

**“Force Disguised as Reason”: Law, Jurists, and Constituent Power in Boccaccio's *Decameron***

By Alberto Vespaziani\*

**Abstract**

This Article presents the *Decameron*, by Giovanni Boccaccio, as a classic writing of universal literature that contains anticipations and fundamental innovations of the political categories of modernity: Contractualism, constituent power, constitutional deliberation, rhetoric, and the relation with *Fortuna*. The argument is developed in three parts: Initially, the legal and European dimension of the *Decameron* are summarized; then the discussion focuses on legal issues and institutional characters narrated in the novels; finally, the introduction of the work is analyzed, in which both the political-constitutional theme of the new beginning of the community and the collective archetype of the plague are interpreted as metaphors for the state of exception.

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\* Professor of Comparative Public Law (UNIMOL, Italy); LL.M. (Harvard)

## A. Introduction

The current crises in national public spheres in Europe—manifested in centrifugal pressures, populist protests, and nationalist resurgence—echo a more general crisis of European culture, values, and institutions. Addressing the crisis in European political organization demands not only reform of supranational governmental processes, but also a European cultural redemption.

The task of legal culture is not only to comment on the case law or the evolutionary trends of national and European legislation, but also to discover sources of inspiration in order to revive European ideals. These ideals are to be found in the wider culture of which the law is an expression, but only a partial one. From this point of view, “law and literature” studies contribute vitally to the life of European legal culture by examining classical European texts to trace the development of a common constitutional culture. More than a proper endogenous method of legal analysis, the “law and literature” approach takes us outside the law to see it in its cultural context, thus allowing us to get a better look at it. It has attracted jurists—both in the Americas and Europe—dedicated to the interdisciplinary study of the most diverse branches of law, united by a dissatisfaction with the isolation in which the dominant formalism and positivism have suffocated mainstream legal literature.<sup>1</sup>

It is with this in mind that the present paper seeks to rediscover a classic text of European culture, the *Decameron*, by Giovanni Boccaccio, both from the more familiar linguistic perspective as well as from the novel legal one. Beyond its value as the masterpiece that generated the tradition of Italian narrative prose, the *Decameron* is also a repository of European culture. A series of stories set in fourteenth century Europe, it invents a new, precipitate language out of the confluence of the many languages spoken in Europe at the time.

But in addition to being a master of linguistic invention, Boccaccio was also a well-trained jurist. In fact, his *Decameron* gives us a wide window into the pre-Westphalian European legal world. It reveals the legal institutions, rules, and cultures of a society no longer medieval, but not yet modern, existing before Machiavelli’s introduction of the term “state” into our political and constitutional vocabulary. Thus, the *Decameron* contains images of the European law that existed prior to the consolidation of European states.

Though one of the three founding fathers of the Italian language, Boccaccio has received surprisingly little attention from legal scholars who instead have devoted most of their

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<sup>1</sup> I prefer to talk about a “law and literature” movement, rather than a “law and literature” method, because the methodological disputes, typical of the classical areas of law, have been reproduced even within this type of studies. For excellent overviews see Ian Ward, *Law and Literature*, CAMBRIDGE, 3–56 (1995). See generally JOSÉ CALVO GONZÁLEZ, *EL ESCUDO DE PERSEO: LA CULTURA LITERARIA DEL DERECHO* (2012); Maria Paola Mittica, *O che acontece além do Oceano? Direito e Literatura na Europa*, 1 ANAMORPHOSIS (2015).

studies to Dante and Petrarch.<sup>2</sup> Thus, this paper seeks to highlight a legal interpretation of this classic text for the first time.

Italy achieved its legal and political unification in 1861, but a consolidated Italian language traces back much further. It was in Florence during the fourteenth century that it was inspired by Dante, Petrarch, and Boccaccio. Dante and Petrarch influenced the development of Italian poetry, while Boccaccio inaugurated the tradition of Italian narrative prose. Boccaccio's stories revolve most obviously around questions of love, passion, deception, and the cunning of reason, but these questions are refracted through the sunset light of medieval ethics and the dawn of bourgeois, mercantile values. Anticipating Machiavelli, Boccaccio offers several clues to the relationship between *Fortuna* and human affairs, between adverse circumstances and the virtuous human action capable of conquering them. Thus, we ought to appreciate Boccaccio as a founding father not only of the Italian literary tradition, but of its modern political tradition as well.

This paper will proceed in three steps. First, I will sketch Boccaccio's biography, specifically his intellectual formation in the Florence and Naples of the second half of the fourteenth century. I will then analyze some of the novellas of the *Decameron*, which feature legal and political themes, orbiting around concepts of justice, power, and law. Finally, I will look at the Introduction's vision of the *locus amoenus*, the pleasant place in which a select group decides to form a community of narrators, drawing an analogy between this and the formation of political and social institutions more generally.

### **B. From Law to Literature: Giovanni Boccaccio's Legal Education and Literary Aspirations**

Giovanni Boccaccio was born in 1313, either in Florence or in the nearby town of Certaldo, where he spent much of his life, wrote the *Decameron*, and died. He was the product of a relationship that his father, a banker for the Bardi firm, had with an unknown woman, probably of humble origins. Recognized and raised by his father, Boccaccio spent his childhood in Florence. In 1327, his father transferred to Naples—then a vibrant economic and cultural center—where he set his son on a path towards a career in banking and commerce. Though hardly passionate in his pursuit of this career, Boccaccio did become familiar with the dynamic world of Mediterranean commerce.

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<sup>2</sup> It suffices to mention the recent Italian republication of the first work of HANS Kelsen, *LO STATO IN DANTE* (2017). Boccaccio scholars themselves have called attention to the lack of a legal analysis of his work: GIUSEPPE MAZZOTTA, *THE WORLD AT PLAY IN BOCCACCIO'S DECAMERON* 213 (1986). "With the exception of a few biographical references to Boccaccio's enrolment in the study of the law and to his contacts with Cino da Pistoia, there is not so much to be found on the question of the law in recent scholarship on the *Decameron* or even on the whole corpus of Boccaccio's work." See Lucia Battaglia Ricci, *Diritto e Letteratura, Il Caso Boccaccio*, in *STUDI DI ONOMASTICA E LETTERATURA: OFFERTI A BRUNO PORCELLI* 72 (2007). "Much has been written regarding the role of the market in Boccaccio; but instead the textual relevance of his legal culture has been practically ignored. And yet, his experience as a student of law has been anything but irrelevant for him, as a scholar, author of the *Decameron*, intellectual reader of Dante and lover of literary fables." *Id.*

As was customary of those times, his father pushed him to study law in general, and canon law in particular. His father was appointed as counselor to King Robert, and his access to the elite Angevin court enabled him to entrust his son's legal education to Cino of Pistoia (1331–1333). An important jurist, Cino was also an extremely refined poet; his legal tutelage opened the door to Boccaccio's encounter with literature, and most importantly with the fascinating Dante. In 1340, a serious economic crisis hit the Bardi firm, forcing the Boccaccio family to return to Florence. Eight years later, a terrible plague struck the city, killing Boccaccio's father, stepmother, and many of his friends. This devastating event moved Boccaccio to write the *Decameron*. He finished his first draft in 1351 but would continue to work on it for the remainder of his life.

In the 1350s, Boccaccio assumed prestigious diplomatic missions on behalf of the City of Florence, while also dedicating himself to the study of his revered Dante. He first met Petrarch—who would become a great friend and mentor—in 1350 when Petrarch welcomed Boccaccio into his homes in Padua, Milan, and Venice. In 1360, after having taken holy orders and obtained ecclesiastical privileges, Boccaccio retreated from Florence to his house in Certaldo, where he died on December 21, 1375.

### C. The *Decameron*: The Triumph of Literature Over Law

Beyond its status as one of the masterpieces of Western literature, the *Decameron* is also the first great work of Italian prose. Its title, however, derives from Greek, and refers to ten days in 1348 in which a young group of seven women and three men left plague-ridden Florence for the Tuscan countryside—the setting of the book's one hundred novellas. While Boccaccio sets some of the stories in medieval feudal courts, he is more interested in the new, urban, mercantile class, which is assuming power in his own fourteenth century Florence, and other Italian cities as well. One of the *Decameron's* most authoritative interpreters has in fact characterized it as a “merchants' epic.”<sup>3</sup> The characters come from all different steps on the social ladder, which is one of the book's great innovations. Though holding fast to a high-style cultural tradition, Boccaccio includes characters from all walks of life, thus multiplying the ways in which he represents and interprets the world.

The novellas of the *Decameron* serve as a map to the Italian linguistic geography of the fourteenth century: we encounter the languages of Bologna (I 10; IX 3), Genoa (II 9), Lombardy (IV 6; VIII 1), Naples (II 5; VII 2), Pisa (ii 10) and Sicily (IV 5; VIII 10; X 7). Boccaccio also draws upon Latin, German, French, Provençal, Catalan, and Arabic (II 9; X 1). His multilinguism expresses a geographic and temporal diversification, as well as a social one. In the everyday language in the *Decameron*, we hear the voices of the powerful and the educated, but also those of merchants, artisans, farmers, and servants. In addition, there is

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<sup>3</sup> VITTORE BRANCA, *BOCCACCIO MEDIEVALE* 172 (2010).

also a variety of specialized languages: From the worlds of religion and theology, to commerce and law.<sup>4</sup>

Literary critics have devoted rich analysis to the social and economic dimensions of the *Decameron*, but so far they have neglected the legal one.<sup>5</sup> Aside from depicting the economic and legal relations of its time, the *Decameron* is also an ethical voyage. Boccaccio channels the voices of his narrators to warn against the excesses and the degradation of certain social classes. The hero of the first novella, Ser Cepparello, is a perversely corrupt lawyer, while the heroine of the last one, Griselda, is the ideal woman—with a job-like ability to withstand injustice and adversity, she models the highest virtue. We can distinguish Boccaccio's very earthly perspective from Dante's eschatological one. Boccaccio plants his roots in a secular ethic, drawn from the great texts of classical culture—like Aristotle's *Nicomachean Ethics*, Juvenal's *Satires*, and the works of Cicero and Seneca—as well as from the feudal values—such as courtesy, loyalty, virtue, dignity, and gratitude—that were supposed to guide civil intercourse. Reading the novellas now, we can appreciate the importance of the art of speech—and, therefore, literary culture—intelligence, and ingenuity in taming the chaos generated by a hostile Fortune, so that virtuous humans might pursue their ideal project of founding a new society.

Boccaccio's text is not just a random compilation of novellas, but an organic work, organized according to an elaborate literary construction in which the author puts forward a vision and representation of the world. Boccaccio holds fast to his classical and medieval inheritance, while expanding the narrative horizon to take in the new conditions of fourteenth century society. Taken as a whole, the hundred novellas offer a detailed picture of human affairs, past and present, awakening reflections upon the virtues, miseries, desires, ambitions, clever conquests, foolish mistakes, intrigues, deceptions, and betrayals of everyday life. They push the reader to think deeply about life and death, love, fortune, friendship, religion, the power of speech and human effort, and about the ultimate role of literature.<sup>6</sup>

We can also see many legal issues: Marriage, paternity, property, contracts, inheritance and succession, religious, economic and sexual freedoms, evidence, and civil procedure. The novellas themselves emphasize private law matters. By contrast, the Introduction is completely focused on the public law matter of the constitutional foundation of the civil order. The legal *leit-motiv* of the novellas is the contrast between the dictates of the positive legal, religious and social norms which claim—often in vain—to govern human affairs, and

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<sup>4</sup> See PAOLA MANNI, *LA LINGUA DEL BOCCACCIO* 115 (2017).

<sup>5</sup> LUCIA BATTAGLIA RICCI, *SCRIVERE UN LIBRO DI NOVELLA* 117 (2013); GIUSEPPE MAZZOTTA, *THE WORLD AT PLAY IN BOCCACCIO'S DECAMERON* 213 (1986). "With the exception of a few biographical references to Boccaccio's enrollment in the study of the law and to his contacts with Cino da Pistoia, there is not so much to be found on the question of the law in recent scholarship on the *Decameron* or even on the whole corpus of Boccaccio's work." *Id.*

<sup>6</sup> MAURIZIO FIORILLA, *INTRODUZIONE AL DECAMERON* 53 (2011).

the laws of nature, meaning the powerful physical and emotional drives, which almost always win out in the end.<sup>7</sup>

Let us examine at close range some of the novellas in which legal issues and personalities emerge. In doing so, I shall proceed backwards, starting from the end of the book in order to conclude with the Introduction.

The fifth novella of the eighth day delivers a fierce blow to the honor of jurists, a mediocre class whose members “seem to have brought up behind a plow or recruited from a cobbler’s shop rather than from any of the schools of law.”<sup>8</sup> In this story, three young men stage a fight, in order to pull the pants off of Judge Nicola di San Lepidio while he is sitting on the bench. This judge is so awkward that he does not know how to dress himself properly, and wears pants that “the crotch of which, when the judge was sitting down and his clothes gaped open in front owing to their skimpiness, appeared to come halfway down his legs.”<sup>9</sup>

Also rich in legal themes is the seventh novella of the sixth day, about the adulteress Madonna Filippa, who “is discovered by her husband with a lover and called before the magistrate, but by a prompt and ingenious answer she secures her acquittal and causes the statute to be amended.”<sup>10</sup> The cruel statute in force in her city of Prato “required that every woman taken in adultery by her husband should be burned alive, whether she was with a lover or simply doing it for money.”<sup>11</sup> Madonna Filippa vividly depicts the utter unreasonableness of such a law: Its failure to distinguish between adultery and prostitution points to its basic injustice. Having caught his wife *in flagrante*, in bed with Lazzarino de’ Guazzagliotri, Rinaldo de’ Pugliesi expects to use the law to do what he cannot: Kill his wife. “And so, having more than sufficient evidence to prove her guilt, he denounced her on the

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<sup>7</sup> For further analysis of the tension between the political order and natural law, see Susanna Barsella, *Boccaccio: i tiranni e la Ragione Naturale*, HELIOTROPIA 131 (2016), [http://www.brown.edu/Departments/Italian\\_Studies/heliotropia/12/barsella.pdf](http://www.brown.edu/Departments/Italian_Studies/heliotropia/12/barsella.pdf); Mario Conetti, *Il collasso dell’ordine giuridico e il diritto naturale nel Decameron*, HELIOTROPIA 105 (2016), [http://www.brown.edu/Departments/Italian\\_Studies/heliotropia/12/conetti.pdf](http://www.brown.edu/Departments/Italian_Studies/heliotropia/12/conetti.pdf).

<sup>8</sup> BOCCACCIO, THE DECAMERON 576 (G.H. McWilliam trans., Penguin Classics 2d ed. 1995).

<sup>9</sup> *Id.* at 576.

<sup>10</sup> *Id.* at 461.

<sup>11</sup> *Id.* at 462; see also Pia Claudia Doering, *Madonna Filippa chiamata in giudizio. Diritto naturale e diritto positivo nel Decameron*, in GIOVANNI BOCCACCIO: TRADIZIONE, INTERPRETAZIONE E FORTUNA (A. Ferracin & M. Venier eds.); *In ricordo di Ettore Branca*, Udine 442 (2014) (noting that “we can’t say that this kind of law really existed, because only fragments of the Prato statutes have survived”); B. Kannowski, *Giovanni Boccaccio und die Juristerei. Rechtshistorische Aspekte des Dekameron*, in VON DES LEGES BARBARORUM BIS ZUM IUS BARBARUM DES NATIONALSOZIALISMUS. FESTSCHRIFT FÜR HERMANN NEHLSSEN ZUM 48–59 (H.G. Hermann, et al. eds., 2008).

very next morning without inquiring any further into the matter, and took out a summons."<sup>12</sup> Though counseled by everyone against appearing before the judge, there being no other witnesses aside from her husband, Madonna Filippa nevertheless defended herself, pronouncing an incredible *oratio defensoria*. She also ignores the public's urging that she deny the facts. She does not want to lie, and defends herself to the judge:

Sir, it is true that Rinaldo is my husband, and that he found me last night in Lazzarino's arms wherein, on account of the deep and perfect love I bear towards him, I have lain many times before; nor shall I ever deny it. However, as I am sure you will know, every man and woman should be equal before the law, and laws must have the consent of those who are affected by them. These conditions are not fulfilled in the present instance, because this law only applies to us poor women, who are much better able than men to bestow our favors liberally. Moreover, when this law was made, no woman gave her consent to it, nor was any woman even so much as consulted. It can therefore justly be described as a very bad law.<sup>13</sup>

Note the constitutional reasoning put forth by Madonna Filippa: The logic of the controversy sets the unjust positive law against the vital value of love. Just laws, by contrast, must be based upon the consent of the governed.<sup>14</sup> Because the statute of Prato punishes only women, who have not been consulted in its adoption, it is unjust and cannot command obedience. Madonna Filippa addresses both the judge and public opinion, which she turns to her favor:

The nature of the charge against the lady, coupled with the fact that she was such a well-known figure in society, had brought almost all the citizens of Prato flocking to the court, and when they heard the charming speech she made in her defense, they rocked with mirth and, as with a single voice, they all exclaimed that the lady was right and that it was well spoken And at the *podestà's* suggestion, before they left the court, they amended the

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<sup>12</sup> BOCCACCIO, *supra* note 8, at 462.

<sup>13</sup> *Id.* at 463.

<sup>14</sup> Here one hears echoes of the medieval legal principle "*quod omnes tangit ab omnibus approbari debet.*" RICCI, *supra* note 3, at 131.

harsh statute so that in future it would apply only to those wives who took payment for being unfaithful to their husbands.<sup>15</sup>

Madonna Filippa's defense is striking in its modernity. Her appeal to liberal principles of government by consent, gender equality, and the rationality of legitimate laws, enable norms of equity to check the cruelty of the positive law. On the topic of sexual freedom and the injustice of the punishment of female adultery alone, Giovanni Boccaccio articulated arguments that took 620 years to be incorporated into law in Italy. As late as 1961, an all-male panel of the Italian Constitutional Court ruled that criminal law which punished only women who committed adultery did not violate the basic constitutional principle of equality.

The story of Madonna Filippa introduces a radically new way of thinking about and practicing the law. First of all, it shows a woman demonstrating sophisticated legal mastery through her linguistic ability to plead the cause of women "tapinelle." She manages not only to avoid the death penalty, but also to change the interpretation of statute. In the story, Boccaccio makes wise use of the legal terminology in which the Madonna Filippa is involved. When he mentions the husband who makes her "*richiedere*," (sue), to she who "*compare*," (has standing before the podestà), who "*la domanda di quello che opposto l'era*," (interrogates her about the accusation), an "*essaminazione*," (an interrogation), in the presence of the large public of Prato, which ends with her "*gloriosa assoluzione*," (a glorious acquittal). Especially in this novel Giovanni Boccaccio makes use of a precise and refined legal terminology, legacy of the unforgotten lessons he had received from Cino da Pistoia. Lexically this is evidenced by the presence of terms related to the different phases of the process: "*prendere*," to arrest and "*presura*" for apprehension, "*martorio*" for torture, "*sentenza*" for judicial decision etc . . . . As mentioned, the legal one is therefore one of the most represented languages of the work. From the point of view of social criticism, the forensic class was at the time of Boccaccio at the top of society and his professional vices should have been well known to him.

The story of Madonna Filippa is certainly not the only one in which the forces of passion are subjected to the judicial review of constitutional authority. In fact, the *Decameron* contains many visions of legal judgment: accusations, evidence, defenses, condemnations, and acquittals are produced by jurists, but also by merchants, religious professionals (clerics, monks, nuns, inquisitors), political figures (princes and podesta), public opinion, and family members. In the seventh novella of the fourth day, for example, we encounter Simona and Pasquino—two young lovers who meet in a garden as Pasquale picks some sage, cleans his mouth with it, and then suddenly dies. Accused of having poisoned her lover, Simona is brought before a judge who interrogates her, and then brings her to the garden where the poisoned body of Pasquino is still lying. While Pasquino's friends demand that she suffer

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<sup>15</sup> BOCCACCIO, *supra* note 8, at 464.

punishment for poisoning Pasquino—to be burned alive—Simona defends herself. She tells the judge what has happened, and then re-enacts the gesture of cleaning her teeth with the garden's sage, at which point she too drops dead.

The judge, along with all the others present, was hardly able to believe his eyes, and remained rooted to the spot for some little time, not knowing what to say. But eventually, he recovered his wits, and said: "The sage is evidently poisonous, which is rather unusual, to say the least. Before it should claim any further victims, let it be hacked down to its roots and set on fire."<sup>16</sup>

Note how, on the one hand, this judge seems to show a rational side, ordering the prudential destruction of the culpable sage. On the other hand, however, he substitutes the accused Simona with the inanimate sage, presumed guilty of the poisonings, so as to still be able to express a judgment of guilty. Nevertheless, as soon as the keeper of the garden moves to carry out the judge's order, he discovers that under the sage there was "an incredibly large toad, by whose venomous breath they realized that the bush must have been poisoned . . . . Nobody dared to approach it, and so they surrounded it with a huge pyre, and cremated it alive together with the sage-bush."<sup>17</sup> This short novella pokes into many legal categories: Simona is unjustly accused of having poisoned her lover, and the public wanted to burn her alive. But in the course of the interrogation and examination of the evidence, it witnesses the accused's death. The judge "condemns" the sage, holding it guilty for the two deaths. Only the accidental discovery of the toad finally reveals the true underlying cause.

Another unedifying legal figure can be seen in the sixth novella of the fourth day, in which Andreuola falls in love with and secretly marries Gabriotto, her social inferior. In the course of a romantic encounter, Gabriotto tells his lover about a nightmare he had, and then suddenly dies. The distraught Andreuola decides to kill herself but, before she can do that, she must give her lover a proper burial. Together with her maidservant, she decides to leave her lover's body at the front door of his house, in the hope that someone would find him and bury him properly. But "as they were making their way along the street with his dead body, they had the misfortune to be discovered and stopped by the officers of the watch, who happened at that precise moment to be passing through the district on their way to investigate some other mishap."<sup>18</sup> Andreuola, recognizing their power, volunteers to explain everything to the magistrates, in order to demonstrate her innocence. The chief magistrate

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<sup>16</sup> *Id.* at 342.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 335.

[Q]uestioned her about the circumstances of the case. He then got certain physicians to carry out a post mortem so as to ascertain that the good man had not been murdered, whether by poison or by any other means, and they unanimously confirmed that he had died a natural death from asphyxia, caused by the bursting of an abscess located in the region of his heart. Feeling that the girl was not entirely blameless, despite the physicians' report, the magistrate made a pretence of offering her a favor that was not within his power to bestow, telling her that if she would yield to his pleasures, he would set her at liberty. On getting no response from her, he exceeded all the bounds of decorum and attempted to take her by force. But Andreuola, seething with indignation and summoning every ounce of her strength, defended herself vigorously and hurled him aside with a torrent of haughty abuse.<sup>19</sup>

Note the qualities of this magistrate; despite all evidence to the contrary, he still holds the accused to be guilty solely to sexually blackmail her, a clear abuse of his authority. Having heard the facts, Andreuola's father, Messer Negro, goes before the magistrate. The magistrate openly admits to his reproachable conduct, and then, for fear of having to defend himself against the woman's accusations, proposes a reparatory marriage:

The chief magistrate, thinking it preferable to make a clean breast of his attempt on the girl rather than to wait for her to denounce him, began by praising her for her constancy, in proof of which he went on to describe how he had behaved towards her. On discovering how resolute she was, he had fallen deeply in love with her. And if it was agreeable to Messer Negro, who was her father, and also to the young lady herself, he would gladly take her for his wife, notwithstanding the fact that she had previously been married to a man of lowly condition.<sup>20</sup>

This awkward proposal is introduced into the dialogue between Andreuola and her father. She asks her father to forgive her for having married Gabriotto without his permission, and

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<sup>19</sup> *Id.* at 336.

<sup>20</sup> *Id.*

her compassionate father, who is sorry about Gabriotto's death, undertakes to provide for his honorable burial.

After the funeral, the chief magistrate repeated his previous offer and Messer Negro talked the matter over with his daughter, but she would have nothing to do with it. And within the space of a few days, it being her father's will that her own wishes should be scrupulously observed in this respect, she and her maidservant entered a convent of great renown for its sanctity, where they thenceforth lived long and virtuous lives as nuns.<sup>21</sup>

The novella thus concludes by delivering a double blow to the magistrate; he fails in his attempt to intimidate Andreuola with violence, encountering her fierce resistance to his blackmail, and then faces the additional offence of her refusal to marry him. The magistrate's blind attempts cannot move the honest love and grief of Andreuola, who joins a convent to escape him. Legal power, once again, withers before the natural forces of love.

The novella that closes the second day gives us another unforgettable vision of withered legal power, in the figure of Pisan Judge Riccardo di Chinzica,

[W]ho had rather more brain than brawn, and who, thinking perhaps he could satisfy a wife with those same talents that he brought to his studies, went to a great deal of trouble to find himself a wife who was both young and beautiful; whereas, has he been capable of giving himself such good advice as he gave to others, he should have avoided marrying anyone with either of the attributes in question.<sup>22</sup>

The judge manages to marry the beautiful Bartolomea, but is barely able to consummate the marriage. He

[O]nly managed to come at her once in order to consummate the marriage, and even then he very nearly fell out of the game before it was over. And next morning, being a skinny and a withered and a spineless sort of fellow, he had to swallow down *vernaccia*, energy

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<sup>21</sup> *Id.* at 337–38.

<sup>22</sup> *Id.* at 179.

tablets and various other restoratives to pull himself round. Now, this judge fellow, having thus obtained a better notion of his powers, began to teach her a calendar which schoolchildren are apt to consult, of the sort that was once in use at Ravenna. For he made it clear to her that there was not a single day that was not the feast of one of more Saints, out of respect for whom, as he would demonstrate by devious arguments, man and woman should abstain from sexual union . . . possibly because he was under the impression that one had to take vacations from bedding a woman, in the same way that he sometimes took vacations from summing up in the law-courts.<sup>23</sup>

Note the legal subtleties articulated by Boccaccio, an expert in canon law: The marriage having been consummated—however awkwardly—and the contract has been sealed. Nonetheless, the judge’s experience of his own sexual impotence teaches him the limits of his own desire and pushes him to a comical exhaustion of a procedural logic—the true obsession of the impotent—with the invention of a calendar full of holidays prohibiting sex. Messer Riccardo’s defensive strategy relies heavily upon crude dilatory motions, revealing procedural delay as the default weapon of which he cannot win on the merits. The story then proceeds with the couple’s vacation at sea. Each partner is sailing in a separate boat, when Bartolomea gets kidnapped by the famous pirate, Paganino da Monaco. At first, Bartolomea is distraught, but then Paganino comforts her to such an extent that “before they had reached Monaco, the judge and his laws had faded from the lady’s memory, and life with Paganino was a positive joy.”<sup>24</sup> Messer Riccardo travels to Monaco to attempt to retake his wife, “prepared to pay whatever ransom was demanded.”<sup>25</sup> But Bartolomea refuses to go back with him, stating that:

If you were more interested in studying law than in keeping a wife, you should never have married in the first place. Not that you ever seemed to me to be a judge. On the contrary, you had such an expert knowledge of feasts and festivals, to say nothing of fasts and vigils, that I thought you must be a town-crier.<sup>26</sup>

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<sup>23</sup> *Id.* at 179–180.

<sup>24</sup> *Id.* at 181.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 183.

Surprised by his wife's reaction, the judge appeals to bourgeois morality and the conventions of the privileged class: "Have you lost all regard for your honor and that of your parents? Do you mean to say you prefer to stay on here, living in mortal sin as this man's strumpet, rather than to live in Pisa as my wife?"<sup>27</sup> But Bartolomea is not impressed by the contractual logic of the impotent judge:

And let me tell you this, that I feel as though I am Paganino's wife here. It was in Pisa that I felt like a strumpet, considering all that rigmarole about the moon's phases and all those geometrical calculations that were needed before we could bring the planets into conjunction, whereas here Paganino holds me in his arms the whole night long and squeezes and bites me, and as God is my witness, he never leaves me alone.<sup>28</sup>

Bartolomea's argument opposes the fact of her natural pleasure in the pirate's arms to the judge's repressive proceduralism. In her reevaluation of bourgeois values and roles, the pirate turns out to be a better husband than the rich judge. The novella in fact concludes with the marriage of Bartolomea and Paganino. Snubbed by his wife, Messer Riccardo

[R]eturned to Pisa, where his grief threw him into such a state of lunacy that whenever people met him in the street and put any question to him, the only answer they got was: 'The wicked hole (*foro*) refuses to take a holiday.' Shortly afterwards he died, and when the news reached Paganino, knowing how much the lady loved him, he made her his legitimate wife. And without paying any heed to hold days or vigils or observing Lent, they worked their fingers to the bone and thoroughly enjoyed themselves.<sup>29</sup>

The happy ending to Bartolomea and Paganino's story stands in opposition to the insanity and death of the judge, who pays heavily for his arrogance in having tried to subject the natural laws of desire to a logic of legal procedure. His deranged refrain, "*il malo foro non vuol festa*," ("*the adverse forum does not want a party*") is an obvious reference to the sexual organ of the wife who rejects him, demonstrating yet again how his moralizing condemnation is the sublimation of the frustration caused by his sexual impotence. It is also

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<sup>27</sup> *Id.* at 184.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 185.

a sublime legal metaphor of the adverse forum: Even the best legal or moral reasoning will fail to move a judge who is prejudiced or adheres to a different set of values. Once again, the *Decameron* gives us a devastating criticism of legalist logic, which cannot contain the vital forces of freedom and pleasure. Law is identified with sterile argumentation and rhetoric, and it inevitably wilts before the vitality of human passion.

Travelling backwards through the *Decameron* we now reach the initial triptych, made up of three novellas whose central theme is faith—belief and making believe—and from which Boccaccio constructs his narrative universe. The initial interjection of theological themes—like the relationship between the three monotheistic religions, conversion and confession—is articulated with the help of legal categories. Thus, in the third novella of the first day, in which “Melchizedek the Jew, with a story about three rings, avoids a most dangerous trap laid for him by Saladin,” the great question seeking the one true religion is resolved through the category of the litispence. Intuiting the rhetorical trap laid for him by the Saladin, who hoped to force Melchizedek via a knotty theological question into lending him money, the Jew tells the following story—likely of Spanish origin<sup>30</sup> and later spread by Lessing through the German-speaking world.<sup>31</sup> The parable turns around a special ring, the possession of which marks one as legitimate heir. This ring has fallen into the hands of a father of three sons, all of whom he loves in equal measure, and among whom he is unable to choose a successor. He decides to resolve his existential doubt by commissioning the production of two more rings, practically identical to the original one, and giving one ring to each son. After their father’s death, the struggle between his legitimate heirs is frozen by the impossibility of establishing which ring is genuine, and thus who is the rightful heir to the father’s estate. In this novella, the conflict between legal systems, and between higher laws, is constructed as an initially impossible search for a rule of recognition, finally supplanted by a pluralistic vision in which every “law” finds its validity and foundation within its specific community of believers. We humans can never resolve the question of which one should prevail over the others:

[A]nd I say to you, my lord, that the same applies to the three laws which God the Father granted to His three peoples, and which formed the subject of your inquiry. Each of them considers itself the legitimate heir to His estate, each believes it possesses His one true law and observes His commandments. But as with the rings, the

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<sup>30</sup> MARIO PENNA, *LA PARABOLA DEI TRE ANELLI E LA TOLLERANZA NEL MEDIO EVO* 10 (1952).

<sup>31</sup> See generally GOTTHOLD EPHRAIM LESSING, *NATHAN DER WEISE* (2012).

question as to which of them is right remains in abeyance.<sup>32</sup>

Confirming the importance of legal themes in framing the *Decameron's* central narrative,<sup>33</sup> the first novella stars the notary, Ser Cepparello. After the description of the destruction of the legal and institutional universe by the plague, the narrator Panfilo begins to reconstruct the normative world through a story in which a jurist succeeds in deceiving both his confessor and public opinion through his perversely cunning use of rhetoric and argumentation. It is worth highlighting that the first door into the *Decameron* is a story set in mercantile Europe: The rich Musciatto Franzesi, a Tuscan gentleman, has to recover some loans made in Burgandy. Having heard that “the Burgundians were a quarrelsome, thoroughly bad and unprincipled set of people,” he decided to send Ser Cepparello, a solicitor from Prato living in Paris, to recover his loans. This legal personality caricatures the worst of human nature: he specializes in the production of false testimonies, has murdered and blasphemed, is an irascible, sodomite, glutton, drunk, and gambler—“perhaps the worst man ever born.”<sup>34</sup> The reconstruction of the normative world destroyed by the plague thus begins with the need to bury a demonic figure, who perverts the law and uses its instruments to pursue morally abject purposes.

Ser Cepparello arrives in Burgandy, where he is taken in by two Tuscan money-lender friends, and soon falls gravely ill. Hearing that his friends are worried that an itinerant sinner like him might die in their house, Cepparello summons a priest to hear his confession, “an ancient friar of good and holy ways who was an expert in the Scriptures and a most venerable man, towards whom all the townspeople were greatly and specially devoted.”<sup>35</sup> The dialogue between the dying Cepparello and the disingenuous friar is structured according to a twisted logic of legal argumentation, in which the clever use of metaphors, hyperboles and antiphrasis enables the most corrupt of men to construct a perversely inverted representation of himself, thereby convincing both the friar and the greater public of his

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<sup>32</sup> Boccaccio, op. cit., p. 44. Cfr. Michael Sherberg, *The Governance of Friendship. Law and Gender in the Decameron*, Ohio, 77 (2011)

Despite Filomena's reconfiguration of the religious discourse of the previous two tales, the story she tells shares with both a significant interest in the question of evidence. All three tales have forensic elements: Ciappelletto as proof, curial misbehavior as proof, the rings as proof. Each in its own way asserts that we base our conclusions on matters of transcendence on the evidence of the material world.

<sup>33</sup> Cfr. Giuseppe Mazzotta, *The World at Play in Boccaccio's Decameron*, PRINCETON 213 (1986) (“Throughout the *Decameron* there is a concern with the law and the judicial practice that is so extensive as to appear, on close inspection, nothing less than a central category of the narrative”).

<sup>34</sup> BOCCACCIO, *supra* note 8, at 26.

<sup>35</sup> *Id.* at 28.

holiness. Even more interesting than Cepparello's subtle use of rhetorical figures is how the legal world opens the paideic narration through an overturning of values: The corrupt man is declared a saint, the learned but naïve friar is persuaded by the criminal, and public opinion rushes to canonize a most lurid character. It is no coincidence that Cepparello is a notary<sup>36</sup>—the professional figure who exists in order to certify legal instruments, to make them trustworthy—and that he uses the instruments of legal argumentation to deceive others and, even on his deathbed, to mock their good faith. And so the *Decameron* begins with a fierce criticism of legal reason and the legal profession.

And now we can move from the first novella back to the highlight of the *Decameron*: The description of the plague of 1348 that we encounter in the Introduction.

#### **D. The Plague as a State of Exception and the Merry Company as a Constituent Power**

The narrative universe of the *Decameron* is built upon the ruins of the plague and the need to escape it. In the Introduction, Boccaccio offers a terrifying description of Florence's devastation: The epidemic created a Hobbesian state of nature in which the corruption of physical bodies has been followed by the corruption of customs, laws, and institutions, both civil and religious.

[I]t was not merely a question of one citizen avoiding another, and of people almost invariably neglecting their neighbors and rarely or never visiting their relatives, addressing them only from a distance; this scourge had implanted so great a terror in the hearts of men and women that brothers abandoned brothers, uncles their nephews, sisters their brothers, and in many cases wives deserted their husbands. But even worse, and almost incredible, was the fact that fathers and mothers refused to nurse and assist their own children, as though they did not belong to them.<sup>37</sup>

While a hostile Fortune has destroyed the social body, infecting individuals, social norms, and institutions, a kind one brings a chance encounter when

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<sup>36</sup> On the social role of the solicitor in the 14<sup>th</sup> century, see GIUSEPPE MASTROMINICO, DIRITTO E LETTERATURA. DISSAPORI MEDIEVALI E MODERNI 44–50 (2017). For a more economic interpretation of the first novella, see UGO DOTTI, STORIA DEGLI INTELLETTUALI D'ITALIA 14 (1997) (“[I]t is instead true that Boccaccio meant to open the book with a particularly intense shock, almost so as to warn the reader of the real values animating social life: [N]ot virtue but money, not devotion but usury, not pieties but the calculated deceptions of businessmen.”).

<sup>37</sup> BOCCACCIO, *supra* note 8, at 8–9.

[O]ne Tuesday morning . . . seven young ladies were to be found in the venerable church of Santa Maria Novella . . . Each was a friend, a neighbor, or a relative of the other six, none was older than twenty-seven or younger than eighteen, and all were intelligent, gently bred, fair to look upon, graceful in bearing, and charmingly unaffected.<sup>38</sup>

In the midst of institutional ruin, there emerges an initial formation of constituent power: A social elite made up of young, aristocratic women—wealthy, beautiful and refined, honest but unburdened by moralism. Within this nucleus of original feminine constituent power, Pampinea, the oldest, takes the decisive initiative in launching the constitutional project: To leave Florence, withdraw to a nice country villa, and there, to begin to live again. Pampinea appeals to natural reason to justify the proposed violation of the positive laws requiring women to remain in the city.

[N]o person does injury to another in exercising his lawful rights . . . I would think it an excellent idea . . . for us all to get away from this city, just as many others have done before us, and indeed as they are doing still. We could go and stay together on one of our various country estates, shunning at all costs the lewd practices of our fellow citizens and feasting and merrymaking as best we may, without in any way overstepping the bounds of what is reasonable.<sup>39</sup>

This is Pampinea's exit strategy: Escape from the plague and escape from the corrupt behaviors of her fellow citizens. A retreat to an amenable place, where the air is fresh, the views pleasant, the water pure, the food wholesome, and the wine good. Only in this way is it possible to recapture the delight of honest living. Note how earthly pleasure is inseparably linked to ethical and social norms. Filomena objects to the gender homogeneity of Pampinea's original proposal:

Pampinea's arguments, ladies, are most convincing, but we should not follow her advice as hastily as you appear to wish. You must remember that we are all women, and every one of us is sufficiently adult to acknowledge that women, when left to themselves, are not the most rational of creatures, and that without the help

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<sup>38</sup> *Id.* at 13.

<sup>39</sup> *Id.* at 14–16.

(*provvidenza*) of some man or other their capacity for getting things done is somewhat restricted.<sup>40</sup>

For Filomena, it is necessary to diversify the constituent body; a group of only women risks degenerating into internal struggle. Elissa agrees that “it is certainly true that men are the head of women, and that without a man to guide us it rarely happens that any enterprise of ours is brought to a worthy conclusion. But where are we to find these men?”<sup>41</sup> At this point, Fortune intervenes again in support of the original constituent process: Three men, over the age of 25, enter into the church. With a swift political instinct, Pampinea “smiled and said: ‘See how Fortune favors us right from the beginning, in setting before us three young men of courage and intelligence, who will readily act as our guides and servants if we are not too proud to accept them for such duties.’” In response to Neifile, who is racked with doubt and fears leaping into the dark, Filomena replies: “Now, if only they were prepared to accompany us, we should truly be able to claim, as Pampinea has said, that Fortune favors our enterprise.”<sup>42</sup> After a moment of reflection, the group unanimously decides in favor of including the young men: “Filomena’s words reassured the other ladies, who not only withdrew their objections but unanimously agreed to call the young men over, explain their intentions, and inquire whether they would be willing to join their expedition.”<sup>43</sup>

Fortune is the real queen of human destiny. She sends the plague, but then also allowed the casual meeting between the seven women and the three men in which they decide to form a community: A new political subject outside the city, where they can recreate the possibility of living together through the art of storytelling, to prepare for a return to the political community.

The constitutional pact is achieved in Santa Maria Novella; the escape from the plague-ridden city pushes the merry company out to the countryside, where the constituent power will continue to unfold. This is an isonomic and jurisgenerative moment, a constitutionalism both insular and redemptive.<sup>44</sup>

As soon as they have reached their protected place, beyond the reach of the plague, corruption and urban anomie, Dioneo asks the others to join him in “laughter, song and merriment.” Pampinea, the founding mother and political leader, replies that a

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<sup>40</sup> *Id.* at 17.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 18.

<sup>43</sup> *Id.* at 19.

<sup>44</sup> Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

[M]erry life should be our aim, since it was for no other reason that we were prompted to run away from the sorrows of our city. However, nothing will last for long unless it possesses a definite form. And since it was I who led the discussions from which this fair company has come into being, I have given some thought to the continuance of our happiness, and consider it necessary for us to choose a leader, drawn from our own ranks, whom we would honor and obey as our superior, and whose sole concern will be that of devising the means whereby we may pass our time agreeably.<sup>45</sup>

After dispelling its Hobbesian fear of a violent death with the *pactum unionis* of Santa Maria Novella, the constituent community enters into a *pactum subiectionis*, in which it submits to the authority of an individual member, who will reign for just one day and set the topic for that day's stories. Pampinea justifies the limited-term, rotating presidential office by the need to avoid the envy that the governed usually feel in relation to their governors. Promising all the listeners the chance to be narrators for one day, Pampinea proposes that the merry company establish an isonomic order in which all of the ruled ultimately coincide with the ruler. The Hobbesian moment is thus followed by a Lockean one, in which the identity between the rulers and the ruled allows the latter to recognize the legitimacy of the new political order.

Boccaccio's conceptions of story-telling, and of the constitutive function of language, anticipate both Hobbes's nominalism and Locke's conceptualism, which are themselves central to the political question concerning the emergence of the contractualist theses of the foundation of statehood. For Hobbes, in fact, language is a fundamental tool for human communication. To reach the formation of the state, the covenant requires an understanding and an adhesion that are possible only through language; a misunderstanding of the pact produces a malformation of the state. The subjective language of denomination of passions requires particular attention. The greatest risks for a state lie in erroneous and subjective interpretation; this is why Boccaccio, before Hobbes and Locke, attributes to language a constitutive function with respect to social and political relations. Without language among men there would be neither state, nor society, nor contract, nor constitution, nor peace.

For the *Decameron's* merry company, the storytelling project ends up being more compelling than just informal relaxation or more formal games. Simple relaxation is unregulated, and thus not destined to last; games excite competition, hence the exclusion of the losers. Storytelling, however, plays the ordering and inclusive role of constituting a

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<sup>45</sup> BOCCACCIO, *supra* note 8, at 20.

narrative community. It creates an isonomic community, in which the narrators take turns speaking and listening. In this social formation, ruling and being ruled coincide. At this point, the constituent body recognizes itself in Pampinea's project, and names her to be its first queen. And from here, the reconstruction of the normative universe that has been destroyed in the city can begin. Pampinea distributes the assignments, recognizes the respective roles of individuals and sets the agenda of the constitutional assembly: Every afternoon the group will meet to listen to the stories told by one narrator at a time. The *Decameron* can begin. And thus, in the earthly paradise of the Eden, the community reclaims the language that the plague had exiled from the city. Through the practice of storytelling, individuals rediscover the public use of reason; storytelling relieves them from the desperation and grief of their private lives.

Boccaccio expresses the tension between constituent and constituted powers through an opposition between the insular and redemptive constitutionalism of the paideic community on the one hand, and the juspathic constitutionalism of the established institutions its members depict in their stories. Just like Dante's *Divine Comedy* begins with his characters lost in a dark forest, the *Decameron* begins with the horrors of the plague; but while Dante relates the experience of getting lost from a subjective point of view (Dante in fact lost himself in a midlife crisis), Boccaccio proceeds from a collective one. The city of Florence has lost itself, its identity. And its salvation lies in a group of seven women and three men, which may rekindle civic life by fleeing to the country and telling the stories of the novellas. More than a historical fact, the plague represents a state of emergency, in which the merry company's decision—to leave the city for a happy place, where they can rebuild a political community—is sovereign. Through the experience of collective storytelling, the community will equip itself to eventually return to a reconstituted city. The re-constituting experience must unfold in a protected place, under isonomic conditions. But it must aim towards an ultimate return to the city, and to the passions and chaos of its public life.

The merry company embarks upon a new beginning, specifically the reestablishment of the rules of shared living through the narration of

[A] hundred stories or fables or parables or histories or whatever you choose to call them, recited in ten days by a worthy band of seven ladies and three young men, who assembled together during the plague which recently took such heavy toll of life. And I shall also include some songs, which these seven ladies sang for their mutual amusement. In these tales will be found a variety of love adventures, bitter as well as pleasing, and

other exciting incidents, which took place in both ancient and modern times.<sup>46</sup>

The enchantment of the merry company's constituent experience in paradise clashes perfectly with the narrow pettiness of the lawyers and laws that claim to govern human affairs, as depicted in the novellas. Boccaccio allows his heroes' passions and reason to circumvent the petty authorities, and thus turn challenging circumstances to their advantage. Anticipating Machiavelli, Boccaccio depicts Fortune as the only real queen of human affairs.<sup>47</sup> The merry company is able to lay down the rules for a common life anchored in public discourse and self-government; however, an important moral of the novellas is that the attempt to fix legal and moral rules once and for all is impossible, because reality never ceases to change. The constituent moment of the Introduction thus connects seamlessly to the Author's Epilogue, where Boccaccio sums up the meaning of his adventure: "I will grant you, however, that the things of this world have no stability, but are subject to constant change, and this may well have happened to my tongue."<sup>48</sup>

The constitution of the merry company has made possible this exercise in storytelling. It teaches us that no constitution can be so rigid as to predict an immutable form for all of human affairs: everything is subject to constant transformation, both political institutions and the legal language in which they are expressed. The plague, after ravaging the city, may eventually come to an end. Having learned this vital lesson, the merry company is ready to return to the city and rebuild its civic life.

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<sup>46</sup> *Id.* at 3.

<sup>47</sup> MARINO BIONDI, BOCCACCIO E MACHIAVELLI, OCCASIONI DI LETTURA 56 (2014). Cf. Giuseppe Antonio Camerino, *Il Peccato della Fortuna: su un Topos del Decameron*, in GIOVANNI BOCCACCIO: TRADIZIONE, INTERPRETAZIONE E FORTUNA. IN RICORDO DI ETTORE BRANCA 163 (2014) ("La fortuna è il campo dell'imprevedibile; ed è volubile ed è insindacabile. Ciò non toglie che i *casi* e gli *avvenimenti* nelle più svariate esperienze dell'esistenza sono *fortunati* o meno in conformità del giudizio degli uomini, liberi di agire e di decidere.").

<sup>48</sup> BOCCACCIO, *supra* note 8, at 802 ("Confesso nondimeno le cose di questo mondo non avere stabilità alcuna ma sempre essere in mutamento, e così potrebbe della mia lingua essere intervenuto.").

