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TABLE OF CONTENTS

Editorial

This is our last editorial as chief editors of Nofo.

After the relaunch of the journal in 2012 as 'Interdisciplinary Journal of Law and Justice' along with a renewed international board, we have been privileged to take the journal in the direction we thought most interesting. It is now time for us to step down from our task as editors and pass on the baton to the next generation, who will take the journal in their own chosen direction.

We began our journey with a special issue on Law and Humanities, followed by another special issue on Democratic Judgment. However, the journal has never been constrained by disciplinary boundaries or buzzwords. During these last six years, our working premise has been to publish scholarship of the highest quality with the aim of building bridges between law and other humanistic and social endeavours. It is our sincere belief that we have accomplished that goal.

This, our last issue, is no exception. We are proud of the articles here presented and of the variety of approaches they embody.

Samuel Chambers, 'On Norms and Opposition' addresses the debate on queer theory. This was sparked by a special issue of the journal *Differences*, where guest editors Robyn Wiegman and Elizabeth Wilson took queer theory to task for its apparent inability to come to terms with norms—calling instead for a 'queer theory without antinormativity'. This, to some of their critics, sounded like another form of 'normativity'. Rather than enter that debate as framed, Chambers takes a step back to reflect on the status, meaning, and conditions of possibility of opposition to norms. He asks: what type of opposition can be mobilized to resist normative forces and normalizing practices (for example heteronormativity)?

Chambers proposes a kind of archaeology to probe into a shift in the 18th century, detected by Foucault, towards a new mechanism of power (biopower) that operated at the expense of juridical power; he contrasts this to François Ewald's analysis of norms (relied on by Wiegman and Wilson) that grew out of, but parted ways from, Foucault on a number of key issues. In the course of his parsing, Chambers proposes an important analytical distinction between 'norms', 'normativity', and 'normalization', and for each of these terms mobilizes different kinds of opposition. So, whereas norms are not just averages but distributions across a range and built into social expectations and structures, normativity is the name for power relations produced when a norm becomes significant within a particular social order, in

turn sustained by a *dispositif* of power and forms of normalization that uphold and enforce those norms. While it makes little sense to be 'against norms' in general, Chambers surmises that, in the sense elaborated, 'antinormativity' becomes not just viable theoretically, but sometimes also necessary politically.

Our next article as its point of departure takes up the title of our journal—a topic that had also inspired Antaki (2014) and MacDonald (2014) in an earlier issue. James Martell, in 'A Weak Anti-foundationalism: Law at the Vanishing Point', enquires into what an anti-foundational law might look like, by engaging with the work of some major thinkers in this tradition: Nietzsche, Benjamin, Agamben, and Negri. Martell observes that, near the end of their argument, anti-foundational thinkers invariably show reluctance to completely eliminate the foundation they seek to eschew. The question is then not so much 'can there be law without foundation?', but 'why do anti-foundational thinkers hold on to a vanishingly small piece of it?'

From Nietzsche's *Thus Spoke Zarathustra* Martel rescues the figure of the 'Law unfulfiller' who stops short of the goal of endless production of completed tasks (e.g., writing law tablets). From Benjamin, a form of divine law emerges that at its core is only a cipher to be interpreted and wrestled with, sometimes even abandoned, as a way of life. He notes Agamben's concept of 'inoperative law' that seeks to deactivate (sovereign) law, though not without hesitation. Finally, Martel engages with Antonio Negri's reading of Spinoza, where the vertical and hierarchical forces of power are very nearly eliminated, though not completely.

As read by Martel, these thinkers seek not so much to destroy the foundations of law as to maximally oppose law. Martel calls this 'weak anti-foundationalism', not because it lacks strength or is powerless, but rather because it decides to hold back over that which it struggles about. In his view, anti-foundationalism is at its best when it does not declare total victory and puts itself in place as another foundation; it is a human (not divine) power to resist metaphysics, combat mythic violence, as well as false projections of sovereignty and legal authority.

If the two first essays theoretically engage with norms and the foundations of law, the next article is more empirical in orientation. Gunilla Carstensen and Leif Dahlberg's 'Court Interpreting as Emotional Work: A Pilot Study in Swedish Law Courts' is an ethnographic study about the work of interpreters in public law courts in Sweden. Based on a series of interviews with interpreters, judges, and lawyers, their study analyses the role of interpreters and how the quality of their work can be improved. Carstensen and Dahlberg argue that interpreting consists in more than a simple word by word transfer from the source language to the target language; interpreters are cultural brokers, too. This can generate tensions between the professional rules that regulate their work and the requirements of doing their job to the best of their abilities. In the course of the essay, Carstensen and Dahlberg consider whether and how to interpret specific cultural differences, particular body language and intonation, varying degrees of power distance, or what is being said implicitly between the lines.

One interesting aspect uncovered in the study is the importance of the emotional

role of interpreters. While the ideal interpreter is someone whose presence remains invisible ('to be but not be seen'), interpreters can and often do generate a sense of calm in the person whose language is being translated, helping to dissolve tense situations, or toning down rude or even insulting expressions by prosecutors. Carstensen and Dahlberg's study reveals the existence of significant knowledge deficits among the various actors, deficits that can affect the conditions for interpreting as well as the principle of legal certainty. The authors conclude with certain areas where their study could be further developed, as well as with recommendations for improving the education and training of interpreters and the functionality of media technology in the courtroom.

We have grouped the last three essays in this issue as exponents of law and film scholarship, which they approach in diverse ways.

Barry Collins's essay critically analyses the concept of Human Rights Cinema. This sprang up in the early 1990s and has its own official network, run by Amnesty International, and even a Charter, which insists on a commitment to the 'truthful' depiction of human rights violations. Collins problematizes the nature of 'truthfulness' through an engagement with Joshua Oppenheimer's documentary *The Act of Killing* (2012), which deals with the mass killings that took place in Indonesia in 1965–66, during the upheavals leading to President Suharto's accession to power.

This is not the first time that we have published work on this 'bizarre' documentary (Sherwin, 2014). Arguably, *The Act of Killing* does not fit easily within the canon of Human Rights Cinema: for one, the film attempts to unsettle its spectators by continually blurring the boundary between fact and fiction, fantasy and 'reality', in what the director has called 'a documentary of the imagination'. Further, the film does not present its audience with factual evidence of crimes committed in Indonesia; moreover, it actually renders impossible the act of 'bearing witness'. More importantly, the film offers the spectator no external meta-position from which to judge, no position of the rational observer within a given normative system. All in all, Collins argues that *The Act of Killing* not only challenges the ideas of truthfulness, authority, and spectatorship presupposed by Human Rights Cinema, but it also provides a lens through which to critique the understanding of human rights predominant in the very notion of Human Rights Cinema itself.

Continuing in the filmic register, our next article shifts attention towards the sensorial aspects of law. It is often argued that law must be visually seen in order to be effective. However, in 'Law's Resonance and Undercover Performances in Gangster Films' Anita Lam highlights instead the aural and synesthetic dimensions of law-in-action. Lam deploys the sonic metaphor of resonance—simultaneously understood as synchronicity, oscillation, and vibration—to think through the ways in which the 'undercover force of law' operates, by means of the figure of the double agent, and disrupts the visual-centric character of law.

Through an analysis of two gangster films—the American movie *The Departed* (2006) and its Hong Kong predecessor *Infernal Affairs* (2002)—that innovatively present the cellular phone as an important addition to the arsenal of sonic technologies,

Lam examines how law can 'tune in' and 'make contact' through technologically-mediated performances. In these films undercover work is communicated through fingers tapping and ears decoding, but never transformed into written text that can be potentially intercepted by prying eyes. Likewise, the ringing or vibrating cellphone is not only a tool for 'blowing' the cover of double agents and for 'identifying' moles, but also a constant reminder of an agent's moral obligations and professional duties. The cellphone features as an aural instrument of self-revelation that, due to its sonic characteristics, promotes the instability, fluidity and multiplicity of identity.

While reassessing the relevance of examining sonic technologies in film, Lam does not wish to reproduce the 'litany of differences' between hearing and seeing; quite the opposite, in fact, Lam aims to disrupt and disturb the conventional division of sight and sound. She argues that a focus on the synesthetic pairings of sound and image offers an important counterpoint to the dominance of visual-centric analyses and understanding of law in scholarship.

Our concluding article deals with zombies, as symbolic representations of community and law. In 'The Litigating Dead: Zombie Jurisprudence in Contemporary Popular Culture' William MacNeil tackles some of the arguments and interpretations of zombies in the literature. According to critics, the recent popular proliferation of zombie narratives suggests a collective failure of imagination: that what the trope of the zombie signifies is the very *impossibility* of thinking outside the prevailing logics of consumption—or Capital. According to this reading, zombie fiction presents us with a stark choice: either we accept the current system of globalized Capital as it stands, or we risk descending into some anarchic 'war of all against all', of which the zombie apocalypse is emblematic. MacNeil challenges that reading by examining the ways in which popular zombie fiction provides us with alternatives, even suggesting solutions to the current impasses of the political-economic predicament in which we find ourselves. Each of these texts gives its respective audience some 'fresh brains' by which to reimagine the social contract and, through it, an(O)ther Law: one which is squarely situated within the 'ethics of the Real' and, in its challenge to zombie jurisdictional dominion, interpellates all of us as the 'litigating dead'.

Julen Etxabe & Mónica López Lerma
Portland, June 2017

On Norms and Opposition

Samuel A. Chambers*

Much has been written on the relation, both conceptual and historical, between the norm and the law. If we begin with Ancient Greek, we can say that *nomos* means both 'law' and 'norm': in the context of the Ancient Greek world it was not possible to distinguish cleanly between, on the one hand, social norms, customs, and mores, and on the other, the will of the *demos*, the actions of the legislative assembly (*ecclesia*). Of course, in our modern lexicon the English 'law' and 'norm' have distinct etymologies. 'Law' comes from the old English *lagu*, meaning 'something laid or fixed'; it dates to circa 1000, with its current spelling emerging in the 16th century. 'Norm' is a borrowing from the classical Latin *norma*, a noun referring to the squares used by carpenters to form right angles, and it only appears in English in the 19th century (*OED* 2017). This etymological *separation* proves important as it is illuminated by and in turn helps to illuminate some of Foucault's most significant writings.

In his 1977 lectures at the Collège de France, Foucault suggests that the juridical model of sovereignty—the monarchical theory of power—'dates from the reactivation of Roman law' during the Middle Ages (Foucault 2003a, 34). 'Juridical power' names a theory or model of power based on reconstructing an idea of Roman law around the institutions of feudal monarchy; the theory both *reflects* and *justifies* the 'actual power mechanisms' of sovereign (kingly) power (Foucault 2003a, 34–35). Hence juridical power is simultaneously the power of law and the power of the king. Perhaps Foucault's most radical historical claim is that by the 18th century '*a new mechanism of power*' is invented, a form of power that is, above all, nonsovereign, i.e. 'absolutely incompatible with relations of sovereignty' (Foucault 2003a, 35, emphasis

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added).[1] Whatever else we might say about this new form of power, we must emphasize its relation to the *norm*: this historically distinct technology of power functions in, as, through, and around the norm. Moreover, Foucault asseverates that the practices, techniques, and mechanisms of this new power have all been growing since its emergence, and they have done so *at the expense* of juridical power.

This important conclusion ties in directly to Foucault's better-known claim—made in *The Will to Knowledge*, and published the same year as these lectures were given—for a 'juridical regression'; this term points not to the disappearance of law but to the historical fact that 'the law operates more and more *as a norm*' (Foucault 1978, 144, emphasis added). Therefore by the 19th century the gap between law and norm has been dramatically narrowed, as the two become entangled.[2] Indeed, in the following year Foucault opens his third Collège de France lecture by pointing directly to this entanglement. As Foucault humbly phrases it, 'some people' have been 'prudently re-reading Kelsen' on the 'fundamental relationship between the law and the norm', and Foucault concurs with a general principle that emerges from Kelsen's work—namely, the fact of 'a normativity intrinsic to any legal imperative' (Foucault 2004, 84; Kelsen 1967). Nonetheless, in his very next breath Foucault emphatically insists that even if the law cannot be dissociated from the norm, this does not mean that the problem of norms can be contained under (or conflated with) the rubric of law (Foucault 2004, 56). For Foucault, the 'juridical regression' means we must pay more attention to norms, lest we blind ourselves to the importance of this new mechanism of power by trying to view it through the old juridical model. Norms are the key to grasping this historically new form of power, and this is so not despite, but precisely because the law now operates in and through norms.

Yet, to shift our analytic (and perhaps political) focus from law to norms, as Foucault repeatedly calls on his readers to do, immediately raises its own conceptual (and political) conundrum. I phrase it in the form of a simple question: *what does it mean to oppose a norm*? The question of resistance was, as everyone knows, always at the heart of Foucault's project; it served as the pivot point for the story he repeatedly told about sovereign and nonsovereign forms of power. After all, the

1 The fundamental difference between this new power and juridical power does not itself prevent the theory of sovereignty from retaining its dominance, and therefore, by 'superimposing' itself on the new mechanisms of power, it (sovereignty) serves to mask those new functions (Foucault 2003a, 37).

2 François Ewald claims that the law/norm relation becomes more complicated, perhaps even overdetermined, from the moment in time (the early 19th century) when 'norm' makes a partial break from 'rule'. Ewald contends that once *norm* comes to mean not only rule but also a principle of producing rules, and even 'a principle of valorization', law ceases to be an act of sovereign will and becomes instead a purely social act. Norms now serve as the very foundation for law (Ewald 1990, 140, 155). I will discuss Ewald's work and its vexed relation to Foucault in more detail below, but for now it seems essential to underscore two points. First, Ewald emphasizes the reverse of Foucault: where Foucault seeks to show that the law functions *as* a norm, Ewald asserts that norms *found* law. Second, in proclaiming that 'there is a radical change in the relationship between the rule and the norm', Ewald may underestimate the continued significance of the complex linkages between rule and norm (Ewald 1990, 144). As I have previously argued, one way to discern if a norm is changing, or if its foundations are crumbling, is to notice when rules are asserted and laws are made in order to bolster or support a norm that was previously thought not to need such assistance (Chambers 2003; Chambers 2005).

primary problem that Foucault identified with the juridical model of power was not strictly an 'academic' one: it was not merely that such a model failed to adequately *capture* (conceptually) the workings of the new form of power that was invented in 17th- and 18th-century Europe. No, the problem runs much deeper than that: as Foucault says repeatedly, from the moment that the juridical model takes shape, the sovereign theory of power itself serves as the primary mechanism by which to contest sovereigns: 'the theory of sovereignty then became a weapon that was in circulation on both sides' (Foucault 2003a, 35). By 'both sides' Foucault means monarchists and anti-monarchists—those trying to maintain sovereign power, and those wishing to check, undermine or overthrow it. Thinkers such as Locke and Rousseau do no more than rework the theory of sovereign power in such a way as to limit or delegitimate absolute monarchy (Ibid.).[3] But this is not the worst of it: the problem becomes pernicious when we 'find ourselves' stuck with the same toolkit, i.e. the sovereign theory of power, while facing a whole *new* set of mechanisms and technologies.

> We now find ourselves in a situation where the only existing and apparently solid recourse we have against the usurpation of [this new form of power] and against the rise of a power that is bound up with knowledge is precisely a recourse or a return to a right that is organized around sovereignty, or that is articulated on that old principle. (Ibid., 39.)

We need a new *theory* of power not merely in order to trace the workings of new *forms* of power, but also so that we might find ways to *resist* those new forms. Because his understanding of power was always linked to his thinking of resistance, Foucault's work on norms was inextricably bound up with the idea of *opposition to those norms*.

I will return to Foucault's work on power and norms below, but here I want first to make the case for why such a return is itself appropriate and important. The ubiquity of references to Foucault, the fact that in many academic circles his is a 'household name' may, I suggest, sometimes make it easy for us to overlook the still fresh, still significant, and still fecund nature of his project, and it may also lead us to misrecognize that project itself (because we mistake the boilerplate reductions that everyone knows by heart, given their rigid ossification over so many years, for the investigations themselves). In particular, I will suggest that Foucault's work from the late 1970s can make an (un)timely intervention in contemporary debates on norms and normativity. To focus the point, I will show that what we need desperately now is a sophisticated and dynamic understanding of norms and the possibility of opposition to them, and this is just what Foucault's work from this period provides.

To lay out the case for why such work remains *necessary* today, let me begin with a very basic point. Starting from first principles, unlike opposition to the law, it is not

3 Foucault's historical account deftly unravels the apparent paradox by which Hobbes and Locke can use all the same conceptual tools to build utterly opposing theories of politics.

at all simple or straightforward to describe what 'opposition to a norm' might mean theoretically or what form it might take practically. The English language is filled with synonyms for 'against the law' in the sense of illegality—illegal, illicit, banned, criminal, unlawful, etc.—and through recourse to the Ancient Greek etymology, we can locate a singular term to designate an opposition to law: antinomian.[4] But 'antinorm' is not a word. And since norms are not promulgated by legislative bodies, signed by designated political officials, or given official names or titles, we never encounter them directly or in the singular in such a way that we would be able to explicitly register our 'opposition' in formal terms. In a sense then—and this point is telling—the only way to oppose a norm is to deviate from it. However, given the very structure and action of norms (as I will discuss below) it remains unclear how deviation would 'count' in terms of opposition to a norm. Would such deviation register as 'opposition' *to* that norm or would that deviation be nothing more than the standard functioning *of* the norm—part and parcel of it? Moreover, since the norm is not a law, it does not include explicit penalties, and because the suffering of those penalties is an essential component of civil disobedience as a political practice, that practice cannot be taken up as a tactic in opposition to norms.[5] Unlike law, then, the idea of *opposition* to norms appears at best, opaque, at worst, incoherent or nonexistent. It is not easy to grasp, much less to efficaciously mobilize, opposition to the norm.

With this in mind, I want to turn now to a specific disciplinary debate that I think captures the importance of understanding the relation between norms and opposition. My aim is two-fold: to contribute to the debate by way of an intervention that clarifies its terms and argues for a transformation of its parameters, while simultaneously using the debate as the occasion to return to Foucault, so as to underscore the continued salience of his own work on norms. The field I have in mind is the still developing discipline of queer theory (not yet 30 years of age), and the debate to which I refer is one that was (re)ignited by a 2015 special issue of the journal *differences*, guest-edited by Robyn Wiegman and Elizabeth Wilson.

It is important to stress here that queer theory *as a discipline* is always already vexed by the fact that at its very inception 'queer' was meant to mark a sort of *antidisciplinarity.* For queer to become a theory or a field or a set of institutions is for it to become unqueer. Kadji Amin puts the point this way: '*queer* can never be *queer enough*' and this means that a queer future always depends upon being queerer than the past (Amin 2016, 176). Perhaps the burden of this edict (for an always queerer future) could once have been met, at a time when 'queer theory' was a scandalizing and mobilizing performative, but once 'queer theory' becomes a constative that names

4 Furthermore, we have to hand a series of ready understandings of what opposition to law would mean: from voting against the passage of a law, to seeking its repeal, to standing against it through an act of civil disobedience. The wide variety of ways of describing opposition to law testifies to how easily we grasp the meaning(s) of such opposition.

5 This is not to deny that deviation from the norm produces its own, often harsh 'sanctions' of various sorts, but rather to emphasize that the historical and political practice of civil disobedience depends upon a violation of law.

an existent field, a discipline—and one with a past, no less—the formula becomes an equation of impossibility: how can the future be more queer than the past when the 'foundation' of queerness (of queer studies) lies in the past. This may explain why, as Amin argues, so much of contemporary queer theory is eager to *forget* its past, its history, the political context of its historical emergence (Amin 2016, 181).

Of course the conceptualization of queer that emerges with the origin of queer theory, i.e. the very meaning of 'queer', serves to name a relation to a norm. Perhaps the most enduring 'definition' of a term whose anti-essentialism resists definition is that given by David Halperin. Writing in 1995, he argues for an understanding of queer that is indissociable from norms: '"queer" does not name some natural kind or refer to some determinate object; *it acquires its meaning from its oppositional relation to the norm*' (Halperin 1995, 62, emphasis added). In one sense then Halperin answers the central question of this essay—what is the meaning of an oppositional relation to a norm—with a direct answer: queer. But if 'queer' is itself opposition to norms, yet queer is never queer enough, then the problem of norms and opposition is the constitutive problem of the 'field'—which will itself always have a problem with being a field.

All of this provides crucial context to help grasp the meaning and stakes of the 2015 special issue, which Wiegman and Wilson title, 'Queer Theory Without Antinormativity'. That title conceals a complex conceptual claim, hidden in the double negative of 'without' and 'anti'. That is, the title announces Wiegman and Wilson's *opposition* to what they see as queer theory's own *abiding opposition*. In unpacking the claim we find two distinct elements: first, an historical account of queer theory as built upon and guided by this fundamental principle named 'antinormativity'; second, a call to move beyond (leave behind, or go *against*) this principle. In a word, Wiegman and Wilson are *anti*-antinormative.[6]

Given their tone (decisive, combative) and given the context (taking up an entire issue of a major journal in the field), it is hard to avoid the conclusion that Wiegman and Wilson, despite their protestations to the contrary, are spoiling for a fight (Wiegman & Wilson 2015, 2). As a challenge to the field of queer theory, it seems only fair to describe their critique as of the 'scorched earth' variety, since Wiegman and Wilson aim not merely to correct recent developments in the field of queer theory, nor simply to criticize a select number of authors or texts. Rather, in their rejection of 'antinormativity' they indict, quite literally, almost all of the major

6 It goes without saying that all authors would reject the effort to sum up their project in a single word: Wiegman and Wilson explicitly resist the idea that the essays in the special issue speak with a 'unitary' voice, and they directly refuse the notion that those essays 'respond to the problems we [Wiegman and Wilson] raise by insisting on anti-antinormativity as a new critical value' (Wiegman & Wilson 2015, 2). In a way, I would not dispute this assertion, since 'anti-antinormativity' would hold no coherence as a 'critical value'. Yet it still makes rhetorical and descriptive sense to characterize Wiegman and Wilson's project (which must surely be distinguished from the individual projects of the authors in the special issue, see Duggan 2015) as 'anti-antinormative' because its entire intellectual force rests on its *oppositional* nature. Wiegman and Wilson are not 'for' anti-antinormativity as a critical value, but that is because they are not really 'for' anything in particular; they are *against* what they call 'antinormativity'.

contributors to the field going back to its very inception more than 25 years ago (Ibid., 3). At the very least, they certainly want to shake up and reorganize the field of queer theory, which while certainly still in its infancy has already been marked by numerous battles over its meaning, terrain, and political trajectory (Warner 1993; Berlant & Warner 1995; Halperin 2003).

Moreover, whether they intentionally wished it or not (I suspect they did) the issue produced controversy: within months of publication, Jack Halberstam picked up the gauntlet with his own blistering, polemical response. Halberstam makes the case that 'anti-antinormativity' is nothing other than a merely *normative* (a word he uses as a pejorative) position: he advances a withering critical response to both the framing and the impact of this project, accusing Wiegman and Wilson of a vast enterprise of constructing 'straw people'. 'Oppositionality'—or the very idea of 'opposition'—is central to Halberstam's polemic since, for him, Wiegman and Wilson are offering nothing other than opposition (as an end in itself). They therefore leave us, Halberstam concludes, with no new theories, no new methodologies, no new avenues for future work; instead, we get 'disciplinary, neoliberal, no stakes, straight thinking' (Halberstam 2015).

Rather than reinforce or refute Halberstam's arguments and conclusions,[7] I would prefer to leave the gloves where they lie and instead use the occasion of this debate over so-called antinormativity as a concrete context for reposing the question of norms and oppositionality. In his polemical effort to entirely undo Wiegman and Wilson's project, Halberstam may too easily accept their framing of the issues—especially their *conceptual* framing.[8] This is not at all surprising given that Halberstam's piece is not a scholarly article or essay; it is a blog post, *intended* to be polemical. But it is also a *widely read* blog post, and at the time of my own writing, it remains what we might call 'the definitive response' to Wiegman and Wilson (see also Duggan 2015). For these reasons, it matters that the reader of this debate may be left with the conclusive sense that Halberstam is simply *for* 'antinormativity' and Wiegman and Wilson are simply *against* it—as if it were obvious or clear what sort of thing 'antinormativity' is. But this brings us to the crux of the matter: at this stage in the debate over 'antinormativity' (after Wiegman and Wilson, after Halberstam), it is simply not the case that we know what antinormativity is, or that we have any sense of how to conceptualize the crude idea of being against a norm.[9] Rather than 'taking a side' pro or con, I want to step back to see how we got to 'antinormativity' or 'anti-antinormativity' in the first place. Surely the best way of doing that is not merely to *oppose* Wiegman and Wilson's *opposition* to that which queer theory putatively always *opposes*. In other words, the answer is not 'anti-anti-antinormativity'.

7 As noted above, the special issue clearly produced controversy, but to date it has not necessarily generated that much productive debate and dialogue. Mine is an effort to contribute to the latter.

8 Halberstam carefully deconstructs Wiegman and Wilson's framing of the *history* of queer theory.

9 Moreover, and as I will show in some detail below, in their own efforts to clarify terms, Wiegman and Wilson often achieve just the opposite: they repeatedly make a real conceptual muddle out of norms and normativity. And Halberstam's polemical response, though valuable for other reasons, is not designed to resolve these matters.

Therefore, instead of offering another round of opposition, instead of advancing another critique, I propose something of an *archeology* (in the Foucauldian sense) of the terms and concepts of this debate. The starting point for this investigation lies in seeing that Wiegman and Wilson are on to something (even if they failed to mine it properly)—something Halberstam himself misses. I agree with Halberstam that when Wiegman and Wilson purport to show that, in essence, the *entirety* of queer theory has committed itself to 'antinormativity', they wind up mainly with empty assertions (Wiegman & Wilson 2015, 3–4; cf. Halberstam 2015). Yet Halberstam says little about Wiegman and Wilson's effort to parse and critically rethink the meaning of 'norm' that they see at the heart of so-called antinormativity. Wiegman and Wilson's main argument here is that a more careful understanding of 'norms' should require us to rethink the 'antinormative' as a theoretical conception (and hence as a political position) (Wiegman & Wilson 2015, 14–16). Too little thought has been put into the question of what we ought to do with the broad problematic of normativity, and too often such necessary analysis has been displaced by an almost 'reflexive' denunciation of 'normativity' (Amin 2017).

In this vein, and departing from Halberstam, I try herein to read Wiegman and Wilson through the lens of the Gadamerian 'hermeneutics of charity'—in contrast to a 'hermeneutics of suspicion' (Weinsheimer 1985; Gadamer 1989; Davidson 1984; Ricoeur 1974)—which allows us to see that at the core of their project lies a meaningful attempt to (re)conceptualize norms in such a way as to undercut the idea that norms are simply things one would (or should) oppose. This project proves important because it has the potential to broach the crucial question of the status, meaning, or conditions of possibility of *opposition to the norm*.[10] In what follows, then, I work archeologically through the layers of Wiegman and Wilson's broadside against (what they see as) queer theory's persistent 'antinormativity' with an eye to developing a clear conceptualization of the relationship between oppositionality and norms. I will show that everything hinges upon a crucial *distinction* between terms that Wiegman and Wilson persistently *conflate*. This is the difference between, on the one hand, *opposing norms,* which is nothing less than a conceptual impossibility[11] (and thus a political non-starter), and, on the other, *opposing normativity and normalization,* which proves theoretically tenable (and sometimes politically necessary). The parsing of these distinctions is enabled by, and benefits enormously from, a return to Foucault's work from the late 1970s, since at this juncture in his career Foucault himself was experimenting productively with a variety of ways of understanding norms and opposition to them. Ultimately I will prove that through

10 Such work itself proves preparatory to developing political strategies, cultural practices, and material mechanisms that would give concrete form and shape to this opposition (on this point I owe a debt to Kadji Amin).

11 To be perfectly clear here, I distinguish my claim in the text, which is that we simply cannot coherently or tenably conceptualize the idea of 'opposing norms' *simpliciter* from the very different project of *conceptualizing* impossibility. The latter has a long history in continental philosophy, so much so that 'thinking the impossible' proves a common article and book title (for example, Gutting 2013) and provides many resources for theorizing politics (for example, Chambers 2013).

careful consideration of *norms, normativity,* and *normalization,* we can make sense of the nature and type of opposition that can be mobilized in response to normative forces and normalizing practices.[12]

This conceptual work begins by thinking about the nature and history of the concept of 'norm', in relation to a host of other related terms. Here Wiegman and Wilson can serve as a useful guidepost, because they appear to return to some of the key early theoretical resources for theorizing norms, including Canguilhem, Foucault, and Ewald. Yet their main source turns out to be Ewald, a significant point to which I will return below. They draw from Ewald the central idea that norms are *averages.* As such, norms have a wide and inclusive reach: 'averages don't exclude anyone' (Wiegman & Wilson 2015, 15). This means that norms have no singular force; they do not 'demand that each of us bend to a common point'; norms are diffuse and heterogeneous, since they require and depend upon deviant outliers (Wiegman & Wilson, 16, 15; citing Halley 2006, 121). In bringing this line of logic to its culmination, Wiegman & Wilson offer a long quote from Ewald about the 'normative equality' that is produced by the norm's demand for comparability: 'the norm is most effective in its affirmation of differences, discrepancies, and disparities. The norm is not totalitarian but individualizing', says Ewald (1990, 154; quoted in Wiegman & Wilson 2015, 16).

Ewald's account of the norm provides Wiegman and Wilson with their pivot point: if we come to understand norms as individualizing and equalizing, then we have no grounds or reasons to reject normativity. Hence Wiegman and Wilson conclude as follows: 'it is not clear what antinormativity would be […] because the norm is already generating the conditions of differentiation that antinormativity so urgently seeks' (Wiegman & Wilson 2015, 16). Wiegman and Wilson seek to defend a conception of the norm as fluid, dynamic, and systemic; above all, this means the norm ought *not* to be understood on what they call a 'center/periphery' model. In thinking about the norm as something that divides, 'antinormativity misses what is most engaging about a norm: that in collating the world, it gathers up everything'

12 Once we see what a valid 'antinormative' position looks like, we also see clearly why and how Wiegman and Wilson's anti-antinormative position might be said to boil down to what Halberstam disputatiously calls, 'straight thinking'. In this context I should expand briefly on a point hinted at in the text: despite my disagreements with Wiegman and Wilson, I believe they are responding to a real and significant phenomenon within the recent literature of queer theory—namely, a certain vagueness or ambiguity about norms, and about what it means to be 'antinormative'. As I show in the text below, Wiegman and Wilson see queer theory writ large as being opposed to norms; this is what they mean by 'antinormative'. Therefore, in a limited sense I concur: *some* recent theory has advanced (or loosely conveyed) the idea that norms themselves are something always to be opposed and rejected. One can even find rhetorical flourishes in a brilliant book like Halberstam's *The Queer Art of Failure*, places where in trying to underscore a radical political point, Halberstam could be taken to imply that he is rejecting norms *tout court* (2011, 89, 159, 181). One of my central points in this essay is to show that by carefully conceptualizing norms—hence delineating the distinction between norms and normativity—we see the viability of a certain form of 'antinormativity', one that does not oppose all norms, but that challenges specific normative enforcements of those norms. In this context I think it makes more sense to read authors like Halberstam generously, thereby seeing their 'antinormative' claims not as denunciations of all norms, but as radical rejections (both rhetorically and politically) of concrete normative orders and injunctions.

(Ibid., 17). Hence for them, the problem with the 'antinormativity' position in queer theory boils down to the following: antinormativity '*asphyxiates* the relationality' of norms, it '*turns* systemic play…into unforgiving rules', and it '*converts* the complexity of moving athwart' into static and 'anodyne' opposition (Wiegman & Wilson 2015, 18, emphasis added). I have italicized the active verbs from these quoted phrases, as they indicate something I see as crucial to Wiegman and Wilson's logic. Their account operates on two levels: first, they draw from Ewald to give an account of the norm as a comprehensive, relational average; then, they attribute to the work of queer theory a certain force for transforming the truth of norms into the falseness (i.e. the conceptual untenability) of 'antinormativity'.

We can now draw a close link between the structure of their account above and the crux of their critical claims against antinormativity. Those central claims read as follows:

> [1] antinormative arguments—entrenched or *en passant* [*sic*]—tend to immobilize the activity of norms. [2] By transmogrifying norms into rules and imperatives, antinormative stances dislodge a politics of motility and relationality in favor of a politics of insubordination. [3] Importantly, these lifeless norms (e.g., heteronormativity) don't stand prior to our antinormative analyses, awaiting diagnosis; rather, they are one of our own inventions. These norms [are] birthed by queer antinormativity… (Wiegman & Wilson 2015, 14.)

I have numbered each of the sentences (in brackets), so as to delineate my commentary on this key passage.

> 1) This sentence contains the core of Wiegman and Wilson's conceptual work: they wish to show that a generalized and wholesale 'antinormativity' operates by way of a fundamental misunderstanding of norms and their operation. Since norms contain and depend upon the marginal and excluded, since norms function by including that which would oppose them, it is impossible to be against norms *simpliciter*. This is all undoubtedly true. But Wiegman and Wilson move from this sound conceptual argument to an odd or ambiguous conclusion. Grammatically, the sentence can be reduced to the following: *antinormative arguments immobilize norms*. But what does it mean to say that an argument can 'immobilize' a norm? It is one thing to suggest that an antinormative argument *incorrectly conceptualizes* a norm *as if* it were static, but how could the argument about norms literally *immobilize* real-world norms? If I were to assert, mistakenly, that 'queer' lies outside and in utter opposition to the practically deployed norm of straightness, then I would fail to grasp how straightness works as a norm (i.e. it depends for its existence upon the deviant and the marginal, but it also thereby contains them within the norm). My false assertion, however, would not itself *alter* the norm of straightness. In this case we see a significant slippage between conceptualizing how norms work and engaging with norms concretely—a problem that returns with a vengeance in the final sentence of this passage (see below).

> 2) Here the language of Wiegman and Wilson again has 'antinormative arguments' *acting* in ambiguous or questionable ways. To read them without suspicion I take them to mean not that such arguments would literally transform norms into rules (though that is the language they use), but rather that within antinormative arguments we can identify an untenable conceptual move by which norms are treated *as if* they were simply rules or directives. The last half of the sentence contains the political and theoretical stakes of this problematic move, but the content proves fuzzy. Here the enemy—again, so-called 'antinormative arguments'—are accused of 'dislodg[ing] a politics of motility and relationality'. Rhetorically, it seems obvious that this is a bad thing for Wiegman and Wilson, but logically I do not know what it means to *dislodge motility*—on my understanding, 'motility', the capacity to move freely, would seem to be always already 'dislodged', i.e. displaced from any fixed position—nor what the implications might be.[13]
>
> 3) This brings us to the culmination of the logic in this passage and to a series of crucial theoretical and above all *political* claims. This key sentence begins with either deep intentional irony or a massive Freudian slip, as Wiegman and Wilson refer to heteronormativity, a normative force that draws precisely from the idea of heterosexual reproduction, as a *life force*; they label such heteronormativity a 'lifeless norm'. Putting that aside, the central claim here matters most—namely, that heteronormativity (apparently like all such norms) does not exist prior to its critique by queer theory. Theirs is not the assertion that heteronormativity is not natural, a declaration that Wiegman and Wilson might find banal, since it has been made so consistently by the very queer theorists that they call 'antinormative'. No, theirs is the much more radical claim that heteronormativity is a construction produced by that very queer theoretical critique. Heteronormativity is thus not a construction of the world that queer theory—*and queer politics*—would then identify and challenge; heteronormativity is 'one of our own inventions'.

At this point my efforts to implement the principles of a charitable hermeneutics reach their limits, since I simply cannot find a subtle, deft, or politic way to respond to this last claim: it is utter nonsense. Heteronormativity existed long before queer theory emerged to name it, analyze it, and mobilize resistance to it. Heteronormativity existed well before queer politics identified it as a target of subversion. And heteronormativity persists not because of but in spite of the best efforts of queer theory and politics to challenge it. In the face of more than a quarter of a century of work in queer theory that studies the concrete forces and historical impact of heteronormativity, I find myself at a loss as to how the following point could evade

13 It is true that Wiegman and Wilson refer specifically to the '*politics* of motility', but dislodging that object hardly makes more sense: if the 'politics of motility' were either stuck or entrenched, then it would still seem that dislodging it would be a good thing. Halberstam (2015) is similarly but much more extensively critical of Wiegman and Wilson's vague language when it comes to specifying the impact of what I am calling anti-antinormativity.

scholars who have been working in the field of queer theory: heteronormativity is in no way an invention of queer theory. As I will elaborate in much more detail below, heteronormativity is a *real-world force* related to and emanating from the norm of heterosexuality when that norm is upheld and enforced by social mores, by cultural expectations and traditions, by law, and by practices and institutions (see Chambers 2003, 26; cf. Chambers 2005).

Wiegman and Wilson reserve their strongest critical ire for the idea of heteronormativity as dividing the world between 'center' (hetero) and 'periphery' (non-hetero), thereby 'figur[ing] statistical distribution more or less in oppositional terms'. In response, they contend that this idea of 'bifurcation' leads to the confused idea of 'antinormativity'—that is, opposition to the center, the 'hetero'. Worse, it leads all the way, 'comically' they say, to the notion that one would stand against oneself (since we are always a part of some normative system). In this context, they suggest that the only thing 'hetero' about heteronormative systems is that they are *generative;* they are 'hetero' because of 'their barely containable, ever mobile heterogeneity' (Wiegman and Wilson 2015, 17). But as I have suggested above by drawing on the rich tradition of queer theory, and as I will show in more detail in my conceptual work below, heteronormativity does not divide the world into the binary choices 'straight' and 'gay'. Indeed, the narrow identitarian notion of 'sexual orientation' achieves that end. In contrast, the work of queer theory that has *named* and *analyzed* the real-world force of heteronormativity has simultaneously refused or resisted the division of the world into two fixed identity categories (straight and gay). The norm of heterosexuality *distributes* identities, practices, and ethoi across a range, while the *force of heteronormativity* operates across that space to delineate, judge, stigmatize, and normalize. This is why that force—of heteronormativity—impacts those in the so-called 'center' just as much (though in far different, and almost always less directly dangerous ways) as those at the periphery—a point that has been essential to so much work devoted to theorizing heteronormativity.

Rather than continuing on, at necessarily great length, to cite all the other excellent accounts of heteronormativity that would repeatedly show how it is a concrete and definite phenomenon *of the world*, with material effects, let me instead retreat a few steps in order to consider where Wiegman and Wilson's ostensibly fine-grained account of norms goes off the rails. In doing so, I intend to turn back sharply to my abiding question: what does it mean to oppose a norm? This also means to return to the historical context that Wiegman and Wilson themselves appear to be drawing from, but to portray it in a very different light than they do.

Let me clarify: by far the most important *theoretical* work done by Wiegman and Wilson centers on their conceptualization of norms. They state at the outset that their article has two parts: the first asserts the centrality of 'antinormativity' to the entire field of queer theory and the second 'offer[s] a more studied consideration of the character of norms' (Wiegman and Wilson 2105, 2). In advancing this 'studied consideration', as I have already shown above, Wiegman and Wilson turn to the work of François Ewald. By enfolding Ewald's work on norms within that of Foucault, a

thinker who unquestionably serves as a lynchpin source for the field of queer theory, Wiegman and Wilson present this turn as unproblematic. I am tempted to say that Wiegman and Wilson 'naturalize' the presentation of Ewald by linking him so tightly to Foucault: immediately upon first citing Ewald they describe him as 'following Foucault', but later this formulation—Ewald-drawing-from-Foucault—morphs into a reference to work done by 'Foucault and Ewald', seemingly together (Wiegman & Wilson 2015, 14, 15). In other words, on a first reading of these passages, Wiegman and Wilson seem to be 'schooling' members of the field of queer studies on norms, by returning to the field's very roots in the work of Foucault and Ewald. But on closer inspection it turns out that the mentions of Foucault prove superficial: in the four pages of detailed discussions of norms, Ewald is cited repeatedly and extensively—his work completely drives the argument—while Foucault is cited only once in the form of a short snippet of text from a very famous passage that Ewald himself cites (and that I also quoted at the opening of this essay). My point proves simple: it may at first seem as if Wiegman and Wilson's crucial conceptual work on norms draws from Foucault and his French contemporaries (Ewald and Canguilhem), but in fact the entirety of their argument rests on the work of Ewald alone.

This point matters because while both Ewald's theoretical understanding of norms and his mobilization of them for his political philosophy surely draw from Foucault's work, they also *diverge dramatically* from Foucault. More to the point, whereas Foucault always theorized power and norms in terms of the possibility of opposition or resistance, Ewald breaks significantly and decidedly with Foucault to develop an account of norms that can support a politics of interest-group consensus liberalism and a politics of neoliberalism. Such claims about the relation between Ewald's theory and politics may sound overstated, but they are not hollow assertions: one finds ample support for them by looking more closely at the development of Ewald's theory, and by sketching his own personal political trajectory.

On the first front, Michael Behrent has done a brilliant job of explicating the development of Ewald's thought, showing how it definitely emerges out of, but decisively departs from Foucault. Behrent tracks Ewald's intellectual trajectory, showing how he takes up and runs with the ideas of insurance and risk that were at the heart of Foucault's work in the late 1970s (Behrent 2010, 594–607). Ewald, however, carries those ideas as far from Foucault as one might imagine, since for him the 'philosophy of risk' served as the *point de passage* for *a rejection of any politics of opposition or resistance*. Ewald draws these conclusions based on his novel understanding (one not shared with Foucault) of risk as itself creating the grounds for 'solidarity between the employer and the worker', thereby eliminating any 'antagonism between capital and labor' (Ewald 1986, 11; quoted in Behrent 2010, 612). Accordingly, for Ewald the goal of politics becomes the end of politics—'the withering away of the state'—in favor of the rational management of the welfare state as negotiations between interest groups (Behrent 2010, 615). Crucially, as Behrent nicely underlines, this entire account of risk depends on Ewald's reconfiguration of the concept of norms: 'Ewald needed to use the term "norms" somewhat differently

than Foucault had in his best-known statements of the problem' (Behrent 2010, 615). In particular, he had to develop a 'nondisciplinary conception of normativity' very much distinct from Foucault's: 'norms, rather than being treated with suspicion, must be seen as an indispensable and even salutary dimension of modern society' (Behrent 2010, 616).

It is no wonder that Wiegman and Wilson find Ewald's work so useful in their own effort to challenge the idea that norms are restrictive and exclusive (Wiegman & Wilson 2015, 12). Indeed, Ewald goes much further in resignifying norms than Weigman and Wilson allow. For him, norms are not merely salutary, they are in fact central to democracy. Norms become the very fabric of modern society: they 'breed solidarity' as Behrent puts it, and in Ewald's own words, they become 'the modern form of the social bond' (Behrent 2010, 617; citing Ewald 1986, 584). Ultimately Ewald diverges so far from Foucault's critical account of norms and normativity that he eventually sees norms, and even normalization, as the central element of an all-inclusive, modern, and fundamentally democratic society. In a particularly powerful flourish he goes so far as to suggest an utter reversal of Foucault's consistent critique of normalization: 'Normalization is a type of power-knowledge that incites the invention of democratic procedures such that all interests, all components of society may negotiate with one another' (Ewald 1986, 593; quoted in Behrent 2010, 617). For readers of Foucault, it might be worth pausing for one moment to consider how astonishingly such a claim ignores or overturns the entire edifice of Foucault's project; for everyone else, allow me simply to specify that this definition of 'normalization' as the lifeblood of democracy bears utterly no resemblance to Foucault's theory.

Wiegman and Wilson may have had many reasons not to follow Ewald to these conclusions, but it bears emphasizing that he reached them in his 1986 dissertation, well before the 1990 article from which they draw. Perhaps they avoided those conclusions because at that point the tension between Ewald's approach and that of not just the central texts, but indeed most texts, of queer theory would have become palpably obvious. But Ewald's full expression of his theory of norms and normativity may also lead one to consider the way in which Ewald himself translates this conception into concrete politics. It would take us too far afield to consider this issue in depth, but it proves worthwhile to offer the briefest synopsis of Ewald's personal trajectory: in 1990 he founded a journal to support the French insurance industry; in 1993 he went to work for the professional organization representing that industry (FFSA); in the 2000s he became the 'most prominent intellectual advocate' for the pro-business federation 'Medef', strongly supporting their efforts to carry out a '*refondation sociale*'—'a coup of civil society against the state' achieved by renegotiating the social contract underlying the welfare state; and in 2006, Jérôme Monod, the business executive and personal advisor to President Jacques Chirac, awarded Ewald the *Ordre national de la Légion d'honneur* (the highest order of merit in France) for his work supporting Medef and FFSA (Behrent 2010).[14] Ewald's is

14 In this light, Antonio's Negri's 2001 description of Ewald as a 'right Foucauldian' appears rather fair-minded (Negri 2001, 4; cited in Behrent 2010, 586). Behrent's account also makes a great deal of sense out of the wide

not exactly a queer politics, and perhaps this is because his was not exactly a queer theory to begin with.

Bracketing these significant problems with the nature of Wiegman and Wilson's source material, let me shift focus to the conceptual work they do, by specifying two overriding problems with their account. First, they significantly and repeatedly overemphasize the link between the norm and an average. It is surely true that as we move from the idea of the norm as a rule or edict, to the conception of a norm as a way of measuring and comparing across a population—an *historical* move charted by Ewald, in a manner that does indeed follow Foucault—so we can see that the broad notion of 'the norm' overlaps and is bound up with the idea of statistical averages. And Wiegman and Wilson are also exactly right that neither norms nor averages have an 'outside', since they are measures designed to 'include'—or better, *contain*—all cases. Nonetheless, averages are reductive, and sometimes singular, in a way that norms are not, and for this reason among others, norms are absolutely irreducible to averages.

Let me delineate some of the key differences (between norms and averages) by starting with the idea of the average age of a population. This average can and will be expressed as a single number—say, 42-years old. But here immediately we can see that 'norm' and 'average' are not substitutable terms, since it wouldn't make sense to call '42-years old' a 'norm'. Indeed, there is absolutely no such thing as a 'normal' age.[15] And this helps us to see a simple but fundamental point: norms are meant to convey *distributions across a range*, where averages collapse that distribution into something singular.[16] This is why the best way of thinking about a norm is to visualize (perhaps even to draw) the normal bell curve. Here we can see how much broader the norm is compared to the average: the average is a *point* on the bell curve, but the norm is a distribution of cases, *a dispersion across the entire curve*.[17] Only in this very specific way can we say that the norm 'contains everything'. Saying that the average age of the population is '36.8 years' does not 'include' everyone in the entire group. The process by which the average was calculated surely *counted* everyone in the group, but 36.8 is an almost meaningless number if we want to ask about boys under the age of 4 or grandmothers over the age of 80.

This brings us to one of the crucial features of the normal curve, *standard deviation*.[18] To talk about a norm is to convey the idea both of averages (means,

areas of agreement, and general rapport between Ewald and the famous neoliberal Chicago economist Gary Becker, as brought to light in the transcripts of their 2012 University of Chicago seminar (Becker et al 2012).

15 Here I explicitly reject Wiegman and Wilson's general claim that '*averages are synecdochal measures of the entire group*' (Wiegman & Wilson 2015, 15, emphasis original). As my example in the text shows, often knowing an average tells us very little about the group, and, to underscore my central point: the average cannot bear the weight of standing in for the 'norm'.

16 In this context, it matters not whether we work with mean, median, or mode as our precise statistical measure for 'average' since in all three cases we get a singular quantity, not a distribution.

17 As I will show below, the *normative* is a *force* that operates across this distribution; it is a force generated out of the field produced by the dispersion of cases. As they once said in physics (particularly about gravity), it is a force at a distance.

18 Has there ever been a queerer concept than this idea, central to statistics, that *deviation*, distance from the

medians, and modes) and the deviation from those averages. Standard deviation is a statistical measure of the *dispersion* of values; it tells us *how many* data points lie *how far* from the mean. If the standard deviation is low, then most cases fall close to the mean (picture a thin and tall bell curve); if the standard deviation is high, then the cases are spread out much further away from the mean (picture a wide and short bell curve). There is no need to detail the complex and sophisticated properties of normal distributions, since the point is quite simple: norms take a variety of shapes and forms, and they cannot be reduced to averages since, crucially, *one can have the same mean and median values while having radically different distributions of those values*. And this, after all, was one of Foucault's main points: norms tell us about distribution and dispersion, variance and difference, across a range of cases. In one sense then Wiegman and Wilson are right to conclude that a norm is not something that one could simply be against—one cannot be 'anti-norm'—but they oversimplify, and worse, conceptually flatten, the account of the norm when they link it so strongly to the much more basic, and reductive, notion of 'average'.

Furthermore, this first problem bleeds into the second, which is that Wiegman and Wilson consistently fail to distinguish the idea of a norm from a whole host of related, *yet absolutely conceptually distinct*, terms. To start the list I would offer: normativity, normalization, and the normal/abnormal pair (Duggan 2015). The fundamental flaw in Wiegman and Wilson's argument is that they attempt to lever their putatively richer account of 'the norm' and use this account as a tool against the so-called 'antinormative' position, but in their eagerness to wield 'the norm' as a weapon against antinormativity, they fail to see that *the* norm is only one among a host of related terms and concepts. In this context, I happily grant, and indeed affirm Wiegman and Wilson's point that it makes no sense to be *against norms*. The norm in the singular is not the sort of thing that it would be meaningful to oppose. However, 'the norm' is not the same thing as *normativity*, and it is not the same thing as *normalization*.

In order to unpack these crucial distinctions with some care, let me start to develop an account of the difference between norms, on the one hand, and this other clutch of terms, on the other, by insisting on this point: *not all norms* (not all distributions of cases or populations) *come to matter in a social order in the same way*. We can take human anatomy as an example: numerous characteristics of human body types are distributed and dispersed across a wide range—height, hair color, foot size, etc. And many of these characteristics are also *roughly* binary, with most of the population appearing to fall within two categories: attached and detached earlobes, tongues that roll and those that do not, double-jointedness or lack thereof, and last but certainly not least, sex. Thus, using the analysis from above, we can clearly say that there is a norm for the distribution of sex as a human characteristic—most

mean, is itself *standard*? Certainly not for Wiegman and Wilson, who say that, like norms, standard deviation is 'similarly expansive and inclusionary as a measure' (Wiegman & Wilson 2015, 22). But this makes no sense, even statistically. Standard deviation is a measure not of 'inclusion' but of *distance*; it specifically tells us how *far* a specific case falls from the median point on the normal curve.

individuals in the population are either male or female,[19] though definitely not all (Fausto-Sterling 2000)—and there is a norm for the distribution of whether one can roll one's tongue. Similarly, we could say that there is a norm for sexuality (i.e. so-called sexual orientation) and one for the distribution of hair color.

Yet the limitation in these two pairs of analogies should already prove obvious: in each example, with the second named characteristic, society seems not to care very much if at all about its distribution across the population, while with the first named characteristic, society itself appears to have been constructed and reconstructed very much around those very characteristics. Sex and sexuality are not just norms, not mere averages, but *norms that have been enforced by being built into social ethics, laws, customs, traditions, expectations, and even into physical structures*. We know heteronormativity is not the invention of queer theory simply by going to the bathroom. There, we still usually come face to face with a single binary choice of the male option or the female option. These enforced choices reflect the importance of *both* the norm of sex (the two sexes are our only options) and the norm of sexuality (since bathroom segregation is premised upon the presumption of heterosexuality).[20] The example shows us that there is much more to norms than their existence as a distribution of cases.

In showing here how some norms *matter* in ways that others do not I have also been offering an incipient definition of 'normative'. The word 'normative' is clearly the adjectival form of 'norm', meaning relating to or deriving from a norm. But the term normative also connotes propriety, value, and notions of right and wrong; this is a point that even Ewald himself highlights, and that Wiegman and Wilson ignore, when he stresses that 'norm' points to 'perhaps most significantly

19 It has been suggested to me by a brilliant colleague and good friend that certain scholars working today on the study of sex and gender might contest my phrasing here that 'most individuals are male or female', and that I could instead use the phrase 'so-called male or female'. This hypothetical critique strikes me as potentially significant, yet, at the same time, ultimately untenable and counterproductive. As a radical constructivist and longtime reader of Judith Butler, I would be the first to affirm that 'sex' is not pre-discursive or a-political: 'male' and 'female' are themselves only grasped *through the discourse of gender*. But to say something is discursive is not to say it is unreal, and if we insisted on putting 'so-called' in front of all constructed identifying terms, then 'so-called' would become the most used word in the English language – so-called male, so-called teacher, so-called tongue-rollers, so-called Black person, so-called Irishman, etc. In the text above I am suggesting that the meaningful and important differences between male and female depend not on something natural or innately biological, but on the social and the political. Surely part of the problem here is the assumption, *made more often by humanists than by scientists*, that the biological is not itself historical. There are physical attributes (genitalia, hormones, chromosomes) of most individuals in a population by which we distinguish 'male' from 'female', and there are physical differences by which we distinguish detached from attached earlobes. Rather than adding 'so-called' in front of a biological term in order to designate our theoretical radicality, we ought instead to consider the historical imbrication of the social and the biological. In my analysis here I am pointing in the direction of that imbrication.

20 To complete the logic, simply imagine a world in which 90% of all individuals were homosexual. In such a world there would be no reason to segregate bathrooms based on sex. Today's political battle over the rights of transgender people to use the bathroom of their choice provides a stark and obvious example that heteronormativity is a real, material force—a thing of the world, and certainly not merely a conceptual production created by the academic field of queer theory—since the opposition to allowing transgender people to choose their preferred restroom absolutely depends on the presumption of the naturalness or ubiquity of opposite-sex desire.

of all, a principle of *valorization*' (Ewald 1990, 14, emphasis added). Emphasizing this principle lets us see a crucial distinction between, on the one hand, the bare fact of a normal distribution of some characteristics within a population—a simple norm—from, on the other, the production of standards and ideals—a normative force. Thus we can draw a clear and helpful distinction between, on the one hand, the mere existence of gender *norms*—the variety of ways in which bodies, behaviors, actions, and expressions convey a wide continuum of masculinity and femininity—and, on the other, the enforcement of a *normative* conception of appropriate and inappropriate gender (again, in the shape of bodies, the expression of meaning, and the performance of actions).

In addition to norm and normative, we also have the idea of the *normal*, wherein the normative force emanating from the existence of a norm leads to a binary distinction between identity/action/behavior/expression that is normal and that which is abnormal—or, according to the language of psychoanalysis and psychology, *pathological.* Foucault devoted an entire annual series of Collège de France lectures to the figure of the 'abnormal' (Foucault 2003b). But even Ewald stresses this point, in the very same article that Wiegman and Wilson cite, and he does so in a way that contradicts their interpretation. In underscoring the extent to which a norm contains its own margins, Wiegman and Wilson refuse the idea of interpreting norms in binary terms; they harshly reject an understanding of norms through the language of center/periphery, calling the very idea 'something of a nonsense' (Wiegman & Wilson 2015, 15–16). To do so they must ignore the words of their most important source; Ewald writes, 'norms involve polarity' based upon their production of a stark 'division between the normal and the abnormal' (Ewald 1990, 157). It is true that, as Ewald himself explains, the normal/abnormal distinction occurs through a process of inclusion rather than absolute exclusion; once again, there is no 'outside' of a norm. Wiegman and Wilson, however, appear to want to take the point further, to inflect 'inclusion' with liberal political connotations (in the sense that an 'inclusive' idea of the norm would be linked to a political system based upon the idea of equal respect, dignity, and rights for all individuals). As I have shown above, such a move might well be supported by Ewald's own theoretical and political development, but in this case at least, Ewald's text indicates something quite different—'no escape' (Ewald 1990, 154).

Furthermore, while it is surely the case, as Wiegman and Wilson argue, that the 'periphery' does not lie outside the norm, this fact simply does not have the implications that they imply. After all, the 'periphery' also does not lie outside the world—it, too, is a particular place within the world. The periphery is not the *hors-texte* for the very good reason that 'there is no *hors-texte*' (Derrida 1967, 158–159). A normal curve has tails and these are, by definition, *peripheral* vis-à-vis the center of the curve. The fact that the abnormal or pathological is 'included' within the normal distribution does not change either the fact or the force of the normal/abnormal binary (Foucault 2003b). To take a blunt example: the distribution of the population based on genitalia would *include* some portion of babies that are born

either with both male and female genitalia or with ambiguous genitalia that cannot simply be categorized as distinctly male or female. That these babies are 'included' in the distribution does not serve as any sort of mitigating factor when it comes to consideration of the medical and political history of practices that have deemed them 'abnormal' and used their pathological status as the ground for sometimes violent medical intervention—all designed, of course, to 'make them normal'.

Finally, the idea of the normal can be played out through daily practices, regulatory regimes, and rules and laws in such a way as to be *normalizing*—that is, enforcing a conception of the normal and coercing individuals (in both subtly and forcefully explicit ways) into 'becoming normal'. It is at this point, finally, that I want to return to Foucault's work on norms. As I articulated in the opening of my essay, Foucault saw his theoretico-historical project as an effort to conceptualize the new mechanisms of power emerging in Europe in the 17th and 18th centuries—in order not only to understand their operation but also to provide theoretical tools for resisting those very technologies of power. In his initial attempt to *name* this new form of power relations, Foucault called it 'disciplinary' power, and he described its working in terms of the process he called 'normalization'. Foucault's massively popular and widely read *Discipline and Punish* painted a vivid and animating portrait of disciplinary practices and institutions, and it theorized disciplinary power in terms of his concept of normalization.[21] Allow me then to quote one of the most famous passages in Foucault's published works:

> Like surveillance and with it, normalization becomes one of the great instruments of power at the end of the classical age. For the marks that once indicated status, privilege and affiliation were increasingly replaced—or at least supplemented—by a whole range of degrees of normality indicating membership of a homogeneous social body but also playing a part in classification, hierarchization and the distribution of rank. In a sense, the power of normalization imposes homogeneity; but it individualizes by making it possible to measure gaps, to determine levels, to fix specialities and to render the differences useful by fitting them one to another. It is easy to understand how the power of the norm functions within a system of formal equality, since within a homogeneity that is the rule, the norm introduces, as a useful imperative and as a result of measurement, all the shading of individual differences. (Foucault 1977, 184.)

A lot can be said, and has been, about Foucault's project, which is simultaneously historical, philosophical, and political, but one thing is safe to say: generations of his readers have taken his account of normalization as a way understanding how one might mobilize *opposition* to this 'great instrument […] of power'.

21 Ewald also discusses normalizing practices at length. Yet Wiegman and Wilson entirely disregard these passages in Ewald: they discuss only norms, without considering the multitude of ways that these other elements, while related to norms, are not reducible to them. They do not cite *Discipline and Punish* or *any* of Foucault's Collège de France lectures; only *History of Sexuality, Vol I*, appears in their list of works cited.

Importantly, however, there has been a great deal of confusion over the years about both the *type* of new power that emerges in modern Europe and the *role* of norms in relation to this power. To simplify, much of this incertitude can be traced to the fact that Foucault changed his mind and changed his terms, without fully clarifying those terms in his published works (nor in his unpublished writings). Putting it schematically we can say that initially Foucault mobilized the conceptual pair discipline/normalization in order to capture the analytics of this new form of power, and this is what the reader finds in *Discipline and Punish*, published in 1975. Yet after exploring the disciplines and their normalizing practices for many years, Foucault came to the conclusion that something was missing. Hence in the final Collège de France lecture given in 1976, Foucault summarizes his notion of disciplinary power and then says the following: 'now I think we see something new emerging in the second half of the eighteenth century: a new technology of power, *but this time it is not disciplinary*' (Foucault 2003a, 242, emphasis added). Both here and in *The Will to Knowledge*, published the same year, Foucault calls this other new power *biopower* (Foucault 2003a, 243; Foucault 1978, 139). Yet in this widely read published book—the first in the famous *History of Sexuality* series—Foucault is not exactly clear about how the distinction between disciplinary power and biopower relates to the question of norms. Luckily (or perhaps more confusingly, depending on one's perspective), in the next year's series of lectures, given in 1978, Foucault significantly clarified his terms by proposing a more subtle distinction between the power of normativity, on the one hand, and the force of normalization, on the other. In those lectures he differentiates the process of *normation* from that of *normalization*. The former is effected by disciplines and centers on the norm as an ideal model, while the latter is carried out by security apparatuses (biopower) and functions by way of normal curves that map the distribution of populations (Foucault 2004, 57). Notice that Foucault here gives a new name, *normation*, to the phenomena he had previously described as normalization, while reserving the latter term strictly for a process tied up with biopower.

The above begins the important work of clarifying Foucault's terms, work which (given the ambiguity in his oeuvre) needs to continue. At this point, I draw from this preliminary sketch two important and related points. First, it is exactly the difference between normation and normalization—that is, the difference between an understanding of the norm as seen through the lens of disciplinary power and an understanding seen through biopower—that serves as a condition of possibility for Ewald's unique (and thoroughly conservative) development of his specific conception of norms. Behrent specifies this key issue, showing that Ewald was 'invoking this nondisciplinary conception of normativity' when he described norms as the lifeblood of democracy (Behrent 2010, 616). In other words, it is only on the basis of Foucault's move, after *Discipline and Punish* and, in effect, also after *The Will to Knowledge* (two central texts for the so-called founding of queer theory) to distinguish disciplinary power from biopower, and thereby to develop two different theorizations of norms—only on this ground could Ewald build an

utterly different account of norms as the modern social bond. Second, and even more significantly, Foucault himself did not use the distinction between normation and normalization in order to suggest a 'salutary' conception of norms. For Foucault, both techniques of normation and techniques of normalization are bound up with mechanisms of power that, while surely not 'bad' in and of themselves are certainly always *dangerous*.[22] In the lectures where Foucault develops the distinction to the fullest, he also continues to press the importance of locating 'points of resistance' to power (Foucault 2004, 194). One can viably argue that Foucault cleared the path that Ewald took from risk/insurance to a rejection of all politics of resistance in favor of social management, but *Foucault himself did not follow this path*.[23] Thus, as readers of Foucault we simply cannot 'snip the thread' that ties Foucault's theorization of normativity/normalization to his conceptualization of the possibility of resistance—of opposition to those forces (Foucault 2004, 194; phrase borrowed from Halperin 2002, 4).

For my specific purposes here, it is this possibility of opposition that matters most, and therefore we can set aside the question of the subtle differences between normation and normalization in order to focus on the more fundamental distinction—that between a norm, on the one hand, and *both* normativity and normalization, on the other. My reading of Foucault above aims to re-inflate the conceptual apparatus that Wiegman and Wilson collapse. To pose the question of opposition to norms it will not do to talk only about 'normativity' (and 'antinormativity'); we must consider, in all their complexity, the forces of normation, of normalization, and of the pathological logic of the normal/abnormal pair.

In this context—that is, armed with even this most basic schematism of broader concepts—we can clearly see that while it would make no sense to *oppose* norms, one could doubtless oppose certain specific forms of *normativity* and *normalization*. For example, I have previously argued that Judith Butler's understanding of gender as a regulatory practice is designed to challenge the normativity of specific forms of gender (Chambers 2007, 662; Butler 1999, 23). In this concrete sense it proves both valid and illuminating to say that Butler's arguments have an *antinormative* valence: she is analyzing, criticizing, and seeking to transform a specific gender normativity. But to say this is in no way to suggest that Butler's work simply *stands in opposition* to norms, nor is it to imply that Butler naively thinks that norms are singular.

One can reject, resist, and in general 'be against' certain forms of normativity and certain practices of normalization, and doing so does not commit one to an untenable understanding of norms. To the contrary, in understanding the relation between norms, on the one hand, and normativity and normalization, on the other,

22 'My point is not that everything is bad, but that everything is dangerous' (Foucault 1983a). This has long been a favorite Foucault quote for a variety of writers, but it is worth stressing a follow-up point of Foucault's that has been nicely highlighted by Margaret McLaren: Foucault's claim cannot be reduced to relativism or nihilism, since he insisted that 'everything is not equally dangerous' (Foucault 1983b; cited in McLaren 2002).

23 And it is Foucault's work, not Ewald's, that has served as both a foundational and continuing resource for queer studies.

we see starkly how an 'antinormative' argument entails taking proper account of what Wiegman and Wilson point to as the dynamic, inclusive, and capacious character of norms. Here, however, we should also note that norms are not only 'capacious' in this sense; they are also differentiating. Not all norms are merely what Wiegman and Wilson call 'systemic play'. They quote Ewald to the effect that the norm 'allows individuals to make claims on the basis of their individuality and permits them to lead their own particular lives' (Ewald 1992, 154; quoted in Wiegman & Wilson 2015, 16). As a limited account of the relationship among 'cases' within a statistical normal distribution of those cases, this is fine as far as it goes. Yet this may be their most egregious misuse of Ewald, since the text they quote comes immediately after, and as an interpolation of the thesis-like topic sentence of Ewald's paragraph, where he writes: 'the norm can also work to *create inequalities*. This is, in fact, the *only objectivity* that it provides' (Ewald 1990, 154, emphasis added). That is, even for Ewald, the norm underscores our 'equality'—in the sense that it treats us all as statistically similar cases—*only to the extent that it produces objective inequalities* by measuring the gap between and among us.

We must remain vigilant about not extrapolating from the individual cases to the life of real-world individuals who are subject to the *normative force* of norms of gender and sexuality. The queer adolescent who is being beaten by bullies at school and disowned by his parents at home, is not 'allowed' or 'permitted' to lead his own life. Rather, the normative force of patriarchy, misogyny, and heteronormativity demands that queer kid's stigmatization; it seductively calls for violence against him so as to normalize him or make an example of him for others who might be tempted to express their own deviance from the norm. And all of this is because norms do not exist in a vacuum—a point that has crucial political implications. To expand upon both the theoretical and political significance of this idea, we can return one last time to Wiegman and Wilson's own favored source on norms:

> As norms can only exist socially, there can be no such thing as a norm that exists in isolation, for a norm never refers to anything but other norms on which it depends…when the norm appears, it establishes itself necessarily as an order: *the normative order* that characterizes modern societies. [Hence] it is essential to distinguish between the norm itself and the apparatus, institution, or technique of power that brings it into action and functions according to its principles. (Ewald 1990, 153.)

This distinction between the norm and the *dispositif* of power that upholds and enforces norms is exactly, and consistently, the distinction Wiegman and Wilson fail to make and frequently elide. The history of work in queer theory that they seek to displace or overturn with the label 'antinormativity' includes a rich body of literature that attends to just this distinction, by analyzing the history of those apparatuses, institutions, and techniques of power that mobilize various norms in a variety of ways.

Hence we can see that the critique of heteronormativity, a critique that

links various diverse (and frequently contentious) strands of queer theory, is not based upon, nor is itself, a naive 'opposition' to the statistical distribution of sex and sexuality. Like feminist critiques of patriarchy and anti-racist critiques of white supremacy, the queer critique of heteronormativity questions and challenges the normative social and political order that seeks to install and preserve the normative force and normalizing ideal of heterosexuality. In doing so, queer theory has often offered detailed theoretical and historical analyses of the ways in which heterosexuality is itself constructed as a norm and instituted as a social and political ordering principle. Yet this type of critical work, this delineation and deconstruction of heteronormativity as a real-world force should never be confused with the idea that queer theory artificially 'constructs' heteronormativity.

There can be no doubt that the *term* and the *concept* of heteronormativity are produced by—are theoretical constructions of—the work of queer theory. But the idea that a 'norm' itself could be 'invented' by an academic project proves totally untenable on its face—for reasons that Wiegman and Wilson's own analysis makes clear. Despite this fact, they consistently fail to attend to another fact—namely, that *norms are things of the world*. Heterosexuality is not a product of nature, nor is it a construction of queer theory. Heterosexuality is itself the powerful invention of a heterosexist and heteronormative world. It is produced not only linguistically but also materially in the world, and it is sustained by practices of the world. This is why the normative force of heterosexuality—the power of heterosexuality when it appears and operates *as a norm*—comes before the field of queer theory emerges. But just as gay liberation movements, especially through the act of coming out, *named* and thus brought to light the possibility of a gay identity (and hence, retroactively, of a straight identity), so too does the naming and conceptual articulation of heteronormativity bring to light the force of heterosexuality when it functions as a norm. None of this has anything to do with the 'bifurcation' between 'centers' and 'peripheries' (though surely Wiegman and Wilson do not need to be reminded that normal distributions have central humps and marginal tails); it has to do with normative and normalizing forces, and here again, it seems worth remembering that these forces apply themselves to and affect those in the center of the normal distribution—i.e. so-called 'straight people'—on a daily basis. If queer theory tomorrow stopped being 'antinormative', or otherwise moved 'beyond' antinormativity, one can be certain that heteronormativity would not go anywhere.

Let me conclude by synthesizing: norms are more than averages; they are distributions. Normativity is more than a norm; it is a name for the power relations produced and sustained when a norm comes to *matter* within a particular social order (or subculture of that order). Normativity connotes, in a way that 'norm' by itself need not, a distribution understood to be—and often culturally and politically enforced as—proper, truthful, and/or *right*. This compulsive power of normativity can thereby render the tails of a normal curve as wrong, deviant, and/or pathological. Hence normativity can generate a polarity between the normal and the abnormal. Normalization is more than normativity; it is the hegemonic enforcement—through

disciplinary practices or biopolitical apparatuses[24]—of the normative distribution, the continued sustenance of the normative polarity.

In concrete terms, this means that we have, first, a distribution of sexual identities and practices that can be understood as a norm, wherein most people identify as and practice a sexuality that we have (historically) named heterosexuality. But more than this, we then also have, second, a singling out of the idea of heterosexuality as a natural, proper, healthily reproductive sexuality—the right sexuality—that leads to the construal of non-hetero identifications and expressions of sexuality as deviant, unnatural, or, in a word, queer. And this gives us, third, heteronormativity: the normative force of the norm of heterosexuality when it is held up and imposed as a regulatory ideal—supported by other norms, by culture, by tradition, by numerous laws, and by countless institutions. Therefore, as Wiegman and Wilson suggest, it would be illogical to be against the basic idea that there is a norm around sexuality in the sense that there is a normal statistical distribution of sexual identities and practices. However, it makes not only logical sense but also good political sense to *oppose* those practices whereby we (that is, society as a whole) mobilize the norm of heterosexuality as a normative and normalizing force to render and preserve society as straight.

Antinormativity therefore becomes not just viable in a theoretical sense—that is, conceptually coherent—it also becomes possible and sometimes necessary in a political sense. We cannot be against a norm, for a norm is not the sort of thing, in and of itself, that one could oppose. But opposition to normativity and normalization remains a rich resource for theory and politics, often essential to analysis and sometimes 'as crucial as bread' (Butler 2004, 29).

24 As I describe above, Foucault first uses the word 'normalization' in the same sense I do here, to apply to both disciplinary practices and security *dispositifs*. He later suggests in his lectures, but not in his published work, the distinction between 'normation' (normalization as it occurs through disciplinary power) and 'normalization' proper (applying more narrowly to biopower) (Foucault 2004, 57). For the sake of clarity in the final formulation I am offering here, and because Foucault's distinction has yet to take hold in the literature, I leave this subtle distinction out of my summary at this point in my text.

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A Weak Anti–foundationalism: Law at the Vanishing Point

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1. Introduction

The idea of law without foundations may strike us at first as an oxymoron. Law, after all, *is* a foundation, a basis for society, for politics even for justice. Yet there is a long and radical tradition of thinking of just this. Thinkers and writers ranging from Nietzsche to Walter Benjamin and from Daniel Paul Schreber to Jacques Derrida and Giorgio Agamben have attempted to conceptualize what an 'anti-foundational' law might look like (not always in those precise terms of course), how it functions, what are its moving (and unmoving) parts. In thinking about this tradition, there is one thing that strikes me as a near constant, namely a reluctance, at the end of the day to completely eliminate the foundation that the law seeks to escape from. That is, for each thinker to some degree or other (sometimes it is barely at all) there is a remnant or trace of the foundation in question. In this way, the question to ask is not so much 'can there be law without foundation?' but 'why do anti-foundationalist legal thinkers hold onto a bit—even if just a vanishingly small bit—of foundation?' What does this say about the law that they conceive of and the goal of having a law that is fully without foundation?

In this essay I will visit this question, looking at the way that the foundations for law are shrunk almost but not quite to the vanishing point. I will look at three of the authors I mentioned above, Nietzsche, Benjamin and Agamben, and their own considerations of law, plus a short discussion of Antonio Negri (who is not discussing law per se but who engages in a similar hesitation at the brink of a fully anti-foundationalist philosophy). In each case, my argument will be that the hesitation that we see with these authors involves not so much a fear of the results of a full departure from foundationalism (in most cases these authors welcome precisely that), but rather a recognition that foundations are constantly reasserting themselves.

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The position of the anti foundationalist thinker is something like a situation when one tries to dig a hole in a very muddy and boggy place and the hole keeps refilling with mud as fast as one can dig it out. In this case the 'mud' is the foundation and the 'hole' is the attempt to think of law without one. What I am looking for then is not a full anti-foundationalism but rather what I have chosen to call a 'weak' anti-foundationalism (not weak in the sense of powerless but more along the lines of Benjamin's idea of a '*weak* messianic power'), an anti-foundationalism that holds back from a full victory over that which it struggles with (which would actually be a defeat, as I will argue further), one that goes to the brink but not quite over that brink in terms of its opposition and its resistance (Benjamin 2003, 390).

In the face of this tendency, the thinkers I will be looking at engage in an oppositional rather than a fully liberational strategy for law, leaning hard against a foundationalism that there is never any risk of fully abandoning. The dangers of chaos, dissolution and the like that are frequently trotted out when more liberal or traditional thinkers contemplate an anti-foundationalist approach to law are, in this view, not real dangers but chimeras that seek to limit the degree to which foundationalism can be resisted in the first place. The thinkers I am looking at then ultimately seek, not so much to destroy the foundations for law (and politics and other things as well) so much as they seek to maximally oppose and resist them. There can—and actually must—be law in such a stance but it needn't only be law that develops out of foundationalism itself. Instead, an attention to this question shows that there are a plethora of other kinds of law, some directly oppositional (a mirror image as it were) and others hardly related to conventional forms of law at all. These other laws also exist and become visible and available to us the more we push back on the assumption that law can be one way only.

2. One span from [the] goal: Nietzsche and the unfulfilment of law

To begin this discussion, let me start with Nietzsche who, more than any thinker, is most responsible for a kind of committed anti-foundationalism, including in terms of the question of law. One key place where he does this comes in a section of *Thus Spoke Zarathustra* entitled 'On Old and New Tablets' ('*Von alten und neuen Tafeln*' in the original German). That section starts with the line 'Here I sit and wait, surrounded by broken tablets, and new tablets half covered with writing' (Nietzsche 1995, 196). The old and broken tablets are clearly meant to represent Moses's tablets that contained the Ten Commandments and which Moses himself subsequently dashed to pieces. In this instance too, those tablets have been thrown down and broken to make room for new law which is only 'half' written. For much of the section that follows, Zarathustra remains in a highly critical mode about the value and function of law as such, particularly in terms of its 'black letter' inscribed and dogmatic aspects. For example, speaking of the old tablets, he says:

> 'Thou shalt not rob! Thou shalt not kill!' Such words were once called holy; one bent the knee and head and took off one's shoes before them. But I ask you,

> where have there ever been better robbers and killers in this world than such holy words?
>
> Is not there in all life itself robbing and killing? And that such words were called holy—was not truth itself killed thereby? Or was it the preaching of death that was called holy, which contradicted and contravened all life? O my brothers, break, break the old tables! (Nietzsche 1995, 203.)

Our duty as subjects of law, it seems, is to destroy the law, to smash the legal codes and strictures that otherwise bind us as legal subjects. Yet note that in the text already cited, the law hasn't quite been destroyed. First of all, the law, as Nietzsche tells us, is not vanished but only broken and in ruins. It is still legible as law, even if its brokenness suggests a different reading and experience of law as such. Also, it seems as if not all the old tablets have been destroyed. When Zarathustra says 'O my brothers, break, break the old tablets,' he is allowing that there still are tablets to be broken (or maybe we can keep breaking the ones that are already partly destroyed, Nietzsche isn't entirely clear on this point). Furthermore, and this is perhaps the most critical point of all, we see that even as old tablets are broken, new tablets are being written. Is it possible that as soon as those tablets are complete they too will be treated as 'old tablets' and destroyed accordingly? Is the law for Nietzsche just a kind of conveyer belt that is constantly shuffling new law for old but never—even in the process of destroying the tablets as soon as they are done—actually breaking away from law itself?

Indeed, Nietzsche seems to suggest precisely that possibility when, a bit further on in the section, he writes:

> Break, O my brothers, break this *new* tablet too. The world-weary hung it up, and the preachers of death, and also the jailers; for behold, it is also an exhortation to bondage. Because they learned badly, and the best things not at all, and everything too early, and everything too hastily; because they *ate* badly, therefore they got upset stomachs; for their spirit is an upset stomach which counsels death. For verily, my brothers, the spirit *is* a stomach. Life is a well of joy; but for those out of whom an upset stomach speaks, which is the father of melancholy, all wells are poisoned. (Nietzsche 1995, 206.)

Here we can see that the new tablets, like the old, quickly become ossified relics worthy of destruction. The law is (as the passage just cited suggests) never performed slowly and carefully enough; it is never free or deliberate enough. A truly correct law can therefore never be produced or discerned. Nietzsche suggests something like this when he writes: 'precisely this is godlike that there are gods, but no God' (Nietzsche 1995, 203). In other words, there are many attempts at a godlike perfection but there is no perfection per se. So in this sense the law is always failing to be 'Law' and, accordingly, it must always be continuously destroyed. Thus Nietzsche writes further, 'O my brothers, there are tablets created by weariness and tablets created by rotten, rotting sloth' (Nietzsche 1995, 207).

This kind of endless failure raises a question; if making law does nothing but repeat the same mistakes, the same hastiness, sloth and weariness of the old tablets, if these new tablets are made only to be (or deserve to be) destroyed, what is the purpose of law? Why is Zarathustra sitting amidst these old and new tablets if law seems to be something futile and entirely negative?

Nietzsche supplies the beginnings of an answer when he argues that it is not the content of law, but the process of making law that is important, what is worth maintaining (and anyway, it seems that the function of making laws is unavoidable for Nietzsche). Depicting one of these hewers of law into tablets, Zarathustra says:

> Behold this man languishing here! He is but one span from his goal, but out of weariness he has defiantly lain down in the dust—this courageous man! Out of weariness he yawns at the way and the earth and the goal and himself: not one step farther will he go—this courageous man! Now the sun glows on him and the dogs lick his sweat; but he lies there in his defiance and would sooner die of thirst—die of thirst one span away from his goal! Verily you will have to drag him by the hair into his heaven—this hero! Better yet, let him lie where he lay down, and let sleep, the comforter, come to him with cooling, rushing rain. Let him lie till he awakens by himself, till he renounces by himself all weariness and whatever weariness taught through him. (Nietzsche 1995, 207–8.)

Here we see that there *is* a great promise in making law tablets, namely the failure to complete them. In a particularly Nietzschean twist, "weariness" here results, not from failure to complete a task but from it's opposite; the lawmaker—when that is all he is—is weary from the endless production of completed tasks. His weariness reflects that nothingness that such completion produces, as opposed to an energy that comes from finally failing to finish the task. Rather than the endless recycling of law that Nietzsche depicts initially, we see here that there is a kind of rest, if not escape, from this endless, wearying cycle in the form of stopping just short of the goal (missing it by one single span).[1]

The 'courage' that Nietzsche admires in this figure is the courage to not complete the tablet, to 'die of thirst one span away from his goal!' This figure resists, therefore a kind of metaphysics of completion, a teleology that demands its own fulfillment. Let's therefore call him the Law unfulfiller (an admittedly awkward term for a strange and uncomfortable role).

This seems to be a complete refutation of the transcendent and metaphysical qualities of law. Indeed, Nietzsche tells us that this figure would have to be 'drag[ged] by the hair into his heaven'; he resists even that kind of completion and prefers to lie where he is, content in his non completion and his non fulfillment.

Nietzsche sees the Law unfulfiller as being courageous and heroic; he is the one who refuses, who stops the endless cycle of making and breaking tablets of the law. But note that this person is stopping amidst an ongoing process of making law. He

1 This is an idea that he reinforces a bit later when he says 'And he whom you cannot teach to fly, teach to fall faster!' (Nietzsche 1995, 209).

has not shattered the law, only this iteration of it. This is not therefore a full break, a complete release but only a relative one; it is a form of resistance from within the body of law itself. The last sentence of the passage just cited suggests that perhaps the Law unfulfiller will in fact return to carving tablets: 'Let him lie till he awakens by himself, till he renounces by himself all weariness and whatever weariness taught through him.' This state of affairs might not last forever; he might go back to making more law but he will do so with a new wisdom; the wisdom to know that it is not the specifics of law that matters (those are made to be discarded) but rather the process of making law itself. This process is what forms a structure that he can abandon (if only temporarily), the very thing that allows him to take his break from lawmaking.

The fact that Nietzsche notes several times that the Law unfulfiller has stopped one span away from finishing may be particularly worth noting in this case because it suggests that the engagement with the end, with termination, is a critical part of what makes giving up or not finishing so valuable, so overcoming of weariness and despair. To come right to the brink of finishing and then not doing it, is the sweet spot for Zarathustra. It is a site of maximal resistance, of being in the full bore of the promise of law (promises for justice, for truth and the like) and at that point simply saying no.

Without this penultimate position or this relationship to law, the Law unfullfiler, it seems, would be and have nothing at all. Thus, for Zarathustra, giving up on law altogether is never in question, never a possibility. Throughout this section we see not so much a choice between making or breaking the law (in a way the Law unfullfiller does neither) but rather a set of possible responses that are simultaneous and which include a strong involvement and engagement in the various paths that the law might take. Indeed, not only does Zarathustra say 'Break, break the old tablets' but towards the end of 'On Old and New Tablets', he asks the Law unfulfiller if he will join him not only in terms of making new law, but in some sense both inscribing and being that law:

> And if your hardness does not wish to flash and cut and cut through, how can you one day create with me?
>
> For creators are hard. And it must seem blessedness to you to impress your hand on millennia as on wax.
>
> Blessedness to write on the will of millennia as on bronze—harder than bronze, nobler than bronze. Only the noblest is altogether hard.
>
> This new tablet, O my brothers, I place over you: *become hard*! (Nietzsche 1995, 214.)

Here, Zarathustra is asking for the Law unfulfiller to effect a kind of merger where he actually becomes a kind of writing implement, hard enough to 'impress [his] hand on millennia as on wax'. It seems making law is in fact a necessary destiny for this figure (and just prior to this passage, Zarathustra says 'And if you do not want to be destinies and inexorable ones, how can you triumph with me?') (Nietzsche 1995, 214).

Even so, as is so often the case with Nietzsche, the sense of ultimate triumph and destiny is itself tempered and subverted by the cycles and rhythms of the text. Insofar as we already know that law—even law that has lasted millennia—is 'old' and vulnerable to breaking, there is no guarantee that even this 'hard' law will not follow the pattern set by what Zarathustra has said up till now.

Furthermore, in effectively suggesting that the ideal temporal position for the subject of law may not be here, at the end of the section (and in a fully teleological mode full of hope for the future and the fulfillment of law and destiny) but back in the middle where the Law unfulfiller was enjoined to lay down just before finishing the tablet, it seems that the 'destinies' that Nietzsche is fond of invoking are not always what they appear to be.

We see some evidence for this earlier in the text in the section called 'On Redemption'. There, Zarathustra is crossing a bridge and comes upon a group of people with various maladies and deformities. They ask Zarathustra to heal them and he refuses. Not only does he refuse to heal them but he identifies with them when he says: 'A seer, a willer, a creator, a future himself and a bridge to the future—and alas, also, as it were, a cripple at this bridge: all this is Zarathustra' (Nietzsche1995, 139).

Here too we see a mixing of destinies and futures with the mundane, with the here and the now. Zarathustra is a 'bridge to the future' even as he is also 'a cripple at this bridge'. And similarly, the lawmaker is urged to become '*hard*' an imprinter of law into millennia, even as he asked to lay down one span before finishing his tablet. The juxtaposition of these two positions tells us a great deal about Nietzsche's position on law and its foundations. We see that we need to ceaselessly unmake, break, deconstruct and otherwise resist the siren calls of the law. We must stop just before the end, just shy of completion (and hence just shy of total destruction). The contrast between law as destiny and law as unfinished task is required to make the moment of unfulfillment, of failure both possible and powerful. Without a sense of a future, there is no point, it seems in stopping. That stopping is powerful because it occurs in the face of what it resists; the stopping needs the destiny, the subject needs the law, in order to perform their resistance, in order to have a purpose at all.

We see the way that the lawmaker is implicated within the law all the more when Nietzsche considers the relationship between this figure and the 'good and the just', those avatars of a law that still promises fulfillment and destiny (Nietzsche 1995, 212). Zarathustra asks:

> 'Whom do they hate most?' The *creator* they hate most: he breaks tablets and old values. He is a breaker, they call him lawbreaker. For the good are *unable* to create; they are always the beginning of the end: they crucify him who writes new values on new tablets; they sacrifice the future to *themselves*—they crucify all man's future.
>
> The good have always been the beginning of the end. (Nietzsche 1995, 212.)

We see here that the lawmaker has a role to play in the ongoing ebb and flow of law as such; he breaks the old tablets, he makes new ones, because without his help, the

law wouldn't exist at all (and, after all, he needs the law too). Here again, Nietzsche performs a curious reversal. The unfulfiller of the law is the "*creator*." His failure to complete the law is what makes his action original, unanticipated, something new. The good and the just 'are *unable* to create'; they rely on the unfulfiller to make and break the laws that otherwise bind and orient them (i.e what they are good and just about), to make the law something other than what it is intended to be. This does not mean that the Law unfulfiller is a stooge for the good and the just—clearly he is not since he won't finish the job that they wish him to do—only that he is part of the way that the law continues both for his own sake (so he can stop) and for theirs (so they can imagine themselves as having a future, so they can think that they are getting law 'right'). This entangled relationship of response, breaking and making is the backdrop for the resistance of the Law unfulfiller. Just as Zarathustra sits in the ruins of the law (ruins but not the utter extinction), so too does this figure occupy a realm where the law is in flux, always challenged and always reasserting itself.

3. (Dis)engaging with the fetish: Benjamin and mythic violence

The basic pattern that we see in Nietzsche of a kind of perpetual revolution against legal foundations (a revolution that approaches but never fully breaks with law as such) can be seen in any number of thinkers who follow in Nietzsche's anti-foundational footsteps. For the sake of brevity, I'd like to focus on just two thinkers in this tradition, Walter Benjamin and Giorgio Agamben. Let me begin with Benjamin and his own relationship to the foundations of law which tracks very closely with Nietzsche's own position.

One way to think about Benjamin is that he dismisses law altogether. Certainly the structure and content of the 'Critique of Violence', Benjamin's most important legal writing, suggests as much. After going through a very complex and admittedly dense argument about various approaches to law ('law making' vs. 'law preserving', natural vs. positive etc.), Benjamin introduces about two thirds of the way through the essay, the critical distinction between mythic and divine violence. Mythic violence is Benjamin's term for what we ordinarily call law (although it could be applied to many other things as well).[2] Mythic violence is the violence of projection, of phantasm and yearnings for power and authority that manifest itself in the form of states, legal systems and the like. This is 'mythic' because it asserts a basis in a mystical authority that it has no actual access to.[3] Whether it claims that authority based on God or nature or on some secularized versions of these things, mythic violence has no actual basis and hence resorts to physical violence in order to—as Benjamin puts it—'jut manifestly and fearsomely into existence'(Benjamin 1996, 242).

2 Benjamin writes that mythic violence 'shows itself fundamentally identical with all legal violence' (Benjamin 1996, 249).

3 Derrida's famous reading of 'Critique of Violence' is one key text that explicates Benjamin's legal theory. See Derrida, 1993.

Benjamin contrasts mythic violence with divine violence which is God's power and which has nothing to do with human activity.[4] Divine violence, for Benjamin, strikes into the world mainly to remove instances of mythic violence which constitute attempts to speak, as it were, for God. Benjamin's chief example of divine violence in the 'Critique of Violence' is the story of Korah, an idolator that God removed, along with all of his followers by swallowing them into the ground. Here, God answers such claims with a purifying violence that erases any trace of the hubristic attempt for humans to speak with God's voice.

If we put this in a legal framework, we could say that for Benjamin, human law is all myth and God's law is unknowable as such. If this is the case, then can it be said that Benjamin really does effectively do away with law altogether?

The short answer, like the longer answer, is no. For one thing, we see that no matter what, for Benjamin, there *is* law in the form of divine law. Although we are almost entirely ignorant of it, this divine law does exist and its existence has a serious consequence for us. Benjamin tells us that even a seemingly clear commandment from God such as 'Thou shalt not kill'

> exists not as a criterion of judgment, but as a guideline for the actions of persons or communities who have to wrestle with it in solitude and, in exceptional cases, to take on themselves the responsibility of ignoring it. (Benjamin 1996, 250.)

In this way, divine law is reflected in our own behavior only in the most feeble and weak form (but here I mean weak once again in the sense of a '*weak* messianic power' that Benjamin evokes in his essay 'On the Concept of History'). As far as we are concerned, divine law exists only as an idea with no definite content, one that ultimately throws us back onto our own devices even as it remains a commandment nonetheless. Here, Benjamin has stripped the meaning of law to its roots. The commandment is only a cipher but as such it points to a need to interpret it (just as language always demands our response) to 'wrestle' with it and indeed, sometimes to ignore—or perhaps more accurately to abandon—it.[5]

Here we already see how Benjamin effectively replicates the way that Nietzsche strips law down to its barest pith, once again almost, but not quite, to the vanishing point. Law here too becomes almost nothing, but not quite, nothing. But there is another, more prosaic way that Benjamin takes law nearly to the vanishing point. Rather than conclude that 'what pleases is permitted', in the absence of clear and unimpeachable law, Benjamin offers us a way to think about law, not just as a murky commandment but also as a kind of way of life (Benjamin 1996, 241). Here, the 'wrestling' that we must engage with takes on a kind of positive form insofar as the one commandment that we *can* follow fairly strictly is the Second Commandment against idolatry, in other words the law that requires us to destroy and oppose mythic

4 Although there are a few instances in the text where Benjamin muddies this distinction.

5 The original German term '*abzusehen*' translated here as ignore means something more like 'to turn your back to it' or abandon which remains much more engaged, I think, than the term ignore itself conveys (Benjamin 1980, 201). I am grateful to Marc de Wilde for pointing this out to me.

violence in all of its forms.[6]

Something like this can be seen in Benjamin's claim (partially quoted earlier) that:

> Far from inaugurating a purer sphere, the mythic manifestation of immediate violence shows itself fundamentally identical with all legal violence, and turns suspicion concerning the latter into certainty of the perniciousness of its historical function, the destruction of which thus becomes obligatory. (Benjamin 1996, 249.)

Although Benjamin does not explicitly link this practice of destruction and opposition with the Second Commandment, there is plenty of textual evidence to suggest just such a connection. Perhaps most critically, he says of Kafka—who is perhaps his most important muse (or perhaps tied with Baudelaire)—that: 'No other writer has obeyed the commandment 'Thou shalt not make unto thee a graven image' so faithfully' (Benjamin 1999, 808).

To obey this commandment means to live and think in a way that is not merely a reiteration of mythic violence. In this way human beings can imitate or perhaps more accurately remain in the aftermath of acts of divine violence and make the opening that that law created a basis for their own practice. Opposing myth is not purely a negative function in this way (just as divine violence is not purely negative, even though its expression takes the form of removal of human myth). Here too then, there is just the barest hint of law but it is enough (as Jews sing on Passover, Dayenu!)

For Benjamin, as for Nietzsche, this barest hint, this law just shy of the vanishing point, is critical. Recall that for Nietzsche in his story in 'On Old and New Tablets', being right at the brink of fulfilling the law ('one span' away) but stopping there allows the presence of law to present the 'unfulfiller' with the best of both worlds; on the one hand he gets all the power and promise of law, the way he is motivated, challenged and put on the hook, ethically speaking. But at the same time, by drawing back just at this moment, he avoids all the darker sides of law, the way it controls and projects, the way it insists and dominates (and often, and along with that domination, injures and kills for its own sake).

I think something very similar happens with Benjamin as well; by engaging with law as a cipher, as a demand to avoid the projection that mythic violence always brings, Benjamin also has a kind of best of both worlds situation; the legal subject acts because the law exists, but that law has no binding effect on her; she is in a sense brought to her own agency by the simultaneous appearance and failure of law (her resistance to law is in effect what law *is* for her). In this way she resists from deep within the apparatus of law, perhaps causing maximal damage to the structures that she rebels against.

6 I make this argument at much greater length in Martel 2014.

4. 'A sort of remnant': Agamben and inoperable law

A final thinker who is very close both to Nietzsche and Benjamin is Giorgio Agamben. For all of his similarity, there is a way in which I think Agamben is more ambiguous than Nietzche and Benjamin about the nature and value of law. For all of his own weak anti-foundationalism, I see Agamben as entertaining the possibility of leaving the law behind altogether (a move that he ascribes to Benjamin himself) in a way that I think Nietzsche and Benjamin both avoid.

The book where Agamben most clearly engages with the question of law and anti-foundationalism is *State of Exception* and more specifically a chapter in that book called 'Gigantomachy Concerning a Void'. In that chapter, Agamben describes Benjamin's unique approach to law (as mediated via Kafka), writing:

> It is from this perspective that we must read Benjamin's statement in the letter to Scholem on August 11, 1934, that 'the Scripture without its key is not Scripture but life'…as well as the one found in his essay on Kafka, according to which '[t]he law which is studied but no longer practiced is the gate to justice' …The Scripture (the Torah) without its key is the cipher of the law in the state of exception, which is in force but is not applied or is applied without being in force (and which Scholem, not at all suspecting that he shares this thesis with Schmitt, believes is still law). According to Benjamin, this law—or rather this force-of-law [crossed out in the text]—is no longer law but life, 'lived as it is lived' in Kafka's novel [*The Castle*] 'in the village at the foot of the hill on which the castle is built'.…Kafka's most proper gesture consists not (as Scholem believes) in having maintained a law that no longer has any meaning but having shown that it ceases to be law and blurs at all points with life. (Agamben 2003, 63.)

Here we see both a way for law to almost but not quite vanish ('the law which is studied but no longer practiced is the gate to justice') as well as a sense that the law might completely vanish after all. The law here, after all is 'no longer law but life "lived as it is lived"'. Law in this way disappears into its own practice, an idea that Agamben expands on a great deal in a later book, *The Highest Poverty* when he further describes the idea of 'form of life' (Agamben, 2013). Gershom Scholem, Agamben says, is mistaken to believe that such a practice is 'still law'.

The question here becomes then, which is it: Law at the vanishing point or law as vanished? Earlier in that chapter, Agamben raises a similar issue when he compares Benjamin and Schmitt on the extent to which the law entails, and works off from a zone of exclusion:

> Just as essential for the juridical order is that this zone—wherein lies a human action without relation to the norm—coincides with an extreme and spectral figure of the law, in which law splits into a pure being-in-force [*vigenza*] without application (the form of law) and a pure application without being in force: the force-of-law [With the final word law crossed out in the text] (Agamben 2003, 60).

Here too we want to ask just how spectral is the figure of law here? If it can be divided into application and force (or to use the terms I have been using earlier, cipher and violence) does it remain lawful or lawlike in any way? Is this too close to vanishing to remain a viable and useful category? And what are the consequences for pushing the idea of the law to such an extreme?

In discussing the example of Kafka and the way that Benjamin reads him, Agamben further states that:

> In the Kafka essay, the enigmatic image of a law that is studied but no longer practiced corresponds, as a sort of remnant, to the unmasking of mythico-juridical violence effected by pure violence. There is, therefore, still a possible figure of law after its nexus with violence and power has been deposed, but it is a law that no longer has force or application, like the one in which the 'new attorney' leafing through 'our old books', buries himself in study, or like the one that Foucault may have had in mind when he spoke of a 'new law' that has been freed from all discipline and all relation to sovereignty. (Agamben 2003, 63.)

The key phrase here, I think, is the idea of the law as 'a sort of remnant', that is, once again, something that is barely there but still has an effect (perhaps neither an application nor a force but some other kind of influence). This is a 'possible figure of law' that has been stripped of both its authority and its content. Agamben writes:

> The decisive point here is that the law—no longer practiced but studied—is not justice, but only the gate that leads to it. What opens a passage towards justice is not the erasure of law but its deactivation and inactivity [*inoperosità*]—that is, another use of law. This is precisely what the force-of-law [crossed out] which keeps the law working [*in opera*] beyond its formal suspension) seeks to prevent. Kafka's characters—and this is why they interest us—have to do with this spectral figure of the law in the state of exception; they seek, each one following his or her own strategy, to 'study' and deactivate it, to 'play' with it. (Agamben 2003, 64.)

Here, Agamben seems to want to reduce the law even further than Nietzsche and Benjamin and my wager here is that he may be reducing it *too much*, depending on how you read his concept of inoperativity. If inoperativity means that the law does literally nothing, then I think Agamben may have reduced it beyond the event horizon where it remains effectively an agent in this world. That would possibly explain the way his text hesitates—as I have tried to show—between announcing the end of law altogether (where it vanishes into life) and the idea of a kind of 'new law' (requiring also a 'new attorney' that has been supplied by Kafka's narratives) where the law appears to survive its own demise and absorption by life.

Agamben continues this ambiguity when he concludes the chapter by writing:

> One day humanity will play with law just as children play with disused objects, not in order to restore them to their canonical use but to free them from it for

> good. What is found after the law is not a more proper and original use value that precedes the law, but a new use that is born only after it. And use, which has been contaminated by law, must also be freed from its own value. This liberation is the task of study, or of play. And this studious play is the passage that allows us to arrive at that justice that one of Benjamin's posthumous fragments defines as a state of the world in which the world appears as a good that absolutely cannot be appropriated or made juridical. (Agamben 2003, 64.)

Here again, we see the same ambivalence between a law from which we are 'free[d] for good' and a 'new use' of law. Note too that at the very end of the passage, Agamben cites Benjamin as being the source of his conviction that the law might be entirely useless and unrelated to the world, perhaps gone once and for good. Yet the Benjamin fragment that he cites this from, 'Notes to a Study on the Category of Justice', [in German '*Notizen zu einer Arbeit über die Kategorie der Gerechtigkeit*'] is not itself as sanguine about leaving behind justice as Agamben implies. In that fragment, Benjamin writes:

> Justice is the striving to turn the world into the highest good.
>
> These thoughts lead to the supposition that justice is not a virtue like other virtues (humility, neighborly love, loyalty, courage), but rather constitutes a new ethical category, one that should probably no longer be called a category of virtue but a category of virtue in relationship to other categories. Justice appears not to be based upon the good will of the subject but forms the state of the world…While virtue can be demanded, justice, in the end, can only be the state of the world or the state of God. (Cited in Jacobson 2003, 166).[7]

We see here, a reiteration of the division of labor between humans and God that we find elsewhere in Benjamin. Justice is, properly speaking, God's business and not ours but we are not unaffected (far from it!) by this practice. Although Benjamin writes further in that fragment that 'the responsibility of the world that we share is shielded from the instance of justice' seemingly saying that justice is not a matter for human beings to concern themselves with, we see that, in effect, we (fortunately) cannot escape justice altogether (Jacobson 2003, 167). We remain 'on the hook', as it were, responsible for and accountable to a form of justice—and, by extension, law—that we otherwise know nothing about.

This same idea is reinforced in another Benjamin fragment that makes a similar point, namely 'The Meaning of Time in the Moral Universe'. There he writes:

> [the significance of the Last Judgment is] revealed not in the world of law, where retribution rules, but only in the moral universe, where forgiveness comes out to meet it. In order to struggle against retribution, forgiveness finds its powerful ally in time. For time, in which Ate [a Greek figure which stands for relentless dogma] pursues the evildoer, is not the lonely calm of fear but the tempestuous

7 See also Lesch 2014

> storm of forgiveness which precedes the onrush of the Last Judgment and against which she cannot advance. …As the purifying hurricane speeds ahead of the thunder and lightning, God's fury roars through history in the storm of forgiveness, in order to sweep away everything that would be consumed forever in the lightning bolts of divine wrath. (Benjamin 1996, 287–288.)

Here again, we see a situation where we are held under God's law (as represented by the Last Judgment) even as that law is forever being put off (blown, in this case, by a 'storm of forgiveness'). In this way, both the human world and the divine world that envelops it exist in a permanent relationship. The fact that we are held accountable does not limit our freedom; both states are true at the same time (i.e. we are perfectly free and on our own even as we are beholden to a law which is only suspended, or put off, albeit possibly forever). Similarly, we see that the significance of the Last Judgment is not 'revealed…in the world of law' but rather in the moral universe.

It is this duality that I think Agamben is missing in his own readings of Benjamin. Where Agamben is ambiguous (is there law or isn't there law? Does it almost vanish or actually vanish?) I see Benjamin as being theological: there is a place with no law: the human world where law is false and mythical and there is also a place with law: the divine law that is always true. Rather than being ambiguous, this duality for Benjamin is simultaneous.

Just as critically, although these two realms never overlap, there is a point of interaction between them. At the intersection of these two realms, the human and the divine, we find the vanishing point. What might look therefore as a binary is in fact a kind of transactional space where something appears to disappear but then reemerges only to disappear again, moving between the human and the divine.

This further means that inoperability may not be the right term to use to describe the function of a law that has been reduced to its pith, to a cipher. Not only does such a cipher continue to have a very strong effect (as my earlier analysis of both Nietzsche and Benjamin suggests), being in that sense very 'operative', but furthermore the law as we understand and practice it cannot not be considered (if you'll forgive the double negative here) in parallel to the divine which is itself very, very operative indeed. In fact, I am tempted to say the opposite of what Agamben claims; that as you reduce law to its pith, it becomes not less but more effective. Under such conditions, the dross of law falls away (its authority, its violence, even its content) and what you get instead is a sheer vision of law's power as such, the demand to interpret, the desire to effect, the wish for justice and the connection to effectiveness. As I've said before, as you approach the vanishing point, that is when you get the best sense of the power of the law. The trick is to let go 'one span' before the end to be in that sweet spot between the law's seduction and its domination (in this way, I think of Nietzsche's 'cripple at this bridge' as similarly situated almost at the far end of the bridge; so close to the shining and ultimate end but not quite there).

5. On the verge: Negri and the self-destruction of the transcendental

This weak anti-foundationalism can be seen beyond the realm of law itself. To give just one example, I will now briefly turn to the work of Antonio Negri and in particular his book *The Savage Anomaly* to show that this kind of brinksmanship exists in other fields of theory as well. Negri's well known book on Spinoza is a masterpiece of anti foundationalism. Even while he acknowledges Spinoza's liberalism and bourgeois sympathies, as well as the way his text can easily be read as being thoroughly rooted in western rational thought, for Negri there is something deeply subversive about Spinoza, a subversion that comes, as it were, from the heart of liberalism and which serves as a 'savage anomaly' to challenge the very structures of power and capitalism that Spinoza otherwise seems to be in service to.

One of the key points that Negri makes about Spinoza is that in expressing an apparently transcendental concept like God, Spinoza shows how the attributes that collectively make up this transcendent being serve, in their infinite variety, to overtake and render material the metaphysical concept that they purportedly serve. Thus, for example, Negri writes:

> The unification of the attribute, of the two attributes ('Thought is an attribute of God, or God is a thinking thing' [P1] and 'Extension is an attribute of God, or God is an extended thing' [P2]), creates a dimension of the world that is not hierarchical but, rather, flat, equal: versatile and equivalent. The absolute essence, predicated univocally, refers as much to the divine essence (the existence of God) as it does to all things that descend from its essence. We are at a fundamental point, at a point in which the idea of power—as univocal order, as the dissolution of every idea of mediation and abstraction (which, instead, is the idea of Power)—leaps to center stage with enormous force. (Negri 1991, 62.)

In this way we see how in Negri's reading, Spinoza in a way transcends (descends might be a better term for it) his own transcendence. His metaphysics disobeys its own principles and heads downward in a materialist direction.

It is here that we can see Negri's own version of what we have seen with Nietzsche, Benjamin and Agamben, a kind of brinksmanship once again with the very constructs that he is engaged with (and resisting). Thus, Negri goes on to say:

> What remains to be said at this point? The attributes (as functions of the mediation of the spontaneity of being, between substance and mode) have themselves been reabsorbed on a horizontal field of surfaces. They no longer represent agents of organization but are subordinated (and very nearly eliminated) in a linear horizon, in a space where only singularities emerge. (Negri 1991, 63.)

In my reading, the key phrase here is the idea that the 'agents of organization' (that is the dominating, vertical and hierarchical forces of power as they are ordinarily practiced) are 'very nearly eliminated'. Why very nearly? Why not absolutely

eliminated since this seems to be the direction that Negri clearly prefers?

I would argue that here Negri is evincing some of the same Nietzschean tendencies that we have seen in the other thinkers discussed in this essay. There is a hesitation in his language (which later on becomes a discussion of limits in general) to fully explode and do away with the transcendental. Why? Because, to put it rather simply, if God disappears, so do God's attributes and, in that sense, so does the material world itself. God needs to *nearly* disappear, almost completely vanish, but a tiny bit must remain just to animate the rebellion against God which is what Negri appreciates about Spinoza's subversive materialism. This view of attributes corresponds to the way that Benjamin sees the objects of the world in constant and endless revolt against the idolatry and commodity fetishism that we humans impart to them.[8] In either case what is animating is what is resisted; the foundation that is being denied, rendered (in Negri's case) horizontal and material.

A bit further on in the same chapter (entitled 'First Foundations') Negri goes on to write:

> Every attempt to resist the violence of the paradox (and the subsequent overthrow of its terms) is unable to account for not the coherence, but the force and happiness of Spinoza's first formulation of the system, of the first stage of the *Ethics*…The attributes and the ontological parallelism are on the verge of elimination. But the process does not stop here. For the moment, though, it settles here, on the first and fundamental limit of pantheism: if God is all, all is God. The difference is important: on one side an idealistic horizon, on the other side a materialistic potentiality. (Negri 1991, 64.)

Here, we find ourselves in territory that is not dissimilar from what was just discussed in the previous section on Agamben. We see God and the world looking at each other, as it were across a great cosmic divide. In this case, for Negri, this simultaneity is decisively settled in favor of the human and the material but notice that even here, he uses a language of limits and hesitations. He writes that 'the attributes and ontological parallelism are on the verge of elimination'. But being 'on the verge' is different than being eliminated. It seems that Negri shares Agamben's belief (or perhaps hope) that the transcendental will in fact be utterly eliminated in the end but in the suspension between being and not being (or, more accurately between vanishing and not vanishing) we see a tremendous apparatus of power, a 'tension,' to quote Negri, that moves and shapes the world and the context of politics (Negri 1991, 63).

6. Conclusion: *Weak* anti-foudationalism

In light of the previous expositions, I argue that anti foundationalism is perhaps at its best and most potent when it holds itself back just a bit, that is when it is weak. In the end, the target of anti foundationalism is metaphysics itself and all of the thinkers

8 I discuss this at much greater length in Martel, 2011.

that follow Nietzsche continue his war on metaphysics—that is one of his greatest contributions to critical thought. But this war can never be complete; I see Nietzsche as being somewhat akin to Trotsky and his view of 'permanent revolution'. The metaphysical is always reasserting itself; it does so through the demands of language, of the cipher, of meaning and of law. When I speak of a 'weak' anti-foundationalism, I mean so precisely in the spirit of Walter Benjamin's '*weak* messianic power'. This power is weak not in the sense of being inept or useless but rather in terms of being human and not divine. In the fuller quotation of Benjamin that this comes from, he writes: 'Like every generation that preceded us, we have been endowed with a *weak* Messianic power' (Benjamin 2003, 390). This is an explicitly human power in the face of the divine. It has just a tinge of that other power (hence *weak*) but our own response, when we use it properly is all that we need. This is a power to resist idolatry in all of its forms, a power to combat mythic violence, false projections of sovereignty and legal authority. Such a power can be very strong indeed but the term *weak* reminds us of a necessary humility that comes with recognizing the position of the human vis a vis the divine. I would argue that weak anti-foundationalism occurs right at the cusp between the human and the divine but it is definitely on the human side of that cusp.

The brinksmanship that Nietzsche describes characterizes each of the thinkers that I have dealt with. All of them, I would argue, are always tempted towards a teleological goal, towards completion and fulfillment. Even Nietzsche himself displays this temptation through his character of Zarathustra when the latter calls himself 'A seer, a willer, a creator, a future himself and a bridge to the future—and alas, also, as it were, a cripple at this bridge: all this is Zarathustra' (Nietzsche 1995, 139). Here, Zarathustra is 'a cripple at this bridge' but he is also 'a seer, a willer… a future himself and a bridge to the future'. He is fully engaged in the longing for fulfillment that metaphysics always promises (but never delivers). Nietzsche's depiction of the Law unfulfiller is similarly in this position; he is one span from completion. These positions are, I argue, manifestations of a '*weak* messianic power'; their strength comes from going to the very brink of the phantasm and pulling back just at that moment. From that position, however weak it seems, they have the ability to bring down the whole apparatus of law and sovereignty. They can do so as long as they don't forget that the dream of utter victory is the same thing as an utter loss; if they cross that final threshold, their enslavement to the siren calls of metaphysics, of mythic violence and projection overwhelms them and they are returned to the status of legal and political subject (in all senses of that word) that motivated their resistance, their brinksmanship in the first place.

As a final thought, I would like to briefly comment about what kinds of law, what kinds of states of subjectivity, emerge when weak anti-foundationalism is engaged with. If we think of this project as purely negative, then it seems quite dreary, just digging that hole over and over again and watching it fill back up with more foundation(s). But if we think about the project as a way of life, we can see it in a much more positive sense. Here, I would like to appreciate Agamben's idea of form

of life minus the insistence the law itself vanishes into such a practice. If we think of this form of resistance and brinksmanship as being a way of life, an ongoing practice, then it becomes less dreary, less futile.

This idea can be illustrated by returning to what Agamben talks about in an earlier citation, the community that lives around the castle in Kafka's work by that name. In my reading of that book, the community that lives in the circumference of the castle is wholly submerged in weak anti-foundationalism sometimes consciously and other times not so much.[9] On the one hand, the villagers live and breathe their love for the denizens of the castle (who are never seen, or at least never seen with any certainty); their lives and their desires are all formed in response to the castle itself. But the castle is nothing for them; it is a mere cipher which they never really encounter and so, even as they are so enamored of the castle, they are actively also living their own lives. In this way, there is a whole set of ongoing practices and laws that can be recuperated simply by recognizing the periphery around the absent center of law. If you remove, however temporarily and partially (and I hope I've been clear that it can never be anything but temporary and partial) the myths of law, the actual practices of law in all of their complex variety stand out in contrast. If we can never be free from law this does not mean that we are doomed to obey one kind of law only. A realization of the plethora of laws and authorities that we are constantly producing and responding to—a plethora that lays, as with Negri, on a horizontal level—is itself a key factor in battling a law that we otherwise only see as something that is done to us according to rules that we only dimly understand and dare not look at too closely (least we espy something we aren't yet ready to see).

9 I also talk about this further in Martel 2011.

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Court Interpreting as Emotional Work: A Pilot Study in Swedish Law Courts

Gunilla Carstensen* and Leif Dahlberg**

1. Introduction

This article is about legal interpreting—i.e. orally translating between languages in public law courts—and is based on 29 semi-structured interviews with Swedish interpreters, judges, and lawyers, as well as field studies in Swedish courts and a literature study.[1] The interviews were mainly conducted in 2015 at three different law courts in the metropolitan Stockholm region and concerned conditions for interpreting, methods for validation of interpreting, the importance of the interpreter as cultural broker and how interpreting in courts can be improved.[2] Our interview study shows that the working situation for interpreters is demanding, that interpreter-users such as judges and lawyers often have little or no knowledge of

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1 To avoid confusion between the act of interpreting between languages and the interpretation of texts—and drawing upon a distinction made by Ruth Morris in a seminal article on legal interpreting from 1995—in this article we refer to the act of oral translation from one language to another as 'interpreting', and the act of making sense of signs and texts as 'interpretation' (Morris 1995, 25). It should be noted, however—as Morris also argues in her article—that this distinction is a legal fiction, i.e. that the act of interpreting is always also an act of interpretation.

2 The study is based on semi-structured interviews with 29 respondents (17 interpreters, 8 judges, 4 legal counsellors) from three District courts in Sweden during 2015–2016. The judges were recruited through the head judge of the District court to whom we had sent an e-mail with information of the study. The interpreters were contacted through an official register at the Swedish Legal, Financial and Administrative Services Agency (Kammarkollegiet). The legal counsellors were found through informal contacts. The interviews lasted for 1-1 ½ hours and were tape-recorded, transcribed and analysed according to a hermeneutic approach often used in qualitative research. The interview questions covered the conditions of interpreting in relation to the court with four main themes: the respondent's general perceptions of the interpreting process, the respondent's general perceptions of the ideal interpreter, the respondent's general perception of methods to verify the quality of the interpreting, and the respondent's general perception on necessary improvements for interpreting in court.

interpreting and that courts differ widely regarding how aware they are about the importance of creating good working conditions for interpreters. In the interviews, an issue emerged that we had not anticipated, the importance of the emotional work performed by the interpreter. The first part of this article presents an overview over interpreting as a field of research and as institutionalised practice. The second part describes and analyses interpreting in Swedish law courts. Finally, the third part of the article discusses emotional work in court interpreting. It should be noted that the article is explorative rather than conclusive.

According to Swedish law, the legal procedure in Sweden should be conducted in the Swedish language (*Språklag* 2009, 600). This implies that if there is a court case where a party or a witness does not speak Swedish, or does not master it sufficiently to manage an interrogation, an interpreter is needed. It is the obligation of the court to provide a competent interpreter.[3] In connection with a law change in 2013, the requirements of the quality of interpreting were increased, and it is now mandatory to provide an authorised interpreter (Fioretos et al. 2014, 28f). However, although there now are higher requirements on legal interpreting in Sweden, there is at the same time a shortage of authorised interpreters, which means that courts have difficulty finding not only authorised but even qualified interpreters. There are today a little more than 900 authorised interpreters in Sweden, of which 226 are authorised legal interpreters (Kammarkollegiet 2017).[4] According to a study from 2010 there are 150 languages spoken in Sweden (Parkvall 2000), yet it is only possible to become authorised interpreter in 39 of these languages. Not using a highly skilled interpreter in court implies a serious risk for legal certainty. If the interpreter is not well versed in the subject or has limited knowledge of legal terminology, there is a great danger that the interpretation will be both faulty and misleading.

A 2015 study by the Swedish Agency for Public Management (Statskontoret) on ways to improve interpretation in Swedish law courts showed that interpreters are used in between 2000 and 3000 court cases every month, but also that the percentage of authorised interpreters is quite low—a third of the time non-authorised interpreters were used (Ibid). It should also be noted that Swedish courts do not keep records over the use of interpreters, and for this reason it is difficult to produce reliable statistics. In the study by the Swedish Agency for Public Management, it is also emphasised that the distribution of authorised interpreters is very uneven in the country, which has as consequence that 'not every court case is given equal conditions' (Ibid, 7). If the situation is precarious today, the need for interpreters in public institutions such as law courts and health care will in all likelihood increase in the future, due to the increased mobility of people both inside and outside EU, as well as other forms of migration. At the same time, due to strenuous working conditions and relatively low remuneration, it is difficult to recruit new interpreters to the profession.

In the next part of the article we describe interpreting as a form of interaction, the norms governing interpreting in public institutions as well as actual interpreting

3 *Rättegångsbalken* [Swedish Trial Code], Chap. 5 § 6; and *The European Convention on Human Rights*, Article 6.3.
4 For a study on the Swedish system of authorising interpreters, see Idh 2007.

practices as they have emerged in the conducted interviews.

2. Perspectives on interpreting

Interpreting is an area of research that has been studied in particular within the fields of language study and linguistics, focusing either on verbal communication and whether the interpretation is 'correct'—that is, if the verbal translation corresponds to the source (often labelled 'source text')—or on pragmatic dimensions of interpreting. In determining the 'correctness' of interpreting, the model used has often been that of translating texts, and frequently has used quite simplistic models of what counts as verbal or textual correspondence between two languages, let alone what would count as a 'correct' translation. Such models fail to take into account factors such as the intention of the speaker, his or her relation to the listener, the situation and social context, and possible cultural differences. However, in the past three decades, research on interpreting has increasingly focused on pragmatic dimensions (for an early example, see Hatim & Mason 1990). There has also been a series of studies on interpreting in the legal context that challenge the text-based conception of interpreting (e.g. Berk-Seligson 2002; Hale 2004; Hale 2007; Jacobsen 2009; Jacobsen 2012). In several of these studies, focus has also been on the role and the significance of the interpreter in the legal process (cf. e.g. Hale 2008).

Further, many studies show that the interpreter typically renders incoherent, paratactic discourse in a more structured and coherent way than in the source text, and also that different interpreters perform differently when it comes to back-channelling and paying attention to pragmatic dimensions such as politeness and respect (Morris 1990; Berk-Seligson 2002; Hale 2004). For instance, some languages and cultures marked by high power distance demand the use of honorary titles, whereas other cultures show a preference for more familiar or egalitarian language. Hence, when translating from English or German into Swedish, the interpreter needs to elide many words indicating power distance in order not to sound ridiculous; and inversely, when translating from Swedish to English or German, the interpreter will need to insert polite expressions and honorific titles in order not to seem uncivil or rude.

The text model for understanding and conceptualising oral interpreting has also been challenged by a model of communication based on interaction and dialogue (Wadensjö 1998). That is, from having been perceived as primarily a question of transmitting information from one language to another, interpreting in the dialogic paradigm is understood as a form of interaction that happens between people and in specific situations—i.e. it is understood relationally and contextually—and it is also seen as surrounded by norms and institutional rules that determine the conditions for interpreting (Wadensjö 1998). This dialogic perspective implies that the act of interpreting is a collaborative process—i.e. not only the work of the interpreter—and that the result depends on the competence of all participants, not only the interpreter. In other words, the meaning of the message does not exist in a pure form to be translated by the interpreter, but is constructed—or co-constructed—by the

participants in the interaction (Wadensjö 1995, 114). In this perspective, interpreting is a complex relational process that puts high demands on all participants, and in particular on the interpreter who must relate to the situation on several levels. The interpreter must not only understand, assess and interpret what is said, but also evaluate and interpret what is said implicitly and between the lines (Ibid, 112), as well as transpose the prosody of the source language to the prosody of the target language.

Thus, a recurrent theme in research on interpreting is the role of the interpreter in the interpreting situation. How should the interpreter act? How should the interpreter interpret? Should the interpreter explain cultural differences that are of importance for what is being said or should the interpreter act as an 'interpreting machine', executing a word-for-word translation? The answer to these questions depends on the situation and the position of the interpreter in the situation. Sandra Beatrice Hale has identified five different roles prescribed or adopted by the interpreter: advocate for minority language speaker, including cultural brokerage or mediation; advocate for the institution or the service provider; gatekeeper (i.e. filtering and editing information); facilitator of communication; and faithful renderer of others' utterances (2008, 102-119). In the legal context, the ideal is that the role of the interpreter should be the last one; but it is not always clear to what extent this also excludes any of the other roles.

Legal institutions, manuals and professional codes for legal interpreting maintain that the interpreter should appear face-less in interpreting and not interrupt and explain cultural differences—a view also held by many interpreters. There are, however, many professional interpreters and researchers who argue that the interpreter, consciously or not, also engages in translating cultural differences. This is not very different from when the interpreter gives a definition of a legal term to the client or paraphrases a saying or an idiomatic expression. A related question is how the interpreter should convey emotions, which not only may differ in content and meaning between cultures but also are expressed in different ways (Barrett 2017, 42-55). To the extent that the task of translating and explaining cultural difference becomes central to interpreting, the interpreter also becomes a 'cultural broker'. However, this conception of the interpreter is neither generally accepted within the profession nor by the institutional codes that regulate praxis (Norström et al. 2011; Fioretos et al. 2014, 44f). But it is not only institutions, regulatory bodies and the profession that have normative perceptions of what (good) interpreting is. The research on interpreting is inherently normative (Wadensjö 1998).

Another theme in research on interpreting is to analyse interpreting from the perspective of power. Inspired by Michel Foucault's work, Ian Mason and Wen Ren distinguish different forms of power that are realised in the context of interpreting: institutional power on the one hand and interactional or micro-power on the other (Mason & Ren 2014). The power of the law court is institutional, which the judge executes by conducting the trial, managing turn-taking and making decisions and rulings. The interpreter has a looser connection to the law court—he/she is not

employed but contracted. However, since the interpreter is usually the only person who understands both languages, he/she has a unique position and possesses an interactional power which, according to Mason and Ren, is manifested in that the interpreter can affect and interrupt the process in the courtroom—through gestures and other expressions (both verbal and non-verbal)—in ways that are not permitted for other actors.[5]

3. Interpreting work

In Sweden, the role and duties of the professional interpreter in institutional contexts are governed in a document from the Swedish Legal, Financial and Administrative Services Agency (Kammarkollegiet 2016).[6] According to this document, the authorised interpreter shall transmit 'information as exactly as possible'; he/she shall not express his/her opinions or values in any way and these should not affect the interpreting; he/she should be neutral in relation to the two parties between which he/she interprets; and he/she may not engage in other activities other than interpreting (i.e. the interpreter should not comment on or explain what is said); and, finally, the interpreter may not use the information that he/she has gained during the interpreting for him/herself or convey it to a third person. Implied in this code is that the interpreter should neither add information in order to make statements intelligible nor subtract information that appear meaningless (this was explicitly stated in the previous version of the interpreter code, Kammarkollegiet 2010). It is further stated that the interpreter should not tone down emotional expressions or vulgar language. This rule implies that emotions are universal both in form and meaning (which is not the case); and it also begs the question how to translate im/politeness from one language/culture to another. Standard praxis is that the parties talk to each other and not to the interpreter, and that the interpreter speaks in the first person when he/she translates. These principles or rules constitute a normative ideal for how the interpreter should comport him/herself (Fioretos et al. 2014, 46f).

There exists both sign-language interpreting (for deaf) and oral interpreting (between languages). It is the latter that is treated in this study. The most common form of interpreting is when the interpreter is physically present in the courtroom. Another form of interpreting is when the interpreter interprets via telephone or video-link, which is often done in detention hearings and also when it is difficult to find a qualified interpreter locally. Interpreting can be done either consecutively or simultaneously: consecutive interpreting means that the interpreter first listens

5 Mason & Ren 2014, 19f. See also Inghilleri, who speaks about socially constituted norms and local interactional practices (2003, 262) and argues that it is in the tension between these norms that changes the status quo.

6 Until very recently, December 31, 2016, the interpreting code was entitled *God tolksed* (Kammarkollegiet, 2010). On 1 January, 2017, this document was replaced by a new document called 'Kammarkollegiets tolkföreskrifter' (December 2016), paragraphs 17-23 (http://www.kammarkollegiet.se/sites/default/files/Kammarkollegiets%20tolkf%C3%B6reskrifter%202017.pdf). The latter is less detailed in the instructions, but does not change the rules.

to what the person says and then translates into the other language; simultaneous interpreting means that the interpreter interprets at the same time as a person is speaking. The latter form of interpreting is generally preferred by interpreter-users, since it is more efficient, but it requires highly skilled interpreters. In some parts of the legal process, such as questioning of a party or witness through interpreter, consecutive interpreting is normally used. It should be noted that the media technology for distance interpreting available today in Swedish courts—i.e. telephone or video-conference systems—does not permit simultaneous interpreting, and hence only consecutive interpreting is possible when the interpreter is not physically present in the court.

The positions or placements of the participants is also important for interpreting. The ideal situation for interpreting is that the participants sit in a triangle, so that all parties face each other and that the interpreter may see both parties. However, this is rarely the setup in Swedish law courts. As we will see, typically the interpreter sits just next to the person (party or witness) for whom he or she translates.

3.1. Interpreting in court

Already before the interpreter begins his/her work in the court, there are several steps that affect his/her ability to perform well, and this independently of his/her own competence as interpreter. When the judge who is assigned to a case sees that there is a need for an interpreter (for a party or witness), this is noted in the file. When the trial date for a case is decided, then it is time to book an interpreter. One can already here see the subordinate role that the interpreter has from the court's perspective. In view of the lack of qualified interpreters in Sweden, one could imagine that one made sure that there is a qualified (i.e. authorised) interpreter available before setting the trial date. This does not happen. Furthermore, the person responsible for the booking of interpreting services typically has limited knowledge about there being different kinds of interpreters (non-authorised, authorised and authorised legal interpreter), as well as the regulations that surround contracting interpreters. As with many other public institutions in Sweden, there are procurement contracts with interpreter agencies (i.e. companies that provide interpreting services) that the courts are required to use (Lundström 2004). However, if the interpreter agency cannot provide a qualified (i.e. authorised) interpreter, the court has the right to disregard the contract and contact an interpreter directly. The latter is obviously more demanding and also requires that the court clerk in charge of hiring interpreters has his/her own list of competent interpreters. According to our interview study and the report by the Swedish Agency for Public Management (Statskontoret 2015), there is often lacking competence in the courts to procure appropriate interpreting service, as well as routines for evaluating the quality of the interpreting service that was provided. However, a few courts now routinely assess the quality of procured interpreting services. Hopefully, this practice will become more common in the future.

In order for an interpreter to work efficiently in a courtroom he or she should

have the possibility to study the case beforehand—at least to the extent that it is available from the summons or detention files. This is especially important when the case concerns complex factual issues. However, according to the interviewed interpreters, it is far from obvious that the courts provide this material without the interpreter first having to request it, or that they pay the interpreter for studying the files. Yet there are again significant differences between how courts behave in this regard. In court, the interpreter should be provided with a copy of written documents, otherwise he or she will have to interpret orally when somebody is reading from a written document, which is more difficult than translating a written text.

When the interpreter arrives at the law court, he/she is treated as an outsider. In contrast to legal counsel, the interpreter is searched before being allowed into the court house building, and hence is not viewed as a trusted or reliable person. When the proceedings commence, the interpreter enters the courtroom at the same time as the parties and legal counsel. It is customary that the interpreter introduces him/herself to the person for whom he/she should interpret either just outside or inside the courtroom (i.e. there has usually been no prior contact between interpreter and client before the trial is about to begin). When the proceedings begin, the interpreter is presented to the court. The interpreter should take an oath in which he/she promises to perform his/her duties to the best of his/her abilities, although this oath has only to be sworn once at each court (*Rättegångsbalken*, chap. 5 § 7). Today, common practice is that the interpreter sits next to the person for whom he/she interprets. Although some interpreters clearly state that they prefer to sit at a certain distance from this person, it is usually not possible to arrange for this in the courtroom.

There should be a technical apparatus in the courtroom so that the interpreter can speak into a microphone connected to a headset. According to several interpreters we interviewed, the technology frequently does not work, so the interpreter must sit very close to his/her client and whisper to her/him. When the interpreter interprets for several people simultaneously the technology of course must function. The neglect of this technical apparatus is another symptom of the disregard for the task of interpreters in Swedish courts today.

Interpreting is very demanding work. There is a need for regular pauses, and it is important that the interpreter actually gets to rest in the breaks (and is not employed as interpreter between client and legal counsel). If the interpreter should work more than half a day, then more than one interpreter should be used. It is important that the person leading the proceedings, the judge, is aware of the interpreter's needs in order to perform his/her work well. It is imperative that the court understands whether one or two interpreters are needed. Beyond that, the competence of the users of interpreting is critical for the interpreter's ability to perform his/her tasks appropriately.

3.2. The ideal interpreter

In our interview study, most of the judges answer the question, 'what characterises a good interpreter' by saying that it is an interpreter that is neither seen nor noticed;

simultaneous interpreting is highly appreciated. The judges are anxious to see that the proceedings will not be affected and should proceed without being disturbed by the need for interpreting. A repeated comment made by judges is that proceedings with interpreting take considerably longer time—in other words, they are less efficient. There is thus an awareness among judges that the presence of an interpreter does affect the proceedings—but primarily as a negative, retarding factor.

The lawyers that we interviewed express similar opinions as the interviewed judges, but with the difference that the lawyers say that they can use the interpreter for their own purposes during the proceedings. For instance, several of the interviewed lawyers mention that the presence of an interpreter slows down the proceedings, which they say can be an advantage for their clients since they then get more time to think before answering questions. One of the interviewed lawyers says: 'And then I must admit that I can turn it around and use it [and] give suggestions to the client [and] that I can reflect on what I shall say myself. In a way, I can be one step ahead.' Another interviewed lawyer in our study emphasises that a good interpreter can create 'a relation of trust' and the interpreter's ability to 'infuse calm in the person who will be translated', which in turn has importance for the proceedings. This dimension of interpreting is connected to what we label emotional work, in that the presence and performance of the interpreter has an emotional impact on the parties and witnesses, and also on the judge and legal counsel. We will discuss this in the second part of the article. In contrast to the interviewed judges, then, the lawyers also identify certain advantages of the presence of an interpreter.

The interpreters we interviewed emphasise that a good interpreter should not be seen or noticed. For instance, in one interview an interpreter refers to another interpreter that she thinks is 'incredibly competent' since it is an interpreter who 'one doesn't even remember what he looks like'. Taken together, our study shows that the interviewed judges, lawyers, and interpreters in general are in agreement about how an interpreter should behave and perform. These ideals and norms conform quite well with the more formalised rules in the Swedish Legal, Financial and Administrative Services Agency's code for interpreters. One could say that they believe that the best interpreter is somebody whose presence is invisible, that the interpreter should be a person that does not take up place and should only be an instrument for the other actors in the courtroom.

Even if the interviewed individuals in our study appear to agree that a good interpreter should not draw attention to him- or herself, it is nevertheless clear that they think that the interpreter actually does play an active role during the proceedings, a role that is not explicitly formulated but is given significance more indirectly and informally.

3.3. To be but not to be seen

That the interpreter is expected to act impartially is part of the professional ethical principles for interpreting. At the same time, this norm has as consequence certain dilemmas both for the interpreter and for the user of the interpreter. In

the interviews that we conducted, there appeared to be a tension between being impartial—to stand outside, being objective, professional—and listening—being present, observant, empathic and understanding to what is not said explicitly. One interviewed interpreter speaks about 'the square fence' as a strategy to deal with a stressful work situation. What this implies is a way to keep a distance from the persons needing the interpreter's services. As mentioned, some interpreters prefer to sit at a certain distance from the party they interpret for—for instance in the witness booth—while others prefer interpreting via telephone or video-link to avoid direct contact. Several interpreters describe how they have developed strategies to avoid contact once the proceedings are finished, for instance by leaving the courtroom last or quickly taking a pre-ordered taxi. These different statements by interpreters about their experiences in the courtroom indicate that they feel exposed and vulnerable in the situation, and that they need better support both from the court and from their employer (the interpretation agency).

Even though many interpreters agree that the ideal interpreter should be invisible, all the interviewed interpreters also emphasise that a 'good interpreter' needs to occupy a position in the room, dare to interrupt and ask questions in case of unclear statements and also be the one who demands breaks and point out malfunctioning media technology. One interpreter says that previously she was 'very idealistic', whereas today she has a more distanced attitude and thinks that 'this is this and this is me', separating herself as a private person from her role as interpreter. The same interpreter says that as interpreter you never get confirmation—meaning people do not say that you have done good work—as the interpreter is not considered important.

A reflection we make is that there are many demands on the interpreter, both by the interpreter and the user of the interpreter. It is expected that the interpreter should not be visible or be noticed, and that the interpreter should take a rather passive role. Yet, it is evident that the interpreter's presence does influence the situation. The double role—to be present but not to be seen—is a strategy that both the interpreter and the court use. In general, it seems to be the responsibility of the individual interpreter to be the one who dares to 'interrupt' the verbal exchange during the proceedings. Based on our interviews it is not unusual that it is the interpreter who needs to demand breaks in the proceedings.

3.4. Quality of interpreting

One question we asked regarded how the quality of the interpreting can be assessed, i.e. how the users of interpreting—primarily judges and legal counsel—can validate the translation from one language to another. All the persons interviewed answer that today there are not any formal methods, but that there appears to be some signs that have importance for the assessment. This dimension of interpreting is complex. The judges say for instance that 'it is difficult to know the quality' and that 'it is difficult for us to know how good is the interpreter since we do not know the language ourselves'. This makes it difficult to know 'how it is interpreted and how

correct it is being interpreted'. Some of the judges in the study state that the only time that it is possible to assess the quality of the interpreting is when you know the language yourself, for instance English.

The interviewed judges say that sometimes it happens that either another interpreter in the room challenges the translation or that there are protests from the audience: 'I have experienced that the other interpreter has said that it was incorrectly translated. This way you can find out. Otherwise it's up to the interpreter to say that he or she is unable to perform the task, they take an oath so it should be on them or possibly the Swedish Legal, Financial and Administrative Services Agency, which oversees the profession' (Judge). There may be protests from the audience or when 'one understands that the parties are not content' (Judge). One of the interviewed lawyers says that he tests the interpreter's competence by using 'a Swedish saying and if the interpreter interprets it without paying attention then I have a suspicion that this is not a good interpreter who evidently skipped what I said, [but if] the interpreter stops a second and like wonders "what's this?", then the interpreter pays attention' (Lawyer).

It is striking that today there exists no formalised methods for assessing the quality of interpreting in Swedish law courts. The sound recording that today is made in Swedish courts only records the judicial proceedings in Swedish. The interpreting passes below the radar of the media technological control mechanisms at place to ensure a fair trial. In Sweden, it is extremely rare that a trial is invalidated because of incorrect interpreting, which probably depends less on the actual quality of interpreting in Swedish law courts than that there are no ways to prove that the interpreting is not good enough (Diesen 2010). A simple media technological device that would improve legal certainty would be to record the interpreting on a separate sound track. Then it would be possible afterwards to control the quality of the interpreting.

In academic research on interpreting, one refers to the 'double roles' of the interpreter: On the one hand, the role as translator, and on the other, the role as cultural mediator, engaging in intercultural communication (Angelelli 2004). The latter can concern verbal idioms or specific cultural expressions or values. How do the judges, lawyers and interpreters that we have interviewed think about whether the interpreter should explain cultural differences and interpret bodily expressions or gestures? Here the interviewed persons have different opinions. Some interpreters as well as some judges believe that this should only be done exceptionally—as an emergency to avoid serious misunderstanding—which is connected to the established norm in the legal system that the interpreter should be distinct from the users of the interpreting, i.e. that the interpreter should not interpret what is being said—he/she should only translate what is said, not explain what was said. If situations occur that demand a linguistic or cultural explanation, it is—according to this view—up to the prosecutor or legal counsel to provide or demand an explanation, not the interpreter. As has been noted repeatedly in the research literature on interpreting, such an understanding of interpreting is based on a fundamental misconception both of how

interpreting is done and of how communication works (Berk-Seligson 1990; Morris 1990; Wadensjö 1998). This is an example of a more general phenomenon, when a discipline (in this case Law) and a professional field (the legal system) is immune to advances in knowledge that threaten the self-understanding of the discipline or profession. As Ruth Morris noted already in the 1990s, legal systems do not realise 'the delicacy' of the interpreter's role and do not understand that interpreting is not only about translation but also requires understanding of context; the interpreter is a 'mediator in the judicial process' (Morris 1995, 26-27). A similar example of a failure to understand how communication works can be found among computer scientists who believe that human communication is a question of coding and decoding signals (much in the same way computers send and receive 0s and 1s). Such misconceptions of how communication and interpreting work is, however, not only erroneous but dangerous, since it prohibits the interpreter from performing his/her task to his/her utmost ability and to correct possible misunderstandings—linguistic as well as cultural. Fortunately, most professional interpreters, to a greater or lesser degree, disregard such censorship, either consciously or unconsciously. That is, studies show not only that professional interpreters never interpret verbatim (word-for-word) what is said, but also that, as a rule, they improve the comprehensibility of the source discourse in the translated discourse (Berk-Seligson 1990; Morris 1995). However, there are of course many times when the interpreter will—and should—translate an incomprehensible sentence in the source language into an equally incomprehensible one in the target language, even if this may put their own competence on the line, since the users do not know what was said in the source language.[7]

There are, however, examples in our interview study where judges, legal counsel, and interpreters say that it is good if the interpreter explains cultural expressions and also conveys gestures and intonations. An example mentioned in an interview is the expression 'to cut the throat of somebody', which does not mean the same thing in Arabic as in Swedish. Translated into Swedish the expression becomes literal, which in Swedish legislation is a threat and therefore criminal, while in Arabic language, according to the interviewed interpreter, it means more that you are very angry with the person but not that you intend to kill. This needs to be explained since it may have importance for the judgement of the case. The judges and interpreters who believe that it is good if the interpreter also interprets gestures, intonations etc., argue that these expressions are an important element in what is communicated verbally. They argue that verbal and bodily communication are connected. One could say that on the one hand there are those— both interpreters and users of interpreters – who believe communication only is a question of verbal communication and that interpreting means a literal (word-for-word) translation, and on the other there are those that mean that communication also involves non-verbal communication, including knowledge of cultural phenomena, as well as differences between cultures.

In the context of the law court there are regularly situations where it is important

7 Morris (1995) takes up a number of such examples, including when an interpreter apparently consciously refuses to improve the comprehensibility of certain persons.

or necessary for the interpreter to explain cultural differences, and for this reason it is imperative that the interpreter also can explain these. In these situations, it is also important that the interpreter makes unambiguously clear that he or she speaks in his/her own voice—that the commentary is not mistaken as coming from the client. Typically, the interpreter signals this by speaking about her/himself in the third person ('the interpreter would like to explain…'). Such interventions would also probably slow down the proceedings even further—even if they prevent misunderstandings—which is another reason why judges do not welcome this kind of assistance.

4. Emotional work in the legal context

A sociological perspective on emotion acknowledges that emotions have a profound importance in social and professional contexts, and that what is understood as proper to experience and express emotionally is something that is successively learned through socialisation (Wettergren 2013). This means that in different ways we are always involved in emotional work, which also is surrounded by different emotional and expressive rules. The emotional perspective emphasises the emotional—and relational—work as a form of tacit knowledge about how certain tasks are expected to be performed or executed (Hochschild 1983). Arlie Hochschild draws on symbolic interactionism when she elaborates on emotional work, and develops Erving Goffman's idea of the importance of impression management in social interaction (Goffman 1990). Emotions are social, and we persistently try to make other people view us in the way we desire to be viewed. According to Hoschchild, some professions and work tasks require emotional work from the person exercising the profession. It may be expected that both the professional/worker and the client/customer will produce and stage some particular emotional states. It may also be that the worker cannot control the emotions which are supposed to be delivered or how they should be expressed. According to Hochschild, there are two types of emotional work and they relate to the concept 'emotional dissonance', which concerns the distance between the true feelings of a person and what a person is expected to feel. What she calls 'surface acting' covers situations where a person displays emotions with no connection to the inner feelings of that person. 'Deep acting' means that a person adjusts his/her inner feeling in accordance to what is expected. Everyone is involved in emotional work—not just at work—and we follow norms regulating various situations.

The field of emotional work has developed and come to be understood in a more nuanced way. An example of this would be that the original assumption that emotional work leads to alienation and low self-esteem has been modified. Now it is recognized that emotional work may also have positive dimensions with respect to the individual worker. Working in professions concerned with tasks involving personal service, care and teaching may create feelings of fulfilment and genuine emotions (Payne 2009). Thus, although emotional work is explicitly or implicitly induced in the job (and need to be so from the perspective of the employer and those who benefit from it) and in this sense constitutes a working requirement and

a burden on the worker, it still may contribute to positive feelings and self-esteem of the individual worker.

One can distinguish between different kinds or forms of emotional work. One category contains expectations and ideals on how work tasks shall be performed, not limited to the exercises necessary to do the job in a strict sense. Apart from serving food to passengers, a flight attendant must smile in a friendly way, and a nurse must show concern. These are examples of emotional work being part of the job, implicitly and explicitly. A second category of emotional work includes the effects and consequences on the individual worker having to perform emotional work and adhere to the actual or assumed requirements for emotional work. It is obvious that it will affect a person, e.g. someone working as nurse caring for a dying person, psychologically and emotionally. The personal impact on the emotional work performed by the interpreter contains both negative and positive aspects; on the one hand vulnerability, low self-esteem and, on the other hand, development of emotional capacity.

The interest in studying emotions in professional contexts has increased in the past decade. This is also the case in law, although one traditionally would not think that they matter—or should matter—in this context (Dahlberg 2009; Wettergren & Bergman Blix 2016; Bergman Blix & Wettergren 2016). A trial is an institutional activity that is expected to be conducted according to neutral and objective principles, but research has shown that emotion and empathy play a role that challenges the assumption of pure rationality, both institutionally and for individual actors.[8] Research on emotions in law courts includes several different disciplines, such as criminology, law, philosophy, sociology (Maroney 2016). A key point of departure is that emotions and law are shaped by each other, that 'emotion shapes law and law shapes emotion'.[9] There are several studies that have looked at the emotional work of judges, prosecutors and legal counsel,[10] but there is no research focusing on the emotional work of the interpreter in court proceedings.

4.1. Interpreting as emotional work

According to the Swedish Legal, Financial and Administrative Services Agency's guidelines for interpreting in institutional contexts, the interpreter is expected to act neutrally and impartially. The emotional work performed by the interpreter is not only a question of translating emotions (or not) from one language or culture to another, but furthermore the task involves to produce in the listener a proper emotional state. The interpreter has to deal with emotions one way or the other. It is important to recognize the importance of emotional work in court interpretation. In her article 'Images of the Court Interpreter' (2010), Ruth Morris submits that the fact

8 Bandes 2006; Bornstein & Wiener 2006; Dahlberg 2009.
9 Abrams & Keren 2010; Bandes & Blumenthal 2012; Maroney 2015.
10 Bandes 2006; Feigenson & Park 2006; Dahlberg 2009; Bandes & Blumenthal 2012; Maroney & Gross 2013; Wettergren & Bergman Blix 2016; Bergman Blix & Wettergren 2016.

that the interpreter is emotionally affected should not be understood to be contrary to the norms of neutrality and objectivity, in the sense that the interpreter must not interfere with the situation; interpreting requires not only that the interpreter understands what is explicitly said but also its underlying messages and the contexts. What Morris highlights is the importance of the interpreter to take the interpreted persons' roles and perspectives: 'the interpreter must identify with and "become" each speaker' (Ibid, 31). This kind of identification with the speaker obviously also has an emotional dimension.

According to the interviews that we have conducted, it is evident that the emotional work of the interpreter plays an important role in the proceedings. For instance, the lawyers say that interpreters have a calming effect on their clients. In the interviews with interpreters, they give several examples on emotional work. One interpreter says that 'a good interpreter knows how to spread calm in the court room and I have learned to use my voice to perform kindness and calm […]. Because the situation in the courtroom can be very tense'. Thus, emotional work is used in the process of interpreting, both by the interpreter and the user, and for a wider purpose than just translation. This indicates that feelings and emotional expressions are attributed greater significance in interpreting practice when compared to the norm/ideal of legal interpreting.

We mentioned earlier a theme which we called 'to be but not to be seen' which also can be understood as a characteristic of emotional work, in that the interpreters tend to tone down emotions—either intentionally or unintentionally—although not elide them completely, and act according to the demands of the situation. The so-called 'square fence' which some of the interviewed interpreters apply as a strategy to fence themselves from stressful working conditions is another example of a strategy to handle negative emotional experiences that seem to be a part of the working conditions of interpreters. There are examples from our interviews, where the interpreters submit different strategies used in order to leave the court building when the trial is over without having to be left alone together with the person or persons for whom they have interpreted. This strategy can be described as an avoidance strategy.

Several of the interviewed interpreters mentioned that they have been on sick-leave, for longer or shorter periods, which they explain with reference to previous working experiences from legal interpretation and the psychological pressure which builds up when you have to interpret experiences of war, death and torture. When the interpreters refer to such experiences, it becomes apparent that sometimes it is not possible—or even desirable—for an interpreter to hold a distance to the situation, to assume a neutral and objective position and 'just interpret'. From the interviews, it is clear that there is no such thing as 'just interpreting', since the context of interpreting consists of an interactive and communicative dialogue based on processes to create meaning.

4.2. Politeness & impoliteness

Although from a juridical point of view, the central issue in interpreting is that of efficiency and correctness, the question of form and manner is also important. As has been noted above, the interpreter is neither supposed to filter out emotions nor omit vulgar expressions. However, an important part of communication in court is showing respect both towards the institution and the judge. Respect can be expressed in different ways, both verbally and non-verbally. An example of the latter is the general expectation from the judge that men should not wear a hat or cap when seated in court. However, among young men today it is quite common to wear cap also indoors. Thus, there regularly occur minor confrontations in court where the judge asks a party or member of the audience to take of his cap and the latter refuses. It is however quite unusual that the judge actually will discipline this kind of act, but it will likely affect the way the person is perceived by the court in a negative way.

When it comes to verbal behaviour, the show of respect consists in part in that a party or witness should only speak in response to questions from the judge, prosecutor or legal counsel (although a party of course can confer with his own legal counsel). Further, the responses should not only be truthful but also pertinent to the questions asked. A party or witness that has not been 'prepared' by legal counsel will typically either speak too much or too little, in both cases testing the patience of the court. A person who consistently responds to simple questions by excessive verbosity would appear to frustrate or even obstruct the court's search for the facts in the case. Whereas this would be clear enough if the person is speaking in Swedish, if the person speaks a foreign language it is only through the interpreter's translation that the court partakes in what he or she says. A frequent concern in the interviews with judges and legal counsel was that an interpreter either would translate an apparently long answer in a much shorter way, sometimes only with an affirmative 'yes' or negative 'no', or on other occasions the interpreter would seem to expand a seemingly succinct answer with extensive detail. Although it is of course possible that this could be an example of poor interpreting, it is more likely that the interpreter is not only verbally translating but also stylistically transposing the answer in a way that is appropriate for the court setting. This would be an example, then, of when the interpreter is engaged in adjusting what is considered an appropriate or polite way of speaking in one language or culture to that of another. Yet, from the outsider's perspective, such stylistic transposition is often viewed with suspicion, since one is unable to understand what is going on.

Another example of when the interpreter is confronted with questions of politeness includes translating aggressive, disrespectful or even insulting verbal behaviour. Although the verbal decorum in court demands both civil and polite behaviour, under the polished surface the going can get quite rough (Harris 2011). When the prosecutor or legal counsel questions a party or a witness, part of their verbal strategy is to unsettle their interlocutor. A common rhetorical device is to attack the credibility of the person (*ad hominem*). In these instances, it is not uncommon that the interpreter, in violation against praxis, avoids speaking in the

first person and instead says 'the prosecutor says', in this way distancing him/herself from the aggressive discourse he/she is translating. Some researchers have analysed this behaviour on the part of the interpreter as a face-saving device, that is, not to appear to be the aggressor (Jacobsen 2008; see also Pöllabauer 2004). This is another example of the avoidance strategy discussed earlier.

Another problem facing the interpreter is that aggressive communicative acts are not always verbal, but may be expressed through gestures, facial expressions and prosody. The latter strategy of impoliteness has been studied by Jonathan Culpeper (2005), taking as an example a television talk show where the host treats her guests in rude and offensive ways, but apparently to the amusement of the audience. Faced with the task of translating a discourse that is clearly sarcastic due to prosody and other non-verbal cues, the interpreter will have to find a way to convey the same tonality either through prosody or through words. In the latter case, it can be argued that the interpreter is doing more than 'just translating', yet anything else would be a mistranslation.

5. Conclusions

Our pilot study shows that there are significant knowledge deficits among users of interpreters that can affect the conditions for interpreting and also for legal certainty when an interpreter is present. The individual courts appear to have very different knowledge concerning legal interpreting, that is, varying competence as users of interpreting. Although interpreting in courts follow the rules for interpreting formulated by the Swedish Legal, Financial and Administrative Services Agency, in practice there is not one praxis regarding interpreting—for instance regarding how to deal with idioms and non-verbal language (gesture, facial expressions, body language) which resist direct translation, and the possibility for the interpreter to comment on culture specific phenomena, and how these factors weigh into the proceedings. Based on our pilot study we cannot judge how serious consequences this has in practice, but it seems to affect the possibility to give equal conditions to different cases, which challenges legal certainty. This should be studied in more detail. In the same way, it is evident that the shortage of both authorised and authorised legal interpreters is at odds with the requirement to use authorised interpreters. This also raises questions that have consequences for the quality of the proceedings and legal certainty. This is primarily a political question how to support the education and training of interpreters and also to give professional interpreters better working conditions, also economically. Other knowledge deficits that the study has revealed relate to the functionality of media technology in the court room, in particular limitations to the video conference systems in place. The interviewed interpreters tell about poor equipment that negatively affect their work. Taken together, our pilot study has revealed strenuous working conditions for interpreters, and several interpreters voice criticism against the way the system with contracted interpreting agencies works, in particular the courts' lack of procurement competence.

Our explorative study shows that emotional work is involved in the process of

interpreting – both by the interpreter and the user, and also for wider purposes than just translation, which indicates that feelings and emotional expressions are attributed greater significance in interpreting practice compared to the official codes/guidelines for interpreting. There are different kinds of emotional strategies, for instance to tone down emotions, using a calm appearance and voice and/or use avoidance as a strategy to cope with stressful working conditions. The interviewed interpreters also relate how they need to recuperate after stressful or even traumatic emotional experiences in court. The emotional work in the process of court interpreting needs to be explored further and from various perspectives, e.g. gender, age and different forms of judicial procedures.

In a broader perspective, our interview study of interpreting in courts raises a more general question of the relation between law and society, primarily as a socio-cultural phenomenon. Although Sweden in many respects always has been a multicultural society, there exists today a different perception of this than in the period of nation-building. The cultures that today meet in Sweden are also more disparate than in the past and more languages are spoken. If Sweden today is becoming a more multicultural and multilingual society, how does this come together with the principle that it is 'Swedish' values that are normative for the legal system and that it is Swedish that is spoken in Swedish courts? There appears to exist a contradiction between the ambition to build a multicultural society and the mono-culturalism prevalent in the Swedish legal system. One can ask if the legal system should not in a better way reflect the society of which it is a constituent part. One can for instance compare with American conditions. Some states accommodate multilingualism in society by allowing for bilingual court proceedings (Berk-Seligson 2002, 54-96). Is such a development possible—and desirable—in Sweden and in other Nordic countries? In the near future, more and more judges—both professional judges and lay judges—will have a mixed cultural background and speak other languages than Swedish, which raises the question of how they should make use of contextual interpretation, and to what extent they may make use of their own linguistic competence during a proceeding.

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Human Rights Cinema: *The Act of Killing* and the Act of Watching

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Over the past twenty years, the phenomenon of Human Rights Cinema has emerged as an important way to think about the relationship between visual culture, human rights and activism. This article will interrogate some of the presuppositions behind this phenomenon and examine what it means for both cinema and the concept of human rights. The article will then look at *The Act of Killing*, a 2012 documentary that has raised many questions for the project of Human Rights Cinema. It will be argued that *The Act of Killing* does not fit easily within the canon of Human Rights Cinema, not simply because of controversies surrounding its making, but also because of the challenges it poses for ideas of spectatorship and authority. Furthermore, this article will propose that Slavoj Žižek's observations on *The Act of Killing* provide a useful means to critique the understanding of human rights predominant in the concept of Human Rights Cinema.

1. Human Rights Cinema and the question of truth

Since the early 1990s, a plethora of human rights film festivals has sprung up around the world, effectively inventing the concept of Human Rights Cinema. This now widely accepted category of film brings together the aesthetic concerns of the film-maker with those of the human rights activist. Human rights film festivals, the earliest being that of Seattle in 1992, are attended annually by thousands of people, and have played a vital role in advancing the idea of Human Rights Cinema. In 1994, the Human Rights Film Network was established in Prague. The Network, whose secretariat is run by Amnesty International, now organises forty-one film festivals around the world, including events in cities such as Melbourne, Seoul, Paris, Pretoria and Buenos Aires (Human Rights Film Network 2017). Additionally, Human Rights Watch organises some twelve film festivals in major cities around the globe (Human

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Rights Watch 2017). A proliferation of scholarly publications and university courses add to the sense that Human Rights Cinema is an idea whose star can only continue to grow (Tascón 2015).

Although many of the film festivals in the Human Rights Film Network are held in developing countries, human rights films are still more likely to be made by, watched by and financed by those in wealthy countries. An examination of the listings of Human Rights Film Festivals reveals a preponderance of films dealing with civil and political freedoms, and rather fewer that deal with poverty and deprivation. In this sense, the phenomenon of Human Rights Cinema is a microcosm of the international human rights system, which unofficially operates a similar hierarchy of rights. In the true style of a human rights organisation, the Human Rights Film Network has a Charter, adopted in 2004, which seeks to articulate the concept of Human Rights Film. The Charter articulates a common strategy for film-makers towards a shared end. To this limited extent, it has echoes of art manifestos of the early twentieth century. However, this is where the similarity ends. The art manifestos of the early twentieth century, such as the Dada manifesto of 1915 or the Surrealist manifesto of 1924, often sought to shock their readers, or to become art-works in themselves. By contrast, the Charter of the Human Rights Film Network frames its vision in restrained, legalistic language. Indeed, it resembles a Human Rights Convention, with numbered articles to outline its organising principles. The Charter begins by committing its members in Article 1.2 to the promotion of human rights film (Human Rights Watch 2017). Article 2.3 attempts to define human rights films as 'films that reflect, inform on and provide understanding of the actual state of past and present human rights violations, or the visions and aspirations concerning ways to redress those violations.' Article 2.2 commits the Network to promote a 'broad concept of human rights, on the basis of international standards as embedded in the Universal Declaration of Human Rights and other international law.' Article 2.3 says that human rights films

> have superseded common notions of 'left or 'right'. They have, implicitly or explicitly, been based on human rights tenets even before the Universal Declaration of Human Rights was established in 1948.

Article 2.3 also allows for a multiplicity of film genres within Human Rights Cinema, saying that human rights films can be 'documentary, fiction, experimental or animation' and adds that: 'Human rights films may be harshly realistic, or highly utopian. They may offer gruesome pictures, or show the bliss of peaceful life. They may report, denounce or convey an emotional message'.

Crucially however, Article 2.3 also states:

> We believe that human rights films, whatever their format, contents or character, should be 'truthful'. That is, they should inform the viewers on human rights issues and aspirations, and should not intentionally misrepresent the facts or the views or words of those portrayed. They should not be so biased as to invoke hatred and discrimination against groups and individuals, or serve political or

> commercial interests only. They should be explorative of the issue rather than propagandistic, and not reproduce stereotypes.

This indicates that Article 2.3, while acknowledging that Human Rights Cinema can embrace a variety of film genres, insists on a commitment to the truthful depiction of the reality of human rights violation. There is an interesting supposition here that the violation of legal categories can be made visible through their 'truthful' depiction. Human Rights are, after all, legal instruments, notwithstanding any normative content they may have. The nature of this supposition, and what it says about the conception of truth in Human Rights Cinema will be explored in this article.

An important supplement to the Charter is to be found in Daan Bronkhorst's influential essay, *Human Rights Film Network – Reflections on its History, Principles and Practices* (Bronkhorst 2003). This essay, widely disseminated by Human Rights Film Festivals, has played an important role in defining Human Rights Film. Bronkhorst charts the nexus between human rights and film with the purpose of articulating a 'theory of the human rights film'. In his essay, he traces the historical origins of human rights, noting that films that have 'implicitly or explicitly based on human rights tenets' can be dated back to well before the 1948 Universal Declaration of Human Rights, to early documentary films such as *The Battle of the Somme*, *Spanish Earth* (1937) and feature films such as *J'accuse* (1918), *The Big Parade* 1925) and *The* Great *Dictator* (1940). He discusses the continuity of human rights concerns to a long list of feature films that ranges from *Judgement at Nuremberg* to *The Green Mile* (1999) and *The Killing Fields* (1984).

Bronkhorst broadly divides his discussion of Human Film into two parts, one dealing with documentary films and the other dealing with feature films. Unsurprisingly, the documentary form tends to predominate in Human Rights Film Festivals. The One World Film Festival in Prague, for example, only screens documentaries. Bronkhorst outlines a typology of four main types of human rights documentary. The first is the Explanatory Documentary, which seeks to document a question involving human rights through the use of interviews, images and commentary. The second is the Denunciatory Documentary, which is concerned with identifying responsibility for human rights abuses. The third is the Search Documentary, which concerns the film-maker's personal search for the truth behind a particular human rights issue. Finally, there is the Testimonial Documentary, which bears witness to the experience of people affected by the abuse of human rights. Bronkhorst describes this final category of Testimonial Documentary as the 'culmination of the genre', noting that 'so much has already been said and explained by so many people, that by now a straightforward personal expression seems to suffice' (Bronkhorst 2003). However, notwithstanding this, he recognises the problematic nature of his claim, as the testimonial film-maker must tell a story as well as bear witness; Testimony must be conveyed in a way that is interesting and engaging for the viewer. However, he does not see this opposition between testimony and story-telling as an irresolvable one for the concept of Human Rights Cinema. Instead, he observes:

> The visual language of film has increasingly become a language of suggestion, of images that evoke other images, and may be accompanied by a spoken comment which is suggestive and non-hermetic. In this way a language of ambiguity is realized (Bronkhorst 2003).

The fluidity of the relationship between narrative and testimony becomes, in his account, a challenge to be taken up by film-makers:

> The human rights film, both as a documentary and as a feature film, can explore the border area of the struggle between reason and emotion. It is precisely in this area that lies the vitality of human rights activism' (Bronkhorst 2003).

Bronkhorst's typology of documentary film, and its culmination in Testimonial Documentary, has much to say about the relationship between Human Rights Cinema and truth. Each of these categories of human rights documentary evince the commitment to the idea that human rights film must always convey the reality of human rights violations truthfully. However, each category also does more than simply present evidence in forensic form. Instead, each must also engage the viewer in different ways. In all of them, narrative plays an important role; a story must be told—whether it is the story of the victim, the human rights defender or indeed that of the film-maker. Despite the predominance of the documentary form in Human Rights Cinema, the boundary between documentary and fictional feature films is not a clear one, but has involved a historical borrowing of styles and techniques. However, as documentary films are more typically used to depict a factual situation, they are often considered to be 'superior to fiction films because of their pretension to monopolize the market of the truth' (Loshitsky 1999, 361).

For Bronkhorst, the question of truth in Human Rights Cinema emerges as an area of contestation. He articulates this as a challenge to the film-maker to be simultaneously an activist and a story-teller. The deeper challenge at stake here, however, is that of properly articulating the relationship between Human Rights Cinema and truth. Bronkhorst argues that the distinguishing feature of a human rights film, is not its relation to truth, but to truthfulness. This means that Human Rights Cinema must not be simply concerned with the telling of stories that are true, but also display a normative commitment to truthfulness. His model of truthfulness is here derived from Habermas' concept of communicative rationality, which describes three criteria for truthfulness in communication. First, a communication should 'correspond to the facts'; Second, a communication should comply with a 'normative system within which both those making the statement and those receiving it are able to make judgements'; Third, a true statement must be 'sincere', 'honest', 'truthful'.

Habermas' conception of truthfulness is, in turn, a pre-condition for deliberative communication. The 'sincerity' to which Bronkhorst refers corresponds to Habermas' appropriation (in various parts of his model of communicative rationality) of the Kantian concept of *Wahrhaftigkeit*. The concept of *Wahrhaftigkeit* implies more than merely abstaining from deception in communication, but translates as a striving for truth, by being 'true to one's inner self', or finding 'one's innermost identity' (Steiner

2013, 92). The idea of truthfulness in Article 2.3 of the Charter resonates with this conception of truthfulness as an abstention from intentional deception. By situating Human Rights Cinema within a register of 'truthfulness' rather than one of mere 'truth', Bronkhorst allows the conception of Human Rights Cinema to cross the boundary between documentary (which typically claims to truthfully depict facts) and fictional feature film (which typically does not). Furthermore, by establishing truthfulness as a pre-condition for Human Rights Cinema, he effectively situates human rights film as part of a deliberative process within a normative system.

However, the conjunction of human rights and film belies a more complex relationship between truth and fiction than Bronkhorst would lead one to believe. Tascón observes:

> Visual textuality has a particular relationship to truth. While semantically speaking, the visual image is but another type of symbol-and thus already a mediated experience, because of its highly motivated and iconic status as a symbol-it is often read as a transparent form of communication and is closer, therefore, to 'the truth' (Tascón 2012, 869).

Documentary film, in particular Testimonial Documentary, also appears to offer a revelation of truth by deploying rhetorical conventions which themselves denote truthfulness. Tascón adds:

> conventions such as testimonies of survivors, interviews with professionals in the field of enquiry, and of course, the hand-held camera, all provide ways to strengthen this film-forms ability to tell the 'truth' (Tascón 2012, 870).

To a lawyer's eye, there are, of course, some obvious problems to the elevation of Testimonial Documentary as an indicator of truthfulness. The special role of testimony in the concept of Human Rights Cinema echoes the importance that testimony plays in legal cases. Many of the same problems of testimony that arise in litigation also apply to documentary film. Problems of memory, hearsay and reliability apply here as they do in, for example, criminal proceedings, or indeed hearings of truth and reconciliation commissions (Campbell 2002). In testimonial film, there is the additional issue that testimony in a documentary can be staged or re-enacted for dramatic purposes. Additionally, unlike a legal proceeding, documentary film does not allow for those who testify to be questioned or cross-examined by the viewer, nor does it guarantee for the accused the right of reply; Instead the viewer must trust in the good faith of the film-maker.

The problematic relationship between truth and human rights film is illustrated by the attempts of film-makers after the Second World War to address the horrors of the Nazi period (Govedarica 2005). For Alain Resnais, director of the documentary about the Nazi death camps, *Night and Fog* (1955), the problem was one of how to depict these events without simply bombarding the viewer with horrific images of suffering, a tactic which would simply reduce the observer to either withdrawal or denial. Resnais describes the task of the film-maker in this situation as one of

'how to maintain the image's power to shock without evoking either total disbelief or incapacitating grief?' (Flitterman-Lewis 1988, 205). Resnais' response is the concept of 'constructing forgetting… …tempering forgetfulness with a call to action, instead of passivity and withdrawal, which leads only to despair' (Flitterman-Lewis 1988, 205). This means that the documentary should do more than merely document reality. It must also be a call to action. This resonates with the subsequent idea that Human Rights Cinema must simultaneously attempt to describe reality and raise awareness. *Night and Fog* is divided into sections which juxtapose slow tracking shots of the deserted and overgrown death-camps with archive footage of Hitler's rise to power. It depicts the dreadful spectacle of daily life in the camps, the horror of mass exterminations and the Allied liberation of the camps. The film is accompanied by a spoken text, which leads the viewer through the footage, not as a litany of horror piled up upon horror, but rather as an ordinary account of extraordinary events intended to compel the viewer to responsibility and social action: 'As *Night and Fog* proceeds, the viewer changes from an observer of documented events to a witness with the capacity for moral judgement' (Flitterman-Lewis 1988, 211). The transformation of the concept of the spectator from observer to witness has later resonances with the concept of the spectator of Human Rights Cinema, as this article will discuss.

As Tascón observes, much of the 'nomenclature' of Human Rights Cinema is derived from an earlier cinematic movement, that of *cinéma vérité* (truthful cinema, sometimes described as 'direct cinema'), which came to prominence on the 1960's. (Tascón 2012). *Cinéma verité*, sought to make 'real films' dealing with 'real life'. The movement was inspired by early directors such as Dziga Vertov and Robert Flaherty, and associated in the later twentieth century with directors such as Jean Rouch, Michel Brault and Robert Drew, who were particularly concerned by the relationship between documentary film and truth. Generally, *cinéma verité* seeks to reveal truth in cinema through the interaction between the film-maker and subject, typically without the guidance of a narrator. The intention of the film-maker is to film 'real' people, not professional actors, as directly as possible, acknowledging always both the role of the camera and of the film-maker him/herself in the process (Mamber 1974, 3). Mamber describes the purpose of *cinéma verité* as '[stripping] away the accumulated conventions of traditional cinema in the hope of rediscovering a reality that eludes other forms of film-making' (Mamber 1974, 4). Rather than absenting himself from the scene the film-maker must seek to reveal a truth without deceptions, as objectively as the medium will allow.

However, Edgar Morin, who was an influential theorist of the movement, observed,

> There are two ways to conceive of the cinema of the Real: the first is to pretend that you can present reality to be seen; the second is to pose the problem of reality. In the same way, there were two ways to conceive *cinéma vérité*. The first was to pretend that you brought truth. The second was to pose the problem of truth (quoted in Lee-Wright 2010, 93).

This search for truth sometimes required interviews with 'real people' to be stylized and provocative, staging scenes in order to reveal the 'reality' of what is being filmed. C*inéma verité* also relied on conventions such as the use of hand-held cameras, grainy footage and intentional sound and continuity mistakes (Dancyger 2007, 122). These created the impression of a 'real' experience, and acted as indicators of truth and authenticity. *Cinéma verité*, for all of its hubristic claim to represent reality, could not avoid trading in the illusion of authenticity.

In his seminal film about the holocaust, *Shoah* (1985), Director Claude Lanzmann relied largely on interviews with survivors, bystanders and witnesses. The film falls into the category of Testimonial Documentary, and stands as an important visual record of those events. *Shoah* has many of the markers of 'gritty truth' that are familiar from *cinéma verité*, with interviews shot in grainy film and with footage of the film-makers themselves included in the film. However, despite its painstaking detail (the film took eleven years to make), Lanzmann does not take a strictly forensic attitude to the question of truth. Indeed, he described staging many of the key scenes, and had his interviewees re-enact their conversations. His purpose was not to falsify their stories, but, in the tradition of *cinéma verité*; to reveal their truth.

Feature films have also struggled with how to deal with the question of how to depict human rights issues truthfully. In the post-war period, fictional movies dealing with Nazi horrors had to find a way of doing so without undermining their truth. *Judgement at Nuremberg* (1961) concerned the trial in post-war Germany of four German jurists, accused of crimes against humanity for their collaboration with the Nazi regime. The film dramatizes the actual trial in 1947 of several German jurists for war crimes and crimes against humanity arising from their collaboration. The trial did not form part of the Nuremberg war crimes tribunals, but was a subsequent legal process operated by the American occupation forces. The film examines in some detail the jurisprudential arguments surrounding the involvement of the German judiciary in the administration of Nazi justice. In particular, it focuses on the struggle of the American Judge Haywood, played by Spencer Tracy, to make a ruling on the culpability of the judges on trial. Most of the action takes place in the courtroom, although the relations between the occupation forces and the local population are also depicted (including an liaison between Judge Haywood and a local woman, played by Marlene Dietrich). At a crucial moment in the trial, the prosecutor screens an extract of actual newsreel footage from the death camps. The footage is overlaid with a spare commentary, narrated by the prosecutor, describing the events of the holocaust, from its planning to its gruesome execution. The footage includes images of naked bodies piled up for incineration, images that were very shocking for a feature film of the period. However, the use of the newsreel footage plays two important roles in the film. The first is that it has the effect of resolving the jurisprudential deadlock that has thus far dominated the narrative. As the footage is played, the film cuts to the faces of the various protagonists, so that we can its transformative effect on them. At the end of the newsreel footage, we see that Judge Haywood, who, until now, has been an inscrutable presence in the film, is visibly

moved by the experience. Judge Haywood wears a fixed expression, as if the only option left available to him in the face of such images is to convict the accused. In the face of this representation of horror, all legal arguments are silenced. The second problem resolved by this 'film within a film' is the problem of how to represent the holocaust in a fictional feature film. By making recourse to actual footage in the film's moment of moral and legal judgement, *Judgement at Nuremberg* is able to bear witness to the Nazi horrors by suspending momentarily the conventions of fiction and replacing them with those of reportage.

The use of documentary techniques as indicators of truth is also found in many other films in the Human Rights Cinema canon. Bronkhorst, for example, includes in his list of human rights films examples such as *Schindler's List* (1993), *Hotel Rwanda* (2004) and *The Killing Fields* (1984), which merge aspects of documentary film with feature film in their attempt to re-create events in painstaking detail. These movies, sticking faithfully to the realist aesthetic of docudrama, also seek to do more than just tell a story but attempt to speak in a register of truth, and by doing so to increase awareness of particular human rights abuses.

Despite the insistence of the Human Rights Film Network Charter on 'truthfulness' as a distinguishing feature of human rights film, these examples indicate that the criterion is a problematic one. Films which have a social purpose have struggled to negotiate not just the boundary between documentary and feature film, but also between truth and fiction. The prioritisation of the documentary form as a form of truth-telling does not resolve the question, as the documentary form itself often relies on conventions that stage actual events in order to construct the impression of reality. The Charter relies on the presumption that what is portrayed in human rights documentary is a visual representation of reality. This presumption persists, despite the rich vocabulary of rhetorical tools evident in documentary film to manifest facticity, and despite the reliance of documentary on the narrative techniques of feature film. By situating Human Rights Cinema within a deliberative structure, Bronkhorst also places it within a register of truth-telling and communicative rationality. This presupposes that Human Rights Cinema is concerned with the depiction of reality in a way that is accessible to a system of rational normative communication, rather than one in which meaning fails, or is disrupted by unconscious desire.

Despite its fictional character, docudrama makes a claim to truth based on its attention to detail in recreating reality and the truth of the facts upon which it is based. If there is a hierarchy of truth in Human Rights Cinema, the lowest position in that hierarchy is occupied by pure fiction; by films that do not claim to represent reality as historical record. What is at stake here is not just a question of genre, but one of the relationship of Human Rights Cinema to truth. Human rights discourse, and indeed legal discourse more generally, presupposes a forensic relation to truth in which truth is to be determined by the impartial investigation of factual evidence. By contrast, the Charter of the Human Rights Film Network, by insisting on 'truthfulness' as a condition of Human Rights Cinema presupposes a very different

kind of criterion; one that is based on the intention of the film-maker rather than the examination of factual evidence. Furthermore, as this article has examined, such a commitment may sometimes sit uncomfortably with the film-maker's craft as a story-teller, or indeed with the social purpose of film-making.

However, the inconsistencies in the way in which cinema is related to truth are elided by the Human Rights Charter's conception of Human Rights Cinema as a humanitarian enterprise. This is rooted in a faith in film's capacity to bear witness to man's inhumanity to man; it is cinema as a tool of humanitarianism rather than of politics, and is reflected by the already mentioned claim in Article 2.3 of the Charter that human rights film 'supersedes common notions of left and right'. However, the humanitarian tendency in Human Rights Cinema can also have the effect of 'flattening out' the political context of human rights issues, reducing questions of desire, identity, class and gender to questions of human dignity.

The humanitarianism of the Human Rights Film Network parallels a similar humanitarian tendency in human rights discourse more generally. In recent years, it has become common to portray human rights as a means of superseding political antagonism in favour of broad humanitarian interests. Wendy Brown, in a critique of Michael Ignatieff, for example, describes how humanitarianism:

> …presents itself as something of an anti-politics, a pure defence of the innocent and the powerless against power, a pure defence of the individual against immense and potentially cruel or despotic machineries of culture, state, war, ethnic conflict, tribalism, patriarchy and other mobilizations or instantiations of power against individuals (Brown 2011, 134).

The humanitarian tendency to de-politicise human rights treats human rights as a nothing more than a normative and legal tool that can resolve humanitarian wrongs, irrespective of the diverse historical and cultural contexts in which they occur. It translates ideological antagonism into a simple struggle for human dignity. Humanitarianism can thus have the effect of emptying human rights discourse of its emancipatory and transformative potential, neglecting its capacity to enable people to think differently about the socio-economic ordering of society. It turns human rights into a 'safe' normative discourse, consistent with the ordinary functioning of liberal democracy.

2. Truth, fiction and *The Act of Killing*

The Act of Killing (2012), directed by Joshua Oppenheimer, is a documentary film that raises difficult questions about the relationship between truth and fiction. The film was widely acclaimed, winning an Oscar nomination, a BAFTA award and multiple other awards. It was screened at many human rights film festivals but, as I will argue, it not only problematizes the relationship between truth and fiction in Human Rights Cinema, but it problematizes the very notion of Human Rights Cinema itself.

The film deals with the mass killings that took place in Indonesia in 1965–66, during the upheavals leading to President Suharto's brutal accession to power. The killings were carried out by Indonesian army units and local vigilantes, who targeted suspected communists, leftists and ethnic Chinese. Although exact figures are not available, the estimated number of deaths varies between half a million and one million deaths (Gellately and Kiernan, 2003 290–291). Despite the terrible scale of these murders, they have been relatively unexamined in Indonesian society, largely due to the thirty years of repression that followed them. Indeed, as the film depicts, the killers are still celebrated openly as heroes and have significant influence in politics, business and media.

The Act of Killing follows the present-day lives of some of the perpetrators of the massacres, notably Anwar Congo, Adi Zulkadry and Herman Koto. The protagonists had been small time gangsters in the city of Medan, Northern Sumatra in the 1960s, who made money from the sale of black-market movie tickets. When the disturbances began, they went from these obscure beginnings to become the leaders of the most powerful death squad in Northern Sumatra. As well as murder and torture, they also extorted money from ethnic Chinese inhabitants as the price for keeping their lives. Today, Anwar is revered as a founding father of Pemuda Pancasila, a right-wing paramilitary organization that grew out of the death squads (Anderson 2000). In the film, the protagonists speak unashamedly about how they murdered their victims. They discuss, for example, how best to strangle a man to death with a piece of wire, even acting it out for the camera. These accounts are difficult to listen to, as they describe atrocious deeds in a dispassionate, matter of fact way. In one account, Anwar describes the clothes he used to wear when carrying out murders, and how he struggled to avoid staining his trousers with the blood of his victims. He claims in the film to have personally murdered some one thousand people. This chilling frankness is the first shocking aspect of this film. The moral universe depicted in this film is one in which ordinary mores are turned upside down, where gangsters are feted, and where their acts of murder, torture, and extortion, are rewarded with both political influence and celebrity.

Some early parts of the film might look like Testimonial Documentary, with little evident intervention from the film-makers in the testimony. However, this film does not pursue the aesthetic of 'gritty truth' found in *Shoah* or *cinema verité;* instead it does something radically different. Anwar and his friends are invited by the film-makers to make a feature film about their crimes, to re-create scenes from the massacres in whatever style they chose. The process of making this 'film within a film' itself becomes the main subject of the documentary. Director Joshua Oppenheimer, said:

> To explore the killers' astounding boastfulness, and to test the limits of their pride, we began with began with documentary portraiture and simple re-enactments of the massacres. But when we realised what kind of movie Anwar and his friends wanted to make about the genocide, the re-enactments became more elaborate. And so we offered Anwar and his friends the opportunity to

> dramatize the killings using a choice of genres (western, gangster, musical). That is, we gave them the chance to script, direct and star in the scenes they had in mind when they were killing people (quoted in Žižek 2014, 307).

As the film progresses, it takes a stylistic turn towards increasingly elaborate and surreal scenarios of staged killing and torture. Oppenheimer has called the result 'a documentary of the imagination rather than a documentary of everyday life' (Bradshaw 2013). *The Act of Killing* is a thoroughly disorientating film, shifting between scenes of observed dialogue in a 'fly on the wall' style, interactions between the perpetrators and the director, scenes of staged interrogation, torture and murder, a realistic re-staging of the violent burning of a village, musical scenes and surreal scenes of dream-like fantasy. The result is unsettling, not just because conventional morality seems are inverted, but also because the distinction between reality and fiction is unclear, as is the role of the film-maker in the production of meaning.

While the film has received great critical acclaim, it has also been strongly criticized for the way it addresses questions of human rights, with one critic describing it as a 'snuff movie' (Fraser 2014). Oppenheimer has responded:

> the film is not violent, and all those appearing in the re-enactments are perpetrators, paramilitary leaders, and their immediate family members—that is, there are no survivors in the dramatizations. And there are certainly no scenes documenting actual physical violence (Oppenheimer 2014).

Nonetheless, an important criticism is that the film does not give a voice to the victims of the crimes, focusing instead entirely on the perpetrators:

> To have the perpetrators legitimate and re-enact their crimes on camera courts a morally obscene *jouissance* of impunity, a re-perpetrating in representation if you will, and may be seen as endorsing a sympathetic portrait of 'traumatized heroes' (Hogan and Marín-Dòmine 2014, 7).

A second criticism is that the film says little about the role of the military in the killings, failing to address the common misconception that these killings were carried out by rogue psychopathic elements, rather than being coordinated at the highest levels (Cribb 2013). Additionally, the film says little about the role of the subsequent Indonesian New Order regime in maintaining a history of silence about the events (Hogan and Marín-Dòmine 2014, 7). Another criticism has been that the film's portrayal of Indonesia as a 'gangster paradise' is an unconsciously chauvinistic portrayal, a freak-show of the primitive for Western audiences (Godmilow 2014).

However, for the purposes of this article the criticism that raises the most difficult question is that of the relation of the film to truth. It is not always clear in the film where the boundary between truth and fiction lies. We have no means, for example, of knowing whether the protagonists are telling the truth, nor does the film explain the full role of the film-makers in staging the scenarios re-enacted by the protagonists. There have been allegations that participants were manipulated

into performing the roles that they played. Anwar Congo, for example, has said that he believed that he was participating in the making of a genuine feature film called *Arsan and Aminah*, not the documentary film that was produced. He has added that if he had known the real nature of the project, he would not have participated in *The Act of Killing* (Sweedler 2014, 16).

The film-makers have argued that their purpose was not to give a platform to the perpetrators but to confront them with their deeds and to raise awareness of the impunity with which these events have been treated in Indonesia. In a comment that addresses some of the criticisms of the film, Oppenheimer observed:

> The question in mind was this: what does it mean to live in, and be governed by, a regime whose power rests on the performance of mass murder and its boastful public recounting, even as it intimidates survivors into silence (Oppenheimer 2012).

However, directorial intervention in this film does seem to go considerably beyond the usual role of the documentary-maker in the human-rights film tradition, even accounting for the active role of the film-maker as provocateur in *cinema verité*.

At the very least, the boundary between fiction and truth that is proper to the documentary genre is tested by this film. The film has little in the way of a meta-narrative to explain the methodology of the film-makers. Indeed, there are moments in it is difficult to distinguish between what is 'real' and what is 'staged' in the film. The suspension of a realistic aesthetic is evident from the extraordinary opening scene, where we see dancers emerging from a giant fish into a lush landscape. In that scene, instructions to the dancers are shouted from the background, including the prescient reminder that 'this is not fake!'

There are also scenes in the film where the fiction of the film-within-a-film comes undone, interrupted by uncanny moments that point towards the unconscious. In the crucial scene of the staged attack on the town of Kampung Kolang, we know from the beginning that this is a reconstruction, as the preparations for the scene have been shown in some detail. However, the attack is simply too intense, too 'real' to watch comfortably. In the filming of the scene, the violent energy of the paramilitaries seems to erupt out of control. The staged violence of the scene is unsettling enough, but the fiction disintegrates when a woman collapses after the scene, and a girl begins to cry uncontrollably. Attempts by the Pemuda Pancasila paramilitaries to console them are to no avail. The woman's collapse and the crying child make a jagged intervention into the re-enactment, breaking the fragile boundary between truth and fiction. As Milo Sweedler observes:

> In contrast to the relation between fiction and reality suggested by Anwar Congo at the beginning of the film, when he claims to have drawn inspiration from Hollywood films for the murders he committed, here the movement is the reverse. The simulation of violence produces its own violent effects on those who re-enact it (Sweedler, 2014, 24).

What is revealed in the staged fiction of the burning of Kampung Kolang is not the direct 'truth' typical to testimonial documentary. Instead, the conception of truth here is, to paraphrase Lacan, structured as a fiction; a film within a film, whose veracity, and indeed very existence is not at all clear. *The Act of Killing*, rather than relying on the stylistic markers of authenticity that are the hallmark of Human Rights Cinema, is an exercise in fiction, allowing a different register of truth to emerge as the limit of what fiction can sustain.

As this essay has already discussed, Human Rights Cinema insists on truthfulness as a defining value, and prioritizes a realist aesthetic as the primary means of expressing this. *The Act of Killing*, however, approaches the question of truth in a very different way. The film employs dream-like imagery at various points, perhaps none so strange as the scene where a protagonist speaks to the decapitated head of one of his victims. The head, played by Anwar Congo, sits perched on a rock, immobile and struggling not to retch while another of the killers pushes pieces of rotten meat into his mouth. The scene is reminiscent of Samuel Beckett's *Happy Days*, in which the life predicament of the protagonist, Winnie, is illustrated by her being buried up to the neck, trapped and unable to move. Anwar's head oozes with bright crimson fake blood, a scene that would be ridiculous if it were not for its horrific context. This nightmarish scene hints at a far more disturbing reality that underpins the 'normality' which Anwar Congo and his colleagues inhabit; an unspeakable horror that exceeds 'normal' representation. In this scene, it is as if the bizarre 'normality' of the killers that has been depicted thus far, from their casual conversations about torture and murder to their homely family lives, all now seem haunted by a hidden visceral horror, a piece of the Real, embodied here by a dismembered head on a rock, conscious but incapable of action; immobilized by the spectacle of its own atrocity.

3. The act of watching

There is, however, another way to approach *The Act of Killing*. This is to examine what it tells us about spectatorship. This is a film that is concerned not just with the act of killing, but also with the act of watching. The film presents its viewers with the spectacle of perpetrators watching the recreation of the terrible events that have defined them. In scene after scene, we not only watch the meticulous recreation of murder and torture, but we also watch the perpetrators as actors and directors in their own drama. In this interaction, the camera lingers occasionally on the face of Anwar Congo and his colleagues as they observe the surreal reconstructions of their crimes. In some scenes, the camera shifts away from the reconstruction, and focuses on Anwar, as if it were seeking an explanation in his gaze for the bizarre cavalcade of cruelty being reconstructed. However, his face provides few answers. Sometimes his expressions are blank. At other times, he appears bemused, and at others again, he seems disturbed by what he sees. At one stage, after the re-enactment of massacre at Kampung Kolang, he seems genuinely overwhelmed by the scene of destruction. Throughout the film, however, the gaze of the perpetrator remains inscrutable, not

delivering for the spectator the recognition of his responsibility that might make sense of such unrelenting cruelty. Anwar's empty gaze neither recognizes, nor does it seek recognition from others. Instead, the perpetrators appear to be not only incapable of moral action, but to be impassive spectators of the horrors they have created.

This brings us to the role of the spectator in Human Rights Cinema. Does the concept of Human Rights Cinema not also demand a different approach to spectatorship? Spectatorship in Human Rights Cinema is not posited as the vicarious enjoyment that one might experience while watching a horror, or a thriller, for example. Instead, it presupposes a commitment to the values of the Universal Declaration of Human Rights, and, at a deeper level, a moral responsibility with respect to the content of what is being viewed. Human Rights Cinema is, after all, meant to be truthful; a communication which, in Bronkhorst's terms, is situated within a normative system. However, does such a concept of spectatorship not also presuppose that human rights spectatorship itself demands recognition? The Human Rights Film Charter links Human Rights Cinema to activism, but also to truthfulness. The value of truthfulness in Human Rights Cinema transforms the spectator into a witness, thereby eliding the concept of the spectator with that of the activist. Accordingly, the role of the spectator in Human Rights Cinema is to recognize the suffering of the human rights victim through the act of spectatorship. In this way, activism and spectatorship are bound together by the concept of Human Rights Cinema in a circle of self-affirming virtue.

However, the concept of Human Rights Cinema also presupposes a third position in the intersubjective network—the position is that from which the spectator's responsible (or indeed virtuous) recognition is itself recognized. In this way, the concept of Human Rights Cinema is organized around a desire for the spectator's recognition of the suffering of the human rights victim to itself be recognized. To borrow a Lacanian term, the desire for the recognition of the spectator's recognition appeals to the Big Other for the recognition of spectatorship as a kind of activism, despite its self-evident passivity. As such, there is an underlying narcissism in Human Rights Cinema—that narcissism is the conceit that the Big Other can successfully mediate the duality between spectator and human rights victim, thereby affirming the value inherent in the act of watching. In contrast to the 'innocent' spectatorship involved in other film genres, the spectatorship of Human Rights Cinema presupposes a spectatorship that is responsible, active, and affirmed by the global normative system of human rights. This gives us another perspective on the Human Rights Film Charter, not as an attempt to merely imitate international human rights norms but to find a normative affirmation for the truth-telling capacity of Human Rights Cinema and for the idea of the Human Rights Cinema spectator as passive activist.

An interrogation of the spectatorship of Human Rights Cinema also gives us another way to examine the way in which the concept of Human Rights Cinema appears at times to occupy an unquestionable moral high ground. The spectator

of Human Rights Cinema at a human rights film festival may witness the most unimaginable horrors on the screen, often without the guard-rail of fiction. In Testimonial Documentary, for example, the spectator may bear witness to the most outrageous and violent depravities, believing it not to be a form of vicarious enjoyment but an obligation owed to the greater project of human rights. However, unlike a horror film, which situates the enjoyment of the spectator clearly in the field of fiction, and is understood from the beginning to be a fantasy, Human Rights Cinema does entirely the opposite—it assures the spectator that the horror being witnessed is not fictional but is, in fact, true. Rather than turning away, the spectator is compelled to endure, in the belief that his or her continued spectatorship is a form of activism, an obscene enjoyment capable of being recognized as virtuous behavior; a sign of spectator's commitment to the values of human rights.

What then, does *The Act of Killing* tell us about spectatorship and Human Rights Cinema? The centrality of spectatorship to the film is illustrated in one scene where Anwar Congo is shown operating a movie camera. He is shown in silence, slowly surveying the film set. As well as being a perpetrator, actor and film-maker, he is also depicted here as a spectator, both re-making and watching his own past. The interchangeability in the film of the watcher and the watched brings home the way in which the cinema-goer is himself or herself implicated in this network. Is the viewer of the film, like Anwar, and indeed Oppenheimer, not also implicated in the manufacture of Anwar's role as a celebrity murderer merely by the act of watching? The opaque role of the makers of the film in enabling Anwar and his colleagues to act out their crimes for the camera adds to this sensation. There are no 'innocent' spectators in *The Act of Killing*.

The Act of Killing is not a film that seeks to challenge its audience with factual evidence of the crimes committed in Indonesia, but in fact renders impossible the act of 'bearing witness'. It is a film that attempts to unsettle its spectators by continually blurring the boundary between fact and fiction, and indeed between fantasy and 'reality'. While some scenes that are seemingly un-staged are so bizarre that the viewer may doubt their plausibility, many of those that are deliberately staged appear nightmarish and unsettling. In one such scene, an actor representing one of Anwar's victims appears, removes a wire noose from his neck and awards Anwar with a medal. He thanks Anwar him for executing him and sending him to heaven. This fiction would be unsettling enough, until we recall that Anwar is in fact a real killer, and that this bizarre scene is a real mass murderer's stylized fantasy of redemption. *The Act of Killing*, as a 'documentary of the imagination', allows no space for a disinterested spectatorship, no clear line between truth and fiction. Instead, it is more like a waking dream, in which the public impunity of the perpetrators is perpetually haunted and disturbed by the ghosts of their victims.

All of this leads us to an important distinction between the nature of spectatorship in *The Act of Killing* and that presupposed by the principles of Human Rights Cinema. The *Act of Killing* does not 'inform' the spectator as a passive observer of events. Instead, it unsettles, disorientates and implies the spectator in the creation

of the perpetrators' grisly celebrity. The film offers the spectator no external meta-position from which to judge, or bear witness to the terrible events of the Indonesian massacres. By contrast, the concept of Human Rights Cinema presupposes just such a meta-position; the position of a rational observer within a normative system, not unlike that of a court or a human rights committee; an objective recipient of the truths that are conveyed by the act of watching.

4. *The Act of Killing and* the collapse of the Other

However, there is another way to think about the relation between *The Act of Killing* and Human Rights Cinema. This is to think about the very different ways in which they relate to questions of ideology and authority in public discourse. In particular, an analysis of both *The Act of Killing* and the Human Rights Network Film Charter offers very divergent perspectives on the concept of the Big Other and its capacity to structure social relations. Slavoj Žižek (who is, incidentally, thanked in the credits of the film), has described *The Act of Killing* as a documentary about the 'real effects of living a fiction' (Žižek 2013). He draws attention to a particularly shocking scene in the film, in which Anwar and his men appear on a 2007 Indonesian talk show. Anwar proudly explains the influence of gangster movies on his killings. When the interviewer asks whether he fears reprisals from the families of their victims, Anwar responds 'They can't. When they raise their heads, we wipe them out.' His colleague adds, 'We'll exterminate them all'. Rather than provoking shock or censure, these bloodthirsty declarations are greeted with smiles from the presenter and cheers from the audience. Žižek suggests that: 'The trap to be avoided here is the easy one of putting the blame on either Hollywood or on the "ethical primitiveneness" of Indonesia' (Žižek 2013). Instead, he says that 'the starting point should be the dislocating effects of capitalist globalization which by undermining the "symbolic efficacy" of traditional ethical structures, creates such a moral vacuum' (Žižek 2013).

Žižek is here returning to a long-standing theme in his work which he has variously described as the 'collapse' or 'retreat' of the Big Other (See Žižek, 1997). The Lacanian concept of the Big Other here operates as the order of language and law in relation to whose address the subject symptomatically attempts to situate its identity. Žižek has described over numerous works how global capitalism has been supported at an ideological level by the collapse of the Big Other, by which he means the decline of paternal authority, custom and moral norms (See Žižek 1993, 231–237). He has described a corollary collapse in the efficacy of the symbolic systems that have for so long defined our social, ethical and moral worlds. His work describes a societal shift towards a social order that can be described as post-Oedipal, in which social norms disintegrate and in which the boundaries of what is usually understood as acceptable social behavior are no longer clear.

In more recent writings, Žižek describes this process of disintegration in relation to the proliferation of the culture of public confessions and the dissemination via social media of the most intimate aspects of private life (Žižek 2014). Rather

than seeing this as an erosion of an ever-shrinking private sphere, as one might expect, Žižek claims the opposite, that it is the public space that is being privatized through the extension of private fantasies into the private space of others. In his account, the concept of the public space that has characterised the modern era is not only eroded, but under threat from the irruption into it of private fantasies that would have hitherto been taboo. The concept of the public space here operates as the big Other; as a system of ordering in the ethical and social field, whose ideological collapse creates the appearance of a 'social and moral vacuum'. In this collapse, the boundary between the private and the public appears to dissolve and the expression of previously unspeakable fantasies loses its capacity to shock:

> What kind of symbolic texture, or set of rules between what is publicly acceptable and what is not exists in a society where even the minimal level of public shame is suspended, and the monstrous orgy of torture and killing can be publicly celebrated even decades after it took place, not even as a necessary crime for the public good, but as an ordinary acceptable pleasurable activity? (Žižek 2014, 308).

In Žižek's account, it is this collapse of public space, and the corollary diminution of superego pressure, that 'normalises' Anwar Congo's cruelty, and makes his lack of shame appear publicly acceptable.

The Act of Killing depicts in vivid form not just the erosion of the Big Other, but its consequence; an ethical void. For Žižek, the crisis in the Big Other is ideological, a function of the onward march of global capitalism. He considers cynicism and an attitude of ironic detachment not merely as symptoms of what Ernest Mandel has described as 'late capitalism' (Mandel 1975), but part of its official ideology:

> [This] cynicism is not a direct position of immorality, it is more like morality itself put in the service of immorality—the model of cynical wisdom is to conceive probity, integrity, as a supreme form of dishonesty, and morals as a supreme form of profligacy, the truth as the most effective form of a lie. This cynicism is therefore a kind of perverted 'negation of the negation' of the official ideology: confronted with illegal enrichment, with robbery, the cynical reaction consists in saying that legal enrichment is a lot more effective and, moreover, protected by the law. (Žižek 1989, 30.)

The detachment from moral consequence evidenced in *The Act of Killing* does not simply depict a country's failure to confront it past, but also the collapse of the social structures that make ethical judgement possible. In Žižek's terms, this ethical disintegration is a thoroughly ideological one. It should be added here that Indonesia has been a poster child for economic success in the global market, a member of the G20, with good figures for economic growth, committed to market reforms and privatisation (International Monetary Fund 2016). Indeed, the film alludes to this economic context with seemingly random shots of billboards, high end commercial activity and shopping centres. However, the film, as well as relentlessly depicting the

moral lacuna that defines Indonesia's relation to its past, also lays bare the ideological nature of that economic commitment.

It is in relation to the concept of the Big Other that we find an important philosophical divergence between *The Act of Killing* and the concept of Human Rights Cinema. This article has already discussed the way in which the Human Rights Film Network reflects the dominant tendency in human rights discourse to prioritise a global humanitarianism capable of transcending the political. However, such humanitarianism must also presuppose the existence a system of signification by which its normative coherency can be guaranteed, if not a public space in which ethical differences can be resolved. More generally, humanitarianism, like all successful political discourse, presupposes the existence of a Big Other by which the subject can attempt to find something of him/herself in humanitarian discourse. In this way, the subject can identify him/herself as representing humanitarian values. Whereas the *Act of Killing* depicts the collapse of the Big Other, the Human Rights Film Network does the opposite, by presupposing the existence of the Big Other. In Lacanian terms, Human Rights Cinema operates ideologically as a means of denying the Lack in the Big Other. Perhaps this difference is another reason why the Act of Killing, while undoubtedly a milestone in documentary cinema, might not sit entirely comfortably within the canon of Human Rights Cinema.

This brings us back once again to the question of spectatorship. It is the operation of the Big Other the allows the spectator of Human Rights Cinema to imagine that their humanitarian commitment is somehow capable of being recognised and is thereby in itself meaningful. The spectator is not here conceived of as a passive observer, but as a participant in a system of normative exchange with the film-maker and with other members of 'the human rights community'. The concept of the Big Other allows the spectator the conceit that his/her recognition of the suffering of others can itself be recognised through 'participation' in Human Rights Cinema. In this way, spectatorship is transformed into participation in the humanitarian project through the act of watching.

5. Conclusion

Towards the end of *The Act of Killing*, there is a scene in which the film-maker accompanies Anwar Congo to the rooftop where many of his murders took place, where earlier in the film he has described his crimes in horrifying detail. It might be expected that in these closing moments, the film might provide some note of hope, perhaps an expression of regret by the perpetrator, or a recognition of the cruelty he has inflicted. Instead, Anwar retches and gags repeatedly, attempting to vomit, but seemingly unable to do so. In these extended moments, it is as if he were attempting to expel something from within his body. However, still no words come out. The viewer does not know if Anwar has been overcome with guilt for his actions, or if he is simply unwell, or indeed if he is simply performing this purgative moment for the camera. The film here refuses to deliver the viewer with the answer s/he wants. There is no moment of remorse, no redemptive moment, no answer to the many questions

the film has opened. Instead, this is a film that can leave the viewer not just shocked, but also bewildered. While it is tempting to see this event as a bodily manifestation of remorse, or a bodily return of the horrors he has repressed, the true message of his retching is that there is no message. There are no words that can properly bring this film to a close.

The refusal of this film to provide a moment of normative closure also points to the broader critique that has been made in this article of Human Rights Cinema. It has been argued that Human Rights Cinema tends to make broad assumptions about the nature of truth and its relation to fiction; assumptions that are not borne out by an analysis of the documentary and feature film genres. The humanitarian impulse that drives the Human Rights Cinema movement, while capable of concealing the inconsistency of such assumptions, also tends to negate more radical or emancipatory interpretations of human rights. The idea that 'truthfulness' can provide a satisfactory normative basis for Human Rights Cinema is also problematic, as it presupposes a necessary correlation between intentionality and signification. This article has also insisted upon a more critical approach to the question of spectatorship in Human Rights Cinema, drawing attention to the illusion that Human Rights Cinema spectatorship is an ethical act in itself, a form of passive activism with no negative consequences for the spectator. The concept of Human Rights Cinema presupposes the un-lacking omniscience of Human Rights discourse *qua* Big Other. However, its ready embrace of a humanitarian logic risks stripping human rights discourse of its potential for social change, rendering it an empty hulk of good intentions and empty principles, rather than a means of transforming peoples' lives. The de-politicization of human rights discourse makes it less able to provide an ideological resistance to the ethical wilderness that underpins the onward march of global capitalism; a consequence laid bare by *The Act of Killing*.

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Law's Resonance and Undercover Performances in Gangster Films

Anita Lam*

1. Introduction

For law to be effective, it is often assumed that law must be visually asserted in the world. Law must be visually seen because its force 'depends partly on the inscription on the soul of a regime of images' (Douzinas & Nead 1999, 9). Its stunning visual display is in turn tied to majestic spectacles that coincide with what Patricia Ewick and Susan Silbey (1998) call 'before the law'. When we are placed 'before the law', law appears with awesome grandeur, transcending history through its abstract reasoning and timeless objectivity. Envisioned and enacted as if it were a separate sphere from the realm of ordinary life, this form of law, or legality, is described as a formally ordered, rational and hierarchical system of known procedures and inert rules. Defining itself as impartial through the image of blindfolded Justice (Ewick & Silbey 1998, 228), law—perhaps, more precisely described as law with a capital 'L'—privileges ocularcentric ways of engaging and making contact with all those who come before it. In the formal setting of the courtroom, not only is visualization central for establishing facts (see Braverman 2010; Jasonoff 1998; Sherwin 2000), but visual metaphors also come to inform the ways in which judges ought to reason. Implicitly operating through the visual metaphor of reflection (for more on the mirror metaphor, see Rorty 1979), judges reason, deliberate and ponder points of law with cool detachment and at a distance. In the hallowed halls of justice, impartial judges reflect upon the world 'just as a mirror reflects light waves without its own substance being affected' (Erlmann 2010, 9).

However, when we return law to the mean streets, it becomes enmeshed within the sensory experiences and technologies that make up the everyday social world. Here, law cannot be characterized as an independent, external force bearing down upon the social realm from without; rather, law is already embedded in society as a constitutive force, one that is routinely performed as a game. Described as 'with

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the law' by Ewick and Silbey (1998), the game of law consists of competitive tactical maneuvering between players with different resources, statuses and strategies. When law is played as a game, players pursue specific courses of action on the basis of their own self-interest. Under this form of law, the power of particular players becomes crucial for understanding how they might successfully deploy and engage with law. They may not always play by the rules set down by law; instead, they may play with the rules themselves, breaking existing rules and creating new ones. In the game of law, the tension between rule-making and rule-breaking is highlighted by the work of undercover enforcement agents who are often hidden in plain sight. Although the everyday life of undercover law enforcement is a far less bombastic affair, it is no less powerful because of its general invisibility and hushed operation. Indeed, undercover law enforcement, I argue, can be well conceived through the aural metaphor of resonance. Because this sonic metaphor can be tied to the possibility of hearing otherwise, I use a multivalent conception of resonance to open up new ways of thinking about law and its representations.

While resonance has been used as a central concept in sociological theories about how culture shapes action through the framing processes of social movements (e.g., Snow et al. 1986; Gamson 1992; Binder 1993; Berbrier 1998; Kubal 1998; Benford & Snow 2000; Bail 2012), news stories (e.g., Gamson & Modigliani 1989; Schudson 1989; Ettema 2005), and judicial rhetoric (e.g., Cole 1992-1993), it often appears as an intuitive concept without an explicit or operational definition (Ferree 2003; McDonnell 2014). In general, these theories use resonance to describe the relationship between a cultural object and its context or audience. Conditions for resonance, such as alignment, salience, or relevance, appear to define resonance itself. Unlike these theories, I use the concept of resonance, not to discuss the success of a cultural text or its alignment to a social context, but as a metaphor for thinking about undercover enforcement, including its performance and representation. To think through the metaphoric implications of the term, this paper deploys multiple and overlapping definitions of resonance—that is, resonance as synchronicity, oscillation, vibration, and as an effect of making contact. Further, the concept of resonance also informs the ensuing method of film analysis, where the films' meanings, like resonance itself, are generated in oscillation.[1] Because oscillation entails movement to and fro between two points without ever being statically grounded by a single, fixed position of equilibrium, the focus of the subsequent film analysis alternates between two selected films. This is in contrast to comparative film analyses that place together certain films as stable points of reference for the purpose of pointing out their similarities and differences. By contrast, the subsequent film analysis, like the pendulum swing that constitutes mechanical resonance, moves back and forth between multiple representations of resonance as well as between two films that

1 This is a different approach to David Black's consideration of law and film. In *Law in Film: Resonance and Representation* (1999), Black analyzes the ways in which film indefatigably represents law through its narrative regime without ever explaining in explicit terms—despite the book's title—how resonance relates to filmic narratives and representations of law.

share the same overall plot and themes. Here, meaning is not found in the differences or intertextual associations between these two films, but rather through an analysis that shifts and sways between the films to bring forth their sonic and sensuous representations of undercover law.

Specifically, I examine two of the most culturally resonant gangster films produced and released in the twenty-first century: the Academy Award-winning Hollywood film *The Departed* (2006) and its Hong Kong predecessor *Infernal Affairs* (2001).[2] The critical and commercial success of both of these contemporary gangster films can arguably be attributed to their complex representations of undercover work. Indeed, *Infernal Affairs*, as a film, has gone undercover according to Karen Fang (2017): in spite of its local plot of covert operations, the film covertly masks its Hong Kong film style with a Hollywood gloss, allowing it to become 'a Hollywood-ready version of exportable surveillance fare' (Fang 2017, 135). By cinematically going undercover, *Infernal Affairs* has been able to reach a global audience, which has subsequently grown in size because of the Hollywood adaptation (*The Departed*) directed by Martin Scorsese. By cinematically representing undercover motifs, both films are intricately plotted stories about the porous boundaries between performances of law and those of organized crime. In these movies, an undercover cop (Billy Costigan/Chen Wing Yan) is sent to infiltrate a criminal gang led by a notorious gangster (Frank Costello/Hon Sam), while the gang sends its own mole (Colin Sullivan/Lau Kin Ming) to spy on the police department.

Further, *Infernal Affairs* and *The Departed* stress the theme of resonance in two ways. One, both are contemporary extensions and adaptations of the gangster genre. As a genre, gangster films have long explored the game of law, in which different players, including both criminals and legal agents, jockey for a better position on the field of power. As such, this is a specific film genre that has a rich history and tradition of representing a particular form of legality, which Ewick and Silbey (1998) have called 'with the law'. Not only are screen gangsters obsessed with rules, despite being organized around the breaking of rules (Leitch 2002, 103-105), they are made to consider the question of which rules to follow because of their relentless juxtaposition with lawful counterparts. When imagining law as a game contingent upon changing rules, both Hollywood and Hong Kong gangster films have done so by following the intertwined trajectories and experiences of 'cops and robbers', emphasizing properties that have been associated with resonance—specifically, adjacency, sympathy, and a collapse of the boundaries between perceiver and perceived (Erlmann 2010, 10). For example, *The Public Enemy* (1931) traces the rise and fall of gangster Tom Powers against the life of his law-abiding brother; and John Woo's *A Better Tomorrow* (1986), a film often credited with establishing, revitalizing and popularizing the gangster genre in Hong Kong cinema, follows the attempt of an aging triad member to reconcile with his brother who happens to be a police detective. Thus, gangster films acknowledge the idea that law and crime are mutually

2 For a comparative analysis of *Infernal Affairs* and *The Departed,* see Choy (2007), Fang (2017), and Marchetti (2010) among others.

constitutive performances that can easily become muddled; and in this specific case study, the line between law enforcement and criminal activity becomes especially blurred as characters lead double lives as both criminals and law enforcers. As a result, their lawful and criminal identities are constantly in vacillation, and can be expressed in terms of mechanical resonance as swings in identity and allegiance.

Secondly, both *The Departed* and *Infernal Affairs* innovatively present the cellular phone[3] as an important addition to the arsenal of technologies used by gangsters and law enforcers alike for covert surveillance and the aural revelation of undercover identities. The cell phone in both films becomes a source of resonance: whether ringing or vibrating, it becomes a weapon for 'blowing covers' and 'making' moles. When represented on film, the cell phone is a sonic technology that allows for the synesthetic joining of image to sound, and sound to touch. Consequently, this synesthetic representation suggests that law is experienced as a string of sensations by the whole body, and not by the eyes alone. To analyze such synesthetic representations, law-and-film scholarship will need to move beyond its predominantly visual-centric, image-bound analyses in order to fully consider how representations of law are produced through the mingling of senses.

2. Synchronizing the sounds and images of law

Before turning to an analysis of these two films, it is useful to briefly trace the role resonance has played in the historical establishment of American gangster films as a distinctive genre. Here, resonance refers to a 'corresponding or sympathetic response' (*OED*) that stems from the pairing of image and sound. Because this definition emphasizes a synesthetic experience—one that joins together multiple sensual perceptions (Cytowic 1989)—it does not reproduce what Jonathan Sterne (2003, 14-15) has termed an 'audiovisual litany' of the differences between hearing and seeing. As the litany often goes, vision offers directional perspective from a distance while hearing immerses its subject in sound; hearing is about affect whereas vision is about intellect; vision is a primarily spatial sense in contrast to hearing, which is a primarily temporal sense. Yoked to 'great divide' theories that posit vision and aurality as polar opposites (see McLuhan 1962; Ong 1967), the audiovisual litany renders 'the history of the senses as a zero-sum game, where the dominance of one sense by necessity [and in the absence of scientific or empirical basis] leads to the decline of another sense' (Sterne 2003, 16). In contrast to approaches that presume

3 The use of the term 'cellular phone', and not 'mobile phone', is important for two reasons. First, the term 'cellular' refers to a 'mobile radio-telephone system in which the area served is subdivided into "cells"' (*Oxford English Dictionary*), and as such, connects cell phones to the coming of sound in the American film industry. As Douglas Gomery (1985) has argued, sound in film owes a debt to the sound recording and sound reproduction technologies produced by the American Telephone & Telegraph Corporation (AT&T) and the Radio Corporation of America (RCA). By economically merging and colluding with these sound engineering companies, Warner Bros. and Fox adapted radio and telephone research as well as equipment for practical use in the film industry. Secondly, the idea of 'cellular' also highlights the individualism that characterizes gangsters within the gangster film genre.

that cultural history and representation happen *between* the senses, an emphasis on resonance-as-synesthetic-experience aims to disrupt and trouble the conventional division of sight and sound. Moreover, a sustained analytic focus on synesthetic pairings of image and sound offers an important counter-point to the dominance of visual-centric, image-bound analyses that have grounded the study of law and film. Primarily conceiving of cinema as a visual medium, law-and-film scholars have focused on the visual dimensions and limits of moving images (e.g., Moran et al. 2004; Sarat et al. 2011). They have sought to examine the ways in which 'law lives in [mass-mediated] images' by charting 'the movement from law on the books to law in action to law in the image' (Sarat, Douglas & Umphrey 2005, 1, 2). By emphasizing the movie camera as the film apparatus of note, they seek to reveal how film's visual logic (Sherwin 2000) and its modes of visualization, including the process of image-assemblage (Mussawir 2005, 132), are 'constantly transforming the way we see the law' (Chase 2002, 31).

In doing so, law-and-film scholars have mirrored the analytical moves made by early critics of sound film, by implicitly endorsing two fallacies that have worked to marginalize the study of sound in film theory (Altman 1985, 51). First, an ontological fallacy privileges film as a predominantly visual medium, presuming that a film's images must be the primary carriers of its meaning and structure. Moreover, this ontological fallacy is tied to a historical fallacy, one that assumes that sound can be an analytical afterthought because it historically and chronologically followed the formation of the moving image. Since sound was added to the image, it was considered a supplement or superfluous accompaniment to filmic imagery. As Rick Altman (1985) has argued, the power and durability of these fallacies ought to be problematized, precisely because these misleading presumptions have served to repress and foil attempts to properly develop a theory of sound cinema. A theory of sound cinema, he argues, would begin with the observation that sound films are composed of two parallel and simultaneous phenomena—image and sound—that co-exist. Such a premise would not hierarchize and isolate one of these phenomena for sustained study while ignoring the other.

Remarkably, the audio-visual relationship, or what Michel Chion (1994) calls 'audio-vision', has been crucial for the establishment and flourishing of classic Hollywood gangster films in the 1930s. Thus, gangster films are an excellent case study for examining how synchronized sound came to sonically reinforce the genre's iconography. Indeed, film theorists, such as Thomas Leitch (2002, 110) and Jonathan Munby (1999, 34), have pointed to synchronized sound as a major factor in the success of these early gangster films as well as a key characteristic that distinguished these films from their earlier prototypes. Synchronized sound has been a significant film technology for deepening the cultural resonance of gangster films in the following two ways. First, it offered early gangster heroes the opportunity to speak, allowing them to define themselves by their ruthless mottos—from Tom Powers' declaration that he 'ain't so tough' after all (*The Public Enemy*) to Tony Camonte's insistence that you '[d]o it first, do it yourself, and keep on doing it' (*Scarface* 1932)—and by their

'ethnic' speech inflections. Featured in some of the first 'talking pictures', gangster heroes spoke in accented, vernacular voices that framed their desire for success within a larger history of struggle over national identity in the United States. As Munby (1999, 64-65) elaborates, the introduction of sound to the gangster film was an important element for 'lending sanction to the perspective of the ethnic cultural "other" on the American screen', a perspective that aligned with the fantasies and ordinary lives of the urban lower classes. By facilitating audiences' identification with ethnic, criminal heroes, gangster films popularized a critical disposition towards the law, and have since been categorized by some scholars, such as Nicole Rafter (2000), as examples of critical crime films. Part of an alternative tradition of telling crime stories, gangster films subverted the false optimism and social happiness offered by other Hollywood film genres (Warshow 1964), by presenting audiences with tragic gangster heroes who made too much noise.

As Michel Serres (1995, 13) reminds us, *noise* originates from and shares etymological roots with the Latin word for *nausea*, and as such, is associated with disorientation and energetic motion. Connecting sea to sound through the motion of disruptive waves, some of that motion can also be associated with crowds, 'the multitude [that] rushes around [covering] space like a flood' (Serres 1995, 54). In the US, the 'disorderly or riotous' crowds (*OED*) themselves became synonymous with the mob, and the mob in turn came to represent both the moving masses of common people (in this sense, as a shortened form of the word *mobile*), and organized criminal associations (i.e., the Mob was used to describe the Mafia in the US). All of these themes—motion, mobility, and mob—reverberated on screen in gangster films through sound. Screen mobsters, fuelled by a furious desire for success, did not speak the 'prim and proper language of precise communication, a fair and measured pair of scales for jurists and diplomats, exact, draftsmanlike, unshaky, slightly frozen' (Serres 1995, 12); rather, they burst on screen with their brash inarticulateness and immigrant inflections amidst the cacophony of big-city streets. As a result, part of the nauseous disorientation evoked by gangster films (see Nochimson 2007) can also be connected to the destabilizing and boisterous force of urban living. From the first American gangster feature film *The Musketeers of Pig Alley* (1912) to *The Lights of New York* (1928)—notably, the first talking gangster film as well as the first all-talking feature film ever made—gangster films mediated fears about a nation's modernization and urbanization by juxtaposing the sounds of the city with the peaceful quiet of small-town rural America (Munby 1999, 21). Thus, synchronized sound helped to dramatize urban stories in a new way, by injecting the background noises of the city—the sounds of trams, buses, cars, sirens, factory machines, and the crowds themselves—into the gangster melodrama.

Allowing film viewers to be surrounded by the sounds of urban living, synchronized sound placed a premium on the gangster genre's expressive sound effects, many of which provided both auditory continuity and served as substitutes for music (Leitch 2002). Thus, synchronized sound was crucial for reinforcing the importance of the gangster's noisy technological toolbox. Sounds of revving

automobile engines and the clattering bang of gunshots became typical of the gangster film's acoustic world, as these sounds also became woven into the background of the modern world. As a genre devoted to providing stories about modernity (Ruth 1996; Mason 2002; Nochimson 2007) and the urban technological present (McArthur 1972, 18), gangster films use synchronized sound to emphasize the deployment of contemporary technologies that make mobility possible. For example, during Prohibition and Depression-era America, automobiles were used by filmic gangsters as a technology that allowed them the freedom of physical mobility. The gun offered these 'urban gunslingers' (McCarty 2004) the possibility of socioeconomic mobility even if it meant taking and remaking the city by violent force. Within the gangster genre, mobile technologies have not only been tied to the performance of gangster identities, but also to the coercive force underlying their claims to power.

3. Tuning in: the ear as an organ for doubling and listening

By discussing how synchronized sound is crucial for deepening the resonance of filmic images of law in gangster films, we can attune ourselves to the sensory life of law on film. This in turn allows us to properly acknowledge the importance of aurality in performing and representing undercover work in films like *The Departed* and *Infernal Affairs*. Like spies, undercover agents are metonymically described as 'the eyes and ears' of an organization. While such a description focuses on the agents' sensory organs of detection, effective undercover work seems to rely less on visual forms of overt surveillance, and more on covert forms of surveillance work that are increasingly mediated by sonic technologies.[4] Not only does this redirect our attention to the sense of hearing, it emphasizes the ear as an organ for the process of doubling. As a crucial theme in both *The Departed* and *Infernal Affairs,* the process of doubling is explored through the different yet ironically similar lives of two Doppelgangers, one who works as a police officer doubling as an undercover gangster while the other works as an undercover cop doubling as a gangster. Because doubling entails pairing a subject with the Other (Warner 2002), these gangster films suggest that the gangster is the law enforcer's double, the shadow of violence that trails after and appears in the face of law. As importantly, this form of shadowing is enacted through acoustic representation. After all, it is the ear of the Other, according to Jacques Derrida (1985, 81), that 'constitutes the autos of my autobiography'. The Self—the

4 With the use of sonic technologies, law enforcers rely on the ear, 'lending an ear' through secret wiretapping programs. At the municipal level, North American police forces are currently using StingRay devices, or International Mobile Subscriber Identity (IMSI) catchers, to mimic cell phone towers in order to trick cell phones into connecting with them. Deployed to intercept communications data and provide detailed location information about cell phone users, IMSI catchers are used for the purpose of covert surveillance by law enforcement and intelligence agencies. At the federal level, the US National Security Agency, according to Edward Snowden's revelations, had been engaging in massive cell-phone surveillance and dataveillance of foreign intelligence targets as well as much of the American population. Based on the explosive allegations recently made by WikiLeaks, the CIA has also developed malware that could turn infected iPhones, Android devices and smart TVs into covert listening devices, capable of recording and sending conversations over the Internet to the intelligence agency.

law-enforcing Self in these films—is constituted in and through the Other by the listening ear, 'an organ for perceiving difference' (Derrida 1985, 51). It is the keen ear that not only hears difference, but can also understand and ultimately authorize the constitution of a Self's personal and political existence. Active hearing, then, is tied to a process of constituting doubles, and double agents in particular. For instance, *The Departed* represents double agents, such as Billy Costigan, as the grown-up versions of 'double kids'. Since his childhood, Costigan has been living a double life as evidenced by his different accents: he was '[o]ne kid with [his] old man. One kid with [his] mother. Upper middle class in the week, and then dropping [his] "r's" and hanging in the Southie projects with daddy the donkey on weekends' (Monahan 2006, 16). Able to mimic the lower-class, immigrant accents of classic film gangsters, Costigan's ear for accents allows him to bypass the sound barriers associated with class in Boston, granting him the ability to culturally pass as both crook and cop.

In addition to facilitating acoustic transformations of the Self, the ear also allows for playful wordplay, so that doubling in these instances can take the form of homophones, or doubled sound-words, giving rise to new meanings and interpretative possibilities. Here, I turn to an analysis of how a double agent exploits law's spectacle in a cheekily instructive scene from *Infernal Affairs* entitled 'Acting counsel'. In this scene, viewers watch as Ming engages in an increasingly complicated performance of law. Ming is an undercover gangster mole working in an official capacity as a police inspector in the Hong Kong Organised Crime and Triad Bureau. When he enters the scene, he notices that an accused gangster has been impatiently waiting in a police interrogation room for his legal representative to arrive. While other police officers have been passively watching the accused gangster through their CCTV surveillance cameras, Ming decides to spring into action by seizing the opportunity to 'act' as the accused's legal counsel. Acting in this case is more than simple legal representation. Instead, it is elevated to the art of deceptive performance and playacting. Ming knows that he will be performing in front of an audience composed of his police colleagues, as well as in front of the accused gangster. To briskly prepare for his role as defence counsel, Ming dons a blazer and tie, and more importantly, a pair of spectacles. Playing on the double meaning of spectacle—not only as a public display performed for an audience, but also as eyeglasses—the scene, at first glance, appears to parallel sociolegal scholars' focus on law's spectacles. Tied to an emphasis on the visual dimensions of judicial authority, law's spectacles have been described by sociolegal scholars as elaborate manifestations of state power that rest on appearances (e.g., Hay 1975). Such appearances include particular props and text-related objects, such as eyeglasses, that 'represent judicial authority as something intimately associated with the word of law' (Moran, Skeggs & Herz 2010, 202). Despite the absence of legal texts or any adherence to black letter law in this scene, Ming appears to be increasing the power of his vision when he puts on his spectacles. Unlike unseeing Justitia whose blindfold has been variously interpreted as emblematic of impartiality and freedom from venal corruption (see Jay 1999; Goodrich 2015), Ming's spectacles imply that he can easily be bribed, and that his assisted vision has little to do with

evermore clear-sighted applications of the law. Indeed, the spectacles in this scene are a red herring when it comes to understanding the performance of undercover work by double agents.

Following Ming's insistence that attorney-client privileges be upheld, the video surveillance cameras are eventually turned off, allowing Ming to act in the absence of any oversight by his police colleagues. Consequently, revelations in this scene do not depend on visual technologies, but rather on sonic ones. Placing his cell phone underneath the interrogation table, Ming compels the accused gangster to make a phone call to their (shared) criminal boss, in order to warn him of an upcoming police raid. The under-the-table placement of the cell phone dramatically represents the underhanded tactics used by double agents, tactics that are neither 'above board' nor easily visible from above—that is, as James Scott (1998) has persuasively argued, from the state's preferred vantage point. Because the double agent in this case is also a gangster, it is worth noting that mobsters in the gangster genre have tended to forcefully operate from the underworld as far away as possible from the state's gaze. Unsurprisingly then, undercover gangsters, as in this scene from *Infernal Affairs*, prefer to act from below through 'the deep country of hearing' (Derrida 1982, xvi). In so doing, these deep cover agents act as human doubles of the mole. Notably, the term *mole* refers to both human spies and burrowing rodents, highlighting the extraordinary ability of both to adapt to widely different environments. Because of this shared adaptability, the rodent[5] has long been represented in Western culture as a shadow or twin of the human (Burt 2006). Yet as mammals, moles have 'very small, hardly apparent' eyes (Serres 2008, 293), and rely on their ears for navigating their subterranean kingdom. Like their animal counterparts, human moles, such as Billy Costigan in *The Departed*, have notably been tasked by their superiors to play to this sensory strength, by 'keep[ing] [their] ears open' for actionable chatter. Unlike eyes that can shut, ears cannot be easily closed or 'turned off'. As a result, one cannot stop hearing, and listening can always become a form of eavesdropping (Toop 2010, xv).

By focusing on acts of listening and eavesdropping, we can also discuss resonance's relationship to synchronicity in a different sense. Here, sonic situations can synchronize individuals with their surroundings through a process of tuning, much like the way we turn the dials of radio receivers to 'tune in' to specific radio stations (Ernst 2016, 37). In the case of moles, they are 'tuned into' their environment when they are able to inconspicuously blend into their social surroundings, so that, as Detective Sergeant Dignam elaborates in *The Departed*, 'they're out there. [But you're] not gonna see them. You're not gonna hear them'. Further, undercover agents can also strategically focus their listening by 'tuning in' to particular conversations. This process of 'tuning in' plays out wonderfully in a scene from *Infernal Affairs*. During this scene, members of the Organised Crime and Triad Bureau are ready to bust a substantial drug transaction once the undercover cop confirms the location of

5 *The Departed* also makes prominent use of rodent imagery—in particular, the image of the rat. Not only is the rat a social climbing animal, and hence an apt representation of the gangster's dream of upward mobility, it also alludes to the 'ratting out' done by snitches and criminal informants, such as mobster Frank Costello.

the drug exchange. The undercover gangster informs his triad boss of the analog radio channel used for communication by the police sting operation. This allows the triad boss to tune into the channel and eavesdrop on police activity. Yet as the undercover gangster discovers, more than one radio channel is broadcasting information to the police. The head of the police raid, Inspector Wong, is also receiving up-to-date information from Yan, his undercover cop, through an undisclosed and private radio channel.

Wearing an additional earpiece, Inspector Wong enacts what Sterne has called 'audile technique'—that is, 'a set of practices of listening that encouraged the coding and rationalization of what was heard' (Sterne 2003, 23). With his eyes closed, Wong can focus on the specific characteristics of sound communicated through his earpiece, isolating these sounds from the collective, communal world of everyday noise. Through the earpiece, a more compact listening technology than the headphone, hearing itself can be separated from the other senses. With his use of an audile technique, the police inspector exemplifies a new practical orientation towards acoustic space: his directed and directional listening practice privatizes acoustic space, transforming audio messages heard within that individuated space into a form of private intelligence. Further, Wong understands the private messages by rationalizing and making sense of sound as Morse code.[6] While Samuel Morse had initially understood telegraphy as an essentially visual medium, allowing for the commingling of image, sound and writing, telegraph operators soon developed an audile technique that allowed them to transform telegraphy into a primarily sonic medium. These operators learned to listen solely to their machines, decoding the messages as they heard them and ensuring that the written script would become a vanishing mediator (Sterne 2003, 144-147). Much like the telegraph operators before him, Inspector Wong never transforms the rhythmic sounds of Morse code into written dots and dashes. Instead, he trusts his ears to efficiently capture all that is communicated through 'wiretapping'. Strikingly in this scene, the undercover cop communicates with Inspector Wong through a dramatized and literal illustration of wiretapping: he taps his finger on the glass of a window pane that has been wired with a concealed device for transmitting sound. Here, knowledge gathered through undercover work is communicated through tapping fingers and decoding ears. It is never transformed into a written text that can be potentially intercepted by prying eyes. Thus, the work of undercover agents, in this instance, revolves around the act of making physical and sonic contact with other objects and people, bringing to the fore a synesthetic joining of sound and touch.[7]

6 There seems to be a distinctly Hong Kong film tradition of representing intelligence gathered by undercover cops as sonic code. For example, in John Woo's *Hardboiled* (1992), the undercover cop sends his updates to his police superior in musical code. In *Silent War* (2012), a film made by the same director-screenwriter team behind *Infernal Affairs,* a blind piano tuner is recruited by an intelligence agency to intercept Morse code messages that are being communicated through hidden radio frequencies.

7 In other criminal justice contexts, sound has been used to substitute for touch in order to impose coercive force on others. For example, 'no-touch' torture used by American military personnel against detainees in Iraqi detention camps has focused on the blaring of extremely loud music at all times of day to 'soften'

4. Making contact: vibrations and aural revelations

By contrast, such contact would have been made in classic Hollywood gangster films in the presence of a machine gun. For example, in *The Public Enemy* (1931), Tom Powers becomes a gangster when he is first gifted a gun by Putty Nose in his youth, and it is no mere accident that Tommy Powers comes to power with a 'Tommy gun' in his hand. The Thompson submachine gun came to prominence and gained notoriety during Prohibition- and Depression-era America as it was used not only in the exploits of real-life gangsters but also those of Hollywood gangsters. Because screen gangsters, such as Tony Camonte in *Scarface* (1932), use their trusty machine gun to 'spit' bullets over the city, critics (e.g., Nochimson 2007, 40) have since argued that the machine gun has become one of the central props in the performance of gangsterism. Consequently, *Infernal Affairs* and *The Departed* are noteworthy for insisting that the cell phone, and not the gun, is what allows gangsters to forcefully make contact. In these films, the cell phone is actually what makes the gangster. As notorious mobster Frank Costello notes in *The Departed,* gangsters do not carry 'automatic weapons because here, in this country, it don't add inches to your dick. You get a life sentence for it'. Following this logic, Costello brings new members into his gang by gifting them with a cell phone and the following rules:

> Here [takes out a red cell phone and hands it to new member, Billy Costigan]. From now on call the bar and ask for Mikey. Just Mikey. You ask for Mikey because there's no Mikey. We wait. We'll call.

In his instructions to new gang members, Costello commands his members to promptly answer the phone when called. That is, when he calls, his gang members must answer; his minions must never call him. Or as his trusted henchman Mister French reiterates, 'You never call us. We call you' (Monahan 2006, 52). As a result, the criminal gang's hierarchical structure and power dynamics become mediated through the cell phone.[8] Answering Costello's call, then, is tied to a gangster's upward mobility within the criminal organization. In this way, the cell phone is in sync with the representation of technology in classic gangster films: it, too, is represented as a means for mobility. As a mobile technology, the cell phone enables communication across large geographical distances by gangsters on the move. When there are new additions to the phone's list of contacts, viewers are alerted to the fact that the gangster is achieving upward socioeconomic mobility, a feat that was once made possible through the gangster's use of guns.

While screen gangsters have traditionally used the gun to violently 'blow away' competitors and rivals, the cell phone becomes a weapon for 'blowing covers' of double agents, since it combines the repeated 'blows' of tapping fingers with the

detainees for interrogation (see Hirsch 2012).

8 Interestingly enough, this filmic representation is consistent with findings from empirical research (e.g., Varese 2013) conducted on the structure of wiretapped phone conversations between members of a criminal gang. These conversations have been used by law enforcement and researchers to document the hierarchical connections between members of organized crime groups.

force of aural revelation. Because the cell phone is used by both gangsters and law enforcers alike, it becomes in these films the only technological means by which otherwise invisible moles can be 'made'. Every attempt to capture the mole through video surveillance footage is foiled, either because the CCTV cameras are knowingly positioned in ways to create blind spots or deliberately shut down in advance. Even when caught on camera, the double agent's face remains unrecognizable because the cheapness of the video footage ensures that it provides, as *The Departed*'s shooting script notes, '[n]o more use as ID than the Shroud of Turin' (Monahan 2006, 101). In contrast to visual identification technologies, the cell phone is represented as an effective means for 'blowing away' the 'shroud' disguising the double agent. In these films, knowledge worth collecting is knowledge that is heard rather than seen. Remarkably, this premise does not privilege sight as the primary sensory mode for collecting knowledge. Instead, it links the cell phone to aural revelations in the following two ways.

First, the ringing cell phone aurally reveals the identity of the mole, and in doing so, embodies the concept of resonance as vibration. In *Entretien entre d'Alembert et Diderot* (1769), Denis Diderot imagines resonance through the metaphor of the vibrating string, where

> the sensitive vibrating string oscillates and resonates a long time after one has plucked it. It's this oscillation, this sort of inevitable resonance, that holds the present object […]. But vibrating strings have yet another property—to make other strings quiver. (translated by and quoted in Erlmann 2010, 9.)

These vibrating strings can also be anthropomophized and take human form, as in the trope of the human harpsichord (*l'homme-clavecin*). In this comparison of human bodies to a string instrument, humans can 'tremble harmoniously' (de la Vilate 1970, 280) as their nerve fibres are analogous to the strings of the harpsichord (Montesquieu 1977, 421-422). In these philosophical writings, the harpsichord is granted the existential equivalence of a human being. Yet we can also consider how the figure of the sentient harpsichord highlights symmetrical relations between humans and nonhuman, technological artefacts. In accordance with the object-oriented ontology underlying Science and Technology Studies, such as actor-network theory (Latour 2005), there is no *a priori* separation between humans and nonhumans, implying that nonhumans can be methodologically and theoretically analyzed using the same conceptual toolbox that had been developed for studying humans. In a symmetrical analysis (Callon 1986), nonhuman objects are granted agency and a capacity for action:

> as soon as they are freed from the spell [that paralyzed and muted them—much like the damning curse placed on inhabitants of enchanted castles in fairytales—objects] start shuddering, stretching and muttering. They begin to swarm in all directions, shaking the other human actors. (Latour 2005, 73.)

By awakening to the agential possibility of noisy objects, with their 'shuddering'

and 'muttering', and bearing witness to the ways that we put objects into contact with one another and ourselves, we can imagine vibrating resonance as an action that encompasses both technological artefacts and humans. When we turn to our filmic case studies, the cell phone is thus a noisy nonhuman on par with the noisy gangsters that carry them. It is also a vibrating object that can make humans quiver in its wake. As such, the cell phone becomes the 'talking and listening machine' that propels both criminal and law enforcing bodies into motion.

As a vivid example of the ways in which the cell phone's vibrations are integral to the sonic hunt for double agents, we can analyze the chase scene between the two moles in *Infernal Affairs*. In a scene titled 'Digging for moles', undercover law enforcer Yan secretly sits in a movie theatre to spy on Ming, the triad's mole. When Ming leaves the theatre, Yan follows on the chance that he could visually identify the other mole. Against a soundtrack with heavy percussive beats, Ming taps an envelope against his thigh, echoing Yan's tapping fingers in an earlier scene. All of a sudden, Yan's cell phone rings and Ming realizes that he is being followed; the hunter soon becomes the hunted. What this scene emphasizes is the idea of repercussion or more precisely, *re-percussion*—that is, the repeated act of hammering on a surface to create and transmit sonic vibrations in the ear. In this particular scene, re-percussion takes the form of the moles' recurrent percussing movements, and the echoing responses they entail. So when the two moles finally make contact in a scene aptly titled 'Making contact', they communicate using a cell phone with 'hammering' fingers, highlighting Hong Kongers' local and colloquial conception of cell phones as 'hand machines'. Regularly held in hand and made to work with nimble fingers, cell phones in Hong Kong are as much about oral communication as they are about handiwork. Linking handiwork to the process of making contact, Ming gets in touch with Yan by redialing or re-percussing the last phone number that Inspector Wong had called prior to his death. Upon seeing a call from a dead man, Yan allows his cell phone to ring twice without picking up. Piqued by curiosity, Yan finally answers his phone but remains silent, listening to the message Ming taps out in Morse code. It is this coded message that ultimately convinces Yan to meet Ming, even as the repercussions associated with both moles' actions begin to catch up with each of them.

In this latter sense, repercussions take the form of unintended consequences—more specifically, the unanticipated emotional agitation and psychological strain of living and performing as a double agent. The psychological and emotional toll is so high that the undercover cop in both of these films is ordered to seek psychiatric help. Notably, representations of emotionally tortured undercover cops, such as in *Infernal Affairs,* echo and repeat a Hong Kong film tradition of imagining double agents as tragically bewildered figures, 'drifting between the order of justice represented by the police and the evil, [morally corrupt] underworld controlled by the criminals' and gangsters (Law 2008, 529). Torn between choosing personal loyalty and official duty, undercover agents—whether working for the police or for a criminal gang—ultimately become the victims of a legal and security apparatus that fails them, particularly since that apparatus exploits and undermines the bonds of

interpersonal trust in society (Law 2008, 530). For viewers, the emotional and moral trajectories of double agents are mapped through aurality in *Infernal Affairs* and *The Departed*, as aurality can take into account temporal flow. To demonstrate the mole's shifting sense of identity, the cell phone is featured in both films as an aural instrument of self-revelation. Unlike visual surveillance technologies that aim to fix in time and space a single, stable identity, the cell phone—because of its reliance on sonic characteristics (see Hibbitts 1995)—promotes the instability, fluidity and multiplicity of identity. As a result, the double agent's moral trajectory is played out through the concept of resonance as oscillation and in this case, as vacillation in identity.

In both films, identity becomes shakable through the tremblings marked by the cell phone's vibrations. Tremblings produced by sound, as David Hartley (1967) had once theorized, can agitate bodies with corresponding vibrations. Through these tremblings, bodies are capable of forming lasting impressions, precisely because the ear is the organ through which auditory sensations can penetrate into us. Consequently, self-reflection in these instances can take on a percussive nature (see also Erlmann 2010, 341-342), whereby acts of hearing do not simply affect visible performances of different personas,[9] but also the inner core of a person's sense of moral identity. Whether ringing loudly or quietly vibrating, the cell phone becomes a constant reminder of an agent's moral obligations and professional duties. As Bruno Latour and Couze Venn (2002) have argued, morality is inscribed in the technological things that oblige us to oblige them. In this case, the cell phone is a technology that can engender possible worlds, by dislocating an individual's relations from certain people and organizations in such a way as to direct them towards a new series of connections and contacts. By mediating changes in a double agent's contacts, the cell phone comes to not only convey changes in social pressure, but also serves to represent the double agent's shifting allegiances. For instance, when the gangster mole takes over the cell phone of his dead police superior, he is also unofficially assuming a new powerful position within the police department. He inherits his superior's contacts, and with them, his network of allies and enemies. Only after commandeering this cell phone does the gangster mole choose a new future for himself, as evidenced in the following scene.

The scene takes place in an underground parking garage—perhaps as a reminder of the mole's favoured subterranean habitat as well as proof of the nefarious doings and betrayals that make up the underworld. As a site for transportation, the garage also evokes the theme of (potential) mobility that runs through the gangster genre. In this scene, the car carrying the film's most notorious gangster—Hon Sam in *Infernal Affairs* and Costello in *The Departed*—is under attack by the police. Sam/Costello manages to momentarily escape from the car, running through the garage while dialing his mole, Ming/Colin, as quickly as possible. 'To his surprise, the phone rings quite nearby. And keeps ringing' (Monahan 2006, 136). The ringing sound of the

9 For the visible performances of personas in *The Departed,* see Marling (2008).

cell phone echoes in the cavernous garage, serving as an aural *punctum* that 'rises from the scene, shoot[ing] out of it like an arrow, and pierc[ing]' viewers (Barthes 2010, 26) and characters alike. Emerging from the shadows, Ming/Colin confronts his former criminal boss with a cell phone in one hand, and a gun in the other; the piercing sound of the cell phone's ring foreshadows the looming threat of the gun's wounding shot. In *Infernal Affairs,* the sound of the ringing cell phone is followed by a brief silence that gives way to a melody formed by the bowing of violins, cellos and basses. Played by string instruments, this instrumental melody is repeatedly heard whenever the mole makes a life-altering decision, harkening back to the figure of the human harpsichord. In this scene, the melody intensifies as it becomes integrated into a series of flashbacks: we see Sam recruit young Ming, promising him that he can choose his own future. In the garage, adult Ming shoots Sam once with his gun, and tells himself, 'I've chosen'. Here again, the cell phone's ring sets off vibrations that are conducted by and penetrate into the flesh of the double agent. As a human harpsichord, the gangster mole is a subject made and remade by the vibrating strings of sensations and memories. In this scene, he ceases to be an instrument used by a criminal boss, and becomes his own musician; the played transforms into a player in the game of law. As a result of this transformation, the gangster mole kills his criminal boss, eliminating all connections to his criminal past and giving himself a chance to legitimately succeed in the field of law enforcement. In *The Departed,* Colin also takes Costello's cell phone after killing him, thereby taking with him evidence of his past criminal contacts. In both films, then, the external vibrations of the cell phone exert an emotionally-charged pull on the undercover agent's sense of identity, leading to internal oscillations between his law-enforcing and criminal identities, as well as pendulum-like swings between his professional and personal selves.

5. Conclusion

Through an analysis of two contemporary gangster films, this paper examined the concept of resonance as a means for conceptualizing the undercover performance of law. To think through the metaphorical implications of resonance, I attended to its multiple and overlapping meanings—including its manifestations as synchronicity, oscillation, and vibration—as they played out through the technologically-mediated performances of gangsters, law enforcers, and double agents. In so doing, I aimed to trouble and disrupt the ocularcentric and spectacular character of law, by bringing forth the synesthetic and aurally-inflected dimensions of law-in-action. While the paper discussed how these films feature the cell phone as a crucial sonic technology for covert surveillance and aural revelation, I end by considering how gangster films imagine the law as an impactful blow. While guns may 'blow away' criminals and competitors in classic films of the gangster genre, the cell phone 'blows covers' in *The Departed* and *Infernal Affairs*. Whether expressed as sonic blasts or sudden tactile attacks, the act of blowing joins together sound and touch in the act of making contact with 'covers'—not only the covers used by double agents, but also the cover

of law itself.

When conceived as a cover, the law is yet another shroud that makes up the cosmos. According to Michel Serres (2008, 264), the Greek word *cosmos* designates not only law and the rightness of things, but also embellishment and adornment. As an ornamental veil, law itself is a 'delicately knitted lace' (Latour 2010, 264) and one that comes together through resonance. The point of resonance is not to unveil the law through sound, or to demonstrate that visible 'naked' truth inevitably lies underneath the veil. To look beneath the covers or to search for depth beyond the surface does not bring us closer to a clearer or purer picture of the law-in-action (see also Lam, 2017). Rather, resonance—as exemplified by the vibrating or ringing cell phone—works to add further links to the 'lacy chain' of law (Latour 2010, 166), or to sever existing links. Instead of lifting the veil, resonance implies that the veil links us together in ways that ultimately entangle us—law enforcers, criminals and citizens alike—in folds and knots (Serres 2008). As dramatized in both films under study, law—either as an official cover or as an undercover identity—can create knots from which moles cannot escape, giving rise to the emotional strain and psychological agony of being a deep cover agent. Part of law's knotting process entails the mixture and mingling of senses; it creates a complex union between different sensory experiences that is not easily unravelled. As a means by which senses can be mingled, resonance ensures that law can better 'tangle us up, hold us and protect us' (Latour 2010, 266).

In addition to considering how resonance can unite sensory experiences, this paper stressed the dynamic ways in which sonic technologies compel us to 'tune in', percuss, and make contact with others. With this emphasis, I have focused on processes and contradictions associated with undercover work rather than on formal principles or decisions made by the static rules of a transcendent law. Such an approach is useful for thinking about how the power of law is constructed and maintained through gangster films. As Ewick and Silbey (1998, 17) have argued, 'the multiple and contradictory character of law's meanings, rather than a weakness, is a crucial component of its power'. These contradictory meanings and uses '*echo and resonate* with other common phenomena, [such as games]' (Ewick & Silbey 1998, 17, emphasis added). Thus, in the games played by gangsters and law enforcers, law and its attending power appear as neither stable possessions nor things, but as relations (see Foucault 1978). As a relational force, the power of law operates through oscillation, entangling us in ever-changing relationships and summoning us to continually percuss and discuss (see Erlmann 2010, 342). In its vibrating vacillation, law does not remain in an unchanging, fixed position in the world; instead, it swings noisily across multiple representations, meanings and performances in the world of popular culture and in the world-at-large.

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The Litigating Dead: Zombie Jurisprudence in Contemporary Popular Culture

William MacNeil*

1. Capitalism, catastrophe and the critical cry for 'fresh brains': the zombie as juridico-political metaphor

'Fresh brains': that *could* be the cry of any number of zombified undead which seem, of late, to have overrun popular culture[1]. It *is*, in fact, the tart riposte of one of the mid-twentieth century's most well known analysands to his eminently distinguished analyst—the latter being, here, famous Freudian rival, Ernst Kris.[2] In this case (see Kris 1975, 237-251), Kris's analysand was a university lecturer who suffered

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2 Ernst Kris (1900-1957) was an art historian and psychoanalyst. Born in Vienna, his early career included a working relationship with Freud. In 1938, he fled to England and, in 1940, he moved to New York. In both places, he continued to work in psychoanalysis and art/art history, including as a training analyst at the London School of Psychoanalysis and as a lecturer at the New York Psychoanalytic Institute.

from a block: he could neither publish his academic work nor, eventually, write up his scholarly findings, all owing to his obsessive fear of putative plagiarism (Kris 1975, 244). Even when Kris pointed out to him—after conducting his own extensive library research—that, far from being plagiarised, his work was highly original (Kris 1975, 244), the analysand remained unconvinced, clinging to his fantasy of scholarly theft. When Kris further explained, in full-blown psychoanalytic fashion, that this (mis)appropriative fantasy may have been founded on an infantile wish for a successful father (Kris 1975, 245), the analysand responded that, after each therapy session, he would wander along a nearby street full of attractive restaurants and bistros in New York, scrutinising their menus for his favourite dish: 'fresh brains' (Kris 1975, 245). For subsequent critics of Kris and his school—such as, most notably, French Freudian, Jacques Lacan—this encephalic vignette served, perfectly, to expose the poverty of a certain kind of psychotherapy[3]: namely, that of ego psychology which, with all its normalising imperatives, entirely missed the point of this, admittedly, cryptic but vividly vivisected reply. From Lacan's vantage, 'fresh brains' was a powerful sign of the analysand's desire, signalling his rejection of Kris' facile reality checks, all the while calling for a new perspective, a different approach: in short, another way of *thinking* about his case, hitherto unexplored by the standard course of treatment (Fink 2004, 52-62; Nobus 2002, 168-171).

Why start with this vignette from psychoanalysis[4] when the topic of this article, as its title indicates, is 'the litigating dead'—that is, zombies? Aside, of course, from the obvious fact that the principal players in each storyline are very much linked by a mutual desire; more than anything else, zombies, as much as Kris' analysand, yearn for 'fresh brains'. That desire, however, is not only literal (for cranial sustenance) but also figural (for new forms of analysis). Consequently, this article's central argument is as follows: whether they be on page or screen—and whether that screen be big (cinema) or small (television)—what popular culture's current crop of the 'walking dead' call forth, on our part, is a different sort of hermeneutic, an alternative interpretation. That is, a critical perspective capable of parsing the (re)animating tropes of zombie fictions which figure, both metaphorically and metonymically, varying approaches to ordering and organising, indeed governing the world as we know it. In making this claim, this article differs markedly from prominent Lacanian-Marxist philosopher, Slavoj Žižek, who sees in this pervasive 'undead' phenomenon an attitude of resignation, even an abdication of ethical responsibility: 'It's easier to imagine the end of the world', said Žižek, 'than it is to imagine the end of capitalism'.[5] Extrapolating from this bleak observation, Žižek's reading would hold that there are no other options to our present institutional arrangements—runaway globalisation,

3 Lacan discussed Kris' article twice in his seminars (1953-1954, 52-61; 1955-1956, 73-88) and returned to it twice in his writings (1966, 318-333, 489-542).

4 For a superb application of this vignette to the field of law, policy and jurisprudence, see Maria Aristodemou's masterful 'A Constant Craving for Fresh Brains and a Taste for Decaffeinated Neighbours' (2014).

5 Žižek has repeated this claim in a number of books, articles and interviews. See, for example, the documentary film *Zizek*! (2015). As is also well known, the claim is first attributed to Fredric Jameson (1994; 2003).

pitiless neo-liberalism, growing inequality, geopolitical instability—*unless* it is the *degree zero* of zombie apocalypse. So, here, zombies come to signify two stark choices: either Capitalism or catastrophe.

While there is much to recommend the position taken by Žižek and innumerable others of his persuasion (Shaviro 2002; Newitz 2006; McNally 2012; Lauro & Embry 2008; Zimbardo, 2014), this article would take the opposite tack. That is, in their relentless pursuit of 'fresh brains', zombies evince an overarching *desire* that goes well beyond the imaginative limits of Capital's compulsively repetitive drives, one which emboldens us to reconceive the juridical bottom line organising not only its methods of exchange (contract, property), but its modes of governance (representation, rights and rationality): to wit, a *desire* for a reconfigured *law*, as much as a *law* of revitalised *desire*. What is this 'law of desire'—that, in turn, desires law above all else—but a radical rethinking of the intersubjective tie; specifically, the way in which 'the One' (the self, the subject) is connected to 'the Many' (the Other, the socio-Symbolic). To resituate this problematic in terms of historical political theory, that of Hobbes, Locke and Rousseau: how is the social contract formed? What are its terms and conditions? Who is negotiating it? And, most important of all, to what end?

The generically diverse zombie fictions privileged by this article—principally, comic book and TV series, *The Walking Dead,*[6] with asides to trail-blazing pulp fiction, *The Rising*[7] and, on both big screen and page, *World War Z*[8]—stage for their respective audiences a dark socio-legal allegory of what Freud would call 'the group and its psychology' by speculating on how juridico-political authority, indeed, leadership (be it charismatic, traditional or bureaucratic[9]) is legitimated and maintained. This article will trace and track these forms of leadership, and the juridical nature of the societies which they lead, linking regimes of property, personality and process with specific kinds of governance: dictatorial, paterfamilial, conciliar. The fact, however, that each of these regimes not only fail, but fail spectacularly, should by no means be read as a symptom of the situation's hopelessness. On the contrary and counter-intuitively, quite the reverse: because, here, governmentality's serial combustions—of the individual and the collective, of the miraculous and the rational—are tremendously productive, the disastrous sum total of each effectively clearing a space for an encounter between zombie and human which is neither antagonistic nor identitarian. As *entre deux morts*—or between two deaths,[10] this encounter models, relationally, an 'ethics of the Real' which, in sidestepping the genre's false dichotomies

6 *The Walking Dead* television series (October 2010–ongoing, Season 8 forthcoming at the time of writing). This series is based on the comic book series by Robert Kirkman (w) and Charlie Adlard et al (a).

7 *The Rising* is the first in a series of zombie horror novels written by Brian Keene (2003). In 2004 it was optioned for film and video-game adaptation. A sequel was also published in 2005: *City of the Dead* (Keene, 2005).

8 *World War Z* is an apocalyptic horror novel by Max Brooks. Published in 2006 it was also published as an (abridged) audiobook and released as a film (of the same name): *World War Z* (2013).

9 This template of authority is if course Weberian, and is drawn from 'The Three Types of Legitimate Authority' (Weber 1978).

10 For a more developed definition of this term of psychoanalytic art, please see below note 25.

(e.g., neo-liberal status quo vs. zombie apocalypse) points a way forward beyond the fundamental fantasy that the zombie, as political, economic and juridical metaphor, at once occludes but also discloses: specifically, Capitalism-*as*-catastrophe.

2. Know thy zombie: the prisoner's dilemma, decision-making and the indeterminacy of human identity

Before, however, exploring any further the juridico-political economic thematics of leadership, governmentality and an 'ethics of the Real' beyond Capital, this article will address, as a core philosophical issue and its ontic condition precedent, the depiction of the basic human bond's emergence in zombie fictions. Simply put: in the wake of an apocalypse, how do we tell the difference between a human friend and a zombie enemy? The former is, of course, a potential subject of the socio-Symbolic, in fact its core relational agent; while the latter, by definition, is inimical to that very subjectivity, it being destructive not only of the socio-Symbolic writ large, but the self which is its basic building block. *The Walking Dead* proffers grounds for such a decision that are epistemologically surprising, even confounding of our normal expectations. I say so because, in terms of *knowing* each other, zombies clearly have the upper hand over humans: they recognise each other almost immediately—by sight, by shuffle, but above all by smell—while humans remain uncertain, doubting whether the other is one of us (human), one of them (zombie), or somewhere in between (one of the infected).

To put in in slightly different terms: zombies *know* and *act*, while humans *hesitate* and *decide*. Of course, this is not to suggest that while we're perpetually paralysed, zombies are always proactive, knowing exactly what to do and when to do it. This is because as the series shows, time and again, zombies can be *fooled*. Much is made of this in *The Walking Dead*, many of its episodes containing a scene in which Rick and his band, in an effort to infiltrate zombie-dominated territory, will disguise themselves as the 'Walking Dead' ('Guts', Ep.2, S.1, *TWD*) smearing their clothes and skin with blood ('No Sanctuary', Ep.1, S.5; 'Start to Finish', Ep. 8, S.6, *TWD*) draping themselves with body parts and, otherwise, stinking of rot ('Guts', Ep.2, S.1, *TWD*). And the ruse often succeeds, at least, initially and for a time; however, it can never be sustained, a fresh wind blowing away the stink as well as the body parts, or a downpour of rain washing away the blood stains ('Guts', Ep.2, S.1, *TWD*), leaving each metaphorically naked in his or her humanity—which, naturally, the zombie senses instantly and seizes upon, pouncing on its victim like an animal instinctively devouring its prey. Humans, however, operate very differently: instead of an immediate affective response, dependent upon one's own senses, their reaction is cognitive, evaluating, weighing and judging the reactions of others before rendering a decision as to whether one is a friend or enemy, human or zombie.

Knowledge, then, for humans comes from outside the self and is dependent on context. This is clearly the case in the 'prisoner's dilemma' hypothetical beloved of management consultants, philosophers and psychologists (Kuhn 2014). In its

psychoanalytic version—that of Jacques Lacan's[11]—three people are assembled in a room, each with an affixed marker—either black or white—which none can see of their own, but only of the others (Lacan 2006, 161-162). The test, here, is who can work out the colour of their own marker and, presumably, go free by judging the reactions of the other two (Lacan 2006, 162, 167-169). For, of course, the other two are the only ones who *know* what one's marker's colour is and, in order to access that knowledge, one must 'read' the other's gestures, parse their attitude, analyse their behaviours because the usual grounds for certitude here (Lacan 2006, 167-169), such as the senses (e.g., 'seeing is believing'), are conspicuously absent in this case. Such a situation would seem to put humans at a tremendous disadvantage. While we agonise over decision-making, they—the zombies—simply get on with what they do best: simply, devouring fresh brains and, in the process massifying their numbers to such an exponential extent that they threaten the social contract, as much as its contracting, rights-bearing subjects. Yet what seems to be, initially, a human weakness (uncertainty, hesitation) can in fact be a source of strength. For doubt, indeed contingency is necessary for judgment, decision-making and leadership (Lacan 2006, 170-171), as well as, by extension, the formation of the *socius* through the foundational legality of its social contract.

3. Post-apocalyptic social contracts: zombie fictions' competing communities of property, personality, and process

Consider the increasing fragility, indeed vulnerability of those societies, the leaders of which would neutralise uncertainty, even abolish difference. The case of Alexandria in *The Walking Dead*'s Season 5 is instructive here. With its impregnable walls, its well networked power sources, and its ample stockpiles of food and ammunition, it appears to be—and is—the safest of safe havens ('Remember', Ep.12, S.5, *TWD*), enabling the illusion of pre-apocalyptic *bourgeois* suburban life to continue: of book clubs and cocktail parties ('Forget', Ep.13, S.5, *TWD*), of manicured lawns and extramarital affairs ('Forget', Ep.13, S.5; 'Try', Ep.16, S.5, *TWD*). There is, however, a fatal flaw in Alexandria's Stepford-style world. Like the contemporary 'gated community' which it so clearly stands for, Alexandria screens its applicants, recruiting only those candidates, shortlisted by various scouting missions, that it deems suitable ('The Distance', Ep.11, S.5, *TWD*), all the while rejecting or expelling the unsuitable ('Remember', Ep.12, S.5, *TWD*)—something like a parody of elite school/university admissions or, better yet, exclusive club or secret society initiation ('Try', Ep.15, S.5, *TWD*). So Alexandria, and its leadership (Deanna, Aaron, et.al.), *know* precisely the kind of person they want: principally, someone who will respect, uphold and defend their values of possessive individualism, euphemised as 'sustainability' ('Remember', Ep.12, S.5, *TWD*). Within the universe of *The Walking Dead,* Alexandria is *the* neo-Lockean community of property *par excellence*, one

11 See Lacan's discussion of the prisoner's dilemma in his key chapter, 'Logical time and the assertion of anticipated certainty' in his *Ecrits* (Lacan 2006, 161-175).

where every inhabitant is, seemingly, safe and secure in their own possessory beds, and each enjoys an autonomy that renders his or her sense of selfhood separate and distinct: a community, effectively, of strangers. No wonder, then, so many of the ills that afflict today's mainstream culture—alcoholism ('Spend', Ep.16, S.5, *TWD*), domestic violence ('Spend', Ep.16, S.5; 'Try', Ep. 15, S.5, *TWD*), mental illness ('Start to Finish', Ep.8, S.6, *TWD*)—persist in Alexandria, and are tacitly tolerated as long as these problems remain private and behind closed doors ('Try', Ep.16, S.5, *TWD*), such as the open secret of Dr Peter Anderson's spousal abuse of wife, Jessica ('Spend', Ep.14, S.5, *TWD*). It is so because, in this society, every man's home is still his castle—even if that castle contains, for some, a *dungeon*.

Contrast Alexandria's attitudes here with Rick's ragtag-and-bobtail group. While the Alexandrians are in deep denial about the precariousness of their context—not only looking the other way when confronted with local problem ('Try', Ep.16, S.5, *TWD*), but, even more, remaining absolutely convinced about who does and does not belong ('Try', Ep.16, S.5, *TWD*)—Rick and his fellow travellers are so indifferent to any sort of selective filter that they comes to incarnate, in their composition, *difference* itself. For Rick's cohort are not only diverse in terms of race, class and gender; they span a capacious range of skill sets, as much as varied personality types, ranging from the utterly useless (e.g., Fr. Gabriel, Eugene) to the absolutely effective (e.g., Abraham, Sasha, Maggie and Glenn), with the remainder equivocating between these two poles—and, more often than not, holding diametrically opposed views which, at times, erupt into open conflict: e.g., recall the fiercely fought Carol/ Morgan disagreement over the sanctity of human life ('Start to Finish', Ep.8, S.6, *TWD*).

Despite such storms and stresses, this group of stragglers and misfits, hangers-on and survivors always manages to rise above their internal tensions, and coalesce into something far more intimate than Alexandria's *faux* community of alienated and atomised individuals. For what Rick's group instantiates is nothing less than what the ancient Greeks would call a *nostos*[12]; that is, a household to call home, as much as home to come back to, at the very heart of which is a *family* ('Remember', Ep. 12, S. 5, *TWD*) that even the most self-absorbed narcissists of Alexandria would see as unique, special and worthy of emulation. The question that arises, however, is whether there is an appropriate *nomos*—that is, law—by which to order and organise this *nostos* (Sage Heinzelman, 2010, xi-xiv) into a community that encompasses, through the founding legality of social contract, the self and the Other, the individual and the group. Certainly, the principal candidate for this role of nomic law-giver, this figure of legitimate authority is former sheriff ('Days Gone Bye', Ep.1, S1, *TWD*), Rick Grimes himself, who already functions as the group's *paterfamilias*; that is, its father figure, prescribing its norms, setting its guidelines and otherwise laying down, as psychoanalysis would have it, the 'Law of the Father's Name' (Evans 1996, 62-64, 101-102, 122, 140-141).

12 For the path-breaking revival and redeployment in cultural legal studies of this ancient term—and concept—please see Susan Sage Heinzelman's law-and-literature classic, *Riding the Black Ram: Law, Literature and Gender* (Sage Heinzelman 2010, xi-xiv).

If, though, Rick is that law-bearing Father, then he is a peculiarly vacillating, even ambiguous one. For no clear patriarchal command—the 'No' of the Nom-du-Pere, as French Freudians' version of Oedipus would have it (Evans 1996, 122)—issues from him. Instead, Rick oscillates back and forth, sometimes taking on the mantle of paternal leadership (as he does in Seasons 1 and 2), sometimes rejecting it (as he does in Seasons 3), then doing both (in Seasons 4 and 5). In short, Rick *wavers*, even questions his phallic authority, doubting his claims to legality as much as paternity. Compare Rick's uncertain attitude and shifting status with that of his obscene counterpart and the monstrously Leviathanic, Phillip Blake, *aka* The Governor—the group's key antagonist in Seasons 3 and 4—who runs his fiefdom, Woodbury, like something out of a Mad Max film[13]—though one seemingly co-directed by Thomas Hobbes as much as George Miller. With its highly contrived (and rigged) gladiatorial games ('Say the Word', Ep.5, S.3, *TWD*) between chained zombies and armed human praetorians (*omnium bellum omnes*?[14]), Woodbury could *easily* be a televisual equivalent of Auntie's Bartertown from *Beyond Thunderdome*, both being awash in pleasure-in-pain. So, unlike Rick, the Entity-like Governor sends an unequivocal and unambiguous message: that is, 'Enjoy!' By 'Enjoy!', I mean 'enjoyment' in the sense of that dark and driving force of a disturbing *eros*; that is, a perverse sexuality that the Lacanians and the post-Lacanians call *jouissance* (Evans 1996, 91-92; Wright 1992, 185-187), tinctured with all manner of paraphilia, especially sadism.

This is precisely the Governor's psycho-sexual/social position, because he urges us to give vent to our desire for retribution and enjoy our blood lust. In this role, the Governor assumes a paternal function that Slavoj Žižek might call the 'anal' father (Žižek 1991, 53-57; 1992b passim), an inversion of Rick's phallic fatherhood. While the latter is always puzzling through the Law, tentatively, even painfully trying to reach the right decision, the former is, unequivocally, laying down the 'Law to Enjoy'. As the Žižekian Father-Enjoyment, the Governor never wavers and, certainly, never doubts. This is, of course, his fundamental problem—*and* pathology: unlike Rick, forever debating his judgment, the Governor never questions his decisions. In so doing, the Governor not only marks himself as authoritarian personality—the Fascist Master (Evans 1996, 105-106)—but as a psychotic (Ibid., 155-157). For the psychotic has complete faith in his fantasy, the delusions of which he misapprehends (Ibid., 33-34, 77), with the full strength of his deranged convictions, as the real. Think how easily the Governor mistakes the dead for the living, misrecognising his own zombified daughter, Penny ('Say the Word', Ep.5, S.3, *TWD*), for the person of the young girl she previously was ('Walk With Me', Ep.3, S.3, *TWD*), and insisting that is who, ontologically, she still is by keeping her with him, secreted away, chained in his office cupboard ('Made to Suffer', Ep.8, S.3, *TWD*). Not that Penny is the only

13 *Mad Max* (1979). *Mad Max* was followed by *Mad Max 2* (1981); *Mad Max Beyond Thunderdome* (1985) and *Mad Max: Fury Road* (2015).

14 Literally, the 'war of all against all', characterising the state of nature in Hobbes' *Leviathan* (Freeman 2008, 142).

(un)dead curio here, the Governor displaying such ghoulish trophies as the severed heads of his victims, as well as other corporeal bits and bobs, in what amounts to a chamber of horrors ('Walk With Me', Ep.3, S.3, *TWD*). With this fetishism of the 'body in … pieces' (Wright, 1992, 36)—the Lacanian *corps morcélé*—the Governor looks to be something like a 'Bluebeard' figure from Grimm's (and grim) fairy tales, a nightmare 'Daddy' who, in his strong associations with death and decay, seems to have stepped straight out of Gothic fiction.

No wonder, in Series 3, Rick abdicates paternal leadership of the group, especially if this is where it leads: from the Symbolic Phallic Father who says 'No!' to the Real Anal Father, urging a deranged 'Enjoy!', the two being flipsides of the same coin. This is why those Series 3 and 4 episodes set in the abandoned prison that Rick and his group take over, with the aid and assistance of some remaining inmates, are crucial. Because this storyline models a leaderless mode of governance ('This Sorrowful Life', Ep.15, S.3, *TWD*); namely, an acephalic sovereignty in which authority is disseminated from the One (Rick-as-Rousseau) to the Many (the group-as-'General Will'). How, though, is this dissemination effected? What is the governing modality that replaces Rick's patriarchal autocracy? Nothing less than through a supreme 'council' ('30 Days Without An Accident', Ep.1, S.4, *TWD*) which operates along such strictly democratic centralist lines that even Lenin himself (or Jodi Dean herself[15]) would be satisfied; specifically, attend the meeting, vote, abide by the majority decision. End of story: no subsequent debate, no follow-up discussion and, certainly, no breakaway splits or deviations. Here, then, is rule by the party and, especially, its central committee, the processes and procedures of which displace, and indeed do away with any sort of singular authority—despite the prison location, even the panoptic gaze of the warden, ordinarily watchful. The irony of which is that, even if the prison residents are no longer themselves watching, then someone else certainly is; specifically, the Governor and his minions, not only watching ('Internment', Ep.5, S.4, *TWD*), but waiting—for what? Simply, to storm the prison, exact their revenge and release the zombie hordes ('Welcome to the Tombs', Ep.16, S.3; 'Too Far Gone', Ep.8, S.4, *TWD*).

This drives home the need for a mode of leadership that has its source *in*, and is, in turn a source *of* liberal-legal *law*-giving, as much as Schmittian-political theological *decision*-making (Schmitt, 1985, *passim*). By this, I mean a leader who, through his or her decisional authority, will not only ensure security but, who, through his or her commitment to Rule of Law imperatives, will respect democratic process: at once representing, yet also bringing into dialogue the individual and the group. This is not only a key challenge confronting *The Walking Dead*'s fictional universe, it is our world's central issue as well. Given such global crises as climate change, financial mayhem, geopolitical uncertainty, the key question facing the world is what form of governance will deliver it from this parlous state of affairs. Certainly not the dysfunctional options on offer from the current law/politics nexus

15 For Dean's uncompromising rehabilitation of what some might think as the least palatable aspect of Marxist-Leninist praxis—the vanguard party—see her now germinal *Crowds and Party* (Dean 2016).

as imaged in the series: for example, Alexandria's precarious model of possessive individualism, desperately clinging to its things (a metaphor for the neo-liberal West); or the prison's vulnerable template of process and procedure, perilously distributing leadership amongst a bureaucratised managerialism that strains responsibility and leaves decision-making compromised (a figure for the old socialist East, its 'revolution betrayed' by party *nomenklatura)*; finally, the truly scarifying blueprint of the charismatic 'cult of personality', where the 'great helmsman' of the ship of state turns out to be a psychotic demagogue (an allegory of Clive Palmer in Australia,[16] Nigel Farage in the UK[17] and, of course, Donald Trump in America[18]), one who will save us from ourselves even if it means killing us all.

4. Miracles, marxism and monsters: towards a zombie jurisprudence of critique

So, the stakes are high in zombie fiction because, *contra* Žižek and others, they force us to rethink our *nomos* but also our *nostos*, our law *and* society. Here, narratives such as *World War Z* (Brooks 2006; *WWZ* 2013) are instructive, especially in the radically discrepant logics proposed by its respective cinematic and textual versions as a response to the zombie crisis. For the former, filmic solution, the proposal turns on what might be called 'the miraculous'. Now miracles are, usually, theological; that is, a sign from God recorded in many faiths' sacred scriptures, including the Upanishads, the Koran, and the Old and New Testaments. That theological miracle informs one of the first of the present wave of zombie fictions, Brian Keene's *The Rising* Series, where blessed release from a zombie apocalypse—who, themselves are demons, rebel angels from another dimension, Hell—comes in the form of an afterlife, presided over and protected by God (Keene 2005, 'Epilogue' 355-357). That, however, is not the miracle of the film, *World War Z*; instead, it is scientific rather than religious, a 'Eureka' moment on the part of UN investigator, Gerry Lane, who observes, during the heart-stopping fall of Jerusalem (*WWZ*, Sc. 9), how the highly mobile zombie swarms sidestep and ignore the terminally ill: in this case, a cancerous child (*WWZ*, Sc. 9). This fieldwork insight leads to Lane's Jonas Salk-like discovery, later at a beleaguered British research institute (*WWZ*, Scs. 13-15): the inoculating effects of deadly (but curable) pathogens, the presence of which, in the body, will repel the zombies and, possibly, save humanity (*WWZ*, Scs. 15, 16).

What is interesting here is how much *World War Z,* the film, departs from *World War Z*, the book. At first blush, the most glaring departure appears to be in

16 Queensland-based mining magnate, and maverick Australian politician with a penchant for the eccentric bordering on the bizarre (e.g., one of his current pet projects is building a replica of the Titanic), Palmer is the founder of the populist Palmer United Party.

17 As the leader of the anti-EU, anti-immigrant UK Independence Party (UKIP), Nigel Farage was, until recently, Britain's leading Euroscpetic, having paved the way—ironically for a sitting MEP—for 2016's Brexit vote.

18 Famously, the 45th & current president of the United States and widely known—and decried—as a populist, protectionist and *Volk*-ish nationalist.

terms of narrative structure, the former being focalised by one character, Gerry Lane being a star vehicle for Hollywood 'himbo' Brad Pitt[19]; whereas the latter is told, in the manner of a Studs Terkel-style oral history 'from below',[20] being vocalised in the multiple viewpoints of those who lived through, and triumphed over, eventually, the zombie apocalypse. That formal-narratological departure is, however, upstaged and, ultimately, overwhelmed by a substantive-thematic one: specifically, when Max Brooks' book flatly rejects the miracle of intervention, scientific, theological, and otherwise; and plumps, instead, for a solution to the crisis that is collective rather than individual, involving as it does full mobilisation of the material and mental resources of global humanity (Brooks 2006, 137-186, 187-269) in order to prosecute a 'total war' against the zombie apocalypse (Brooks 2006, 270-327). In so doing, according to Brooks' *World War* Z, global society must undergo a radical restructuring by installing, surprisingly for an American text, a version of the old 'communist idea'[21]—'from each according to their abilities, to each according to their needs' (Marx 1978, 531)—that would put the now defunct command economies of the passé Soviet bloc to shame.

The problem, though, with *World War Z*'s two solutions to the zombie apocalypse is that each repeat rather than reconcile the divide between the individual (the 'Eureka' moment of the film) and the collective (the 'communist idea' of the text). By way of contrast, *The Walking Dead* opts for, at least I maintain, a solution that encompasses both the individual and the collective and all the other antinomies for which this binary stands: security/democracy, decision-making/dissemination, leadership/consensus. But what will bring these sets of opposition together? Naturally, the solution must involve the law, that great mediator between right and utility, the individual and the common good. Yet what kind of law is it? I would argue that it is a law that takes ethics seriously, putting it, squarely, front row and centre. Namely, a legality that valorises an ethical care and concern for, as Levinas would put it, 'the Other' (Levinas 1998), the duty to whom we can never resile from, can never disavow, can never give up on, no matter what the consequences. Given this definition, surely the most ethical figure in Western jurisprudence is Antigone,[22] Oedipus' celebrated daughter, who refused to obey the order of her uncle, Creon, King of Thebes.[23] For Creon, infamously, barred any citizen from properly burying,

19 It was Pitt's production company, Plan B Entertainment, which secured the screen rights for the film. Pitt is also one of the Producers of the film (with Dede Gardner, Jeremy Kleiner and Ian Bryce).

20 See, for example, Studs Terkel's oral histories of the Great Depression (Terkel 1970) and World War II (Terkel 1984).

21 Of which everything old is new again, the 'communist idea' being brushed off, put on display and re-circulated as a viable political option, a branding process amply attested to by trail-blazing collections such as Costas Douzinas' and Slavoj Žižek's *The Idea of Communism* (Douzinas and Žižek 2010) and Jodi Dean's provocative *The Communist Horizon* (Dean 2012).

22 For the definitive reading of Antigone as the *ur*-figure of jurisprudence, see Julen Etxabe's superb *The Experience of Tragic Judgment* (2014).

23 *Antigone* is one of the three Theban plays (and Oedipal dramas) by Sophocles, following on in terms of plot from *Oedipus the King* and *Oedipus at Colonus* (Sophocles, 1984). It was written and performed first, however, around 441 BC.

according to the rites and rituals of the gods, his nephew, Polynices, recently dead from having taken up arms against Thebes (Sophocles 1984: *Antigone*, lines 26-30, 215-231). In performing what amounts to a burial—sprinkling dust over Polynices' body (Sophocles 1984: *Antigone*, lines 277-281, 417-489)—Antigone not only honours her brother but the gods themselves, following their 'higher' law instead of that posited by the state through the 'command of the sovereign' (Sophocles 1984: *Antigone*, lines 499-524).

5. My zombie, (not) my self: the 'ethics of the real' as laying the living dead to rest

Something like Antigone's Sophoclean drama is played out in Series 5 of *The Walking Dead* when Sasha, a female character of great Antigone-like resolve and determination who, after losing, dispatching and burying her dead brother Tyrese ('What's Happened and What's Going On', Ep.9, S.5, *TWD*), symbolically joins him by lying down in a shallow mass grave of disposed and truly dead zombie cadavers, identifying with each ('Conquer', Ep.16, S.5, *TWD*). Why do I say identifying? Because, in so doing, Sasha knowingly honours the zombies, as well as the memory of her brother, elevating both of them to the dignity of the dead 'Thing',[24] to be put to rest, buried ritually, even prayed over. Is this not the ethical moment of the series: an ethics, as Alenka Zupančič might put it, of 'the Real'? (Zupančič 2000, *passim*). That is, an ethics where we identify with 'the Real' of the zombie, not in order to become one of them—this is the fatal mistake of the Terminus cannibals (Seasons 4 and 5) or the roving Wolves (Seasons 5 and 6) who misrecognise the 'Walking Dead' as living subjects to be mimicked, *i.e., Imitatio Zombii*—but to end, mercifully, an existence that is well and truly '*entre-deux-morts*', between two deaths.[25] After all, when all is said and done, we are all zombies, at least, potentially. We know this because, as Rick later reveals ('Beside the Dying Fire', Ep.13, S.2, *TWD*), Dr Jenner whispered to him, in the final, intense scenes set at the end of Series 1 in Atlanta's Centre for Disease Control, that all of humanity had been infected with the virus ('TS-19', Ep.6, S.1, *TWD*).

This startling revelation is recalled *in*, and makes sense *of* Rick's despairing lament in Series 5 that 'we are all the "Walking Dead"' ('Them', Ep.10, S.5, *TWD*). But one should not necessarily read this utterance as fatalist resignation, quiescently accepting one's inevitable fate; that is, ceding dominion of the planet to the zombie

24 Borrowing from Lacan (Lacan 1959-1960, 21, 42, 80, 98, 151), via Žižek (Žižek 1999, 263; 2000, 95), Zupančič equates *das Ding,* 'the Thing' with the 'the Real' and, as such, as affording access to the ethical event, rearranging the coordinates of our existence: 'The Real Happens to us (as we encounter it) *as impossible*, as the 'impossible thing' that turns our symbolic universe upside down' (Zupančič 2000, 235).

25 That of the body's biological (Real) death and its ceremonial (Symbolic) death, thereby opening up the space in which the death drive prevails, evacuated of desire, but animated by a demand—the emblematic literary example is the ghost of Hamlet's father, who, as neither fully dead nor as one of the living, haunts his son with a demand for vengeance. The terminology is, of course, Lacanian (Lacan 1959-1960, 248; Evans 1996, 32-33) and the point Žižekian (1992a, 23), on which has been picked up in and disseminated widely in the critical literature (e.g., Dima 2016; Sigurdson 2013; Mullen 2014; Larson 2010).

hordes by becoming one of them. On the contrary, the presence of the virus in all of us presents us with a *free choice*: we can either join the dead, participating—like the current subjects of global capital—in their never-ending and iterative loop of consumption, metaphorised cinematically in the 'fresh brains' demanded in innumerable zombie flicks; or we can make a conscious effort, like Kris' analysand impliedly invited in his nosological anecdote of 'fresh brains' (Kris 1975, 245), to break with this chain of consumption by embracing our uncertainty, hesitation, difference to become an alternative version of humanity, one that would challenge the hegemony of the 'Walking Dead', calling them into question, putting them on trial, judging them and finding them wanting. To that political, ethical and, above all, *juridical* end, *The Walking Dead* invites us to become nothing less than 'The Litigating Dead'.

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Book Review

Bonnie Honig: *Public Things. Democracy in Disrepair.* Fordham University Press, New York 2017.

Illan rua Wall*

The final lecture of Bonnie Honig's latest book *Public Things* finishes redemptively on a golf course, which seems to me to be a very good place to start a review: When Trump (falsely) claimed that Obama spent more time on the golf course than any other US president, he sought to conjure up an imagination of wide open green spaces, sunny manicured fairways, relaxation and leisure. Obama's presence in this space signified a dereliction of duty—he was taking time off, with the 'globalist' elite when he should have been dealing with various crises.[1] Trump sought to draw the public's attention to an exclusive space. A space funded by private donations and fees, and where the greens and fairways could be finely manicured only because they first exclude the many from walking across them. In Trump's rhetoric, Obama was corrupt because he spent his time away from his public office, away from the space of government. Of course in this political imaginary Obama was damned either way because Washington was a swamp, populated by 'globalists' who had sunk their claws into Democrats and Republicans alike. The rhetorical solution was to 'drain the swamp'. The 'holding environment' of Washington had to be radically refashioned. Trump suggested he too would use the golf club, if he had any time. But on the greens, he would hammer out deals with foreign leaders that were in America's interest. Trump's emotional register established the image of the private

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1 For instance, Trump wrote on twitter on 21 May 2016: 'While our wonderful president was out playing golf all day, the TSA is falling apart, just like our government! Airports a total disaster!' or again at 5am on the 8th of September 2013; 'PresObama is not busy talking to Congress about Syria… he is playing golf… go figure'.

space of a golf club at once as a space of Obama's failure to act in the public interest, and at the same time the infrastructure of his 'art of the deal'. In other words, it was not simply a way to criticise Obama on behalf of the 'victims of globalisation', but also a way to underline the 'honesty' of Trump's position. Bonnie Honig's new book sensitises us to the terrain of this political imaginary. It draws our eye to the minor agency of environments, infrastructure and 'public things' as *they* structure our public life. The book which is made up of three lectures focuses on the capacity of public things as sites of care and concern, hope and play.

The golf course is an excellent place to start thinking about 'public things' because it is *not* public. It is not shared, open or universal. In that sense it can be contrasted with a park which is open to all. Park-goers must negotiate amongst themselves how best to use the space. But in the last pages of *Public Things* Honig tells the story of the 'San Francisco Recreation and Park Service that began to sell reserved time slots for the use of a public park' (Honig 2017, 96). This lead to a confrontation between a group of tech workers who had filled out an online booking form to reserve an hour of unadulterated use, and local teens who maintained that the park was for the public. Honig writes: 'In response to the request that they clear the field… the local teens showed they knew what a park is *for:* They invited the tech workers to join their game' (Ibid.). The logic of the golf course, with its reserveable tee-off times, creeps into the park. 'This alteration of the public thing into a rentable resource by local government is transformative. It does not just kick some kids off their field. When public things are subject to private rental, our entire relationship with them is changed' (Ibid.). As Honig explains, this is very close to Wendy Brown's recent analysis of neoliberalism in *Undoing the Demos* (2015). Honig adopts much of Brown's analysis of the catastrophe of neoliberalism. The 'stealthy work of neoliberal rationality' has hollowed out the core of democracy, without ever simply overturning it (Honig 2017, 13). In this neoliberal condition, we are left with a husk, a shell of democracy.

In Honig's hands, Brown's thesis about the infection of democracy with neoliberal rationality is subtly inflected to become an analysis of the 'almost always already overness of democracy's (or politics) necessary conditions' (Ibid., 15). Honig uses this shift to refocus our attention from neoliberal *rationality* to the necessary *object-ive conditions* and shared *environments*. Her wager is that an emphasis on public things loosens the grip of the question of 'the people', as the quintessential political frame. Explaining this shift she writes:

> When we think from the angle of public things, we are switched to questions of orientation and receptivity, from subjectivity to object-ivity, from identity to infrastructure, from membership to worldliness. From a public things perspective, we are more moved first to ask not 'who are we?' but 'what needs our care and concern?' We are moved out of the realm of infinite cycle (Rousseau's paradox) and into the realm of the more finite and futile, which is the realm of things and the gift (and curse!) of object permanence. Really, more precisely we are moved into the domain of relations between these two: object *relations*. (Ibid., 28.)

She suggests that objects allow us to think again about politics. We might say that they shift attention from the constitutional distribution of public power to the public distribution of constitutional things. Public things reframe the debate: 'If democratic theorists neglect public things, we end up theorizing the demos or proceeduralism without the things that give them purpose and whose adhesive powers are necessary to the perceptual reformation of democratic collectivity' (Ibid., 90). But it is not a headlong rush to the object as we have seen in other works on public things (Latour 2014). The aim is not to displace the anthropocentrism of the politics of the collective political subject. Things are given a certain limited vitality, which allows them to occasionally shine through: They 'have agency enough to thwart or support human plans or ambitions, and we do well to acknowledge their power and, when appropriate, to allow that power to work on us, or work to lessen or augment us' (Honig 2017, 28).

The theoretical heart of the book is the second lecture where Honig convincingly reads Winnicott and Arendt together. She insists that the purpose here is *not* to synthesise their work nor to translate one into the other, leading to an inevitable loss of all that separates them. Instead the book is an attempt to use each theorist to extend 'each one's vocabulary to rework or resituate the other's ideas' (Ibid., 51). So it circles around a number of key interlocking similarities, where the two run in parallel tracks. In both, objects and environments give us a sense of permanence beyond ourselves. From Winnicott we learn that objects 'are key to what makes us human' (Ibid., 16). 'The baby learns about the existence of an external world when it destroys/disavows the object and the object survives. This is object permanence. The fantasy of infantile omnipotence gives way, in the face of the object's permanence, to the reality of subjectivity, finitude, survival' (Ibid., 16). From Arendt, we find Labour and Work undergirding Action. '[W]e make things and things condition our existence' (Ibid., 46). The social is the space wherein conditions are fabricated for the political. Labour and Work are re-read through Winnicott's 'object-mother' (who provides satisfaction of basic needs) and the environment-mother (who provides a holding environment, 'warding off the unpredictable' (Honig 2017, 20)). Arendt's emphasis on the facticity of things—they are the 'common world'—is rebalanced through Winnicott's emphasis on fantasy. But while the book insists that connecting Winnicott and Arendt together enlarges both vocabularies, in reality the tendency throughout is to put pressure on Arendt. Torsion is applied and Winnicott is often the unmoving fulcrum around which Arendt is twisted. I say this not as a criticism, but in admiration. Because through Winnicott, Honig sensitises us to a reading of Arendt that neither accepts her problematic characterisation of the relation between the social and the political, nor brackets it (for a full discussion see Wenman 2015, 218-59). Honig writes: 'With Winnicott in the picture, it is less easy to berate Arendt for being simply and cruelly oblivious to the *needs* of the poor or disenfranchised' (2017, 51).

The book insists that public things generate an environment in which the political becomes possible: they 'are the world-stabilizing infrastructure on which

our capacity to act in concert depends' (Ibid., 96-7). There are few more beautiful instantiations of this relationship between infrastructure and the political moment of the people coming forth, than Eyal Weizman's *The Roundabout Revolutions* (2015). He observes that when the first crowds gathered in Tunis, it was the roundabout at the *Place du 7 Novembre* to which they were drawn. And they returned there again and again. When the rupture began in Egypt it was the Tahrir Square roundabout that drew the crowds. Also in Bahrain's Pearl Roundabout and before at the Azadi square roundabout where Tehran's 2009 Green revolt centred. Over and again: the roundabout. Of course there were crowds that did not gather on roundabouts, but Weizman argues we should not simply dismiss the significance of this traffic architecture. He offers a number of observations: The 'roundabout organise[s] the protest in concentric circles, a geometric order that exposed the crowd to itself, helping a political collective in becoming' (Weizman 2015, 1). The roundabout exercises a strange gravity, with bodies strewn about in orbit. While they 'exercise a centripetal force, pulling protestors into the centre, the police seek to generate a movement in the opposite direction… to break a collective into controllable individuals that can be handled and dispersed' (Ibid., 14). Gas, water cannon, rubber bullets and other dispersal agents are thus a centrifugal technology in this context, seeking to break the gravity. At the same time, their centres often house statues of major political figures, and carry names like liberation (*tahrir*) and liberty (*azadi*), or carry the date of the establishment of the previous regime (*Place du 7 Novembre*). Thus they hold a certain symbolic cache in terms of who they represent. The symbolism of a roundabout, Weizman says, 'is almost jokingly obvious, what better place to stage revolution, after all, then one built for turning around?' (Ibid., 8). Weizman underlines the manner in which a proto-neoliberal traffic infrastructure that establishes material and symbolic conditions that are inimical to the presence of individual bodies, can be performed differently. The cars whizzing around are displaced by crowds who take possession of public space in the name of a different public. In this sense, the everyday infrastructure has a minor agency in shaping the events of the revolutions. But while it would seem to fit well with Honig's framework, she overwhelmingly eschews such examples.

Instead of simply turning to the agency of public things in revolution, Honig instead identifies more everyday and quotidian moments. Food and water, for instance crystallise sovereignty claims, bridges and parks mark a politics of everyday life. At the heart of this decision is Honig's understanding of politics, or more accurately, the paradox of politics. This is framed in *Democracy and the Foreigner* (Honig 2003) through Rousseau's liminal figure of the lawgiver, who arrives on the scene of a revolution to resolve the problem that the collective subject of politics is always constituted under imperfect conditions. The people that overthrow tyranny will have been habituated to tyrannous conditions and so are incapable of willing a good and just settlement. In Honig's hands, this problem of radical refoundation of the political order becomes immanent to political orders. The paradox of politics is constantly being rearticulated in multiple ways in each body politic. In *Public Things*, rather

than 'escape' the paradox of politics (an impossibility she claims), Honig suggests that we might rework it by way of object relations politics. 'The democratic paradox does not need to defeat democratic activists, they may be energised by it' (2017, 29). Like Rousseau's lawgiver who mystically settles the paradox of politics, public things 'have the power to (re)enchant, to interpolate us as a(n often fractious) public' (Ibid., 28). In short, rather than think about the importance of public things in bringing forth the people as a claim to unity in action, she wants to get to a position where we are attuned to the plurality of agonistic public sites that facilitate a multitude of positions *between* accommodation and revolution. Crucially, this includes a struggle for the state, which should also be considered as a public thing (Ibid., 92). It is something that might enchant and unite, rather than control, discipline, govern or exclude—she suggests.

The stakes of the book are never clearer than in the prologue where Honig observes that the 'infrastructure of security is a public thing' (Ibid., xii). Like bridges and parks, the body imaging machines that we find in airports and ports are transitional objects that help society to adhere, she suggests. But Honig explains her discomfort with these machines. She explains that she tries to avoid the most invasive scans, refusing to '"assume the position", hands on head, legs spread apart' (Ibid., xi). She refuses to enter the screening machine, but for US airport security that means she must utter the performative speech act: 'I opt out'. 'So, of course,' she says, 'I try to refuse that, too.' What follows is a linguistic duel with the guard where she refuses both to go through the machine, but also to utter the 'opt out' phrase. 'The insistence that I *say* 'I opt out' is productive. It obscures the real opt-outs, those who have paid an annual fee, had their irises scanned and their fingerprints taken so that they can be whisked quietly and quickly through security' (Ibid., xi). Public things 'constitute us, complement us, limit us, thwart us, and interpolate us into democratic citizenship' (Ibid., 5). But they are not simply determined by the administrators, guards and police. The park is not determined solely by the local authority, the roundabout is not controlled simply by traffic police, and the body scanning machine is not the sole purview of the border guard. Each of them might be contested, perhaps even re-appropriated or re-performed. But the airport security machine is also the moment where Honig comes closest to acknowledging the power that such a contestation has to face. Honig nods to this when she notes her privilege in refusing the machinery of security: 'I was never taken to a private room for questioning, and I never worried I would be detained. I don't fit the profile' (Ibid., xi). Her privilege is to be one of those people that the agents imagine themselves securing. She is not the object-threat, not a dangerous subject. If she were to challenge the San Francisco park attendants she would have been less likely to be shot or tasered, because she is one of the public imagined by the guards. In this, it would be productive to read *Public Things* alongside Butler's recent *Notes Towards A Performative Theory of Assembly* (2015)—a source that Honig avoids. In Butler's quasi-Arendtian account the question of differential precarity of assemblies-in-dissent is brought to the fore, along with a shared interest in infrastructures. But while Honig is evidently aware of the role of

privilege and precariousness, it takes something of a backseat. Reading *Public Things* with *Antigone Interrupted* (2013) the reasons for this become a little more clear, but that is for another day.

I said at the outset that the final lecture finishes redemptively on a golf course. The terrain is von Trier's *Meloncholia*, which Honig pairs with Lear's reflection on the world-ending genocide faced by the Crow people. For both the world is coming to an end. Unlike Butler's almost infinite lines of precarity, there is something common, shared, almost public about Honig's catastrophes. Butler's precarity leads to a performative ground of alliance, but here there is nothing less than the world at stake. This is because Honig claims through Arendt and Winnicott that public things open us to worldliness. For Honig, this is a way to think through the neoliberal situation described by Brown. The catastrophe that is relevant to us now, she says, is 'capitalism in a neoliberal context, and its attendant modes of individuation, alienation, overwork and desolation' (Honig 2017, 80). The golf course then, is the site of our world-ending catastrophe. But on it, Honig recounts how von Trier's protagonists build a holding environment: an empty bare stack of sticks. Something that could not protect them from the destruction of the earth, but that creates a kind and humane holding environment in which they live out the catastrophe. Crucial to this is Honig's reading of Winnicott, who insists 'that in such an environment [of catastrophe] we experience what feel like world-ending feelings, and we—and the world—survive' (Ibid., 79). We must create in our democracy-in-disrepair, new, kinder holding environments. The way to do this, it appears, is to reinvest our attentions, our care and concern, our hope and play in the public things that remain.

The book is vivid and lucid. It surprises you with turns and twists. There are beautiful insights lying in wait for you around every corner. The lectures were given in 2015, before Trump stood for office. It takes aim at the very clear target of the hopelessness of the left under neoliberal conditions. But the book has come out after Trump and his radical right, protofascist or white nationalist assemblage has come to power. In this sense, it demands a creative and generative reading—the type of reading that Honig herself applies whenever she turns to a new text. It is an astute book, its argument is at once subtle and bold, and I think it should form essential reading for our current conjecture.

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