

# Introduction

It was probably the stories of Greek mythology that ignited my future academic passion: the intersection of law and literature. I grew up in an ancient Mediterranean port city, where the distant past is always palpable. It is a city, mentioned in sources from the Iron Age, on which the Phoenicians, the ancient mariners who cast anchor in many Mediterranean ports, left their mark, and also a city that boasts Hellenistic heritage.<sup>1</sup> It is a city whose wall and moat resonate with centuries of sieges, battles, destruction, ruin, and regeneration. Most notably, it is site that poignantly presents the symbiosis between sea and land. This might have been the sea on which a thousand ships were launched in the chase after Helen of Troy or the waters on which Odysseus may have spent part of his long journey. It is a sea that triggers enchantment with these mythological tales.

Over time, however, I became aware of the discrepancy between the attraction of these mythological stories and the discomfort they aroused. Beneath these tales of heroism and glory lurked discordance that stems from what I now – from a distance of decades, and wearing my scholar’s cap – identify as recognition of the unbearable price of lawlessness. While writing this book, the elusive threads linking ancient myths, my own history, and many years of pursuing law and literature gained perceptibility.

This book introduces the Homeric oeuvre into the law and literature canon. In view of the *Iliad* and the *Odyssey*’s unique cultural centrality and the broad canvas created by the law and literature discourse since the 1970s, one might expect to find extensive preoccupation with the Homeric epic and its connection to law and justice. Although other works belonging to the legacy of ancient Greece – especially, of course, Aeschylus’ *Oresteia* trilogy and others from the corpus of ancient Greek drama – have become a focus of this discourse, the Homeric epics have remained largely on its margins.<sup>2</sup>

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<sup>1</sup> The city’s Hellenistic name was Ptolomaïs. Ptolemy II, who occupied the territories of Syria and Palestine, named this city after his father, Ptolemy I (Barclay Vincent Head, *Historia Numorum: A Manual of Greek Numismatics* (Oxford: Clarendon Press, 1911), 788. Ptolemy I founded the Library of Alexandria, and initiated the editing and canonization of the *Iliad* and the *Odyssey*, which had no uniform text at the time (Charles Fredrick Partington, *The British Cyclopaedia of Biography: Containing the Lives of Distinguished Men of All Ages and Countries, with Portraits, Residences, Autographs, and Monuments* (London: Wm. S. Orr and Co., Amen Corner, Paternoster Row, 1838), 986).

<sup>2</sup> Examples of works that deal with the connections between law and Greek drama include Danielle S. Allen, “Law and Greek Tragedy,” in *Cambridge Companion to Greek Law & Culture*, eds. David Cohen and Michael Gagarin (Cambridge: Cambridge University Press, 2005), 374–393;

As a modern academic discipline, law and literature is generally regarded to have been inaugurated by the publication of James Boyd White's *The Legal Imagination*.<sup>3</sup> I therefore begin by directing attention to the allusions to the Homeric epics in that seminal composition. It is unsurprising that White turns to these epics when attempting to describe how a story gradually accrues layers of meaning and its circles of influence expand. Imagine, he suggests, that you are telling a story that is not intended to generate any general or theoretical meaning; for instance, a story about a soldier who returns home after many years. The longer the story continues to circulate, the more it becomes possible to identify trends and themes pulling in contrary directions – action versus reflexivity, adventurism versus tranquility and domesticity, life versus death. These are the qualities that found their way into the fabric of the *Odyssey*, which once was a mere collection of stories. The development of the *Iliad* represents a similar process. There once was a poet who decided to tell a tale about the wrath of the hero Achilles, who abandoned the battlefield after being deprived of his spoils of war, and later decided to return. Yet that selfsame poet – or perhaps it was some other – was unable to ignore the brutal nature of the battle and the losses it entailed, the moral significance of Achilles' actions, and the possibility that they expressed not only protest against Agamemnon, but a revolt against the entire heroic enterprise. As White concludes, "to write a story is very often to find that one has written more than one knew,"<sup>4</sup> aptly illustrating his point with the *Odyssey*, which remains to this day one of the most striking examples of a story that gradually accumulated new layers of meaning changing and grown richer, expanding its circles of influence over generations.

Yet, although the Homeric epics already powerfully evoke legal imagination – including the way in which we imagine justice and injustice – and the need to develop a defense for individuals and for the public against raging fury, White skips several centuries forward to the *Oresteia* to demonstrate how a powerful story may be connected to the vast subject of justice: The century begins with Aeschylus' play the *Oresteia*, which tells the story of retaliatory justice in the house of Atreus – a chain of vengeance that continues through generations without end – and celebrates the foundation of a public institution for trial and pun-

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Maria Aristodemou, *Law & Literature: Journeys from Her to Eternity* (Oxford: Oxford University Press, 200); Edward Monroe Harris, Delfim Ferreira Leao and P. J. Rhodes (eds.), *Law and Drama in Ancient Greece* (London: Bristol Classical Press, Bloomsbury Academic, 2012).

<sup>3</sup> See James B. White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Boston: Little, Brown, 1973) (hereinafter abbreviated as: White 1973).

<sup>4</sup> White 1973, 864.

ishment, which is instrumental in allowing the community to bring the narrative of perpetual destruction to a close.

Before expanding on the rationale of this study and its structure, two preliminary remarks are due. The focus here is on an analysis of the *Iliad* and the *Odyssey* as literary texts that contain various representations of law and its absence. The following chapters do not treat the texts from the usual standpoint of classical scholarship and are therefore situated beyond debates between Classics and Ancient History scholars on the Homeric question, the correspondence between history and literature or between myth and reality, and analyses of whether myth does or does not represent religious faith. Nor am I concerned with summarizing developments in Homeric analysis, many of which are already available. The discussion here focuses on the epics as literary works relevant to law. More specifically, the focus of my interest is the status of the works as literary texts, particularly as works that narrate myths that have cultivated notions pertaining to the naissance of law.

“It goes against my grain to repeat a tale told once, and told so clearly,”<sup>5</sup> says Odysseus to his Phaeacian audience (*Odyssey* 12.490–491), juxtaposing humility and arrogance. But these words perhaps even better illustrate the power ingrained in the repetition of stories already told. The myths about the Trojan War, the wrath of Achilles, Hector’s death, and Odysseus’ prolonged return to Ithaca had passed from generation to generation even before Homer recorded them. Their very survival attests to their reception by previous generations. Homer retells them in his own way, and apparently does it best, as according to Moses Finley, Homer “[o]ccupies the first stage in the history of Greek control over its myths.”<sup>6</sup> The new story that Homer tells brings to light a fundamental understanding of law and justice. This study highlights and uses these new insights to identify points of correspondence between the transition from myth to tragedy and the gradual transition from a social existence lacking formal law to an institutionalized legal system such as that practiced in the polis.

Through an exploration of the transcendent games that past and future play in literature, it is my aim to contribute to our understanding of the tapestry of stories about the evolution of law. Broadly, this book presents several observations on laws’ evolution. First, I aim to show that the Homeric epics represent

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<sup>5</sup> Homer, *The Odyssey*, trans. Robert Fagles (London: The Folio Society, 2001) (hereinafter abbreviated as: *Odyssey*). The story of the Greek victory in the Trojan War, from which Odysseus returns, is told in Homer, *The Iliad of Homer*, trans. Robert Fagles (London: The Folio Society, 2001) (hereinafter abbreviated as: *Iliad*).

<sup>6</sup> Moses I. Finley, *The World of Odysseus* (Harmondsworth: Penguin, 1972), 29 (hereinafter abbreviated as: Finley 1972).

a significant milestone in the long conceptualization of Greek law. Second, I suggest that the Homeric epics prefigure, perhaps even necessarily so, the main story of the regimentation and juridification of anger that later appears in the *Oresteia*. Finally, from the perspective of female agency, I argue that the newly institutionalized law represented in the *Oresteia* blocks paths of action that had been available to women in the Homeric epics.

A second remark concerns the use of the term “law.” The law does not exist a priori. It is not a material field whose establishment and stages of development are amenable to capture, tracking, and rigorous description. The law is an abstract concept, a complex and multifaceted intellectual continuum. The development of the system of law and the legal institutions that operated in Athens was influenced by multiple factors, including emerging social needs and power struggles between groups and interests. Other factors included norms and practices concerning the resolution of the tension between individual interests and the public interest, insights that developed and gradually seeped into collective consciousness through various means, including through powerful narratives. Within such an evolutionary conception of the law, an important contribution is made by an analysis of the stories that gradually structured the law and of the overt and covert intersections between the legal field and other fields.

The first chapter lays the theoretical foundation for the reading of the epics this book puts forward, beginning with an elaboration of the concept of generative legal narratives. Generative legal narratives, stories about the shift from a lawless society to a society that embraces the rule of law, shape the way we imagine law, establish our expectations of the law, and design potential ways of changing or reforming law. As mentioned earlier, the *Oresteia* is one of the major generative legal narratives in western cultural reserves. The following chapters discuss how the emergence of this work was facilitated by notions that were prefigured several centuries earlier in the Homeric epics.

The first chapter begins with the literature alongside law paradigm, which suggests several possible prisms of inquiry into the nature of the links between the two fields. One such prism focuses on narratives dealing with the absence of law and the consequences of such absence for the human condition. Another prism of inquiry points to a careful scrutiny of law’s failures and limits: “Always mistrust the law,” as the ancient maxim goes.<sup>7</sup> No matter which prism is selected, the literature alongside law paradigm critically examines the conceptualiza-

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<sup>7</sup> This maxim, reported by Nicole Castan, is quoted in David Cohen, *Law, Violence, and Community in Classical Athens* (Cambridge, UK; New York: Cambridge University Press, 1995), 23 (hereinafter abbreviated as: Cohen 1995).

tion of law as an autonomous, self-contained system. Literature makes us realize how incomplete the law is when it stands alone: Law realizes its full potential only when set within a broader context. As David Cohen maintains, it would be naïve to assume that legal institutions emerge to meet “societal needs” or result from the beneficial operation of some invisible hand. The *law* and legal norms that existed in fifth-century BC Athens “should not be judged according to a set of independent norms, but rather as a part of ongoing process that began long before the particular trial and will [...] continue into the future.”<sup>8</sup> Such a trajectory is emblematic of intellectual and moral evolution, but also of “competitive efforts of groups and individuals to pursue their enmities, advance their interests, and to recall the traditional Greek definition of justice, to help their friends and harm their enemies” (*The Republic*, 332d–335c).<sup>9</sup> A re-analysis, then, of the Homeric epics, equipped with the law alongside literature perspective, should reveal significant landmarks on the long path of progress of law in general, and of Greek law in particular.

The second chapter opens with an exposition of the similarity between situations that could be considered a crisis of revenge that stand at the center of both the *Odyssey* and the *Oresteia*. The *Oresteia* deals with a warrior-king who returns victorious but is murdered by his wife and her lover upon his return. Orestes, his son, exacts revenge by murdering his mother, triggering the fury of the Erinyes, goddesses of revenge. To end the conflict and the cycle of vengeance, Athena establishes a court. Orestes is brought to trial, and acquitted. The *Odyssey*, too, deals with a warrior-king who returns home victorious. He, however, encounters a band of audacious suitors who have pestered his faithful wife for years and consumed his property. He takes revenge by murdering them. The *Odyssey*, however, makes no mention of a judicial resolution or of the murderer’s accountability for his actions. As a result, it will not be the cunning trickster Odysseus who lights the eternal fire of the torch of law, but rather by tormented, anguished Orestes.

This chapter illuminates the poetic, performative, and sociopolitical considerations in the *Odyssey* that prepared the ground for the emergence of a generative legal narrative in the *Oresteia*, and suggests that the *Odyssey* constitutes a significant milestone on the path to the generative legal narrative. Epic poetry generally, and the *Odyssey* in particular, sketches a sophisticated social milieu in which economics, politics, warfare, and social and family life are conducted in accordance with known norms and rules. Its heroes are responsive to social

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<sup>8</sup> Cohen 1995, 23.

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authority, and they exhibit some degree of subservience to the social order and its values. The Homeric communities function through a discourse that takes place in the public sphere, at assemblies. These assemblies are instrumental in regulating the interactions between community members and leaders, allowing social life to be conducted. Even in the absence of written laws, the assemblies furnish a certain representation of the principle of deliberation and practices that we would now ascribe to the field of public law. Furthermore, the world of the epics is not entirely unfamiliar with judicial or quasi-judicial procedure, and its protagonists follow rules that define the course of revenge recounted in the *Iliad*. The epics, then, already reflect contemplations on reckoning, retribution, justice, and public order.

And yet, the pre-generative story told by the *Odyssey* conveys a picture of law afflicted by inherent failures, since the model it presents primarily serves the interests of the privileged patriarchal elite. As much as the *Odyssey* recounts the exploits of an elite that pays a relatively small price for its offenses, not much will change in a formal rule of law according to the *Oresteia*. Orestes, who is a member of this elite, is ultimately exempted from legal restitution for the murder he committed. The elite will continue to enjoy privileges.

Finally, the discussion sheds light on the figure of Athena as a symbol of both the expectations and hopes concerning the law, and its failures. Already in the *Odyssey*, Athena represents the potential of judicial process as encompassing a wide range of possibilities, including the flexibility to deviate from the formal judicial model in favor of a rhetorical-persuasive model that expands the available means of conflict resolution. In the *Odyssey*, Athena is a quasi-mediator who aspires to craft a peace pact that is beneficial to society at large. In the *Oresteia*, Athena becomes an adversarial judge who administers the court according to formal rules. In both cases, Athena comes across as a judge acting in accordance with the zeitgeist, but also as a deeply flawed judge whose partiality in favor of the masculine over the feminine is brazenly self-declared. In both cases the law comes across as an instrument of conflict resolution and peace, but also as one that is malformed.

In the third chapter, the discussion delves into the connection between the Homeric epics and law by turning the spotlight on the destructive consequences of unbridled wrath. Anger is a key concept that has always been linked to law. In effect, the ability and authority to regiment anger lies at the root of most legal systems. The subjugation of the impulse to act out of anger to procedures dictated by the law is a core fundament of the rule of law. The Homeric epics represent an appropriate and perhaps even prerequisite prequel to the central story of regimentation and juridification of anger that assumes a more structured form in the *Oresteia*. The third chapter contrasts the wrath of the two major epic heroes,

Achilles and Odysseus. The *Iliad*'s narrative posits Achilles' wrath as a central topic already in its first line, and it subsequently becomes clear that he is serially enraged. The *Iliad* describes three successive waves of fury that sow increasingly devastating consequences. Odysseus' wrath, by contrast, is not framed as a central element of the narrative, and is not a theme on which Homer elaborates. Still, a close look at Odysseus' wrath, which comes to a crescendo in a spectacle of fury, costs the lives of Ithaca's nobility and the dozen serving women of Odysseus' household.

The question that the epics explore is whether the terrible costs to society exacted by the eruption of fury are unavoidable. Tragedy, presided by Aeschylus' Athena, offers an answer that stems from the new understandings and new values represented by the polis, first and foremost the need to devise defenses against murderous rage in the interests of society as a whole. The law is the tool by means of which these defenses will be implemented. As an institution that belongs to society at large, the law highlights the divergence between the private interest of the mythical hero and the collective interest of society. Achilles and Odysseus bore no responsibility for the many deaths they caused, and in cultural consciousness they ended their days as heroes haloed in glory. The tragic hero Orestes, however, was subject to a new conception that drew a link between action and accountability. He would be judged by the new institution established by Athena atop the Areopagus, and would ultimately be saved by a tie from suffering harm for his actions. Thus, the generative narrative of the evolution of law is distilled out of the epics that centered upon the malignant outcomes of unbridled wrath. Unfortunately, as the generative story itself demonstrates, and as the future reiterates, the law would not prove to be an efficient or reliant mechanism for justly resolving conflicts or for achieving truth and justice. It would gradually become clear that the law is part of an ongoing human endeavor, studded with good and bad intentions, with the power to protect the social order as well as the capacity to serve whoever would disrupt it.

The fourth chapter proposes to reconceptualize the *Odyssey* as a unique moment on the continuum of the conflict between the sexes. In effect, the *Odyssey* is female driven: The *Odyssey* tells of queens, princesses, goddesses, and serving women who manage to determine courses of events. The pre-judicial era of the epics grant women some freedom of action, as long as it is discreetly exercised or disguised. The social system strikes a balance between male dominance and feminine agency: In this social and political environment focused on male will and interest, women are allowed some degree of freedom to promote their own interests, choices and desires by operating outside the default androcentric options of action. Homeric society represents what I denote the *Metis Syndrome*. It is a spectrum of behaviors that represent women's power alongside the need to

conceal its manifestations from the public eye. The *Metis Syndrome* clarifies some puzzling aspects of the enigmatic figure of Penelope, and adds depth to the figures of Calypso, Circe, Arete, Nausicaa, and the serving women whose voices also can be heard in the epic. Chapter four adds another layer to the analysis of the Homeric figure of Athena, arguing that in significant ways she is closer to ideals of justice and equality than the Athena of tragedy.

On the stage of history, the *Metis Syndrome* eventually dissipates. Future society, which gives birth to the rule of law, also blocks the restricted spectrum of female agency reflected in the Homeric epics. The era of tragedy decides unequivocally in favor of male superiority, to the constant service of which the newly minted rule of law would be harnessed and committed.