

Some Thoughts on American Legal Culture: the Legal 'Object' in Arthur Miller's *The Crucible* and in William Gaddis' *A Frolic of His Own*.

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Abstract

This paper offers a critical discussion of how some elements of American legal culture can transform legal subjects into objects. The concept of the object, which originated in the works of Kristeva, exists in between the concept of a subject and the concept of an object. Abjection describes the state of often marginalized groups, such as convicts, the poor, the aged or the disabled. The analysis is based on two well known American literary works: *The Crucible* by Arthur Miller and *A Frolic of His Own* by William Gaddis.

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Contemporary legal research has to deal with the reinterpretation of the term “legal subject”. A positivist approach to law, at least in the context of traditions of civil law, envisages the legal subject in a narrow sense as a bearer of rights and obligations, while in the traditions of common law it may refer to the concept of the citizen, in a historical sense, the one who is under the dominion of the sovereign.

Theories of legal pluralism¹ have recently insisted on the role of the legal subject, which cannot any longer be viewed in a narrow sense, but which becomes an actor influencing the legal system with his/her choices by opting to use or neglect the formal legal system according to his/her values and culture².

¹ Baudouin Dupret, ‘Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxiological Re-specification’, *European Journal of Legal Studies*, vol. 1, 2007, available at: <http://www.ejls.eu/1/14UK.pdf>

² On the relationship between law and culture in comparative law, see Lawrence M. Friedman, *The Legal System: A Social Science Perspective*, New York: Russel Sage Foundation, 1975, David Nelken (ed.), *Comparing Legal Cultures*, Aldershot 1997, Nelken D. and Feest J. (eds.), *Adapting Legal Cultures*, Oxford, Portland-Oregon: Hart Publishing, 2001, Legrand Pierre, *Le Droit Comparé*, Que sais-Je? Paris: PUF, 1999 and, by the same author, *Fragments of Law as Culture*, W.E.J.. Tjeenk Willink, Deventer, 1999, Cotterrell Roger, ‘Law in Culture’, *Ratio Juris*, Vol. 17, No. 1, pp. 1-14, March 2004, Gessner Volkmar, ‘Global Legal Interaction and Legal Cultures’, *Ratio Juris*, vol. 7, 1994, pp. 132-145. Kravaritou Yota, ‘*Schesi dikaïou kai politismou: Opseis tis synchronis provlimatikis*’ [The relationship between law and culture: Aspects of contemporary thinking], *Nomiko Vima*, vol 52, issue 10, November 2004, at 1673-1694, Deliyianni-Dimitrakou Christina, ‘*Synkritiko dikaio kai filosofikes prosengiseis*’ [Comparative law and philosophical approaches], *Nomiko Vima*, vol 54, 2006, at 23-48 and specifically 33-41, Moustaira Elina, *Stathmoi stin poreia tou synkritikou dikaïou, Theseis kai antitheseis* [Milestones in the evolution of comparative law: Positions and counter-positions], A. Sakkoulas, Athens, 2003 and specifically chapter 4, ‘*To Synkritiko Dikaio stin avgi tou 21ou aïona*’ [Comparative law at the dawn of the 21st century], at 123-205. On the use of legal culture as a methodological tool in comparative law, see

The study of the concept of 'subjectivity' draws attention to the contemporary discussion of legal culture.

A contemporary differentiated legal subjecthood opens the doors to political, economic, social and legal relations of great complexity which could be characterized by individuals whose legal status may become more and more differentiated from the so-called 'neutral', legal subject of positive law. At the same time, this legal subject is shaped constantly, it changes, it is eventually altered; rights are conferred to it, rights are taken away from it, according to the interests of supranational or national entities.

According to J.M. Balkin 'one also may use the term "legal subject" to describe how law or legal culture constructs how we think about people - how law and legal culture ascribe particular identities and features to people, defining some characteristics as salient and others as irrelevant. The "legal subject", in this sense, is a subject as seen (and dealt with) through the eyes of the law or legal culture.'³ A jurisprudence of the subject is above all a cultural jurisprudence, for it is culture that creates legal subjects as subjects⁴.

People may be the subjects of law, the bearers of rights and obligations, but they can be transformed by law and through law into objects, or, in the terms of Kristeva, into abjects. The concept of the abject, which originated in the works of Kristeva⁵, exists in

Konsta Anna-Maria, *Working Time Law in Japan and the European Union, A Comparative Approach in the Context of Legal Culture*, Athens-Thessaloniki: Sakkoulas Press, 2003.

³ J.M. Balkin, 'Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence', v. 103 *Yale Law Journal*, 1993, pp. 105-176.

⁴ *Ibid.*

⁵ Julia Kristeva, 'Approaching Abjection', Chapter 1 of Kristeva's book: *Powers of Horror: An Essay on Abjection*, trans. Leon S. Roudiez, New York: Columbia University Press, 1982, See also Dino

between the concept of a subject and the concept of an object. The abject is something which used once to be a subject, and which can provoke a traumatic experience in one who comes into contact with it. A corpse, for example, used once to be a subject, it is something that should be alive, but isn't. The corpse especially exemplifies Kristeva's concept since it literalizes the breakdown of the distinction between subject and object that is crucial for the establishment of identity and for our entrance into the symbolic order⁶. What we are confronted with when we experience the trauma of seeing a human corpse (particularly the corpse of a friend or family member) is our own eventual death made real. As Kristeva puts it, "The corpse, seen without God and outside of science, is the utmost of abjection. It is death infecting life"⁷.

On the level of our individual psychosexual development, the abject marks the moment when we separated ourselves from the mother, when we began to recognize a boundary between 'me' and other, between 'me' and '(m)other'. In the words of Kristeva, the abject has to do with 'what disturbs identity, system, order. What does not respect

Felluga, 'Modules on Kristeva, II On the Abject', *Introductory Guide to Critical Theory*, Purdue University, available at:

<http://www.cla.purdue.edu/english/theory/psychoanalysis/kristevaabject.html>, Thea Hurrington, 'The Speaking Abject in Kristeva's Powers of Horror', *Hypatia*, issue 13, v. 1, Winter 1998, Indiana University Press, pp. 138-157 and Hal Foster, 'Obscene, Abject, Traumatic', in Costas Douzinas and Linda Nead, *Law and the Image: the Authority of Art and the Aesthetics of Law*, Chicago: University of Chicago Press, 1999, pp. 240-256.

⁶ On the term 'symbolic order' in Julia Kristeva, Luce Irigaray and Helene Cixous, see: Susan Sellers, *Language and Sexual Difference. Feminist Writing in France*, Houndmills: MacMillan Education Ltd, 1991, p. 60.

⁷ Kristeva, *op. cit.*, p. 4.

borders, positions, rules'⁸ and, so, can also include crimes like Auschwitz. Such crimes are abject precisely because they draw attention to the 'fragility of the law'⁹.

Abjection describes the state of often marginalized groups, such as convicts, the poor, the aged or the disabled.

According to Kristeva, the best modern literature (Dostoevsky, Proust, Artaud, Céline, Kafka, etc.) explores the place of the abject, a place where boundaries begin to break down, where we are confronted with an archaic space before such linguistic binaries as self/other or subject/object. The transcendent or sublime, for Kristeva, is really our effort to cover over the breakdowns (and subsequent reassertion of boundaries) associated with the abject; and literature is the privileged space for both the sublime and abject¹⁰: 'On close inspection, all literature is probably a version of the apocalypse that seems to me rooted, no matter what its sociohistorical conditions might be, on the fragile border (borderline cases) where identities (subject/object, etc.) do not exist or only barely so - double, fuzzy, heterogeneous, animal, metamorphosed, altered, abject'¹¹.

In the present paper, literature is used in order to reflect on some elements of American legal culture. In both literary works, the *Crucible* and *A Frolic of his Own*, the legal subject is transformed into a legal abject and this transformation or transmutation takes place due to the 'fragility of the law' as Kristeva puts it¹². The first work, the *Crucible*

⁸ *Ibid.* p. 4.

⁹ *Ibid.*, p. 4.

¹⁰ Felluga, *op. cit.*

¹¹ Kristeva, *op. cit.*, p. 207.

¹² *Ibid.*, p.4.

by Arthur Miller¹³, is a theatrical play, and the second is a novel written by William Gaddis entitled *A Frolic of his Own*¹⁴. Traditional scholars of comparative literature would not have opted to deal with these two books at the same time. They refer to different time periods in American history and their subjects relate in the first case to criminal law and in the second only to civil litigation. In the eyes, however of a comparative lawyer they serve as excellent tools for drawing conclusions about American legal culture. They reflect two basic traits of American legal culture: sanctification of the law and autonomous individualism. The protagonists of the both stories emerge at the end as legal abjects.

In the case of the *Crucible* the whole story is an abject. Miller wrote the *Crucible* in 1953 during the McCarthy period, when Americans were accusing each other of communist sympathies. Many of Miller's friends were being attacked as communists and in 1956, Miller himself was brought before the House of Un-American Activities Committee, where he was found guilty of holding communist beliefs. The verdict was reversed in 1957 by an appeal court. The *Crucible* is set against the backdrop of the Salem witch trials in the late 17th century. Miller brings out the absurdity of these events, while promoting the values of truth and righteousness through the struggles of the main character, John Proctor.

John Proctor himself is transformed from a legal subject (a bearer of rights and obligations) to a legal abject. In his quest to save the life of his wife, Elisabeth Proctor, and the lives of many other innocent men and women, he finally finds himself accused and

¹³ Arthur Miller, *The Crucible*, New York: Penguin Books, 2003 (first published by Viking Press, 1953).

¹⁴ William Gaddis, *A Frolic of his Own*, New York: Scribner paperback fiction, 1995.

sentenced to death for witchcraft. The play is set in puritan New England. God is everywhere, society's binding force. Abigail, the girl protagonist who falsely accused half the village, represents the voice of God on earth.

Reverend Parris, the official representative of God in Salem, says to Reverend Hale when he first arrives in the village to ascertain if a young girl is possessed by the Devil:

Parris: *These are heavy books.*

Rev. John Hale: *Well, they should be. They're weighted with authority*¹⁵.

From a different passage of the play¹⁶:

Martha Corey: *I, sir, am innocent to a witch. I know not what a witch is.*

Judge Hathorne: *If you know not what a witch is, how do you know you are not one?*

And Judge Danforth states:

Judge Danforth: *The pure in heart need no lawyers*¹⁷.

In the words of Arthur Miller himself: '*...for good purposes, even high purposes the people in Salem developed a theocracy, a combine of State and religious function whose function was to keep the community together....The witch-hunt was a perverse manifestation of the panic which set in among all classes when the balance began to turn toward greater individual freedom.*'¹⁸

¹⁵ Miller, op. cit. p. 34.

¹⁶ Ibid, p. 77.

¹⁷ Ibid, p. 86.

¹⁸ Ibid, p. 6.

American legal culture even today is largely characterized by this paradox, by this constant clash between individual freedom and sanctification of the institutions and law which is largely based on historically rooted puritan and theocratic ethics.

American protestant ethics have their root in the pre-American Independence and Bill of Rights historical period and mark a rupture with the European past, the Catholic Church and tradition and have taken the form nowadays of a process of desanctification of religion and a process of sanctification of American institutions, as those are defined in the American Constitution. Sanctification of institutions has resulted in a sanctification of law itself. McCarthyism was a feature of a time in the US when communism was seen as a threat to sacred American institutions, which needed to be preserved at any cost, even to the detriment of highly cherished individual freedoms and liberties, such as freedom of speech. Neo-conservatism in the US represents this sacred America and gives theoretical grounds to the so-called “world-mission” rhetoric largely expressed in the 1990s by Samuel Huntington¹⁹.

On the other hand, a conflicting American tradition based on natural rights fosters autonomous individualism, which has increasingly been separated from previous notions of the common good. In his account of American Legal Culture Lawrence Friedman observed that Americans have created a ‘Republic of Choice’²⁰ which has replaced an earlier balance between liberty and restraint, right and duty.

¹⁹ Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, New York: Simon & Schuster, January 1998.

²⁰ Lawrence M. Friedman, *The Republic of Choice: Law, Authority and Culture*, Cambridge MA: Harvard University Press, 1994

This transition from the theocratic world of the Community to the Republic of Choice and to autonomous individualism is vividly expressed at the end of the play in the words of John Proctor when he refuses to sign a confession that would incriminate other people and for this reason is about to be sent to execution:

John Proctor: *Because it is my name! Because I cannot have another in my life! Because I lie and sign myself to lies! Because I am not worth the dust on the feet of them that hang! How may I live without my name? I have given you my soul; leave me my name!*²¹

And earlier in the play:

John Proctor: *I say- I say- God is dead!*²²

The American legal culture of individualism is represented in William Gaddis' *Frolic of his Own*. Individualism recognizes no hierarchy of values outside personal choice. It is skeptical of commonly accepted values since they might impose a conception of the good on persons who have not chosen it for themselves. Even the Civil Rights Revolution in the US grew out of individualism. At the core of this movement was the desire to treat each person as an individual human, not as a member of a race, gender or group. Cars and guns are both appropriate metaphors for an American's liberty and autonomy, and the law protects his right to both, as David S. Clark²³ claims. "With a car one can drive quickly

²¹ Miller, op. cit. p. 133.

²² Ibid, p. 111.

²³ David S. Clark, 'The American Legal System and Legal Culture' in David S. Clark & Tugrul Ansay (eds.), *Introduction to the Law of the United States*, Hague: Kluwer Law International, 2002, pp. 1-11, specifically p. 9.

past the homeless, past the decay and violence of the inner city, toward the epitome of isolation: suburbia. Once at home - increasingly a one-person household - a gun becomes the instrument to protect one's rights: rights in privacy and property."

The opening sentence of Gaddis' book states:

'Justice? –You get justice in the next world, in this world you have the law'.²⁴

Like storytelling, the law is supposed to serve as a tool, in William Gaddis' words, for imposing or rescuing 'order from the demeaning chaos of everyday life', but as his characters quickly discover, the law tends to be a poor substitute for justice. In *A Frolic of His Own*, the law links people together in purely adversarial relationships of mistrust, promoting a Kafkaesque sense of disintegration and crisis, rather than a sense of order²⁵.

Oscar Crease, a middle-aged college teacher, has written an unproduced play called *Once at Antietam*. The play is based on his grandfather's experiences in the Civil War, and also appears to draw heavily on the works of other writers, including Plato and Eugene O'Neill. Oscar's grandfather, Thomas Crease hired substitutes to take his place in the army. One substitute ended up serving with the Confederates, while the other joined the Union army. They met as opponents at the bloody battle of Antietam. Thomas Crease became '*increasingly haunted by the conviction that the two men killed each other and that he was thus in some fanciful way a walking suicide*'²⁶.

²⁴ Gaddis, op. cit., p. 13.

²⁵ Michiko Kakutani, "Plagiarism as a Metaphor for a Litigious Era", *New York Times*, 4 January 1994, available at: <http://www.williamgaddis.org/frolic/frolicrevmkakutani.shtml>

²⁶ Gaddis, op.cit., p. 350.

Oscar claims that he once submitted the play to a producer. It is Oscar's contention that the producer's latest blockbuster, a Civil War epic titled *The Blood in the Red White and Blue*, is based on *Once at Antietam*. He is suing for compensatory and punitive damages. Discussing with Christina, Oscar's step-sister, how Oscar will react if he loses the copyright infringement suit, Harry, her lawyer husband, suggests that Oscar has been going 'on a frolic of his own'. Harry explains: '*Just a phrase comes up sometimes in cases of imputed negligence; the servant gets injured or injures somebody else on the job when he's not doing what he is hired for.... Like an office worker puts out an eye shooting paper clips with a rubber band...*'²⁷. This is a concept of the law of agency. An employer is not liable for a tort committed by the employee, if the employee was on a frolic, that is, was engaged in an activity unrelated to his employment²⁸.

'Isn't that what law is all about?', Christina then asks Harry, 'where it's all laws, and laws, and everything's laws and [Oscar's] done something nobody's told him to, nobody hired him to and gone off on a frolic of his own. I mean think about it Harry. Isn't that really what the artist is all about?'²⁹.

As Oscar's legal bills mount, his lawyer is imprisoned, and Oscar finds himself being sued by the O'Neill estate for plagiarizing *Mourning Becomes Electra*. At the same time Oscar is also trying to recover damages in another lawsuit involving his own car, which ran over him while he was trying to jump-start it. This law suit becomes more and more

²⁷ Ibid, p. 348.

²⁸ Term as defined by Richard A. Posner, *Law and Literature: Revised and Enlarged Edition*, Cambridge MA: Harvard University Press, 1998, p. 32.

²⁹ Gaddis, op. cit. 348-349.

complex due to the fact that Oscar is actually suing himself! *'You are suing the hit and run driver who ran over you, aren't you?'*, Christina asks him at some point. *'No'*, Oscar answers, *'I'm suing his, I mean my, I'm suing the insurance company for the owner of the car who are suing the, I think they are suing the dealer who's suing the car's maker it's all in the letter I got...'*³⁰.

Both Oscar's grandfather and father are judges and proponents of pragmatism in law, another characteristic of American legal culture. As Oliver Wendell Holmes Jr. (1841-1935), one of America's most renowned jurists said: *'The life of the law has not been logic, it has been experience'*³¹ Oscar himself refers to a story about Justice Holmes. When Justice Learned Hand cried to Justice Holmes: *'Do justice, sir, do justice'*, Justice Holmes replied, *'That is not my job. It's my job to apply the law'*³². The judge not the scholar is the protagonist of the system in American legal culture. Case method of instruction predominates in American law schools. A law graduate in the US views trees, not the forest as in continental Europe!³³

Meanwhile, Oscar's father is trying to cope with the public outcry over his ruling in a case involving the accidental death of a dog named Spot, who became trapped in a piece of outdoor sculpture, a case that has spawned further lawsuits involving the creator of the sculpture, the town where the sculpture was erected and assorted entrepreneurs who want to cash in on Spot's untimely death. In another case, Judge Crease in his instructions to

³⁰ Ibid, p. 385.

³¹ David S. Clark, *op. cit.*, p. 8.

³² Gaddis, *op. cit.* p. 251.

³³ David S. Clark, *op. cit.* p. 8.

the jury is suggesting that the drowning of a small boy during his baptismal ceremony was not the fault of the Minister who was actually performing the ceremony, but God's fault since in this particular case, during the drowning, the Minister was engaged on his master's business, and his master was God!

Oscar's brother-in-law, Harry; his girlfriend, Lily, and friends of his step-sister Christina are fielding lawsuits of their own. The one thing that pre-occupies everyone is the law. One way or the other, every character in the novel is involved in at least one lawsuit.

Christina describes the legal profession as a '*...a self regulating conspiracy*'³⁴. Oscar finally gets help from his judge father with his copyright infringement suit only to find out that his father's interest stems from love of the law rather than love for his son.

Most of the book consists only of voices: characters creating themselves out of words, out of conversations, asides and ruminations. Heated conversations about death and money and sex are interrupted with murmurings about lunch and tea. Petty arguments about legal proceedings are sprinkled with allusions to Shakespeare and Plato. Long, extracts from Oscar's play are carefully laid out, as are jargon-filled legal briefs and opinions. One has the sense that nothing has been edited out of Oscar's story; unlike conventional fictions, it does not feel sculptured or shaped. Instead, William Gaddis seems to suggest, the reader is supposed to make order out of disorder, discern the patterns among the repetitions, ellipses and digressions. Even his characters tend to feel amorphous and poorly defined; they exist, after all, not as the completed creations of a novelist, but as modernist symbols of people in a continuous state of becoming³⁵.

³⁴ Gadis, op. cit. p. 462.

³⁵ Michiko Kakutani, op.cit.

According to Kristeva, the abject has to do with "what disturbs identity, system, order"³⁶. All the characters in William Gaddis' novel are in this sense abjects. Oscar Crease is a frolic and an abject. He is, as Richard Posner describes him, a frolic himself³⁷. He is '*a disheveled, reclusive, unmarried, eccentric, selfish, childless, middle-aged skinflint who lectures on the history of the American Civil War at a small college...*'³⁸

John Proctor and Oscar Crease, the protagonists of both books are transformed by law and through law from legal subjects, bearers of rights and obligation into outcasts, into legal abjects. In the first case, this transformation takes place in the context of a theocratic law which is negated by the protagonist, who, at the end of the play, through his sacrifice, regains his subjectivity and liberates his society from the past, opening the door to a new autonomous individualism. Religious law is replaced by a process of sanctification of law and institutions in the US, evident during the period of McCarthyism and in the more recent neo-conservatism. Law is disconnected from justice and legal pragmatism prevails in the US. The protagonist of the second book, a representative of autonomous individualism himself, feels free from the conventions of the past to be a 'frolic of his own'. This freedom allows his involvement in constant litigation, and in his quest to reassure his identity and subjectivity through law, he finds himself in an abstract state of becoming, no subject nor

³⁶ Kristeva, , *op. cit.*, p. 4

³⁷ Richard A. Posner, *Law and Literature: Revised and Enlarged Edition*, Cambridge MA: Harvard University Press, 1998, p. 32.

³⁸ Ibid.

object of law, but an outcast of the legal system, rejected by the Father Judge; a walking legal suicide³⁹, an abject of law.

‘The subject and object of law - both in practice and in theory - is found in our language and our expressions of moral justice, expressions that arise out of our minds and our imaginations, from our senses and within our experiences, within the unrelenting pressures of a world of money and violence and power, which we, as lawyers, choose to inhabit’⁴⁰.

This process of abjection does not distinguish between representatives of external and internal legal culture⁴¹; it is the same for all, lawyers or non lawyers; somehow, one way or another, we are all marginalized like the protagonists in our stories. The use of literature in legal studies contributes to a deeper understanding of those values which embody a ‘true humanism’⁴², and is more necessary today than ever before to legal practitioners engaged in reinventing law and legal institutions. It is necessary for comparative lawyers as well, in an effort to comprehend legal cultures other than their

³⁹ Helle Porsdam, *Legally Speaking: Contemporary American Legal Culture and the Law*, Amherst: University of Massachusetts Press, 1999, p. 215. See in particular the analysis of Gaddis’ work in Chapter VIII of Porsdam: “American Law and the Search for Cultural Redemption: A Discussion of William Gaddis’s *A Frolic of his Own*”, pp. 193-216. See also: Robert Weisberg, “Taking Law Seriously”, *Yale Journal of Law and the Humanities*, 7.2, 1995, p. 446.

⁴⁰ From Lawrence Joseph, ‘The Subject and Object of Law’, *Brooklyn Law Review*, v. 67:4, 2002, p.1033

⁴¹ See Lawrence M. Friedman in *The Legal System: A Social Science Perspective*, New York: Russel Sage Foundation, 1975.

⁴² Steven L. Winter, ‘Human Values in a Postmodern World’, 6 *Yale Journal of Law and Humanities*, 1994 p. 245.

own, which in their turn will allow them to better acquaint themselves with, and feel the pulse of, their own legal culture.

In the words of J.M. Balkin⁴³:

‘We can no longer remain content to imagine law’s nature exterior to us; we must search for the nature of the law within’.

⁴³ J.M. Balkin, ‘Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence’, [1993], v. 103 *Yale Law Journal*, p. 69.