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On tragic legal choices¹

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ABSTRACT

In this article the concept of the tragic legal choice is established as an indispensable complement to our theoretical understanding of adjudication. Tragic legal cases are part of everyday adjudication (albeit of course not necessarily part of the everyday experience of each and every judge). In such cases, adjudication will engender a sense of tragic loss, incommensurability, messiness, which cannot be avoided, overcome, or dismantled by means of legal reasoning as a pre-reflective or extra-legal illusion. In this sense, this article is a harbinger of 'bad news' for law and adjudication. Throughout the argument a variety of legal cases will be discussed in an attempt to bring some of this phenomenology to the fore, and also as a means of fostering the reader's sense of the tragic.

KEYWORDS tragedy and law; conflicts between rights; incommensurability; moral remainder; dirty hands; tragic responsive reactions; virtue jurisprudence; judicial perception

'Tragedy requires a recognition of the fallibility of particular moral ideals and aspirations'.²

1. Introduction

At an experiential level tragic choices in adjudication are not so strange a phenomenon. If a layman attends court sessions, watches a courtroom reality series, or, perhaps, as part of an exotic hobby, delves into legal databases, he might well be struck by the tragic nature of certain legal choices, and might even discern a level of tragic sensitivity on the part of the presiding judges.

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¹This article can be regarded as a further elaboration of my earlier work on this topic. See: I van Domselaar, 'Tragic Choice as a Legal Concept' (2010) 119 *Archiv für Rechts- und Sozialphilosophie* 105; I van Domselaar, *The Fragility of Rightness, Adjudication and the Primacy of Practice* (dissertation, University of Amsterdam, 2015) ch 12.

²JD Barbour, 'Tragedy and Ethical Reflection' (1983) 63 *Journal of Religion* 1, 25.

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However, on a more theoretical score the tragic dimension of adjudication has to date received little attention. Theories of law and adjudication, as posited in all sorts of scholarly debates, have paid little heed to tragedy. Legal theory seems to view tragedy either as an extra-legal phenomenon or as a peripheral and negligible phenomenon, in any case at odds with the purported defining features of law and adjudication such as rationality, legal certainty and transparency.

In this article the concept of the tragic legal choice will by contrast be established as an indispensable complement to our theoretical understanding of adjudication. Tragic dilemmas are part of everyday adjudication (albeit of course not necessarily part of the everyday experience of each and every judge). In such cases, adjudication will engender a sense of incommensurability, messiness and tragic loss that cannot be avoided, overcome or dismantled by means of legal reasoning as a pre-reflective illusion. In this sense, this article can be taken as a harbinger of 'bad news' for law and adjudication.³

This article is organized as follows. It firstly discusses the concept of the 'tragic' in (the history of) practical philosophy and legal philosophy. Subsequently, the central features of a tragic legal choice are laid out. I take tragic legal choices to be the result of a genuine conflict between judicial commitments, which leave a tragic remainder in their wake and as such typically evoke a tragic response on the part of the virtuous, responsible judge. Different categories of conflicts between judicial commitments that may give rise to tragic legal choices will be distinguished. Subsequently, the purported advantages and drawbacks of anchoring the concept of a tragic legal choice in both the theory and practice of adjudication are analysed.

One caveat must be made beforehand: as tragedy is an experiential concept, it is not something one can defend by means of analytical argument.⁴ In consequence, this article cannot stand on its own. Its 'argumentative' force depends largely on the actual phenomenology of adjudication in everyday practice, and additionally on all the modes of expression in which this phenomenology manifests itself, for instance in film and in literature. Hence, a variety of legal cases will be discussed in an attempt to bring some of this phenomenology to the fore, also as a means of fostering the reader's sense of the tragic.⁵

³For the use of the term 'bad news' in the context of moral philosophy I draw on B Williams, 'The Woman of Trachis: Fiction, Pessimism, Ethics' in RB Loudon and P Schollmeier (eds), *The Greeks and Us: Essays in Honor of WH Adkins* (University of Chicago Press, 1996).

⁴This problem is common to phenomenology as a philosophical discipline. It cannot provide analytical arguments in support of its own project, because its method is to draw upon lived experience.

⁵I mostly use *fictitious* legal cases that are based on a wide range of cases and judgments that are real. The claim is that the cases that are discussed *could* happen, not that they actually did happen in this exact form.

2. The 'tragic' and (in)commensurability in philosophy and legal thought

Before expounding the main features common to a range of tragic legal choices, some remarks on the concepts of 'tragic' and 'tragedy' in practical philosophy and in legal thought are in order.

Within practical philosophy, the meaning of these concepts hinges predominantly upon an understanding of the Athenian tragedies that emerged at the end of the sixth century BC and which were performed during the annual festival of the city of Dionysia.⁶ These tragedies are considered to be a unique human achievement because of their special style, their characterizing features as a social and political institution, and – most importantly in this context – because they introduce 'tragic consciousness', a hitherto unrecognized aspect of human experience.⁷

Tragic consciousness encompasses the highly complex, largely unintelligible and painful relationship between men, their actions and the external world.⁸ The protagonists of Greek tragedies are neither flawless heroes nor vicious scoundrels, and typically find themselves either at a crossroad or on the verge of making a choice, wondering which course of action to take without having morally reassuring solutions at hand.⁹

Aeschylus' *Agamemnon* for instance, has to decide whether to kill his daughter in order to save his army:

Obey, obey, or a heavy doom will crush me! – Oh but doom *will* crush me once I rend my child, the glory of my house – a father's hands are stained, blood of a young girl streaks the altar. Pain both ways and what is worse? Desert the fleets, fail the alliance?¹⁰

In Sophocles' *Antigone* King Creon has to decide how to deal with his disobedient niece Antigone who has acted against the law of Thebes by interring her brother Polynices, an enemy of the state. Near the end of the play and after hearing the terrible prophecies of the seer Tiresias, Creon is in tremendous doubt about what to do: 'It is dire to yield, but by resistance to smite my pride with ruin – this too is a dire choice.'¹¹

As these examples show, Greek tragedies lay emphasis on the hazard of ending up with 'dirty hands'. These are situations in which defensible

⁶Walter Kaufman puts this as follows: '[T]he plays in question were not called tragedies because they were so tragic – they merely had some connection with goats, and the Greek word for goat is *tragos* – but the word tragic was derived from tragedy.' W Kaufmann, *Tragedy and Philosophy* (Princeton University Press, 1968) 310.

⁷J-P Vernant and P Vidal-Naquet, *Myth and Tragedy* (Zone Books, 1990) 21, 23.

⁸*Ibid*, 315.

⁹*Ibid*, 29.

¹⁰Aeschylus, *The Oresteia. Agamemnon, The Libation Bearers, The Eumenides*, trans R Fagles (Penguin, 1975) 110.

¹¹Sophocles, *The Complete Plays of Sophocles*, trans RC Jebb (Bantam Dell, 1967) 149.

choices lead to morally troublesome losses, famously pigeonholed by Bernard Williams as the moral remainder – a value that, even after the choice, still commands attention and remains on the normative scene.¹²

The moral ambiguity of human actions and, relatedly, the limitation of reason and freedom are highlighted; the protagonists bear responsibility for situations that they cannot fully understand, let alone control. The outcomes are in any case not the effect of bad people simply making the wrong decisions. The protagonists often come to understand the troublesome nature of their actions post hoc, when it is already too late. In Sophocles' *Oedipus Rex*, the protagonist is faced with the unbearable fact that he has killed his father and married his mother: the very outcome that he had consciously tried to avoid. Similarly, in Sophocles' *Antigone* Creon discovers his error too late; by then Antigone and his son Haemon are already dead.

Intimately related to their attention to the phenomenon of 'dirty hands' is the fact that Greek tragedies also thematize what can be dubbed the 'ethics of the aftermath': the variety of responses to the troublesome consequences of choices. Not only do the protagonists react – discursively and emotionally – to the consequences of their own deeds, also the chorus, a group of singing elders, responds and comments on the unfolding events and the role of the protagonist(s) therein. When the protagonists are insensitive to the troublesome consequences of their decisions – when they rigidly stick to their own one-sided perspective – they are not only reproached for 'hubris', but also for their 'blindness'. For instance, in Aeschylus' *Oresteia* the chorus blames Agamemnon for his failure to see the tragic nature of the choice he made: 'Holding her in no special honor, as if it were the death of a beast where sheep abound in well-fleeced flocks, he sacrificed his own child.'¹³

These tragedies thus introduce the idea of a *tragic responsive reaction* to the troublesome consequences of choices and as such also provide an account of practical reason that is responsive to complexity and vulnerability rather than reductive and in search of simplicity. In this account practical reason boils down to a form of perception, of responsive sensitivity that allows one to adequately take in the salient features of a particular situation and to respond accordingly. In describing this form tragic account of practical wisdom Martha Nussbaum uses the image of a spider 'sitting in the middle of its web, able to feel and respond to any tug in any part of the complicated structure'.¹⁴

¹²In this regard conflicts of beliefs follow a different logic than conflicts of values. Whereas resolving the former requires one to give up the 'losing' belief, in case of a conflict of values one does not have to give up one of them as a requirement of logic just because of the conflict. Cf B Williams, 'Ethical Consistency', *Problems of the Self: Philosophical Papers 1956–1972* (Cambridge University Press, 1973), 179; MC Nussbaum, 'Aeschylus and Practical Conflict' (1985) 95 *Ethics* 233, 243; R Hursthouse, 'Two Ways of Doing the Right Thing' in C Farrelly and L Solum (eds), *Virtue Jurisprudence* (Palgrave Macmillan, 2008).

¹³MC Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy* (rev edn, Cambridge University Press, 2001) 39.

¹⁴*Ibid.*, 69.

A tragic account of practical reason is of course far from reassuring; it comes with passivity, insecurity and vulnerability to loss as inescapable elements of a good life. Reason and emotion are inextricably linked. When confronted with Antigone, who is being led to the cave where she will be imprisoned for life, the chorus sings: '[I] can no longer keep back the streaming tears, when I see Antigone thus passing to the bridal chamber where all are laid to rest.'¹⁵ Below we shall see that it is precisely because of the role of passivity and vulnerability in practical life that the first encounter between Greek tragedies and philosophy was an antagonistic one.

Tragedy first appeared on the philosophical stage in Plato's work. Although in his youth an aspiring author of tragedies, Plato's comments on others' works of tragedy were openly antagonistic. In his *Republic*, Plato straightforwardly criticized the tragic poets for being delusional, dwelling on the suffering of human beings, and providing too much room for irrational emotions, thereby dangerously influencing, even defaming, the character of the citizens of Athens. Tragedy 'awakens and nourishes and strengthens the feelings and impairs the reason'.¹⁶ It perilously ignores that reason itself, or more specially the art of measuring, numbering and weighing can actually rescue citizens from their tragic predicaments. In Plato's *Republic*, we can read that 'the arts of measuring and numbering and weighing come to the rescue of the human understanding'.¹⁷

Plato's philosophy marks the beginning of a dominant rationalistic strand within the history of practical philosophy, which has as its premise the commensurability of the practical world. This philosophical tradition relies on the idea that reason will always provide (reasonably acting) agents with an external and homogeneous measure in terms of which all the relevant factors at stake in a concrete situation can be exhaustively represented and ranked.¹⁸ On the basis of this ranking, rational choices can be made and transparent and definitive justifications and explanations can be offered in their support. This Platonic thought strongly holds to the idea that 'what is ... commensurable is graspable, in order, good; what is without measure is boundless, elusive, chaotic, threatening, bad'.¹⁹ Not surprisingly, within this Platonic tradition of practical philosophy the concepts of the 'tragic', 'tragedy' or 'tragedies' seldom make an appearance. They are regarded as phenomenological delusions, as signs of ignorance, or even of intellectual laziness. Tragedy, as Barbour has put it, 'has often been perceived as a "problem" to be either dissolved or entirely avoided'.²⁰

¹⁵Sophocles, *The Complete Plays of Sophocles* (n 10) 142.

¹⁶Benjamin Jowett, *Dialogues of Plato: Translated into English, with Analyses and Introduction*, vol 2 (Cambridge University Press, 2010) 447.

¹⁷*Ibid.*, 389.

¹⁸Cf MC Nussbaum and R Hursthouse, 'Plato on Commensurability and Desire' [1984] *Proceedings of the Aristotelian Society* 55.

¹⁹*Ibid.*, 57.

²⁰Barbour (n 2) 1.

Furthermore, in the history of legal thought it is either explicitly or implicitly held in Platonic vein that commensurability is a necessary condition for the rationality of legal decisions. John Finnis observes that '[a] classical explanation of law calls it a measure: *quedam regula et mensura actuum*, a kind of rule and measure of action'.²¹ If the legal claims in a concrete case are not commensurable, no rational legal decision can be made, or so is the idea. Incommensurability in law is often presented as an equivalent to the 'non-decidability thesis': it constitutes a threat to 'our ability to reason decisively' and rationally in law.²² Where incommensurability applies, it is suggested that we would do 'better to ponder whether these cases would be better left to judges, or whether they should start a social conversation, that can lead to a better shaping of social preferences'.²³

At the same time, incommensurability in law is not considered a genuine threat to law's claim to rationality as it is held to be an exotic and rare phenomenon. Fully in line with Plato's rationalistic view, conflicts are mostly only deemed *genuine* when exactly symmetrical rights are in play and when the resource needed for their realization is both unique and indivisible. Incommensurability could, for instance, be acknowledged in a case involving Siamese twins,²⁴ where one twin is parasitic on the other, and the judge must resolve a dispute between the parents and the doctor concerning the required course of action.²⁵

Moreover, in these rare cases in which outcomes are sometimes explicitly acknowledged as tragic, the concept is often juxtaposed with the *legal* viewpoint.²⁶ To the extent that tragic sensitivity is displayed by judges in their judgments, it is often presented and understood as stemming from a

²¹ J Finnis, 'Commensurability and Public Reason' in R Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press, 1997) 215.

²² BG Scharffs, 'Adjudication and the Problems of Incommensurability' (2000) 42 *William and Mary Law Review* 1369 1372.

²³ E Brems, (ed.), *Conflicts between Fundamental Rights* (Intersentia, 2008) 30.

²⁴ See, for instance, the real life case *Re A (children) (conjoined twins)* [2001] Fam 147, [2000] 4 All ER 961. This case has been extensively discussed by analytical legal scholars such as Neil MacCormick, *Practical Reason in Law and Morality* (Oxford University Press, 2008) 171–81. It also received due attention from legal scholars working in the field of law and humanities. Julien Extabe, for instance, refers to this case to illustrate 'the kind of responsibility that judgement sometimes carries with it'. J Extabe, *The Experience of Tragic Judgment* (Routledge, 2013) 140. For a critical discussion of the way Lord Justice Ward framed the case and the decision, see: G Watt, 'Medical Dilemma in Law and Literature' in D Carpi (ed), *Bioethics and Biolaw through Literature* (De Gruyter, 2011).

²⁵ Unsurprisingly, this numerical Platonic manner of framing incommensurable rights is fully in line with Dworkin's description of 'tie' situations in which the legal argument for one position offers exactly as good a justification for a judicial decision as does the argument for the opposing position. Dworkin, himself a proponent of commensurability in law, argues that these situations need not concern us, since they will hardly ever occur: 'The tie result is possible in any system, but it will be so rare as to be exotic in these.' R Dworkin, *A Matter of Principle* (Harvard University Press, 1985) 143.

²⁶ This distinction is also hinted at by Alvarez when she states that although genuine moral dilemmas and tragic choices may occur, 'the *legal* [emphasis added] choice should not have to take on itself the tragic component entailed in the presence of genuine moral dilemmas'. See: S Alvarez, 'Constitutional Conflicts, Moral Dilemmas, and Legal Solutions' (2011) 24 *Ratio Juris* 59, 71.

layman or human point of view as strictly opposed to the legal point of view, thereby endorsing the idea that tragic sensitivity should not influence, let alone constitute, the latter.

For instance, in the infamous Evans case one of the national judges acknowledges that: 'In *human* [emphasis added] terms, the greatest sympathy must, of course, be extended to Miss Evans, who, as a result of this case, now lacks the capacity to give birth to a child which is genetically hers.' Also, Zucca and Bomhoff in discussing this case state that: '*Stripped of all legal technicalities* [emphasis added], the plight of Ms Evans presented an obvious human tragedy.'²⁷ Surely, as human beings judges and legal scholars can express empathy for the pain, harm and suffering that a particular decision might bring, but these experiences are fully in line with Plato's rationalism clearly set apart from the legal point of view. The losses that occur as a result of in themselves defensible decisions are mostly accounted for in terms of what Ronald Dworkin has called 'bare harm', a legally irrelevant experience of the losing citizen.²⁸

Thus for all of these reasons, we can assert that practical philosophy and legal theory – and perhaps also legal practice – are to a large degree tragic-evasive. But this is not the whole story.

Aristotle was the first 'philosopher' who did see the relevance of the tragedies to philosophy. In his *Poetics* he famously provided a definition of tragedy as a dramatic genre.²⁹ Together with reversal, recognition and the protagonist's tragic flaw (*hamartia*), he saw suffering as a necessary component of a tragic plot – 'an action involving destruction and pain'.³⁰ In his *Nicomachean Ethics* Aristotle highlighted – that even the virtuous person is not safeguarded from causing genuine losses, for instance by discussing the example of a captain who throws his cargo overboard in order to save himself and the lives of the other passengers.³¹

After Aristotle, others including Hume, Hegel, Nietzsche, Schopenhauer and Scheler have paid close attention to the Greek tragedies and used insights gained from them to emphasize the tragic character of life and society.³² Hegel, for instance, famously understood tragic situations to be those in which 'right collides with right',³³ using Sophocles' *Antigone* as an example.

²⁷J Bomhoff and L Zucca, 'The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights, Evans v The United Kingdom, Fourth Section Judgment of 7 March 2006, Application No 6339/05' (2006) 2 *European Constitutional Law Review* 424, 427.

²⁸Dworkin (n 25) 80.

²⁹Aristotle defined tragedy as 'an imitation of an action that is admirable, complete and possesses magnitude, in language made pleasurable, each of its species separated in different parts; performed by actors, not through narration; effecting through pity and fear the purification of such emotions'. Cf Aristotle, *Poetics*, trans M Heath (Penguin Books, 1996) 10.

³⁰*Ibid*, 18.

³¹Aristotle, *Nicomachean Ethics*, trans SBroadie and C Rowe (Oxford University Press, 2002), 1110a9–10.

³²Barbour (n 2) 12.

³³Cf Kaufmann (n 6), 203.

Over the past several decades ‘tragedy’ and the ‘tragic’ have enjoyed renewed attention in moral³⁴ and political philosophy,³⁵ and also in legal philosophy and legal theory.³⁶ They are sometimes examined within the confines of a critical project, in reaction to rationalistic moral, political and legal theories, but they also appear as part of constructive attempts at developing a more sophisticated, richer and more sensitive approach to moral and legal matters.

3. A tragic legal choice: its central features

Inspired by the ‘tragic consciousness’ as conveyed by Greek tragedies and the tragic tradition within practical philosophy and legal theory, in this section I will set out the central features of a tragic legal choice as part of the everyday practice of adjudication. It goes without saying that a similar line of thought can be explored for other domains of legal practice and thus the concept of a tragic legal choice applies more broadly than only to adjudication. Below I shall expound that a tragic legal choice is characterized by three interrelated elements: conflicting judicial commitments, a tragic legal remainder and tragic responsive reactions.

3.1 Conflicting judicial commitments

In the context of adjudication a tragic legal choice stems from the fact that a judge is confronted with a conflict between impossible judicial commitments, meaning that fulfilling one makes it impossible to fulfil the other.³⁷ These conflicts are genuine and not due to a clear mistake either in the law or in the reasoning of the judge. The source of the trouble does not lie not within the realm of legal thought and reason, but for instance in human nature, in physical aspects of the world, in time-constraints, in epistemological

³⁴See: B Williams, ‘Conflicts of Values’, in *Moral Luck: Philosophical Papers 1973–1980* (Cambridge University Press, 1981) 71–82; B Williams, ‘The Woman of Trachis: Fiction, Pessimism, Ethics’ in RB Loudon and P Schollmeier (eds), *The Greeks and Us: Essays in Honor of WH Adkins* (University of Chicago Press, 1996); Nussbaum (n 13); M Stocker, *Plural and Conflicting Values* (Clarendon Press, 1990); S de Wijze, ‘Tragic Remorse: The Anguish of Dirty Hands’ (2004) 7 *Ethical Theory and Moral Practice* 453; Tessman, *Moral Failure: On the Impossible Demands of Morality* (Oxford University Press, 2016).

³⁵See: G Calabresi and P Bobbitt, *Tragic Choices: The Conflicts Society Confronts in the Allocation of Tragically Scarce Resources* (WW Norton, 1978); B van den Brink, *The Tragedy of Liberalism* (SUNY Press, 2000); MC Nussbaum, ‘The Costs of Tragedy: Some Moral Limits of Cost–Benefit Analysis’ (2000) 29 *Journal of Legal Studies* 1005; D Cornell, *The Philosophy of the Limit* (Routledge, 1992); B Honig, ‘Antigone’s Two Laws: Greek Tragedy and the Politics of Humanism’ (2010) 41 *New Literary History* 1.

³⁶See, for instance: DJ Schmidt, ‘Can Law Survive: On Incommensurability and the Idea of Law’ (1994) 26 *University of Toledo Law Review* 147; N Smith, ‘Incommensurability and Alterity in Contemporary Jurisprudence’ (1997) 45 *Buffalo Law Review* 503; PT Minerich, ‘Incommensurability in Legal Reasoning: If I’m Doing the Right Thing, Why Does It Hurt So Much’ (1994) 21 *Western State University Law Review* 467; Scharffs (n 22); L Wolcher, *Law’s Task: The Tragic Circle of Law, Justice and Human Suffering* (Ashgate, 2008); Extabe (n 24).

³⁷Scharffs (n 22) 1395.

constraints, in current technology, in certain deeply entrenched acceptable characteristics of institutions and laws, or in (mutually exclusive) forms of life.³⁸

Sure, these sources of practical conflicts are of course not 'necessary', 'inherent' or an absolute state of affairs; however, in the case of a genuine conflict they cannot be simply altered on the moment of choice and as such they form a genuine obstacle to the realization of one's commitments.³⁹ If a judge is faced with such conflicts he finds himself in a rather passive and vulnerable position. He in any case does not have a prior measure or standard available in terms of which he can decide the issue and is, in this sense, left on his own. The actual choice that the judge will make will thus inherently have a personal side to it.⁴⁰

This idea that judges, as part of their everyday practice, will be confronted with genuinely conflicting commitments is of course at odds with a Platonic understanding of judicial conflicts in which commensurability is projected onto the practical world. If one relies on practical commensurability conflicts are then construed as conflicts between propositions about the world, which are subject to the rules of propositional logic, including the principle of non-contradiction. From this perspective, judges always have intellectual means at their disposal by which contradictory claims, understood as propositions that can either be true or false, can be solved exhaustively. The validity of one of the conflicting propositions will as a matter of logic always be denied its validity. For A cannot at the same time be \neg A.

By contrast, if we take tragic consciousness seriously, judicial commitments can never be reduced to beliefs, to mere propositions. Ideally, they are the result of the perceptive sensitivity of the judge that is mediated by socially and historically informed practices and hence do not follow the rules of discursive logic.⁴¹

Being the result of the adequately taking in of the concrete particulars of the case, judicial commitments will never form a coherent and conflict-free web. They will sometimes prove to be genuinely in conflict with one another. Hence, from a tragic perspective, conflicting judicial commitments and the acknowledgement thereof is far from an affront to legal rationality. These conflicts must be seen as a particular instantiation of the limitation and vulnerability of legal rationality and the legal order as a whole. Hence,

³⁸In Julen Exteba's highly original and thought provoking book, *The Experience of Tragic Judgment* (n 24), which discusses the tragic nature of adjudication, emphasis is put on conflicts between normative worldviews as a source of law's tragedy, such as those conflicts that occur in Jehovah's Witness cases in medical law. In such cases, judges are confronted with the question whether to respect the will of a patient who has, for instance, cancer but because of his or her religion does not want to have a blood transfusion. As we will see in this article, I take tragic legal choices to be a more comprehensive concept. It is in any case not limited to choices in which conflicting normative worldviews are at stake.

³⁹Cf Williams, 'Conflicts of Values' (n 34) 74; see for this point also: HS Richardson, *Practical Reasoning about Final Ends* (Cambridge University Press, 1997) 144–45.

⁴⁰In the next section I will come back to this point.

⁴¹For a more elaborate account of the role of judicial perception in adjudication, see: I van Domselaar, 'The Perceptive Judge' (2017) *Jurisprudence: An International Journal of Legal and Political Thought*, online version available at: <http://www.tandfonline.com/doi/abs/10.1080/20403313.2017.1352319> (last visited 28 September 2017).

a responsible judge, rather than trying to escape from the conflict, tries to fully expose himself to it and only then decides. In order to further substantiate this idea of a genuine conflict between judicial commitments, four categories of such conflicts will now be discussed.

3.1.1 *Conflicts between fundamental rights*

The first category of conflicts between judicial commitments that may result in tragic legal choices involves genuine conflicts between fundamental rights. In such situations, two or more fundamental rights may prove incompatible. They cannot be realized simultaneously, or at least not to such a degree that the essence or core of both rights can remain intact.

In Western legal orders, conflicts between fundamental rights are likely to occur simply because their systems are (constitutionally) committed to protecting a wide variety of non-hierarchical and heterogeneous fundamental rights. Factual conditions in the external world may prevent these fundamental rights from harmoniously coexisting and may lead them into conflict with one another. An example of such a conflict is the case of Jason and Nancy.

Jason met Nancy's mother right after she divorced the father of her children. They fell in love and decided to move in together. Jason was now living with Nancy's mother, Nancy and her two brothers in a small apartment. Everything seemed to be going swimmingly. Jason may have occasionally resorted to hitting the boys when they misbehaved, but on the whole they were fond of him. When Nancy started high school, Jason suddenly became extremely strict with her. He would not allow friends from school over for visits, and Nancy ended up feeling isolated.

One day, out of desperation, Nancy started to seek out her schoolmates on social media. In a chat session, she revealed to one of them that Jason had been sexually abusing her, and that he was blackmailing her in exchange for her silence. The very same week, Jason was arrested and charged with the sexual abuse of a minor.

The judge now has to decide whether Nancy should testify in court, and be interrogated by both the prosecution and the defence. In dealing with this, the judge may experience a genuine sense of conflict when weighing the right to a fair trial against one's right to privacy. That is, on the one hand, a defendant must be able to question a witness, especially if that witness's statement is the only evidence presented. Jason's right to a fair trial is put in peril if a conviction is based exclusively on assertions that cannot be rebutted. On the other hand, Nancy's right to privacy is at stake, including the right to have one's emotional development protected.⁴² A court-

⁴²For a discussion of these conflicts in the context of European law, see: E Brems, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2005) 27 *Human Rights Quarterly* 294.

appointed psychiatrist could very well advise the judge that, due to Nancy's young age, and the likelihood that she would be made to relive the traumatic occurrences, a cross-examination could threaten her developmental well-being. In this case the factual conditions may be such that honouring the essence of the right to a fair trial would inevitably come at the expense of violating Nancy's right to privacy, and vice versa. It will thus prove impossible to honour both rights.

The judge could, of course, try to tailor the meaning of the competing fundamental rights in such a way as to let them coexist. However, the chances are that this strategy would hollow out their substantial meaning and that it would put the horse behind the cart. The scope of protection ensured by a certain right would then depend on any number of contingencies, rather than on a legal order's obligation to uphold it. As stated earlier, these rights, and the judicial commitments that serve to defend them, are contoured by historically and socially conditioned practices, modes of dealing with and acknowledging certain human needs and capacities. The judge cannot change this contour simply by an act of reasoning alone. Such an act would nominally redefine these rights, while ignoring the actual concerns they address.⁴³

3.1.2 Conflicts between law and values of political morality

Another category of conflicts between judicial commitments that may give rise to tragic legal choices are those between a judge's commitment to codified law and his commitment to the values of political morality that underlie a legal order. At first sight, this may seem counterintuitive; in a liberal legal order part of the justification of codified law is that it expresses the underlying values and that by its effectuation these values of political morality are realized. Such an order will to a considerable degree instantiate said values by the application of concrete legal norms and also give further room to their indirect realisation in concrete cases, for instance by the use of open norms such as 'reasonableness', 'equity' and so on.

However, as the discussion of conflicts between fundamental rights already indicated, the practical world is not necessarily friendly to the aspirations of a legal order. Factual contingencies may be such that a judge is unable to reconcile settled law with the demands of political morality. Think of a judge who feels duty bound to make use of legal fictions, of assumptions that are considered to be legally valid regardless of whether they can indeed reasonably be upheld in a concrete case.⁴⁴ These fictions

⁴³B Williams, 'Liberalism and Loss' in M Lilla *et al* (eds), *The Legacy of Isaiah Berlin* (New York Review of Books, 2001) 94.

⁴⁴Note that the term 'legal fiction' is used here in a looser fashion than the classical definition offered by Lon Fuller in his seminal article 'Legal Fictions' in which he states that a legal fiction is 'either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement

are generally accepted as important instruments for a legal order to regulate the behaviour of society at large, and a judge might therefore be right in feeling committed to applying them.⁴⁵ However, in such a case a judge may at the same time conclude that by effectuating the legal fiction and thus by ignoring the actual facts at stake, basic values of political morality will be violated.

Take the case of Joachim Mayer, an adolescent raised as a Jehovah's Witness.⁴⁶ At the age of sixteen Joachim contracted acute leukaemia. The doctors told him that blood transfusions were imperative to save his life. Yet, strongly committed to the ethics of the Jehovah's Witnesses Joachim refused blood transfusions. He argued that the doctors were not allowed to treat him without his consent, as the applicable law contains the legal fiction that adolescents older than sixteen years are competent and able to make their own choices.

In reaction to Joachim's refusal, the Childcare and Protection Board petitioned the court to authorize the blood transfusions and in support argued that his refusal could not be considered a meaningful choice. His parents – also Jehovah's Witnesses – had indoctrinated him and consequently Joachim has not been in a position to genuinely oversee and appreciate his own situation and interests. Yet, in court Joachim eloquently supported his refusal, citing by heart several passages from the Bible.⁴⁷ Accepting the transfusion would amount to a sin and would break his bond with God, Joachim declared. He also declared that he was fully aware that the final consequence of his standpoint would be his premature death.

In a case like this a responsible judge may experience a genuine conflict between his commitment to serving settled law, and thus to said legal fiction, and his commitment to the values of political morality, such as the value of life and of not dying prematurely. The judge may indeed be convinced that because Joachim has hardly been in contact with other world-views than that of his parents, he has not had the opportunity to form his own view of life, as a separate and autonomous person.

At the same time, the judge may not feel free to make an exception to the legal fiction, precisely because a case-by-case test whether the legal fiction of

recognised as having utility'. Cf L Fuller, 'Legal Fictions' (1930–31) *Illinois Law Review* 363; for illuminating articles on legal fictions, see also: NJ Knauer, 'Legal Fictions and Juristic Truth' (2010) 23 *St Thomas Law Review* 1; F Schauer, 'Legal Fictions Revisited' (2011) available at SSRN: <https://ssrn.com/abstract=1904555> (last visited 15 September 2017).

⁴⁵Or as Schauer has put it: legal fictions are the 'vivid embodiment of the way in which any enterprise that trades in generality – which law certainly does – will wind up drawing conclusions that may not always be literally correct' (*ibid*, 4).

⁴⁶For a discussion on the tragic nature of the judge's decision in a similar Jehovah's Witness case, see: Extabe (n 24) 138–39.

⁴⁷The relevant passages in the Bible are, among others: 'Only flesh with its soul – its blood- you must not eat.' (Genesis 9:3–4); 'Abstain from ... fornication and from what is strangled and from blood' (Acts 15:19–21).

competency holds for each and every case would undermine its rationale, namely the need for generality and formal equality when it comes to arranging human affairs on the level of society. Hence, it may well be that a judge will experience a genuine conflict of commitments.

Another way in which codified law can conflict with values of political morality concerns the legal effectuation of procedural rules. Whereas substantive law directly provides the considerations that are relevant for defining concrete legal rights and duties, procedural rules prescribe how these rights should be determined. Among many other things, these rules tell us how, where and when one may file a lawsuit and how to proceed. Part of the rationale behind procedural rules is the need for legal certainty and efficient, fair and orderly procedures. However, an actual case may be such that the effectuation of procedural rules may lead to a conflict with the values of political morality that underlie a legal order.

Another example: During his holiday in Turkey, Mr Hampton, a man in his late fifties, fell off his bike and ended up in coma. After he woke, he suffered from aphasia, causing him serious difficulties in speaking and writing. The doctors told him that he would be unable to work as a teacher again. It was only after some time that Mr Hampton came to think about how to continue his life. At a certain point he filed a claim for a disability benefit as he had no prospects on the labour market. However, partly due to a mistake by his lawyer, Mr Hampton filed his claim three weeks past the deadline set by the applicable procedural rule. Therefore, the social security agency rejected his claim. Mr Hampton appealed the decision and argued that holding him responsible for this violation would result in a disproportionate consequence that he should not be asked to bear; it would mean that he would not have the financial means necessary to lead a decent and relatively independent life.

The judge may hold that from the viewpoint of political morality, Mr Hampton has a right to a social minimum, given what has happened to him, but at the same time he may feel duty bound to honour the procedural rules, as a case-by-case assessment of whether these should be upheld or not would undermine their rationale. The judge will then be faced with a genuine conflict between judicial commitments that he cannot exhaustively resolve by a better understanding or grasp of the legal merits of the case.

And thus we have the different categories of conflict for which the concept of tragic legal choice holds potential relevance. Note that all the attention paid to the conflictual character of adjudication does not refute that due reflection can in fact often reveal that the conflict under consideration is indeed nothing more than a *prima facie*, or *apparent* conflict. The judge's expertise will prove crucial in showing that his judicial commitments can in the end be tailored in a way that makes them compatible with each other. Again, an emphasis on the hazard of genuine conflict within the domain of

adjudication does not negate the inherent value of legal reason. Acceptance of the possibility that genuine conflict may arise between competing judicial commitments is not tantamount to a plea for laziness, fatalism or despair in relation to the use of reason.

3.2 *Tragic legal remainders, and tragic responsive reactions in law*

There is of course more to a tragic legal choice than the resolution of a conflict between judicial commitments. In order to grasp the tragic dimension of such choices we must also pay attention to the moral remainders they leave, to the troublesome consequences that leave the judge with 'dirty hands'.

A tragic legal choice will lead to a *high* value loss or remainder, with the loss in question central rather than peripheral to a good life or a good institution; it affects a person's chances of leading a good life negatively – structurally rather than temporarily – and the loss cannot be easily compensated by other means.⁴⁸ The concept of tragic legal choice does not promulgate a 'taxi-meter-sensibility' for all the painful consequences resulting from a choice in genuine conflict situations.⁴⁹ When a judge decides to authorize the decision of an administrative agency to deny a citizen a permit to build a shed, such a choice is not tragic.

Western constitutional democracies and international human rights treaties do give some guidance as to which values can be qualified as 'high' and hence can be at stake in tragic legal choices. The interests protected by these rights are generally considered to be crucial for leading a good life. But, of course, neither such documents nor any other discursive source can a priori define the substance of tragedy and the tragic. As has already been stated: tragedy is an experiential, phenomenological – rather than an analytical – concept, always mediated by culturally and socially embedded ideas of the good and by sensitivity on the part of those who are confronted with dire situations.

As a moral remainder by and in itself exerts a claim to attention, a tragic legal choice opens the door for the notion of 'tragic responsive reactions'.⁵⁰ In response to a moral remainder caused by an actual legal decision, the least we can expect from a responsible judge is a tragic responsive reaction, for instance an internal reaction such as an expression of regret, distress, or anxiety. In his novel *The Children Act*, Ian McEwan beautifully describes how the protagonist, Judge Fiona Maye, suffers from the consequences of a

⁴⁸Cf Nussbaum (n 13) 27–28.

⁴⁹Stocker (n 34) 16.

⁵⁰For this discussion of 'tragic responsive reactions' I draw upon: B Williams, 'Ethical Consistency' in *Problems of the Self: Philosophical Papers 1956–1972* (Cambridge University Press, 1973); J Landman, *Regret: The Persistence of the Possible* (Oxford University Press, 1993); PS Greenspan, *Practical Guilt: Moral Dilemmas, Emotions, and Social Norms* (Oxford University Press, 1995); B Williams, 'Liberalism and Loss' (n 43); de Wijze (n 34) 453.

decision in a case in which she decides the fate of a Siamese twin. Rather than shirking responsibility for such a loss by seeking refuge in the law, Maye readily acknowledges her 'dirty hands':

For a while some part of her body had gone cold, along with poor Matthew. She was the one who had dispatched a child from the world, argued him out of existence in thirty-four elegant pages. Never mind that with his bloated head and unsqueezing heart he was doomed to die.⁵¹

Tragic responsive reactions may also entail more explicit and discursive reactions to the losing citizen or to the legal order as a whole whether expressed orally during a court session, in written legal decisions, in a judge's attempts to avoid similar conflicts in the future, for instance through recommendations that legislators or policymakers change current laws or policies, or in the form of (financial) compensation. These reactions can also be understood as responsible action on the judge's part, as opposed to dissociating himself from the moral bearing of the loss generated by his choice.⁵²

Insofar as these reactions are indeed expressed to the 'losing' citizen, they can also be seen as a way for the judge to show due respect. It honours the fact that the losing citizen is asked to bear a burden that the judge – not merely in his role as a fellow citizen, but also in his role as a judge – does not want him to bear.

From this perspective, tragic responsive reactions are part of the 'art of addressing the loser' in adjudication and require perceptual sensitivity from the judge. These oftentimes pre-reflective responses imply a certain emotional state and they are highly situation dependent. The judge must be able to decide when it would be better to remain silent or how and when to address the loss caused by his decision.

Recall, for instance, the case of Mr Wood who was sentenced to prison for killing his wife. A responsible judge, after reaching the actual decision, might devote part of his opinion to stating that, in this case, criminal law has reached its limits and that the outcome is morally disturbing because of Mr Wood's plight.⁵³ Doing so, the judge is able to express that, in spite of having made a choice to the best of his abilities, he acknowledges that the intrinsic good of Mr Wood has not been erased from the 'legal field'.⁵⁴ The judge could also decide to restrict his views on the tragic nature of the decision to oral

⁵¹ McEwan, *The Children Act* (Vintage Books, 2014) 31. For a more extensive discussion of the relevance of this novel for legal philosophy, see: I van Domselaar, 'The Perceptive Judge' (n 41).

⁵² Because of his responsiveness to loss of reason a responsible judge, according to Drucilla Cornell, can be compared with Derrida's figure of a rag-picker who is 'salvaging the remains'. Cornell (n 35) 75. This responsiveness to loss and suffering is also highlighted by Luis Wolcher in his account of responsible judging given the tragic nature of law. See Wolcher (n 36).

⁵³ We indeed find this kind of tragic responsive reaction in the judgment from which I have drawn for my discussion of the case of Mr Wood. See: *Rechtbank Middelburg*, August 25 2011, ECLI:NL:RBMID:2011:BR5781.

⁵⁴ Nussbaum (n 12) 243.

expression during the court session, simply because he is hesitant to express his views unequivocally to the general public.

This is, of course, not to suggest that a responsible judge is fully transparent – even to himself. As the unintelligibility of the course of events in Greek tragedies indicates, such a judge will always be, to phrase it in Iris Murdoch's terms, 'moved in a manner which [he is] at a loss to explain'.⁵⁵ How a particular judge will respond to a tragic remainder will largely depend on his professional character, inescapably linked as it is to his own idiosyncratic background. Different judges will inevitably react differently to a tragic remainder.

Despite the room for individual differences among judges, accepting the concept of tragic legal choice nonetheless implies that we can justifiably level blame at judges who remain completely oblivious to the tragic character of certain of their choices, for instance when they explain away a moral remainder, use detachment strategies, or insufficiently grasp the value of what remains after a decision. The concept of tragic legal choice thus has critical potential: it allows us to blame judges for a certain 'blindness' to the troublesome nature of the loss that results from a decision.

For instance, in the actual conjoined twin case that provided the inspiration for Ian McEwan's portrayal of Judge Maye's way of dealing with the conjoined twins case, we have reason to be critical of presiding Judge Ward's reasoning that supports his decision to grant the hospital permission to separate the twins. Ward portrays one of the twins, Mary, as a 'parasite'.

She is alive because and only because, to put it bluntly, but none the less accurately, she sucks the lifeblood of Jodie and she sucks the lifeblood out of Jodie. She will survive only so long as Jodie survives. ... Mary's parasitic living will be the cause of Jodie's ceasing to live.

Ward allows the twins to be separated, with the consequence that Mary will directly die. Despite Ward's explicit acknowledgement of the tragic nature of the case it seems that the need to find the legally 'right answer' comes at the expense of discursively hollowing out one of the values at stake. Judge Ward denies Mary, in a manner of speaking, a proper witness.⁵⁶

Finally, it must be stressed that the extent to which judges are made to bear the burden of 'dirty hands' will always be a matter of moral luck⁵⁷ – not least because the tragic nature of a legal choice and the ensuing actual moral remainder is not always fully clear at the moment the choice is made.⁵⁸ Part of the tragic consciousness conveyed by the Greek tragedies

⁵⁵I Murdoch, 'Nostalgia for the Particular' in Peter Conradi (ed), *Existentialists and Mystics: Writings on Philosophy and Literature* (Harmondsworth, 1997) 58.

⁵⁶Wolcher (n 36) 62.

⁵⁷Vernant and Vidal-Naquet (n 7) 44.

⁵⁸That one's choices can be morally troublesome due to factors unknown at the moment of choice is of course radically epitomized in the person of Oedipus who did not and could not know the actual bearing of his deeds at the relevant moments.

is that the genuine nature of a choice only becomes apparent afterwards, post hoc. In a similar vein, a judge may only come to see the tragic import of his – at the time wholly defensible – decision somewhere down the line.

4. Advantages and addressing some objections

As said in the beginning: because of their phenomenological, experiential character the concepts of ‘tragedy’ and ‘tragic’ cannot be (analytically) argued for or be imposed. Yet, this is not to deny that we can identify some advantages of allowing for the concept of a tragic legal choice both in practice as well as in theoretical accounts of adjudication.

One such advantage is that this concept adds to the integrity of judges and legal orders as a whole. If firmly anchored in adjudication’s practice, the notion of a tragic legal choice may foster a tragic sensitivity on the part of judges and as such counterbalance the human tendency to deny the moral and legal import of a losing claim; that is, being in a state of internal conflict and experiencing a sense of anxiety, regret and guilt is something that we all tend to avoid.⁵⁹ Developing one’s tragic sensitivity can reduce all kinds of cognitive dissonance and forms of self-deception that are likely to arise in these situations.⁶⁰ Thus, the concept of a tragic legal choice not only provides judges the necessary conceptual space, but – if genuinely embedded in practice – it can also develop their capacity to more honestly deal with the moral nature of the choices they face.

In addition, the concept of a tragic legal choice can play a valuable role where it comes to the realisation of the principle of liberal legitimacy and on that account it can add to the integrity of a legal order as a whole. This principle minimally entails that as a matter of equal respect, each and every citizen must have a reason to bear the burden that the exercise of state power brings. I take it that this also means that a legal order is committed to epistemic sincerity and thus that – other things equal – the moral losses resulting from judicial decisions should not be ‘silenced’ or concealed, but must rather be identified and (skilfully) acknowledged.⁶¹ Once integrated in legal practice, arguably the concept of a tragic legal choice may increase the chance that citizens’ experience of having to bear a genuinely troublesome cost is acknowledged and will be respected.

⁵⁹Cf A Freud, *The Ego and the Mechanisms of Defence* [1937] (Karnac Books, 1966).

⁶⁰See for an overview of all kinds of cognitive dissonance that may arise in the context of lawyering, which I think are to a great degree also relevant for the context of judging: D Luban, ‘Integrity. Its Causes and Cures’ (2003) 72 *Fordham Law Review* 279.

⁶¹For this notion of ‘silencing’ I took inspiration from J McDowell, ‘Virtue and Reason’ in J McDowell (ed), *Mind, Value and Reality* (Harvard University Press, 1998) 56.

Connected to the previous point, there is the advantage of incentivizing moral progress of a legal order. An important lesson to be learned from Greek tragedy is that it often takes the shock of pain and suffering to fully grasp the moral bearing of a situation or a choice.⁶² By giving voice to law's failure, the concept of a tragic legal choice can function as an important antidote against the potential self-congratulatory and morally self-reassuring character of commonly used notions of 'rightness', 'justification' and 'rationality'. Because of its focus on moral remainders generated by a legal order and, connected to this, the presumed rationality of tragic responsive reactions, the concept of a tragic legal choice offers a (painful) incentive for new insights and changes in actual laws and policies. In this way it may help to 'refresh' a legal order. Hence, in case of a tragic legal choice it may well be that part of the 'drama' will be written 'off court', in the dialectical process between all legal and political institutions that, because they are concerned with the realization of values of political morality, react to said moral remainders.⁶³

In addition, the concept of a tragic legal choice has explanatory potential for a range of sociolegal phenomena that otherwise will remain unnoticed or will be ignored as being negligible, non-legal or legally peripheral aspects surrounding adjudication. More specifically, it can conceptually make sense of the 'phenomenology of the aftermath' of legal decision-making.⁶⁴ It allows us to account *coherently* for all the kinds of responses (emotional or practical) that judges do in fact give in reaction to the loss, independently of the actual decision that is made as part of what law amounts to. Think, for instance, of what are often pigeonholed as 'obiter dicta'. Rather than categorically ignoring these judicial utterances as subjective, non-legal hick-ups of judges, from the viewpoint of the concept of a tragic legal choice these utterances might sometimes well be upgraded as a 'tragic responsive reaction' and thus be considered as part and parcel of the legal viewpoint itself.

More generally, by paying attention to the 'ethics of the aftermath' we are provided with a different picture of adjudication. Rather than conceiving of adjudication as, in essence, a single judgment arrived at by means of an unbroken line of reasoning, it could perhaps better be thought of as an activity that unfolds and develops in several stages and in different spatiotemporal contexts. The judge confronted with a legal action does not so much consider whether this or that is the case, but rather, as Nussbaum's image of the spider (thereby inspired by Heraclitus) also suggests, he 'relate[s] to this or that in such and such a manner'.⁶⁵

⁶²Cf Aeschylus, *The Oresteia. Agamemnon, The Libation Bearers, The Eumenides* (n 10) 33.

⁶³Cf Nussbaum (n 35) 1013.

⁶⁴C Bagnoli, 'Phenomenology of the Aftermath: Ethical Theory and the Intelligibility of Moral Experience' in S Tenenbaum (ed), *New Trends in Moral Psychology* (Kluwer, 2007).

⁶⁵Extabe (n 24) 190.

In addition to the advantages, three objections argue against embedding the concept of tragic legal choice in practice. The first is the ‘Hamlet objection’, which states that true appreciation of the conflictual character of an impending choice – and the morally troublesome nature of its consequences – may cause a deep sense of anguish and anxiety that contributes to judicial incapacitation and inertia. Or to phrase this concern in Nietzsche’s words: ‘Knowledge kills actions, to action belongs the veil of illusion – that is the lesson of Hamlet.’⁶⁶ Having penetrated the ‘true nature of things’, Hamlet cannot act. We do not want the same fate to befall judges because of their tragic sensitivity.

Another and related objection is that the concept of a tragic legal choice, when brought to life in practice, may lead to the sentimentalizing of adjudication. Feelings of regret, ethical distress and anxiety can become fetishes. Rather than genuinely finding a right judicial answer, judges may be too easily tempted to lament the loss stemming from their decisions.

Both these objections deserve to be further explored, although I do not think that they form a genuine problem for acknowledging tragedy within the practice of adjudication. That is, a proposal for embedding the concept of tragic legal choice is not tantamount to an attempt to *impose* tragic consciousness to practice, nor does it suggest that each and every judicial choice is in fact tragic.⁶⁷ Again, (explicating) the concept of a tragic legal choice is a way of making sense of a phenomenology that already exists.

Moreover, by virtue of his professional qualities a good judge can take care that the loss caused by his decision is not unwarrantedly sentimentalized or exaggerated. His professional qualities not only help him to distinguish mere losses from tragic losses, but also encourage him to take decisions in full awareness of the troublesome nature of his actual choices. Hence a good judge will seek to establish equilibrium between activity and passivity, order and disorder, control and vulnerability.⁶⁸

This brings us to the last and purportedly most disconcerting objection, which has already been alluded to earlier, in the discussion on judges having to resolve conflicts between fundamental rights. It is the objection that resolving genuine conflicts between judicial commitments will inherently be a highly subjective endeavour, because the law itself does not provide a uniform standard that can justify the outcome. Hence, the actual outcome

⁶⁶FW Nietzsche, *The Birth of Tragedy: Out of the Spirit of Music* (Oxford University Press, 2000), 46. Hamlet is used in philosophy to describe the inertia that may come from (too much) reflection. Hegel described Hamlet’s inertia as follows: ‘His noble soul is not made for this kind of energetic activity; and, full of disgust with the world and life, with decision, proof, arrangements for carrying out his resolve, and being banded from pillar to post, he eventually perishes owing to his own hesitation and a complication of external circumstances.’ Cf GWF Hegel, *Hegel’s Aesthetics: Lectures on Fine Art* (Oxford University Press, 1998) 1226.

⁶⁷De Wijze (n 34) 470.

⁶⁸Nussbaum (n 13) 80.

in such cases can only be explained in terms of the personal valuations of the judge, or so is the idea.

To some extent this objection is justified: in the event there is genuine conflict between judicial commitments, there is a personal aspect involved in the decision. The choice is subjective in that different judges will tend to decide such cases differently. However, this personal dimension of legal decision-making is not exclusive to tragic legal choices – it is present in every legal case. Moreover, this subjective aspect does not necessarily make a decision and the way the judge handles the case arbitrary, political or extra-legal. The rationality of both easy cases and tragic cases can be explained by reference to a set of judicial virtues.⁶⁹ The virtue of judicial perception – a character-dependent skill that allows a judge to adequately take cognizance of the case at hand, and decide and deal with it accordingly – is the most prominent among them.⁷⁰ Rationality is a product of professional character rather than stemming from application of an external legal standard. Yet, precisely because this account of rationality allows for different judges to decide differently in similar cases, it does not prevent adjudication from being messy and seemingly inconsistent rather than fully transparent and logically coherent. Moreover, and in reiteration: when tragic legal choices must be made, the idea of ‘rationality’ loses its reassuring connotation as it cannot prevent the occurrence of tragic remainders.

5. Conclusion

By introducing the concept of a tragic legal choice, this article seeks to make sense of an oftentimes neglected aspect of the phenomenology of adjudication, ie its inherent moral ambivalence, messiness and unintelligibility. Rather than understanding this phenomenology as irrational and as something to be dismantled or as irrelevant, it is envisaged as a potential expression of adjudication’s moral nature.

In characterizing the concept of a tragic legal choice I discussed the notions of a genuine conflict between judicial commitments, a tragic legal remainder and tragic responsive reactions. Subsequently I pointed out why the concept of a tragic legal choice has a valuable role to play in practice. It can enhance a more respectful way of dealing with judicial loss, it can stimulate moral

⁶⁹So, allowing for (conceptual) room for tragic legal choices in adjudication fits well within a virtue-ethical approach to adjudication. For virtue-ethical approaches to legal reasoning, see: LB Solum, ‘Virtue Jurisprudence. A Virtue-Centered Theory of Judging’ (2003) 34 *Metaphilosophy* 178; C Michelon, *Practical Wisdom in Legal Decision-Making* (University of Edinburgh School of Law 2010), available SSRN: <https://ssrn.com/abstract=1585929> (last visited 15 September); A Amaya, ‘Virtue and Reason in Law’ in M Del Mar (ed), *New Waves in Philosophy of Law* (Palgrave Macmillan, 2011) 123–43; I van Domselaar, ‘Moral Quality in Adjudication. On Judicial Virtues and Civic Friendship’ (2015) 44 *Netherlands Journal of Legal Philosophy* 24.

⁷⁰Again, see for a more elaborate discussion of this virtue: van Domselaar (n 41).

progress and it can add to the integrity of a legal order. Also, through the concept of a tragic legal choice we are better positioned to account for the phenomenology of the aftermath in adjudication, that often goes unnoticed and is misunderstood and dismissed as rare anomaly or non-legal phenomenon.

Through discussion of a variety of legal cases we have seen that the concept of tragic legal choice indicates that neither the judge nor the legal order as a whole can stay morally 'pure' and 'clean'. Even in its most ideal form adjudication will be a morally ambivalent, tragic practice, pervasively vulnerable to the contingencies of the practical world.

Disclosure statement

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