Angst and the North Carolina law of mortgage

"The present picture is rather of a world in which everything is, if you like, persuasion"[1]

In 1928 Wesley Sturges – then professor and later dean of Yale Law School – published an article concluding with a study of North Carolina cases on mortgage;[2] a subject, Grant Gilmore rightly says, "of no conceivable interest to Sturges or anyone else." The point of the study, in Gilmore's words, was to show that "the North Carolina law of mortgages **made no sense** and could most charitably be described as a species of collective insanity on the march." [3]

Gilmore revered Sturges and wrote a memorial piece about him in 1963. In that note Gilmore discusses at length Sturges's article of 1928, evoking its mood in bleak terms:

> "The jurisprudential attitude illustrated by this article is surely a hopeless and despairing one. Theory is a dead end, doctrine is absurd, rules of law are merely meaningless sequences of words whose function is not 'descriptive' but 'emotive.' At an earlier point in the article the author states his belief to be that a court – any court – 'uses or refrains from using one theory in one case and uses or refrains from using that theory in another case, depending on the judges' sense of convenience and the matters which stimulate them in the particular case.' The 'judges' sense of convenience' and 'the matters which stimulate them' can hardly be made into tools for analysis or prediction. There is, to be sure, an obscure reference in the final footnote . . . to what are called 'fact-transactions' and 'fact-patterns' and a suggestion that the 'identification' of these transactions and patterns might lead to something. 'These matters,' however, are 'left to a later consideration' – but, from Wesley's pen, that 'later consideration' was never forthcoming. It cannot be surprising that there was no sequel: the article stands as a lonely monument, an ultimate expression of disbelief."[4]

Gilmore claims that for Sturges these attitudes were not just a passing mood, were instead "the permanent landmarks of his intellectual life. At the end, as at the beginning, his response was an uncompromising: Non credo."[5]

Non credo what? If his jurisprudential attitude was indeed "hopeless and despairing" – and Gilmore lays it on thick, calling him "a lonely, great, and tragic figure"[6] – the implication is that

---

[1] Bernard Williams.
[2] Wesley A. Sturges and Samuel O. Clark, "Legal Theory and Real Property Mortgages," 37 *Yale L. J.* 691 (1928). Clark was a third-year student and a member of the Board of the *Journal.*
[3] Grant Gilmore, *The Ages of American Law* (1977) 81 (my emphasis).
[4] "For Wesley Sturges: On the Teaching and Study of Law," 72 *Yale L. J.* 646, 653 (1963); http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3640&context=fss_papers
[5] *Ibid.*
[6] *Ages* at 81.

Sturges felt a world had been lost yet could not feel it well lost. The "prevailing intellectual mood" of that former world, Gilmore tells us, "was a confident belief in the rational structure of the legal system, in the possibility of logical progression from premise to conclusion, in the relationship between the rule of law and the result at law."[7]

By 1928 that world appeared to be on the wane, owing in no small part to the work of the Legal Realists.[8] But in Gilmore's view Sturges took the critical spirit of legal realism too far, "to the point of intellectual nihilism."[9] As evidence for this claim Gilmore recounts that around the same time as his mortgage article Sturges was putting together a textbook to collect "the most absurd cases, along with the most idiotic law review comments, which he had been able to find."[10]

What did this professor on the verge of nihilism teach his students? "He taught us," Gilmore recalls, "in a way that none of us will ever forget, something – indeed a great deal – about the use and uses of words. . . . He taught us to be forever on our guard against the slippery generality, the received principle, the authoritative proposition. He taught us to trust no one's judgment except our own – and not to be too sure of that."[11] But all that's just 'Don't take anyone's word for it' (*nullius in verbis*) and 'Dare think for yourself' (*sapere aude*). The mottoes of the Royal Society and Immanuel Kant do not on their face suggest intellectual nihilism.

The better then to understand Sturges's fundamental insights, the "permanent landmarks of his intellectual life" which guided his teaching, we look to the words of his article of 1928:

> "If the three theories [of the nature of mortgage] are predicated upon the three different classes of decisions concerning a mortgagee's right to possession and the classification is based upon those rules, quite clearly [from his foregoing review and analysis] these theories are *ex post facto* generalities; quite clearly they had no 'far reaching application' in fixing the decisions in these cases – they come only to report the result of the decisions in their very general terms.
>
> "But it may be denied that these several theories are confined to reporting in general terms the rules regarding possession. It may be, and apparently is urged that they represent a basis of classification of the American states and that in a given state a given theory permeates, at least by-and-large, its whole mortgage structure; that the states can be classified as 'title,' 'intermediate,' or 'lien' to give a prevailing if not a complete picture of a mortgage.

[7] "For Wesley Sturges" 648-649.
[8] Karl Llewellyn named Sturges and nineteen others as leading representatives of the movement in "Some Realism about Realism—Responding to Dean Pound," 44 *Harv. L. Rev.* 1222, 1226-1227 fn. 18 (1931).
[9] *Ages* at 80.
[10] *Id.* at 81. The textbook was *The Law of Credit Transactions* (1930).
[11] "For Wesley Sturges" 654.

> "We are inclined to criticize this position. **We believe that a supreme court of a given state uses or refrains from using one theory in one case and uses or refrains from using that theory or another theory in another case, depending upon the judges' sense of convenience and the matters which stimulate them in the particular case**."[12]

This expressly affirms – "we believe" – that judges respond, at least can respond, to the factors, details, and configurations of situations, circumstances, and context – "matters which stimulate them in the particular case." "Sense of convenience" need not be understood as 'Will I make my tee-time?' but as '*aisthēsis* of suitability,' appreciation of the issues in keeping with the fabric of the relevant domain of interests and ends. Legal formulae are vehicles of this responsiveness. So Sturges goes on:

> "Without presuming to declare why judges behave like judges, we do submit that the writing of opinions couched in one or more terms which are more, rather than less, abstractions, in terms of generalizations, general legal principles, legal doctrine or legal theory, is **a problem involving the functions of language**. Without insisting that there is an exact delineation in the two concepts, we believe, however, that the words reporting the theories, doctrines and generalizations which are under consideration are not used as symbols designed to be *descriptive*, but rather to be *emotive*. They are 'one word more' in soliciting approval, in urging plausibility, for a particular judgment."[13]

Sturges's contrasting terms 'descriptive' and 'emotive' are metonymical for logic and rhetoric; the underlying theme of his article is the relation of logic and rhetoric; specifically the inversion of rhetoric's traditional subordination to logic. His part in that inversion is Sturges's lasting contribution. In 1927 Heidegger published *Being and Time*; in 1928 Sturges published his mortgage article; in 1929 Wittgenstein returned to philosophy. All three and others were non-colluding instigators of this inversion: the *Umschlag* from *svabhāva* to *pratītyasamutpāda* – the turnover from the metaphysics of inherent being to the phenomenology of *Geworfenheit,* thrownness, mutually conditioned origination – 'relationality' in Andrew Mitchell's term.[14]

---

[12] "Legal Theory" at 709 (my emphasis in bold).
[13] *Id.* at 714 (my emphasis in bold).
[14] "The members of the fourfold name the conditions by which the thing extends into a world of relations (as appearances, as mediated, as meaningful, as with others), they coalesce in the emergence of the thing into this world. But this relationality would not be possible for 'objects' as self-contained pieces of material, as the sturdy 'furniture' of a pre-existing world. . . . To think things as relational means that no thing exists independent of another and that to ex-ist is already to be held out and supported by a context." Andrew J. Mitchell, *The Fourfold: Reading the Late Heidegger* (2015) 12, 15.

Newton Garver shows that in the West this turnover took place in two movements.[15] The first movement formalized "the standard picture" of language and the world: "that the world of referents is endowed with a mind-independent structure and that our language manages to latch onto the world not just by force of convention, but by the existence of some objectively existent structural similarity between language and world."[16] Citing Frege, Husserl, Whitehead, Russell, and the early Wittgenstein Garver recounts how these logicians succeeded in giving "an irresistible impetus to the view that language is basically and primarily logical in character and that the fundamental essential features of language can be determined on the basis of requirements of logic."[17] They made explicit the notion of a "ready-made world," "a world that exists independent of human interests and concerns and already shows a particular kind of structuring which our structured language could then set out to reflect."[18]

That was the world – whose structure was logistic – inhabited by most of the American legal profession until the early twentieth century. The Legal Realists disavowed that world. Gilmore:

> "The trouble with the nineteenth century, said the realists, was that lawyers believed, and law professors taught, that law was a symmetrical structure of logical propositions, all neatly dovetailed. The truth or error, the rightness or wrongness, of a judicial decision could be determined by merely checking to see whether it fitted into the symmetrical structure; if it fitted, it was right; if it did not fit, it was wrong and could, or at least should, be disregarded. Moreover, law students could be trained by being made to read carefully selected collections of correct cases, from whose study, by induction, they could arrive at the correct general principles." [19]

---

[15] Newton Garver, "Preface" to Jacques Derrida, *Speech and Phenomena and Other Essays on Husserl's Theory of Signs* (tr. David P. Allison 1973).

[16] Jan Westerhoff, *Nāgārjuna's Madhyamaka: A Philosophical Introduction* (2009) 17.

[17] "Preface" at xiii. In 1928 Carnap published a sort of *Summa* whose title says it all: *Der logische Aufbau der Welt.* Garver was a student of "a certain nonstandard conception of language, one which occurs infrequently in the history of Western philosophy and usually on its fringes rather than in its mainstream. This renegade conception of language is one which sees language as a sort of communication arising out of cries and gestures rather than out of 'ideas,' and it focuses on what Wittgenstein has called the sense of whole selfstanding expressions (sentences in the usual case) rather than on the meaning of words (sentence parts). This conception of language has found little place in the tradition of Western philosophy – in neither Plato nor Aristotle, in neither Augustine nor Aquinas, in neither Locke nor Leibniz, and among linguists in neither Saussure nor Chomsky. It has not found a place in the tradition because it conflicts sharply with two central tenets of the tradition, viz. (1) the unity and analyticity of semantics, and (2) the priority of logic over rhetoric." "Derrida on Rousseau on Writing," 74 *Journal of Philosophy* 663, 667 (1977).

[18] *Nāgārjuna's Madhyamaka* 219.

[19] Grant Gilmore, "Legal Realism: Its Cause and Cure," 70 *Yale L. J.* 1037, 1038 (1961). As a prominent Realist put the point: "Every attempt to reduce the law in a given field to a rule which can be applied automatically to really new situations by the processes of deductive logic, is of necessity foredoomed to failure." Walter Wheeler Cook, "The Present Status of the 'Lack of Mutuality' Rule," 36 *Yale L. J.* 897, 912 (1927). What necessity?

This nineteenth century American understanding had its proximate origin in the previous century. Blackstone began lecturing on the common law in 1753 at Oxford, and his published *Commentaries* shaped the development of a distinctive American strain of that law. Blackstone taught that "Upon these two foundations, the law of nature and the law of revelation, depend all human laws;" so that "with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former."[20] Daniel Boorstin describes the core of Blackstone's doctrine:

> "According to Blackstone somewhere there existed a general principle of law, which was the perfect form of any rule. This perfect form was merely exemplified and imperfectly reflected in any particular legal system. . . . The essences distilled by the 'noble alchemy' of the [common] law possessed a purity and perfection that were immeasurable. That man could sometimes not discover the rationale of a law was evidence not of any vagueness in the rationale itself but of the crudeness of man's instrument of analysis. One of the first efforts of the student of law should be, then, to avoid preoccupation with the confusions and perversions which had been the work of men, and instead to devote himself to the search for the pure essences which were properly the substance of his study."[21]

In the tradition of the Legal Realists Deirdre McCloskey observes that the error here "is to think that you are engaged in mere making of propositions ['declaring the law'], about which formal logic speaks, when in fact you are engaged – all day, most days – in persuasive discourse, aimed at some effect about which rhetoric speaks."[22]

So the Realist Sturges implicitly suggests that rhetoric – in the broad sense of practical discourse – rather than logic sustains meaning; rhetorical force ('emotive') rather than "the crystalline purity of logic" ('descriptive') makes for cogency; that the opinions of judges deciding cases are principally works of rhetoric, not logic; that logical relations of concepts depend on communicative relations of persons rather than the other way around.[23] As the later Wittgenstein put it, "And everything descriptive of a language-game is part of logic. . . . I want to say: We use judgments as principles of judgment."[24]

---

[20] *Commentaries on the Laws of England, in Four Books* (ed. George Sharswood 1893) I.ii, p. 42.
[21] Daniel J. Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries* (1941) 41-42, 28.
[22] *The Rhetoric of Economics* (2d ed. 1998) 24. *See also* "The Rhetoric of Law and Economics," 86 *Mich. L. Rev.* 752 (1988); http://www.deirdremccloskey.com/docs/graham/michigan.pdf .
[23] Garver singles out Charles Sanders Peirce as "surely one of the few geniuses in the history of Western thought who have conceived in detail and with plausible consistency that logical relations of concepts depend on communicative relations of persons, rather than the other way around." Book Review, 22 *Transactions of the Charles S. Peirce Society* 68, 73 (1986).
[24] *On Certainty* (ed. G. E. M. Anscombe and G. H. von Wright, tr. Denis Paul and G. E. M. Anscombe 1969) §56, p. 9; § 124, p. 18. So Boorstin notes, "The identification of maxim and law did not prevent Blackstone from

Bernard Williams comments on this set of oppositions that "For the Platonic spirit (Plato himself, needless to say, had more complex views) the aim is ultimate truth or rationality, and the powers that could lead us to it merely need to be protected from interference by persuasion. The present picture is rather of a world in which everything is, if you like, persuasion, and the aim is to encourage some forms of it rather than others. This is not a technical task, like clearing a radio channel of static." As judging would be a logico-technical task if it were, for example, the application of what John Rawls calls "moral geometry."[25] It is, Williams continues, "a practical and ethical task, like deciding who can speak, how and when."

Williams adds that "It is also not, as is often suggested by those of a Platonic disposition, a picture that is a product of despair, a mere second-best for a world in which the criteria of true objectivity and ethical truth-seeking have proved hard to find. To recognise how we are placed in this respect is, if anything, an affirmation of strength. To suppose that the values of truthfulness, reasonableness, and other such things that we prize or suppose ourselves to prize, are simply revealed to us or given to us by our nature, is not only a philosophical superstition, but a kind of weakness."[26]

The kernel of this philosophical superstition is expressed by the Sanskrit word *svabhāva*, literally 'self-being,' and which means 'inherent existence,' 'intrinsic nature,' 'autousia.' The Mahāyāna innovation challenged the hegemony of *svabhāva* enthroned as *brahman*, the Vedic doctrine of the one true nature of being, the real reality, 'the unit substance' inherent in all beings; in human being as *ātman*. Buddhism denies *brahman*; claiming instead that all beings are *śūnya*, empty; empty of *svabhāva*, inherent existence. All beings are what they are in virtue of *pratītyasamutpāda*, 'dependent origination;' the being of each being depends without exception on other beings.[27]

In Sturges's analysis *svabhāva* shows up in the word 'symmetry,' some supposed essence of mortgage which the North Carolina cases purportedly conserve by adjudicating disputes on the basis of the 'title' or 'intermediate' or 'lien' theory allegedly permeating the jurisdiction. The cases do not, as Sturges showed, bear out the presupposition of such an essence glowing within

---

giving a maxim as the 'reason' for a legal rule. And this despite the fact that, in Blackstone's own terms, this meant that he was giving one rule of law as the reason for another." *The Mysterious Science* 115.

[25] "We should strive for a kind of moral geometry with all the rigor which this name connotes." *A Theory of Justice* (1971) 121. "The realist revolution," Gilmore writes, "had its greatest success in its onslaught on nineteenth century conceptualism—which was overready to assume that a well-articulated set of rules would by itself enable our legal system to withstand the shocks of a new era." "Legal Realism" at 1047-1048. *A Theory of Justice* – itself a reaction to the shock of World War II – evidences the limited extent of that success.

[26] "Saint-Just's Illusion" in *Making sense of humanity and other philosophical papers 1982-1993* (1995) 148.

[27] Graham Priest expounds emptiness concisely here: https://www.youtube.com/watch?v=0ILmGpgzYlM ; and in greater detail in his "The Structure of Emptiness," 59 *Philosophy East and West* 467 (2009).

the decisions.[28] But that is no cause either for despair or for Gilmore's disparagement of the decisions as "a species of collective insanity on the march." Sturges did not denounce, he accepted the obligate casuistry of legal decision-making:

> "We are reluctant to refer to the situation as one of 'confusion' because the opinions of the North Carolina court were approached with a feeling that, true to life generally, questions in mortgage law are many and complex and that a court confronted with a concrete case with its live parties presenting conflicting claims is likely to be influenced by the particular case to the prejudice of any simple generalization, general legal principles, legal theory or conception of 'a mortgage,' and that the symmetry of any doctrine or conception will be lost in that 'wilderness of single instance.' Unless it is postulated that the establishment and preservation of such a symmetry is the primary, fundamental, far-reaching function of the court we do not criticize it for its 'variations.'"[29]

Its variations do not show the court as straying off the one true path or soiling the purity of some essence; instead they show its plasticity in coping with the vagaries of its environment, questions many and complex, life, the wilderness. As Nietzsche described the phenomenon of plasticity: "in every single case the elements of the synthesis change valence and alter the order in which they occur so that now this, then that element stands out and dominates, to the detriment of the others, indeed, in some circumstances one element . . . seems to overcome all the rest."[30] Moreover, and this is Sturges's point, I think: 'it's wilderness to the horizon;' in which we make our way not as collective insanity on the march and not by syllogizing along rigid logical tracks

---

[28] Llewellyn said in the introduction to his own 1930 casebook on Sales, "I do not conceive it to be the teacher's duty to let the true light shine." As quoted in "For Wesley Sturges" 647.

[29] "Legal Theory" 713-714. *Cf.* Thayer on the law of evidence, with no reluctance to characterize its general aspect as 'confused' by repeated attempts to make soufflé out of Mulligan stew: "A system of evidence, like ours, thus worked out at the forge of daily experience in the trial of causes, not created, or greatly changed, until lately, by legislation, not the fruit of any man's systematic reflection or forecast, is sure to exhibit at every step the marks of its origin. It is not concerned with nice definitions, or the exacter academic operations of the logical faculty. It is attending to practical ends. Its rules originate in the instinctive suggestions of good sense, legal experience, and a sound practical understanding; and they are seeking to determine, not what is or is not, in its nature, probative, but rather, passing by that inquiry, what, among really probative matters, shall, nevertheless, for this or that practical reason, be excluded, and not even heard by the jury. From the diversity and multitude of casual rulings by the judges,—rulings often hastily made, ill-considered, and wrong,—from the endeavor to follow these as precedents and to generalize and theorize upon them, from the forgetting by some courts, in making this attempt, of the accidental and empirical nature of much in these determinations, and the remembering of this fact by others, there has resulted plenty of confusion. The pressure under which a ruling must be made is often unfavorable to clear thinking, and the law of evidence, largely shaped at nisi prius, took on a general aspect which was vague, confused, and unintelligible." James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898) 3-4.

[30] *Genealogy of Morality* (ed. Keith Ansell-Pearson, tr. Carol Diethe 1994) Second essay, §13. *wie für jeden einzelnen Fall die Elemente der Synthesis ihre Werthigkeit verändern und sich demgemäss umordnen, so dass bald dies, bald jenes Element auf Kosten der übrigen hervortritt und dominirt, ja unter Umständen Ein Element (etwa der Zweck der Abschreckung) den ganzen Rest von Elementen aufzuheben scheint.*

(lacking in a wilderness anyway) but, in Nietzsche's trope, as a mobile army of metaphors, metonyms, and anthropomorphisms; as a congeries of language-games.

Thus the *second* movement of the inversion which Garver describes questioned the formerly "unexamined and almost unnoticed" assumption (before the logicians had made it explicit) "that linguistic meaning belongs to an abstract realm where logical criteria dominate." This second movement "regards the role of utterances in actual discourse as the essence of language and meaning," and therefore "regards logic as derivative from rhetorical considerations." For this second movement "rhetoric and the context of actual communication are an essential and ineradicable feature of all linguistic meaning."[31]

The meaning of any situation is not a glimpse vouchsafed of 'that other world;' rather it is 'thrown' in the sense of dependently originated in human communication and practice. This understanding of meaningfulness, that of the second movement, culminates in Wittgenstein's end-of-life remarks *On Certainty* and in Heidegger's late thinking of the Fourfold.[32] So Wittgenstein:

> "We do not learn the practice of making empirical judgments by learning rules: we are taught *judgments* and their connexion [*Zusammenhang*] with other judgments. *A totality* of judgments is made plausible to us. When we first begin to *believe* anything, what we believe is not a single proposition, it is a whole system of propositions. (Light dawns gradually over the whole.) It is not a single axiom that strikes me as obvious, it is a system in which consequences and premises give one another *mutual* support [***gegenseitig*** *stützen*].
>
> The child learns to believe a host of things. I.e. it learns to act according to these beliefs. Bit by bit there forms a system of what is believed, and in that system some things stand unshakeably fast and some are more or less liable to shift. What stands fast does so, not because it is intrinsically obvious or convincing [*an sich offenbar oder einleuchtend*]; it is rather held fast [*festgehalten*] by what lies around it."[33]

So when Wittgenstein says "The difficulty is to realize the groundlessness of our believing" we may understand *grundlosigkeit* as *śūnyatā*, emptiness; in that our believing, our sense-making,

---

[31] "Preface" xvii, xxii.

[32] The imagery of the Fourfold is not to everyone's liking and, on the figure's perspicuity, one suspects the consensus is with Graham Priest: "I have always found this one of the more opaque of Heidegger's metaphors." Review of *The Later Heidegger* by George Pattison, 52 *The Philosophical Quarterly* 401, 402 (2002). Yet are not the Fourfold and the Net of Indra both images of the phenomenon of dependent origination?

[33] *On Certainty* §§ 140, 141, 142, 144, p. 21.

does not rest on some *svabhāva*, some self-subsisting extra-human ground, but arises from our (shifting) practices and holds together (while it does) as texture, 'the web of belief' in Quine's image. "What I hold fast to is not *one* proposition but a nest of propositions [*ein Nest von Sätzen*]."[34]

Likewise Heidegger says in *Being and Time* there is no such thing as 'an' equipment.[35] A thing exists as equipment by virtue of its relation to a totality of equipment, *ein Zeugganzes.* Heidegger's 'worldhood' is empty in that it is interdependently originated through a web of references and relations. The things in our environs, he says,

> "are encountered in references [*Verweisungen*] in the character of 'serving to,' useful for,' 'conducive to,' and the like; worldhood [*Weltlichkeit*] is constituted in references, and these references themselves stand in referential correlations [*Verweisungszusammenhängen*], referential totalities [*Verweisungsganzheiten*], which ultimately refer back to the presence of the work-world. It is *not things but references* [***nicht Dinge, sondern Verweisungen***] which have the primary function in the structure of encounter belonging to the world, *not substances but functions* [***nicht Substanzen, sondern Funktionen***], to express this state of affairs by a formula of the '*Marburg School.*'"[36]

By their different paths Heidegger, Wittgenstein, and Sturges became Śūnyavādins:

> "For the Śūnyavādin, empirical objects are *nissvabhāva* [non-substantial, empty of *svabhāva*] not because there is some entity of some other higher *svabhāva* that renders them so but because *nissvabhāvatā* [non-substantialness, emptiness] itself is the highest truth. There is nothing above and beyond empirical entities which is distinct from them all in its *svabhāva*. All empirical entities are characterized by momentariness and dependent origination and there is nothing that is eternal and non-dependently originated. Nāgārjuna says very clearly, 'There is no existence of any kind, anywhere at any time which is non-dependently originated; therefore there is nothing nowhere at no time that is eternal.'"[37]

---

[34] *Id.* § 225, p. 30. "[M]uch of what the later Wittgenstein had to say was anticipated about 1800 years ago in India." Chris Gudmunsen, *Wittgenstein and Buddhism* (1977) 113. I.e. by Nāgārjuna and the Mādhyamikas.
[35] ***Ein*** *Zeug »ist« strenggenommen nie. Sein und Zeit* ([1927] 2006) § 15, p. 68.
[36] *History of the Concept of Time: Prolegomena* (tr. Theodore Kisiel 1985) 200.
[37] Srinivasa Rao, *Perceptual Error: The Indian Theories* (1998) 51, citing Nāgārjuna's *Madhyamakakārikā* 24.19. But the Sanskrit text Rao quotes is not MMK 24:19; it appears to be from Āryadeva's commentary *Catuḥśataka* at 9.2. Nāgārjuna's verse in translation is, "There being no dharma whatsoever that is not dependently originated,/ it follows that there is also no dharma whatsoever that is non-empty." Mark Siderits and Shōryū Katsura, *Nāgārjuna's Middle Way:* Mūlamadhyamakakārikā (2013) 24.19 p. 278. Siderits and Katsura translate Candrakīrti's quotation of Āryadeva's gloss with these words: "Never is there anywhere the existence of anything that is not dependently originated,/ hence never is there anything anywhere that is eternal." *Ibid.*

So why was Sturges, by Gilmore's account anyway, so gloomy about emptiness? Can't say for sure, but one might conjecture that he came to see the fiction of a logico-metaphysical ground of jurisprudence as, so to speak, *das Man* on stilts. But that show is just funny; so again, why the long face? Perhaps because as Williams says, "To suppose that the values of truthfulness, reasonableness, and other such things that we prize or suppose ourselves to prize, are simply revealed to us or given to us by our nature, is not only a philosophical superstition, but a kind of weakness." And Sturges may have come to view, with sadness, this superstition as a congenital human weakness: the need for *svabhāva* in one form or another an unremoveable woof-thread extending through the texture of our dependent origination, our thrownness. [38]

If that was in fact Sturges's view it has been borne out by the subsequent recrudescence of jurisprudential *svabhāva* in both new and old forms; e.g., economic efficiency, textual originalism, and most strikingly Attorney General William Barr's Restatement of Blackstone in a recent address to a law school audience:

> "social order must flow up from the people themselves – freely obeying the dictates of inwardly-possessed and commonly-shared moral values. And to control willful human beings, with an infinite capacity to rationalize, those moral values must rest on authority independent of men's will – they must flow from a transcendent Supreme Being. In short, in the Framers' view, free government was only suitable and sustainable for a religious people – a people who recognized that there was a transcendent moral order antecedent to both the state and man-made law and who had the discipline to control themselves according to those enduring principles. . . . [The precepts of the Judeo-Christian moral system] also include the guidance of natural law – a real, transcendent moral order which flows from God's eternal law – the divine wisdom by which the whole of creation is ordered. The eternal law is impressed upon, and reflected in, all created things. From the nature of things we can, through reason and experience, discern standards of right and wrong that exist independent of human will."[39]

---

[38] The standpoint of emptiness "is not at odds with the conventional standpoint, only with a particular philosophical understanding of it—that which takes the conventional to be more than conventional. What is curious—and, from the Buddhist [the Śūnyavādin] standpoint, sad—about the human condition, on this view, is the naturalness and seductiveness of that philosophical perspective." Jay L. Garfield, *The Fundamental Wisdom of the Middle Way: Nāgārjuna's* Mūlamadhyamakakārikā (1995) 314.

[39] "Remarks to the Law School and the de Nicola Center for Ethics and Culture at the University of Notre Dame," October 11, 2019. https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-law-school-and-de-nicola-center-ethics Blackstone had said, alluding to Newtonian dynamics, "as man depends absolutely upon his Maker for everything, it is necessary that he should, in all points, conform to his Maker's will. This will of the Maker is called the law of nature. For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion, so, when he created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain

So much for overcoming metaphysics; "our growing understanding that the world has no metaphysical structure whatsoever"[40] gets continually stunted by inveterate ontotheology. We may give voice to that notion's persistence and centrality by repurposing a popular lyric:

Svabhāva, now that we've found you we won't let you go,
Build our world around you, we need you so.[41]

Hence, I guess, Wesley's blues; the pang of the hard lesson imposed on anyone who would short ontotheology: 'the market can stay irrational longer than you can stay solvent.'

DCW 11/22/2019

immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws." *Commentaries* I.ii, 39-40.

[40] Bernard Williams, "Introduction to *The Gay Science*," in *The Sense of the Past: Essays in the History of Philosophy* (ed. Myles Burnyeat 2006) 316.

[41] Thanks and apologies to The Foundations (*sic*).
https://en.wikipedia.org/wiki/Baby_Now_That_I%27ve_Found_You