

## METAMORPHOSIS

*Kenji Yoshino\**

“But always, always, / A man must wait the final day, and no man / Should ever be called happy before burial.”<sup>1</sup> So warns the narrator of Ovid’s *Metamorphoses*, in recounting how Cadmus founded Thebes. This dark pronouncement underscores the caprice of fate, to which Cadmus himself would fall prey.

Were Robert Ferguson here, he would gently remind us that the warning originally came from Solon: “Call no man happy until he is dead.”<sup>2</sup> Robert recited this line often, specifically directing it at me. He worried that I had an unduly sunny view of history, and warned me against the Whiggish assumption that the world only spun forward. Only stoic virtue, he believed, could protect us against the frightening randomness of life.

At this troubled time in our national life, I think of Robert almost daily. I strive to live up to his fierce—sometimes imperious—sense of right and wrong, his vast erudition, and his expansive compassion. And now that the book of his great life has closed, I think he would allow me to find consolation in Ovid’s pronouncement. For surely we can now say without peradventure that this life was a happy one—happy in his marriage to Priscilla, in the love of his friends, in the esteem of the world, and in the profound works he left us all.

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I first met Robert in 1997, when I applied to join the Columbia faculty. As an aspiring scholar of law and literature, I of course knew who he was. I had read his magisterial 1984 book, *Law and Letters in American Culture*, where he makes the case that the membrane between law and letters was much more porous in the early republic than it is today.<sup>3</sup> With his belletristic instincts and classical training, Robert could easily have lived in that time himself. At our first meeting, he bestowed the gift he always gave me—of seeing me clearly. He told me we were engaged in the same project, and so a conversation and friendship began.

When I moved to New York in 2007, my new proximity to Robert transformed my life. We began to have lunches every month near Columbus Circle—the midpoint between Columbia and NYU—a tradition that continued until shortly before his death. This monthly ritual became

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1. Ovid, *Metamorphoses* 61 (Rolfe Humphries trans., Ind. Univ. Press 1955) (n.d.).  
2. See 1 Herodotus 50 (William Beloe trans., New York, Harper & Bros. 1836) (n.d.).  
3. See Robert A. Ferguson, *Law and Letters in American Culture* 3–10 (1984).

an immovable part of my calendar and a steady source of comfort, fellowship, and inspiration.

Those lunches gave me access to one of the prodigious minds of our time. Even in an era when the humanities are under siege, I never lost confidence in their capacity to improve and illuminate our lives, inside and outside the law, largely because of Robert. He had a peerless knowledge of how to use imaginative literature to secure greater empathy in law, how to approach legal interpretation in literary terms, and how to understand the law as itself a set of narratives.

Between lunches, I was fortunate to be an early reader of his landmark work *The Trial in American Life*.<sup>4</sup> The most resplendent chapter in that book concerns the abolitionist John Brown. It argues that we cannot understand how Brown's trial functioned as an apotheosis unless we read it through the contemporary genre of the romance, in which the ne'er-do-well has a moment of grace that redeems all prior time.<sup>5</sup> "Show me a man who feels bitterly toward John Brown, and let me hear what noble verse he can repeat," observed Thoreau.<sup>6</sup> "He'll be as dumb as if his lips were stone."<sup>7</sup>

Around 2010, Robert brought his own abolitionist spirit to bear on what would be his final and most critical intellectual arc. The book *Inferno*, published in 2014, is a blistering indictment of mass incarceration in this country.<sup>8</sup> As Yale Law School's Paul Kahn wrote, it affords a "searing moral vision" of how "we have become a nation of punishers who can no longer see the human dignity of the punished."<sup>9</sup> Or as a reviewer for the *Atlantic* wrote: "[I]f I had won the \$400 million Powerball lottery last week I swear I would have ordered a copy for every member of Congress, every judge in America, every prosecutor, and every state prison official and lawmaker who controls the life of even one of the millions of inmates who exist today."<sup>10</sup>

Yet Robert was less moved by the public acclaim his book elicited from critics than he was by the private engagement it invited from its subjects. The book unleashed torrents of correspondence from prisoners who felt they had found the Dante to represent their Inferno, or perhaps

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4. Robert A. Ferguson, *The Trial in American Life* (2007).

5. *Id.* at 117–53.

6. Henry D. Thoreau, *The Last Days of John Brown*, in *Essays* 217, 220 (Jeffrey S. Cramer ed., 2013).

7. *Id.*

8. See Robert A. Ferguson, *Inferno: An Anatomy of American Punishment* (2014).

9. Reviews of *Inferno: An Anatomy of American Punishment*, Harv. Univ. Press, <http://www.hup.harvard.edu/catalog.php?isbn=9780674983939&content=reviews> [<http://perma.cc/X57A-8SGV>] (last visited Jan. 22, 2018).

10. Andrew Cohen, *American Exceptionalism, Crime-and-Punishment Edition*, Atlantic (Feb. 24, 2014), <http://www.theatlantic.com/national/archive/2014/02/american-exceptionalism-crime-and-punishment-edition/284021/> [<http://perma.cc/6HFQ-7GNJ>].

even the Sibyl who would light the way out of it.<sup>11</sup> Robert responded to each one of these missives. One chain of correspondence led to an invitation to give a commencement address at Fishkill Correctional Facility's graduation ceremony. He agonized over what he could say to his audience, many of whom were serving life sentences, that would be both true and kind. Here is part of what he said:

All of you would prefer to be somewhere else, and one of my hopes is that it will be possible for all of you, but it will not happen for some, and it can take far too long for many others. Education is your guard against this despair. The mind, often a torment, is also a sanctuary. Your education is your own place. It is a room that can become a house. The knowledge you build into the room can become a house that reaches the many other houses that have gone before you. It is knowledge that holds us all together as a community across time. As you think, so others before you have thought, and people who come after will recognize you through that commonality. This kind of house has no race, no inequality, no class distinctions, no time limits, no restrictions. It is what you make of it. It is the resting place that will never let you down.

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Don't let yourself down. Others who are here are very proud of what you have accomplished, and I have been honored to be able to represent you today. The really hard part comes now. What's next? What is next is your continuing adventure in making yourself better than you were. You are, in my view, ideally equipped for this even in circumstances that are not the best. Why? You have the best of educations because it has been the hardest to obtain, and you therefore know the value of it.<sup>12</sup>

To paraphrase Thoreau: Let me hear a person unmoved by Robert Ferguson, and I will show you a person who has never read a line of poetry in their life.

Robert's final work, which will be published this spring, is called *Metamorphosis*.<sup>13</sup> He reads Ovid's eponymous work to represent what he called a "change beyond recognition,"<sup>14</sup> the kind of imaginative act necessary for a real reform of our carceral state. This book cuts as deep as *Inferno*. Yet it offers hope, too, and a respite from suffering. While he would have been too modest to say it, the best reading of this work is to see the author as an Orphic figure. Ovid tells us that when Orpheus played his lyre in hell,

. . . the music

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11. See Ovid, *supra* note 1, at 341 ("[Aeneas] found the caverns of the Sibyl, / The long-lived prophetess, and prayed for passage / Through Hell's dark realm . . .").

12. Robert A. Ferguson, *Metamorphosis* (forthcoming 2018) (manuscript at 341–42) (on file with the *Columbia Law Review*).

13. *Id.*

14. *Id.* (manuscript at 2).

Made the pale phantoms weep: Ixion's wheel  
 Was still, Tityos' vultures left the liver,  
 Tantalus tried no more to reach for the water,  
 And Belus' daughters rested from their urns,  
 And Sisyphus climbed on his rock to listen.  
 That was the first time ever in all the world  
 The Furies wept.<sup>15</sup>

What Orpheus offers is a respite from seemingly eternal torment—the stilling of fiery wheels, the quieting of addiction, the transfiguration of the instrument of torment (Sisyphus's rock) into the form of sanctuary. No wonder that when Orpheus dies in a later book of the *Metamorphoses*, the “birds wept for him, and the throng of beasts, / The flinty rocks, the trees which came so often / To hear his song, all mourned.”<sup>16</sup>

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With Robert gone, how shall we live? I lean on two legacies—my son and his work. My husband Ron and I wanted our children to have first names that were entirely their own. At the same time, we wished to give them middle names that invoked living heroes. Our young son Lucas's middle name is Robert, after Robert Ferguson. It is our way of saying to him: *Understand all that a human being can be—not from some historical or legendary figure, but from this man who comes to visit even when he is gravely ill just so he can sit quietly and watch you at play. Let Robert live within your life as he lives within your name.*

For the rest of you, I commend the work. I find comfort in rereading Robert, hearing through the pages his mild rasping voice, feeling the heft of the learning in his Latinate prose, and seeing a flash of his blue-grey eyes in a sentence filled with fine contempt for human cruelty. Even accepting his old admonition—*call no man happy until he is dead*—I can now fairly imagine Robert happy. So I imagine him, content in the conviction that the Romans still rule us through their wisdom, intoning the lines with which Ovid ends the *Metamorphoses*:

Now I have done my work. It will endure,  
 I trust, beyond Jove's anger, fire and sword,  
 Beyond Time's hunger. The day will come, I know,  
 So let it come, that day which has no power  
 Save over my body, to end my span of life  
 Whatever it may be. Still, part of me,  
 The better part, immortal, will be borne  
 Above the stars; my name will be remembered  
 Wherever Roman power rules conquered lands,  
 I shall be read, and through all centuries,  
 If prophecies of bards are ever truthful,

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15. Ovid, *supra* note 1, at 235.

16. *Id.* at 260.

I shall be living, always.<sup>17</sup>

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17. *Id.* at 392.

