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ABSTRACT

When introducing the respective roles of the philosopher and the mathematician in Being and Event, Alain Badiou notes that when representing mathematics:

> *placing being in the general position of an object, would immediately corrupt the necessity, for any ontological operation, of de-objectification. Hence, of course, the attitude of those the Americans call working mathematicians: they always find general considerations about their discipline vain and obsolete. They only trust whomever works hand in hand with them grinding away at the latest mathematical problem. . . . Empirically, the mathematician always suspects the philosopher of not knowing enough about mathematics to have earned the right to speak.*[1]

While the discipline of law does not have the ontological purchase of the discipline of mathematics, the working lawyer, like the working mathematician, would feel disconnected from "the rigorous description of the generic essence of [his] operations"[2] *that the philosopher might offer.*

Badiou further reports that "justice" is a philosophical word if we do not include juridical significations in it.[3] *It is precisely here, when the juridical significations are left aside, that the lawyer (not the legislator) is excluded from the benefits of a "rigorous description"*[4] *that a philosopher might offer. What can be done to extend the ontological understanding of justice to include the subjectivity of the lawyer and to determine whether the juridical is capable of Badiou's sense of "event?"*

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1 ALAIN BADIOU, BEING AND EVENT 11 (Oliver Feltham trans., 2005).

2 *Id.*

3 Alain Badiou, *Truths and Justice*, *in* METAPOLITICS 96 (Jason Barker trans., 2005).

4 BADIOU, *supra* note 1, at 11.

INTRODUCTION

Early in his essay *Truths and Justice*, Alain Badiou states: "Justice is a philosophical word—at least if we leave aside, as one should, its juridical signification, which is entirely the preserve of the police and the magistracy."[5] Later in the essay, Badiou raises a critique that one finds elsewhere in his work as well—the critique of what he calls "capitalo-parliamentarianism."[6] In large measure, I agree with his observations regarding the functioning of parliaments in service of capitalism, but a consequence of that critique is that there would seem to be no place in the work of Badiou where any extant parliament can escape this negative coupling with capitalism, and hence this dismissal. Badiou then notes that "the State has nothing to do with justice, for the State is not a subjective and axiomatic figure."[7] In short, these three observations of Badiou's together would eliminate the State and the acts of any of Montesquieu's tripartite branches of the State from participation in a philosophy of justice.

Badiou is not satisfied with philosophy that does not conduct its enquiries with a fidelity to the notion of a time-enduring truth. He makes no apologies for Platonist tendencies. When it comes to considerations of justice and law, those Platonist tendencies need do no more than bring one to fourth century Athens. The Socratic philosophers repeatedly made clear that their interests were in justice, not the laws—unlike the Romans of that period, who were completely content to solve legal problems without a grand theory of justice, and from whom the western legal tradition has received far more of its identity.[8]

Later in this Article, I shall revisit the connection of law to the event. At this point, it is sufficient to note that only four topoi[9] are capable of being events: love, politics, art, and science. Justice, per the Greek taxonomy, fits into the possibility of event through the topus of politics.

I. JUSTICE AND THE JURIDICAL

"[J]ustice . . . cannot be defined. . . . [It] is simply one of the words

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[5] Badiou, *supra* note 3, at 99.

[6] *Id.* at 101.

[7] *Id.* at 100.

[8] HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 142 (1983).

[9] BADIOU, *supra* note 1, at 11.

through which a philosophy attempts to *seize* the egalitarian axiom inherent in a genuine political sequence."[10] Even when Badiou announces that "justice" is a philosophical word, he quickly adds that "this philosophical word is conditioned . . . by politics."[11] In combining the function of truth with that of politics, he says: "We shall call 'justice' that through which a philosophy designates the possible truth of politics."[12] Shortly thereafter, he expands on that formula, and uses it to present us with several tasks:

> It then becomes a matter of seizing the past or present manifestations of the politics in question philosophically. The task, then, is twofold:
>
> 1. To examine political statements along with their prescriptions, and draw them their egalitarian kernel of universal signification.
>
> 2. To transform the generic category of "justice" by putting it to the test of these singular statements, according to the always irreducible mode through which they carry and inscribe the egalitarian axiom in action.
>
> Finally, it is a matter of showing that, thus transformed, the category of justice designates the contemporary figure of a political subject. It is this figure that enables philosophy to carry out, under its proper names, the eternal inscription that our time is capable of.[13]

Yet, according to Badiou, the political subject has gone under various names in the past—citizen, professional revolutionary, and even grassroots militant—but today is without a name, and is thus in need of a new one.[14] That naming could well be added to the above list as a third task. But even then we would not be finished. In the common law, and especially in the common law of the United States, I would add to this list a fourth task: to recognize the politics of legislation that occur not directly, but by litigation. Elected legislators far too often concerned with garnering as much support as possible from voters, refuse to take clear or strong positions in legislation and leave it to litigants, lawyers, and judges to do the job of norm-building. With this fourth task added, then, the connections of justice, politics, and democracy[15] can be used to see a philosophical role, modest though it may be, for law.

According to Badiou, "justice" is "the qualification of an egalitarian moment of politics *in actu*."[16] Is this "moment" capable of

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10 Badiou, *supra* note 3, at 99.

11 *Id.* at 96.

12 *Id.* at 97.

13 *Id.* at 101-02.

14 *Id.* at 102.

15 Alain Badiou, *Democracy, Politics, Philosophy*, Lecture at the European Graduate School (Jan. 1, 2006), *available at* http://www.youtube.com/watch?v=5-gjz2yORJk.

16 Badiou, *supra* note 3, at 99.

being an event? As we shall later see, if the moment is not simply the everyday background of *chronos*, but the emergence of meaning, then the answer is yes. Does adding the attribute "egalitarian" affect this answer? It narrows the quality of the moment and is sufficient for much of philosophy to characterize justice. But for Alain Badiou, the egalitarian moment alone is not enough to constitute an event; it must be an egalitarian moment "of politics *in actu*."[17] With that in mind, how should we understand "politics" and how should we understand "*in actu*?" Are all of these qualities—"egalitarian," "moment," "politics," and "*in actu*" necessary for justice? First, the easiest. Without "moment," justice could be regarded as a status, as described by Aristotle, according to Badiou,[18] rather than as *actus*.[19] But in Badiou's definition, both "moment" and "*in actu*" are included, so either they are together redundant, or are in fact not to be understood in the popular way that would allow them to be equated. The answer is of course the latter: it is politics which is in action as the necessary conditions, and the moment as a temporal seizing of egalitarianism.

When it comes to justice, Badiou writes: "A politics worthy of being interrogated by philosophy under the idea of justice is one whose unique general axiom is: people think, people are capable of truth. . . . [T]hus transformed, the category of justice designates the contemporary figure of a political subject."[20] By comparison, the law, understood as the juridical, is capable of injustice as well, particularly "in an age when the 'law' of the global market provides sufficient grounds for Western State intervention in the internal affairs of developing nations."[21]

Coincidental with Badiou's assertion that the juridical is to be left aside from justice, the justice part of the juridical is missing from legal education. Law students in the United States are taught in their first year of study that public policy arguments are the lowest appeal that one can make. And for the working lawyer, "justice" would be just one such policy argument. I like to illustrate this point with a true story from my own classroom. I had invited a biologist to provide a guest lecture to my third-year law students on the foundation of some environmental regulations. On our way to the lecture, she said that she had never lectured to law students before, and was curious as to what sorts of things we lawyers discussed. "Justice?" she suggested, for instance. "No," I responded, and in reference to the didactic maxims of first-year students, added, "These are third-year students; they no longer

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17 Another name for "politics *in actu*" is "restricted action," a term that Badiou borrows from Mallarmé. *Id.* at 104.

18 *Id.* at 101.

19 It is worth noting that Aristotle wrote *Politics*, but it was his teacher Plato who wrote the *Laws*. *See* BERMAN, *supra* note 8.

20 Badiou, *supra* note 3, at 98.

21 Jason Barker, *Translator's Note*, *in* METAPOLITICS, *supra* note 3, at 106 n.7.

talk about justice." She thought I was joking when I said it, but soon experienced the truth of the matter. When she had finished her lecture, I added some comments to tie the science to law, and raised the question why a particular regulation had been designed as it had. "Judicial efficiency," was one student's answer. "To balance interests," said another. "How about justice?" I offered. An audible laugh arose from half of the class. My guest biologist was horrified—law students had just laughed at justice.

In concluding his *Truths and Justice* essay, after Badiou provides a Celán poem that relates "inconsistency and justice,"[22] he insists that "it is always in subjectivity, rather than community [contra Habermas, for example] that the egalitarian edict (*l'arrêt*) interrupting and overflowing the usual course of conservative politics is uttered."[23] The statist and social inconsistency of all egalitarian politics is given the philosophical name "justice."[24] And it is here that we are able to join in the descriptive and axiomatic vocation of the poem.[25]

In following the form and appeal of Badiou's poetic conclusion to the *Truths and Justice* essay, but in attempting to give an opportunity to the lawyer as subject, I am rather reminded of a poem by W. H. Auden, which, rather than relate justice to inconsistency, relates law (understood as the juridical) to the subject. Auden defines law through a variety of subjects including the gardener, the old, the young, the priest, the judge, the scholar, and the crowd. He then concludes with his own subjectivity—"timid similarity"—through simile,[26] but nevertheless reserves a place for the juridical (not only justice) in the subject:

> Although I can at least confine
> Your vanity and mine
> To stating timidly
> A timid similarity,

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22 *Id.*

23 Badiou, *supra* note 3, at 105.

24 *Id.*

25 *Id.*

26 In *Truths and Justice*, Badiou criticizes definitions (of 'justice'):

> Every definitional and programmatic approach to justice makes it into a dimension of State action. But the State has nothing to do with justice, for the State is not a subjective and axiomatic figure. The State, as such, is indifferent or hostile to the existence of a politics that touches on truths. The modern State aims only at fulfilling certain functions, or fashioning a consensus of opinion. Its subjective dimension merely consists in transforming, in resignation or *ressentiment*, Capital's economic necessity, or is objective logic. This is why every programmatic or statist definition of justice changes into its opposite: justice becomes a matter of harmonizing the interplay of conflicting interests. But justice, which is the theoretical name for an axiom of equality, necessarily refers to a wholly disinterested subjectivity.

Id. at 100.

We shall boast anyway:
Like love I say.

Like love we don't know where or why,
Like love we can't compel or fly,
Like love we often weep,
Like love we seldom keep.[27]

II. REINTRODUCING THE LAWYER AND THE JURIDICAL TO THE ENQUIRY

How can *working lawyers* be brought into the consideration of "law and event?" More specifically, what can be done to extend the ontological understanding of justice to include the subjectivity of the working lawyer? If not the executive, judicial, or legislative actors, who then might remain as the legal subject in Badiou's corpus? While introducing the respective roles of the philosopher and mathematician in the thesis of *Being and Event*, Alain Badiou notes that when representing mathematics:

> [P]lacing being in the general position of an object, would immediately corrupt the necessity, for any ontological operation, of de-objectification. Hence, of course, the attitude of those the Americans call *working mathematicians*: they always find general considerations about their discipline vain and obsolete. They only trust whomever works hand in hand with them grinding away at the latest mathematical problem. But this trust—which is the practico-ontological subjectivity itself—is in principle unproductive when it comes to any rigorous description of the generic essence of their operations. It is entirely devoted to particular innovations. . . . Empirically, the mathematician always suspects the philosopher of not knowing enough about mathematics to have earned the right to speak.[28]

Anyone who identifies himself or herself as the working arm in a discipline of a set of skills typically carries such a suspicion. Practitioners of the sociology of scientific knowledge (SSK), working at the Universities of Bath and Edinburgh in the late twentieth century, observed that working scientists—and by this they meant physicists, chemists, and biologists—doubted anyone's ability to speak about science, if that person was not himself or herself a card-carrying physicist, chemist, or biologist.[29] They held this skepticism perhaps

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27 W. H. Auden, *Law, Like Love*, *in* WYSTAN HUGH AUDEN, THE COLLECTED POETRY OF W.H. AUDEN 74 (1945), *available at* http://www.poemhunter.com/poem/law-like-love-2/.

28 BADIOU, *supra* note 1, at 11.

29 *Compare* BARRY BARNES, DAVID BLOOR & JOHN HENRY, SCIENTIFIC KNOWLEDGE: A SOCIOLOGICAL ANALYSIS (1996) *with* LEWIS WOLPERT, THE UNNATURAL NATURE OF SCIENCE

with good reason. In bringing this point to law, Peter Goodrich noted pointedly during a symposium on the topic of "law and literature," that if literary theory is unrelated to law, it is because the literature people "don't allow the facts of law to operate as impediments to their theories."[30]

I would add that within the American legal academy, due to the historical peculiarities of mixing professional training with academic law, we have faculties divided between working lawyers and theorizing lawyers, each claiming exclusive relevance to the discipline, or at the very least, disciplinary superiority. Among philosophers, this dichotomy might be couched in its abstract sense as a species choice between epistemology and ontology. And we know on which side the work of Alain Badiou lies. But I should like to note that academic philosophy does not really have a practice wing in the building, the way that mathematics, biology, or law does. Will these practice wings embrace philosophy the more if it functions to seek universal truths instead of theories of interpretation? Regrettably, but sincerely, I doubt it. This then, is the challenge. Those who have lived with philosophy know its value. We need not discuss that here. But if we are going to talk about law, we must confront not only justice, which is sadly in low quantity, but which has a vein of ontological gold in its richness; we must also confront the juridical, which by comparison to justice is voluminous in quantity, but perhaps iron pyrite in ontological richness.

And it may well be that precisely in such an area as law, where there is this internally-conflicted split personality, that by necessity, an ontology of the work practices—the juridical—might make sense. Lest one shy away from giving voice to a profession that today is heavily dishonored, I am here reminded of a passage from Hölderlin's poem "Patmos," so often quoted by Heidegger: "Where the danger lies, there the saving power also grows."[31]

Professional life is filled with similar tensions between those who style themselves as the "doers," the "hands-on, roll up your sleeves and get something done" people and the "thinkers" or "theorists." I have worked with bricklayers among whom the higher skilled and higher paid were chided by the hod-carriers with the quip "you get paid for what you do, not what you know." Theorists and thinkers in turn may claim superiority over the doers by pointing out that one's actions always and already follow a theory or at least a sociology, and either one benefits from knowing what that is, or one marches to someone

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(1993).

[30] Peter Goodrich, The Failure of the Word: the Rise of Law and Literature, Cardozo Law Review Symposium, Benjamin N. Cardozo School of Law, New York (Feb. 20, 2005.)

[31] Friedrich Hölderlin, *Patmos*, *in* POEMS OF FRIEDRICH HÖLDERLIN 39 (James Mitchell trans., 2004).

else's music, perhaps unknowingly at one's own peril. Architects ridicule engineers, and vice versa. In this light, Alain Badiou has observed that "[t]he problem with most doctrines of justice is their will to define what it is, followed by attempts to realise it."[32] Nevertheless, Badiou does explicitly discuss law. To that extent, it is worth noting Badiou's use of Rousseau's distinction between decrees and laws:

> Laws are the foundation of any social order and, since they enable governments to enact decrees, governments (which are only majority assemblies) cannot pass them. In order to be legitimate, laws require the assent of the whole people. This is not to say that laws must enter into every aspect of the people's lives, or that they are oppressive of individual freedoms. On the contrary, they are the basic axioms which enable individual freedoms to exist in the first place.[33]

Before considering what the working lawyer as subject might be, or how he or she might have a role in justice, one must consider whether the working lawyer can be considered as a legal subject for justice.[34] Badiou makes clear that no conceptual apparatus is sufficient without a doctrine of the subject.[35] Oliver Feltham, who translated Badiou's *Being and Event* into English, has commented that "the only way to develop a modern de-substantialized non-reflexive concept of the subject is to restrict it to that of a subject of praxis."[36] Of interest to my questions is the fact that for Badiou, "any subject whatsoever may carry out the work of the enquiries."[37] And as to the goal to be obtained and its distinction from ideology: "The distinction between generic truth procedures and ideologies is . . . a practical matter to be dealt with by those locally engaged in the procedure."[38] Who then might be more local to the procedures of justice than the working lawyer? Badiou's theory of praxis provides a bridge between what would seem to be the disconnected pedestrian acts of the working lawyer and a philosophy capable of justice. But, as Feltham has commented, Badiou's theory of praxis is a "renovated" theory in which "the new happens in being, under the name of the event."[39]

For the philosopher, the subject is understood as being the point of view of the self, that is, the speaker or writer, and the object is

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32 Badiou, *supra* note 3, at 99.

33 Barker, *supra* note 21, at 100 (emphasis omitted).

34 The litigant is not significant in juridical language as a subject, but as an object. OREN BEN-DOR, THINKING ABOUT LAW IN SILENCE WITH HEIDEGGER 4 (2007).

35 BADIOU, *supra* note 1, at 2.

36 Oliver Feltham, *Translator's Preface* to BADIOU, *supra* note 9, at xxxi (citing Oliver Feltham, *And being and event and . . .: philosophy and its nominations*, *in* POLYGRAPH 16 (2005)).

37 *Id.* at xxix.

38 *Id.* at xxx.

39 *Id.*

understood as being the point of view of the other, the thing, the that-which-is-not-the-self. Thus we return to Badiou's coupling of "disinterested" with "subjectivity." The disinterested subject is the disinterested self. Disinterested in what way? Badiou has changed the more standard post-modern concept of the subject, the placement of the subject and the importance of the subject (announcing a "second epoch for the doctrine of the Subject"[40]) but has not removed the subject, as did Plato, nor attempted to erase the subject-object split, as did Heidegger.

Why introduce the lawyer as a subject capable of justice? There are three reasons. First, simply because the subject has a role in Badiou's philosophy, unlike the subject-less philosophy of Plato. Laypersons may have a lay sense of justice (such as treating like persons and like behaviors alike), but lay persons cannot articulate how laws might accomplish this sense of justice. Second, it is true that traditional (Aristotelian, syllogistic) logic fails to enable the necessary categories and historical conditions of the law. Common law, in theory, is piecemeal, taking one step at a time, without an over-arching, pre-determined set of principles. Witness the Constitution of the United Kingdom, the binding judicial precedent in any common law country, and the strong advocacy role of the practicing litigator in the adversarial practice of the system. Yet compare these piecemeal phenomena with the analytic tradition of philosophy in the United Kingdom or the United States, and it would appear to be a completely different society of persons who could have developed legal systems with these attributes, if indeed a society manifests itself through its institutions. Indeed, the civil systems of continental Europe would be much more aligned with attitudes toward the ascertaining of truths with Anglo-American rationalist philosophy. But instead, these legal systems sit somewhat comfortably among so-called "continental" (also known as "non-rational") philosophy.

The nature of the decision of a case in civil law is that the decision is said to have consequences only for the litigating parties before the court at that moment. Yet the working lawyers in the civil law systems, as well as their spokes-theorists, are keen to announce that theirs is a legal science, with hypotheses, rules, hypothesis-testing, and rule-determined consequences.

A common law case decision, by contrast, functions within the common law legal system in that it not only makes a decision for the present litigants and issues, but also creates a binding legal rule of interpretation for factually similar future cases. Indeed, Badiou has stated that he would like the publication of *Being and Event* "to mark an

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[40] BADIOU, *supra* note 1, at 3 (emphasis omitted).

obvious fact: the nullity of the opposition between analytic thought and continental thought."[41] Therein is an irony—insofar as continental thought in philosophy typically would be aligned with the poetic and set up in opposition to the analytic type of Anglo-American thought. At first blush, this typology would not appear to hold up when applied to the law. Continental legal science is, or at least historically was, driven by codified bodies of statutory rules—the *Code civil des Français,* the *Corpus Juris Civilis*, and the *Bürgerliches Gesetzbuch*, for example.

By comparison, Anglo-American law was thought to be as rule-free as the judge's last opinion. In fact, the term "opinion" is so commonplace as the common noun referent for juridical decisions and their rationale that no one any longer questions whether any truth is involved in the adjudication. But at second blush, or perhaps under the influence of post-Enlightenment scientism, when everyone wants to claim to be "more scientific than thou," while the continental jurists still appeal to the deductive pattern of their reasoning (producing echoes of "hypothetico-deduction"), Anglo-American jurists also claim to be scientific, but inductive rather than deductive. The recorded decision and rationale of the common law judge adds a rule of law, if none existed before, as in the so-called "case of first instance," or simply refines an interpretation of an existing rule.

Each case is an experiment, with only a slight incremental change or affirmation, cautiously creating an *acquis communautaire* on a case-by-case basis, rather than legislating an over-arching rule. In his *Juristische Methodenlehre*, the German legal philosopher Reinhold Zippelius demonstrates, through symbolic logic, the essential interpretive steps necessary in order to make the civil law function.[42] "Unbiased, neutral, deductive, science" would thus seem to be more of an asymptote, perhaps even an ideological one, that guides the data points of legal decisions, but which is itself an unachieveable absolute.

Perhaps it is precisely because the legal systems provide an outlet for cultural pressures that the discipline of law may manifest thinking that is other than the discipline of philosophy manifests in that same culture. Hence, because the culture produces the *Bürgerliches Gesetzbuch*, the culture feels its rational work is done for it, and it can find other modes of truths and accuracies in Heidegger's writing. Likewise in reverse for the common law countries. Thus one can see that there is not consistency in thought between the disciplines of philosophy and law within any given culture. Indeed, the categories of thought can be sliced in varied ways, thereby creating a stitched-together whole within any culture, rather than a monumental and consistent synthesis. For example:

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41 *Id.* at xiv.

42 REINHOLD ZIPPELIUS, JURISTISCHE METHODENLEHRE 85 (10th ed. 2005).

> Since World War II, thinking in terms of natural law has been revived on all fronts. The fundamental distinction between those involved in its revival is not one between continental and noncontinental thinking, but between two approaches to natural law. On the one hand is an approach to a jurisprudence described in terms of natural rights (as exemplified by Kant) and one described in terms of natural law (as exemplified by Cathrein, following Thomas Acquinas). On the other is an approach to jurisprudence described in terms of *neither* natural rights or natural law, but in terms of Stammler's social ideal or in utilitarian terms as exemplified by Bentham and Austin. Contrary to the restricted positivist view held by Maine and Radbruch, there is room for this debate in the legal education of lawyers.[43]

In considering the ideological disagreement between Oliver Wendell Holmes and the first Dean of Harvard Law School and advocate of the case study system of legal education, Christopher Columbus Langdell,[44] Susan Haack has recently pointed out that neither had more than a layperson's understanding of logic, which meant that neither would have known of, nor understood the more powerful tools of logic that Frege and Peirce had just developed, and which are with us yet today as the "classical logic" of Russell and Whitehead's *Principia Mathematica*.[45] Nevertheless, Haack argues that "the old debate between Langdell and Holmes remains of more than merely antiquarian interest; for while these new logical tools certainly have something to contribute, they by no means nullify the insight behind Holmes's resistance to the idea of law-as-logical-system."[46] Jerome Frank even argued in *Courts on Trial* that it is difficult if not impossible to establish the facts of the case.[47] Haack has pointed out, however, that the "classical logic" of Frege and Peirce "has been used by legal scholars primarily as a tool for resolving structural ambiguities."[48] With that advance, we can begin to see a way to make the juridical philosophically interesting.

As between the civil law and the common law, theorists of the civil law often make claims that as compared to the piecemeal determinations of the common law judge and the binding nature of the

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43 Jes Bjarup, *Continental Perspectives On Natural Law Theory and Legal Positivism*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 287, 297 (Martin P. Golding & William A. Edmundson eds., 2005).

44 *Compare* O. W. HOLMES, JR., THE COMMON LAW 1 (Lawbook Exchange, Ltd., 2005) (1881) ("The life of the law has not been logic; it has been experience.") *with* C. C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi (Lawbook Exchange, Ltd., 1999) (1870) ("Law, considered as a science, consists of certain principles or doctrines.").

45 Susan Haack, *On Logic in the Law: "Something, but not All,"* 20 RATIO JURIS 1, 11 (2007).

46 *Id.* at 9.

47 BEN-DOR, *supra* note 34, at 1.

48 Haack, *supra* note 45, at 11.

common law judge's interpretations, the civil law operates as a social science, using logic and deductive structures to provide predictability, verifiability, and clarity. At the very basic level of the working lawyer, Zippelius finds that the calculus of the civil system is deceiving, and would thus be more akin to para-consistent and intuitionalistic logics, or worse, a logic of appearance.[49] He says:

> To the laity, the main application of legal thinking is the formal thought of the syllogism, in which the legal norm is the major premise, the facts of the case are the minor premise, and the valid establishment of the normative legal result for the facts of the case is the conclusion. However, the share of formal logical thought in legal thought should not be overestimated. The judge's difficult efforts are valid for the discovery and the exact limitations on the establishment of the premises (namely the appropriate statements of law on one side and the determination of facts of the case on the other side.) Here, Schopenhauer's statement applies: the "difficulty and the danger of erring lies in the setting of the premises: not in the pain from the conclusion; this follows necessarily and from itself. But to find the premises is the difficulty: and there we leave logic behind us." Therefore legal decisions will be found playing a musical ensemble with premise-searching, premise restricting, and premise establishment as well as formal logical thinking.[50]

Thus, both the civil law tradition (per Zippelius) and the common law tradition (per Holmes) arrive at the understanding that law cannot be a set of rules alone, no matter how flexible and powerful the logic becomes. This conclusion points toward the wisdom of the functioning of the event as characterizing the nature of the law—even the juridical.

How might a juridical happening qualify as an event? Given that one cannot intentionally create the event nor intentionally characterize it as such after the fact, one would need to find the juridical happening that takes on the status of event from praxis and from context, not from fiat. In the common law, judicial decisions of appellate courts bind the outcome determinations of subsequent trial courts in the same jurisdiction, if the same legal norms are invoked and the pattern of factual happenings is characterized as being sufficiently similar to the factual happenings of the case at hand.

If sufficient subsequent references are made to that judicial decision, in its textual form, as creating significant legal meaning, the decision is referred to as a "landmark" decision—a marker that rises up from the otherwise insignificant landscape, and one that represents far more than the obvious materials and forms from which it is made. These landmark decisions are, for the working lawyer, legal events.

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49 *See* ZIPPELIUS, *supra* note 42.

50 *Id.* at 86 (quoting A. SCHOPENHAUER, VORLESUNGEN ÜBER DIE GESAMTE PHILOSOPHIE 361 (1913) (author's trans.)).

They are not status, nor are they everyday.

Consequently, the "and" of the phrase:

> "being and event" . . . finally names the place of the subject, the subject of the work of change, fragment of the truth procedure—the one who unfolds new structures of being and thus *writes the event into being*. . . . The 'and' of being and event is thus up to the subject: it's open.[51]

When a working lawyer asks a witness questions, and that witness is sworn to "tell the truth, the whole truth, and nothing but the truth," we can see several contextual operations simultaneously taking place. First, if the witness is asked a simple question of observation ("was it snowing?") he or she can rather easily determine what would be understood as a truthful response.

Second, he or she likely would see an easy difference between telling the truth alone, and telling the truth but adding false statements. But what is it to tell the "whole truth?" From what cultural understanding and context must the witness make the determination of all that might be part of the whole? We cannot approach that question mathematically; rather, we must look at what Badiou calls the "interval of two events" to find a context. As Jason Barker has written:

> Mathematics cannot totalize philosophy completely, and occasionally something happens which escapes thought. Badiou names this unforeseen happening "the event.". . . The event is what changes a situation. Quite what that event will turn out to have been after the event, however, is a question of time, or what Badiou calls the "interval of two events."[52]

Echoing Derrida's question: Why are some differences marked and others are not?,[53] Badiou develops the marked differences into events. Unmarked are chronological things, which Badiou dismisses to the "chronicler of ontology,"[54] but these cannot rise to the level of events, even when investigated in the name of ontology.

Third, the introduction of the lawyer as a subject capable of justice may offer the agency to take the possibility of making the juridical philosophically interesting and make it so. The question becomes, if we introduce the juridical and its actors—the working lawyers—is the juridical capable of ontology with an attitude towards truth (and thus of qualifying for Badiou's notion of "fidelity")[55] or even in its renovated state, is the juridical capable only of being a facilitator for justice? To begin to answer this last question, one might look to the suggestions of

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51 Feltham, *supra* note 36, at xxxi n. 16 (emphasis in original).

52 JASON BARKER, ALAIN BADIOU: A CRITICAL INTRODUCTION 6 (2002) (citing BADIOU, L'ÊTRE ET L'EVENEMENT 232 (1987)).

53 JACQUES DERRIDA, WRITING AND DIFFERENCE (Alan Bass trans., 1978).

54 BADIOU, *supra* note 1, at 13.

55 Adrian Johnston, *Confronting the New Sophists*, *in* 6 THEORY AND EVENT (2002).

scholars who preceded Badiou.

To say that the juridical significations *are* the preserve of the police and the magistracy seems to make a descriptive statement through the function of the word "are" as copula, but if we were to find that juridical significations also could be outside of the domain of the police and magistracy, then it may well have been a normative statement to constrain the significations. Alternatively, a latent appeal to some form of natural law might even apply here. Rudolf Stammler's natural law doctrine of law as "social ideal" represented "in the 1920s, an effort to go beyond 'technical legal science' to develop natural law, but one with 'a changing content,' not fixed in an *a priori* Kantian fashion."[56] Gustav Radbruch, perhaps due to his having endured the Nazi era, "criticized Stammler's effort and proposed instead [what became known as] the 'Radbruch formula,' according to which law is to be identified with positivist terms, subject to the proviso that law that does not even attempt to do justice is to be dismissed as 'false law.'"[57] These are just a few examples to show that there are ways to quarantine the technical, positive, or juridical rules that Badiou apparently finds incapable of philosophy, but perhaps still have a concept of law that is capable of philosophy—some juridical significations that could be outside the narrow domain of the police and magistracy.

Into what corner have I painted the working lawyer as a subject capable of justice? If the juridical is to be philosophically interesting—that is, ontologically interesting—it is not of interest because of the specifics of the lawyer's daily tasks, such as the assignment of logical referents to establish something called "facts of the case" that one may then subsume under the rule of law. Both the common law and continental legal traditions recognize this shortcoming. Unfortunately, as soon as law students discover that there is no solid connection between the sign and its referent, their materialist-pragmatist socialized "intuition" kicks in, and they feel it is rabid relativism and an unrestrained power game among crass forces—the police in criminal law, maleness in family law, the military in international law, and money in the law of corporations, business, and others. But even then, with this material pragmatism (mobilized cynicism) in place, these same students or young lawyers hit upon real cases where somehow the police, the military, the male of the big corporation did not "win." Only then can they begin to understand the subtle symbol-referent relationship. Similarly, biologist Steven Rose has stated that the first moment the student of science realizes the degree to which his or her molecule-building and cell-building is also and necessarily theory-

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56 William A. Edmundson, *Introduction* to THE PHILOSOPHY OF LAW AND LEGAL THEORY, *supra* note 43, at 10.

57 *Id.*

building is the moment when he or she must write up the results of his or her own experiment that tested his or her own hypothesis, rather than a science cookbook recipe.[58] Jason Barker asks, "Why should scientists have a monopoly on truth?"[59] In a similar vein, Jon Turney has remarked that science is too important to be left to scientists.[60] It is, however, a time in history when many assume that science does have the final word on all matters, including those of knowledge production. For example, in her book *Science on Trial*, *New England Journal of Medicine* editor Marcia Angell refuses to consider that the testimony of one or more scientists in a court of law should be accepted as superior evidence to an epidemiological study on the issue of whether silicone breast implants cause connective tissue disease.[61]

What does remain of ontological interest, however, is to distinguish what *presents* itself (essentially what the Greeks would have called "the many") from *what* presents itself (essentially what the Greeks would have called "the one"). This multiplicity of presentations, such as interpretations of statutes, constitutions or regulations, are juridical *acts*. (They may even turn out to be events.) With an ontology of multiple juridical acts presenting themselves as the law, one can understand the law as *actus*, not *status*. Without moment, justice could be regarded as status as maintained by Aristotle. If, as is maintained by Badiou, "justice" is the qualification of an egalitarian moment of politics *in actu*, so, too, I would argue, the quality of *in actu* extends to the multiplicity that is the juridical.

A less direct concern for working lawyers, but still a related one, is Badiou's statement that democracy is a condition of philosophy,[62] because he goes on to note that laws can forbid some opinions, even in a democracy. Also related is his statement that mathematics consists of primitive choices, logical rules, and consequences, for these statements begin a connection to the working lawyer. Would these logical rules correspond to the "juridical" in justice? He concludes that "equality and universality are the characteristics of valid politics in the field of philosophy. The classical name for this is 'justice.'"[63]

What happens if one does not exclude the juridical signification from a philosophical discussion? One may begin to explore this idea by

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58 Interview with Steven Rose by Kirk W. Junker at the Open University, Milton Keynes, U.K. (July 1996).

59 BARKER, *supra* note 52, at 5.

60 Jon Turney, *To Know Science is to Love It? Observations From Public Understanding of Science Research*, *in* PUBLIC UNDERSTANDING OF SCIENCE PRACTICE SERIES (1998), *available at* www.communicatingastronomy.org/repository/guides/toknowscience.org.

61 MARCIA ANGELL, SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE (1996).

62 Badiou, *supra* note 15.

63 *Id.*

considering what is the totality from which the juridical signification is being left aside. According to Badiou, "justice, which is a theoretical name for an axiom of equality, necessarily refers to a wholly disinterested subjectivity."[64]

The coupling of the words "disinterested" and "subjectivity" is cause for pause. In the practice of law, there is a standard coupling of "disinterested" with "objectivity" employed by the *working lawyer* in understanding the simple dichotomy of subjective versus objective. Thus a "disinterested subject" would sound nearly oxymoronic. First, I should note the difference between the use of "subjective" and "objective" by the working lawyer compared to the use by philosophers. The working lawyer's sense of the difference is a sense loaded with values of egalitarian fairness. In the working lawyer's sense, "subjective" is an attribute of an individual's personal belief, a belief that may be genuine or disingenuous, forthright or conniving, and based upon ethos, pathos, or logos. Insofar as it is understood as dialectically opposite from objectivity (a dialectic that Badiou attacks in *Metapolitics*),[65] in this working lawyer sense, it is assumed in a scientized world, to be of lesser value than the objective. It is a suspicious basis upon which to form belief, make decisions, or organize a society. It is a synonym equated with bias. In this pairing, that which is known as "objective" is to be trusted and invested in. It is understood as the object—material or abstract—expressing itself and is therefore to be trusted.[66] The objective is a synonym for "neutral."

According to Badiou:

> [The subject] is no longer the founding subject, centered and reflexive, whose theme runs from Descartes to Hegel and which remains legible in Marx and Freud (in fact, in Husserl and Sartre). The contemporary Subject is void, cleaved, a-substantial, and ir-reflexive. Moreover, one can only suppose its existence in the context of particular processes whose conditions are rigorous.[67]

Although the subject is undeniably present, it is not to be featured so strongly so as to displace the pursuit of a truth beyond the limitations of the subject.

Further, this featuring of the act, insofar as it permits events to arise, makes it possible to develop an ontology of the juridical from the magistracy, police and parliament. Badiou reports that his thesis in *Being and Event* is that mathematics is ontology, a thesis that "delimit[s] the proper space of philosophy."[68] He continues, "It is

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64 Badiou, *supra* note 3, at 100.

65 ALAIN BADIOU, METAPOLITICS, *supra* note 3.

66 See Kirk W. Junker, *Making Rights from What's Left of Darwinism*, 36 FUTURES (Sept. 2004), in which I argue that "arguments, not things, make facts."

67 BADIOU, *supra* note 1, at 3.

68 *Id.* at 15.

therefore essential, in order to hold a reasoned debate over the usage made here of mathematics, to assume a crucial consequence of the identity of mathematics and ontology, which is that *philosophy is originally separated from ontology*."[69] According to Badiou, ontology exists fully:

> to the degree that what is sayable—and said—of being qua being does not in any manner arise from the discourse of philosophy. . . . Our goal is to establish the meta-ontological thesis that mathematics is the historicity of the discourse on being qua being. And the goal of this goal is to assign philosophy to the thinkable articulation of two discourses (and practices) which are not it: mathematics, science of being, and the intervening doctrines of the event, which, precisely, designate "that-which-is-not-being-qua-being."[70]

III. LAW AND EVENT

The core ideas around which Badiou's philosophy orbits are, of course, being and event. The study of being, as a study of ontology, is not new for philosophy. Badiou's insistent return to ontology (following Heidegger) and away from the epistemology of the scientized world, already gives one an understanding of the uniqueness of his focus. More precisely, it is his couching of the pursuit of being qua being and his simple, powerful equation that ontology is mathematics, that defines his work. Unlike the Socratics themselves, who may have arrived at a similar ontology but found the mathematics of geometry to equate with being, Badiou arrives at set theory and even the particular interpretation of set theory known as the Zermelo-Fraenkel set theory (with the axiom of choice). All of this we know. But what about "event?" What about *law* and "event?"

First we should eliminate the word "and" as a potential source of concern. As used by Badiou, the "and" in *Being and Event* is up to the subject to determine—it is open.[71] The (English) title of the work might well have been *Being. Event.* and that would have sufficed, provided one understood that the words were independent and the first did not modify the second. And so we turn to "event" and "law and event." Truths are attractive for what remains of them over time and for what is not completely historically contingent. While we may experience events chronologically, their ultimate timeless character makes the chronology largely irrelevant. Advertising and newscasters try to fix chronological happenings as events. That would only be possible if

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69 *Id.* at 13 (emphasis in original).

70 *Id.* (emphasis omitted).

71 Feltham, *supra* note 36, at xxxi.

ethos alone were sufficient to force or create an event. It is not, and we can mark an event as such only after the fact, after it has been recognized repeatedly. Moreover, an event can be established only by its relation to another one. The clearest concise summary of the relation of being to the event is found in Jason Barker's critical introduction:

> As is implied in the title of the book, two elements mark the thesis of *Being and Event*: the place of ontology, or 'the science of being qua being' (being in itself), and the place of the event—which is seen as a rupture in ontology—through which the subject finds his or her realization and reconciliation with truth. This situation of being and the rupture which characterizes the event are thought in terms of set theory, and specifically Zermelo–Fraenkel set theory (with the axiom of choice), to which Badiou accords a fundamental role in a manner quite distinct from the majority of either mathematicians or philosophers.[72]

The axioms of Zermelo–Fraenkel set theory upon which Badiou relies result in his maintaining "that ontology has nothing to say about the event."[73] Badiou limits the list of things capable of being events to politics, love, science, and art. It is in politics that he, like the Socratics, locates justice, and, due to those limitations, and finding no home for the juridical in love, science, or art, presents only a limited discussion of "law." We should begin by assuming that an intervention has occurred:

> The intervention is "unlawful," suspending the law of order we ordinarily attribute to the State. Given the fact that the State is unable to account for that event, the intervention performs the task of nominating it, or giving the event a name. Every crisis of the State can usually be found in a declaration that "In the name of . . . ("justice," "peace," "the Republic," etc.) the law is being challenged. The intervention does not found the event. Instead, it merely intervenes in a situation whose consequences are always already decided in the act of being seized by the State. The intervention, which brings into circulation the name of the event, will always ultimately (re)compose the State's interests, its arbitrary powers, and its wider constitutional aspirations. But what chance is there that the intervention might otherwise serve a truly militant aim, i.e. one whose consequences remain unified, holding themselves together as it were, in spite of the rule of law? This paradoxical mode of intervention is what Badiou calls "Time" which, "if it is not co-extensive to the structure, if it is not the sensible form of the law, is the intervention itself, thought as interval of two events". Time enables the intervention to actually occur rather than simply following mechanically and aimlessly in the wake of what has already gone before it. Although incapable of presenting the exact moment of the event, time at least draws out the event's presumed

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[72] BARKER, *supra* note 52, at 5.

[73] BADIOU, *supra* note 1, at 190.

consequences—to the point of the occurrence of another event.[74]

Given the timeless nature of the sought-after generic, universal, juridical truths, what of them may be known through mathematics? A problem with the ontology of the juridical is that its consideration at best slips into event, but more often slips into a discussion of happenings that do not even qualify as events. Much more could be said, and has been said, of course, regarding ethics in law as a philosophical inquiry, and this discussion need not necessarily lead us back to justice. The juridical concerns of evidence also would lead one to consider epistemological claims that would fall within the province of philosophy.

A former student from many years ago admitted to me recently that she never understood the distinction that I made between "laws" and "the law." It is nothing less than that between the multiplicity and the one. The multiple presentations, as least in the common law, are the cases, the records of those cases, and functioning of the rules and outcomes that may stand the test of time as creating an event. While they may be multiple in their presenting, their *what* is nevertheless the singularity of the law. And it is in this presenting that the common law has the life of experience to which Holmes refers.[75]

The power of the subject is indeterminate except for consequences and impacts. Socrates did not understand that about the writing of Plato. Briefly summarized, while Plato was concerned with only the object, the post-moderns were and are concerned with a ratio of the subject to the object that privileged the subject, and Badiou now changes that ratio of the subject to the object so that although one might say that we privilege the object, the subject is not excluded and is given significance. This balancing takes on several challenges. First, Badiou courageously resists what Marie Hochmuth Nichols has called the "tyranny of relevance."[76] For the law student and practicing lawyer, this lesson cannot be over-emphasized. Second, while Badiou does not want the subject to become all-consuming, as with the post-moderns, the presence of the subject remains the undeniable "saving power" that resides "where the danger lies" for Hölderlin.[77] A third balance may be attributed to Heidegger directly. He warns that "as long as we waiver back and forth on the surface by doubling theoretical and practical maxims, we are not yet in philosophy."[78]

If we re-introduce the juridical to the event, what might we find?

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74 BARKER, *supra* note 52, at 80-83 (citing BADIOU, L'ÊTRE ET L'EVENEMENT 230-31 (1987)).

75 *See supra* note 44.

76 Marie Hochmuth Nichols, *The Tyranny of Relevance*, 6 SPECTRA 1, 9-10 (1970).

77 Hölderlin, *supra* note 31.

78 MARTIN HEIDEGGER, THE METAPHYSICAL FOUNDATIONS OF LOGIC 221 (Michael Heim trans., 1984).

Bringing the truth of an event to fruition requires what Badiou calls the "fidelity" of a subject, since the event's truth has to endure long enough in a quasi-indeterminate status to, so to speak, reap the benefits of a favorable historical verdict.[79] Thus, while the subject is present, he or she cannot simply will something to be an event. So how is an event anything more than the assignation of meaning? Because it is in some way tethered to, and determined by, some truth beyond an individual or collective will.

CONCLUSION

The failure of the law to map neatly onto classical logic, as Holmes accused and Zippelius demonstrated, does not destroy the usefulness and applicability of the mathematical ontology offered by Badiou. The being that is the event, when so characterized afterwards, creates the significant meanings that guide the just working lawyer as well as the just parliamentarian, magistrate, or police officer. The mathematical ontology of the Zermelo-Fraenkel interpretation of set theory is not the wooden calculus attempted by classical logic. Indeed, as Susan Haack notes, some advance over the classical logic that Holmes criticized had been made even by the time Holmes launched his critique—in the work of Charles Sanders Peirce in the United States and Gottlob Frege in Germany.[80] But, as Haack also points out, even the improvements, power, and flexibility added by Peirce and Frege do not allow logic to escape fully the criticism of Holmes (nor that of Zippelius in the civil systems, I would add).[81] The question remains as to whether the Zermelo-Frankel set theory, when it is applied to law, fully escapes these contributions.

Near the end of the essay *Truths and Justice*, Alain Badiou provides the following cadence: "In politics, let us strive to be militants of restricted action. In philosophy, let us strive to be those who eternalise the figure of this action through a categorical framework wherein the word 'justice' remains essential."[82] To this instruction I add: in the law (the juridical), let us strive to understand the being of the multiplicity *in actu*.

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79 Johnston, *supra* note 55, *passim*.

80 Haack, *supra* note 45, at 11.

81 *Id.*

82 Badiou, *supra* note 3, at 104.