FICTIONS OF LAW:

CRIMINALITY AND JUSTICE IN THE JURIDICAL AND LITERARY IMAGINARIES OF 19TH-CENTURY ARGENTINA

This article looks at the ways 19th-century Argentine literature articulates the relationship between the country's inhabitants and the State and the law. It raises questions about how —in the context of the formation of the judicial and legal system and against the background of Rosas's controversial regime and of laws that criminalised the gaucho— Argentine literature, itself in formation, represented and intervened in what Lawrence Friedman has called 'legal culture': the ensemble of a society's opinions, expectations and attitudes regarding the law. Through a study of judicial scenes in El matadero *by Esteban Echeverría (published in 1871) and* Martín Fierro *by José Hernández (1872, 1879) in which State notions of criminality and of justice are disputed, I argue that these texts fix a position of literature on the law and State justice that displaces the symbolic place of criminality in society, and establish a site of enunciation specific to Argentine literature that continues to operate into the present.*

Legal Culture and Literature in Argentina

In his essay 'Nuestro pobre individualismo' [Our poor individualism] (1946), Jorge Luis Borges wonders why the popular hero in the Argentine tradition—as opposed to other national literatures—is a man singlehandedly battling a squadron of police (Martín Fierro, Juan Moreira, Hormiga Negra). He then argues that Argentines do not identify with the State, that the Hegelian notion that 'the State is the reality of the moral idea' seems to them a sinister joke, and that that distinguishes Argentines from North Americans and Europeans: while Hollywood films find it admirable that a man befriend a criminal in order to hand him over to the police, the Argentine 'for whom friendship is a passion and the police a *maffia*, feels that this "hero" is an incomprehensible scoundrel' (II, 34).[1]

[1] In this essay, written during Juan Domingo Perón's first term as president, Borges posits a notion of 'Argentine individualism' that can be used politically to resist State interference in the life of individuals. An entire chapter of my forthcoming book on judicial scenes and relationships with the law in Argentine literature from the 19th to the 21st centuries is on Borges's ideas about the law. There, I analyse his aspiration to a justice outside the State, even an 'affective justice' put forth, I argue, in two scenes he adds to *Martín Fierro*: his short stories 'The Biography of Tadeo Isidoro Cruz (1829-1874)' (1944) and 'The End' (1953).
Whilst this article was being prepared for publication, Juan Pablo Dabove published a book (*Bandit Narratives in Latin America, from Villa to Chávez*. Pittsburgh, PA: University of Pittsburgh Press, 2017, p. 424) which contains two valuable chapters on Borges.

In *Law, Lawyers, and Popular Culture*, Lawrence Friedman (1989) presents a social theory that refutes the autonomy of the Law. He claims that how popular culture envisions the law has effects on the formation of legal culture, and legal culture, understood as what people think about the law, in turn, determines how far they might deviate from the norm.[2] In other words, legal culture is essential to the law's effectivity.[3] Along those lines, Paul Kahn argues (1999) that the power of the law is not measured by judicial acts but is rather a product of the imagination. On that premise, the study of a given society's legal culture is crucial to understanding how it behaves and how its legal system operates. While cultural productions are not the same as public opinion —there are taboos and political, commercial and aesthetic factors at play in the formation of the former— they do provide access to and evidence of the place and value of the law in a given society.

This article examines how two foundational works of 19th-century Argentine literature articulate the relationship of the territory's inhabitants to the State and the law[4] and how, during a period when institutions *and* discursivities were in formation, literature represented and intervened in the production of what —following Friedman—

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[2] In Friedman, 'popular culture' refers to the norms and values of 'ordinary people' (whom he defines as 'non-intellectuals') *and* to cultural production aimed at the general public, as opposed to at the *intelligentsia*. Here, he is using the term in the second sense (1989, 1579).

[3] Not only, as Friedman points out, does 'the public learn its law from the evening news' (1605), but the legal system itself looks to representations from popular culture. In March 2015, when the province of Buenos Aires initiated a new system of trial by jury, an article by Fernando Soriano in *Clarín* newspaper described the new system with references to popular culture: 'There are many examples of how this system operates in foreign films and TV series', and even claimed that the 'training being provided to prosecutors, defense attorneys, and judges is based on fictions like the film "The Suspect" (1987) by Peter Yates, in which Cher accepts and rejects candidates on the basis of their answers to her questions' (*Clarín*, Friday, 13 March 2015).

[4] Although opinions and attitudes regarding the law, its legitimacy and authority, change according to age, gender, social class, education, and other variables, there are overarching and systematic patterns of behaviour and values. Lawrence Friedman (1969) contrasts the willingness to pay taxes in the USA with the reluctance to do so in Italy, and Susan Silbey (2010) calls attention to the repeated reference in recent studies to 'Cultures of Legality', that is, cultures where invocation of the law bestows legitimacy.

I call 'legal culture', that is, a given society's set of opinions, expectations, values and attitudes regarding its legal and judicial system.[5]

To examine this I am going to focus on the judicial scenes in *El matadero* [The Slaughterhouse] by Esteban Echeverría (written in 1838 but not published until 1871) and in *Martín Fierro* by José Hernández (1872, 1879).[6] Since the legal and judicial system in Argentina were incipient and unstable at the time, I understand 'judicial scenes' to be confrontations where one of the parties represents the law or acts in its name, whether or not the scenes constitute trials as we conceive of them today. This because in the legal system as it stood at that time situations like the ones I discuss here operated as judicial instances that, if not legitimate, were at least valid —indeed, the legal status of those situations is one of the problematics I am going to interrogate. My argument is that these scenes create an alternative space of signification where a symbolic battle against the system of State justice is waged. And that that is determinative insofar as such scenes establish a position for literature regarding the law and the State's judicial apparatus, and lay the foundation of a site of enunciation in

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[5]. While in their book *Legal Cultures and Globalization* (cited by Couso, Huneeus, and Sieder) Lawrence Friedman and Rogelio Perez-Perdomo speak of the 'strictly national character' of legal culture, Couso, Huneeus, and Sieder have a pluralist vision of Latin America as a region where multiple legal orders co-exist and are even superimposed in different ways, both between different countries and within them. They speak of 'legal cultures' in the plural. My position is somewhere in the middle: I believe there are common features and factors throughout Latin America, but also modulations that are the product of juridical, political, historical and social characteristics (and, for my work, I would include literary ones as well) specific to each country. Though I agree that it is possible to distinguish multiple legal cultures within the same country and, at the same time, that there are general regional tendencies, I think it necessary to explore legal culture in national terms first, in the interest of explanatory power.
Additionally, my work is not about legal culture *per se* but about its connections to national literatures, which is why here I focus on Argentina even though many of the aspects discussed are applicable across Latin America (even, I might say, to 'Latin culture').

[6]. The dates of the composition and publication of *El matadero* are uncertain; some hold that it was written in 1838 and published in 1874 (Piglia), and others that it was written in 1839 and published in 1871 (Sarlo). Cristina Iglesia maintains that it was written 'sometime between 1838 and 1840'. I use the most commonly cited dates.

keeping with a legal culture specific to Argentine literature and imaginary that is still prevalent today. [7]

By the period discussed here, the National Constitution had been passed (1853), as had the Rural Code (1865) and the Civil Code (1871); notwithstanding, they were applied in conjunction with older norms from the Spanish Law and the Compilation of the Laws of the Indies. There were, then, varied and opposing norms, and justices of the peace [*los jueces de paz*] would choose which laws to apply from an array of codes and, above all, whom to apply them to. In that context, *El matadero* and *Martín Fierro* voice demands for legality and demands for inclusion. In *El matadero*, liberal demands are made of a popular government,[8] and in *Martín Fierro* popular demands are brought to bear on the logic of the liberal State: in both cases though, those demands are for juridical recognition. Thus, these texts make visible what the prevailing juridical system excludes, its 'residues', to use Wai Chee Dimock's term, and construct a counter-discourse that asserts itself in the *jurisgenetic* capacities of literature, in its potentiality to create legal meanings.[9]

During the 'modernising leap' (Ludmer 1994, 102) when the law was being established and the legal system and judicial apparatus formed, Argentine literature, also in formation, not only problematised the relationship between Argentines and the State

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7. In *Nightmares of the Lettered City* Juan Pablo Dabove suggests that, in Argentine literature, heroes are born through confrontation with the police. He argues that *Ida* [Outward Journey], part one of *Martín Fierro*, paves the way for Roberto Arlt, for Ricardo Piglia's *Plata quemada* (1997), and even for the Montoneros of the 1970s. I would add Eduardo Gutiérrez's *Juan Moreira* (which Dabove deliberately excludes) to that genealogy since it installed the story of the *gaucho* that confronts the police not only in Argentine literature but also in the behaviour of *paisanos*, who started to be arrested for what police reports called 'becoming a Moreira', that is, dressing like Moreira and challenging the police (Balderston 2000, 44).

8 [Tr. Note: 'Popular' here means 'of the people', with a more or less deprecatory connotation: the masses, *hoi polloi*, the great unwashed, the mob – but no single term does the work in English]

9. '*Jurisgenesis*' is the creation of legal meaning by unauthorised persons or groups, and it includes obedience to unofficial laws (Haritatos, P.)

—specifically its legal system— but also, texts like *El matadero* and *Martin Fierro*, as well as *Juan Moreira*, exorcised the 'demonisation of writing' (Alonso 286) with which Ángel Rama —who included the written world in its entirety in the lettered city, making it inescapably complicit with power— deprives writers of the possibility of any oppositional, anti-establishment, practice. These canonical, inaugural texts of Argentine literature assume a site of enunciation that destabilises the link between writing and power; they make visible the mechanisms by which the State criminalises, marginalises and excludes its others, and challenge the notions of criminality and justice that the State was attempting to impose, displacing the symbolic place of criminality in society.

Justice as Performance in Esteban Echeverría's *El matadero*

During Juan Manuel de Rosas's long tenure, the writers of the generation of '37, who saw themselves as 'excluded', had religious faith in the effectiveness of letters.[10] In the context of violent political and social confrontation and repression in which they lived, they turned to literature when other means of political action were closed off (Gamerro 14). *El matadero*, considered the first work of Argentine fiction, was written at a juncture when Argentina was struggling to organise its institutions, a time of combating factions and widespread violence and repression. This story, which Echeverría wrote while holed up in an *estancia* just before going into exile in

10. Juan Manuel de Rosas, 'The restorer of the laws', was a powerful landowner proclaimed governor of Buenos Aires. He governed from 1829 to 1832, and again from 1835, holding absolute power over the three branches of government, until his overthrow in 1852. Rosas systematically opposed any form of national organisation or a constitution, since that would have meant sharing customs income with the rest of the country and the loss of hegemony for Buenos Aires. The landing-owning class supported Rosas (the social structure of the time was based on land, and ownership of large estates [*estancias*] was what conferred status and power), but Rosas also had a great following among the popular sectors of Buenos Aires. At that time, there was still no national government and the political and economic organisation of the country was at the heart of the conflict that led to the civil war between Unitarians and Federalists (Unitarios y Federales).

Montevideo, presents itself as the only instance where a crime that took place in the *casilla*[11] of a judge, in a situation where justice was supposed to be administered, is brought to light. Argentine literature, then, envisions itself *ab initio* as a potential space of an alternative legality, as the device of a symbolic and supplementary justice that exposes the lack of State justice.

The lettered class believed that the Rosas regime had deprived them of a power that —as intellectuals— was theirs to exercise, and in response it attacked the regime as dictatorial and popular. The text is thus constructed around these two motifs and brings them together in the scene of the trial of the Unitarian, in order to delegitimise Rosism.[12] Although the text warns that it will not begin with Noah's ark, it does begin with a flood. That, along with a meat shortage, configures a moment of exception in which, as Carl Schmitt theorises, the sovereign, situated both inside and outside the law, can suspend the extant order, including laws, rights and guarantees. To that 'State of exception', where the Law sanctions its own suspension creating juridical conditions that allow the State to dispose of the citizen as what Giorgio Agamben calls *bare life*,[13] the text will add the exceptionality with which Bakhtin characterises carnival, where laws are suspended, hierarchies inverted, and the distance between human beings abolished (Bakhtin 312). But whereas for Bakhtin that is positive, liberating, even potentially renovating, Echeverría, given his ideological-political position, presents what I read as carnivalesque elements as negative, as the conditions of possibility for a violent and despotic government of the mob.

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[11] [Tr. Note: this has various translations in the versions in the literature: 'hut', 'shed', 'counting house' –but simply refers to the judge's office within the abattoir where the murder takes place]
[12] [Tr. Note: The ideology and practice of Rosas's system of government]
[13] Giorgio Agamben considers this the permanent and paradigmatic form of government in the 20th century. He calls "bare life" the merely biological life of the body, the exact opposite of what we consider human rights. (Agamben 1998)

In order to do this, in the midst of a popular fiesta celebrating the arrival of fifty bullocks at the slaughterhouse the narrator stops to sketch out exactly where we are, and right next to a grotesque spectacle of filth and barbaric deformity he places the building in which 'the terrible judge', the caudillo of the butchers, 'has all the power in that small republic, as a delegate of the Restorer' (106). He thus establishes the slaughterhouse as a 'small republic', an analogy he repeats and confirms by mentioning that the judge, like Rosas, is all-powerful. The crowd enjoys a fiesta, parcelling out the meat, until a bull gets free, accidentally decapitates a child, and escapes. The butchers and Matasiete catch the raging beast —froth coming from its mouth and smoke from its nostrils— and drag it back. A chorus of voices celebrates as the animal's throat is slit. The fiesta is coming to an end and people beginning to disperse when, in the distance, they catch sight of a Unitarian. For the romantic writers, the popular classes support the dictator because they themselves are violent and brutal. Hence, from the moment the Unitarian appears, the text establishes a parallel between the butchers who have just castrated and killed the bull and Rosas's system of justice which will slit the throat of the Unitarian, and a parallel between the two events as instances of a popular, mob-led fiesta of unbridled violence.

As with the bull, the chorus of voices encourages Matasiete to kill the Unitarian. When the judge arrives we expect things to change, but the parallel continues and the fiesta takes a sinister aspect because, from the moment the judge intervenes, it becomes official: carnivalesque popular culture ceases to be clearly distinguishable from official culture, is no longer a mechanism of decompression but a part of the official sphere.[14] In Bakhtin's terms this would mean that it has stopped being carnivalesque, because the latter implies a questioning of the ruling order, it is its parodic flipside and could not,

[14]. Martín Kohan identifies this coincidence of official sphere and carnival as decisive (2006, 193).

therefore, also constitute it. In the case of *El matadero*, though, the popular carnivalesque fiesta continues in the official sphere precisely in order to show its inadequacy, to present the Rosas regime as the opposite of order, as an inversion of 'normal' hierarchies, in sum, to show that the Rosas regime officialises the excesses of the carnivalesque popular world (Kohan 2006, 193).

A sort of procession drags the Unitarian to the *casilla* where the judge 'is all powerful' (106), a 'small and contemptible building' (106) under the patronage of Rosas's dead wife, that marks out the judicial sphere within the slaughterhouse. That patronage, inscribed in red letters on the white walls, invests everything with officialdom: the table, the chair, the writing implements, the glass of water, even the cards on the table.

The 'trial' seeks to 'federalise' the appearance of the Unitarian, the judge has the Unitarian's identifying 'U'-shaped beard cut off, to the spectators' wild laughter, and everything becomes spectacle when the Unitarian kicks the glass of water, shattering it against the ceiling, and the water showers down on the chorus. The festive intervention of the spectators and the participative and polyphonic scene where they mingle with the actors carnivalise justice and constitute a parody of a trial.[15] But when the judge orders the Unitarian to be stripped naked, tied to the table, and given 'the *verga*'[16] and the Unitarian resists, tenses up, kicks, foams at the mouth like the bull, and consumed by rage, dies, popular fiesta and official event become one, a single ceremony where law

[15] Jens Andermann, Sarlo-Altamirano, and Martín Kohan (2006) read the carnival motifs in *El matadero* in general and in this scene in particular (the procession that drags the Unitarian to the *casilla*, the participative and polyphonic setting where there is no clear distinction between actors and spectators, the mingling of bodies, the laughter, the desacralization and the inversion of hierarchies) in Bakhtinian terms. Beatriz Sarlo and Carlos Altamirano see this episode as one of those carnivalised representations of justice that appear in mediaeval popular culture, where the forms of the trial are parodied (1991, 45). According to Andermann, the entire plot of *El matadero* can be read as a series of coronations and humiliations of carnival kings (74).

[16] [Tr. Note: *verga* is a rod, but also slang for the male organ, and is used synonymously with *mazorca*, corn cob which is an instrument of violent anal penetration carried out by Rosas's para-police, the Mazorca, from which they take their name.]

and violation, State justice and carnival, violence, fiesta and power, are indistinguishable.

What disturbs Echeverría is precisely the fact that this happens in a judicial setting, cloaked in ritual, and under the protection of the State as evidenced in the large red letters on the white walls of the *casilla*; it disturbs him because that lack of distinction between popular carnival and the legal system —whose possibility Bakhtin excludes— turns, according to Martín Kohan (2006), the festival of the people into what Borges and Bioy called the 'Fiesta of the Monster' since the carnivalesque embodies, rather than parodies, official ceremony (192-195).[17] It is not for nothing that Echeverría constructs his text around the symptomatic nature of the Federalist fiestas: he agrees with Sarmiento that 'barbarism is fiesta turned into a system of government' (Andermann 75). Rosism is, for him, a permanent suspension of the laws, the 'permanent state of exception' that Agamben speaks of. Carnival's mockery, then, represents the very basis of the regime, and for that reason Echeverría projects the characteristics of the carnival —the suspension of the law and what, for him, is an inversion of hierarchy— onto the trial scene, onto the government's presence in the text. This can be seen in the staging of the trial because its theatricality permits a personification of social actors, and the assignment of a specific social actor to each role draws attention to the 'inversion' that places barbarism at the centre of power as the urban aristocracy is displaced from its position of leadership and constituted as the accused, as the State's other.

While the ceremonial elements in the trial scene —calling those present to order, offering the accused a glass of water, interrogating and issuing a report— suggest a legal framework, the location of the crime in the judge's *casilla*, in an instance of

[17] Borges and Bioy's 'La Fiesta del Monstruo' is a rewriting of *El matadero* in which a group of Perón's followers murder a Jewish intellectual.

supposed administration of justice, points at the law as a space of arbitrariness. Thus, instead of conferring legitimacy and symbolic force on the trial, the formal procedures —conceived to establish, through repetition, a relationship with the past, in which the authority of the law is based and to displace legitimacy from a person to a mechanism— are presented here as the way the judicial apparatus screens the State violence at the core of Rosas's justice.[18]

At the same time, however, the abandonment of those formal procedures when in that very place, by order and in the presence of the judge and thus constituting the trial, the *Mazorca*[19] torture and humiliate the Unitarian —they insult him, tie him up, and try to strip him naked— represents an abuse of the system, a flagrant lack of justice. That way the State authorises and, retreating from its regulatory role, becomes complicit in the exercise of an extra-legal violence with which Rosas's law does not protect from the absolute demands of the Other but embodies them. The text's ambivalence about procedural justice, about the mechanisms that both enable and cover up the violence with which the State applies the law, but also regulate that application, evidences unease about the conditions of the performativity of the law, about the modes and mechanisms by which the law is enforced and justice realized.

Judicial processes are performances acted out to maintain the public's belief in the empire of law; its rituals structure a social environment and the patterns of behaviour associated with it, making ideas on the law and the legal system circulate.[20]

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[18] I use the term 'formal procedures' to refer to the acts that govern the procedure by which the case is heard when it arrives in front of a judge (swearing in, taking deposition, discovery of evidence, etc).

[19] See Tr. Note 15

[20]. Richard Schechner (2011) defines performance as 'twice behaved behaviours', that is, behaviour that happens twice, never just once (36-37). Diana Taylor (2006) uses the term in the wider sense of iterative behaviours; for her, it encompasses not just theatre, dance and concerts, but also conventional acts like funerals, rituals and political demonstrations. She considers performance to be a system that holds and conveys knowledge. Finally, Paul Kahn (2006) asserts that 'performance' characterises the Law as a whole, and that judicial performance is

Those rituals and codified behaviours are, in fact, the condition of possibility of that process: without them we would not consider this scene in *El matadero* a trial. According to Friedman (1989), lawyers see justice in procedural terms, that is, they consider the rituals of due process the very essence of what is fair and of the empire of law (1603). Due process establishes a sequence of formal stages in a penal process in order to guarantee the rights of the accused. It is a procedural legal principle according to which each person has the right to certain minimal guarantees that the State *must* respect, guarantees that protect persons *from* the State. For this conception, strict compliance with legal procedures in and of itself provides legitimacy regardless of outcome.

Lay people —people who are not legal professionals, the ones Bourdieu suggestively calls 'the secular'— do not, however, share this zeal for procedure.[21] They think of justice in substantive terms, that is, as a function of outcome not of process.[22] According to this conception, the legitimacy of the agencies of the law does not lie in the structure of the doctrine or in the formal writings of the jurists, but in the 'messages that travel between the public and the organs of popular culture' that spread them (Friedman 1989, 1605).

This problem divides the Philosophy of Law between those who see the law as, in essence, a situation where one person gives another an order backed by threats (Fish;

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successful when it upholds belief in the empire of law, that is, when we see the law and nothing but the law every which way.

[21]. Bourdieu uses that term repeatedly throughout his texts. His assertion 'Like religious practice, juridical practice is defined by the relation between the juridical field (…) and the demand of the secular [actors]' (2005, 202) is, in my view, particularly relevant to this argument because in it those who do *not* form part of the specific juridical field play a decisive role.

[22] 'Substantive Law' is what *defines rights and obligations*, and mandates that a crime be prosecuted; 'Adjective' or 'Procedural Law', by contrast, regulates *the process* by which rights are demanded, the rules that establish and govern the judicial process.

J. Austin)[23] and those who see it as operating by conferring power, that is, not by compelling an action directly but by setting off a process in which a duly qualified person authorises another also qualified person to do something (Hart; Kahn). These mechanistic conceptions envision the law as a more or less mediated application of coercion. A third position sees the moment the law is applied as the moment it is created: the law is what the court says it is (Hardt cited in Fish 2). It is not made by the one who writes it but by the one who has the authority to apply it (Hoadley, quoted in Fish 2): its realization, its passage from potentiality to actuality, its performative moment lies, then, in the judge's decision.

The judge's decision, insofar as act that turns a man into a convict, creates Law. It is at the precise moment when the innocence or guilt of the accused is decided and a sentence issued that the law is realized, that it ceases to be potential and becomes actual. As Derrida (1992) holds, to be legitimate, that act, like any judicial act, must oscillate between the constative and the performative; it must reaffirm the value of conventions through a reinstitutive act that preserves the law in the very act that institutes it.

The lack of that performative instance, when after a moment of undecidability the decision is made and the verdict reached, is what makes the trial and Rosist justice in Echeverría's text arbitrary. At no point does the Rosist world as depicted in the text question the Unitarian's guilt, he is guilty from the moment he appears because his crime is his social status and his political allegiance. Without a moment of undecidability that would culminate with the verdict, the process in Rosist justice is univocally constative. The declaration of innocence or guilt requires as well the pronouncement of what J.L. Austin (1971) called a 'performative utterance' in appropriate circumstances by a qualified person: the express enunciation of the

[23]. In reference to the British jurist (1790-1859), not the philosopher of language J.L. Austin (1911-1960), to whom I refer below.

performative sentence 'I declare him guilty' by people who can do so is what realizes the action of declaring someone guilty.[24] The vertiginous process that ends in the death of the Unitarian underscores the lack of any performative instance through which, in the passage from doubt to decision, declaration, and conviction, the law is realized.

With no performative instance, the trial constitutes what Ludmer (1993) calls 'a farce of truth', a legal process with discourses and ceremonies identical to legitimate ones but lacking in value; acts that create an illusion of lawfulness but are carried out in a place, time or manner different from legitimate ones, by another subject or with illegitimate discourses or actions. Echeverría includes legitimate rituals and conventions in order to empty them of their functionality and to present the judicial process as an act to make believe, as a performatic montage that stages the administration of a justice never realized. In this lack of performativity, the text challenges the Rosist legal system, reveals it as arbitrary and repressive and questions its legitimacy.[25] From a markedly ideological place of enunciation, Echeverría depicts legality under Rosas in a scene where the law is construed as lack.

It is difficult today to think about Rosas and his times outside the terms established by the Unitarians, but different political sectors and historiographical currents have sought to reverse the construction of this regime as a legal void. They

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[24]. In reference here to the philosopher of language J.L. Austin.

[25] I use Diana Taylor's distinction (2003) between the performatic and the performative. She coins the term 'performatic' to describe the non-discursive sphere of performance, non-discursive reiterative behaviours; she uses 'performative' as theorised by J. L. Austin (1971) in reference to *performative utterances,* that is, enunciations that realize an action. In *El matadero*, the ceremonial actions (opening the trial, bringing those present to order, giving a glass of water to the accused, the questioning, etc.) constitute the performatic aspect of the trial, while the performative aspect—absent, as I have shown, from the text—would be the instance when, after a moment of undecidability, the judge goes from doubt to decision and declares the accused guilty or innocent through the express formulation of the performative utterance 'I find the accused guilty…', and then proceeds to sentencing through the express formulation of the performative utterance 'I sentence the accused to …'. But also, on a symbolic level, the trial *in toto* and the notion of 'justice' in *El matadero* are performatic, empty actions that do not really effect, actualise, what they are staging, that is, they are not performative.

maintain that, under Rosas, not only was there a legal order sustained by an elaborate judicial structure and an active policy of ritualisation of judicial practices, but even a conscious educational effort to disseminate legal concepts and behaviours. The crux of the disagreement between those two historiographical perspectives lies in their respective assessments of the degree of intervention by the executive in judicial affairs and its arbitrariness. The revisionisms argue that the empire of law, that is, the population's knowledge of the legal apparatus and its effective application, was —contrary to what the inherited image asserts— one of Rosas's main concerns and that he advanced judicial practices and discourses about the law amongst a people resistant to it (Salvatore 1993; Barreneche 1997).[26] From that perspective, Ricardo Salvatore holds that formal procedures helped to legitimise notions of impartial justice and to show that Rosas's judicial system was not arbitrary but governed by rules.

By contrast, Echeverría presents formal procedures and proceedings as a farce, as State mechanisms of punishment that act at the bidding of the executive power. Echeverría's trial, where spaces, bodies, customs, practices, language and laws are all violated, establishes a position for literature on the law and the State's judicial apparatus, a site of enunciation from which literature conceives of itself as the device of an alternative justice, a justice made in the struggle for representation.[27]

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[26]. In *Una nación para el desierto argentino* [A Nation for the Argentine desert], Tulio Halperín Donghi (who was not a revisionist) asserts that the generation of Domingo F. Sarmiento inherited a sense of order and respect for the law from Rosas (8).

[27]. Viñas rewrites and reedits *Literatura argentina y realidad política,* [Argentine Literature and Political Reality] periodically, reworking his interpretation of Argentine literature. The first version was written in 1964; in the second version, in 1971, he puts forward the hypothesis that violation is the matrix from which Argentine literature emerges, a hypothesis that takes on new meanings with the military government—which came to power five years later—that kidnapped, tortured, and disappeared thirty thousand people.

Legality and Injustice in *Martín Fierro*

The subordination of the judicial system to the executive power and the use of criminal proceedings as a means of punishment that we saw in the farce of a trial in *El matadero* are two features that emerged during the transition from the colonial to the post-colonial period and that Osvaldo Barreneche (1997) holds that still characterise the contemporary Argentine judicial system.[28] From that, Barreneche notes that the long history of a flawed judicial system and of executive interference in judicial affairs, along with the utilisation of institutionally malleable penal-legal procedures in the administration of justice in order to apply the law selectively, have produced a widespread notion that the legal system is unpredictable and arbitrary (353-355).

This selective system of justice, applied in different ways in the city and the countryside, to citizens, gauchos and foreigners, is the specific context of the gauchesque genre. Juridical changes are slower than the political agendas that mark them, and require a periodisation of their own, separated from the political history. When in 1871, thirty years after it was written, *El matadero* was finally published and, one year later, *Martin Fierro*'s *Ida* came out, the civil wars had come to an end and the liberal State had been established, but the judicial system had not significantly changed: the administration of justice was still in the hands of justices of the peace who would select from an array of operative codes which laws they would apply and to whom.[29]

A revision of the traditional interpretative scheme that read the period after independence as a constitutional void casts light on the existence of what is called a 'material constitution': a set of norms stemming from different codes that, though not

[28] Barreneche (1997) also points out police interference in the judiciary-civil society interface, as well as manipulation of the initial stages of the judicial process by senior police officers (*comisarios*).

[29] During this period, a system of municipalities was set up briefly and then dissolved, and there was a never-enacted proposal to install a jury system.

compiled as a single written text, regulated social relationships and political activity. The selective application of the law was, then, helped by the vagueness implicit to an unwritten constitution, one that included moreover norms from the 13th-century *partidas* of Alfonso X [the Seven Part Legal Code] to the 17th-century Compilation of the Laws of the Indies, and allowed the co-existence of contradictory norms. Nevertheless, even after the National Constitution was enacted (1853), and the rural, civil and penal codes adopted —in 1865, 1871 and 1877 respectively— jurists didn't completely abandoned the use of old Spanish Law and judges continued to base their decisions on norms stemming from the 13th to 17th centuries right up to 1931 (Chiaramonte n.p).

Juridical differentiation between persons was noted in popular poetry from just after independence in 1810 (consider the work of Bartolomé Hidalgo); after the Battle of Caseros (1852), which marked the fall of Juan Manuel de Rosas, the issue was also raised in Congress. But it is *El gaucho Martín Fierro* (1872) that makes visible the mechanism by which the State classified the gaucho as *vago* [vagabond, vagrant, rural unemployed] in order to outlaw him and then apply the law.[30] Agamben (2007) calls *bando* the original structure by which the law is applied even to what it excludes from itself, to that which it sends *al bando* [to the side], turns into *band*it, a*band*ons.[31] The

[30] In September 1873, when the Chief of Police of Buenos Aires asked for greater powers to track down '*vagos y malentretenidos*' —the latter being poor country folk who took part in fiestas and other forms of recreation beyond the areas where they lived (Sarlo and Gramuglio 43)— the public prosecutor replied that 'Vagrancy in itself is not a crime, it is prosecuted but just as a preventative measure' (Molas 590), clearly expressing the paranoid logic with which laws penalise according to the fantasies of the ruling class.

[31] Agamben says that his use of the term picks up on a notion suggested by Jean-Luc Nancy. The word, he explains, comes from an old Germanic term that refers to both exclusion from community and the insignia of the sovereign, and expresses the sovereign nature of the law, its power to include by excluding (164). I have not been able to find the Germanic term that Agamben refers to, but I did find 'bannan', which means 'to speak in public' and etymological dictionaries give it as the origin of 'banns' [proclama] and 'bandit'. In a similar sense, *bando* was, in the 19th century, the name of the announcements issued by Argentine authorities to order that those who had vanished from sight reappear before them (Dabove, 2007, 8). For a discussion of the term and its relationship to 'bandit', see Juan Pablo Dabove, *Nightmares of the Lettered City*.

State casts the gaucho outside the law and in that act occludes the very existence of an 'outside' to the law because even there, in its own exterior, the law continues to regulate. Classified as *vago* and sent to fight at the border, the gaucho is the subject that —as proposed by Fermín Rodríguez— the State excludes by including him in the armed service (305).

Before the representational aspect of the law, which imposes definitions and imagines social relations, *Martín Fierro* posits the gaucho as victim rather than as perpetrator (Caimari 197), revealing a discrepancy between the historical subject and its juridical representation. Since 'prescriptive texts change their meaning with each new epic we choose to make relevant to them' (Cover 4), and considering that theories of causation are, at heart, social theories (Dimock 161), an account where the gaucho falls into criminality because of the State and its laws dislocates the symbolic place of criminality in society and destabilises State notions of criminality and justice.

***Ida*: Constructing Illegality as Right.**

In the tradition of Western political thought, from Aristotle to Hegel, man becomes moral in the State: through the internalisation of Law, morality is imposed by the State as the empire of law. But this written, positive, State law —the particular set of laws a community gives itself— is in tension with an unwritten law, a natural law that is prior to and independent from positive law. Natural law asserts that certain rights are inherent by virtue of human nature. Based on a natural order, it is a body of hypothetical laws understood to be objective and universal, in relationship to which the justice or injustice of positive law is measured. That tension is what Antigone's struggle dramatises: she considers burying her brother's corpse 'naturally just', even if that goes against the laws of the State.

If we read the legality that *Martín Fierro* institutes from this naturalist point of view founded on the idea that unjust law is not law[32] but a perversion of Law, and therefore there would be no *moral* or *legal* obligation to obey it, we can see Martín Fierro as someone who upholds his *right* to do things that clash with legality. What turns him into an avenger, then, is not the justice or injustice of his actions but his position before the law.[33]

In what has been recently called 'Cultures of Legality' (Cfr. Silbey), cultures where the law is highly valued, the order founded by *Martín Fierro* is inconceivable. In those cultures, a rule has the status of law and must be complied with because of its source, because its origin lies in certain persons and it is established pursuant to certain procedures, regardless of whether or not its content is just or in keeping with moral ideals. Whereas in those cultures the mere invocation of the law ('it's the law') bestows legitimacy and ends any discussion, *Martín Fierro*'s *Ida* not only challenges the letter of the law but also the position of enunciation that grounds that law, the State as legislator and as lawgiver, and articulates a legal culture that mistrusts a justice that uses

[32] In St. Augustine's words:'*lex iniustia non est lex'*.

[33]. In his article 'El desertor de fierro' [The Iron Deserter], Martín Kohan (2013) argues that when Fierro provokes and ultimately kills not 'a lawman', responsible for his unjust suffering, but a poor black, when he victimises that other, the fact that Fierro has suffered injustice before does not make him an avenger, but rather someone who reproduces injustice. Beatriz Sarlo (2003) wonders about morality in a world like Fierro's, one where, due to the absence of institutions of justice, courage is what enables dishonour and provocation to be challenged. She reflects on the conditions, the exceptional circumstances, that cause us to suspend moral judgment (192). Borges and Bioy Casares (1955) note that though logic as well as the text itself would allow us to consider Martín Fierro a troublemaker, a drunk and a murderer, that is not how we feel about him. Indeed, 'there is no Argentine who would not deem that assessment somehow blasphemous or irreverent' (*Poesía Gauchesca* XXI. My translation). Lastly, Martínez Estrada (1958) explains that we have two images of Martín Fierro: the one in our mind based on what he confesses about himself and the one we witness in the events he narrates (I, 52). My position is that the fact that he is a reproducer of injustices due to the injustice he himself has endured; that courage is the only thing in this institution-less world that allows him to respond to provocation; and that he is driven into criminality by the State's official laws, is precisely what turns even his unjust acts into acts of compensation (which is, in the end, the concept of 'reparation' and 'justice' at play in judicial systems).

the law to persecute and criminalise.[34] For that reason, as Carlos Gamerro argues (n.d), gauchesque literature envisions society as a pastoral Arcadia until the police and the judge appear (47).

Martín Fierro takes place in a context where, due to increased State surveillance of the rural population, face-to-face confrontations between *paisanos* [country folk] and legal and police authorities had become more frequent and a punitive law that criminalised, persecuted and recruited was a growing part of *paisano* life.[35] Scholars of crime and justice in Europe have developed what they call 'reluctant litigator theory'. According to that theory, in Europe between the Middle Ages and the end of the 19th century —that is, during the transition from restitutive justice carried out by local communities to punitive justice monopolised by States— members of civil society became increasingly reluctant to get involved in judicial matters because more State intervention meant the criminalisation of certain groups (Barreneche 6). Barreneche claims that the same process took place in the River Plate region where, since those who started out as witnesses were at times punished by agents of the State, the authorities had more and more trouble getting citizens to cooperate (45-46, 264). Starting in 1824, the only evidence admitted in favour of those arrested as *vagos* was the word of the justice of the peace, leaving the gaucho at the mercy of local authorities ('A mí el Juez me tomó entre ojos/ en la última votación:/ me le había hecho el remolón/ y no me arrimé ese día,/ y él dijo que yo servía/ a los de la esposición').[36] In 1827, when a law authorised the government to recruit four thousand men into the army 'by any means

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[34]. In the same sense, *El matadero* shows that the law is not applied to the Federalists (they are not prosecuted), but to the Unitarian (he is persecuted and criminalised).

[35]. Martín Fierro complains: 'Estaba el gaucho en su pago/con toda siguridá;/pero aura... ¡barbaridá!,/ la cosa anda tan fruncida,/ que gasta el pobre la vida/ en juir de la autoridá [the gaucho'd live in his home town/ as safe as anything/ but then …it's a crime/ things got so twisted/ that the poor man wears out his life/ in fleeing from the judge] (II-26).

[36] "The judge had taken against me/ at the last election day/ I'd played it lazy and I didn't vote /and he said I was with the ones in the proposition" (says Martin Fierro, III-27).

necessary' (Rodríguez Molas 151), *paisanos* fled to escape judges and police captains. By 1890, the police were in control of almost every aspect of the lives of the poor and their territorial movements and, according to a government minister, the police were 'almost an enemy of the citizen, and the citizenry hated the police and were always against them' (Rodríguez Molas 458).

Martín Fierro shows the police squad as the enemy of the popular hero, of the persecuted gaucho whose hardships are due to the repressive apparatus ('Antes de cair al servicio/tenia familia y hacienda;/ cuando volví, ni la prenda/ me la habían dejao ya. / Dios sabe en lo que vendrá/a parar esta contienda' IX-40),[37] and that clash between hero and police produces a rift in the identification of law and justice. This is where Martín Fierro becomes an avenger, in the fight against the police, in the confrontation with unjust law, after which justice will be identified with the voice, history and representation of the gaucho (Ludmer 2012, 229). This is symbolised in Sergeant Cruz's change of sides because —as Ludmer states— at that crucial juncture, at the moment of confrontation between bandit and police, the two gauchos meet —Cruz on one side and Fierro on the other— and form an alliance. The text makes equals confront each other, and Cruz, with the cry 'Cruz no consiente/que se cometa el delito/ de matar ansí a un valiente!' (IX-40),[38] inverts the category of crime, changing sides to fight with Fierro against the very police detachment he had, until that very moment, commanded (2012, 233). Identified with justice, Cruz and Martín Fierro decide to head where the Indians are, where 'the writ of the government doesn't run', in search of safety. From that moment on, heroes in Argentine literature are born in the fight with the police, in the

[37] "Before falling into service/ I had family and steers;/ when I returned not even my wife had they left me./ What the end of this fight will be/ God alone can tell" (IX-40).
[38] "Cruz will not allow/ the crime to be committed/ of killing a brave man like this"(IX-40).

struggle against oppression and injustice —a clash that, as Juan Pablo Dabove maintains, will have a particular place in Argentine culture (2007, 180).

Vuelta [Return]. An Attempt at Integration: Martín Fierro Tries Himself

The recruitment system does not change until 1901 with the law of compulsory military service, but Martín Fierro returns with the publication of the second part, *Vuelta*, in 1879. Although the central thesis of *Ida* is the gaucho's innocence, not his guilt, Martín Fierro returns now to recognise his crimes. Seven years had gone by and eleven editions of *El gaucho Martín Fierro* had been published, drawing criticism and unleashing political pressure, all of which must have made José Hernández aware of the juridical sense of the poem. In 1879, now a congressman, Hernández wrote what some see as a sly, toned-down version of the same social criticism found in *Ida* and others see as a way of taming the gaucho, incorporating him into the civilising pact: everyone agrees, though, that it is a didactic book, one that introduces the voice of the State into gauchesque literature.[39]

Martín Fierro returns from the desert defeated, not to take action but to narrate his misfortunes and to instil the law. He discovers that, since the judge is dead, nobody remembers what had happened there so he tries himself, scrutinising the events in *Ida*. He recalls the death of the black and recognises his own imprudence ('Aunque si yo lo

[39]. While critics agree that *Vuelta* is didactic, their arguments vary. For Sarlo and Gramuglio (1968), the worldview underlying the virulent condemnation of *Ida* and the didacticism of *Vuelta* is the same: the impossibility of integrating the gaucho; Martínez Estrada (1958), Jitrik (2010), Viñas (n.d), Dabove (2007), Caimari (2004) and Fermín Rodríguez (2010) hold that *Vuelta* marks a change in the gaucho's reconciliation and incorporation into the juridical pact; Ludmer (2012) reads *Vuelta* as the incorporation of the gaucho but she does not believe that Hernández had changed ideologically; Schvarzman (2013) believes that there is more than docility, didacticism and State perspective at play in *Vuelta*.

maté/mucha culpa tuvo el negro./ Estuve un poco imprudente,/ puede ser, yo lo confieso');[40] he excuses the fight with the commandant's *protégé* in the cantina ('Él, engreído, me buscó,/ yo ninguna culpa tengo;/ él mesmo vino a peliarme,/ y tal vez me hubiera muerto');[41] and, finally, he provides an explanation for the confrontation with the police ('Esa vez me defendí/ como estaba en mi derecho,/ porque fueron a prenderme/ de noche y en campo abierto/ (…) de un modo que daba miedo.')[42] (XI-73). Though at times he uses codes of oral law to justify his deeds ('Pero él me precipitó,/ porque me cortó primero,/ y a más me cortó la cara,/ que es un asunto muy serio.'),[43] his language and voice now coincide with the State's written law: Martín Fierro examines and passes judgement on himself *on the basis of* State notions rather than in opposition to them.

The self-trial that constitutes the judicial scene in *Vuelta* is not a scene where a hero confronts the law and fights against oppression and injustice. With no State representative or authority present, this trial inverts the judicial scene in *Ida*: Martín Fierro accepts the restrictions imposed by the law in order to enjoy its protection and no longer distinguishes between just and unjust laws. The law is law of the State, and it has to be obeyed. Martín Fierro's reconciliation and even identification with the law of the State, his assumption of its voice to justify crimes for which, as Martínez Estrada says, 'we had pardoned him because they were foreign to him' (I, 60) contradict the sense of justice instituted in *Ida*. On those grounds, Martínez Estrada complains that 'on Fierro's return *he deceives himself and deceives us* by painfully and woefully excogitating the

[40] "Although I killed him/ the black had much guilt./ I was a little imprudent/ perhaps, I confess".
[41] "He, arrogant, sought me out/ I was not guilty/ he came to fight me/ and perhaps would have killed me".
[42] "That time I defended myself/ as was my right/ because they were going to take me/ at night and on open ground/…so that I was afraid".
[43] "But he pushed me/ because he cut me first/ more, he cut my face/ a serious matter".

attenuating circumstances for his actions' (I, 60, my italics). To embrace the voice of State law, its logic and notion of justice, means to accept a culpability that radically alters the definition of criminality that the text had held.[44] Martín Fierro acknowledges the acts that according to State notions make him guilty, explains the mitigating circumstances but, crucially, he does not find himself guilty or innocent because what is central, what is politically relevant in *Vuelta*, is the conversion of the gaucho: he now accepts State morality in order to construct himself as an obedient subject and, thus, join the community.

By affirming that the State frequently changed the definitions of legality in order to outlaw the gaucho, *Ida* endorses the legitimacy of popular violence and the Law it upholds; *Vuelta*, conversely, embraces State definitions and eschews Fierro's right to violence. Despite their differences, both parts end with the exclusion of the gaucho. In *Ida,* Cruz and Fierro go off to live with the Indians beyond the reach of the law ('…y hasta los indios no alcanza/ la facultá del Gobierno./ (…) Alcemos el poncho y vamos./ (…) Allá habrá seguridá,/ ya que aquí no la tenemos' XIII-46);[45] in *Vuelta*, after Fierro instils the law with a series of lessons ('El trabajar es la ley', 'A ningún hombre amenacen', 'El hombre no mate al hombre/ ni pelee por fantasía' XXXII- 99 and 100)[46] he, his two sons and Cruz's son —who have just met each other again— go their separate ways ('Después, a los cuatro vientos/ los cuatro se dirigieron')[47] and change their names ('convinieron entre todos/ en mudar allí de nombre').[48] Furthermore, the narrator concludes 'Vive el águila en su nido,/ el tigre vive en la selva,/ el zorro en la

[44] The numerous amendments found by Martínez Estrada in the manuscript suggest how difficult it was for Hernández to do this.

[45] '…and the reach of government/ does not go as far as the Indians/ take our ponchos and let's go (…)/ There will be safety there/ since here we have none'.
[46] 'Work is the law', 'Threaten no man', 'Man does not kill man/ or fight over fantasies'.
[47] 'Afterwards to the four winds/ the four set off'.
[48] 'everyone agreed that/ it was better to keep quiet about their names'.

cueva ajena,/ y en su destino inconstante/ sólo el gaucho vive errante/ donde la suerte lo lleva' (XXXIII-101),[49] evidencing that Martín Fierro's integration is not total. V*uelta*, in that sense, finishes in much the same way as *Ida*: in a flight into the unknown that reasserts the gaucho's impossibility of integrating into the national project (Sarlo and Gramuglio 42).

The gaucho, cast out of society and produced as its 'constitutive outside', will never become fully immanent to it. He will, however, return to haunt the polities predicated upon his absence. As Ernesto Laclau and Chantal Mouffe observe,[50] democratic organisations are constituted through exclusions, and the return of the excluded forces an expansion and rearticulation of social relationships: the figure of the gaucho will operate politically, then, as the embodiment of demands of [the] others who are excluded, demands for inclusion, for an expansion of the State's sphere of legality towards the popular subject. After *Vuelta*, the essential narrative structure of gauchesque literature will thus return in Argentine culture in different supports and formats to press the opening of new conceptual horizons.

Conclusions

As the specific property of symbolic power is that it can only be exercised with the (unconscious) complicity of those whom it dominates, the Law can only exert its power to the extent that its arbitrariness is disavowed. It is in this sense that Pierre Bourdieu (1987) stresses the importance of legal procedures to the law's effectiveness; legal procedures are, he argues, crucial to obtaining and sustaining social consent

[49] 'the eagle lives in his nest/ the tiger in the forest/ the fox in another's lair/ and in his inconstant destiny only the gaucho lives wandering wherever fate may lead him'.
[50] Cited by Judith Butler in 'Replantear el universal' [Restaging the Universal] (2011, 19).

because they are taken (however illogically) as a sign of the law's impartiality and neutrality: the effectiveness of the law and, consequently, the stability of the juridical field depend on this 'formal rationality'. Bourdieu asserts that we must, therefore, grant social reality to the symbolic power that the law owes to the specific effect of legal procedures and of the codification of behaviour.[51] This is a recurrent problem when we think about justice and the law in Argentina. As we have seen, *El matadero* and *Martín Fierro* structure illegitimate judicial instances that do not follow established legal procedures —or do so in form only— precisely to show State justice as a farce that simulates the administration of a justice that it does not realize. *El matadero* attributes injustice and arbitrariness to the State and to judicial institutions, more specifically, to the way governmental authorities of the time administered justice and made use of the law: Echeverría ascribes the lack of legality and the farce of justice specifically to Rosas's administration. More than thirty years later and from a different ideological and political position, *Martín Fierro* also accuses the prevailing administration and its procedural justice, only to institute an alternative legality. From a conception of justice rooted in the natural law tradition and in its hypothetical laws independent from and superior to positive law, *Ida* asserts that '*lex injustia non est lex*'. *Ida* casts light on what the law excludes and measures the legitimacy of the law, of the judicial system that implements it and of the State that supports it on the basis of its final outcome, that is, of a naturalist understanding of the law that organises substantive notions of justice. In *Vuelta*, Martín Fierro changes stances and accepts the law of the State, but justice has forgotten him and he arraigns and tries himself in yet another process with no

[51] Bourdieu's assertion reminds of the famous formulation with which Pascal 'scandalously' inverts the order of things when he says 'Kneel down, move your lips in prayer and you will believe'. Althusser mentions that 'inversion' when he puts forward the idea that ideology has a material existence in our actions, inasmuch as they are inserted in practices regulated by rituals that are, in turn, dictated by the ruling class (50).

legitimacy.

Every simulation entails a dispute over representation and a political debate, and the judicial farce that, according to Echeverría and Hernández, is set up by the State undermines the very notion of a 'State justice'. Literature, then, exposes the presence of fiction in the real and in politics, and reveals how the State constructs reality and conspires to manipulate and regulate social relations (Piglia, n.d). I hold that the recurrence of judicial scenes in foundational works of Argentine literature attests to a concern over how conflicts are negotiated, raises questions about the idea of justice and the type of demands that recurrence expresses and, ultimately, about how and why literature processes those demands, and to what, if any, extra-literary effects. Despite their different notions of justice, *El matadero* and *Martín Fierro*'s *Ida* express distrust of the legal system. By organising State justice as a farce that abuses legal procedures and contradicts the substantive justice of natural law, they establish a place of enunciation that, as argued above, would help form a 'legal culture' specific to Argentine literature and imaginary that is still prevalent today.

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