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# Law and Art

Justice, Ethics and Aesthetics

Edited by  
Oren Ben-Dor

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# Law and Art

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In engaging with the full range of ‘the arts’, contributors to this volume consider the relationship between law, justice, the ethical and the aesthetic. Art continually informs the ethics of a legal theory concerned to address how theoretical abstractions and concrete oppressions overlook singularity and spontaneity. Indeed, the exercise of the legal role and the scholarly understanding of legal texts were classically defined as *ars iuris* – an art of law – which drew on the panoply of humanist disciplines, from philology to fine art. That tradition has fallen by the wayside, particularly in the wake of modernism. But approaching art in that way risks distorting the very inexpressibility to which art is attentive and responsive, whilst remaining a custodian of its mystery. The novelty and ambition of this book, then, is to elicit, in very different ways, styles and orientations, the importance of the relationship between law and art. What can law and art bring to one another, and what can their relationship tell us about how truth relates to power? The insights presented in this collection disturb and supplement conventional accounts of justice; inaugurating new possibilities for addressing the origin of violence in our world.

**Oren Ben-Dor** is a Reader in the Philosophy of Law at the University of Southampton, UK. His writings explore the relationship between ontology and ethics and the implication this relationship has to the happening of critical legal and political thinking. He is the author of *Constitutional Limits and the Public Sphere* (Hart Publishing 2000) and *Thinking about Law: In Silence with Heidegger* (Hart Publishing 2007).

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For Keren

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Oren Ben-Dor  
Southampton 2011.

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# Introduction

## Standing before the gates of the law?

Oren Ben-Dor

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### I

Why should lawyers and artists be interested in the relationship between law and art? Works of art involve hermeneutic creativity as constraint by judgement. So is the activity of judges and lawyers. In law, texts are constantly created, re-encountered and interpreted. New legal arguments are the result of approaching legal texts in an ever surprising way, thereby marking moments of ‘beginnings’ of unexpected evolution of case-law. The very ambit of critical legal interpretation is at stake in the constant creativity that traverses ethical judgement which gives *political* voice to ever changing multiplicity of othernesses and differences which are for the most part silenced in conventional interpretation of past texts. A similar ethical moment challenges artists too. The moment during which the due of justice is understandingly brought into language, indeed challenging the very use of language, involves what Kant calls in his *Critique of Judgement* – a *reflective* judgement – a judgement of particular encounters which is made without subsumption of particularity under a general rule – a moment of genuine thinking that links justice and beauty. The happening of the just, ethical and aesthetic characterises law and art and the enriching asymmetry of their encounter. Aesthetic happening ethically destabilises the subject who creates/encounters the legal text or the work of art.

And yet, the response from both lawyers and artists to this topic combines interest with suspicion or even outright dismissal. There seems to be grasping that something important and unique happens when thinking with and through law encounters a work of art – something which points to a telling strife between the two, one that can generate in-sights that are transparent and audible and indeed useful for ethical, political and legal reflection but which, at the same time, can easily develop into a distortion of a primordial secret, a mystery that perhaps pertains to the actuality and beginning of both.

Contributions in this volume are about art and law – about the riddle of *aisthesis* as the imperative strange and beautiful beginning of perception as sensuous apprehension – perceivedness – and its relationship to the beginning of law and the normative thinking it harbours. They are about the ethical, political and legal

implications of those points where the sublime beauty of strangeness begins, as well as about the question of whether the law should protect mortals from the violence that might well come with that which this strangeness indicates at. However, contributions are also about how art relates to the need for the decisiveness of law, the *aisthesis of* such towards-a-decision, decisiveness that might indeed exist despite art, perhaps even as an ethical response to art. Contributions are about the points of overlap, differences, as well as the functional complementarities, between the truth that art protects and the truth that law protects. Art does protect something essential in humans and in their togetherness as a political community. That protection is, of course, transparent to legal and ethical judgement, but is far from clear how. The more this theme of protection casts light on the relationship between law and art, a corresponding riddle emerges and with it the question of the price to be paid by making good sense of some common theme of protection.

Nothing less is at stake in the relationship between law and art than what it is to be a mortal – what it is for mortals to be together in the mysterious beauty of justice and ethics. How does beauty and justice relate to law – arguably the most important of social institutions; one that constitutes the essence of moderate political community and through which such community aspires for constant re-evaluation and change? Dwelling on these relations, the book also constitutes a platform that canvasses the various conceptions of, and complementarities between, truth and power. Depending on these conceptions the book opens up questions about what does it mean to hold truth to power and, indeed, to hold power to truth.

Law was classically understood as *ars iuris*, an art of law, legal aesthetics which used the panoply of humanist disciplines, from philology to fine art, in the exercise of the legal role and the scholarly understanding of its texts. That understanding which points to an essential aesthetic aspect of law has somewhat fallen by the wayside over time although has never been diminished, not even in the wake of modernism, with its increased specialisation of legal expertise and the entrenchment of the objectifying representations of a legal subject in legal rights and duties. Indeed, modernism itself has been shown to recast this aesthetic aspect of law within itself.<sup>1</sup> However, law and art are still captured by many as antagonistic, at best existing in a tense and uneasy, highly suspicious, relationship with each-‘other’.

Even, perhaps especially, at their seemingly possible discrete dynamic existences, the very suspicion between law and art indicates that each has always somehow desired the other – a feature which again indicates at an essential connectedness between the two. Post-Modernist and structuralist/post-structuralist meditations as well as open-Marxist critical frameworks of analysis<sup>2</sup> show that any separation between law and art is essentially impossible and thus, as illusion, constitutes a depoliticised form of social relations which cloaks behind objectivism for the sake of protecting existing structures of power.

Law and art serve both as instruments of oppression and as means for emancipation. This insight yields the active realisation (and in turn possibility for action) that not only is art transparent to legal reflection and growth, but that law

is essentially an aesthetic activity. Critical legal thinking constantly encounters works of art and generates possibilities for action (*praxis*) opening new paths for practical wisdom (*phronēsis*) that keeps the political community alive through both refusing uncritically accepted and oppressive conventions that justified ethical, political and legal decisions but also bringing constant explorations, contestations and negotiations of new expressions of togetherness. When philosophical truths become abstractions only to conceal them being a means to surrogate particular power relations, thus stifling the active life of the political community, engagement with art mercilessly mirrors that fact and is able to alter the dormant and domesticated collective [un]consciousness. The relationship between *praxis* and received 'theory' is thus constantly destabilised instrumentally, conceptually and symbolically through such engagement.<sup>3</sup>

Critical legal thinking engages with how law already contains aesthetic sensibility that symbolically constitutes the unconscious of the [legal] subject, but which also oppresses singular encounters and possibilities (also 'allowing' the encounter with too narrow a range of possibilities) of genuine alterity and in turn, of resistance. Through engaging with works of art post-structuralism brought forth the possibilities for law to constantly encounter the exposure, and then the critique of, the symbolic order. In turn, the background justification, of which the relationality and priority between legal rules and principles are the conclusion, could re-politicise as a work of art.

Post-structuralist critical legal thinking exposes the contestability of identity in the face of any identification. Appreciating the critical aesthetic aspect of law has considerably drawn on psychoanalysis and the unconscious forces which obey the law of desire of which legal subjectivity is but an essential aspect. Lacanian psychoanalysis has radicalised this insight further by pointing towards an underlying essential lack which generates a schism within subjectivity within the aesthetics of which the law and its normativity plays a key role.

Explorations of the multi-layered happening of the aesthetics within which, and as which subjectivity is constituted, constantly reveals the manner structures of power operate. This happens very intensely in the culture of control yielded by modernity. As Carl Schmitt, Michel Foucault and Giorgio Agamben have taught us, these structures persist within constant complicity and blurry boundaries between, on the one hand, sovereign exercise of power which is rationalised after the fact of its exercise, rationalisation that takes place through the justified representation of rights and, on the other hand, subjugation of the body and soul – life – to normalising, knowledge-producing scientism, disciplinary, and bio-, power that controls the politicisation of life itself through the very happening of governmentality.<sup>4</sup> The debates around the nature of this complicity and boundaries have led to contemplation about whether and how constitutionalism can respond to the mysterious antecedent arbitrariness of dominating power that its legitimacy always already belatedly conceals and rationalises. Such critical explorations help to articulate the condition for the legal and the political subject in a manner that can lead to the possibility of resistance to domination in a way that

both distances itself from legalism and the tranquilising reasonableness of risk assessment, but which is still transparent to law's aesthetic sensibilities. Art can expose the essential singularity and inassimilable nature of pain and suffering – that singularity that is for the most part silenced by legal representations and bio-power, singularity which is audible only as already subsumed under the all-too-general categories of law which are in fact too concrete and distorting instantiations of those abstract values that are said to underpin law.<sup>5</sup>

The result of all these explorations is that aesthetics, in particular the patient encounters with works of art oppress Jurisprudence, and law, to reconnect to the messiness of life, to the constant de- and re-politicisation of conflict- and alterity-ridden actuality. The 'otherness' between law and art could not be seen any more as crude and vulgar separation but rather be constantly displaced so as to mirror the poetic essence of the togetherness of humans as always being deconstructed and displaced within the law itself.<sup>6</sup>

This renewed appreciation of the essential link between law and art – of the anaesthetisation of law – was a part of a major destabilisation of the very notion of 'truth' and whether a certain truth in art had a role in such destabilisation – in short whether the very gesture of philosophy has collapsed into art. The notion of truth has been considerably debated and at the very least inflected by post-structuralism and more deeply, by the kind of fundamental ontology and radical ethics that it stems from. Many contributions in the book magnify into that happening of truth-about-'truth' of art and, in turn, how the truth of art and of law relate to such truthfulness of truth-about-'truth'.

This magnification can take different forms that may well critique the very aesthetic of law, or legal aesthetics. For example, could not the truthfulness of art critiques 'aesthetics' itself, and, crucially, do not aesthetic, ethical, political and legal judg[e]ments have some role in such questioning?<sup>7</sup> In other words, is not the relationship between law and art capable of interrogating and critiquing the very notion of art upon which legal aesthetics depends? In the process of examining and illustrating the troubled relationship between power of truth and truth of power, art itself is subjected to an interrogation thus exploring a potential, and extent of, schism that characterises the very force of art and which assesses the political implications of a mystery that characterises the very truthful happening of art and how mortals, their understanding and togetherness hang there over the abyss of this mystery.

The force of art seems to be capable of disturbing the normativity that pertains to the aesthetic aspect of legal subjectivity. Despite art being capable of generating an 'ought', this 'ought' might be derived from prior listening to the unfolding of certain mysteries of the 'is' and does not seem to be 'normative', indeed may be valuable precisely because of not comporting to any 'ought to do something about . . .'. There is something problematic, deeply so, in the very origin of normativity – its very beginning for humans. Thus, the very origin of normative thinking, as well as any crave to critically and ethically enrich normative thinking is at stake in the very puzzle before which we are standing.

But further, would it not be for art to question not merely any notion of itself that readily lends usefulness that manifests as 'legal aesthetics' but the very collapse of philosophy into art upon which both such questioning and the very interpretation of 'legal aesthetic' which is being questioned still depend? Could art question its own subsumption of philosophy without the latter returning to any totalising gesture of truth? *What would be the role of justice, ethics, politics and law in enabling; even guarding the aesthetic moment that generates the possibility of such questionings?*

These various dislocations and twists are enough to generate wonder and to appreciate that mysterious creativity is the hallmark of art and of law, one which characterises the singular encounter with truth and power in both the work of art and in legal texts. How to conceive the beginning of law, justice, ethics and politics and how mortals begin at such beginning are quandaries that eludes thinking, forcing it to encounter the emptiness of its own origin. The appreciation of this emptiness means that it is not clear what is the stake for creativity in law and in art and whether or not these stakes are one.

The thread that runs through the book, then, is that despite the creativity that involves both ethical and aesthetic judgement in both art and law, creativity that shows that they already exist in close connection, their relationship is nevertheless irreducibly puzzling and highly troubled. No doubt that juristic notions of values, rights the good and finally, the 'due' of justice, notions which can be traced to responsibility to being-in-life, are indeed transparent to art. How to give account of this transparency though? The point of departure for this volume from current books about legal aesthetics maintains that irreducible lump in the throat. Is there not something in art, tamed by the very crave to make 'sense' that still lurks in legal aesthetics that connects law, ethics and justice? Is there not an uncanny refusal by art to be tamed in this critical, still useful, way, making it valuable precisely because of that refusal?

All contributions to this book, then, *in very different ways, endure* the question-worthiness of the relationship between law and art. It is hoped that the interrelationship between contributions would open up many possibilities for connecting these different manners of enduring question-worthiness. What is, or should I say *how* is, or, perhaps even *why* is that which makes the relationship between law and art question-worthy? What is at stake in investigating the relationship? At the same time, though, is not the very craving to give account of the question-worthiness of this relationship question-worthy in a way which is very relevant for the gesture of the volume? Is not the very thinking that is comported to 'give account of things', or 'to offer an explanatory power of . . .' at stake in meditating upon the ethical and political dimension of the encounter between truth and power, between the decision and creativity that is embodied in both law and art? Does not thinking itself as the unmediated engagement with happening have to undergo a transformation in reflecting on the question-worthiness of the encounter between art and law?

It might well be, then, that to endure and preserve question-worthiness of the encounter, the very encounter must remain protected from any account given

of it. To put it somewhat more colourfully, being in the midst of the encounter between law and art would prove a pebble in the shoe to any account given of it. What does it take for some-thing to remain essentially a pebble in the shoe to any account given of it? What does it take for that opening which constitutes a ‘pebble in the shoe’ to endure *as such*, namely in a manner that surpasses any actual, and arguably potential, explanation of, and any sense given to, the pebble-ness? There is some manner in which the very question remains an essential problem, uncanny to its own pursuance.

## II

Contemplating the Greek myth about hubristic Marsyas and his music contest with Apollo can bring up well the various trends which contributions to this volume actually point at, as this myth arguably captures the mystery, tragedy and complexity that characterises the relationship between art and law. As it is well known according to prophecy, Athena, the goddess of love and wisdom, of philosophy, who, important for this volume, also protects the city as *Athena polias* – Athena of the City, was to be greater than her father Zeus, who had swallowed her pregnant mother Metis in an attempt to prevent the prophecy from actualising.

Athena plays the flute she made out of deer bones. Playing the flute, Athena is mocked by Aphrodite and Hera who comments on her swollen cheeks. Athena retreats to Mount Ida and, while looking at her image, abandons the flute and, again significantly for our exploration, curses it. The curse is that whoever picks it up would suffer the most terrible of punishments. Marsyas, the mortal satyr, finds it, and dares to pick it up thereby committing his first *hubris*, the irresistible desire to play the music of wisdom. Marsyas learns to play so proficiently so as to make him disposed to be coaxed into committing his second *hubris* – challenging no other than Apollo, the god of Music himself, but also the god of civil institutions, justice and government, to a contest.

Apollo is the master of the lyre given to him by Hermes. Apollo is claimed to have even enhanced the lyre by adding strings to it. Hermes, the god who bears the message, the god of hermeneutics, gives Apollo the lyre as the musical mean to near the hermeneutic riddle. Again, significantly for us, it remains unclear whether it was not actually Apollo who challenges Marsyas to the contest, so that the very ground of the *hubris* is not clear. The muses are assigned to judge the contest. Marsyas plays a tune that surpasses Apollo’s and is declared the winner of the first round. However, Apollo is declared the overall winner as during the second round he plays with the lyre upside down, something the satyr can not do with the flute. Some say that Apollo sang and played at the same time – also impossible to do with the flute. Apollo claims that he just uses air for his singing which makes it similar to playing the flute. (No doubt Apollo would make a good lawyer . . .) At the command of Apollo, who later somewhat repents, Marsyas is flayed alive, his skin is taken off, exposing his bare flesh, veins and warm intestines which pop out of the flayed body, details that Ovid described in *Metamorphoses*.

Marsyas cries out: 'Why flayest thou me so? . . . It irketh me. Alas, a sorry pipe Deserveth not so cruelly my skin from me to strip.'<sup>8</sup>

We can see an obvious theme in the myth that takes us towards a starting point in which to conceive the relationship between law and art. Apollo's music, his reasoning, victory and punishment may evoke the dominant power that uses art for strengthening and sustaining the structures of power. Art quite often lends itself to the monumentality of the dominant power. Art engages with dominant power so that the achievement of art come *in part*, as Adorno observed, on the back of conditions of exploitation, domination and oppression. As postcolonial scholarship shows, works of art often hide unconscious colonial symbols and prejudices that both assimilate and distance the colonised thus silencing and distorting her genuine alterity.<sup>9</sup> Apollo's music and its glory is that which depicts orderly institutions and the decisiveness and command, whose music trumps any singular song that may have attempted to interrupt their reign. The story points, perhaps, to the triumph of decision over hesitation, of the crunch point where general good has to trump over particularity, of the apollonian image of the world, as Nietzsche referred to it in *The Birth of Tragedy* over the Dionysian untamed desire.<sup>10</sup> The ethics and Justice, as well as the deployment of aesthetic judgement and creativity may well be oppressive, one that is either not critical or which critical only within a range of possible criticisms in order to preserve some sameness palatable to the powerful. The powerful that rule the city can be a dominant group or culture that constitutes uncritically and rigidly accepted essence of traditional origin. The 'powerful' can also be an organised religion that manages to maintain, *inter alia* through art, both a 'natural' and 'critical' status and with it 'critical reason' that is in actuality highly controlling of the range of possibilities to resist. 'Powerful' can also mean superstructures of power and ideology as based on the historicity of dominant and exploitative imperialistic economic interests. But 'the powerful' may relate not merely to actors but to the very thinking that craves for metaphysics – to the truth to which art is subservient as either imitation (Plato), or as dispositional active participation in, and constant progress and aspiration towards essences (Aristotle). Such a crave manifests as either 'positive' or 'negative' *telos*, a movement 'towards' either perfection or self-destruction which itself conceals well some fixity and closure in symbolic and conceptual relations. When art and law are arrested in metaphysics both practical wisdom and critical action have a for-the-sake-of-which that assimilates and highly control possible conflicts and un-saids. Art and law, despite being connected, run the danger of becoming 'useful' or 'imitations' to the very metaphysical thought that consciously and unconsciously constraints interpretation. Thus, in a manner that matures in modernity, art and law can assume new intensity of becoming subservient to a 'universal' that, through self-concealing 'participation' in it, hide its instrumental and symbolic contingency. The objectifying violence of modern controlling and normalising power, power that is so entrenched so as to make it blind to its own menace, threatens to subsume art in making its saying part of power's own internal differentiations of objective 'truth'. Such subsumption and taming of art brings to the fore special

historical epoch in which the liberating power of art are tied with transgression, criminality, even terror – amplifying the anxiety of the no-outside of control. Violence *as* art can grow exponentially with the lie of the velvety silencing of the otherness of its saying.

Thus, Apollo's music can be seen as the aesthetic of the powerful, one that plays beautifully and serenely the harmonious music and image of order until threatened by another music, that of the infinitely improvising everyday, the music of life. But art can never *fully* serve power. With Marsyas, the mortal, we can see the aesthetics of hesitation, interruption, improvisation and transgression, the happening of the call to encounter multiplicity and alterity. A strife thus emerges which links the never ending surplus of ethics and justice that disrupts, one which reintroduces insurgency, conflict and even violent resistance into the complacent ethics and justice that turns law into an instrument of oppression and domination.

Through the myth we find the tension between, on the one hand, free speech, for which this myth is famous for, *pharhesia*, and with it, *praxis*, the opening for that novel and suppressed possibility/all-too-limited range of possibilities of speech and action that awakens through encountering art. Free speech holds truth to power, the constant ongoing refusal of truth to be assimilated and homogenised into the demands of dominant power. Marsyas' music is that of the revolutionary on behalf of the oppressed, the marginalised and the disempowered whose visibility is diminished by structures of powers that on the face of it seem to effectuate egalitarian distribution of rights.<sup>11</sup> Art, as Marsyan music, depicts the ongoing re-politicisation of the law, constantly reintroducing *genuine* conflict, bringing the suffering of the disempowered, marginalised and assimilated into its eyes and ears, thus making the music of the law. The means by which Marsyan music can be played is left for our imagination but the very contest conveys that only through attentiveness to Marsyas can Apollo be forced to overcome the uncritically accepted coordinates of his own music and thus becoming more inclusive, enabling necessary discursive inflections as well as the persistence of faith in its transparency to primordial ethics of Levinasian alterity.<sup>12</sup> Marsyas is the oxygen that gives life to the law, keeping it alive, maintaining faith in it. But let us not forget, the myth is about an ongoing contest and the new inclusion that alleviates suffering can mark also necessarily different exclusion and displacement of suffering. Thus some tragedy is built into the contest, namely that only through inflection and recreation of exclusion can the law become more inclusive.<sup>13</sup> Legal aesthetics encapsulates change and creativity that effectuates ethical liberation through law in the face of otherwise domesticated, and thus self-destructive, Law's Empire. Such Empire, the myth tells us, can 'win' only by a ruthless ruse.

We can configure fourfold relationships between law and art that are initially encapsulated in the myth: the first is how art becomes an instrument of Law's Empire by helping the aesthetic idle invocation of subsumption and assimilation of particular relationships under what is, pretentiously universal, but in fact all-too-particular structures of power. Second, art is transparent to legal aesthetics and fuels alterity into the law – re-politicising it. Thus the complementarity between

law and art, the work of art, as Marsyan music, always already responds to existing political and legal relations. Only then can art be said to be able to hold the ethical mirror of justice to law, perturbing its 'managed' categories. The important question that arises here, which pertains to the nature and origin of legal aesthetics, the dependency of its 'how' on its visibility and audibility, is whether there is some aesthetic sensibility *in law*, that comes from Apollo to Marsyas, law that actually 'teaches' art something that art can learn as a result of the happening of some difference that comes from within the persistence, and closure, of law. To what extent does the law generate its own aesthetics and in turn, transcendence towards some alterity that is transparent *to* art that in turn can pick this aesthetics of law up, amplify it in a way which is audible and visible to law? Thirdly, Apollo's power can depict the Schmittian aesthetics of decision by the always antecedent power that cuts off the ethical mirroring of art, some power, the exception, where the true force of law is created through the suspension of the legal aesthetics of the Marsyan music, of that legal aesthetics of mirroring, showing that it is power, rather than the truthfulness of ethics and justice that are immanent in the law. Finally we may ask whether the law responds to the ethical need to protect not only from the ongoing aesthetic hesitation in art, but from the actual violence that art's in-sights, sometimes even the very execution of art, can bring in its wake, however truthful the saying of art is. There is a room for normativity, the need for which arises from the sheer violence and instability that comes with art and its truthfulness, even accepting that such protection is temporary, maybe even 'second best'. The ruse, therefore, might have its point in practical wisdom despite its coming undone on primordially and authenticity. The danger of such 'indirect' or 'second best' wisdom to become a tool of power is evident, of course, but this, in itself, must not detract from its supreme importance.

All these four dimensions witness, or rather point towards, a complementarity between law and art, a positive one, a constant movement, a dialectic, maybe even a double bind between the justice, ethics and aesthetics of decision and justice ethics and aesthetic of hesitation, mirroring and alterity. It is a double bind because only through the former does a beginning begin for the latter. Broadly speaking, all four connote legal aesthetics, that is legal *aesthetics* and *legal* aesthetics.

What constitutes the uniqueness of the thread of this volume, its novelty and ambition, is that manner in which all these four dimensions point earlier than themselves and thus at the need for a debate about law and art which stems from the uncanny nature of art and some refusal of it to become the purpose of any normative thinking and 'ought'; 'purpose'; 'end'. Tension is thus created between art and practical wisdom itself. At stake now is also the capacity of art to mirror a refusal to legal aesthetic as such, highlighting perhaps a chiasmic ipseity in legal aesthetic's very gesture towards metaphysics, thus opening a political dimension by resisting the very thinking and in turn, the relationship between power and truth – the very ethical and political possibility that legal aesthetics opens up. To what extent can art constitute a quiet and constant originary refusal, one that persists within, and is transparent to, the very philosophical tradition that views

legal aesthetics as linked to ethical and aesthetic judgements, viewing such a link as a central historical paradigm for law and its own critique?

Can we not read the myth as evoking some irreducible uncanniness which pervades the relationship between law and art, Justice, ethics and aesthetics? Is the only possibility to view uncanniness as valuable to the world of legal aesthetics to be seen as valuable *for the sake* of such aesthetic? Can not the very 'not' that constitutes the critical opening for legal aesthetics be critiqued by, be subject to earlier refusal? How should this earlier refusal be characterised? Could not the earlier refusal itself embody another self refusal, a refusal of refusal? How, to complete the contemplation, would this refusal of refusal relate to legal aesthetics? To what extent and how does the uncanny 'other within' legal aesthetic enable the very beginning of such aesthetics? It is thus precisely the possibilities of how essential uncanniness may compliment with the four aspects mentioned that the volume, it is hoped, opens up. The paradox of the beginning of law might be conditioned by, and distort, earlier beginning. Let us leave the myth for a moment to magnify into uncanniness and this 'refusal of refusal'.

### III

The Kafkaesque title to this introduction thus borrows from Kafka's story in *The Trial* about the many and various gates for the law that are opened by art, a labyrinth of gates guarded by one's own innermost fettered [im]possibility. In his lecture 'the Meridian' which was given on receiving the 1960 Büchner Prize, Paul Celan conceived art as constituting an *essential* problem – the problem of problems. Celan said:

But when there is talk of art, there is often somebody who does not really listen. More precisely: somebody who hears, listens, looks . . . and then does not know what it was about. But who hears the speaker, 'sees him speaking', who perceives language as a physical shape and also – who could doubt it within Büchner's work – breath, that is, direction and destiny.<sup>14</sup>

Grasping and encountering that which constitutes an *essential* problem poses a challenge to the very surplus that survives any performative 'yes' of engagement and *a-fortiori* to the very crave and gesture of 'giving account of what does it mean to engage with art' or of 'art and . . .' quandary – 'art and law' . . . 'art and justice' . . . 'art and ethics' . . . politics . . . and, last but not least, 'art and aesthetics'. Being in the midst of engagement with the essentially problematic may well already be very different from having *an idea* about what such engagement might involve. Are we *engaging* actuality of the essentially problematic, dwelling in the midst of its unfolding, when we *begin* by gesturing a construction that would give an account of a problem? Encountering and enduring the essentially problematic is not the same as facing the point of not-yet-articulated experience and thus ignorance, with a view to theorise and to give account of it. The happening of art as the essentially

problematic happens earlier than ‘art and . . .’, earlier than re-creating, re-presenting and re-opening, ‘a problem’ for the sake of practical wisdom that may unite a sense of law, ethics and justice. We see how the whole gesture of the book attempts unsuccessfully (why?) to reach silence, some relinquishing that opens up something else. To be essentially problematic means much more than ‘making a problem out of novel experience’.

Contributions give us clues as to how, and as what, could that ‘earlier’ be brought forth for readers? All converge in having a sense that there is some urgency about it; it must reach thinking.

Sure, the encounter with that opening which is essentially problematic no doubt prompts the creative construction of new problems in ‘current affairs’ in the face of any uncritically accepted problem construction and in turn, solutions. And yet, being an essential problem seems to have more layers to it and highly mysterious ones at that. There is a sense in which an essential problem that renders problematic any theoretical and practical problem construction, however creative, renders it so in a certain sense shrouded in mystery and uncanniness and yet one which is able to affect thinking with deep sense of affirmation and appropriateness.

What is it to be in the light? The essentially problematic, wrestling Celan’s insights and thus making it a pointer at silence, is so primordial a hint that it must relate to the problematic happening of thinking itself, something so simple, engaging with the happening, and yet so essentially fateful in its fragility. The manner in which art is an essential problem poses a quandary to any sense of ‘conception’ including that of art itself. The very field of enquiry of this volume – ‘art and law’ – must somehow become very problematic to itself and only as such, as an essential problem, can it near the happening of the ethical and the just.

The troubled nature of the relationship goes to the very heart of what does it mean to be a human being, a mortal, who dwells in, and in a sense always already responds to, this essential problem of problems. Why, and anyway, how could, mortals live with one another given the uncanny nature of this quandary? Why might it still be extraordinarily difficult to live in an epoch that seems to be free and which is inundated with radical methodologies, historiographies and genealogies – all different senses that enable that freedom to infinitely construct problems and to be in constant engagement with problem construction and solution? All these methodologies may not yet touch the opening that creates the scission where mystery of suffering begins at the beginning yet see this tragic attempt to overcome that failure as ‘life’? *What* does this failure point at? What are the consequences of suffocating the possibility for a grasp that essential problem is assimilated into the derivative movement that preserves merely a ‘problem’? What happens when the very tendency for opening up the possibility for new problems, legal, ethical and political problems, *stop being problematic*? Can art re-charge such misuse, even abuse of itself, thereby offering hope to overcome the silencing of its essential alienation that rumbles within itself? One of the problematic contemporary aspects of this relationship is that its troubled nature becomes less and less visible in a legalised, representational and calculative world. That this world becomes more and

more violent in the wake of more and more critical legalisation may hint at a deeper unfolding which is silenced by always-already legal responses to that violence. The contemporary legalised world and its legalising critical actors may be conceived itself to be a work of art that remains a sign which is not read.

In 'Majesties' – his seminar on 'The Meridian' – and in critiquing Heidegger's *Introduction to Metaphysics*, where Heidegger had discussed the nature of man as the strangest of the strange,<sup>15</sup> Jacques Derrida alluded to Celan's attempts to articulate the essential problematic nature of art and related this problematic nature to his own critique of the primacy of the question of Being, presence and sovereignty. Derrida said:

I do not say a poetics, a poetic art, or even a poetry; I will, rather, say a certain poetic signature, the unique signature of a unique poem, always unique, which attempts to express not the essence, the presence of what there *is* there of the poem, *but where the poem comes and goes, that attempts, then, to set itself free, through art, from art.*<sup>16</sup> (my emphasis)

Derrida detects in Celan's speech the fundamental characteristics of art, namely that it tries to free itself from itself, overcome itself as itself, be essentially uncanny *to* itself. The ipseity that characterises the very uncanniness of art problematises any comportment towards the very notion of 'art and . . .'. There is, as Celan alluded to in his countless 'perhapses', which Derrida keeps referring to, the more ancient estrangement of art even from its own uncanny presence within anything ordinary.

Derrida alludes to Celan's hesitation about giving account of art which makes it essentially problematic to itself, a becoming of alterity of the Wholly Other, giving the Other her own time, Other even to that all-too-human domain of uncanniness. In a sense also the very uncanniness that is present in art always already distorts art. Derrida detected in Celan's text the essential problematic of art as that which sways between, on the one hand, saying of the work of art, or the poem's there-ness, which is always uncanny (*Unheimliche*) and, on the other hand, the *most* uncanny (*Unheimlichste*), and therefore Derrida would say, unconditional and absolute hospitality.<sup>17</sup> Art refuses even that its own present uncanniness, showing its uncanny happening to be essentially not yet most uncanny, still finite, not yet one that 'turn the breath' which gives the Other her own time. The sound of *Unheimlichste* – that music – that most uncanny even to its own uncanny saying – is the happening that makes art essentially problematic to itself – it is the beginning.

In my reading, Derrida points to a mysterious ipseity that pertains *either* to the very notion of Being with no possible outside to it, *or* indeed, to the relationship of proximate exteriority within Being, an Other within, a thinking which, as Levinas pointed out, is otherwise than thinking-Being and is pre-ontological. How we grasp this ipseity points to the very question of law and art, and has aesthetic aspect (grasped as perceivedness), ethical aspect (goodness, valuable-ness) and an aspect of justice (due to be given back). All related to the question of what does it

mean to be a human being in the midst of the uncanniness of happening, to grasp the finitude of the human as mortal and as Derrida puts it, ‘to open up the problematic of the legitimacy of submitting the question of life to the question of Being’.<sup>18</sup> This question of legitimacy of art as presencing, the ethical and political implications of obeying some *law* of ipseity by contemplating this self-questioning nature of art, lies at the heart of the question-worthiness of art and law. It is in meditation of just how actual mortal law is *not* and the critical unfolding by which mortal law compliments these two notions of uncanniness that contributions to this volume constitute a point of inflection, of displacement, from books on legal aesthetics. It is in this manner that the volume constitutes a ‘turn of breath’ in grasping the very happening of the boundary of such aesthetics and in the very contemplation of the relationship between law and art.<sup>19</sup>

Thus the question of law and art relates to the hermeneutic of beginning. How is beginning as art and as law, and how might these beginnings be complimentary to some sort of usefulness to their respective instantiation in legal aesthetics that manifests as mortals’ affairs and their law? The beginning of the very ‘time’ and ‘place’ of mortals as that which enriches a for-the-sake-of-which that pertains to a process of legal aesthetic is problematised. Law and art, grasped as the question of faith in law is mysteriously related to a faith in some fate of refusal. At stake is whether the very juridifiability of art not distorts the law to which the essence of art belongs. The question-worthiness of law and art thus becomes a question-worthiness of being-in-uncanniness and that takes the stake of the question to become a contemplation of the relationship between *dikē* as the necessary law and *technē*, art, that is never a mere craft, but the violent knowledge into which human beings are responding in being aware and which also makes for an *essential* problem of their own finite uncanniness before the law.

Marsyas, the interrupter, is subjected to the most horrific of punishments, taking his skin off, peeling away any particular feature, any reminiscence of personality, leaving only the bare insides – the common denominator, the brutally achieved, but fake, consensus. The inability of Apollo to bear the face, the skin, that particular source that would remind him of this endless improvisation is apparent. The need for Apollo to resort to a ruse points to an act of silencing and an imposition of something else, a substitute which will lead to a winning, whose rightness proves derivative and which would effectuate some primordial tragedy. Apollo’s infliction of a punishment for the ‘*hubris*’ of Marsyas, is followed by his repentance by putting the (hermeneutic) lyre to the side for awhile, at horror with himself, and his own brutal realisation of that tragic ruse and at his attempt to undo that ruse through such severe punishment. The ruse is transparent to the god of music, justice and government but conveys something that can never be fully accommodated, something that Apollo, as god, can never be at peace with.

Thus, justice seems to be impossible to be done but somehow it *is* done in the contest and the manner it is decided and ‘resolved’. It is the *hubris* which reveals a mysterious and troubled schism within the aesthetics of giving back what is due – justice; does this justice connote ethics that is spoken through the language

of legal and moral rights and duties or is it the due that is owed and manifested as the happening of earlier desire the saying of which generates something even in Apollo himself, something that he can not get rid of, nor fully comprehend and accommodate?

What calls from Marsyas's music? How *ought* (ethically and justly) the muses understand the *hubris* of Marsyas which its very occurrence as *hubris* is doubtful? How could we account for the uncanniness of it? How could this '*hubris*' that arises out of the fateful earlier *hubris* by Marsyas towards Athena – which had ignited the gift of the curse of the Goddess of love and wisdom – teach us about the relationship of law and art, between *dikē* and *technē*, between the assignment of necessity and fate and the violent knowledge that responds to that assignment?

The myth tells us about the subtle relation between mortals and gods that reveals their dependency and mirroring of characteristics in one another and thus, their co-existence in each desire for the other.<sup>20</sup> The story does not only reveal the desire for the godly on the part of Marsyas, but raises the issue of whether the contest itself is not steered *by* Apollo as only through such a contest can he *be* god. He can only be a worthy god if he dares traversing that 'contest' with the mortal song, one that he can not erase, impossibility that he is desperately trying to overcome through the flaying he inflicts on Marsyas. Only in dwelling together with mortals, with being-in-death and, in turn with the condition of possibility for desire, can Apollo *be* god.

The myth, then, does point towards the tragic complementarity between *dikē* and mortal desire as that fall into violence that keeps igniting legal aesthetics. However, even this complementarity merely points at the uncanny beginning at a deeper tragedy that binds both gods and mortals who dwell together in the strife between *dikē* and *technē* – *together* in sublime uncanniness, that is neither of merely human origin nor God's 'natural' law but rather an encounter that only necessity and fate can order. The hermeneutics of the *mystery*, the curse of wisdom, prevails between law and art in a way that mortals and gods desire one another. It is this strife between *dikē* and *technē* that constitutes the fateful and wonder-full law for *both* mortals and gods. The violent desire, art, a desire *for* the *hubris*, for the uncanny, is no other than the power of *dikē*, the unbounded cosmology of *nomos* – the law, and of *logos*, the secret word. The law that makes both human and gods response-able together *as art*, responds to the sublime uncanniness of the *hubris* which constitutes the origin of the call for justice, for ethics and aesthetics in a manner that is uncanny and interruptive to any mortal punctuation and 'sense' and purpose-ness.

Despite the contest having an aura of rules and legality, do not the muses, as muses, rather than judge, attest to the music of the strife between *dikē* and *technē* – the music that even the god of music could not play, perhaps even not Zeus? Indeed, the gift of Athena – the flute of wisdom as well as the uncanniness of Hermes's lyre, shows how *dikē* harbours the prophecy of Athena anticipating the finitude that characterises gods. Art is the very violence of the contest and the justice that is done in it, through the persistence of the mystery of the '*hubris*' by Marsyas towards Apollo which is itself already a response to that *hubris* towards

Athena, the hubris of beginning that binds him and Apollo together in fate. Athena thus activates the fate of *dikē* in Marsyas the desire for the godly that traverses his sublime desire *for* death, and in turn coaxing and awakening a mortal desire in Apollo, who orders the skin, the medium through which mortality is so radiant, awakening the impossible desire to rid himself of mortality in order to re-turn to the pure godly again.

The music of mortality by Marsyas, desired by Apollo, is contrapuntal to the human's song of material and useful injustice, beyond merely the human desire that can not be fulfilled by any oppression by law. It conveys the sense, that humans always already respond to, beyond their choices, makes them grasp that the violent knowledge conveyed by their words and deeds is not for their sake. The *hubris*, perhaps, indicates also the ambivalence between transgression, abomination as the most primordial ethical happening. *Gewalt*, originary violence, as the riddle of art, as that which fuels the contest and the ruse of any comfortable resolution of it even, arguably, as some critical complementarity between law and art that anticipate enrichment of the performativity of law. The riddle of art happens as music. There is something so terrible in the fatefulness of this story but at the same time so humble and infinite in its simplicity, the pure breath of love that is at the beginning of justice, ethics and aesthetics, fate that can not be disempowered of any human power that appropriates the portrayal of suffering and conflicts. So, could *legal* aesthetics in appropriating a for-the-sake-of-which for itself be the most sophisticated form of the ruse? Could it be the harbinger of a tragedy more primordial than that tragedy that arises at the impossibility of law to render that very justice that is transparent and immanent in it and any complementarity that sustains the for-the sake-of-which of such aesthetics?

The uncanniness of art, to which any gesture towards 'art and . . .' is comported too, points to the relationship between humans and the divine and asks how the uncanny and the *most*-uncanny feature in this relationship. Is the relationship between humans and the divine pagan in which the uncanny is mysterious to itself as the most uncanny, or is the relationship based on divine revelation that installs the most uncanny in the world, that installs the witness who is ultimate Other to any pagan sameness that unites mortals and gods and who witnesses the moment of art being an erasure of any trace of *dikē* and *technē*, erasure that is the *most* uncanny origin of the relationship between them, the origin of their beginning, one, again, which is antecedent and exterior, one which points within their pagan manifestation as wholly Other? However we contemplate it, there is a mystery.

From which law does thinking call? How are mortals to grasp the law of the mystery(s)? How do these mystery(s) translate into the actuality of the turbulent relationship between truth and power and in turn how does suffering originate in, and respond to such turbulence? How can uncanniness as absolute singular Other relate to its origin in mystery?

Once the dimension of uncanniness that characterises *dikē* and *technē* opens up, the very relationship to the question of how legal aesthetics is located in the happening of both becomes not merely constantly nourished, but rather

*essentially* troubled. The question then becomes how to contemplate whether uncanny complementarity to legal aesthetics happens as uncanny (*unheimliche*) that already *harbours* the most uncanny (*unheimlichste*) or as the *uheimlichste* as radical exteriority, in short, how is uncanniness configured into legal aesthetics?

The complementarity and contrapuntuality between uncanniness and legal aesthetics, then, assumes a twisted perspective: that *legal* aesthetics is maintained only through its suspension (it being a ruse) by the uncanny justice and hospitality of art and that art is maintained only through its suspension by the decisiveness of that juridifiable dialectic that pertains legal aesthetics. Despite art having the capacity to sublimely awaken critical audibility in law or to respond to critical openness that manifests as always antecedent aesthetics *of* law, any critical aestheticisation of law can also be conceived as the legalisation of that sublime capacity of art. The myth seems to critique any unqualified ‘yes’ between law and art, a ‘yes’ that somewhat tames the uncanniness between the two.

But, does not essentially problematic art that resists sense and resists an account of how originary ipseity in uncanniness features in legal aesthetics must also convey an originary ipseity in *technē* which points to ipseity in *dikē* itself and thus the very uncanny relationship to legal aesthetics becomes a problem of problems? What ‘showing’ for legal aesthetics does it take for art to overcome itself through art? It is the traversing, the crossing, of that ipseity which constitutes the *chiasmus* of art and law – that region on the outskirts of sanity – the beginning.

So, finally, then, listening to Celan, perhaps this quandary indicates further. Celan’s in-sight as Derrida portrays it is that ‘*where the poem comes and goes, that attempts, then, to set itself free, through art, from art*’. So if formal and objectified law was the ruse for critical legal aesthetics, and then legal aesthetic becomes a certain ruse in relation to the uncanniness of art, now, art itself *including its uncanniness* becomes essentially problematic revealing the ruse of its own ‘law’ *as* its own law. We can recall that it was wisdom and love itself, as an insight of Athena, an alienation from her own beauty, the beauty of love and wisdom that had been triggered by the laughter of the other goddesses at her, which led to the origin of the curse and with it, of the double hubris that formed the rest of the story. The curse of Athena may imply the *unheimlichste*, the ipseity of the very uncanny presence of art towards itself.

The myth, and the relationship between truth and power, law and art, and as we saw of the essential estrangement of art from itself, is taken to be about how mortals can traverse, through their mortality, the beginning which immortalises them into the impermanence of *technē* that occurs as the assignment of *dikē*. The *question* is how are we to conceive ‘the beginning of art as art’ as the assigning order of *dikē*. Depending on this view, how are we to conceive the beginning of ethics, politics, justice and how *such* beginning relates to legal aesthetics. Do *technē* and *dikē* relate to legal aesthetics as the most uncanny *exception* to the mysterious interconnectedness of all beings – exterior to the uncanniness towards legal aesthetics that this interconnectedness brings forth? However, could it be that the seemingly most-uncanny grasp as exception – is *still* juridifiable, namely

not yet uncanny at all *vis à vis* legal aesthetics, sophisticatedly, and tragically, still nourishing it?

Could it be that the view of *unheimlichste* as exteriority despite its apparent radicality and being otherwise than the finitude of *unheimliche*, despite the total emptiness of its perhapses, is the origin of juridifiability – is still a self-concealing ‘yes’, to legal aesthetics and thus is not yet a genuine ipseity of uncanniness towards it? Could it be that the radical punctuation of the wholly Other within the uncanny (*unheimliche*) anticipates punctuation and thus is precisely the origin of the for-the-sake-of-which of legal aesthetics? In such a question we can locate, arguably the deepest origin of the turbulence that characterise the relationship of law and art.

How may such exteriority further nourish legal aesthetics? Derrida’s reflection on Celan’s account of the secret and problematic encounter with art, may indicate, perhaps, that art itself grasps its own beginning as a self-grasp that it is, as itself, not exhaustive of truth, that art *itself* is finite for itself and that a most uncanny (*unheimlichste*) event should be taken to allow politics and law to grasp some human-based, and thus machinational, finitude of the very insights of art, that is for politics and law to grasp the finitude of art as art. But this would, in however weaker and aporetic sense, still maintain the essential link between art and truth and would thus bear certain implications and relationships of estrangement of the truth of art (as grasping its own finitude) to legal aesthetics.

The upshot is that the most uncanny as radical exteriority leads to constant reincarnation of legal aesthetics through which art overcomes itself, including its own strange relationship to legal aesthetics – what a double bind! Can, then, the Greek myth hint at Athena’s curse of wisdom igniting the ipseity that characterises the aisthesis, ethics and justice that makes the account between law and art both complimentary and encompassing the most uncanny? Or does that wisdom indicate that when art becomes most uncanny as exterior to its own uncanny presence actually juridified and stops to be genuinely uncanny in relation to the juridical? Is encountering the Other to that mirroring between human-gods, not another way of enforcing the subject, the human desire for punctuation, the legal, despite its gesture to the contrary? In this ipsiety of ipsiety lies the problem of problems of law and art. It is how to characterise uncanniness and thus, the truth of suffering, towards juridifiability of art which is at stake in the volume.

However, *unheimlichste* could indicate an attempt at extrication from art not as art but altogether. It could be understood as a genuine finitude of the primordiality of art *tout court*, thus resisting the subsumption of philosophy by, and into, art. Law and politics have the role of capturing that moment – embracing the insights of essentially problematic art without granting it any monopoly, thus in a sense protecting thought and action from that monopoly and the violence that art’s insights and its monopoly generates – thus constituting a new dawn for legal aesthetics that does neither monopolise, nor being monopolised by, art. This also changes the role of law in renewing the dialecting between decision and hesitation, elevate it to a level where the finitude of art is at question. *Dikē* and *technē*: is not the myth about Athena’s leaving of the flute precisely as the very manner in which the

beginning of wisdom abandons gods and mortals to battle the still finite uncanniness of art, to say that there are other truths than art's?

#### IV

Part one brings out various philosophical reflections on the relationship between law and art. **Krzysztof Ziarek** opens this part by developing the notion of poietic 'Justice' that is built on Heidegger's notion of poietic dwelling. *Dikē*, he argues, constitutes a unique sense of 'Justice' in a manner which is not-translatable to the notion of 'poetic justice', one that conceives justice as *iustitia*, a notion which is still associated with normative discourse of law and with morality. *Dikē* is also not translatable to any absolute alterity of an Other in the manner that Levinas promoted, namely pre-ontological alterity which is otherwise than viewing the other as a thinker of Being. Viewed as *dikē*, 'justice' connects the perspective of *poiesis* and connotes the strictly singular one-time enduring, and in turn, measuring, the time-space of the event of being's withdrawal. Otherness, as Ziarek puts it, is uniquely and singularly manifest in this originary time-space opening up to the (never) present and constitutes an event in which 'Justice' is measured otherwise than in a manner that can be assimilated into the command-based notion of Justice. Ziarek's critique demonstrates the near total dominance of *iustitia* that is weaved into many similar distortions of basic notions, distortions that have become pillars of the philosophical tradition in the West and which has continually forgotten the world of the early Greeks and the political and ethical potential that this world encapsulated.

However, 'Law remains law' argues **Andreas Philippopoulos-Mihalopoulos**. Law is just only when law's own repetition produces difference. The ethical as well as the political route towards the just is usually captured as Otherness which is exterior to any transcendence that preserves the same. Alluding to de Chirico's seemingly unthoughtful and mundane reproduction of his *Piazza d'Italia* series of paintings Philippopoulos-Mihalopoulos argues that otherness as the impossibility of sameness is immanent in repetition. He argues that law's process of becoming-other is enabled through the aesthetics immanent to the repetition of the legal. In considering the notion of repetition in Kierkegaard and Deleuze an opening horizon for Justice which continues to haunt the law (and lawyers) is conceived as the paradox of immanence, namely that only repetition generates the very impossibility to repeat. In debating the [im]possibility of pure repetition the chapter raises important questions as to the very emptiness or groundlessness as a condition of possibility for difference. The chapter opens with a debate between the lack of confidence in the justice created by open aesthetic encounter with law as against the possible lack of primordially of otherness that is generated in legal repetition. The question remains: should we conceive the relationship between law and art so as to ask what can art learn from law?

The very possibility of *chiasmus* between being Jewish and being Greek, the very 'and' in 'Athens and Jerusalem', is in question for **Ariella Atzmon** who argues