



Goethe and Law: Advancement Through Narrative and Arbitration

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Goethe and Law: Advancement through Narrative and Arbitration

A dissertation presented

by

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to

The Department of Germanic Languages and Literatures

in partial fulfillment of the requirements

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Goethe and Law: Advancement through Narrative and Arbitration

Abstract

Although Goethe was not only a literary writer, but also a lawyer and a statesman, his views on how law and why law advances have not been considered. Through a reading of *Faust* and the *Wahlverwandtschaften*, this dissertation shows that the two components of legal advancement in Goethe's mind were narrative and *gränzunbewußte* arbitration [arbitration unconscious of borders]. Narratives shape the way we think, and thus affect laws and legal outcomes. As the legal significance of borders diminishes – as the legal order becomes more *gränzunbewußt* – narratives cross borders more easily, and their effect becomes more global.

A focus on legal advancement in Goethe's works opens a novel understanding of them. For instance, it is unclear whether Gretchen killed her child – even though she has become one of literature's most famous child-killers. The evidence against her consists merely of contradictory narratives. The dominant narrative of infanticide in Goethe's time dictated that only the mother could kill the child, and that is why Gretchen has been deemed guilty. The resolution of the pact between Faust and Mephistopheles can also be understood in a novel way. Mephisto's defeat has been understood with reference to the terms of the written pact. However, it is better understood in terms of the legal advancement that has taken place since *Faust I*: in the *gränzunbewußte* legal order at the end of *Faust II*, Mephisto's pact to claim Faust's soul is no longer enforceable. The tragic ending of the *Wahlverwandtschaften* can be seen as the failure of legal advancement to materialize – for divorce fails to occur in spite of the fact that it has become legally possible – because the right narratives are missing, and the legal order is not *gränzunbewußt*.

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Dedication

To my parents, who started my narrative without borders.

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NOTE ON CITATIONS AND TRANSLATIONS

FA: Frankfurter Ausgabe

MA: Münchner Ausgabe

WA: Weimarer Ausgabe¹

Where needed, the *Abteilung*, volume, and part are also indicated, e.g. FA I, 7/2 refers to the Frankfurter Ausgabe, first *Abteilung*, volume 7, part 2.

References to *Faust* use line numbers.

References to the *Wahlverwandtschaften* use the number of the Part followed by the number of the chapter, and, where appropriate, the page number.

Unless otherwise indicated, Goethe's writings are cited from the WA.

Citations to the Bible are to Luther's Bible when in German, and to the King James Bible when in English, unless otherwise indicated.

Citations to classical sources use the format of the Loeb Classical Library.

Translations are my own unless otherwise indicated.

¹ The reason to rely principally on the WA for Goethe's writings is that the WA preserves the original spelling, to which Goethe attached considerable significance. See Eric Albert Blackall, *The Emergence of German as a Literary Language, 1770-1775* (Cambridge: Cambridge University Press, 1959). The FA and the MA have standardized the spelling. Those editions are here used principally for their commentary, but also where their version of Goethe's text is more accurate than that of the WA.

INTRODUCTION

Narrative and *gränzunbewußte* arbitration are the two components of legal advancement in Goethe's works. Narrative is as a series of events arranged in time.² Arbitration is legally binding dispute resolution outside of state courts – arbitration thus fulfills the function of a court, without being beholden to a state.³ Faust uses the word “*gränzunbewußt*” (WA 9363) to describe Helena's empire, where the significance of state borders is less than in the *Kaiser's* bordered realm. We use it here to describe arbitration, where the significance of state borders is less than in litigation. This allows those involved in an arbitration to travel more freely, until they eventually are hardly conscious of the borders they are crossing – and to take their narratives with them. It is remarkable that Goethe would see the way to advancement in this way, especially given the historical context – a context of change and reform. Goethe's life (1749-1832) saw the Declaration of Independence (1776) and the French Revolution (1789). The first European legal codifications soon followed: the *Allgemeines Landrecht für die Preußischen Staaten* (1794), the roughly contemporaneous codification in Austria, followed by the Napoleon's Civil Code of 1804 and Napoleon's other codifications in the ensuing years. Goethe's life overlapped with that of some of the greatest Western philosophers, such as Kant, Hegel, Schopenhauer, Schleiermacher, and Fichte in the German language, Rousseau, Voltaire, Diderot in the French language, and so the list goes on. Yet Goethe, a lawyer, statesman, and

² M. H. Abrams, *A Glossary of Literary Terms*, ed. Geoffrey Galt Harpham, 10th ed. ed. (Boston, MA: Wadsworth, 2011), 234. See also Alex Preminger, Frank J. Warnke, and O. B. Hardison, *Princeton Encyclopedia of Poetry and Poetics* (Princeton: Princeton University Press, 2015), 623.

³ See George A. Bermann, *International Arbitration and Private International Law*, The Pocket Books of The Hague Academy of International Law / Les livres de poche de l'Académie de droit international de La Haye (Leiden: Brill: Nijhoff, 2017), 247-56, and footnotes. In the interests of full disclosure, I note that I was involved in drafting the lectures that formed the basis for this book.

literary writer – a very rare combination – saw the way to legal advancement in little stories and traveling adjudicators.

The pinnacle of such a traveling narrative adjudicator is Helena. Faust has been striving intensely to attain this coveted woman. Finally, she comes to his castle in Act III of *Faust II* – generally considered central to all of *Faust*, even to all of Goethe’s work.⁴ Faust brings Lynceus to her in chains – this guard has failed to detect her arrival. (WA 9193ff.) Faust informs her that if she had not been there, he would have put Lynceus to death already. (WA 9210-11) Instead, Faust asks her to judge him. (WA 9212) Helena states: “So üb' ich nun des Richters erste Pflicht, / Beschuldigte zu hören. Rede denn.” (WA 9216-17) Lynceus obeys, and explains that he mistook her for the rising sun. (WA 9240-42) She acquits him, because she has had an overwhelming effect on men, heroes, and demigods alike, and therefore cannot fault him. (WA 9246-57) This simple act causes the very foundations of Faust’s world to shake. Now, vassals, walls, army, even all his possessions become uncertain all at once:

Erstaunt, o Königin ...

...

Was bin ich nun? Auf einmal machst du mir
Rebellisch die Getreusten, meine Mauern
Unsicher. Also fürcht' ich schon, mein Heer
Gehorcht der siegend unbesiegten Frau.
Was bleibt mir übrig als mich selbst und alles,
Im Wahn das Meine, dir anheim zu geben?
Zu deinen Füßen laß mich, frei und treu,
Dich Herrin anerkennen, die sogleich
Auftretend sich Besitz und Thron erwarb.
(WA 9258-72)

⁴ FA I, 7/2, p.581.

Lynceus is similarly amazed. Previously, he had predominantly been preoccupied with looting after successful campaigns – now, he brings all this treasure to Helena because he no longer believes that possessions matter. (WA 9273-9332)

The fact that Faust is so astonished that a judge actually hears the accused should astonish us. After all, all Helena did was listen to the accused and then apply one of the most familiar narratives of Western literature: the narrative that she, Helena, by her mere presence, is irresistible to men. Faust's reaction is all the more astonishing given that Faust lists "Juristereien" (WA 355) among the disciplines he has "[d]urchaus studirt, mit heißem Bemühn" (WA 357) and that he himself was paralyzed for the first two scenes of Act II of *Faust II* after seeing Helena (or an apparition of her). That is, Faust should understand the basics of due process, as well as the effect Helena has on men – and therefore he should consider it only natural to hear the accused, as he should also expect that Lynceus might be under Helena's spell.

At the same time, we need not be astonished at all by Faust's conduct. For by this point, Faust is operating in a legal order that is centralized, formal, rigid, and bordered. He has built a mighty medieval palace and seeks to rule from it. Helena, however, represents a different legal order – one that is *gränzunbewußt*. She crosses into Faust's realm and his castle with ease, and leaves it at the end of Act III simply by vanishing, even though she is embracing Faust. He is left holding merely her clothes. Indeed, such movement between realms and across borders is her life: throughout Act III, Goethe alludes to the numerous places where Helena has been in the various narratives that exist about her: Sparta, Troy, Egypt, Hades, Attica.⁵ Although Faust wants her to rule with him from a center, she assumes this position as "[a]ls Richterin, als Herrscherin" only temporarily. (WA 9214) She executes her duties as a judge with efficiency and informality,

⁵ These narratives and their respective sources are discussed *infra* p.173.

renders her decision promptly, without reference to formal laws, but rather to narrative. The narrative she uses to acquit Lynceus is distilled from the various narratives about her – in all of them, she is a passive character who arouses men simply by being. She thus acquits Lynceus on the basis that she has such an effect on men, and therefore cannot fault him for having been affected in this way as well.

After Helena's intervention in Act III, Faust begins to move towards a *gränzunbewußte* order. His movement is by no means linear, and even in Act III itself he relapses into highly bordered thinking as soon as he hears that Menelaus' armies are attacking his realm: he promises his various vassals their defined lands, provided they help him achieve victory – even though Helena had only just made him doubt those very vassals. (WA 9474-75, 78-79) And again, Faust returns to a centralized conception of state power: “Doch Sparta soll euch überthronen, / Der Königin verjährt Sitz. / ... / Ihr sucht getrost zu ihren Füßen / Bestätigung und Recht und Licht.” (WA 9476-81)

Eventually, however, Faust does build the *gränzunbewußte* order. He uses “[d]ie Lehn von gränzenlosem Strande” (WA 10306) to reclaim land from “d[em] gränzenlose[n] Meer.” (WA 11076) On this reclaimed land, he builds a world that is not run from a center, and where he famously stands “[a]uf freiem Grund mit freiem Volke.” (WA 11580) Faust then dies, and Mephisto wants to claim his soul. But this devil knows that something has changed, even if he cannot quite put his finger on it; he knows that he is going to have trouble enforcing their “blutgeschriebnen Titel” (WA 11613): “Bei wem soll ich mich nun beklagen? / Wer schafft mir mein erworbenes Recht?” (WA 11832-33); “Uns geht's in allen Dingen schlecht! Herkömmliche Gewohnheit, altes Recht, / Man kann auf gar nichts mehr vertrauen.” (WA 11620-22) – these are only some of the ways in which Mephisto makes clear that something has changed about the

legal reality that is making his pact no longer enforceable. Although he himself cannot quite put his finger on it, the change that has taken place is that a *gränzunbewußte* order has come into being, replacing the centralized, formal, bordered order – and in this new order, Mephisto’s blood-written deal is no longer enforceable.

We shall therefore understand Faust’s victory over Mephistopheles in a novel way. Usually, this victory is analyzed by interpreting the “blutgeschriebnen Titel.” (WA 11613) Thus it is often asked if Faust’s words “Zum Augenblicke dürft' ich sagen: / Verweile doch, du bist so schön!” (WA 11581-82) mean that he has violated the pact, and thus lost; or whether his utterance is rendered unreal by his use of the subjunctive *dürft'*, and thus is not a violation of the pact.⁶ We shall leave the contents of the pact to the side, however, and understand Faust’s victory as rooted not in the terms of the pact, but rather in who will adjudicate the enforcement of the pact, and how – as Mephisto puts it “Bei wem soll ich mich nun beklagen?” (WA 11832) By the end of *Faust II*, that answer has become *gränzunbewußte* arbitration. Indeed, the angels, who were appointed to adjudicate the bet between the Lord and Mephistopheles in the *Prolog im Himmel* (WA 330-333), and who care little about borders, arrive and carry off Faust’s soul. (WA 11934ff.)

A focus on the terms of the pact has become so standard in attempts to understand it, that it is worth considering several other indications in *Faust* that we should in fact look beyond those terms. First and foremost, unlike in other works based on the Faust myth, Goethe does not

⁶ The commentary on the pact and who won it is vast. Already in 1939, an article appeared arranging 49 works after 1900 into six categories of possible outcomes. Ada Martha Klett, *Der Streit um 'Faust II' seit 1900, chronologisch und nach Sachpunkten geordnet, mit kommentierter Bibliographie von 512 Titeln* (Jena: Frommann (W. Biedermann), 1939). The body of commentary has only grown since then, but is no closer to a consensus. Karl Eibl, "Zur Bedeutung der Wette im Faust," *Goethe-Jahrbuch* 116 (1999): 272; Georg Mein, "Aporien von Eid und Fluch: Unmögliche Versprechen in Goethes Faust," *MLN* 131, no. 3 (2016): 652. See also FA I, 7/2 p.752-53. Given the amount of commentary on this topic, it is impossible to consider all of it, but I have not found any commentary that concludes that we do not know the contents of the written pact.

provide the text of the pact.⁷ Rather, Faust and Mephisto have an extensive conversation, after which Faust reluctantly signs “ein paar Zeilen.” (WA 1707-15) Mephisto proposes these lines and puts them to Faust – but these “paar Zeilen” are never seen by us or read out to us. One does not need to be a lawyer to realize that knowing the precise contents of a written deal is key to interpreting it – and *Faust* was written by Goethe, who was a lawyer and a statesman. Faust himself also stresses the great power of the written deal: “Allein ein Pergament, beschrieben und beprägt, / Ist ein Gespenst, vor dem sich alle scheuen. / ... / Die Herrschaft führen Wachs und Leder.” (WA 726-29) Second, when Faust dies, there are several allusions to the conversation he and Mephisto had when concluding the pact – this leaving us unable to determine which lines of this conversation, if any, constitute the “paar Zeilen” that make up the pact. For instance, the lines “Zum Augenblicke dürft' ich sagen: / Verweile doch, du bist so schön!” (WA 11581-82) echo the lines “Werd' ich zum Augenblicke sagen: / Verweile doch! du bist so schön!” (WA 1699-70); “Die Uhr steht still --- / *Chor.* Steht still! Sie schweigt wie Mitternacht. / Der Zeiger fällt. *Mephistopheles.* Er fällt, es ist vollbracht” (WA 11592-11594) refers back to “Dann mag die Todtenglocke schallen, / Dann bist du deines Dienstes frei, / Die Uhr mag stehn, der Zeiger fallen, / Es sei die Zeit für mich vorbei!” (WA 1703-06)” Third, no lines from their conversation actually entitle Mephisto to claim Faust’s soul, except for the lines “[i]ch will mich *hier* zu deinem Dienst verbinden, / Auf deinen Wink nicht rasten und nicht ruhn; / Wenn wir uns *drüben* wieder finden, / So sollst du mir das Gleiche thun.” (WA 1656-60) (original emphasis) – but if those are the lines of the pact, then Mephisto would have to wait for Faust to arrive

⁷ For an overview of the Devil’s Pacts in the various versions of Faust, see Jochen Schmidt, *Goethes Faust: erster und zweiter Teil: Grundlagen, Werk, Wirkung*, 2., durchgesehene Aufl. ed. (München: Beck, 2001), 22-24.

“drüben” – that is, in hell – but Mephisto instead believes that he has a right to Faust’s soul right upon Faust’s death on earth. Fourth, Mephisto is a superb lawyer within the bordered, centralized, formal legal order. Thus, he would not likely consider himself to have an “erworbenes Recht” to Faust’s soul if the pact did not in fact technically entitle him to such a right – at least within that bordered legal order. But none of the lines just considered in fact state that Mephisto can claim Faust’s soul when Faust dies.

Before turning to *Faust* in Parts II and III, and to the *Wahlverwandtschaften* in Part IV, this dissertation will discuss the framework of narrative and *gränzunbewußte* arbitration in Part I. Narrative we define as a series of events arranged in time. Arbitration is legally binding dispute resolution outside of state courts. It becomes more *gränzunbewußt* when the legal significance of borders for arbitration diminishes. To explain how such a legal order can work, we shall turn to the example of international commercial arbitration today. This order will demonstrate that a *gränzunbewußte* legal order is possible even as bordered states continue to exist, and provide us with a language in which to talk about this order, even though it may not be precisely what Goethe had in mind. Narrative matters because it shapes the way we connect facts – including how judges, prosecutors, the accused, and others connect facts to draw their conclusions. *Gränzunbewußte* arbitration matters because it allows narratives to cross borders more easily – for instance, Helena brings her narratives with her. Such arbitration also allows narratives freer reign, because the arbitrations are less formal and less rigidly bound by the written law than litigation in state courts – again, Helena is a fine example, in that she acquits Lynceus with reference to narratives, not to formal law.

Part II of this dissertation turns to infanticide, which provides a powerful example of the power of narrative in shaping legal outcomes. Infanticide was a hotly discussed and debated

topic in Goethe's time, and actual infanticide cases drew widespread attention. They were still governed principally by the *Constitutio Criminalis Carolina* of 1532. However, a survey of this topic in various discourses, such as literature, law, philosophy, and policy will reveal that only one narrative dominated the discourse on infanticide: unmarried girl is seduced, becomes pregnant, and kills her child. Typically, she tries to conceal the pregnancy and the birth. When she commits the killing, she is also usually in an affected state bordering on insanity. Given this dominant narrative, a pregnant woman and her dead child were sufficient grounds to conclude that the woman was the murderer – for there was no other narrative to connect these facts. A pregnant woman and a disappeared child were typically also enough – especially when the woman confessed (torture was still used to elicit these confessions). Again, there was no other narrative to connect the fact before the judge other than the narrative of infanticide. If, however, alternative narratives had existed, the same facts would not constitute sufficient evidence. Such alternative narratives could include the father killing the child, or the family of mother or father killing the child, or (in the case where the child's body was not recovered) the mother giving up the child. If such alternative narratives had been seriously considered, then a pregnant woman and her dead child would not be sufficient evidence to conclude that the mother killed her child – for one would also have to consider other possible culprits, or even consider that the child might still be alive. Goethe's own involvement in real infanticide cases and the discussions that surrounded them further informs Part II of this dissertation. Particularly important was the case of Susanna Margaretha Brandt in Goethe's native Frankfurt in 1771-72, and the case of Johanna Catharina Höhn in Sachsen-Weimar-Eisenach in 1783, where Goethe lived and worked by that point. Goethe followed the Brandt case followed very carefully; in the Höhn case, he was involved as a *Geheimrat* when the case came before Duke Carl-August. The Duke had the power

to commute the death penalty given out to Höhn, but decided not to do so. He did ask his *Geheime Räte* for advice on an idea of his: to replace the death penalty in these cases with a major expansion of public shaming. The *Geheime Räte* unanimously voted against this proposal. Goethe believed the topic to be of such importance that he explained his vote in a separate essay (which does not survive).

Part II then turns to the *Gretchen Tragedy* of *Faust I*. Gretchen is generally assumed to have committed infanticide.⁸ However, it is in fact unclear whether Gretchen killed her child. For all the evidence against her is a statement by Faust “Als Missethäterin im Kerker zu entsetzlichen Qualen eingesperrt” (WA p. 226)⁹ and her confession in the final scene of *Faust I, Kerker*. Faust’s statement is mere hearsay, does not tell us what her crime is, and does not even say that she committed the crime – only that she is locked up as a criminal. Her confession is contradicted by her own earlier claim that “Sie nahmen mir's [das Kind] um mich zu kränken / Und sagen nun, ich hätt' es umgebracht” (WA 4445-46) and by her later claim that the child is still alive “Es zappelt noch!” (WA 4561) Especially the last of these utterances could be the rambling of a madwoman – but if so, it only renders her earlier confession all the less reliable. The question of the *Gretchen Tragedy* is thus not whether Gretchen killed her child, but rather why she is judged for having done so, and why she accepts the punishment for it. The answer is narrative. The dominant narrative of infanticide dictates that she is guilty, and audiences, commentators, and Faust himself have generally accepted this. Faust can entertain only the narrative wherein Gretchen is a child-murderess – and does not even lend the least credence to

⁸ The only exception I have found to this general consensus is Arnd Bohm, "Margarete's Innocence and the Guilt of Faust," *Deutsche Vierteljahrsschrift für Literaturwissenschaft und Geistesgeschichte* 75, no. 2. This contribution will be discussed *infra* Chapter IV.D-E.

⁹ Because the scene *Trüber Tag, Feld* is in prose, citations to it use page numbers, rather than line numbers.

the narrative that she may have hidden her child and that the child is thus still alive. Even though Gretchen tells him to fetch his still living child, Faust does not even bother to check whether his child is alive.

In Part III, we turn to *Faust II*, and consider it as a tug-of-war between two legal orders. One legal order is characterized by rigid adherence to the written word, by formality, by centralization, by rigid state borders. Mephisto and the *Kaiser* are the main proponents of this order. The other order is the *gränzunbewußte* order: decentralized, informal, flexible towards the written word, with state borders that are not legally paramount. Helena is the champion of this order. Faust oscillates between these two orders until he finally comes around to the *gränzunbewußte* order towards the end of his life in Act V of *Faust II*. The order of Mephisto and the *Kaiser* seeks to prevent change – and in doing leads not merely to stagnation, but to decay. The *gränzunbewußte* order, on the other hand, is designed for advancement. In Act I of *Faust II*, the empire is collapsing. The *Kaiser*'s advisors are desperate, but Mephisto introduces paper money to solve all the empire's woes. This money is underpinned by “des alten Kaisers Recht” (WA 4940), namely that “[d]er Boden ist des Kaisers, der soll's haben.” (WA 4938) The money is itself very much a written instrument – we are given its full text (WA 6057-62) and it is signed by the *Kaiser* himself. (WA 6066) The *Kaiser* is pleased that the problems of his empire are resolved, and returns to enjoying various pleasures. In other words, the woes of the empire are allegedly solved by restoring its old legal order – which goes back to the Golden Bull of 1356, if not to Roman law itself¹⁰ – and thus by resisting advancement. But the empire is in decay, and paper money will prove only a temporary solution – for when we will see the *Kaiser* again in Act IV, the empire will be bankrupt once more. In Act II, Mephisto reveals what he

¹⁰ MA 18/1 p.686.

really means by no change, for Faust's *Studierzimmer* has decayed since we last saw it in *Faust I*: "Die bunten Scheiben sind, so dünkt mich, trüber, / Die Spinnewebe haben sich vermehrt; / Die Tinte starrt, vergilbt ist das Papier;" (WA 6576-78), but Mephisto calls it "[a]llunverändert" (WA 6571). Artificiality is then associated with borders. Thus Homunculus, a man-like being conceived artificially, and still in his vial, understands that this vial makes up the fragile and necessary borders of his world: "Komm, drücke mich recht zärtlich an dein Herz, / Doch nicht zu fest, damit das Glas nicht springe" (WA 6880-81). And this Homunculus, as well as Mephisto, is ill at ease in the *Klassische Walpurgisnacht* with its republican order: "Die alte Walpurgisnacht, sagte Goethe, ist monarchisch, indem der Teufel dort überall als entscheidenes Oberhaupt respektiert wird. Die klassische ist aber durchaus republikanisch, indem alles in der Breite nebeneinander steht, so daß der Eine so viel gilt wie der Andere, und niemand sich subordiniert und sich um den Andern bekümmert."¹¹ Faust, however, is at home in this order, and incessantly seeks Helena there. In Act III, he finally finds her when Mephisto, disguised as Phorkyas, brings Helena to Faust's medieval castle. There she acquits Lynceus – and leaves Faust "Erstaunt." (WA 9258) Yet the *gränz unbewußte* order has not been established yet. Already in Act III, Faust relapses into bordered thinking as soon as Menelaus' armies arrive. But he is changing. For in Act IV, he rejects a splendid capital city when Mephisto offers it, and even curses fixed spatiality itself: "Das verfluchte *hier!*" (WA 11233) (original emphasis) – in stark contrast to his efforts to rule from his palace in Act III. What he now wants is the "[d]ie Lehn von gränzenlosem Strande." (WA 10306) To obtain it, he helps the *Kaiser* win the war against the *Gegenkaiser*. For, we now learn, a *Gegenkaiser* has been proclaimed and has waged a successful campaign

¹¹ FA I, 7/2, p.519.

against the *Kaiser*, who “[z]ieht sich hierher, vielleicht zur letzten Schlacht.” (WA 10290) But Faust and Mephisto help the *Kaiser* win, and Faust obtains his *Lehn*. After this victory, the *Kaiser* proceeds to establish a legal order for his empire, once again based on the Golden Bull of 1356. This order is all about the written law and borders. The *Kaiser* is explicit about what his order is built for: “Und also sei, *zum Schluß*, was wir bisher bethätigt, / Für alle Folgezeit durch Schrift und Zug¹² bestätigt.” (WA 10965-66) (emphasis added) – a mighty reminder that his order is built to keep things the same forever. But Faust has obtained his *Lehn*. Faust has worked from inside the *Kaiser*’s order to obtain the very thing that he will use to establish a different order in Act V. Although in Act V he is initially still obsessed with domination – it bothers him that there is even one little hut and chapel on his land that is not his (WA 11131-11134; 11156-63) – he finally comes around to establishing a *gränzunbewußte* order on the land that he has acquired from the sea. For taking land from the sea – from “das gränzenlose Meer” (WA 11076) – is to create land where there are no borders. There Faust can “[a]uf freiem Grund mit freiem Volke stehn.” (WA 11580) and there Mephisto’s “blutgeschriebnen Titel” (WA 11613) is not enforceable.

Important here is not only what does create legal advancement, but also what does not. Violence and force invariably fail. Faust’s attempts to rescue Gretchen from the dungeon, sword-in-hand, fails. The *Gegenkaiser*’s military attempt to overthrow the *Kaiser* also fails. Indeed, it backfires, for the *Kaiser* establishes a legal order “[f]ür alle Folgezeit” soon after defeating the *Gegenkaiser*. Similarly, breaking the law does not work. Faust’s attempt to take Gretchen out of the dungeon, the money-lending of Gretchen’s mother, Faust’s and Mephisto’s bearing of false

¹² *Zug*, here short for *Federzug*, [translated as “stroke of a pen”] refers to the *Kaiser*’s signature on the legal document. FA VII(2) 698.

witness to secure a *Totenschein* for Marthe's husband, Faust's murder of Valentin in an unfair duel, Faust's and Gretchen's fornication – these are all illegal, and none end with advancement.

Part IV turns to the *Wahlverwandtschaften*. This novel happens in the shadow of the legal order of its time – in fact, the novel would not make any sense if it were not for the divorce law of Goethe's time. Divorce had recently become available by mutual consent – which was a major and legal reform.¹³ Divorce was also available for cause, such as adultery, abandonment, change of religion, sodomy, but the spouse who had not committed these acts had to file for divorce.¹⁴ Against this backdrop, Eduard needs Charlotte's agreement in order to obtain a divorce from her, which he seeks for much of the novel. If marriage were simply indissoluble – a position with deep historical roots in Europe, and still espoused in Goethe's day, to an extent by Hegel¹⁵ – then Eduard's requests for divorce would simply make no sense, for Charlotte's consent would be legally irrelevant. If no-fault divorce were already available – that is, if Eduard could divorce Charlotte without her permission or any wrongdoing on her part – then he would not need to seek her permission.¹⁶ But in the legal system that forms the backdrop to the novel, Eduard does need Charlotte's permission, and her refusal to grant it until late in the novel means that he remains married. Divorce, however, does not happen in the novel, even though it is legally

¹³ The *Allgemeines Landrecht für die Preußischen Staaten* of 1794 was the first major modern law to contain divorce by mutual consent, something Frederick II had been experimenting with in some of his provinces in the decades preceding his major codification. Napoleon also introduced divorce by mutual consent in his Civil Code of 1804. Ernest Schuster, "The History and Present Condition of the German Divorce Law," *Journal of the Society of Comparative Legislation* 10, no. 2 (1910): 231. *See infra* p.219.

¹⁴ Karl Leydecker, "The Avoidance of Divorce in Goethe's *Die Wahlverwandtschaften*," *Modern Language Review* 106, no. 4 (2011): 1055 & n.9.

¹⁵ Canon law considered marriage indissoluble, *see infra* p.220. Hegel considered marriage "an sich" indissoluble: "Darum ist aber auch die Ehe an sich für unauflöslich zu achten: denn der Zweck der Ehe ist der Sittliche, der so hoch steht, das alles andere dagegen gewaltlos und ihm unterworfen erscheint." Georg Friedrich Wilhelm Hegel, *Grundlinien der Philosophie des Rechts*, ed. G.J.P.J. Bolland (Leiden: A.H. Adriani, 1902), 243. *See also* Leydecker, "The Avoidance of Divorce in Goethe's *Die Wahlverwandtschaften*," 1060 & n.21.

¹⁶ No-fault divorce only came into being in the 20th century, first introduced in Russia in 1917 after the Russian Revolution, apparently because the very institution of marriage conflicted with the ideology of Bolshevism. Donald Bolas, "No-Fault Divorce: Born in the Soviet Union?," *Journal of Family Law* 14, no. 1 (1975): 34.

possible – first, Charlotte refuses to grant it. Then, after Charlotte finally agrees, Otilie talks her out of it. Divorce here proves unattainable because, on the one hand, narratives are lacking to help with the divorce. Rather, Mittler’s non-narrative moral propositions govern, in particular that marriage is the “Grund aller sittlichen Gesellschaft,” “der Anfang und der Gipfel aller Cultur” and must be “Unauflöslich” (I.9, p.107). On the other hand, divorce proves unattainable because narratives counteract divorce. An example of this is when Otilie talks Charlotte out of divorce – this is because of the familiar narrative of infanticide. As “eine Andre Art von Mutter” (II.13) of the dead child, Otilie connects her transgression of intimacy with Eduard to the death of the child. For after her transgression, she took the child on a boat, dropped it, and it drowned. In Otilie’s mind, the transgression becomes connected to the death, and the narrative of infanticide here dictates that she must now die herself. Like Gretchen, she believes she must choose between death and misery. Physically, there was nothing stopping Gretchen from escaping with Faust; physically, there is nothing stopping Otilie from marrying Eduard – except for the narratives that stopped these women.

Even though the novel ends tragically with the deaths of Otilie and Eduard, change is introduced by another *gränzunbewußte* character. This is the English Lord, who is hosted by Charlotte and Otilie after Eduard has left to war. This Lord travels so much that he has given up on even having a home, and brings stories from his many travels. He comes for a visit in II.10, and leaves promptly in the next chapter. His companion tells a story, set apart in the text as: “Die wunderlichen Nachbarskinder. Novelle” (II.10). This story shows the possibility of marrying happily for love, and shows how little is truly needed for it sometimes – those involved simply need to choose to marry the ones they love. Yet Charlotte is deeply affected by this simple narrative – like Faust was deeply affected by Helena’s simple narrative judgment. This one

narrative intervention leaves her changed and open to divorcing Eduard. Thus, legal reform alone does not bring about legal advancement. For divorce was legally available to Charlotte, but a narrative had to affect her before she would agree to it.

The themes of the *Wahlverwandtschaften* are thus familiar from the previous chapters: narrative is needed for advancement, as is a *gränzunbewußte* approach. But the emphases are different. We see not so much legal cases – such as the trial of Lynceus or the incarceration of Gretchen – as we see characters moving in the shadow of the law. Divorce is legally available – hence Eduard can pursue it. But, legally, he needs Charlotte’s consent – hence he has to pursue that consent. His main opponents are narratives that counteract divorce, and proposition that prohibit it. These propositions are not laws – as, for instance, “[d]es alten Kaisers Recht” in *Faust II* – but rather moral propositions, such as that marriage is the “Grund aller sittlichen Gesellschaft,” but just like the non-narrative legal propositions were antithetical to legal advancement in *Faust*, so here non-narrative moral propositions are antithetical to that advancement.

The time in which Goethe lived may very well have contributed to this presence of legal advancement in his works. For it was an intellectual and cultural golden age in many respects, but a time we might call savage in other respects – and such a contrast tends to raise questions about how to resolve it. Thus, in the German language alone, one may think of great writers such as Schiller, Hölderlin, Novalis, Lenz, Jean Paul, and great philosophers such as Kant, Hegel, Schopenhauer, Schleiermacher, and Fichte. Just across the border, Voltaire, Diderot, and Rousseau were introducing their ideas in French, while America’s Founding Fathers were writing in English across the Pond. 1776 saw the signing of the Declaration of Independence, 1789 saw the French Revolution, 1806 saw the dissolution of the Holy Roman Empire. Legal

codifications were introduced for the first time: the *Allgemeines Landrecht für die Preußischen Staaten* (1794), the roughly contemporaneous codification in Austria, followed by the Napoleon's Civil Code of 1804 and Napoleon's other codifications in the ensuing years. These codifications constituted the first exclusive and exhaustive sources of law, and governed within the borders of the jurisdictions that adopted them. However, this was also an age in which armed conflict was commonplace, as even an incomplete list of armed conflicts involving European powers during Goethe's time shows: the Seven-Years' War, the American War of Independence, the French Revolution and the ensuing Revolutionary Wars and Napoleonic Wars, the Russo-Swedish War, four Russo-Turkish Wars, the Bavarian War of Succession, the Silesian Wars, the Saxon Peasant Revolt, the Greek War of Independence, the Dutch Patriot Revolt. Executions were still common public spectacles, and Goethe even attended them as a child.¹⁷ He probably did not witness the gruesome punishment of *poena cullei* – which entailed being sewn up in a sack with live animals, typically a dog, a rooster, a snake, and a cat (though, when available, monkeys were preferred) and then drowned – because this punishment was gradually being replaced by death by the sword (i.e. decapitation) in the 17th century.¹⁸ Torture was still a legal and frequently employed method for extracting confessions, which could form the basis for a sentence. The abolition of torture was a slow process – in Sachsen-Weimar-Eisenach it only

¹⁷ “So wurde ich denn als ein junger Bewohner einer großen Stadt von einem Gegenstand zum andern hin und wider geworfen, und es fehlte mitten in der bürgerlichen Ruhe und Sicherheit nicht an gräßlichen Aufritten. Bald weckte ein näherer oder entfernter Brand uns aus unserm häuslichen Frieden, bald setzte ein entdecktes großes Verbrechen, dessen Untersuchung und Bestrafung die Stadt auf viele Wochen in Unruhe. Wir mußten Zeugen von verschiedenen Executionen sein, und es ist wohl werth zu gedenken, daß ich auch bei Verbrennung eines Buchs gegenwärtig gewesen bin.” (*Dichtung und Wahrheit*, WA I.26, p. 237)

¹⁸ Wilhelm Wächtershäuser, *Das Verbrechen des Kindesmordes in Zeitalter der Aufklärung: eine rechtsgeschichtliche Untersuchung der dogmatischen, prozessualen und rechtssoziologischen Aspekte* (Berlin: Erich Schmidt, 1973), 68.

finally took place in 1819.¹⁹ Public shaming, such as so-called *Kirchenbusse*, was also a prevalent legal punishment – and seeing a woman sentenced for fornication paraded through town on a donkey was not an uncommon sight. The abolition of *Kirchenbusse* was also a slow process. In Sachsen-Weimar-Eisenach it was finally abolished only 1786.²⁰

Although this historical context, like Goethe's professional experiences, will be very useful toward understanding Goethe's literary works and his views on legal advancement, those works and views rise above the particular problems of their time: "den Poeten bindet keine Zeit." (WA 7433) Thus, understanding how infanticide was viewed in Goethe's time, and knowing just how thoroughly Goethe understood that problem, helps to understand the Gretchen Tragedy of *Faust I*. But we learn from Gretchen not only that innocent women in the eighteenth century were convicted of infanticide – we also learn that unless we have multiple narratives to explain a given set of facts, we may arrive at wrong conclusions. Gretchen – who is still almost universally considered a child-murderess – still proves that point more than 200 years after she first appeared on stage. Similarly, it is important to understand that the legal order the *Kaiser* institutes after he defeats the *Gegenkaiser* (in Act IV of *Faust II*) is very much inspired by the Golden Bull of 1356. The Golden Bull remained in force until 1806, when the Holy Roman Empire was dissolved, even though it was far outdated by that point. Indeed, in 1763, at the age of fourteen, Goethe attended the coronation of Joseph II, still according to the Golden Bull, and described it as oddly anachronistic.²¹ But *Faust II* does not merely comment that the Golden Bull is

¹⁹ Volker Wahl, *"Das Kind in meinem Leib": Sittlichkeitsdelikte und Kindsmord in Sachsen-Weimar-Eisenach unter Carl August: eine Quellenedition, 1777-1786* (Weimar: Böhlhaus Nachfolger, 2004), 45.

²⁰ *Ibid.*, 124.

²¹ FA I, 7/2 p.688.

antiquated – rather, it makes a more general point that a legal order that is centralized, bordered, formal, and rigidly adheres to the written word is not designed for advancement, but for stagnation.

The different parts of this dissertation emphasize different levels on which advancement can be stalled or made to happen. On each of these levels, narrative and *gränzunbewußte* arbitration are key to advancement. Thus, Part II of this dissertation focuses on infanticide, and operates largely on the level of evidence and procedure, in that the evidence typically before the courts was insufficient to establish guilt, but nevertheless was judged to be sufficient. But it was the dominant narrative of infanticide that made it so. In Part III, the emphasis shifts to the arrangement of the legal order as a whole – fitting, given that Part III moves from the *kleine Welt* of *Faust I* to the *grosse Welt* of *Faust II*. Here, we see the centralized, bordered, rigidly written order of the *Kaiser* clash with the *gränzunbewußte* order of Helena, who brings her narratives to bear on her decision and thus amazes Faust. In Part IV, the emphasis shifts towards the reality in the shadow of the law. The legal backdrop to the *Wahlverwandtschaften* allows for divorce by mutual consent, and thus is central to the novel, in that especially Eduard pursues the consent that he needs for divorce. Here we also see that not only the law on the books, but also the thinking of the people involved has to change. For instance, Charlotte’s thinking about divorce has to change before Eduard can have his divorce – and it takes a *gränzunbewußte* English lord to change her thinking by telling a story, “Die wunderlichen Nachbarskinder. Novelle” (II.10).

PART I. THE FRAMEWORK: NARRATIVE AND ARBITRATION

The main components of legal advancement in Goethe's works are narrative and arbitration. Part I explains narrative and arbitration generally, and their role in advancing the law specifically. Parts II through IV will then show the importance of narrative and arbitration to understanding *Faust* and *Die Wahlverwandtschaften*, the legal developments that take place, and fail to take place, in those works.

Chapter I focuses on the role of narrative. Narrative shapes what we find *wahrscheinlich* [verisimilar], and what we do not find *wahrscheinlich* – and, therefore, what we believe, and what we do not believe. What we believe matters greatly in the law: what judge believe affects how they decide a case, what prosecutors believe affects which cases they bring and how, what legislators believe affects the laws they do and do not pass, and so on.

Chapter II looks at arbitration as a way of changing the spatial arrangement of the legal system, especially the role of state borders therein. In the spatial arrangement often called Westphalian, courts govern exclusively within the borders of their respective states. International law then governs relations between these various bordered systems. A state that opposes change can thus use its borders to guard its laws from change. Arbitration throws a wrench into this spatial arrangement by permitting laws and arbitrators to cross borders with relative ease. As they cross borders, they can carry narratives with them – and thus provoke legal advancement.

Part I is to some extent paradoxical. It provides a framework for Goethe's works before those works will be considered in detail in Parts II through IV – while this framework is actually derived from those works. Yet sometimes it is easier to follow a path if one understands where it is headed. That is the case here, and therefore the framework is explained first, and how it is derived from *Faust* and the *Wahlverwandtschaften* will come after that.

Chapter I: Narrative, or I Will See It when I Believe It

A. Introduction

“I’ll see it when I believe it” – this inversion of the saying is the motto of this chapter. In Goethe’s understanding, to be believed, something must already be *wahrscheinlich* [verisimilar] – and what is *wahrscheinlich* is determined by the narratives we are familiar with. We fit facts and events into the narratives we know, and those narratives thus shape the connections we make between those facts and events, and thus the conclusions we arrive at.²² A playful and short dialogue, *Über Wahrheit und Wahrscheinlichkeit der Kunstwerke* (1798),²³ [On Truth and Verisimilitude of Works of Art] provides a good example of Goethe’s understanding of the roles of narrative and *Wahrscheinlichkeit*.²⁴

One may well wonder why this dialogue, which may appear to be about whether art should imitate reality, deserves so much attention in a project about Goethe and the Law. The dialogue, however, is also about persuasion and shows the critical role narrative plays in persuasion. And such is the role of this dialogue in this dissertation – the role of an example that can show with nuance (and some humor) how Goethe conceived of the role of narrative in persuasion. This will allow us to see its role in the law in future chapters. By itself, this dialogue would not be sufficient to establish Goethe’s views, but what this text shows concisely will

²² The idea that narrative is the basic means by which we make sense of the world has also been proposed by psychologists. See, e.g., Jerome S. Bruner, *Acts of Meaning*, The Jerusalem-Harvard lectures (Cambridge, Mass.: Harvard University Press, 1990). See also Abrams, *A Glossary of Literary Terms*, 235.

²³ Goethe himself referred to the dialogue as “ein[] heiter[es] Gespräche” WA I. Abt., 47. Bd., p.37, see also Peter J. Burgard, *Idioms of Uncertainty: Goethe and the Essay* (University Park, Pa.: Pennsylvania State University Press, 1992), 124. WA refers to the Weimarer Ausgabe of Goethe’s works.

²⁴ My undergraduate thesis focused on this dialogue. That thesis was concerned with different issues than this dissertation, and the arguments here do not come from my undergraduate thesis as far as I can tell. However, the translations of the dialogue used here are drawn from that undergraduate thesis, sometimes with minor changes.

repeat itself numerous times in Goethe's works, when narratives will be key to persuasion, often in a legal context. There are suggestions in the dialogue that it may be read in relation to the law: one of the two interlocutors is the Advocate of the Artist [*Anwalt des Künstlers*], who seeks to persuade his interlocutor, the Spectator, that the latter is wrong to criticize the *Vorstellung*²⁵ in the theatre. The presence of an Advocate suggests a connection to the law, especially where the Spectator is at once accuser and adjudicator.²⁶ For the spectators accuse the *Vorstellung* of being problematic at the outset of the dialogue, but the Spectator will consider it acceptable by the end of the dialogue.

Before turning to *Über Wahrheit und Wahrscheinlichkeit*, a few definitions and clarifications are in order. I use "narrative" and "story" interchangeably to refer to a series of events in time.²⁷ A narrative can thus be very short. For instance, a key narrative that is referred to in *Über Wahrheit und Wahrscheinlichkeit* can be summarized simply as: a master painter

²⁵ I use *Vorstellung* here in the German, because it captures well an ambiguity that is part of the dialogue, see *infra* p.5. Among its many meanings, *Vorstellung* can refer to a performance (and thus refer to the opera that is being performed) but also to a visual representation (and thus to the painted spectators). Some dictionaries omit the meaning of *Vorstellung* as a visual representation. See, e.g., Johann Christoph Adelung, *Grammatisch-kritisches Wörterbuch der hochdeutschen Mundart, mit beständiger Vergleichung der übrigen Mundarten, besonders aber der Oberdeutschen*, 2. verm. und verb. Ausg. ed. (Leipzig: Georg Olms, 1793), v.4, p. 1304. However, although *Darstellung* was more commonly used for visual representations, Goethe quite frequently used *Vorstellung* instead. Jacob Grimm and Wilhelm Grimm, *Deutsches Wörterbuch von Jacob und Wilhelm Grimm*, 16 vols. (Leipzig: S. Hirzel, 1854-1961), v.26, pp. 1688-89.

²⁶ It may seem jarring today that the role of accuser and judge are united in one person. However, this type of inquisitorial procedure was still quite common in Goethe's time, and has deep roots in Continental Europe, where it was endorsed in 1199 by Pope Innocent III. Kenneth Pennington, "Introduction to the Courts," in *The History of Courts and Procedure in Medieval Canon Law*, ed. Wilfried Hartmann and Kenneth Pennington (Washington, D.C.: The Catholic University of America Press, 2016), 10-18; Charles Donahue, "The Ecclesiastical Courts," *ibid.*, 285. The fact that the Spectator is a lay judge is also consistent both with adjudication in Goethe's time (e.g. the *Schöffenstühle* used lay judges), and, more importantly, with arbitration, which shall be the focus of Chapter II. Indeed, the general informality of this dialogue may also seem to be in tension with considering the Spectator to be an adjudicator – but, again, exactly informality is a key characteristic arbitration in Goethe's work.

²⁷ Abrams, *A Glossary of Literary Terms*, 234. See also Preminger, Warnke, and Hardison, *Princeton Encyclopedia of Poetry and Poetics*, 623.

makes a painting of cherries, sparrows flock to the painting.²⁸ When events are arranged into a narrative, some connection between them is suggested (though there need not necessarily be one). However, a narrative need not make clear what that connection is. Thus, in the narrative of the sparrows, the Spectator initially connects the events by concluding that the cherries were exquisitely painted. (WA 263) The Advocate, however, sees a different connection. He proposes that the narrative rather proves that the sparrows were real. That is, a sparrow is so unsophisticated that it mistakes a painted cherry for a real one, whereas a more educated viewer would not make such a mistake. (WA 263) We shall see that Goethe frequently plays on the fact that multiple possible connections exist between the events in a narrative. For instance, Gretchen proposes at least three ways in which some of the events in her narrative can be connected: she killed her child; others killed her child; or her child is safely hidden away.²⁹

As Goethe uses the word, *Wahrscheinlichkeit* is best rendered into English as “verisimilitude.”³⁰ He uses the word in its literal sense, namely as “truth-appearing” (*wahr* means “true,” and *scheinen* means “to appear”). Thus, “verisimilitude,” which derives from Latin *verus* (“true”) and *similis* (“like”), captures its meaning well. It should be noted, however, that *Wahrscheinlichkeit* is a much more common word in German than “verisimilitude” is in English. Indeed, in most contexts the most natural translation of *Wahrscheinlichkeit* would be

²⁸ This narrative has a long history going back to, at least, Pliny the Elder. See *infra* p.38 & n.51.

²⁹ See *infra* Chapter IV.D-E.

³⁰ I am by no means the first to render *Über Wahrscheinlichkeit der Kunstwerke* as “On Truth and Verisimilitude of Works of Art.” See, e.g., Johann Wolfgang von Goethe, *Essays on Art and Literature*, ed. Thomas P. Saine, et al., trans. Ellen von Nardroff and Ernest H. von Nardroff, vol. 3, Goethe's Collected Works (Princeton, N.J.: Princeton University Press, 1994), 248, n.1; Erika Fischer-Lichte, “Reversing the Hierarchy between Text and Performance,” *European Review* 9, no. 3 (2001): 277.

“probability” (“likelihood” or “plausibility” may also be possible).³¹ Another reason to translate *Wahrscheinlichkeit* as “verisimilitude” is that the discourse of Goethe’s time saw a shift towards understanding *Wahrscheinlichkeit* in terms of statistics³² (much like English “probability” can mean statistical probability) but Goethe’s dialogue decidedly ignores statistics. The dialogue thus emphasizes that not statistical probability, but how true something seems – how *wahrscheinlich* it is – determines how likely it is to be believed. It may seem strange to suggest that statistical probability has little to do with what one believes – but in Part II especially we shall see a powerful example of exactly that: a reality of infanticide jurisprudence where what was *wahrscheinlich* according to the dominant narrative of the time, not statistical probability, determined what was believed in court.

The realization that *Wahrscheinlichkeit* so greatly affects what is believed has major, and terrifying, implications in the legal context, as we shall see in Parts II through IV. For, as the famous phrase goes, *le vrai n’est pas toujours vraisemblable* [the truth is not always *wahrscheinlich*].³³ It may thus be difficult to convince a judge of the truth when that truth is not

³¹ Indeed, *Über Wahrheit und Wahrscheinlichkeit* is often translated using “probability” rather than “verisimilitude.” See, e.g., Burgard, *Idioms of Uncertainty: Goethe and the Essay*, 13; Johann Wolfgang von Goethe, *Goethe on Art*, ed. John Gage (Berkeley: University of California Press, 1980), 25.

³² Rüdiger Campe, *Spiel der Wahrscheinlichkeit: Literatur und Berechnung zwischen Pascal und Kleist*, Wissenschaftsgeschichte (Göttingen: Wallstein, 2002), 8-9; Douglas Lane Patey, *Probability and Literary Form: Philosophic Theory and Literary Practice in the Augustan Age* (Cambridge; New York: Cambridge University Press, 1984).

³³ For instance, this phrase is famously invoked in Anette von Droste-Hülshoff’s novella *Die Judenbuche* by the president of a court, who added that he had often experienced that in his work. Anette von Droste-Hülshoff, *Die Judenbuche / The Jew’s Beech-Tree: Deutsch | Englisch*, trans. Lillie Winter (Berlin: Hofenberg, 2018), 36. The original quote appears to be from Nicholas Bouileau, who wrote “Le vrai peut quelquefois n’être pas vraisemblable.” [The truth can sometimes not be verisimilar.] Nicolas Boileau Despréaux, *L’art poétique*, ed. David Nichol Smith (Cambridge: Cambridge University Press), Canto III, l. 48. In *Demons*, Dostoevsky took the idea a step further when he suggested that the truth is necessarily not verisimilar: “Друг мой, настоящая правда всегда не правдоподобна, знаете ли вы это? Чтобы сделать правду правдоподобнее, нужно непременно подмешать к ней лжи.” [“My friend, real truth is always not verisimilar, do you know this? To make the truth more verisimilar, one should always

wahrscheinlich. For instance, if someone else indeed killed Gretchen's child, this would not be *wahrscheinlich* in Goethe's time, because in the dominant narrative of infanticide, the mother was the killer. But the inverse is also true – *le vraisemblable n'est pas toujours vrai*.³⁴ To use Gretchen as an example once more, the dominant narrative of infanticide renders it *wahrscheinlich* that she killed her child, but this need not be true. *Wahrscheinlichkeit* is not the same as imitation of reality. The opera, which Goethe uses as example in *Über Wahrheit und Wahrscheinlichkeit*, shows this: opera is not an imitation of reality – in reality, people do not walk around singing constantly – but a good opera does have *Wahrscheinlichkeit*: we believe and are taken in by what happens. Indeed, whereas imitation goes back to Greek *mimesis* through Latin *imitatio*,³⁵ *Wahrscheinlichkeit* goes back to Greek *to eikos*, through Latin *verisimilitudo*.³⁶

B. Über Wahrheit und Wahrscheinlichkeit: The Power of Reduced Narrative

Über Wahrheit und Wahrscheinlichkeit suggests that truth and *Wahrscheinlichkeit* are not the same thing right at the outset: both in its title and in its opening paragraph. For if an artwork can have both truth and *Wahrscheinlichkeit*, the two need not be the same; and if something can be both untrue and *unwahrscheinlich*, then those two things need not be the same either. The opening paragraph, in its entirety, reads:

mix in some lies”] Федор Достоевский [Fyodor Dostoevsky], *Полное собрание сочинений [Collected Works]*, vol. 10 (Leningrad: "Наука," Ленингр. отд-ние), 172.

³⁴ Heinrich Henel, "Annette von Droste-Hülshoff: Erzählstil und Wirklichkeit," in *Festschrift für Bernhard Blume: Aufsätze zur deutschen und europäischen Literatur*, ed. Egon Schwartz, Hunter Hannum, and Edgar Lohner (Göttingen: Vandenhoeck & Ruprecht, 1967), 159.

³⁵ Preminger, Warnke, and Hardison, *Princeton Encyclopedia of Poetry and Poetics*, 378. This is not to suggest that *mimesis* as originally used by Aristotle meant imitation in the simple sense of mimicking reality (although it has been interpreted that way). See, e.g., Abrams, *A Glossary of Literary Terms*, 171-72. Cf. Bruner, *Acts of Meaning*, 46. See also MA v.4, p.989. MA refers to the *Münchener Ausgabe* of Goethe's works.

³⁶ Preminger, Warnke, and Hardison, *Princeton Encyclopedia of Poetry and Poetics*, 379, 883.

Auf einem deutschen Theater ward ein ovales, gewissermaßen amphitheatralisches Gebäude vorgestellt, in dessen Logen viele Zuschauer gemahlt sind, als wenn sie an dem, was unten vorgeht, Theil nähmen. Manche wirkliche Zuschauer im Parterre und in den Logen waren damit unzufrieden, und wollten übel nehmen, daß man ihnen so etwas Unwahres und Unwahrscheinliches aufzubinden gedächte. Bei dieser Gelegenheit fiel ein Gespräch vor, dessen ungefährer Inhalt hier aufgezeichnet wird. (WA I. Abt., 47. Bd., p.257)

What is it, exactly, that dissatisfies the “real” spectators – in other words, what is it, exactly, that they deem untrue and *unwahrscheinlich*? There are at least two possibilities, and the dialogue will leave both possibilities open. First, it could be that the *Vorstellung*³⁷ of the amphitheatrical building and the painted spectators is a poor imitation of reality – that would be one way to understand why the spectators consider that something “Unwahres und Unwahrscheinliches” was put before them. Indeed, this dialogue is often read as a rejection of the idea that art should provide mere imitations of reality.³⁸ Yet there is also a second reading. The “real” spectators could deem it untrue and *unwahrscheinlich* that the painted spectators appear to be taking part in what is happening on stage. The “real” spectators, that is, could be dissatisfied because they believe that it is neither true nor *wahrscheinlich* that audiences can be so engrossed in a performance as to appear to take part in it. This signifies both a lack of education on the part of the “real” spectators – for the notion that audiences can be engrossed in performance is hardly new³⁹ – and a lack of self-awareness. For, as we shall soon discover, the “real” Spectator himself had been rather nearly “vollkommen getäuscht” (WA 260) by the opera

³⁷ For how *Vorstellung* accords with the two possibilities for the Spectator’s dissatisfaction offered here, see *supra* n.25.

³⁸ See, e.g., Max J. Wolff, "Die Wahrscheinlichkeit des Kunstwerks," *PMLA: Publications of the Modern Language Association of America* 50, no. 1 (1935): 323; Goethe, *Essays on Art and Literature*, 3, 248, n.1.

³⁹ For instance, in the *Poetics*, Aristotle already described that tragedy, by arousing fear and pity in the audience, can cause *catharsis*. *Poet.* 1449b21–29. See Preminger, Warnke, and Hardison, *Princeton Encyclopedia of Poetry and Poetics*, 106-08.

– and yet the Advocate will need to point this out before the Spectator will become aware of it.
(WA 260)

The Advocate promptly targets the Spectator’s lack of self-awareness. The spectator readily concedes that he does not expect that everything he sees in the theater to be “wahr und wirklich sein soll” (WA 257) – but he insists that he does expect that everything there at least “wahr und wirklich scheinen solle.” (WA 258) The Advocate replies:

Verzeihen Sie, wenn ich in Ihre eigne Seele läugne, und behaupte: Sie verlangen das keinesweges. (WA 258)

The peculiar wording of this reply draws further attention to the nature of the persuasion that will occur in this dialogue, persuasion on a deeper, psychological level, rather than merely on a logical level.⁴⁰ The persuasion here does not rely solely on logical argument (for one does not, after all, need to deny into someone’s soul [*Seele*] to make a logical argument). The Spectator is not just there to offer counterarguments such that the reader may be persuaded or such that Goethe may have a chance to lay out a philosophical position. Rather, the Spectator is there because he – the “real” Spectator, not just the reader – must be persuaded not to object to the painted spectators on the stage. To be persuaded, the Spectator will have to advance in

⁴⁰ The *Goethe Wörterbuch* – citing this very usage in *Wahrheit and Wahrscheinlichkeit* as the example – explains the phrase “in jemandes eigene Seele läugnen” as “einer Willensbekundung, Selbstaussage (aufgrund tiefer(er) psychologischer Einsichten) widersprechen.” *Goethe-Wörterbuch*, ed. Akademie der Wissenschaften der D.D.R., et al. (Stuttgart: W. Kohlhammer, 1966), v.5, p.1147. Grimm’s Dictionary – also citing this very usage in *Wahrheit and Wahrscheinlichkeit* as the example – finds that this phrase derives from the older and official phrase “in eines (ändern) seele schwören,” which meant to swear an oath on behalf of another person, that is, in another person’s name. That other person would then be bound by the oath. Grimm and Grimm, *Deutsches Wörterbuch von Jacob und Wilhelm Grimm*, v.15, p.2898. This suggests that the Advocate may be speaking for the Spectator to some extent, which would help explain why, later in the dialogue, the Spectator will be repeating some of the things the Advocate stated earlier. See also Adelung, *Grammatisch-kritisches Wörterbuch der hochdeutschen Mundart, mit beständiger Vergleichung der übrigen Mundarten, besonders aber der Oberdeutschen*, v.4, p.12; *Deutsches Rechtswörterbuch (Wörterbuch der älteren deutschen Rechtssprache)*, ed. Akademie der Wissenschaften der D.D.R., Heidelberger Akademie der Wissenschaften, and Preussische Akademie der Wissenschaften (Weimar: H. Böhlau Nachfolger, 1914), v.13, p.167.

understanding, at least insofar as his self-awareness will have to improve. After all, so the Advocate has informed us, the Spectator is not even aware of what he desires from a performance – and the Advocate promptly emphasizes this by saying “Sie drücken Ihre Empfindungen recht gut aus, nur ist es schwerer als Sie vielleicht denken, recht deutlich einzusehen, was man empfindet.” (WA 259)

After establishing the nature of the persuasion that is to take place, the Advocate sets out to achieve it. He will succeed when he will employ narrative later in the dialogue – indeed, when he will employ narrative, the simplicity of the narrative will stand in stark contrast to the complex attempts he will have made up until that point.

The first such complex attempt is abstract argumentation, which quickly fails. Thus, to the Advocate’s rather abstract position that theatrical representations “keinesweges wahr scheinen” (WA 258), but rather “einen Schein des Wahren haben” (WA 258) the Spectator responds that this can be little more than a play on words. In response to the Advocate’s similarly abstract attempt to explain the importance of this “play on words” by speaking of the way the human mind operates through contradictions to become able to express what goes on inside us, the Spectator simply requests that the Advocate be clearer and use examples. If this abstract discussion has some persuasive effect on the Spectator, that effect is limited at best. Not only is this discussion very brief, and promptly ended by the Spectator, but the introductory paragraph of the dialogue cautions against attributing much value to it. For if only the “ungefähre[] Inhalt” (WA 257) of the conversation is presented in the text, one should doubt whether the Advocate in fact made such a fine distinction between two expressions that are approximately the same: “wahr scheinen” and “nur einen Schein des Wahren haben.”

After this unsuccessful attempt to persuade through abstract argumentation, the Advocate tries a second method: he follows the Spectator's request, and offers an example: "Z.B. also wenn Sie in der Oper sind, empfinden Sie nicht ein lebhaftes vollständiges Vergnügen?" (WA 259) (emphasis added). Although the Spectator readily agrees that he does have such an experience, the Advocate's use of this example will still fail to persuade his interlocutor. The Advocate points out that the performers of the opera do everything while singing, from meeting each other to dying; the Advocate then asks the Spectator a leading question: does the *Vorstellung* that is the opera, or even a part of that *Vorstellung*, appear true or even have the appearance of truth? The Spectator readily admits that nothing about the opera appears true to him. What is more, he soon readily admits that he is "völlig vergnügt und zufrieden" (WA 260) when he attends the opera – and then recalls that attempts to make the opera ridiculous because of its gross *Unwahrscheinlichkeit* did not affect his enjoyment of it. Asked whether he is deceived in the opera, the Spectator fails to give a clear answer: "Getäuscht, das Wort möchte ich nicht brauchen -- und doch ja -- und doch nein!" (WA 260)

At this point, the Advocate observes that the Spectator finds himself in a total contradiction. Goethe does not specify which contradiction the Advocate is referring to, and there are several candidates: the Spectator is claiming at once to be deceived and not to be deceived; the Spectator had averred that the best actors are those who do manage to deceive one into believing that one is seeing the real thing, rather than an imitation – but is now claiming that he no longer wants to use the word deceived; the Spectator has also moved from claiming that a *Vorstellung* should appear true and *wahrscheinlich* to readily admitting that the opera does no such thing, and yet gives him the greatest enjoyment. Indeed, the Spectator is contradicting the very criticism that generated the entire conversation in the first place: for in the opening

paragraph the spectators had criticized as untrue and *unwahrscheinlich* the *Vorstellung* with the painted spectators in their amphitheatrical structure – yet now he is not only claiming that opera is not *wahrscheinlich*, but even that he had known that all along and had not minded.

The reader who thinks that this dialogue will soon end by resolving these contradictions will have to wait, however. For even though the Spectator has been caught in a complete contradiction – and is aware that he is in one – persuading him will take more than just logically resolving the contradiction. The Advocate does begin by offering a logical solution, however. He leads the Spectator to the realization that the state he enters into during a performance is not one of deception, but rather one of forgetting oneself. He then asks the Spectator under which circumstances the Spectator forgets himself, and the Spectator struggles to answer – even though, as the Advocate is quick to point out, the Spectator had already given the answer previously: “wenn alles zusammenstimmt” (WA 261). The Spectator now sees that such harmony of a complete performance is an agreement [*Übereinstimmung*] with itself, rather than with a product of nature. The interlocutors also have no trouble agreeing that this internal agreement of the opera further means that it has a certain inner truth, in its own little world that proceeds according to its own laws. The Advocate proceeds to explain that, therefore, the truth of art and the truth of nature are fully different (recall that the interlocutors agreed that a complete performance agrees with itself, not with nature) – and the artist should not strive to make his work appear as a work of nature. Here, the interlocutors arrive at the final step of the Advocate’s logical argument: the Spectator observes that artworks often appear as works of nature – and the Advocate retorts that this is true only of a completely uneducated spectator, for only such a spectator is on a level so low as to mistake completely the truth of art for that of nature.

The Advocate has made all his arguments now, and the Spectator has stated that he agrees with them – if arguments were going to persuade the Spectator, the dialogue should end here. If arguments had done the trick, the Spectator should believe that he forgets himself in the opera, because the opera thus has an inner truth, and that the opera therefore need not be true to life. Whichever reason the Spectator had to be dissatisfied with his painted counterparts (recall that, from its opening paragraph, the dialogue is ambiguous as to the reason for the spectators' dissatisfaction), he should now be satisfied. If the Spectator had been dissatisfied with his painted counterparts because he thought they were not good imitations of reality, then he should now reason that such imitation is not required, because, after all, the opera plainly does not imitate reality, but he still very much accepts it. If, on the other hand, the Spectator had been dissatisfied because he did not believe that spectators ever become so engrossed in a performance as to appear to take part in it, he should now reason that spectators do, in fact, become so engrossed – for he himself wholly forgets himself in the opera, to the point of almost being deceived that he sees reality rather than imitation.

The Spectator *should* be persuaded now, but he is not. Even though the Spectator followed the Advocate in every step of the argument, the Spectator is not actually convinced. This becomes evident when the Advocate reminds the Spectator of the story in which birds fly to cherries of the great master of painting.⁴¹ In spite of all the talk about how a *Vorstellung* need not be a good imitation of reality, the Spectator still views this story of the sparrows as proof that the

⁴¹ The advocate is referring to a famous story that was recorded by Pliny. See *infra* p.38 & n.51. That this reference really is to a *story* will be confirmed a bit later in the dialogue, when the Advocate will offer to tell the Spectator “eine neuere Geschichte” (WA 263) [“a newer story”]. Given the location in the text of this reference, one may wonder whether it is still a part of the Advocate’s efforts to use examples, or already a part of his shift to using stories. Given that examples and stories are not mutually exclusive, there is no need to resolve this question. What is important is that a narrative shapes the Spectator’s thinking, and that a “newer” one will be required to change it.

cherries are exquisitely painted; reminded of the story, he asks: “Nun beweis't das nicht, daß diese Früchte vortrefflich gemahlt waren?” (WA 263) Even after the Advocate points out wittily that the story rather proves that the devotees were real sparrows, the Spectator retorts: “Ich kann mich doch deßwegen nicht erwehren, ein solches Gemählde für vortrefflich zu halten.” (WA 263) The Spectator thus reveals that his actual views have not changed, and the Advocate’s efforts at persuasion thus far have not born fruit – the Spectator still believes that a painting that is a good imitation of reality is therefore great.

Both of the Advocate’s methods thus far have failed, they have not managed to match the power of an old narrative about sparrows and a painting. The Spectator did not even appear to follow abstract argument, and argument coupled with example failed to persuade him, even though he stated that he agreed with the arguments. The Spectator still wants art to imitate reality; still, he wants paintings, be they of cherries (or, one may infer, of spectators) to be just like the real thing. An old narrative about a master painter, his painted cherries, and sparrows that flock to them is more powerful than all the Advocate’s reasoning and examples – the story is so powerful that even a brief reference to it suffices. We may now begin to understand why the Advocate expressed his goal using the odd wording “in Ihre eigne Seele läugne” – to actually convince the Spectator, he has to convince him not on the level of reason, but on the deeper level of the *Seele*, where narratives are more powerful than arguments.⁴²

The Advocate now resorts to the power of narrative. Defeated by the simple old narrative of the sparrows, he proposes to tell “eine neuere Geschichte” (WA 263) and the Spectator agrees, stating “Ich höre Geschichten meistens lieber als Räsonnement.” (WA 263) Like most people,

⁴² For a discussion of the phrase “in Ihre eigne Seele läugne,” see *supra* p.26 & n.40.

the Spectator prefers to listen to stories rather than to arguments. This newer story is short and humorous:

Ein großer Naturforscher besaß, unter seinen Hausthieren, einen Affen, den er einst vermißte, und nach langen Suchen in der Bibliothek fand. Dort saß das Thier an der Erde, und hatte die Kupfer eines ungebundnen naturgeschichtlichen Werkes um sich her zerstreut. Erstaunt über dieses eifrige Studium des Hausfreundes, nahte sich der Herr, und sah zu seiner Verwunderung und zu seinem Verdruß, daß der genäschige Affe die sämtlichen Käfer, die er hie und da abgebildet gefunden, herausgespeis't habe. (WA 263-64)

This little narrative is quickly effective. After we are told a third time that this is a story – the Spectator says “[d]ie Geschichte ist lustig genug” (WA 264) – the Spectator readily acknowledges that the copperplates of beetles are not equal to the great master’s painting; he also readily acknowledges that the ape is an uneducated *Liebhaber*. The effectiveness of the little narrative goes further still: it evokes in the Spectator “einen sonderbaren Gedanken,” namely “[s]ollte der ungebildete Liebhaber nicht eben deßwegen verlangen, daß ein Kunstwerk natürlich sei, um es nur auch auf eine natürliche, oft rohe und gemeine Weise genießen zu können?” (WA 264) As the exchange that follows quickly underlines, this “interesting thought” is little more than an idea that the Advocate had already explained to the Spectator, to wit, the idea that an artist who seeks to produce imitations of reality lowers himself.

Now that the Spectator’s thinking has actually been changed, he even raises a question that will require a new explanation from the Advocate. The Spectator is still bothered that even to him, who is at a higher level than the uneducated *Liebhaber*, complete artworks appear as works of nature. The Advocate launches a lengthy and rather abstract explanation. He explains that an artwork is a work of nature in that it is a work of the human mind, and above nature “indem die zerstreuten Gegenstände in eins gefaßt, und selbst die gemeinsten in ihrer Bedeutung und Würde aufgenommen werden.” (WA 265) He explains that the true *Liebhaber* sees not only the truth of the imitation, but also the aspects that elevate an artwork above nature: “die Vorzüge

des Ausgewählten, das Geistreiche der Zusammenstellung, das Überirdische der kleinen Kunstwelt.” (WA 265)

Once again, such abstract argumentation does not have much effect. The Spectator does not even appear to have understood what the Advocate was talking about, as his use of approximating language suggests: “ich habe bei Gemähdn, im Theater, bei andern Dichtungsarten, *wohl ähnliche* Empfindungen gehabt, und das *ungefähr* geahnet, was Sie fordern.” (WA 265, emphasis added) The Spectator’s next statement reads like an admission that he has thus far lacked the self-awareness and the awareness of artworks to have the experience that the Advocate was talking about: “Ich will künftig noch besser auf mich und auf die Kunstwerke Acht geben.” (WA 265-66) The Spectator then makes it clear that he has not understood the Advocate’s arguments, for he is unable to connect them to the question of the painted spectators on the stage, and indeed asks for more arguments:

Sie wollten mich überzeugen, daß ich die abgemahlten Zuschauer in unserer Oper zulässig finden solle; und noch sehe ich nicht, wenn ich bisher auch mit Ihnen einig geworden bin, wie Sie auch diese Lizenz vertheidigen, und unter welcher Rubrik Sie diese gemahlten Theilnehmer bei mir einführen wollen. (WA 266)

A lawyer might take this to mean that he has failed to persuade the Spectator, and seek to argue further. But our Advocate appears to realize that the story of the ape has done its job, for he merely points out to the Spectator that the opera will be repeated that day, and asks “Sie werden sie doch nicht versäumen wollen?” (WA 266) The Spectator answers “[k]eineswegs,” and – asked about the painted men – states “[w]erden mich nicht verscheuchen, weil ich mich für etwas besser als einen Sperling halte.” (WA 266) The Advocate has persuaded the Spectator not to object to the painted spectators, and adds: “Ich wünsche, daß ein beiderseitiges Interesse uns bald wieder zusammenführen möge.” (WA 266)

C. *Why This Little Dialogue Matters*

Having now gone through *Über Wahrheit und Wahrscheinlichkeit* from beginning to end, let us now look back at some key insights in Goethe's dialogue. A first insight is Goethe's notion of an ending – which is at once an ending and not an ending.⁴³ On the one hand, the Advocate resolved the dissatisfaction that gave rise to the dialogue in the first place – for the Spectator is no longer bothered by his painted counterparts, and will attend the opera again. On the other hand – quite characteristically for Goethe's essays – this dialogue has an ending that invites a continuation.⁴⁴ Indeed, the Advocate's invitation is quite explicit: the dialogue ends with his expressing a hope that a mutual interest will bring the interlocutors together again. Perhaps even more important is what the dialogue does not end with: it does not end with a closing of the frame that was set up in the opening paragraph. For the opening paragraph did exactly that: frame the remainder of the text.⁴⁵ But that frame is not closed at the end of the text. Rather, we are simply left with the Advocate's invitation for a future conversation. This is not an empty invitation, for much remains to be discussed. For instance, the Spectator has described himself as “wenigstens unter die halbgebildeten Liebhaber,” (WA 264) and the Advocate confirmed that the Spectator was “[u]nter die Liebhaber, die auf dem Wege sind, Kenner zu werden.” (WA 264) The Advocate's answer makes clear that the Spectator still has to develop, and is indeed on that path – that is, as the Spectator makes progress along this path, there may be new occasions for dialogue. Thus, this ending in one sense ends the text, but invites a continuation in a different

⁴³ Goethe's essays, and indeed the entire genre of the essay, have indeed been characterized as anti-systematic and thus opposed to closure. Burgard, *Idioms of Uncertainty: Goethe and the Essay*, 22-23.

⁴⁴ Goethe actually planned a continuation of *Über Wahrheit und Wahrscheinlichkeit*. Ibid., 239, n.3.

⁴⁵ For a definition of a frame narrative, see Abrams, *A Glossary of Literary Terms*, 366-67.

sense.⁴⁶ This notion of ending while also inviting continuation is important in understanding Goethe's idea of legal advancement. Legal advancement requires not the Kaiser's legal system, a system that seeks to be a final and unchanging system of law – in the Kaiser's words in *Faust II*: “Und also sei, *zum Schluß*, was wir bisher bethätigt, / *Für alle Folgezeit* durch Schrift und Zug bestätigt.” (WA 10965-66) (emphasis added) – but rather an approach to law that, while capable of closing a case, remains open to change, and which shall be the focus of the next chapter.

The ending of the dialogue also emphasizes the level at which the persuasion has taken place. The Spectator's word choice is instructive: “Werden mich nicht *verscheuchen*, weil ich mich für etwas besser als einen Sperling halte.” (WA 266, emphasis added) *Verscheuchen* reminds us that it is hardly on the rational level that the Spectator has been convinced. Rather, it is on a deeper and less rational level – recall that the Advocate set out to deny into the Spectator's *Seele*.⁴⁷ Indeed, the ending of the dialogue is set up so as to emphasize that it is not rational persuasion that has swayed the Spectator. Just a few lines before the end of the dialogue, the Spectator is rationally unconvinced that he should accept the painted spectators: “und noch sehe ich nicht, wenn ich bisher auch mit Ihnen einig geworden bin, wie Sie auch diese Lizenz vertheidigen, und unter welcher Rubrik Sie diese gemahlten Theilnehmer bei mir einführen wollen.” (WA 266) Yet he does not object to the same painted spectators just a few lines later, without any additional arguments on the Advocate's part. The Spectator has been persuaded not on the level of reason, but on a deeper level. On the level of reason, he denies that he has been convinced at all – but his planned action of attending the opera that same day, undaunted by the

⁴⁶ There is even a suggestion in the dialogue that it is itself a continuation of a previous one: “Es ist ja doch unter uns *dießmal* nicht auf Complimente angesehen,” the Spectator says. (WA 262, emphasis added)

⁴⁷ See *supra* p.26 & n.40.

painted spectators, speaks louder than his denial of having been persuaded. In other words, *Über Wahrheit und Wahrscheinlichkeit* shows us that our actions may be determined not by our stated, more rational beliefs, but rather by what we are persuaded of at the level of *Seele*.

This discrepancy between persuasion on the level of reason and on the level of *Seele* will be important in this dissertation project, insofar as the latter affects what people actually do. What judges actually do, not what they state their beliefs are, may determine the outcome of a case.⁴⁸ In *Über Wahrheit und Wahrscheinlichkeit*, we have an adjudicator, namely the Spectator,⁴⁹ who states that he has not been persuaded, yet actually has been persuaded. After all, his final judgment is to attend the opera with its painted spectators, even if he states that he does not see how those painted spectators can be excused. The Spectator has accepted his painted counterparts, even though he says that he has found no rubric to enter them into, even though he says that he has not seen a connection between them and anything the Advocate has said. Goethe's focus on such actual persuasion, rather than logical reasoning will be seen throughout this dissertation project. One may think of the Lord, who pardons Gretchen at the end of *Faust I* without revealing any of His reasoning – we learn only the outcome; or one may think of entire

⁴⁸ One may think, for example, of a judge who states that, in accordance with the law, he has given the testimonies of men and women equal weight, but who (whether based on conscious or unconscious biases) has actually given more weight to the testimonies of men, or vice versa.

⁴⁹ See *supra* p.21 & n.26. It may appear jarring to compare the thinking of the Spectator – who is at best half-educated – with that of an ad. However, lay judges were used in Goethe's time, for instance in the *Schöffentühle*. More importantly, educated as it is used here also has to do with self-awareness, not merely with being learned in the law. Thus, *Faust I* famously opens with Faust's words "Habe nun, ach! Philosophie, / Juristerei und Medicin, / Und leider auch Theologie! / Durchaus studirt, mit heißem Bemühn" (WA 354-57). However, that same learned Faust is "[e]rstaunt" (WA 9258) when Helena pardons Lynceus principally because he was, as many men before him, overwhelmed by her – even though Faust himself had been in a similar state after seeing Helena (or an apparition of Helena) in Act I of *Faust II*. As Mephisto put it: "Wen Helena paralysirt / Der kommt so leicht nicht zu Verstande." (WA 6568-69) That is, the learned Faust lacks self-awareness in that he fails to recognize that Lynceus was thrown into a similar state to the one he himself had been in – and in that sense, the learned Faust turns out to be uneducated.

generations of judges (and not only judges) who, logically, were quite persuaded of the difficult circumstances that women faced in Goethe's time, circumstances that could make them commit infanticide – and yet failed to act on this persuasion, in that they failed to realize that the women may not in fact have been guilty of the killing of their infants.⁵⁰

The Spectator, our judge, then, has accepted, at long last, the painted spectators. His language emphasizes that he was persuaded on the level of narrative. The painted men will not bother him, he says, “weil ich mich für etwas besser als einen Sperling halte.” (WA 266) The Spectator thus refers to the narrative of sparrows flocking to the great master's painting. This reference comes right after the Spectator failed to be persuaded by the reasoning of the Advocate, and thus indicates on what level the Spectator was persuaded. However, *Über Wahrheit und Wahrscheinlichkeit* provides only a reference to the narrative of the sparrows that flock to the master painter's cherries. All we read is: “Gewiß, erinnern Sie sich der Vögel, die nach des großen Meisters Kirschen flogen.” (WA 263) Such cursory treatment of this narrative is not accidental (that this is still meant to be a narrative will be confirmed in a few lines, when the Attorney will offer to tell *eine neuere Geschichte*, meaning that story of the sparrows was the older story). First, it emphasizes just how pervasive this narrative was – a mere reference to it is enough to evoke it. Second, and more importantly, it shows that the narratives that shape our understanding can be very short, and their nuances and subtleties can be altered, even ignored or forgotten. Thus, Pliny already recorded the narrative of the birds that flew to the great master's paintings in his *Naturalis Historia*.⁵¹ There, two Greek painters, Zeuxis and Parrhasios, enter into

⁵⁰ For the Lord's pardoning of Gretchen, see *infra* Chapter IV.D-E; for a discussion of infanticide jurisprudence, see *infra* Chapter III.B.

⁵¹ Pliny, *The Natural History of Pliny*, ed. John Bostock and Henry T. Riley (London: H.G. Bohn, 1855), 35.36. See MA v.4.2 p.991; FA v.18 p.1259. See also Brigitte Peucker, "The Material Image in Goethe's

a contest. Zeuxis has created a painting that contains a bunch of grapes (not cherries as Goethe would have it) so true to life that birds (the species of bird is not specified) flock to the painting to taste the grapes. Zeuxis loses the contest, however, for Parrhasios has managed to paint a curtain in front of his painting that is so realistic, that Zeuxis himself attempts to pull it back. Zeuxis concedes his defeat on the grounds that while he had only deceived birds, Parrhasios had deceived Zeuxis, and artist. In a different variation of the story, Zeuxis had painted a boy who was holding the grapes, and birds still flocked to the painting. Upon realizing that this meant that he had not painted the boy in as lifelike a manner as the cherries – for a lifelike boy would have scared the birds away – Zeuxis removed the grapes from the painting and kept what was best, rather than what was most lifelike.⁵² But Goethe could also be alluding to Boccaccio's *Decameron*, where Giotto (who actually refused to be called a master) is hailed for having brought back the art of depicting things such that they seemed so real that people were often deceived and mistook the depictions for reality.⁵³

The inaccuracy in the reference to the narrative of the sparrows underlines that not accurate, detailed understandings of narratives shape thought, but rather general, abbreviated, and even inaccurate ones. Just a few elements of the narrative are present in the dialogue: there is a painting of cherries by a master painter, and sparrows flock to this painting. Other aspects of

Wahlverwandtschaften," *Germanic Review* 74, no. 3 (1999): 197-98 & n.7. FA refers to the *Frankfurter Ausgabe* of Goethe's works.

⁵² "The Material Image in Goethe's *Wahlverwandtschaften*," fn.7.

⁵³ Giovanni Boccaccio, *The Decameron*, ed. John Payne (New York: H. Liveright, 1925), 6.5. This is by no means intended to be a complete list of places where this narrative of birds and painting appears – indeed, this narrative appeared in many sources. As we shall see when we turn to *Faust* especially, Goethe was quite fond of such allusions that cannot be traced with certainty to a given source – Goethe gives us nothing specific enough to trace this allusion with certainty to Pliny, Boccaccio, or any other source.

the narrative are missing from the discussion between artist and spectator, for instance: the existence of a competition between the painters; that the painter of the cherries (or grapes) lost the competition; that this competition may not have been used to determine who the greatest artist was; and that, in at least one variant of the narrative – that in which Zeuxis removes the grapes but keeps the boy (who did not frighten the birds) – imitation was not hailed as determinative of the quality of an artwork. Of course, a careful reader of Pliny would pick up on such nuances and read the story in their light. The important point, however, is that reduced, not detailed, forms of narratives shape understanding.

It may appear strange that reduced narratives have such a powerful effect. Yet in Goethe's work we shall see several examples of the power of such basic and abbreviated narratives, such as that of infanticide: seduction of an unmarried woman, pregnancy, killing of the infant by the mother – this shall be the focus of Part II of this dissertation. This narrative was so pervasive that readers and critics alike have for generations – and to this day – ignored nuances in *Faust I* and assumed that Gretchen indeed killed her newborn child, even though a more careful reading of the play casts serious doubt on this assumption.⁵⁴ More tragically, it does not seem to have occurred to judges or to anyone else writing on this topic at the time that someone other than the mother could have killed the newborn child.

The narrative of the ape underlines another reason why narrative is so important for persuasion. Logically, the narrative of the ape does not prove what the Advocate wants to prove. For the fact that the copperplates are good imitations but not art does not prove that art need not be a good imitation – it proves, at most, that good imitations need not be art. That is, the

⁵⁴ Indeed, I have found only one source that questions whether Gretchen in fact killed her child. Bohm, "Margarete's Innocence and the Guilt of Faust." *See infra* p.113.

narrative of the ape shows that not every imitation is an artwork, but, logically, that does not imply that artworks need not be imitations. Thus, logically, the narrative of the ape leaves open the possibility that art should imitate reality – and therefore, that the painted spectators, who are not good imitations, are not art. Indeed, logically, the narrative of the sparrows did not prove that art needed to be an imitation either – for, as the Advocate pointed out, it could also be read to prove that the sparrows were uneducated spectators. But this lack of logic does not affect the persuasive power of narrative – the sparrows had the Spectator convinced of one view, and the ape convinced him of another view.

Both narratives suffer from another weakness as well – but this, like their logical insufficiency, does not prevent them from being effective tools of persuasion. These narratives are not convincing imitations of reality, for they are not true to life. After all, sparrows hardly flock to paintings of cherries (or grapes or any other fruit). The dialogue underlines this by making the narrative of the ape even more absurd – not only does the ape actually eat the copperplates, but he eats one after another. For we learn that there were many copperplates, which the ape spread out around itself, to then eat the beetles out of each of them. That is, the ape devoured not merely one depicted beetle, but – having eaten one and tasted it – decided to eat a few more.⁵⁵ Even if it were the case that an ape could be deceived by a copperplate of a beetle and eat one, an ape would be able to tell the difference between the flavor and the smell of a copperplate and that of a beetle. And yet, the Spectator is convinced by exactly these two narratives, untrue though they may be. There may be an element of playful exaggeration in the

⁵⁵ The story of the ape is quoted in full, *supra* p.32.

narrative of the ape, one could even say that the narrative is absurd⁵⁶ – but it is still an effective tool of persuasion. The Spectator does not appear to realize that it is potentially absurd – and the Advocate appears to consider it believable as well. After all, the Advocate tells it in order to make a point and to persuade the Spectator, who is persuaded.

The story of the ape thus performs what the Spectator and the Advocate agreed on earlier – namely, that artworks have a certain internal truth, a little world of their own that functions according to its own laws. The story of the ape punctuates just how far this can go – in the world of this narrative, animals can actually eat depictions of edibles without even noticing that they are eating mere depictions. Just like the exaggerated world of the opera is still believable because it works according to its own laws, so, too, the exaggerated world of the story of the ape is believable according to its own laws. Narrative can thus make the untrue into the *Wahrscheinliche*. Sparrows eating paint, apes eating copperplates, or characters singing while dying become *wahrscheinlich* when they follow a familiar narrative, a narrative that lends internal truth to an artwork. The spectator who has forgotten himself (WA 261) (and who is *getäuscht*, though perhaps not quite) (WA 260) buys into this internal truth. This has tremendous, and frightening, implications for the law, which shall be explored in Part II of this dissertation especially. For now, suffice it to say that the judge (recall that our Spectator is cast in the role of a judge) who is presented with something untrue may believe it if it has an internal truth, if it follows a familiar narrative.⁵⁷ If this seems a cynical take on legal reality, one need only consider the widespread legal practice of torture in Europe from the Middle Ages well into

⁵⁶ Recall that Goethe himself alluded to the dialogue as “amusing.” See *supra* n.23.

⁵⁷ Of course, nobody is arguing that every judge forgets himself and fully buys into the narrative that unfolds before him. But for significant amounts of time, significant numbers of judges do.

Modernity – including in Goethe’s time. Although it is absurd to suppose that a confession secured by torture should be given much credence, it was in fact given much weight in the courts of Continental Europe for centuries.⁵⁸ Thus, legal proceedings acquired an internal truth through, quite literally, their internal laws.

The narrative of the ape is essential for at least one more reason, namely that it is sufficiently similar to the narrative of the sparrow that it is readily apparent even to the Spectator that the narratives are connected – and yet it is different enough to make a different point. The similarities between the narratives are striking: both involve animals who are deceived by accurate imitations of edibles into believing that the depictions are the edibles, and then eating the edibles. And the one small difference that makes all the difference is obvious even to the Spectator – the copperplates are not great art, whereas the painting of the cherries was. Curiously, the narrative of the ape proves a point that could have been proven by the narrative of the sparrows. Indeed, the main point the Advocate wants to make is that the fact that spectators are deceived by a good imitation proves only their lack of education. This point is, as the Advocate stresses, already made by the narrative of the sparrows. The Spectator will acknowledge this point at the end of the dialogue, when he will say that the painted spectators will not bother him because he considers himself better than a sparrow – that is, the Spectator will have drawn from the narrative of the sparrows the realization that educated spectators are not deceived by accurate imitations. But he will only have drawn this realization after having been presented with an alternative narrative, namely the narrative of the ape. This need for an

⁵⁸ Kenneth Pennington, "The Jurisprudence of Procedure," in *The History of Courts and Procedure in Medieval Canon Law*, ed. Wilfried Hartmann and Kenneth Pennington (Washington, D.C.: The Catholic University of America Press, 2016), 157-59; Susanne Kord, *Murderesses in German Writing, 1720-1860: Heroines of Horror*, Cambridge Studies in German (New York: Cambridge University Press, 2009), 120.

alternative narrative will resurface several times in Goethe's works. For instance, to mention infanticide yet again, Gretchen tries to present alternative narratives at the end of *Faust I*, alternatives to the usual narrative of the mother as the killer of the newborn child. These alternative narratives are simple variations on the usual narrative, and change just one detail: in one alternative, not Gretchen (the mother) killed the infant, but someone else; in the other alternative, the child is still alive, and Faust should save it. These slight changes are of great importance – legal and otherwise – for they change one crucial element: who the culprit is.

Putting these insights together provides an understanding of *Wahrscheinlichkeit*. What is *wahrscheinlich* is, to a large degree, determined by the narratives one has already accepted. The Spectator accepts the narrative of the sparrows, and consequently is convinced that art must be a good imitation of reality. He therefore also finds it *Wahrscheinlich* that animals would eat depictions of food. He can thus readily believe a story about an ape eating copperplates. Such an alternative narrative is more powerful in terms of persuading the Spectator than is nuance in the original narrative. Still, the narrative does not necessarily persuade on the level of logic or one's stated beliefs. After all, at the end of the dialogue, the Spectator still claims to be unconvinced that he should accept the painted spectators. But narrative persuades on a different level – recall that the Advocate set out to deny into the Spectator's *Seele* – and there action is determined. For the Spectator does actually accept his painted counterparts in the end.

One more thing must be noted about narrative. This is the ease with which narratives travel. The narrative of the sparrows was recorded by Pliny the Elder, a *Roman* writer; it concerned two *Greek* painters; it was later echoed by Boccaccio, an *Italian* author; and centuries

later shapes the understanding of a spectator in a *German* theatre.⁵⁹ The nuances of the narrative may become lost in its travels; its details may be altered – but its core travels with ease. This ability of narrative to travel across borders shall and thus to shape thinking across borders shall be very important in this dissertation project. One may think, for instance, of the French-speaking English Lord who brings a solution to the problems of the German characters in the *Wahlverwandtschaften* in the form a narrative, a narrative about how a marriage for love can come to be in spite of a loveless one.⁶⁰

Thus far, I have stressed the importance of narrative for law insofar as the judge and defense counsel are concerned. Narrative greatly influences what the Spectator – that is, the adjudicator and the accuser – in *Über Wahrheit und Wahrscheinlichkeit* believes, and how he acts. The accusation, stated in the opening paragraph, is that something untrue and *unwahrscheinlich* is being put upon the spectators. The narrative of the sparrow underlies this accusation. After all, that narrative, as understood by the Spectator, means that art must imitate reality well, and the accusation is that the *Vorstellung* on the stage fails to do so. The defense, in turn, only succeeds once the Advocate brings the conversation to the level of narrative, and presents an alternative narrative. The narrative of the ape persuades him to act differently, namely to attend the opera and not to mind the painted spectators.

⁵⁹ Here, we already see an indication of Goethe's relationship to the past, especially to classical antiquity. This complex relationship will be explored further especially in Part III. Here, suffice it to say that Goethe seeks to restore classical antiquity to some extent: Pliny's narrative is one key to convincing the Spectator, and a misunderstanding of the significance of that narrative is remedied by the Advocate, who shows that the narrative does not mean that art must seek to be an imitation of reality. At the same time, this is not a return to antiquity, for Pliny's narrative has to be in dialogue with a "newer story," the story of the ape. Similarly, the very form of this dialogue is both a return to antiquity and not a return to antiquity. The form of the dialogue certainly evokes the Platonic dialogues, but is at the same time too opposed to systematic thought and the value of argument in persuasion to mark a return to Plato. Cf. Burgard, *Idioms of Uncertainty: Goethe and the Essay*, 125-32.

⁶⁰ See *infra* Chapter VII.E.

D. Conscience and Narrative

The importance of narrative is not limited to the adjudicator, accuser, or advocate, however – it also affects the accused. The accused is missing from *Über Wahrheit und Wahrscheinlichkeit*, which contains only an Advocate of the Artist, but not the Artist, and we shall therefore not rely on that dialogue here. To understand the importance of narrative to the accused, we must first understand the relationship between narrative and conscience.

Conscience in Goethe's time was often not conceived of as some deep moral faculty, but rather as a faculty that simply made connections, sometimes mere semantic connections, between accusation and response.⁶¹ On this view, good conscience is the result not so much of not having done anything wrong, as it is the result of responding to an accusation by making an association to an adequate response. Such responses can take the form of, among others, confessions, pleas for forgiveness, excuses, justifications, and even distractions.⁶² Bad conscience, vice versa, is the result not so much of a morally bad act, as it is the result of an accusation – and the lack of an adequate response. For example, a thief raised with the knowledge that theft is wrong may suffer from bad conscience due to a voice that accuses him of theft, and the lack on his part of a good response. But if that same thief were to be versed in certain interpretations of communism, he may respond that he is taking property away from the rich, who had stolen it in the first place, and giving it back to the poor, all in order to build a more just society. His theft has not become moral just because he believes it to be right – but his conscience is at ease.

⁶¹ Fritz Breithaupt, "Goethe's Conscience," *MLN* 129, no. 3 (2014): 550; Albert R. Jonsen and Stephen Toulmin, *The Abuse of Casuistry: a History of Moral Reasoning* (Berkeley: University of California Press, 1988).

⁶² Breithaupt, "Goethe's Conscience," 552-53.

Narrative operates on several levels here. First, both accusation and response are typically narratives – for one is hardly ever accused of “murder” or “theft” without more. Rather, one may be accused of murdering a given person at a given time and in a given way, or of stealing certain property at a certain time and in a certain way. And a response is hardly ever simply “self-defense” or “creating a just world.” Rather, one may argue that “he came running at me with a knife and tried to stab me, then I shot him” or “he had stolen all his wealth by exploiting the poor, and I reclaimed it and then gave it back to the people.” It is telling that after humanity’s first transgression both Adam and Eve answer God in simple narratives: “The woman whom thou gavest to be with me, she gave me of the tree, and I did eat”⁶³ and “[t]he serpent beguiled me, and I did eat.”⁶⁴ Second, the very idea that a confession or a plea for forgiveness will actually help is a narrative – and a dangerous one, for confessions and pleas rarely work in human court. For instance, one narrative is that a confession will lead to mercy, divine or otherwise.⁶⁵ Whatever the impact of a confession may be on God, it is often damning in human court – for instance in infanticide cases in Goethe’s time, as we saw in Chapter III of this dissertation. The accused who acts according to the narrative that a confession will result in mercy may thus damn herself before the human court. Third, an accused who believes the

⁶³ Gen. 3:12. Citations to the Bible are to Luther’s translation when in German, and to the King James Bible when in English, unless otherwise indicated.

⁶⁴ Gen. 3:13. Breithaupt argues that excuse [*Ausrede*] is the first human utterance, at least in the Bible, and also the birth of narration. Fritz Breithaupt, *Kultur der Ausrede*, 1. Aufl. ed., Suhrkamp Taschenbuch Wissenschaft (Berlin: Suhrkamp, 2012), 7. However, the first human utterance comes earlier. First, man speaks of woman being made from his rib (Gen. 2:23). Then, woman speaks to the serpent (Gen. 3:2-3). One may also wonder whether the answers Adam and Eve give to God after having eaten of the fruit of the forbidden tree are excuses, justifications, explanations, confessions, or some combination thereof. But they are narratives.

⁶⁵ E.g., Proverbs 28:13 (“He that covereth his sins shall not prosper: but whoso confesseth and forsaketh them shall have mercy.”); 1 John 1:9 (“If we confess our sins, he is faithful and just to forgive us our sins, and to cleanse us from all unrighteousness.”)

narrative that she does not have a chance in human court, or would be doomed to a terrible existence even if acquitted, may not put up much of a fight – that is, she may not try very hard to come up with a response to accusations, thus giving way to bad conscience. Here, too, one may think of a woman accused of infanticide. She may (perhaps not wrongly) believe that she has no chance to win her case in court, and that even if she did win, she would be an outcast. Consequently, she may simply throw in the towel and not even try to respond, thus giving in to bad conscience. Narrative operates on all three of these levels in Gretchen’s case.

Chapter II: *Gränzunbewußte* Arbitration

A. Introduction

I shall begin simply with an example of what an international commercial arbitration today looks like. Party A, a Chinese company, has received a shipment of goods from Party B, a Mexican company. Party A believes that the goods in the shipment are not up to specifications; Party B disagrees. The parties fail to work out their differences amicably. Therefore, Party A decides to initiate legal proceedings against Party B for breach of contract. The contract between the parties contains an arbitration agreement – that is, an agreement whereby the parties agree to submit disputes arising from the contract to arbitration. Party A is therefore bound to bring its claim against Party B in arbitration, and Party B is bound to answer this claim in arbitration. In the arbitration agreement, the parties agreed on various aspects of the arbitration, such as: it was to have its legal seat in Stockholm, Swiss law would govern the interpretation of the contract, Swiss procedural law would be used, the arbitration rules of the International Chamber of Commerce (ICC) would apply, the language of the arbitration would be English, and three arbitrators would preside over the arbitration. Per the rules of the ICC, an organization headquartered in France, the parties each appoint one arbitrator. Party A – called the claimant –

opts for a Chinese engineer whose technical expertise is relevant to the dispute; Party B – called the respondent – opts for a Spanish lawyer who has much experience in international transactions generally, but little familiarity with Swiss law. Together, these two arbitrators agree on the third arbitrator, often referred to as the president of the tribunal – who happens to be a Greek lawyer with much experience in commercial transactions between the Americas and China, and who also has little familiarity with Swiss law. After the parties have stated their positions in several filings to the tribunal, an actual hearing is held. The parties and the tribunal agree to hold the hearing in Tenerife, which has much nicer weather in winter than Stockholm, though the legal seat of the arbitration remains Stockholm. At the hearing, the parties plead their case and bring witnesses. After some deliberation, the tribunal issues its decision – called an award – in which it finds that Respondent must pay Claimant a certain amount of money. Respondent, however, refuses to pay, and challenges the award in Swedish court. The Swedish court conducts a limited review, and rejects the challenge to the award. Claimant learns that Respondent has sufficient assets in Australia to pay the award, and turns to the courts of Australia to enforce the award. Respondent again challenges the award, this time in the courts of Australia. The Australian court hears from both parties and conducts a limited review of the award. Although the court privately harbors doubts whether the arbitrators’ award was correct on the merits, it is not called upon to consider the merits of the dispute, and enforces the award. The Respondent’s assets in Australia are promptly attached in the relevant amount and transferred to the Claimant.

Already from this example, one can begin to see that laws and the relevant actors (the parties, the arbitrators) cross borders with ease where arbitration is involved. One can also see, however, that borders continue to exist and to matter. In the example, parties from two different continents resolve their dispute applying law from a third continent, their arbitration is legally

seated in that third continent, though physically they convene in a fourth continent, where arbitrators from those three continents resolve their dispute, and the award is finally enforced in a fifth continent. In addition, both the civil and the common law are involved (Australia is a common law country, the other jurisdictions involved use the civil law). This example is not designed to be unusually international – rather, the number of different countries and continents involved is not unusual for an international commercial arbitration.⁶⁶

This chapter seeks to describe the spatial order heralded in by the widespread use of arbitration today – specifically, to analyze the role of state borders in that order. Various terms have been used to describe this order or some aspect of it: “Delocalized,”⁶⁷ “pluralistic,”⁶⁸ “diffuse or distributed,”⁶⁹ “three-dimensional,”⁷⁰ “fluid,”⁷¹ and many more.⁷² Each term comes with its own problems. For instance, “borderless” suggests that there are no borders – but states do still have borders; “delocalized” suggests that arbitrations have no locations – but arbitrations

⁶⁶ Indeed, the example could quite easily have been made even more international. For instance, I did not specify the nationality of counsel for the parties, which could add several more nationalities to this arbitration (each party’s counsel could add several nationalities as several lawyers, or even entire law firms, could be representing each party); another possibility is that the arbitrators will have multiple nationalities. Furthermore, relevant documents and witnesses could be in yet other countries, which could necessitate recourse to the courts of those countries to compel production of the documents or the witnesses.

⁶⁷ Julian D. M. Lew, *Applicable Law in International Commercial Arbitration: a Study in Commercial Arbitration Awards* (Dobbs Ferry, N.Y.: Oceana Publications, 1978), 202.

⁶⁸ Jan Paulsson, *The Idea of Arbitration*, First edition. ed. (Oxford, New York: Oxford University Press, 2013), 35.

⁶⁹ Arthur Taylor Von Mehren, *Limitations on Party Choice of the Governing Law: Do they exist for International Commercial Arbitration?* (Tel Aviv: Tel Aviv University, 1986), 20.

⁷⁰ Jan Paulsson, "Arbitration in Three Dimensions," *International and Comparative Law Quarterly* 60, no. 2 (2011): 291.

⁷¹ *Ibid.*, 306.

⁷² See Bermann, *International Arbitration and Private International Law*, 247-56, and footnotes. In the interests of full disclosure, I note that I was involved in drafting the lectures that formed the basis for this book.

do take place in physical locations, even if the legal significance of those locations is much diminished as compared to litigation.

An important reason to focus on the role of state borders in the law is the role they play in *Faust II*: the Kaiser wants bordered states of which each contains its own legal order, Helena stands for a legal order that crosses borders with ease – more on that in Part III. I propose here to describe this spatial order as *gränzunbewußt*, borrowing from Faust’s description of Helena’s empire in *Faust II* (WA 9363). This term is not free of its own problems, but it captures two facets of today’s reality. First, the word *gränzunbewußt* conveys that many actors – parties, arbitrators, arbitral institutions – often act almost as if there were no state borders, and are, in that sense, unconscious of borders. While these actors surely know that borders exist, they only rarely need to think about borders. Indeed, parties may even select the locations for an arbitration based on such factors as the convenience and even the pleasantness of the locations.⁷³ Second, the word *gränzunbewußt* captures that state borders do continue to exist, and do continue to matter. After all, one does not render something nonexistent or irrelevant by being unconscious of it. Indeed, arbitration very much relies on states – which are bordered entities⁷⁴ – and their laws in order to function. For instance, if a party refuses to comply with the orders of the arbitrators, arbitrators may need to rely on national courts to force the party to comply. In addition, the word *gränzunbewußt* carries a connotation of the cognitive, and, as we shall see, the very we think of

⁷³ Ibid., 241.

⁷⁴ Having a defined territory has been an official part of the legal definition of a state at least since the Montevideo Convention of 1933. Montevideo Convention on Rights and Duties of States (1933), 165 LNTS 19, Art. 1 (“The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States.”) (emphasis added)

conceive of the spatial order of law will have to change from the Westphalian model to a new one.

But why, one may well wonder, describe a 21st-century legal reality in a dissertation on Goethe and law? One reason is that the spatial order of this reality is very close to the spatial order that brings about legal advancement in Goethe's works. Where this spatial order is to be found in Goethe's works and how it functions there we shall see in Parts II through IV of this dissertation; for now, we will look at how it works in our world, and attempt to understand it. Another reason is that the *gränzunbewußte* spatial order is not easy to grasp, and therefore scholarship that has sought to understand it will be very valuable – and some of the scholarship on international arbitration has sought to do exactly that. The 21st-century reality will also provide us with a language in which to speak about Goethe's envisioned spatial order: terms such as “arbitration,” “arbitrator,” “award,” and several others will prove useful. Finally, the fact that this spatial order exists can also put to rest concerns as to whether it is possible – which is not a given at all, for international arbitration as it exists today used to be dismissed as unrealistic. The discussion throughout this dissertation will thus not need to focus so much on whether Goethe's vision is practically possible, but rather will be able to focus on what that vision entails.

Describing what exists will also make it easier to imagine what could exist. This will be valuable because the current reality is not identical to what Goethe envisioned – but by starting with that current reality it will be easier to see what Goethe's reality would be. For instance, arbitration today does not cover criminal law, whereas Goethe's idea of it does – after all, Gretchen is sentenced to death, and Lynceus is tried for his life. Yet understanding how arbitration works will make it easier to see how it could cover criminal law – indeed, with fines

and suspensions for athletes in doping cases, arbitration today already comes close to criminal jurisdiction.⁷⁵ Another example is that in most arbitrations today a state law is applied, such as English law or Chinese law or another jurisdiction's law. Only a small percentage of arbitrations applies "general principles of law," "*ex aequo et bono*," or a similar notion that essentially means fairness in the eyes of the arbitrators⁷⁶ – which is closer to what we will find in Goethe's works. But if one understands today's reality, it is no longer difficult to imagine a reality in which arbitrations are routinely governed by "general principles of law" or decided "*ex aequo et bono*." Today's spatial order is therefore not to be understood as the final form of arbitration – rather, it is something that can, and does, still develop.

The spatial order that preceded the order of today – and against the backdrop of which the today's order exists – was a highly bordered, territorial order, often called Westphalian, after the Peace of Westphalia of 1648. Heralded in by the age of nation states and the international law that accompanied them, this order was one where a given state's legal order governed, and did so exclusively, within the borders of that state, and international law governed between these orders. To the extent that any conflicts arose as to which law should govern a given dispute, the court applied its state's rules for resolving such conflicts – aptly treated under the rubric "conflict of laws."⁷⁷ That is, the national legal order still controlled – within its borders – which legal order would govern in a given case. For instance, if two parties appeared before a French court

⁷⁵ See *infra* p.63.

⁷⁶ Bermann, *International Arbitration and Private International Law*, 351-66 & n.972.

⁷⁷ "Conflict of laws" is sometimes also called "private international law." I avoid the use of the term "private international law" here, because – quite confusingly – private international law is really domestic law; in addition, again confusingly, that term is sometimes used to refer to several types of transnational law that include international arbitration.

and disputed whether their contract should be governed by French or German law, the French court would apply its own (i.e. French) conflict-of-law rules to determine whether to apply French or German law to the contract. Even when the French court would decide to apply German law, the parties would still be before the French court and thus within the French legal order. Between these bordered nation states, international law governed. For such international law to apply, states had to consent to it – whether it be by practice or by signing a treaty. For any international body, such as the International Criminal Court, to have power over them, states would have to consent to that body’s jurisdiction.⁷⁸

Today’s spatial order, however, permits one to avoid the legal order of nation states in many cases. The example of a commercial arbitration⁷⁹ illustrates that laws and parties can cross state borders with an ease that was unthinkable in the Westphalian order. In an international commercial arbitration, the parties are free to choose the arbitrators, the procedural law, the substantive law, the seat of the arbitration, the language of the proceedings, and many other aspects, and no one state has control over the arbitration. One would likely not be wrong to see this as part of globalization – but this would be too simple. Various spatial order are compatible with globalization. For instance, one could think of a world completely without state borders, and one court sitting atop of it. Or one can think of courts such as the European Court of Justice, which is part of an effort to decrease the importance (or perhaps even to eliminate) state borders within the European Union, but which, at the same time, has new borders – namely, the borders

⁷⁸ Naturally, the reality of this territorial legal order was not always as neat as is presented here. For instance, one may think of entities whose status as a state is controversial, or of border disputes between states.

⁷⁹ *Supra* p.47.

of the European Union itself.⁸⁰ Thus, the purpose of this chapter is not only to show that the Westphalian legal order is not the only possible one in a world with states, but also that there are different ways that a post-Westphalian world can look – and that one such was is a *gränz unbewußte* order, which shall turn out to be key to understanding legal advancement in Goethe’s works.

It may seem strange, even paradoxical, that arbitration relies on the power of state courts and yet seeks to be an alternative to them – for while arbitration seeks to provide proceedings outside of state courts, it still needs state courts to enforce an arbitration awards against recalcitrant parties. Another paradox of arbitration is that it is at once legal and not – on the one hand, arbitration offers legally binding resolutions of legal disputes; on the other hand, it prides itself on allowing fairness to triumph over technical application of the law, and even allows for lay adjudicators. To understand how this paradox – and other paradoxes of arbitration – can function, it is essential to take a closer look at international arbitration in its various manifestations.

B. How International Commercial Arbitration Works

The description of arbitration offered here is not intended to be normative, but rather to describe how arbitration has changed the spatial order of law and the role of state borders. Whether arbitration is a good thing or rather a way to circumvent state power and undermine state sovereignty, whether arbitration is indeed efficient and neutral, or rather costly and favorable to commercial interests – such question have given rise to heated discussions, but are outside the scope of this work.

⁸⁰ [The European Court of Justice will be discussed in greater detail in the Introduction, and therefore the description of it here is so brief]

Arbitration is usually divided into three varieties: international commercial arbitration, investor-state arbitration,⁸¹ and state-to-state arbitration. In addition, there is arbitration that does not neatly fit into any of these three categories, such as arbitration before the International Court of Arbitration for Sport (CAS). International commercial arbitration, which produces by far the greatest number of arbitration cases,⁸² is of the most interest for the purposes of this dissertation. The reason to focus here on international commercial arbitration is by not its subject matter, but rather its spatial order, which takes this legal process outside the power of any one state, even the state where the proceedings take place, but not outside the power of the sum total of states. Other forms of arbitration will be considered only very briefly, mostly to show that different orders are also possible, even if less relevant here.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, better known as the New York Convention,⁸³ is the legal cornerstone of international commercial arbitration.⁸⁴ This international treaty currently has 159 state parties,⁸⁵ and requires states to recognize and to enforce international arbitration awards rendered on the territory of another

⁸¹ Investor-state arbitration is also known as treaty arbitration and investment arbitration.

⁸² Thus, 2016 saw over 5,000 international commercial arbitrations filed at ten of the leading arbitration centers. By contrast, the same year saw 48 investment cases filed at ICSID (the International Center for Dispute Settlement), where most investment arbitrations are handled. Markus Altenkirch and Jan Frohloff, "International Arbitration Statistics 2016 – Busy Times for Arbitral Institutions," *Global Arbitration News* (2017), <https://globalarbitrationnews.com/international-arbitration-statistics-2016-busy-times-for-arbitral-institutions/>.

⁸³ 330 UNTS 38 (1968).

⁸⁴ The account of international commercial arbitration here is generally based on Bermann, *International Arbitration and Private International Law*; Gary Born, *International Commercial Arbitration*, Second edition. ed. (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2014); Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, Third edition. ed. (Cambridge, United Kingdom: Cambridge University Press, 2017).

⁸⁵ "Contracting States - List of Contracting States," <http://www.newyorkconvention.org/list-of-contracting-states>.

signatory state.⁸⁶ The New York Convention also provides for limited grounds on which a state may refuse to do so. Such refusal is called annulment.⁸⁷ Grounds for annulment include a lack of an opportunity to be heard or a lack of consent of the parties to arbitration -- these grounds are narrow and few.⁸⁸ Crucially, mistakes by the arbitrator as to the substance of the dispute are not a reason for annulment. This is no accident – one of the main reasons parties choose arbitration is that it provides a final resolution of the dispute, from which no appeal is possible, which

⁸⁶ New York Convention, Art. III (“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”)

⁸⁷ Annulment is also referred to as “vacatur” or “set aside.”

⁸⁸ New York Convention, Art. V (“1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.”)

provides for faster resolution of the dispute.⁸⁹ Note that the grounds for annulment are also all permissive, rather than mandatory – that is, if a court finds that, for instance, the parties were not given an adequate opportunity to be heard, then it may annul the arbitration award, but it need not do so. Recall that in the example of an arbitration above, the courts of Australia did not consider the merits of the dispute, but conducted only a limited review of the award⁹⁰ – the review permitted by the New York Convention.

Already here one can see one fundamental tension of arbitration: it both seeks to escape state courts, and needs them at the same time.⁹¹ On the one hand, arbitrations are private proceedings outside state courts, and are not beholden to any state. On the other hand, arbitration needs national courts to function. For instance, if a party refuses to comply with an award, the power of the state, provided through its courts, is needed in order to force the party to comply; similarly, if a party refuses to participate in an arbitration, the power of a state court may be needed to force the party to participate.⁹² Thus, arbitration relies on the power of state courts both at the beginning of the arbitration (forcing a party to participate in an arbitration) and at the end of an arbitration (enforcing the award). But even during the arbitration proceedings, the power of state courts may be needed, for instance to compel a witness to appear.

⁸⁹ Paulsson, *The Idea of Arbitration*, 292.

⁹⁰ *See supra* p.47.

⁹¹ This is sometimes called the “dual foundation of arbitration.” Bermann, *International Arbitration and Private International Law*, 23.

⁹² New York Convention, Art. II(3) (“The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”)

This fundamental tension of arbitration is also visible in the source of its legitimacy. The cornerstone of this legitimacy is typically referred to as “party autonomy.”⁹³ This autonomy is far-reaching – not only can parties choose to resolve their dispute in arbitration, but parties can also choose, among other things, the substantive law that will govern their dispute, the procedural law that will govern their dispute, the language of the proceedings, the number of arbitrators and how they will be selected, the seat of the arbitration, etc. Yet party autonomy is not unlimited, for the New York Convention provides ground on which the courts can decline to enforce arbitration agreements (Article II(3)), as well as arbitration awards (Article V). Still, party autonomy in arbitration is much more expansive than in litigation, where party autonomy manifests itself principally in that parties can designate a state court for the resolution of their disputes (this is known as a forum selection clause) and choose which substantive law will apply to their disputes (this is known as a choice-of-law clause) – and such a state court may refuse to exercise jurisdiction over the parties or their dispute based on that state’s rules; similarly, such a state court may, based on its own conflict-of-law rules, refuse to honor the parties’ choice of law.⁹⁴ Party autonomy in arbitration is thus greater than in litigation, but still only to the extent that state law allows for it – if, for instance, states did not recognize arbitration agreements that chose a non-national law, then party autonomy would accordingly be more limited than it is today;⁹⁵ if states simply did not recognize arbitration agreements at all, then there would be no party autonomy at all with respect to arbitration, for there would be no arbitration. Thus, again,

⁹³ Bermann, *International Arbitration and Private International Law*, 24.

⁹⁴ *Ibid.*, 31-33.

⁹⁵ This indeed was the case in some jurisdictions in the past, but no longer appears to be the case anywhere. *See, e.g.*, F.A. Mann, "England Rejects Delocalized Contracts and Arbitration," *International and Comparative Law Quarterly* 33 (1984).

arbitration exists in a fundamental tension. On the one hand, its legitimacy derives from *private* consent to arbitration and *private* choices concerning that arbitration; on the other hand, *public* entities grant private parties the very autonomy that underlies their consent and their choices, and those *public* entities also place limits on the autonomy of private parties.

There is yet another fundamental tension in arbitration. Arbitration is both legal and not legal.⁹⁶ On the one hand, party autonomy means that private parties can make legally binding agreements to arbitrate, and party autonomy is both created by law and limited by law; arbitration relies on state courts at crucial stages in the process, such as enforcement of the award. In addition, most arbitrations apply some state law, and basic elements of a legal proceeding, such as the opportunity to be heard, are guaranteed by Article V of the New York Convention. Typically, lawyers represent parties, and arbitrators may also be lawyers and even retired judges. Yet arbitration also has something decidedly not legal about it. Parties can choose, and at times do, to have their disputes resolved not by application of law, but rather without law, by such principles as “*amiable compositeur*,” “general principles of law,” or “*ex aequo et bono*” – which essentially means fairness in the eyes of the arbitrator.⁹⁷ Arbitration also avoids the power of courts to a great extent – once an award is issued, a given court can exercise only limited influence over it. Arbitrators need not be lawyers, they can be laymen. And even when they are lawyers, they are often selected because they are not specialists in the law that is to be applied. The reason for such selection is that parties often seek to escape a very formal application of any state’s substantive or procedural law, rather seeking something more efficient

⁹⁶ BNA International and Penn State Institute of Arbitration Law and Practice, *World Arbitration & Mediation Report* (BNA International Incorporated, 2003), 287.

⁹⁷ See *supra*, n.76.

and less legalistic. Though basic elements of a legal proceeding are guaranteed (such as an opportunity to be heard) these elements are not laid out in technical detail – in stark contrast to most state legal systems, where procedural law is typically very technical.

To understand international arbitration, one must understand why parties choose it. One must understand what is so appealing about international arbitration that it has grown from virtual non-existence to being an immensely widely used form of dispute resolution, indeed the default for many kinds of international disputes within just a few decades. To sharpen the question: why does a form of dispute resolution ridden with the fundamental tensions just described, a form of dispute resolution that is not even legal in some ways, become so widespread through the choice of parties? The stated appeal of arbitration lies in part in its efficiency compared with state courts: procedure is less formal, and therefore proceedings can move faster; there are no appeals, and therefore appeals do not cause delays; arbitrators can be selected for their expertise in the nature of the dispute, and therefore less time needs to be spent on explanations specific to the type of dispute. Another part of the appeal of arbitration is its neutrality: parties often perceive (whether correctly or not) that state courts are biased in favor of parties from their own state; in addition, parties may perceive (again, rightly or wrongly) that the peculiarities of a particular state's legal system could be used against them, especially by a party that is familiar with those peculiarities; and the ability to be involved in arbitrator selection given parties a sense that they can make sure that the adjudicators will be properly neutral. Parties may feel that arbitrators are more competent than judges; perhaps because the low level of competence of judges in a particular state, or because specialist knowledge is required for a certain dispute (and arbitrators can be selected based on already having that knowledge, whereas judges cannot). Along the similar lines, parties choose arbitration for its greater perceived

fairness: because arbitrators are less bound to the technicalities of a legal system, they are freer to make fair choices than state judges are. Cost is often advanced as a reason for arbitration as well: the greater efficiency of arbitration means lower attorney's fees.⁹⁸

But perhaps the most important reason that parties favor arbitration is the power of the end result. An arbitration award is enforceable in any country that is a signatory to the New York Convention – and that is the vast majority of countries in the world. Indeed, an arbitration award is also enforceable in a number of places that are not even signatories to this Convention.⁹⁹ Such an award is hardly subject to destruction by any one state court – annulment by a state court precludes enforcement in that state, but other states remain free to enforce the award. This stands in stark contrast to a state court decision, for it is difficult, even today, to get a state court decision enforced in most other states.¹⁰⁰ In addition, if the final decision of a state court system is against a plaintiff, then the buck stops there for that plaintiff – whereas, in arbitration, even if an award is annulled in one state, the award may still be enforceable in another state.

This concludes the summary of international commercial arbitration – but it is worth briefly noting a few things about other varieties of arbitration.

⁹⁸ For an overview of the virtues of arbitration, see Paulsson, *The Idea of Arbitration*, 1-9.

⁹⁹ For instance, Taiwan is not a party to the New York Convention (its complex status under international law does not permit it to become a party to the Convention); however, international arbitral awards are enforceable in Taiwan as a matter of Taiwanese law. See Hong-Lin Yu, "The Taiwanese Arbitration Act 1998," *Journal of International Arbitration* 15, no. 4 (1998).

¹⁰⁰ Bermann, *International Arbitration and Private International Law*, 558-62. To some extent, blocks of states that agree to recognize each other court decisions form an exception to this. One may think of the European Union, where the decision of a court of any given member state is entitled to recognition in any other member state. Still, such enforcement in such cases exists only within the block, which cannot compare with the almost global enforcement of arbitration awards.

In investor-state arbitration,¹⁰¹ as its name suggests, a private investor typically sues a state. Investor-state arbitrations are rooted in treaties between states that provide that investors can bring a claim against states in arbitration on such grounds as expropriation without compensation and denial of fair and equitable treatment. Most such treaties are between two states, and hence known as Bilateral Investment Treaties (BITs), though there are also Multilateral Investment Treaties, such as the North American Free Trade Agreement (NAFTA). There are currently more than 2300 BITs in force in the world.¹⁰² Thus, under a bilateral investment treaty between, for instance, Germany and China, German investors in China could bring a claim against China in arbitration – and, vice versa, Chinese investors in Germany could bring a claim against Germany in arbitration. Unlike international commercial arbitration, no contract is necessary here – for instance, if Germany expropriates property of a Chinese investor in Germany, then that investor can sue Germany in arbitration pursuant to the treaty, regardless of whether any relevant contracts contain arbitration clauses.

Two differences between commercial and investor-state arbitration are relevant here. First, consent works very differently. Whereas in commercial arbitration, the parties to a given dispute consent to arbitration their dispute, in investor-state arbitration that consent happens on the level of the states who sign the treaties – the investors then benefit from that consent. Second, in investor-state arbitration, arbitration tribunals can override courts to the extent that they can even hold that the decision of a court constitutes an violation of an investor’s rights. That is, an

¹⁰¹ The general account of investor-state arbitration is based on Chester Brown and Kate Miles, *Evolution in Investment Treaty Law and Arbitration* (Cambridge, New York: Cambridge University Press, 2011); Moses, *The Principles and Practice of International Commercial Arbitration*.

¹⁰² "Investment Policy Hub," United Nations Conference on Trade and Development, Division on Investment and Enterprise <http://investmentpolicyhub.unctad.org/IIA>.

investor can bring a claim arguing that a given court decision constitutes an expropriation without compensation or a denial of fair and equitable treatment.¹⁰³ Returning to our example, if the Chinese investor first went to German court and lost there, that would not prevent the investor from then bringing its case in arbitration and arguing that the decision of the German court was itself an expropriation of the investor's assets.

Another kind of arbitration deserves mention here, because it shows that arbitration can also exist without recourse to state power. Rather, arbitration can function because it has the power to exclude members from a global club, such as the global world of sports. This is how arbitration before the International Court of Arbitration for Sport (CAS) functions. The CAS is headquartered in Lausanne, Switzerland with courts in Lausanne, Sydney, and New York City, and it also organizes *ad hoc* tribunals, for instance alongside the Olympic Games.¹⁰⁴ The CAS was created to become a "supreme court of world sport," an aim that has largely been achieved.¹⁰⁵ The jurisdiction of the CAS can derive from arbitration agreements that specify that any disputes shall be resolved before the CAS. But the CAS also has jurisdiction over disputes involving many sports federations as well as the Olympic Committee.¹⁰⁶ For instance, pursuant

¹⁰³ See, e.g., *Sistem Muhendislik Sanayi Ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award of 30 September 2009.

¹⁰⁴ The account of the workings of the CAS is based generally on Ian Stewart Blackshaw et al., *The Court of Arbitration for Sport, 1984-2004* (The Hague: TMC Asser Press; Distributed by Cambridge University Press, 2006); Paulsson, "Arbitration in Three Dimensions," 315-17. Note that the legal seat of CAS arbitrations is deemed to be Lausanne. Code of Sports-related Arbitration, Art. R.28 ("The seat of CAS and of each Arbitration Panel ('Panel') is Lausanne, Switzerland. However... the President of the Panel may decide to hold a hearing in another place...")

¹⁰⁵ Blackshaw et al., *The Court of Arbitration for Sport, 1984-2004*, XI, 52.

¹⁰⁶ Code of Sports-related Arbitration, esp. Art. R.27 ("These Procedural Rules apply whenever the parties have agreed to refer a sportsrelated dispute to CAS. Such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings). Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests relating to

to the Olympic Charter, any type of dispute pertaining to the Olympic Games must be submitted to the CAS.¹⁰⁷ The Olympic Charter is not adopted or signed by states, but rather by the International Olympic Committee (IOC), a NGO based in Lausanne. Another example arises in the context of the World Anti-Doping Code – all signatories recognize the jurisdiction of the CAS in anti-doping cases.¹⁰⁸ The World Anti-Doping Code, too, is not created or signed by states. Rather, it was adopted (and amended several times) by the World Anti Doping Agency (WADA); its signatories are all international Olympic Federations, all national Olympic Committees, as well as numerous other international and national athletic organizations and anti-doping agencies.¹⁰⁹

CAS awards can be enforced effectively without recourse to national courts.¹¹⁰ This is because the CAS can effectively exclude parties from the world of international sports.

For instance, in disciplinary cases such as doping violations, a powerful sanction is exclusion from international sporting competitions.¹¹¹ This sanction can be applied to individual

the practice or the development of sport and may include, more generally, any activity or matter related or connected to sport.”)

¹⁰⁷ Olympic Charter (2017), Art. 61(2) (“Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration.”)

¹⁰⁸ WADA Anti-Doping Code, esp. Art.23.5.6 (“If the *Signatory* wishes to dispute *WADA*’s assertion of non-compliance, and/or the consequences and/or the reinstatement conditions proposed by *WADA* ... that dispute will be resolved by the *CAS* ... the *CAS* Panel will also consider, by reference to the relevant provisions of the International Standard for Code Compliance by Signatories, what consequences should be imposed and/or what conditions the *Signatory* should be required to satisfy in order to be reinstated.”)

¹⁰⁹ For a complete list of signatories, see “Code Signatories,” <https://www.wada-ama.org/en/code-signatories>.

¹¹⁰ Although, where its jurisdiction derives from arbitration agreements in contracts, awards of the CAS can typically be enforced based on the New York Convention (that is, through state courts), they almost never are, due to the efficacy of enforcement outside of court.

¹¹¹ Paulsson, “Arbitration in Three Dimensions,” 315.

athletes, but also to national or international athletic organizations. For instance, if a fine is imposed on an athlete, and that athlete refuses to pay that fine, then exclusion from competitions may follow. In certain cases, the club of that athlete or the relevant sports federation may face sanctions if it does not take action against the non-compliant athlete, even in contractual cases. Because such sanctions can amount to exclusion of that club or federation from international competition, they are very powerful. This CAS thus sits atop a club-like structure – and has power because it can exclude members from that club.¹¹²

C. How to Understand this Spatial Order

Arbitration exists. It produces legally binding awards. These awards can be enforced. Yet arbitration differs from litigation in state courts. Arbitration sometimes needs state courts, sometimes overrides them, and sometimes exists alongside them. The existence of arbitration shows that if we are to understand the spatial order of law today, we need a model other than the Westphalian one, at least in those spheres in which arbitration operates.

Perhaps the main challenge in describing this new spatial order is that the building blocks of the Westphalian one are still present: states still exist, and defined borders are still a part of what it means to be a state;¹¹³ states still have their own courts and their own laws; there is still international law to govern the relationships between those states.

Let us place next to each other three main theses that have been advanced for understanding how arbitration functions: the territorial thesis, the pluralistic thesis, and the

¹¹² One who might balk at the idea of a club being a legal order, and exclusion being a legal sanction, need only think of the sanction of excommunication – exclusion from the club of the Church – which was one reason ecclesiastical courts remained powerful in the Middle Ages even far from Rome. See, e.g., R.H. Helmholz, "Local Ecclesiastical Courts in England," in *The History of Courts and Procedure in Medieval Canon Law*, ed. Wilfried Hartmann and Kenneth Pennington (Washington, D.C.: The Catholic University of America Press, 2016), 352.

¹¹³ See *supra* n.74.

autonomy thesis.¹¹⁴ As their names may suggest, these theses are arranged from the one that attaches the greatest significance to borders to the one that attached the least significance to them. None of these theses quite captures the reality – but they are worth going through, because each emphasized elements that are important towards understanding the role of state borders in arbitration. In addition, these theses will show that in order to understand the *gränzbewußte* spatial order, a shift in thinking away from the Westphalian mode is needed, for one cannot fully explain today’s reality in terms of the Westphalian order.

The territorial thesis is effectively an attempt to make today’s reality fit the mold of the Westphalian order. It stands for the proposition that a state has exclusive control over the legal significance of what happens within its borders.¹¹⁵ On this understanding, it is a contradiction in terms that an event can have legal significance if it is not given that significance by the state in which it occurs. This may have been a fair description of the Westphalian order, but it no longer fits the realities of today.¹¹⁶ We have already seen that an international commercial arbitration award can survive annulment at the seat. That is, if the courts of the state where the arbitration is seated annul the award, that does not spell the end of the award – the award can cross the borders of the state and be recognized and enforced by other states. In a curious twist, the arbitration does not even need to take place physically in the state where it is legally seated, for it is possible

¹¹⁴ Bermann, *International Arbitration and Private International Law*, 247-56.

¹¹⁵ Cf. Paulsson, *The Idea of Arbitration*, 32-33.

¹¹⁶ This description may have been accurate when arbitration still required what was known as “double exequatur” – that is, when an arbitration award had to be confirmed in the state where it was rendered before it could be enforced in any other state, and then confirmed again in the state in which enforcement was sought. But this system was replaced by the New York Convention. See Bermann, *International Arbitration and Private International Law*, 35-36.

for an arbitration to be legally seated in one state but physically take place in another.¹¹⁷ This reality cannot be accommodated by the territorial thesis – the reality allows for an arbitration to take place on the territory of one state, but, for all legal purposes, to be deemed to have taken place on the territory of another state, while neither of those states can stop the enforcement of the award outside its own territory.

Still, the territorial thesis does serve as an important reminder of a few key realities. States do have the power to annul an international commercial award within their borders. If one state annuls an award, that may be of little impact, for the claimant can seek enforcement in another jurisdiction where the respondent has assets – but if many states annul an award, that may be enough to render the award worthless. After all, the world is still divided into states, and the more states annul an award, the fewer places remain where the award can be enforced. This is so because states have power within their own territories. More fundamentally, the international commercial arbitration system requires the participation of states, indeed of many states – for it can only be effective as a system if many states agree that their courts will provide support to arbitration at key stages, such as enforcement of the arbitration agreement and enforcement of the arbitration award. In investor-state arbitration, the territorial thesis is also a reminder that a state can even effectively completely withdraw from the system, and effectively close its borders to that variety of arbitration, if that state does not sign any investment treaties or the ICSID Convention.

¹¹⁷ See, e.g., ICC Arbitration Rules, Art. 18 (“1. The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties. 2. The arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties. 3. The arbitral tribunal may deliberate at any location it considers appropriate.”) (Using “place” to mean “seat”).

The next thesis is the pluralistic thesis. At its core is the realization that a multiplicity of legal orders ensure the efficacy of arbitration.

No sovereign enjoys an exclusive right to deal with the award and one or more sovereigns' denial of recognition or enforcement does not deprive the award of its legitimacy nor necessarily renders it worthless. In the case of judicial proceedings, sovereignty is focused; in the case of international commercial arbitration, it is diffuse or distributed. As a result, unlike the judge, the arbitrator has no *lex fori*.¹¹⁸

It is worth emphasizing some other ways in which arbitration is a pluralistic legal order. As a practical matter, international commercial arbitration is attractive to parties exactly because they can take what they believe to be the best features from various legal orders, and eliminate what they believe to be the worst. For instance, parties can choose the substantive law that best suits their needs, be that a neutral body of law, or a clear one, or one particularly developed in a relevant area; the same is true of the relevant procedural law and arbitral rules, among other things. If we recall the example of a commercial arbitration above,¹¹⁹ there the parties selected Swiss substantive and procedural law, the ICC Rules of Arbitration, English as the language of the proceedings, and, as arbitrators, a Chinese engineer, a Spanish lawyer, and a Greek lawyer, (all three known to have little or no familiarity with Swiss law, and one of them not even lawyer). Technically, one may say that the dispute will be resolved under Swiss law. However, there is a difference between Swiss law as applied by Swiss judges in Swiss court (and potentially reviewed on appeal by more Swiss judges in more Swiss courts) and the much more pluralistic English-language-ICC-arbitration-rules-Chinese-engineer-Spanish-lawyer-and-Greek-lawyer version of Swiss law. This is especially true if one recalls that the arbitrators are often

¹¹⁸ Von Mehren, *Limitations on Party Choice of the Governing Law: Do they exist for International Commercial Arbitration?*, 19-20.

¹¹⁹ See *supra* p.47.

selected exactly in order not to apply the law too technically, and that they are not beholden to states; indeed, their awards are not subject to review on the merits by state courts.

Although the pluralistic thesis captures much of the reality of arbitration, it still fails to account for various aspects of this reality. It fails to describe the kind of arbitration that takes place before the CAS, which is more in the nature of a global club than a pluralistic legal order, and one that does not need to take recourse to any state legal order or institution. The pluralistic thesis also fails to describe important reasons for the efficacy of international commercial arbitration. As a purely legal matter, awards are enforceable because of the New York Convention. But the efficacy of international commercial arbitration cannot be explained wholly on the grounds of this Convention – after all, plenty of international laws and treaties have little or no bite in practice. While the Convention does matter, there are at least two other reasons why awards are enforced. First, parties who regularly engage in international transactions generally do not want to acquire the reputation for not honoring awards – put differently, such parties belong to a club of a certain kind, a club of persons who regularly engage in international transactions.¹²⁰ Second, states also here join a kind of club – a club of states that are friendly to international commerce, and therefore to international commercial arbitration.¹²¹ That provides a reason for them not only to join the Convention, but also to enforce it in practice. An important element in maintaining this club is reciprocity – state courts make decisions that are unfavorable

¹²⁰ See Orley Ashenfelter and Radha Iyengar, *Economics of Commercial Arbitration and Dispute Resolution* (Cheltenham, UK; Northampton, MA: Edward Elgar, 2009). Cf. Paulsson, "Arbitration in Three Dimensions," 316, n.68.

¹²¹ Opponents of international arbitration, or of globalization more generally, might argue that private parties and states have not so much an incentives to be a part of this club as they are under pressure to be a part of it. But whether one views this club positively or negatively or somewhere in between does not affect the fact that it exists, and that its spatial order needs description.

to parties from their own state, but they can generally count on courts in other states to do the same thing.¹²² It would be naïve to suppose that enforcement is guaranteed in all cases by reciprocity alone – after all, there are instances, as in our example of a commercial arbitration – where parties will resist enforcement of an award, and recourse to state courts will be necessary. But that does not mean that reputation and reciprocity are not a part of the picture.

The third thesis used to explain how arbitration works is the autonomy thesis. This thesis posits the existence of *l'ordre juridique arbitral* – rendered here in the French, for most scholars espousing this view are French – an autonomous arbitral legal order.¹²³ Arbitrators apply, so this argument goes, internationally shared rules, while courts also apply such shared rules in arbitration cases, thus producing an autonomous legal order. This thesis suffers from a few fundamental problems.¹²⁴ First, it is not at all clear that a set of internationally shared rules of sufficient specificity to give rise to a legal order of its own actually exists – especially where arbitrators often apply national laws in arbitration. While arbitrators are often called upon to apply those laws less technically than national courts would, that does not mean that the substantive law selected is of no consequence. Second, even to the extent that courts apply different rules to international arbitral awards than they do in domestic cases, those rules are

¹²² The fact that fewer states are part of the investment arbitration framework and that several states have withdrawn from it or intend to withdraw from it could be explained exactly because that club does not provide the same level of reciprocity. Although the name Bilateral Investment Treaty (BIT) suggests that there is reciprocity, this is not necessarily the case. After all, in a BIT between an economically developed country and an economically developing country, investment mostly flow in one direction – and, therefore, investment claims mostly flow in the opposite direction. Although states have an interest in attracting investment, and BITs may help to do so, some countries are finding that the harms of the claims they are exposed to are greater than the benefits of the investment (allegedly) attracted by the BITs.

¹²³ Emmanuel Gaillard, *Legal Theory of International Arbitration* (Leiden, Boston: Martinus Nijhoff, 2010), 35.

¹²⁴ For a particularly forceful attack on the autonomy thesis, see Paulsson, "Arbitration in Three Dimensions," 301-06.

hardly shared internationally, and, more importantly, are still the product of their own legal order. That is, if a national court chooses to apply a less formal notion of due process when assessing an international arbitral award than it would if assessing a domestic litigation, then that national court does so of its own volition. The arbitral legal order can hardly be said to be autonomous if it depends on the autonomous orders of states.

Still, the autonomy thesis produces valuable insights. Chief among those for the purposes of this dissertation is the fact that different legal systems become exposed to each other both in arbitration itself, and when courts are called upon to assess arbitration awards – and that this causes a certain exchange between different state legal systems, both within arbitration and in state courts. This can influence the practice of the courts – more importantly for present purposes, it causes a certain consensus to emerge within arbitration as to how things should be done. If we recall just how many different systems were involved in one way or another in our example of an arbitration,¹²⁵ this is hardly surprising: just in that example, the Mexican, Chinese, Spanish, Greek, Swiss, Swedish, and Australian legal systems were involved in one way or another. It is thus unsurprising that they may influence each other, and that the world of arbitration may need to find a way of doing things that is amenable to all these legal orders. An example of this can be seen in attitudes towards *iura novit curia* [the court knows the law].¹²⁶ This staple of procedure in civil law jurisdictions stands means that courts can apply the law to the fact themselves – for instance, once the facts have been established, courts may decide the

¹²⁵ See *supra* p.47.

¹²⁶ For more such examples, see Gaillard, *Legal Theory of International Arbitration*, 92-114.

case based on a theory not pleaded by the parties, or award relief not requested by the parties.¹²⁷ Thus, a civil law court may grant relief based on a tort theory, even if the plaintiff only argued a contract theory.¹²⁸ In common law jurisdictions, such an approach would quickly amount to a due process violation – based on the position that a party should be made aware of any theory on which relief can be granted against it, and afforded a chance to respond. In the earlier days of arbitration, as one might expect, arbitrators from civil law jurisdictions applied *iura novit curia* quite naturally, performing their task as they understood it.¹²⁹ Courts in common law jurisdictions, by a similar token, would not hesitate to annul such awards based on what they saw as due process violations.¹³⁰ With time, however, arbitrators became more aware that the validity of *iura novit curia* could not be taken for granted, while common law courts became more aware that it was a common practice in civil law jurisdictions, and should not automatically be seen as a reason for annulment. Indeed, arbitrators now are called upon to apply the doctrine with caution, and courts have become more open to enforcing awards where the doctrine is applied.¹³¹

This, then, are the main attempts to understand the spatial order of arbitration. Not one quite works, yet each one produces useful insights.

¹²⁷ This doctrine is by no means identical across civil law jurisdictions, with some jurisdictions having more robust interpretations than others do. For instance, some jurisdictions do not allow courts to award relief greater than was requested.

¹²⁸ 6 La. Civ. L. Treatise §16.20.

¹²⁹ Gisela Knuts, "Jura Novit Curia and the Right to be Heard - an Analysis of Recent Case Law," *Arbitration International* 28, no. 4 (2012).

¹³⁰ Marta Viegas de Freitas Monteiro, "Jura Novit Curia in International Commercial Arbitration" (University of Helsinki, Faculty of Law, 2013), 67-69.

¹³¹ See, e.g., International Law Association Resolution 06/2008, Art. 6 ("In general, and subject to Recommendation 13, arbitrators should not introduce legal issues – propositions of law that may bear on the outcome of the dispute – that the parties have not raised.")

Before synthesizing these insights, one other thing that sometimes gets lost in all these descriptions is worth emphasizing: arbitration is constantly changing. This is not merely the case because, at least as a global phenomenon, it is relatively young – but also because it is inherently designed to change. Much about arbitration is customizable by the parties – applicable law and rules; language; legal seat and physical location; number of arbitrators and who they are; where and to what extent the awards can be appealed; and so on. Other things are customizable by states, for instance, whether the award is subject to review by the courts at the seat, and if so, whether the parties may opt out of such review.¹³² In addition, arbitration causes different legal orders to interact with each other constantly, thus constantly causing change.

What, then, is the spatial order heralded in by arbitration – more specifically, what do state borders mean where arbitration is involved? Neither extreme position can be maintained. On the one hand, it is wrong to say that there are no state borders where arbitration is concerned, that arbitration is “borderless” in the literal sense of that word. States can annul an award within their borders. States can even shut investment-treaty arbitration out from their borders completely. And if a critical mass of states were to depart from the world of commercial arbitration, that world would be significantly impacted, because enforcement of awards could not be sought in significant territories. On the other hand, the spatial order of arbitration cannot be understood fully if one were to think of states as having exclusive control within their own borders, and of international law as governing between states. An arbitration can be legally seated within a state, and then promptly depart from the legal control of that state. It can even be

¹³² Several countries, such as Belgium, Switzerland, and Sweden, currently allow parties to opt out of any review by the court at the seat of the arbitration, provided no parties are from the state where the arbitration is seated. Paulsson, *The Idea of Arbitration*, 35, n.8.

legally seated in a state, while physically taking place in another – thus hardly belonging to the legal order of the state where it is legally seated, and even less to the legal order of the state where it physically takes place.

It is not wrong – but it is too simple – merely to say that the truth is somewhere in the middle, like it is not wrong – but again too simple – merely to say that this is globalization. It is too simple to say that we are dealing with a middle, because the middle between a bordered and a borderless world can take many forms. For the same reason, it is too simple to speak only of globalization, which, too, can take many forms. The spatial order described here is one in which law and state borders become greatly detached from each other, to the extent that one needs to think only little about state borders in the world of arbitration. After all, the law of a state (substantive and procedural) can be detached not only from that state’s territory, its courts, its lawyers, and even its language. The savvy parties to a commercial arbitration may check that the courts of the seat of the arbitration are competent and friendly to arbitration – but that can hardly compare to consideration that go into selecting a state to litigate in: one becomes bound to that state’s courts, procedural law, conflict-of-law rules, language(s) that the courts operate in, lawyers licensed to practice there, and so on. At the same time, state borders can remind of themselves, for instance when a court annuls an award, thus refusing it entry into its borders.

The word *gränzünbewußt* [unconscious of borders] captures these two sides of the role of borders. In one sense, unconscious means something one hardly needs to think about – as those involved in an arbitration only rarely need to think about state borders. Yet unconscious also implies that something continues to exist, and continues to matter. Finally, this word – derived from Latin *com + scire*, “to know” – also reminds us that we are dealing with a model for

knowing a particular legal and spatial reality. That is, one cannot know this reality in terms of the Westphalian mindset, but one needs to think in a way that is much more *gränzunbewußt*.

Conclusion of Part I

This first part set out to explain the framework of the dissertation. This is a paradoxical task, because that framework, in truth, is derived from Goethe's works, not vice versa. The persuasive power of narrative will be seen in *Faust* and in the *Wahlverwandtschaften*, as will the importance of the *gränzunbewußte* legal order. Yet at the same time, this framework will inform our reading of Goethe's works – and that is the main reason to explain the framework before launching into *Faust* and the *Wahlverwandtschaften*.

Narrative, or story, is the first aspect of the framework. Narrative, or story, is defined in a very nuclear way: a series of events in time. Narratives can thus be very short and very simple: painter paints cherries, sparrows flock to the painted cherries; or: unmarried woman bears child, kills that child. It may seem strange to propose that such nuclear narratives can have much importance, that they can shape our thinking, that they can affect legal outcomes, and even statutes. Yet in *Wahrheit und Wahrscheinlichkeit der Kunstwerke*, we have seen that an old story about a painting and some birds shapes the Spectator's thinking – and that a new story, this time about an ape and some copperplates, is needed to change the Spectator's thinking. And as we shall see in Chapter III, the *Constitutio Criminalis Carolina* of 1532 (still in force in Goethe's time) defined infanticide as a crime perpetrated by the infant's mother (Article 131, as well as 35 and 36). Indeed, even in Goethe's time, when a *Preisfrage* asked how to curb the problem of infanticide, the respondents all assumed that the mother was the killer, even though many were sympathetic to her plight – but, again, we shall see that in Chapter III. Gretchen proposes alternative narratives for her alleged infanticide – that others killed her child, or that she hid her

child away – but nobody appears to believe her (except, perhaps, the Lord). And thus, she, too, has been assumed to have killed her child by nearly all critics of *Faust*.

The *gränzunbewußte* legal order changes what state borders are. In the Westphalian order, state borders contained legal orders, and states had control over legal events within their borders. This has changed – though state borders are certainly still there. In the *gränzunbewußte* reality, a legal proceeding can take place within the borders of a state, and yet stand outside that state's legal order. Even if the courts of the state annul the award issued in that proceeding, the award can continue to exist. Entire domains of human activity – we have seen the example of sports – are governed legally by an order that does not require state courts at all, but exists as a kind of global club. Chapter II principally considered how this *gränzunbewußte* order functions today, how to understand it today. Even though today's reality and the legal order we shall see in Goethe's works are not identical, today's order will help us to understand what Goethe meant. Seeing that the *gränzunbewußte* legal order exists will also mean that we shall not have to wonder as much whether Goethe's understanding can materialize in reality, but we will be able to focus more on what it entails. Equipped with a fairly detailed understanding of the workings of today's legal reality will also enable us to see the nuance in, for instance, the juxtaposition between the Kaiser's bordered view of law and empire, and Helena's *gränzunbewußte* approach. This juxtaposition is not one between a world of state borders and a world without such borders. Rather, it is a juxtaposition between two different spatial orders of the law, with two different roles allocated to state borders.

Yet how do the two aspects of the framework – narrative and arbitration – interact? What makes them one framework for understanding legal advancement? On one level, arbitration makes legal orders interact with each other intensely, as laws and parties constantly cross

borders. Narratives travel with them – whether carried by parties, arbitrators, or the laws themselves (case law is readily understood as a set of narratives, for legal decisions typically recount the facts of the case; but even statutes can have narratives embedded in them – for instance, the narrative of infanticide embedded in the *Constitutio Criminalis Carolina*). But narrative and arbitration encounter each other on another level as well: both have a cognitive element. Narrative shapes our thinking, and new narratives can make us think in new ways, see new things. The *gränzunbewußte* spatial order also represents a different way of thinking – one cannot understand it fully merely by applying a Westphalian way of thinking. That is, legal advancement requires changes on a cognitive level – something we shall see occur in, among others, Faust himself.

PART II. STORIES OF INFANTICIDE

Part II of this dissertation seeks to show the importance of narrative in shaping our thought using a real-world example from Goethe's time: infanticide. Infanticide was a major topic of discussion and presented at least two problems. First, many infants were killed. Second, many mothers of those infants received harsh penalties, including the death penalty, even though the evidence against them was often scant at best – but according to the dominant narrative of infanticide, it was always the mother who killed the child, and hence these mothers were found guilty. The second of these problems shall be our focus.

Chapter III of this dissertation focuses on the discussions of infanticide that were taking place in German lands in Goethe's time. This chapter reminds us that many people, including members of the elite, openly espoused views one might not associate with what is often regarded as an intellectual and cultural golden age. For instance, torture was legal and its abolition slow and controversial; *Kirchenbuße* – public shaming by the Church – was also legal and its abolition also slow and controversial. Indeed, Duke Carl August of Sachsen-Weimar-Eisenach, where Goethe was a *Geheimrat*, seriously proposed introducing intense and repeated public shaming of *Kindsmörderinnen*, along with incarceration and corporeal punishment. Proposals to introduce a legal obligation on citizens to report extramarital pregnancies – and to punish them if they failed to do so – won prizes. On the other hand, many argued for decreasing punishments, improving education, and improving facilities for pregnant women and for foundlings.

Chapter III then points out that, seemingly without anyone realizing it, there was agreement on the narrative of infanticide. In spite of the intensity of the discussions and disagreements surrounding infanticide, everyone appeared to agree on the following narrative: first, an unmarried woman is seduced, then she conceals (or at least attempts to conceal) her

pregnancy and the birth of her child, and then, often in an agitated state that arguably amounts to insanity, she kills her child. Frequently, she confesses to the killing after the fact. This had legal implications. If one can only see this narrative, then a recently pregnant woman and her dead child are enough to establish the guilt of the mother – for there is no other way to connect those facts. Similarly, a recently pregnant woman and a missing child are enough to prove guilt, provided the woman confesses (torture was permitted in such cases).

Chapter IV turns to the *Gretchen Tragedy* of *Faust I*, and focuses on how this narrative causes the almost universal assumption that Gretchen committed infanticide – hers has even become a famous case of the crime – whereas the play does not in fact provide adequate grounds for this assumption. In fact, the *Faust I* leaves open the question of who killed Gretchen’s child, and even provides reasons to doubt if her child was killed at all. What *Faust I* does show, however, is that after the seduction has taken place – the first element in the narrative of infanticide – Gretchen is doomed. She is promptly surrounded by various narratives that are connected to infanticide. Lieschen tells her that lovers always abandon the women they impregnate in such situations. Gretchen’s brother, Valentin, tells her that she will live a life of misery and exile, and suggests she will kill her child. The *Böser Geist* also suggests she will kill her child, and tells her all her crimes will be revealed before the divine court. She is sentenced to death even though she tells two alternative narratives: first, that her child was taken away from her, and she was blamed for its death; second, that she hid her child, and that it is still alive.

Part II of this dissertation thus picks up where Chapter I – which focused on narrative – left off. Chapter II, which dealt with arbitration, will figure more prominently in Parts III and IV.

Chapter III: The Dominant Narrative, or the Mother Did It

A. Introduction

Infanticide dominated discourse in Germany for decades starting in about 1770. This crime was not merely a topic of discussion among jurists and policymakers, but rather a hotly discussed topic by people from various walks of life: philosophers, physicians, clergymen, writers, and many others. Goethe's Gretchen may well be German literature's most famous *Kindsmörderin* – though, ironically, she may not in fact have killed her child – but infanticide also figures prominently in works by Schiller, Lenz, Wagner, and many other writers of the *Sturm und Drang* and beyond.

Such great interest naturally resulted in different opinions on the topic. Some favored stricter punishments for infanticide, while others argued for lighter ones; some viewed single women who became pregnant through a lens of moral condemnation, while others saw such women more as victims of a society that ostracized them excessively. But there was also much consensus. For instance, a broad agreement emerged that the principal motive for infanticide was *Ehrenrettung*. That is, unmarried women who killed their children were believed to be principally motivated by a desire to save their honor by hiding the shame of their pregnancy. This led them, so it was broadly believed, first to conceal their pregnancy, and then to kill their child. Other motivations were recognized as well, though often only as derivatives of the *Ehrenrettungsmotiv*. Such motivations included the fear of often very harsh legal punishments and fear of exclusion from their families and communities.

There was another broad consensus as well, which was apparently not even noticed. This was the agreement on the narrative of infanticide – on the nuclear narrative, discussed in Chapter I, that basic notion that shapes our understanding in fundamental ways. The nuclear

narrative of infanticide that prevailed, unnoticed was: first, an unmarried woman is seduced, then she conceals (or at least attempts to conceal) her pregnancy and the birth of her child, and then, often in an agitated state that arguably amounts to insanity, she kills her child. Frequently, she confesses to the killing after the fact. For *infanticide*, this was *the* only narrative. That is, while there were some related narratives, no infanticide occurred in those narratives. Thus, there was the narrative wherein a child would be stillborn or die of natural causes soon after birth – but there was no infanticide in such a case. There was also the narrative wherein a woman did not kill her child, but kept it. On this narrative, the woman was condemned to a difficult life, one of an outcast, and a poor one at that. In other words, if a killed infant was found, there was only one explanation: its mother killed it.

The existence of only one narrative for infanticide carried significant legal implications. When a woman was accused of infanticide, the facts before a court typically fit one of two scenarios. In one scenario, an unmarried woman had become pregnant, concealed her pregnancy, gave birth. Her child was then found dead, and the medical expertise concluded that the child had not died of natural causes. In the other scenario, her child was not found (and she would typically be made to confess to the killing, using torture if necessary). Both scenarios – through the dominant narrative of infanticide – led to only one conclusion: the accused had committed infanticide. In the first scenario, the facts neatly fit into the narrative: an unmarried woman had become pregnant, concealed that pregnancy, gave birth – and killed her child. In the second scenario, the child is presumed dead and the narrative once again neatly connects all the facts. The one alternative narrative the courts routinely considered was that the child was stillborn or died of natural causes soon after being born. However, given the medical tests used at the time, this alternative was exceedingly difficult to establish.

If there had been other narratives of infanticide, however, the same facts could lead to the conclusion that the mother was not guilty. Such narratives are plentiful. After all, someone other than the mother could kill the child. The mother's parents or other relatives are plausible candidates, because, for instance, they may wish to hide her shame and their own. The father of the infant is also a plausible candidate, for a similar reason. Anyone jealous of the new mother is another candidate – indeed, any enemy of the new mother is a candidate – all the more so if such a person realizes that the mother will most likely be blamed for the crime. For those cases in which the infant's body is not found, an even greater number of narratives is possible – because the infant could still be alive. One possibility is that the mother gave the infant away to a family that could raise it as a legitimate child. If one considers that most such mothers were doomed to poverty and a life on the margins of society – and their children would typically remain illegitimate for their entire lives, with the stigma and legal limitations that went with that – it is quite plausible that a woman would choose to die in order to give her child a better life.

If a court were to consider these additional narratives of infanticide, it would have to consider the possibility that someone other than the mother killed the child. Thus, with the usual evidence a court had before it, the court would have to consider that the mother was innocent, and acquit her.

B. The Legal Framework

The law governing infanticide in German lands was set out in the *Constitutio Criminalis Carolina*, also known in German as the *Peinliche Halsgerichtsordnung Kaiser Karls V*, or

simply the *Carolina*. It was passed in 1532 – and was still in force in Goethe’s time. Articles 35, 36, and 131 of the *Carolina* deserve particular mention here.¹³³

Von heimlichem Kinder haben / vnd tödten durch jre mütter / gnugsam anzeygung.

xxxv Item so man eyn dirn so für eyn jungfraw geht / imm argkwon hat / daß sie heimlich eyn kindt gehabt / vnnd ertödt habe / soll man sonderlich erkunden / ob sie mit eynem grossen vngewonlichen leib gesehen worden sei / Mer / ob jr der leib kleyner worden / vnd darnach bleych vnnd schwach gewest sei. So solchs vnd dergleich erfunden wirdet / wo dann die selbig dirnn eyn person ist / darzu man sich der verdachten thatt versehen mag / Soll sie durch verstendig frawen an heimlichen stetten / als zu weither erfahrung dienstlich ist / besichtigt werden / würd sie dann daselbst auch argkwönig erfunden / vnd will der thatt dannocht nit bekennen / mag man sie peinlich fragen.

xxxvj Item wo aber das kindtlein / so kürztlich ertödt worden ist / daß der mutter die milch inn den prüsten noch nit vergangen / die mag an jren prüsten gemolcken werden / welcher dann inn den prüsten recht vollkommene milch funden wirdet / die hat deßhalb eyn starck vermutung peinlicher frag halber wider sich / Nach dem aber etliche leibärztz sagen / daß auß etlichen natürlichen vrsachen etwann eyne / die keyn kndt getragen / milch in prüsten haben möge / darumb so sich eyn dirnn inn disen fellen also entschuldigt / soll deßhalb durch die hebammen oder sunst weither erfahrung geschehen.

Straff der weiber so jre kinder tödten

cxxxj. Item welches weib jre kind / das leben vnd glidmaß empfangen hett / heimlicher boßhafftiger williger weiß ertödtet / die werden gewonlich lebendig begraben vnnd gepfelt / Aber darinnen verzweiffelung zuerhütten / mögen die selben übelthätterin inn welchem gericht die bequemlicheyt des wassers darzu vorhanden ist / ertrenckt werden. Wo aber solche übel offft geschehe / wollen wir die gemelten gewonheytt des vergrabens vnnd pfelens / vmb mer forcht willen / solcher boßhafftigen weiber auch zulassen / oder aber das vor dem erdrencken die

¹³³ These articles of the *Carolina* are reprinted in Wahl, "Das Kind in meinem Leib": Sittlichkeitsdelikte und Kindsmord in Sachsen-Weimar-Eisenach unter Carl August: eine Quellenedition, 1777-1786, 179-80.

übelthätterin mit glüenden zangen gerissen werde / alles nach radt der rechtuerstendigen.

SO aber eyn weibßbild / als obsteht eyn lebendig glidmessig kindlein / das nachmals todt erfunden / heymlich geborn vnnnd verborgen hett / vnnnd so die selbig erkundigte mutter deßhalb bespracht würd / entschuldigungs weiß fürgeben / als dergleichen je zuzeiten / an vnnß gelangt / wie das kindtlein on jr schuldt todt von jr geborn sein solt / wolt sie dann solch jr vnschuldt durch redlich gut vrsachen / vnd vmbstende durch kundtschafft außfürn / damit soll es gehalten vnd gehandelt werden / wie am vier vnd sibentzigsten artickel anfehnd / Item so eyn beklagter kundtschafft etc. funden wirt / auch deßhalb zu weither suchung / antzeygung geschicht / wann on obbestimte gnugsame beweisung ist der angeregten vermeynten entschuldigung nit zu glauben / sunst möcht sich eyn jede thätterin mit eynem solchen gedichten fürgeben ledigen.

Doch so eyn weibßbild eyn lebendig glidtmessig kindtlein also heymlich tregt / auch mit willen alleyn / vnd on hilff anderer weiber gebürt / welche on hilffliche geburt / mit tödtlicher verdecktlicheyt geschehen muß / So ist deßhalb keyn glaublichere vrsach / dann daß die selbig mutter durch bößhafftigen fürsatz vermeynt / mit tödtung des vnschuldigen kindtleins daran sie vor inn oder nach der geburt schuldig wirt / jre geübte leichtuertigkeit verborgen zuhalten. Darumb wann eyn solche mörderin auff gedachter jrer angemasten vnbeweisten freuenlichen entschuldigung bestehn bleiben wolt / so soll man sie auff obgemelte gnugsame antzeygung bestimpts vnchristlichen vnnnd vnmenschlichen erfunden übels vnd mordts halber / mit peinlicher ernstlicher frag zu bekantnuß der warheynt zwingen / Auch auff bekantnuß des selben mordts zu entlicher todtraff / als obsteht vrtheylen. Doch wo eyns solchen weibs schuld oder vnschuld halb gezweifelt würd / so sollen die Richter vnd vrtheyler / mit antzeygung aller vmbstende bei den rechtuerstendigen oder sunst wie hernach gemelt wirdet / radts pflegen.

One should not read the *Carolina* the way one would read a legal codification in today's sense of that word. Unlike a codification today, the *Carolina* was not exclusive – rather, in its *Vorrede*, it expressly reserved that old legal customs would remain in force,¹³⁴ and various local

¹³⁴ Wächtershäuser, *Das Verbrechen des Kindesmordes in Zeitalter der Aufklärung: eine rechtsgeschichtliche Untersuchung der dogmatischen, prozessualen und rechtssoziologischen Aspekte*, 59.

laws enacted after the *Carolina* applied even when in conflict with it.¹³⁵ Also unlike a codification today, the *Carolina* was not exhaustive – in fact, it expressly provided in articles 104 and 105 that judges had discretion to change the punishment for an offense, and that judges have the power to punish for offenses not provided for in the *Carolina*.¹³⁶ The *Carolina* was also not technical in the sense a lawyer today might expect – it was designed to be applied principally by lay judges known as *Schöffen*, though these *Schöffen* would frequently consult with legal faculties on specific issues before making their decisions.¹³⁷ Indeed, the *Carolina* was principally intended as a way to innovate procedure, such as by determining – jarring as this may seem today – when torture was appropriate, and what rights one had under torture; most substantive law in it was considered a confirmation of the familiar.¹³⁸ Thus, most attempts to find in the text of the *Carolina* strict definitions of a crime, with all the elements of the *actus reus* and the requisite *mens rea* are doomed from the outset. For instance, one looking for strict definitions might infer from the *Carolina* that a finding that the woman was motivated by *Ehrenrettung* would be needed for a conviction¹³⁹ (Art. 131 “jre geübte leichtuertigkeit verborgen zuhalten”). However, courts do not appear to have ever made such a finding.¹⁴⁰ Or, reading the articles on infanticide, one may conclude that only the mother of the child can be guilty of infanticide

¹³⁵ Ibid., 59-60.

¹³⁶ Ibid., 59.

¹³⁷ Ibid., 50.

¹³⁸ Ironically, that substantive law would prove important; the substantive law of infanticide was still applied almost 300 years later. See Albrecht Cordes et al., *Handwörterbuch zur deutschen Rechtsgeschichte (HRG)*, 2., völlig überarbeitete und erw. Aufl. ed., HRG (Berlin: Erich Schmidt, 2008), v.II, pp.1333-36.

¹³⁹ Art 131 (“jre geübte leichtuertigkeit verborgen zuhalten.”) See *supra* p.83.

¹⁴⁰ Wächtershäuser, *Das Verbrechen des Kindesmordes in Zeitalter der Aufklärung: eine rechtsgeschichtliche Untersuchung der dogmatischen, prozessualen und rechtssoziologischen Aspekte*, 100.

pursuant to the *Carolina*. However, both courts and commentators well into the first half of the early 18th century frequently viewed others as possible perpetrators. In 1743, Johann Jodocus Beck, an important legal scholar of his time, wrote: “Wann nun also die Eltern ihre neugebohrne Kinder um das Leben bringen, alsdann wird der, so den Mord lebendig in einen Sack gesteckt, und in dem Wasser ertraencket. Und dieses ohne Unterschied, es mag gleich diese Mordthat von dem Vater / oder der Mutter / oder denen Groß-Eltern, männ. oder weiblichen Geschlechts geschehen, in gleichen die Kinder, welche / von denen Eltern ums Leben gebracht worden, rechtmäßig und ehelich gebohrne oder uneheliche und natuerliche Kinder seyn.”¹⁴¹ Even a 1759 reprinting of Johann Christian Frölich von Frölichsburg’s important 1709 commentary on the *Carolina* states that “das geschriebene Recht keinen unterschied [macht], zwischen Vater oder Mutter”¹⁴² in terms of applying *poena cullei* (death by drowning in a sack)¹⁴³ for infanticide. However, These appear to be the latest legal texts that consider that someone other than the mother could be guilty of infanticide. When Georg Friedrich Meister published his *Principia* in 1789 – Meister was one of the most cited criminal jurists of his time – he described “Infanticidium, in sensu stricto et proprio, est homicidium, quod *a matre* in infantes a) recens

¹⁴¹ Joh. Jodocus Beck, *Tractatus de eo, quod justum est circa stuprum: von Schwäch- u. Schwängerung der Jungfern und ehrlichen Wittwen. Worrinnen von der Obligation dess Stupratoris, der demselben bey fälschlicher Beschuldigung gebührenden Satisfaction, der Straffe dess Stupratoris und der Geschwächten ... gehandelt wird aus denen allgemeinen Reichs-Rechten, und denen bewährtesten Scriptoribus zusammen getragen* (Nürnberg 1743), 852-53.

¹⁴² J.C.F. von Frölichsburg and J.G. Scopp, *Hn. Joh. Christ. Frölichs v. Frölichsburg, ... Commentarius In Kayser Carl des Fünfften, und des H. Röm. Reichs Peinliche Halsgerichts-Ordnung, Worinnen kurtze, doch gründliche Unterweisung, Wie Ein dem Richterlichen Amt obliegender Nachforschungs- oder Inquisitions-Process, ... zu Protocoll zu bringen, und zu vollführen seye: deme die Erklärung deß Bann- und Achts- auch Anklags-Proceß, zusamt der Uebelthaten Natur und Wesenheit, dero Abstraffung, milderend- und beschwerende Umstände, Innzicht und Fragstück, mit vollkommenem Register der Titlen, und deren Inhalt beygesetzt worden* (Wohler, 1759), 165., see also Wächtershäuser, *Das Verbrechen des Kindesmordes in Zeitalter der Aufklärung: eine rechtsgeschichtliche Untersuchung der dogmatischen, prozessualen und rechtssoziologischen Aspekte*, 13.

¹⁴³ See *infra* p.87.

natos b) committitur”¹⁴⁴ (emphasis added) [“Infanticide, in its strict and proper sense, is homicide that must be committed *by the mother* against an infant recently born.”] Although, in passing, Meister recognized that infanticide could be used, in its general sense, to refer to any killing of a descendant, such usage was not, he stated, the relevant one in criminal law.

This is not to say that the *Carolina* was unimportant. On the contrary, it formed the backbone of criminal law in German lands.¹⁴⁵ It was routinely cited in infanticide cases.¹⁴⁶ For instance, the elements of infanticide the *Carolina* mentioned played an important part in those cases. Thus, the *Carolina* places significant emphasis on the concealing of the pregnancy and the birth. Although this did not mean (as it might in a statute today) that these were necessary elements of the crime of infanticide, courts typically emphasized the concealing of the pregnancy or birth where it occurred.¹⁴⁷ The importance of the *Carolina* could also be seen in the punishment meted out for infanticide. Thus, the gruesome punishment of *poena cullei* – which entailed being sewn up in a sack with live animals, typically a dog, a rooster, a snake, and a cat (though, when available, monkeys were preferred), and then drowned – that the *Carolina* prescribes was common practice until it gradually began to be replaced by death by the sword

¹⁴⁴ Georg Jacob Friedrich Meister, *Principia iuris criminalis germaniae commvnis*, Editio secvnda emendator. ed. (Gottingae: Dieterich, 1792), Pars II, Lib. I, Sect. I, Cap. V, § 154. See also Wächtershäuser, *Das Verbrechen des Kindesmordes in Zeitalter der Aufklärung: eine rechtsgeschichtliche Untersuchung der dogmatischen, prozessualen und rechtssoziologischen Aspekte*, 7.

¹⁴⁵ Kirsten Peters, *Der Kindsmord als schöne Kunst betrachtet: eine motivgeschichtliche Untersuchung der Literatur des 18. Jahrhunderts* (Würzburg: Königshausen & Neumann, 2001), 48.

¹⁴⁶ Otto Ulbricht, *Kindsmord und Aufklärung in Deutschland* (München: R. Oldenbourg, 1990), 17ff.

¹⁴⁷ Where it did not occur, courts typically mentioned that the accused attempted to conceal the pregnancy or birth, or else explained why she failed to conceal the pregnancy or the birth. Wächtershäuser, *Das Verbrechen des Kindesmordes in Zeitalter der Aufklärung: eine rechtsgeschichtliche Untersuchung der dogmatischen, prozessualen und rechtssoziologischen Aspekte*, 72ff.

(that is, decapitation) in the 17th century.¹⁴⁸ The *poena cullei* and death by the sword were understood as variations of the same punishment (the death penalty – the former being the harsher version), and the shift towards death by the sword was considered only a slight change.¹⁴⁹ Still, drowning remained the punishment of choice for infanticide in parts of Germany in the first half of the 18th century. Indeed, it was reintroduced in Prussia in 1720, and abolished again in 1740 when Frederick II came to power.¹⁵⁰ Judges would still decide to mete out death by drowning in the second half of the 18th century, although local rulers would frequently commute this punishment to death by the sword or even to a prison sentence.¹⁵¹

This legal reality left an accused mother with only three defenses that could result in an acquittal. First, she could argue that the child was stillborn or died of natural causes after birth. This defense was frequently raised;¹⁵² however, there is no record of this defense being effective. The main reason for this, presumably, is that the medical test used in such cases was floating of the lungs, which would only rarely result in the conclusion that the child was not killed.¹⁵³

¹⁴⁸ Ibid., 68.

¹⁴⁹ Ibid., 67-68.

¹⁵⁰ See *infra* p.97.

¹⁵¹ Wächtershäuser, *Das Verbrechen des Kindesmordes in Zeitalter der Aufklärung: eine rechtsgeschichtliche Untersuchung der dogmatischen, prozessualen und rechtssoziologischen Aspekte*, 67-68.

¹⁵² Kord, *Murderesses in German Writing, 1720-1860: Heroines of Horror*, 219.

¹⁵³ The floating of the lungs (*Lungenprobe*) entailed throwing the lungs of the dead child into the water. If they floated, this was taken to mean that the child had breathed (for the lungs contained air), and thus was not stillborn. If the lungs did not float, this was taken to mean that the child was stillborn. Already in the 1700s, it was argued by various physicians that this test was unreliable, and that the lungs of the child almost always floated, including in cases when it was stillborn or died of natural causes soon after childbirth. Ulbricht, *Kindsmord und Aufklärung in Deutschland*, 236. It should be noted that it is possible that in those cases where this test did show that the child was stillborn or died of natural causes, the case was not prosecuted and therefore no record remains. Still, the consensus is that given the numbers of sentences for infanticide in cases where there were no physical signs of violence, and the numbers of children who were stillborn or died of natural causes, many innocent women were sentenced for infanticide. Susanne Ude-Koeller, "'Straff der weiber so jre kinder tödten' Zur sagenhaften Geschichte des

Second, the mother could claim that she simply did not do it. If the body of the infant was at hand, this defense would be futile, because the court would have enough evidence even without her confession. If the body of the infant was not at hand – and assuming the accused could withstand torture, which few could – this defense could result in a reduced sentence. The third, and final, option for the accused mother was to argue that someone else killed her child. There are very few records of such attempts in Goethe’s time;¹⁵⁴ Gretchen attempts such a defense, but nobody appears to believe her – to which we will return in the next chapter.

Several other defenses that may seem intuitively appealing had little chance of success. For instance, insanity was not an effective defense. Indeed, it was commonly assumed that women were in a highly agitated state, induced by fear, shame, and “the weakness of their sex” when they killed their children – but this was not viewed as legally relevant. The attitude appears to have been that the woman should have thought of that when she got pregnant. Arguing that the child died by accident also did not help.¹⁵⁵ Indeed, a common cause of death appears to have been that the mothers – who often knew little or nothing about giving birth and other “facts of life” – would give birth standing upright above a hard surface.¹⁵⁶ The children would perish

Kinds mordes," *Fabula: Zeitschrift für Erzählforschung/Journal of Folktale Studies/Revue d'Etudes sur le Conte Populaire* 32, no. 1-3 (1991): 270.

¹⁵⁴ In a particularly curious, and exceptionally rare, case in which a woman from the higher classes was accused of infanticide, this woman attempted such a defense, see Wächtershäuser, *Das Verbrechen des Kindesmordes in Zeitalter der Aufklärung: eine rechtsgeschichtliche Untersuchung der dogmatischen, prozessualen und rechtssoziologischen Aspekte*, 102-04. The court eventually sentenced both her and the father of the child, even though on the facts only he had killed the child; her entire fault had been to give him the child.

¹⁵⁵ An example of this in Goethe’s work is Otilie in the *Wahlverwandtschaften*. Even though it has often been assumed that Charlotte’s child died in an accident, Otilie would in fact have been legally responsible for it. See *infra* p.229. See also Heinz Müller-Dietz, "Die Strafjustiz in der Sicht Goethes," in *Jahrbuch der Juristischen Zeitgeschichte* (2010), 290-92.

¹⁵⁶ In a particularly telling example of this kind, a woman apparently believed that if she simply left her child behind right where it was born, then she would not be committing a sin. Wächtershäuser, *Das Verbrechen des*

when they hit the hard surface. Many children also died because – again, often out of ignorance – the mothers failed to tie their umbilical cords. The courts, however, still found such mothers guilty of infanticide due to their failure to keep the child alive, apparently on an implicit rationale that negligence here equaled a deliberate act.¹⁵⁷ Similarly, attempts to shift the blame to the man who abandoned the woman, often after (allegedly) promising to marry her,¹⁵⁸ were of no avail in court. Whatever the moral merits of such attempts may have been, the woman was still deemed a *Kindsmörderin*.

Thus, where it was proven that a woman was pregnant and no living child could be produced, the woman would be found guilty. If the dead body of the child was found, or if the woman confessed – often under torture – to the killing, then the death penalty would frequently be given, though local rulers would sometimes commute the sentence to a prison term. If the body of the child was not found – and if the mother could withstand torture – a death sentence would not be given, though a hefty prison sentence would.

Naturally, many other legal provisions are relevant to understanding infanticide, and it is not possible to discuss them all here. Still, it bears mentioning that illegitimate children were limited legally in their rights (not to mention the social stigma they suffered). For instance, they could not enter the clergy or public service.¹⁵⁹ Although they could be made legitimate through

Kindesmordes in Zeitalter der Aufklärung: eine rechtsgeschichtliche Untersuchung der dogmatischen, prozessualen und rechtssoziologischen Aspekte, 108.

¹⁵⁷ *Ibid.*, 60.

¹⁵⁸ Promises to marry coupled with intercourse were considered legally binding since Pope Alexander III had so decreed in the 12th century, and for a long time thereafter. Frederick Pollock, *The History of English Law before the Time of Edward I*, ed. Frederic William Maitland, 2d ed. ed. (Cambridge: Harvard University Press, 1898), 2:371. However, by the time of Goethe, this was no longer the case.

¹⁵⁹ Ulbricht, *Kindsmord und Aufklärung in Deutschland*, 143.

the mother's subsequent marriage, this was not a likely prospect in practice, at least for those women typically accused of infanticide. These were often women who were abandoned by the men who impregnated them. They were also usually from the lower classes, often servants, which made it difficult to find a match, especially given that they were already pregnant.¹⁶⁰ Indeed, some laws even helped men to escape without marrying. Thus, soldiers and junior officers could not marry without permission from their superiors in many places.¹⁶¹ Abortion was not easily available, at least to the lower classes, and punishable by death pursuant to Article 133 of the *Carolina*. In addition, many of the women who were accused of infanticide had so little knowledge of "the facts of life" that they sometimes hardly understood how one became pregnant, and were not aware that abortion was possible.

C. The Dominant Narrative

Infanticide was a common theme in literary works of Goethe's time. I have already mentioned an early study of infanticide in the literature of the *Sturm und Drang*. A key passage reads as follows:

Hieraus erklärt sich dann wieder die merkwürdige Gleichheit oder Ähnlichkeit der dem Sturm und Drang eigenen Tendenzen, Stoffe and Motive.

Diese Gleichheit and Ähnlichkeit zeigt sich wohl am stärksten and am auffallendsten bei dem K i n d e s m o r d m o t i v. Kein Stürmer and Dranger, der sich nicht daran versucht hätte. Wagner schrieb sein großes Drama "Die Kindermörderin", Goethe behandelte den Stoff in der "Gretchentragodie" seines "Faust", Muller in einer eingefügten Erzählung seiner Idylle "Das Nußkernen",

¹⁶⁰ Ibid.

¹⁶¹ For instance, in Würzburg there was an ordinance according to which soldiers and junior officers were strictly prohibited from marrying without first obtaining permission from their regiment commander and of the *Hofkriegsrat*. If they failed to do so, the marriages were null and void. Wächtershäuser, *Das Verbrechen des Kindesmordes in Zeitalter der Aufklärung: eine rechtsgeschichtliche Untersuchung der dogmatischen, prozessualen und rechtssoziologischen Aspekte*, 127.

Klinger in seinem Faustroman, Lenz in seiner Erzählung "Zerbin oder die neuere Philosophie", Schiller in seinem Gedicht "Die Kindesmörderin", Sprickmann in seiner Ballade "Ida". Verwandte Stoffe enthalten die Dramen "Der Hofmeister" und "Die Soldaten" von Lenz, das Gedicht "Das schwangere Mädchen" von Schubart, "Das braune Fräulein" von Maler Müller, "Mariens Reden bei ihrer Trauung" von Sprickmann. In Gemmingens Drama "Der deutsche Hausvater" wird mit Kindesmord gedroht.

Es muß hier aber schon gleich darauf hingewiesen werden, daß auch zahlreiche außerhalb des Sturms and Drangs stehende Dichter und Schriftsteller das Thema behandelt haben z.B. Burger, Meißner, Stäudlin, Schink, Wucherer...¹⁶²

The *Ehrenrettungsmotiv* – the notion that the principal motive for infanticide was the preservation of honor or virtue – figures prominently in these works.¹⁶³ So does the nuclear narrative of seduction of an unmarried woman, (concealed) pregnancy, birth, killing of child by the mother appears in these works of the *Sturm und Drang*.¹⁶⁴ For instance, in Heinrich Leopold Wagner's *Die Kindermörderin*,¹⁶⁵ 18-year-old Evchen Humbrecht is seduced by an officer, von Gröningseck. She conceals her pregnancy until it is discovered in the fifth act of play (the play has six acts). Then, believing that von Gröningseck has broken his marriage vow to her, she kills

¹⁶² Jan Matthias Rameckers, "Der Kindesmord in der Literatur der Sturm-und-Drang-Periode: ein Beitrag zur Kultur- und Literaturgeschichte des 18. Jahrhunderts" (1927), 4-5. (original emphasis) Cf. Peters, *Der Kindsmord als schöne Kunst betrachtet: eine motivgeschichtliche Untersuchung der Literatur des 18. Jahrhunderts*, 63-64.

¹⁶³ Kord, *Murderesses in German Writing, 1720-1860: Heroines of Horror*, 130.

¹⁶⁴ Cf. *Ibid.*, 124.

¹⁶⁵ Wagner apparently stole the idea to write a drama about infanticide from Goethe, or at least Goethe claimed as much in *Dichtung und Wahrheit*. "Er zeigte sich als ein Strebender, und so war er willkommen. Auch hielt er treulich an mir, und weil ich aus allem was ich vorhatte kein Geheimniß machte, so erzählte ich ihm wie andern meine Absicht mit Faust, besonders die Katastrophe von Gretchen. Er faßte das Sujet auf, und benutzte es für ein Trauerspiel, die Kindesmörderin. Es war das erste Mal, daß mir jemand etwas von meinen Vorsätzen wegschnappte; es verdroß mich, ohne daß ich's ihm nachgetragen hätte. Ich habe dergleichen Gedankenraub und Vorwegnahmen nachher noch oft genug erlebt, und hatte mich, bei meinem Zaudern und Beschwätzen so manches Vorgesetzten und Eingebildeten, nicht mit Recht zu beschweren." WA I, 28, p. 251-52.

her child. In Maler-Müller's *Nuß-Kernen*,¹⁶⁶ Hannchen is seduced by a man whose name she refuses to reveal, manages to conceal the pregnancy and the birth, but – after the body of the dead child is accidentally discovered – she is apprehended, sentenced to death, and executed. In Meissner's poem *Die Mörderin*,¹⁶⁷ the mother who has killed her child recounts her lover's sweet kisses, his betrayal, and then kills their child.¹⁶⁸

This is not to say that there were no differences between the various works of the *Sturm und Drang* in terms of how they treated the theme of infanticide. For instance, in terms of social status of the mother who kills her child, Wagner's Evchen is a *Bürgerliche*, rather than a servant or royalty, apparently for the first time in literature.¹⁶⁹ The nature of the seduction also differs. In Wagner's play, the seduction is so forceful it may be better understood as rape,¹⁷⁰ whereas the seducer in Meissner's poem is recalled for his sweet kisses. There are also differences in the way the murderesses face punishment. Though Evchen is sentenced to death, von Gröningseck, her lover, vows to seek a pardon for her from the French king; Hannchen is executed, though she sought to evade punishment; and the murderess in *Die Mörderin* expresses her desire to be executed for her deed.

Literature was by no means the only place where infanticide was a common theme. For instance, Kant – generally a proponent of the death penalty – singled out infanticide and killing

¹⁶⁶ Reprinted in Matthias Luserke-Jaqui, *Medea: Studien zur Kulturgeschichte der Literatur* (Tübingen: A. Francke, 2002), 270-72.

¹⁶⁷ Reprinted in *ibid.*, 283-85.

¹⁶⁸ The list given here is not exhaustive. For further examples, *see ibid.*, 133, fn. 10. *See also* Ulbricht, *Kindsmord und Aufklärung in Deutschland*, 231-35.

¹⁶⁹ Luserke-Jaqui, *Medea: Studien zur Kulturgeschichte der Literatur*, 131.

¹⁷⁰ *Ibid.*, 138 & fn. 13.

in a duel as two crimes for which the death penalty would be problematic.¹⁷¹ Few, if any, agreed with Kant's equating infanticide and dueling, to say nothing of his comparing an illegitimate child with illegal wares.¹⁷² But even Kant, with his singular way of viewing the question, does not appear to have considered the possibility that anyone other than the mother could have killed the child. Indeed, he saw honor as the common feature between the two crimes. To Kant, too, the perpetrator of infanticide is necessarily the mother.

Perhaps the clearest example of just how broadly infanticide was discussed at the time is a *Preisfrage* that appeared in the journal *Rheinische Beiträge zur Gelehrsamkeit* in 1780. It became known as the *Mannheimer Preisfrage*. The question posed was "Welches sind die am besten ausführbaren Mittel, dem Kindermorde Einhalt zu thun?"¹⁷³ A "Menschenfreund" offered to pay the winner 100 ducats. The question drew a record of approximately 400 responses.¹⁷⁴ By comparison, in the same year, a *Preisfrage* by none less than Frederick II – also known as Frederick the Great – drew 42 responses, which was already considered a large number.¹⁷⁵ Frederick II had asked a provocative question, namely whether a ruler could deceive his

¹⁷¹ "Es gibt indessen zwei todeswürdige Verbrechen, in Ansehung deren, ob die *Gesetzgebung* auch die Befugnis habe, sie mit der Todesstrafe zu belegen, noch zweifelhaft bleibt. Zu beiden verleitet das Ehrgefühl. Das eine ist das der *Geschlechtsehre*, das andere der *Kriegsehre*, und zwar der wahren Ehre, welche jeder dieser zwei Menschenklassen als Pflicht obliegt. Das eine Verbrechen ist der mütterliche *Kindesmord* (infanticidium maternale); das andere der *Kriegsgesellenmord* (commilitonicidium), der Duell." Immanuel Kant, *Werkausgabe in zwölf Bänden*, ed. Wilhelm Weischedel, 1. Aufl. ed., 12 vols., vol. 8 (Frankfurt am Main 1977), 457-58. (original emphases)

¹⁷² "Das uneheliche auf die Weit gekommene ... ist in das gemeine Wesen gleichsam eingeschlichen (wie verbotene Ware), so daß dieses seine Existenz (weil es billig auf diese Art nicht hätte existieren sollen), mithin auch seine Vernichtung ignorieren kann, und die Schande der Mutter, wenn ihre uneheliche Niederkunft bekannt, wird, kann keine Verordnung heben. Ibid. Cf. Kord, *Murderesses in German Writing, 1720-1860: Heroines of Horror*, 139-41.

¹⁷³ "[Preisfrage]," *Rheinische Beiträge zur Gelehrsamkeit* 2 (1780): 84-86.

¹⁷⁴ Ulbricht, *Kindsmord und Aufklärung in Deutschland*, 217.

¹⁷⁵ Ibid., 217-18.

people,¹⁷⁶ but evidently infanticide sparked far greater interest. What stunned many contemporaries was not only the sheer number of responses, but also the diversity of the respondents. Though most of the respondents were members of the *Bürgertum*, some were nobles. Most respondents were administrators (the duties of administrators at the time included legal tasks), but almost as many were physicians. Clergymen, theologians, and teachers were also well represented, and a member of the Cistercian order had also submitted a response. Some submissions were authored by well-known individuals, such as Professor Michaelis, who had achieved international fame with his work on the Old Testament, and Johann August Schlettwein, the main proponent of physiocracy in Germany. Only two of the approximately 400 submissions were written by women.¹⁷⁷

The principal motive for infanticide was, again, the *Ehrenrettungsmotiv*. Prohibited sexuality – principally pre-marital intercourse – invariably led to infanticide.¹⁷⁸ The man was portrayed as the seducer, and often blamed for the outcome, though no contestants proposed that men actually face legal consequences for their seduction (beyond an occasional proposal for modest fines). Concealed pregnancy and birth generally followed after a prohibited sexual act and came before the infanticide. The connection between prohibited sexuality and infanticide can already be seen in the title under which the three winning submissions were published: “Drei Preisschriften über die Frage: Welches sind die besten ausführbarsten Mittel dem Kindermorde

¹⁷⁶ Ibid., 218.

¹⁷⁷ For a detailed overview of the backgrounds of the respondents, *see* *ibid.*, 224-31.

¹⁷⁸ Luserke-Jaqui, *Medea: Studien zur Kulturgeschichte der Literatur*, 157.

abzuhelfen, *ohne die Unzucht zu begünstigen*”¹⁷⁹ (emphasis added). This slight change from the question originally posed in the *Preisfrage* speaks volumes, both in that infanticide was generally viewed as a consequence of poor virtue, but also in that harsh punishment for infanticide was generally viewed as a deterrent for poor virtue.

This is not to say that there were no significant differences between the submissions. Even if one takes only the three winning submissions, they differ in major respects. For instance, Pfeil’s submission saw the solution for infanticide in education. Pfeil argued that public and ecclesiastical education would enlighten the otherwise barbaric masses and cause them to act in a truly honorable and moral way (Pfeil believed that infanticide was committed out of a misguided understanding of honor).¹⁸⁰ Klippstein’s submission argues for what we might call a surveillance state. On this view, the creation of a “Sittenpolizei” would solve the infanticide problem by preventing illicit sexual intercourse. Along similar lines, Klippstein proposes that people practice “Aufmerksamkeit aufeinander”— which one might also call denunciation – and that “Aufseherinnen” be installed in villages and neighborhoods, with the task of monitoring the moral character of families.¹⁸¹ The third winner of the competition, Kreutzfeld, proposed abolishing public shaming, providing shelter for the pregnant, and improving care for infants.

¹⁷⁹ P. E. Klippstein, Johann Gottlieb Kreutzfeld, and Johann Gottlob Benjamin Pfeil, "Drei Preisschriften über die Frage: Welches sind die besten ausführbarsten Mittel dem Kindermorde abzuhelpfen, ohne die Unzucht zu begünstigen?," (Mannheim 1784).

¹⁸⁰ Luserke-Jaqui, *Medea: Studien zur Kulturgeschichte der Literatur*, 164.

¹⁸¹ Such denunciatory practices were already in place in many German lands for midwives, who appeared to have reported many pregnancies, and also to have convinced women who had hidden their (sometimes already dead) infants to produce them. Ulbricht, *Kindsmord und Aufklärung in Deutschland*, 140. However, expanding such practices to others does not appear to have borne fruit in practice. See *infra* p.97.

Other contestants proposed an even greater range of solutions. Some took the opposite view to Kreutzfeld's – namely that shaming should not be abolished, but rather should be enhanced. The rationale here was typically that if women were so afraid of shaming that they were willing to kill their own children to avoid it, more shaming would deter them from engaging in prohibited sexual acts in the first place. Some argued that the excessive luxury that the higher classes lived in led to loose morals, and should therefore be targeted. Some believed that domestic servants (those convicted of infanticide were often domestic servants) served those same employers, thus acquiring a distaste for marriage, which should be prevented. Other solutions involved monetary rewards for those women who voluntarily revealed that they were pregnant.¹⁸²

These similarities and differences mirror those seen in actual legal policy. Prussia provides a fine example. Leading up to 1720, the general trend in infanticide law had been towards milder punishments – the sword had replaced the *poena cullei*, and was often commuted to a prison sentence. But in 1720, Frederick Wilhelm I issued an edict reintroducing death by drowning, on the grounds that infanticide was becoming all too common, and harsher punishment would scare potential child-murderesses.¹⁸³ The edict also stipulated harsher punishments for secret births: these would now be punished by *Staupenschlag* and exile. Frederick Wilhelm I also instructed the authorities to look out for extra-marital pregnancies, and to institute investigations where they suspected such pregnancies – after all, he reasoned, these would lead to infanticide. This edict apparently did not have the desired effect, because three

¹⁸² Ibid., 230-31.

¹⁸³ Wächtershäuser, *Das Verbrechen des Kindesmordes in Zeitalter der Aufklärung: eine rechtsgeschichtliche Untersuchung der dogmatischen, prozessualen und rechtssoziologischen Aspekte*, 69.

years later, a new edict was enacted, which extended the obligation to look out for extra-marital pregnancies to parents, those who had servants, and landlords. These edicts failed to have any significant impact on the frequency of infanticide in Prussia, however.¹⁸⁴ In 1740, three days after ascending to the throne, Frederick II abolished torture. Less than two months later he did away with the *poena cullei* and reinstated the sword as the standard punishment for infanticide. Six years later, he abolished *Kirchenbuße*.¹⁸⁵ Infanticide continued to occupy Frederick II. In a dissertation in 1749, he described it as a crime caused in significant part by state law.¹⁸⁶ After an insignificant edict on the topic in 1756, he abolished all *Hurenstrafen* in 1765. The edict of 1765 also introduced numerous other changes designed to decrease the number of infanticides. Thus, a pregnant woman could prove that her child was stillborn if she told at least one honorable woman of her pregnancy, and that woman witnessed the birth. There was no punishment for the pregnancy itself, though there was for a failure to disclose it to an honorable woman (6 years incarceration if the child lived, 10 years if it died). Parents, relatives, masters of servants, and the father of the child had to encourage the pregnant woman to disclose her pregnancy; if she did so, it was prohibited to them the pregnant woman through “unbillige Härte zur Verzweiflung und Verübung eines großen Übels”. Frederick II’s measures caused a significant decrease in the number of death penalties for infanticide – especially because the abolition of torture drastically decreased the number of confessions, which were often needed for a death penalty. However,

¹⁸⁴ Peters, *Der Kindsmord als schöne Kunst betrachtet: eine motivgeschichtliche Untersuchung der Literatur des 18. Jahrhunderts*, 50.

¹⁸⁵ *Ibid.*, 50-51.

¹⁸⁶ Ulbricht, *Kindsmord und Aufklärung in Deutschland*, 242. Cf. Wächtershäuser, *Das Verbrechen des Kindsmordes in Zeitalter der Aufklärung: eine rechtsgeschichtliche Untersuchung der dogmatischen, prozessualen und rechtssoziologischen Aspekte*, 28-29.

Frederick II's efforts did nothing to decrease the number of infanticides actually committed, as he himself admitted in a letter to Voltaire in 1777.¹⁸⁷

These developments in Prussia – mirrored, though with some delay, in several other parts of Germany¹⁸⁸ – provide an example of the role of narrative in shaping the law. The dominant narrative is that seduction, via concealed pregnancy and concealed birth, leads to the mother killing her child. The edicts of 1720 and 1723 were based on that narrative, in that they sought to catch concealed pregnancies (and thus to halt the narrative there, and not let it reach infanticide), punish secret births severely (thus, again, to halt the narrative there), and to punish the mother more severely for infanticide (thus to prevent the final stage of the narrative through deterrence). The laws of Frederick II are also based on that dominant narrative, though they allowed more space for one recognized alternative narrative, namely that the child was stillborn or died of natural causes. That is, these laws provided reduced sentences (prison time rather than the death penalty) where it was not clear that the child was in fact killed – that is, where the alternative narrative of stillbirth or death from natural causes was not sufficiently disproven. The other changes of Frederick II also follow the dominant narrative, just with a different attitude towards deterrence than his predecessor had. Thus, he softened the punishments at the various stages of the dominant narrative: no more *Kirchenbuße*, no more *Hurenstrafen* for being seduced, incentives to reveal (rather than to conceal) the pregnancy and to give birth in the presence of witnesses. The main idea underlying these changes was that the harsh punishments increased fear

¹⁸⁷ Frederick II also planned to institute facilities for foundlings and for deliveries, but apparently lacked the financial means to do so. Peters, *Der Kindsmord als schöne Kunst betrachtet: eine motivgeschichtliche Untersuchung der Literatur des 18. Jahrhunderts*, 52.

¹⁸⁸ Wächtershäuser, *Das Verbrechen des Kindesmordes in Zeitalter der Aufklärung: eine rechtsgeschichtliche Untersuchung der dogmatischen, prozessualen und rechtssoziologischen Aspekte*, 109-12.

– fear of shame, fear of punishment – and thus caused, rather than prevented, mothers from killing their children; whereas, if they had nothing to fear, they would disclose their pregnancies and hence not kill their children.

Yet the notion that the child could be killed by someone other than the mother does not appear to occur to anyone. Frederick Wilhelm I did not introduce punishments for anyone other than the mother, or an obligation for citizens to pay attention to anyone other than the mother. Frederick II does not appear to have considered that the witnesses he sought to have at the births could themselves have an interest in killing the child, or that he needed to consider introducing punishments for other potential culprits. The respondents of the *Mannheimer Preisfrage* had the same blind spot. Those who proposed harsher punishments to deter infanticide proposed such punishments for the mothers, and for nobody else. Those who sought to ease punishments for the mothers argued that this would cause fewer mothers to kill their children. Those who focused on using education to decrease the incidence of infanticide believed that women – as future potential child-killers – should be the focus of that education; men were only the focus insofar as they should be taught not to seduce unmarried women and then abandon them.

Had more alternative narratives for infanticide been available, other solutions could readily have surfaced. Those who reasoned that harsher punishments would deter infanticide would logically also have had to consider introducing punishments for other perpetrators of infanticide. Those who reasoned that more moderate punishments were more effective would logically have to consider them for other perpetrators as well. Those who focused on education as the solution would logically have to focus their efforts on the other potential perpetrators as well. Perhaps most importantly, those who focused on the evidentiary side of the problem would have to consider that, in many cases, there would have been insufficient evidence for a

conviction. That is, even with only one alternative (stillbirth or death from natural causes) convincing proof of actual infanticide was frequently unavailable, as Frederick II's edicts exemplify. If one considers more alternative narrative than only death of natural causes – that is, if one considers alternative perpetrators, then a class of cases arises wherein it not clear *who* killed the infant, even if it is clear that the infant was killed. One may think of the frequent scenario where an infant's body bore clear signs of violence, but there were no witnesses to the killing.

D. Goethe's Exposure to Infanticide

There is a paradox in Goethe's attitude towards infanticide. On the one hand, he was intensely involved with the issue, both academically and professionally. The *Gretchen Tragedy* in *Faust I* of course concerns infanticide; as does the drowning of Charlotte's child in the *Wahlverwandtschaften*. On the other hand, no clear statement of his own view on the issue is to be found.

Goethe completed his legal studies in 1771. His written dissertation (which does not survive) was rejected by the faculty, so he had to defend a set of oral theses to obtain his degree. The 55th of 56 theses Goethe submitted was “An fœmina partum recenter editum trucidans capite plectenda sit? quæstio est inter Doctors controversa”¹⁸⁹ [“Whether a woman who kills a newborn child, should be subjected to the death penalty? The question is disputed among the Doctors [of laws].”] What was actually said at his oral defense of his theses is not known. What is known, however, is that in late 1771 – just months after Goethe returned to his home town of Frankfurt and began to practice as a lawyer there – the talk of the town was the case of Susanna

¹⁸⁹ Wahl, *“Das Kind in meinem Leib”: Sittlichkeitsdelikte und Kindsmord in Sachsen-Weimar-Eisenach unter Carl August: eine Quellenedition, 1777-1786*, 455.

Margaretha Brandt, who was accused of infanticide. Goethe showed enormous interest in the case, even obtaining the full court records, which he appears to have read thoroughly. He also appears to have followed aspects of the case through personal and family connections. For instance, the two doctors who had examined Brandt during her pregnancy (and failed to spot the pregnancy) were family doctors of the Goethes and the Textors. The case had some peculiarities. According to the court record, a doctor who examined Brandt when she was seven months pregnant had failed to detect the pregnancy – one might expect that this would render it doubtful that Brandt concealed her pregnancy. She gave birth just a month later, and babies born at eight months only rarely survived at the time. Again, one might expect that this fact would at least cast doubt on whether she killed the child. Still, Brandt’s plea to have her sentence commuted was rejected and she was put to death on January 14, 1772.¹⁹⁰ In spite of Goethe’s fascination with the case, there is no direct record of his thoughts on it.

Goethe’s next major involvements with infanticide came in the duchy of Sachsen-Weimar-Eisenach, where he was by that time a member of the *Geheimes Consilium*. Goethe joined this Privy Council as a *Legionsrat* in June of 1776, and was promoted to a *Geheime Rat* in September of 1779.¹⁹¹ The legal framework concerning infanticide in the duchy was fairly typical of German lands. The *Carolina* still governed. A *Landesordnung* of 1539 called for the punishment of being buried alive and impalement for infanticide, though a child-murderess could be pardoned and drowned: “Eine Kindermörderin soll lebendig vergraben und ein Pfahl durch sie

¹⁹⁰ Rebekka Habermas and Tanja Hommen, *Das Frankfurter Gretchen: der Prozess gegen die Kindsmörderin Susanna Margaretha Brandt* (München: C.H. Beck, 1999).

¹⁹¹ Willy Flach, "Goethes amtliche Schriften. Zur Begründung ihrer Veröffentlichung," *Viermonatsschr. d. Goethe-Gesellschaft* 12: 129.

geschlagen, doch auf Vorbitte begnadiget und ertränket warden.”¹⁹² *Kirchenbuße*, enacted in 1664, was still practiced for most *Sittlichkeitsdelikte* – such as fornication, adultery, and concealed pregnancy – as well as theft and a few other crimes.¹⁹³ Many *Sittlichkeitsdelikte* also carried worldly punishments. Thus, pursuant to a law from 1589, intercourse of those who were engaged but not yet married (*anticipirter Beyschlaf*), was punished “mit zeitlichem Gefängniss oder sonst nach Gelegenheit willkürlich.” By the eighteenth century, the standard sentence for this crime had become eight days in prison, which was increased to fourteen days by a law of 1771.¹⁹⁴

In 1774, just a year before Goethe became a *Geheimrat*, Countess Anna Amalia, who ruled in place of her minor son, did not confirm the death penalty for child murderess Catharina Elisabetha Warz, but rather commuted it to prison time. The exact reasons for her decision are unknown because the transcripts of the discussion in her *Geheimen Ratskollegium* have not survived.¹⁹⁵

When Anna Amalia’s son, Duke Carl August came of age and took over in 1775, one of the first issues he tackled was *Kirchenbuße*, the eventual abolition of which became closely intertwined with infanticide cases that came before the duke in 1781 and 1783. Voices to abolish the punishment had been raised formally in Sachsen-Weimar relatively early, to wit in 1728 and 1752, though those efforts failed. Count Carl August promptly abolished *Kirchenbuße* for theft

¹⁹² Wahl, *“Das Kind in meinem Leib”*: *Sittlichkeitsdelikte und Kindsmord in Sachsen-Weimar-Eisenach unter Carl August: eine Quellenedition, 1777-1786*, 193.

¹⁹³ *Ibid.*, 193-94.

¹⁹⁴ *Ibid.*, 195.

¹⁹⁵ *Ibid.*, 13.

in 1777, with the full support of his *Geheimes Consilium* and his government, but over the objections of the ecclesiastical authorities. Carl August then lead efforts to abolish *Kirchenbuße* entirely. Again, the *Geheimes Consilium* supported him. As to the positions of the government and the ecclesiastical authorities, the surviving documents are less clear, but the government appears to have been in favor of abolishing *Kirchenbuße* altogether, while the ecclesiastical authorities sought to preserve it.¹⁹⁶

Before *Kirchenbuße* was finally abolished in 1786, however, three cases created quite a furor in Sachsen-Weimar. The first was the case of Johanna Dorothea Kübelstein, who in 1779 had given birth to a child in the public street, but had not attempted to kill it. The second and third cases were both infanticide cases: in 1781, Dorothea Altwein was accused of killing her child; in 1783, Johanna Catharina Höhn faced the same charge. Both women were found guilty and sentenced to death. However, Altwein's sentence was commuted to life imprisonment. In prison, she was deemed "eine der fleisigsten und ordentlichsten Dirnen," and the duke pardoned and freed her in 1798, after she had served 17 years.¹⁹⁷

The case of Kübelstein left the government of Sachsen-Weimar divided over the question whether the *Mandat* of 1752 applied to her case. The *Mandat* prescribed a ten-year prison sentence for women who concealed their pregnancy. This punishment appeared only to apply in cases of infanticide, or at least potential infanticide, but the text was not unequivocal.¹⁹⁸ Kübelstein had concealed her pregnancy, but her child was alive. The government presented this

¹⁹⁶ Ibid., 18.

¹⁹⁷ Ibid., 31 & n.107.

¹⁹⁸ Ibid., 190.

question to the duke for resolution, who discussed it with his *Geheimräte* in 1780 – though Goethe was absent due to illness – and concluded that the *Mandat* did not apply to Kübelstein, but was limited to cases where “das neugeborene Kind todt seyn, oder gegen dessen Mutter ein auch nur entfernter Verdacht eines intendirten Kindermordes oder einer andern gehabten bösen Absicht sich zu Tage legen würde.”¹⁹⁹

This case revived the discussion about the law of infanticide in Sachsen-Weimar, which only intensified with the *Mannheimer Preisfrage* of 1780.²⁰⁰ Not only did the *Preisfrage* draw quite some attention in and around the Duchy, but a young bureaucrat in Weimar, Christian Gottlob Voigt, drafted a response. His star was on the rise, and he would later join Goethe as a *Geheimrat*. Goethe, who somehow learned of Voigt’s draft, requested a copy of it, read it, sent Voigt comments, and encouraged him to publish it (Goethe’s comments do not survive). Many others who had power in the Duchy – including the duke himself – read Voigt’s essay, be it in its initial draft or the final draft that was published. Voigt’s essay had many markings of the period in terms of how it addressed infanticide. The *Ehrenrettungsmotiv* was the principal motivation for infanticide (though the published version does acknowledge that the “[e]ntferntere Ursache ... ist überhaupt die Unkeuschheit ...”²⁰¹ The first draft views the harsh laws of the time as contributing to infanticide, and the solution to infanticide is to encourage marriages. The second draft is considerably more cautious when it comes to the laws in place, as well as to the solutions

¹⁹⁹ Ibid., 69.

²⁰⁰ See *supra* p.94ff.

²⁰¹ Wahl, “Das Kind in meinem Leib”: Sittlichkeitsdelikte und Kindsmord in Sachsen-Weimar-Eisenach unter Carl August: eine Quellenedition, 1777-1786, 61.

for infanticide.²⁰² Although the published draft notes that the death penalty has failed to solve the problem, it also cautions that nobody knows how much bigger the problem could become if the death penalty were removed. Although the published draft also states that marriage should be encouraged, it exhibits greater humility “[n]ur Kosmopoliten auf Thronen, Sieger über erhabene und niedere Vorurtheile, mit der genauesten Kenntnis der Landesverfassung begabt ... werden hier rathen und helfen können”²⁰³ – perhaps a reason that the Duke and many in the political and bureaucratic apparatus liked the essay.

Voigt was apparently prompted by the case of Altwein – the second case we consider here before we arrive at the abolition of *Kirchenbuße* in 1786 – who was accused of infanticide in 1781. He produced the first draft quickly enough that the Duke read it before he decided to commute Altwein’s death sentence to life imprisonment – and even quoted the essay in his decision.²⁰⁴ The Duke also promptly convened his *Geheimes Consilium* – this time, Goethe was present – and the decision was taken to draft two laws. The first law would abolish *Kirchenbuße*, the second law would work out how to punish pregnant women, particularly those who concealed their pregnancies. The death penalty set out for infanticide in the *Carolina* was not called into question at this time. Voigt was selected to draft the “Mandat wider Verheimlichung der unehelichen Schwangerschaften.”²⁰⁵ His proposal, among other things, included the punishments for parents, relatives, and masters of servants who knew of secret pregnancies or

²⁰² Both drafts are reprinted in *ibid.*, 51-67.

²⁰³ *Ibid.*, 67.

²⁰⁴ *Ibid.*, 27.

²⁰⁵ *Ibid.*, 28.

births, but did not report them.²⁰⁶ This expansion proved too much, and the *Geheimräte* rejected this proposed law.

The *Geheimes Consilium* had, however, voted to abolish *Kirchenbuße*.²⁰⁷ Goethe's vote survives in its entirety.²⁰⁸ He is unequivocal that *Kirchenbuße* must be abolished. His argumentation is rather unusual for the time, however. He focuses on the history of *Kirchenbuße*, and sees it is not an inherent part of Christianity, but rather as a move away from the first church. His proposal is to do away with the public shaming that was *Kirchenbuße*, while still allowing the church to discipline transgressors: delinquents would first be punished by a judge, then handed over to the local *Beichtvater*, who would accept their repentance in the presence of two witnesses, and readmit them to the church. "Stillschweigend war er ausgeschlossen, stillschweigend kehrt er wieder zurück!"²⁰⁹ The Church would, on Goethe's proposal, retain the power to renounce, even to excommunicate, those who refuse to repent, as well as repeat offenders.²¹⁰ The proposal to abolish *Kirchenbuße* stalled in the bureaucracy, however. The reason for this is not entirely clear, but is likely due to ecclesiastical resistance.

Before any marked progress was made on the proposal to abolish *Kirchenbuße*, Sachsen-Weimar was again the site of an infanticide that drew much attention. In 1783, Höhn was accused of killing her child. Before she was even sentenced, the Duke discussed with his *Geheimräte* an idea that he had. It consisted in replacing the death penalty for infanticide with a

²⁰⁶ Ibid., 29.

²⁰⁷ Ibid., 18.

²⁰⁸ Ibid., 128.

²⁰⁹ Ibid., 129.

²¹⁰ Ibid.

punishment that would be an even greater deterrent. The idea resembled legislation that had been introduced in Sweden, where the death penalty had been replaced with incarceration coupled with repeated humiliation and painful procedures.²¹¹ The duke may have learned about this proposal from Voigt's essay for the *Preisfrage* (though Voigt can hardly be said to endorse this approach).²¹² The duke proposed various humiliating and painful procedures: "Abschneiden des Haupthaars zur dauernden Schande der Missetäterin, Stellung an den Pranger und öffentliche Geißelung, lebenslängliches Zuchthaus mit harter Arbeit, Wiederholung der Prangers und der öffentliche Geißelung für Lebenszeit oder wenigstens eine Anzahl Jahre ein- oder mehrmals jährlich, besonders am Jahrestag des Kindsmordes."²¹³ The duke's idea was sent to the government, which appears to have rejected it, though with such differences of opinion that it did not issue a recommendation of its own. In the meantime, Höhn was sentenced to death. In an unusual move, the duke requested that his *Geheimräte* give him their opinion about his idea – this was unusual, because, as one of them pointed out, this was not within their competence. Still, they obeyed, and unanimously rejected the idea. Two of the *Räte* submitted their votes in a matter of days, whereas Goethe took about two weeks. His vote was brief, stating that he agreed, in essence, with outcome that his colleagues had reached. He further wrote that he considered

²¹¹ Ibid., 33.

²¹² Ibid., 63.

²¹³ Ibid., 33.

this an issue of such importance, that he would submit an essay on it to the duke, rather than explain himself in a vote.²¹⁴ This essay, though submitted, is lost.²¹⁵

The duke, who, unlike in the case of Altwein, does not appear to have asked his *Geheimräte* whether he should commute Höhn's sentence, confirmed her death sentence. Why the duke treated these two women so differently is unclear. If the reason was that he hoped the death penalty would serve as a mighty deterrent, then he was misguided, for only a month later a dead, likely murdered, child was found in the Duchy (the perpetrator was not found), and two more infanticide cases were reported.²¹⁶

Of these, the case of Rost is of interest here. Rost claimed that her child never lived, even though the medical faculty had concluded otherwise. Because Rost would not confess to her crime, the *Schöffentuhl* decided to resort to torture. The duke, however, after discussion with his *Geheimräte*, decided against permitting torture in this case – and in future cases. Rost was therefore sentenced to life imprisonment, though pardoned five years later.²¹⁷ After the duke again refused the use of torture in a murder case in 1785, a kind of unofficial ban on torture

²¹⁴ The vote is reprinted in full in *ibid.*, 106.

²¹⁵ Lothar Frede, "Kindesmord und Kirchenbuße bei Goethe," *Zeitschrift für die gesamte Strafrechtswissenschaft* 78, no. 3 (1966): 425.

²¹⁶ Wahl, "*Das Kind in meinem Leib*": *Sittlichkeitsdelikte und Kindsmord in Sachsen-Weimar-Eisenach unter Carl August: eine Quellenedition, 1777-1786*, 41. Goethe is often criticized for his involvement in the Höhn case, on the grounds that he did not stop her execution; had he voted in favor of the Duke's proposal to expand public shaming and do away with the death penalty, Höhn would presumably have fallen under this proposal, and would have lived to be repeatedly shamed. See, e.g., Kord, *Murderesses in German Writing, 1720-1860: Heroines of Horror*, 146 & n.96. It is not my goal here to judge Goethe, but it does bear mentioning that these criticisms typically ignore the fact that Goethe was voting on a legislative proposal, not on Höhn's individual case, and that this proposal involved the expansion of public shaming at a time when the complete abolition of such punishments was within reach, and indeed achieved.

²¹⁷ Wahl, "*Das Kind in meinem Leib*": *Sittlichkeitsdelikte und Kindsmord in Sachsen-Weimar-Eisenach unter Carl August: eine Quellenedition, 1777-1786*, 43.

entered into force, though torture would not be formally abolished in Sachsen-Weimar until 1819.²¹⁸

The unofficial abolition of torture in 1783-85 does not appear to have decreased the number of infanticides in Sachsen-Weimar, nor the interest they evoked – but, as a practical matter, it did decrease sentences for infanticide. No torture meant many fewer confessions; and if there was no body and no confession, then there could be no death sentence. As in Prussia, a change in the evidentiary rules had an impact on the sentences.²¹⁹ Thus, in 1804, Voigt – by then a *Geheimrat* – wrote to Goethe from Eisenach, that an infanticide there was causing women to lose their minds.²²⁰ Without torture, however, the alleged *Kindsmörderin*, Caroline Burkhart, was sentenced to “merely” four years and exile. Because such cases did not need to be sent to the duke for confirmation of the death penalty or of torture, his *Geheimräte* were not involved in them. Perhaps due to the time freed up in this manner, *Kirchenbuße* was finally abolished in 1786.²²¹

The dominant narrative of infanticide thus had a profound effect on shaping the discourse on infanticide, very much including questions of law and of policy. Had the thought that someone other than the mother could kill the child been a part of the discourse, the discourse would have looked very different. It is remarkable that this dominant narrative was what it was, for there were plenty of sources from where to draw alternative narratives. The Bible has no lack

²¹⁸ Ibid., 45.

²¹⁹ See *supra* p.97.

²²⁰ Wahl, "Das Kind in meinem Leib": Sittlichkeitsdelikte und Kindsmord in Sachsen-Weimar-Eisenach unter Carl August: eine Quellenedition, 1777-1786, 84.

²²¹ Ibid., 124.

of infanticide, both attempted and successful, by someone other than the mother. Abraham almost sacrificed Isaac; the Pharaoh killed many Israelite children; the Lord killed the firstborn of Egypt; and Psalm 137 (“By the Waters of Babylon”) ends with the verse “Happy shall *he* be, that taketh and dasheth thy little ones against the stone” (Emphasis added); in what is known as the Massacre of the Innocents, King Herod attempted to killed infant Jesus by slaughtering the children of Bethlehem. In addition, the killing of the Christ – “the Son,” “the Child” – has been portrayed as an infanticide in the Christian tradition.²²² Who, exactly, is to blame for his death is controversial – but it is not the Virgin Mary.²²³ Folktales have no shortage of infanticide stories, and the mother is not always the perpetrator; sometimes the mother is even falsely accused, and the truth surfaces when she is in either this world or the next.²²⁴ Legal scholars in the first half of the eighteenth century still took it for granted that at least the father can also be guilty of infanticide.²²⁵ Indeed, the *Carolina* itself in Article 132 – right after Article 131 that deals with infanticide – discusses how to punish mothers who hid their illegitimate children.²²⁶ But somehow, all these narratives appear to have faded from public consciousness. Why this was the

²²² See Bohm, "Margarete's Innocence and the Guilt of Faust," 217-18.

²²³ It was not uncommon for German legal scholars to express surprise at the fact that Mosaic law does not have a provision for infanticide. (Under Mosaic law, infanticide is an instance of murder.) Wahl, *"Das Kind in meinem Leib": Sittlichkeitsdelikte und Kindsmord in Sachsen-Weimar-Eisenach unter Carl August: eine Quellenedition, 1777-1786*, 32, fn. 113. Indeed, it was with Christianization that infanticide first acquired a status as a separate crime, because the child was not yet baptized, and thus lost its soul. Peters, *Der Kindsmord als schöne Kunst betrachtet: eine motivgeschichtliche Untersuchung der Literatur des 18. Jahrhunderts*, 47. Perhaps the reason that the discussion about infanticide become so central has something to do with the religious significance of Christ's death being seen as an infanticide. Gretchen does see a connection between herself and the *Mater Dolorosa*, and emphasizes the loss of the Son as the reason. See *infra* p.121. Note that Margarete = Maria + Gretchen.

²²⁴ Ude-Koeller, "'Straff der weiber so jre kinder tödten' Zur sagenhaften Geschichte des Kindsmordes," 269-72.

²²⁵ See *supra* p.86.

²²⁶ Article 132 of the *Carolina* is reprinted in full in Wahl, *"Das Kind in meinem Leib": Sittlichkeitsdelikte und Kindsmord in Sachsen-Weimar-Eisenach unter Carl August: eine Quellenedition, 1777-1786*, 180.

case – or why infanticide was even such a major issue – is hard to say. It likely has something to do with the fact that those who were pressing for the abolition of the death penalty in general saw infanticide as a good place to start, because the mother as perpetrator could be quite sympathetic. On the other hand, those pushing to preserve the death penalty, and those pushing to preserve sexual mores, saw infanticide as a good place to defend the death penalty, in part because the mothers could be portrayed as lacking in (sexual) virtue, and in part because infants made for very sympathetic victims.²²⁷ Instances of infanticide were also relatively numerous at the time – especially unsolved cases appeared to be quite common – though there was neither a marked increase nor a marked decrease in Goethe’s time.²²⁸ But the question of why infanticide was so central in Goethe’s time is beyond the scope of this project.

What we can conclude from Goethe’s exposure to infanticide in real life is that he knew a lot about infanticide, especially in terms of the legal issue that surrounded it. He had studied the matter as a student, closely followed at least one infanticide case, and was involved as a *Geheimrat* in several more, as well as in such related issues as *Kirchenbuße*. For more, we will have to turn to his literary writings. It is tempting to make too much of Goethe’s exposure to infanticide in real life. It is not uncommon to see arguments to the effect that Gretchen is effectively Susanna Margaretha Brandt.²²⁹ However, even though the case of Brandt (1771-72) and the production of the *Urfaust* (1772-75) match up chronologically, infanticide was simply

²²⁷ See Ulbricht, *Kindsmord und Aufklärung in Deutschland*, 174-89; Wächtershäuser, *Das Verbrechen des Kindesmordes in Zeitalter der Aufklärung: eine rechtsgeschichtliche Untersuchung der dogmatischen, prozessualen und rechtssoziologischen Aspekte*, 109-24.

²²⁸ *Das Verbrechen des Kindesmordes in Zeitalter der Aufklärung: eine rechtsgeschichtliche Untersuchung der dogmatischen, prozessualen und rechtssoziologischen Aspekte*, 109-24.

²²⁹ See, e.g., Habermas and Hommen, *Das Frankfurter Gretchen: der Prozess gegen die Kindsmörderin Susanna Margaretha Brandt*.

too pervasive a topic at the time to be able to tie any one case to Gretchen – especially when there is little in the play to connect her with any specific *Kindsmörderin*.

Chapter IV: Goethe's Alternative Narrative, or Someone Else Did It

A. Introduction

Gretchen is widely considered to have killed her child. Scholars and commentators who write about Faust²³⁰ or about Goethe more generally,²³¹ those who condemn Goethe's attitude towards infanticide or his conduct in the Höhn case,²³² and those who defend him;²³³ those who write about infanticide in the literature of Goethe's time,²³⁴ or in the literature of other periods;²³⁵ legal historians²³⁶ and political scientists²³⁷ – all labor under the same flawed supposition.²³⁸ Although some do argue that Gretchen does not carry the moral guilt for her child's death, the

²³⁰ See, e.g., Albrecht Schöne, *Johann Wolfgang Goethe - Faust: Kommentare*, 5. erneut durchgesehene und ergänzte Auflag. ed. (Frankfurt am Main: Deutscher Klassiker Verlag, 2003).

²³¹ See, e.g., Breithaupt, "Goethe's Conscience."

²³² See, e.g., Kord, *Murderesses in German Writing, 1720-1860: Heroines of Horror*, 146 & n.96.

²³³ See, e.g., Wolfgang Wittkowski, "Hexenjagd auf Goethe. November 1783: Hinrichtung einer Kindsmörderin und 'Das Göttliche'," *Oxford German Studies* 31, no. 1 (2002).

²³⁴ See, e.g., Rameckers, "Der Kindesmord in der Literatur der Sturm-und-Drang-Periode: ein Beitrag zur Kultur- und Literaturgeschichte des 18. Jahrhunderts."

²³⁵ See, e.g., Luserke-Jaqui, *Medea: Studien zur Kulturgeschichte der Literatur*.

²³⁶ See, e.g., Wächtershäuser, *Das Verbrechen des Kindesmordes in Zeitalter der Aufklärung: eine rechtsgeschichtliche Untersuchung der dogmatischen, prozessualen und rechtssoziologischen Aspekte*.

²³⁷ See, e.g., Ekkehart Krippendorff, *Goethe: Politik gegen den Zeitgeist*, 1. Aufl. ed. (Frankfurt am Main: Insel, 1999). For a further list of commentators who have assumed that Gretchen committed infanticide, see Bohm, "Margarete's Innocence and the Guilt of Faust," 220 & nn.12-13.

²³⁸ See also "Margarete's Innocence and the Guilt of Faust," 220. ("Literary critics have analyzed *Faust* on the unquestioned premise that Margarete committed infanticide. Indeed, the assumption has gone so without challenge that the secondary literature does not even know the question of her guilt or innocence as a topic ... Unanimously, the critics are convinced that Margarete / Gretchen is guilty of infanticide.")

simple question whether she actually killed her child is not asked.²³⁹ She has become not just the killer of her child, but a famous child-killer.²⁴⁰

Faust I in fact leaves the question of Gretchen's guilt open. It is possible that she killed her child, but the play does not provide sufficient evidence to draw such a conclusion. Rather, it is not at all clear that she actually killed her child; it may even be doubted that her child is dead at all. The evidence against Gretchen is scant at best – the most convincing piece of evidence is her confession in final scene of *Faust I*. But this confession contradicts an account she offered at the beginning of the very same scene (she claims she is falsely accused of killing her child), and is contradicted again by an account she offers later on in the same scene (where she claims that her child is still alive).

Why, then, has Gretchen been so harshly judged, by the court behind the scenes in *Faust I*, by *Faust's* readers, and even by herself? Given the survey we conducted in the previous chapter, this harshness should not surprise us. If we consider the *Gretchen Tragedy* as a set of narratives surrounding infanticide, as a battle between the very few narratives that favor Gretchen and the many narratives that do not, then we can see why she has come to be viewed as a child-killer, and why even she was willing to accept this conclusion.

B. The Seduction

When Gretchen first appears in *Faust I* – in the first *Strasse* scene, roughly half-way through the play – we are immediately in the first element of the dominant narrative of

²³⁹ The only exception to this consensus I am aware of is *ibid.* Bohm considers that the best evidence for the proposition that Gretchen killed her child is the passage from the scene *Trüber Tag. Feld*

²⁴⁰ At least one work on child-murderesses is even named after her. Marita Metz-Becker, *Gretchentragödien: Kindsmörderinnen im 19. Jahrhundert (1770-1870)*, Kindsmörderinnen im 19. Jahrhundert (1770-1870) (Sulzbach am Taunus: U. Helmer, 2016).

infanticide described in Chapter III: the seduction. Faust approaches Gretchen, who has just left church (Faust, by contrast, just came from the Witches' Kitchen). He offers to her his "Arm und Geleit" (WA 2606) – apparently quite insistently, for she has to free herself to leave the stage (*Sie macht sich los und ab*) (WA 2608). Faust is enamored with Gretchen, and, right as Mephisto enters, insists that this devil help him procure Gretchen. Mephisto declines, claiming that he has no power over this innocent creature who just came from church and confession. Faust switches to a legal argument: "Ist über vierzehn Jahr doch alt." (WA 2627)²⁴¹ Fourteen was the age at which a girl could marry.²⁴² Of course, this did not mean that she could engage in extramarital sexual intercourse, which was a crime. After some innuendo from Mephisto to this effect, Faust no longer wishes to be bothered about the law "Laß Er mich mit dem Gesetz in Frieden!" (WA 2634) Rather, Faust appears to imply that if Mephisto will not promptly help seduce Gretchen for him, their deal will be off. After some back and forth – during which Faust makes it explicit that his goal is seduction ("So ein Geschöpfchen zu verführen") (WA 2644) – Mephisto agrees to take Faust to Gretchen's room, and to prepare a present for her.

Mephisto makes good on his promise, in the very next scene, *Abend*, and the seduction continues. Gretchen briefly appears at the beginning of the scene, braiding her hair, tying it up, wondering who this gentleman was who had taken her by the hand earlier that day, and leaves the scene. (WA 2678-2683) Faust and Mephisto enter, and plant a jewel box in a chest of drawers as a present for Gretchen, and then promptly depart the scene when they hear her approach. Gretchen soon begins a song about a king and his concubine whose love extended

²⁴¹ Although we do not learn Gretchen's exact age here, it is likely that she is very young, for she is repeatedly referred to as *Kind* (e.g. WA 2609, 2655, 2713).

²⁴² FA I, 7/2, p. 289.

beyond the grave. (WA 2759-2782) At the conclusion of this song, she finds the jewel box. Her first thought as to how the box got there is telling: she supposes someone may have brought it as collateral for a loan her mother made. (WA 2785-86) This suggests that she may not quite be the innocent child that Faust believes her to be, and also that her mother is engaged in a practice that was strictly prohibited for Christians by Canon law.²⁴³ Gretchen, it appears, is aware of her mother's unchristian practices, and of their workings. She promptly opens the box, finds therein beautiful jewels fit for a noblewoman on the highest holidays – her first enjambment comes after the word *Edelfrau* (WA 2792) – and wastes no time in putting them on.

Faust's efforts at seduction continue. In the short scene *Spaziergang*, Mephisto tells Faust that, although Gretchen's mother senses danger, the poor child herself spends her days thinking of her gift and of him who gave it to her. The restless Faust instructs the devil to come up with a new present for Gretchen, and to attach himself to her neighbor. Mephisto obeys, and the next scene is *Der Nachbarin Haus* Gretchen's neighbor, Marthe, laments that her husband suddenly left her. She weeps, and supposes he may even be dead. A legalistic desire follows her tears: "Hätt' ich nur einen Todtenschein!" (WA 2872)²⁴⁴ Mephisto will soon latch on to exactly this desire to help Faust seduce Gretchen. First, however, Gretchen enters the scene, and tells Marthe that she has received another gift. Marthe, who appears significantly older than Gretchen – Gretchen addresses her as "Frau Marthe," whereas Marthe uses "Gretelchen" and "Kind" – advises Gretchen not to tell her mother about the present, lest her mother take the gift to church. Rather, Marthe urges, Gretchen should wear the jewelry, first in private, then at a celebration as

²⁴³ FA I, 7/2, p. 296.

²⁴⁴ Georg Müller, *Das Recht in Goethes Faust* (Berlin: C. Heyman, 1912), 138-39.

soon as it will present itself – and conceal all this from her mother. (WA 2885-92) Enter Mephisto. (WA 2897) After some skillful courtesy and flattery, he informs Marthe that her husband is dead. Mr. Schwerdtlein, so Mephisto relates in his “traurige Geschichte,” (WA 2920) is buried in Padua. After rather a brief exclamation of grief at learning of her husband’s death, Marthe seems much more interested in what he has left her, materially: “Was! Nicht ein Schaustück? Kein Geschmeid'?” (WA 2933) Her curiosity is piqued when Mephisto tells her that he and her husband had seized a barque carrying treasure of the Turkish Sultan. Her anger grows when she learns that the treasure is most likely gone, because her husband squandered it on a woman in Naples.²⁴⁵ She appears to recover quickly once Mephisto suggests that he would marry her – so much so that he realizes he must flee the scene before he ends up making an enforceable promise: “Nun mach' ich mich bei Zeiten fort! / Die hielte wohl den Teufel selbst bei'm Wort.” (WA 3004-05) Before Mephisto can escape, however, Marthe returns to the legalistic desire she expressed at the outset: she needs a legally valid document that her husband is dead. Mephisto, who knows that two witnesses are required for such a document, quickly uses this to involve Faust in the matter, thus making sure that Faust will be introduced to Gretchen:

Ja, gute Frau, durch *zweier Zeugen Mund*
Wird allerwegs die Wahrheit kund;
Habe noch gar einen feinen Gesellen,
Den will ich euch *vor den Richter* stellen.
Ich bring' ihn her.

(WA 3013-17) (emphasis added)

²⁴⁵ Mephisto seems to be implying that Mr. Schwerdtlein died of syphilis, which was also known as “mal de Naples.” FA I.7/2 p. 302.

This “feine Geselle” is Faust. He shall be the second witness. The need for two eyewitnesses is one of the most famous rules of Mosaic law, and one of its most influential – and, accordingly, German law required two witnesses who had seen a person die and be buried to establish death.²⁴⁶ Marthe is convinced, and invites the two to the garden behind her house that same evening. Mephisto has successfully set up a double date.

Back on the street, Mephisto is quite pleased with how perfect Marthe is for his purposes: “Das ist ein Weib wie auserlesen / Zum Kuppler- und Zigeunerwesen!” (WA 3029-30) Mephisto has little trouble persuading Faust to violate yet another law – this time, the Eighth Commandment, which prohibits bearing false witness. Especially Mephisto’s choice of words “Ist es das erstemal in eurem Leben, / Daß ihr *falsch Zeugniß* abgelegt?” (WA 3041-42, emphasis added)²⁴⁷ emphasizes that Faust is consciously agreeing to transgress a legal prohibition here.²⁴⁸

Faust’s transgression appears to be paying off, as he is walking with Gretchen on his arm in *Garten*. We learn of Gretchen that her father passed away “Mein Vater hinterließ ein hübsch Vermögen” (WA 3117) (in seeming contradiction to her repeated claims of being poor). We learn that her brother is a soldier, and her little sister has passed away. (WA 3120-21) She apparently raised this sister single-handedly, for this sister was born after their father’s death, and their mother was in very bad shape after giving birth. Yet this little girl died – perhaps an anticipation of the fate of Gretchen and her child. (WA 3125-3135) Kissing her on the hand here,

²⁴⁶ FA I, 7/2, p. 302.

²⁴⁷ Cf. 2. Mose 20:16 (“Du sollst kein falsch Zeugnis reden wider deinen Nächsten.”)

²⁴⁸ See Müller, *Das Recht in Goethes Faust*, 140.

flattering here a bit there, confessing his love, grabbing her by both hands – and Faust has overwhelmed Gretchen. She flees the scene, and he follows her, leaving Mephisto and Marthe to comment that the young couple are quite taken with each other. (WA 3202-04)

It is possible that the seduction is hereby complete – in the sense that the couple have intercourse right after leaving Marthe’s garden – but the play does not make this clear. If up to this point in the Gretchen Tragedy, the time has been fairly clear, then after the *Garten* scene, the amount of time that passes between scenes become unclear, and can be pieced together only to a limited extent. After Gretchen flees the scene in *Garten* and Faust follows here, the lovers appear in the next scene in a *Gartenhäuschen*. This could be a *Gartenhäuschen* at which the two arrived straight from *Garten*, though their familiar tone and especially Gretchen’s apparent comfort confessing her feelings and kissing Faust suggest some time has passed. (WA 3205-06) On the other hand, Mephisto and Marthe are the ones who came and fetch them from the *Gartenhäuschen* on the grounds that it has gotten late (WA 3207-08), which does suggest that they have did come straight from the *Garten* scene. The time thus remains unclear, and we have no way of knowing whether Faust and Gretchen had intercourse by this point or not.

When we next see Gretchen and Faust together on the stage, they are again in Martha’s Garden. Gretchen famously asks Faust: “Nun sag', wie hast du's mit der Religion?” (WA 3415) Faust evades the question. Gretchen insists, and asks: “Glaubst du an Gott?” (WA 3426) After another attempted evasion by Faust, Gretchen again asks: “So glaubst du nicht?” She now receives a lengthy answer, the words of which appear to satisfy her – but she soon adds “du hast kein Christentum.” (WA 3468) Her basis for this conclusion is the company Faust keeps – though she does not know Mephisto is the devil, she senses his incompatibility with *Christentum*. These religious discussions do not prevent Faust from complaining “Ach kann ich nie / Ein

Stündchen ruhig dir am Busen hängen, / Und Brust an Brust und Seel' in Seele drängen?" (WA 3502-04)²⁴⁹ and Gretchen from retorting "Ach wenn ich nur alleine schlief! / Ich ließ' dir gern heut Nacht den Riegel offen; / Doch meine Mutter schläft nicht tief" (WA 3505-07) To solve this problem, Faust offers Gretchen a bottle containing a potion, "[d]rei Tropfen nur" will put anyone to sleep. After receiving assurances from Faust that the potion is harmless, Gretchen agrees to administer the potion to her mother. The potion will in fact be her mother's death.

We will not see the lovers on stage together again until the final scene of *Faust I*, by which time Gretchen is in a dungeon awaiting execution. By that time, she will have had a child, hence months will have passed since her seduction – that is, at least nine months have passed between *Garten* and *Kerker*, though we still have no way of determining when, exactly, Faust completed his seduction of Gretchen. But all scenes of the *Gretchen Tragedy* in which Faust and Gretchen appear together (except the final scene, *Kerker*) are part of the first element of the narrative of infanticide: the seduction.

C. The Narratives that Surround and Attack Gretchen

Gretchen does not appear on stage with Faust between *Garten* and *Kerker*, but she does appear in a number scenes without him. In each of those scenes, she is attacked by a narrative that damns her – an unmarried girl who is pregnant (or about to become pregnant).

In *Am Brunnen*, the scene that follows *Garten*, Gretchen is quickly exposed to a narrative similar to her own. Lieschen, the other girl at the well, opens with a mention of Bärbelchen. Bärbelchen, we soon learn, has apparently become pregnant from her lover. (WA 3549) The

²⁴⁹ Again, the play does not clarify whether Faust and Gretchen had intercourse. It could be that Faust is here complaining that he never has an hour to make love to Gretchen in peace – but that they have made love in a more hurried fashion. Alternatively, it could be that Faust is complaining that they have not made love at all, because he would need a "Stündchen" for that.

secret is out, and the rumor mill is in full swing, for Lieschen learned about it from Sybille, and is now telling Gretchen about it in a public place, namely at the well. (WA 3546) Marthe described the town accurately when she said: “Es ist als hätte niemand nichts zu treiben / Und nichts zu schaffen, / Als auf des Nachbarn Schritt und Tritt zu gaffen.” (WA 3198-3200) Bärbelchen’s story recalls Gretchen’s not only generally, but also in some of its particulars: “War doch so ehrlos sich nicht zu schämen / Geschenke von ihm anzunehmen” (WA 3558-59); “Uns Nachts die Mutter nicht hinunterließ, / Stand sie bei ihrem Buhlen süß.” (WA 3564-65) Lieschen’s narration is harsh in many places – e.g. “So ist's ihr endlich recht ergangen” (WA 3551) – and ends in a familiar way: “Da mag sie denn sich ducken nun, / Im Sünderhemdchen Kirchbuß' thun!” (WA 3568-69) Gretchen is sympathetic to Bärbelchen, and briefly tries to attach a different ending to the narrative: “Er nimmt sie gewiß zu seiner Frau.” (WA 3570)²⁵⁰ Lieschen promptly eliminates this ending – after all, she reasons, a young man has plenty of options, and would be a fool to marry Bärbelchen; surely, he has left already. (WA 3573) And even if he has not, the ending for Bärbelchen (or for Gretchen) is hardly a happier one: “Kriegt sie ihn, soll's ihr übel gehn. / Das Kränzel reißen die Buben ihr, / Und Häckerling streuen wir vor die Thür!” (WA 3574-76)

Unsurprisingly, in the next scene, *Zwinger*, Gretchen is in distress as she prays to the Virgin Mary – more precisely, to the *Mater Dolorosa*. This *Mater Dolorosa* is looking upwards, to her Son’s death: “Blickst auf zu deines Sohnes Tod.” (WA 3592) Only this Virgin Mary can understand Gretchen’s pains and fears. (WA 3596-3600) It is unlikely that Gretchen’s child has

²⁵⁰ In German literature of the seventeenth century, marriage was a common ending for a narrative that started with seduction – but not so in the eighteenth century, unfortunately for Gretchen. Kord, *Murderesses in German Writing, 1720-1860: Heroines of Horror*, 122.

already been born and killed – for Gretchen will appear on stage twice more, before the *Kerker* scene, and be quite free. Rather, Gretchen asks the *Mater Dolorosa* to save her not only from shame – which is understandable after *Am Brunnen* – but also from death: “Hilf, rette mich von Schmach und Tod!” (WA 3616) Gretchen, it seems, knows that death often follows extramarital pregnancy, and fears – quite rightly – that she may die herself.

Her brother, however, will die first. He appears at the outset of the next scene, *Nacht*, on the street in front of Gretchen’s house. He has heard of her disgrace, and, sighting Faust and Mephisto, intends to kill them. (WA 3646-49) He is angered by Mephisto’s *Moralisch Lied* – which warns women not to sleep with men until they have a wedding ring – and even breaks Mephisto’s *Zither*. (WA 3700-02) He then attacks Faust. Faust, at Mephisto’s urging, does not flee, but stays to fight. Mephisto, however, does most of the fighting – he parries several blows from Valentin, then paralyzes his hand, and tells Faust “Stoß' zu!” (WA 3711) Valentin falls. Although duels were probably legal at the relevant time,²⁵¹ this was not a legal duel, because it was two against one, not to mention Mephisto’s use of his powers to paralyze Valentin’s hand.²⁵² This illegality – this murder – is immediately underscored by Mephisto:

Nun aber fort! Wir müssen gleich verschwinden:
Denn schon entsteht ein mörderlich Geschrei.
Ich weiß mich trefflich mit der Policei,
Doch mit dem Blutbann schlecht mich abzufinden. (WA 3712-15)

But now away! We must disappear immediately:
For already a murderous cry arises.
I get along well with the the police,
But poorly with the blood-ban.

²⁵¹ Assuming we are in the time of the historical Faust, rather than in Goethe’s time.

²⁵² Müller, *Das Recht in Goethes Faust*, 168-69.

Mörderisch Geschrei here means the cries that announced an attempted or committed murder.²⁵³ *Policei* refers to the regulations for an orderly society, *Blutbann* to the *Peinliche Gerichtsbarkeit* [Penal Law].²⁵⁴ Gretchen is among those who find her dying brother. Before he dies, however, he tells her a narrative about what will become of her. He describes his own sister as “eine Hur” (WA 3730) [“a whore”], and states that, given that one man has had her already, more will soon follow, until the whole town has had her. He then narrates how shame, once born in secret, only grows; his narrative is phrased in such a way that shame and a child are closely compared, if not equated – and infanticide is suggested:

Wenn erst die Schande wird geboren,
Wird sie heimlich zur Welt gebracht,
Und man zieht den Schleier der Nacht
Ihr über Kopf und Ohren;
Ja, man möchte sie gern ermorden.
Wächs't sie aber und macht sich groß,
Dann geht sie auch bei Tage bloß,
Und ist doch nicht schöner geworden.
Je häßlicher wird ihr Gesicht,
Je mehr sucht sie des Tages Licht.
(WA 3740-3749) (emphasis added)

Just like an extramarital child, shame here is first born in secret – recall that concealed pregnancy and birth were a frequent feature of the infanticide narrative – has a head and ears, and evokes the desire to kill it. And if one does not kill it, then it only grows, and does not go away – recall that extramarital children had to deal with stigma and shame for their entire lives.

²⁵³ FA I, 7/2, p. 336.

²⁵⁴ FA I, 7/2, p. 337.

As if this were not too much already, Valentin adds that he can already see the time when Gretchen will be shunned by “alle brave Bürgersleut” (WA 3751), no longer be allowed to wear a gold chain, and not be welcome in church,²⁵⁵ and end up hiding among beggars and cripples, damned on earth, even if she may one day be pardoned by God.

This hope for a divine pardon is attacked in the next scene, *Dom*. Gretchen appears one last time before the *Kerker* scene at a mass, with organ and choir, and a *Böser Geist* behind her. The *Böser Geist* accuses her of having lost her innocence, and of having a crime in her heart. This tormenting spirit then charges her with at least three accusations: killing her mother, causing the death of brother, and being pregnant. Gretchen cannot escape these tormenting thoughts, no matter how much she tries. The Choir sings the hymn *Dies irae*, of which we hear only the part on judgment and accusation – even though at least 11 of its 19 strophes ask for divine compassion, the mercy of Christ, and eternal bliss.²⁵⁶ The Day of Wrath will come, according to the hymn, and the judge will sit, nothing will remain hidden, and all things will be punished. The *Böser Geist* emphasizes that Gretchen will not be able to hide her sins. *Quid sum miser tunc dicturus?* [What will I, wretch, then say?] the hymn continues. This verse is repeated, and Gretchen has no answer, but rather faints. The *Böser Geist* standing behind her, whispering damning narratives to her which she is unable to answer mean this episode can be read as Gretchen’s conscience failing. The *Böser Geist* is the personification of bad conscience, bringing

²⁵⁵ A 16th-century Frankfurt ordinance known to Goethe prohibited dishonored maidens from wearing gold chains and from occupying a space in church. FA I, 7/2, p. 337.

²⁵⁶ FA I, 7/2, p. 339.

his accusations in narrative form – Gretchen’s conscience has no response, it is defeated, and she faints.²⁵⁷

Gretchen thus finds herself surrounded by damning narratives. From one side, Lieschen makes clear that Gretchen will be abandoned by her man, condemned by the townspeople, and faced with *Kirchenbuße*. Indeed, these townspeople will even take justice into their own hands if need be. From another side, Valentin, her brother – and, as far as we know, her only remaining family member – calls her, with his dying words, a *Hur*’, tells her she is damned on earth, doomed to a life of misery, and suggests she will commit infanticide. Finally, as if the threat of *Kirchenbuße* and exile into misery were not enough, the *Böser Geist* and the Choir make sure she feels condemned by the church as well. In other words, Gretchen is excluded by her community, her family, and the Church. She has nowhere left to go, except into an exile of misery, or the hereafter – which she will be painfully aware of when we see her again in the final scene of *Faust I*.

D. Gretchen in the Dungeon

When we see Gretchen for the last time in *Faust I*, she is in a *Kerker*. We are told very little about why she is there. Faust tells us she is there as a “Missethäterin” (WA p.226)²⁵⁸ and has “Erbärmlich auf der Erde lange verirrt und nun gefangen” (*Id.*) It is unclear where Faust got this information or how reliable it is.²⁵⁹ Strictly speaking, the only crime she may have committed for

²⁵⁷ See *supra* Chapter I.B. See also FA I, 7/2, p. 340.

²⁵⁸ Because the scene *Trüber Tag, Feld* is in prose, citations to it use page numbers, rather than line numbers.

²⁵⁹ Remarkably, as Bohm notes, “[c]lose examination of the commentaries reveals that the entire history (pregnancy, birth and death of child, killing, flight, capture and conviction of the mother) has been erected solely on the basis of Faust’s words ‘Im Elend! Verzweifeld! Erbärmlich auf der Erde lange verirrt und nun gefangen! Als Missethäterin im Kerker zu entsetzlichen Qualen eingesperrt das holde unselige Geschöpf! Bis dahin! dahin!’” Bohm proceeds to note that this “hearsay is being related to us by someone who is himself not in a very sound or stable frame of mind.” Bohm, “Margarete’s Innocence and the Guilt of Faust,” 220. Although we have seen in the preceding sections

which she would be sentenced to death is infanticide, because she is not legally sufficiently culpable of her mother's or her brother's death to receive the death penalty for either of those deaths.²⁶⁰ But that does not mean that she could not have been held responsible for these deaths by a less-than-objective judgment. Mephisto, at least, is quite explicit that Gretchen has to be saved from the "Bande des Rächers" (WA p.229) – suggesting she is dealing not with justice, but with revenge.

When Faust arrives in the *Kerker*, there is singing coming from behind the door.²⁶¹ The verses are from the *Märchen von Machandelbaum*, though slightly modified,²⁶² wherein the mother has killed her child:

Meine Mutter, die Hur',
Die mich umgebracht hat!
Mein Vater, der Schelm,
Der mich gessen hat!
Mein Schwesterlein klein
Hub auf die Bein',
An einem kühlen Ort;
Da ward ich ein schönes Waldvögelein;
Fliege fort, fliege fort!
(WA 4412-4420)

of this chapter that there is some basis on which to conclude that Gretchen was pregnant (even if it not possible to know when she became pregnant), and the final scene (*Kerker*) will provide some further support for her pregnancy, the death of the child, and her apprehension, there is still no sufficient basis on which to conclude that Gretchen killed her child, or even that her child is dead.

²⁶⁰ Müller, *Das Recht in Goethes Faust*, 146.

²⁶¹ It is generally assumed that Gretchen is singing these verses. However, the stage directions are about as impersonal as possible "es singt inwendig." In the actual *Märchen*, the song is sung by a bird. Thus, it may be that it is not actually Gretchen who is singing here.

²⁶² This *Märchen* was not published in written form until 1806 by Phillip Otto Runge, and then again later by the brothers Grimm. However, it already figures in the *Urfaust* (1772-75), so it is not known which version of the *Märchen* Goethe relied on. The main differences between Goethe's version and the published versions published versions are the addition of *Hur'* to describe the mother and *Schelm* to describe the father. FA I, 7/2, p. 378-79.

This singing suggests (but does not establish) that Gretchen killed her child. She has already been called a *Hur*’ before by her brother,²⁶³ and is the only female character in this scene. For this *Märchen* to describe Gretchen, significant aspects of the *Märchen* have to be ignored: in that tale, a *stepmother* killed the child, the child was already several years old, and the stepmother fed the child to its father – none of which applies in Gretchen’s case. But as we saw in Chapter I, *supra*, the nucleus of the narrative, not its details, shape thought.

Gretchen first mistakes Faust for “Bittre Tod” (WA 4423). She asks not so much to be pardoned, as to be treated with some humanity, some compassion (“Bist du ein Mensch, so fühle meine Noth”; “Laß mich nur erst das Kind noch tränken.”) She claims that she had held it close to her heart the entire night, but that:

Ich herzt' es diese ganze Nacht;
Sie nahmen mir's um mich zu kränken
Und sagen nun, ich hätt' es umgebracht.
Und niemals werd' ich wieder froh.
Sie singen Lieder auf mich!
Es ist bö's von den Leuten!
Ein altes Märchen endigt so,
Wer heißt sie's deuten?
(WA 4444-49)

Gretchen could be saying that her child died in her arms of its own accord, after which “they” then took it away and said she killed it. Or, she could even be saying that “they” took her living child from her, killed it, and are now blaming her. If we recall that Lieschen discussed how the townspeople would take justice into their own hands in Gretchen’s case, and how Mephisto described Gretchen as caught in bonds of an avenger, then Gretchen’s versions are plausible. The *altes Märchen* she is alluding to could be the *Märchen von Machandelbaum*, or any one of the

²⁶³ See *supra* p.123.

many other *Märchen* wherein a mother (or stepmother) kills her child.²⁶⁴ What matters here is not exactly which *Märchen* Gretchen is alluding to, but that she claims that her guilt was established because of a *Märchen*, a narrative.

Gretchen only realizes who Faust is after he loudly calls her by her name. She immediately thinks she is saved, and seeks Faust's caresses. She does not receive them. To her "weile" (WA 4479), he (changing one crucial letter), retorts "eile."²⁶⁵ (WA 4481) His kiss does not convince her: "Wie? du kannst nicht mehr küssen?" (WA 4484) Convinced that Faust no longer loves her, she changes her story:

Meine Mutter hab' ich umgebracht,
Mein Kind hab' ich ertränkt.
War es nicht dir und mir geschenkt?
Dir auch. --- Du bist's! ich glaub' es kaum.
Gib deine Hand! Es ist kein Traum!
Deine liebe Hand! --- Ach aber sie ist feucht!
Wische sie ab! Wie mich däucht
Ist Blut dran.
Ach Gott! Was hast du gethan!
Stecke den Degen ein;
Ich bitte dich drum! (WA 4507-4517)

That Faust has his sword out further suggests that he has come more with violence than with love. It is doubtful that he in fact has blood on his hand – more likely, this is Gretchen's feeling of guilt for her brother's death getting the better of her. She also now blames herself for her mother's death, and for her child's death. She likely has some guilt for her mother's death, because she administered poison to her, although Faust had convinced her that it was a sleeping

²⁶⁴ See *supra* n.224.

²⁶⁵ Another part of the word play here is that the word *verweile*, arguably part of the pact between Faust and Mephisto, is not uttered. See *infra* Chapter V.C.

potion.²⁶⁶ As to her child, however, there is no reason to suppose that her current version is closer to the truth than the previous one. That is, there is no reason to suppose that she drowned her child, rather than had her child taken away from her. Indeed, it may be the hopelessness of the situation that causes her to claim that she is guilty. For a little while, Faust brought her hope, but because she now believes that he no longer loves her, her future looks bleak to her, even if she will escape from the dungeon. After describing how she wishes her family and herself to be buried, she makes this lack of hope explicit:

Ich darf nicht fort; für mich ist nichts zu hoffen.
Was hilft es fliehn? Sie lauern doch mir auf.
Es ist so elend Betteln zu müssen,
Und noch dazu mit bösem Gewissen!
Es ist so elend in der Fremde schweifen,
Und sie werden mich doch ergreifen! (WA 4544-49) (emphasis added)

Before Faust leaves, Gretchen tells him another story still – the third version of what happened to their child.²⁶⁷ The child, she claims, is still alive, and she tells Faust how to find it: “Rette dein armes Kind. / Fort! Immer den Weg / Am Bach hinauf, / Über den Steg, / In den Wald hinein, / Links wo die Planke steht, / Im Teich.²⁶⁸ / Faß es nur gleich! / Es will sich heben, / Es zappelt noch! / Rette! rette!” (WA 4552-4562)

²⁶⁶ See *supra* p. 120.

²⁶⁷ Both alternative explanations (that Gretchen’s child was taken from her; that she hid her child away) have received very little attention from commentators. At most, they have been dismissed as the hallucinations of a madwoman. Bohm, “Margarete’s Innocence and the Guilt of Faust,” 228-29. (“Even though the language [of lines 4551-62] is so powerful, critics have found almost nothing to say about these lines, relegating them to the background noise of dramatic atmosphere”) It is entirely possible that Gretchen is mad for a whole of part of this scene – after all, she has been through an incredible ordeal. But if she is mad, we have no way of knowing when she is speaking the truth, and when she is not. Thus, again, we have no way of determining which of the three explanations for her child’s absence to believe: Did she drown her child? Did “they” take her child from her? Did she hide her child away? These questions are no less poignant if Gretchen is mad than if she is sane.

²⁶⁸ “Teich” can be rendered “dike” (“Teich was a common alternative spelling of “Deich”) or “pond.” “Teich” commonly referred to the kind of pond from which the water could be let out, meaning that Gretchen’s child could

Faust does not appear to believe her. Rather, he attempts to carry her off by force – she refuses. She stays for her impending death. Upon seeing Mephisto appear, her horror only grows. She surrenders herself to God’s court. Mephisto exclaims that she is judged – a voice from above (presumably the Lord’s voice) says she is saved. Mephisto and Faust disappear together, and a voice (presumably Gretchen’s voice) is heard from inside, fading, calling Faust by his first name: “Heinrich! Heinrich!” (WA 4612)

E. Why Gretchen was Judged

Gretchen has been judged as a *Kindsmörderin* nearly universally, within the play and by its readers.²⁶⁹ Yet the evidence that she has killed her child is scant. A significant number of scenes is devoted to the seduction of Gretchen by Faust – the first part of the dominant narrative. We are left to infer that she became pregnant and gave birth. Then, crucially, we have nothing on which to conclude reliably that she killed her child. The best evidence of her guilt that we have is her confession. Confessions, as we have seen in Chapter III, *supra*, are not a reliable basis for a conviction, and here that confession is even contradicted by two alternative accounts that she offers.²⁷⁰

We do see a Gretchen who is defeated by the narratives that have surrounded her since *Am Brunnen*. There, Lieschen told her the narrative that lovers abandon women like her. Lieschen then told her that even if those lovers stay, there is no hope for a happy ending. Her

be alive in a pond that contained no water. Adlung, *Grammatisch-kritisches Wörterbuch der hochdeutschen Mundart, mit beständiger Vergleichung der übrigen Mundarten, besonders aber der Oberdeutschen*, v.4, p.550.

²⁶⁹ See *supra* p.113.

²⁷⁰ Bohm proposes that Gretchen may also have been tortured, or else is afraid that she will be tortured. Bohm, "Margarete's Innocence and the Guilt of Faust," 227 & n.29. Given the realities of infanticide jurisprudence described in Chapter III, *supra*, this is likely, and would likely also have been understandable to contemporary readers.

own brother also told her that stories like hers end tragically, even if she will manage to evade the authorities. Her desperation in the *Kerker* scene is littered with allusions to these narratives that have surrounded her, for instance: “zerrissen liegt der Kranz” (WA 4436) recalls Lieschen’s words “Das Kränzel reißen die Buben ihr” (WA 3575); “Es ist so elend Betteln zu müssen” (WA 4546) recalls Valentin’s words “Unter Bettler und Krüppel dich verstecken” (WA 3761); “Und noch dazu mit bösem Gewissen!” (WA 4547) recalls the *Böser Geist* and the bad conscience Gretchen suffered in *Dom*. Her belief “Und sie werden mich doch ergreifen!” (WA 4549) echoes the generally hopeless outcome of the narratives that have surrounded her, summarized by Valentin when he said: “Auf Erden sein vermaledeit!” (WA 3763). Her final act – surrendering herself to God’s court – has also already been told in the *Dom* scene, where a divine court was presented as the final court of judgment.

Gretchen claims that her situation is futile directly after Faust told her “Du kannst! So wolle nur! Die Thür steht offen.” (WA 4543) In other words, nothing physical prevents Gretchen from escaping. Even when Faust attempts to carry her away with force, she refuses. She only sees her impending death, that is, the consequence of the ending of the *Märchen von Machandelbaum* and of “ein altes Märchen” (WA 4449) (which could be the same *Märchen*), the same ending Valentin had hinted at (“Ja, man möchte sie gern ermorden.” (WA 3744)

The narratives that surround her thus determine Gretchen’s reality. For someone living in the time of the historical Faust (or even in Goethe’s time), she is probably right – for indeed, unmarried women who gave birth (and were caught) ended up punished, often with death. Flight was not likely to lead to much good, for high rewards were given out for catching such women,

and they would therefore have to live on the margins of society to survive.²⁷¹ Within the world of the play, however, she is probably wrong. For Faust and Mephisto have magical black horses to take her away on, and in *Faust II* we will very soon find ourselves in the *Saal des Thrones* of a *Kaiserliche Pfalz* – where the norms and values much more easily permitted unmarried people to live together.²⁷² But not reality determines Gretchen's decision. Rather, her belief about what will happen does – and that belief is shaped by the narratives that have surrounded her.

Although the occasional counternarrative – a narrative that spells a different outcome for Gretchen – does arise, it is soon extinguished. Thus, in *Am Brunnen*, Gretchen does propose that Bärbelchen's lover will marry her – but this alternative narrative lasts exactly one line until Lieschen shatters it. She has no counternarrative to offer to Valentin or to the *Böser Geist*. In *Kerker*, she does provide two alternative narratives, first that her child was killed by others, and then that it is still alive, but that she hid it. But she quickly changes to the narratives that are damning to her – that she killed it, that there is no hope for her if she escapes, that she will be executed. Nobody believes her, however. The court has apparently sentenced her to death, and Faust – the father whose child might still be alive – does not bother to check if his child is indeed still alive. On her own, feeling abandoned, she is unable to sustain these narratives.

What Gretchen believes, and what she does, is thus profoundly shaped by narrative. Even presented with the physical opportunity to escape from the *Kerker*, she refuses, she does not

²⁷¹ For instance, in the Brandt case, a reward of 50 *Reichthalern* – more than four times her annual income was promised to anyone who seized her. FA I, 7/2, p. 459.

²⁷² Note that Goethe himself enjoyed a similarly privileged position that effectively placed him above the laws and the stigma that Gretchen fears so much. He had lived with Christiane Vulpius for many years – and they had many children – until they legalized their marriage in 1806. Though several of their children died in childbirth or very young, they did not have to worry about charges of infanticide. Müller-Dietz, "Die Strafjustiz in der Sicht Goethes," 297- 98.

believe there is any point to it, because her narrative must end badly – whatever narrative begins with seduction ends badly. What has been believed about her by audiences and readers also appears to have been shaped by a narrative, namely by the dominant narrative of infanticide in Goethe’s time. *Faust I* offers only the first element of that narrative: seduction. The other elements – (concealed) pregnancy, (concealed) birth, killing of the child by its mother – happen behind the stage (to the extent they happen at all), thus leaving them to the imagination of the reader.²⁷³ While the indications for pregnancy and birth are strong, the indications for the killing are contradictory at best, and may even point to Gretchen not having killed her child. The audience, or the readers, thus have about as much information as a court in Goethe’s time would typically have in a case of alleged infanticide. That is, the seduction (though not the intercourse) are played out quite extensively on stage. That there was a pregnancy, and hence a birth, we can be reasonably certain of, though it is not clear whether Gretchen tried to conceal them. We do not see the killing of her child (if such a killing even took place), and have no reliable account of it. We do get a confession from Gretchen – but it is muddied by her two contradicting statements: that the child was taken from her, and killed; and that the child is alive, though abandoned in the forest. There is no reason to take her confession of murder over these other two accounts. In any event, confessions are hardly a credible basis for conviction, although they were still judged to be at the time. The evidence against Gretchen is analogous to the evidence that would be before a court in Goethe’s time. Courts would typically have evidence that a woman was pregnant, and then either have the child’s body or secure a confession if they did not.²⁷⁴

²⁷³ Cf. FA I.7/2, p. 306, 322.

²⁷⁴ See *supra* p. 81, 90.

Which of these scenarios is Gretchen's is unclear, because we do not know whether the court had the child's body – but either way, Gretchen's case was typical, the evidence against her scant. It seems that courts and audiences have shown themselves to work similarly in this case, for Gretchen was judged to be a *Kindsmörderin* by court and audience alike.

This is not to say that Faust readily accepts Gretchen's fate, even though he hardly questions her guilt. He is outraged when he learns of it in the scene *Trüber Tag, Feld* and persuades a reluctant Mephisto to help him save Gretchen. On black horses, he and Mephisto come to her rescue. He enters her dungeon, pleads with her, even resorts to force. Faust's attempt to free Gretchen from prison is against the law, for it is prohibited to help a prisoner escape.²⁷⁵ Much like the several legal violations that have occurred already – bearing false witness, fornication, an illegal duel and murder – do not lead to anything good, so, too, nothing good comes of this infraction. As we have seen, Faust fails to free Gretchen, or to change her fate. She will not follow him through an open door. Even force does not work, for when Faust attempts force, Gretchen reacts: "Nein, ich leide keine Gewalt!" (WA 4576) When Mephisto exclaims "Sie ist gerichtet!" (WA 4611) he is correct insofar as human justice is concerned. Why Gretchen is rescued by the Lord we will return to in Part III – for now, we have seen that in *Faust*, neither breaking the law nor violence²⁷⁶ lead to legal development. Gretchen is sentenced to death, and

²⁷⁵ Müller, *Das Recht in Goethes Faust*, 191.

²⁷⁶ Goethe frequently expressed a distaste for violence, especially as a means of development, e.g. in the *Gespräche mit Eckermann*: "Sie wissen, wie sehr ich mich über jede Verbesserung freue, welche die Zukunft uns etwa in Aussicht stellt. Aber, wie gesagt, jedes Gewaltsame, Sprunghafte ist mir in der Seele zuwider, denn es ist nicht naturgemäß." (WA Anhang, v.5, p.176) ["You know, how much I rejoice over any improvement, which the future provides us as a prospect. But, as I said, anything violent, leaping, is counter to my soul, for it is not in accordance with nature." See also Müller-Dietz, "Die Strafjustiz in der Sicht Goethes," 287.

there is no indication that attitudes towards infanticide are changing. For now, the problem of infanticide remains unsolved.

Conclusion of Part II

A simple narrative, implicit and unnoticed, shaped the understanding of infanticide in Goethe's day. This narrative meant that women were convicted for murder to a large extent because it simply did not occur to anyone that someone else could be the culprit. In order to consider alternative culprits, one would need alternative narratives – but those were forgotten. Thus, law and policy in Goethe's time failed to decrease infanticide, and Gretchen has been assumed to be a child-killer. Law and policy only considered that the mothers could be the killers – for so the narrative went – and hence only focused on them as possible perpetrators. Similarly, seduction, the first element of the narrative of infanticide, coupled with inconclusive indications that Gretchen killed her child, has been enough to lead to the conclusion that Gretchen is a *Kindsmörderin*.

To return to the language of Chapter I, it was not deemed *wahrscheinlich* that anyone but the mother would kill an infant, for there was no narrative for any such alternative culprits. More precisely, such narratives were forgotten. Such narratives can be found in the Bible, in *Märchen*, and in other sources – but, somehow, they were forgotten. Gretchen, who is surrounded and destroyed by damning narratives, briefly attempts to introduce alternative narratives. More precisely, she attempts to reintroduce them, because the narratives she proposed are based on forgotten ones. We will see many instances in Goethe's work of borrowing from the past to move things forward. Gretchen, however, fails, just like law and policy in Goethe's time failed. As we will see in Part III, she fails not because the alternative narratives she proposes are themselves inadequate. Rather, she fails because she exists within a highly bordered world, and a

highly bordered legal order. That is, the *gränzunbewußte* legal order discussed in Chapter II is lacking in Gretchen's world, except for her appeals to the Lord – and the Lord does rescue her. It would appear that God alone can see outside the walls of this narrative.

PART III. FROM THE DEVIL'S COURT TO A COURTLESS DEVIL

Part II of this dissertation saw a world dominated by centralized laws of bordered realms. In Chapter III, the *Carolina* of the Holy Roman Empire played a key role. Laws from smaller bordered realms, such as Prussia and even Sachsen-Weimar-Eisenach, played their part as well. In Chapter IV, the effect of these laws was felt in *Faust I*, especially in the fate of Gretchen. The absence of meaningful legal change dominated both those chapters – especially with respect to infanticide, little meaningful change occurred, and the key problem remained unresolved: potentially innocent women were condemned of infanticide.

In Part III of this dissertation, as we turn to *Faust II*, the picture changes. On the one hand, legal advancement begins to take place. On the other hand, the absence of change is revealed to be not stability or constancy, but stagnation and decay. This stagnation and decay are associated with the legal order that dominated Part II: centralized, bordered, and rigidly adhering to the written word. Legal advancement, however, is associated with another legal order: the *gränz unbewußte* order laid out in Chapter II. Mephistopheles is the main proponent of the order of stagnation and decay; the *Kaiser* and many more minor characters support this order as well. Helena and the Lord are the main champions of the *gränz unbewußte* order.

Faust himself at once resists and builds the order of stagnation, in part because he does not fully understand the difference between these legal orders, and in part because he is conflicted between them – until, at the end of *Faust II*, he finally creates the *gränz unbewußte* order. Faust's ceaseless striving makes him discontent with the order of stagnation, even if he does not quite understand why – ironically, he therefore ends up devoting much energy to building the centralized rule and rigid borders associated with the order of stagnation. Only in the

final act does he finally curse the “hier” that represents the order of stagnation, and build the *gränz unbewußte* order.

This *gränz unbewußte* order is Faust’s final victory over Mephistopheles. Mephisto knows that he has lost, and he knows that something has changed, but he cannot quite put his finger on it. Mephisto knows that in the world at the end of *Faust II*, he will not be able to enforce his pact with Faust anywhere, and therefore will not be able to seize Faust’s soul. This does not mean that Mephisto accepts his defeat, however. Rather, he believes that he has a right to Faust’s soul, and that he has been deprived of that right. Mephisto is not wrong – for in the legal order of stagnation, with its rigid adherence to the written law, he does have a right to Faust’s soul. But Faust has built a different world, with a *gränz unbewußte* order, where the written word can give way to justice – and thus Mephisto loses.

Chapter V. Two Framing Pacts: *Prolog im Himmel* and the Devil’s Pact

A. Introduction

Part III of this dissertation attends to the role in *Faust* of two conflicting legal orders. The first legal order, associated with Mephisto and the *Kaiser*, and indeed with most of *Faust I*, is bordered, centralized, and rigidly adheres to what is written down. This order is designed to prevent change. It is the order of stagnation, and thus of decay. The second legal order, which gradually comes to the fore in *Faust II*, associated with the Lord and with Helena, allows narratives to cross borders, is not centralized, and attaches less importance to writing. This order is designed for change.

This chapter, the first of Part III, focuses on two early manifestations of these different conceptions of legal orders in *Faust*. In the *Prolog im Himmel*, the Lord concludes a pact with Mephistopheles – nothing is written down, and the setting is as free of borders as can be:

Heaven. In the second *Studierzimmer* scene of *Faust I*, Mephisto insists on a written document, and we find ourselves walled in by the confines of Faust's narrow study. Meanwhile, Faust himself is conflicted. He is irritated by Mephisto's insistence on a written document, understanding the intention to bind him for eternity by means of it; but he agrees all the same.

B. Prolog im Himmel

In the *Prolog im Himmel*, the Lord and Mephistopheles make a bet. Two things are at stake. On one level, this bet is about Faust. For if Mephisto can lead Faust astray – “Und führ' ihn, kannst du ihn erfassen, / Auf deinem Wege mit herab,” (WA 325-26) – then Mephisto wins. Yet if Faust instead remains on the right path (“Und steh beschämt, wenn du bekennen muß: / Ein guter Mensch in seinem dunklen Drange / Ist sich des rechten Weges wohl bewußt.” (WA 327-329), then Mephisto loses. On another level, this bet is about different views of mankind. Mephisto offers a grim view of mankind (or, from his satanic perspective, a happy one): “Nein Herr! ich find' es dort, wie immer, herzlich schlecht. / Die Menschen dauern mich in ihren Jammertagen, / Ich mag sogar die armen selbst nicht plagen.” (WA 296-298). In response to this vision, the Lord offers Faust, his “Knecht,” (WA 299) thus suggesting that Faust can disprove this grim vision of humanity. Mephisto agrees that Faust serves the Lord, but is derogatory towards Faust: “besondre,”²⁷⁷ “Toren,” “Tollheit” (WA 300-04) are only some of the words that characterize Faust in Mephisto's eyes. The Lord does not disagree with Mephisto insofar as Faust serves Him “nur verworren,” (WA 308) but believes that He will promptly lead Faust “in die Klarheit.” (WA 309) Mephisto is equally convinced that he will lead Faust astray,

²⁷⁷ Not unlike English “special,” German “besonder” does not necessarily carry a negative connotation, but given the context, that is likely how Mephisto intends it. See Adelung, *Grammatisch-kritisches Wörterbuch der hochdeutschen Mundart, mit beständiger Vergleichung der übrigen Mundarten, besonders aber der Oberdeutschen*, v.1, p.915.

and thus win this bet: “Schon gut! nur dauert es nicht lange. / Mir ist für meine Wette gar nicht bange.” (WA 330-31) And should Mephisto indeed prevail, he relies on the angels present to be permitted “Triumph aus voller Brust.” (WA 333)

Several aspects of this bet are quite remarkable. First, either party to this bet stands to win only an admission from the other party. Mephisto accepts that if he loses, he will have to “steh’ beschämt” (WA 327-29) as he admits his defeat. If he wins, he will be allowed “Triumph aus voller Brust” (WA 333). Second, Mephisto and the Lord consent to letting the angels to adjudicate the dispute.²⁷⁸ Both parties apparently trust that the angels will be competent and fair; and also trust each other to follow the decision of the angels. This is a particularly great act of trust given that the terms of the pact, such as “des rechten Weges” and “deinem Wege” – are broad and vague. Third, Mephisto can win only in two ways. He must show that the Lord is wrong either about Faust specifically (in that Faust is not in fact “[e]in guter Mensch” (WA 328)), or about “good people” generally (in that “good people” do not in fact always remain “sich des rechten Weges wohl bewußt.” (WA 329). Mephisto cannot win merely by proving that Faust is a confused and special fool who cannot be satisfied – after all, the Lord hardly contests this. Mephisto also cannot win merely by causing Faust to err. For the Lord is quite aware that Faust errs: “Es irrt der Mensch so lang er strebt.” (WA 317). Indeed, ironically, the Lord seems worried that Faust could lose his “Thätigkeit” (WA 340) – and Mephisto serves to protect Faust from this human weakness: “Des Menschen Thätigkeit kann allzuleicht erschlaffen, / Er liebt sich bald die unbedingte Ruh; / Drum geb’ ich gern ihm den Gesellen zu, / Der reizt und wirkt und muß als Teufel schaffen.” (WA 340-43)

²⁷⁸ Mephisto states “Erlaubt ihr mir Triumph aus voller Brust.” (WA 333) Other than Mephisto and the Lord, the only ones present are the angels, who are thus the only ones “ihr” can refer to.

The *Prolog im Himmel* is remarkable also for where it is set. The *Vorspiel auf dem Theater* that preceded it occurred on a German stage (WA 231); the scene *Nacht* that succeeds it takes place in a small Gothic room – yet the *Prolog* is set in Heaven. Technically, Goethe here intended a stage above the stage, one that closes only at the end of the *Prolog* to leave Mephisto standing alone on the stage.²⁷⁹ Unlike the *Vorspiel*, the *Prolog* is not bound to any nation or to its borders. Unlike *Nacht*, the *Prolog* is not bound by the walls of a narrow room. Rather, the three archangels who open the scene extensively discuss celestial bodies and their workings, thus emphasizing that we are in the boundless realm that is Heaven (WA 243-270).

This pact between the Lord and Mephistopheles is thus a pact about two conflicting visions of mankind. The pact entitles the winner to nothing more than an admission from the loser. It is concluded in a location that is free from any human boundaries – there are no state borders in Heaven, and no walls. Mephisto and the Lord agree to the pact, and consent to the jurisdiction of the angels.

The structure here is not that of state courts, but much rather that of the *gränzunbewußte* arbitration described in Chapter II: party consent; parties and arbitrators who do not need to think about state borders, and who are not constrained by them; global enforcement (for angels have power everywhere on earth). And just as an arbitration agreement frames the rest of a contract and lays out how, by what standard, and by whom a dispute will be resolved, so, too, the *Prolog im Himmel* frames *Faust* and lays out how, by what standard, and by whom the dispute between the Lord and Mephisto will be resolved. Indeed, it even provides a standard for evaluating not only Mephisto's success, but also Faust's.

²⁷⁹ FA I, 7/2 p.162.

C. *The Pact between Faust and Mephisto*

Mephisto does not tarry to conclude a pact with Faust as well. After first appearing in the third scene of *Faust I* (the first *Studirzimmer* scene), he promptly appears again in the next scene, the second *Studirzimmer* scene, and there concludes the pact. The contents of this famous pact are never revealed to us – a significant omission that has, to the best of my knowledge, been entirely overlooked by the commentators. Before Faust signs this pact in blood, however, the two future companions have a lengthy conversation, to which we now turn.

First, Mephisto offers himself as a companion to Faust. He uses the same word, *Geselle*, that the Lord had used in the *Prolog im Himmel* in order to describe the role Mephisto will assume vis-à-vis Faust.²⁸⁰ He thus follows the Lord's instructions. He also calls himself the *Knecht* of Faust, the word the Lord used to describe Faust's relation to Him.²⁸¹ Mephisto thus suggests that Faust will be a kind of god; recall that in the *Prolog im Himmel*, Mephisto had called man "Der kleine Gott der Welt" (WA 281).²⁸²

Ich bin dein Geselle
Und, mach' ich dir's recht,
Bin ich dein Diener, bin dein Knecht!
(WA 1646-48)

Faust, perhaps because he has studied both "Juristerey" and "Theologie" with such "heissem bemühn," (WA 355-57) immediately realizes that, especially because he is dealing with a devil, there will be a price to pay for Mephisto's services.

Faust.
Und was soll ich dagegen dir erfüllen?
Mephistopheles.
Dazu hast du noch eine lange Frist.

²⁸⁰ See *supra* p.140.

²⁸¹ See *supra* p.139.

²⁸² This is an apparent reference to Leibniz, who likened man to "un petit Dieu dans son propre monde." *Essais de Théodicée* 2, § 147. See FA I, 7/2 p.169.

Faust.

Nein, nein! der Teufel ist ein Egoist
Und thut nicht leicht um Gottes Willen
Was einem andern nützlich ist.
Sprich die Bedingung deutlich aus;
Ein solcher Diener bringt Gefahr in's Haus.
(WA 1649-1655)

Faust's words also betray that his understanding is not equal to that of the Lord. For the Lord understands that Mephisto, precisely by becoming Faust's *Geselle*, will inadvertently aid Faust by preventing Faust from letting his "Thätigkeit" weaken.²⁸³ Although Faust, as we shall soon see, does sense the importance of striving, he does not understand that Mephisto will inadvertently aid him in this process. What will compel Faust to agree to the pact is not that he is sure he will prevail (as the Lord and Mephisto are each sure that they will prevail), but that he does not mind losing:

Mephistopheles.

Ich will mich *hier* zu deinem Dienst verbinden,
Auf deinen Wink nicht rasten und nicht ruhn;
Wenn wir uns *drüben* wieder finden,
So sollst du mir das Gleiche thun.

Faust.

Das Drüben kann mich wenig kümmern;
Schlägst du erst diese Welt zu Trümmern,
Die andre mag darnach entstehn.
Aus dieser Erde quillen meine Freuden,
Und diese Sonne scheinete meinen Leiden;
Kann ich mich erst von ihnen scheiden,
Dann mag was will und kann geschehn.
Davon will ich nichts weiter hören,
Ob man auch künftig haßt und liebt,
Und ob es auch in jenen Sphären
Ein Oben oder Unten gibt.
(WA 1656-70) (original emphasis of *hier* and *drüben*, other emphasis added)

²⁸³ See *supra* p.140.

Mephisto has offered here the closest we will see of his price: when the two will meet “drüben,” presumably meaning in the hereafter, it will be Faust’s turn to serve Mephisto. Faust does not mind this, for he cares more about this world than the next. Mephisto accepts this thinking, and urges Faust to agree to the pact by offering further promises of what he will do for Faust:

In diesem Sinne kannst du's wagen.
Verbinde dich; du sollst, in diesen Tagen,
Mit Freuden meine Künste sehn,
Ich gebe dir was noch kein Mensch gesehn.
(WA 1671-1674)

Faust finds Mephisto’s offer insufficient, however, for he believes that all this devil has to offer is false and deceptive. Faust also offers a first hint that he may share some of the Lord’s understanding of the importance of “Streben.” Faust states that a man’s “Geist,” in its high “Streben,” has never been “gefaßt” by the likes of Mephisto.²⁸⁴ Instead, Faust actually wishes to see real things that seem impossible: fruits that rot before they are plucked, and trees that daily leaf anew:

Was willst du armer Teufel geben?
Ward eines Menschen Geist, in seinem hohen Streben,
Von Deinesgleichen je gefaßt?
[...]
Zeig' mir die Frucht die fault, eh' man sie bricht,
Und Bäume die sich täglich neu begrünen!
(WA 1675-87)

²⁸⁴ “Geist” has multiple meanings, as does “gefaßt.” Among other things, “Geist” can mean “mind” or “spirit,” but also “soul.” When Faust dies late in *Faust II*, Mephisto will indeed use “Geist” in the sense of “soul”: “Der Körper liegt und will der Geist entfliehn, / Ich zeig' ihm rasch den blutgeschriebnen Titel; --- (WA 11612-13) “Gefaßt,” like “grasped,” can mean “grabbed” or “seized,” but also “understood.” Thus, Faust here creates a matrix of possible meanings. He may be saying that Mephisto cannot understand his mind, his spirit, or his soul. He could also be saying that Mephisto cannot seize his mind, spirit, or soul. Thus, perhaps, this is an anticipation of Mephisto’s defeat, for Mephisto will fail to seize Faust’s soul at the end of *Faust II*.

Mephisto is undaunted by this proposal, just as he was undaunted by his bet with the Lord. He then suggests that the day may come when they may wish to rest – it seems that Mephisto understands that he will need Faust to come to rest in order to prevail:

Mephistopheles.
Ein solcher Auftrag schreckt mich nicht,
Mit solchen Schätzen kann ich dienen.
Doch, guter Freund, die Zeit kommt auch heran
Wo wir was Guts in Ruhe schmausen mögen.
(WA 1688-91)

Faust, in turn, understands that if he will give in to this state of rest, then he will be done for. Similarly, he understands that if Mephisto will fully deceive him, then he will also be done for. Just a few lines back, Faust stated that Mephisto's kind cannot deceive a striving *Geist* – but one at rest is a different story. Faust now offers a bet, which Mephisto promptly accepts, and the two shake hands on it:

Faust.
Werd' ich beruhigt je mich auf ein Faulbett legen,
So sei es gleich um mich gethan!
Kannst du mich schmeichelnd je belügen
Daß ich mir selbst gefallen mag,
Kannst du mich mit Genuß betrügen;
Das sei für mich der letzte Tag!
Die Wette biet' ich!
Mephistopheles.
Top!
Faust.
Und Schlag auf Schlag!
(WA 1692-1698)

Such a shaking of the hands was a way of sealing an agreement under medieval *Faustrecht*, and Faust, under the impression that the pact has been concluded, restated its terms

in different language.²⁸⁵ The crux of Faust's understanding of the pact is that if he stagnates, he will die.

Werd' ich zum Augenblicke sagen:
Verweile doch! du bist so schön!
Dann magst du mich in Fesseln schlagen,
Dann will ich gern zu Grunde gehn!
Dann mag die Todtenglocke schallen,
Dann bist du deines Dienstes frei,
Die Uhr mag stehn, der Zeiger fallen,
Es sei die Zeit für mich vorbei!
(WA 1699-1706)

Mephisto immediately stresses that this pact will not be forgotten, to which Faust readily acquiesces verbally. Mephisto promises to begin his duties as servant that very same day – but first, he wants the pact put in writing.

Mephistopheles.
Bedenk' es wohl, wir werden's nicht vergessen.
Faust.
Dazu hast du ein volles Recht,
Ich habe mich nicht freventlich vermessen.
Wie ich beharre bin ich Knecht,
Ob dein, was frag' ich, oder wessen.
Mephistopheles.
Ich werde heute gleich, bei'm Doctorschmaus,
Als Diener, meine Pflicht erfüllen.
Nur eins! --- Um Lebens oder Sterbens willen,
Bitt' ich mir ein paar Zeilen aus.
(WA 1707-15) (emphasis added)

Faust is frustrated by this request, for he would rather that his word alone sufficed. He knows that a spoken promise will not bind him in the same way that a written and sealed one will, because only a parchment, with writing and sealed, is feared by all. He also understands that

²⁸⁵ Müller, *Das Recht in Goethes Faust*.

the written word is “erstarrt” – rigid, unchanging. Mephisto insists that Faust sign in blood. After Faust reluctantly signs, he promises the striving of his entire soul – that is, he promises to win.

Faust.

Auch was Geschriebnes forderst du Pedant?
Hast du noch keinen Mann, nicht Mannes-Wort gekannt?
Ist's nicht genug, daß mein gesprochenes Wort
Auf ewig soll mit meinen Tagen schalten?

[...]

Allein ein Pergament, beschrieben und beprägt,
Ist ein Gespenst, vor dem sich alle scheuen.
Das Wort erstirbt schon in der Feder,
Die Herrschaft führen Wachs und Leder.

[...]

Mephistopheles.

[...]

Ist doch ein jedes Blättchen gut.
Du unterzeichnest dich mit einem Tröpfchen Blut.

Faust.

Wenn dieß dir völlig G'nüge thut,
So mag es bei der Fratze bleiben.

Mephistopheles.

Blut ist ein ganz besondrer Saft.

Faust.

Nur keine Furcht, daß ich dieß Bündniß breche!
Das Streben meiner ganzen Kraft
Ist g'rade das was ich verspreche.

(WA 1716-1743)

The pact is concluded, and it will not be explicitly invoked again until Mephisto pulls out this “blutgeschriebnen Titel” (WA 11613) again towards the end of *Faust II*.

But what, exactly, are the terms of the pact? Remarkably, we are never told the contents of the document Faust signs. Although previous versions of Faust – including the *Faustbuch* and Marlowe’s *Dr. Faustus* – provide the text of the pact, Goethe’s *Faust* does not.²⁸⁶ The extensive discussion between Faust and Mephistopheles provides only a general idea of the contents of the

²⁸⁶ For an overview of the Devil’s Pacts in the various versions of Faust, see Schmidt, *Goethes Faust: erster und zweiter Teil: Grundlagen, Werk, Wirkung*, 22-24.

pact, but it is not sufficient to establish its exact contents. Thus, it appears that Faust loses if he ceases to strive, if he gives in to stagnation. Various phrases point in this direction, such as: “Werd' ich beruhigt je mich auf ein Faulbett legen, / So sei es gleich um mich gethan!” and “Werd' ich zum Augenblicke sagen: / Verweile doch! du bist so schön! / Dann magst du mich in Fesseln schlagen, / Dann will ich gern zu Grunde gehn!” If Faust loses, much of the language implies that he accepts death as a consequence: “So sei es gleich um mich gethan!”; “Dann mag die Todtenglocke schallen.” Some of the language, however, implies a different penalty for Faust: “Dann magst du mich in Fesseln schlagen.” But Mephisto has only asked Faust to sign “ein paar Zeilen” – we are not told which two lines from their extensive conversation Mephisto has chosen. Indeed, the two lines he has chosen may even be different from any we have seen. This is especially so given that the conversation between the two takes place *before* the pact is signed – and seemingly even before it is drafted (“[i]st doch ein jedes Blättchen gut (WA 1736)). That is, Faust’s understanding of what is in the pact is not based on the text of the pact.

The only other scene in *Faust* where the pact is explicitly invoked, the scene *Grablegung* in *Faust II*, also does not provide the text of the pact.²⁸⁷ Mephistopheles produces the pact, and believes that it entitles to take Faust’s soul right when Faust dies. But Mephisto does not tell us why he believes that he has the right to claim Faust’s soul. The scholarship has often focused on Faust’s words “Zum Augenblicke dürft' ich sagen: / Verweile doch, du bist so schön!” (WA 11581-82) in that scene to determine who won according to the pact.²⁸⁸ These words

²⁸⁷ This scene is discussed in greater detail *infra* p.200ff. The pact is also referred to by Mephisto in first scene of *Faust II*, Act II, when Mephisto revisits the *Studirzimmer* in which the pact was signed. *See infra* Chapter VI.D.

²⁸⁸ The commentary on the pact and who won it is vast. Already in 1939, an article appeared arranging 49 works after 1900 into six categories of possible outcomes. Klett, *Der Streit um 'Faust II' seit 1900, chronologisch und nach Sachpunkten geordnet, mit kommentierter Bibliographie von 512 Titeln*. The body of commentary has only grown since then, but is no closer to a consensus. Eibl, "Zur Bedeutung der Wette im Faust," 272; Mein, "Aporien von Eid und Fluch: Unmögliche Versprechen in Goethes Faust," 652. *See also* FA I, 7/2 p.752-53. Given the amount

clearly echo Faust's words from the second *Studirzimmer* scene "Werd' ich zum Augenblicke sagen: / Verweile doch! du bist so schön!" (WA 1699-1700) Even if these were in the pact, that does not tell us what else the written pact contained. And it would have to contain something else. At the very least, it would have to contain some provision stating what Mephisto stands to win (presumably Faust's soul). Otherwise, it cannot be a binding legal contract,²⁸⁹ and would not entitle Mephisto to claim Faust's soul, or anything else.

Indeed, the *Grablegung* scene provides further indications that the words Faust and Mephisto exchanged in the *Studirzimmer* did not enter the pact literally. First, Mephistopheles attempts to claim Faust's soul right when that soul leaves Faust's body – that is, well before the soul reaches "drüben." (WA 11612-13) Yet in the *Studirzimmer*, Mephisto only discussed claiming Faust's soul once it would be "drüben." (WA 1656) But in the scene *Grablegung*, he not only seeks to claim Faust's soul right away, he also views it as his defeat that the angels carry it away to Heaven. (WA 11830ff.) That is, the actual text of the pact, which is hidden from us, apparently entitles Mephisto to claim Faust's soul directly upon Faust's death. Thus, the words Faust and Mephisto exchanged cannot be the exact words of the pact. Second, most of the words they exchanged in the second *Studirzimmer* scene indicated that Faust would die if he were to cease to strive and were to stagnate. Faust does die in the scene *Grosser Vorhof*, soon after uttering "Verweile doch, du bist so schön."²⁹⁰ (WA 11582) Mephisto, however, does not view this death by itself as his victory; rather, he believes he has been defeated – that is, the pact was

of commentary on this topic, it is impossible to consider all of it, but I have not found any commentary that concludes that we do not know the contents of the written pact.

²⁸⁹ Müller, *Das Recht in Goethes Faust*, 322-23.

²⁹⁰ Concerning the timing of Faust's death, see *infra* notes 345, 350.

not about Faust's death. Third, it is not certain that the pact even explicitly deals with stagnation or the cessation of striving. For upon Faust's death, Mephisto states about Faust: "Ihn sättigt keine Lust, ihm g'nügt kein Glück, / So buhlt er fort nach wechselnden Gestalten." (WA 11587-88) Mephisto thus suggests that Faust was striving right up until his death – but Mephisto also believes that he won the pact, and that Faust lost it. Mephisto is thus suggesting that the written pact was not about stagnation, that Mephisto could win even if Faust never stagnated. Perhaps the pact was a simple trade, whereby Mephisto serves Faust on earth, Faust's soul serves Mephisto in the hereafter: "Ich will mich *hier* zu deinem Dienst verbinden, / Auf deinen Wink nicht rasten und nicht ruhn; / Wenn wir uns *drüben* wieder finden, / So sollst du mir das Gleiche thun." (WA 1656-59) (original emphasis)

We thus cannot be sure what the language of the pact is. The argument thus far has assumed that Mephisto is competent and interpreting contractual language – for instance, we have assumed that if he believes that the contract entitles him to claim Faust's soul, then he is correct about that. This assumption is justified, for Mephisto is indeed highly competent within his legal order²⁹¹ – Faust is quite right to call him "Pedant." (WA 1716) In Chapter IV, *supra*, we saw that Mephisto is quite at home in the law. For instance, he knows how to procure fraudulently a *Totenschein* for Martha's deceased husband – he knows that two witnesses are legally required, and he apparently knows what to say and to do in order to secure the

²⁹¹ Some commentators, however, appear to suggest that Mephisto was beaten at his own game. They find support in Mephisto's lament that he is "getäuscht," (WA 11834) and in Faust's use of the subjunctive in "[z]um Augenblicke dürft' ich sagen" (WA 11581) immediately before he says "Verweile doch, du bist so schön!" (WA 11582) On such a reading, Mephisto does not realize that the subjunctive makes Faust's utterance unreal, and is therefore wrong to think that Faust has in fact spoken the words: "Verweile doch, du bist so schön!" (such readings tend to assume that the language of the pact is known and states that Faust loses if he says "Verweile doch, du bist so schön!") Therefore, on such a reading, Faust wins because he never really uttered the fateful phrase, whereas Mephisto wrongly believes himself the winner, because the phrase left Faust's lips – and Mephisto fails to appreciate that this was an unreal utterance. Eibl, "Zur Bedeutung der Wette im Faust," 278. See also *supra* note 288.

Totenschein. Indeed, from the very first scene in which Mephisto appears, he shows himself to be law-abiding and legally clever all at once. In the first *Studirzimmer* scene, Mephisto finds himself trapped in a pentagram. He did not notice it when he entered, and is unable to leave it. Faust wonders why Mephisto cannot leave “durch's Fenster?” (WA 1409) Mephisto informs him “s ist ein Gesetz der Teufel und Gespenster” (WA 1410) that they can only leave the same way they came in. Faust is surprised that even Hell has its laws, and concludes that a pact may therefore be made with the devil, which is exactly what will transpire in the next scene. (WA 1413-15) Faust believes that he has Mephisto as his prisoner now, trapped in the pentagram. But Mephisto quickly conjures a clever solution. He has Faust lulled to sleep, and then has rats gnaw through the pentagram so as to let him escape without violating any laws. (WA 1416ff.) Faust, who has studied law, is still promptly outplayed by Mephisto at this legal game.

But Mephisto’s masterstroke of legal skill and knowledge is the paper money he induces the *Kaiser* to introduce in Act I of *Faust II*. The empire is faced with an array of problems, which the various courtiers of the *Kaiser* lay out in the scene *Kaiserliche Pfalz, Saal des Thrones*.²⁹² Mephisto, however, quickly manages to persuade them that their real problem is a shortage of money. (WA 4889-90) Although Mephisto faces some initial resistance, he manages to persuade the *Kaiser* and his courtiers through a combination of temptation and law. The temptation is that his solution is easy – according to Mephisto, the wealth already exists in the empire, but is in the ground, and merely needs to be dug up. The law is “des alten Kaisers Recht” (WA 4940), namely that “Der Boden ist des Kaisers, der soll's haben.” (WA 4938) He then has the court astrologer

²⁹² This scene is discussed in greater detail *infra* p.162ff.

repeat what he whispers into his ear – predictions favorable to his plan. When the *Kaiser* is still not quite convinced, Mephisto seals the deal with a little narrative. He tells the *Kaiser* of a peasant who digs, merely hoping to find some saltpeter, and stumbles a rich treasure instead.

(WA 5009ff.)

Having successfully advocated his proposal, Mephisto's real genius is in the legal tender itself (for the devil in such things is in the details), which reads:

"Zu wissen sei es jedem der's begehrt:
Der Zettel hier ist tausend Kronen werth.
Ihm liegt gesichert, als gewisses Pfand,
Unzahl vergrabnen Guts im Kaiserland.
Nun ist gesorgt, damit der reiche Schatz,
Sogleich gehoben, diene zum Ersatz."
(WA 6057-62)

Mephisto here blends many insights into a single legal document. There is inspiration here from Imperial Roman times. As Tacitus (and briefly Suetonius) report, Emperor Nero gave great credence to Caesellius Bassus, who asserted to Nero that he knew the location of Dido's treasure.²⁹³ Only after Nero expended very significant resources excavating the site did it become apparent that Caesellius Bassus was delusional. Mephisto also draws inspiration here from the Middle Ages, where bills of exchange became arguably the earliest form of paper money in the West.²⁹⁴ Bills of exchange were issued by merchants, and such merchants guaranteed that when

²⁹³ Tacitus *Annals* 16.1–3; Suetonius *Nero* 39.3. See Rhiannon Ash, "At the End of the Rainbow*: Nero and Dido's Gold (Tacitus *Annals* 16.1–3)," in *Fame and Infamy* (Oxford: Oxford University Press, 2015).

²⁹⁴ Benjamin Geva, *The Payment Order of Antiquity and the Middle Ages: a Legal History* (Oxford, Portland: Hart Publishing), 402. Paper money has a much longer history in China than in Europe. Marco Polo's account brought knowledge of China's paper money to Europe. While it is tempting to conclude that his account influenced the development of paper money in Europe, there is not enough evidence at present to draw such a conclusion. Richard von Glahn, "The Origins of Paper Money in China," in *The Origins of Value: the Financial Innovations that created Modern Capital Markets*, ed. William N. Goetzmann and K. Geert Rouwenhorst (Oxford, New York: Oxford University Press, 2005), 94.

the bill came due in some fixed period of time, they would pay the amount stated on the bill in coin (coins, at that time, were made of precious metal). Bills of exchange had at least two major advantages compared with coin: they were more easily transported, and they could function as loans with interest – without violating the prohibition on usury.²⁹⁵ The prohibition on usury, rooted in the Bible, was taken very seriously well into the Early Modern period.²⁹⁶ Mephisto's paper money brings these same advantages: "Man honorirt daselbst ein jedes Blatt / Durch Gold und Silber, freilich mit Rabatt" (WA 6089-90) and "Man wird sich nicht mit Börs' und Beutel plagen, / Ein Blättchen ist im Busen leicht zu tragen." (WA 6103-04) Mephisto's paper money also draws inspiration from the *assignats* issued during the French Revolution, which were mortgaged by the real estate that the Revolution would appropriate from the church and the state.²⁹⁷ Similarly, Mephisto's money is guaranteed by treasure the *Kaiser* will appropriate from the land. Mephisto's paper money also contains an element from Goethe's own experience. In his professional capacity, Goethe sought to stimulate the economy of Sachsen-Weimar by reopening its copper mine at Ilmenau.²⁹⁸ After convincing the Duke of the potential of this mine, Goethe was effectively put in charge of the project. To secure financing, he had 1,000 so-called *Kuxe* issued – which promised the holders thereof returns when the mine would become

²⁹⁵ John F. Chown, *A History of Money: from AD 800* (London, New York: Routledge, 1994), 127.

²⁹⁶ Ibid.

²⁹⁷ Richard T. Gray, *Money Matters: Economics and the German Cultural Imagination, 1770-1850* (Seattle: University of Washington Press, 2008), 355.

²⁹⁸ Hans Tümmeler, *Carl August von Weimar, Goethes Freund: eine vorwiegend politische Biographie*, 1. Aufl. ed. (Stuttgart: Klett-Cotta, 1978), 34. (Carl August book)

operational.²⁹⁹ Although the copper was there (whether Mephisto's promised treasures were there is uncertain) the project ran into various technical difficulties, the worst of which was flooding.³⁰⁰ This required the holders of the *Kuxe* to provide additional financing, which they became increasingly unwilling to do. Eventually, the difficulties meant that the project had to be abandoned, in what was perhaps the worst professional failure of Goethe's career.³⁰¹ Like these *Kuxe*, Mephisto's paper money relies on value being excavated. This clever blending of periods by Mephisto created a form of legal tender that was new – paper money secured by treasure that allegedly exists and is yet to be excavated. This is a unique invention – up until Goethe's time, paper money had either been secured by assets the state actually possessed (typically precious metals) or else by a right to a portion of future taxes.³⁰² Mephisto thus allowed the empire to raise money even though it lacked assets to provide as security (the treasury was empty) and without forcing it to have to raise future taxes. Mephisto's plan is effective – for the empire's economy is churning again (WA 6037) – although by the time of Act IV it will again be in a dismal state.³⁰³

Given the degree of legal sophistication that Mephisto exhibits throughout *Faust*, it is implausible that at end of the work he is unable to interpret correctly his pact with Faust, just as

²⁹⁹ Heike Knortz and Beate Laudenberg, *Goethe, der Merkantilismus und die Inflation: zum ökonomischen Wissen und Handeln Goethes und seiner Figuren* (Berlin: Lit, 2014), 81.

³⁰⁰ Ibid.

³⁰¹ Ibid., 81-82.

³⁰² There had already been some experiments with unlimited backing by land, such as John Law's experiment in France in the early 18th century, where limited backing by gold was replaced by virtually unlimited backing by land. Still, land was an asset that actually existed, unlike Mephisto's treasure, which only possibly existed, and had to be excavated if it did. Gray, *Money Matters: Economics and the German Cultural Imagination, 1770-1850*, 355.

³⁰³ See *infra*, p.183.

it is implausible that he would have drafted this important pact poorly. If we are to understand, then, why this legally sophisticated devil cannot enforce his contract at the end of the play, why he is “getäuscht,” (WA 11834) we will not find the answer in the terms of the contract – which are hidden from us – but we will have to look elsewhere.

An early indication of where to look comes at the end of *Faust I*. Gretchen is saved at the end of *Faust I*, when a voice from above – that is, the Lord – announces that she is saved. This is an indication that the road to legal development lies in a decentralized legal order, where borders are not absolute, and the written word does not reign rigidly. Recall that this legal order is associated with the Lord in the *Prolog im Himmel*.³⁰⁴ Mephisto opposes change in that he wants Gretchen to be put to death – recall that Mephisto is associated with a different legal order, one that is centralized, highly bordered, and clings rigidly to the written word. The two framing pacts also represent this difference between the two legal orders. The pact between the Lord and Mephisto is verbal, it is signed in Heaven, a place without state borders, and the jurisdiction of the angels is not constrained by state borders. On the other hand, the pact between Faust and Mephisto is very much in writing – Mephisto insisted on writing, and on a signature in blood. Apparently, the remedy is stated clearly in the contract, for Mephisto apparently gains a right to Faust’s soul if certain conditions are met. This Faustian bargain is quite suitable for a judge who interprets the law precisely and technically – indeed, anyone else might hesitate to hand over a man’s soul to a devil. Mephisto’s pact is also connected to a fixed place: he emphasizes that he wants it signed in Faust’s study “Ich will mich *hier* zu deinem Dienst verbinden” (WA 1656)

³⁰⁴ See *supra*, Chapter V.B.

(original emphasis), that narrow room – quite the contrast from the borderless setting where the Lord and Mephisto agree to their pact.³⁰⁵

If we are to understand Mephisto’s defeat at the end of *Faust II*, then, we will have to understand why his legal order has lost out. This is precisely what the next chapter shall address.

Chapter VI. Legal Advancement in Faust II: Mephisto contra Helena

A. Introduction

The previous chapter focused on two pacts that frame *Faust*. The first pact was concluded by the Lord and Mephistopheles in the *Prolog im Himmel*. The second pact was concluded by Mephistopheles and Faust in the second *Studierzimmer* scene of *Faust I*. The first pact is unwritten, and not designed for strict legal interpretation – for its terms are vague, and it is not determined what the winner will gain. The second pact, however, is in writing, and apparently is strictly interpretable. This second pact is designed to keep things unchanged, to preserve the status quo, whereas the first pact is all about change – striving is at its heart. The Lord achieves victory where there is progress, Mephistopheles achieves it where there is stagnation.

This juxtaposition between two pacts that represent different conceptions of law becomes a battle in *Faust II*. Mephisto and the *Kaiser* wish to preserve the status quo – and seek to do so through rigid written law, centered on the *Kaiser* in his bordered realm. The other conception of law, more open to change, does not have a visible champion for most of *Faust*. Although the Lord introduces this conception in the *Prolog im Himmel*, he disappears for the rest of *Faust*, except for his brief utterance at the end of *Faust I* that Gretchen is rescued. It is not until Helena

³⁰⁵ It is also possible to read “*hier*” not as a reference specifically to Faust’s narrow study, but rather as meaning “here on earth.” What is important is not so much which location Mephisto is referring to, but that the location is so important to him that he even emphasizes it. He thinks in terms of a bordered legal order, and thus a contract has to have a location so it can be a part of – and thus enforced by – a legal order.

appears in Act III of *Faust II* that this conception of law again finds a champion on stage. She leaves Faust “erstaunt” (WA 9258) by the way she practices justice, and he eventually becomes a champion of her approach. Helena’s approach to law eventually triumphs, rendering Mephisto’s “blutgeschriebnen Titel” (WA 11613) without force – this pact had power in the bordered and rigid world centered around the *Kaiser*, but it has no power in the *gränzunbewußte* order advanced by the Lord, Helena, and, eventually, also Faust.

This chapter proceeds by retelling *Faust* in terms of the two competing legal orders and their key elements, such as borders, the role of the written word, and centralization. *Faust I* is summarized briefly, after which *Faust II* is retold chronologically, which a section of this chapter dedicated to each act of *Faust II*.

B. Faust I: Where Laws Do Not Change

In the world of *Faust I*, law does not change, except insofar as the Lord announces that Gretchen is rescued at the end of the play. As discussed in Chapter IV above, duels are still practiced, two witnesses can secure a *Totenschein*, lending money at an interest is problematic, and Gretchen is set to receive the death penalty for only perhaps being guilty of infanticide. These are all old laws: duels were widely practiced in Europe for centuries, the two-witness rule and the prohibition against money-lending are Biblical, and the law of infanticide was fixed in the *Carolina* of 1532.

Mephisto feels very much at home in this legal world. He knows how to use the duel to murder Valentin, and then to escape punishment. He knows how to bear false witness just right to secure a *Totenschein* from a judge. He also knows that Gretchen will be judged by the human court for her alleged infanticide. He also masterfully guides – or rather manipulates – Faust through this legal reality: Faust’s sword slays Valentin after Mephisto’s “Stoß' zu!” (WA 3711)

and Faust is the second witness who secures the *Totenschein* for Marthe's dead husband, after Mephisto convinces him to bear false witness. Mephisto also knows to escape from Gretchen's dungeon just in time, and manages to cause the death of Gretchen's mother in such a way that seemingly nobody ends up paying for it – except, perhaps, Gretchen, but that suits Mephisto just fine.

Faust, on the other hand, is not at home in this legal reality. In his opening monologue, he lists “Juristerei” (WA 355) among the disciplines he has “Durchaus studirt, mit heißem Bemühn” (WA 357), but it still leaves him merely “so klug als wie zuvor.” (WA 359) In spite of these intensive studies, Faust is no match for Mephisto in the legal world they inhabit. For instance, after Mephisto falls into an accidentally set legal trap, Faust does not manage to keep him there.³⁰⁶ Recall that in the first *Studirzimmer* scene, Mephisto is caught in a pentagram (which the laws of hell prevent him from exiting). (WA 1393ff.) He is also not permitted to escape through the window, because (again according to the laws of hell) he must leave the way the entered. (WA 1410-12) Although Faust thinks that Mephisto now has no way out, Mephisto promptly displays his skills: he lulls Faust to sleep, and has his rodent friends chew a hole in the pentagram, through which Mephisto now escapes. Faust is astonished that he has lost, but Mephisto observes: “Du bist noch nicht der Mann den Teufel fest zu halten!” (WA 1509) That is, Faust is not as skilled as Mephisto at legal games. Mephisto here also suggests that he evaluates men in terms of their ability to play such games – Faust is not a great man because Mephisto is the better technical lawyer.

³⁰⁶ This episode is discussed *supra* p.151.

Faust's dislike for Mephisto's approach to the law is apparent when the two conclude their pact in the second *Studirzimmer* scene.³⁰⁷ Faust expresses his disdain for Mephisto's proposal to put the pact in writing: "Auch was Geschriebnes forderst du Pedant?" (WA 1716) Faust has a different notion than Mephisto of what makes a man: a man's word, (WA 1717) rather than his ability to play legal games. Faust acknowledges that his spoken word will be with him forever: "Ist's nicht genug, daß mein gesprochenes Wort / Auf ewig soll mit meinen Tagen schalten?" (WA 1718-19) He then juxtaposes this spoken word to the written, and formally confirmed, word that Mephisto requires. Faust views such language as dead: "Das Wort erstirbt schon in der Feder / Die Herrschaft führen Wachs und Leder" (WA 1728-29). His use of *Herrschaft* here also connects this notion of law to centralized, imperial rule – for it is exactly his *Herrschaft* that the *Kaiser* will seek to restore and solidify in *Faust II*, and it is exactly *Herrschaft* that will repeatedly tempt Faust in *Faust II*. Faust does not articulate his reservations about Mephisto's approach more clearly, because he has not yet fully understood the difference himself. It will take him until the end of *Faust II* to do so – but he is already intuiting that Mephisto's approach is designed to resist change. Note that Faust is not here resisting the idea that he shall be bound – he acknowledges that his word will bind him – but he is resisting the idea of being bound by the immutable written word. Faust is also resistant to the idea that law must be so formal. He understands that this formalism is what renders the pact enforceable in the legal world Mephisto favors. For Faust understands the power, in that legal world, of "Wachs und Leder"; he understands that "[a]llein ein Pergament, beschrieben und beprägt, / Ist ein

³⁰⁷ See *supra* Chapter V.C for a more detailed discussion of this scene.

Gespenst, vor dem sich alle scheuen” (WA 1726-27) – but this legal world does not appeal to Faust.

The pact scene is not the first time that Faust resists the immutable written word. In the first *Studirzimmer* scene, Faust decides to translate the Gospel according to John. (WA 1210ff.) He begins with its opening sentence: “ἐν ἀρχῇ ἦν ὁ λόγος.”³⁰⁸ He is dissatisfied with the rendition “im Anfang war das *Wort*” (WA 1224, original emphasis), for he “kann das *Wort* so hoch unmöglich schätzen.” (WA 1226, original emphasis) Faust then considers two alternatives for *Wort*, both of which were known in Goethe’s time as possible translations: *Sinn* and *Kraft*.³⁰⁹ Even though Faust is explicit that *Kraft* is a rewriting rather than a translation – “Es sollte stehn: im Anfang war die *Kraft!*” (WA 1233, original emphasis) – he is still dissatisfied. Finally, he “schreib[t] getrost: im Anfang war die *Tat*” (WA 1237, original emphasis), which was a novel rendition in Goethe’s day, and abandons his effort.³¹⁰ Faust thus rejects the preservation of the written word as immutable in eternity, and he does so on several levels. First, he provides four possible translations, thus showing at once both that words have multiple meanings and that meaning can be altered through translation. Second, he does not feel bound by the written word, for he explicitly rewrites “Wort” into “Kraft” and then into “Tat,” knowing that both “Kraft” and “Tat” rewritings rather than accurate translations. Third, he removes the word as the beginning of all things, and substitutes the deed for it, implying that deeds are more important than words. Fourth, he abandons his effort after translating only one phrase. He thus implies that not many

³⁰⁸ “Im Anfang war das Wort” / “In the beginning was the Word.”

³⁰⁹ Rüdiger Görner, “Vom Wort zur Tat in Goethes Faust-Paradigmenwechsel oder Metamorphose?,” *Goethe-Jahrbuch* 106 (1989): 123.

³¹⁰ *Ibid.*

written words are needed to find “Offenbarung” (WA 1217), the search for which was the reason for his translation – apparently, one phrase suffices.

Faust’s translation is also a blending of different times. Faust himself is in the Middle Ages, and while the first translation he offers is from Luther’s Bible, some of the other translations are early modern. The New Testament is an ancient book, dating back to the first and second centuries of the Common Era, yet Faust underscores its relevance to him. He then rewrites it to be consistent with the Old Testament. *Genesis* opens with “In the beginning God created the heavens and the earth” / “Am Anfang schuf Gott Himmel und Erde.” That is, *Genesis* opens with the deed of creation, and Faust has now placed the deed at the beginning of it all, apparently satisfied that the deed – unlike *Wort*, *Sinn*, or *Kraft* – “alles wirkt und schafft.” (WA 1232)

The Faust of *Faust I* thus has reservations about the written word, especially insofar as it must remain immutable. Thus, he is annoyed that Mephisto wants a written and signed pact from him, because Faust understands that such a pact is utterly inflexible even as time passes. Rather, he prefers to be bound by only a few spoken words, which are more amenable to change over time. He translates the New Testament freely, true not to its literal meaning, but rather to the truth as he sees it, and to different times all at once. Thus, he is not true to any one time in particular, but rather to continuing change.

Even with his dislike of Mephisto’s approach to law, Faust does not manage to effect any changes to it in *Faust I*. His clearest attempt to do so is by breaking into Gretchen’s dungeon to free her. That is, he attempts to change the outcome in her case. However, he fails. Yet Mephisto also fails with respect to Gretchen. For he announces “Sie ist gerichtet!” (WA 4611) at the end of the play – and according to his legal reality, he is right. For as we saw in Chapter III, a sentence

was indeed the fate of most alleged child murderesses. But the Lord interferes at the last moment, announcing “Ist gerettet!” (*Id.*) This is an early indication that the legal reality is changing from the one Mephisto prefers to a different one – but no major change will take place until Act III of *Faust II*. For Gretchen receiving a sentence is consistent with the *Carolina*, that imperial, centralized effort at legislating through extensive writing within the borders of the Holy Roman Empire. The Lord’s rescue of Gretchen, on the other hand, represents another conception of law, which was discussed in Chapter II and which we saw in the *Prolog im Himmel* – where there is no center, no empire, where the written word is not rigidly enforced, where borders are not absolute.

C. Faust II, Act I: Mephisto Restores the Empire’s Old Law

Already in the second scene of *Faust II* we find ourselves in the throne room of an imperial palace – that is, in the center of the empire. The State Council is there. The splendidly attired courtiers enter to the sound of trumpets. The *Kaiser* then ascends his throne. His astrologer stands at his right, and the *Kaiser* promptly notices the absence of his fool on his left. (WA 2731) The fool has apparently collapsed and has been carried away. (WA 4733-34) Mephisto, whose trickery is the likely cause of this collapse, promptly and successfully offers himself as a substitute. (WA 4743ff.)

We thus find ourselves in the center of the empire, for an imperial palace – and especially its throne room – is the seat of centralized power, and the *Kaiser* is the person in whom power is centralized. We also receive an early indication of what kind of person this *Kaiser* is: one who cares most for his entertainment, for the first thing he notices – and the first thing he remedies – is the absence of his personal entertainer. Indeed, having resolved the issue of the missing fool, the *Kaiser* promptly welcomes the council that has come from far and wide,

only to lament that they insist on bothering him with worries at this merry carnival time.

(WA 4761-71)

The various members of the council paint a very bleak image of the state of affairs. The first to speak is the *Kanzler*. He underscores that power in the empire is centralized, in that only the *Kaiser* “[v]ermag sie gültig auszuüben: / Gerechtigkeit!” (WA 4774-75) He then proceeds to lament that “Gerechtigkeit” is nowhere to be found in the empire. First, the laws themselves are unjust, for in the empire “[d]as Ungesetz gesetzlich überwaltet.” (WA 4785) Second, crime, specifically theft, is widespread and goes unpunished: “Der raubt sich Heerden, der ein Weib, / Kelch, Kreuz und Leuchter vom Altare, / Berühmt sich dessen manche Jahre / Mit heiler Haut, mit unverletztem Leib.” (WA 4787-90) Third, the courts convict the innocent rather than the guilty: “Jetzt drängen Kläger sich zur Halle, / Der Richter prunkt auf hohem Pfühl, / Indessen wogt, in grimmigem Schwall, / Des Aufruhrs wachsendes Gewühl. / Der darf auf Schand' und Frevel pochen / Der auf Mitschuldigste sich stützt, / Und: Schuldig! hörst du ausgesprochen / Wo Unschuld nur sich selber schützt.” (WA 4791-98) Fourth, the judges are unable to punish: “Ein Richter der nicht strafen kann / Gesellt sich endlich zum Verbrecher.” (WA 4805-06)

The *Heermeister* is the next councilmember to lament the pitiable state of affairs. There is no discipline in the army: “Ein jeder schlägt und wird erschlagen / Und für's Commando bleibt man taub.” (WA 4813-14) The empire is at war, but has no successes to speak of: “Der Bürger hinter seinen Mauern, / Der Ritter auf dem Felsennest / Verschwuren sich uns auszudauern / Und halten ihre Kräfte fest.” (WA 4815-18) The army has to rely on mercenaries, but has no money to pay them with, and they are not loyal: “Der Miethsoldat wird ungeduldig, / Mit Ungestüm verlangt er seinen Lohn, / Und wären wir ihm nichts mehr schuldig, / Er liefe ganz und gar davon.” (WA 4819-22) The empire itself has not been protected effectively, and is devastated:

“Verbiere wer was alle wollten, / Der hat in's Wespennest gestört; / Das Reich das sie beschützen
sollten / Es liegt geplündert und verheert.” (WA 4823-26) Indeed, it has lost much of its territory:
“Man läßt ihr Toben wüthend hausen, / Schon ist die halbe Welt verthan;” (WA 4827-28) The
empire does not have allies, and is even the only realm fighting for centralized rule: “Es sind
noch Könige da draußen, / Doch keiner denkt, es ging' ihn irgend an.” (WA 4829-30)

Next is the *Schatzmeister*. He, too, recounts a depressing state of affairs. The empire's
allies are not only militarily unreliable, but also financially: “Wer wird auf Bundsgenossen
pochen! / Subsidien die man uns versprochen, / Wie Röhrenwasser, bleiben aus.” (WA 4831-33)
The empire is losing control over its distant states: “Auch, Herr, in deinen weiten Staaten / An
wen ist der Besitz gerathen? / Wohin man kommt da hält ein Neuer Haus / Und unabhängig will
er leben, / Zusehen muß man wie er's treibt; / Wir haben so viel Rechte hingegeben, / Daß uns
auf nichts ein Recht mehr übrig bleibt.” (WA 4834-40) And those parties to whom rights have
been given cannot be trusted: “Auch auf Parteien, wie sie heißen, / Ist heut zu Tage kein Verlaß.”
(WA 4841-42) Everything has descended into individual interests, and nobody cares for the
common good: “Wer jetzt will seinem Nachbar helfen? / Ein jeder hat für sich zu thun.”
(WA 4847-48) The treasury is empty: “Und unsre Cassen bleiben leer.” (WA 4847)

Finally, the *Marschalk* lists his troubles. At first glance, things may not seem so bad, for
the *Marschalk* informs us that there is plenty of food in the palace (WA 4856-60), although the
palace is running short on wine, whereas it used to have full wine cellars. (WA 4861-65)
However, we soon learn that the palace is heavily leveraged, that all this luxury is borrowed –
and it may not be possible to borrow any more: “Nun soll ich zahlen, alle lohnen; / Der Jude wird

mich nicht verschonen,³¹¹ / Der schafft Anticipationen, / Die speisen Jahr um Jahr voraus. / Die Schweine kommen nicht zu Fette, / Verpfändet ist der Pfühl im Bette, / Und auf den Tisch kommt vorgegessen Brot.” (WA 4869-75)

The problems are not merely large – they also cut to the core of the centralized system that is the empire. The *Kanzler* began his speech by emphasizing that the *Kaiser* alone could provide justice. He finished by stressing that majesty itself was in danger: “Wenn alle schädigen, alle leiden, / Geht selbst die Majestät zu Raub.” (WA 4810-11) The *Heermeister* concluded his speech by stating that while there are still kings out there, they do not understand that this concerns them. The *Schatzmeister* lamented that the empire has given up so many rights, it is not clear it has any left – that is, it is not clear the central power still has any power. He then lamented the treasury – the pot of money at the center of the empire – was empty. The *Marschalk*’s speech focuses on the critical state of affairs of the palace – of the center of the empire, that is: even the *Kaiser* and his entourage are eating borrowed bread and running out of wine.

The *Kaiser* now turns to his fool, to Mephisto, to see if he knows of any other pressing matters. Mephisto seizes this opportunity to convince the *Kaiser* of his solution. He first flatters the *Kaiser*, then quickly offers his diagnosis of the problem: “Wo fehlt's nicht irgendwo auf dieser Welt? / Dem dieß, dem das, hier aber fehlt das Geld.” (WA 4889-90) The diagnosis is remarkable – Mephisto, devil that he is, claims that all the fundamental, critical problems the empire is facing can be solved with money. Psychologically, Mephisto has hit the mark, because

³¹¹ The Jew here means the money-lender. Because Christians were prohibited from lending at an interest, borrowers had to turn to the Jews. *See supra*, n. 296.

the *Kaiser* accepts this diagnosis without questioning it, and asks Mephisto to resolve the problem: “Es fehlt an Geld, nun gut so schaff’ es denn.” (WA 4926)

As discussed above, Mephisto will famously do exactly this: he will create money by introducing a clever kind of paper money.³¹² We saw that this money is secured by treasure buried in the lands of the empire, and provides its bearer with a legal right to claim 1,000 crowns worth of treasure when such treasure will be excavated. (WA 6057-62) Whether this treasure indeed exists is a different matter – the *Kaiser* takes Mephisto’s word for it. This paper money is a legally complex document, which confirms Mephisto’s brilliance as a technical lawyer.

Yet what is the law that underlies it? Mephisto explains that this is “des alten Kaisers Recht” (WA 4940), namely “[d]er Boden ist des Kaisers, der soll's haben.” (WA 4938) This is another conflating allusion, for Mephisto is at once alluding to Roman law and to the Golden Bull, the legal foundation of the Holy Roman Empire since 1356, both of which provided that the emperor owned what was under the land, albeit with some caveats.³¹³ Mephisto seeks to restore the past exactly as it was, and here cleverly creates a great incentive to restore the old law. For without the old law, the paper money would not work – after all, the *Kaiser* would not own the treasure he would excavate. The councilmembers are delighted: “Der Narr ist klug, verspricht was jedem frommt; / Fragt der Soldat doch nicht woher es kommt.” (WA 4945-46) Thus, Mephisto literally monetizes and liquidates the past.

Mephisto’s relationship to the past thus stands in stark contrast to Faust’s. Recall that when Faust sought “Offenbarung,” he looked to the New Testament, at least one text before it

³¹² See *supra* p.152.

³¹³ MA 18/1 p.686.

(the Hebrew Bible), several later translations of the New Testament, and finally arrived at an interpretation both novel and ancient at once.³¹⁴ Faust drew inspiration from the past, and saw that the past is not one fixed point, but many different points that are subject to reinterpretation. To Mephisto, however, the past is a fixed point – Roman law and the Golden Bull are the same to him, there is only one “des alten Kaisers Recht.” The past is not to be reinterpreted, it is to be restored, to be reintroduced. The past is not there to inspire something new; rather, it is to be liquidated and monetized.

However, Mephisto’s approach suits the *Kaiser* and his councilmembers splendidly. They are not striving for change – they want to restore their order, and then preserve it. After some weak initial protestations on the part of the *Kanzler* “Der Satan legt euch goldgewirkte Schlingen: / Es geht nicht zu mit frommen rechten Dingen,” (WA 4941-42) Mephisto’s approach is accepted and put into practice. Once it takes effect, it shows the moral bankruptcy of the *Kaiser* and his council. The councilmembers, who initially seemed to care about such things as justice in the courts and the loyalty of the army, are now content because the money is flowing and their practical concerns are addressed. (WA 4637ff.) The *Kaiser* himself soon forgets about the fundamental issues that had just been raised – he wishes to be entertained, and calls upon Faust to produce Helena for him. (WA 4983-84) Faust eventually convinces Mephisto to do so. Mephisto produces an apparition, that may be the real Helena or may just be an illusion,³¹⁵ Faust tries to grab this Helena, (WA 6561-62) an explosion ensues, and Mephisto carries the unconscious Faust away. Thus ends Act I.

³¹⁴ See *supra* p.160.

³¹⁵ There is no consensus on this question. MA 18/1 p.786.

D. Faust II, Act II: The Artificial are Brought into the Open

Act II begins in a narrow, high vaulted Gothic room, the very same room in which Faust once signed his pact with Mephisto. The room is, as the stage directions state, unchanged. While Faust is recovering, “paralysiert,” from his encounter with Helena (WA 6568), Mephisto is pleased that nothing in the room has changed: “Allunverändert” (WA 6571) What he means is that nothing in the room has been changed or moved:

Die bunten Scheiben sind, so dünkt mich, trüber,
Die Spinnweben haben sich vermehrt;
Die Tinte starrt, vergilbt ist das Papier;
Doch alles ist am Platz geblieben;
Sogar die Feder liegt noch hier,
Mit welcher Faust dem Teufel sich verschrieben.
Ja! tiefer in dem Rohre stockt
Ein Tröpflein Blut, wie ich's ihm abgelockt.
(WA 6572-6579)

Ironically, Mephisto here reveals that his idea of no change really does entail change – negative change, that is. For he is really speaking of decay, of stagnation. Things have not moved, and so decay is apparent in the cobwebs and the decayed paper. This explains why Mephisto seeks to make Faust cease to strive, to make him stop: because not moving means stagnation and decay. The absence of change, is not constancy, but stagnation and decay.

Mephisto is also pleased to find that the items that served him well in this same room in *Faust I* are still there. The feather with Faust’s blood in it is still there, and Mephisto reminds us of its significance: with it, Faust had “dem Teufel sich verschrieben.” Signed himself away to the Devil, or, perhaps, miswrote himself to the Devil – either way, Mephisto appears pleased with himself for the pact he secured from Faust.³¹⁶ The coat he wore to appear professorial and

³¹⁶ Adelung, *Grammatisch-kritisches Wörterbuch der hochdeutschen Mundart, mit beständiger Vergleichung der übrigen Mundarten, besonders aber der Oberdeutschen*, v.4, p.1128-29.

instruct the *Schüler* in *Faust I* about various possible fields of study is also still there. As he shakes the coat, various insect come out of it, and affirm his importance in this world. They call him “alter Patron” (WA 6593) and “Vater.” (WA 6599) Mephisto himself also feels very much at home “Heut bin ich wieder Principal.” (WA 6617)

If in the stagnation and decay of Faust’s old study Mephisto is pleased, then in the next scene, *Laboratorium*, he becomes excited. There Wagner, now apparently a great scientist (WA 4888ff.), is making a human being. His attempt is deliberately unnatural and artificial. He is trying to undo the natural way in which human beings are born, and replace them with a process of creation in a vial, which he believes will give man a higher origin: “Behüte Gott! wie sonst das Zeugen Mode war / Erklären wir für eitel Possen. /... / So muß der Mensch mit seinen großen Gaben / Doch künftig höhern, höhern Ursprung haben.” (WA 6938-47)

Wagner’s effort is partly successful. He creates Homunculus. On the one hand, Homunculus is small and can only exist in a vial. On the other hand, he is instantly mature in that he can speak and think. He is also knowledgeable, in that he instantly recognizes Wagner as his father (WA 6879), and also instantly recognizes Mephisto for who he is. (WA 6885) Homunculus also immediately understands that the vial he is in is fragile, and that he must be careful lest it break: “Komm, drücke mich recht zärtlich an dein Herz, / Doch nicht zu fest, damit das Glas nicht springe.” (WA 6880-81) Most impressively, once a door opens Faust becomes visible, still paralyzed on his bed after the explosion at the end of Act I, Homunculus can see what is going on in Faust’s mind – which even Mephisto cannot do. (WA 6903ff.) Homunculus sees Faust’s dream, he sees that Faust is dreaming about Leda and the swan – the story of

Helena's birth.³¹⁷ That is, even in his sleep Faust is dreaming about obtaining his perfect woman, his Helena. Even though Faust spends the first two scenes of Act II lying paralyzed on a bed, Homunculus reveals that Faust strives even in his sleep.

Homunculus and Mephistopheles now take off to the Classical Walpurgisnight. In Goethe's initial drafts, this was not a very long scene, but as he put it in a letter to Eckermann on August 9, 1830, it eventually expanded "in's Grenzenlose."³¹⁸ The initial setting are the Pharsalian fields, where Caesar and Pompey fought the decisive battle of the civil war, which Caesar won. Later the setting moves to the river Peneus, a river that flows in that area. Finally, the setting moves to the rocky inlets of the Aegean Sea.

Mephisto had looked forward to meeting the Thessalian witches at the Classical Walpurgisnight. (WA 6979-80) But where Mephisto, by Goethe's own description, was a king at the Walpurgisnight scene of *Faust I*, he is now caught in what Goethe described as a republic: "Die alte Walpurgisnacht, sagte Goethe, ist monarchisch, indem der Teufel dort überall als entschiedenes Oberhaupt respektiert wird. Die klassische ist aber durchaus republikanisch, indem alles in der Breite nebeneinander steht, so daß der Eine so viel gilt wie der Andere, und niemand sich subordiniert und sich um den Andern bekümmert."³¹⁹ Mephisto is ill at ease in this world, and exits early, right before the setting changes to the Rocky Inlets of the Aegean Sea. The artificial Homunculus also does not belong here. It is suggested that he become king of the

³¹⁷ FA I, 7/2 p.514.

³¹⁸ At 1483 verses, the *Classical Walpurgisnight* is almost as long the entire act that follows it, which comes in at 1551 verses. See FA I, 7/2, p.519.

³¹⁹ FA I, 7/2, p.519.

Pygmies – that is, leave this republican space for a monarchy to which his artificial being is better suited. (WA7875) At the end of the scene, his vial breaks and he dies.

Faust, on the other hand, reaffirms his striving in this scene. He even establishes that his willpower is unrivalled. The multiplicity of creatures in this scene only delights him. (WA 7181-82) Undaunted by the Sphinxes Oedipus once faced (WA 7185) – the same fearsome Sphinxes that killed anyone who could not solve their riddle – Faust simply asks: “Ihr Frauenbilder müßt mir Rede stehn: / Hat eins der Euren Helena gesehn?” (WA 7195-96) Faust’s striving for Helena continues. The Sirens that once tempted Odysseus are also here. (WA 7186) They sing their tempting song to Faust. (WA 7202-7208) Where Odysseus lacked the willpower to resist the Sirens – Odysseus had himself tied to a mast, rightly fearing that his willpower alone would not be enough – the stage directions here simply indicate “Faust entfernt sich.” (After WA 7213) Faust’s willpower is greater than Odysseus’. The Nymphs also make an attempt later in the scene, explicitly asking Faust to rest: “Am besten geschäh' dir, / Du legtest dich nieder, / Erholtest im Kühlen / Ermüdete Glieder, / Genössest der immer / Dich meidenden Ruh; / Wir säuseln, wir rieseln, / Wir flüstern dir zu. (WA 7263-7270) But Faust is only more awakened by them: “Ich wache ja!” (WA 7271). In the same speech, he adds: “Doch immer weiter strebt mein Sinn.” (WA 7291) His striving is still for Helena, “Das reiche Laub der grünen Fülle / Verbirgt die hohe Königin.” (WA 7293) More precisely, Faust desires Helena, which suggests that, just as at the end of Act I, he wishes to possess her: “Sie ist mein einziges Begehren!” (WA 7412) He expects to find her in a place: “Woher? wohin? ach, trugst du sie?” (WA 7413) Faust started out looking a suitable object for his will; Gretchen was an initial victim of this quest.³²⁰ Helena is its

³²⁰ Benjamin Bennett, *Goethe's Theory of Poetry: Faust and the Regeneration of Language* (Ithaca: Cornell University Press), 158.

current object. What, if anything, Faust plans to do with her should he obtain her is unclear. One may wonder whether Faust will end up like Menelaus does in *The Odyssey* – contently ruling his kingdom, with Helena by his side, drugged by her *nepenthe*, hardly recognizable as the great warrior he once was.

Act II first casts light on what Mephisto views as the absence of change. This absence of change is really stagnation and decay. Act II then juxtaposes the world in which Mephisto feels comfortable – Faust’s walled study, Wagner walled laboratory, the monarchic Walpurgisnight of *Faust I* – with the unbound, republican Classical Walpurgisnight of *Faust II*, where Faust feels at home. The artificial Homunculus also needs his borders, as he explains himself: “Natürlichem genügt das Weltall kaum, / Was künstlich ist, verlangt geschloss'nen Raum.” (WA 6883-84) Faust has left his study in *Faust I* (he has not returned to it since the second *Studirzimmer* scene early in *Faust I*), and feels at home in the Classical Walpurgisnight. He converses readily with Sphinxes, Nymphs, and Sirens, among others, and shows the strength of his will in the course of doing so. For where Odysseus himself – the Odysseus who fought in the entire Trojan War, and who then made it home to Ithaca and Penelope after one of the most arduous and trying journeys in all literature – could not resist the call of the Sirens, Faust resists it with apparent ease. He is striving for Helena. When asleep he dreams of her, and when awake he seeks her. Unlike Odysseus, he will not be distracted from his quest.

E. Faust II, Act III: Helena Amazes Faust

The Faust we have seen so far is a striving Faust, even if he does not always articulate the object of his striving clearly. In *Faust II*, his striving increasingly hones in on Helena. He tries to grab her apparition at the end of Act I, and is looking for her everywhere in the Classical Walpurgisnight. What he plans to do if he should obtain her is less clear, however. To ask the

question more precisely, will obtaining her be the end of his striving? Will he, akin to Menelaus in the *Odyssey*, settle down with her and cease to strive? Will he thus lose in the Lord's eyes, and possibly lose his pact with Mephisto as well? The answer to these questions depends on whether, if he should obtain Helena, she will be the end of his striving, or whether she will rather cause further striving. The answer, as we shall see, is that Faust, well into Act III, views Helena as the end of his striving, but that she will cause him to strive further by astounding him, and by disappearing from his world.

Helena appears at the very beginning of Act III. She has just returned from the Trojan War to the beach of Sparta in front of Menelaus' palace. She is a conflation of various sources. She first calls Tindareos her father, (WA 8497) but later calls herself a daughter of Zeus. (WA 8647). In the *Classical Walpurgisnight*, Faust had to go to the underworld to obtain her release, yet here she is alive and well, returned to Sparta in one piece, not killed or sacrificed. Phorkyas – that is, Mephisto in disguise – brings up that she in fact stayed in Egypt rather than in Troy.³²¹ (WA 8872-73) Helena does not deny this – she rather admits that she is confused by all these versions: “Verwirre wüsten Sinnes Aberwitz nicht gar. / Selbst jetzo, welche denn ich sei, ich weiß es nicht.” (WA 8874-75) Indeed, the narrative that Achilles followed her out of Hades to be with her leaves her even more confused.³²² She does not know if it really happened, and it left her seeing herself the way she is seen by others, that is, seeing herself from the outside as an idol: “Ich als Idol, ihm dem Idol [Achill] verband ich mich. / Es war ein Traum, so sagen ja die

³²¹ The first known recording of this version of the Helena myth can be found in Stesichorus' *Palinode*. Euripides incorporated it into his plays *Elektra* and *Helena*. In this version, Helena stayed in Egypt until Menelaus fetched her from there, while Paris had only brought an idol, a phantom to Troy. FA I, 7/2 p.600; MA 18/1 p.952.

³²² This myth can be traced back to Pausanias. FA I, 7/2 p.600.

Worte selbst. / Ich schwinde hin und werde selbst mir ein Idol.” (WA 8879-81) Perhaps this confusion accounts for the reason that she does not know how her story will end, for she wonders whether Menelaus will sacrifice her, (WA 8928) and is surprised when Phorkyas points out to her that she is the sacrifice Menelaus intends. (WA 8924)

For all this conflation and even confusion, there are also constants in this scene. Helena is a passive element of her narratives – things happen to her. In the first line of the scene, she describes herself in passive terms: “Bewundert viel und viel gescholten Helena.” (WA 8488) Her encounter with Menelaus happened to her “Geschah's daß mir, erwählt aus vielen, Menelas / In Bräutigams-Gestalt entgegen leuchtete.” (WA 8504-05) Their marriage was due to her father’s will: “Doch Vaterwille traute dich an Menelas.” (WA 8856) Paris was a robber who grabbed her: “Mich aber dort ein Räuber griff, der phrygische.” (WA 8512) Helena is not an actor in these narratives, but acted upon. She is not even a seductress, for a seductress must act to seduce. Rather, she simply attracts – not through her will or in spite of it, but regardless of it.

Phorkyas – that is, Mephisto – still likes stagnation, and sees central power, the fixed word, and walls and boundaries as its best guarantee. Within the walls of Menelaus’ high palace (WA 8975), just as within the walls of Faust’s study, is “[d]och ungeändert alles.” (WA 8981) The reason for the lack of change is that King Menelaus, the center of power, has been away fighting in Troy. (WA 8984-91) The lands beyond the palace walls have seen change, however. Mephisto informs Helena that during Menelaus’s absence, an “unersteiglich feste Burg” has been built in those lands. (WA 9001) Mephisto praises this castle, and especially the Lord who dwells there. (WA 9006ff.) Mephisto then tells Helena that she must flee to this castle, for Menelaus is about to sacrifice her. (WA 9049-9070) Helena agrees, though it is unclear why. She does not appear persuaded that Menelaus will sacrifice her, although she does not rule it out: “Wie? sollt’

ich fürchten, daß der König Menelas / So grausam sich verginge mich zu schädigen?"

(WA 9052-53) She realizes that Phorkyas is evil: "Ein Widerdämon bist du, das empfind' ich wohl / Und fürchte, Gutes wendest du zum Bösen um." (WA 9072-73) Still, she wishes to go to the castle Mephisto advertised, but she keeps her reasons to herself: "Vor allem aber folgen will ich dir zur Burg; / Das andre weiß ich; was die Königin dabei / Im tiefen Busen geheimnißvoll verbergen mag, / Sei jedem unzugänglich. Alte! geh voran." (WA 9074-77)

If the *Classical Walpurgisnight* and *Vor dem Palaste des Menelas zu Sparta* were two scenes set in the open, then we now once again find ourselves in a closed space, the *Innerer Burghof*. The chorus of women who follow Helena emphasize just how walled and constraining this space is: "Dunkelgräulich, mauerbräunlich. Mauern stellen sich dem Blicke, / Freiem Blicke starr entgegen. Ist's ein Hof? ist's tiefe Grube? / Schauerlich in jedem Falle! Schwestern, ach! wir sind gefangen, / So gefangen wie nur je." (WA 9123-26) The Trojan women are met by an impressive procession of marching men. (WA 9149ff.) After the procession has passed, the stage direction state that Faust appears "oben an der Treppe in ritterlicher Hofkleidung des Mittelalters und kommt langsam würdig herunter." (following WA 9181) Even though the chorus was impressed with the reception they received, Faust is displeased, for he was unable to prepare what he would consider an adequate reception. He blames Lynceus for this, whom he has brought onto the stage in chains: "Statt feierlichsten Grußes, wie sich ziemte, / Statt ehrfurchtsvollem Willkomm bring' ich dir / In Ketten hart geschlossen solchen Knecht, / Der, Pflicht verfehlend, mir die Pflicht entwand." (WA 9192-95) Lynceus possesses great eyesight, and Faust therefore appointed him as a watchman in the tall tower, with the duty to report "Was etwa da und dort sich melden mag." (WA 9202) But "[h]eute, welch Versäumniß! / Du [Helena] kommst heran, er meldet's nicht, verfehlt / Ist ehrenvoller, schuldigster Empfang / So hohen Gastes." (WA 9206-

09) For this negligence, Faust explains, Lynceus deserves death – indeed, he would have been dead already, if Helena had not been there, for she alone may punish or pardon as she pleases: “Freventlich verwirkt / Das Leben hat er, läge schon im Blut / Verdienten Todes; doch nur du allein / Bestrafst, begnadigst, wie dir's wohl gefällt.” (WA 9209-12)

Helena’s first task – indeed, her first real act in *Faust*, for until now she has been passive and acted upon – is thus to judge Lynceus. Helena attaches the highest value to this new role: “So hohe Würde wie du sie vergönnt, / Als Richter, als Herrscherin, und wär's / Versuchend nur, wie ich vermuthen darf.” (WA 9213-15) She hears Lynceus after announcing: “So üb' ich nun des Richters erste Pflicht, / Beschuldigte zu hören. Rede denn.” (WA 9216-17) Remarkably, absurdly even, she is the first character in the law-laden work that is *Faust* who actually listens to the accused. Lynceus fully gives himself over to Helena’s authority: “Laß mich knieen, laß mich schauen, / Laß mich sterben, laß mich leben, / Denn schon bin ich hingegeben / Dieser gottgegebenen Frauen.” (WA 9218-9221) Indeed, in the rest of his defense, (WA 9222-9245) he emphasizes several times that she is a superior being, and he is therefore willing to accept her judgment, even if it means his death. He tells the story from his perspective: the sun miraculously rose in the south, rather than the east. He sought the sun with his eyes, but when this dazzling goddess appeared, he was blinded by her beauty, and forgot his duties as a watchman.

Helena acquits Lynceus: “Entferne diesen Guten, laß ihn frei;” (WA 9256) because “[d]as Übel das ich brachte darf ich nicht / Bestrafen.” (WA 9246-47). She means that it has been her fate to attract males to the extent that they are willing to do anything to obtain her:

Welch streng Geschick
Verfolgt mich, überall der Männer Busen
So zu bethören, daß sie weder sich
Noch sonst ein Würdiges verschonten. Raubend jetzt,

Verföhrend, fechtend, hin und her entrückend,
Halbgötter, Helden, Götter, ja Dämonen,
Sie führten mich im Irren her und hin.
Einfach die Welt verwirrt' ich, doppelt mehr,
Nun dreifach, vierfach bring' ich Noth auf Noth.
(WA 9247-55)

Helena is reminding us of the many narratives about her that were circulating in the previous scene, where here suitors included such demigods as Achilles and such heroes as Menelaus and Paris – and she was moved across the world, and even into Hades, regardless of her will. Here in Faust's palace, she again explains that she is passive, that her will had no bearing on events: she confounds masculine souls not because of anything she does, but because it is her "streng Geschick." Because she understands these narratives of passivity, she now acts to acquit Lynceus.

Faust is "Erstaunt, o Königin" (WA 9258) by Helena's act of narrative justice. His entire world, including his conception of himself, is collapsing:

Was bin ich nun? Auf einmal machst du mir
Rebellisch die Getreusten, meine Mauern
Unsicher. Also fürcht' ich schon, mein Heer
Gehorcht der siegend unbesiegten Frau.
Was bleibt mir übrig als mich selbst und alles,
Im Wahn das Meine, dir anheim zu geben?
Zu deinen Füßen laß mich, frei und treu,
Dich Herrin anerkennen, die sogleich
Auftretend sich Besitz und Thron erwarb.
(WA 9264-72)

Faust's mighty walls no longer provide security. Faust now believes that all his property, which he only mistakenly thought was his, should belong to Helena, as should he. In Faust's eyes, Helena has now acquired the throne and property. Lynceus is similarly struck. He brings Helena all his possessions, which involve significant treasures. (WA 9271 ff.) He thought these to be

valuable, but, like Faust, now has changed his mind, and believes that a look from Helena has greater value.

Faust, however, is still a conflicted character. His total and voluntary surrender to Helena still reeks centralized power, for he sees her as a “Herrin” who acquired “Besitz and Thron.” Faust soon asks that she “Bestärke mich als Mitregenten deines / Gränzunbewußten Reichs, gewinne dir / Verehrer, Diener, Wächter all' in Einem.” (WA 9362-64) He is still influenced greatly by Helena, for he now wants an empire unconscious of borders, rather than the walls of his castle, and he wishes to serve her in several capacities. Still, he also wants to be her co-regent – he is no longer fully content merely to give everything over to her, but wants a share of her power.

It is worth pausing here to consider how remarkable the scene is. In one simple act of judging, Helena has made Faust’s entire world collapse, and Lynceus’, too. All she did was hear the accused – she is, remarkably, the first character in all of *Faust* to exercise this “Richters erste Pflicht” – and render a judgment based on her life experience. This underlines just how dismal of a state Faust is really in. For only someone who has truly forgotten the basics of justice would inform the woman of his dreams that Lynceus would already have been executed if she had not been there – that is, Faust tells Helena that he does not even bother to hear the accused. This is all the more remarkable given that Faust himself has studied law, and given that he was paralyzed himself for the first two scenes of Act II after encountering Helena (or a phantom of her) in Act I. That is, he of all people should understand the basics of procedure, and he, of all people, should understand the effect Helena can have on men.

However, this does not mean that the change in Faust is complete. Mephisto soon announces that Menelaus’s army is attacking Faust’s and Helena’s castle: “Menelas mit Volkes-

Wogen / Kommt auf euch herangezogen; / Rüstet euch zu herbem Streit!” (WA 9426-28) Faust’s reverence for Helena appears to have dissipated, in that he now acts without even consulting her. Indeed, Helena will not even get to say a word until the battle is over. Even though Faust just won Helena’s favor by letting her judge and rule, he now suddenly believes that “Nur der verdient die Gunst der Frauen, / Der kräftigst sie zu schützen weiß.” (WA 9444-45) This is strange, given that Helena is weary of males fighting over her, and does not appear to have loved any of those males, whether they were victorious or not. But Faust is fully focused on the battle. Again, his walls become important: “Drängt ungesäumt von diesen Mauern / Jetzt Menelas dem Meer zurück;” (WA 9458-59) Again, he believes in his “Getreuesten;” rather than being *gränz unbewußt*, he now divides lands between them. First, they must defend or attack those lands: the *Germanen* get the bays of Corinth, the Goths get Achaia, the Franks get Elis, the Saxons Messene, the Normans get Argolis (and must clear the sea). After these loyal vassals have been successful, they may inhabit their respective dominions. (WA 9474-75, 78-79) And again, Faust returns to a centralized conception of state power: “Doch Sparta soll euch überthronen, / Der Königin verjährter Sitz. / ... / Ihr sucht getrost zu ihren Füßen / Bestätigung und Recht und Licht.” (WA 9476-81)

This tendency on the part of Faust to organize his empire with walls, internal fiefdoms, and a center, coupled with his propensity for war lead to the death of Euphorion, the son he and Helena have in *Arkadien*, the final scene of Act III. Euphorion seeks to escape these walls, and seeks the thrill of battle, even if it might lead to his death. (WA 9855-63) And thus he perishes. (WA 9900ff.) Helena follows him to Hades by simply vanishing – Faust’s walls have no power over her. (WA 9939-44) Faust is left merely holding her clothes.

Act III is generally regarded as central to all of *Faust*, and Helena as one of Goethe's most important characters.³²³ In this central act, this central character performs one real act – that is, one act governed by her own will: she judges. Acting as a judge over the watchman Lynceus, she acquits him. Up to this point, Helena had been passive. She was married to Menelaus through her father's will, she was taken to Troy by a robber, and taken back to Sparta by a conquering husband. But in Faust's castle she acts of her own volition, if only once. That one action profoundly affects Faust. Faust begins to question the very world he was creating, with its walls and its centralized rule.

Helena is an unusual kind of judge. She has no legal background, unlike Faust (who studied law), or Mephistopheles (who has shown himself to be well-versed in law). She does not apply any laws to reach her verdict. In a literary work laden with legal references, Helena's verdict is devoid of them. She derives her legitimacy in part from being exceptional, in part from Faust, the ruler of this state, and in part from Lynceus, the accused who submits himself to her judgment even before she renders it. She is always moving from place to place – Sparta, Troy, Attica, Hades, Arkadia. Indeed, she simply vanishes back to Hades in the final scene of Act III. Even in time, she is hard to place – she is a figure from Classical Antiquity, but she is at once Homer's and Euripides' – whose writings are separated by centuries. At the same time, Faust's castle is medieval, and he wears medieval attire in Act III. Precisely this movement between different places and times allows her to bring her narratives – which come from different places and times – to bear on her decision. Helena is thus akin to the arbitrators described in Chapter II – who derive their legitimacy from their competence, the cooperation of the state, and the

³²³ Schmidt, *Goethes Faust: erster und zweiter Teil: Grundlagen, Werk, Wirkung*, 234-35.

consent of the parties, who cross borders with relative ease, and who are not bound to apply law strictly.

Yet even though Faust is deeply affected by Helena, he is not completely changed. The advent of war brings back his affection for walls and for a realm run from one center. With war upon him, he no longer consults Helena, even though her husband is the one attacking him, and she had years of experience with that at Troy. Faust's thinking promptly reverts to what is perhaps the most primal and animalistic aspect of territorial thinking: "Nur der verdient die Gunst der Frauen, / Der kräftigst sie zu schützen weiß." (WA 9444-45) Faust still wants to possess Helena, to install her on a tall throne at the center of his empire.

F. Faust II, Act IV: The Kaiser Fights Back, but Faust is Changing

Act IV will also feature a battle. This time, not Faust and his vassals will face Menelaus, but rather the *Kaiser* and his vassals will face the *Gegenkaiser*. But before that battle begins, Faust fights out an internal one. On the one hand, he is still longing for his centralized rule from a walled castle. On the other hand, he is beginning to understand that this will not satisfy him – Helena has had some effect.

At the beginning of the act, Faust steps down from a cloud onto high mountains. In this cloud he sees the fairest of women. (WA 10047ff.) As the cloud hovers away into the ether, it "zieht das Beste meines [Faustens] Innern mit sich fort." (WA 10066) We are reminded that when Helena departed in the previous act, she took the best of Faust with her.

But even without Helena by his side, Faust is changed. He no longer wants a mighty capital from which to rule, even though Mephisto insistently proposes that idea. Mephisto also arrives on a cloud, and is mightily displeased that they disembarked here. (WA 10067-72) He explicitly associates centralization with hell: "Als Gott der Herr --- ich weiß auch wohl warum --

- / Uns, aus der Luft, in tiefste Tiefen bannte, / Da, wo centralisch glühend, um und um, / Ein ewig Feuer flammend sich durchbrannte.” (WA 10075-78) He then explains that these mountains where they have disembarked were once the floor of hell. (WA 10072) Mephisto wonders “Gefiel dir nichts an unsrer Oberfläche? / Du übersahst, in ungemess'nen Weiten, / Die Reiche der Welt und ihre Herrlichkeiten;” (WA 10129-31) Faust responds, cryptically: “Und doch! ein Großes zog mich an. / Errathe!” (WA 10134-35) Mephisto does not realize that Faust has been changing after his experience with Helena, and supposes that Faust was attracted by a capital city: “Das ist bald gethan. / Ich suchte mir so eine Hauptstadt aus,” (WA 100135-36). Mephisto thinks that Faust is still looking for a realm to rule from a capital city. But Faust is no longer so easily satisfied: “Das kann mich nicht zufrieden stellen!” (WA 10155) Mephisto offers to build “Am lustigen Ort ein Schloß zur Lust.” (WA 10161) Even this Faust rejects. (WA 10176) That offer might have suited the pleasure-seeking *Kaiser*, but Faust states: “Herrschaft gewinn' ich, Eigenthum! / Die That ist alles, nichts der Ruhm.” (WA 10187-88) His veneration for the deed recalls his translation of the New Testament in *Faust I*, where he translated the opening of the Gospel according to John not as “in the beginning of the word,” but as “in the beginning was the deed.”³²⁴ His desire for *Herrschaft* and for *Eigenthum* recalls the Faust of Act III: the Faust who was briefly willing to give up all his *Eigenthum* and *Herrschaft* to Helena, but quickly changed his mind when war was upon him, and soon sought to possess Helena.

This conflicted Faust, this Faust who no longer likes capital cities or mighty castles, but who still wants *Herrschaft* and *Eigenthum*, explains to the confounded Mephisto that “ein Großes zog mich an” (WA 10130) referred to the sea: “Mein Auge war auf's hohe Meer

³²⁴ See *supra* p.160.

gezogen,” (WA 10198). He is disappointed that the sea, upon successfully invading the shore, retreats every time, in an endless repetition. And thus, according to Faust, “ist nichts geleistet.” (WA 10217) Faust decides to vanquish this sea. (WA 10221) He intends to: “Das herrische Meer vom Ufer auszuschließen, / Der feuchten Breite Gränzen zu verengen / Und, weit hinein, sie in sich selbst zu drängen.” (WA 10229-31) His new *Herrschaft*, then, will be to set the borders for the *herrische* sea itself; and, it seems, the land thus acquired from the sea will be added to his *Herrschaft* and his *Eigenthum*. Mephisto must help Faust with this endeavor: “Das ist mein Wunsch, den wage zu befördern!” (WA 10233)

Now the sound of drums and martial music is heard in the distance – war has arrived again. (WA 10233-34) Mephisto sees an opportunity here: Faust will help the *Kaiser* win, and the *Kaiser* will give Faust control over the shore – give him “[d]ie Lehn von gränzenlosem Strande.” (WA 10306) There, Faust will be able to carry out his project of subduing the sea. The *Kaiser*, so Mephisto tells us, is badly in need of help. We last saw the *Kaiser* in Act I, when Mephisto’s paper money had repaired the empire, at least temporarily, and let the *Kaiser* return to seeking pleasure. But the *Kaiser* was more interested in pleasure than in governing (WA 10246-10260), therefore “zerfiel das Reich in Anarchie.” (WA 10261) Mephisto calls the paper money he conjured for the *Kaiser* “falschen Reichthum” (WA 10245), which may also be a part of the reason that the empire is in such a dire state.³²⁵

³²⁵ It is frequently assumed that the paper money is economically problematic. See, e.g., Gray, *Money Matters: Economics and the German Cultural Imagination, 1770-1850*, 356. However, Faust and Mephisto focus much more on the *Kaiser*’s character – specifically on his propensity for enjoyment, which we saw in Act I. Goethe himself was apprehensive about paper money, but also appreciated that it could be the way to get an empire through a war when money is in short supply, as in the case of the Austrian Empire, which issued paper money and similar instruments various times during the Napoleonic Wars. Knortz and Laudenberg, *Goethe, der Merkantilismus und die Inflation: zum ökonomischen Wissen und Handeln Goethes und seiner Figuren*, 123. We have no way to reconstruct with certainty the course of the empire towards anarchy, but can suppose that the combination of an emperor who seeks pleasure and the seductive, temporary fix that is Mephisto’s paper money is a dangerous combination.

The anarchy caused the “Tüchtigen” (WA 10278) to elect a new emperor, in the hope that he “[i]ndem er jeden sicher stellt, / In einer frisch geschaffnen Welt / Fried' und Gerechtigkeit vermählen.” (WA 10282-84) Faust notices the Biblical allusion here,³²⁶ and Mephisto explains that it was indeed the clergy who were “mehr als beteiligt.” (WA 10287) Indeed, they blessed the uprising, concerned about their “wohlgenährten Bauch.” (WA 10286) Faced with such an uprising, the *Kaiser* “[z]ieht sich hieher, vielleicht zur letzten Schlacht.” (WA 10290) This uprising does not seek to create a different order, to change the system. Rather, the rebels simply seek to place a different ruler at the top of the same order. Indeed, the vision of the rebels of Act IV parallels the vision presented in Act I at the *Kaiser*'s court. In Act I, we read that only the *Kaiser* can provide *Gerechtigkeit* – in Act IV, the rebels want the new emperor to do exactly that.³²⁷ In Act I, we read that the *Kaiser* was needed to restore peace – in Act IV, the rebels want a new emperor to provide exactly that.³²⁸ In Act I, we read that the *Kaiser* needed the clergy to legitimate his power – in Act IV, it is also the clergy that is needed to bless the rebellion.³²⁹

Even though he was surprised that Faust wanted to subdue the sea, Mephisto is prepared to help Faust achieve that goal. For Mephisto has long seen the war coming (WA 10315), and therefore “[d]en Kriegerath gleich voraus formirt” (WA 10316). Faust, who knows that he is not competent to lead the battle, will assume command of the battle as “Obergeneral,” (WA 10310)

³²⁶ Psalm 85:11 (10 in the KJV): “Gerechtigkeit und Friede sich küssen” / “righteousness and peace have kissed each other.”

³²⁷ See *supra* p. 163.

³²⁸ See *supra* p. 163.

³²⁹ “Der Kaiser, er, an heiligen Sohlen / Erbat sich erst das Recht zur Macht.” (WA 5072-73)

– but he will simply leave all decisions to the council Mephisto has formed. (WA 10313). The members of this council promptly appear: Mephisto has made the council of the *Drei Gewaltigen* – Goethe provides the reference to Samuel II 23:8 in the text – the Three Mighty Men who helped King David overcome the Philistines.

Still, the *Kaiser* nearly loses the battle. (WA 10659-63; 10685-87) Only through Mephisto’s powers is the battle saved. He causes human eyes – including those of the *Gegenkaiser*’s troops – to see a torrent that inundates them. While even Faust is deceived by this trick (WA 10725-10733), an entertained Mephisto comments:

Und mich ergetzt der wunderliche Fall.
Sie stürzen fort zu ganzen hellen Haufen,
Die Narren wännen zu ersaufen,
Indem sie frei auf festem Lande schnaufen
Und lächerlich mit Schwimmgebärden laufen.
Nun ist Verwirrung überall.
(WA 10736-10741)

The battle is now won, and it is time to divide the spoils of victory. The *Gegenkaiser* has somehow amassed a significant amount of gold, even though the empire was devoid of gold to the point that only Mephisto’s ingenuity could create money in Act I. (WA 10785) But the *Kaiser* is more interested in restoring permanent order – and he is not looking to change the system. He begins by awarding titles to the four princes who were loyal to him. (WA 100871ff.) One becomes *Erbmarschall*, one *Erzkämmerer*, one *Erztruchsess*, one *Erzschenk*.³³⁰ This awarding of titles confirms that the *Kaiser* has not changed – even after almost losing a war, his power, and possibly his life. He is still a pleasure-seeker at the center of a bordered realm. He

³³⁰ Goethe here appears to draw inspiration from the coronation of Joseph II, Holy Roman Emperor, which Goethe witnessed in 1763 at the age of fourteen. There, too, an *Erbmarschall*, *Erbruchsess*, and *Erbschenken* were present. FA I, 7/2 p.688. The prefix *Erz* made way for the prefix *Erb* over time, as these titles became inherited attributes of nobility. *Id.* p.696.

puts the *Erbmarschall* in charge of the army, but does not expect him to work much during peacetime: “Im Frieden wirke nun wie es die Zeit begehrt.” (WA 10875) The newly appointed *Erzmarschall* quickly articulates that his real function is to protect the empire’s borders so the *Kaiser* can enjoy his feasts:

Dein treues Heer, bis jetzt im Inneren beschäftigt,
Wenn's an der Gränze dich und deinen Thron bekräftigt,
Dann sei es uns vergönnt, bei Festesdrang im Saal
Geräumiger Väterburg, zu rüsten dir das Mahl.
(WA 10877-80)

The *Erzkämmerer* is placed in charge of the domestic staff. He promptly articulates that his real function is ensuring that that the *Kaiser* remain the main power: “Des Herren großen Sinn zu fördern bringt zu Gnaden.” (WA 10889) He also understands that the *Kaiser* is looking for pleasure, and promptly proposes a feast. (WA 10893-96). The *Kaiser* then appoints the other two loyal princes to functions that are even more directly aimed at ensuring his pleasure: the *Erztruchsess* is in charge of supplying food to the *Kaiser*, and the *Erzschenk* of ensuring a sufficient supply of wine. Both stress that they will ensure that the *Kaiser* enjoys his feasts. (WA 10903-07; 10915-24)

The *Kaiser*’s effort to ensure that the order he reestablishes will be unchanging and permanent does not end here, however. He immediately proceeds to put the arrangement into writing. His rationale, and even his word choice, recall, among others, the pact scene of *Faust I*, where Faust signed his pact with Mephisto.³³¹ For the word (or verbal promise), even the *Kaiser*’s word, is not enough to guarantee that there will be no change – writing is required for that:

³³¹ Recall Faust’s antipathy to the immutability of the written word. See *supra* p.146.

Was ich euch zugedacht in dieser ernsten Stunde,
Vernahmt ihr mit Vertrauen aus zuverlässigem Munde.
Des Kaisers Wort ist groß und sichert jede Gift,
Doch zur Bekräftigung bedarf's der edlen Schrift,
Bedarf's der Signatur. Die förmlich zu bereiten,
Seh' ich den rechten Mann zu rechter Stunde schreiten.

Der Erzbischof-Erzkanzler tritt auf.

Wenn ein Gewölbe sich dem Schlußstein anvertraut,
Dann ist's mit Sicherheit für ewige Zeit erbaut.
(WA 10925-32)

Having thus ensured the arrangement of his palace, the empire's center, and the empire's borders, the *Kaiser* now turns to "das Reich in seinem Ganzen." (WA 10935) He gives each of the loyal princes their bordered chunk of the empire: "An Ländern sollen sie vor allen andern glänzen, / Deßhalb erweitr' ich gleich jetzt des Besitzthums Gränzen." (WA 10938-39) They may increase their lands "[d]urch Anfall, Kauf und Tausch," (WA 10942), but they may not divide them, and they must pass them down to their eldest sons. (WA 10968-70) Thus, the *Kaiser* ensures that this order will last through time: his empire cannot shrink, and the structure of the empire is passed down, unbroken, undivided, from one generation to the next. This order is further guaranteed by the powers the princes have within their respective bordered lands:

Dann sei bestimmt vergönnt zu üben ungestört
Was von Gerechtsamen euch Landesherrn gehört.
Als Richter werdet ihr die Endurtheile fällen,
Berufung gelte nicht von euern höchsten Stellen.
Dann Steuer, Zins und Beth', Lehn und Geleit und Zoll,
Berg-, Salz- und Münzregal euch angehören soll.
Denn meine Dankbarkeit vollgültig zu erproben,
Hab' ich euch ganz zunächst der Majestät erhoben.
(WA 10943-50)

This legal system is the opposite of what Helena showed in Act III. Here, each prince presides over his bordered piece of the empire, and is the ultimate judicial authority within it.

This power is one incentive for the princes to want to preserve this system – another are the great

economic powers they are given. These princes can be wealthy simply by enjoying these various rents from their land – hardly an incentive to change anything.

Finally, the *Kaiser* further ensures the continuation of this system by entrusting these four princes and the *Erzbischof* with the election of the next *Kaiser*. (WA 10958) Given that these electors have every incentive to preserve the *status quo*, they also have every incentive to elect an emperor who will do so.

This is a system that recalls that of the *Golden Bull*, the legal foundation of the Holy Roman Empire, which remained in force from 1356 until the dissolution of the Empire in 1806.³³² It is a system designed to last forever. For no lands can leave this system, and no outsider can have real power in it. No Helena can pass judgment here – only the princes (and presumably the *Kaiser* in his lands) can issue final judgments. The princes control all the levers of the economy. And these princes, who have every incentive to keep this system from changing, elect every next *Kaiser*. Having established this order, the *Kaiser* emphasizes that it is intended to last forever, and that writing is thus needed:

Und also sei, zum Schluß, was wir bisher bethätigt,
Für alle Folgezeit durch Schrift und Zug bestätigt.

The *Erzkanzler* is prompt to underline the importance of writing in this system:

Dem Pergament alsbald vertrau' ich wohlgemuth,
Zum Glück dem Reich und uns, das wichtigste Statut;
Reinschrift und Sieglung soll die Canzelei beschäftigen,
Mit heiliger Signatur wirst du's, der Herr, bekräftigen.
(WA 10971-74)

³³² FA I, 7/2 p.689. Cf. *supra* p.166.

Act IV thus leaves us with a victory of the law that is written, bordered, centered – with the law that resists change and favors stagnation. Again, this conception of law is associated with a confined space – Faust signed his pact in blood in his *Studirzimmer*, Mephisto introduced paper money in the *Kaiser's* palace, Faust sought to possess Helena in his impressively walled castle – and the *Kaiser* introduces his new order in the tent of the *Gegenkaiser*. Again, this order proves resistant to violence and to illegal acts. Faust's illegal attempt, sword-in-hand, to liberate Gretchen from the dungeon failed in *Faust I*. And so the illegal and violent attempt of the rebels and the *Gegenkaiser* fails in *Faust II*. They lose, their defeat only strengthens the *Kaiser's* legal order – and even if they had won, they would not have changed the legal order, merely installed a different man at its center.

G. Faust II, Act V: Faust Finally Triumphs

Act IV left us with the victory of a legal order Mephisto favors – centralized, written, bordered. The *Kaiser* fought for this order, and, with help from Mephisto, prevailed. He then returned to enjoying the physical pleasures of life. Mephisto would have little difficulty winning under his pact with the Lord if the *Kaiser*, rather than Faust, had been involved. Mephisto would also have little difficulty enforcing his pact with Faust in the *Kaiser's* realm – the written pact fits nicely into the legal order of that realm.

But Faust is not the *Kaiser*, and he is not done striving yet. He helped the *Kaiser* win the war not for the sake of the *Kaiser's* legal order, but to obtain “[d]ie Lehn von gränzenlosem Strande,” (WA 10306) so as to begin his project of subduing the sea. He indeed received this *Lehn*. (WA 11115-16) If Faust achieves this goal, and ceases his striving there, Mephisto will win his pact with the Lord. And if the outcome of the pact between Faust and Mephisto will be judged will be judged in the legal order of the *Kaiser's* empire, then that pact will be

enforceable. But if the pact will be judged in a world that fits with Helena's *gränzunbewußte* order, then it remains to be seen if it will be enforceable.

The first scene of Act V, *Offene Gegend*, bodes well for Mephisto and his bordered legal order. A wanderer visiting Philemon and Baucis wishes to see "das gränzenlose Meer," (WA 11076) but can only see "in der Weite / Erst des Meeres blauen Saum." (WA 11103-04) This is because Faust's project is well underway:

Kluger Herren kühne Knechte
Gruben Gräben, dämmten ein,
Schmälernten des Meeres Rechte,
Herrn an seiner Statt zu sein.
(WA 11091-94)

Faust – the "Herr" in this passage – now has minions performing a massive border-making task. Human suffering does not prevent him from moving the work forward: "Menschenopfer mußten bluten, / Nachts erscholl des Jammers Qual." (WA 11127-28) Faust's vision here is more ambitious even than the *Kaiser's* vision was in Act IV. Where the *Kaiser* only sought to solidify the external and internal borders of his empire, Faust is creating borders where previously there were none. For the beach and for the sea, both *gränzenlos* (WA 10306; 11076), Faust is now having borders built.³³³ This is all the more striking because *Landgewinnung* need not be a border-making exercise – it could be about creating space for people outside the order of the *Kaiser's* bordered realm. At this point in time, however, Faust is not thinking in that way – rather, he is building artificial borders ("Gruben Gräben, dämmten ein") where previously there were none. He wishes to be lord where the sea once was – even the *Kaiser* has not gone to such

³³³ The sea has long been seen as borderless in the European legal tradition, in the sense of being outside any state or even any legal order. Carl Schmitt, *Der Nomos der Erde im Völkerrecht des jus publicum Europaeum* (Köln: Greven, 1950), 13-14.

lengths in his pursuit of borders and power. He even uses the water to make internal borders: “Meerab flossen Feuergluthen, / Morgens war es ein Canal.” (WA 11129-30). Unsurprisingly, we soon learn that Faust has now built himself a palace as well (WA 11122) – even though, in Act IV, he emphatically rejected that he desired a palace at all.³³⁴ And when Faust, now “im höchsten Alter,” first appears in Act V, we are once again in a palace – palaces have, throughout *Faust II*, been associated with centralized rule, be it the *Kaiser*’s palace in Act I, Menelaus’ palace in Act III, Faust’s palace in Act III, or now Faust’s new palace in Act V. Faust’s project seems to be building the order that Mephisto favors and that Helena had counteracted: a bordered and centralized order. Indeed, Faust is bothered that in his realm, which is “for Augen ... unendlich” (WA 11153), not quite everything is his. For a small hut and a small chapel belongs to Philemon and Baucis, not to Faust. (WA 11131-11134; 11156-63)

As might be expected, Mephisto is quite pleased with this state of affairs, and happily collaborates with its further development. He returns from a journey with twenty ships, even though he left with only two. Lynceus spots his arrival. (WA 11145-50) Lynceus failed to spot Helena’s arrival in Act III, with almost fatal consequences for himself.³³⁵ But where Helena crosses borders as if they were hardly there, Mephisto takes borders most seriously – indeed, in the very first scene in which he appears before Faust, he is caught in the borders of a pentagram, which presents a serious problem to him.³³⁶ His understanding of the basis of legitimacy recalls the *Kaiser*’s, who reestablished his legal order through war: “Man hat Gewalt, so hat man

³³⁴ See *supra* p.182.

³³⁵ See *supra* p.175.

³³⁶ This episode is discussed *supra* p.151.

Recht.” (WA 11184) And that is also how he expanded his fleet: “man fängt ein Schiff, / Und ist man erst der Herr zu drei, / Dann hakelt man das vierte bei; / Da geht es denn dem fünften schlecht.” (WA 11180-83) Mephisto does not recognize peaceful or honest commerce, to him: “Krieg, Handel und Piraterie, / Dreieinig sind sie, nicht zu trennen.” (WA 11187) Tellingly, Mephisto is accompanied by the *Drei Gewaltigen*, who had helped the *Kaiser* win his war in Act IV.³³⁷

But Faust is not pleased with the return of this fleet, or with the treasure it brings. Where he organized an impressive reception for Helena in Act III, even though Lynceus had failed to detect her arrival, he organizes no reception for Mephisto and his fleet, even though Lynceus did detect their arrival. Rather, Faust makes a “Widerlich Gesicht;” (WA 11194) a first indication in Act V that Faust has not fully internalized Mephisto’s worldview. Mephisto promptly pushes that worldview on Faust. He first reminds Faust that the project of hemming in the sea has been completed successfully: “Das Ufer ist dem Meer versöhnt.” (WA 11222) Indeed, Faust is now in a position that he need only speak to complete his domination of the world: “So sprich daß hier, hier vom Palast / Dein Arm die ganze Welt umfaßt.” (WA 11225-26) By repeating “hier” and adding that this refers to the palace, Mephisto is once again stressing the importance of the center in his worldview. Mephisto continues on this of emphasizing the importance of this central location:

Hier stand das erste Breterhaus;
Ein Gräbchen ward hinaberitzt
Wo jetzt das Ruder emsig spritzt.
Dein hoher Sinn, der Deinen Fleiß
Erwarb des Meers, der Erde Preis.
Von hier aus ---
(WA 11228-33)

³³⁷ See *supra* p.185.

But now, before Mephisto can finish the verse, Faust interrupts him:³³⁸

Das verfluchte *hier!*
(WA 11233) (original emphasis)

Faust is thus cursing this location, this center of his realm where his palace stands.³³⁹ He is, after all, not fully taken in by Mephisto's worldview. He does not want to rule the world from his central palace. But he still wants "Welt-Besitz," (WA 11242) which is being spoiled for him by the trees that stand on the land of Philemon and Baucis, living in their humble hut – because these trees prevent him from seeing all that he has accomplished, his entire realm. (WA 11241-11250) Although Faust had just cursed the "hier," he has not thereby cursed the idea of having a center for his realm. Rather, he wants this center to be in the trees old Philemon and Baucis currently possess: "Die Linden wünscht' ich mir zum Sitz, / ... / Dort wollt' ich, weit umher zu schauen, / Von Ast zu Ast Gerüste bauen." (WA 11240-44)

Mephisto is understandably sympathetic to Faust's frustration, for Mephisto wants Faust to establish this new center that Faust will be content with. Faust then emphasizes his frustration with the old couple, but also his commitment to remaining just:

Das Widerstehn, der Eigensinn
Verkümmern herrlichsten Gewinn,
Daß man, zu tiefer, grimmiger Pein,
Ermüden muß gerecht zu sein.
(WA 11269-72)

³³⁸ Such breaks in a line are infrequent in *Faust*. Where they do happen, they typically mark an important moment. For instance, at the end of *Faust I*, Mephisto exclaims "Sie ist gerichtet!" (WA 4611) But a voice from above (the Lord's voice overrides his assessment "Ist gerettet!" Still in the same line, Mephistopheles summons Faust "Her zu mir!"

³³⁹ In *Faust I*, Faust went on a tirade of curses. (WA 1587-1606) See Mein, "Aporien von Eid und Fluch: Unmögliche Versprechen in Goethes Faust." There, however, he did not curse "hier," and his many curses caused no change. Now, close to the end of *Faust II*, he curses only "hier" – and thus gets to the core of his struggle with Mephistopheles.

Helena's influence can be felt here – Faust is committed to justice, even though the stubbornness of Philemon and Baucis are spoiling his success. That is, he has not forced them to move, even though he has the power to do so. He has offered them “Schönes Gut” (WA 11136) to live on elsewhere in his realm, but has not forced them to move there. Now, he sends Mephisto to make Philemon and Baucis move after all:

So geht und schafft sie mir zur Seite! ---
Das schöne Gütchen kennst du ja,
Das ich den Alten ausersah.
(WA 11275-77)

Faust does not specify what means Mephisto can use. On the one hand, Faust's commitment to justice would suggest that Mephisto should stay within the bounds of law and justice. On the other hand, Faust has expressed fatigue with this justice, and sending a devil who just recently espoused that might makes right (WA 11184) on a mission suggests that Faust is open to the use of violence here.

Still, when Faust hears Lynceus' laments, he finds that “mich, im Innern, / Verdrießt die ungeduld'ge That.” (WA 11340-41) Lynceus was lamenting the destruction by fire of Philemon and Baucis' estate. (WA 11304-11335) Faust soon learns that Mephisto not only destroyed Philemon and Baucis's estate, but that Philemon and Baucis also died in the process, as did a stranger, presumably the wanderer staying with them, the one who wanted to see “das gränzenlose Meer” (WA 11076) at the beginning of Act V:

Behende dir sie weggeräumt.
Das Paar hat sich nicht viel gequält,
Vor Schrecken fielen sie entseelt.
Ein Fremder, der sich dort versteckt
Und fechten wollte, ward gestreckt.
(WA 11361-65)

Faust now squarely condemns this act:

Wart ihr für meine Worte taub!

Tausch wollt' ich, wollte keinen Raub.
Dem unbesonnenen wilden Streich
Ihm fluch' ich, theilt es unter euch!
(WA 11370-73)

Thus, the two people who are disturbed by Mephisto's violent and destructive approach are the two people who were most directly and strongly affected by Helena's justice: Lynceus and Faust. Helena acquitted Lynceus in Act III, impacting him so much that he, previously openly concerned with looting, ceased to value his looted treasures and wished to give them to Helena; and she left Faust astounded, similarly willing to give her all his possessions.³⁴⁰ Helena's intervention in Act III has thus not been without consequence – both Faust and Lynceus have some commitment to justice now.

Faust does not have long left to live. At the end of this life, blind by this point, he exits his palace, the seat of centralized power, after all. He is motivated in part by the belief that his personal presence is necessary to make the work of his minions move forward, (WA 11503-10) and in part because he delights in hearing the sound of the work and being among the crowd that performs it. (WA 11539-11540) Although Faust believes that the work is on a canal, his overseer, Mephisto, soon informs us that they are in fact digging a grave: "Man spricht, wie man mir Nachricht gab, / Von keinem Graben, doch vom Grab." (WA 11555-56) It is often assumed that this is Faust's grave.³⁴¹ However, when he dies he is laid simply "auf den Boden." (stage direction after WA 11586) Thus, if the work was indeed on Faust's grave, he was not put to rest in that grave.

³⁴⁰ See *infra* p.176.

³⁴¹ FA 7/2, p.745.

Before Faust dies, however, he explains what he has built, and the one thing needed to complete the work. That thing is the draining of a swamp, which “Verpestet alles schon Errungene;” (WA 11560) – that is, stagnation must be fully removed from the realm built on Faust’s striving. For a swamp is stagnant water, and Faust describes it as such when he calls it “faul[.]” (WA 11560)³⁴² Rather, what Faust has in mind for his people is perpetual striving, for outside the “paradiesisch Land” (WA 11569) that he, as a new Moses, has built for them, is the “Flut” that “nascht gewaltsam einzuschließen.”³⁴³ (WA 11570-71) But this violence of the sea will be counteracted by the people who in their “[g]emeindrang eilt die Lücke zu verschließen.” (WA 11572) Faust’s idea of paradise is thus not a place where life is easy, but rather one where life is “[n]icht sicher zwar, doch thätig-frei.” (WA 11564) This freedom to act is not just one to do anything one wants, but rather jointly to prevent the violent sea from entering the land, to have to earn life every day:

Ja! diesem Sinne bin ich ganz ergeben,
 Das ist der Weisheit letzter Schluß:
 Nur der verdient sich Freiheit wie das Leben,
 Der täglich sie erobern muß.
 Und so verbringt, umrungen von Gefahr,
 Hier Kindheit, Mann und Greis sein tüchtig Jahr.
 (WA 11573-11578)

Faust then underlines that this constant activity is what makes a land and its people free, and this is the world he gladly creates:

Solch ein Gewimmel möcht' ich sehn,
 Auf freiem Grund mit freiem Volke stehn.³⁴⁴

³⁴² See Grimm and Grimm, *Deutsches Wörterbuch von Jacob und Wilhelm Grimm*, v.3, p. 1368.

³⁴³ For the parallels between Faust and Moses, see Konrad Burdach, *Faust und Moses. I. II. III* (Berlin: Verlag Der K. Akademie Der Wissenschaft, 1912). See also FA I, 7/2 p.751.

³⁴⁴ The drafting history of this passage underlines that it serves to show a movement away from the notions of *Eigenthum* and *Herrschaft* and towards freedom from these things for Faust, and for the *Volk*. Goethe’s first draft did not include these lines at all. The second draft read: “Auf wahrhaft eignem Grund und Boden stehn.” *Eigenthum* was still Faust’s goal. The third draft had: “Solch ein Gewimmel möcht ich sehn, / Auf wahrhaft freyem Grund und

(WA 11579-580)

This vision is fundamentally different from the *Kaiser's* vision. Unlike the *Kaiser*, whose main pursuit is feasting, Faust is not interested in feasts – he even refuses to have one for Mephisto and the *Drei Gewaltigen* when they arrive with treasures from their sea voyage. (WA 11284-85) Rather, Faust has created a world of perpetual striving and activity. The *Kaiser* does not even mention the people when he reestablishes his rule in Act IV – Faust, however, repeatedly mentions the people and their role in this “paradiesisch Land.” And where the *Kaiser* focuses on a few princes and the privileges they will get, Faust does not even mention such princes. Where the *Kaiser* creates borders both around his empire and within it, Faust only sets up dams around his realm. The borders around the *Kaiser's* realm are to be guarded by his army. That is, these are borders to protect, with human violence, against human violence. The dams around Faust's realm function as borders that protect from natural violence through joint human effort. These are borders that non-violently guard from natural violence. Internally, the *Kaiser* set up borders to ensure that the fiefdoms will all remain unaltered for eternity, and he solidified this arrangement as written law, signed and sealed. Faust has set up no such internal borders, nor has he written anything into law, relying instead on the spoken word, “[d]es Herren Wort” (WA 11502) And where the *Kaiser*, after winning the war, seeks to return to his palace – he even assigns his princes various roles in that palace – Faust, on the contrary, exits his palace to stand “[a]uf freiem Grund mit freiem Volke.” Faust's *Landgewinnung* thus creates a new space for people, built where there used to be water, and thus outside the bordered realm of the *Kaiser*.

Boden stehn.” *Eigenthum* made its exit in this draft, and freedom its entrance. The fourth and final draft added the *Volk* more clearly, which would prove crucial to Mephisto's defeat. (WA 11826, *see infra* p.202.)

Borders carry no legal significance in Faust's realm, but are needed only to protect from natural forces – thus diminishing the significance of legal borders.

Having now established this new order, Faust is ready to pass on. Before the stage direction “Faust sinkt zurück, die Lemuren fassen ihn auf und legen ihn auf den Boden,” (stage direction after WA 11586) he states:³⁴⁵

Zum Augenblicke dürft' ich sagen:
Verweile doch, du bist so schön!
Es kann die Spur von meinen Erdetagen
Nicht in Äonen untergehn. ---
Im Vorgefühl von solchem hohen Glück
Genieß' ich jetzt den höchsten Augenblick.
(WA 11581-86)

The allusion to the pact scene of *Faust I* is unmistakable. There, Faust said “Werd' ich zum Augenblicke sagen: / Verweile doch! du bist so schön! / Dann magst du mich in Fesseln schlagen, / Dann will ich gern zu Grunde gehn!” (WA 1699-1702) Faust here varies the language by using the subjunctive “dürft’,” which can be understood to mean that his utterance is unreal.³⁴⁶ If one assumes that the language of the pact proscribes Faust from uttering the words “Verweile doch, du bist so schön!” then one may argue that he has still not violated the pact, because he has not really uttered those words. But we do not know the wording of the written pact between Faust and Mephistopheles – because we are never presented the text of that pact – and therefore

³⁴⁵ It is possible that Faust in fact dies so slowly that he really dies in the next scene: “Oft sah ich lüstern auf die starren Glieder; / Es war nur Schein, das rührte, das regte sich wieder.” (WA 11634-35) For the sake of convenience, however, the moment when Faust is placed “auf den Boden” is here, as is common, referred to as the time of his death.

³⁴⁶ See *supra* note 291.

we cannot know if Faust here loses due to the words he utters, be they a real or an unreal utterance.³⁴⁷

What is more relevant is why it is at this point in *Faust* that Faust recalls his pact with Mephisto, and why he now enjoys “den höchsten Augenblick.” This is because, where the *Kaiser* built a realm designed to stagnate forever, Faust’s empire is designed for perpetual striving. Tellingly, Faust describes his lasting impact as “die Spur von meinen Erdetagen” which cannot “in Äonen untergehn.” Faust will leave a “Spur,” not, as the *Kaiser*, an entire and immutable system. This trace, the essence of which is perpetual striving, will last – other things may change. The enjoyment of the “höchsten Augenblick” with which Faust’s earthly days end is thus not stagnation, but rather an anticipation of endless striving. That is how the paradoxical “[i]m Vorgefühl von solchem hohen Glück” makes sense. Simply understood, this phrase makes no sense – for how can one enjoy the highest “Augenblick” if the high “Glück” that causes it is not yet real? Logically, it would seem, this highest “Augenblick” would be when this high “Glück” is actually achieved. But this paradox is resolved if the high “Glück” refers not to a point in time, but to a perpetual process. The “Augenblick” that Faust enjoys is thus not a stagnant moment in time, but rather an ever-lasting moment of eternal striving. Insofar as the high “Glück” that the “Augenblick” precedes is everlasting, so the “Augenblick” itself becomes everlasting as well, insofar as there is always a “Vorgefühl” of something that does not end.

Mephisto, however, does not understand this. Mephisto believes that all of Faust’s work is helping Mephisto’s side, and that Faust is heading for inevitable defeat: “Du [Faust] bist doch nur für uns bemüht / Mit deinen Dämmen, deinen Bühnen; / ... / In jeder Art seid ihr verloren; --

³⁴⁷ See *supra* Chapter V.C.

- / Die Elemente sind mit uns verschworen, / Und auf Vernichtung läuft's hinaus." (WA 11544-50) And immediately after Faust dies, Mephisto sees only empty and futile striving on Faust's part:

Ihn sättigt keine Lust, ihm g'nügt kein Glück,
So buhlt er fort nach wechselnden Gestalten;
Den letzten, schlechten, leeren Augenblick
Der Arme wünscht ihn fest zu halten.
(WA 11587-90)

Mephisto does not understand that Faust's last "Augenblick" was all but empty; nor does he understand that Faust is not trying to hold on to it, but is rather enjoying something that is not fixed in time. Mephisto, with some help from the Chorus, also alludes to the pact scene:

Die Zeit wird Herr, der Greis hier liegt im Sand.
Die Uhr steht still ---
Chor.
Steht still! Sie schweigt wie Mitternacht.
Der Zeiger fällt.
Mephistopheles.
Er fällt, es ist vollbracht.
(WA 11592-11594)³⁴⁸

And as soon as, in the very next scene, *Grablegung*, Faust's soul is about to leave his body, Mephisto pulls out that pact, the "blutgeschriebnen Titel" (WA 11613) and shows it to Faust's soul that wants to leave his body. But Mephisto has already lost some of the optimism he had in the previous scene. Immediately after producing the pact, he notes "[d]och leider hat man jetzt so viele Mittel / Dem Teufel Seelen zu entziehn." (WA 11614-15) The temporal "jetzt" already suggests that something has changed, and not to Mephisto's advantage. This is only

³⁴⁸ Cf. Faust's words during the pact scene of *Faust I*: "Dann mag die Todtenglocke schallen, / Dann bist du deines Dienstes frei, / Die Uhr mag stehn, der Zeiger fallen, / Es sei die Zeit für mich vorbei!" (WA 1703-06) *See supra* p.146.

underlined by the lines that follow: “Auf altem Wege stößt man an, / Auf neuem sind wir nicht empfohlen.” (WA 11616-17)

Mephisto soon explains that the change that has taken place is a legal one. He laments “[u]ns geht's in allen Dingen schlecht!” (WA 11620) Then, he explains: “Herkömmliche Gewohnheit, altes Recht, / Man kann auf gar nichts mehr vertrauen.” (WA 11620-22) We have already seen Mephisto refer back to old law – which he views as a fixed notion. For instance, Mephisto convinced the *Kaiser* in Act I that all the treasure buried in the land of the empire belongs to the *Kaiser* because of old law.³⁴⁹ He now complains that the soul no longer leaves the body at a clear time, the way it used to:³⁵⁰

Sonst mit dem letzten Athem fuhr sie aus,
Ich paßt' ihr auf und, wie die schnellste Maus,
Schnapps! hielt ich sie in fest verschloss'nen Klauen.
Nun zaudert sie und will den düstern Ort,
Des schlechten Leichnams ekles Haus nicht lassen;
(WA 11623-27)

But this complaint is about “Herkömmliche Gewohnheit,” for it is hardly a matter of law when the soul leaves the body, especially if law here is Mephisto’s idea of law as fixed, centralized, written and rigid. Mephisto has given us only a hint so far of what has changed, legally, when he complained that even though he presented his “blutgeschriebnen Titel,” but that this was not conclusive. Somehow, his written pact does not have the power he expected it to have, “altes Recht” is somehow not reliable any more.

³⁴⁹ See *supra* p.166.

³⁵⁰ Mephisto’s laments here are frequently read as commenting on the discussion in Goethe’s time about when, exactly, death set in. There were many opinions on this matter, including ones that viewed death as gradual, and the question of when someone became legally dead was thereby complicated. Note, however, that although the time of death can be legally defined, the time at which the soul leaves the body cannot. FA I, 7/2 p. 768-69.

Only after Faust's soul is carried away does Mephisto offer greater insight into why he has lost. Angels who appear from above carry away Faust's soul, after they have an elaborate exchange with Mephisto and his devils, and even fill the entire room. Immediately after the angels carry away Faust's soul, Mephisto is confounded: "Doch wie? --- wo sind sie hingezo-gen?" (WA 11825) Mephisto is confused by how it is possible that the angels escaped with Faust's soul, and by the direction in space of the angels. This cannot simply mean that he does not understand that the angels have carried Faust's soul away to heaven – Mephisto is quite knowledgeable, and has visited the angels in heaven during the *Prolog im Himmel*. Rather, he does not understand the new spatial order. Like Faust was left with Helena's garments in Act III after she vanished into the afterworld, so Mephisto is here left with Faust's body in Act V after Faust's soul vanishes into the Heaven. Helena was not constrained by the walls of Faust's castle, and now Faust's soul is not either.

Mephisto now explains his defeat. First, he states: "Unmündiges Volk, du hast mich überrascht." (WA 11826) Mephisto is not here referring to the angels (to whom he refers in the third person plural in this passage), but rather to the people who inhabit Faust's land. Faust has also repeatedly called them "Volk," such as when he expressed his wish to "Auf freiem Grund mit freiem Volke stehn." Mephisto was still expecting the subjugated people of the *Kaiser's* land – recall that he never understood that Faust's construction efforts created a new order – but instead the people here surprised him. He had expected to rely on the legal order that governed the people in the *Kaiser's* realm, but now realizes: "Bei wem soll ich mich nun beklagen? / Wer schafft mir mein erworbenes Recht?" (WA 11832-33) It cannot be that Mephisto is here referring to the Lord or to the angels – they are still there, and Mephisto could invite himself over to the Lord again should he wish to – he has an open invitation from the *Prolog im Himmel* to visit the

Lord. (WA 336) Rather, Mephisto here refers to earthly courts, for it is on earth that Mephisto hurried to pull out his blood-signed pact with Faust, and it is on earth that Mephisto announced his defeat after Faust's soul departed the earth.

In the final scene of *Faust II*, an angel "schwebend in der höheren Atmosphäre, Faustens Unsterbliches tragend" confirms that Faust is judged in the end according to the arbitration set up in the *Prolog im Himmel*:³⁵¹

Gerettet ist das edle Glied
Der Geisterwelt vom Vösen,
"Wer immer strebend sich bemüht
Den können wir erlösen."³⁵²
(WA 11934-37)

He is judged in the higher atmospheres, where one does not have to worry about borders, by judges who traverse space with an ease perhaps even greater than Helena's. They follow the original agreement, which was about whether or not Faust would end up on the wrong path and would cease to strive. This is a legal agreement, but hardly one that could be understood in the legal order of Mephisto or the *Kaiser* – it is not written, and too vague. Faust, although he has made his share of errors, eventually finds the right path and creates a realm of perpetual striving. In the legal order of that realm, Mephisto's blood-signed parchment has no power.

Conclusion

In Part III we have seen the eventual triumph of the *gränzunbewußte* order over the formal and centralized order of Mephisto and the *Kaiser*. The path to this triumph was by no means linear. After the *gränzunbewußte* order first makes an appearance in the *Prolog im*

³⁵¹ See *supra* Chapter V.B.

³⁵² Why two verses here are in quotations marks is unclear; the quotations marks may not even be Goethe's. FA I, 7/2 p.800-01.

Himmel, it is absent from *Faust I* (except for the Lord's brief rescue of Gretchen at the very end). In *Faust II*, the *gränzunbewußte* order has to wait until Act III to make its appearance in the person of Helena. She then vanishes at the end of act. Helena amazes Faust with a simple act of justice: she actually hears Lynceus, the accused. After hearing the accused, she acquits him, by applying the core of her own narratives to his case: She has always had an overwhelming effect on men, heroes, and demigods alike, and therefore she does not blame Lynceus for being blinded by her as well. But even while Helena is still in Faust's palace, Faust promptly relapses into territorial and centralized thinking when Menelaus' armies appear. In the two final acts, Faust is conflicted in his thinking, until, finally, he curses the "hier" in his palace and then leaves it to join his "Volk."

We have seen that the two competing legal orders differ with respect to centralization, borders, and the role of the written word. But *Faust* also shows other key differences. One such difference is that the genius of the *gränzunbewußte* order is in its simplicity, while that of the bordered order is in its intricacy. Helena's acquittal of Lynceus is amazingly simple: she listens, she applies her narratives, and she acquits. Faust's eventual triumph is also simple: he curses the "hier," leaves his palace, and creates a realm of perpetual striving. Mephisto's paper money, on the other hand, is complex: it needs a legal foundation that makes treasure under the ground belong to the *Kaiser*, then it needs a cleverly drafted document that promises the bearer thereof a thousand crowns worth of that treasure, then it needs Mephisto to manipulate the *Kaiser* and his circle to accept it. Complex, too, is the order the *Kaiser* establishes after he defeats the *Gegenkaiser*: the *Kaiser* has to provide his princes with titles, then with lands, then he has to establish how they may enlarge those lands, who will inherit them, how new *Kaisers* will be

appointed, what rights the princes have in their lands, and then he has to cement all this in writing.

Another key difference between the two legal orders is their relationship to striving. Both orders involve striving. For Helena strives to do justice, and Faust's soul is rescued by the angels because he is "immer strebend." But Mephisto and the *Kaiser* also strive. Mephisto strives to lead Faust astray, and to prop up the *Kaiser*. The *Kaiser* strives to keep his empire together. In Act I, he signs the paper money Mephisto conjured. In Act IV, he fights and wins a battle, and then establishes an elaborate legal foundation for his empire. The difference, then, lies not in the presence or absence of striving, but in their direction. The *Kaiser* and Mephisto strive for an endpoint, they strive to arrive at a point where there will be no change. That is, they strive for stagnation. Helena, however, is constantly in motion, as she moves between Sparta, Troy (or possibly Egypt), Attica, Arkadia, Hades, and Faust's palace. Faust, for most of *Faust*, is also striving for an endpoint. One such endpoint is Helena, whom he simply wants to possess. Another such endpoint is establishing himself as the ruler of a centralized empire. It is only once Faust relinquishes this kind of striving and creates a world designed for perpetual striving that he prevails.

PART IV. ELECTED AFFINITIES, UNELECTED STORIES

Chapter VII: The Wahlverwandtschaften

A. Introduction

Part IV of this dissertation turns to the *Wahlverwandtschaften*. The main themes we explore remain those we have explored thus far: legal advancement through narrative and *gränz unbewußte* arbitration. This novel, however, brings two important changes with it for this dissertation.

First, our emphasis shifts. This dissertation previously emphasized cases, laws, and legal documents, but these now move into the shadow,³⁵³ whereas the way characters act against the backdrop of those laws will move into the foreground.³⁵⁴ This shift in emphasis permits us to see that even a major reform of the written law is not enough to effectuate legal advancement – again, narratives and the role of borders have to change.

The main law that is in the background here is the law of divorce – which had undergone one of its most significant reforms in modern times in the years preceding the publication of the *Wahlverwandtschaften* (1809). The most important aspect of this reform was the introduction of divorce by mutual consent. The *Allgemeines Landrecht für die Preußischen Staaten* of 1794 and Napoleon’s Civil Code of 1804 were the most significant legal documents that contained divorce by mutual consent. The laws of most Protestant German lands followed the *Allgemeines Landrecht für die Preußischen Staaten* (1794). Before this reform, divorce, to the extent it was

³⁵³ I borrow this term from Robert Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: the Case of Divorce*, ed. Council Social Science Research (Oxford 1979).

³⁵⁴ Goethe indeed wrote the novel in such a way that much is hidden from view, and requires careful reading to uncover. “Ich habe viel hineingelegt, manches hinein versteckt” (WA IV, 20, p.346) he wrote to a Carl Friedrich Zelter in 1809 – a remark he repeated to his publisher Cotta just a few months later: “Es ist so manches hineingelegt, das wie ich hoffe den Leser zu wiederholter Betrachtung auffordern wird.” (WA IV, 21, p.99) The law proves no exception, as much of it is hidden in this novel.

available, was available only for cause. That is, the spouse seeking divorce had to prove that the other spouse had given cause for divorce, such as committing adultery or being insane. These reforms and their history will be discussed in greater detail in section C of this chapter. Suffice it to say here that in the novel, this legal background is taken for granted – but determines much of the dynamic between the characters. Indeed, the novel would not make sense if divorce by mutual consent were not available. For it would make no sense for Eduard to seek Charlotte’s consent to a divorce – such consent would have no legal weight. The fact that divorce fails to happen even though the law has been reformed permits us to see that legal reform on paper alone is not enough for real legal advancement. Indeed, by the end of the novel, we see not divorce, but rather three tragic deaths that could have been averted by a timely divorce: Otto (Eduard’s and Charlotte’s child), Otilie, and Eduard all die. As in the previous chapters of this dissertation, narrative plays a key role in this failure. On the one hand, there are narratives that are holding back divorce. For instance, the familiar narrative of infanticide enters the picture: after Otto drowns, Otilie, as a mother, or rather as “eine andre Art von Mutter,” (II.13, p.341) who has been intimate with Eduard, blames herself for the child’s death, and therefore talks Charlotte out of divorcing Eduard (II.14, p.371), and then indeed dies. (II.18, p.405) On the other hand, the lack of narratives is holding back divorce. For instance, Mittler – who repeatedly tries to prevent divorce – does so on the basis of morality, which he conceives of in non-narrative terms: marriage, he claims, is the “[g]rund aller sittlichen Gesellschaft,” and “der Anfang und der Gipfel aller Cultur.” (I.9, p.107) “Unauflöslich muß sie [marriage] sein,” he adds, and “was ein Paar Gatten einander schuldig werden ... ist eine unendliche Schuld, die nur durch die Ewigkeit

abgetragen werden kann.” (I.9, p.107)³⁵⁵ As we have come to expect from those who oppose advancement, Mittler’s ultimately roots his position in unchangeable writing. He does not use a signed document, like Mephisto or the *Kaiser* do, but rather the Bible – and even the laws of the Bible he understands not as part of a narrative, but merely as a set of propositions.

The second thing that is different in this part of the dissertation is that the *Wahlverwandtschaften* takes us out of the fantastical world of *Faust*, and thus allows us to see how advancement plays out in the real world. Although at times idyllic, and arguably tending towards the mystical at the end, this novel is in fact very realistic, and was already recognized as such by Goethe’s contemporaries, one of whom wrote that even centuries later the novel would permit “ein vollkommenes Bild von unserm jetzigen täglichen Leben [zu] entwerfen.”³⁵⁶ The legal reality is no exception, even if the law may be hidden from view at first sight, or be “in the shadow.” For instance, when Charlotte’s child drowns, it appears, at first glance, that this is merely an accident. Unlike in *Faust*, nobody is tried or incarcerated for this death by drowning. The possibility of legal proceedings is not even mentioned. But the novel in fact turns out to be carefully crafted to provide us with all the necessary elements for a finding of negligent homicide (*fahrlässige Tötung*). In this realistic world, we see a realistic *gränzunbewußte* character show the way forward – the English Lord. Unlike Helena in *Faust*, this English Lord is

³⁵⁵ Mittler here echoes a position on marriage with deep roots in Canon law. In Goethe’s time, the view that marriage should be very difficult to dissolve and the law should strive to minimize divorce was prevalent in many German lands, and had strong proponents such as Hegel. *See infra* p.220.

³⁵⁶ These are the words of the philosopher Karl Wilhelm Ferdinand Solger, *see* Knortz and Laudenberg, *Goethe, der Merkantilismus und die Inflation: zum ökonomischen Wissen und Handeln Goethes und seiner Figuren*, 90. Although the events in the novel cannot be dated exactly, they can be dated approximately, for when Charlotte calls divorce a sad word, “das man leider in der Welt jetzt so oft hört” (I.4, p.52) she is alluding to the period around 1800, which saw widespread discourse about divorce. Leydecker, “The Avoidance of Divorce in Goethe’s *Die Wahlverwandtschaften*,” 1056. Indeed, the availability of divorce by mutual consent also helps to date the novel, because it only started to become available in German Protestant lands towards the end of the 1700s. *See infra* p.219. Similarly, the exact duration of events cannot be established, but it can be approximated. For Eduard and Charlotte have intercourse early in part I of the novel, (I.11, p.131), their child is baptized roughly midway through part II of the novel (II.8, p.299), and is still small when he dies towards the end of part II of the novel (II.13, p.360).

not fantastical – but like her, he is not concerned with borders very much, and he brings narratives with him, one of which, “Die wunderlichen Nachbarskinder. Novelle.” (II.10, p.323) will show the way forward and affect one of his listeners greatly. Indeed, this Englishman has given up on even having a home – that is, he no longer has a fixed center – and rather spends his days traveling the world. And, like Helena, he appears briefly and leaves promptly – he arrives in II.10 and leaves in the next chapter. One of the stories he brings with him (his companion tells it), “Die wunderlichen Nachbarskinder. Novelle.” (II.10, p.323), shows how a happy marriage out of love is possible, as long as the relevant parties are willing to let it happen. Like Faust was “erstaunt” (WA 9258) by Helena’s narrative judgment, so Charlotte is “höchst bewegt” (II.11, p.336) by this novella. Before this narrative moved her so deeply, she resisted divorce – but after this novella, she becomes willing to grant it.

The character most consistently acting against change, especially divorce, is Mittler. Unlike the English Lord, he is very much a localized character, who operates from a center and within borders. For he has a “Residenz,” which he “zum Mittelpunkt seiner Wirksamkeit machte,” as well as a “Wirkungskreis.” (I.2, p.23) He appears, briefly, at most of the crucial points in the plot. Every time, he seeks to prevent change – especially divorce is immoral in his eyes. Indeed, Mittler “konnte es aber nicht über sich gewinnen, das Wort Scheidung auch nur im Vorbeigehn auszusprechen.” (I.18, p.193)

He operates not by resolving disputes in some kind of legal forum, but rather by settling them before they even get there – he is thus not an arbitrator, but rather a mediator. As we have grown to expect from characters who seek to counteract legal advancement, Mittler also likes the formal law, understands law as a set of propositions rather than narratives, and does not seek the consent of the parties. But Mittler also adds something that we have not yet seen in the

proponents of stagnation, such as Mephisto and the *Kaiser*: he is deeply committed to strict morals. This attachment to morals offers us a shift in emphasis from the previous chapters of this dissertation – there, non-narrative law was used to keep things unchanged “[f]ür alle Folgezeit.” (WA 10966) Here, it are non-narrative moral proposition, such as “[d]ie Ehe ist der Anfang und der Gipfel aller Cultur...Unauflöslich muß sie sein.” (I.9, p.107)

B. Overview of the Wahlverwandtschaften

Before we turn to our analysis of the *Wahlverwandtschaften*, an overview of the novel is useful. Given how much Goethe “hineingelegt” in the novel, and how much he “hinein versteckt” (WA IV, 20, p.346), the overview here is by no means designed to summarize all that happens in the novel. Rather, this overview serves to provide a framework in which to situate the more detailed analyses that follow.

The novel is divided into two parts, each eighteen chapters long. The novel begins by introducing Eduard. He is a rich baron “im besten Mannesalter.” (I.1, p.3) When he was much younger, he and Charlotte were very much in love. But his father, “aus nie zu sättigender Begierde des Besitzes,” (I.1, p.9) had him marry an older, and richer, woman. Charlotte, who was not independently wealthy, then had to marry for money as well. Eventually, both became free, and found each other again. Eduard insisted that they marry, but Charlotte worried that she had become too old – eventually, he overcame her resistance. So that nothing would disturb their marriage, Charlotte put both her own daughter, as well as her beloved niece and *Pflegetochter* Otilie, into a *Pension*. Together, Eduard and Charlotte read and make music. Charlotte takes charge of improving the park of the castle, while Eduard worries more about the garden and the crop.

Already in the first chapter of the novel, however, this isolated existence is about to be ended. For Eduard wants to invite the Captain to stay with them. This friend from his military service in his youth has fallen on hard times, and Eduard wishes to help him. Charlotte does not welcome this intrusion into their insular lives. Eduard, however, is accustomed to getting that he wants, and Charlotte soon gives in. She then balances the situation by convincing Eduard to agree to bring Otilie from the *Pension* to their estate. Unlike Charlotte's biological daughter, Otilie is not making progress in the *Pension*, and Charlotte believes that she will be able to raise her better herself. Eduard does not appear to mind the addition of a young and attractive woman to his household. The Captain soon takes charge of improving the estate. He is especially involved in various landscaping projects. Otilie soon comes to manage the household.

Thus, we have the four main characters of the novel: Eduard, Charlotte, the Captain, and Otilie. Charlotte is soon drawn to the active and productive Captain, and he to her. Unlike Eduard, who has always been a rich nobleman, Charlotte and the Captain both grew up as members of the poorer *Bürgertum*, perhaps the reason that they both possess and appreciate such qualities as productivity and frugality. Eduard and Otilie are also attracted to each other, although they initially seem less conscious of it. Two other lovers, a Count and a Baroness, now come for a visit. The Count's wife refuses to grant him a divorce, and so the two are forced to meet outside his home. They are very open about their relations, and the Count even advances an elaborate legal proposal – in short, he believes marriages should be concluded for a fixed term, and then renewed only if both parties so choose. In this atmosphere, not only the Count and the Baroness, but also Eduard and Charlotte can think only of their love interests, rather than their spouses. Eduard and Charlotte, husband and wife, thus make love while thinking about Otilie and the Captain, respectively, rather than about each other. Later, in Part II of the novel, Eduard

will refer to this as “*einem doppelten Ehbruch.*” (II.13, p.358) This “double adultery” will produce a son, who, curiously, has the face of the Captain and the eyes of Otilie – even though neither are its biological parents. Otilie, as part of her role of running the household, will also take care of Charlotte’s child, “*viel als eine Mutter, oder vielmehr eine andre Art von Mutter.*” (II.13, p.341)

However, long before this son is born, in fact on the day after Eduard and Charlotte commit their “double adultery,” Charlotte and the Captain confess their feelings for each other. Charlotte, however, feels bound by her marriage, and demands that the Captain respect this. Eduard also confesses his feelings for Otilie and longs to possess her. But Charlotte demands from him the same sacrifice she made, and proposes that Otilie be sent away such that their marriage could be resumed as it was. Eduard, leaves the estate. He again tries to obtain a divorce, but after Charlotte rejects this in writing, he heads off to a war.³⁵⁷ Thus ends Part I of the novel.

This quadrangle of love does not prevent other developments from taking place. Charlotte had begun to change their garden from a rigidly geometric garden in the French style to a much more freely arranged garden in the English style.³⁵⁸ After he arrives, the Captain begins to run this project, which involves such significant alterations as uniting three ponds into a lake and building a new house on the estate.

After the Captain and Eduard leave the estate at the end of Part I of the novel, the two women continue this project with the help of a young architect in Part II. Much to the chagrin of the townsfolk, they even expand the project to include the nearby cemetery and church. Otilie

³⁵⁷ The novel does not specify which war. Given the frequency of war in this epoch, it should not be surprising that there is some war going on when Eduard leaves Charlotte. For an incomplete list of wars in this era, *see supra* p.16.

³⁵⁸ Gardens were considered among the most important architectonic projects at the time, and the change from the French to the English style was fashionable. *See* Claudia Brose, *Park und Garten in Goethes Wahlverwandtschaften* (Heidelberg 1977). Cf. MA. p.1245-46.

paints the inside of the chapel herself. The women manage to enjoy their solitude, especially after Charlotte's child is born. They are visited by an English Lord and his companion, who share stories from their many travels. One of these stories is "Die wunderlichen Nachbarskinder. Novelle," (II.10, p.323) which shows the ladies a way out of their predicament, and deeply affects Charlotte.

After an absence of about a year, Eduard returns with decorations from a war. He promptly summons his friend the Captain – by now the Major – to the estate. Eduard convinces him to go to Charlotte and request a divorce. Eduard's plan is that the Major and Charlotte will live on the estate, while Eduard and Otilie will travel. The Major heads to Charlotte, who agrees to grant a divorce, apparently because she believes that her earlier refusal to do so has caused her child's death. She does not, however, give the Major a clear answer when he asks for her hand. The child dies after Eduard, out of impatience, follows his friend. On the way, by the lake that has been built on the estate, he encounters Otilie with Charlotte's child. They fall into each other's arms and Otilie experiences intimacy for the first time.³⁵⁹ Eduard tells her of his plans, but Otilie leaves the decision to Charlotte. As it is getting dark, Otilie is now in a hurry to return to the house. She decides the row back there across the lake. The child slips out of her hands and drowns. Otilie, who believes the child's death is a consequence of her romantic transgression and thus blames herself for the child's death, now convinces Charlotte to revoke her agreement to the divorce. Otilie is irreconcilable. She not only punishes herself by denying herself the happiness of love, but stops eating and speaking until she eventually dies. Eduard, unable to come to terms with this tragic reality, loses all interest in life and also dies.

³⁵⁹ How far this intimacy goes is open to interpretation: "sie wechselten zum erstenmal entschiedene freie Küsse und trennten sich gewaltsam und schmerzlich." (II.13, p.359)

C. Finding the Law in the *Wahlverwandtschaften*

On the surface, there may not appear to be much law here. Even though Charlotte's child ends up dead, unlike in *Faust*, there is no dungeon, no sentence. That is, at first glance, even an issue such as infanticide – which we have considered as a legal issue in this dissertation – is presented in a way that does not appear to be legal. Indeed, generations of commentators have largely overlooked the legal aspects of the novel.³⁶⁰

However, once one looks under the surface, the novel in fact presents the legal side of various issues. Crucial among these issues is divorce. The death of the child is in fact presented as an instance of negligent homicide (*fahrlässige Tötung*).

Before we turn to these issues, however, let us consider the issue of beggars – not only to see how this novel hides its legal side, but also to see that Eduard's lands are their own small example of a bordered, centralized realm.³⁶¹ In I.6, Eduard and the Captain are walking through the village.³⁶² The quadrangle of love has not yet developed, and they are still on most friendly terms, letting no time go by without undertaking something: “Ja täglich fanden sie neuen Anlaß etwas zu bedenken und zu unternehmen.” (I.6, p.70) On this particular day, they come upon the idea to build a wall to contain the river that flows through the village. This river causes damage when its levels rise. Every resident protects himself from the river in his own way, in such a way “keiner aber den andern fördert, vielmehr sich und den Übrigen Schaden und Nachtheil bringt.” (I.6, p.71) A wall could remedy this problem, according to the interlocutors, and a few other

³⁶⁰ The first commentator to consider that law is very significant in this novel is Uwe Diederichsen. See Uwe Diederichsen, "Die 'Wahlverwandtschaften' als Werk des Juristen Goethe," *Neue Juristische Wochenschrift* 57 (2004); "Goethe's 'Wahlverwandtschaften' - auch ein juristischer Roman?," *Goethe Jahrbuch* 118 (2001).

³⁶¹ These legal episodes and references considered in this chapter are by no means the only ones in the *Wahlverwandtschaften*. Indeed, to consider every legal allusion in the novel would require a book of its own. Such a book is apparently planned. "Goethe's 'Wahlverwandtschaften' - auch ein juristischer Roman?," 144, n.5.

³⁶² My account of this issue is deeply indebted to "Die 'Wahlverwandtschaften' als Werk des Juristen Goethe.," "Goethe's 'Wahlverwandtschaften' - auch ein juristischer Roman?."

improvements, such as raising the road, could further bring any damage from the river under control. The interlocutors are here inspired by what they once saw in Switzerland, and wish to bring “Schweizer-Ordnung und -Sauberkeit, welche die Benutzung so sehr befördern” to the village. (I.6, p.71)

However, Eduard soon reveals another reason for this construction: “Ich mag mit Bürgern und Bauern nichts zu thun haben, wenn ich ihnen nicht geradezu befehlen kann, versetzte Eduard.” (I.6, p.72) This is not an isolated statement of contempt for the common folk, but part of a vision of statehood – one we have seen before on a bigger scale, where the *Kaiser* viewed himself as the center of the state. For as we are about to see, Eduard is very much a local ruler on his estate. Indeed, the Captain promptly launches on an exposition of power, emphasizing the shortsightedness of most people, in that they do not seek to remedy the causes of a problem but only its symptoms, and rarely look ahead to tomorrow. He concludes: “Alles eigentlich gemeinsame Gute muß durch das unumschränkte Majestätsrecht gefördert werden.” (I.6, p.72)

A beggar then approaches Eduard and asks for alms. After this man does not leave after polite rejections, Eduard scolds him. The man leaves, but when he “die Rechte des Bettlers trotzte, dem man wohl ein Almosen versagen, ihn aber nicht beleidigen dürfe, weil er so gut wie jeder andere unter dem Schutze Gottes und der Obrigkeit stehe, kam Eduard ganz aus der Fassung.” (I.6, p. 73) Seeing how shaken Eduard is by this encounter, the Captain quickly comes up with a proposal to prevent it from repeating itself. He believes that alms must be given, but also that this is better not done in person and not “zu Hause.” (I.6, p.73) He therefore proposes that Eduard deposit a small amount at both ends of the village, at a tavern and with a good older couple. Beggars who leave the village, but not those who arrive, will be given small alms from

those deposits. The *ländliche Polizei* will then ensure that this setup functions (how it will do so is not specified). The two promptly take care of the matter, and return to the castle – nobody but Eduard is needed to institute this new measure on his estate, he is thus shown as its ruler; and the castle to which he promptly returns it its center.

Within the span of this short chapter, the two friends, and especially Eduard, show their affection for absolutism with clear boundaries and a center. They espouse “unumschränkte Majestätsrecht” and institute a measure to solve the problem of beggars. Only Eduard’s authority is needed to institute this measure, and even the *Polizei* shall have to cooperate – he is effectively a local *Majestät*, or at least he acts like one. Eduard appears more bothered by the fact that a beggar can approach him and claim rights than by the fact that there are beggars. He does not want to be bothered in this way again, and the Captain proposes a solution that is intended to keep beggars out of Eduard’s lands by paying them to leave. These payments will occur at the borders of these lands, namely at the home of the old couple and at the tavern, thus showing that Eduard and his friend are thinking within the borders of Eduard’s lands.

This little episode is part of a larger legal discourse, however. For the beggar was correct, legally speaking, when he stated that he stood under the protection of “der Obrigkeit.” This was generally true in German lands at the time. Specifically in Sachsen-Weimar, Duchess Anna Amalia (the mother of Duke Carl August whom Goethe served) had passed a law that made every town responsible for its beggars. The motivation for the law was in large part so-called “Bettellaufen” – namely the movement of beggars from one town to the next. This law, which Carl August strengthened in 1775, envisioned that locals would make voluntary as well as

mandatory donations to a fund.³⁶³ That fund was then charged with handing out alms to the poor, and with making sure that only the truly poor received them. The amount of the voluntary contributions was published alongside the names of the donors. The local *Polizei* would be involved in ensuring the law was implemented properly. Because the fund would provide to the poor what they needed, and because they could not hope to receive more from a similar fund in another city, the poor would, at least in theory, stay put. The Captain's proposal is very similar to this law in Sachsen-Weimar. For he and Eduard also create a fund that will give out alms to the poor, and it is also the *Polizei* that is involved in ensuring its implementation. The law also emanates from the local center of power – from Baron Eduard, not from Duchess Anna-Amalia. The Baron's law takes a different approach than the law of the Duchess in one respect, however. It is designed to encourage beggars to leave rather than to stay – for only leaving beggars receive alms from the Baron's fund. Neither law worked. "Bettellaufen" remained an issue in Sachsen-Weimar, and Eduard will again be approached by a beggar later in the *Wahlverwandtschaften*.

As we have seen repeatedly in *Faust*, laws that emanate from a center of power and apply in a bordered entity fail to bring about meaningful change. But Eduard is not simply a parallel to the *Kaiser* of *Faust II*. That *Kaiser* does not want change, and is not a man of action. On the contrary, the *Kaiser* is explicit that he is implementing laws in order to ensure that nothing changes, and he is a pleasure-seeker, who busies himself with matters of state only insofar as they are needed to keep pleasure flowing to him. Eduard, on the other hand, is a man of action. He is glad to implement the Captain's proposal immediately: "Komm, sagte Eduard, wir wollen das gleich abmachen; das Genauere können wir immer noch nachholen. Sie gingen zum Wirth

³⁶³ The account of the law concerning beggars is based on "Goethe's 'Wahlverwandtschaften' - auch ein juristischer Roman?," 146-47.

und zu dem alten Paare, und die Sache war abgethan.” (I.6, p.74) Indeed, Eduard soon makes clear that this prompt handling of that matter was not an exception for him, but rather his character: “Wenn ich von etwas Gutem überzeugt bin, was geschehen könnte und sollte, so habe ich keine Ruhe bis ich es gethan sehe.” (I.6, p.74)

The reasons for Eduard’s failure are also ironic. For the Captain lamented that most people treat only the symptom, not the cause of the problem. Therefore, he reasoned, “unumschränkte Majestätsrecht” was needed. But now Baron Eduard, with the Captain’s advice, is acting as a local *Majestät*, and yet the solution he implements addresses only the symptom of the problem of poverty: his solution is merely to offer alms to the poor, not to remedy poverty itself in any way. Also ironically, the failure of “unumschränkte Majestätsrecht” was anticipated at the beginning of the chapter. There, Otilie retells an anecdote from the trial of King Charles I of England, who was executed following this trial. Otilie recounts that at this trial, “fiel der goldne Knopf des Stöckchens das er trug herunter.” (I.6, p.70) The King was accustomed that someone would pick it up for him, but nobody did, and he had no choice but to pick it up himself.³⁶⁴ Otilie was so touched by this little narrative that she now always picks things up for people who drop them. After Otilie recounts this anecdote, Goethe immediately switches to Eduard and the Captain, and their activities in the village. Although the anecdote of Charles I might at first glance seem incidental to this chapter about walls and beggars, it in fact serves two ironic purposes. First, the failure of Charles I, an absolute monarch famous for his refusal to accept a constitutional monarchy even after he was defeated, anticipates the failure of Eduard’s and the Captain’s “unumschränkte Majestätsrecht.” They fail here to resolve the problem of

³⁶⁴ The golden head of Charles I’s cane indeed fell off during his trial. Philip Alexander Prince, *Parallel Universal History, an Outline of the History and Biography of the World Divided into Periods* (London: Whittaker, 1838), 347. See also Diederichsen, "Goethe's 'Wahlverwandtschaften' - auch ein juristischer Roman?," 146, n.10.

beggars, and Eduard ultimately fails more generally in the novel and dies a sad death. But the anecdote also serves to show how little has changed in the way the powers that be think. Even after Charles I was executed (and after the American War of Independence and the French Revolution, one might add), Eduard and the Captain still believe that “unumschränkte Majestätsrecht” is the best model for a country. But we should not be surprised by this, for we have seen that in Goethe’s work, narrative, not violence, change the way people think.

The legal side of divorce may also not appear prominent at first glance. Divorce law as such is taken for granted in the novel. Specifically, it is taken for granted that divorce by mutual consent is legally available. This may not be striking to a reader today, but the availability of divorce by mutual consent represents a major legal reform.³⁶⁵ Previously, in Protestant lands, divorce was available only for cause, such as adultery, abandonment, and mental illness.³⁶⁶ Only the spouse that was the victim of the cause could sue – that is, if a husband was unfaithful, only the wife could file for divorce. Thus, the husband could not get out of a marriage by committing adultery and then filing for divorce. When the *Allgemeines Landrecht für die Preußischen Staaten* of 1794 included not only divorce for cause, but also divorce by mutual consent (when there were no children) this was a radical move.³⁶⁷ Protestant German lands, including Sachsen-Weimar-Eisenach, generally followed this move.³⁶⁸ Other German lands did not provide for divorce by mutual consent, except insofar as Napoleon’s Civil Code of 1804 governed there.³⁶⁹

³⁶⁵ A reader to day might be struck that no-fault divorce is not available, however. No-fault divorce means that one spouse can divorce the other without needing cause or the other spouse’s consent. No-fault divorce, however, is a phenomenon of the twentieth century, first introduced in Russia in 1917 after the Russian Revolution. Bolas, "No-Fault Divorce: Born in the Soviet Union?," 34.

³⁶⁶ Schuster, "The History and Present Condition of the German Divorce Law," 231.

³⁶⁷ Ibid. Friedrich II had experimented with divorce by mutual consent in some of his provinces in the decades prior 1794. Ibid.

³⁶⁸ Leydecker, "The Avoidance of Divorce in Goethe's Die Wahlverwandtschaften," 1055, n.9.

³⁶⁹ Between 1804 and 1811, Napoleon enacted his Civil Code in those German lands that he had conquered, including Sachsen-Weimar-Eisenach. The extent to which they were actually applied in these conquered lands

Napoleon, too, had permitted divorce by mutual consent, and also made marriage a matter of civil law, rather than religious law.³⁷⁰ The introduction of divorce by mutual consent was controversial. Indeed, divorce was discussed very much at the time, so much so that Charlotte's reference to divorce as "das traurige Wort ... das man leider in der Welt jetzt so oft hört" (I.4, p.52) can be used to date the events in the novel to around 1800.³⁷¹ Fichte was perhaps its main champion, arguing that the state should always grant divorce if both parties requested it.³⁷² However, many voices were raised for the indissolubility of marriage. Hegel, for instance, espoused the view that marriage "an sich" was indissoluble, and therefore legal authorities should strive as much as possible to prevent it.³⁷³ Marriage as indissoluble – that is, without the possibility of divorce – has long roots in the canon law of Europe, which even created a category called *separatio quoad mensum et torum*.³⁷⁴ This meant, paradoxically, that a woman who was granted a divorce would still commit adultery if she married again or had sexual intercourse after the divorce. The extent to which divorce by mutual consent was controversial is probably best shown by the fact that the famous *Bürgerliche Gesetzbuch* of 1900 did not provide for divorce by mutual consent, and generally made divorce difficult to obtain in practice.³⁷⁵

varied greatly in this tumultuous period. The provisions providing for divorce by mutual consent were stripped from the Civil Code in France in 1816. Ironically, these provisions remained in force in those German lands that retained Napoleon's Code, such as Baden. Schuster, "The History and Present Condition of the German Divorce Law," 232.
³⁷⁰ Ibid.

³⁷¹ Leydecker, "The Avoidance of Divorce in Goethe's Die Wahlverwandtschaften," 1056.

³⁷² (GA I/4:121-128) See also Allen W. Wood, "Fichte's Philosophy of Right and Ethics," in *The Cambridge Companion to Fichte*, ed. David James and Günter Zöllner, Cambridge Companions to Philosophy (Cambridge: Cambridge University Press, 2016).

³⁷³ "Darum ist aber auch die Ehe an sich für unauflöslich zu achten: denn der Zweck der Ehe ist der Sittliche, der so hoch steht, das alles andere dagegen gewaltlos und ihm unterworfen erscheint." Hegel, *Grundlinien der Philosophie des Rechts*, 243. See also Leydecker, "The Avoidance of Divorce in Goethe's Die Wahlverwandtschaften," 1060 & n.21.

³⁷⁴ Note that pre-Christian Germanic law did have divorce by mutual consent. Schuster, "The History and Present Condition of the German Divorce Law," 229. Jewish law also has such divorce.

³⁷⁵ Max Rheinstein and Mary Ann Glendon, "West German Marriage and Family Law Reform," *The University of Chicago Law Review* 45, no. 3 (1978): 415; Schuster, "The History and Present Condition of the German Divorce Law," 235-36.

This divorce by mutual consent not only helps us to date the novel, but is also essential to it. For the entire dynamic between Eduard and Charlotte concerning their divorce depends upon her ability to consent to it – that is, upon the existence of divorce by mutual consent. For without this, it would make no sense for Eduard to request a divorce from Charlotte – her consent would have no legal weight.

For most of the novel, the law of divorce indeed remains thus in the background, seemingly taken for granted. But when the Count and the Baroness visit Eduard and Charlotte's estate, the Count presents a proposal for a new law to make marriages less lasting:

Einer von meinen Freunden, dessen gute Laune sich meist in Vorschlägen zu neuen *Gesetzen* hervorthat, behauptete: eine jede Ehe solle nur auf fünf Jahre geschlossen werden. Es sei, sagte er, dieß eine schöne, ung'rade heilige Zahl und ein solcher Zeitraum eben hinreichend, um sich kennen zu lernen, einige Kinder heranzubringen, sich zu entzweien und, was das Schönste sei, sich wieder zu versöhnen. Gewöhnlich rief er aus: wie glücklich würde die erste Zeit verstreichen! Zwei, drei Jahre wenigstens gingen vergnüglich hin. Dann würde doch wohl dem einen Theil daran gelegen sein, das Verhältniß länger dauern zu sehen, die Gefälligkeit würde wachsen, je mehr man sich dem Termin der Aufkündigung näherte. Der gleichgültige, ja selbst der unzufriedene Theil würde durch ein solches Betragen begütigt und eingenommen. (I.10, p.112) (Emphasis added)

Charlotte wishes to change the subject for the sake of the young and innocent Ottilie: “Sie [Charlotte] wußte recht gut, daß nichts gefährlicher sei, als ein allzufreies Gespräch, das einen strafbaren oder halbstrafbaren Zustand als einen gewöhnlichen, gemeinen, ja löblichen behandelt; und dahin gehört doch gewiß alles was die eheliche Verbindung antastet.” (I.10, p.113) The Count, however, carries on and presents another legal proposal (perhaps more accurately an extension of the same proposal):

Jener Freund, so fuhr er fort, that noch einen andern Gesetzs vorschlag. Eine Ehe sollte nur alsdann für unauflöslich gehalten werden, wenn entweder beide Theile, oder wenigstens der eine Theil, zum drittenmal verheirathet wäre. Denn was eine solche Person betreffe, so bekenne sie unwidersprechlich, daß sie die Ehe für etwas Unentbehrliches halte. Nun sei auch schon bekannt geworden, wie sie sich in ihren frühern Verbindungen betragen, ob sie Eigenheiten habe, die oft mehr zur Trennung Anlaß geben als üble Eigenschaften. Man habe sich also wechselseitig zu

erkundigen; man habe eben so gut auf Verheirathete wie auf Unverheirathete Acht zu geben, weil man nicht wisse, wie die Fälle kommen können. (I.10, p.114)
(Emphasis added)

The Count raises this proposal to counteract what is, according to him, an unrealistic portrayal of marriage in comedies. “In der Komödie sehen wir eine Heirath als das letzte Ziel eines durch die Hindernisse mehrerer Acte verschobenen Wunsches, und im Augenblick, da es erreicht ist, fällt der Vorhang, und die momentane Befriedigung klingt bei uns nach. In der Welt ist es anders; da wird hinten immer fortgespielt, und wenn der Vorhang wieder aufgeht, mag man gern nichts weiter davon sehen noch hören.” (I.10, p.111)

In other words, the power of narrative is here juxtaposed to that of legal propositions. Comedies, according to the Count, repeatedly present the same narrative: there is the wish for marriage, then there are obstacles which are overcome, then there is marriage – and the curtain falls. The Count sees two problems with this narrative. First, it presents marriage as a lasting thing. Second, it ends where actual marriage really begins. People thus come to view as *wahrscheinlich* (to use the terminology from Chapter I of this dissertation) what he considers an unrealistic notion of marriage, namely where marriages are automatically lasting. The Count’s remedy to this problem created by the narratives that comedies present is to introduce laws that will make marriages temporary. That is, he attempts to fight narrative with legal propositions.

Narrative wins in this matchup. Narrative has had its effect – Eduard and Charlotte have attained marriage after overcoming obstacles, and both believed that it would be lasting. The Count’s statute, however, will have no effect. Although Eduard, who at this point is already in love with Ottilie, likes the proposal, nothing ever comes of it. The various attempts to dissolve his marriage to Charlotte will all fail. Later in the novel, Eduard and Charlotte’s child dies, then Ottilie dies, and then Eduard himself dies.

D. Mittler, der hartnäckige Mann

Mittler is the character who most clearly understands that much of the plot – especially where divorce is concerned – operates in the shadow of the law. His name refers to what he does – mediate disputes. He is decidedly not an arbitrator, for he does not hold legal proceedings of any kind, nor does he issue legally binding decisions. Rather, he resolves disputes by settling them before they even reach court. His focus when he does this is to prevent change, especially for issues he considers moral (*sittlich*) – and divorce is chief among these. Mittler promptly realizes that for his activities he needs to know formal law: “Wie nöthig ihm die Rechtskunde sei, ward er zeitig gewahr.” (II.2, p.23) That is, he understands that in order to settle disputes, he needs to understand the respective legal positions of the parties. For instance, we will repeatedly see him seeking to convince Charlotte not to grant a divorce – because he understands that this is all he needs to save their marriage, legally speaking. He does not seem concerned that the marriage will thus not be saved in a meaningful way, but only in a legal one.

Mittler first appears in I.2, when Eduard and Charlotte are deciding whether or not to take in the Captain and Otilie. He then appears in I.9, before the Count and the Baroness visit Eduard’s estate. In I.18, he rushes to the aid of Eduard and Charlotte upon hearing of their separation – more precisely, he rushes to prevent a divorce.³⁷⁶ In II.8, he takes charge of Charlotte’s newborn son, ensuring he is baptized Otto. In II.15, he successfully pushes Charlotte to decide to send Otilie away. Charlotte’s son has died by this point, Otilie has condemned herself for this death, and Charlotte has reconsidered her decision to grant Eduard a divorce. Mittler relates these events to Eduard in the next chapter. Finally, he appears in the last chapter, II.18, and moralizes about the Ten Commandments. When he is discussing the prohibition

³⁷⁶ Cf. Leydecker, "The Avoidance of Divorce in Goethe's Die Wahlverwandtschaften."

against adultery, Otilie enters. His discussion perturbs her; she promptly leaves, and promptly dies. A confession extracted from Nanny leads to the conclusion that Otilie died because she stopped eating. Eduard dies later in the same chapter. Charlotte suspects suicide, but Mittler, with the help of a physician, convinces her not to pursue this suspicion.

After Charlotte and Eduard discuss inviting the Captain and Otilie to stay with them, Mittler suddenly arrives. Eduard calls him the “Der drollige Mann!” (I.2, p.21) and a bit later the narrator refers to him as “der närrische Gast” and “der Seltsame Mann.” We soon learn that this peculiar character specializes in resolving disputes:

[Mittler] war früherhin Geistlicher gewesen und hatte sich bei einer rastlosen Thätigkeit in seinem Amte dadurch ausgezeichnet, daß er alle Streitigkeiten, sowohl die häuslichen, als die nachbarlichen, erst der einzelnen Bewohner, sodann ganzer Gemeinden und mehrerer Gutsbesitzer, zu stillen und zu schlichten³⁷⁷ wußte. So lange er im Dienste war, hatte sich kein Ehepaar scheiden lassen, und die Landescollegien³⁷⁸ wurden mit keinen Händeln und Processen von dorthier behelliget. (I.2, p.23)

This strange man is thus impressive and even admirable in his own way. He has the rare ability to smoothen out disputes. Such a character we have not yet seen in this dissertation. For even Helena resolved a dispute by adjudicating it – but Mittler has the ability to resolve disputes without adjudication. Today, we would call him a mediator or conciliator, but not an arbitrator. For an arbitrator resolves a dispute by issuing an award – that is, a decision – after holding adversarial proceedings.³⁷⁹ However, a mediator or a conciliator convinces the parties to reach an amicable settlement. Whereas an arbitral award is legally binding, a mediator or conciliator has

³⁷⁷ “Schlichten” is here to be understood as part of a mediator’s work, not an arbitrator’s. “Schlichten,” when referring to disputes, principally meant to settle them, especially through the use of a comparison. Only a rarer usage of the word referred to a judge resolving a dispute through a judgment, and a judicial judgment is not intended here, for Mittler’s activity prevented cases from reaching the courts in the first place. Adelung, *Grammatisch-kritisches Wörterbuch der hochdeutschen Mundart, mit beständiger Vergleichung der übrigen Mundarten, besonders aber der Oberdeutschen*, v.3, p.1529.

³⁷⁸ I.e. courts. MA 1246.

³⁷⁹ Arbitration is discussed at greater length in Chapter II, *supra*.

no legally binding power over the parties – but may be able to convince them to agree to a settlement. When the mediator succeeds, no judge or arbitrator is needed, for the dispute has been settled. This is indeed what Mittler invariably achieved.

This does not mean, however, that a mediator or conciliator would be able to achieve a settlement if courts and arbitrations simply did not exist. For a mediator or conciliator operates “in the shadow of the law”³⁸⁰ – he convinces parties to accept a settlement given a certain legal reality, which includes their legal rights and their odds of winning in court or arbitration. Mittler understands this relevance of the law to his activities: “Wie nöthig ihm die Rechtskunde sei, ward er zeitig gewahr. Er warf sein ganzes Studium darauf, und fühlte sich bald den geschicktesten Advocaten gewachsen.” (II.2, p.23)³⁸¹ Indeed, divorce is an excellent example of a matter resolved in the shadow of the law, and Mittler understands this. For instance, the bargaining power between the parties to a divorce is determined by law to a significant extent, for the law answers such questions as whose consent is needed for divorce, which grounds are available for a divorce and how they must be proven, how property is divided upon divorce, etc.

It is hard not to notice several similarities between Mittler and Faust. Both have studied law intensively. Faust did so “mit heissem Bemühm,” Mittler “warf sein ganzes Studium darauf.” Faust remains constantly active until his very death, and Mittler is described as working with “einer rastlosen Thätigkeit.” Perhaps it should come as no surprise that Mittler, like Faust for much of *Faust II*, seeks to work from a center (Faust eventually overcomes this quest for centralization in Act V of *Faust II*, but Mittler does not) First, when he was a clergyman, the

³⁸⁰ I borrow this term from Mnookin and Kornhauser, *Bargaining in the Shadow of the Law: the Case of Divorce*.

³⁸¹ It remains unclear whether he in fact masters *Rechtskunde*, or merely believes himself to have done so – but he has studied it intensively. Some have therefore called what he does *Scheinjurisprudenz*. See Diederichsen, “Die ‘Wahlverwandtschaften’ als Werk des Juristen Goethe,” 539-40.

church was at the center of his activity. Then, he acquires a “Residenz,” which he “zum Mittelpunkt seiner Wirksamkeit machte.” (I.2, p.23) And these centers are centers of bordered entities. We are reminded of this by the words “Landescollegien” (from when Mittler was a clergyman) and “Wirkungskreis” (from when he began to work from his “Residenz”).

Nevertheless, Mittler is no Faust – where Faust constantly sought change, even when he inadvertently prevented it, Mittler’s very goal is to prevent it. A first indication of this is that, as a clergyman, he prevented all divorces. While decreasing the number of divorces and helping people to save their marriages is valuable, ensuring that there are no divorces at all reeks of excessive resistance to change. This suggests that Mittler prevented divorces even in the worst cases – where divorce, unfortunate as it may be, is necessary. This suggestion will be confirmed towards the end of the novel, when we will learn that Mittler “konnte es aber nicht über sich gewinnen, das Wort Scheidung auch nur im Vorbeigehn auszusprechen.” (I.18, p.193)

Although Mittler is no Faust, he is also no Mephistopheles, even though he resists change – for Mittler is committed to a strict morality. Mittler next appears in I.9, just before the Count and the Baroness arrive. Again, he simply shows up. While Mephisto would likely have been delighted to see a couple openly engaged in adultery, Mittler, upon learning that the Count and the Baroness are coming, decisively refuses to stay. Efforts to make him stay fail: “Man suchte ihn zu begütigen; aber vergebens.” (I.9, p.107) His reasons are of a moral nature. He views the actions of the Count and the Baroness as open desecrations of marriage, and launches into a sermon on the sanctity of marriage. Marriage, he claims, is the “[g] rund aller sittlichen Gesellschaft,” and “der Anfang und der Gipfel aller Cultur.” (I.9, p.107) “Unauflöslich muß sie [marriage] sein,” he adds, and “was ein Paar Gatten einander schuldig werden ... ist eine unendliche Schuld, die nur durch die Ewigkeit abgetragen werden kann.” (I.9, p.107) Mittler’s

belief in the importance of marriage is thus rooted in his moral convictions, and to him means that marriage is permanent. In the context of the novel, this puts him squarely on the opposite side of divorce to Eduard – for Eduard seeks divorce, while Mittler opposes it. Similarly, he is on the opposite side of the written law, which has recently permitted divorce by mutual consent, and thus become more permissive towards divorce.

Indeed, when we see Mittler next, he is doing all he can to prevent Eduard from divorcing Charlotte. We are now in I.18, the final chapter of Part I of the novel. Eduard has left the estate, and is being consumed by his passion for Ottilie. He hoped that Mittler came from Ottilie, and is disappointed to learn that he arrived of his own accord: “Verdrießlich daher und verstimmt war Eduard als er vernahm, Mittler komme nicht von dorthier [from Ottilie], sondern aus eigenem Antriebe.” (I.18, p.186) Eduard’s passion and suffering are incomprehensible and irrelevant to Mittler. He sees only a marriage in danger, and promptly launches into another moral sermon. According to Mittler, Eduard “solle sich ermannen, solle bedenken, was er seiner Manneswürde schuldig sei; solle nicht vergessen, daß dem Menschen zur höchsten Ehre gereiche im Unglück sich zu fassen, den Schmerz mit Gleichmuth und Anstand zu ertragen, um höchlich geschätzt, verehrt und als Muster aufgestellt zu werden.” (I.18, p.189) Unsurprisingly, these words are “hohl und nichtig” (I.18, p.190) to Eduard, who is in far too emotional a state to listen to a sermon. He charges Mittler with the task of securing a divorce from Charlotte. Mittler, much to his delight, finds that Charlotte is willing to take Eduard back, and believes that he will restore their marriage. Charlotte gives him a letter for Eduard, in which she states that they should not give up on their marriage. But Charlotte is not content with Mittler: “Charlotte war dießmal, wie schon öfters, über Mittlern unzufrieden. Sein rasches Wesen brachte manches Gute hervor, aber seine Übereilung war Schuld an manchem Mißlingen. Niemand war abhängiger von

augenblicklich vorgefaßten Meinungen als er.” (I.18, p.194) What exactly Charlotte is displeased with is not specified; presumably, she understands that Mittler has failed to grasp the intensity of Eduard’s feelings for Ottilie – but what is clear by this point is that Mittler is no Helena, who has a profound positive impact on those whom she judges.

However, Mittler will have a profound negative impact. After he briefly appears in II.8 to ensure that Charlotte’s child is baptized Otto, we see him again in the final chapters of the novel. By the time he appears in II.15, Charlotte’s child has died. Ottilie is walking with the child along the lake that has been created on the estate. Eduard, on his way to Charlotte, from whom he again is hoping to obtain a divorce, sees Ottilie and “er fliegt auf sie zu und liegt zu ihren Füßen.” (II.15, p.357) He explains that he has dispatched the Major (the Captain has been promoted) to Charlotte to obtain a divorce. Ottilie reciprocates his feelings, but emphasizes that she will respect Charlotte’s decision: “Sie [Charlotte] muß unser Schicksal entscheiden, laß uns ihr nicht vorgreifen. Ich [Ottilie] bin die Deine, wenn sie es vergönnt; wo nicht, so muß ich dir entsagen. Da du die Entscheidung so nah glaubst, so laß uns erwarten.” (II.15, p.359) They “wechselten zum erstenmal entschiedene freie Küsse und trennten sich gewaltsam und schmerzlich.” (II.15, p.359)³⁸² It has begun to get dark, and the way back around the lake seems too long to Ottilie. Her reservations about taking the child onto the water dissipate in this hurry.

Sie springt in den Kahn, ergreift das Ruder und stößt ab. Sie muß Gewalt brauchen, sie wiederholt den Stoß, der Kahn schwankt und gleitet eine Strecke seewärts. Auf dem linken Arme das Kind, in der linken Hand das Buch, in der rechten das Ruder, schwankt auch sie und fällt in den Kahn. Das Ruder entfährt ihr, nach der einen Seite, und wie sie sich erhalten will, Kind und Buch, nach der andern, alles in's Wasser. Sie ergreift noch des Kindes Gewand; aber ihre unbequeme Lage hindert sie selbst am Aufstehen. Die freie rechte Hand ist nicht hinreichend sich umzuwenden, sich aufzurichten; endlich gelingt's, sie zieht das Kind aus dem

³⁸² How much physical intimacy this entails is open to interpretation: “sie wechselten zum erstenmal entschiedene freie Küsse und trennten sich gewaltsam und schmerzlich.” (II.13, p.359)

Wasser, aber seine Augen sind geschlossen, es hat aufgehört zu athmen. (II.15, p.360)

This tragedy is often understood as an accident for which Otilie is not liable.³⁸³ However, this short passage in fact contains all the elements required for a finding of negligent homicide (*fahrlässige Tötung*) at the time. Indeed, one could find negligent homicide here on two different theories. The first theory, in force in German lands since at least the *Constitutio Criminalis Carolina* of 1532, required a death to occur “ungevehrlich, aufs geylheydt oder unführsichtigkeyt, doch wider der Thätters Willen” (Art. 146). Otilie indeed does not intend the death of the infant, and she is also *unfährsichtig*. Even though she has reservations about taking the child on the water, she carelessly holds it in her left arm while also holding a book in her left hand and an oar in her right hand – and thus overloaded, she jumps into the boat, and pushes off with violence. Unsurprisingly, this ends badly – the child falls out of her hands. A responsible course of action would have been to place the infant into the boat first, then to board oneself, and to push off carefully. As if this were not enough, Otilie is also guilty of negligent homicide on a second theory. For at the time, one was also guilty of negligent homicide if the death occurred as the consequence of a prohibited action, even if one took the necessary precautions to prevent the death. Otilie here engages in two prohibited acts: first, she kisses the married Eduard; second, she gets on the boat with the child, which Charlotte, the child’s mother, told her not to do. (II.10, p.315) Otilie’s guilt becomes even clearer if one considers that she knew that not long ago, a boy had fallen into the very same lake and nearly drowned. (I.15, p.161)

Otilie will never be the same again – she wishes to pay for her sins. She understand the tragedy of Otto’s drowning as her own fault not because of her negligence, however, but rather

³⁸³ Diederichsen, "Die 'Wahlverwandtschaften' als Werk des Juristen Goethe," 542-43. My account of Otilie’s negligence here is much indebted to Diederichsen’s work.

because of her intimacy with Eduard – strict morals and narratives determine her actions from this point on. She absolutely refuses ever to be Eduard's: "Eduards werd' ich nie!" (II.14, p.371) She tells Charlotte to change her decision to divorce Eduard – and even threatens suicide: "In dem Augenblick, in dem ich erfahre: du [Charlotte] habest in die Scheidung gewilligt, büße ich in demselbigen See mein Vergehen, mein Verbrechen." (II.14, p.371) Otilie believes that through the death of the child God has "[a]uf eine schreckliche Weise ... mir die Augen geöffnet, in welchem Verbrechen ich befangen bin. Ich will es büßen; und niemand gedenke mich von meinem Vorsatz abzubringen!" (II.14, p.371) She thus connects her moral transgression with Eduard to the death of the child – a theme we already saw in the dominant narrative of infanticide discussed in Part II of this dissertation. There, infanticide was invariably the consequence of an unmarried girl's sin with a man, and here that connection is echoed. Otilie draws this same connection between morals and the child's death in another way as well. When she was a small orphaned child and Charlotte took care of her, she made for herself "nach [ihren] beschränkten Einsichten Gesetze" (II.14, p.370), according to which she lived. But because of her intimacy with Eduard she says "ich habe meine Gesetze gebrochen." (II.14, p.370). These laws are not to be understood as laws in the formal sense, but are rather rules that a child made for herself. Otilie does not appear to entertain even the possibility that said laws should evolve as she matures – but rather believes that her breaking these rules is the cause of the infant Otto's death. She thus renounces any possibility of marrying Eduard.

Her reason for not wanting to marry Eduard also has another narrative reason:

sehen wir nicht in der Geschichte, daß Menschen, die wegen großer sittlicher Unfälle sich in die Wüsten zurückzogen, dort keineswegs, wie sie hofften, verborgen und gedeckt waren? Sie wurden zurückgerufen in die Welt, um die Verirrten auf den rechten Weg zu führen; und wer konnte es besser als die in den Irrgängen des Lebens schon ingeweihten! Sie wurden berufen den Unglücklichen

beizustehen, und wer vermochte das eher als sie, denen kein irdisches Unheil mehr begegnen konnte! (II.15, p.377)

Otilie has thus chosen her own fate. Charlotte emphasizes that this is Otilie's decision, that Otilie could be with Eduard if she so chose:

Wenn dein Entschluß, entgegnete ihr Charlotte, Eduarden zu entsagen, so fest und unveränderlich ist ... ja verändere lieber deinen gegenwärtigen Entschluß: aber aus dir selbst, aus freiem wollendem Herzen... Wie gesagt, ehe du diesen Schritt thust, ehe du dich von mir entfernst und ein neues Leben anfängst, das dich wer weiß auf welche Wege leitet, so bedenke noch einmal, ob du denn wirklich für alle Zukunft Eduarden entsagen kannst. (II.15, p.379)

However, Otilie does not change her mind – she wishes to leave the estate without marrying Eduard, now or ever, and wishes to return to the *Pension*.

When Charlotte tries to delay Otilie's departure to the *Pension*, thinking that perhaps Otilie will change her mind, Mittler convinces her otherwise. Again, he counteracts change: "und nun war freilich Mittlern die schwierige Aufgabe übertragen, auf eine Veränderung des Zustandes Eduarden vorzubereiten. Mittler aber, wohlwissend, daß man das Geschehene sich eher gefallen läßt, als daß man in ein noch zu Geschehendes einwilligt, überredete Charlotten: es sei das Beste, Ottilien gleich nach der Pension zu schicken." (II.15, p.381) Mittler (who once again showed up uninvited) sees in the tragic death of Charlotte's child an increased likelihood of change, and seeks to counteract it by removing Otilie from the premises as soon as possible: "Dieser Unfall, der ihm die Wiedervereinigung beider Gatten höchst unwahrscheinlich machte, wirkte gewaltsam auf ihn; aber immer nach seiner Sinnesweise hoffend und strebend, freute er sich nun im Stillen über den Entschluß Ottiliens." (II.15, p.381) He does not understand that the relationship between Eduard and Charlotte is doomed, and still believes that they will be able to keep things the same: "Er vertraute der lindernden vorüberziehenden Zeit, dachte noch immer die beiden Gatten zusammenzuhalten und sah diese leidenschaftlichen Bewegungen nur als Prüfungen ehelicher Liebe und Treue an." (II.15, p.381)

As the novel nears its close, the four main characters are living merely “ein Scheinbild des vorigen Lebens, und der Wahn, als ob noch alles beim Alten sei, war verzeihlich.” (II.18, p.397) By this point, Eduard has, at least temporarily, lost his mind. He has exacted from Charlotte a promise that she will grant the divorce, and even that she will marry the Major. She agreed “ihn zu besänftigen, ihn zu erhalten Sie sagt dem Major ihre Hand zu, auf den Fall, daß Ottilie sich mit Eduarden verbinden wolle, jedoch unter ausdrücklicher Bedingung, daß die beiden Männer für den Augenblick zusammen eine Reise machen.” (II.18, p.393) Charlotte’s caveats and conditions seem designed to salvage the situation. For Ottilie is thus given an incentive to marry Eduard – namely that this is the only way to make Charlotte and the Major marry, thus the only way to give them some happiness. At the same time, travel may give Eduard some time to come to his senses, while also giving Ottilie some time to reconsider her decision not to marry him.

However, Mittler, aptly described as “der hartnäckige Mann,” who again does not appear to have been invited by anyone, does not realize that the reality that existed is lost:

Mittler hatte sich diese Zeit öfter sehen lassen und war länger geblieben als sonst gewöhnlich ... Ottiliens Schweigen so wie ihre Weigerung legte er zu seinen Gunsten aus. Es war bisher kein Schritt zu Scheidung der Gatten geschehen; er hoffte das Schicksal des guten Mädchens auf irgend eine andere günstige Weise zu bestimmen; er horchte, er gab nach, er gab zu verstehen und führte sich nach seiner Weise klug genug auf.” (II.18, p.401)

He even launches into a legal and moral “Raisonnement.” (II.18, p.402) The subject is “Materien ... denen er eine große Wichtigkeit beilegte.” (II.18, p.402) Specifically, he discusses the Ten Commandments, and the way he believes they should be taught to children. He is utterly insensitive to the fact that this is not the time to moralize. He does not seem to understand (or else to care) that several people, especially Ottilie, are in a very vulnerable state, and that they do not need moral and legal sermons at this time. He does not object to the way the Fourth

Commandment was taught, that one should honor one's father and one's mother. But he is less pleased with the Fifth Commandment, the prohibition against murder:

Aber ist es nicht eine barbarische Anstalt, den Kindern Mord und Todtschlag zu verbieten? Wenn es hieße: Sorge für des andern Leben, entferne was ihm schädlich sein kann, rette ihn mit deiner eigenen Gefahr; wenn du ihn beschädigst, denke daß du dich selbst beschädigst: das sind Gebote wie sie unter gebildeten vernünftigen Völkern Statt haben, und die man bei der Katechismuslehre nur kümmerlich in dem Wasistdas nachschleppt. (II.18, p.402)

When he reaches the Sixth Commandment, the prohibition against adultery, he disapproves extremely of the way it is taught:

Und nun gar das sechste, das finde ich ganz abscheulich! Was? die Neugierde vorahnender Kinder auf gefährliche Mysterien reizen, ihre Einbildungskraft zu wunderlichen Bildern und Vorstellungen aufregen, die gerade das was man entfernen will, mit Gewalt heranbringen! Weit besser wäre es, daß dergleichen von einem heimlichen Gericht willkürlich bestraft würde, als daß man vor Kirch' und Gemeinde davon plappern läßt. (II.18, p.403)

Perhaps Mittler's "Raisonnement" has some appeal; there is probably something to be said for teaching children to take care of the lives of others before teaching them not to murder. But Mittler's exposition is absolutely out of place. He expounds about the prohibition against murder, when both Charlotte and Otilie blame themselves for the death of the infant Otto, and especially Otilie is in a vulnerable state. Indeed, right before he begins to discuss adultery, Otilie walks in. Mittler is unperturbed, and launches on his exposition. Meanwhile, Charlotte sits "wie auf Kohlen," and tries to change the subject. However, it is too late. Otilie, who blames herself for her near adultery and whose facial expression has changed, leaves the room. Promptly, a terrible scream is heard: "Sie stirbt! Das Fräulein stirbt! Kommen Sie! Kommen Sie!" (II.18, p.405)

Soon after, Otilie indeed dies, in spite of the *Tätigkeit* of a doctor, Charlotte, and others. The scholarship has largely accepted her cause of death as that which her Nanny confessed to:

starvation through deprivation of food.³⁸⁴ For “das Mädchen [Nanny] bekennt, Otilie habe nichts genossen.” (II.18, p.406) However, as we saw in Part II of this dissertation especially, confessions were not always reliable in this period. Indeed, we soon learn that Nanny “von dem Arzt heftig gescholten, durch Drohungen zum Bekenntniß genöthigt, und nach dem Bekenntniß mit Vorwürfen überhäuft, war entflohen. Nach langem Suchen fand man sie wieder, sie schien außer sich zu sein.” (II.18, p.407) This is not a sufficient basis on which to conclude that Otilie starved to death – as we saw in Part II, young women were willing to confess to being killers when pressured. It is thus all the more likely that the perturbed Nanny would confess in this situation, in which her alleged guilt is much more limited – allegedly, she merely did nothing when her mistress did not eat, except eating some of the meals herself. The explanation that Otilie starved herself to death also suffers from another deficiency. She was in Eduard’s estate, with Charlotte, Eduard, the Major, Nanny, and, frequently, Mittler as well. It is hardly plausible that they would not notice it if she were becoming so deprived of nutrition as to be close to death.

When Eduard dies soon after, we can see an alternative explanation for Otilie’s death as well: suicide. Charlotte suspects suicide: “ein Verdacht des Selbstmordes regte sich in ihr; sie wollte sich, sie wollte die andern einer unverzeihlichen Unvorsichtigkeit anklagen.” (II.18, p.416) However, the doctor and Mittler each have their grounds to talk her out of this suspicion: “Doch der Arzt aus natürlichen, und Mittler aus sittlichen Gründen, wußten sie bald vom Gegentheil zu überzeugen.” (II.18, p.416) *Sittliche Gründen* are hardly a basis on which to conclude that a suicide did not occur – at best, they are a reason that it ought not occur, or else a reason to deny it occurred. *Natürliche Gründen* could be evidence that there was no suicide – but

³⁸⁴ See MA p.1258.

we already saw in Chapter III of this dissertation that medical opinions as to cause of death were not always reliable. The fact that the doctor has this opinion ready right away does not enhance its credibility.

Mittler, then, both fails and succeeds in his opposition to change. He has been counteracting change at various pivotal moments in the novel. The change he most opposes is divorce – he cannot even utter the word. He is successful insofar as divorce does not materialize in the novel. In spite of Eduard’s and the Captain’s successive attempts, in spite of the strong feelings within the love quadrangle, in spite of the death of the infant Otto, there is no divorce. However, Mittler also fails. By the end of the novel, there are three bodies: the infant Otto, Otilie, and Eduard. The written law of divorce underwent a major advance in that divorce by mutual consent became possible – but this does not mean that legal advancement is in fact achieved. Here we can see that legal advancement requires more than mere change in the written law. For in spite of a major reform in the written law of divorce, divorce fails to happen in the novel. If legal advancement would have occurred, the tragic deaths would have been averted. Otto would not have died if a frenzied Eduard had not first aroused and delayed Otilie – and he would not have been frenzied if divorce had not been so unattainable to him. Otilie would hardly have died if Otto had not died, if she would have married Eduard, and perhaps even if, immediately before her death, she did not have to listen to Mittler’s moral “Raisonnement” about adultery. Eduard would not have died if Otilie and his son had lived, and if he had been able to divorce Charlotte and marry Otilie.

Mittler’s success, in other words, is a success of stagnation – a tragic success. This should not come as a surprise, because Mittler is the very opposite of a *gränzunbewußte* arbitrator. Whereas such an arbitrator operates without a center, we learn that Mittler is localized in a center

the very first time he appears in the novel – first in his church, then in his residence. Whereas a *gränz unbewußte* arbitrator approaches the formal law with flexibility, Mittler likes formal legal learning – he even finds expertise in *Rechtskunde* necessary for his activities as a mediator. Where arbitration relies fundamentally on consent, Mittler invariably shows up uninvited, sometimes even when he is not welcome. Where an arbitrator derives much of her legitimacy from being exceptional – recall the effect Helena has on Faust and Lynceus – Mittler does not impress the parties to his mediations. He is a strange and comic character. Charlotte is even displeased with Mittler’s rashness when he comes to her after meeting with Eduard at the end of Part I of the novel.

Finally, and perhaps most importantly, Mittler’s approach is non-narrative. He moralizes and he reasons, but he does not tell stories. He explains that marriage is sacred, but provides arguments and assertions, but never narratives. He believes that the Ten Commandments should be taught differently to children. He takes these propositions to have a key effect on children, and believes that these propositions should be substituted by other propositions. However, he does not consider the effects narratives have on children, or narratives that could substituted them. He fails even to consider the Ten Commandments as part of a greater Biblical narrative. Even though we learn only a few things about Mittler – he appears only a handful of times – we learn all the essential things needed to see why he is not a character who creates advancement.

E. The Traveling Lord who Crosses Borders and Brings Narratives

Even though advancement fails to happen in the *Wahlverwandtschaften*, one important change needed for that advancement does take place: Charlotte becomes willing to grant Eduard the divorce. At the end of Part I, she put her refusal to divorce Eduard in writing. (I.18.p.195) However, in II.14, she agrees to the divorce: “Ich willige in die Scheidung.” (II.14, p.366) She

now understands that she was wrong in the way she thought about both marriage and divorce, and has thus caused much misery, including, so she believes, the death of her child: “durch mein Zaudern, mein Widerstreben habe ich das Kind getödtet.” (II.14, p.366)

This change in Charlotte’s thinking was caused by the English lord. Like Helena, he appears only once, and only briefly – but he offers a solution to the rigid stagnation our main characters are caught in. Like Helena offered a narrative, so this Englishman tells the “Die wunderlichen Nachbarskinder. Novelle.” (II.10, p.323) Like Helena left Faust “erstaunt,” so the English Lord leaves Charlotte “höchst bewegt.” (II.11, p.336)

The English Lord appears in II.10 when he visits Eduard’s estate. He leaves in the next chapter. Of the main characters, only Charlotte and Ottilie are on the estate. Eduard and the Captain both left the estate in Part I of the novel, and they have not yet returned. Charlotte gave birth to Otto in II.8, who was baptized with Mittler’s help in the same chapter. Although they miss Eduard and the Captain, caring for the child and their other activities makes this into a happy time for them: “In dieser schönen Zeit kam Charlotten der Besuch eines Engländers sehr gelegen.” (II.10, p.315) A contrast with Mittler is thus evident right when the Lord appears: unlike Mittler, who comes uninvited and is often unwelcome, the English Lord is welcome. He even brings “ein Empfehlungsschreiben vom Grafen mit.” Only in his presence “genossen die Frauzimmer erst vollkommen ihrer Umgebung.” (II.10, p.315) He is so attentive to every detail in the park that Charlotte has been working so hard to improve, “daß durch seine Bemerkungen der Park wuchs und sich bereicherte. Schon zum voraus erkannte er was die neuen heranstrebenden Pflanzungen versprachen.” (II.10, p.316) That is, he creates growth and sees potential, rather than merely the status quo.

This English Lord is remarkably well-traveled, unlike his hosts. He has a habit of painting all the meaningful locations that he has visited. He thus takes Charlotte and Ottilie on a journey of sorts: “Sie freuten sich, hier in ihrer Einsamkeit die Welt so bequem zu durchreisen, Ufer und Häfen, Berge, Seen und Flüsse, Städte, Castelle und manches andre Local, das in der Geschichte einen Namen hat, vor sich vorbeiziehen zu sehen.” (II.10, p.317) The world of Charlotte and Ottilie is a lonely and contained one, as opposed to the wide world of the English Lord.

However, the difference between the worlds of the English Lord and the other characters runs far deeper than merely the number of places they have seen. The difference between their worlds is also how those worlds are organized in space – whether it has a center in the form of a home or not. For as Ottilie and Charlotte listen to the English Lord, Ottilie asks the Englishman “wo er sich denn jetzt gewöhnlich aufhalte, wohin er am liebsten zurückkehre.” (II.10, p.317) His answer, which he utters “ganz unbewunden,” is “unerwartet” for the ladies. (II.10, p.318) They themselves have a fixed home. Eduard also has that same home, and he will return to it in II.12, the chapter following the English Lord’s departure, as will the Captain (by then the Major). And when these characters lose their abode, they think of another one. For instance, when it becomes clear towards the end of the novel that Ottilie must leave the estate, the question is put in spatial terms: “Wollte man *den Ort* verändern und sich zugleich, wenigstens auf einige Zeit, von einander trennen, so trat die alte Frage wieder hervor: *wo* sich Ottilie hinbegeben solle?” (II.15, p.374) (emphasis added) The options are both fixed places in space where she can settle: “Jenes große reiche Haus” and the *Pension*. (II.15, p.374) But the Lord’s approach to having a home is fundamentally different:

Ich habe mir nun angewöhnt überall zu Hause zu sein und finde zuletzt nichts bequemer, als daß andre für mich bauen, pflanzen und sich häuslich bemühen. Nach

meinen eigenen Besitzungen sehne ich mich nicht zurück, theils aus politischen Ursachen, vorzüglich aber weil mein Sohn, für den ich alles eigentlich gethan und eingerichtet, dem ich es zu übergeben, mit dem ich es noch zu genießen hoffte, an allem keinen Theil nimmt, sondern nach Indien gegangen ist, um sein Leben dort, wie mancher andere, höher zu nutzen, oder gar zu vergeuden. (II.10, p.318)

The English Lord simply has no fixed home, and he does not want one. His world has no center, and he feels at home everywhere. Borders do not enter his discussion, and even the fact that his son went as far away as India is something he mentions as if it were the most natural thing in the world. He then proceeds to explain that he sees having a fixed home as the source of various problems:

Gewiß, wir machen viel zu viel vorarbeitenden Aufwand auf's Leben. Anstatt daß wir gleich anfangen uns in einem mäßigen Zustand behaglich zu finden, so gehen wir immer mehr in's Breite, um es uns immer unbequemer zu machen. Wer genießt jetzt meine Gebäude, meinen Park, meine Gärten? Nicht ich, nicht einmal die Meinigen, fremde Gäste, Neugierige, unruhige Reisende.

Selbst bei vielen Mitteln sind wir immer nur halb und halb zu Hause, besonders auf dem Lande, wo uns manches Gewohnte der Stadt fehlt. Das Buch das wir am eifrigsten wünschten, ist nicht zur Hand, und gerade was wir am meisten bedürften, ist vergessen. Wir richten uns immer häuslich ein, um wieder auszuziehen, und wenn wir es nicht mit Willen und Willkür thun, so wirken Verhältnisse, Leidenschaften, Zufälle, Nothwendigkeit und was nicht alles. (II.10, p.318)

The ladies are “tief ... getroffen” by this answer. (II.10, p.319) The final sentence of the English Lord’s answer summarizes their own woes. These woes have indeed consisted in moving into and out of Eduard’s estate. Otilie and the Captain moved in, then Eduard and the Captain had to move out. And this has happened not so much through their own choice or their own will, as through “Verhältnisse, Leidenschaften, Zufälle, Nothwendigkeit und was nicht alles.” (II.10, p.319) The Captain fell on hard times, and therefore had to be taken in. Otilie was not faring well in her *Pension*, and had to be taken in as well. Passion and relationships then developed in the estate, which meant that someone had to leave.

Although the English Lord has inadvertently upset the ladies with his answer, he is not as tactless as Mittler. He did so because he was not aware of what had been happening in the estate. His companion, however, is interested in, among other things, the “Conflict des Gesetzlichen und des Ungebändigten,” (II.10, p.321) has made himself aware of what has been taking place, and duly informs the English Lord. The English Lord now feels sorry for the pain he has caused, and seeks to make up for it by having his companion tell “angenehmen und bedeutenden Anekdoten und Geschichten” from their travels. (II.10, p.322) Although initially these anecdotes and stories appear to be having the intended effect, the final one cuts too close to the lives of the the listeners to cheer them up. But its effect is all the more profound.

This story is titled “Die wunderlichen Nachbarskinder. Novelle.” (II.10, p.323) This is the only place in the novel where a text is set off with both a title and its genre. Although there are many inserted texts in the novel, for instance entries from Otilie’s diaries at the ends of most chapters of Part II up to this point, this novella is the only text labelled with both a title and its genre. This specific genre is one that is rooted in the law, specifically in the *Novellae Constitutiones* (also known as Justinian’s novels.)³⁸⁵ And indeed, this novella will show Charlotte and Otilie that their lives could have worked out in a different way.

In the novella, a boy and a girl who are neighbors, both from important families, grow up together. Their parents intend for them to marry one day. However, they soon develop a strong antipathy towards each other, which even results in a physical fight at one point. The boy leaves to pursue his education further and to join the military. When they grow up, a young man, older than they, and also with high status, begins to pursue the girl actively. They soon become

³⁸⁵ See Chenxi Tang, "The Transformation of the Law of Nations and the Reinvention of the Novella: Legal History and Literary Innovation from Boccaccio's *Decameron* to Goethe's *Unterhaltungen deutscher Ausgewanderten*," *Goethe Yearbook* 19, no. 1 (2012).

engaged, live together, and feel as if they were married, although they never actually tie the knot. The boy who left now returns while on leave from the army. He is a young man by this point, and has been successful in his education and attained a worthy position. The young lady, who believes herself to be happy, treats him in a friendly way. He does not see anything more in this than normal friendliness. But she soon feels as if she woke up from a dream. Even her memory of events changes – she now remembers things as if she had always loved her childhood neighbor. Perhaps one cannot blame her for this, for her fiancé cannot compare with her neighbor.

Rather than share her feelings with someone, she decides to die, as a way of punishing her beloved for his indifference. This strange madness pursues her everywhere, and although people notice it, nobody discovers its cause. One day, she and her fiancé invite her beloved, among many others, for a leisurely sailing trip. The neighbor steers the ship after the old shipmaster fell asleep. When they near particularly treacherous waters, our suicidal young woman approaches him wearing a wreath of flowers and throws it at him. He does not want to be disturbed at this challenging moment, so she obliges by saying that she will never disturb him again and jumps into the water. In the ensuing commotion, the ship is stranded, and our young hero jumps into the water to rescue the woman who loves him. He gets her out of the water. On land, he finds a house where a young couple lives, and manages to bring his nearly dead neighbor back to life. In the tenderness and passion that ensues, they find love. They decide to stay together, and wonder what they should do – return to their homes, or flee. In the meantime, their parents and others arrive on the beach in that same fateful ship that the neighbors jumped off. The parents, the fiancé, and others jump onto the shore, in the hope of finding the lost young people. They learn that the young people survived, and the young people promptly emerge from

the bushes. The parents are delighted, their children announce that they are now a couple, and ask for their parents blessings, “und wer hätte den versagen können?” (II.10, p.335)

Charlotte is “höchst bewegt” (II.11, p.336) by this story. She rises and leaves the room. Charlotte’s state is perhaps even more remarkable than Faust’s *Erstaunung* at Helena’s judgment of Lynceus. For there Helena not only briefly retold her own narratives, but also acquitted the accused. Here, however, the English Lord’s companion tells merely a story that at first glance appears little more than a common love story, and one with a happy ending at that. Indeed, like Faust knew Helena’s narrative from his own experience, so Charlotte also knows this narrative, for this story indeed happened to the Captain and a neighbor.³⁸⁶ The events were “im Einzelnen mehr ausgebildet und ausgeschmückt, wie es dergleichen Geschichten zu gehen pflegt, wenn sie erst durch den Mund der Menge und sodann durch die Phantasie eines geist- und geschmackreichen Erzählers durchgehen” (II.11, p.336) – a reminder that not the details of narratives matters in terms of shaping thought, but their core. Here, the core of the narrative is simply that two people love each other, but prevent happiness by being confused about their feelings, and then finally marry happily once they overcome that psychological barrier. For as children the young people thought they hated each other, and even had a physical fight. The young lady then deluded herself into believing that she wanted to marry the man she lived with. When the young man returned, they were both mistaken about their feelings towards each other at first. The young lady then decided the best way to show her feelings was to attempt suicide in front of her beloved – which ended up working. The narrative is set up such that nothing other

³⁸⁶ We do not learn why the Captain is not now married to the woman he saved from drowning, unless we are to understand that he was not the man who happily married in the end, but rather was the fiancé left without the woman he loved.

than the psychology of the young couple prevents their happiness: for their parents favor their union, neither of them is married, and the young man has achieved a respectable position.

Charlotte's situation is analogous; hence, she is so affected by this narrative. For at this point in her life, only psychology is preventing her from letting Eduard and Ottilie marry each other, and from marrying the Captain herself. No law prevents her from giving her consent to the divorce – indeed, the law now permits divorce by mutual consent. Eduard wants a divorce, and the Captain wants to marry her. Society has become accepting not only of divorce, but of looser morals generally, as the visit of the Count and the Baroness showed (those two could not marry each other only because one of them could not divorce, not because of morals or stigma). Yet Charlotte has been stubbornly resisting a happy outcome. She has to change before even a legal change can lead to real advancement here in the form of a divorce everyone (except Mittler) wants.

As the Englishmen prepare to leave, we learn that they have touched their listeners “auf eine sonderbare Weise . . . , doch den Wunsch zurückgelassen, daß man sie irgendwo wieder antreffen möchte.” (II.11, p.340) Charlotte and Ottilie would like to see the Englishmen again, in spite of having been so upset by them. This can be explained by the fact that the Englishmen upset them principally by shaking up their world at its foundations – its spatial arrangement and its narratives. This was disturbing to the ladies, for it can be difficult to see the fundamental problems of one's own world. It did not even cross Ottilie's mind when she asked the English Lord about his home that he could simply not have one, and it was hard to realize that the very creation of a home was at the root of many of the problems in the novel. Yet the Englishmen also showed the possibility of another reality, better than the one our main characters are caught in,

and therefore Charlotte and Ottilie would like to see them again. Like Helena, they arrived, affected their listeners with a familiar narrative, and left promptly.

Charlotte is the one most deeply affected by this narrative, even though this change is not enough to avert the tragic ending of the novella. Ottilie and Eduard will both die in the final chapter. The happy ending stays in the novella, but does not enter into the novel. Yet Charlotte does act very differently in material respects. She agrees to a divorce, which she had refused so staunchly in the first part of the novel. She also encourages Ottilie to make her own and free choice as to whether she will go the *Pension* or marry Eduard. Again, this contrasts starkly with her earlier behavior, when she made Ottilie's decisions for her. And when Charlotte agrees a second time to divorce Eduard, she uses the power she has in that moment to make him and the Captain embark on a journey together. This peculiar condition for agreeing to the divorce can be explained as her attempt to make Eduard and the Captain more like the two Englishmen – though it is, sadly, too late to avert catastrophe. The Englishmen have shown the possibility of a different reality, but that reality has not materialized within the novel. What the Englishmen have shown is that it takes a change in the way people think for a legal change on paper to make a difference in reality as well.

F. Conclusion

Legal advancement, and the failure thereof, in the *Wahlverwandtschaften* is governed by the same elements we saw in *Faust*: centralization, borders, narratives. Yet the emphases are different. In this novel, a major legal reform has already taken place on paper: divorce has been made much easier by the introduction of divorce by mutual consent. But this does not mean that divorce happens when it should – rather, it is resisted for so long that we have three bodies at the end of the novel: Otto, Ottilie, and Eduard. This resistance is psychological – especially the

narratives that govern the thinking of the characters need to change, and narratives need to replace strict moral propositions that stand in the way of advancement. Their attachment to the fixed location and the borders of Eduard's estate needs to change also.

At the outset of the *Wahlverwandtschaften*, we are squarely in a reality that would delight Mephisto. Formal, centralized law is the law of the land, and also governs the way the characters think. Eduard and the Captain, for instance, espouse "unumschränkte Majestätsrecht," even after the execution of King Charles I, the American War of Independence, and the French Revolution. At the same time, with the exception of Mittler, the characters are not too concerned with morality, as especially the visit of the Count and the Baroness reveals. Not only are they forthright about their adulterous relationship, but the Count also recounts with approval a statutory proposal to make marriage temporary.

Most of the characters (again, Mittler is the exception) are rubbing against the boundaries of their reality, even if they cannot see beyond them – except to the extent that the English Lord and his companion show them how to. Thus, Eduard, the Captain, the Count, and the Baroness all want divorce. However, the way they go about achieving change is squarely within the order of centralized, formal, written law – and thus fails. The Count relates a statutory proposal to make marriages temporary. Eduard requests a divorce from Charlotte, and the Captain urges her to accept it. All the while, Mittler is working squarely in the shadow of the law to ensure that there will be no divorce. He seeks to avert advancement not so much through the written law – as Mephisto and the *Kaiser* did in *Faust* – but through an utterly inflexible morality rooted in writing. This is a morality of propositions and arguments, but not of narratives, and is rooted in the writing that is the Bible. Thus, he eventually reveals that the Ten Commandments are the

basis for his strict morals – and he conceives even of them not as part of a Biblical narrative, but only as a set of propositions.

Mittler succeeds to achieve stagnation until Charlotte has been influenced by the English Lord and his companion. They insert *gränzunbewußte* and narrative thinking into the world of the novel. Especially Charlotte's thinking changes after they depart. In spite of her earlier staunch refusal, she now twice agrees to divorce Eduard. The second time she even insists that he and the Major embark on a journey together. That is, she wants less attachment to this central location that is Eduard's estate. She also insists that Otilie make her own choices freely, specifically with regard to marrying Eduard or leaving for the *Pension*. Otilie, however, has judged herself for the infant Otto's death. She has done so not based on a legal theory (such as negligent homicide), but because she believes in the narrative of infanticide, whereby adultery leads to infanticide by the mother, and because she believes in a strict morality, whereby she must pay for her sins. She thus believes that Otto's death is caused by her intimacy with Eduard, and believes she must pay for this intimacy. Like Gretchen at the end of *Faust I*, she refuses to live on. Gretchen could have left the prison with Faust, but refused; Otilie could have married Eduard, but instead talked Charlotte out of divorcing him.

CONCLUSION

Two simple words are at the core of this dissertation: “narrative” and “*gränzubewußt*.” Yet understanding Goethe’s works in their terms has yielded new insights. Not only can Gretchen’s predicament be understood in terms of the narratives that surround her, but the reason that she has been judged so harshly – even by those who are sympathetic to her – for a crime she may not have committed can also be answered with the word “narrative.” Mephisto’s defeat in spite of his “erworbenes Recht” (WA 11833) can now be understood in terms of a change to a *gränzubewußte* legal order. The main driver of that change was a *gränzubewußte* arbitrator, Helena, and the narratives that she brought with her and applied in Lynceus’ case. Indeed, *Faust* as a whole can be read as a battle between the *gränzubewußte* order that Helena embodies and the bordered, centralized, formal, rigidly written order that Mephisto represents.

The focus on narratives and borders does not mean that other aspects connected to legal advancement are irrelevant. One could readily and convincingly argue that misogyny is part of the reason that women, and not men, were held responsible for infanticide. One could also add that it was practically easier to find the mother than the father – for the father could be far away by the time the child was born – and that human nature demanded a culprit be found and sentenced. One could add a dose of classism, for the women convicted of infanticide were usually servants or other members of the lower classes. All these explanation may be true – but in Goethe’s work, the solution to the problem is not found in targeting these causes directly. Rather, it is to be found in the introduction of narratives and in the diminution of the legal importance of borders.

The written law does not become irrelevant – nobody is advocating lawlessness. Rather, the way the system relates to the written law is key. The more one conceives of the written law

as fixed, rigid, and formal, the more resistant it becomes to advancement. Thus, those who counteract advancement in Goethe's works conceive of law as propositions that have no narrative, no history. For instance, Mephisto bases his paper money in "des alten Kaisers Recht" (WA 4940), namely that "[d]er Boden ist des Kaisers, der soll's haben." (WA 4938) That is, the legal proposition that the *Kaiser* owns what is in the ground should not change. Mephisto knows the past – this is, after all, the law of the old *Kaiser*, not of the present one. Yet Mephisto does not conceive of this past as history – in the sense of a narrative of change – but rather as something that must remain the same. Similarly, when the *Kaiser* reinstates his rule after defeating the *Gegenkaiser*, he proposes a set of legal propositions, confirmed "[f]ür alle Folgezeit." (WA 10966) This set of propositions, with its apportionment of titles and powers to the *Kaiser*'s vassals, also shows knowledge of the past – for it is based on the Golden Bull of 1356. Like Mephisto, the *Kaiser* also knows the past, but does not think of it as history, as narrative. Rather, the past is to him something fixed that must remain fixed.

This importance of thinking in narratives rather than propositions applies not only to the written law as such, but also to related matters. Morals are a good example. To Mittler, they are fixed propositions. Thus, he claims that marriage is the "[g]rund aller sittlichen Gesellschaft," and must be "[u]nauflöslich" (I.9, p.107). Even when he discusses the Ten Commandments (a source of both law and morals), he can conceive of them only as a set of propositions. (II.18, p.402) Even though he is a clergyman, and therefore must know the Bible well, he does not think of the Ten Commandments as part of a narrative.

This dissertation has focused on two works: *Faust* and the *Wahlverwandtschaften*. Yet, in a future project, the framework developed here could also be applied to other works by Goethe. Thus, it may be possible to understand why children so often die, or nearly die, in Goethe's

works, for instance: *Iphigenie auf Tauris* (Tantalus offers his son to the gods as a meal), *Vor Gericht* (a pregnant woman staunchly refuses to tell the court who the father is, because she wants to protect him), the *Erlkönig* (mysterious cause of death in spite of father's attempts to protect the child), *Die Ersticker in London* (criminal gangs kill children to sell their bodies to hospitals for teaching purposes). This can be understood as an effort to present narratives to counteract the effects of the dominant narrative of infanticide. Each of these narratives offers an alternative to the conclusion that the mother killed the child. If these narratives become *wahrscheinlich*, then a dead child does not, without more, mean that the mother killed it. It could, for instance, be the father (like Tantalus in *Iphigenie auf Tauris*), a criminal gang (as in *Die Ersticker in London*), or another woman, such as "eine Andre Art von Mutter" (II.13) (as in the *Wahlverwandtschaften*).

The framework could also be used better to understand the conflicts in other works. *Götz von Berlichingen* (1773) readily offers itself as a possibility. There, Roman law is gradually taking over. Indeed, in the scene *Palast zu Bamberg* of Act I, Roman law is juxtaposed to the *Schöffentuhl*, the main advantage of Roman Law being that its "Gesetze sind unveränderlich." In the scene *In einem finstern engen Gewölbe* of Act V, Adelheid is sentenced to death by a *Vehmegericht*, in a very efficient proceeding that reaches the legally correct outcome, but is troubling for its lack of process – nobody is heard on behalf of the accused. There is a need for legal advancement, for the *Vehmegerichte* are too much like the Faust who wishes to execute Lynceus without hearing him. But the alternative offered, namely Roman law, is not the right way to get there, for it resists advancement by its very nature.

As the framework used here can be used in a future project for other works of Goethe, so, too, it can be used for other legal topics. In this dissertation, infanticide, divorce, and the legal

order as a whole have taken center stage. This does not mean, however, that narratives and borders do not matter towards other legal topics. A future project could take this framework beyond Goethe's works, and consider how it applies to other legal topics. Rape may present an interesting example, given that it has gone through periods when the dominant narrative was that the victim provoked it, or when the perpetrator was a member of a particular group: one may think of Harper Lee's *To Kill a Mockingbird*, where the narrative that the rapist must be black holds sway.

One final thought deserves mention. This dissertation has frequently relied on asking simple questions, at least from a lawyer's perspective: What is actually in the document that Faust signs in blood? What evidence do we actually have before us that Gretchen killed her child? Why is Faust so amazed when Helena acquits Lynceus? Even though these questions may appear legalistic at first, they should give us pause. After all, it is remarkable that Goethe, himself a lawyer, excluded the text of the pact from his work. It is remarkable that he did not provide enough evidence to determine what happened to Gretchen's child. And it is remarkable that Faust, himself learned in the law, is amazed by the basic due process of listening to the accused. This pause opens the door to more important questions: If we do not know what is in the Devil's Pact, how can we explain Mephisto's failure to enforce it? If we cannot be certain that Gretchen killed her child, then why is she judged for it? How is it possible that Faust does not appreciate basic due process? The answers to these questions have been integral parts of this project. It may be hoped that future projects could also open doors by similarly asking questions that will give us pause.

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