"Into the Blue":
The Image Written on Law

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If we trace the space between an idea and its referent, between the move to judge and the act of judgment, a shadow falls within it. Between the opening mouth, the scratching pen, or the blank stare of the judge and the materialization of decision, a shadow is indelibly if illegibly inscribed. This shadow names and marks the always fading subject.

This Essay is broken in two parts. In the first part, my concern is with the written texts of law; in the second, it is with the visual texts of culture. The theme of both parts is nevertheless the interpretation of HIV and its relation to the process of judgment, its force as a limit or liminal case in revealing the imaginary order of judgment.

In substance, the Essay will concentrate upon the reading of cases concerning the judgment of the gay man and, more specifically, the HIV positive gay man before the law. Although my argument focuses on the appearance of the gay man in judgment, its implications might well extend to the suffering that many groups experience as they oscillate between negation and derogation in the legal imagination. The intent of this Essay is not to advocate any kind of withdrawal from the legal sphere, any opting-out of legal discourse. Rather, my intent is to find hopefulness in paradox: it is only in the disappearance of images that the compassionate envisioning of the other can take place. And then, in response to the pain and passion of the lover/the other, what might ideally be asked of the judge is compassionate judgment: judgment with passion, a connection to law's lost emotional body. And it is in the immaterial judgments of art and cinema that reflections of an ethics of judgment in law might be glimpsed.

To this end, I begin by emphasizing a largely unremarked feature of

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1. For other evocations of ethical or compassionate judgment, see Arthur Glass, The Compassionate Decision-Maker, in 3 LAW/TEXT/CULTURE 162 (1997); and PETER GOODRICH, LANGUAGES OF LAW (1990).
modern judgment—namely, the legal recognition of phantasy as a distinct order of reality. The specific phantasy in question involves a narrative of abuse variously thematized in terms of homosexual sex and HIV infection. This phantasy is set in motion in an attempt to gain exemption from the ordinary responsibilities of legal subjecthood. I explore the judicial response to this move, namely, a narrative of the betrayal of trust between men. My argument in the first half of the Essay will be that the modern textuality of law has been occupied by a visual order of representation: to the extent that judgment has not been reduced to the anaesthetic product of administration, judgment becomes an aesthetics of appearance which returns law to the horizon of “our” values.

The second part of the Essay turns this understanding of judgment on its head. The resources for this task are the artwork of Felix Gonzalez-Torres and the cinema of Derek Jarman. These texts comprehend the judgment of HIV/AIDS as an aesthetics of disappearance. Paradoxically, the visual texts are iconoclastic. As Jarman puts it, our prayer or plea must be to be delivered from image. My gloss on the visual texts of culture draws this iconoclastic process into relation with an ethics of alterity and the materials for reconstructing judgment. And in the Essay’s coda, I will make some comments on how this argument might contribute to the much-vaunted and much-debated conjunction of law and culture, or law and cultural studies, that characterizes contemporary jurisprudence.

I. HIV AND THE LEGAL AESTHETICS OF APPEARANCE

A. Legal Phantasies

In Green v. R, the accused, Malcolm Green, had been convicted of murdering his friend Don Gillies, the local real estate agent. It was well-known, by Green and in the small town in which they lived, that Gillies was gay. One night, Green and Gillies ate dinner and watched television together. They drank a considerable amount of alcohol, and at least one of them used amyl nitrate. Green stayed the night. At some point, Green beat Gillies, and killed him by stabbing him with scissors and bashing his head against the bedroom wall. Green tried to clean up the blood; he failed, and called the police.

At the trial, the prosecution argued that Green had killed Gillies pursuant to a premeditated plan to kill, and that his defense story was an invention. The defense’s claim was that Gillies had made persistent homosexual advances to Green, which had prompted in Green an image of his father beating his mother and sexually assaulting his sisters, causing him to lose self-control and kill Gillies. He was convicted of murder, unsuccessfully appealed against the conviction to the Court of Criminal

Appeal of New South Wales, and then successfully appealed to the High Court of Australia. His case was sent back for retrial; at the second trial, Green was acquitted of murder and convicted of manslaughter on the grounds of provocation, receiving a sentence of ten years’ imprisonment.

The case, then, is one of a number of so-called “homosexual advance” cases: in a series of Australian and North American cases, heterosexually identified male defendants have argued that an alleged homosexual advance provides a basis for the defense of provocation (and sometimes self-defense). This claim has become increasingly common in homicide trials in Australia. Although straightforward claims that the accused killed in direct response to a homosexual advance have been successful, defense lawyers soon realized that an argument based on homosexual advance would be more persuasive if it could be tethered to some additional feature. Use of the homosexual advance defense has become increasingly opportunistic: for example, the defendant in Parsons v. Galetka attempted to claim that the victim had made a homosexual advance to him, despite evidence from others that the victim was heterosexual and that no advance had been made. In Jones v. Johnson (in the context of a killing motivated by theft), the defendant still tried to claim that a homosexual advance had provoked a homicidal response. In order to raise the chances of


4. For example, between 1993 and 1995 in New South Wales, thirteen murder trials saw the homosexual advance defense invoked. Of those trials, two resulted in acquittals; two in jury verdicts of murder; three in verdicts of not guilty of murder but guilty of manslaughter; eight resulted in pleas being accepted to a lesser charge such as manslaughter; and one case was dismissed. See ATTORNEY-GENERAL’S DEPARTMENT (New South Wales), REVIEW OF THE “HOMOSEXUAL ADVANCE DEFENCE” 10 (1996). Successful attempts to enter evidence about a homosexual advance can be seen in the following cases. For example, one accused said an elderly man invited him for a drink in his house; he accepted. The old man grabbed his buttocks and made an indistinct comment. The accused beat him with a garden gnome, then stabbed him to death. He was found guilty of manslaughter rather than murder and received a three-year sentence of imprisonment. In another case, the defendant, while riding his bike along a cycle path, saw a man in a dress waving his penis and shouting at him. The defendant beat the man to death. He was found not guilty of murder and guilty of manslaughter. See DAVID MARR, THE HIGH PRICE OF HEAVEN 60 (1999).


6. 171 F.3d 270 (5th Cir. 1999).
succeeding with a claim that a homosexual advance had been made, defense lawyers would link the alleged discomfort of such an advance with the memory of abuse at an earlier age. Thus, in Bibbee v. Scott, the defense led psychiatric evidence that after an unwanted homosexual experience as a teenager, any subsequent advance by a gay man would trigger a violent response from Bibbee. In his attempt to raise the homosexual advance defense, one of Matthew Shepard’s killers, Aaron McKinney, cited a retrospective trail of traumatic homosexual encounters: forced oral sex with a neighborhood bully at the age of seven, “more trauma” caused by sex at fifteen with his male cousin, and, at twenty, breaking down in tears after accidentally entering a “gay church” and seeing men kissing. The conventional tactic thus asserts that the interconnection of a contemporary homosexual advance and a previous abusive experience causes a homicidal reaction.

However, the case of Green is distinctive for its linking of homosexual advance to a phantasy of abuse (as opposed to any actual experience of abuse). During police questioning, Green said two crucial things. The first arose soon after he arrived at the police station: “He told the police: ‘Yeah, I killed him, but he did worse to me.’ When asked why he had done it, the appellant said: ‘Because he tried to root me.’” Green thus constructed himself in the now-classic manner as the object of a homosexual advance, wherein the possibility of homosexual anal intercourse is viewed as worse than death. However, later in the interrogation, Green also added the following: “In relation to what had happened this night I tried to take it as a funny joke but in relation to what my father had done to four of my sisters it forced me to open more than I could bear.” Green was asked at trial to explain what he meant by this: “Well, it’s just that when I tried to push Don away and that and I started hitting him it’s just—I saw the image of my father over two of my sisters... and they were crying and I just lost it... Because of those thoughts of me father just going through me mind... About [him] sexually assaulting me sisters...” In short, the defense that was persuasive for the High Court and for the jury at the retrial comprised two elements: one, a homosexual advance by a male friend; and two, an image of heterosexual and incestuous abuse. As Justice McHugh stated: “The sexual, rather than homosexual, nature of the assault filtered through the memory of what the accused believed his father had done to his sisters, was the trigger that provoked the accused’s violent response.” In the

10. id. at 667 (Toohey, J.).
11. id.
12. id. at 683. With regard to the homosexual advance, the prosecution did not concede that there
arguments of the defense, accepted by the majority of the High Court, these two elements are fused so that Gillies' actions become characterized as sexual abuse by a father figure. Only on the basis of the displacement of homosexuality and its replacement with abuse by a father figure does the judiciary bind the objectivity of what has now become "sexual abuse" with a subjective phantasy.

Concerning the image of the abuse that the accused said he experienced, the prosecution argued that it was concocted, or irrelevant. But the reality of this image of abuse was endorsed in the High Court, and endorsed in a distinctive way. All the judges noted that the accused did not witness directly the sexual abuse of his sisters; all noted that whether or not such abuse occurred is immaterial. What was important is that the accused was told of the abuse and told by his mother and sisters. What the accused heard from the lips of others became a visual scene that he played in his head. The accused became, as described by his lawyer and the High Court judges, a person carrying around "mental baggage,"13 with the image of abuse a burdensome prosthesis. Gillies' sexual overtures—touching Green on the hip as they lay in bed together—animated this prosthesis so that, the defense argued, in killing Gillies, Green was killing the image (of his father). As Justice McHugh (dissenting in the Court of Criminal Appeal) confirms: "He sees the advance through the spectacles of what his father had done to his sisters."14 The validity of Green's substitution mechanism is affirmed by the High Court's determination to reconstruct the victim as a father figure. As Chief Justice Brennan comments,

The real sting of the provocation could have been found not in the force used by the deceased but in his attempt to violate the sexual integrity of a man who had trusted him as a friend and father figure... and in the evoking of the appellant's recollection of the abuse of trust on the part of his father.15

The victim, then, in his sexual touching of Green, betrayed the trust

had been such an advance. At most, there had been amorous or sexual touching by Gillies which the accused could easily have rebuffed. As Justice Kirby remarked in his dissenting opinion in the High Court, "[If] every woman who was the subject of a 'gentle', 'non-aggressive' although persistent sexual advance... could respond with brutal violence rising to an intention to kill or inflict grievous bodily harm on the male importuning her, and then claim provocation after a homicide, the law of provocation would be sorely tested and undesirably extended." Id. at 719.


14. Id. at 30.

15. Green, 148 A.L.R. at 683 (McHugh, J.). Justice McHugh also describes Gillies as "a person whom the accused looked up to and trusted." In the Court of Criminal Appeal, Justice Smart commented on "the deceased's betrayal of the relationship of trust, dependency, friendship and the abuse of his hospitality." Id. at 704. In applying for special leave to appeal to the High Court, defense counsel argued: "He said... there were flashes of his father over his two sisters, at the time he lost self-control, that he kept hitting him because he felt trapped. The evidence... would establish a clear connection between his relationship with the deceased as a father figure and his own sense of betrayal in relation to his relationship with his father." Green Transcript, supra note 13, at 2.
between friends, between men.

The case of Green, then, marks the recognition by law of the visual force of phantasy. More than this, however, it recognizes a visual phantasy that exists through a conversion of oral familial stories into the realm of the visual. The force of such phantasy cannot be evaluated by reference to an empirical reduction: there is no derivation of the image from the father’s behavior as seen by Green (in fact, Green had not seen his father for approximately twelve years). And it cannot be reduced to the symbolic order of law: this is not homophobia per se (although the majority in the High Court and the minority in the Court of Criminal Appeal cannot restrain themselves from commenting on the moral reprehensibility and horror of an amorous homosexual encounter). In short, phantasy emerges here as a space of the imaginary: it is the specular phantasy of law. As Lacan emphasizes, phantasy has a protective quality for the subject: Lacan compares the scene of phantasy to a frozen image on a cinema screen, as if the film had been stopped in order to avoid showing a traumatic scene. Phantasy fixes and immobilizes a threat or trauma, which can then be excluded from representation. The tales told in law become specularized as a visual phantasy which can screen out or guard against the threat embodied by the object of law—here, portrayed as the gay man.

B. Killing the Image

The following two recent cases show how the law’s recognition of the visual phantasy of the gay man as a betrayer of the trust between men can be given additional force through its reconfiguration with HIV. The two cases also show the judiciary actively participating in the defendant’s phantasy of the gay man. In Andrew and Kane, also involving the murder of a gay man, the phantasy again involves the narrative of abuse and betrayal by the gay man, but it is conjoined with the imagined embodiment of the gay man as a repository of HIV infection. In this case, two sixteen-year-old boys killed a man called Wayne Tonks. They were prosecuted for murder: the jury found Peter Kane guilty of murder and Benjamin Andrew guilty of manslaughter.

At the trial, Andrew argued that, several weeks earlier, he had been

16. But see R v. Moffa (1977) 13 A.L.R. 225 (High Court) (emphasizing that words must be of a violent or extreme character in order to be provocative); R v. Tuncay [1998] 2 VR 19 (same).

17. See, e.g., Green, 148 A.L.R. at 665 (Brennan, C.J.) (“Some ordinary men would feel great revulsion at the homosexual advances being persisted with in the circumstances. . . . They would regard it as a serious and gross violation of their body and their person. . . .”) (quoting Justice Smart (Ct. Crim. App.)).


forced to have sex with Tonks, and that he became increasingly aggrieved over this. Andrew had come into contact with Tonks by finding his name and phone number in a public toilet. Andrew was being teased at school for possibly being gay; he said at trial that he wanted to ask Tonks, whom he did not know, for advice. It turned out that Tonks was a schoolteacher, albeit at a different school and with his identity as a gay man unknown to family and colleagues. Andrew went to Tonks' apartment in the early hours of one morning; they drank alcohol and watched a porn video. Andrew alleged that he was then forced to have anal sex with Tonks. Some time later, he became convinced that he was infected with HIV and obtained an HIV test. Tonks was not HIV positive and the accused did not test positive. In a state of anxiety about the encounter he had had, Andrew, with his friend Kane, returned to Tonks' apartment equipped with a baseball bat, duct tape, and a plastic bag: they had agreed beforehand that Andrew would verbally abuse Tonks and, if necessary, hit him.

The sentencing judge commented that it was plain that Andrew's aim was "to avenge himself on the victim by inflicting... bodily injury serious enough to expunge what... was his firm conviction that he had been subjected to vile and degrading conduct wholly unprovoked by, and wholly unwelcome to, him." Together, Andrew and Kane beat Tonks with the baseball bat, bound, gagged, and blindfolded him and left him with the plastic bag fastened over his head, so that he later suffocated. Though Kane was convicted of murder, Andrew was convicted of manslaughter by reason of provocation.

His defense had succeeded in ways similar to those played out in Green. In both cases, gay sex is identified with sexual abuse. In both cases, sexual abuse is then hitched to a phantasy—of familial abuse in Green, and of HIV infection in Andrew and Kane. In both cases, the salience of the phantasies is that they are elements in a legal narrative of the betrayal of trust between men (in Andrew and Kane, Tonks is judicially constructed as the teacher, the older man, the paternal figure of trust, who should have given advice but who instead exacted anal intercourse). And finally, in both cases, this legal narrative of betrayal produces an antiportrait of the dead, gay man. Where in Green, however, this speculative image belonged to the defendant and was recognized by the judges, in Andrew and Kane, the sentencing judge himself participated in the perception of the victim as an embodiment of infective abuse. Judge Sully considered the event described by Andrew and his phantasy of infection as being significant in understanding the "objective criminality" of Andrew.

20. Id. at 11, 15.
21. Id. at 11.
22. Id. at 18-19 (Sully, J.).
23. Id. at 7.
This objective criminality is measured against an imagined portrait of the dead man. As with many cases of homophobic murder, the judge noted that the dead cannot speak; others speak to the court on their behalf. Judge Sully characterized this "body of material" representing the deceased as "damaging as it inevitably was in its illumination of the character and lifestyle of the dead man."\(^{24}\) The oral tales told by witnesses were transformed into a judicial image of the identity of the victim. In this conversion, law attaches an intention or desire to the dead. Tonks was described by Judge Sully as having "a clandestine but active homosexual lifestyle" and "a particular attraction towards teen-aged boys and young men. He actively sought out homosexual encounters with such partners, doing so by a number of methods of which one was to solicit, in effect, by leaving appropriate invitations and personal details inscribed on the walls of public toilets."\(^{25}\) Judge Sully glossed this "lifestyle" as follows:

It could scarcely be doubted that there are many people—and, more probably than not, a clear majority of people—in contemporary Australian society for whom the kind of lifestyle that the late Mr. Tonks is shown to have followed would be morally reprehensible, physically repellent and socially subversive. All the more reason to emphasize in the strongest and most uncompromising of terms that a person who follows that lifestyle, even if that lifestyle entails the committing of serious criminal offences, does not become on that account an outlaw whose life is simply forfeit to anybody who feels strongly enough to take it in fact. The paramount purpose of the rule of law is to uphold in principle and to shield in practice the absolute and fundamental sanctity of human life: all human life.\(^{26}\)

A compromise is being effected here, evidenced in the acceptance of the defense of provocation, the leniency recommended by the jury, and the judge's endorsement of leniency in a reduced sentence of six years' imprisonment. The compromise is between the moral principle of the sanctity of all human life (which has no exceptions, which cannot be sacrificed in ideal or in practice) and the subjective legitimacy, for law, of killing those who are its practical exceptions: the abusive and infectious outlaws whose necessary and contradictory inclusion within legal discourse shores up the moral principle of the legal sanctity of life.

\textit{C. Bleeding Wounds}

Enthusiastic judicial participation in the phantasy of a gay man as an embodiment of abuse is also found in a civil case involving a

\(^{24}\) See id. at 7; see also Green Transcript, supra note 13, and accompanying text.

\(^{25}\) See Andrew and Kane, supra note 20, at 6-7.

\(^{26}\) See id. at 7. This echoes the comments of Justice Smart in the Court of Criminal Appeal in Green, when he describes the "great revulsion" that "some ordinary men" would feel at a homosexual advance. Green, 148 A.L.R. at 665 (quoted by Brennan, C.J.).
discrimination suit brought against the Australian Army by a recruit who was discharged when he tested HIV positive. The case begins as *X v. Department of Defence* and becomes *X v. The Commonwealth* in its later stages.27 X served as a signaller in the Signals Regiment of the Army Reserve for two years, then applied to enlist in the Australian Defence Force (the army proper). He began recruit training in November 1993. Blood was taken from him to screen for HIV: this was military policy for all new recruits.28 On December 21, the army discovered that X was HIV positive; on December 24, he was discharged. He complained to the Human Rights and Equal Opportunity Commission that his discharge was unlawful discrimination under the Disability Discrimination Act 1992 (HIV being categorized as a disability under that Act). The Department of Defence argued that, by virtue of being HIV positive, X could not fulfill an inherent requirement of military employment, namely “deployment as required” in any field of army service, including combat or field training. If X were to be “deployed as required,” the Army claimed that this would risk the infection of other soldiers (who are assumed to be HIV negative).

The Commission agreed that there was a risk, varying in the circumstances of combat or training, “that a soldier may be infected with HIV by another who is HIV positive.”29 This risk did not mean, however, that X was unable to carry out the inherent requirements of his employment and thus the discharge of X had been unlawful discrimination. The Department of Defence promptly appealed the decision to the Federal Court, which dismissed the appeal; the Department then appealed to the Full Court of the Federal Court, which set aside the Commission’s decision, allowing the appeal. X then appealed to the High Court of Australia.

The High Court accepted the army’s contention that it was necessary for a soldier “to ‘bleed safely’ in the sense of not having HIV... [as] an inherent requirement of the employment.”30 Although this was discriminatory (meaning that no HIV positive person could be recruited into the Army in any capacity), the High Court found that the Army’s “specialness” did indeed allow it exemption from discrimination law.31

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28. “Applicants are to be informed, before entry, that such testing will take place... and they are to be given the option to refuse and to withdraw their application. As with newly inducted entrants in whom other potentially serious diseases have been detected, personnel with HIV infection are to be discharged.” AUSTRALIAN DEFENCE FORCE, SERVICE POLICY cl. 12 (quoted in *X v. Dep’t of Def.*, at 5).

29. *X v. Dep’t of Def.*, at 8.


31. The majority of the High Court found in favor of the Army, sending the case back to the Commission for further adjudication by a different Commissioner. Compare *Green*: in the judgment of
What makes the Army special is the effect of a phantasy shared by the army as the civil defendant and the judges in both the full Federal Court and the High Court.

This shared phantasy centers on the figure of blood, the blood spilled by soldiers in battle and the blood that signifies the transmission of HIV.\textsuperscript{32} The Army had argued as follows:

[D]eployment is not available to [X] because in the course of service with the ADF a soldier, whether in training or in combat, may suffer an injury, be it a major or minor one, which may involve the discharge of bodily fluids including blood which may be transferred to the body of another by some form of physical contact . . . rang[ing] from, on the one hand, an urgent blood donation or a major blood spill because of serious injury incurred in combat to, on the other, any accidental contact with even a small blood deposit, e.g. on an obstacle used for training purposes by another who may have even a minor skin lesion.\textsuperscript{33}

From the gift of blood to an injured soldier, through the rubbing of blood on equipment, to the flowing of blood out of wounds, the Army imagines a spilling pool of infected blood which threatens to engulf it. Although X’s preference for deployment was the Signals Unit where he had served before and where the risk of blood flow would be minimal, the Army argued that soldiers were required to be deployable in all fields, not simply in some. Medical evidence was admitted, estimating the risk of transmission in the field as “not zero” and “not fanciful.”\textsuperscript{34} In response to X’s suggestion that soldiers could routinely use protective devices such as plastic gloves, the Army countered that they would be unlikely to “take appropriate care that such protective equipment was maintained in good order and condition,” an ironic claim given the fetishization of care and order commonly associated with other Army equipment such as guns, uniforms, and the like.\textsuperscript{35}

the High Court, as also in the argument of defense counsel, the phantasy of paternal abuse is characterized as giving rise to a “special sensitivity to a history of violence and sexual assault within his family.” Green v. R (1997) 148 A.L.R. 659, 682 (McHugh, J).


33. X v. Dep’t of Def., at 6.


35. X v. Dep’t of Def., at 8.
The Army did not want to admit that it should issue protective devices to its personnel because of its self-image as a protective device (a kind of rubber glove or condom for the nation). To concede the need for protection within its own protectiveness would admit that something had got past it, had insinuated itself through its borders. To that extent, then, the HIV positive recruit is to be screened out in much the same way that a rubber glove is thought to prevent HIV, in flowing blood, from getting access to the body within. For the Army, the virus constitutes X as the mark of exclusion.

Such a phantasy of flowing viral blood is shared by the judges. In the High Court, Justice Callinan described his view of the Army:

By an Army . . . I mean a class of men set apart from the general mass of the community, trained to particular uses, formed to peculiar notions, governed by peculiar laws, marked by particular distinctions, who live in bodies by themselves, not fixed to any certain spot, nor bound by any settled employment, who neither "toil nor spin"; whose home is their Regiment; whose sole profession and duty it is to encounter and destroy the enemies of their country wherever they are to be met with . . . .

In the Army’s successful appeal in the Federal Court, Justice Burchett began his judgment thus:

This appeal . . . has much to do with blood. Modern warfare may seem less brutally physical than such a struggle as that of Horatius and his companions to hold the bridge, depicted by Lord Macaulay in his Lays of Ancient Rome, which cumbered with corpses—"the narrow way / where, wallowing in a pool of blood, / The bravest Tuscans lay." But the big and small wars of the twentieth century, the [defendant] contends, have shown clearly enough that the science of slaughter still inflicts physical wounds, from which soldiers bleed, perhaps copiously. Realistic training exercises, too, may entail injuries. Bleeding, for today’s army, involves a soldier’s comrades in dangers unknown to Horatius, or to those American Indian warriors who were accustomed to seal their brotherhood in mutual blood. For the deadly viruses Hepatitis B, Hepatitis C and HIV have become prevalent, which infect through transmission of blood and other bodily fluids.

The Army is configured as a fraternal order, entrusted with the safety of the nation, and trusting in each other. That mutual fraternal trust is endangered by the specter of the HIV positive man, whose blood cannot be used as the life-giving transfusion for the injured and whose blood may put at risk his fellow soldiers. His status, as the embodiment of infection, means that he can no longer be part of the fellowship of soldiers; he must

be put out of its ranks.38

In the judicial discourse, we can read a validation of the military imagination of the HIV positive as an uncontrollable danger to other soldiers, a kind of enemy agent or weapon within the ranks. The Army envisages soldiers bleeding on equipment during training, bleeding on the field of battle due to injury, having to give blood transfusions in the field when a fellow soldier has lost blood, or having the partially healing wounds of training or injury come into contact with the flowing blood of another soldier. However, in the military body, it is not simply that blood flows freely. In addition to “safe bleeding,” soldiers are required to be “deployed as required,” sent anywhere, receiving any orders. X wanted to be contained, he wanted only a semiotic function, to be an Army signaller, to stay in one place, sending and receiving signals, transmitting only messages. The Army, however, saw him as indiscriminate and peripatetic, moving all over the place, signifying the viral weakening of the military body from within. X is thus figured as indiscriminate in the same way as the victim in Andrew and Kane: a man who left his name and phone number on toilet walls inviting sex, “soliciting” as the judge put it, and thus indiscriminate in his seduction of strangers. It does not matter that X did not want indiscriminate military mobility: since HIV infection is part of a catachresis conjoining gay sexuality, risk, and promiscuity, the HIV positive individual is narrated in law as peripatetic, prolific, unfixable, and in perpetual motion, flowing like blood around, under, and through the military shield.

II. “INTO THE BLUE”: THE AESTHETICS OF DISAPPEARANCE

My reading of these three cases has shown that judgment in legal texts is predicated upon an aesthetics of appearance—a conversion of writing into a specular image. Moreover, that aesthetics subjects the appearance of gay sex and HIV positivity to the horizon of “our values”: the values of the “ordinary” person, of the territorial nation state, of the living. In reading these three cases I have sought to show the carceral effects of imagination: the image of the gay man conjured in each judgment freezes and frames the victims Gillies, Tonks, and X. And at the same time, the defendants—Green, Andrew, the Australian Army—are retrospectively

38. Note that an impassioned dissent is provided in the High Court by Justice Kirby (who also dissented in Green, and who is the only “out” gay man on the High Court Bench). He states: “It would be as well . . . if the courts were to avoid the preconceptions that lie hidden, and not so hidden, in tales of . . . soldiers wallowing in blood (however vivid may be the poetic image), or in descriptions of regimental life and soldierly duty in the heyday of the British Empire (however evocative may be the memories).” X v. The Commonwealth, at 34. He also notes the persistent difficulty of obtaining legal recognition of discrimination and victimization: “The field of anti-discrimination law is littered with the wounded who appear to present the problem of discrimination which the law was designed to prevent and redress but who, following closer judicial analysis of the legislation, fail to hold on to the relief originally granted to them.” Id. at 24.
empowered to act in response to that image, to act without the constraints that normally enjoin against killing or against discrimination. My aims in this second Part of the Essay are to reject law’s judgment, through its invocation of appearance (of the image), of the gay man or the HIV positive gay man and to argue instead that we might look towards the aesthetics of disappearance achieved in certain cultural texts. These texts—artworks and cinema—help us forestall the closure of community effected by the legal aesthetics of appearance and open the processes of judgment to the proximate others dwelling in law. In the written texts of law HIV is made to appear through a phantasy of abuse (leading to the legitimated annihilation of the persona of infection), while the visual texts of culture approach the representation of HIV through an image of disappearance, or disappearing images.

A comparative reading of the legal and cultural texts of HIV allows us to ask what understanding of judgment could take account of the suffering and fleshly body. In Andrew and Kane and X, judgment proceeds from the sense of betrayal imagined in the transmission of HIV. The judge projects anger and vengeance in response to such an imaginary event, and makes it an a priori condition for any judgment of the gay man. In the cultural texts that this Essay will go on to examine, HIV transmission is more than any phantasy, it is bodily reality. In both artworks and cinema, the artists offer an approach to the lover and a means to approach the image as if it were the body of the other, without vengeance or anger. In contrast to the self-righteously violent judgment of law, in these cultural texts can be found a means for the compassionate judgment of the other.

A. Touch the Body of the Lover

In the art of Felix Gonzalez-Torres, the art object is always about to disappear.39 His installations are organized around certain formal modalities: some works are word lists40 (seemingly random recitations of personal and public events fixed to particular dates but listed out of


chronological order); billboards\(^{41}\) (photographs or word lists produced as billboards and installed at multiple locations around a city); puzzles\(^{42}\) (letters or photographs reprinted as jigsaw puzzles and sealed within plastic bags); spills\(^{43}\) (sweets or candies piled in a corner or spread across the floor); stacks\(^{44}\) (identical sheets of paper, sometimes with an image or words printed on them, forming a solid cube composed of hundreds of separate sheets); and drapes\(^{45}\) (curtains, beads, or strings of light bulbs arranged around doorways, window frames, and walls). In this Essay, I will be concentrating on the spills, stacks, and drapes: each of these forms rejects the idea of a static artwork and, indeed, creates the artwork on the basis of its continual movement, always on the verge of vanishing.

Gonzalez-Torres—who died of AIDS in 1996, five years after his lover also died of AIDS—produced many works that deal explicitly with HIV and AIDS: for example, the spectator passes through a doorway draped with blue beads in Untitled (Chemo), and through another doorway laced with red beads in Untitled (Blood). As Spector notes, the works' titles make direct reference to AIDS and its treatment, "but the sheer tactility of these interactive and appealing objects . . . foregrounds the body, your body, by the experience of moving through them (emphasis in original)."\(^{46}\) The reductivism effected by HIV upon the body is foregrounded in Untitled (21 Days of Bloodwork—Steady Decline), a work that shows how the scopic regime of the medical gaze dismembers the corporeal self in favor of an abstracted geometry (the graphs of declining T-cells uncannily similar to the cool abstractions of Minimalist art). He also participated in AIDS activism, making a billboard work for the Day Without Art in 1990 (Untitled).\(^{47}\) The works on which I wish to dwell, however, approach the

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\(^{41}\) See, e.g., Untitled (The New Plan) (a photograph of undulating denim displayed in one location); Untitled (For Jeff) (a photograph of a man's hand, displayed in thirty locations); Untitled (Strange Bird) (a photograph of distant birds against a cloudy sky, displayed in twenty locations); Untitled (a photograph of a rumpled bed, with the imprints of two heads still visible on the pillows, displayed in twenty-four locations). A photograph of this last billboard on location in New York can be seen on the cover of the issue of the Yale Journal of Law & the Humanities in which this Essay appears.

\(^{42}\) See, e.g., Untitled (Ross and Harry); Untitled (Lover's Letter); Untitled (Klaus Barbie as a Family Man); Untitled (Waldheim to the Pope).

\(^{43}\) See, e.g., Untitled (Portrait of Dad) (175 pounds of white candies piled into a corner); Untitled (USA Today) (a corner pile of red, white, and blue candies); Untitled (Welcome Back Heroes) (hundreds of Bazooka bubble gum chews spread across the floor).

\(^{44}\) See, e.g., Untitled (NRA) (a stack of sheets of red paper edged in black); Untitled (two stacks placed side by side: each sheet in one stack reads "Somewhere better than this place," while each sheet in the other stack reads "Nowhere better than this place"); Untitled (Death by Gun) (which reproduces on each of its sheets the names, ages, and faces of the 464 people who were killed by gunshot wounds in the United States in a one-week period).

\(^{45}\) For examples of drapes using light bulbs, see Untitled (March 5\(^{th}\)) and Untitled (Ischia); for drapes using beads, see Untitled (Chemo) and Untitled (Blood); for fabric drapes, see the various versions of Untitled (Lover Boy).

\(^{46}\) SPECTOR, supra note 39, at 171.

\(^{47}\) The full text of the billboard reads: "HEALTH CARE IS A RIGHT. A government by the people, for the people, must provide adequate health care to the people. NO EXCUSES."
subject of AIDS more obliquely, through the vanishing self, the vanishing lover.

In *Untitled (Loverboy)*, a stack of sheets of blue paper is placed on the floor against a white gallery wall. In this space, the paper is the space of the imaginary. Gonzalez-Torres has said of it: “The beautiful blue creates a glow on the wall when it rests on the floor . . . [It] has a gender connotation; you can’t get away from that. But I also meant it as this beautiful blank page onto which you can project anything you want, any image, whatever.” The work is a screen onto which images can be projected by the spectator, but its apparent solidity is always already fragmented and its certainties bent by refraction into reflection. Like Gonzalez-Torres’ other paper stacks, it exists in a constant state of diminution and replenishment. Designed to reach a certain height, it is described as being made of “endless copies.” Visitors to the museum or gallery are invited by the label on the wall to take a sheet or sheets. As the stack reduces, gallery staff periodically add more sheets. As Gonzalez-Torres has stated, “these stacks are made up of endless copies or mass-produced prints. Yet each piece of paper gathers meaning, to a certain extent, from its final destination, which depends on the person who takes it.” Diminution, dispersal, and replenishment also occur in the spills, with visitors enjoined to help themselves to the sweet candies strewn on the floor or heaped in corners. In *Untitled (Portrait of Ross in L.A.)*, 175 pounds (the body weight of the artist’s lover, Ross) of Fruit Flashers candies are piled in a corner of the gallery with visitors enjoined to take one (to eat or to keep). *Untitled (Loverboys)* involves 350 pounds of candies, the combined body weight of the artist and his lover. In *Untitled (Placebo—Landscape for Roni)*, thousands of candies, glinting in their metallic plastic wrappers and evoking the sugar pills of a drug trial, are spread across the museum floor and collected or eaten at random by spectators. These stacks and spills, then, are configured as always in motion and always on the verge of disappearance.

In the blue stack that is *Untitled (Loverboy)* and the candy spill of *Untitled (Portrait of Ross in L.A.)*, Gonzalez-Torres created aporetic works of art which are always fading and always returning. Gonzalez-Torres described his intentions as follows:

I wanted to do a show that would disappear completely. It has a lot to do with disappearance and learning . . . . Freud said that we rehearse

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48. Gonzalez-Torres states, “Around 1989 everyone was fighting for wall space. So the floor space was free, the floor space was marginal.” See the interview with the artist in Tim Rollins, Felix Gonzalez-Torres 13 (1993). Note that another version of *Lover Boy* drapes sheer blue fabric as curtains, perhaps because the window space in galleries is also marginal. In his placement of the art object within the gallery, then, Gonzalez-Torres metaphorizes the marginality awarded to the gay man, the racial other, the HIV positive person.

49. Spectator, supra note 39, at 62.

50. Rollins, supra note 48, at 23.
our fears in order to lessen them. In a way, this "letting go" of the work, this refusal to make a static form, a monolithic sculpture, in favour of a disappearing, changing, unstable, and fragile form was an attempt on my part to rehearse my fears of having Ross disappear day by day right in front of my eyes.51

In inviting the spectator to remove parts of the artwork, Gonzalez-Torres rehearses the death of the lover and the death of the self which will follow. The selected piece of the artwork which the spectator removes is taken away from the rest permanently, whether it is eaten or placed in a drawer at home, or pinned on a wall. The artwork is always diminishing, heading towards nothingness, towards the abyss. And yet, the abyss is always held at bay, always deferred, since fragments of the artwork are transported by spectators into new places.52 Here, the generosity of the artist is not simply about undercutting the art market’s fetishization of acquisition and ownership that operates in a closed circuit of display and ownership; it is also a gift that both invokes the transmission in HIV infection and rewrites it otherwise than as infection. In contrast to the abjection attached to notions of the “exchange of bodily fluids,” Gonzalez-Torres invites spectators to take part of the image representing his lover’s body into their own bodies, to ingest or to secrete in a pocket or a drawer. As Weintraub comments, "individuals who have taken a sheet of paper from his stacks are ‘carriers’" in a metaphorical circuit.53 It is a gift without price or return, in a circuit which is open and unending. An artwork about HIV transforms the circuit of transmission from the criminalized, abjected, and reviled archetype condensed around HIV infection into a rehearsal of loss and an act of giving, a positive positivity.

In the later version of Lover Boy, wherein sheer blue fabric is draped across a window, forming a transparent curtain, Gonzalez-Torres evokes the evanescence of the amatory relationship and the mutability of the body of the object of desire. With an opened window behind the curtain, the fabric moves with every breath of air, rarely at rest, an artwork which is never still, always in motion, impossible to fix. The fabric provides a screen onto which desire is projected and interpreted; yet, the fabric’s sheerness creates a screen that does not attach the gaze of the spectator to the surface of the object: it points to a beyond, an other side, a farther horizon. It veils, but does not mask. As with the spills and stacks, it bespeaks loss. And for Gonzalez-Torres, in its selected blue color, whether in stack form or fabric, Lover Boy enacts “a memory of a light blue. For me, if a beautiful memory could have a color, that color would be light

51.  Id. at 13.
52.  Gonzalez-Torres has said: “I wanted people to have my work. The fact that someone could just come in and take my work and carry it with them was very exciting.” Id.
53.  LINDA WEINTRAUB, ARTHUR DANTO, & THOMAS McEVILLEY, ART ON THE EDGE AND OVER

113 (1996).
blue . . . an innocent blue.”54 In the chromatic hues of judgment—where blood colors the law’s phantasy of the gay man—here blue is the colour of memory, the rehearsal of a loss yet to come, the loss of a lover, the loss of the self.55 And like the stacks and spills, Lover Boy establishes a relation with the spectator that is prior to vision, operating instead through touch. The papers in each stack, the candies spilled on the floor, the curtain moving in the breeze: each exists to touch and be touched by the spectator. As Irigaray comments: “Touch makes it possible to wait, to gather strength, so that the other will return to caress and reshape, from within and without, a flesh that is given back to itself in the gesture of love.”56

The works project a past experienced through the touch of memory into a future prefigured through evanescence. The mobile artworks of Gonzalez-Torres succeed in precluding the grounds for visual judgment, reinstituting judgment instead as a re-hearing, a past re-membered, and a future imagined, a moving image oscillating on the border of appearance and disappearance. Where the judgments in the cases of legal phantasy of HIV and gay sex turn loss towards the self of law (the self of the Army, the self of the accused), these artworks are concerned to respect absolute alterity through an act of compassionate judgment that brings self and other into proximate, tangible relation.

B. Hear the Voice of the Lover

The liminal moment between appearance and disappearance also structures a film made by Derek Jarman, the British artist, filmmaker, writer, and gardener, who died of AIDS in 1994. The film is entitled Blue, and it is at once a meditation on color and also a film without a moving image.57 For 75 minutes the screen is filled with cobalt blue, while voices, sounds, and music enact scenes, read poems, toll bells, and provide an aural landscape for that which cannot be seen. Blue gives up the glamour and the visual charge of cinema, in much the way that Gonzalez-Torres’

54. ROLLINS, supra note 48, at 15, 17. Note that, for the artist, the color evokes the erotic relation: “Ross and I would spend summers next to a body of blue water or under clear, Canadian skies.” Id. at 17.

55. For similarly evanescent artworks evoking the loss of friends to AIDS, see the blurred and indistinct photographs of Bill Jacobson, reproduced in BILL JACOBSON, 1989-1997 (1998), and discussed in Anastasia Aukeman, Coming Together and Letting Go, 94 ART NEWS 95 (1995); see also David Wojnarowicz, Untitled (Hijar Dead), in FEVER: THE ART OF DAVID WOJNAROWICZ 60 (Amy Scholder ed., 1999).


artworks eschew expressionism or pictorial figuration. Blue’s abstractions, however, are still rooted in narrative: a narrative of pleasure (sunshine on a warm summer day, sex with a good-looking stranger, dancing in nightclubs), of anger (at AIDS activism, at the double bind of AIDS drug trials), of grief (for lost friends already dead from AIDS), of mourning and the contemplation of one’s own death. Of the film, Lombardo writes: “With a violent leap, the most bodyless film ever produced projects the human body in its most cruel and unspeakable presence: pain, illness, suffering at the borderline between the physical and the mental, the conscious and the unconscious, life and death.” Like the artworks of Gonzalez-Torres, Blue is a judgment of death, of the inscription of bodily pain: the pain of radical otherness, of the loss of self and the loss of the other. The object of judgment, in the film like the artworks, is death.

Jarman was losing his sight as a result of cytomegalovirus (CMV). Blue allows us to imagine sightlessness and the rehearsal of imminent but still uncertain death. Rehearsal, as with Gonzalez-Torres, becomes the main modality of existence: “The worst of this illness is the uncertainty. I’ve played this scenario back and forth each hour of the day for the last six years.” Rehearsal and repetition: with every opening succeeded by a moment of closure, as the narrative plays on and out towards its end.

58. Jarman says, variously: “Lost in the warmth/ Of the blue heat haze,” JARMAN, CHROMA, supra note 57, at 108; “Kiss me again/ Kiss me/ Kiss me again/ And again/ Never enough/ Greedy lips/ Speedwell eyes/ Blue skies,” id. at 118; “The smell of him/ Dead good looking/ In beauty’s summer/ His blue jeans/ Around his ankles/ Bliss in my ghostly eye,” id. at 124; “Dance in the beams of emerald lasers . . . What a time that was.” Id. at 116.
59. On AIDS activism, Jarman states: “I shall not win the battle against the virus—in spite of the slogans like ‘Living with AIDS.’ The virus was appropriated by the well—so we have to live with AIDS while they spread the guilt for the moths of lathca across the wine dark sea.” Id. at 110. Jarman’s ambivalence about the AIDS Quilt (also known as the Names Project) is also expressed elsewhere: “When the AIDS quilt came to Edinburgh during the film festival I attended out of duty. I could see it was an emotional work, it got the heartstrings. But . . . I shall haunt anyone who ever makes a quilt panel for me.” DEREK JARMAN, DEREK JARMAN’S GARDEN 91 (1995). Of drug trials, he says in Blue: “Oral DHPG is consumed by the liver, so they have tweaked a molecule to fool the system. What risk is there? If I had to live forty years blind I might think twice . . . . The pills are the most difficult . . . . I’m taking about thirty a day, a walking chemical laboratory.” JARMAN, CHROMA, supra note 57 at 120.
60. Of lost friends, he laments, “The virus rages fierce. I have no friends now who are not dead or dying. Like a blue frost it caught them.” Id. at 109.
61. Lombardo, supra note 57, at 133.
62. Note also the artwork of John Dugdale, photographer, who has also lost his sight to AIDS. His blue-washed images are now made with the help of assistants, and can be seen in JOHN DUGDALE, LENGTHENING SHADOWS BEFORE NIGHTFALL (1995).
63. JARMAN, CHROMA, supra note 57, at 109.
64. To that extent, Blue has a perfectly circular, or perhaps spiraling, structure. The opening lines of Blue evoke an awakening to vision: “You say to the boy open your eyes/ When he opens his eyes and sees the light/ You make him cry out. Saying/ O Blue come forth/ O Blue arise/ O Blue ascend/ O Blue come in” and mark ‘blue’ as the space of subjectivity and relationality: “Blue of my heart/ Blue of my dreams/ Slow blue love/ Of delphinium days.” JARMAN, BLUE, supra note 57, at 107-08. In Blue’s closing poem, having moved through details of illness, treatment, and decline, the final line rewrites “blue” as the space of subjectivity, relationality and death: “I place a delphinium, Blue, upon your grave.” Id. at 124.
“Blue” is not only the color of the screen that captivates the gaze of the spectator; it also names and marks the site to which the oral speech is destined or transmitted (in a juridical terminology, it is justice). And just as Gonzalez-Torres’ artworks tend always towards disappearance, Blue always moves towards death. The film’s key motifs are given a melancholic finality in the closing poem:

| Our name will be forgotten | In the time | Our life will pass like the traces of a cloud | And be scattered like Mist that is Rays of the sun For our time is the passing of a shadow | And our lives will run like Sparks through the stubble. | I place a delphinium, Blue, upon your grave. |

In some ways, the film makes literal the difficulties inherent in the struggle to portray the unrepresentable that is HIV, the virus that cannot be seen, the illness that for years has no symptoms other than invisible antibodies present in the blood. As Haver evokes, the struggle to represent the relation of the self to the loss of self occasioned by AIDS “signals what will henceforth be the impossibility of language, communication, and sociality,” an impossibility inscribed as a narrative of melancholia, desire, and mourning. David Wojnarowicz, another artist who died from AIDS, spoke angrily of the pain of being frozen in the image: “Sometimes I come to hate people because they can’t see where I am. I’ve gone empty, completely empty and all they see is the visual form. . . . I’m a xerox of my former self. . . . I am disappearing. I am disappearing but not fast enough.”

Blue engages with the paradoxical acceleration of invisibility in the image imposed upon marginal groups (often those who have become synonymous with the transmission of HIV): gay men, injecting drug users, whiteness’s racial others, prisoners. Jarman’s film can thus be understood as an activist intervention, from an artist who for years had been sickened by the endless parade of stereotypes deployed by the British media when depicting gay sexuality and when depicting HIV/AIDS. As Jarman asks in Blue: “How are we to be perceived, if we are to be perceived at all? For

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65. Id. at 123-24.
the most part we are invisible." Jarman is all too aware that visibility can be a projection, an image constructed around a condensation of fearful signifiers. He notes that HIV infection invokes: "All the old taboos of/ Blood lines and blood banks/ Blue blood and bad blood/ Our blood and your blood/ I sit here and you sit there," linking social class, racial and sexual segregation, and homophobia in the overcoded signifier of blood which works to effect a paradoxical visual invisibility.

Both intensely figurative (representing blue as sexual desire, sadness, melancholy, serenity, and so on) and also utterly literal in that it presents to us no image other than a blue screen, Blue is a cinematic work that rejects kinesis, the moving image. It has no personae in the sense of actors or characters, places or scenes. It thus removes the object of the gaze by providing instead a visual object which remains unmoving. Blue is thus strangely paradoxical: film is the art of the moving image, while Blue is a film whose image does not move. Where Gonzalez-Torres interrupts attachment to the image by setting the artwork in motion, for Jarman, attachment to the image is interrupted by the immobile image of blue. While the spectator seeks in vain for something to look at, the film insists rather that we listen and re-member. Jarman tells us: "In the roaring waters/ I hear the voices of dead friends . . . My heart’s memory turns towards you/ David. Howard. Graham. Terry. Paul." Blue detaches the spectator from the screen and attaches the viewer to the voice. In this process, we are re-moved into an audience of voices, into an ethical relation that allows a response to the suffering other.

III. THE SCENE OF ANOTHER JUDGMENT

Jarman’s displacement of visual personae is not simply a consequence of filmmaking after the advent of blindness; rather, "In the pandemonium of image/ I present you with the universal Blue/ Blue an open door to soul/ An infinite possibility/ Becoming tangible." Caught in the tension between the tyranny of the image ("a prison of the soul") and the desire to make images, Jarman enjoins us:

69. Jarman, Chroma, supra note 57, at 113. See also the discussion of visibility, nationality and queer politics in the “cinema of AIDS” (including Jarman’s Blue) in Smith, supra note 57.
70. As Burns Neveldine writes, “[O]nly an accumulation, an overaccumulation, of representations will make AIDS, and the bodies of persons with AIDS, radically visible and therefore viable: granted life, authorized to be written and read, allowed to mingle, or condemned to wither away, or condemned for withering away.” Burns Neveldine, supra note 34, at 150. For more on the metaphorization of HIV/AIDS and its consequences, see, for example, Susan Sontag, AIDS and Its Metaphors (1991); Waldby, supra note 34; Simon Watney, Policing Desire (1989); and Alison Young, Imagining Crime (1996).
71. Jarman, Chroma, supra note 57, at 121.
72. Id. at 108.
73. Id. at 112.
74. Id. at 115.
For accustomed to believing in image, an absolute idea of value, [the] world had forgotten the command of essence: Thou Shalt Not Create Unto Thyself Any Graven Image, although you know the task is to fill the empty page. From the bottom of your heart, pray to be delivered from image.75

Thus Jarman uncovers the attachment to the visual order that is entailed when phantasy seizes the imagination. His injunction—"pray to be delivered from image"—substitutes "image" for "evil" in the conventional invocation. A plaintiff before the court was archaically said to "pray" to the court for relief. One of my aims in this Essay has been to trace this indelible, if illegible, prayer as the vocation of judgment. As Green, Andrew and Kane, and X make clear, judgment proceeds by means of a series of configurations, personae, or images of infection which fix and immobilize the subject of HIV and gay sex. The written texts of law reconstruct the event (the "real") of HIV in the order of vision, where judgment is governed by the desire to see, and in "seeing," to have done with HIV.76 The vision of law remains an aesthetic in which an inscribed image breaks the link between the eye and the pain of the other. The way that the law sees HIV is defensive, self-protective. Goodrich comments:

The constitution, the community of doctrine and of law, had to be defended and indeed would define itself antirhetically ... against an outside peopled by strangers, foreigners, ... and other untouchables. Similarly, there were enemies within the constitution and against whose antiportrait the image of the upstanding legal subject could be projected.77

The visual texts of culture expose the writing of law as idolatry. They draw the event closer to and through an ethics of alterity, an ethics that confounds the juridical order of vision (a vision of the self, of the State). Their interventions turn our attention away from the image: they bind us to the other through oral and tangible media. With Blue, we attend to the voice of the other; with Lover Boy, we attend to the body of the other. These aural and corporeal relations point towards the materiality of another scene of judgment.

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75. *Id.* at 114-15.
76. The Aristotelian account of the will to knowledge as a desire to see constructs the juridical moment of metaphysics as the pronunciation of judgments on the correctness of the world. Minkinnen notes the aporetic and agonising nature of this will or desire when remarking that, "Justice constitutes the desired object (to orekon) of a "first philosophy" of law, but in the judgments of correctness that a mortal man is capable of, such justice is forever delayed. ... For the ownmost essence of things, that is, justice in itself, or the future that will come to be, is a matter fit only for infinite gods." PANU MINKINNEN, THINKING WITHOUT DESIRE: A FIRST PHILOSOPHY OF LAW 47 (1999).
IV. CODA: LAW IN THE IMAGINARY REALM OF CULTURAL STUDIES

Just as the artworks contemplated in this Essay signal a trajectory towards an other scene of judgment, so also do they point towards the relation that might ensue in the move from the visual realism of law towards the imaginary realm of cultural studies. The trajectory of this Essay has moved from the written texts of law to the visual texts of culture. Such a trajectory re-stages the larger scene of contemporary legal studies in the Anglo-American tradition. In the recent years of this tradition, a shift has taken place which promises to understand law as culture and jurisprudence as cultural studies. The law-and-literature movement evokes literature as sensitizing the judge, while the interest in hermeneutics binds the process of legal interpretation to the virtue or character of the judge. Where we were once encouraged to be literary, to become social and to “get real,” now we are exhorted to “do” cultural studies. What has been at stake in this injunction, and this conjunction, of law and culture?

For my purposes, it is that modern law wants (for) judgment. More specifically, I seek to ask what understanding of judgment could take account of the fragmented, suffering, fleshly body? The artworks and film suggest the elements of a response. As I hope to have made clear, the judgment of HIV takes place on the site of conditions of attachment to (the) law (of the other). If judgment is a matter of memory, incorporation, and hearing, then attention is due to the process of inscription—understood here as the naming and marking of the body. In the written texts of law, the eye of the judge has become disconnected from the pain of law’s proximate others.

Nevertheless, it is still possible that the eye of the law could be made to flicker from the mark to the pain of the other in law, for the stilled voice to listen or hear, for the upright hand that holds the rule to waver. Gonzalez-Torres and Jarman remind us that law has not been totally occupied by the modern textuality. There is a site through which judgment can take place, reconstructed around the aural and corporeal scenes of attachment.

78. As examples within this shift, see LAW, CULTURE AND THE QUESTIONS OF FEMINISM (Nina Puren & Alison Young eds., 2000); LAW IN THE DOMAINS OF CULTURE (Austin Sarat & Thomas R. Kearns eds., 1998); and RICHARD SHERWIN, WHEN LAW GOES POP (2000).

Gonzalez-Torres re-stages the loss of the other in terms of fleshly touch, as the art object brushes up against and inscribes the other on the body of the spectator. Jarman interrupts the idolatry of modern textuality by reasserting the melancholy claims of speech, as the moving image inscribes the other in the ear of the spectator. The transmission of law in the moment or scene of judgment takes place, as a response to the other, through the corporeal and audible inscription of the pain and passion of the lover. Legal judgment may be dominated by modern textuality and the order of the visual, but the texts of culture show that there are materials (which operate through memory, incorporation, hearing) through which to respond in judgment to the proximate other. Unlike law, which subjects the death and dying of others to the horizon of “our” values—the values and phantasies of the living—cultural studies might subject the legal and the living to the horizon of deathbound subjectivity. What would remain is not the dead letters of law but the materials of voice, touch, and memory. Such is the value of cultural studies to law: the provision of material for a reconstruction of judgment in proximity with the fragmented bodies of law’s suffering others.