

AESCHYLUS' LAW

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Practitioners of "law and literature," a newly fashionable area of legal scholarship, are rarely concerned with literature at all. They have generally focused instead on literary criticism, seeking to apply current theories about interpreting literary texts to the judicial enterprise of interpreting legal texts.¹ Much interesting work has been done in this vein, although there probably has been too little emphasis on the differences between judicial action and literary criticism, differences that limit the usefulness of analogies between one field and the other.² I am more interested, though, in efforts to augment the "law and literature" movement with work that explores the relevance to law of literature itself, not only literary criticism. I cannot claim to know how fruitful such work will ultimately be, but we have barely begun to examine the images of law that appear in literature and to assess whether they illuminate the legal world in distinctive ways.³

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¹ See, e.g., Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, 32 *RUTGERS L. REV.* 676 (1979); *Symposium: Law and Literature*, 60 *TEX. L. REV.* 373 (1982) (articles by Stanley Fish, Ronald Dworkin, Sanford Levinson, and others); *Interpretation Symposium*, 58 *S. CAL. L. REV.* 1 (1985); Fish, *Working on the Chain Gang: Interpretation in the Law and in Literary Criticism*, in *THE POLITICS OF INTERPRETATION* 271 (W. Mitchell ed. 1983).

² What is at stake when judges construe a legal text is how they will wield governmental power over us and the legitimacy of exercising that power; when critics interpret literature, on the other hand, they usually wield no state power and the consequences of any particular reading are generally very small indeed. The fact that power over others is so immediately at stake helps explain why judges view themselves as less free than literary critics to devise novel and individualistic readings of legal texts, but instead usually feel a heightened obligation to give legal texts a meaning rooted in sources external to themselves — for example (to mention just the most typical one), in the purposes or intentions of the legislature that framed the text and whose right to exercise power over others is usually clear. Cf. Gewirtz, *Remedies and Resistance*, 92 *YALE L.J.* 585, 666–68 (1983) (discussing different norms within the legal and literary cultures).

³ For examples of work along this line, see B. JOHNSON, *Melville's Fist*, in *THE CRITICAL DIFFERENCE: ESSAYS IN THE CONTEMPORARY RHETORIC OF READING* 79 (1980); R. WEISBERG, *THE FAILURE OF THE WORD* (1984); Coles, *Charles Dickens and the Law*, 59 *VA. Q. REV.* 564 (1983); Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 *CAP. U.L. REV.* 179 (1985); and Reich, *The Tragedy of Justice in Billy Budd*, 56 *YALE REV.* 368 (1967). Cardozo's essay, "Law and Literature," in B. CARDOZO, *LAW AND LITERATURE AND OTHER ESSAYS* 3 (1931), discusses the literary and rhetorical style of judicial opinions, and thus falls into another category, "law and literature" in the sense that judicial opinions and other legal activities are treated as "literary" efforts; an influential present-day work in this category is J. WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (1973). Other noteworthy writings in the "law and literature" canon include Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 *STAN. L. REV.* 81 (1975); Cover, *Violence and the Word*, 95 *YALE L.J.* 1601 (1986); Posner, *Law and Literature: A*

This essay is an effort in that direction. Its subject is Aeschylus' *Oresteia*. This trilogy of plays is one of the earliest surviving masterpieces of Western culture, and it has special meaning for lawyers. Many of us read the *Oresteia* in college. But at that point, focusing on other stories it tells, we may not have appreciated that it is fundamentally a story about the emergence of law. Aeschylus' myth, which links law's emergence to the foundation of our civilization, presents an image of law that deserves examination — an image of genuine complexity, power, and modern resonance, an image that law-trained readers should address as well as the professional classicists and college undergraduates who are currently the plays' main audience.

The plot of the *Oresteia* is a familiar one that found repeated use among Greek writers. The House of Atreus has long been mired in wrongdoing and revenge. As the *Oresteia* opens, Atreus' son Agamemnon, King of the Argives, returns home after the ten-year war with Troy. His wife, Clytemnestra — embittered by Agamemnon's sacrifice of their daughter Iphigenia at the outset of the Trojan expedition, and enmeshed in an adulterous relationship with Aegisthus — kills Agamemnon and his mistress, Cassandra. Orestes, the son of Agamemnon and Clytemnestra, avenges his father's murder by killing both Clytemnestra and her lover. The Furies, spirits avenging Clytemnestra's death, begin to haunt Orestes, and the cycle of blood feuds appears endless. Apollo intervenes, however, and sends Orestes to Athena, who establishes a court and a legal process within Greek society and puts Orestes on trial. Orestes is acquitted, and the embittered Furies are forestalled from continuing their vendettas by being offered an honored place within the new social order.

Two aspects of the image of law in the *Oresteia* are especially arresting: passion is seen as a central, necessary element of law; and law is presented as a gendered phenomenon. To explore these aspects more clearly, though, I must first describe in more detail law's basic appearance in the plays.

I.

The trial of Orestes is presented as "the first trial of bloodshed,"⁴ and Athena sees the emergence of this legal forum as an historic turning point in Greek civilization:

Relation Reargued, 72 VA. L. REV. 1351 (1986); and J. WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985); see also Curtis & Resnik, *Images of Justice*, 96 YALE L.J. 1727 (1987) (interpreting various portrayals of "Justice" in painting, sculpture and drawing).

⁴ THE EUMENIDES, l. 694, in AESCHYLUS, THE ORESTEIA (R. Fagles trans. 1975) [hereinafter THE ORESTEIA (Fagles trans.)]. Citations in this essay are to the individual plays in the trilogy:

[S]ince
 the burden of the case is here, and rests on me,
 I shall select judges of manslaughter, and swear
 them in, establish a court into all time to come.⁵

With this case, Athena introduces both a court and a trial process to replace the endless cycle of blood feuds and revenge — she establishes a tribunal of law — and she consecrates the site on which this first trial occurs:

Now and forever more, for Aegeus' people
 this will be the court where judges reign.
 This is the Crag of Ares
 Here from the heights, terror and reverence,
 my people's kindred powers
 will hold them from injustice through the day
 and through the mild night. Never pollute
 our law with innovations. No, my citizens,
 foul a clear well and you will suffer thirst. . . .
 Untouched by lust for spoil, this court of law
 majestic, swift to fury, rising above you
 as you sleep, our night watch always wakeful,
 guardian of our land — I found it here and now.⁶

This is not to say that Athena introduces *justice*, for throughout the trilogy the characters have all conceived their claims in terms of what justice requires. But Athena's innovation has several elements that set it altogether apart from the system of blood revenge that had preceded it — elements that we take for granted today almost as defining characteristics of a system of law.

Athena's court is public and political; by contrast, the regime it seeks to replace is private and familial, with aggrieved family members taking direct action themselves. Moreover, Athena's system involves a process — an orderly and controlled process for hearing claims, rather than uncontrolled violence. Specifically, the system introduces a decisionmaker standing apart from the immediately interested parties: a judge presides, and there is a lay jury. (Although Athena herself presides in Orestes' case and casts the deciding vote when the lay jury divides, the new system is clearly to be embedded in Greek civil society and implemented by mortals; law may express the will of the gods, but it is an activity of humans.) This process involves reasoned discussion. The complainant and the accused pres-

Agamemnon, *The Libation Bearers*, and *The Eumenides*. I have found it useful to quote sometimes from Robert Fagles' translation and sometimes from Richmond Lattimore's *AESCHYLUS I: ORESTEIA* (R. Lattimore trans. 1953) [hereinafter *ORESTEIA* (Lattimore trans.)].

⁵ *THE EUMENIDES* (Lattimore trans.) ll. 481–84.

⁶ *Id.* (Fagles trans.) at ll. 695–721.

ent “witnesses” and “proofs.”⁷ They appeal to rights, and they reason from abstract principles. Principles of justice had been invoked even under the regime of blood feuds, but only as explanations for private acts of revenge. Now there is open debate about which principles are appropriate, and a third party decides. The movement is from a world of passion and subjectivity toward a regime that, in form at least, empowers a more detached authority influenced by reason.

The process is also influenced by the aspiration for a wise resolution of conflict. The pervasive sense of closure achieved at the play’s end is linked to the possibility of closure that a legal judgment provides. Before law — without courts — there is revenge after revenge, a cycle of violence without end. This, as the *Oresteia* exposes, is the inner contradiction of revenge: it does not stop. With law, there is the possibility of an ending, both in individual cases and in systemic struggles. The establishment of Athena’s court and legal process becomes the central event that propels the action toward the transfiguring harmonies of the play’s close.

II.

Law’s image in the *Oresteia* gains its richness, though, from other features. The most basic feature is the place of the Furies in the system. Although they consent to participate in the trial, the very establishment of the court seems to displace their method of revenge. After the Furies lose the case against Orestes, they announce that they will “let loose on the land . . . vindictive poison.”⁸ Athena, however, pleads with them to take an honored place within the community, and after considerable resistance they finally agree.

How is one to understand Athena’s offer to include and empower the Furies in the new social order? The starting point is to appreciate what the Furies are and what they represent: complex forces of passion, linked at various points in the plays with vengeance, fear, anger, violence, conscience, instinct, the sense of hurt, memories of grief, the primitive, the emotional and nonrational.

One might view Athena’s effort to include these forces of Fury simply as an act of political necessity. Excluded, the Furies threaten to wreak havoc. Since the Furies and the emotional forces they represent will have some role one way or another, inclusion is a tactic to spare Athens the wrath of a Fury spurned.

This understanding, however, fails to take account of the positive function that Aeschylus clearly sees the Furies playing in the new order. There is more than political manipulation in Athena’s state-

⁷ *Id.* (Lattimore trans.) at l. 485.

⁸ *Id.* at ll. 781–82.

ments that the Furies will be "honored" and will provide "salvation for your citadel."⁹ The Furies have this stature because they actually contribute to the system Athena is establishing. What the Furies most clearly represent — call it fear, conscience, vengeance — is not a "threat" to law in the *Oresteia's* scheme. Rather, Fury is law's partner. It reinforces a respect for legal rights. It promotes "reverence for the just,"¹⁰ which in turn is a source of society's prosperity. From the moment she announces the new legal order, Athena advises her citizens

not to cast fear utterly from your city. What man who fears nothing at all is ever righteous? Such be your just terrors, and you may deserve and have salvation for your citadel . . .¹¹

Here she echoes the Furies themselves, who warn:

There are times when fear is good.
It must keep its watchful place
at the heart's controls.¹²

This, then, is Aeschylus' large claim about law: law and passion are inseparable. The Furies are "steering spirits of law."¹³ A stable law is rooted in passion, and does not transcend it. At the trilogy's end, the Furies are included, but they are not transformed into gentle spirits or agents of reason. As Athena says: "I establish in power spirits who are large, difficult to soften."¹⁴ They remain fearsome forces, but Athena proclaims that "[i]n the terror upon the faces of these I see great good for our citizens."¹⁵ The Furies change by putting their energies in the service of Zeus' goals, but their transformation is from Furies as a "rampaging force" to Furies as a "steering" force of law, a change that does not abolish their primitive energies but channels them and makes an effective law possible.

This explains what the Furies mean when, toward the end of the play, they pray for "hate with one strong heart: such union heals a thousand ills of man."¹⁶ Channeled through law, vengeance and hate speak through the one strong voice of civil authority. Only with this vehicle for hate can the play achieve its resolution and civilization move ahead. Thus, the *Oresteia* stands behind those in contemporary debates who insist that retribution must play a central role in a system

⁹ *Id.* at ll. 701, 868.

¹⁰ *Id.* (Fagles trans.) at l. 714.

¹¹ *Id.* (Lattimore trans.) at ll. 698-701.

¹² *Id.* at ll. 517-19.

¹³ *Id.* at l. 961; see *id.* at l. 993.

¹⁴ *Id.* at ll. 928-29.

¹⁵ *Id.* at ll. 990-91.

¹⁶ *Id.* (Fagles trans.) at ll. 995-96.

of criminal justice and who warn that if retributive emotions are ignored they will be unleashed in less acceptable ways. Inclusion of the Furies suggests this channeling function of law, and in the play's terms that is an advance. But the blissful harmonies of the play's close should not mask the basic truths that the foundation of the new legal order is hate as much as concern, and that law becomes an instrument of violence not its replacement. The Furies' role underscores the connection of the legal order to terror and violence.

This does not mean, of course, that the Furies come to represent what law is. Professor Hugh Lloyd-Jones misreads the play, I think, when he says that "Athena chooses to institute a new court . . . to assist the [Furies]."¹⁷ Athena's establishment of the court precedes the inclusion of the Furies in the system, and the basic process and rational method of the new legal order is a radical departure from the cycle of vendettas that the Furies have represented. Within the terms of the play, moreover, it is clear that Athena would persist with her new institution even if the Furies rebelled. The Furies come to assist the new social order, not vice versa.

The Furies bring more to the legal system than fear. Along with fear, which contributes to order, they bring pain, which contributes to wisdom — that most essential attribute of those who judge. In pressing their claims, the Furies not only counsel that "there are times when fear is good" but also speak of the "advantage in the wisdom won from pain."¹⁸ The Furies thereby echo the vision of tragic understanding articulated by the chorus in *Agamemnon*, perhaps the most famous lines in the *Oresteia*:

[W]isdom
comes alone through suffering.
Still there drips in sleep against the heart
grief of memory; against
our pleasure we are temperate.
From the gods who sit in grandeur
grace comes somehow violent.¹⁹

The Furies (elsewhere linked to "memories of grief"²⁰) become agents in the legal order for the kind of understanding that passes what reason alone can provide. The Furies are not "emotion" to the exclusion of "reason" — indeed, they are at least Apollo's equal in offering reasoned arguments to Athena — but they do represent more emotional forces in life and in law. Through the Furies, law is strengthened by terror; legal judgment is ripened by pain; and a cluster

¹⁷ H. LLOYD-JONES, *THE JUSTICE OF ZEUS* 95 (2d ed. 1983) (emphasis added).

¹⁸ *THE EUMENIDES* (Lattimore trans.) ll. 520-21.

¹⁹ *AGAMEMNON* (Lattimore trans.) ll. 177-83.

²⁰ *THE EUMENIDES* (Fagles trans.) l. 393.

of emotions are infused into the legal order as a source of fruitful, and at times disturbing, social action and understanding.

In short, the inclusion of the Furies must be seen as a challenge to any view that reason rules in law's domain. In our time, though, advocates for reason's preeminent role in law remain ascendant virtually everywhere, from the development of highly rationalized sentencing guidelines, to the adamant idealizing of much constitutional theory, to the currently prominent law-and-economics movement. The Legal Realists of the 1920's and 1930's may have smashed the rationalist conceptualism of Langdell, but their heirs have typically developed approaches that reflect as deep a faith in the presiding powers of reason. Indeed, it is common in legal analysis to draw a sharp line between reason and emotion, as if the line were a clear one and as if the law's domain properly excluded emotion. Only last Term in the Supreme Court, Justice O'Connor wrote that a jury's decision whether to impose the death penalty

should reflect a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion. . . . [T]he individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence²¹

Aeschylus reveals a more haunting view of law: law is not and cannot be an enterprise of reason alone; it includes the nonrational emotions as an essential and central ingredient. Law may be in part — perhaps in largest part — a process of reasoned judgment, but it also engages forces beyond reason, like most other things in life.

It is foolish and perhaps dangerous, in this view, to imagine that law can or should be made perfectly rational. In part, nonrational forces have a place in law simply because "law's terrain (and the lawyer's terrain) must be the realities of life, in all their tangled complexity."²² Every actual society contains forces that undercut logical models and clear lines of authority. The world resists — or, more accurately, resistance is part of law's world²³ — and what we end up with can rarely be reason's design alone. There is harsh conflict and imperfect compromise everywhere; reconciliation or coherence among social forces, to the extent there is any, often comes through mysterious dynamics and communal rituals of the sort that close the *Oresteia*.

²¹ *California v. Brown*, 107 S. Ct. 837, 841 (1987) (O'Connor, J., concurring) (emphasis omitted) (upholding a jury instruction directing the jury not to be "swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" in deciding whether to impose the death penalty).

²² Gewirtz, *A Lawyer's Death*, 100 HARV. L. REV. 2053, 2055 (1987).

²³ See Gewirtz, *supra* note 2, at 608-09.

To use law effectively, we must be prepared to deal with those realities. We can improve law to serve our purposes, but we cannot expect an operating system of law to deliver all that can be imagined by our largest capacities for reason.

Nor is reason the only thing of value in a legal system. Undeniably, the goal of giving a more rational direction to human life is indispensable. But while the nonrational emotions can distort, delude, or blaze uncontrollably, they have worth in themselves and can also open, clarify, and enrich understanding. The values and achievements of a legal system — and of lawyers, judges, and citizens involved with a legal system — are shaped by what the emotions yield. Whether or not one is comfortable with Aeschylus' particular claim that the emotion of fear is indispensable to the legal order, this broader meaning of the Furies' inclusion in the legal order remains — and it is important to keep this meaning alive as the rationalist impulses in law drive ahead ever more insistently.

These observations suggest one important connection between literature and law that is rarely made explicit. Literature makes its special claims upon us precisely because it nourishes the kinds of human understanding not achievable through reason alone but involving intuition and feeling as well.²⁴ If, as the *Oresteia* suggests, law engages nonrational elements and requires the most comprehensive kinds of understanding, literature can play an important part in a lawyer's development. The inclusion of the Furies within the legal order — an inclusion that represents the linking of emotional spheres to law — links literature itself to law and underscores the special place literature can have in developing the legal mind to its fullest richness and complexity.

III.

An equally striking feature about the image of law in the *Oresteia* is that law is portrayed as a highly gendered phenomenon. Gender's role is pervasive in the trilogy.²⁵ Clytemnestra is frequently described as manlike, and her lover "like a woman."²⁶ The Furies are pointedly all women. The members of the lay jury are all men. Apollo seeks to distinguish Orestes' murder of his mother from Clytemnestra's murder of her husband by arguing that a father's death is different from a mother's. The mother, Apollo says, is "no parent" but only a "nurse

²⁴ See L. TRILLING, *THE LIBERAL IMAGINATION* at ix (1950).

²⁵ For a catalogue of the various sexual conflicts in the *Oresteia*, see D.J. CONACHER, *AESCHYLUS' ORESTEIA: A LITERARY COMMENTARY* 206-12 (1987), and M. GAGARIN, *AESCHYLEAN DRAMA* 87-105 (1976).

²⁶ *AGAMEMNON* (Lattimore trans.) l. 1625; see *THE LIBATION BEARERS* (Lattimore trans.) ll. 304-05 ("since his heart is female").

of the [father's] seed The parent is he who mounts."²⁷ Athena is a virgin goddess who has renounced marriage. And her own justification for voting in favor of Orestes' acquittal also seems to have a gender basis:

There is no mother anywhere who gave me birth,
and, but for marriage, I am always for the male
with all my heart, and strongly on my father's side.
So, in a case where the wife has killed her husband, lord
of the house, her death shall not mean most to me.²⁸

What is one to make of the role that gender plays in the trilogy? The strongest currents may well come from Greek religious mythology, in which male gods replaced female ones as the dominant rulers of the universe. But the role of gender in the *Oresteia* must also be understood within the main terms of the play itself, and therefore one must ask: what is gender's connection to the emergence of law?

Once again, the place of the Furies in relation to the legal order seems most basic. Aeschylus portrays the Furies as a female force. Most obviously, of course, they *are* female and identify with the female. In addition, the Furies are the ones insisting upon a place for emotions — emotions of hurt and anger and terror, emotions they have been playing out within the blood relations of the family sphere. The emotions, as well as the family sphere, have conventionally been associated with the "female" (although terror itself has not).²⁹ Within

²⁷ THE EUMENIDES (Lattimore trans.) ll. 659–60. Apollo's argument bears a striking resemblance to an unusual argument that surfaced in a more recent case challenging, under the equal protection clause, the constitutionality of California's statutory rape law, which punished males but not females for engaging in sexual intercourse with persons under 18 years old. See Michael M. v. Superior Court, 450 U.S. 464 (1981). In upholding the California law, the Supreme Court of the United States noted without disapproval that the California Supreme Court had justified the law "[b]ecause males alone can 'physiologically cause the result [pregnancy] which the law properly seeks to avoid.'" *Id.* at 467 (quoting Michael M. v. Superior Court, 25 Cal. 3d 608, 611, 601 P.2d 572, 574 (1979)).

²⁸ THE EUMENIDES (Lattimore trans.) ll. 736–40. Athena's vote, however, does not necessarily reflect a sweeping gender-based principle. It is when a wife has already killed her husband that her murder does not mean "most" to Athena. Moreover, Athena seems to say that her vote was not based on a general favoritism towards males, but instead on allegiance to her father, Zeus, who was behind Orestes' act. As Athena later explains to the Furies:

You were not
dishonored, but the luminous evidence of Zeus
was there, and he who spoke the oracle was he
who ordered Orestes so to act and not be hurt.

Id. at ll. 796–99. Of course, even if Athena's judgment could be explained entirely on the basis of personal allegiance rather than her identification with "the male," it is significant that this sort of subjectivity emerges within an ostensibly detached decisionmaking process.

²⁹ For a striking recent representation of the Furies as agents passing judgment on the harsh history of women, see A. RICH, *From An Old House in America*, stanza 15, in THE FACT OF A DOORFRAME 221 (1984).

the scheme of the play, the Furies embody the female, or at least a version of the female.

The legal regime, on the other hand, is otherwise predominantly male. The day-to-day apparatus of the system, such as the lay jury, is all male; and the god of law, Apollo, is male. To be sure, Athena is female — a fact that undercuts any gender simplicities about the play³⁰ — but Athena is female of a particularly androgynous sort: a warrior, and one who “identifies with the male in all things” and utilizes decidedly pro-male decision rules as a judge. In addition to these explicitly male features, the legal regime emphasizes reason, public process, closure — things often associated with the “male.”³¹ Simplified a bit, then, the gendered scheme of the play is that the legal order, essentially male, displaces but then comes to include the female.

Finding suggestions of all this in the *Oresteia* is rather startling in light of the work of some feminists today that seeks to construct a critique of law as fundamentally expressing a male perspective,³² and in light of other contemporary arguments that the legal culture disadvantages and devalues the women included within it.³³ It is worth looking a little closer, therefore, at what “inclusion” of the female means here. Myths illuminate origins, as well as present circumstances; and the effort to see clearly the world that literature reveals both measures and trains our ability to see clearly the rest of the world around us.

In the play's scheme, the alternative to inclusion is the Furies marginalized — remaining a roving band of vengeful females harassing the city and perpetuating blood feuds, or becoming permanent exiles. There is no doubt that Aeschylus portrays the solution of

³⁰ Athena's large role highlights the quite limited role played by the male god, Apollo. Although Apollo is the god typically associated with law and civilization in Greek mythology, his role is surely no greater than Athena's in establishing the new system; in fact, he says nothing at all in the play after the verdict is announced, during the all-important phase when the status of the Furies within the legal order is being clarified.

³¹ Carol Gilligan contrasts the male voice on moral questions, which tends to emphasize rights and individuation, with the female voice, which tends to emphasize the emotion of care and the web of social connection. See generally C. GILLIGAN, IN A DIFFERENT VOICE (1982).

³² See, e.g., MacKinnon, *Feminism, Marxism, Method, and the State: Toward a Feminist Jurisprudence*, 8 SIGNS 635 (1983); Polan, *Toward a Theory of Law and Patriarchy*, in THE POLITICS OF LAW 294 (D. Kairys ed. 1982); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); see also Karst, *Woman's Constitution*, 1984 DUKE L.J. 447; Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in THE POLITICS OF LAW, *supra*, at 117.

³³ See, e.g., C. EPSTEIN, *WOMEN IN LAW* (1981); Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. REV. 55, 60-61 (1979); Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L.J. 15 (1986).

inclusion as far better. The play's forces are harmonized and resolved only when the female comes to be included — only when the male perspective and female perspective each secures a place of high honor, each contributing to the social order.

For all the ritualized harmony, though, the question remains whether this is a myth of gender reconciliation or really one of female subordination.³⁴ It is a mistake, I think, to focus exclusively on the Furies' displacement and loss at Orestes' trial, without taking account of their inclusion at the trilogy's end. But the gathering harmonies of the play's close should not blind us to the undercurrents that remind us that gendered relations almost always involve issues of power. For one thing, coercion shapes the Furies' inclusion. The terms of inclusion are crafted by Athena, who has just ruled against the Furies. Her argument to the Furies, which reads almost like a seduction,³⁵ is that they can have a place of honor; and she proclaims at the play's end that "persuasion" has led to a consensual resolution in which the Furies agree to come on board.³⁶ But Athena has backed her arguments all along with threats of (male) violence:

I have Zeus behind me. Do
we need to speak of that? I am the only god
who know[s] the keys to where his thunderbolts are locked.
We do not need such, do we?³⁷

³⁴ Recent commentators have read the play in very different ways. Compare M. GAGARIN, *supra* note 25, at 104–05 ("Male and female elements, which have been in conflict since before the beginning of *Agamemnon*, are thus reconciled at the end of *Eumenides*. Sexual harmony is established at last.") and Fagles, *The Serpent and the Eagle*, in AESCHYLUS, *THE ORESTEIA* (R. Fagles trans.) 75–76 ("[T]he *Oresteia* culminates in a union of male and female strengths, a healthy unisexuality of the spirit. . . . It declares the power of the feminine; it insists that the masculine alone is myopic and destructive.") with K. MILLET, *SEXUAL POLITICS* 115 (1970) ("Athena cajole[s] the Furies out of their rage and into an ancillary role within the new order [S]he coaxes the Furies into a bargain which appears to afford them no benefits beyond survival [P]atriarchy . . . come[s] off triumphant.") and Zeitlin, *The Dynamics of Misogyny: Myth and Mythmaking in the Oresteia*, 11 *ARETHUSA* 149, 150 (1978) ("[T]he cornerstone of [Aeschylus'] architecture is the control of woman, the social and cultural prerequisite for the construction of civilization. The *Oresteia* stands squarely within the misogynistic tradition which pervades Greek thought").

David Luban, in a highly interesting recent article that came to my attention after this essay was completed, makes a rare attempt to link the *Oresteia's* treatment of gender with a conception of law: "Aeschylus means us to perceive the trial of Orestes as manifestly unfair The *Eumenides* presents an instrumentalist conception of legal argument and legal institutions [I]n the name of prosperity and peace, an unjust verdict converts women into a permanent underclass of society." Luban, *Some Greek Trials: Order and Justice in Homer, Hesiod, Aeschylus and Plato*, 54 *TENN. L. REV.* 279, 311–13 (1987).

³⁵ Indeed, Athena's "persuasion" of the Furies to enter the new order is not unlike the passage in which Clytemnestra, another manlike woman, lures Agamemnon into the house to be murdered. See *AGAMEMNON* (Lattimore trans.) ll. 905–74.

³⁶ *THE EUMENIDES* (Lattimore trans.) ll. 970–72.

³⁷ *Id.* at ll. 826–29.

In addition, the Furies clearly give up something in order to be included. They do receive honor and are told that "[n]o household shall be prosperous without your will."³⁸ But their exclusive jurisdiction has been clipped. Although the fear, vengeance, and other passions that they represent are given a central place in the new order, the Furies' elemental "wild[ness]"³⁹ has been somewhat tamed. For the first time in the trilogy, the Furies call Zeus "all powerful";⁴⁰ they put their energies in the service of Zeus' goals. For all their honor, the Furies are called "guests of the state."⁴¹ In short, although the system of law in the *Oresteia* incorporates the female and may even make female forces its steering spirits, the Furies lose something in this transformation. They may receive honor and devotions "for the rest of time,"⁴² but for the most part they will serve the younger gods and a largely male regime.⁴³

The drive for sex equality in our time, both within law and within the larger community, has largely focused on securing women's inclusion within institutions that were established predominantly for men. The *Oresteia* can be seen as a myth of inclusion: an affirmation that law is incomplete without the female perspective, an affirmation of the necessary and central role of the "female" within law. But in Aeschylus' myth, the included female assumes an inferior place in the hierarchy. Thus, in the end, the gendered myth of the *Oresteia* is one that contains female privilege *and* female subordination within the legal order, a combination that we know can be insidious.⁴⁴ In significant part, today's women's movement contends with the persistence of such stories. The current debate has largely moved beyond the question whether women should be included to questions about what the terms of inclusion should be. Is it enough if the traditional norms of traditionally male institutions are applied with true evenhandedness to women and men? Do these seemingly neutral norms express a "male" point of view and disadvantage women for that reason — suggesting that perhaps the norms themselves should change

³⁸ *Id.* at l. 895.

³⁹ *Id.* at l. 972.

⁴⁰ *Id.* at l. 918.

⁴¹ *Id.* at l. 1011.

⁴² *Id.* at l. 898.

⁴³ The Furies' subordinate status may provoke different responses depending upon which aspect of the Furies' role is emphasized. To the extent that the Furies represent certain nonrational forces, their inclusion with subordinate status is not especially troubling. To the extent that the Furies represent a version of the "female," their inclusion as subordinates has a harsher ring to modern ears. This tension arises in part, of course, because Aeschylus locates the female and the nonrational in the same entities.

⁴⁴ "The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage." *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 20, 485 P.2d 529, 541 (1971).

to accommodate a "female" perspective as equally valid? Such questions obviously move far beyond what the *Oresteia* addresses. But a reader today is encouraged to reflect upon them as the *Oresteia* tells its double-edged myth — affirming the indispensable importance of the female for law, yet locating the female in a subordinate place. As in other contexts, modern feminism has opened up new ways of hearing old tales.

IV.

A modern-day lawyer has almost a sense of awe in rediscovering an ancient literary masterpiece that contains such a richly evocative image of law. Judging, like system-building itself, is seen as pervaded with difficulties — among them the tension between the goal of reasoned judgment, which Athena proclaims, and the pull of personal allegiance, to which Athena in the end succumbs.⁴⁵ More fundamentally, at the very beginning of our tradition Aeschylus sees through to the complexity of the legal order's basic enterprise. Law is blessed in these plays as a great advance for civilization, but the system of law at its origin is tangled in a cluster of contradictions and clashing dualities: linked to the divine, but inescapably human; aspiring to objectivity, but finding subjectivity unavoidable; shaping the future, but tied irrevocably to the past; predominantly male, but steered by the female; following the cadence of reason, yet also the rhythm of terror. The image endures.

⁴⁵ See, e.g., THE EUMENIDES (Lattimore trans.) ll. 735–38; *supra* note 28.