would be crazy to regret the idea that natural science reveals a special kind of intelligibility, to be distinguished from the kind that is proper to meaning.' (McDowell 1996: 109).

16 Signatures, as performative expressions of commitment, have a distinct and more wilful character than involuntary physical characteristics.

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