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Law and Resistance: Toward A Performative Epistemology of Law

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Law

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Abstract

This thesis is a genealogical inquiry into law's conditions of possibility for political critique as/and resistance. Questioning law's claim to normativity, it argues that law is a performative discourse that generates and presents its normative materiality through performative iterations. From the constitution of sovereignty to the formation of the legal subject; from the rituals of legislation to ceremonials of adjudication, there is a performative logic that contingently conditions law's generation of the normative reality of the present. Arguing that law's normative representation and expression of sovereignty, the subject, and politics closes the possibility for change and becoming; contesting law's claims to rationality, objectivity, neutrality, autonomy, and universality; it puts forth a performative epistemology of law that is attentive to power and discourse; and to the production of knowledge' and the 'generation of truth.' Calling attention to law's entanglement with power and the violence of exclusion and domination; it brings historical inquiry into the orbit of law and legality. The thesis presents the political trial both as: (1) a moment that subverts law's normative claims to rationality, autonomy and value-neutrality; and (2) as a power-knowledge formation capable of accommodating fresh articulations of hegemonic norms. Drawing on Foucault's conceptions of power and resistance, I will offer strategies and tactics that: (1) formulate and circulate strategic knowledges of power in law; and (2) open up new sites of struggle for what I call a performative-genealogical intervention.

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Acknowledgement

According to some preeminent thinkers whose ideas animate this thesis, the individual person is nothing more than a contingent articulation of a power-knowledge assemblage that conditions her or him. Completing a thesis offers the occasion to look back and reflect on the self according to this axiom. Looking back, it is evident that I am indeed a product of a series of assistances, mentors, debts, books, supervision sessions, seminars, conferences and the many individuals, institutions, friends and family who participated in these formative acts. They have all provided the raw material for this thesis.

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Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature

Printed name Awol Allo

1. Introduction

Resistance or what the Ancient Greeks call *agōn*, began as ‘a moral gesture,’ as a concern with truth and a contestation against oneself.¹ Although there are several mythologies of resistance dating back to the pre-Socratic era, it is really Sophocles’s *Antigone* that provides the most complete account of resistance against the state.² Through *Antigone*, Sophocles shows the incommensurability between law and resistance – the antithetical and irreconcilable difference between sovereignty and the subject on questions of fundamental significance to organized political communities. Creon and *Antigone* hold mutually exclusive views about law and justice and the very meaning of the good life and how to achieve it. More than two millennia after *Antigone*, we are still asking the same question: what is the precise relationship between law and resistance?

In contemporary political theory, agonism is conceptualized as an ‘alternative normative vocabulary’ to communicative rationality and democratic consensus. Theorists such as William Connolly, Bonnie Honig, Chantal Mouffe and others suggested various modes of agonistic struggles against the containment and reduction of politics through democratic consensus and procedural reductionism.³ In the legal domain, however, the whole idea of a ‘normative vocabulary’ is a normalizing discourse that disables resistance and renders it unintelligible. Law, we are told, is a paradigmatic normative system that lays claim to a very distinctive genre of normativity.⁴ Given this claim, i.e., law’s representation and expression of its constitutive and regulative conditions as always already normative, resistance becomes a backstage discourse that cannot be spoken in the face of law. Law’s claims to universality, rationality, objectivity, autonomy, and value-neutrality, on the one hand, and its

¹ Herta Muller, ‘Das Ticker, Der Norm,’ in Hunger and Seide (Reinbeck: Rowolt, 1997) 91-2.

² See generally, Sophocles, *Antigone*, *Oedipus the King* and *Electra*, Edith Hall, eds., trans. H. D. F. Kitto (Oxford: Oxford University Press, 2008).

³ See generally William Connolly, *Pluralism*, (Durham, NC: Duke University Press, 2005); Bonnie Honig, *Political Theory and the Displacement of Politics* (Ithaca: Cornell University Press, 1993); Chantal Mouffe, ‘For an Agonistic Model of Democracy,’ in *The Democratic Paradox*, (London: Verso, 2000).

⁴ See generally, Hans Kelsen, *General Theory of Norms*, trans. M. Hartney (Oxford: Clarendon Press, 1975); H. L. A. Hart, *The Concept of Law*, 2nd eds. (Oxford: Oxford University Press, 1994); Max Weber, *Economy and Society*, Guenther Roth and Clause Wittich, eds., (Berkeley: University of California Press, 1978).

prescriptive nature (law's power to prescribe what is) impose a closure that renders resistance, *a priori*, unintelligible.

With the emergence of democratic states, the rationalization and formalization of law in the 19th century, and the rise of legal positivism in the same period, law managed to institute a form of rationality and mode of reasoning that render resistance superfluous. The constitutionalization of the exercise of political power, the institutionalization of legality, and constitutionalism were defended as normative ideals that make resistance unnecessary or the right to resistance superfluous. Legal positivism played a crucial part in the elimination of the right of resistance from the juridical discourse. By 1831, John Austin, the father of legal positivism, proclaimed that '[a] law, which actually exists, is a law, though we happen to dislike it.'⁵ Two centuries later, the rationalization of law reached its apogee, with H. L. A. Hart, formulating the 'crown of the positivist method'⁶: the 'legal system is a 'closed logical system' in which correct decisions can be deduced from predetermined legal rules by logical means alone.'⁷ This rationality and neutrality, it is argued, elevates law beyond the expediency of power and politics. It gives law an inner reality, closed within itself and inaccessible to the man 'Before the Law,' waiting at the gate in anticipation of its truth. According to this mode of reasoning, law and politics operate according to two exclusive axioms: politics is the field of power relations and contestations; and law is the sphere of truth and justice governed by the rule of law.

Normatively speaking, then, law and resistance are incommensurable. They depart from different referent points, and operate through antagonistic genres of discourse that operate according to their own rules, strategies, and instruments. Given these differences, there cannot be mutual recognition between law and resistance. On this register, resistance registers as resistant only insofar as it contests the order against which it stands on its own terms and from within its own discourse. If resistance is to register as resistant on its own

⁵ John Austin, *The Province of Jurisprudence Determined* (Amherst: Prometheus Books, 2000), 184.

⁶ See P. d'Entrèves, Alexander, 'Legality and Legitimacy,' *The Review of Metaphysics* 16, (1963), 694.

⁷ H. L. A. Hart, *The Concept of Law*, 2nd eds. (Oxford: Oxford University Press, 1994), 302.

terms, it must resist law's predominant modes of representation and expression of social conflicts, its notions, categories, and functional and systematic distinctions without which law cannot code the juridical universe. Law, on its part, can only process the claims it is faced with by reducing, re-enacting, and reconfiguring them into languages, categories, discourses, notions, and distinctions it understands: legal-illegal, good-evil, reason-unreason, and guilt-innocence, etcetera. On this account, coupling law and resistance by a seemingly innocent conjunction - 'and,'- as to suggest a causal relationship, is indeed analytically and conceptually unintelligible. However, if we recognize the system's grid of intelligibility as the effect of discourse, if we conceived both law and resistance as performative, rather than normative, as contingent and complex rather than coherent and logical, we can begin to problematize the unease underlying the conjunction 'and' in 'law and resistance.' In fact, insofar as law, and its foremost institution, the court, constitute the primary institutions responsible for rationalizing, justifying, and disseminating law's contingent norms and rationalities, the 'and,' could be more explosive than law or resistance.

This thesis is a genealogical inquiry into law's conditions of possibility for political critique as/and resistance. Contra law's claims, a genealogical inquiry into law's conditions of possibility assumes that law, i.e., the system of rights, the judicial system, and other institutions and apparatuses that interpret and apply law, in their routine and exceptional operations, are permanent instruments of power - of exclusion, marginalization, and oppression. By codifying economic, political, social and technical power into rules, rights, and institutions, the legal system conceals and erases the fundamental relations of domination and inequality that traverse the social body. The thesis argues that the entire edifice of juridical thought, its mechanisms, instruments, discourses, knowledges, even its most cherished ideals, are the general mechanisms of power. Taking Foucault's genealogical analysis of power and resistance as my point of departure, I want to ask, from below: is there something in the very nature of law, i.e., in its discursive and institutional forms, in its spatial, material, and temporal coordinates; in its own claims, and mechanisms, that makes law something more than the mere instrument and armature of power? If those in power can utilize the device of law and justice to achieve political

ends, isn't there something about these devices that can accommodate fresh articulations? Furthermore, can law's gate-keeping discourses or those who guard its gate protect and secure law from itself? Isn't there a raw material for resistance in the contingency of the founding moment, the contestability of the political order, in the uses and exceptions of legality, and in the radical indeterminacy of legal discourses? Can we carve out a space, a meta-level space, within the geometric space of the very courtroom that vindicates and rationalizes power; and strategically redirect it against the system itself? These are, broadly speaking, the questions this thesis is set out to elucidate.

The judicial apparatus is my primary site of inquiry not only because it is the foremost institution of sovereignty with a superior quality of 'knowledge production and truth generation,' but also because it is one of the few responsive and reflexive legal spaces where intervention is possible and meaningful. Indeed, Foucault identified the court as an 'important' site of struggle.⁸ Conceiving the political trial as a power-knowledge-discourse constellation, I want to locate the analysis of power-struggles in the courtroom within this Foucauldian paradigm to explicate its repressive and productive architectures. By conceiving the political trial as struggle in power-relations, I will investigate, following Foucault, the forms and mechanisms power struggle assumes in the courtroom, 'where and how, between whom, between what points, according to what processes, and with what effects' power is used in the courtroom.⁹

Conceiving the political trial as a crises-formation, endorsing it as a site of political critique and resistance, I claim that relationships of exclusion are not inevitable realities but effects of the power-knowledge *dispositif* that hegemonic performatives institute. Emphasizing incongruities, inconsistencies, points of tension, on the one hand, and gate-keeping juridical discourses deployed to manage, contain, suppress, or transcend these non-normative

⁸ Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, eds. Colin Gordon, trans. Colin Gordon, Leo Marshall, John Mepham, Kate Soper (New York: Pantheon Books, 1972), 16, 23, 36.

⁹ Michel Foucault, *Security, Territory, Population, Lectures at the College de France, 1977-78*, trans. Graham Burchell, eds. Arnold Davidson, Michel Senellart, Francois Ewald, and Alessandro Fontana (New York: Palgrave, Macmillan, 2007), 1-2.

moments and sites, on the other, I conceive the political trial as a power-discourse-knowledge constellation generative *par excellence* of power effects. Through this performative-genealogical approach to the political trial, the thesis attempts to offer a genealogical reconstruction of this formation, the forms of knowledge and discourse that inform it, the strategies that animate it, about who participates in the production of narratives, and who controls the means of narrative production, and finally the cultural meaning and power effects generated by a particular episodes of confrontation.

1.2. Research Objective

My goal is not to write a theory of law and resistance but rather to advance a discourse that opens up new lines of inquiry into law's conditions of possibility for change and transformation. If there are discursive and institutional dynamics in the nature and form of law that makes it such a productive and irresistible site of power, my thesis argues, these resources could be re-purposed and redeployed as counter-discourse and counter-power for resistance and political critique. In order to do this, the thesis moves beyond the normative modes of thought and suggests what I call a performative epistemology of law that creates a condition of possibility for performative resistance. By taking the present as its point of articulation—'what we do,' 'what we say,' and 'how we act' now as subjects constituted within the terms of the very legal order we seek to change and transform—it puts forth a performative epistemology of law that is empirically intelligible and conceptually viable. Conceiving juridico-philosophic conceptions of law as generative of power effects, I will argue for a performative epistemology of law that re-articulates law's 'inner-reality' as an open-ended reality, one more attentive to contingency, complexity, responsibility, and justice.

A performative epistemology of law therefore represents a conceptual break from essentialist modes of thinking about law and its constitutive and regulative domains. Both as a deconstructive and re-constructive device, the performative prefigures and displaces what the system regards as the normative. The normative in law, it may be said, stands in an oppositional relation to the

performative. While normativity claims to be representative and expressive of an essence, (validating conditions, and law's reason giving ability), performativity is non-referential—it assumes that there are no absolutes, or last instances. Normativity claims to express a preexisting condition that foregrounds law's normative validity, performativity rejects the existence of any essential identity behind law's normative claims. Normativity claims to express the normativity of law by reference to a prior principle that preexists law, performativity generates the very norm it speaks about.

Working through Michel Foucault, Jacques Derrida, and Judith Butler, I will explore the interplay between the normative and the performative and call attention to why the celebration of abstract normativity is ultimately hollow, and to the extent that it hides and conceals law's strategic entanglement with politics, history and power; oppressive. Against the normative thesis, I will argue for a performative epistemology that, among other things, (a) recognizes performative generation of normativity, (2) keeps law, sovereignty, politics, and subjectivity open to unprefigurative future resignifications, (3) recognizes the operations of language and discourse in law, (4) remains vigilant to law's historicity, to the contingent and complex constitution of its coherence and unity; (5) understands disciplinary and normalizing technologies of power; (6) remains attentive to techniques of 'knowledge production' and 'truth generation' in the legal domain; and (6) capable of producing and actualizing new rights—rights that are emancipated from the colonizing logic of sovereignty.

1.3. Methodology

To claim that law is performative is not to deny its normative dimensions. Instead, it is to state that, contrary to the dominant philosophic reflections (legal positivism and natural law) that presumes law's normativity as something already there, law's normative quality is not a given. In most instances, the normativity of a legal proposition is posited by those authorized to speak the law—constituent assemblies, legislators, judges, and others—and becomes normative through our performance. Law is first performative, and only then, subject to the repetition of the signifying form, can it become normative. To

speak of the performativity of law is to speak of its historicity—the contingency, complexity, and heterogeneity—that undergirds law’s constitutive and regulative conditions. To say that law is historically contingent is to state that its coherence, necessity, universality, and rationality are contingently articulated. But the aim of this study is not merely to expose the historicity of law’s taken for granted necessities. Most importantly, I am interested in problematizing its contingency and heterogeneity to do something with it—something of a transformative consequence on the present. By explicating the historicity and therefore the becoming potentiality of three key discursive formations—sovereignty, the subject, and the political—the thesis inquires into law’s conditions of possibility for resistance and struggle.

This thesis is a genealogical work in the Foucauldian tradition but will not remain within the strict Foucauldian framework. Recognizing that genealogy at least theoretically tilts toward critique, than vindication and reconstruction, this thesis suggests a creative and strategic coupling of genealogy and performativity—performative genealogy—for a reconstructive problematization of the constitutive and regulative conditions of the present. As an inquiry into the constitutive and regulative conditions of the present, genealogy excavates the submerged juridico-political crisis of sovereignty, it unearths the contingent and heterogeneous ensembles woven into a coherent unity, bringing them into an arena of visibility. By tracing the conflict that rages beneath law’s normative registers to the submerged crisis of the past, to the abyss that unsettles law from within, genealogy historicizes the juridical realm and exposes the contingency that lies beneath the coherence of the normative order. This disclosure space created by genealogical work exposes the trials and tribulations of the present as the surface effects of the usurpations, defeats, dispossessions, and conquests of the past; the submerged past ‘where truth becomes a sort of error that cannot be refuted because it has hardened into an unalterable form in the long baking process of history.’¹⁰

¹⁰ Michel Foucault, *Nietzsche, Genealogy, History*, in *Language, Counter-Memory, Practice: Selected Essays and Interviews* by Michel Foucault, Donald F. Bouchard, (eds.) (Ithaca: Cornell University Press, 1977), 144.

A skeptic might ask how a research with an explicit normative dimension uses a method whose normativity is at best contested.¹¹ The answer is this: while genealogy does not seek to offer a normative conclusion about the historical processes that constitute and regulate the present, there is no reason to believe that genealogy is a value-free enterprise. But to say that it is not value-free is not tantamount to claiming that it is value-laden as juridical and many other discourses are. While Foucauldian genealogy is not normatively loaded, I will provide textual evidence to show that it is by no means value-free. Indeed, genealogies can be performative, vindicating or subverting the norms and practices they seem to problematize or explain.¹² Although both performativity and genealogy are not about normative distinctions, I argue that we can engender normativity into our genealogical performances through the exercise of ethical responsibilities- through an ethic of care that leads to what Foucault termed an ‘ethical consensus,’ perhaps a basis for a different kind of ‘we.’¹³

Insofar as genealogical work excavates that which ‘silently, animates and sustains the present(ed) understandings,’ this re-presented understanding creates domains of knowledge.¹⁴ The investigation into the logic, the modes of reasoning, and forms of rationality that contingently conditions and regulates our present consigns knowledges of consequence on these conditions.¹⁵ Whatever our particular rendering of genealogical traditions from Nietzsche to

¹¹There are different readings of genealogies political potential generally and Foucauldian politics specifically. Some genealogies are subversive (Nietzsche), some are vindicatory (Williams), and Foucault (problematization). But genealogies can also explain that which they ostensibly describe. Paul Rabinow for example describes Foucault’s genealogy as an attempt to ‘cultivate an attention to the conditions under which things become ‘evident,’ ceasing to be objects of our attention and therefore seemingly fixed, necessary, and unchangeable.’ Wendy Brown argued: ‘For Foucault, the project of making the present appear as something that might not be as it is constitutes the distinctive contribution of intellectual work to political life’ in Wendy Brown, *Politics Out of History* (Princeton: University of Princeton Press, 2001), 113.

¹² See Edward Craig, *Genealogies and the State of Nature*, in Alan Thomas, (eds.) Bernard Williams (Cambridge: Cambridge University Press, 2007), 182. He argues that genealogy can be subversive, or vindicatory, of the discourses or practices whose origins (factual, imaginary, and conjectural) they claim to describe. They may at the same time be explanatory.’

¹³ Michel Foucault, *Social Security*, in *Politics, Philosophy, Culture: Interviews, and Other Writings, 1977-1984*, Lawrence D. Kritzman, trans. Alan Sheridan et al (New York: Routledge, 1988), 165-66. Foucault says, ‘I believe the decisions made ought to be the effect of a kind of ethical consensus so that the individual may recognize himself in the decisions made and in the values that inspired them. Only then would such decisions be acceptable, even if there might be protests here and there.’

¹⁴ See Bell, Vikki, *Culture & Performance: The Challenge of Ethics, Politics and Feminist Theory* (Oxford: Berg, 2007), 82.

¹⁵ Id.

Bernard Williams¹⁶ and Foucault, I argue that genealogical knowledge, like any other knowledge, has a transformative consequence. It provides epistemic resources for those subjected to ‘epistemic injustice.’ By virtue of its existence and circulation, this knowledge ensures the contestability and resistibility of hegemonic knowledges. Those deprived of access to narrative production and knowledge practices can turn to genealogical knowledge to undermine and transform oppressive norms. By bringing historical inquiry (that which looks to the past) into the domain of politics (that which is said to look into the future), genealogy reveals subjection at sites not seen before. By ‘producing unfamiliar representations of persons, collectivities, places, and things,’ as Michael Shapiro argued, genealogy reveals the arbitrariness with which the reality of the present is constituted.¹⁷ By unearthing this arbitrariness and contingency underneath juridico-political norms, institutions, and familiar representations, genealogy creates conditions of possibility for what Jose Medina refers to as ‘epistemic resistance,’ providing resistant subjects with the raw material for struggle against normative theories of law and sovereignty.¹⁸

Genealogy may not generate a norm or argue in the name of a brighter future but there is nothing inconsistent with the genealogical framework in using genealogy to look both ‘backward into history and forward into futurity.’¹⁹ Against the ‘buffer zones,’ to use Paul Ricoeur’s expression, erected by grand historical narratives, and against the paralyzing inertia of law, I will argue that genealogical knowledge creates entry points into these subterranean spaces for a performative intervention. Asked about the objective of his historico-political critique, Foucault replied: ‘It should be an instrument for those who fight, those who resist and refuse what is. Its use should be in the process of conflict and

¹⁶ Bernard Williams, *Truth and Truthfulness: An Essay in Genealogy* (Princeton: Princeton University Press, 2002). William’s genealogy of truth and truthfulness is a vindicatory genealogy.

¹⁷ Michael J. Shapiro, *Reading the Postmodern Polity: Political Theory as Textual Practice*, (Minneapolis: University of Minnesota Press, 1992), 2.

¹⁸ For an account of epistemic resistance, see Jose Medina, *The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and the Social Imagination*, at 1.

¹⁹ See Colin Koopman, *Genealogy as Critique: Foucault and the Problems of Modernity* (Bloomington: Indiana University Press, 2013), 140.

confrontation, essays in refusal. It doesn't have to lay down the law for the law. It isn't a stage in programming. It is a challenge directed to what is.'²⁰

1.4. Outline

The thesis is divided into two parts. Part one consists of four theoretical chapters that seek to identify and mark out the conditions that enable and disable resistance in law. Drawing on the insights that emerge from part one, the final three chapters will examine three landmark political trials. In demonstrating the means by which performative-genealogical strategies are synchronized with the legal form to create conditions of possibility for critique and resistance, my own writing will take on a performative-genealogical turn in this part.

Chapter two will explore the volatile relationship between law and resistance. By problematizing the unease underlying the conjunction 'and' in the notion of law and resistance, I will identify various discursive and institutional mechanisms by which law usurps the speaking position of those it calls into being as subjects to its jurisdiction. Beginning at the constituent point of politics, it argues that the order of being, saying and acting instituted at this moment establishes rules of visibility and hearing that mishears, miscounts, and misrecognizes those it excluded from the 'we.' It emphasizes the modality of reasoning in law that functions to foreclose sovereignty and the subject from change and becoming. Drawing on Walter Benjamin and Foucault, I will try to demonstrate the non-normative origin of law and sovereignty.

Against the dominant mappings, reference points, and analytic frameworks of the field, chapter three sets the tone for a performative epistemology of law. Arguing against normative conceptions of sovereignty, law, politics, and subjectivity, the chapter offers a detailed account of the performative logic that structures and organizes what I take to be the two constitutive points of politics: the constitution of the legal order and the formation of the legal subject. The central idea here is that, contrary to the received knowledge of

²⁰ Michel Foucault, Questions of Method, in *Power: Essential Works of Foucault 1954- 1984*, (eds.), James D. Faubion, (London: Penguin Books, 1994), 236.

juridico-philosophic thought, law is a performative discourse that generates and presents its specific normative materiality through iterative practices. I first provide a brief account of normativity and the normative thesis in law to show that what we regard as the normative in law is indeed a *placeholder* for the performative—the normative is the name law uses to conceal, suppress, and forbid its historicity to remain legitimate and coercive. Second, offering a brief genealogy of performativity both as a linguistic and deconstructive device, I will use these insights to explicate the performative rationale that cuts through the legal domain over and over again, making performativity a key conceptual tool. The chapter concludes with a detailed reflection on the transformative promises of the performative and an explanation of what it is that makes this rethinking of law and the legal domain a generative exercise.

Chapter four identifies the political trial as a concrete performative moment that destabilizes juridico-philosophic accounts about law's normative claims to neutrality, objectivity, autonomy and universality. Arguing against law's denial of any relationship with 'inescapable political and sociological realities' and its autonomy from adulterating spheres of politics, history, and power, I argue that the political trial is a privileged site of domination and resistance. Far from being an impersonal and objective application of general norms to self-evident facts of criminality, where there is a necessary congruity, between the 'ought' and the 'is,' and, between criminal law and the compliance of the legal subject, the political trial is a double performative that denaturalizes so as to undermine and unravel the complex and contingent foundations of the very norm and order normativist thinking hides and conceals. Conceiving the political trial as a power-knowledge formation, I will argue for a performative conception of the political trial that goes beyond the transcendental plane of necessity and neutrality to a historicist account of contingency and heterogeneity that creates conditions of possibility for a reconstructive problematization of the juridical realm.

Chapter five is a critical part of the thesis where I bring the power-knowledge constellation constituent of the political trial into a responsive and generative coupling with the disruptive and transformative impetus of performativity. The chapter begins by developing an account of what a performative resistance

looks like, the conditions of possibility it is able to create. By outlining a broad explanatory paradigm within which to locate different discourses and strategies of resistance, it identifies the ways in which specific discourses of resistance and struggle situate themselves and appropriate the legal space. Attending to gate-keeping legal technologies by which law conceals and suppresses the wrongs it inflicts, it shows how a creative subject reconfigures the categories and subject positions power uses to suppress or integrate the claims of its adversaries. Calling for a performative-political engagement with law, it identifies disruptive and utopian strategies sensitive to local and global situations, attentive to the reflexivity and responsive coordinates of both the trial and the rights discourse to appropriate core systemic contradictions to disrupt gate-keeping discourses. Situating performativity and genealogy in reflexive spaces, interstices and speaking positions made available by the ‘deliberative’ paradigm of the trial, it suggests conceptual resources central for opening up a political space within a legal space to create conditions of possibility for what Foucault terms a ‘micro politics of resistance.’ Through a discussion of the Chicago Conspiracy trial, I hope to elucidate performativity’s disruptive and transformative potentials.

In chapter six, I look at one of the most celebrated juridico-political events of the 20th century, Nelson Mandela’s 1962 trial for incitement (hereafter the Incitement Trial), where he appropriated ‘the transformative opportunities’ offered by the trial to infiltrate Apartheid’s complex apparatus of subjection. By submitting himself to the very law he denounces, Mandela excavates law’s aporetic moments, those most fragile frontiers that are so heavily policed from subversive discourses, opening up space for a micro-politics of resistance. Drawing on modes of critique that are both performative and genealogical, Mandela both uses and critiques the law, resists and claims authority, prosecutes and indicts at a site where political contestation is normatively deactivated. By synthesizing specific and local instances of violence, exclusion, and injustice, he offers a political testament that is both forward and backward looking; one that bears witness to law’s rotten past while calling into presence a new egalitarian form of legality and justice. Attentive to contradictions, cracks and points of tension that disturb Apartheid legality and justice from within, situating himself strategically to the spaces made available by the system, he

appropriates his speaking position to disclose the incommensurable, that fundamental wrong Apartheid cannot suppress, contain or integrate. Through a reading of a few scenes from the Incitement trial, the chapter shows how a performative-genealogical approach to political trials can create conditions of possibility for change and transformation, for visibility and hearing. It shows how a ‘racialized black body’ can overcome the usurpation of his voices to amplify and filter what Diana Taylor refers to as ‘repertoires of resistance’; ‘acts of hope’ that register without being co-opted, integrated or domesticated by the discourse and the system they resist.

From Apartheid South Africa, chapter seven turns to the Occupied Territories, to recount a similar, but substantively different narrative. Examining the stories and narratives of the prosecution and defense surrounding the trial of a Palestinian Member of Parliament Marwan Barghouti, this chapter tries to illuminate the complex interplay of discourses of occupation, resistance and terrorism in the courtroom. By attending to the political logic that animates the synchronization of politics with the legal form, the chapter tries to account for the power-effects the parties sought to generate to appeal to their respective constituencies. In particular, the chapter seeks to provide an account of the ways in which the trial seeks to decolonize Western epistemologies and methodologies, how the defendants produce and enact moral myths that undermined Israeli laws, culture, history, and conventions. Dissecting the system of discourses within which both resistance and terrorism are situated, I will pay attention to the ways in which the narratives move from the personal to the political, from the local to the global, from the historical to the cultural, creating the space for meaning, and understanding. By situating this trial within Israel’s historical use of political trials, I want to give an account of the performative cultural politics that informs Israel’s deployment of terrorism to mute and paralyze Palestinian acts of resistance. The chapter concludes with some reflection on the defendant’s ethical appeal to the conscience of Israelis and the world alike, bringing ethical responsibility to his performative contestation.

In Chapter eight, I look at one of America’s most memorable courtroom spectacles of resistance. Drawing on Foucault’s historico-political critique of

sovereignty, this chapter seeks to investigate the extent to which emancipatory counter-history can be deployed as a conceptual tool for problematizing and reconfiguring the instituted order. If Foucault's 'micro-politics of resistance' takes off with re-politicization—finding a register for critique within the instituted formulas of rights and equilibriums of justice but breaks off—counter-history imports a reflexivity essential for the re-politicization of the juridical realm. By analyzing some of the most disruptive scenes from the 1969 trial of Bobby Seale (the Chicago Eight Conspiracy Trial), I argue that Seale's deployment of a counter-historical knowledge of enslavement and servitude reveals the discursive and visible practices of American sovereignty—including the constitution and the judicial apparatus—as strategic deployments used to conceal and secure the inequality of those Rancière identifies as 'the part of no part': Afro-Americans. I will further argue that as a strategic weapon capable of tapping contradictions, incongruities, and points of tension within the system, counter-history opens up a disclosure space that both uses and critiques juridical presuppositions to unmask the biological war that goes on beneath the rhetoric of 'law and order' and expose racism as the signifier of American sovereignty.

Finally, the thesis is a genealogical critique of law and the modes of reasoning and the forms of rationality that animate and sustain it. My goal is not to uncover law's pre-suppositional points but to try to identify a sociologically intelligible conception of law that provides a better illumination into law's constitutive inside, its modes of regulation and generation, its truths and power-effects. It does not seek to obliterate the object of its critique but simply problematize certain assumptions that law presents as inevitable and natural and test opportunities for change and transformation.

2. Law and Resistance: Beyond a Normative Conception of Law

2.1. Introduction

Is there something conceptually unintelligible about the idea of ‘law and resistance,’ when coupled, as it were, by a conjunction ‘and’? What does it mean for both law and resistance to be coupled in this way? If law, at least within the constitutional state, claims to express or represent the very grievances or sources of indignation that provokes resistance, i.e., since law presents itself as the fulfilment of the normative justification of resistance, the notion of ‘law and resistance’ appears counter-intuitive or superfluous. According to this reading, if resistance has any truth, this truth is presumed to have been definitively materialized in law. On this register, there is an incommensurability that makes communication and understanding between law and resistance impossible. Law by definition renders resistance unintelligible. Despite the seemingly innocent conjunction, ‘and,’ however, the mere presence of resistance against law disrupts or can disrupt law’s normative claims to legitimacy, objectivity, rationality, neutrality, and universality. But the conjunction ‘and’ could be more explosive than law or resistance for it signifies something that cannot be exhausted or absorbed by law within its terms.

This chapter is designed to set the scene for a conception of both law and resistance as performative formations. The first part provides a brief expose of the troubled dynamics between law and resistance and argues that the expression and representation of law as normative is the key reason why resistance came to have the kind of political reality it now has. By problematizing the various ways- discursive and institutional- by which law forecloses resistance and renders it unintelligible, the second part tries to unmask the non-normative in law that enables the spectral presence of resistance. Drawing on Benjamin and Foucault, the last part presents a non-normative reading of law and sovereignty.

2.2. Law and Resistance

In a recent book on the right to resistance, Costas Douzinas traces the genealogy of resistance - as a mythology, as a moral gesture, and as a right- to the Ancient Greece.¹ In this rather brief blend of ‘radical philosophy’ and praxis, Douzinas insists on the notion of *adikia* (injustice) as the seedbed of despair and indignation that sustains resistance and supplies the passion and energy for its ‘eternal return.’² Traversing various philosophical traditions from Aristotle to Hobbes, Kant, Heidegger, Arendt, and Derrida, Douzinas identifies two forms of ‘subjectivities’ that animate and sustain the antagonism between *adikia* (injustice) and *dikaion* (right): ‘the conserving and the revolutionizing.’³ Despite the repeated declaration of its death by the constitutional state, resistance perpetually gnaws at injustice from lower depths. Wherever there is *adikia*, Douzinas argues, resistance becomes *dikaion* (right) in the double sense of a ‘claim accepted or seeking admission to the law’ and a ‘will that wills what does not exist or what is prohibited.’⁴ By alluding to the ‘out-of-joint-ness’ and dislocation immanent in *Adikia*, Douzinas points to the recent confrontation between sovereignty and the ‘multitude’ from North Africa to Europe as evidence of the right to resistance beyond positive law.⁵

Whatever the significance of Douzina’s claim, it is really Sophocles’ Antigone that still provides the model for understanding the tension Hegel described as ‘imminent in the life of both’ conserving and revolutionizing subjectivities.⁶ The confrontation between Creon and Antigone brilliantly encapsulates the insoluble conflict between law and resistance, sovereignty and the subject, law and conscience. For Creon, law is the posited law of the city, his edicts. He says, ‘This is my command . . . That is my will. Take care that you do your part’ for

¹ Costas Douzinas, *Philosophy and Resistance in Crisis: Greece and the Future of Europe* (Cambridge: Polity Press, 2013), 78.

² Id.

³ Id.

⁴ Id at 86.

⁵ Id at 78.

⁶ Ann Paulicci and Henry Paulucci, *Hegel: On Tragedy*, eds. (West Port: Greenwood Press, 1962), xxvi

‘there is no greater curse than disobedience.’⁷ For Antigone, law is more than just a rule and is certainly not reducible to the mere command of the sovereign. To command obedience, law must be compatible with ‘the laws of the gods,’ - ‘the final justice that rules the world below.’⁸ Creon mounts the standard objection to the natural justice argument: ‘Lawful authority must be obeyed in all things, great or small, just and unjust’ -claiming the unfettered right of obedience.⁹ Antigone deploys natural justice to subvert the authority of the city. We are still having the same debate - law or justice?

2.2.1. Between Legality and Legitimacy

Despite an aggressive project of juridifications that led to the proliferation of laws and regulations, notwithstanding systematizations and institutionalizations of law and legal processes, law itself has not changed much since Antigone. Apart from the emergence of several strands of legal theory, legal positivism remained the dominant form of legal thought. The ‘positivist manifesto’ that was written by John Austin in 1832 - few decades after the revolutionary bourgeois begun the formalization and rationalization of law - was a fulfilment of Creon’s prophecy: ‘A law, which actually exists, is a law, though we happen to dislike it, or though it may vary from the text, by which we regulate our approbation or disapprobation.’¹⁰ By the mid 19th century, Antigone’s claims are no longer intelligible within the legal framework. The same bourgeois that invoked the right to resistance less than a century ago, giving it a definitive expression in positive law for the first time, eventually eliminates resistance as an oppositional form of politics.

One of the greatest achievements of the rationalization project is the constitutionalization of politics and the codification of commerce and other social relations. The civil law guaranteed the sanctity of the freedom of contract whilst public law institutionalized the principle of ‘legality,’ the ‘rule

⁷ Sophocles, *Antigone, Oedipus the King and Electra*, Edith Hall, eds., trans. H. D. F. Kitto (Oxford: Oxford University Press, 2008), 24.

⁸ Antigone makes specific reference to the Gods but I understand the Gods here to also include conscience.

⁹ Id.

¹⁰ John Austin, *The Province of Jurisprudence Determined* (Amherst: Prometheus Books, 2000), 184.

of law' and 'law and order.'¹¹ The constitutionalization of political power meant that the right to obedience is taken from individuals and given to laws. Power is depersonalized and legalized: 'commands are bestowed not in the name of a personal authority, but in the name of an impersonal norm.'¹² The principle of legality emerged as an autonomous principle normatively indifferent to legitimacy, justice, and morality. It is seen as the ultimate safeguard against arbitrary power. Legal Positivism advocated 'ethical neutrality' towards the substance of laws. Here is what Alexis De Tocqueville says about the emergence of this legal rationality: 'Lawyers are attached to public order beyond every other consideration; and the best security of public order is authority. It must not be forgotten also that if they prize freedom much, they generally value legality still more: they are less afraid of tyranny than of arbitrary power.'¹³

Legality assumes that laws are neutral, objective, rational, clear, and independent of other extralegal considerations. By tracing the validity of law to the law itself, legality establishes itself as 'the last fortress and fortification of the existing state of things.'¹⁴ This de-personalization of power and legalization of politics transformed legality, as Max Weber observes, into 'the prevailing type of legitimacy.'¹⁵ Weber observes that 'the most common form of legitimacy is the belief in legality, i.e., the acquiescence in enactments that are formally correct and which have been made according to established procedure.'¹⁶ By reducing legitimacy to legality, this mode of thought engendered a reading of 'politics in legal terms,' conceptualizing the state, 'as the exercise not of arbitrary force but of lawful authority.'¹⁷

¹¹ Stuart Hall, Chas Critcher, Tony Jefferson, John N. Clarke, and Brian Roberts, *Policing the Crisis: Mugging, the State and Law and Order* (London: Palgrave Macmillan, 1978), 193

¹² Max Weber, in Alexander P. D'entrèves, *Legality and Legitimacy*, 16 (4) *The Review of Metaphysics*, 687(1963), 690.

¹³ Alexis De Tocqueville, *Democracy in America*, trans. Henry Reeve (A Penn State Electronic Classic Series, 2002), 304.

¹⁴ Hall et al, *Policing the Crisis*, 192-95.

¹⁵ Max Weber, *Economy and Society*, Guenther Roth and Clause Wittich, eds. (Berkeley: University of California Press, 1978), 37.

¹⁶ Id.

¹⁷ D'entrèves, *Legality and Legitimacy*, 690; See also Eric Slauter, *The Cultural Origins of the Constitution* (Chicago: The University of Chicago Press, 2009), 39-40.

The basic architecture of the idea of legality formulated in Sophocles' play and recalibrated by Austin as the positivist Manifesto in 1832 still reverberates across much of the world. Contemporary legal positivism retained the basic outline of its predecessors. If we simply look at Hans Kelsen and H. L. A. Hart – the two giants of 20th century legal positivism, we will see that they will gladly repeat the Austinian dogma cited above. Of course, both Kelsen and Hart rejected Austin's command theory and formulated theories that recognized law's normative dimensions. Kelsen is best known for his ideas of the Grundnorm. In Kelsen's schema, the normative force of a legal proposition drives from the Grundnorm: a closed, self-generating and self-authorizing presupposition he later called a 'fiction' in contradiction with reality and with itself.¹⁸ However, Kelsen reduces the question of legitimacy to the mere effectiveness of the order. In 'The General Theory of Law and State,' he writes, 'the principle of legitimacy is restricted by the principle of effectiveness.'¹⁹ For Hart, law is both positive and normative. Arguing against Austin's command theory, Hart defends the normative dimension of law.²⁰ Rejecting the natural law thesis on the conceptual link between law and morality, he locates law's normativity in the 'rule of recognition,' what he described as 'the germ of the idea of legal validity.'²¹

Both Kelsen and Hart sought to create a coherent and holistic order that can be analyzed solely on the basis of legal rules. In 'The Concept of Law,' Hart formulates this 'crown of the positivist method': the 'legal system is a 'closed logical system' in which correct decisions can be deduced from predetermined legal rules by logical means alone.'²² Within this paradigm, the legal order is conceived not only as a rational arrangement of things but as a design and 'an absolute proposition of reason.'²³ It is a 'closed logical system,' whose foundation is self-evident and therefore 'absolute and immutable.'²⁴ In the final

¹⁸ Hans Kelsen, *General Theory of Norms*, trans. M. Hartney (Oxford: Clarendon Press, 1975), 256.

¹⁹ H. Kelsen, *General Theory of Law and State*, trans. Andres Wedberg, (Cambridge: The Law Book Exchange Ltd. 2009), 117.

²⁰ H. L. A. Hart, *The Concept of Law*, 2nd eds. (Oxford: Oxford University Press, 1994), 239.

²¹ *Id* at 95.

²² *Id* at 302.

²³ Alexander Nekam, *The Personality Conception of the Legal Entity* (Cambridge: Harvard University Press, 1938), 3.

²⁴ *Id*.

analysis, legitimacy and other normative considerations are subsumed in legality in both Kelsen and Hart. Legality, then, is the ‘polar star’ that is called upon to elevate law above the fray of politics and the perpetual battle that circulate within society and divides it along a binary line. Despite the various fictions they provide to justify their conclusion, both Kelsen and Hart will say once again with Austin that: ‘A law, which actually exists, is a law.’

The convergence between the methodology of legal positivism and capitalism’s demand for certainty, stability, and order further reinforced law’s claims to rationality, autonomy, objectivity, and universality.²⁵ Alexis De Tocqueville provides a compelling account of this alliance and how the legal profession and individual pursuits of lawyers ‘gives an aristocratic turn to their ideas.’²⁶ Legal positivism- the form of rationality and mode of reasoning that underpins the positivist method - is central for installing a notion of law as objective, rational, universal, autonomous, and value-neutral. Otto Kirchheimer singles out the triumph of legality and legalism as instrumental to the ‘elimination of the right of resistance’ and locate the emergence of this mode of thought in the 19th century rationalization project.²⁷ The rule of law, democracy and the constitutional state, he argues, came to signify the fulfilment of the right to resistance. Arguing against this constitutional containment of resistance, Stephen Carter laments the tendency of the constituted authorities to treat dissent as a criminal conduct.²⁸ Reflecting on the history of dissent in the USA and analysing landmark cases on dissent, he identifies the principle of legality as the enemy of resistance. He writes, ‘The United States of America was scarcely a decade old when it enacted the Seditious Acts, which were immediately applied as a political tool for silencing dissent.’²⁹ The Constitution’s commitment to ‘order,’ ‘a more perfect union,’ ‘posterity,’ and

²⁵ Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge: Harvard University Press, 1964), 128-29.

²⁶ *Id.*

²⁷ Otto Kirchheimer, *Legality and Legitimacy*, in Otto Kirchheimer and Franz Neuman, *Social Democracy and the Rule of Law*, William E. Sheuerman, eds., (Berkeley: University of California Press, 1996), 45-46; David Dyzenhaus, *Legality and Legitimacy*: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar (Oxford: Oxford University Press, 1997), 149.

²⁸ Stephen Carter, *The Dissent of the Governed: A Meditation on Law, Religion, and Loyalty* (Cambridge: Harvard University Press, 1954), 12-15.

²⁹ *Id.* at 15.

‘institutional security’ silently erases and excludes the Declaration’s enunciation of the ‘fundamental right to revolution’—‘it is their right, it is their duty.’

Unable to resist the truth-bearing discourses of legality and legalism, and no longer an intelligible political ideal, resistance silently disappears from the formal structures of power by the end of the 19th century. Boaventura de Sousa Santos traces this constitutional containment and expulsion of resistance from the juridical universe to the project of rationalization and formalization that started around the end of the 18th century.³⁰ By the end of the 19th century, he notes, law ‘gave up resistance in docile submission to the whole range of values and beliefs.’³¹ No longer a weapon of struggle; Santos argues, ‘law becomes a lion of negativity.’³² But in order to appreciate the discursive field and institutional framework within which juridical power formulates, accumulates, and circulates power, brute force, in the name of law, truth, order, reason, and etcetera, let us begin at the beginning—at the constituent point of politics itself.

2.3. Foundations, Intelligibility, and the Logos³³ of Politics

Let us begin at origin, the constituent point of politics and the birth site of justice and injustice. Referring to the Iranian Revolution, Foucault notes, ‘Justice and injustice are the sensitive point of every revolution; that is where they are born, and often it is also where they lose their way and die.’³⁴ Indeed, it is here, at the very beginning that society plants the seeds of exclusion,

³⁰ Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 14(3) *Journal of Law and Society* (1987), 279.

³¹ *Id.*

³² *Id.* at 280.

³³ I use the term *logos* following Jacques Rancière, as formulated in Jacques Rancière, *Dis-Agreements: Politics and Philosophy*, trans. Julie Rose, (Minneapolis: University of Minnesota Press, 1999), pp. 22-23. By *logos*, Rancière encapsulates the ideas of ‘speech’ and ‘an account of that may be taken of that speech.’ But he identifies two levels of *logos*. The first is the ‘*logos* that orders and bestows the right to order’ which is necessarily aporetic. The second is the *logos* ‘that deals with the useful and the harmful.’ Rancière emphasizes the former, arguing that ‘there is a symbolic distribution of bodies that divides them into two categories: those that one sees and those that one does not see, those who have a *logos*—memorial speech, an account to be kept up—and those who have no *logos*, those who really speak and those whose voice merely mimics the articulate voice to express pleasure and pain.’

³⁴ Michel Foucault, *Open Letter to Mehdi Bazargan*, in *Power: Essential Works of Foucault 1954- 1984*, James D. Faubion, eds., (London: Penguin Books, 1994), 439.

usurpation, violence and injustice. Every new beginning, which is at the same time an end, takes off the ground with a menacing germ that both secures it and returns to haunt it. Whatever authority law summons to render this violence rational, justified and legitimate, authority cannot cleanse itself off the usurpation and exclusions that contaminate its root: ‘Even the most just social order excludes that which does not fit into its view of the world.’³⁵

The origin marks the birth of three fundamental things: a new body politic, a new mode of knowing, and a new rule of action. This is the moment at which the constituted institutes a new grid of intelligibility for the constituent—a signifying form that organizes and structures what Jacques Rancière identifies as the ‘the order of saying, the order of doing, and the order of being.’³⁶ It is the inaugural moment of law and politics – a moment that allocates the distribution of speaking positions according to force relations, and inscribes the terms of visibility and hearing in discourse, law and history. Despite this dissymmetry at the heart of foundations, late modern political theory privileged normative conceptions of the social contract and made this moment the foundational point of truth and reason.³⁷ Hannah Arendt describes these truths as ‘pre-rational—they inform reason but are not its products—and since their self-evidence puts them beyond disclosure and argument, they are in a sense no less compelling than . . . the axiomatic verities of mathematics.’³⁸ It is this essentialized truth that provided the basis for power’s desire to ground itself in perfectly ordered, stable, rational, and true foundation since Nietzsche’s declaration of ‘the death of God.’ At the same time, it is at this point that ‘reason’ became, as Achille Mbembe argues, ‘one of the most important elements of both the project of modernity and of the topos of sovereignty.’³⁹

Against the constituent, the constituted inscribes its exclusionary rules of intelligibility into laws, institutions, discourses and history; normalizing its

³⁵ Roland Bleiker, *Popular Dissent, Human Agency and Global Politics*, (Cambridge: Cambridge University Press, 2000), 281.

³⁶ Rancière, *Dis-agreements*, 55.

³⁷ See James Bohman and William Rehg, *Deliberative Democracy: Essays on Reason and Politics*, eds., (Cambridge, MIT Press, 1997).

³⁸ Arendt, *On Revolution* (New York: Penguin Books, 1963), 192.

³⁹ Achille Mbembe, *Necropolitics*, 15 (1) *Public Culture*, 11 (2003), 13.

violence and rendering it an expression of reason. In Nietzsche, *Genealogy, History*, Foucault characterizes the origin as ‘a place of inevitable loss, the point where the truth of things corresponded to a truthful discourse, the site of a fleeting articulation that discourse has obscured and finally lost.’⁴⁰ Sovereign power articulates a truthful discourse that erases the aporetic contradiction and the violence of usurpation that marks this moment. Its usurpation of the logos of its parts, what Rancière calls ‘the part of no part’ who are invisible, unspeakable, and uncountable, beings incapable of voice and articulation, are concealed by measured truths of this moment and the grand historical narratives that perpetuate them. The discourse of origin frames and determines our ways of being, acting, and speaking. It conditions and regulates what we recognize as true and false, rational and irrational, good and evil. It is a master discourse that controls the production, accumulation, circulation, and diffusion of other discourses. It controls the rules of right that sets out what is legally speakable and punishable, what is legitimately contestable and beyond the horizon of contestation. It regulates, and filters cultural codes and social rules that determine ‘which statements most people recognize as valid, as debatable, or as undoubtedly false.’⁴¹

To put this in the Foucauldian schema, the discourse of origin formulates a signifying power-knowledge complex that establishes: (1) a ‘code’ — ‘an ensembles of rules, procedures, means to an end’—that institutes the limit of acceptable conduct and; (2) truth-bearing discourses necessary ‘to found, justify, and provide reasons and principles’ for these codes of conduct.⁴² In short, it institutes domains according to which true and false, right and wrong, acceptable and debatable are distinguished, ways of being and acting that reference, reiterate, and reaffirm the original force configuration.⁴³ It is through this power-knowledge complex that constitutes and regulates the practices of knowing and acting that individuals perceive and sense the political universe. Though everything is not a discourse, everything is conditioned by

⁴⁰ Michel Foucault, *Nietzsche, Genealogy, History*, in *Language, Counter-Memory, Practice: Selected Essays and Interviews* by Michel Foucault, Donald F. Bouchard, eds., (Ithaca: Cornell University Press, 1977), 208.

⁴¹ See Bleiker, *Popular Dissent*, 83.

⁴² Michel Foucault, *Questions of Method*, in *Power: Essential Works*, 230.

⁴³ Id.

discourse. As Roland Bleiker, drawing on Nietzsche and Foucault, writes, ‘we can only assess [things] through the lenses of discourse, through the practices of knowing, perceiving, and sensing, which we have acquired over time.’⁴⁴ This, as will be argued in the next chapter, is a performative violence that sustains itself and its sense of certainty and stability by treating those who do not share its truths and views of the order as evil, irrational, perverse, and with threat of force and destruction.

It is on the basis of this exclusionary logic that signifies the constituted as rational and universal that sovereign power has been able to articulate a depoliticized notion of the sovereign, the political, and the subject; depleting the emancipatory potentials of politics itself.⁴⁵ As a master-signifier, sovereignty codes the juridical universe in terms of the right of the sovereign and the duty of the subject. Its logic is one of closure, a concealing orthodoxy that forecloses spaces of thinking and acting: claims incompatible with the system’s grid of intelligibility, claims that seek to break off from its ‘economy of representation,’ will run into its obdurate premise—closure.⁴⁶ In hiding and masking its truths from being perceived and recognized, it forecloses or mutes immanent possibilities that seek to break free from its logics and frameworks. In this way, sovereignty effectively sucks up whatever transformative opportunities the juridical framework promises.

As a signifier, sovereign power determines what the signified is, can, says and does. As such, any claim against the system, whatever its form, must not only be ‘legal,’ it must also be intelligible within the system’s genre of discourse. The instituted mode of legal intelligibility requires the subject- the subject that resists this mode of construction and framework of subjection- to conceptualize and articulate his grievance against the state within the frameworks of what the state recognizes as legally valid and plausible. Before the substantive questions of what is true and false, right and wrong, legitimate and illegitimate are taken to task, the law requires resistant interventions to be within the true. Through

⁴⁴ Bleiker, *Popular Dissent*, 83.

⁴⁵ See Mbembe, *Necropolitics*, 13.

⁴⁶ See Emiliios Christodoulidis, *The Inertia of Institutional Imagination: A Response to Roberto Unger*, 59 *The Modern Law Review*, 377, 384.

these exclusionary discourses, law decides not only the question of what is legally intelligible and speakable but also what is socially recognized as valid, arguable or outright false. It determines what legitimately belongs to the realm of contestation and the epistemic standards that set out the parameters of that contestation. By excluding the subject from participating in the production and circulation of resistant discourses, sovereignty dissipates the possibility of change and becoming.

When power inscribes relationship of exclusion and inequality in the juridical edifice—institutions, laws, the discourse of rights and the instituted scale of justice—to preserve the original force configuration, how does resistance infiltrate these buffer zones to register its objections? If sovereignty encodes this founding violence into laws, rights and legal institutions to dissolve and erase this violence; simultaneously inscribing and demarcating its exteriority, what is left of resistance? Against the dominant mappings of the fields, reference points, and frameworks of meaning and interpretation that take juridico-political discourses as their points of departure, the thesis situates law and its foremost institution—the trial—at the interstices of domination and resistance. I am therefore interested not only in the originary violence of exclusion but also in the strategic coupling of silencing conventional historiography with what I refer to as gate-keeping juridico-political discourses (the reason of state, law and order, national security, crimes against the state (espionage, treason, sedition etc)) in order to mute and paralyze political critique. But before that, let me introduce, briefly, how legal technologies of sovereign power encode these founding logic and rationality into laws to mute and paralyze political critique and resistance.

2.4. Gate-keeping Legal Technologies of Power

For the function of violence in lawmaking is twofold, in the sense that lawmaking pursues as its end, with violence as the means, what is to be established as law, but at the moment of instatement does not dismiss violence; rather, at this very moment of lawmaking, it specifically establishes as law not an end un-alloyed by violence, but one necessarily and intimately bound to it, under the title of power. Lawmaking is power making, and, to that extent, an immediate manifestation of violence.

Justice is the principle of all divine end making, power the principle of all mythical lawmaking.⁴⁷

Walter Benjamin, Critique of Violence, 295

Law, to be sure, is the prominent—some would even argue the pre-eminent—discourse at the heart of projects of oppression and domination from slavery, to colonization, from totalitarianism to dictatorship, and the liberal state. As Friedman aptly stated, law ‘is not a tangible object of the real world.’⁴⁸ It consists of conceptual assemblages, unfinished and flexible rules, open-ended principles, processes, and arbitrary practices.⁴⁹ Every time law is interpreted and applied, it is produced and elaborated.⁵⁰ As Derrida notes, neither public authority nor the judge follows the law and its principles to the letter.⁵¹ In confirming, elucidating, or rejecting the law, the judge reinvents the law.⁵² Every major decision ‘must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case [and] re-justify it.’⁵³ This act of interpretation, which is at the same a reinvention, is not ‘the slow exposure of the meaning hidden in an origin.’⁵⁴ As Foucault put it, ‘interpretation is the violent and surreptitious appropriation of a system of rules . . . in order to impose a direction, to bend it to a new will, to force its participation in a different game.’⁵⁵ Insofar as law is power’s foremost vehicle of self-reproduction and re-assertion, law is a condensation of power, and an ideological reflection of force relations. Law produces and disseminates this power and ideology as law - investing the power it reflects and transmits with an aura of truth and rationality.

⁴⁷ Walter Benjamin, *Reflections: Essays, Aphorisms, Autobiographical Writings*, Peter Demetz, eds.. (New York: Harcourt Brace Jovanovich, Inc., 1978), 295.

⁴⁸ In Patricia Tuitt, *Race, Law, Resistance* (London: Glass House Press, 2004), 1.

⁴⁹ Alan Wolfe, *The Seamy Side of Democracy: Repression in America* (New York: David McKay, 1973), 204-08

⁵⁰ Derrida, ‘The Force of Law: The ‘Mystical Foundation of Authority,’ in *Deconstruction and the Possibility of Justice*, David Gray Carlson, Drucilla Cornell, and Michel Rosenfeld, eds. (New York: Routledge, 1991), 23.

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ Foucault, *Nietzsche, Genealogy, History*, 151-52.

⁵⁵ Id.

To preserve the order and its founding presuppositions, to safeguard its vulnerable frontiers against those who seek to change it, law projects an appearance of necessity, naturalness, and universality. Gate-keeping legal technologies—juridification, ‘law and order,’ ‘reasons of state,’ ‘national security,’ and ‘crimes against the state’ such as treason, espionage, sedition, etc—function to safeguard this claim to rationality and necessity. They produce and generate an alternative reality that conceals and hides the contingent and complex origin of the order while protecting its vulnerable frontiers from subversive interventions. What is more, these gate-keeping discourses contain in bellicose relations both inclusion and exclusion. Those who are denied voice and excluded from the political process are at the same time included- they are subjects of the law and therefore subject to the jurisdiction of the very power that excluded them. They are included as excluded. It is this discursive paradox that allows performative sovereignty to operate at different levels of legality and evade, conceal, and mask the contingencies and heterogeneities underlying its façade of coherence and unity. If sovereignty can operate at different, perhaps multiple, levels of legality, it is because, as William Connolly maintains, it has ‘a plurality of forces’ that functions ‘through and under the positional authority of the official arbitrating body’ external to the sovereign.⁵⁶ By drawing a straight line between one of gate-keeping discourses such as national security and instituted order of legality, performative sovereignty authors a decision that is neither legal nor illegal, a decision that is at ones inclusive and exclusive, and one that oscillates, at will, between legality and illegality, exclusion and inclusion—a zone of extralegality.

By closing the becoming potential of sovereignty, the subject, and the political, law circumscribes the terms for activating its space, the conditions under which admission is granted or indefinitely deferred, re-enacts conflicts according to its rules of intelligibility, and sets out the terms under which one enters its space. Following Derrida’s reading of Kafka’s Parable ‘Before the Law,’ Agamben contends that ‘nothing and certainly not the refusal of the gate-keeper-prevents the man from the country from passing through the door of the law if not the

⁵⁶ William Connolly, *Pluralism*, (Durham: Duke University Press, 2005), 145

fact that this door is already open and that the Law prescribes nothing.’⁵⁷ There is no outside of law. Law is all around us and there is no escape from it. For Agamben, one is always before the law, one is always already before the law as one of the governed, the represented, the excluded, etc. Whatever the terms of entry, whatever the man who stands before the door assumes; law’s truth is always anticipatory, open-ended, and can never be definitively realized.⁵⁸ On the basis of this exclusionary exercise of jurisdiction over life and death, law circumscribes the transversal relationship between resistance and domination and depletes the transformative potential of politics through closure, reduction, and juridification.⁵⁹

To prevent the disruption of the circularity and self-reference that guarantees the system’s remarkable resilience; law deploys gate-keeping discourses and rules to render political intervention impossible. These discourses protect law’s discursive boundaries from subversive intrusions; drawing permeable but ever-shifting boundaries between inside and outside, the stranger and the familiar, the legal and the political, through systemic distinction between democratic public spheres available for legitimate contestations, on the one hand, and the juridical sphere where action is juridically deactivated, on the other. Irrespective of the egalitarian and progressive character of the formal juridical architecture, power preserves its domain by transgressing and overstepping these seemingly egalitarian frameworks. Moreover, despite its egalitarian appearance, the juridical framework is underpinned by disciplinary mechanisms that ‘guarantee the submission of forces and bodies.’⁶⁰ If the rule of law, legality, judicial independence, and fundamental freedoms and liberties constituted the formal frameworks of what we call democratic politics, ‘the tiny, everyday, physical mechanisms’ of micro-power infiltrate and colonize their spheres of operation.⁶¹

⁵⁷ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), 49.

⁵⁸ *Id* at 50.

⁵⁹ Emiliios Christodoulidis, *Law and Reflexive Politics* (Dordrecht: Kluwer Academic Publishers, 1998), 97; Agamben, *Homo Sacer*, 49.

⁶⁰ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Random House, 1977), 221.

⁶¹ *Id*.

Within this paradigm, even the most glorious ideals of the rule of law and equality can be reinvented and used to achieve a radical inequality. The rule of law, ‘the central jewel in liberalism’s crown,’ may be seen as an ‘unqualified human good’ but when law is used as a tactic, and as a technique of power, it becomes insidiously concealing. Writing on the power-struggle at the heart of the Chicago Conspiracy trial, Pnina Lahav observes, ‘Few would disagree that the rule of law, as an abstract ideal, is glorious. The dialogue’s considerable appeal may lie precisely in the fact that it does not engage in making the invisible visible, but rather in a cover up.’⁶² To recall Foucault’s poignant formulation: ‘Humanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare; humanity installs each of its violence[s] in a system of rules and thus proceeds from domination to domination.’⁶³

Today, the elimination of resistance from law is justified by positing sovereignty as the exercise of ‘public reason’ on behalf of autonomous rational subjects. This representation of sovereignty and the democratic process as the exercise of public reason is one of the ways by which normative theories of law and democracy juridified and depoliticized the public sphere, depleted the agency of the subject and effectively closed off the possibility of change and becoming. Through juridification and depoliticization, law dislocates the spontaneity, and contingency inherent in social conflicts, reducing complex relations into productive classifications and categorizations.⁶⁴ In that way, law pre-empts, distorts, and disfigures, at the level of discourse, the intelligibility of resistant discourses that contest the terms of political engagement. Commenting on this dialectic, Gunther Teubner writes: ‘the ambivalence of juridification, the ambivalence of a guarantee of freedom which is at the same time a deprivation

⁶² Pnina Lavah, *Theatre in the Courtroom: The Chicago Conspiracy Trial*, 16 (3) *Law and Literature*, 381(2004), 400.

⁶³ Foucault, *Nietzsche, Genealogy, History*, 151.

⁶⁴ Christodoulidis, *Law and Reflexive Politics*, 99-101.

of freedom, is made clear in the telling phrase, ‘the colonization of the life-world.’⁶⁵

2.4.1. The Judicial Apparatus

Institutions are the macro-objects within which the fine-grained workings of power take place. In Foucault’s schema, institutions are neither the sources nor the origins of power relations.⁶⁶ Instead, institutions are already situated within the all-encompassing web of power relations. If knowledge is ‘what power relations produce in order to spread and disseminate all the more effectively,’ institutions are the means by which dissemination and circulation takes place. This knowledge produces itself through institutions such as schools (which ‘transmit ideology masked as knowledge’), psychiatry, (‘all the psychiatric components of everyday life which form something like a third order of repression and policing’), and prisons (which reinforces the distinction between good and evil, normal and abnormal, guilt and innocence) and the judicial apparatus (elevated from partisan considerations and ‘arbitrating conflicts in the realm of the ideal’).⁶⁷ While prisons, schools, and psychiatric and medical institutions play a central role, Foucault identifies the judicial apparatus as the most concealing and normalizing institution that must be an object of critique and confrontation. In ‘Truth and Juridical Forms,’ Foucault identifies judicial practice as the template by which ‘society defined subjectivity, forms of knowledge and relations between ‘man and truth.’⁶⁸ Given its central importance in perpetuating existing relationships of domination and inequality, Foucault called for its ‘radical elimination.’⁶⁹

⁶⁵ Gunther Teubner, *Juridification of Social Spheres: A Comparative Analysis in the areas of Labour Law, Corporate, Antitrust and Social Welfare Law*, eds. (Berlin: Walter de Gruyter, 1987), 4.

⁶⁶ Michel Foucault, *Two Lectures*, in *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, Colin Gordon, eds., trans., Colin Gordon, Leo Marshall, John Mepham, Kate Soper, (New York: Pantheon Books, 1972), 96; John Caputo and Mark Yount, *Foucault and the Critique of Institutions*, (Philadelphia: Pennsylvania State University Press: 1993), 7-10.

⁶⁷ Foucault, *Intellectuals and Power*, in *Language, Counter-Memory, Practice*, 208.

⁶⁸ Michel Foucault, *Truth and Juridical Forms*, in *Power, Essential Works*, 4.

⁶⁹ Michel Foucault, *On Popular Justice*, in *Power/Knowledge*, 16. Foucault spoke of the existence of ‘thousands of possibilities’ for its ‘radical elimination.’

In his 1975-76 Lectures, Foucault launches a stinging rebuke against ‘the system of rights and the judiciary field.’⁷⁰ Conceiving the judiciary and the rights discourse as the epistemological registers of violence, the originary violence inscribed in ‘institutions, laws, economic inequalities,’ Foucault identifies the rights discourse and the judiciary as technologies of legitimation, the reservoir that contains, through its ritual operations, the violence and excesses of sovereignty.⁷¹ The judicial apparatus preserves the violence of lawmaking and law preserving by arbitrating claims about the usurpation of voice and the very legitimacy of the law in the realm of reason and rationality. Through interpretation and application, the judiciary re-invents and re-situates the originary violence according to the evolving discourse of political truth. In his own words: ‘The system of right and the judiciary field are permanent vehicles for relations of domination, and for polymorphous techniques of subjugation.’⁷²

Foucault’s analysis emphasizes not on the questions of normativity and legitimacy that underpins its operations but on the ‘procedure[s] of subjugation’ its discourse implements.⁷³ The essential functions of the rights discourse and the judiciary field is to channel conflicts into the system’s normalizing and constraining procedures to preclude the possibility of resistance to its stifling categories and binaries. Instead of challenging the power relations it is there to secure, the judicial apparatus renders these power relations rational and legitimate.⁷⁴ By pretending to be a neutral and expert arbiter of conflicts according to reason and justice, the judiciary dissolves radical inequality into juridical abstraction and ultimately legitimizes the system, its truths, and modes of arbitration.⁷⁵ This claim to neutrality and truth allows the judiciary to dispel the shock of usurpations and inequalities within society. Through these

⁷⁰ Foucault, *Society Must be Defended: Lectures at the College De France 1975-76*, Mauro Bertani and Alessandro Fontana, trans. David Macey, eds. (London: Penguin Books, 2003), 27.

⁷¹ Id at 27-28.

⁷² Id at 27.

⁷³ Id at 27-28.

⁷⁴ Id

⁷⁵ See Robert Moore, *Law, Normativity, and the Level Playing Field: The Production of Rights in American Labour Law*, in John Caputo and Mark Yount, *Foucault and the Critique of Institutions*, (Philadelphia: Pennsylvania State University Press: 1993), 17-18.

truth claims, the judiciary transforms ‘the most frenzied manifestation of power imaginable’ into a question of law and justice.⁷⁶

In a commentary on Philippe Boucher’s book, *Le Ghetto Judiciare*, Foucault writes, ‘the legal system is a bit like the penalties it inflicts: it doesn’t much like to display itself. Its rituals no longer serve to impress the parties to a dispute [justiciables] but to give a little comfort to the judiciaries . . . it is no longer the grand social theatre that it was for centuries.’⁷⁷ Foucault emphasizes on the invisible ‘operational mechanisms’ of the judicial system wherein ‘disorder’ determines its operational logic.⁷⁸ He says, ‘[I]f you look at the apparatus in motion, with its ins and out, you notice that the violence done to the law obeys the principle of protection of order.’⁷⁹ As formations that obey multiple configurations and reconfigurations of their content, gate-keeping legal discourses constitute the single most important politico-juridical instrument used by the state to reinforce the will of the constituted order. The judiciary precludes the possibility of action and real struggle not only through confinement but also through the production of truth and normalization.

The question, then, is: What does resistance become when law becomes both the form and vehicle of violence and domination? As Benjamin usefully put it, law is the material and symbolic condensations of force whose rationality and modes of reasoning is ‘necessarily and intimately bound’ with violence.⁸⁰ But power is the signifying force that determines its particular configurations and effects.⁸¹ How does resistance takes off the ground when power manifests itself as law to exclude, dominate, dehumanize, and oppress? To put it more succinctly, how do we resist the power relations law codifies and circulates through the court—a truth-bearing institution—for a maximum effect? In what follows, I suggest that we rather view law and its modes of reasoning as non-normative.

⁷⁶ Foucault, *Intellectuals and Power*, 210.

⁷⁷ Michel Foucault, *Lemon and Milk*, in *Power: Essential Works*, 435.

⁷⁸ *Id.* at 436.

⁷⁹ *Id.* at 437.

⁸⁰ Benjamin, *Critique of Violence*, 295.

⁸¹ *Id.*

2.5. Beyond a Normative Conception of Law and Sovereignty

If normativity is the central feature of law, it is because law is conceptually tied to notions of ‘obligation’ and ‘authority, i.e., the authority of the state to impose obligations and the duty of the subject to obey. Normative facts are distinguished from descriptive facts. They are considered necessary, intrinsic, and natural.⁸² They are ‘*a priori* than a posteriori,’ ‘conceptual rather than synthetic,’ and internal rather than external.⁸³ ‘While obligations are presumably imposed by norms,’ Stefano Berta writes, ‘the fact of there being any such things as obligations would seem to require that the norms which impose them should be capable of generating the requisite critical reaction in others.’⁸⁴

Writing on the relationship between law, norms, and authority, George Christie laments what he regards as the arbitrary juxtaposition of rules and norms in juridical thinking.⁸⁵ The conflation of ‘legal rules’ which are not yet normative with ‘norms’ in juristic thought creates ‘the unfortunate consequence of turning questions about the binding quality of law into logical questions.’⁸⁶ While there are legal rules that have crystallized into norms, becoming part of the normative system, Christie’s point is suggestive of the ways in which this mode of thought reduces substantive claims about the validity of law into a logical and procedural question. Christie suggests that the ultimate normative force of the law is not a given that already is and cannot be otherwise. The normativity of a given legal proposition, he argued, is ‘posited by the speaker by means of a statement expressing the belief that the purported norm is part of a normative

⁸² Stephen Turner, *Explaining the Normative*, (Cambridge: Polity, 2010), 4-5.

⁸³ *Id.* at 5-8.

⁸⁴ Stefano Berta and George Pavlakos, *New Essays on the Normativity of Law* (Oregon: Hart Publishing, 2011), 201.

⁸⁵ George C. Christie, *Law, Norms, and Authority* (Duckworth, London, 1982), 1-2.

⁸⁶ *Id.*

system.’⁸⁷ Those who invoke the law are not describing the law; they are making a claim about its normative quality.⁸⁸

Normative theories of law conceive law as ‘an extension of practical reason,’ thereby annihilating the contingency that empirically contaminates law all the way through and transform it into some neutral, autonomous, and impersonal enterprise elevated from the adulterating effects of history, politics, and power.⁸⁹ As Joseph W. Bendersky noted, normativism, the term Schmitt uses to refer to this mode of ‘juristic thought,’ ‘transforms a legal norm into an absolute, claiming for itself the status of superiority and eternal universality.’⁹⁰ As Schmitt observes, normativity ‘elevates itself above the individual cases and above the concrete situation and thus has, as ‘norm,’ a certain superiority and eminence above the mere reality and factual nature of the concrete individual case, the changing situation and the changing will of men.’⁹¹ Yet, despite these ideal promises of ‘impersonal, objective justice,’ the normative cannot adequately explain law’s empirical investment in power and domination.

At the most basic level, a conception of law as a normative system identifies law with reason, truth and rationality. The judicial apparatus provides the template according to which society conceptualizes and articulates relations between man and truth.⁹² This, of course, has the consequence of elevating law and sovereignty beyond contestation; paralyzing claims by the marginalized and usurped—those who have no fixed place within social order. It has the effect of rendering sovereign violence and practices of exclusion and domination rational. It de-historicizes subjectivity and sovereignty, and de-politicizes politics. In fact, as Rancière argues, politics is always already de-politicized by its original contradiction and what we ordinarily call politics has little or nothing to do with

⁸⁷ Id at 6.

⁸⁸ Philip Pettit, How Norms Become Normative, in *The Hart–Fuller Debate in the 21st Century*, Peter Cane, eds. (Portland: Hart Publishing, 2010), 234.

⁸⁹ Carl Schmitt, *On the Three Types of Juristic Thoughts*, Joseph W. Bendersky, eds., (New York: Praeger, 2004), 48-52.

⁹⁰ Joseph W. Bendersky, in Carl Schmitt, *On the Three Types of Juristic Thoughts*, 21.

⁹¹ Schmitt, *On the Three Types of Juristic Thoughts*, 87.

⁹² Foucault, *Truth and Juridical Forms*, 71.

the logos proper to politics.⁹³ By identifying law with reason and truth, normativism perpetuates this originary violence.

In reality, however, law does not have empirically tangible and sociologically intelligible inner truth of the kind normativity and positive legal theory bestows upon it. In various interrogations into the domain of law, sovereignty, subjectivity, and politics, several thinkers including Benjamin, Foucault, Derrida, and Butler have decentred law's claims to normativity, truth, rationality, and objectivity; destabilizing the conceptual correlation claimed to exist between the 'ought' and the 'is,' i.e., between the supernatural force that 'appears as an absolute' and compels the sovereign subject to act according to its will. Rejecting the essentialist claim about the existence of an intrinsic nexus between the internal 'ought' and the external behaviour of the subject, they offered a different way of conceiving sovereignty, politics, and the subject—a conception that reconfigures and turns inside out the political ontology of these formations. Let me introduce, briefly, Benjamin and Foucault, to show that beneath law's measured truths, there is a 'proliferation of error' that cannot be refuted. I will return to Derrida and Butler in the next chapter to suggest a performative conception of law.

In 'Critique of Violence,' Walter Benjamin offers a genealogical problematization of violence and its internal relationship with law and justice. Calling for a non-essentialist starting point and explicitly locating his critique outside the domain of both natural law and positive legal theory, Benjamin approaches his analysis of violence from what he calls a 'historico-philosophical view of law.'⁹⁴ Dismissing 'the end justifies the means' maxim of the French revolutionaries; Benjamin's critique seeks to analyze 'violence' in itself, irrespective of its normative ends. Benjamin's insights are crucial to my argument, not only because he situates sovereignty and the legal subject at the heart of his analysis but also because he engages with notions of significant implications for law's claims to normativity such as legitimacy, legality, validity, and power. Central to his framework is the distinction between 'lawmaking'

⁹³ Rancière, *Dis-agreements*, 18-19.

⁹⁴ Benjamin, *Critique of Violence*, 297.

violence and ‘law preserving’ violence.⁹⁵ Whereas lawmaking violence is an inaugurative violence that calls the political order into presence, law preserving violence is a violence deployed to preserve what has been instituted.⁹⁶ In his own words, violence is ‘lawmaking, for its characteristic function is not the promulgation of laws but the assertion of legal claims for any decree, and law-preserving, because it is at the disposal of these ends.’⁹⁷

Contrary to the claims of mainstream legal jurisprudence, Benjamin sees violence as the essential principle that explains the obedience of the subject and the workings of organized political communities. Despite his analytic distinction, both forms of violence serve the ends of protecting the concrete order by preserving existing force relations within the body-politic. Although the normative explanation behind founding acts invariably invokes humanist/Enlightenment ideals of social contract, truth, liberty, morality, justice, freedom, and etc; Benjamin argues that lawmaking ‘establishes as law not an end unalloyed by violence but one necessarily and intimately bound to it, under the title of power.’⁹⁸ Benjamin offers the operations of police and the military as a site that displaces the distinction between the two forms of violence: ‘the ‘law’ of the police really marks the point at which the state, whether from impotence or because of the immanent connection within any legal systems, can no longer guarantee through the legal system the empirical ends it desires.’⁹⁹ This transgression marks a break in law’s retroactive justification of its normative foundation. The contemporary operation of police and military beyond the realm of legality, i.e., in sphere of extra-legality, is tantamount to ‘a suspension of legal authority’ and therefore lawmaking violence.¹⁰⁰ As a form of violence that at once transgresses and preserves law, the protection and primacy of order breaks the chain of regressive reasoning that establishes the normativity of law by tracing it to its source. For Benjamin, then, there is no *a priori* truth, no constitutional convention or natural rights

⁹⁵ Id at 278-286.

⁹⁶ Id at 287.

⁹⁷ Id.

⁹⁸ Id at 295.

⁹⁹ Id at 288.

¹⁰⁰ Id at 286-87.

discourse that explains the origin of law and sovereignty. What compel the subject to obey the law is not the appearance of the absolute but the naked facticity of force, raw brute force- violence. In his own words: 'For in the exercise of violence over life and death more than in any other legal act, law reaffirms itself.'¹⁰¹

Calling, famously, for the cutting off of the 'King's head' in political theory, Foucault's historico-political critique begins by dislocating normative theories of legitimation and juridico-discursive formations as the starting point of analysis.¹⁰² In 'What is Enlightenment,' he rejects, rather forcefully, normative theories of rights and legitimacy as points of departure for analysis and political critique: 'Criticism is no longer going to be practiced in the search for formal structures with universal value but, rather, as a historical investigation into events that have led us to constitute ourselves and to recognize ourselves as subjects of what we are doing, thinking, saying.'¹⁰³ Criticism cannot be transcendental and its objective is not metaphysical.¹⁰⁴ Criticism, Foucault insists, is historical: 'it is genealogical in its design and archaeological in its method.'¹⁰⁵

In his 1975-76 Lectures published as 'Society Must be Defended,' he opens up a site of historical inquiry by suggesting 'the model of war,' as 'a principle that can help us understand and analyze political power.'¹⁰⁶ Conceiving the modern state as a product of battles, confrontations, and struggles, Foucault rejects normative theories whose primary concern is to outline the terms of legitimacy and proposes an understanding of 'political power in terms of war, struggles, and confrontations.'¹⁰⁷ He rejects turning to law and rights against sovereignty or turning to sovereignty against discipline.¹⁰⁸ As philosophico-juridical concepts,

¹⁰¹ Id at 286.

¹⁰² Foucault, Truth and Power, in *Power/Knowledge*, 121.

¹⁰³ Michel Foucault, What is Enlightenment? in *The Foucault Reader*, Paul Rabinow (New York: Pantheon Books, 1984), 45-46.

¹⁰⁴ Id.

¹⁰⁵ Id.

¹⁰⁶ Foucault, *Society Must be Defended*, 23.

¹⁰⁷ Id at 27.

¹⁰⁸ Id at 27, 39.

the discourse of law and rights does not provide the language for conceptualizing, understanding and critiquing ‘the state, its institutions and power mechanisms.’¹⁰⁹ Arguing against juridico-philosophical discourses, Foucault calls for historico-political analysis of rights and the judicial apparatus if critique is to decipher and outwit the measured truths of juridical norms.¹¹⁰ For Foucault, the discourse of rights must not be analyzed to uncover a stable foundation and an essential truth of law but with the view to unearthing ‘the procedures of subjugation it implements.’¹¹¹

For Foucault, it is not a ‘foundational juridical convention,’ or an ‘explicit body of laws’ that constitutes the *body politic*, but violence, ‘a stable dissymmetry,’ or what he calls a ‘congruent inequality.’¹¹² Neither Kantian metaphysical universals nor the Lockean social contract; neither the Machiavellian politics of the prince nor the Hobbesian ‘war of all men against all men’ provides the analytic grid for understanding society.¹¹³ It is war and war-like relations.¹¹⁴ The fundamental laws of the state do not eradicate force relations; they merely reinscribe, codify, and legalize it: ‘the use of civil institutions was . . . purely instrumental and the war was still basically a war’¹¹⁵ even long after the dust of revolution and state formation has settled. In ‘Truth and Juridical Forms,’ he contends that ‘Germanic law . . . assumed that law was a special, regulated way of conducting war between individuals.’¹¹⁶ As instruments of revenge, law and the courtroom are thus regulated and ritualized technologies of war.¹¹⁷

Inverting Clausewitz and identifying violence, (‘war’ is Foucault’s preferred metaphor) as a ‘grid of intelligibility,’ as ‘an essential condition,’ Foucault reveals law as a register of violence.¹¹⁸ Instead of being something outside of

¹⁰⁹ Id at 88.

¹¹⁰ Id.

¹¹¹ Id at 27.

¹¹² Id at 192.

¹¹³ Id at 94-102.

¹¹⁴ Id.

¹¹⁵ Id at 225.

¹¹⁶ Foucault, Truth and Juridical Forms, 35.

¹¹⁷ Id.

¹¹⁸ Foucault, Society Must be Defended, 44-51.

civil society, war is a strategic grid and constitutive principle of civil society. Here is Foucault:

War obviously presided over the birth of States: right, peace, and laws were born in the blood and mud of battles . . . The law is not born of nature, and it was not born near the fountains that the first scarpered frequented: the law is born of real battles, victories, massacres, and conquests which can be dated and which have their horrific heroes; the law was born in burning towns and ravaged fields.¹¹⁹

Given this inextricable nexus between law and violence, the task of performative genealogy is to discover ‘beneath the forms of justice that have been instituted,’ the battle cries that unsettles the coherence and normative claims of the system. In his famous formulations, ‘Law is not pacification, for beneath the law, war continues to rage in all the mechanisms of power, even the most regular. War is the motor behind institutions and order.’¹²⁰ In her reading of Foucault, Marianna Valverde opines that a politico-historical framework of analysis offers sociologically intelligible conceptual tool for understanding the constitutive and regulative conditions of sovereignty and subjectivity ‘than the standpoint of liberal thinkers from Locke to Rawls.’¹²¹

To sum up, then, let me identify two significant features common to both Benjamin and Foucault. While violence in Benjamin provides the analytic grid for the foundation of the *body politic*, in Foucault, violence offers a ‘principle for the analysis of power relations.’ Foucault conceives power in terms of two markers or limits: ‘the rules of rights that formally delineate power, and . . . the truth effects that power produces.’¹²² So we have essentially a triangular relationship between the three elements—power, right/law, truth— where power occupies the apex of the triangle and ‘the rules of right’ and truth the two ends of the triangle. Mediating the three elements within the triangle is discourse- in which power and knowledge articulate each other to generate truth-effects. For Foucault, then, it is not abstract normative ideals but

¹¹⁹ Id at 50. He argues that ‘The social order is a war, and rebellion is the last episode that will put an end to it.

¹²⁰ Id at 50.

¹²¹ Mariana Valverde, *Society Must be Defended*, 1 Law, Culture, Humanities, 119 (2005), 120.

¹²² Foucault, *Society Must be Defended*, 27.

confrontations, the war that goes on ‘continuously and permanently’ through these formations that offer a point of reference and a fruitful illumination of society and relations of domination. Although Benjamin’s critique is tailored towards the analysis of violence in its own, a critique that breaks with the normative dimensions of both positive legal theory and natural law, like Foucault, he sees ‘power’ as a signifying force that animates the form a particular deployment of law assumes. He writes: ‘Lawmaking is power making, assumption of power, and to that extent an immediate manifestation of violence.’¹²³ Deploying the disclosure space opened up by historico-political critique, both Foucault and Benjamin reject normative universalisms and offer the idea of war—contestations, confrontations, and struggle—as strategic grid and a constitutive principle of civil society.

2.6. Conclusion

This chapter addressed three main themes: the volatile relationship between law and resistance; the various discursive and institutional means by which law institutes a grid of intelligibility that determines the mode of being, knowing, and acting, and therefore foreclose resistance; and finally a non-normative account of law and sovereignty that provided a counter-narrative of the normative. By providing a brief account of the volatile relationship between law and resistance, I argued that legalism and its form of rationality and modes of reasoning are instrumental for the elimination of resistance. As a mode of thought, the normative conceals the contingent and complex articulation of the present. By providing a façade of coherence and unity to the contingent production, interpretation and application of laws, normativity forecloses the possibility of change and becoming. As the constituent moment of politics, the founding act is central to my analysis. I argued that its normativity is established and sustained by grand historical narratives and gate-keeping discourses that formulate and circulate juridical knowledges that legitimize, justify and rationalize it. Through Benjamin and Foucault, I tried to bring historical inquiry into the orbit of law and sovereignty to account for what normativism submerges, misrecognizes, and excludes.

¹²³ Benjamin, Critique of Violence, 295.

In short, the normative account privileges a very particular view of law, sovereignty and subjectivity, and therefore of the political. The juridical codes that cite, reiterate, and invoke the founding act preserves the original force relation its configuration reflects. By providing empirically unintelligible and historically inaccurate account of law and legality, normativism turns its back to the realities of power and domination. Drawing on Derrida and Butler, the next chapter provides a performative account of sovereignty and subjectivity to put forth a performative epistemology of law.

Chapter Three

3. Law and Resistance: Toward a Performative Epistemology of Law

3.1. Introduction

My thesis—that law and legal discourses are inherently performative—is fundamentally at odds with law’s claim to normativity. Law not only lays claim to normativity but claims a distinctively juridical normativity that bestows it with a façade of rationality, neutrality, autonomy, and universality. Law’s unqualified claim to normativity is one of the key ways by which law neutralizes and defends its investment in politics, history, economics, and power-relations. Against the prescription of normative theories of law as the privileged vernacular for conceptualizing sovereignty, the political, and the subject, this chapter proposes a performative epistemology of law that contests normativity’s closure of sovereignty, the political, and the subject. If there is a normative dimension to law, I argue, it is because of performative iterations: performativity generates and presents law’s normative materiality. Calling into question law’s temporal, material, and spatial indifference to its normative claims, working through the Derridean and Butlerian account of performativity, I argue that law’s signifying moments are performative par excellence. From the constitution of sovereignty to the formation of the subject, from the rituals of legislation to the ceremonials of adjudication, a performative logic undergirds and animates law’s modalities of signification.

My aim in this chapter is to engage in a genealogical problematization of two constitutive moments—the constitution of the body politic and the legal subject—not merely with the view to subverting or vindicating the normative reality of these moments but also to make intelligible the performative that contingently conditions the realities of the present. Drawing on the Derridean insight that—‘the founding and justifying moment that institute law implies a performative force’—that law performatively produces the ‘we’ it governs; interpellating us as ‘subjects’ to its jurisdiction—the chapter seeks to

demonstrate how sovereignty came to have the kind of normative reality it has. Working through Butler's 'political genealogy of gender ontologies' — 'that the gendered body . . . has no ontological status apart from the various acts which constitute its reality,'—I will show the performative logic that undergirds the formation of legal subjectivity—the legal person—to demonstrate how the legal subject came to have the kind of depoliticized reality it has. By unearthing the contingency and complexity underneath the rationality and autonomy of sovereignty and the subject, the chapter concludes with some thoughts on the conditions of possibility immanent in a performative reconceptualization of law.

3.2. Performativity: The Genealogy of the Concept

In his Harvard Lecture posthumously published as 'How to Do Things with Words,' John L. Austin introduced the notion that language is not merely descriptive but also constitutive.¹ Arguing that speech is action, Austin formulated a speech act theory that conceives language as a generative and transformative enterprise. Austin classified linguistic utterances into 'constatives' and 'performatives.' Performative utterances are categories of utterances that perform action rather than describe, where, as he writes, 'the issuing of the utterance is the performing of an action.'² He argued, performatives 'are not true or false,' they 'do not 'describe' or 'report,' or 'constate' anything at all; the 'uttering of the sentence is, or is a part of, the doing of an action.'³ In his formulation, 'I do, [take this woman to be my lawful wedded wife], 'I give and bequeath my watch to my brother'—as occurring in a will,' 'I name this ship the *Queen Elizabeth*,' and 'I sentence you' when the judge pronounces sentence, are instances of utterances that effect the very thing they appear to describe and 'would not normally be described as 'just' saying something.'⁴ In these situations, Austin argued, 'to utter the sentence (in, of course, the appropriate circumstances) is not to *describe* my doing of what I should be said in so uttering to be doing or to state that I am doing it: it

¹ John L. Austin, *How To Do Things With Words* (Cambridge: Harvard University Press, 1963), 5-6.

² *Id.* at 6.

³ *Id.* at 5.

⁴ *Id.*

is to do it.’⁵ Through these analytic distinctions, Austin liberates performative utterances from the confines of meaning and truth-values and reveals the ‘force’ implicit in utterances.⁶

Coined and introduced to language philosophy in 1955, neither Austin nor his contemporaries who completed or reworked aspects of Austin’s conceptual architecture saw the disruptive and utopian thrust inherent to the notion of performativity.⁷ Two decades later, however, Austin’s grammatical formulation becomes a critical intellectual tool for problematizing the political ontology of sovereignty and the subject; and for conceiving and disclosing a new and different subject and political universe.⁸ Popularized primarily through the works of Derrida and Butler, performativity is now one of the key deconstructive and interventionist conceptual and analytic tools that functions somewhere in between Derridean deconstruction and Foucauldian genealogy.

Writing on the political potential of performativity, Eve Kosofsky Sedgwick describes the kind of Manichean split that she finds in performativity as ‘kinda hegemonic, kinda subversive.’⁹ But performativity is primarily a hegemonic tool – a neutralizing logic that imposes a particular mode of acting and being in the world as natural and universal. It is an instrument of legitimation that creates ‘a context of legitimate, legitimizing, or legitimized convention’ for eventalization of sovereign enunciation.¹⁰ By neutralizing the contingencies and complexities

⁵ Id at 6.

⁶ Id at 133-48.

⁷ Stanley Cavell, *The Claim of Reason: Wittgenstein, Skepticism, Morality, and Tragedy* (Oxford, University of Oxford Press, 1979); John Searle, *Speech Acts: An Essay in the Philosophy of Language*, (Cambridge, Cambridge University Press, 1969); John Searle, *Expression and Meaning: Studies in the Theory of Speech Acts*, (Cambridge, Cambridge University Press, 1979).

⁸ Jacques Derrida, *Declarations of Independence*, 7 (1) *New Political Science*, 7 (1986); Jacques Derrida, *Signature, Event, Context*, in *Limited Inc*, (Evanston: Northwestern University Press, 1972); Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, in Case Sue-Ellen, (eds.) in *Performing Feminisms: Feminist Critical Theory and Theatre*, (Baltimore: Johns Hopkins University Press, 1990), 270-82; Butler, *Gender Trouble: Feminism and the Subversion of Identity*, (New York: Routledge, 1990); J. Butler, *Bodies That Matter: On the Discursive Limits of Sex*, (New York: Routledge, 1999); Vikki Bell, *On Speech, Race and Melancholia: An Interview with Judith Butler*, in Vikki Bell, *Performativity and Belonging*, (eds.), (London: SAGE Publications, 1999) 163-74; James Loxley, *Performativity*, (New York, Routledge, 2007), 88-139.

⁹ Eve Kosofsky Sedgwick, *Touching Feeling: Affect, Pedagogy, Performativity*, (Durham, Duke University Press, 2003), 12.

¹⁰ Jacques Derrida, *Performative Powerlessness – A Response to Simon Critchley*, trans. J. Ingram, 7 (4) *Constellations*, 466 (2000), 466-67.

underneath the event of enunciation, it creates conditions of possibility for iteration and repetition of the code enunciated by the event. However, performativity can also work in the opposite direction. While the performative is at the heart of authoritative and signifying practices central to the constitution of domains of knowledge and regimes of truth, it is also a reflexive concept that can be deployed from the opposite direction and for an entirely different agenda.¹¹ If the original appropriation conceals, submerges and neutralizes the violence of exclusion and inequality at the heart of constitutive moments, its subversive appropriation reveals the violence at the core of its constitutive and regulative conditions. If the original hegemonic deployment of performativity presents the present as constative, rational, and self-evident, its subversive redeployment exposes its rationality and self-evidence as contingent and heterogeneous; creating conditions of possibility for a different way of being and acting, for perceiving and naming the world differently.

3.2.1. Performativity as Deconstruction

In series of landmark texts, Derrida reverses performativity's grammatical impulse and explicates its deconstructive impetus.¹² In 'Signature, Event, Context,' he notes, 'the performative does not have its referent outside of itself or, in any event, before and in front of itself. It does not describe something that exists outside of language and prior to it. It produces or transforms a situation, it effects.'¹³ While the constative refers to the self-evident, the necessary, and the irresistible, the performative calls into presence the very act it names. It is an action of a very particular character capable of generating effects-political or otherwise. A decade later, Derrida deploys this generative conceptual architecture in his deconstruction of the American Declaration of Independence, arguing that, the Declaration is a performative document that brings into being the very truths and 'The We' it speaks about. He writes: 'The 'we' of the Declaration speaks 'in the name of the people.' . . .

¹¹ Butler, *Bodies That Matter*, 241; Butler, *Gender Trouble*, 189.

¹² Derrida, *Declarations of Independence*, 8; Derrida, 'The Force of Law: The 'Mystical Foundation of Authority,' in *Deconstruction and the Possibility of Justice*, ed. David Gray Carlson, Drucilla Cornell, and Michel Rosenfeld (New York: Routledge, 1991).

¹³ Derrida, *Signature, Event, Context*, 13.

If it gives birth to itself, as free and independent subject, as a possible signer, this can hold only in the act of the signature. The signature invents the signer.’¹⁴

Neutralizing the politics at the core of the event of signing, i.e., the dubious legality of the signer creating itself with his own signature, the performative presents the constitutive moment as a freestanding and extra-discursive moment.¹⁵ In this, it brings into being, a new body politic and a new grid of intelligibility that institutes the mode of being, speaking, and thinking that excludes those who do not share the views of the constituted.

Redirecting its destabilizing impetus against the very order that deployed it to constitute its normative reality as self-evident, Derrida here recounts a different story of the Declarations of Independence, a story that creates conditions of possibility for questionability and contestation. The self-evident truths that the Declaration refers to cannot of themselves generate a new *body politic* nor are they sufficient justifications for bringing into being a new order that did not exist before. There is something more at work.

By explicating the dubious legality that inaugurates law’s founding moment; Derrida here imports a destabilizing contingency into the coherent terrain of sovereignty to expose its arbitrary constitution made possible only through repetition. The Declaration is a performative act that retroactively acquires its normative force through repetition of an iterable code. Derrida asks, ‘Could a performative utterance succeed if its formulation did not repeat a ‘coded’ or iterable utterance . . . if it were not identifiable in some way as a ‘citation?’’¹⁶ The success of the performative is contingent on the possibility of repetition of the iterable code which goes to constitute the signifying form. In his own words: ‘the signifying form only constitutes itself by virtue of its iterability, by the possibility of being repeated in the absence not only of its ‘referent’ . . . but also a determinate signified.’¹⁷

¹⁴ Derrida, *Declarations of Independence*, 10.

¹⁵ Derrida, *Performative Powerlessness*, 467.

¹⁶ Derrida, *Signature, Event, Context*, 18.

¹⁷ Derrida, *Signature, Event, Context*, 10.

In 'Force of Law,' Derrida offers the most the definitive philosophical account of the performativity of law yet. In this account, Derrida is interested in opening up conditions of possibility, the possibility of justice. For Derrida, the performativity of law reveals its deconstructability - which in turn constitutes law's conditions of possibility for justice. He says, 'The fact that law is deconstructable is not bad news. We may even see in this a stroke of luck for politics, for all historical progress.'¹⁸ Law is always a codification of power relations, necessarily informed by and embedded in interest and ideology.¹⁹ Deconstruction creates the conditions of possibility for justice beyond the instituted interests and ideologies.

By working at the margins, its borders and unstable frontiers, deconstruction threatens to denaturalize as to destabilize the mythical convention that holds law's ideological edifice together. Deconstruction identifies the disjuncture between law and justice as site for the possibility of a justice to come. If law is constructed, rationalized, and legitimized through a performative *coup de force*, Derrida notes, it can be equally deconstructed. If the self-evident truths referred to in the Declaration of Independence are performatives that the Declaration presents as constative, things that already are and cannot be otherwise, Derrida's performative intervention reconfigures the Declaration's constative—the new body-politic—as performative, a being that can be otherwise. In raising the stakes and calling for 'increase in responsibility,' deconstruction provides access to the inaccessible vicissitudes of law, to the disjuncture between law and justice, by unravelling the contingency and complexity underlying the constitutive and regulative conditions of the present. By stripping law of its neutralizing and sanitizing truths, deconstruction generates discourses and domains of consequence on justice. Contra normativist arguments, his intervention provides a counter-hegemonic account of institutive violence that is not merely a historical description of dissymmetry of forces and relationships of inequality and injustice but also a prescriptive form of knowledge that can be used as a weapon of political struggle. In his own words,

¹⁸ Derrida, *Force of Law*, 14.

¹⁹ *Id* at 13.

‘Deconstruction, while seeming not to ‘address’ the problem of justice, has done nothing but address it, if only obliquely, unable to do so directly.’²⁰

Working somewhere between Foucault and Derrida, Butler situates performativity, particularly the ideas of iterability and signification within the Foucauldian power-knowledge apparatus to problematize the political ontology of the subject.²¹ Building on Nietzsche’s claim that ‘there is no ‘being’ behind doing, working, becoming; ‘the doer’ is a mere appanage to the action, a fiction imposed on the doing,’²² Butler launches her own gendered corollary: ‘there is no gender identity behind the expressions of gender; that identity is performatively constituted by the very ‘expressions’ that are said to be its results.’²³ In *Gender Trouble*, Butler writes: ‘gender proves to be performance—that is, constituting the identity it is purported to be. In this sense, gender is always a doing, though not a doing by a subject who might be said to pre-exist the deed.’²⁴ Pointing to the constitutive and regulative force of language and discourse, Butler persistently denies the existence of a subject that predates its constitution in language and discourse.²⁵ Instead, she argues, gender acts ‘performatively constitute a subject that is the effect, rather than being the cause of discourse’: ‘that the gendered body is performative suggests that it has no ontological status apart from the various acts which constitute its reality.’²⁶

The subject, called into presence within an interpolative framework, ‘at once acts out and constitutes’ its identity within normative structures tainted by existing networks of power relations. In a characteristically Foucauldian mode of analysis, Butler insists, ‘[g]enders can be neither true nor false, but are only produced as the truth effects of a discourse of primary and stable identity.’²⁷ Put simply, Butler’s contention is that there is no natural gender identity—a

²⁰ Id at 10.

²¹ Butler, *Gender Trouble*, 32.

²² Friedrich Nietzsche, *The Genealogies of Morals*, T. N. R. Rogers, eds., (New York: Dover Publications Inc., 1887), 26.

²³ Butler, *Gender Trouble*, 25.

²⁴ Id.

²⁵ Id.

²⁶ Id at 136.

²⁷ Id. It is in this sense that Butler appropriates the concept of performativity for an anti-essentialist project that escapes the confines of the Austinian grammatical impulse.

masculine man or a feminine woman—that is pre-linguistic or pre-social and that our gender identity is a reality performatively constructed within a power-discourse-knowledge constellation.²⁸ Gender is an ‘act,’ a performance that calls into being the very thing it names. Like Derrida, Butler too, emphasizes iterability as the central mode by which the subject comes into being. As Elin Diamond notes, ‘gender is relentlessly exposed as performativity, as a system of regulatory norms which the subject cites to appear in culture.’²⁹

In ‘Performative Knowledge,’ Vikki Bell suggests a conception of performativity as an epistemic domain.³⁰ As a counter movement to the Cartesian notion of agency, Bell argues, performativity breaks the Cartesian link between ‘thinking’ and ontology: ‘performativity names an approach that refuses to tie the fact that ‘there is thinking’ to identity or ontology.’³¹ By disentangling thinking from being, performativity reveals the constitutive and regulative conditions that contingently constitute the subject. ‘The subject,’ Bell argues, ‘is co-extensive’ with the external environment that conditions his or her subjectivity.³² As an epistemic domain, then, performativity problematizes not only the complex and contingent conditions out of which the subject emerges but also the means by which and the ways in which non-normative, i.e., causal, sociological or empirical facts have been transformed into normative facts that are said to be inescapable, binding and compelling.

Situating the performative at the interstices of the event and theories of legitimation, Derrida shows how performativity creates opportunities for reopening spaces totalized by ‘the authoritative forces of signification.’³³ By exposing the incoherence and contingency that underpins America’s much revered birth certificate, he uses the performative to give intelligibility to claims against the Declaration, opening it up to future contestations and

²⁸ Butler, *Gender Trouble*, 24-26.

²⁹ Tracy C. Davis and Thomas Postlewait, eds., *Theatricality* (Cambridge: Cambridge University Press, 2003), 207.

³⁰ Vikki Bell, *Performative Knowledge*, 23 *Theory, Culture & Society*, 214 (2006), 214.

³¹ *Id.*

³² *Id.*

³³ Derrida, *Performative Powerlessness*, 467.

resignifications.³⁴ Here, we see performativity's condition of political possibility: if there is no guarantee the original performative will be repeated, there is a possibility of reimagining and reconfiguring present configurations of sovereignty, the political, and the subject and the whole series of relations that constitute and regulate them. In her deconstructive genealogy of the subject, Butler credits Derrida for offering 'a way to think performativity in relation to transformation, to break with prior contexts, with the possibility of inaugurating contexts yet to come.'³⁵ This break, this possibility of disjuncture between the original inscription and a particular invocation, constitutes the subject's limitless potentials for being otherwise. Reading the possibility of a disjuncture between signification and context, Janelle Reinelt writes, 'Iteration means that in the space between the context and the utterance, there is no guarantee of a realization of prior conditions, but rather of deviance from them, which constitutes its performative force.'³⁶

3.2.2. Law's Performativity

Let me begin by reiterating two questions emblematic of a central paradox in jurisprudence suggestive of law's oscillation between normativity and performativity. One is the eternal debate between legal theorists whether we should consider states as artificial products of individuals or the individual as an artificial product of the state. Another equally foundational paradox for jurisprudence and juridical discourse is the question of whether rights originate in a state of nature, or were they really created by governments.' Jurisprudence does not provide a theoretically adequate and empirically intelligible answer to its central organizing precepts: sovereignty, the subject, and right (law). Both Natural Law and Legal Positivism approach these questions from different perspectives and arrive at different answers.³⁷

³⁴ Derrida, *Declarations of Independence*, 9.

³⁵ Judith Butler, *Excitable Speeches: A Politics of the Performative*, (New York: Routledge, 1997), 151-52.

³⁶ Janelle G. Reinelt, *The Politics of Discourse: Performativity meets Theatricality*, 31 (2-3) *SubStance*, 201 (2002), 204.

³⁷ Andrei Marmor, 'The Nature of Law,' *Stanford Encyclopedia of Philosophy*, available at <http://plato.stanford.edu/entries/lawphil-nature/>, (Last accessed 12 March 2012).

There are at least two paradigms of normativity that dominate philosophical reflection in law. Joseph Raz, for example, distinguishes between ‘justified normativity’ and ‘social normativity’ whilst Gerald Postema distinguishes between ‘the normative thesis,’ and ‘the social thesis.’³⁸ Within both paradigms, law is conceptualized as referential, in the sense of having a referent outside itself, and autonomous; as something with its own inner truth.³⁹ While justified normativity takes *a priori* facts as its point of departure and claims the existence of a conceptual link between law and morality⁴⁰; social normativity departs from the social domain and claims that law’s criterion of validity comes from the social domain.⁴¹ Perhaps the foremost normativist legal positivist, Hans Kelsen, belongs to the former category. In accounting for the normativity of law, Kelsen turns to the Ten Commandments to explain the regressive logic at work in an explanation of normativity. ‘The reason for the validity of the Ten Commandments,’ Kelsen writes, ‘is that God Jehovah issued them on Mount Sinai’; or: “‘men ought to love their enemies, because Jesus, Son of God, issued this command in his sermon on the mount.’”⁴² Accordingly, the normative force of a legal proposition drives from these categories and established through a regressive reasoning that traces the norm to its source.

Departing from different referent points, and adopting different modes of reasoning, both paradigms regard law as a normative system and conceptualize it as a proposition of reason that gives individuals and officials ‘reason for action.’⁴³ It is precisely this rationalization of law that posits law as an ‘extension of practical reason’ and dissimulates its violence in the realm of the rational that Carl Schmitt attacked in his survey of ‘The Three Modes of Juristic

³⁸ Joseph Raz, Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal Systems* (Oxford: Clarendon Press, 1979), 134; Gerald Postema, *Coordination and Convention at the Foundations of Law*, 11(1) *Journal of Legal Studies*, 1982, 165.

³⁹ Postema, *Coordination and Convention*, 165.

⁴⁰ Hans Kelsen, *General Theory of Norms*, trans. M. Hartney, ((Oxford: Clarendon Press, 1979), 257.

⁴¹ Hart, H. L. A., *The Concept of Law* (Oxford: Oxford University Press, 1961), 79-88.

⁴² Hans Kelsen, *General Theory of Law and State*, trans. A. Wedberg, (New Brunswick, Transaction Publishers, 1925), 194-95.

⁴³ See Stefano Berta, *Law and Obligation: Outlines of a Kantian Argument*, in Stefano Berta and George Pavlakos, (eds.) *New Essays on the Normativity of Law*, (Oxford: Hart Publishing Ltd. 2011), 216; See also George Pavlakos, *Law, Normativity and the Model of Norms*, 254.

Thought.’⁴⁴ In his critique of legal normativism, Schmitt writes, ‘Normativistically: Only law, not the necessities of the momentary, continually changing situation or even the choices of men, should be allowed to ‘rule’ or ‘command.’’⁴⁵ Whatever the sociological facts in the concrete order, irrespective of the domination and subjugation it underwrites and erases, law is independent of the claims of history, politics, and power. These empirical facts cannot of themselves refute claims about the normativity of law.

In the last few decades, there have been several attempts at reformulating and elucidating these questions from a broader disciplinary perspective. Gunther Teubner for example made a crucial intervention from a systems theoretical perspective. In ‘How the Law Thinks,’ he asks, ‘What is the precise meaning of the somewhat ambiguous statement that law constitutes an autonomous reality? What is meant by saying that the individual is a mere construct of society and law?’⁴⁶ Calling into question the normative presupposition that pervade the dominant conception of law, Gunther Teubner proposes a conception of law premised on communication: ‘law is communication and nothing but communication.’⁴⁷ Drawing on Foucault, Jürgen Habermas and Niklas Luhmann—Teubner singles out communication as ‘the cognitive instrument by which the law as social discourse is able to ‘see’ the world.’⁴⁸ But communication is too narrow a concept and too neutral a notion to account for the strategic, the deliberate concealing and the deadlock by which law achieves things. The notion of communication Teubner advances does not adequately account for the strategic, discursive, historical, and political means by which law codifies its violence—economic, political, and social—into system of rules to constitute and regulate its juridical universe.

⁴⁴ Carl Schmitt, *On the Three Types of Juristic Thought*, Joseph W. Bendersky, eds. (New York: Praeger, 2004), 48-52.

⁴⁵ *Id* at 49.

⁴⁶ Gunther Teubner, *How the Law Thinks: Towards a Constructivist Epistemology of Law*, 23 (5) *Law & Society Review*, 727 (1989), 730.

⁴⁷ *Id* at 939.

⁴⁸ *Id* at 740.

In an essay titled ‘Legal Performance Good and Bad,’ Julie Peters goes back to the story in *Exodus* when God introduced the Jews to the Ten Commandments.⁴⁹ By reading ‘the ‘spectacular sound and light show’ that inaugurated the moment of lawgiving as speech act, Peters shows the irreducibly performative logic that displaces law from within its normative basis: ‘law is the ultimate performative institution.’⁵⁰ Performativity encapsulates not only the communicative in law but also the discursive, bodily, ritualistic and literary aspects of language that are much more strategic and cannot be accounted for within the communicative paradigm. Whatever law’s ambivalent relationship to its performativity, law is performative through and through. Law’s schematics of enunciation and execution, its modes of assertion and expression, its re-enactment of social conflict and their dramatization, are all performative. Without recalling the claims of the normativist camp, this thesis argues that the normative in law is simply a placeholder for the performative.⁵¹ Law thinks performatively: a performative logic and mode of reasoning frames and determines law’s constitutive and regulative moments—foundation, subject-formation, legislation, and adjudication. In the rest of this chapter, I will try to establish this claim by looking at two profound moments: foundation and subjectification.

3.2.3. The Performative Constitution of Sovereignty

Although Hans Kelsen returns to ‘The Ten Commandments’ to account for law’s normativity, Julie Peters offers a rigorously non-normative (performative) reading of ‘The Ten Commandments’ itself.⁵² Re-reading the story in *Exodus* with the view to extrapolating the performative rationality that undergirds it, she writes:

Thunder and lightning appear in the skies, and suddenly the voice of a trumpet ‘exceeding loud’ can be heard. Trembling, the people are led by Moses to the foot of Mount Sinai . . . they see a vast smoky cloud. Suddenly, flames burst forth and the mountain begins to quake. Enter: God from the ‘heavens’ in the form of fire (the original *deus ex*

⁴⁹ Julie Stone Peters, *Legal Performance Good and Bad*, 4 *Law, Culture, Humanities*, 179 (2008), 179.

⁵⁰ *Id* at 181.

⁵¹ Stephen Turner, *Explaining the Normative*, (Cambridge: Polity, 2010), 3

⁵² Peters, *Legal Performance*, 180-81.

machina). The trumpet gives one long blast, getting louder and louder. And a dialogue between God and Moses begins, as God descends onto the mountain and Moses climbs up it. . . . ‘I am the Lord thy God, which have brought thee out of the land of Egypt, out of the house of bondage.’ And then he lays down the law.⁵³

Drawing on Montaigne’s most rehearsed phrase—‘*fondement mystique de [l’]autorité*’—Peters reads the thunder, lightning and the smoke, as an ‘ocular spectacle in which God frames his giving of the law.’⁵⁴ Peters states that the underlying rationale for the thunder, lightening, and the trumpet, is to render ‘authority visual, palpable, bodily (accessible to the senses).’⁵⁵ Through such a performative speech act, Peters argue, ‘God effectively establishes the mystical or occult nature of legal authority.’⁵⁶ Instead of providing a transcendent referent for the normative source of its authority, the performative *coup de force* of the thunder, lightning and the smoke functions to ‘transcend[s] the demand for rational justifications.’⁵⁷ This ‘*coup de force*,’ coupled with the ‘replay of violence,’ ‘Ye have *seen* what I did unto the Egyptians,’ constitutes ‘both a legal order and a nation.’⁵⁸ In Peters’ schema, therefore, it is the performative speech act (God’s speech act through thunder, trumpet and smoke) that authenticates ‘the invisible and unspeakable’ foundation of authority in Judeo-Christian tradition.⁵⁹ In this account of foundation that displaces law’s normative claims, Peters eloquently reminds us how, even when deconstructive analysis excavates the hidden roots of the law, its ‘foundation remains ultimately inaccessible, too dazzling to gaze upon and thus concealed just out of view.’⁶⁰

In ‘Declaration of Independence,’ Derrida draws on the notion of performativity to disrupt the transcendent referents named in the Declaration as the

⁵³ Id at 179.

⁵⁴ Id. For there is an underlying connection between this spectacle and the original *coup de force*, ‘Ye have *seen* what I did unto the Egyptians,’ Peters argues that the former is a ‘replay of violence’ that inaugurates what famously called ‘*fondement mystique de [l’]autorité*.’

⁵⁵ Id at 180.

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ Id at 181-183.

⁶⁰ Id at 180.

foundations of the new *body politic*. He asks, ‘who signs, and with what so-called proper name, the declarative act that founds an institution?’⁶¹ In disrupting the normative link between the ‘We’ of the Declaration and the new *body politic*, Derrida writes:

The ‘we’ of the declaration speaks ‘in the name of the people.’ But this people [do] not yet exist. They do not exist as an entity; it does not exist, before this declaration, not as such. If it gives birth to itself, as free and independent subject, as possible signer [of the declaration], this can hold only in the act of the signature. The signature invents the signer. This signer can only authorize him- or herself to sign once he or she has come to the end, if one can say this, or his or her own signature, in a sort of fabulous retroactivity.⁶²

The ultimate moral or legal authority of the Declaration, Derrida argues, is neither the self-evident truths nor ‘Nature’s God.’⁶³ It is the will generating signature that generates the signer ‘in a sort of fabulous retroactivity.’⁶⁴ However, Derrida does not consider the ‘we hold’ of the Declaration as a pure performative. In his account, the undecidability that obscures the nature of the utterance, i.e., the ‘we hold,’ accounts for the ‘rhetorical force’ the Declaration enjoys: ‘this obscurity, this undecidability between, let’s say, a performative and a constative structure, is required in order to produce the sought after effect.’⁶⁵ Insofar as it is not obvious whether the utterance is expressive or productive of ‘independence,’ Derrida claims, the ‘we hold’ is neither exclusively performative nor fully constative.⁶⁶ However, others disagree with this reading of the key justificatory statements of the Declarations. Comparing Arendt’s and Derrida’s readings of the Declaration, Bonnie Honig argues that the ‘we hold’ of the Declaration is a performative speech act that constitutes the ‘we’ it speaks about.

Here, we witness a performative utterance, ‘an action that exists in words,’ neither true nor false, that doesn’t refer to any prior principle, with no

⁶¹ Derrida, *Declarations of Independence*, 8.

⁶² *Id* at 10.

⁶³ *Id* at 12.

⁶⁴ *Id*.

⁶⁵ *Id* at 9.

⁶⁶ *Id*.

antecedent referent or a first instance, but nevertheless calls into being the ‘We’ that never existed before the utterance. The reference to ‘nature’s god’ and ‘self-evident truths’ as ‘transcendent sources of authority’ are meant to anchor the new *body politic* and its authority in a normative fact. These are the factual presuppositions that validate the founding act and the authority of the sovereign as legal. For the authors of the Declaration, these transcendent truths belong to ‘empirically inaccessible’ category of facts that are not ‘part of the ordinary stream of explanation.’⁶⁷ These truths—life, liberty, and the pursuits of happiness—drive their criterion of validity from conceptually constituted domains capable of compelling those to whom the norm is addressed both as included and excluded. However, Derrida’s performative deconstruction denies that there is any transcendent universal that justified the founding act and argues that the transcendent is simply a placeholder for the performative fact of iteration that generates itself in a sort of ‘fabulous retroactivity.’⁶⁸ In the same way that the theological order that Peters so vividly elaborates is justified via a performative coup de force, i.e., a performative knowledge that legitimizes the foundation of authority, Derrida’s account reveals the performative violence that both institutes law’s authority and keeps it inaccessible.

Derrida emphasizes another key moment in the Declaration where the ‘we’ drives political authority from the pure ‘performativity of institutive language’: ‘We, . . . the Representatives of the United States of America, . . . appealing to the Supreme Judge of the world . . . , do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare.’ Although the earlier speech act—‘We hold these truths to be self-evident’—is a performative speech act that, instead of asserting that they are self-evident, transforms the truths it speaks about into self-evident facts, it is this last moment in the Declaration - ‘we, . . . the representatives of the United States of America . . . appealing to the Supreme Judge of the world . . . *declare* and *publish*’- that institutes, authenticates and vindicates the new *polis* and defines its participants. In Vikki Bell’s schema, there is a *cogito* that ties ‘thinking,’ the

⁶⁷ Turner, *Explaining the Normative*, 1.

⁶⁸ Derrida, *Declarations of Independence*, 10.

‘we hold’- to ‘identity or ontology’ - the new *body-politic*.⁶⁹ If, as Derrida contends, the invocation of ‘nature’s God’ is a ‘game’ meant to transform the performative into constative, or the performative into the normative, the Declaration’s performative, a Cartesian Cogito, is the colonies’ constative. This groundless act of founding that posits the performative as normative constitutes the material fabric for relationships of domination and resistance within the new *body politic*.⁷⁰

In the ‘Force of Law,’ Derrida offers one of the most incisive theoretical articulations of this concealing domain that legitimizes institutive usurpation: ‘The very emergence of justice and law, the founding and justifying moment that institutes law implies a performative force.’⁷¹ In this rather definitive formulation of the performative logic that undergirds and animates juridical discourses, Derrida demonstrates that the ‘operation that amounts to founding . . . justifying law’ constitutes a performative *coup de force*. He writes:

Its very moment of foundation or institution (which in any case is never a moment inscribed in the homogeneous tissue of a history, since it is ripped apart with one decision), the operation that amounts to founding, inaugurating, justifying law (*driot*), making law, would consist of a *coup de force*, of a performative and therefore interpretive violence that in itself is neither just nor unjust and that no justice and no previous law with its founding anterior moment could guarantee or contradict or invalidate.⁷²

If Derrida’s emphasis here is on the logic of justification that underwrites the institutive moment, it is precisely because he views the founding act as a formative moment that configures the constituent elements of our political universe: the state, sovereignty, politics, and the subject. In this passage, and throughout this work, Derrida makes visible the contingent foundations of these elements and shows us that the political practices of the present were not inevitable and that things could have been different. When he writes that ‘the founding and justifying moment that institutes law implies a performative

⁶⁹ Bell, *Performative Knowledge*, 26.

⁷⁰ Rancière, *Dis-agreements*, 16-17.

⁷¹ Derrida, *Force of Law*, 13.

⁷² *Id.*

force,’ he is clearly displacing the normative claims of this moment. The ‘force of law’ that justifies the founding moment that institutes legality and the conditions of intelligibility are not the Kantian transcendent referents but linguistic games that present the performative as constative.

‘Force of Law’—the force that validates law as lawful—has its origin in a non-normative source. ‘The Force of Law’ makes visible, if not accessible, the *coup de force* of a performative that institutes and justifies a normative fiction that anchors our system of law and justice. Indeed, the origin of law is extralegal: ‘the position of the law can’t by definition rest on anything but itself.’⁷³ It is an aporetic moment which ‘no justice and no previous law with its founding anterior moment could guarantee.’⁷⁴ No regressive reasoning traces the normative validity of the law to a set of pre-constituted conceptual domains that are valid beyond empirical recognition. As Montaigne’s famous formulation elucidates, law is anchored in a fiction of a particular kind, a fiction that generates a domain of knowledge and truth and ensures the consolidation of order: ‘even our law, it is said, has legitimate fictions on which it founds the truth of its justice.’⁷⁵ It is this performative formation, variously referred to as ‘fiction,’ ‘fetish,’ ‘magic,’ ‘myth,’ etcetera, that powerfully explains law’s normative conundrum and its ambivalent relationship with ideals of justice, equality, and dignity. Emphasizing the displacement of justice from the orbit of performative sovereignty, Derrida reiterates Montaigne’s famous statement: ‘laws keep up their good standing, not because they are just, but because they are laws . . . that is the mystical foundation of their authority . . . Anyone who obeys them because they are just is not obeying them the way he ought to.’⁷⁶

For Derrida, the institutive function of performativity and the iterability of the signifying form is the starting point. He writes that the ‘theories of the performative are always at the service of powers of legitimation, of legitimized or legitimizing powers.’⁷⁷ They inaugurate a politico-economic system that

⁷³ Id at 14.

⁷⁴ Id at 16.

⁷⁵ See Montaigne, in Derrida, *Force of Law*, 12.

⁷⁶ Derrida, *Force of Law*, 12.

⁷⁷ Derrida, *Performative Powerlessness*, 467.

preserves and guarantees the right of sovereignty and the relationship of domination it underwrites. It is a reductive moment that institutes a grid of intelligibility consistent with the juridical theory of sovereignty, inscribes a discourse of right and justice subject to the right of sovereignty. It is a moment that delineates the scope of the political, usurping citizen's right of resistance through juridical codes whose central project is the preservation of the status quo. Derrida's deconstruction of this moment is a political-intellectual intervention aimed at disrupting essentialist-normative discourses that conceal law's technologies of truth generation, revealing the myth that legitimizes sovereign technologies of truth and injustices of inaugural usurpations. For him, the proper question of validity lies not in the normative force of law but in the performative force- a felicitous performative that repeats itself as a 'sort of fabulous retroactivity.'⁷⁸

3.2.4. The Performative Constitution of the Subject

We should try to grasp subjection in its material instance as a
constitution of subjects

—Michel Foucault, Two Lectures, 1976

[T]he subject constitutes himself in an active fashion, by the practices of the self, these practices are nevertheless not something that the individual invents by himself. They are patterns that he finds in his culture and which are proposed, suggested and imposed on him by his culture, his society, and his social group.⁷⁹

—Michel Foucault, Interview, 1984

In 'Law and the Stranger,' the editors reiterate Derrida's thesis in the 'Force of Law': 'law constitutes the 'we' it governs, hailing us as those subjects to its

⁷⁸ Derrida, *Declarations of Independence*, 10.

⁷⁹ Michel Foucault, *The Ethic of Care for the Self as a Practice of Freedom: An Interview with Michel Foucault*, in *The Final Foucault*, James Bernauer and David Rasmussen, eds., (Cambridge: MIT Press, 1988), 11.

power, naming us as the group under its jurisdiction.’⁸⁰ The law interpellates the individual as a ‘legal person,’ hailing it as a bearer of rights and duties, and subject to its jurisdiction. Problematizing the ontology of the subject and decentering its ‘centre of cognition,’ Butler rejects the idea of the autonomous and rational subject law claims to deal with, arguing that, ‘Juridical power inevitably ‘produces’ what it claims merely to represent.’⁸¹ The ‘I’ that the law refers to as sovereign is not sovereign indeed. The ‘I,’ according to this logic, is revealed to be a construct; which in Butler’s thesis, acquires its reality/identity from discursive and linguistic performativity.⁸² Alluding to this generative operation of law, Teubner writes, ‘The human subject is no longer the author of discourse. Just the opposite: the discourse produces the human subject as a semantic artefact.’⁸³ Let me return to Butler’s ‘political genealogy of gender ontologies’ to account for discursive and institutional processes within which law produces and presents the subject as the effect of discourse.

Invoking the Nietzschean idea that ‘there is no being behind doing,’ Butler launches her own genealogical formulation of the gendered subject: ‘There is no gender identity behind the expressions of gender; that identity is performatively constituted by the very ‘expressions’ that are said to be its results.’⁸⁴ The gender identity that one has is not ‘something one is, it is something one does,’ a ‘doing’ rather than a ‘being.’⁸⁵ Butler further argues that ‘Gender is the repeated stylization of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance, of a natural sort of being.’⁸⁶ A series of iterative practices within strictly regulated normative structures, the feminine identity of the women or the masculine identity of the man, Butler argues, is a construct within these regulated frames rather than a fact expressive of its essence.⁸⁷ In

⁸⁰ Austin Sarat, Lawrence Douglas, and Martha Umphrey, *Law and the Stranger*, eds. (Stanford, Stanford University Press, 2010), 1.

⁸¹ Judith Butler, *Gender Trouble*, 2.

⁸² *Id.* at 24-25.

⁸³ Teubner, *How the Law Thinks*, 735.

⁸⁴ Butler, *Gender Trouble*, 25.

⁸⁵ *Id.*

⁸⁶ *Id.* at 33.

⁸⁷ Sara Salih, *Judith Butler*, (London: Routledge, 2002), 64. See Salih, *Judith Butler*, 64.

the Butlerian framework, gender performativity produces the liberal subject that speaks in discourse: 'The 'I' only comes into being through being called, named, [and] interpellated.'⁸⁸ This discursive constitution, Butler claims, 'takes place prior to the 'I' . . . precedes and conditions the formation of the subject.'⁸⁹ As a performative discourse, Butler claims, gender, brings into being the very stuff it names: 'feminine' woman or 'masculine' man.⁹⁰ Reading Butler, Sarah Salih argued, 'Since identity is a signifying practice, culturally intelligible subjects are the effects rather than the causes of discourses.'⁹¹

Arguing that gender acts 'performatively constitute a subject that is the effect of discourse rather than the cause of it,' Butler claims, 'That the gendered body is performative suggests that it has no ontological status apart from the various acts which constitute its reality.'⁹² Performativity is, therefore, the discursive instrument by which the gendered, sexed, and the racialized subject is constituted, partly through his own actions but importantly through practices, as Foucault said, 'proposed, suggested and imposed on him by his culture, his society, and his social group.'⁹³ Subject formation is an ongoing and never-ending process.

As Butler writes, it is 'at once a becoming of the subject and the process of subjection.'⁹⁴ The subject produced through technologies of subjection 'is not produced at an instance in its totality.'⁹⁵ It is in the process of repetition that the subject continues to consolidate his subjecthood and subjection. But how does this concept of gender performativity help us explain the transformation of the messy, living, concrete, and socially embedded human being into a fiction called 'legal person' and its nexus with questions of agency and resistance?

⁸⁸ Butler, *Bodies that Matter*, 171.

⁸⁹ *Id.*

⁹⁰ Salih, Judith Butler, 64.

⁹¹ *Id.* at 65.

⁹² Butler, *Gender Trouble*, 136.

⁹³ Foucault, *The Ethic of Care for the Self*, 88.

⁹⁴ Butler, *The Psychic Life of Power: Theories in Subjection*, (Stanford: Stanford University Press, 1997), 83.

⁹⁵ *Id.* at 93.

3.2.5. The Performative Generation of the Legal Person

The human person is the subject of rights and duties from birth to death.⁹⁶

—The Ethiopian Civil Code, Art. 1, 1960

To be a legal person is to be the subject of rights and duties. To confer legal rights or to impose legal duties is therefore to confer legal personality.

—Gray Chipman, 1921

The corporation is no fiction, no symbol, no piece of the state's machinery, no collective name for individuals, but a living organism and a real person with a body and members and a will of its own.

—Bryan Smith, 1928

‘Legal Personality’ is the primary device through which law codes and regulates the juridical universe. It is the foremost cognitive instrument by which law produces actors and assigns duties and obligations. As L. C. Webb usefully notes, legal personality is ‘the gift of the legal sovereign.’⁹⁷ It is the means by which the state grants recognition to its subjects and compels the subject to yield to prescribed norms of behaviour. It is ‘the means by which the state has regulated the activities of social groups and made them conform to its order.’⁹⁸ Teubner refers to this indispensable device through which the law ‘sees the world’ as

⁹⁶ Inherited from the Roman *jus privatum*, this provision in the Ethiopian Civil Code drafted by the French jurist, Rene David, represents a paradigmatic formulation of the principle of legal personality in continental legal traditions. In the Anglo-American tradition, legal personality is a common law principle that confers rights and duties on juristic persons whether human or artificial. In both formulations, the concept of legal personality is performative *par excellence*. See Gray, John Chipman, *The Nature and Sources of the Law*, (2nd ed., 1921) 27; Salmond, *Jurisprudence*, (5th ed.) 1916, 272, Holland, *Jurisprudence*, (9th ed.), 1900, 88; Pollock, *A First Book of Jurisprudence*, 1928, 114. For more on legal personality, see Bryant Smith, *Legal Personality*, 37 *Yale Law Journal*, No.3, 1928; Johan Dewey, *The Historical Background of Corporate Legal personality*, 35 *Yale Law Journal*, No. 6,

⁹⁷ Leicester. C. Webb, *Legal Personality and Political Pluralism*, (eds.), (London: Cambridge University Press, 1958), v.

⁹⁸ *Id.*

‘the atoms of classical jurisprudence.’⁹⁹ The person in law is not the human being with its own ontological existence. It is an ‘artificial semantic product’ internally constructed within law’s self-referential and self-replicating discourses.¹⁰⁰ Even the foremost normativist legal scholar, Hans Kelsen, sees legal personality as a semantic artefact. Legal personality, like the ‘Grundnorm,’ is ‘a social construction, created by the science of law.’¹⁰¹ Kelsen goes on to state that ‘The assumption that the legal person is a reality different from individual human beings, a reality, yet curiously imperceptible to the senses . . . is the naïve hypostatization of a thought, of a heuristic legal notion.’¹⁰²

My interest here is not to restate the much stated claim that legal personality is an artificial construct of the law. Rather, I am contending that legal personality is a performative discourse that brings into being the very thing it names. Just like sovereignty in Derrida or the gendered, sexed or racialized body in Butler comes into being through performative signification; the legal subject (the legal person) too comes into being through law’s performative speech act. Reiterating the feminist contention that ‘law does not merely represent physical bodies but actually produces them,’¹⁰³ Kristen Savell’s informative essay, ‘The Mother of the Legal Person,’ conceives legal personality as a formative moment of legal subjectivity.¹⁰⁴ The law hails us: ‘The Human Person is the Subject of Rights and Duties from Birth to Death.’ To state so is not to describe something, it is do something, to effect action, as Austin says. It is ‘an action that exists in words.’ In the Butlerian schema, this statement is a performative speech act that transforms, in the constitutive sense, the human being it speaks about into a bearer of rights and duties to create a new reality. As a performative speech act, the action brings into being a subject with a distinct identity that does not

⁹⁹ Teubner, *How the Law Thinks*, 741.

¹⁰⁰ *Id.*

¹⁰¹ Hans Kelsen, *The Pure Theory of Law*, trans. Max Knight (Berkeley: University of California Press, 1967), 173-4; Regarding the Grundnorm, see Kelsen, *General Theory of Norms*, 256.

¹⁰² Hans Kelsen, *Introduction to the Problems of Legal Theory*, trans. Bonnie Litschewski Paulson and Stanley L. Paulson, (Oxford: Clarendon Press, 1992), 49.

¹⁰³ Kristen Savell, ‘The Mother of the Legal Person,’ in Susan James and Stephanie Palmer, eds., (Oxford: Hart Publishing, 2002), 29.

¹⁰⁴ *Id.*

have an ontological status separate from the series of juridifications ‘that constitute its reality’ as a subject. The juridical identity to which the action refers comes into being through the action itself. In Butler’s formulation, this ontology is ‘manufactured and sustained through corporeal signs and other discursive means’ and ‘has no ontological status apart from the various acts which constitute its reality.’¹⁰⁵

The person in law is everyone and specifically no one. The human being, not born a person, becomes one through law’s performative signification. An example will illustrate this constant becoming: Alice Nelson Anderson was born on 10 January 1975 as a human being, a person of blood-and-flesh unencumbered by legal obligations. At the moment of birth, that performative speech act that interpellates all ‘human persons’ as ‘the subject of rights and duties from birth to death’ transforms Alice into a legal person that is subject to the jurisdiction of the sovereign. The law consolidates this transformation of the human being into the legal person by granting her inaugurative credentials such as birth certificates, passports, National Insurance Numbers or Social Security Number or other credentials that makes her visible and intelligible in the system. These credentials are material instances of what Butler refers to as ‘written discourses’ or ‘bureaucratic discourses’ that invest the body and mark out the inauguration of the subject.

In our example above, the Anderson N. Alice that appears on her birth certificate, passport, Bank Account, Driving License, National Insurance Number (Social Security Number) and other necessary credentials is different from the Alice Nelson Anderson that is born free. While the former is a juridical figure brought into being through law’s performative production, the latter is a human being with its own ontological existence, arguably, dating back to conception. In acting out the identities of a legal person, Alice N. Anderson simultaneously constitutes herself and sustains her construction as a subject. In performing her legal duties, Anderson constitutes herself as legal subject- subjecting herself to the legal structure. As Butler points out, ‘by virtue of being subject to them,’

¹⁰⁵ Butler, *Gender Trouble*, 185.

subjects are ‘formed, defined, and reproduced in accordance with the requirements of those structures.’¹⁰⁶

This transformation of Alice Nelson Anderson—the universal, messy, living, concrete, socially embedded human being—into Alice N. Anderson, a seemingly sovereign, autonomous legal person, inscribes discursive ensembles that determine what Alice is, can, and does. It determines her mode of knowing, acting and being in the world. It is a discourse that renders practices of domination intelligible and accepts, and masks the performative logic through which it is constituted and framed. Because it is the only register that the discourse of right is capable of recognizing, the category of the person is not just some exploitative device, it is also a precondition of visibility and hearing. It is something claimed by everyone—from the embryo in the womb to the most gigantic of institutions like the UN and EU. Legal personality is not merely about legal standing, the capacity to sue and be sued, it also involves a much deeper question of who is visible in law and under what conditions.¹⁰⁷ Reflecting on law’s treatment of African American subjectivity, McHugh claims that personality determines ‘the fundamental legal and political concept of membership within a liberal society.’¹⁰⁸ Legal personality, therefore, not only constitutes us as subjects visible in law, it also determines the question of who is ‘recognized as an active participant in the polis.’¹⁰⁹

The legal principle that ‘the human person is the subject of rights and duties from birth to death’ is a performative speech act that constitutes a political ontology of the subject. It is in this sense that that formative/generative encounter between law and the human being brings into being a new juridical ‘subject’ that never existed before that formative encounter. Instead of merely ‘causing,’ ‘determining’ or superimposing disciplinary norms, these discursive ensembles constitute legal subjectivity reaching deeper into our lives and conditioning our desires, knowledges, and values. This brings us to one of the

¹⁰⁶ Butler, *Gender Trouble*, 3.

¹⁰⁷ J McHugh, ‘What is the Difference Between a ‘Person’ and a Human Being’ within the Law,’

¹⁰⁸, ‘What is the Difference Between a ‘Person’ and a ‘Human Being’ within the Law?, 54 *Review of Politics* 445 (1992), 456.

¹⁰⁹ *Id.*

most puzzling aspects of subjectivity and the central antinomies of our political rationality: subjectivity generally and legal subjectivity specifically is at once the becoming of the subject and a process of subjectification. As Butler notes, ‘one inhabits the figure of autonomy only by becoming subjected to a power.’¹¹⁰ Finally, since legal personality is the fundamental premise upon which law confers rights and imposes duties, this performative architecture reverberates across the legal system shaping and informing our conceptions of sovereignty, politics, society, and agency. It is a vector and instrument for both technologies of domination and resistance.

3.3. Toward a Performative Epistemology of Law

Performative writing refuses an . . . easy and . . . false distinction
between performance and text, performance and performativity . . .
writing as doing displaces writing as meaning.

—Della Pollock, ‘Performing Writing,’ 1998

Why a performative Epistemology? What are these performances that performativity consists in, and what explanatory/interventionist work do these acts do? How do the explanations that performative acts provide differ from or relate to explanations of normative facts? My argument is that the normative thesis is a metaphysical fiction incompatible with the actual materiality of political life within the concrete order. The normative thesis—‘Law is a form of practical reasoning; like morality and prudence, it defines a general framework for practical reasoning’—does not give a satisfactory account of the relationship between the framework of practical reason that guides the legal norm and the ability of the norm to generate the corresponding will that directs the subject. The identification of law with the realm of practical reason not only conceals the historical and political dimension of law, sovereignty, rights, and subjectivity, it also prevents the possibilities of change and becoming. Once law is identified with reason itself, shrugging off, historical, political, social, and economic facts of constitutive effect, this submits the subject to norms of

¹¹⁰ Butler, *The Psychic Life of Power*, 83.

intelligibility that pre-emptively forecloses alternative modes of being, knowing, acting, and belonging.

Once law is conceived as a product of reason, that conception has the effect of naturalizing the present—investing practices of deprivation, occupation, domination, and inequality, with self-evidence and necessity that are grounded in reason. It defines the terms of political and cultural intelligibility, the terms under which one can speak and give account. By foreclosing the very notion of change and transformation (because you cannot argue against reason), it closes off sovereignty, the political and subjectivity from political contestation. Whatever power it serves, the congruity between reason and legal norms is precisely the justification summoned by authority to abdicate responsibility and turn its back against injustice, violence, and oppression. By making itself appear obvious, natural, necessary, and even absolute, law forecloses the possibility of imagining otherwise where, empirically speaking, there is no reason why the exact opposite of the present is not possible.

A performative epistemology begins from the view that an ethical and responsive politics emerges out of the destabilization of this shackling essentialism, and the ‘fissuring of the subject.’ Toward that end, it attempts to demystify the normative thesis, i.e., the inherent nexus between reason and law, by demonstrating the unwarranted nature of the assumption and its incompatibility with the actual materiality of life. Apart from the non-referential claim, law cannot offer any empirical evidence that expresses its self-evident character or its obvious conformity with reason. To the extent that there is any appearance of necessity and naturalness, it is generated through our individual and collective repetition of prescribed non-referential codes.

Insofar as the performative generates and presents law’s normative materiality, animating its central organizing moments—foundation, subjectification, legislation, and adjudication—a normative analysis of law cannot adequately account for law’s characteristics, processes and institutions. If the ‘we’ in whose name the founding act constitutes the legal order and the ‘legal person’ - ‘cognitive instruments’ through which law codes and subjectifies those under its jurisdiction—are both brought into being through performative signification,

then, performativity becomes fundamental to any theoretical project aimed at understanding and articulating law and its discursive operations. As a concept that involves a double movement, of signification and re-inscription, it is critical not only for understanding the rationality and modes of thought underlying the framework of production and subjection, but also for theorizing a discourse of rights emancipated from the colonizing logic of sovereignty. A performative rethinking of the law creates spaces of intervention and ensures the resistibility of normalizing and invasive norms.

Central to the operations of the performative is the discursive transformation of the causal and the sociological into the normative.¹¹¹ The performative appropriation of language and discourse transforms the sociological fact of state, law and legality into some intrinsic and necessary fact that determines our way of being, knowing and acting. As the primary instrument of legitimation, the performative justifies sovereignty, validates its authority, and makes it culturally intelligible. The performative force undergirding ‘the founding and justifying moment that institutes the law,’ Derrida notes, ‘maintain[s] a more internal, more complex relation with what one calls force, power or violence.’¹¹² By concealing the iterability that constitutes the unity of the signifying form, law claims conceptual continuity with practical reason. The transcendent validity that law claims—a validity that transcends what people recognize as valid—fundamentally conceals the complex and contingent foundations of sovereignty, politics, and subjectivity. By neutralizing these contingent foundations with normative discourses and representing them as natural, self-evident, necessary, compelling, inescapable etcetera, the law closes possibilities of change and becoming. A performative reconceptualization allows us to engage in a subversive and disruptive resignification of prior significations.

The performative marks the birth of justice and injustice, equality and domination, oppression and liberation. In inaugurating a *body politic* and constituting the legal subject, the performative reduces, manages or suppresses

¹¹¹ See Richard H. Mcadams, Resentment, Excuse, and Norms, in Peter Cane, *The Hart-Fuller Debate in the Twenty-First Century*, eds. (Oxford: Oxford University Press, 2010), 249.

¹¹² Derrida *Force of Law*, 13.

contingency. For example, the reduction of the constituent to the constituted, the political to politics, and the human being to a legal person functions to subject the individual to series of subjectifications.¹¹³ The performative logic that justifies these reductions institutes a ‘grid of intelligibility’ and idioms of judgment through which it suppresses subjection, obscures exclusions, and prevents change and becoming, closes down spaces of contestation, precludes political action, and legitimizes a violent suppression of resistance against exclusion and injustice.

This exclusionary ‘grid of intelligibility’ operates through exclusionary regimes of truth that Foucault formulated in ‘The Will to Truth.’ According to this formulation, ‘the will to truth’ is an ‘institutionally constraining system of exclusion that regulates what sorts of statements can appear as truth-bearing events—what can and cannot be intelligibly said in any given social formation.’¹¹⁴ ‘[L]ike other systems of exclusion,’ the ‘will to truth’ ‘rests on an institutional support: it is both reinforced and renewed by a whole strata of practices, such as pedagogy . . . But it is also renewed, no doubt, more profoundly, by the way in which knowledge is put to work, valorized, distributed.’¹¹⁵

In ‘From Bakunin to Lacan: Anti-Authoritarianism and the Dislocation of Power,’ Saul Newman makes this revealing observation about essentialist discourses: ‘Essentialist identities limit the individual, constructing his or her reality around certain norms, and closing off the possibilities of change and becoming.’¹¹⁶ As I argued through the concept of personality in the previous section, by conferring legal personality on the human being and transforming it into a person, the legal discourse constructs the individual’s identity/reality ‘around certain norms’ and ‘closes off the possibility of change and becoming’¹¹⁷ ‘[A] whole series of

¹¹³ See Christodoulidis Emilios, *Against Substitution*, in Martin Laughlin and Neil Walker, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, (Oxford: Oxford University Press, 2007), 190-207.

¹¹⁴ Brady Heiner, *Foucault and the Black Panthers*, 11(3) *City*, 313(2007), 314.

¹¹⁵ Michel Foucault, *The Discourse on Language*, in *The Archaeology of Knowledge*, (Abingdon: Tavistock Publications Ltd., 1972), 219.

¹¹⁶ Saul Newman, *From Bakunin to Lacan: Anti-Authoritarianism and the Dislocation of Power*, (Plymouth: Lexington Books, 2001), 3.

¹¹⁷ *Id.*

institutional practices which dominate the individual in multitude of ways,’ continues Newman, ‘are brought into play by essentialist logics.’¹¹⁸ In this way, essentialist discourses foreclose the intelligibility of resistant discourses. It perpetrates what Miranda Fricker refers to as ‘epistemic injustice.’ Performativity alerts us to the micro-practices that invest and pervade the body to get hold of it from within.

My contention is that while performative knowledge plays a central role in constituting the ‘legitimate fiction’ necessary for the operation of essentialist discourses, particularly the law, it is a form of knowledge capable of reconfiguring that formative configuration of power-knowledge constellation and interrupt gate-keeping discourses. As a strategic instrument that functions across the power-knowledge complex and informs their particular configuration, performativity has a potential to configure and reconfigure the universe of domination and resistance. In other words, it is a hinge essential to the workings of the politics of truth and the perpetual war that rages between discourses of domination and resistance. It is the configuration and reconfiguration of this ‘hinge,’ this fulcrum, that is key for understanding not only the logic of subjection that traverses the legal order but also for articulating an action that ‘registers as resistant, neither reducible to—nor co-optable by—the order [and the discourse] it seeks to resist.’¹¹⁹

A performative conception of law recognizes practices of domination, subjection, and the fiction underlying our instituted forms of justice. It enables innovative interventions that expose the contingency of juridical discourses and biopolitical technologies that animate the subject’s identities. Performative knowledge ‘recognizes disciplinary power, enables action in the face of that power, enables innovation in deliberation, and thus allows us to see the world of political action differently.’¹²⁰ Such reconceptualization allows us to trace the genealogy of what Montaigne calls ‘legitimate fiction of justice’ and ‘the mystical foundation of authority’ to its source and problematize their historical

¹¹⁸ Id.

¹¹⁹ Emilios Christodoulidis, *Strategies of Rupture*, 20 *Law and Critique*, 3 (2009), 9.

¹²⁰ Jessica J. Kulynych, *Performing Politics: Foucault, Habermas, and Postmodern Participation*, 30 (2) *Polity*, 315 (1997), 336.

inscription to illuminate the present. Whatever emancipatory potential one ascribes to this approach, no matter how contingent performativity's transformative promise, one thing is clear: performative knowledge is a resistant knowledge.

In this sublime age of ours, performative knowledge provides epistemic resource for those who fight. In fact, by its very existence and circulation in the social body, this knowledge engages in an epistemic resistance against hegemonic and juridical forms of knowledge. By displacing the self-evident, natural and inevitable character of the present, it enables action. In dislocating the self-evidence and naturalness with which the constituted order legitimizes its laws and system of justice, the performative articulates a different narrative of sovereignty, a narrative that rejects the founding moment as a foundational site of truth. The myth that undergirds the moment of foundation, a moment that inscribes a grid of intelligibility and is both a site of truth and justice, is characterized by this paradox that Montaigne called 'legitimate fictions.'

Law, to be sure, is illegal at origin. Tracing law to its origin does not lead to any presupposed norm of validation or justification, not as such. But it reveals a performative fiction that retroactively validates the institutive moment. A performative epistemology understands this fiction placed at the very core of the legal system and crafts a new performative fiction to counter the earlier fiction: fiction against fiction. By breaking the illusion of coherence, naturalness, and apparent necessity said to ground law's moment of origin, the performative allows us to speak of a different form of law, a higher law, and the law to come, politically responsive and responsible law that leads to justice, equality and dignity. By dislocating justice from the orbit of the law, performativity unleashes the interruptive force of justice to make law responsive and responsible. It subjects law to the endless demands of justice, humanity, and dignity. As courtroom strategy, performative knowledge can be deployed as a critical resource to destabilize, decentre, reconstitute, and transform normative closures and gate-keeping discourses Christodoulidis identifies as 'law's power of homology and deliberate deadlock.'¹²¹ Finally, a

¹²¹ Christodoulidis, *Strategies of Rupture*, 11-15.

performative epistemology of law does not seek to do away with the normative. By recognizing the contingent and complex foundations of sovereignty, and subjectivity, a performative epistemology creates conditions of possibility for a normativity that is open-ended and breaks with the edifice of sovereignty. By acting with an awareness of the contingency of the present, it does not seek to do away with normativity and the discourse of rights: It conceptualizes the normative as an ongoing formation; it aims to create a new discourse of rights that is anti-disciplinarian and emancipated from the dazzling light of sovereignty. It aspires to reclaim the reign of justice from the hermeneutic monopoly of the state.

3.4. The Transformative Promise of a Performative Epistemology

Performativity is now deployed as a method, a conceptual device, and strategy attentive to contingent histories undergirding origins, subjectification, ‘truth generation,’ and ‘knowledge production.’ As a tool of political struggle, its value lies in the disruption and subversion of normative ideals that infiltrate, control and dominate the individual. Its political promise lies in its ability to ‘open the political to unprefigurative future significations’- denaturalizing the natural, historicizing the self-evident, exposing the singularity of the universal, revealing the heterogeneity, complexity, and contingency that proceed and animate the necessity, inevitability and universality of politico-juridical formation.¹²²

Performativity is not a discourse but operates within and across multiple discursive registers. It is not an ideology but functions within ideology; informing multiple configurations of power-knowledge constellations that Foucault so brilliantly articulated in his genealogical investigations. Not being a discourse, performativity is a free floating signifier open for signification and re-signification. Because of its ‘open temporality,’ the sign can be appropriated by both hegemonic and subversive discourses. As Butler, via Nietzsche, argues, ‘the uses to which a given sign is originally put are ‘worlds apart’ from the uses to

¹²² Judith Butler and Athena Athanasiou, *Dispossession: The Performative in the Political*, (Cambridge: Polity Press, 2013), 140.

which it then becomes available.’¹²³ However, there is no symmetry between the appropriation of the sign by sovereignty and those who resist sovereignty from the margin. Nevertheless, the ‘open temporality’ of the sign central to signifying practices means that domination and subjection are not inevitable consequences of the natural order of things. The temporal and spatial openness of the sign suggests a condition of possibility for reflection and intervention.

It is my contention that despite the invasive and capillary nature of modern apparatuses of subjection, performativity offers a resource for reflection and intervention. Performative problematization demonstrates that there is nothing natural or inescapable about the inequalities and exclusions of the present. Performative reflection suggests that power is far from omnipresent and subjection is never total. Insofar as the success of the performative rests on its repetition of an iterable code, there is a possibility for subversive intervention. As I have argued, between signification and context, there is a possibility of disjuncture that creates opportunities for being otherwise. Arguing against the system’s reduction of complexity and contingency, Christodoulidis writes, ‘The irreducibility of the political to politics, of the constituent to the constituted, underpins our ability to break from, to imagine otherwise, and to renew beyond modalities of what has already been instituted.’¹²⁴

Central to Butler’s concept of performativity is the view that the subject is a project of becoming. In ‘Excitable Speech,’ Butler takes subversive resignification beyond gender and extends its transformative capabilities to spheres of democracy and justice.¹²⁵ In recognizing the endless contestation that a performative resistance presupposes, she points to potential surprises that performative resistance might register against a politics of domination. Here is Butler: ‘the political promise of the performative is one that positions the performative at the centre of a politics of hegemony, one that offers an unanticipated political future for deconstructive thinking.’¹²⁶ In rejecting the claim that performative discourses effect what they name only when uttered by

¹²³ Judith Butler, *The Psychic Life of Power*, 94.

¹²⁴ Christodoulidis, *Against Substitution*, 195.

¹²⁵ Butler, *Excitable Speech*, 158.

¹²⁶ *Id.*

the hegemonic group, Butler calls attention to ‘the expropriability of the dominant, ‘authorized’ discourse’ with built-in subversive potential.¹²⁷ We are animated, repressed, and attached by dominant norms to the point that this attachment is perhaps the very condition for disruption and resignification.¹²⁸ In ‘Bodies That Matter,’ she argues, ‘performativity implies that discourse has a history that not only precedes but conditions its contemporary usages, and that this history effectively decentres the presentist view of the subject as the exclusive origin or owner of what is said.’¹²⁹

As a tool of resistance, performative knowledge contests practices of oppression by tying the personal to the political and the pedagogic. It returns the body, race, community, culture, language and all those discursive and non-discursive practices that codify and vitalize existing force-relations back into an arena of visibility. In short, it formulates and circulates a discourse that makes resistance possible through reflection (by revealing the originary violence) and intervention. In Butler’s optimistic formulation: ‘A political genealogy of gender ontologies, if it is successful, will deconstruct the substantive appearance of gender into its constitutive acts and locate and account for those acts within the compulsory frames set by the various forces that police the social appearance of gender.’¹³⁰ If subjectivity is ‘a becoming, a constructing that cannot rightfully be said to originate or end,’¹³¹ it becomes a process open to ‘intervention and resignification.’ It is this possibility for a resignification of the constitutive and regulative conditions of sovereignty and subjectivity that provides a way of a conception of the political as open and indeterminate. It is precisely this open temporality that is crucial to the logic of law, sovereignty and the subject that constitutes ‘the subject’s agency within the law,’ the possibility of subverting law from within.¹³² In the world of performative sovereignties and subjectivities, transgressive resignification becomes the new strategy and performative transformation the new form of resistance.

¹²⁷ Butler, *Excitable Speech*, 157.

¹²⁸ Butler, *The Psychic Life of Power*, 91-93.

¹²⁹ Butler, *Bodies That Matter*, 227.

¹³⁰ Butler, *Gender Trouble*, 45.

¹³¹ *Id* at 33.

¹³² Butler, *Bodies That Matter*, 73.

3.5. Conclusion

While performativity may be traced to Austin's grammatical excavation of utterances, its political/critical currents are formulated in the works of Derrida and Judith Butler who deployed its reflexive offshoot to destabilize normative presuppositions. By unearthing the contingency of the truths upon which sovereignty is anchored, Derrida offers an account of performativity that breaks with its institutive context and functions as a liberationist counter-history. Butler's account of gender performativity shows how the law, pretending to be merely regulative, in reality frames and determines the subject's mode of being, knowing and acting.

If the emphasis is on sovereignty, and the subject, it is because how one conceptualizes and articulates the two discursive ensembles determines the ways of being and action in the political universe. If modernity privileged a normative reading of these formations, it is because such a reading allowed late-modern capitalism to submerge and conceal relationships of domination and inequality behind a façade of transcendent universals. As a subversive device, performativity is consequential because performative knowledge makes things happen. It unlocks closed normative meanings. It historicizes history, imagines scenes of liberation and performs liberated subjectivities; generating critical cultural spaces for a politics of possibilities.

If the legal discourse is performative and neutralizes the politics that constitute its centre of gravity, what emancipatory purchase does this knowledge bring to bear on strategic engagements with law? If the performative reduction of contingency and complexity constitutes the key ways by which law inscribes those founding exclusions and guards its most vulnerable frontiers from subversive interventions by those it excluded and silenced, what critical resource can a performative knowledge bring to bear in struggles to enhance law's revisability and responsiveness; in opening up spaces for interventions, critique and transformation? What resources can we craft out of the raw materials of historic knowledges that speak of, as Foucault says, 'the battle cries that can be heard beneath the stability of law and order'? If we know that

our system of justice is being sustained by ‘fictions,’ what does this add to struggles from within to redress injustices that are urgent and cannot wait? In Chapter four, I want to extend this analysis to the contested space of the political trial.

Chapter Four

4. Law and Resistance: Toward a Performative Epistemology of the Political Trial

4.1. Introduction

One of legal positivism's essential characteristics, perhaps its fundamental axiom, is the separability thesis- the separation of law from everything that is not legal. Contradictory and hypocritical, the separability thesis insists on the necessarily autonomous quality of legal decisions posited in contingent positive laws.¹ Precisely because of the centrality of the separability thesis, law has continued to assert its claims to neutrality and autonomy from inescapable sociological and historical realities. Equally important for at least a certain strand of legal positivism is the view that law is a normative system that generates sound reasons for action. In explaining law's normativity, legal positivists such as Kelsen, Hart, and Raz situate themselves in between the classic positivism of Austin and Bentham, and natural law theorists.² For them, law is normative without being necessarily moral. Within this paradigm, the trial is a legal act. In fact, as Judith N. Shklar notes, it is 'the supreme legalistic act.'³

For normativists, the whole concept of the 'political trial' is a contradiction in terms—a misnomer that designates nothing more than 'a cheap stock in trade of a sensationalist newspaper or a disgruntled loser's gratuitous self-indulgence.'⁴ For normativists, the conceptual distinction between the spheres of the legal and the non-legal—political, social, economic, and cultural—guarantees law's inviolable independence and value-neutrality.⁵ Rejecting the concrete

¹ See Vittoria Villa, Neil MacCormick's Legal Positivism, in Maksymilian Del Mar and Zenon Bankowski, *Law as Institutional Normative Order*, (Surrey: Ashgate, 2009), 48.

² Frederick Schauer, Positivism as Pariah, in Robert P. George, eds. *The Autonomy of Law: Essays on Legal Positivism*, (Oxford: Oxford University Press, 1996), 36

³ Judith N. Shklar, *Legalism: Law, Morals, and Political Trials*, (Cambridge: Harvard University Press, 1984), 144.

⁴ Otto Kirchheimer, *Political Justice: The Use of Legal Procedures for Political Ends* (Princeton: Princeton University Press, 1961), 48.

⁵ Gerald J. Postema, Law's Autonomy and Public Practical Reason, in *The Autonomy of Law*, eds., 82-85.

materiality of power and inescapable sociological and political facts of power and legitimacy, inequality and domination, normativists deny the real political battle that goes on within laws and courts and ultimately bear on law's relationship with broader issues of history, morality, politics, and society. Laying claim to comforting but untenable normative ideals of objectivity, impersonality, and universality, law neutralizes its political and ideological orientations.

This continued claim to objectivity and value-neutrality is blindly used by 'men of Law Immaculate'⁶ to deny the political dimension of law generally and the trial specifically. For this strand of legal thought, the existence of general rules used to distinguish truth from falsehood, the distribution of speaking positions with equality of arms between the parties, the rigorous conformity of courts to 'time honored and generally recognized trial standards,' the meticulous rituals and ceremonials that enchant and reinforce the court's façade of neutrality and independence, and the standard of guilt and innocence effectively eliminates 'the intercession of political motivations and aspirations.'⁷ It is a narrow reductionism that precludes the possibility of a political objective in a legal procedure and regards politics in the legal domain as pejorative and negative. So for a normativist who sees the 'ought' as a supernatural force or a social force that internally compels the subject to act accordingly, the political trial is not a trial at all. For them, trials cannot be at once legal and political, and cannot be fair without strict compliance with the rules of the game. If the political trial signifies anything, they argue, it is the exception - that aberration of law and justice reminiscent of Stalinist show trials aimed at total control.⁸

Contrary to these abstract normative claims, history is replete with instances of nation-shaking trials that cannot be reducible to the mere question of law and legality. Indeed, from the ancient trials of Socrates (corrupting the youth) and Jesus of Nazareth (blasphemy and sedition) to the medieval European inquisition of Joan of Arc (heresy and witchcraft) and Galileo Galilei (1633, heresy), from

⁶ Kirchheimer, *Political Justice*, 47.

⁷ *Id* at 4.

⁸ See Judith Shklar's criticism of an ideology she calls legalism, Judith N. Shklar, *Legalism*, 110-13; 144-45.

the 18th century trial of Louis XVI (treason) to the nineteenth century trials of Alfred Dreyfus (treason) and Suzanne Anthony (for attempting to vote), from the Moscow Show Trials to the Nuremberg and Tokyo Trials, from Nelson Mandela's trial (for sabotage and incitement) to the recent trial of Bo Xilai of the Chinese Communist Party, the courtroom has been used for purposes incompatible with their normative inscription: as platforms for the politics of domination and resistance. As the Frankfurt Jurist Otto Kirchheimer wrote, 'With or without disguise, political issues are brought before courts and weighed on the scales of law, much though the judges may be inclined to evade them. Political trials are inescapable.'⁹ In particular, since the onset of the 20th century, the courtroom has become an indispensable weapon of oppression and liberation.

This chapter will begin by giving an account of the political trial- what it is and what it does. Through a consideration of landmark texts on political trials, I will try to retrieve or determine the most salient features of the political trial or those features that 'figure most prominently in an explanation' of the concept. Arguing against the normative conception of the political trial, it will claim how a performative reconceptualization of the political trial reveals something paramount and essential about the nature of the institution (the trial), and the politics of power-struggle the concept of the 'political trial' denotes. Conceptualizing the political trial as a power-discourse-knowledge constellation that operates at the interstices of the normative and the performative, the chapter will give an account of how the power-knowledge ensemble is formulated, reconfigured and put into circulation in the courtroom.

Finally, the political trial is presented here both as a performative formation and as a concrete instance of law's indifference to its normative claims. Rather than asking the labyrinthine question of what constitutes the political trial, I will re-conceptualize the political trial both as an effect of power struggle, and a mode of 'political action' proper to unpack the modes of thought and forms of rationality that constitute its centre of gravity. In particular, I am interested at a point where the political trial comes in a direct and immediate relationship with the politics of domination and resistance.

⁹ Kirchheimer, *Political Justice*, 47.

4.2. The Political Trial: From Domination to Resistance

The political trial is a surface manifestation of a deeper political struggle between the established authorities and their foes. What makes the trial ‘political’ is not its distance from formal legality so much as the aporia that threatens to disrupt, as to unmask, the court’s power rationalizing and order-legitimizing functions. Unlike the ordinary criminal trial, it brings into the courtroom two individuals with an irreconcilable or antithetical notion of law and society or the very meaning of the ‘common good’ and how to realize it.¹⁰ Whatever the precise substance of its politics, the political trial is a pivotal moment that unravels submerged conflicts that rage just beneath the calm order of sovereignty; a crystal moment that unearths a problem both at the depth and on the surface and makes it conceptually visible and accessible. ‘Political trials,’ as Foucault put, ‘are always touchstones.’¹¹

Otto Kirchheimer’s seminal scholarship, ‘Political Justice: The Use of Legal Procedure for Political Ends,’ is the most comprehensive scholarly attempt at providing a near definitive account of the political trial.¹² In this rather rich treatise on political justice, Kirchheimer dismisses the abstract independence and neutrality of law and excavates the interface between the sphere of the legal and the political as a limit situation. He writes, ‘In the simplest and crudest terms, disregarding for a moment the embellishments, enlargements of functions, and safeguards of the age of constitutionalism: the courts eliminate a political foe of the regime according to some prearranged rules.’¹³ By tracing significant political trials in both Anglo-American and continental traditions, he extrapolates features he identifies as central to political trials. Conceiving the political trial as ‘struggle in power-relations,’ and as a mode of ‘political participation’; Kirchheimer’s ‘Political Justice’ is an inquiry into the strategies,

¹⁰ Laura Bilsky, Political Trials in an Age of Terror, 5 *Adalah’s Review*, 11(2009), 13.

¹¹ Michel Foucault, Open Letter to Mehdi Bazargan, in *Power: Essential Works of Michel Foucault 1954-1984*, V.3, (London: Penguin, 1994), 441.

¹² Kirchheimer, *Political Justice*, 4.

¹³ *Id* at 6.

tactics, and the means by which the synchronization of politics with the legal form generates political effects sought by political actors.

Kirchheimer identifies three categories of political trials: politicized criminal trial, the classic political trial, and the derivative trial.¹⁴ The first category involves ‘a common crime committed for political purposes’ with an eye toward using the trial for political purposes.¹⁵ The second category, the classic political trial, consists in ‘a regime’s attempt to incriminate its foe’s public behavior with a view to evicting him from the political scene.’¹⁶ The third category, ‘the derivative political trial,’ involves the weaponization of juridical devices such ‘defamation, perjury, and contempt . . . in an effort to bring disrepute upon a political foe.’¹⁷ While this is by no means an exhaustive list, it does tell us something essential about the means by which ‘the judicial machine is set in motion.’ Crucial to all the three categories is the friend-foe distinction, where the ‘foe,’ an enemy from within, is transformed into a public enemy and evicted from the democratic public sphere.¹⁸ In a political contestation between those who seek to preserve and consolidate the order, the *status quo*, and those who refuse what is and resist sovereignty’s exclusionary logics, its excessive overreach, and deployment of law as a tactic in the service of governmentality; the judicial machinery is activated to attain a determined political end.¹⁹

Identifying ‘power struggle’ as the animating principle and an essential feature of the political trial, Kirchheimer argued,

The judicial machinery and its trial mechanics are set into motion to attain political objectives which transcend both the bystanders’ curiosity and the governmental custodian’s satisfaction in the vindication of the political order. Court action is called upon to exert influence on the distribution of political power. The objectives may be to upset—fray, undermine, or destroy—existing power positions, or to strengthen efforts directed at their preservation. Again, efforts to

¹⁴ Id at 46.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

maintain the status *quo* may be essentially symbolic, or they may specifically hit at potential or full-grown existing adversaries. Sometimes it may be doubtful whether such court action really does consolidate the established structure; it may even weaken it. Yet that it is in both cases aimed at affecting power relations in one way or another denotes the essence of a political trial²⁰.

Here, Kirchheimer provides one of the most salient features and animating rationalities of the political trial: struggle in power-relations within the social-body. Whether it is the ancient trials of Socrates and Jesus, or the Inquisition of the medieval and Spanish prototypes, whether it is the Stalinist Show trials or McCarthyist communist trials, whether it is the trial of the freedom fighter by the colonial master or the trial of a political adversary by an authoritarian regime, or trials of dissenters by liberal democracies, there is a single thread that cuts across all categories of political trials: ‘trial mechanics are set into motion to attain political objectives.’²¹ The specific ‘objectives may be to upset—fray, undermine, or destroy—existing power positions, or to strengthen efforts directed at their preservation.’²² It may be orchestrated by the regime or by their foes. It might succeed in evicting the foe and consolidate existing structures or it might backfire.²³ Yet, that it is power struggle as a mode of political action that animates the activation of the judicial machine ‘denotes and marks out’ its ‘peculiar problem area.’²⁴ Whether it is a politics of domination or resistance, ‘power struggle’ constitutes the epicentre of the political trial. It is contestations between those who control the emblem of sovereignty and therefore seek to preserve existing force relations within society, and those who have no fixed place within society and therefore seek to interrupt and transform the status quo.

Kirchheimer’s other important insight is his conception of the political trial as an act of political participation.²⁵ Beyond the elimination of the political adversary, political trials also serve as instruments of policy-authentication and

²⁰ Id at 49.

²¹ Id.

²² Id.

²³ Id.

²⁴ Id.

²⁵ Id at 7.

order vindication. In articulating this judicialization of mega-politics, Kirchheimer writes, ‘In proceedings to which the public has some access, authentication, the regularizing of the extraordinary, may under favourable circumstances be transformed into a deeper popular understanding and political participation.’²⁶ By synchronizing politics with a whole series of politico-juridical discourses, the political trial serves not only as a blunt instrument of terror and elimination but also as a device of authentication, vindication, legitimation, and transformation. Opining on this rather creative dimension of the trial, Kirchheimer notes, ‘such an undertaking—the vicarious participation of a virtually unlimited public in the unfolding of political reality, re-created and severely compressed for trial purposes into categories within easy reach of the public’s understanding—fashions a new political weapon.’²⁷

Writing few years after Kirchheimer, Judith N. Shklar suggested a conception of the political trial as a political event.²⁸ She defines the political trial as ‘a trial in which the prosecuting party, usually the regime in power aided by cooperative judiciary, tried to eliminate its political enemies.’²⁹ The political trial, Shklar notes, ‘pursues a very specific policy—the destruction, or at least the disgrace and disrepute, of a political opponent.’³⁰ Far from legalism’s normative claim about law’s autonomy from politics, Shklar claims, law is complicit in the politics of force relations. Not just law generally, even the trial, what Shklar calls ‘the supreme legalistic act,’ ‘like all political acts,’ serves a political agenda since ‘it does not take place in a vacuum. It is part of a whole complex of other institutions, habits and beliefs. . . . Law, in short, is politics, but not every form of politics is legalistic.’³¹ There, she asserts, ‘Law, in short, is politics’ and unpacks this assertion as a critique of a legal ideology she refers to as ‘liberal legalism.’³² Situating the trial within a whole series of inescapable historical and political realities that ultimately bear on it, she

²⁶ Id.

²⁷ Id.

²⁸ Shklar, *Legalism*, 149-50.

²⁹ Id at 149.

³⁰ Id.

³¹ Id at 145.

³² Id at 113-51.

displaces liberal legalism's naïve assumptions about law's inviolable separation from politics and other inescapable social formations.³³

The relevant question, Shklar contends, is not whether law is political, this being a foregone conclusion, it is, rather, 'what sort of politics can law maintain and reflect?' or what 'legalistic values' the political trial pursues.³⁴ 'It is the politics of persecution which political trials serve that is the real horror,' she contends, 'not the fact that courts are used to effect it.'³⁵ Her reflections on the prosecutions of the Nazis at Nuremberg and their counterparts in Tokyo are used to establish the reflexivity of legal discourses manoeuvred to justify the prosecution of offenses contrary to the principle of legality.³⁶ For Shklar, this is a key moment where political expedience replaces the rule of law, eviscerating legalism's normative claims and vindicating her contention that 'Law, in short, is Politics.'³⁷ As a result of the ambivalent positioning of the political trial between the realms of the legal and the political, Shklar claims, nowhere else is the 'conceptual narrowness' and ideological blindness of legalism is 'most starkly confronted' than in the interrogation of the normative landscape of political trials.³⁸ As such, the ideological insistence of legalism on the water-tight separation between law and politics is no longer tenable.³⁹

The political trial is an event.⁴⁰ Some of them become cultural artefacts capable of transforming and reformulating the law itself. As microcosms of conflicting narratives about the collective, the political trial presents us with an event - nation-shaking narratives that transform the way people think and act as members of a political community. The Dreyfus trial, to use Hannah Arendt's characterization, was 'a fore-gleam of the twentieth century.'⁴¹ Robert M. W.

³³ Id at 112.

³⁴ Id at 144.

³⁵ Id at 145.

³⁶ Id at 179-183.

³⁷ Id at 144; 216-217.

³⁸ Id at 112.

³⁹ Id at 111.

⁴⁰ Emiliios Christodoulidis, Political Trials as Events, in *Events: The Force of International Law*, Fluer Johns, Richard Joyce, Sundhya Pahuja, eds. (Abingdon: Routledge, 2011), 130.

⁴¹ Hannah Arendt, *The Origins of Totalitarianism*, (New York: Meridian, 1958), 93.

Kempner, one of the prosecuting attorneys at Nuremberg, described the Nuremberg trials as ‘the greatest history seminar ever held in the history of the world.’⁴² Nelson Mandela’s Rivonia trial has been recognized as the ‘the trial that changed South Africa.’⁴³ The trial of Klaus Barbie was described as ‘an enormous national psychodrama, psychotherapy on a nationwide scale’ while the Papon trial was dubbed as ‘the trial of the Vichy government.’⁴⁴ The Eichmann trial, Shoshana Felman notes, represents ‘“monumental contemplation of the past,” a ‘dramatic’ and ‘totalizing’ deployment of the trial as a stage for ‘historic justice.’⁴⁵

This notion of the trial as cultural artefact of unparalleled historical and political significance is the thesis developed in Ron Christenson’s ‘Political Trials: Gordian Knots in the Law.’ In his poignant formulation, political trials ‘embody such paradigmatic and society shaking stories’ that ‘society’s common understanding of basic issues of politics drives from them.’⁴⁶ A sphere of communicative action sanctioned by supposedly rational system of rules, the political trial confronts fundamental questions of justice, value, and political loyalty capable of engaging the common deliberation of the *body politic*.⁴⁷ In that, they ‘reflect the human condition’ and perform political imperatives that cannot be validly explained within law’s normative coordinates.

Attentive to the ensemble captured by the subtitle of his book, *Gordian knots in the law*⁴⁸, Christenson emphasizes on the power of stories. He writes:

⁴² Lawrence Douglas, *Memory of Judgment: Making Law and History in the Trials of the Holocaust*, (New Heaven: Yale University Press, 2001), 2.

⁴³ See the Famous Trial Website, <<http://law2.umkc.edu/faculty/projects/ftrials/mandela/mandelahome.html>>, (accessed 16 May 2011).

⁴⁴ Richard J. Golsan, *Memory and Justice on Trial: The Papon Affair*, eds., trans., by Lucy B. Goslan and Richard J. Goslan, (New York: Routledge, 2000), xi.

⁴⁵ Shoshana Felman, *The Juridical Unconscious, Trials and Traumas in the Twentieth Century*, (Cambridge: Harvard University Press, 2002), 112.

⁴⁶ Ron Christenson, *Political Trials: Gordian Knots in the Law*, (Oxford: Transaction Books, 1986), 8.

⁴⁷ See for example Barbara Falk, *Making Sense of Political Trials: Causes and Categories*, Occasional Paper, No. VIII, (2008). Falk argues that “Trials are also public narratives par excellence, stories of societal and individual conflicts great and small, ritualized and state sanctioned exercises in adversarial struggle. Trials educate, excite, and pontificate and are exhausting and compelling in equal measure.”

⁴⁸ Christenson, *Political Trials*, 9. ‘Gordius is said to have tied a knot so convoluted and tight that whoever was skillful enough to untie it would command all Asia. Many made the attempt, but none untied the knot. When Alexander the Great failed, he whipped out his sword and cut the knot. Political trials present

No matter how distilled the stories become and how thick the code books, the spirit, if not the body, of the law is in the stories. Certain stories, that is. They are the ones that shape our thinking about the dilemmas of law, influence our sense of justice, and change our morality. They do more. They provide the crucible for defining and refining its identity.⁴⁹

Central to Christenson's framework is a normative distinction between political trials which promote legalistic values and those enterprises of terror and elimination written off as political *par excellence*.⁵⁰ By identifying political trials that confront the basic dilemmas of law and politics—representation, responsibility, nationalism, dissent, and former regime officials—he demonstrates the hegemonic and transformative potential of narratives in political trials. Through this emphasis on the transformative power of stories, Christenson urges us to move away from a pejorative conception of the concept of political trials.⁵¹ While most political trials are indeed authentic political events the sole purpose of which is repression and domination, Christenson argues, there are transformative political trials that 'shape our thinking about the dilemmas of law, influence our sense of justice,' and refine our identity as people.⁵² He writes, 'Certain political trials are creative, placing before society basic dilemmas which are clarified through the trial.'⁵³ They are profound moments that provoke public reflection on basic but neglected questions of foundational significance, and compel the public to examine its founding values and principles.

Trials are also inherently intertwined with the clarification of the historical record, the edification of history and memory. Although law is not a particularly effective instrument for comprehending history and memory, the courtroom has become one of the most significant institutional vehicle for the edification of history and the construction of collective memory. In coming to terms with

Gordian knots. While a court may cut through the issues in a sharp decision—the defendant convicted or acquitted—the dilemmas . . . remain.'

⁴⁹ Id at 7.

⁵⁰ Id at 12-14.

⁵¹ Id.

⁵² Id at 7-8.

⁵³ Id at 6.

‘momentous events’ of profound reverberation in the lives of political communities— ‘wars, revolutions, economic depressions, large-scale strikes and riots, and genocides’—trials are effective sites of power-struggle over the terms of history and memory. Richard Wilson writes: ‘criminal trials are now prime venues at which . . . history is investigated . . . and eventually stamped with the imprimatur of a legal judgment.’⁵⁴ In ‘Between Impunity and Show Trials,’ Martti Koskenniemi argues that ‘The engagement of a court with ‘truth’ and ‘memory’ is . . . always an engagement with political antagonism, and nowhere more so than in dealing with events of wide ranging international and moral significance.’⁵⁵

From a different angle, Vivian Curran, argues that ‘The trial can be an ideal medium for representing memory, so long as the concern is to control meaning according to present perspectives, to concretize a normative position.’⁵⁶ Whatever the limit of law’s ability of representation and disclosure of the past, this representation is necessarily partial and selective. The past becomes a privileged site of inquiry, history becomes an object of power-struggle over what must be actualized and repressed in the selective recounting.⁵⁷ As a vehicle for representation of collective trauma, and guilt, regimes deploy their courts as technologies of power for crafting an uncontested official history and ‘the cultivation of collective memory.’⁵⁸

This is the thesis put forth by Lawrence Douglas, in *The Memory of Judgment: Making Law and History in the Trials of the Holocaust*.⁵⁹ Cutting through the major trials of the Holocaust from the Nuremberg to the Eichmann trial, from the trial of John Demjanjuk to Klaus Barbie’s and Ernst Zundel, Douglas

⁵⁴ Richard Ashby Wilson, *Writing History in International Criminal Trials*, (Cambridge: Cambridge University Press, 2011), viii.

⁵⁵ Martti Koskenniemi, *Between Impunity and Show Trials* 6 *Max Planck Yearbook of United Nations Law*, 1 (2002), 25.

⁵⁶ Vivian G. Curran, *The Legalization of Racism in a Constitutional State: Democracies Suicide in Vichy France*, 50 (1) *Hastings Law Journal*, (1998-99), 86-87.

⁵⁷ See Emiliios Christodoulidis and Scott Veitch, *Reflections on Law and Memory*, in Suzanne Karstedt, eds. *Legal Institutions and Collective Memory*, (Portland: Hart Publishing, 2009), 63.

⁵⁸ Marouf Hasain Jr., *Rhetorical Vectors of Memory in National and International Holocaust Trials*, (East Land: Michigan State University Press, 2006), 5.

⁵⁹ Douglas, *Memory of Judgement*, 1-7.

conceives perpetrator trials as necessarily tied to the collective interest and therefore to history and memory.⁶⁰ Emphasizing the use of perpetrator trial as a vehicle for ‘historical instruction and memory reconstruction,’ Douglas suggests a pedagogic conception of the trial that he terms ‘didactic legality.’⁶¹ In his view, perpetrator trials necessarily transcend the narrow question of guilt and regress into the terrain of history and memory.⁶² He writes, ‘. . . courts are invariably thrust into the position of looking into the larger sweep of history and making visible the efficacy of the law as a tool of such inquiry.’⁶³ Notwithstanding Douglas’s hegemonic account of law and history, his notion of didactic legality offers an interesting insight into the notion of what he refers to as ‘narrative jurisprudence.’⁶⁴

4.3. Beyond a Normative Conception of the Political Trial

The subject-matter of the political trial is as vast as politics itself. The key texts devoted to the study of the topic differ in their normative orientations, subject-matter emphasis, and framework of analysis. As their analytic framework and normative assumptions vary, so does their consideration of the utility of a political trial in the pursuit of a politically just society. Although they recognize and probably justify political trials in situations of ‘necessity,’ they have differing views of whether a political trial can contribute to the pursuit of a more perfect political polity. Despite obvious differences, however, there are theoretical and methodological parallels that shape and inform their approaches to the political trial. They all privilege juridico-philosophical approach, and overemphasize the juridical and institutional dimension of the trial.

Although the most comprehensive account of the political trial yet, Kirchheimer’s ‘Political Justice’ remains a normative critique that places too heavy an emphasis on the vehicle, the court. As he put it, ‘rather than giving a

⁶⁰ Id at 257.

⁶¹ Id at 2, 27, 44.

⁶² Id at 69.

⁶³ Lawrence Douglas, Perpetrator Proceedings and Didactic Trials, in Antony Duff, Lindsay Farmer, Sandra Marshall, and Victor Tadros, *The Trial on Trial II: Judgment and Calling to Account* (Oxford: Hart Publishing, 2006), 192.

⁶⁴ Id at 112.

panorama of the major political contests which have passed across the legal stage,' 'Political Justice' 'relate[s] the political content to the juridical form under which it takes place.'⁶⁵ While I want to hold on to his central insights, namely, the political trial as struggle in power-relations, and as a political participation, Kirchheimer's account of the political trial remained strongly normative, places too much emphasis on the vehicle, and adopts too juridical a conception of power—power as repressive and prohibitive. As a result, Kirchheimer's account ignores another important dimension of the courtroom: the courtroom as one of the most productive spaces of resistance and transformation. If, as Kirchheimer aptly put it, 'court action is called upon to exert influence,' that is, 'to upset—fray, undermine, or destroy—existing power positions,' surely it is the political dimension that constitute the epicentre of the political trial, and gives it its distinctive colour.⁶⁶ In a world in which power-relations are discursive, where power-struggles operate through truth-bearing discourses that are effects of the power-knowledge regimes, this framework for understanding and articulating the political trial does not offer an adequate explanation of the transversal relationship between domination and resistance.

The political trial is a manifestation of a long submerged crisis of sovereignty, politics, and society. The moment of the political trial signifies the surface appearance of a problem that is both at the depth and at the surface. My aim is to problematize this crisis that appears on the surface with the view to understanding the constitutive conditions that condition the present. This requires, not a juridico-philosophic inquiry, but a historico-political problematization of the present. Drawing on resources from Foucauldian genealogy, I want to capture -understand and articulate—this contingent and complex ensemble called the political trial according to the Foucauldian 'strategies of knowledge and power.'⁶⁷

In his genealogical investigation of sovereignty, Foucault distinguishes between juridical power, and disciplinary power. Foucault tells us that we should not

⁶⁵ Kirchheimer, *Political Justice*, viii.

⁶⁶ *Id* at 50.

⁶⁷ Michel Foucault, *The History of Sexuality: The Will to Knowledge*, trans. Robert Hurley, (London: Penguin Books, 1976), 105-6.

‘concentrate the study of the punishment mechanisms on the ‘repressive’ effects alone, or their punishment aspects alone, but situate them in a whole series of their possible positive effects.’⁶⁸ He suggests that we ‘regard punishment as a political tactic’ of a very specific nature within the broader circuits of power-knowledge.⁶⁹ To grasp the repressive-productive schematic at the heart of complex social relations such as punishment and discourses such as sexuality, domination, security, immigration, asylum, etc., ‘we must cease once and for all to describe the effects of power in negative terms: it ‘excludes,’ it ‘represses,’ it ‘censors,’ it ‘abstracts,’ it ‘masks,’ it ‘conceals.’ In fact, power produces; it produces reality; it produces domains of objects and rituals of truth.’⁷⁰ While the political trial is predominantly repressive and aims at perpetuating and sustaining hegemonic relations, it is structurally productive. It produces meanings, truths, values, and other power-effects that undermine, upset, and displace the ‘multiple relations of power [that] traverse, characterize, and constitute the social body.’⁷¹ As struggle in relations of power, the political trial neatly fits into this Foucauldian schema.

Extending this insight into the terrain of the political trial, I want to explore both the repressive and productive aspects of struggles in the courtroom, with emphasis on how power and knowledge articulate each other within legal discourses and generate truth effects. According to this logic, a political trial the explicit object of which is repression is not merely repressive, it is also productive: it produces legitimacy, visibility, voice, docile bodies etc. A political trial aimed at repressing the visibility and audibility of the foe is not only repressive, it is also productive: it produces audibility and visibility for the very foe it is meant to silence and suppress. The same can be said of a successful political trial the object of which is to produce transformative power effect.

⁶⁸ See Michel Foucault, *Discipline and Punish*, (London: Penguin Books Ltd., 1975), 23.

⁶⁹ *Id.*

⁷⁰ *Id.* at 194.

⁷¹ Michel Foucault, *Society Must be Defended: Lectures at the Collège De France 1975-76*, eds. Mauro Bertani and Alessandro Fontana, trans. David Macey, (London: Penguin Books, 2003), 24.

This thesis seeks to go beyond a normative approach to political trials to shed light on the micro-politics of domination and resistance in the courtroom. Just as Foucault conceives politics as ‘the continuation of war by other means,’ we can conceptualize the political trial as a continuation of politics by a *legal* means. Inverting Clausewitz’s aphorism, Foucault says, ‘within this ‘civil peace,’ these political struggles, these clashes over and with power, these modifications of relations of force—the shifting balance, the reversals—in a political system, all these things must be interpreted as so many episodes, fragmentations, and displacements of the war itself.’⁷² In the same fashion—the increasing juridification of the friend-enemy relations in politics, the tactical deployment of the entire sovereignty of a nation against the political foe, the strategic use of the devices of justice as a technology of order-preservation and the biopolitical logic that organizes and structures its specific modality of deployment, the plasticity and inexhaustible richness of the legal discourse—all these discursive and institutional ensembles constituent of the political trial can be analyzed as a continuation of the struggle by legal means. Within this paradigm, the court is merely used as a vehicle to re-enact, amplify, filter, project and archive the battle-front that runs throughout the social-body; generating and presenting new domains of knowledge, politico-cultural meanings and values.

4.4. Toward a Performative Conception of the Political Trial

One of the most paradoxical legacies of the Enlightenment is the establishment of reason and objective truth as the central elements of modernity and the normative basis for the exercise of public authority.⁷³ The institution of the judiciary is normatively inscribed as independent and guardian of individual freedom and liberty.⁷⁴ The ‘triumph of Weberian legal-rational authority,’ further reinforced the centrality of reason and contributed to enhancing the legitimacy of courts.⁷⁵ Within the Weberian paradigm, the trial is seen as the

⁷² Id at 16.

⁷³ Genevieve Lloyd, *Enlightenment Shadows*, (Oxford: Oxford University Press, 2013), 24.

⁷⁴ See David Lemmings, *The Independence of the Judiciary in 18th Century England*, in Peter Birks, eds. *The Life of the Law: proceedings of the 10th British Legal History Conference*, (London: 1993), 127.

⁷⁵ Falk, *Making Sense of Political Trials*, 5.

public exercise of reason.⁷⁶ The distribution of speaking positions within the deliberative paradigm of the trial guarantees the rationality and deliberative character of what Habermas calls the ‘ideal speech situation.’⁷⁷ In reality, however, trials are less normative and more performative. Although modernity has invested the institution of the trial with an aura of rationality and reason that goes to account for its normativity, what happens in the courtroom—the story, drama, sarcasm, irony, narrative, the emotion, catharsis, etcetera—are inescapable performative facts that inevitably bear on the trial and affect its outcome.

As ‘public narratives,’ and ‘ritualized and state-sanctioned’ contest, the trial does more than it says it does. It has an institutional life and meaning but it assumes both a dramatic and tragic form.⁷⁸ Characterizing this century as ‘the century of the trial,’ Lindsay Farmer identifies both the virtues and dangers of our fascination with the trial.⁷⁹ In our century, Farmer argues, trials are used ‘to establish an official historical account of certain events; to give voice to forgotten or silenced victims; and to reveal truths about our society and ourselves.’⁸⁰ In serving as vehicles for writing history and reconstructing memory, the trial exceeds its normative inscription and institutional function. Farmer notes, ‘in a society obsessed by celebrity, gesture, and character, the trial may be doing little more than’ holding perpetrators accountable.⁸¹ As re-enactments of social and political dramas of life, trials cannot be explained in purely normative terms. In fact, if we take the actual materiality of the trial seriously, its central appeal lies not in its normative architecture but in its performative ordering. As Judge William Dwyer writes, ‘Trial by jury succeeded in part because it appealed to the same irrational values that were served so

⁷⁶ Id.

⁷⁷ Jurgen Habermas, *Between Facts and Norms*, (Cambridge, MIT Press, 1996), 228.

⁷⁸ Falk, *Making Sense of Political Trials*, 5.

⁷⁹ Lindsay Farmer, *Trials*, in Austin Sarat, Matthew Anderson, and Catherine O. Frank, *Law and the Humanities: An Introduction*, (Cambridge: Cambridge University Press, 2010), 476-77.

⁸⁰ Id at 477.

⁸¹ Id.

well by the old methods. It still does. Drama and catharsis are provided on a scale rivalling that of team sports.’⁸²

Political trials are not legal events in which self-evident rules are applied to inviolate sociological or historical facts. Although the legitimacy of the criminal trial depends on its ability to offer a speaking position to the defendant, this is not a communicative offer designed to produce ‘the best, most rational, least biased arguments that most precisely express an interlocutor’s ideas and interests.’⁸³ In fact, given the performative politics characteristic of political trials, a politics that at once contests the normative legitimacy of the existing order and imagines a new political order, the very notion of ‘ideal speech situation’ inevitably excludes speeches that are not intelligible within the constituted order.

In a revealing intervention in the Foucault - Habermas debate, Kulynych offers a critique of both approaches to political participation.⁸⁴ Debunking the Habermasian account of an ‘ideal speech situation,’ she argues, ‘The ideal speech situation establishes a norm of rational interaction that is defined by the very types of interaction it excludes.’⁸⁵ Kulynych’s point is a powerful illustration of the terms under which speaking positions are offered in the trial. A communication is rational and ideal only insofar as it confirms to the terms under which the system distributes speaking positions to speaking bodies. That is what qualifies ideal as ideal or rational as rational. Irrespective of normative ideals that govern and structure the domain of the trial, the excluded, the occupied, the colonized, the gendered and racialized subject enters the communicative landscape on a tenuous plane. Furthermore, the violence of exclusion that inaugurates the founding moment and forever instigates militant confrontations, the *aporia* that never ceases to expose the fictions on the basis of which instituted authorities form the truth of their justice, the performative

⁸² William Dwyer, *In the Hands of the People: The Trial Jury’s Origins, triumphs, troubles, and Future in American Democracy* (New York: Thomas Dunne Books, 2002), 36; See also Robert P. Burns, *The Death of the American Trial*, (Chicago: The University of Chicago Press, 2009), 3;

⁸³ Jessica J. Kulynych, *Performing Politics: Foucault, Habermas, and Postmodern Participation*, 30 (2) *Polity*, 315 (1997), 345.

⁸⁴ *Id* at 317-24.

⁸⁵ *Id* at 324.

logic that traverses key moments of the legal landscape and dislocates the normative elements of law renders the courtroom a performative site that re-enacts the deeper political conflict that runs through society.

Let me identify three categories of performatives central to political trials. First, typically, political trials proper are contestations over power between the sovereign and the subject. The conflict moves beyond the juridical to history and politics, taking a performative turn, to unravel what Foucault called ‘the battle cries that can be heard beneath the formulas of right, in the dissymmetry of forces that lies beneath the equilibrium of justice.’⁸⁶ Those engaged in the struggle for transformation of the status quo seek to summon the consciousness of the *body politic* by drawing attention to the myth, the fiction and the paradox that undergirds the imposed order of justice, and suggest that there is nothing inevitable about the present and that things could have been different. By revealing the contingency of origin, and the fiction that lies at the heart of the juridical order, they seek to make a new fiction conceivable and intelligible. This contestation that calls into being a new order is ‘non-referential,’ in that it does not refer to any ‘pre-existing conditions,’ does not have an antecedent referent that it expresses. In short, it is a performative act that imagines beyond instituted modalities to articulate a counter fiction to counter the original fiction; ‘fiction against fiction,’ to create the possibility, as Derrida says, for an ‘event, decision, responsibility, ethics, or politics.’⁸⁷

If the original hegemonic appropriation of the performative contributed to the dislocation of contingency and justice from the orbit of law, instituting a coherent unity at one with itself, its subversive deployment seeks to subject law to the interruptive and endless demands of justice, responsibility, dignity, and ethics. It is here, then, at this juncture, where a new fiction displaces the original fiction, that the political trial becomes subversively performative. By reactivating local knowledges to re-politicize the juridical space, those who seek to transform the present intervene to provide a different reading of sovereignty, subjectivity, and politics with the view to revealing the concealing

⁸⁶ Foucault, *Society Must be Defended*, 56.

⁸⁷ Stephen Curkpatrick, *Mandela’s “Force of Law”*, 41 (2) *Sophia*, 63 (2002) 66.

logic of the normative structure and its juridico-philosophical knowledges. Through performative reinscription, they aim to disrupt the 'legitimate fictions' on which the truth of its justice is founded.

Let me offer the following courtroom exchange to illustrate this point further. The defendant is Nelson Mandela, and the space is the Old Synagogue Court, Pretoria:

[M]y objection is that I consider myself neither morally nor legally obliged to obey laws made by a parliament in which I am not represented. That the will of the people is the basis of the authority of government is a principle universally acknowledged as sacred throughout the civilized world, and constitutes the basic foundations of freedom and justice. It is understandable why citizens, who have the vote as well as the right to direct representation in the country's governing bodies, should be morally and legally bound by the laws governing the country. It should be equally understandable why we, as Africans, should adopt the attitude that we are neither morally nor legally bound to obey laws which we have not made, nor can we be expected to have confidence in courts which enforce such laws.⁸⁸

Here, we have a narrative that invokes the discourse of freedom and justice to denounce and protest authority, to attack it and make demand on it. It is a paradigmatic story of the political trial that marks, as Kirchheimer says, 'its peculiar problem areas.'⁸⁹ Speaking in the name of and on behalf of Africans, deploying meta-level discourses of freedom and justice that are beyond Apartheid's determinate legality, Mandela destabilizes the normative basis of Apartheid to sit in judgment over him. By disturbing the normative basis of Apartheid's infelicitous performative, Mandela calls into being a new conception of the normative that discloses a different kind of world, a new form of subject, and a new normative standard. In challenging the authority of the court to sit in judgment over those who have no representation, those subject to the violence of exclusion and dispossession, Mandela uses what Christodoulidis calls 'a logic of dislocation' to unsettle the system from underneath its 'normative mainstay and explanatory schemas.'⁹⁰ This, then, is not a normative intervention, but a

⁸⁸ Nelson Mandela, Transcript, The Incitement Trial, Nelson Mandela's First Court Statement, available at <http://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01600/05lv01624/06lv01625.htm>, (Last accessed 06 September 2013).

⁸⁹ Kirchheimer, Political Justice, 49.

⁹⁰ Emilios Christodoulidis, Strategies of Rupture, 20 Law and Critique, 3 (2009), 17.

performative resignification that appropriates historical knowledges to activate politics and ask questions that are world disclosing. As a story that speaks of ‘rights’ in strategic political terms, his contestation cannot be explained in normative terms for its very objection is to reveal the contingency of the normative and suggest an alternative meaning of the normative.

Second, notwithstanding the politics of the trial, the trial itself is performative—as in theatrical. As Milner Ball argues, the trial is a judicial theatre that performs ‘perceptual judgments of past events.’⁹¹ The narrativity of the trial is central to its ability to historicize, educate, and pontificate. As Alasdair MacIntyre writes in ‘After Virtue,’ ‘Man is, in his actions and practice, as well as in his fictions, essentially a story-telling animal.’⁹² From the opening statement to evidence, to direct examination, cross-examination, and verdict, the stories filtered into the courtroom perform the parties’ account of events.⁹³ The opening statement performs the truth of the evidence that will be presented by both sides. Mediated and constrained by procedural and evidentiary rules—these narratives dramatize and perform innocence or guilt. As Ball further notes, evidence is ‘a peculiar performance that both complicates the tension between the competing stories and creates tension within each side’s version of its own story.’⁹⁴ The same thing can be said of the closing argument, the verdict, and the judgment.

The discursive universe that frames these performative moments—words, forms, ways of thinking, rituals and ceremonials—are inherently performative. Far from being the ‘ideal speech situation’ that normativists imagine, the narrative form that structures the communicative offer in the courtroom is embodied, ‘exclusive, learned, and gendered.’⁹⁵ They are dramatic, emotive, politicized, racialized, ethnocentric, and ‘richly colored with rhetoric, gesture, humor, spirit, or affectation.’⁹⁶ As Kulynych argues, ‘The literary aspects of debate—

⁹¹ S. Ball, *All the Law’s Stage*, 11(2) *Cardozo Studies in Law and Literature*, 215 (1999), 216.

⁹² Alasdair MacIntyre, *After Virtue*, quoted in Ron Christenson, *Political trials*, 256.

⁹³ S. Ball, *All the Law’s Stage*, 216-17.

⁹⁴ *Id* at 216.

⁹⁵ Kulynych, *Performing Politics*, 323.

⁹⁶ *Id* at 324-25.

irony, satire, sarcasm, and wit—work precisely on the slippage between what is said and what is meant, or what can be said and what can't be conceived.⁹⁷ As I argued above, the stories recounted in political trials are recounted differently. From the opening statement to the direct examination, and cross-examination, 'recounting differently' is not a mode of deliberation. It is an agonistic expression of a claim that cannot be captured or exhausted within the realm of deliberative rationality.⁹⁸ Indeed, strategies used by lawyers to frustrate, misdirect, and confuse, the jury and the bench such as humour are visceral and cannot be sufficiently explained in normative terms.

Third, the trial is performative in a related but slightly different sense. Perhaps this relates to the rituals and ceremonials built around courts. In 'Democracy in America,' Alexis De Tocqueville offers an emblematic account of this performative authority vested in courts: 'It is a strange thing what authority the opinion of mankind generally grants to the intervention of courts. It clings even to the mere appearance of justice long after the substance has evaporated; it lends bodily form to the shadow of the law.'⁹⁹ Here we have an image of a judicial space with a ritual power of a distinctive quality - one that generates and presents its own truth not reducible to the actual events of the trial.¹⁰⁰ The narratives filtered into the public register continue to act even long after the substance of the verdict is eviscerated as 'wrongful' or 'miscarriage of justice.' The image of the court generates and presents law's normativity, lending 'bodily form to the shadow of the law.'¹⁰¹ It is a ritual moment where the adjudicative act of the court retains a 'life' and 'history' of its own, breaking from the instance of its invocation and 'clings,' as Tocqueville says, to the memory of the subject 'long after the substance has evaporated.'¹⁰² Speaking of a ritual moment, Judith Butler writes, 'The 'moment' in ritual is a condensed historicity: it exceeds itself in past and future directions, an effect of prior and

⁹⁷ Id at 345.

⁹⁸ See Kulynych, *Performing Politics*, 345.

⁹⁹ Alexis De Tocqueville, *Democracy in America*, trans. Henry Reeve, (A Penn State Electronic Series, 2002), 160.

¹⁰⁰ Id.

¹⁰¹ Id.

¹⁰² Id; See also Alan Dershowitz, *America on Trial: Inside the Legal Battles That Transformed Our Nation*, (Boston: Warner Books, 2004), xiv.

future invocations that constitute and escape the instance of utterance.’¹⁰³ It is a discursive space capable of performing politics, history, memory, justice, and generating politico-cultural meanings. Indeed, nowhere else is this historicity evident than in world famous political trials. They are microcosms of the era and the generation in which they took place. Who can account for the history of political philosophy and the tradition of enlightened inquiry without regard to Socrates’ Apology, or Christianity without an account of the trial of Jesus, or for that matter the history of France, South Africa, and Israel without an account of the trials of Alfred Dreyfus, Nelson Mandela, and Adolf Eichmann respectively?

Finally, if the trial is performative, the political trial is a double performative. In the political trial, it is not merely the trial that is performative, but also the politics that is at once at the depth of the order and all across the entire structure of the trial. To appreciate the multivalent ways in which ‘historically significant trials’—those which ‘transcended time and space’ and secured a separate life of their own—have been redeployed as strategic resources in similar struggles, one only need to look at the trials of Socrates, Jesus, Joan of Arc, Suzanne Anthony, Nelson Mandela, and Eugene Debs.¹⁰⁴ In what is now known as ‘Letter smuggled from Birmingham City Jail,’ Martin Luther King Jr. invokes Socrates’ testimony in the Apology:

Just as Socrates felt that it was necessary to create a tension in the mind so that individuals could arise from the bondage of myths and half-truths to the unfettered realm of creative analysis and objective appraisal, we must see the need of having non-violent gadflies to create that kind of tension in society that will help men rise from the dark depths of prejudice and racism to the majestic heights of understanding and brotherhood.¹⁰⁵

As will be discussed in chapter seven in detail, Marwan Barghouti, for example, invited Nelson Mandela to draw parallel between his trial and Nelson Mandela’s trials under Apartheid. From Socrates’ Apology to Jesus’ ‘pleading before Pilate,’ from the trial of Joan of Arc in the 15th century to the trial of Suzanne Anthony in the 19th century, from Eugene Deb’s testimony in 1918 to Martin

¹⁰³ Judith Butler, *Excitable Speeches: A Politics of the Performative*, (New York: Routledge, 1997), 3.

¹⁰⁴ For an account of these trials, see generally, Christenson, *Political Trials*.

¹⁰⁵ James M. Washington, *I have A Dream: Writings and Speeches that Changed the World* (New York: HarperCollins Publishers, 1992), 87

Luther King's 'Letter from Birmingham City Jail,' from Nelson Mandela's 'I am Prepared to Die Speech' to the eventful spectacles of the Chicago Eight Conspiracy Trial, from the trial of Slobodan Milosevic to the trial of Saddam Hussein, we bear witness to something far more profound and enduring than the life and liberty of the litigants on trial. Underneath the politics of domination and resistance that frames, and animates the turn to this new weapon is a politics of 'knowledge production and truth-generation' that taps the discursive environment created by the event to filter new images and alternative realities into the public domain.

Any convincing conception of the political trial must take a nuanced and complex account of the mechanics of this 'weapon'; how it is articulated, what strategy it deploys, what form of knowledge and discourse informs it, who participates in the production of historical narratives, who controls the means of narrative production, and what effect all these produce. I am interested here, therefore, not in the political use of the courtroom as such, but in the configuration and reconfiguration of the power-knowledge-discourse matrix to generate discourses and truths of domination or resistance. If both technologies of domination and resistance are bound up with certain forms of knowledge and deployed by forms of power mutually at odds with one another, in what terms can we explain the discourse these two technologies invoke?

4.5. The Power-Knowledge-Discourse Complex in the Courtroom

So far, I have presented the case for a performative conception of the political trial. In the first section, I have explored landmark scholarship on the political trial to extrapolate two salient features of the political trial: an understanding of the political trial as struggle in power-relations, and the political trial as a mode of political participation. Arguing that contemporary power operates through the production of domains of knowledge and regimes of truth, I suggested a conception of the political trial as a power-knowledge -discourse constellation central to the politics of domination and resistance. Working through Foucault, this section will try to show how the power-knowledge-discourse constellation is 'formulated, circulated and set to work' and generate hegemonic or subversive effects of power in the courtroom.

In 'The History of Sexuality,' Foucault formulates a 'rule' that explicates 'the tactical polyvalence of discourses.'¹⁰⁶ There, he argues for a conception of discourse that goes beyond the established hierarchies, dualisms and binaries and pays attention to the polymorphic strategic convergence of 'discursive elements.'¹⁰⁷ The 'tactical polyvalence' of a discourse requires, he argues, a reconstruction of 'discursive elements' according to what it reveals and conceals; the enunciation it supports and subverts, the specific technology that governs its spatial-material-temporal configuration.¹⁰⁸ He says, we must reconstruct particular discursive ensembles according to 'who is speaking, his position of power, [and] the institutional context in which he happens to be situated . . . the shifts and reutilizations of identical formulas for contrary objectives that it also includes.'¹⁰⁹ In his own words:

Discourses are not once and for all subservient to power or raised up against it, any more than silences are. We must make allowance for the complex and unstable process whereby discourse can be both an instrument and an effect of power, but also a hindrance, a stumbling-block, a point of resistance and a starting point for opposing strategy. Discourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart it.¹¹⁰

This political-strategic thinking that conceives discourse in terms of its strategic relationship with power is a textbook case of how the power-knowledge-discourse matrix informs technologies of domination and resistance in the courtroom. The legal discourse is a paradigm case that embodies this reflexivity that Foucault calls 'tactical polyvalence.' The indeterminacy of legal discourses provides the raw material that keeps law open to unprefigurative future possibilities of resignification.

¹⁰⁶ Foucault, *The History of Sexuality*, at 100.

¹⁰⁷ Id. He writes, 'we must not imagine a world of discourse divided between accepted discourse and excluded discourse, or between the dominant discourse and the dominated one; but as a multiplicity of discursive elements that can come into play in various strategies.'

¹⁰⁸ Id.

¹⁰⁹ Id.

¹¹⁰ Id at 101.

With the appearance of the new subject in history who began ‘to speak in history, to recount history . . . reorganize the past, events, rights, injustices, defeats, and victories around himself and his own destiny,’ as Foucault writes, the same discourses that were once used to dominate, colonize, and oppress have begun to be resignified as ‘a starting point for opposing strategy’ and redirected against the colonizer and the oppressor.¹¹¹ Slavoj Žižek for example speaks of the ways in which the universal in the discourse of universal human rights has been turned against the very forces that formulated and imposed this discourse: ‘something that was originally an ideological edifice imposed by colonizers is all of a sudden taken over by their subjects as a means to articulate their ‘authentic’ grievances.’¹¹²

This ‘tactical polyvalence’ extends well beyond legal discourses, and pervades the legal space. In his critique of the French criminal justice system, Foucault writes, ‘The judicial system is neither a ghetto nor a fortress, that it is fragile, permeable, and transparent, in spite of its fogs.’¹¹³ It is reflexive, ‘as flexible as one pleases,’ to admit the configuration and reconfiguration of its temporal, material, and spatial coordinates.¹¹⁴ Although these attributes of the legal space—fragility, permeability and flexibility—can be appropriated by power to perpetuate existing relationships of domination and inequality, Foucault’s observation points to another significant dimension: the state cannot totalize the political appropriation of these polyvalent qualities of legal discourses and its spaces. The system is replete with cracks, incongruities, and fissures that form the material fabric of contestation in political trials. In spite of its heavily policed borders, gate-keeping discourses are not fortresses that cannot be infiltrated by subversive discourses.

No longer ‘a daily and permanent display of royal power,’ the courtroom has become, as Kirchheimer observed, the ‘new dimension through which many types of political regimes, as well as their foes affirm their policies and

¹¹¹ Id.

¹¹² See also Slavoj Žižek, *Against Human Rights*, 34 *New Left Review*, 115 (2005), 130.

¹¹³ Foucault, *Milk and Lemon*, in *Power: Essential Works*, 436.

¹¹⁴ Id.

integrate the population into their political goals.’¹¹⁵ While performative sovereignty still determines what can be legitimately speakable and what must not, it does not really claim hermeneutic monopoly over the domain of justice and discourses of the rule of law, legality, legitimacy, public safety, national security, etc, at least within liberal constitutional democracies. As Hans Lindahl writes, ‘the idea that the interpretation favoured by the legal authority—and only that interpretation—flows inexorably from the applicable norm, is an illusion that merely masks the discretionary power exercised by legal authorities.’¹¹⁶ If we put this in Foucauldian terms, we may say, the legal discourse is not merely ‘an instrument and an effect of power, but also a hindrance, a stumbling-block, a point of resistance and a starting point for opposing strategy.’¹¹⁷ In fact, the normalizing and disciplinary mechanisms that Foucault traces to the 17th century, those mobile and tactile mechanisms designed to operate underneath the formal juridical frameworks; colonizing discourses of rights and investing the body to interiorize hegemonic norms, are not exclusively repressive. As Timothy Mitchell reminds us, ‘Disciplines can break down, counteract one another, or overreach. They offer spaces for manoeuvre and resistance, and can be turned to counter-hegemonic purposes.’¹¹⁸

It is this historico-political critique and struggle that synthesizes historical knowledges and legal discourses to generate and transmit power effects that I have been trying to describe. How it is that juridical power synthesizes political practices of the present with regimes of truth to sustain and consolidate an ‘apparatus (*dispositif*) of knowledge-power’ to generate hegemonic effects of power? How it is that resistant discourses activate politics, resist the dazzling light of sovereignty, reinvent themselves and their political universe? If the political trial is a power-knowledge formation, what legal strategies and tactics transform discursive dynamics—fissures, indeterminacies, discontinuities, cracks, myths, incongruities, and weak points—into what Kirchheimer called a

¹¹⁵ Kirchheimer, *Political Justice*, 17.

¹¹⁶ Hans Lindahl, *Dialectic and Revolution: Confronting Kelsen and Gadamer on Legal Interpretation*, 24(2) *Cardozo Law Review*, 770 (2003), 772.

¹¹⁷ Foucault, *Society Must be Defended*, 101.

¹¹⁸ Timothy Mitchell, *Colonizing Egypt*, (Berkeley: University of California Press, 1991), xi.

‘weapon’ of domination and resistance? Let us take a concrete example. Once again, the scene is the Old Synagogue Court, Pretoria, and the defendant is Nelson Mandela:

In its proper meaning equality before the law means the right to participate in the making of the laws by which one is governed, a constitution which guarantees democratic rights to all sections of the population, the right to approach the court for protection or relief in the case of the violation of rights guaranteed in the constitution, and the right to take part in the administration of justice as judges, magistrates, attorneys-general, law advisers and similar positions.¹¹⁹

Here is a classic account of what Butler would call discursive resignification.¹²⁰ It is an intervention in which the defendant infiltrates Apartheid’s complex of subjection to resignify and expand the responsive range of the discourse of the rule of law. Reformulating the principle of ‘equality before the law,’ he constructs a claim Apartheid can neither ‘contain’ nor ‘repress’ within its power-knowledge *dispositif*. Mandela reinscribes one of the central legitimizing legal discourses and imbues it with a meaning capable of re-politicizing not only the trial but also the very idea of ‘equality before the law’ as a constituent element of the rule of law. By identifying the state’s discourse about the ‘rule of law’ as an object of intervention, Mandela ‘imports a specific reflexivity that does not necessarily fall within, but . . . situate[s] itself incongruently’ to the State’s discourse on the rule of law.¹²¹

Using his speaking position as a defendant to expose Apartheid’s systematic deployment of the rule of law to produce ‘determinate effects,’ Mandela taps the rule of law, to ‘demand rights that have not been recognized’ while at the same time declaring war on the system through a declaration of rights. In the Foucauldian schema, Mandela’s political offensive ‘speaks of legitimate rights in order to declare war on laws.’¹²² In exposing how laws deceive and institutions of justice rationalize and justify technologies of domination, Mandela appropriates this legal discourse to transcend the questions of guilt and innocence; and

¹¹⁹ Nelson Mandela, *Long Walk to Freedom*, 79.

¹²⁰ J. Butler, *Bodies That Matter: On the Discursive Limits of Sex*, (New York: Routledge, 1999), 175.

¹²¹ Christodoulidis, *Strategies of Rupture*, 22.

¹²² Foucault, *Society Must be Defended*, 73.

activate politics to reveal the violence of exclusion on which the system's fictions of justice thrive.

His contention is that Apartheid deliberately and wickedly instrumentalized the rule of law, and the idea of equality before the law to normalize its racist violence. Using the speaking position offered by the trial, Mandela reconfigures the content and meaning of equality before the law to shame and expose Apartheid in the worst moral light possible. One of the *sine qua non* conditions of the right to 'equality before the law,' he argues, is the 'right to participate in the making of the laws by which one is governed, a constitution which guarantees democratic rights to all sections of the population.'¹²³ The 'right to equality before the law' does not stand in isolation. Instead, it is grounded in and validated by a social contract—the Freedom Charter—that recognizes the rights of its people to representation, and participation in the affairs of government, 'the right to approach the court for protection or relief . . . and 'the right to take part in the administration of justice.'¹²⁴

This, then, is not a juridico-philosophical discourse of sovereignty, but rather a performative-genealogical reconstruction aimed at resurrecting 'the battle cries that can be heard just beneath'¹²⁵ the codification of Apartheid legality. Using the principle of equality before the law as a starting point, his intervention reactivates historical knowledges of violence, and dispossession to infiltrate the racist order and disturb 'the knowledge of the system.' The deployment of historical knowledges of dispossession and inequality to reconfigure the meaning of 'equality before the law' generates a domain of knowledge and regimes of truth that will shape the terms of political debate both within and beyond South Africa. This knowledge aims at constituting and circulating a true discourse, a repertoire of liberation that compels people to register their objection against Apartheid, and move to act and transform it.

Of course, for Apartheid, equality before the law designates something much more specific and must be subject to the integrity of the concrete order. As

¹²³ Id.

¹²⁴ Id.

¹²⁵ Foucault, *Society Must be Defended*, 56.

Schmitt writes in ‘The Concept of the Political,’ ‘the rule of law means nothing else than the legitimation of a specific status quo, the preservation of which interests particularly those whose political power or economic advantage would stabilize itself in this law.’¹²⁶ According to this philosophic-juridical approach, the rule of law and equality before the law do not exist outside the concrete political order and could not have precedence over order. Their meaning is contingent on the existence of order. For the system, equality before the law is coded and that internal code does not recognize claims of constitutional significance such as representation, recognition, and participation. In spite of the principle of equality before the law, repressive and overtly racist laws specifically made to dehumanize Africans are deployed under the guise of law and legality. In Apartheid South Africa, the rule of law and equality before the law are not inconsistent with the ‘anti-constitutional constitution’ of the Boer republic and its codification and institutionalization of racial inequality. The ‘rule of law’ and ‘equality before the law,’ in this sense, simply degenerates into the rule of brute force. For the individual judge who conceives law as ‘a closed logical system,’ as H. L. A Hart does, Mandela’s pleas, however true, are ‘objections that cannot be heard.’¹²⁷

4.5.1. The Political Trial as a Site of Domination and Resistance

Every tool is a weapon if you hold it right.

—Ani DiFranco

The deployment of the trial as a ‘political weapon’ is a practice as old as antiquity. In his historico-political critique of sovereignty, Foucault considers the court as the mask for power. He says, ‘The court’s essential function is to constitute, to organize, a space for the daily and permanent display of royal power. The Court is basically a kind of permanent ritual operation that begins

¹²⁶ See Carl Schmitt, *the Concept of the Political*, trans. George Schwab, (Chicago: University of Chicago Press, 1996), 66.

¹²⁷ Emiliios Christodoulidis, *The Objection That Cannot be Heard: Communication and Legitimacy in the Courtroom*, in Antony Duff, Lindsay Farmer, Sandra Marshall, and Victor Tadros, *The Trial on Trial*, V.1, (Oxford: Hart Publishing, 2004), 179.

again every day and re-qualifies . . . the sovereign.’¹²⁸ ‘No matter whether the jurists were the king’s servants or his adversaries,’ Foucault continues, ‘the great edifices of juridical thought and juridical knowledge were always about royal power.’¹²⁹ According to this logic, then, the rituals and ceremonials of the courtroom have internal didactic logic that does not sit comfortably well with its normative inscription. By reiterating, reciting, and repeating the will of the sovereign and reinscribing it within the ambit of law, the court consolidates and secures sovereignty. As Foucault says, ‘The specific operation of court ritual and court ceremonial is to make his love affair sovereign, to make his food sovereign, and his going to bed ritual sovereign.’¹³⁰ The sovereignization of political conflicts, rather than the exercise of ‘public reason’ constitutes the court’s ‘essential function.’ The courts are the key sites of legitimation, rationalization and justification of the sovereign’s right to ‘decide who may live and who must die.’

As a technology of domination, the political trial consolidates and secures the constituted authorities and their view of the world. It produces images and concepts in the image of the instituted power by reinscribing unequal relationship of force into legal discourses to sustain and preserve it.¹³¹ By ‘enlisting the services of courts’¹³²—institutions normatively inscribed as agents of justice—‘in behalf of political goals,’¹³³ those in control of the emblem of sovereignty deploy gate-keeping technologies of power to preserve existing force relations.¹³⁴ In a more pointed passage, Foucault writes, ‘The system of right and the judiciary field are permanent vehicles for relations of domination, and for polymorphous techniques of subjugation.’¹³⁵ As the central ‘organizing principles behind the great juridical codes,’ sovereignty’s interest is nothing but the preservation of the status quo. By submitting the actions of its foes for

¹²⁸ Foucault, *Society Must be Defended*, 175.

¹²⁹ *Id.* at 26.

¹³⁰ *Id.* at 176.

¹³¹ *Id.* at 16.

¹³² Kirchheimer, *Political Justice*, 419.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Foucault, *Society Must be Defended*, at 27.

court scrutiny, the system at once eliminates its foes and vindicates the political order.¹³⁶ By authenticating regimes alternative realities and affixing it with the imprimatur of the judiciary, courts construct legitimacy for the power that stands behind it.¹³⁷ The participation of the judiciary in the disposition of regime adversaries ‘removes the fear of reprisals or liquidation from multitudes of possible victims.’¹³⁸ By scrupulously adhering to the rituals and canons of the courtroom, the state conceals technologies of domination and repression that operate to criminalize dissent and silence critique.¹³⁹ As Kirchheimer writes, ‘The more elaborate the paraphernalia of authentication, the greater the chance of vicarious popular participation in its conundrums.’¹⁴⁰ Whether it is aimed at the elimination of the foe, or the formulation, and circulation of a truthful discourse, whether it is intended to institute a particular interpretation of the past to construct an official memory, or the projection of a new reality in the image of the ruling class, one thing is certain: the courtroom is one of the most potent instruments of preservation.

However, this ‘permanent ritual operation’ that reinvigorates and vitalizes the political order is no longer the exclusive domain of sovereignty. Indeed, it has never been so. Since the first recorded political trials of the antiquity, the deployment of the legal system to silence critique almost always generates the opposite effect- it provides a platform for the very voice it tries to silence. From the trial of Socrates in the ancient Greece to the 19th century trials of sedition and treason, from the 20th century Stalinist show trials to the trials of communists, and dissidents in liberal democracies, to ‘terrorism’ trials today, political justice hardly proceeds according to prearranged set of rules. The communicative offer that makes the trial such an irresistible site of political justice cannot be at once communicative and silencing. If the Athenian Assembly succeeded in putting Socrates to death, the latter’s Apology survived for over two millennia and served as the incarnation of Western philosophical thought. The same can be said of the trial of Galileo, the trial of Martin Luther

¹³⁶ Joel B. Grossman, *Political Justice in the Democratic State*, 8 (3) *Polity*, 358 (1976), 365-69.

¹³⁷ *Id* at 373.

¹³⁸ Kirchheimer, *Political Justice*, 6.

¹³⁹ See generally, Andrew Green, *Silence in the Courtroom*, 24 (1) *Law and Literature*, (2012).

¹⁴⁰ Kirchheimer, *Political Justice*, 6.

King, Suzanne Anthony, Mahatma Ghandi, Nelson Mandela, and several other trials of far-reaching and long-lasting effects on the future of political communities. While the trial in the short run vindicates the government by upholding its decisions and re-creating reality in its image, its long term effects are uncontrollable. Instead of simply producing normalizing truth effects that consolidate and sustain the status quo, trials become ‘crystals for society,’ provoking ‘the critical and ethical imagination’ of societies in crisis, and prescribing ‘a method of writing their psychic balance.’¹⁴¹

With the radical transformations that took place in the legal discourse since the 17th century, and the emergence of what Foucault refers to as the new subject in history, courts have become the primary sites of struggle against royal power.¹⁴² As Foucault writes in ‘Power and Strategies,’ in the eighteenth century, law ‘was a weapon of the struggle against the same monarchical power which had initially made use of it to impose itself.’¹⁴³ Indispensable in this transformation is the Enlightenment that gave us the language of freedom, truth, reason, and normative theories of justice. The subject that is constituted within the post Enlightenment institutional terrains begun to appropriate the languages of freedom, rights, and equality enunciated in the social contract and other foundational juridical codes.¹⁴⁴ From the Magna Carta to the French Declarations of the Rights of Man, from the American Declarations of Independence to the Universal Declarations of Human Rights, and several regional human rights instruments, there emerged new paradigms within which to understand and rework the rationality that organizes and structures the relationship between sovereignty, politics, and the subject.

If the law is the pre-eminent instrument through which hegemonic norms are interiorized and relationships of exploitation and oppression legitimized, resistance against the oppressive effects of the law is most meaningful before the law. One submits himself to the very law he despises ‘not in the service of

¹⁴¹ Christenson, Political Trials, 6.

¹⁴² Michel Foucault, Power and Strategies, in Power/Knowledge, 141.

¹⁴³ Michel Foucault, Two Lectures, Power/Knowledge: Selected Interviews and Other Writings, 1972-1977, (eds. Colin Gordon), trans. Colin Gordon, Leo Marshall, John Mepham, Kate Soper, (New York: Pantheon Books, 1972), 141.

¹⁴⁴ Zizek, Against Human Rights, 103.

the law' but to summon the law itself as 'he is summoned by it.'¹⁴⁵ In here resides the opportunity to submit the law to the perpetually interruptive force of meta-level discourses such as justice, morality, responsibility and ethics, in strategic terms. In somewhat of a Foucauldian gesture, this contestation goes to demonstrate 'the extent to which, and the forms in which, right (not simply the laws but the whole complex of apparatuses, institutions and regulations responsible for their application) transmits and puts in motion relations that are not relations of sovereignty, but of domination.'¹⁴⁶ As they use the discourse of rights, they also contest it and transform it. They argue that the discourse of rights and the judicial apparatus constitute the penultimate frameworks of domination and subjection. Whatever the justice of the trial, this is the moment at which those who use the platform to resist domination and oppression seek to disentangle juridical knowledge from its regimes of truth and expose the violence it effects and sustains.¹⁴⁷ With all the constraints in the courtroom, the trial provides a window of opportunity to tell the truth of law and the system of domination and exploitation concealed by the mechanism of rights.

As a site of resistance, the courtroom provides the resistant subject—those who cannot directly activate the trial mechanics—with the much needed platform for visibility and hearing. The opening-up of this public space of contestation, offers the opportunity for the incitement of counter-hegemonic discourses and for a militant deployment of what Foucault calls 'subjugated knowledges' against truth-bearing discourses of the state. In trying to reconfigure the political map, they aim to lay the foundation for radical social transformation—an awakening of consciousness for a politics of possibilities and a new politics of truth. Contesting the truth of the law and the truth of rights, they seek to constitute a new pedagogy of these juridical concepts, rights emancipated from the colonizing logic of sovereign power. As one of Foucault's revealing insights state: 'Truth is a thing of this world: . . . Each society has its regime of truth, its 'general politics' of truth: that is, the types of discourses which it accepts

¹⁴⁵ Jacques Derrida, *The Laws of Reflection: For Nelson Mandela, In Admiration*, in Jacques Derrida and Mustapha Talili, *For Nelson Mandela*, (New York: Seaver Books, 1987), 27.

¹⁴⁶ Foucault, *Society Must be Defended*, 27.

¹⁴⁷ See Thomas F. O'Meara, *The Trial of Jesus in an Age of Trials*, 28 *Theology Today* 451 (1972), 451.

and makes function as true.’¹⁴⁸ It is this society specific truth resistant subjects seek to transform. For them, the courtroom offers a performative site for a genealogical reconstruction of the past and the economy exclusion that persists. By intervening at this ritual site, the genealogical subject seeks to desecrate the law from what is true and good, and offers a subversive account of law and order. For those who want to bring about a radical transformation and the awakening of consciousness, the ritual unfolding in the courtroom helps transform statements and utterances of the legal moment into poetry of movements to inspire generation of activists. The trial’s unique ability to ‘elevate partisan happenings into a quasi-authoritative forum,’ to historicize, ‘educate, excite, and pontificate,’ enhances its resistant and transformative capabilities. Successful courtroom acts of resistance become ‘public narratives par excellence, stories of societal and individual conflicts’ capable of summoning the empathy of the general public.¹⁴⁹

4.6. Conclusion

Arguing that the political trial is performative both at the level (the trial) and the meta-level (the politics of the trial), this chapter suggested a reconceptualization of the political trial as a double performative. A performative reconceptualization of the political trial thus opens the possibility for a more complex understanding of the relations between the submerged problem that destabilizes the system from within and the surface effects that the courtroom seeks to frame in legal terms and settle.

Since the core substance of the political trial resides in the contingencies and reductions that are submerged and concealed out of juridical view, the contestations straddle the depth and the surface, to unravel the abyss that opens beneath law’s self-referential unity and universality. The surface appearance of these long submerged problems can assume various formulations but it is often articulated as a disjuncture between the promise of the system and the demands of the concrete order. It is here, at this confluence, where the

¹⁴⁸ Foucault, *Truth and Power*, 131.

¹⁴⁹ Falk, *Making Sense of Political Trials*, 5.

tension between the 'normative elements of justice' and 'the concrete order' reaches its zenith, warranting court intervention, that the political trial functions as a continuation of political struggles between those who have no fixed place in society, and those who hold the emblem of sovereignty. While the former deploys historical knowledges of dispossession and struggle to reconfigure, disrupt, and transform sovereignty's petrifying power of subjectivation and exclusion, the latter relies on gate-keeping philosophico-juridical discourses to deny the former the opportunity to articulate its grievances. Seen from strategic point of view, as it were, the political deployment of court action and the devices of justice is a visceral exercise that cannot be contained by either sides and often generates consequences far beyond the expectations of its actors. It can denaturalize as to undermine the very order that deploys it, stripping it off its mask, and rendering it vulnerable. It is a risky and uncertain terrain where the innovative qualities of the strategy determines the power-effects a particular configuration of the power-knowledge matrix generates.

Chapter Five

5. Law and Resistance: Toward a Performative Genealogy of Resistance in Law

5.1. Introduction

Critique doesn't have to be the premise of a deduction that concludes, 'this, then, is what needs to be done.' It should be an instrument for those who fight, those who resist and refuse what is. Its use should be in the process of conflict and confrontation, essays in refusal. It doesn't have to lay down the law for the law. It isn't a stage in programming. It is a challenge directed to what is.

—Michel Foucault, *Questions of Method*, 1978

Two central claims inform and structure my arguments in this chapter. First, conceiving the political trial as a contingent and contested space that confronts a conflict that is at once at the depth and across the surface of law's normative structure, I will argue that a genealogical-performative defense strategy enables us to problematize and make visible this conflict that stretches from depth to surface. By displacing normative and essentialist discourses of law and sovereignty, the performative can import a specific contingency and historicity that situates itself at points of tension to open up space for contestation and transformation of the present.

Second, insofar as law's gate-keeping discourses and the deliberative paradigm of the trial proceeds by dislocating the possibility of communication and understanding between sovereignty and the subject, the chapter claims, the possibility of communication and understanding requires a performative-genealogical resignification of law's gate-keeping discourses and a strategic reinvention of new unprefigurable standards open to limitless possibilities.

Furthermore, such interventions enable us to re-imagine and reconfigure our relations to the political universe.

Working via Foucault's account of power and resistance, the chapter argues for a conception of resistance as performative. By identifying the linguistic and discursive conditions that create opportunities of intervention in the political trial, it will show how the conflict in a particular episode of confrontation is synchronized with the legal form to generate a resistant-transformative effect.

5.2. Law, Resistance, and the Subject

'In being born,' Paul Ricoeur claimed, 'I enter into the world of language that precedes me and envelops me.'¹ In 'Acts of Hope: Creating Authority in Literature, Law, and Politics,' James Boyd White extends this claim to account for language's constitutive and regulative authority.² He writes, 'to be understood at all we must speak it as it is spoken by other people, employing its terms and categories and gestures; yet our experience is never exactly the same as that of others, we have our own thoughts and feelings.'³ Questioning the humanist notion of the sovereign subject, White identifies language as one of the social-cultural forces that constitute and dominate the subject. He asks, 'How adequate is our language to what we know, to what we have become? How far are we free, and able, to transform it?'⁴ If language alone can claim such a shackling power over the subject, how can subjects escape from complex normative and affective structures that constitute and regulate them? How can 'we rework,' as Butler asks, the very power-knowledge regime 'by which we are worked'? With reference to what ideals can we criticize, subvert, and transform the power-knowledge regime within which our normative intuitions are formed?

¹ Paul Ricoeur, *Infallible Man* (New York: Fordham University Press, 2002), 27.

² James Boyd White, *Acts of Hope: Creating Authority in Law, Literature, and Politics* (Chicago: The University of Chicago Press, 1994), 27.

³ *Id.*

⁴ *Id.*

In ‘Domination and the Arts of Resistance,’ James C. Scott provides a refreshing reading of what he calls ‘fugitive political conducts’ by the enslaved, oppressed, excluded, and marginalized.⁵ By examining patterns of resistance by various subordinate groups—slaves, serfs, the colonized, occupied and the subjugated—across time and place, he concludes: ‘Every subordinate group creates, out of its ordeal, a ‘hidden transcript’ that represents a critique of power.’⁶ Scott opposes what he calls the ‘hidden transcript’—consisted of the backstage discourse, to the ‘public transcript’ of the hegemonic group to retrieve the salient features of transcripts of power. By comparing these two transcripts and their respective strategies, tactics, and modes of thoughts, Scott emphasizes the relational character of domination and resistance.⁷

By emphasizing contradictions, reversals, and tensions immanent in the public transcript, he demonstrates how these contradictions create immanent possibilities for the marginalized to create dissident spaces. For Scott, then, there is a strict relationality, in the Foucauldian sense, between domination and resistance; even in spaces of unfreedom such as slavery and serfdom. In spite of the elimination of resistance by the constitutional state from political discourse, there remain various discontinuous struggles against power and sovereignty. The question, then, is: if law is premised on closure, how does resistance takes off against ‘the totalizing and individualizing power of the state’?

Situating ‘the theory of the subject’ at the heart of humanism and accusing the latter for concocting a fiction generative of truth and knowledge, Foucault suggests two modalities of resisting the effects of humanism on the subject: ‘“desubjectification” of the will to power’ and ‘the destruction of the subject as a pseudosovereign.’⁸ In a 1971 interview, Foucault singles out humanism as the single most important factor behind the political ontologies of the present. He defines humanism as ‘the totality of discourse through which Western man is told: ‘Even though you don’t exercise power, you can still be a ruler. Better

⁵ James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts*, (New Heaven: Yale University Press, 1990), xii; James C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance*, (New Heaven, Yale University Press, 1985).

⁶ Id.

⁷ Id at 103.

⁸ Id.

yet, the more you deny yourself the exercise of power, the more you submit to those in power then, the more this increases your sovereignty.’⁹ Humanism, Foucault argued, invented ‘a whole series of subjected sovereignties’ who subjected themselves ‘to the laws of society and nature.’¹⁰ By withdrawing the subject’s will to power and his desire to seize power, humanism produces ‘subjected sovereignties.’¹¹ The subject of humanism claims to be a ‘sovereign’ agent capable of free will when in fact he is nothing more than the surface effects of the discourse that construct him.¹²

Law is the primary humanistic discourse through which power masks a ‘substantial part of itself’ and its techniques. The legal discourse and the judicial apparatus constitute the primary foils within which power enfolds itself to conceal, neutralize, rationalize, and ultimately ‘dispel[s] the shock of daily occurrences.’¹³ Because of the power effects generated by the discourses, notions, categories and institutions that transmit and perpetuate existing force relations, Foucault insists, we must obliterate not only the ideological foundation of those notions, categories, binaries, and definitions but also the institutions: ‘We wish to attack an institution at the point where it culminates and reveals itself in a simple and basic ideology, in the notions of good and evil, innocence and guilt.’¹⁴ He speaks of ‘local actions’ whose strategic purpose is not to reform these institutions but to attack the internal relationship between power and the knowledge they produce and disseminate. With regard to what psychiatry makes possible, for example, he suggests, learning from the experiences of the marginalized, the confined, and the subjugated to ascertain ‘how they were divided, distributed, selected, and excluded in the name of psychiatry and the normal individual, that is, in the name of humanism.’¹⁵ Once

⁹ Michel Foucault, ‘Revolutionary Action: ‘Until Now,’’ in *Language, Counter-Memory, Practice: Selected Essays and Interviews* by Michel Foucault, Donald F. Bouchard, eds., (Ithaca: Cornell University Press, 1977), 221.

¹⁰ Id.

¹¹ Id at 222.

¹² Michel Foucault, ‘The Ethic of Care for the Self as a Practice of Freedom: An Interview with Michel Foucault,’ in *The Final Foucault*, James Bernauer and David Rasmussen, eds., (Cambridge: MIT Press, 1988), 11.

¹³ Foucault, ‘Revolutionary Action,’ 220.

¹⁴ Id at 228.

¹⁵ Id at 229.

we understand the particular patterns through which psychiatric knowledge and power articulate each other with legal and juridical discourse, we can intervene to cut the hinge between power and knowledge.

Following Foucault, Butler locates resistance in the temporal gap between the original signification and the ‘possibility of reversal.’¹⁶ She argues that no matter how contingent our actions, contingency does not mean that we cannot act but only that our very actions are based on a contingent identity that comes into being through that very action.¹⁷ In ‘Contingent Foundations,’ she argues, ‘the constituted character of the subject is the very precondition of agency.’¹⁸ This becoming potential crucial for re-subjectification is at the same time a condition of what Foucault calls de-subjectification. But how can the subject resist the normalizing effects of these categories, notions, and discourses in the name of law, justice or other moral codes? How can one resist a regime of knowledge and truth that conceives itself as self-evident? How can resistances take off against ‘reason’? Can the subject resist in the name of moral codes or ideals of justice drawn from the very constitutive principles he seeks to escape?

5.3. Resistance in the Name of Law and Justice

Foucault’s skepticism of normative foundations and ideal significations is very well known. For Foucault, to suggest that one can resist in the name of law or a new moral code and to achieve some emancipatory ends such as justice is not merely self-refuting and historically inaccurate, it is also theoretically incoherent. To try to hold sovereignty responsible for failing to uphold its law is an implicit affirmation of law: the very law that dominates and limits us.¹⁹ In the famous Foucault-Chomsky debate, Foucault repudiates the essentialist conceptions of ‘human nature’ and ‘justice’:

. . . these notions of human nature, of justice, of the realization of the essence of human beings, are all notions and concepts, which have been

¹⁶ Judith Butler, *The Psychic Life of Power: Theories in Subjection* (Stanford: Stanford University Press, 1997), 94.

¹⁷ Judith Butler, *Bodies That Matter: On the Discursive Limits of Sex* (New York: Routledge, 1993), 57.

¹⁸ Judith Butler, ‘Contingent Foundations: Feminism and the Question of ‘Postmodernism,’ in J. Butler and J. W. Scott, eds. *Feminists Theorize the Political*, (New York: Routledge, 1992), 12.

¹⁹ Michel Foucault, ‘The Thought from Outside,’ in *Foucault/Blanchot* (New York: Zone Books, 1990), 38.

formed within our civilization, within our type of knowledge and our form of philosophy, . . . and one can't, however regrettable it may be, put forward these notions, to describe or justify a right which should—and shall in principle—overthrow the very fundamentals of our society.²⁰

The distinction between good and bad, reason and unreason, and notions such as morality and justice, are nothing but technologies of rationalization.²¹ For Foucault, the individual has no irreducible core, no essence and true self constitutive of his identity; the subject is nothing more than a contingent articulation of power-knowledge constellation. The reality of the subject is the effect of the very power-networks that invest and constitute it. Foucault also repudiates the existence of moral codes that are intrinsic and necessary: 'it seems to me that the idea of justice in itself is an idea which in effect has been invented and put to work in different types of societies as an instrument of a certain political and economic power or as a weapon against that power.'²² This skepticism toward essentialist identities and discourses leads Foucault to reject resistance in the name of a new law, the Higher Law or the Law to come. In 'The Thought from Outside,' he argues, 'Anyone who attempts to oppose the law in order to found a new order, to organize a second police force, to institute a new state, will only encounter the silent and infinitely accommodating welcome of the law.'²³

We can still resist but we cannot resist in the name of law; whether the laws of the state and its animating principles or the 'eternal laws of heaven.'²⁴ In 'Intellectuals and Power,' he claims that resistance is about struggle for power and against forms of power that subject and transform the individual 'into its object and instrument.'²⁵ It is not even 'to awaken consciousness,' for the notion of consciousness is itself a bourgeoisie construct, it is a struggle 'aimed at

²⁰ Michel Foucault, 'Human Nature: Justice versus Power,' in *Reflexive Water: The Basic Concerns of Mankind*, Fons Elders, eds. (Ontario: Souvenir Press, 1974), 184-85

²¹ Id.

²² Id.

²³ Foucault, 'The Thought from Outside,' 38.

²⁴ Foucault, 'Revolutionary Action,' 208.

²⁵ Id.

revealing and undermining power where it is most invisible and insidious.’²⁶ One resists to take power- and it is in this struggle for power that Foucault locates the value of resistance. Whether it the creation of new sites of resistance; the disclosure of excess, the engendering of a culture of agonism or self-recreation, resistance cannot be undertaken in the name of a higher law or to achieve justice. For Foucault, the rejection of an essential core of a human being does not, of itself, reduce our ability to ask and experiment. In fact, it enhances it. What Foucault displaces is not action but the grounding of action in a particular understanding of humanness that limits action to that particular understanding. In ‘What is Enlightenment?’, he says, ‘the contingency that has made us what we are,’ should be distinguished from ‘the possibility of no longer being, doing, or thinking what we are, do or think.’²⁷ ‘Genealogical critique,’ he insists, ‘will not deduce from the form of what we are what is impossible for us to do and to know.’²⁸ Questioning the distinctions between good and evil, reason and unreason, guilt and innocence, the normal and the pathological, silence and articulation, history and metaphysics, Foucault accounts for the systems of meaning, the modes of reasoning and structures of thought ‘by which men, in an act of sovereign reason, confine their neighbours.’²⁹

5.4. Law, Power, and Resistance

In a decisive conceptual break with the orthodox conception of power—a conception that ‘takes law as a model and a code,’ one that ‘has its central point in the enunciation of the law,’³⁰ Foucault offers a more nuanced analytics of modern techniques of power that goes beyond the repressive hypothesis. To understand power in its complex, relational, concrete and historical operations, he argues, we must move away from an understanding of power as repressive and negative and situate it ‘in a whole series of their possible positive effects’:

²⁶ Michel Foucault, ‘Intellectuals and Power: A Conversation Between Michel Foucault and Gilles Deleuze,’ in *Language, Counter-Memory, Practice*, 208.

²⁷ Michel Foucault, *What is Enlightenment?* In *The Foucault Reader: An Introduction to Foucault’s Thought*, Paul Rabinow, eds. (New York: Pantheon Books, 1984), 46.

²⁸ Id.

²⁹ Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason*, (Ithaca: Cornell University Press, 1977), xi.

³⁰ Michel Foucault, *The History of Sexuality: The Will to Knowledge V.1*, trans. Robert Hurley (London: Penguin Books, 1976), 90.

power *excludes, represses, censors, and conceals*.³¹ In fact, power produces; it produces reality; it produces domains of objects and rituals of truth.³² With the emergence of disciplines, power ceased to be merely 'repressive' but also permissive, not only negative, but also positive, not only prohibits but promotes, not only prevents but also invents.³³ In fact, power is most productive when it is less repressive, and more productive and permissive.³⁴ Arguing against the orthodox conception of power as 'always juridical and discursive,' a theory that takes 'the problem of right and violence, law and illegality, . . . the state and sovereignty' as its centre of gravity, Foucault identifies new sites and spaces of power 'whose operation is not ensured by right but by technique, not by law but normalization, not by punishment but by control . . . and go beyond the state and its apparatus.'³⁵

It is important to note that the expulsion of resistance from the juridical discourse was accompanied by the appearance of disciplinary techniques of power.³⁶ The 'formally egalitarian juridical frameworks' made possible by 'the new theories of natural law and liberal political philosophies' in the 18th century were colonized and undermined by the 'asymmetrical and non-egalitarian' disciplinary mechanisms.³⁷ The coalescence of these 'absolutely heterogeneous' techniques—the organization of rights around sovereignty' and 'the mechanisms of coercion exercised by disciplines'—created a normalizing power-knowledge regime that control and regulate the individual and therefore cannot be conceptualized, understood and resisted within the older paradigm.³⁸ The old conception of power in terms of law and sovereignty no longer provides a nuanced understanding and analytics of the all-entangling web of relations that operate through the production and dissemination of knowledge, truth, and

³¹ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage, 1979), 194.

³² *Id.*

³³ *Id.* at 26; See also John Caputo and Mark Yount, *Foucault and the Critique of Institutions*, (Philadelphia: Pennsylvania State University Press, 1993), 6.

³⁴ Foucault, *The History of Sexuality*, V. 1, 136.

³⁵ *Id.* at 89.

³⁶ *Id.* at 12, 85-91.

³⁷ Foucault, *Discipline and Punish*, 222.

³⁸ Michel Foucault, *Society Must be Defended: Lectures at the College De France 1975-76*, Mauro Bertani and Alessandro Fontana, trans. David Macey, eds., (London: Penguin Books, 2003), 38.

discourse.³⁹ An understanding of power in terms of institutions, laws, and rights, Foucault claims, conceals, normalizes, and erases the fundamental relationships domination law and legal institutions underwrite.⁴⁰

To account for the polymorphous techniques of subjugation that cut across society, Foucault proposes a new paradigm that goes beyond a conception of power in terms of law and sovereignty to ‘the multiple forms of domination that can be exercised in society’: not the king in his central position . . . not sovereignty in its one edifice, but the multiple subjugations that take place and function within the social body.’⁴¹ Institutions are conceived not as the sources of power but as infrastructures in which power transgresses the rules of right and inscribes itself and ‘acquires the material means to intervene, sometimes in violent ways.’⁴²

According to this paradigm, resistance is everywhere. The evidence of this, as one of Foucault’s much rehearsed insights suggest, is that ‘power is everywhere’:

Where there is power, there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power. Should it be said that one is always ‘inside’ power, there is no ‘escaping’ it, there is no absolute outside where it is concerned, because one is subject to the law in any case? . . . This would be to misunderstand the strictly relational character of power relationships.⁴³

The entanglement of power and resistance means that power needs resistance in order for it to project itself and secure its interests. Resistance reinvigorates and legitimizes power. It instigates the formation of strategic knowledge and a discursive field which enables power to render its secrets inaccessible.⁴⁴ This entanglement also means that resistance does not exist in a ‘relationship of

³⁹ Id at 24.

⁴⁰ Id at 27.

⁴¹ Id.

⁴² Foucault, ‘Practicing Criticism,’ in *Politics, Philosophy, Culture: Interviews and Other Writings, 1977-1984*, eds. Lawrence D. Kritzman, tr. Alan Sheridan et al., (New York: Routledge, 1988), 155.

⁴³ Foucault, *The History of Sexuality*, V.1, 95.

⁴⁴ Id at 86.

exteriority’ to power and ‘does not have to come from outside’ in order for it ‘to be real.’⁴⁵ It is already there within laws, discourses and institutions that power uses to reproduce and disseminate itself.⁴⁶ The same institutions, laws and discourses breakdown and instigate resistance.⁴⁷ Finally, the imbrications of power and resistance further suggests that one cannot account for the operations of power - its techniques, instruments, mechanisms, and effects - without an account of the plurality of resistances that exist in strategic relationship with power.⁴⁸

Genealogical critique assumes all human ‘relations to be relations of power, all relations of power to be relationships of force, and relationships of force to be relationships of war.’⁴⁹ We are already in the battle field: ‘we are at war with one another; a battle front runs through the whole of society, continuously and permanently.’⁵⁰ That is why critique must be local and must begin from the analysis of power relations at the local level. But what makes local critique possible is the ‘insurrection of subjugated knowledges’- naïve knowledges and ‘historical contents that has been buried or masked in functional coherences or formal systematizations.’⁵¹ If knowledge, discourse, and truth are the raw materials of power, the efficacy of critique and/as resistance turns on the exhumation of knowledge ‘which owes its force only to the harshness with which it is opposed by everything surrounding it.’⁵² If resistance is to avoid becoming another normalizing gesture, if it is to unmask the play of power concealed by law’s ‘functional arrangements and systematic organizations,’ it must begin with the analysis, not of institutions and laws per se, but with the confrontations and struggles that goes on within laws, discourses, practices and

⁴⁵ Id at 95.

⁴⁶ Id at 95-96.

⁴⁷ Id.

⁴⁸ Id at 95-96.

⁴⁹ See Mark Yount, *The Normalizing Power of Affirmative Action*, in Foucault and the Critique of Institutions, 224.

⁵⁰ Foucault, *Society Must be Defended*, 51.

⁵¹ Id at 7.

⁵² Michel Foucault, ‘Two Lectures,’ *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, Colin Gordon, eds., trans. Colin Gordon, Leo Marshall, John Mepham, Kate Soper, (New York: Pantheon Books, 1972), 83.

institutions.⁵³ According to this framework, a critique of law begins, not from the analysis of legal rules, principles, discourses, categories, hierarchies, and institutions per se, but rather from a historical analysis of their interpretations, applications, and deployments in struggles over power.

I find this paradigm extremely helpful for understanding and problematizing the unease underlying the discourse on law and resistance. First, Foucault goes beyond the orthodox definition of power and offers a nuanced understanding of the instruments, mechanisms, and techniques by which modern power reproduces and disseminates itself. In doing that, he suggests conceptual tools and languages that help infiltrate the volatile and troubled dynamics between law and resistance.

Secondly, and most importantly, juridical power, or ‘the rules of rights that formally delineates power,’ constitutes one of the two pillars of Foucault’s conceptions of power and resistance. Foucault approaches the mechanism of power according to two ‘markers, or limits’: ‘the rules of rights that formally delineate power, and the truth effects that power produces.’⁵⁴ Since power cannot operate without ‘a certain economy of the discourse of truth’; power must produce and disseminate a true discourse on the basis of which it can project and secure itself. This true discourse, Foucault claims, is traditionally produced by juridico-philosophic discourses that claim to ‘establish the limits of power’s right.’⁵⁵ Foucault mocks the philosophico-juridical discourse for asking a question that departs from a presumption that truth limits power. Against the backdrop of this empirically unfounded assumption, philosophico-juridical discourse asks: ‘how does the discourse of truth . . . establish the limits of power’s rights?’ According to this discourse, truth is outside of power and beyond power. By definition, it is objective, universal, neutral, autonomous, and elevated beyond the expediency of power and politics. It resides in the realm of the ideal and discovered through philosophical reflection. More significantly, these truths claim to lay down the rules of right that ‘establishes

⁵³ Foucault, *Society Must be Defended*, 52.

⁵⁴ *Id.* at 24.

⁵⁵ *Id.*

the limits of power's right.'⁵⁶ Hannah Arendt's account of the self-evident truths invoked by the US Declarations of Independence as a justification for its authority is a revealing case in point. Referring to these truths as 'pre-rational,' Arendt writes, 'these truths' . . . inform reason but are not its products—and since their self-evidence puts them beyond disclosure and argument, they are in a sense no less compelling than . . . the axiomatic verities of mathematics.'⁵⁷

By formulating the question in this way, and by conceiving its own fictions as *a priori* fact, the performative as constative, something that already is and cannot be otherwise, philosophico-juridical discourse formulates a normative theory of sovereignty, the subject, and the political; foreclosing their potential for change and becoming. Once something is identified with reason, it cannot be contested and questioned, it is 'beyond disclosure and argument,' as Arendt put it. It is precisely the triumph of this kind of logic, rationality and mode of reasoning following a rapid formalization and rationalization of law by the bourgeois in the nineteenth century that ultimately eliminated resistance from the juridical domain.⁵⁸

Foucault's reformulation of this question suspends the mythical unity of the juridical discourse, exposes its contingency, and ensures its criticizability. To reveal the play of power concealed by this system of thought, 'to show that things are not as self-evident as one believed,' Foucault poses an empirical question from below: 'What are the rules of rights that power implements to produce discourses of truth? Or: What type of power is it that is capable of producing true discourses of power that have . . . such a powerful effect?'⁵⁹ Here, rather than the Arendtian self-evidence that puts the truths it speaks about 'beyond disclosure and argument,' truth is a product of power, a 'thing of this world' that every society produces and circulates in the social body. Contesting the self-evidence and rationality of the foundational truths, categories, discourses, and institutions that produce, accumulate, and circulate

⁵⁶ Id.

⁵⁷ Hannah Arendt, *On Revolution* (New York: Penguin Books, 1963), 192.

⁵⁸ Otto Kirchheimer, 'Legality and Legitimacy,' in Otto Kirchheimer and Franz Neuman, *Social Democracy and the Rule of Law*, William E. Sheuerman, eds., (Berkeley: University of California Press, 1996), 45-46.

⁵⁹ Foucault, *Society Must be Defended*, 24.

a discourse of truth, Foucault's account opens up new sites of critique and/as resistance. By unmasking the contingency underneath the coherence and self-evidence of philosophico-juridical discourse and its mode of reasoning, genealogical critique builds a strategic knowledge of the juridical approach for critique and struggle.

5.5. Strategies of Resistance: From Agonism to Genealogical Critique

While Foucault does not provide a formula or a theory of resistance, he offers strategies and tactics that can be used in struggles at the local level. From the elaboration of agonism and transgression in his early work to the formulation of genealogical critique and the 'aesthetics of self-creation,' Foucault offers strategies that break off from the power-knowledge regime to open up new sites and avenues of struggle. In 'Madness and Civilization,' resistance is conceived as struggle against the limit imposed by culture.⁶⁰ Resistance resists what is -the limit conditions proposed and imposed on the subject by culture.⁶¹ During the genealogical period, when power emerged as a central concept, resistance went beyond the affirmation of difference to an attack against the notions (humanist conceptions of human nature, legitimate truth, reason, justice, the rule of law, morality, etc) and institutions (schools, universities, prisons, factory, the judiciary) that 'function as the instruments, armature, and armour' of power-relations.⁶² Let us take three of the most notable forms of resistance elaborated in his work.

5.5.1. Agonism: Contestations and Transgressions

The first explicit account of resistance is developed in 'Madness and Civilization.' In the preface, Foucault says, 'we have yet to write the history of that other form of madness, by which men, in an act of sovereign reason,

⁶⁰ See Foucault, *Madness and Civilization*, xi.

⁶¹ Id.

⁶² Foucault, 'Intellectuals and Power,' 210; see also Foucault, 'Revolutionary Action,' 228; Foucault, *The History of Sexuality* V. 1, 91-96; Brent L. Pickett, *Foucault and the Politics of Resistance*, 28 (4) *Polity*, 445 (1996), 455-56.

confine their neighbours.’⁶³ Foucault is troubled by dichotomies and categories, particularly the distinction between reason and unreason, and the merciless social relations it entrenches and sustains.⁶⁴ By unearthing the confrontation that lies beneath the language of reason, Foucault identifies ‘limit’ as the key factor behind the ‘Reason-Madness nexus.’⁶⁵ He says, what is in question is ‘neither the history of knowledge nor history itself,’ but limit.⁶⁶ Beginning from the Middle Ages, the distinction between reason and unreason served as the normative basis for imposing limit on madness; for confining, punishing, and silencing madness.⁶⁷ Foucault here speaks of the contestation of unreason and the excess it makes possible:

Ruse and new triumph of madness: the world that thought to measure and justify madness through psychology must justify itself before madness, since in its struggles and agonies it measures itself by the excess of works like those of Nietzsche, of Van Gogh, of Artaud.⁶⁸

The works ‘of Nietzsche, of Van Gogh, of Artaud’ - ‘those barely audible voices of classical unreason’ - compel the world, and its ‘limit,’ to recognize what it authorizes, marginalizes and fully excludes.⁶⁹ Speaking from within the shadows, unreason amplifies madness, what was mute gives itself expression as ‘shrieks and frenzy.’⁷⁰ In this way, unreason reveals a different kind of madness, a madness that speaks the language of discourse, reason, truth and rationality. Like those voices of unreason before him, Foucault wanted to redeem the depleting culture of agonism that ‘makes possible all contestations as well as total contestations.’⁷¹ At this stage, resistance is primarily against the ‘limit.’ Two years later, Foucault writes an essay titled: ‘A Preface to Transgression.’⁷²

⁶³ Foucault, *Madness and Civilization*, ix.

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Id at xi.

⁶⁸ Id at 289.

⁶⁹ Id.

⁷⁰ Id at 281

⁷¹ Id at 281.

⁷² Foucault, ‘A Preface to Transgression,’ in *Language, Counter-Memory, Practice*, 29.

Drawing on Bataille, Foucault argues against the discourse of God and the various distinctions and categories it animates and makes palpable. He says, ‘at the root of this discourse of God, which Western culture has maintained for so long—without . . . any clear sense that it places us at the limits of all possible languages—is a singular experience shaped: that of transgression.’⁷³

Transgression is here defined as a negation of the limit. But it is not in itself negative. He writes, ‘Transgression contains nothing negative but affirms limited being.’⁷⁴ It has a complex relationship with the limit, neither white nor black, but a sort of permanent entanglement: ‘[t]ransgression incessantly crosses and re-crosses a line which closes behind it in a wave of extremely short duration, and thus it is made to return once more right to the horizon of the uncrossable.’⁷⁵ Transgression does not speak in the name of another principle such as reason, truth, or humanity; it does not seek to dismantle stable foundations; it does not fight the law with a higher law; it does not transform: ‘its role is to measure the excessive distance that it opens at the heart of the limit and to trace the flashing line that causes the limit to arise.’⁷⁶ Without claiming any positive or transformative role, transgression undermines and weakens those limits culture imposed on us as absolute and inevitable to marginalize and exclude those who don’t fit into the world views of the hegemonic group.⁷⁷ Foucault held these views until the early Seventies when a major shift occurred in his intellectual thought.

5.5.2. Genealogical Critique as/and Revolutionary Agitation

In early 1970s, Foucault abandons his ‘excavations of the epistemological foundations of the modern subjects of knowledges’ and begins a historical inquiry into modern techniques of power and domination. With this shift from archaeological investigations into genealogical inquiry, concepts like ‘episteme,’ ‘enunciation’ and ‘discursive formation’ were replaced by

⁷³ Id at 33.

⁷⁴ Id at 35.

⁷⁵ Id at 33-34.

⁷⁶ Id at 35.

⁷⁷ Id.

‘discipline,’ ‘technology,’ ‘strategy’ and ‘biopower.’ In an interview in 1976, Foucault has this to say about these transformations in his thought:

I wrote [The Order of Things] at a moment of transition. Until then, it seems to me that I accepted the traditional conception of power, power as an essentially legal mechanism, what the law says, that which forbids, that which says no, with a whole string of negative effects: exclusion, rejection, barriers, denial, dissimulation, etc. Now I find that conception inadequate . . . this occurred to me in the course of a concrete experience I had around 1971-72, regarding prisons. Prisons convinced me that power should not be considered in terms of law but in terms of technology, in terms of tactics and strategy, and it was this substitution of a technical and strategic grid for a legal and negative grid that I tried to set up in *Discipline and Punish*, and then use in *History of Sexuality*.⁷⁸

The concrete experience Foucault refers to here is mainly the prison industrial complex in the United States and revolutionary struggles of black liberationist movements.⁷⁹ In an essay that examined the influence of the Black Panthers’ mode of struggle and political critique on Foucault’s thought, Brady Heiner presents strong textual evidence to support his claim that Foucault’s ‘encounter with American-style racism and class struggle, and his engagement with the political philosophies and documented struggles of the Black Panther Party’ that motivated the shift.⁸⁰ In a 1971 interview published as ‘Revolutionary Action: ‘Until Now,’’ Foucault makes explicit reference to the trial of Soledad Brothers where George Jackson, the Black Panther Party Field Marshall and two others were tried.⁸¹ He defines revolutionary action as ‘the simultaneous agitation of consciousness and institutions.’⁸² This involves attacking ‘the relationships of power through the notions and institutions that function as their instruments, armature, and armour.’⁸³ Whereas schools, prisons, asylums, factories, and courts limit and constrain possible sites of struggle, notions like reason, truth, progress, morality, and even justice, which are brought together under the title

⁷⁸ Foucault, ‘Power Affects the Body,’ in *Foucault Live: Collected Interviews, 1961–1984*, eds. Sylvère Lotringer (New York: Semiotexte, 1989), 207–08.

⁷⁹ See generally Brady Heiner, *Foucault and the Black Panthers*, 11(3) *City*, 313(2007).

⁸⁰ *Id* at 317-20.

⁸¹ Foucault, ‘Revolutionary Action,’ 227.

⁸² *Id* at 228.

⁸³ *Id* 228.

of humanism, serve to ‘dispel the shock of occurrences, to dissolve the event.’⁸⁴ Power succeeds only to the extent that it conceals itself. Modern power operates by inscribing itself in these discourses. It manifests itself as knowledge, and circulates through these institutions.

Unlike the knowledge of the ruling class interested in the categories and typologies of humanism, the histories and narratives of the repressed and the excluded are preoccupied with power and struggle.⁸⁵ The insurrection of subjugated knowledges cut-off the link between power and knowledge and unravels humanist meta-narratives as a mask of power.⁸⁶ This unmasking has the effect of de-subjectification of the subject and destabilization of the categories and divisions that masquerade as natural and inevitable to impose limit on the subject’s mode of being, acting, and becoming. If power thrives on masking itself from being recognized by the subject, as Foucault claims, its unmasking incites action, creates conditions of possibility for action.⁸⁷ This disclosure of what was previously accepted as natural and inevitable, exposing the contingency underneath the coherence and rationality of the present, constitutes the epicentre of Foucault’s notion of resistance in this period. Though Foucault refrained from placing limit on the forms resistance must take, endorsing various practices that range from the affirmation of difference to various forms of revolutionary action, the unmasking of the present as a contingent constellation of culture and history (what he later calls power-knowledge regime) and unravelling of its constitutive and regulative mechanisms constitute the core of his idea of resistance.

Defining itself in opposition to essentialist juridico-philosophic discourses, genealogy unravels the radical contingency underneath the coherence of the present.⁸⁸ By assigning historical meaning to law’s central legitimating discourses such as equality, liberty, the rule of law, legality, and justice, genealogy exposes the ‘violent and unfinished’ nature of rules: ‘humanity

⁸⁴ Id at 220.

⁸⁵ Foucault, *Society Must be Defended*, 98.

⁸⁶ Foucault, ‘Revolutionary Action,’ 221-22.

⁸⁷ Foucault, ‘Intellectuals and Power,’ 208.

⁸⁸ Foucault, ‘Nietzsche, Genealogy, History,’ in *Language, Counter-Memory, Practice*, 139-40.

installs each of its violence[s] in a system of rules and thus proceeds from domination to domination.’⁸⁹ Foucault conceived genealogy as an intellectual work and a methodological toolkit that reveals the lines of power/knowledge that traverses relationships of all kinds within the *body-politic*. Genealogical critique, as Foucault conceived it, must begin from a micro-analytics of power relations. By exhuming disqualified knowledges of struggle and recovering the voice of those deprived of logos, by unearthing the force-relations inscribed in egalitarian norms of equality and justice; the genealogist ‘aims to entertain the claims to attention of local, discontinuous, disqualified, illegitimate knowledge against the claims of a unitary body of theory which would filter . . . them in the name of some true knowledge.’⁹⁰ The primary task of the genealogist, this new intellectual, is criticism of a particular kind:

I dream of the intellectual destroyer of evidence and universalities, the one who, in the inertias and constraints of the present, locates and marks the weak points, the openings, the lines of power, who incessantly displaces himself, doesn’t know exactly where he is heading nor what he’ll think tomorrow because he is too attentive to the present.⁹¹

Foucault provides this seemingly elusive notion of critique, at least for people who endure daily violence and indignation, because of his view that there are no easy solutions for the givens of the present such as prison, madness, psychiatry, and medical power since they don’t exist as a problem in the first place. In ‘Polemics, Politics, and Problematizations,’ Foucault offers the notion of problematization as a point of departure for critique: ‘[t]his development of a given into a question, this transformation of a group of obstacles and difficulties into problems to which the diverse solutions will attempt to produce a response.’⁹² This intellectual, the genealogist, ‘would like to produce some effects of truth which might be used for a possible battle, to be waged by those who wish to wage it, in forms yet to be found and in organizations yet to be defined.’⁹³ Since power is always already there, since juridical power is always

⁸⁹ Id at 151.

⁹⁰ Foucault, Two Lectures, 83.

⁹¹ Foucault, ‘The End of the Monarchy of Sex,’ in Foucault Live, 155.

⁹² Foucault, ‘Polemics, Politics, and Problematizations,’ in The Foucault Reader, 389.

⁹³ Foucault, ‘The Question of Power,’ in Foucault Live, 191.

already there within the all-encompassing field of power, a genealogical problematization of law's constitutive and regulative conditions, its central notions and organizing concepts, exhumes voices and knowledges that juridical knowledge subjugates, disqualifies, and excludes. As he writes, 'the purpose of history, guided by genealogy, is not to discover the roots of our identity but to commit itself to its dissipation.'⁹⁴ Through excavation of 'the submerged problem that is all across the surface,' genealogy induces unsettling nausea.⁹⁵

In his later work, Foucault turns to the notion of self-creation, not just as affirmation of difference but as a refusal of what one is. In 'The Subject and Power,' he writes, '[M]ay be the target nowadays is not to discover what we are but to refuse what we are.'⁹⁶ By cutting the hinge that ties the subject to sovereignty and the state, Foucault here envisages the emergence of new forms of subjectivities.⁹⁷ Despite his formulation of power as all-encompassing, investing all positions including the position of the critique, his later work may provide a basis for thinking about a certain ethic of resistance that is not reducible to power and strategy.⁹⁸

There are, of course, well known objections to Foucault's approach: Foucault's crypto-normativity and account of power annihilates agency, cripples political action, and leads to paralysis. There are two distinct objections. The first turns on Foucault's skepticism towards normative concepts. Jürgen Habermas and Nancy Fraser are perhaps among the most prominent. Habermas criticizes Foucault's suspicious attitude towards normative ideals as 'presentistic, relativistic and crypto-normativism.'⁹⁹ Habermas claims that there is always already a normative drive behind every project: 'This grounding of a second-

⁹⁴ Foucault, 'Nietzsche, Genealogy, History,' 162.

⁹⁵ Vikki Bell, *Culture and Performance: The Challenge of Ethics, Politics, and feminist Theory* (Oxford: BERG, 2007), 82.

⁹⁶ Michel Foucault, 'The Subject and Power,' in *Power, Essential Works of Foucault, 1954- 1984*, James D. Faubion eds., (London: Penguin Books, 1994), 216.

⁹⁷ Michel Foucault, 'On the Genealogy of Ethics: An Overview of Work in Progress,' in *The Foucault Reader*, 262-63. Foucault here identifies three possible domains of genealogy: truth, power, knowledge and suggests that these genealogies were present in his work dating back to 'Madness and Civilization.'

⁹⁸ See Yount, 'The Normalizing Powers of Affirmative Actions,' 226.

⁹⁹ Jürgen Habermas, *The Philosophical Discourse of Modernity*, trans. Frederick Lawrence (Cambridge: MIT Press, 1987), 276.

order value-freeness is already by no means value-free.’¹⁰⁰ Acknowledging that Foucault indeed exalts resistance, Fraser asks why Foucault’s subject must resist if he cannot articulate a normative ideal and ambition in the name of which we seek to change the present.¹⁰¹ She asks, ‘why is struggle preferable to submission? Why ought domination to be resisted?’ The second critique relate to his account of power and resistance and his characterization of the subject as the effect of a power-knowledge dispositif. This is the concern expressed by Thomas McCarthy who saw the effect of Foucault’s power-knowledge regimes and his ‘docile bodies’ as paralyzing par excellence.¹⁰² McCarthy asks, if we treat individuals as incapable of making differential and differentiated responses to situations ‘simply as acting in compliance with pre-established and publicly sanctioned patterns,’ how can we ‘gain an adequate understanding of most varieties of social interaction.’¹⁰³

Contra these objections, I claim that the dynamism with which Foucault elaborates resistance opens law to problematization, critique, and struggle. If resistance today inhabits law’s outside, it is because of the rationalization and formalization of law’s discourses and humanist notions and categories discussed above. If the very notion of the right to resistance as oppositional form of politics, (as opposed to the right to armed resistance by people under foreign or colonial occupation as recognized by international law), appears difficult and counter-intuitive, it is because of law’s truth-effects. If there is something problematic about the conjunction ‘and’ in the notion of ‘law and resistance,’ it is because, as Foucault says, this problem is not already there, at least not as a problem yet.¹⁰⁴

¹⁰⁰ Nancy Fraser, *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory* (Minneapolis: University of Minnesota Press, 1992), 29.

¹⁰¹ *Id.*

¹⁰² Thomas McCarthy, *The Critique of Impure Reason: Foucault and the Frankfurt School*, 18 (3) *Political Theory*, 437 (1990), 449.

¹⁰³ *Id.*

¹⁰⁴ Foucault, ‘Polemics, Politics, and Problematizations,’ 389.

5.5.3. Toward a Performative Conception of Resistance

I suggest that we conceptualize resistance as a performative action rather than a normative action that expresses something outside itself. Rather than being strictly ‘representative or expressive action,’ an action that expresses something essential about the subject (McCarthy), the practices he resists (Habermas), or why he resists (Fraser), resistance is a performative action that calls into presence the very reality it speaks about. Performative acts of resistance do not express or represent any normative notion the subject refers to in his performance of resistance. Unlike the normative, performative acts are non-referential. They bring into being the very ideal or normative principle they ostensibly refer to. Although the act of resistance, per se, does not express anything essential about the practices being resisted, or the ends pursued, the subject of resistance speaks in the name of normative ideals such as justice, dignity, and equality. As White writes, ‘Every speech act is a way of being and acting in the world that makes a claim for its own rightness, which we ask others to respect.’¹⁰⁵ A claim to truth is always a claim for power, a claim that seeks to transcend the power networks that determine what counts as true.

In fact, Foucault’s account of subjectivity in conjunction with his notion of strategy and resistance seems to gesture toward a conception of resistance as performative. Although Foucault rejects acting in the name of normative ideals, he is not against the strategic use of normative ideals. Defending strategic appropriations of normative concepts, Foucault wrote: ‘when the prisoners began to speak, they possessed an individual theory of prisons, the penal system, and justice. It is this form of discourse which ultimately matters, a discourse against power, the counter-discourse.’¹⁰⁶ Despite his unease with normative ideals, his celebration of the deployment of justice as a counter-discourse suggests something performative in Foucault’s conceptions of resistance. When justice becomes a counter-discourse to ground and mobilize resistance, it becomes a counter-power, resistance itself. But this invocation of a justice beyond the instituted model, what Derrida calls ‘the justice to come,’

¹⁰⁵ White, *Acts of Hope*, xi.

¹⁰⁶ Foucault, ‘Intellectuals and Power,’ 209.

is not normatively loaded. It is a performative exercise that seeks to materialize the justice it speaks about.

In Foucault's notion of aesthetics of self-creation—we will find a facet of performativity that is 'identity-creating' or 'world-disclosing.'¹⁰⁷ In a 1984 interview cited earlier, Foucault speaks of the 'active fashion' by which 'the individual invents himself.'¹⁰⁸ This self-creation, the practices of the self, he argued, is a permanent becoming. Drawing on Foucault, Butler argues, 'the subject who is produced through subjection is not produced at an instant in its totality.'¹⁰⁹ The processes by which the subject of resistance breaks from the normative structures that limit and regulate his choices are performative. Bell for example argued that 'subjectivity, as Foucault comes to regard it through the texts studied in *The Use of Pleasure*, breaks off from the lines of force which brought it into being and establishes its relation to self.'¹¹⁰ One can find several textual evidences suggestive of a certain performative rational in Foucault's approach to questions of law and resistance. On the occasion of the launching of the International Committee against Piracy, for example, Foucault spoke of the existence of the right to international citizenship, which establishes rights and duties 'that obliges one to speak out against every abuse of power.'¹¹¹ Of course, there is no such right either in national or international law in the juridical sense of the term. Like Hannah Arendt who wrote about 'the right to have rights' to generate, performatively, the rights she was writing about,¹¹² Foucault is performatively creating the very right he was speaking about. Hence, Foucault's notion of self-creation as resistance can be read as a performative resistance.

But the reference to normative ideals is often a strategic move aimed at appropriating the excesses and gaps between law's normative claims and its performative orderings. Indeed, without appeal to the normative, without the

¹⁰⁷ Jessica J. Kulynych, *Performing Politics: Foucault, Habermas, and Postmodern Participation*, 30 (2) *Polity*, 315 (1997), 335.

¹⁰⁸ Foucault, 'The Ethic of Care for the Self as a Practice of Freedom,' 11.

¹⁰⁹ Judith Butler, *The Psychic Life of Power*, 93.

¹¹⁰ Vikki Bell, *Performative Knowledge*, 23 *Theory, Culture and Society*, 216 (2006), 216.

¹¹¹ Michel Foucault, *Confronting Governments: Human Rights*, in *Power: Essential Works*, 474-75.

¹¹² See Judith Butler's reading of Arendt's 'The Right to have Rights,' in Butler, *Performativity, Precarity and Sexual Politics*, Lecture given at Universidad Complutense de Madrid. June 8, 2009, xi.

strategic appropriation of the very notions, categories, and discourses of juridical power, resistance cannot enter law's space. The man before the law cannot access its already inaccessible gate. Without a counter-discourse that supports resistant knowledges of struggle, a discourse within which to synchronize their politics with the legal form, resistance cannot take off the ground in law. The possibility of historicization or re-politicization resides in the disjuncture between the actuality of law and the normative notions of justice, equality, and dignity to which law appeals. They can be reconfigured and used as a counter-discourse, from an opposing direction, and for an altogether different purpose. If there is nothing eternal and determinist about legal discourses that produce hegemonic norms to sustain relations of domination, As Curkpatrick suggests, a performative re-articulation of counter-discourse can thwart the complex assemblages of normative forces. However, without a normative account of the present and normative ideals so recognized by the system, the subject cannot access the fortified and heavily guarded terrain of law let alone open up space for contestations. The mode of thought that animates the reversal in the temporal gap between signification and 'the differential and differentiated' uses to which the signifying form can be put is performative par excellence.¹¹³ I claim that this understanding of resistance to practices of subjectification can provide a framework for thinking about resistance to the ways by which human beings have become the subject and objects of law.

5.6. Performative Strategic Thinking in Law: Carving out Space within Space

If the emphasis is on strategy, it is precisely because the innovative synergies of political trials reside in the economy of the strategy, i.e., in the disruptive and transformative potential of the strategy of intervention. It is at the strategic level that the performative mediates the unity between the activist's discourse, his action and his immanent motives. The rigor of legal process, the canon of interpretation or the rituals of the courtroom notwithstanding, the core issues in political trials—responsibility, justice, morality, legitimacy, representation,

¹¹³ Judith Butler and Athena Athanasiou, *Dispossession: The Performative in the Political* (Cambridge: Polity Press, 2013), 140.

loyalty, identity, nationalism, etc—rests upon innovative strategies of intervention that draw their critical pedagogic impetus from lived experiences of the excluded and the marginalized.

Tapping law's responsive spaces, the performative subject exploits law's 'transformative opportunities' to redeem its promise for justice and equality. But what exactly are these responsive and reflexive spaces and what does their resignification consists in? What does it mean to engage law in 'political-strategic' terms? What types of resistance register as properly resistant in law to generate the kind of power effects Foucault suggests? Through a consideration of the works of Emiliios Christodoulidis, what follows will identify a conceptual-strategic apparatus crucial for understanding performative resistance in the courtroom.

In 'Law and Reflexive Politics,' Christodoulidis suggests a conception of 'the reflexive' as that which is the anti-thesis of 'the 'exclusionary'' and 'reflexive politics' as a redemptive enterprise.¹¹⁴ He defines reflexive politics as that which 'keeps the question of its revisability always open and where the political constellation of meanings is always disruptable.'¹¹⁵ Recognizing the 'limited' reflexivity on which law's gate-keeping discourses secure their legitimacy and resilience, 'Law and Reflexive Politics' attempts to redeem law's exclusionary premises. While this particular work can be read as an attempt to clarify and reveal the politics of exclusion central to the dominant mode of democratic will formation, the author uses this conceptual framework to articulate specific legal strategies attentive to key sites and moments in his later works. It is due to this specificity that straddles the 'level and meta-level,' a framework that strategically redirects discursive dynamisms to points of contradictions, incongruities, uncertainties, fissures and cracks that I find Christodoulidis's work an informative genre of critique.

Frustrated with these gate-keeping technologies of foreclosures, closures and co-option, Christodoulidis warns against abandoning law as a site of critique and

¹¹⁴Christodoulidis Emiliios, *Law and Reflexive Politics* (Dordrecht: Kluwer Academic Publishers, 1998), xviii.

¹¹⁵ Id.

resistance.¹¹⁶ In ‘Strategies of Rupture,’ he identifies the ways in which the system operates to contain its externalities within the system to guarantee its continued and uninterrupted vitality. He identifies two broad schematics ‘pertinent to law’s functions’ and potential targets for critical interventions: ‘law’s powers of homology and law’s mechanisms of deliberate deadlock.’¹¹⁷ By homology, he refers to law’s paradigmatic mode of stabilizing expectations through ‘controlled innovation’ and ‘the use of normativity peculiar to it.’¹¹⁸ By ‘deliberate deadlock,’ he seeks to capture a plethora of instances in which the law reduces or neutralizes the substance of promises central to its legitimacy and therefore displaces ‘opportunities of redress.’¹¹⁹ After identifying these exclusionary categories that operate in tandem with the system’s logic of performative self-reference, which also explains the remarkable resilience and stability of the circuit, Christodoulidis turns to examining innovative strategies of intervention attentive to ‘contradictions,’ ‘heterogeneity,’ and ‘incongruence’ that permeates ‘the legal landscape.’¹²⁰

To tap into the system’s own ‘transformative opportunities,’ strategic thinking should be attentive to and vigilant about ‘meta-level-dilemmas’ and must take account of the constitutional framework that ‘fore-structures the field of possible action.’¹²¹ ‘Strategic thinking at the meta-level,’ he argues, ‘re-orient itself to carving out a space for the possibility of acting—a meta-level struggle—against the registers of democratic Capitalism.’¹²² Christodoulidis calls these modalities of critique immanent. He writes: ‘Immanent critique aims to generate within these institutional frameworks contradictions that are inevitable (they can neither be displaced nor ignored), compelling (they necessitate action) and transformative in that (unlike internal critique) the

¹¹⁶ Emiliós Christodoulidis, *Strategies of Rupture*, 20 *Law and Critique*, 3 (2009), 17.

¹¹⁷ *Id.* at 10.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 24-25.

¹²¹ *Id.* at 25.

¹²² *Id.*

overcoming of the contradiction does not restore, but transcends, the ‘disturbed’ framework within which it arose.’¹²³

With ‘Law and Reflexive Politics’ as his overarching framework, Christodoulidis’s work is an attempt to strategically reposition law’s reflexive and responsive impulse to the margin of discourse and politics. Situating resistance at irresistible sites, exploiting discontinuities and contradictions either repressed or managed by the system, vigilant to normative prescriptions and concrete institutional architectures, attentive to rights discourse and ‘institutional imagination,’ attentive too, to the local and global constitutional frameworks, Christodoulidis’s project gives new significance to the totality of legal strategies and inspires strategic engagement with the law to ameliorate, if not redress, present injustices that are urgent and cannot wait.

In response to Roberto M. Unger’s thesis of ‘law as politics’ and his optimistic account of law’s ‘transformative opportunities,’ Christodoulidis reminds us of the rationality that foregrounds the system’s openness and how it might be harnessed for transforming consciousness. There, he writes, ‘The system’s cognitive openness, in fact the cognitive openness that can be nothing else except systemic, is premised on the system’s closure, its ability to reduce the complexity it is faced with.’¹²⁴ In the binary logic that governs the conduct of the criminal trial and the system’s expectation of all claims and utterances to confirm to its grid of intelligibility, closure is the rule and openness the exception to the rule.

In ‘Against Substitution,’ through James Tully, he explains how political action rises to the meta-level: ‘through militant attention to the points of tension upon which the management of consensus depends; through the logic of rupture; through acting to create the possibility of acting in a way that was foreclosed.’¹²⁵ In ‘Strategies of Rupture,’ a work calibrated to elaborating the

¹²³ Id at 6.

¹²⁴ Christodoulidis Emilios, *The Inertia of Institutional Imagination: A Response to Roberto Unger*, 59 *The Modern Law Review*, 377, 384.

¹²⁵ Emilios Christodoulidis, *Against Substitution: The Constitutional Thinking of Dissensus*, in in Martin Laughlin and Neil Walker, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, (Oxford: Oxford University Press, 2007), 206.

specific operation of these strategies, he begins by drawing attention to rights discourse and the institutional architecture neglected by mainstream critique. Whatever normative closure characterize the discourse of rights, Christodoulidis argues, the fundamental indeterminacy of the rights discourse provides us with an opportunity for a political-strategic intervention aimed at creating space for acts of resistance that are ‘neither co-optable’ nor ‘institutionally relevant.’¹²⁶ Through a discussion of Peter Fitzpatrick’s claim that ‘sovereignty must be intrinsically receptive to plurality . . . [that] law, to be law, cannot be contained in its determinate essence,’ Christodoulidis paints a picture of rights discourse that is amenable to militant intervention. A right, he writes,

[c]annot be contained or exhausted in any one determinate content . . . any one definitive interpretation or conclusive *determinatio*. Instead it renews itself as responsive to our humanity . . . Law creates determinate effects, but those determinations forever leave a remainder, which as excess invokes further responses from the law.¹²⁷

If this provides a glimpse of the transformative potential evident in law, what modality of resistance resists without drawing on the dominant ideology to transcend institutional cooption? Christodoulidis’ question, ‘what registers as resistant, neither reducible to nor co-optable by the order it seeks to resist?’¹²⁸ is a question, that, not only seeks to illuminate practices of subjection sustained through techniques of closure and cooption, but also explicates a mode of critique that intervenes to retrieve the political, to revitalize, even reinvent, the political universe: ‘what can break incongruently, irreducibly so, with the order of capital or, more precisely, with capitalism’s economy of representation?’¹²⁹ In a passage suggestive of an answer to this question and pertinent to the politics of the political trial, he puts forth a view of strategic intervention that I take as a departure for a political-strategic thinking that opens up new spaces and holds on to already opened spaces, tricks sovereignty into its turf, launches an assault against it, to disrupt its rituals and ceremonials, destroy its dazzling symbols and prestige, expose exclusionary and

¹²⁶ Christodoulidis, ‘Strategies of Rupture,’ 10.

¹²⁷ *Id.* at 17.

¹²⁸ *Id.* at 9.

¹²⁹ *Id.*

hegemonic norms, subvert it, transform it at a site where the system's cognitive expectation of surprise against its normative structure is at its lowest:

Against a 'communicative' or 'deliberative' distribution of speaking positions, the 'strategic,' imports a reflexivity that does not necessarily fall within, but may situate itself incongruently to the spaces, interstices and speaking positions that the system makes available; incongruently, thus also, to the channels of change that ... the system offers as productive to the order of capital.¹³⁰

The strategic may not be the central animating factor behind the personal moral conviction to resist but profoundly informs and instigates the transformation of the personal into a collective political struggle. Although how one situates oneself in this space that 'the system makes available' remains a political-strategic decision contingent upon local 'situations,' legal proceedings contain a 'reflexivity that does not necessarily fall within' the system's filters.¹³¹ In its insistence on revealing, exposing, disrupting, and problematizing frameworks of subjection, performative resistance operates at the margin, situating itself at the interstices of legality and illegality, incongruently, and poetically, through humour, irony, wits, jokes, and music to evoke its power-effect. Contesting and using the truth of the law and of rights, the figure of resistance calls into presence a new order of exchange between sovereignty and those it excludes. It offers a different political ontology of the subject, sovereignty, and the political.

5.7. The Transformative Potential of Performative Resistance in Law

What transformative or emancipatory promise can the performative bring to bear on resistance to juridical discourses? If sovereignty and the subject constitute the two most important juridico-political formations central to the openness and closure of the political, the performative deconstructs their political ontology; creating conditions of possibility for the 'politics of becoming.' By revealing the contingency and complexity underneath the coherence of both sovereignty and the subject, it opens these formations to

¹³⁰ Id at 22.

¹³¹ Id.

what Butler and Athena Athanasiou call ‘unprefigurable future significations.’¹³² In other words, understanding these formations as performative, as a historical articulation of contingent power-knowledge constellation, forces us to acknowledge and recognize the ‘becoming’ central to these formations, leaving the future open, unpredictable, and unclosable.

Performative resistance emphasizes not the prohibitive and negative aspects of sovereignty and subjectivity but the productive, disciplinary, and normalizing effects of power on these formations. If law is a manifestation of power, and it certainly is, performative resistance eludes this power because it rejects the normativity of its central concepts and organizing principles. If juridical power functions only to the extent that it conceals itself, as Foucault says; if the technology of concealing survives only to the extent that this power masks itself as something else—as knowledge, reason, national security, public safety, etc—and circulated by supposedly neutral institutions such as courts and prisons; performative resistance resists by refiguring the discourse that articulates power and knowledge. It breaks the discursive hinge that ties this power to institutions.

The understanding and recognition of these formations as performative and contingently constituted allows us to unsettle taken-for-granted necessities about sovereignty and its power over life and death. It helps us see the heterogeneity and complexity underlying its coherent unity, and finally import historical inquiry into the orbit of law and legality.’ If the performative succeeds in explicating the contingent historical constitution of the present, if it gives us a diagnostic device for re-articulating the political ontology of sovereignty, the political, and the subject; then, we can begin to question the notions, domains, central concepts, and analytic frameworks by which law disables contestations and closes opportunities of change and becoming. By desecrating these formations from determinist rationalities by which law presents performative sovereignty and subjectivity as normative, fixed and static, the performative reconfigures these formations—as historical, contingent, and non-referential and opens up lines of flights. By situating

¹³² Butler and Athanasiou, *Disposessions*, 140.

critical historicity at points of tension, cracks, and fissures, performative resistance creates a condition for disjuncture between signification and context. Through practices of transgression, disruption, excess, and self-creation, performative resistance questions the eventalizing force of sovereign enunciations and its signifying practices.

Let me recapitulate my central arguments so far: In chapter two, I identified the forms of rationality and modes of reasoning by which law eliminated resistance and established a normative ontology of sovereignty and the subject. By identifying three central moments - foundation, and subject formation - as performative par excellence, chapter three advanced an understanding of law as a performative enterprise. Through a performative deconstruction of sovereignty and subjectivity, I have tried to show how these two formations came to have the kind of normative reality they now have. Arguing that a normative conception of law, sovereignty, and the subject imposes a closure by limiting the becoming horizons of subjectivity and sovereignty, I suggested a performative epistemology of law that recognizes and acknowledges the constitutive and regulative conditions of these formations. The recognition of sovereignty and the subject as processes of becoming introduces a contingency that enables a disjuncture between the original signification and the context, disrupting the repetition of an iterable code, and therefore rupturing its exclusionary and oppressive aims. In chapter four, I identified the political trial as one specific performative moment that exposes law's empty claims to normativity, neutrality, objectivity, and justice. I argued that as a surface manifestation of a submerged crisis of sovereignty, the political trial offers an occasion to go beyond the narrow question of guilt and innocence to question the very logic that sustains these and other categories.

Most importantly, since the possibilities for communication and understanding between sovereignty and the subject are limited by the instituted idiom of intelligibility, i.e., by the logic and rationality that organizes and structures communications between the two, the possibility of communication depends on the performative disruption of that limit. The subject's refusal to obey the limits imposed by these oppressive structures compels the system to recognize and acknowledge its exclusionary character. Through transgressive disruption of

law's gate-keeping discourses and egalitarian principles, performative resistance opens up possibilities of communication and understanding between the subject and the sovereign. Communication and understanding are the key ingredients of political life. However, if the terms of convincing a political adversary about the validity of one's claim are limited by the instituted paradigms of communication, then, the possibility of communication and understanding depends on the disruption of that paradigm and the performative reinvention of a new.¹³³ Our ability to break from the limits imposed on visibility and voice by power-knowledge turns on our ability to renew and imagine beyond the present, to perceive and believe in a possibility of a different kind of world. Performativity offers a way to conceptualize and perform that world.

5.7.1. The Performative-Genealogical Paradigm in Action

Through a consideration of a particular scene from Abbie Hoffman's testimony in the Chicago Conspiracy trial, I want to account for the political promises of performativity. By identifying the performative logic undergirding Hoffman's interventions, I want to explicate the practical relevance of performative strategies for disruption and transformation. A transformative intervention informed by performative strategies, to use Christodoulidis's formulation, 'imports a specific reflexivity that does not necessarily fall within, but may situate itself incongruently to the spaces, interstices and speaking positions that the system makes available.'¹³⁴ While Abbie Hoffman spoke through several genres of speech act to get his message out, here I am interested in one innovative scene that not only brilliantly activates politics at a site where politics is juridically deactivated, but also engenders new ways of thinking, acting, and being in the world.

Here is the exchange:

The Counsel: Will you please identify yourself for the record?

The Witness: My name is Abbie. I am an orphan of America.

¹³³ See Kulynych, *Performing Politics*, 335.

¹³⁴ Christodoulidis, *Strategies of Rupture*, 22.

The Prosecution: Your Honor, may the record show it is the defendant Hoffman who has taken the stand?

The Court: Oh, yes. It may so indicate. . . .

The Counsel: Where do you reside?

The Witness: I live in Woodstock Nation.

The Counsel: Will you tell the Court and jury where it is?

The Witness: Yes. It is a nation of alienated young people. We carry it around with us as a state of mind in the same way as the Sioux Indians carried the Sioux nation around with them. It is a nation dedicated to cooperation versus competition, to the idea that people should have better means of exchange than property or money, that there should be some other basis for human interaction. It is a nation dedicated to--

The Court: Just where it is, that is all.

The Witness: It is in my mind and in the minds of my brothers and sisters. It does not consist of property or material but, rather, of ideas and certain values. We believe in a society--

The Court: No, we want the place of residence, if he has one, place of doing business, if you have a business. Nothing about philosophy or India, Sir. Just where you live, if you have a place to live. Now you said Woodstock. In what state is Woodstock?

The Witness: It is in the state of mind, in the mind of me and my brothers and sisters. It is a conspiracy. Presently, the nation is held captive, in the penitentiaries of the institutions of a decaying system.

. . .

The Counsel: Can you tell the Court and jury what is your present occupation?

The Witness: I am a cultural revolutionary. Well, I am really a defendant--full-time.

The Counsel: What do you mean by the phrase 'cultural revolutionary?'

The Witness: Well, I suppose it is a person who tries to shape and participate in the values, and the mores, the customs and the style of living of new people who eventually become inhabitants of a

new nation and a new society through art and poetry, theater, and music.

An innovative strategy here appropriates the system's openness at the earliest 'speaking position' available. Ordinary questions generate extraordinary answers aimed at putting one of America's turbulent decades on trial. It is a political strategic intervention that situates the innovative and agonistic qualities of the performative at the point where the trial is most reflexive. Although the system expects the legal subject to act responsibly, i.e., respecting authority and viewing it as its mirror-image, the defendant breaks with sovereign enunciation, at his peril, and activates politics. The witness begins his defense in a subversive style. In identifying himself as 'an orphan of America,' resident of 'Woodstock Nation,' and a 'cultural revolutionary,' the defense strategy is at once oriented towards 'carving out space for acting' and to bringing back internalized norms that make our identities self-evident into the realm of contestation. His defiant response to standard questions is at once an act of disruption and self-recreation.

This strategic engagement with law offers an account of what Jill Dolan describes as a 'utopian performative' that is 'world-disclosing' and 'identity-creating.' In 'Utopia in Performance,' Dolan uses the phrase 'utopian performative' to capture,

[S]mall but profound moments in which performance calls the attention of the audience in a way that lifts everyone slightly above the present, into a hopeful feeling of what the world might be like if every moment of our lives were as emotionally voluminous, generous, aesthetically striking, and intersubjectively intense.¹³⁵

The moment of the political trial is precisely the kind of moment Dolan describes as 'small but profound,' akin to what constitutional lawyers call 'constitutional moments.' Not all political trials embody such foundational stories as to engage the common deliberation of the body politic. But those like

¹³⁵ Jill Dolan, *Utopia in Performance*, (Ann Arbor: University of Michigan Press, 2005), 5.

the Chicago Seven Conspiracy Trial are fulcrums for judgment-on them depends societies' understanding of its values, its identity and its sense of justice. As a 'utopian performative,' Hoffman rearticulates the dilemmas of responsibility, representation, recognition, exclusion, morality, and legitimacy facing the American public.

In imagining himself as a resident of what he named the 'Woodstock Nation,' a utopian nation that does not have a concrete political existence yet, one that exists in 'the state of mind,' the witness is disclosing a different world governed by a new epistemic standard. He says: 'a new nation . . . dedicated to cooperation versus competition, to the idea that people should have better means of exchange than property or money, that there should be some other basis for human interaction.'¹³⁶ While this trial comes at a pivotal moment in American history, the performance of seven middle-class-white Americans created an intense moment of intersubjective communication between the white middle class and the African Americans and the Indians. In their concession to the demands of Bobby Seale (the only black defendant in the group of eight alleged conspirators), in their denunciation of the system, they transformed the trial into a 'moment of enchantment' that resulted in a 'sudden insight into the shared process of being in the world.'

It is identity-creating too. In identifying himself as a 'Cultural Revolutionary,' the witness is bringing into being a new citizen, a new identity, a new political subjectivity that is defiant and resistant to the apparatus of subjection and seeks to transform it. He defines a 'cultural revolutionary as 'a person who tries to shape and participate in the values, and the mores, the customs and the style of living of new people who eventually become inhabitants of a new nation and a new society through art and poetry, theater, and music.'¹³⁷ Apart from reconstituting the defendant as a subject capable of resistance to disciplinary technologies that constitute his identity, his performative response extends the universe of contestation beyond self-recreation and returns the taken fore-granted norms of the ideal liberal subject to the realm of contestation. It is, to

¹³⁶ Id.

¹³⁷ Id.

use Fredrick Jameson's formulation, a utopian that marks a 'radical disjuncture with the present.'¹³⁸

Condemning the usurpation of the power of the constituent and naming a different kind of society and an alternative way of being and acting in the world, the defendant institutes a disruption that defies containment by the system. It is utopian, disruptive and insists on the transformative opportunity of the moment to call into being a new reality and a new identity he calls 'new people' or 'new society,' a new world that he names 'new nation' and articulate a new epistemic standard that shapes their vision of transformation: 'art and poetry, theatre, and music.' Regardless of its utopian form, Hoffman's disruptive strategy demonstrates that 'we can still act' though these actions are always contingent. The performative is often utopian and utopian is more often than not contingent. As Jameson argues, 'It [utopia] is the break that secures the radical difference of the new utopian society [which] simultaneously makes it impossible to imagine.'¹³⁹ Whether or not this mode of performative resistance 'can break incongruently . . . with the order of capital or . . . with capitalism's economy of representation,'¹⁴⁰ his intervention resists his construction as passive and obedient and offers a different way of naming and perceiving the world.

If the teleology behind this mode of resistance is one that seeks to bring into the public arena those self-evident truths 'that cannot be refuted because it was hardened into unalterable form in the long baking process of history'¹⁴¹ with the view to performatively reinscribing and accentuating their constructedness rather than their self-evidence, its success, i.e., the consciousness transformation and identity creating effect of his resistance can only be achieved by an acting subject after action not before action. In 'The Subject and Power,' Foucault argues that 'power exists only when it is put into action.'¹⁴² His disruptive strategy not only secures space for acting but also destabilizes the norms and identities that structure the dialogue within the

¹³⁸ Christodoulidis, *Strategies of Rupture*, 23.

¹³⁹ Frederick Jameson, in Christodoulidis, *Strategies of Rupture*, 23.

¹⁴⁰ Christodoulidis, *Strategies of Rupture*, 9.

¹⁴¹ Foucault, *Nietzsche, Genealogy, History*, 144.

¹⁴² Michel Foucault, *The Subject and Power*, 8(4) *Critical Inquiry*, 1982, 788,

courtroom. Through such strategic and innovative intervention at this early stage in the trial, the defense hints at his utopian politics that seeks to strategically bring what is rendered invisible and unimaginable into the sphere of politics. In the ‘Archaeologies of the Future,’ Jameson brilliantly encapsulates the logic at work in this disruptive-utopian paradigm: ‘Disruption is then the name of the new discursive strategy, and Utopia is the form which such disruption necessarily takes.’¹⁴³

5.8. Conclusion

Whatever transformative or liberating potential one ascribes to this mode of participation in law, no matter what the critical potentials of its pedagogy, these interventions clearly represent a chasm in the integrity of the institution. They are strategic and their utopian mode of critique breaks with the logic of the system. The goal of the intervention is not to annihilate power or dispel the end of the power structure that is the object of its critique; it aims to create the conditions of possibility for intervention and critique. Performative resistance is disruptive. As performative strategic participation in law, these disruptive interventions deploy disruption as ‘a discursive strategy’ to re-politicize social conflicts and transform embodied experiences of injustice and indignation into a weapon that nourishes their anger and determination to resist. Their conflict is not just with the law but also the discursive domains and power-knowledge regimes within which their voice is usurped and their agency annihilated.

Breaking with the system’s logic of representation and redress, their disruptive confrontation with the system oscillates from an internal critique to immanent critique and utopian resistance (calling for ‘a radical disjuncture with the present’). Exposing the limits of the communicative paradigm and marking its ‘blind spots,’ such interventions return the system’s normative structures, its discourses and operational logic, the norms it consistently upholds and the exceptions it allows into the realm of confrontation. In their own ways, these strategies generate dilemmas that force the system to acknowledge their

¹⁴³ Frederick Jameson, *Archaeologies of the Future* (London: Verso, 2005), 231.

claims. In rejecting the communicative paradigm, the performative paradigm does not propose an alternative paradigm. It is an agonistic struggle that seeks to capture which does not present itself as an object of deliberation within the instituted paradigm.

As discussed earlier, if the subject is the effect of power that wields a limited free will and therefore agency, it is difficult to see how the agent, at least according to this Foucauldian-Butlerian logic that situates the subject in an ambivalent relationship to power, effectively subverts the system by ‘using the resources of the system’ let alone dispel the end of the structure. Instead, the point being made is this: insofar as one can engage in the resistance of the very practices that constitute us, this is necessarily a micro-politics of resistance whose aim is not to identify a blueprint for the notion of the moral life and how to achieve it, it is a struggle against what is, against the closures and foreclosures, the limits on the becoming potential of the human subject. Its aim is to contest the constitutive and regulative conditions of the present that exclude, dispossess, dispose, murder, exterminate etc. Struggles within the law do not aim at obliterating the structures of domination once. They aim to surprise the system, crush its symbols, disrupt its prestige, and leave ineffaceable signs, memorable repertoires of resistance that inhere in memory, one which the system cannot integrate or from which it cannot recuperate. It is an attack against the notions and systems of thought that legitimize and consolidate the order. It is about registering irreparable ruptures that will eventually erupt into what Althusser calls ‘ruptural unity.’¹⁴⁴

¹⁴⁴ Louis Althusser, *For Marx*, (London: Verso, 2005), 99.

Chapter Six

6. 'Black man in the white man's court': Nelson Mandela's Performative- Genealogical Interventions

6.1. Introduction: Apartheid on Trial

I want to tell you so to your face so that it carries more weight.

—Pascal, Pensees

What are these trials about, eh? Who is it they are trying?' one of them asked. 'The whole of South Africa is on trial,' replied Professor Matthews, looking up darkly from his group. 'You're on trial, we're all on trial. It's ideas that are being tried here, not people.'¹

—Anthony Sampson, *The Treason Cage*

Anthony Sampson's account of the above encounter is emblematic of both the substance and the tone of conversations taking shape on the streets of South Africa as the government stages a phenomenal spectacle in the courtroom. Describing the politics of repression at the heart of the treason indictment, counsel for defense captured the essence of the confrontation in terms of competing spectacles—a confrontation between spectacles of repression and resistance.² It was a cultural representation of a battle of ideas between those who 'seek equal opportunity for, and freedom of thought and expression by, all persons of all races and creeds' on the one hand, and 'those which deny to all but a few the riches of life, both material and spiritual, which the accused aver should be common to all.'³ The first of the many high profile political trials, the spectacle backfired and generated what Sampson described as 'the oddest paradox': 'in the very court where they were being tried for treason, the

¹ Anthony Sampson, *The Treason Cage: The Opposition on Trial in South Africa* (London: Heinemann, 1958), 28.

² Michael Lobban, *White Man's Justice: South Africa's Political Trials in the Black Consciousness Era* (Oxford: Oxford University Press, 1996), 17.

³ Vernon Berrange, cited in Helen Joseph, *If this Be Treason* (London: Andre Deutsch, 1963), 37.

Congress leaders were able to hold their biggest unbanned meetings for four years.’⁴ In his memoir, *Long Walk to Freedom*, Mandela describes the trial’s boomerang effect: ‘Our communal cell became a kind of convention for far-flung freedom fighters. Many of us had been living under severe restrictions, making it illegal for us to meet and talk. Now, our enemy had gathered us all together under one roof for what became the largest and longest unbanned meeting of the Congress Alliance in years.’⁵

Apartheid’s spectacles of oppression were overtaken by liberatory counter-spectacles. What is orchestrated to produce and generate images and concepts productive to the racist regime was redirected and used by the oppressed as a platform for visibility and hearing: to give account of themselves in their own terms, with their own discourse and dialect.⁶ As he later noted, ‘By representing myself I would enhance the symbolism of my role’: ‘I would use my trial as a showcase for the ANC’s moral opposition to racism.’⁷ Instead of defending themselves against the charges, they laid a charge against the system, accusing it of racism, violence, injustice, immorality, and illegality, and illegitimacy; transforming themselves into ‘the subjects of history rather than . . . impersonal objects of official historical records,’ as Rancière would say.⁸ An event staged with the one and only purpose of squashing resistance to the usurpation of the very conditions of intelligibility as speaking beings, generated the opposite result: it created a defiant subject that exposed subjection at sites

⁴ See Sampson, *The Treason Cage*, 203.

⁵ Nelson Mandela, *Long Walk to Freedom: the Autobiography of Nelson Mandela* (Boston: Little, Brown and Co., 1994), 201.

⁶ See Joel Joffe, cited in Catherine Cole, *Performing South Africa’s Truth Commission: Stages of Transition*, (Bloomington: Indiana University Press, 2010), 63. Joffe recounts the defendants’ jubilant mood in anticipation of the opportunity to speak and give account of themselves and their people: ‘We had come on legal business to consult the accused. But it was clear that they were in no mood for consultation. They were rediscovering, it seemed to us, the joys of speech, not unlike people who had been dumb and had suddenly had the power of speech restored to them. They were miraculously wondering at the joy of it, turning it over on their tongues, feeling the savour of it on their lips; they were drunk with speech, with human communication, and contact, with being able to talk, to meet with and touch other people, too involved in all these new sensations, too intoxicated with them to be prepared to consider serious problems of the law.’

⁷ Mandela, *Long Walk to Freedom*, 201.

⁸ Dmitri Nikulin, *The Names in History: Rancière’s New Historical Poetics*, in Jean-Phillip Deranty and Alison Ross, (eds.), *Jacques Rancière and the Contemporary Scene: the Philosophy of Radical Equality*, 67.

never seen before, that apprehended and named Apartheid's schematic of subjection and injustice.

This chapter will examine the significance of Mandela's courtroom performances of resistance in illuminating our understanding of the constitutive and regulative conditions that sustained Apartheid. Much of the emphasis will be on the conditions of possibility his interventions made possible. By identifying a few scenes from the Incitement trial (1962), and genealogically analyzing their disruptive and transformative potential, moments, I will offer a historicist reading of Mandela's relations to the law, focusing on the objections he raises and the moves he makes between different registers.

6.2. Performative-Genealogies in the Old Synagogue Court

We would not defend ourselves in a legal sense so much as in a moral sense. We saw the trial as a continuation of the struggle by other means.

Nelson Mandela, *Long Walk to Freedom*, 360

In 'Just Stories,' Milner S. Ball conceives 'narrative' as a medium through which a political community is continuously and permanently constituted and reconstituted.⁹ He argues, 'Narrative is the primary medium for talking together about who we are—and would be—as people, and this is the talk in which conversation about justice chiefly subsists.'¹⁰ It is in the telling and retelling of stories of people, in the continuities and ruptures, in the homogeneities and heterogeneities, and the disjuncture between the coherence and contingency of the past that the raw material for contestation, re-creation and renewal resides.¹¹ As Melvyn Hill tells us, 'Stories tell us how each one finds or loses his just place in relation to others in the world.'¹² In particular, some stories of law

⁹ Milner S. Ball, *Just Stories*, 12 (1) *Cardozo Studies in Law and Literature* (2002), 37.

¹⁰ *Id.*

¹¹ Erik Hobsbawm and Terence Ranger, *The Invention of Tradition*, eds., (Cambridge: Cambridge University Press, 1983), 7.

¹² Melvyn Hill, *The Fictions of Mankind and the Stories of Men*, in Hannah Arendt, *The Recovery of the Public World*, eds., (New York: St. Martin's Press, 1979), 290.

‘embody such paradigmatic’ dilemmas as to ‘engage our common deliberation as a public.’¹³ They confront the body politic with fundamental questions of responsibility, representation, recognition, equality, and justice. These are stories ‘in which the community defines itself, not once and for all, but over and over, and in the process it educates itself about its own character and the nature of the world.’¹⁴ Mandela’s trials constitute those singular national occasions in which a resistant subject confronted South Africans with foundational questions—what kind of society they are and what kind of political community they want to have for the future. In recounting the story of exclusion and misrecognition of black identity and personhood, the defendant transformed the legal moment into what may be called a counter-constitutional moment that sought to redeem the logos of those excluded by the original act of founding.¹⁵ ‘Recounting differently,’ the defendant composes a genealogical account not only of South African justice but also South Africa the nation.¹⁶ In recounting stories of origin differently, i.e., in reconfiguring and retelling South Africa’s violence of law-making and law-preserving, Mandela brings politico-historical inquiry into the orbit of law and legality.

In displacing the gathering effect of the ‘we,’ he offers a genealogical and performative reading of the founding moment generally and the law specifically: he uses the moment of the trial to show the gap between law and mere law. In ‘recounting differently,’ as Ricoeur observes, ‘the inexhaustible richness of the event’ of founding, he situates himself genealogically and performatively, to the spaces, interstices, and speaking positions offered by the

¹³ Ron Christenson, *Political Trials: Gordian Knots in the Law*, (Oxford: Transaction Books, 1986, 8.

¹⁴ James Boyd White, *Plato’s Gorgias: The Ethics of Argument*, 50 U. Chi. L. Rev., 849 (1983), 882.

¹⁵ I am here relying on Ackerman’s formulation of constitutional moment. Mandela’s transformation of the trial into a moment of constitutional politics from outside is a counter-constitutional moment that seeks to displace the original social contract. Since ‘only people already enjoying democratic and constitutional rights have grounds for speaking of . . . constitutional’ moment, Mandela’s intervention makes a counter-constitutional offer to displace the constituent principles of the present. For an account of ‘constitutional moments,’ see Bruce Ackerman, *We the People: Foundations*, (Cambridge: The Belknap Press of Harvard University, 1991). For a critique of Ackerman’s position, see Michael J. Kilarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman’s Theory of Constitutional Moments*, 44(2) *Stanford Law Review*, 759, (1992).

¹⁶ Nelson Mandela, *The Transcript of the Incitement Trial*, Nelson Mandela’s First Court Statement, <<http://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01600/05lv01624/06lv01625.htm>> (Last accessed 06 September 2013).

system, to expose the intense political and legal crisis haunting Apartheid.¹⁷ Mandela's critique both uses and mocks the law, he upholds and defeats the law. In this double movement, he stages a genealogical and performative problematization that displaces and reinvents law. Without abandoning enlightenment values of equality, freedom and liberty, Mandela's critique of Apartheid law and 'justice' takes a genealogical turn; launching a stinging demythologization of the mythical foundation of law and justice and the desacralization of sacred knowledge.

But what do genealogies do in the context of the political trial? First of all, genealogies are diagnostic tools: as a historical inquiry into the conditions of the present, genealogy reveals the coherence underlying sovereignty, the subject, institutions, discourses, and identities as contingent and contested.¹⁸ As a diagnostic or analytic tool into the conditions of the present, genealogy excavates submerged juridico-political crisis into an arena of visibility and shows the relationship between the practices of the present and the submerged crisis of the past.¹⁹ The political trial is simply a surface manifestation of that submerged crisis, a crisis of sovereignty that makes an appearance on the normative structures of the system ones in a while. By tracing the conflict that rages beneath law's normative mainstays to the submerged crisis of the past, genealogy historicizes the juridical realm and exposes the contingency that lies beneath the coherence of the normative order. It brings that submerged problem into view 'so as to do something with them.'²⁰ Mandela conceived the trial not as 'a taste of the law' or as a site of 'truth-telling,' but, in his own words, 'as a continuation of the struggle by other means.'²¹ In all the three trials- from the treason trial to the incitement trial and the Rivonia trial, Mandela brings historical inquiry into the orbit of law and legality, with the view

¹⁷ See Emilios Christodoulidis, *Strategies of Rupture*, 20 *Law and Critique*, 3 (2009), 22.

¹⁸ Michel Foucault, 'Nietzsche, Genealogy,' *History*, in Donald F. Bouchard, *Language, Counter-Memory, and Practice: Selected Essays and Interviews* (Ithaca, Cornell University Press, 1977), pp- 142-144; See also Colin Koopman, *Genealogy as Critique: Foucault and the Problems of Modernity* (Bloomington: Indiana University Press: 2013), 6-8.

¹⁹ See Vikki Bell, *Culture and Performance: The Challenge of Ethics, Politics, and Feminist Theory* (Oxford: BERG, 2007), 82; Koopman, *Genealogy as Critique*, 2.

²⁰ Koopman, *Genealogy as Critique*, 2.

²¹ Nelson Mandela, *Long Walk to Freedom*, 428-29.

to doing something with it, with the view to unlocking, if you like, juridically closed meanings.

Situating himself within, Mandela reconfigures the reflexive and polyvalent material and spatial coordinates of legal principles and the rights discourse to appropriate the tension that traverse the legal order. As Foucault writes in ‘Nietzsche, Genealogy, History,’ ‘the nature of these rules allows violence to be inflicted on violence and the resurgence of new forces that are sufficiently strong to dominate those in power.’²² In a passage that encapsulates the kind of strategic move adopted by Mandela, Foucault writes:

The success of history belongs to those who are capable of seizing these rules to replace those who had used them, to disguise themselves as to pervert them, invert their meaning and redirect them against those who had initially imposed them; controlling this complex mechanism, they will make it function so as to overcome the rulers through their own rules.²³

Mandela’s reconfiguration of South Africa’s story of ‘origin,’ his recounting of the story and history of its laws, his re-signification of the very meanings of juridical concepts and ideals—legality, criminality, equality, the rule of law, violence, communism, democracy, etc —inverting their ‘meaning and redirecting it against the very order that originally imported and imposed it’—is an impeccable evidence of a genealogical logic at work in his defense.²⁴ Indeed, Mandela’s deployment of Apartheid’s own rules against those who owns them, re-functioning them so as to expose the violent and ‘surreptitious appropriation of a system of rules’ is a successful use of what Foucault calls effective history.²⁵ In making spectacle out of Apartheid’s legal absurdity and the false legalism of his trials, he invokes and protests rights, a disruptive exercise that Foucault calls the ‘simultaneous declaration of war and of rights.’²⁶

²² See Foucault, ‘Nietzsche, Genealogy, History,’ 151.

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ Michel Foucault, *Society Must be Defended: Lectures at the College De France, 1975-76*, Mauro Bertani and Alessandro Fontana, eds., trans. David Macey (London: Penguin Books, 2003), 73.

Consistent with Foucault's counter-historical discourse, Mandela conceives the struggles and confrontations within Apartheid laws, institutions, and the social sphere in terms of a race-war that divides the South African *body politic* along a racial line.²⁷ More over, just as Foucault's genealogical analysis of power²⁸ draws on a reformulation of Carl Von Clausewitz's classic aphorism—'war is a mere continuation of policy by other means . . . carrying out of the same by other means'—Mandela's liberationist repertoire of resistance conceived the theatre of the state as spectacles of oppression aimed at repressing and eliminating resistance to the order. In the Rivonia trial, Mandela goes further, making explicit reference to 'the classic work of Clausewitz,' as one of the intellectual thoughts that shaped his thoughts.²⁹ He said: 'The Court will see that I attempted to examine all types of authority on the subject—from the East and from the West, going back to the classic work of Clausewitz, and covering such a variety as Mao Tse Tung and Che Guevara.'³⁰ After three decades of thinking and reflection in his cell, Mandela gestures at the genealogical logic at work in his encounter with Apartheid courts: 'We would not defend ourselves in a legal sense so much as in a moral sense. We saw the trial as a continuation of the struggle by other means.'³¹

I further argue that Mandela's strategy of resistance is clearly performative. By exposing the hidden violence that marks the moment of origin, by revealing the performative coup de force that unsettles the law from within, he counters the original performative with a new performative, a fiction with a fiction, to create an occasion for interruption. By referring to a higher law, what Derrida calls 'the law of laws,' the law to come, that law which is responsive to the ethic of justice and responsibility, he performatively brings into being a new standard of justice that always interrupts the law and opens it up to 'the incalculable singular demand of justice beyond circumscription by the law.'³²

²⁷ Id at 47, 56.

²⁸ Id at 16, 47.

²⁹ Nelson Mandela, The Rivonia Trial, at <<http://law2.umkc.edu/faculty/projects/ftrials/mandela/mandelaspeech.html>>, (Last accessed 06 September 2013).

³⁰ Id.

³¹ Nelson Mandela, Long Walk to Freedom, 429.

³² Stephen Curkpatrick, Ethical Discourse in an Age Cognizant of Perspective. Reflections on Derrida's 'The Laws of Reflection: Nelson Mandela, In Admiration,' 40 (1) *Sofia*, 81 (2001), 100.

Since his intervention is aimed creating conditions of possibility for change and transformation, his genealogies are not merely diagnostic. They are reconstructive and transformative. It is here, where genealogy engages in reconstruction and transformation that it takes a performative turn.

Although appeal to humanist ideals of reason, freedom, liberation, truth and democracy are pervasive in his defenses and elsewhere in his writings, Mandela's mode of critique and struggle are both performative and genealogical.³³ In both the Incitement and the Rivonia trial, we see forms of critique and political struggle that are genealogical and performative. Without abandoning enlightenment values of rights and political liberty, Mandela's scrupulous excavation the submerged past of the law and its surface manifestation takes a genealogical and performative approach to the juridical domain. In 'The Other Heading: Reflections on Today's Europe,' Derrida wrote, 'If the Enlightenment has given us human rights, political liberties and responsibilities, it would surely be out of the question to want to do away with the Enlightenment project. But it may also be necessary not simply to affirm but to question the values it has given us . . . The imperative remains . . . they have given us our language; our language of responsibility.'³⁴

While Foucault rejects the idea of resistance in the name of a new law and a moral code, and somehow exaggerates the effectiveness of disciplinary normalizations, he nevertheless exalts the strategic appropriation of the organizing concepts and normalizing procedures of law as a counter-discourse. As Timothy Mitchell put it, 'disciplines can breakdown, counteract one another, or overreach. They offer spaces for manoeuvre and resistance, and can be turned to counter-hegemonic purposes.'³⁵ In using and critiquing these values, Mandela is doing exactly this- using the spaces offered by disciplines 'for manoeuvre and resistance' to re-politicize the juridical realm and create conditions of possibility for intervention and critique. Through a productive

³³ While Mandela's critique unravels the power relations law and the judicial apparatus reproduces and disseminates, he does not stop at unraveling. In order to support a programmatic solution, he imagines and outlines the shape and form of a future South Africa. It is this imagination of a higher law and appeal to moral codes such as justice and morality that makes him at once genealogical and performative.

³⁴ *The Other Heading: Reflections on Today's Europe*, trans. Pascale-Anne Brault & Michael Naas, (Bloomington/Indianapolis: Indiana University Press, 1992), xiii.

³⁵ Timothy Mitchell, *Colonizing Egypt*, (Berkeley: University of California Press, 1991), xi.

coupling of performative genealogies with enlightenment values, he slips under Apartheid's normative mainstays to expose the violence it neutralizes and renders inaccessible while critiquing the terms of its rationality.

6.3. Jurisdictional Objections: Opening up Space within Space

In 'The Human Condition,' Hannah Arendt writes, 'Wherever the relevance of speech is at stake, matters become political by definition, for speech is what makes man a political being.'³⁶ Whereas one can still communicate without speech, Arendt maintains, 'No other human performance requires speech to the same extent as action.'³⁷ For Arendt, therefore, political action proper requires a form of speech that reveals the appearance of the acting subject 'in the human world.' However, political action is not solely restricted to the domain of speech. In her book, 'Just Silences,' Marianna Constable observes that '[silence is not always an absence of voice.]'³⁸ It can be heard as voice of consent or dissent. Identifying a paradox often appropriated by regimes in silencing competing voices from being heard as voices, she writes, 'the empowerment that is to come with voice is a power that cannot be conjured without first being asserted; but the voice that asserts or demands power must in some sense be already empowered.'³⁹ This is precisely the paradox that animates the setting into motion of the judicial machine with the view to achieving repression.⁴⁰ The courts offer political defendants the very stuff they intend to deny them: hearing and visibility.

In political trials, 'jurisdiction' matters precisely because of the opportunity it offers for contestation.⁴¹ The debate over whether the court is a competent court of jurisdiction to examine the matter and determine its merit, or whether the matter is justiciable in the first place etc, provides the resistant subject

³⁶ Hannah Arendt, *The Human Condition*, (Chicago: The University of Chicago Press, 1998), 3-4.

³⁷ *Id* at 179.

³⁸ Marianne Constable, *Just Silences: The Limits and Possibilities of Modern Law*, (New Jersey, Princeton University Press, 2005), 58.

³⁹ *Id*.

⁴⁰ The use of the courtroom as a technology of repression leaves behind a trace, a remainder that no one can predict how it might be recalled and deployed on the historical stage.

⁴¹ See Otto Kirchheimer, *Political Justice: the Use of Legal Procedure for Political Ends*, (Princeton: Princeton University Press, 1961), 37; Ron Christenson, *Political Trials*, 9.

with the opportunity to slip into the normative structure of the order - unravelling the dirty linen underneath its symbols of legitimation. If the Incitement trial was aimed at eliminating resistant voices from being heard, in reality, they did exactly the opposite: instead of silencing Mandela and others, instead of suffocating black liberationist narratives and discourses, the trial offered them a space for hearing and visibility, allowing them to filter stories of injustice and indignation into the court of world opinion.⁴² In his essay, 'Silence in the Courtroom,' Andrew Green writes this about the trial of Socrates: 'Although the trial represented an attempt to silence the critic . . . the speech survived for the next two and a half millennia—a solid refutation of the Athenian government's ability to quiet a voice of dissent.'⁴³ In this trial, a subject whose voice is usurped and whose discourse marginalized given an opportunity to re-create himself as resistant and to negotiate his relation with the law. It allowed him to both resist and claim authority. Of course, the court would eventually silence foes of the state through incarceration or other measures, but the 'hearing' proper provides precisely that—a hearing and visibility through which they can offer an account of themselves, in their codes and dialects, through their discourse.⁴⁴

Insofar as the political appropriation of the speaking position offered by the system depends on the defendant's ability to craft a strategy capable of opening up space for re-politicization, Mandela begins his politicization by establishing rapport with the court. He assures the judge of his highest respect for them and the law. In carving out space for action, a political space within the legal space, he mounts a generative objection that is at once legal and political and carves out space that the system cannot close off without significant risks to its own legitimacy. From the outset, he reminds the judge that the 'case is a trial of the aspirations of the African people' - one that is neither reducible to nor comprehensible within the confines of the trial's 'communicative offers.' By respectfully submitting himself to the law, warning but not accusing, he defines what the trial is—the trial of the 'aspirations of

⁴² Christenson, *Political Trials*, 9.

⁴³ Andrew Green, *Silence in the Courtroom*, 24 (1) *Law and Literature*, (2012), 81.

⁴⁴ See James C. Scott, *Domination and the Arts of Resistance* (New Heaven, Yale University Press, 1990), 109.

the African people’—and delineates its domain of emphasis: ‘on important questions that go beyond the scope of this present trial.’⁴⁵ Here we have a preliminary political injunction- the subject of the trial is not the tragic hero, Nelson Mandela, who at once claims and resists authority, but South Africa as a whole. It is the crisis of South African sovereignty, the moral degeneration of its institutions of justice that is on trial. By inviting them out of the restraining domain of the juridical into the political, he deploys the ‘communicative offer’ of the trial to communicate his experiences, and how Africans in South Africa lost their ‘just place in relation’ to Whites.

Asked by the judge whether he pleads guilty—a standard neutralizing question that elevates the judiciary above and beyond politics by ground its function in the moral distinction between guilt and innocence, masking law’s preeminent role in technologies of domination—Mandela transcends these normalizing categories, by raising jurisdictional objection⁴⁶: ‘Your Worship, before I plead to the charge, there are one or two points I would like to raise.’⁴⁷ By objecting to the competence of the court to hear his case, Mandela carves out space for the possibility of acting, to enable politics at a site where politics is deactivated, and to turn the destabilizing impetus of the political trial against the very power that abuses it while seeming to preserve it. Questioning the court’s authority to sit in judgment and dispense justice, Mandela asked the judge to suspend the invitation for a plea and made a counter-invitation; inviting the judge into his turf—to take flight into the submerged crisis of sovereignty and its constituent point. Speaking as a lawyer, a man of law who at once upholds and contests law, he makes an objection that cannot be ignored: ‘I want to apply for Your Worship’s recusal from this case. I challenge the right of this court to hear my case on two grounds.’⁴⁸

This is how, at the earliest stage of the trial, he refuses to enter a guilty plea, to expand the responsive ranges of this space and this moment:

⁴⁵ See The Incitement Trial Transcript.

⁴⁶ Foucault, ‘Revolutionary Action,’ in *Language, Counter-Memory, Practice*, 227.

⁴⁷ See The Incitement Trial Transcript.

⁴⁸ *Id*

Firstly, I challenge it because I fear that I will not be given a fair and proper trial.

Secondly, I consider myself neither legally nor morally bound to obey laws made by a parliament in which I have no representation.'

The first objection is an internal critique that does not remain internal but transcends. Departing from forms of critique that are possible within law's frameworks and analytic categories, he creates the conditions of possibility for a critique of law that is neither reducible to nor subsumable within law's categories. It is a critique that deploys the language of Enlightenment—equality, fairness, judicial impartiality, and the principle that one cannot be a judge in his own case. He says, 'It is improper and against the elementary principles of justice to entrust whites with cases involving the denial by them of basic human rights to the African people.'⁴⁹

The second objection, however, is a meta-level objection that is both genealogical and performative. It is not a mere denunciation of the inaugural violence of exclusion, it is also a performative claim that seeks, to use Derrida's formulation, to 'justify, to legitimate or transform the relations to law, and so to present itself as having a right to law.'⁵⁰ It is an institutive act of intervention that seeks to legitimate itself as law while trying to displace state law. As Christodoulidis argues, these are meta-level considerations necessary to open up space for an 'act of resistance [that] registers without being absorbed, integrated or co-opted' by the system and the discourse it resists.⁵¹ It is an objection that elevates itself beyond the legal-illegal distinctions into the meta-level critique of the just law and the unjust law, the moral law and the immoral law to 'resist injustices of assimilation and recognition'⁵². As James Tully argues, only at the meta-level can 'politics resist and redress the multiple forms of its

⁴⁹ Id.

⁵⁰ Jacques Derrida, *Force of Law: "The Mystical Foundation of Authority,"* in *Deconstruction and the Possibility of Justice*, eds. Drucilla Cornell, Michel Rosenfeld, & David Gray Carlson (London: Routledge, 1992), 2.

⁵¹ Christodoulidis, *Strategies of Rupture*, 5.

⁵² James Tully, cited in Emiliios Christodoulidis, *Against Substitution*, in Martin Laughlin and Neil Walker, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007), 206.

co-option.’⁵³ By elevating the contestation from level to meta-level, i.e., from the legal-illegal to the just-unjust, moral-immoral, Mandela appropriates the interruptive force of justice and morality to import what Christodoulidis calls a ‘reflexivity that cannot be captured, and certainly is not exhausted, in any notion of the political constitution’ to redeem the speaking position of ‘the entire nation.’⁵⁴

Conceiving his trial as a surface manifestation of a long submerged and much deeper crisis of sovereignty, he excavates the strange singularities that undergird law’s universality, and unravels the incoherence of the order. He identifies gaps, tensions, ‘linkages, assemblages, and networks’ that show how the coherence of law and the judicial order is contingently articulated.⁵⁵ To create a line of flight for forms of critique that go beyond the crisis that manifests itself as the surface effect of a much deeper problem, he begins from forms of critique that are possible within. But to transcend ‘the multiple forms of its cooption,’ as Tully says, to resist the confines of the deliberative offer, he instigates a crisis that cuts the ties between the subject and the legal order and obliterates their reciprocal obligations.

6.4. From Epistemic Injustice to the Ethic of Coexistence

As a black defendant before Apartheid law, Mandela enters the deliberative framework of the trial with a speech impediment. In spite of procedural and substantive safeguards enshrined in Apartheid juridical codes, Africans in South Africa, like the plebeians of the antiquity, are subject to injustices of misrecognition. The founding violence that institutes an exclusionary grid of intelligibility subjects the excluded to epistemic and hermeneutic marginalization that cannot be redressed in law. The political philosophy of white supremacy and racist discourses that have become normative and quotidian effectively socialized and racialized institutions of law and justice. Within that racialized and socialized institutional paradigm, the black body represents a problem and a danger. For Mandela, the concern here is what

⁵³ Christodoulidis, *Strategies of Rupture*, 17.

⁵⁴ *Id* at 207; See also Anthony R. DeLuca, *Gandhi, Mao, Mandela, and Gorbachev: Studies in Personality, Power, and Politics* (Westport: PRAEGER, 2000), 73.

⁵⁵ See Coopman, *Genealogy as Critique*, 6.

Fanon refers as the dangerousness of being identified with a danger.⁵⁶ It is not the law as such that is a problem, but the disrespected black being that is before the law which creates a problem for law. It is Mandela's explication of what W. E. B. Du Bois calls 'existence as a member of a racial group deemed problem people'⁵⁷ and the epistemological permutations of this dynamics that is the focus of this section.

Mandela's first objection—'I fear that I will not be given a fair and proper trial'—is not merely an internal critique suggestive of biases and prejudices, it is not even a concern with the politicization of the administration of justice. It is an objection to the impossibility of justice under Apartheid, a claim expressive of the Fanonian 'anti-black racial gaze'⁵⁸ that, to use Foucault's expression, 'attached itself to the body,' inscribed 'in the nervous system, in temperament, in the digestive apparatus' of the Whiteman and the white court to which Mandela submits himself. Here is Mandela's trenchant articulation of that conundrum:

Broadly speaking, Africans and whites in this country have no common standard of fairness, morality, and ethics, and it would be very difficult to determine on my part what standard of fairness and justice Your Worship has in mind. In their relationship with us, South African whites regard it as fair and just to pursue policies which have outraged the conscience of mankind and of honest and upright men throughout the civilized world. They suppress our aspirations, bar our way to freedom, and deny us opportunities to promote our moral and material progress, to secure ourselves from fear and want. All the good things of life are reserved for the white folk and we blacks are expected to be content to nourish our bodies with such pieces of food as drop from the tables of men with white skins. This is the white man's standard of justice and fairness. Herein lies his conceptions of ethics. Whatever he himself may say in his defense, the white man's moral standards in this country must be judged by the extent to which he has condemned the vast majority of its inhabitants to serfdom and inferiority.⁵⁹

In this diagnosis of the political rationality and the moral and ethical standards of the white community, Mandela is accounting for a mode of knowing and acting that excludes the very possibility of communication and understanding

⁵⁶ Franz Fanon, *Black Skin, White Masks*, trans. Richard Philcox (New York: Grove Press, 2008), 143.

⁵⁷ W. E. B. Du Bois, *The Souls of Black Folk*, (Boston: St. Martins, 1997), 34.

⁵⁸ See Frantz Fanon, *Black Skin, White Masks*, 89-100.

⁵⁹ Mandela, *The Rivonia Trial*, Transcript.

between ‘whites’ and blacks in South Africa. This is a conundrum that Miranda Fricker, writing almost half a century after Mandela’s speech, identified as ‘epistemic injustice.’⁶⁰ According to Fricker, epistemic injustice takes place ‘when a speaker receives the wrong degree of credibility from his hearer owing to a certain sort of unintended prejudice on the hearer’s part.’⁶¹ In offering a theoretical exposition of this problematic, Fricker refers to this domain as a domain of ‘rationality and the ethics of what must surely be our most basic and ubiquitous epistemic practice—the practice of gaining knowledge by being told.’⁶²

As an object of epistemic injustice excluded from participating in the production of truth bearing discourses, Mandela’s genres of discourses, dialects, truths are *a priori* excluded. As an agent that harbors what Fanon calls the look of a black male body, Mandela’s image generates a prejudice that exposes his claim to what Nancy Fraser calls ‘injustice misrecognition.’⁶³ This problematization of the cognitive and affective substrate of Apartheid’s normative structures is both redemptive and resistant: redemptive because, by demanding the right to have equal access to knowledge production, Mandela claims epistemic agency. It is resistant because his intervention contests and resists the hermeneutic marginalization of blacks and recreates a rationality that resists in epistemic terms, as epistemic resistance.

Here, Mandela offers a destabilizing critique of epistemic domains that *a priori* excludes the possibility of justice for a ‘black man in white man’s court.’ Put in the Foucauldian paradigm, it is an intervention that subverts Apartheid’s moral/juridical codes, dislocates its ‘orders of knowledge,’ and decenters the domains and objects in which the system’s true and false are inscribed.⁶⁴ When he claims that the whites ‘regard it as fair and just to pursue policies which

⁶⁰ Miranda Fricker, *Epistemic Injustice and A Role For Virtue in the Politics of Knowing*, 34 (1/2) *Metaphilosophy*, (2003), 154.

⁶¹ Id. See also Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford: Oxford University Press, 2007), 18.

⁶² Miranda Fricker, *Epistemic Injustice and A Role For Virtue in the Politics of Knowing*, 61.

⁶³ See Nancy Fraser, *Heterosexism, Misrecognition, and Capitalism: A Response to Judith Butler*, 141; Fanon, *Black Skin, White Masks*, 94.

⁶⁴ Michel Foucault, ‘Questions of Method,’ in *Power: Essential Works of Michel Foucault, 1954-1984*, V.3, James D. Faubian, eds., (London: Penguin, 1994), 230.

have outraged the conscience of mankind . . . They suppress our aspirations, bar our way to freedom, and deny us opportunities to promote our moral and material progress, to secure ourselves from fear and want’⁶⁵, he is drawing a direct line between the submerged crisis of sovereignty to its surface manifestations- his trial. Using this moment as an opportunity, he is problematizing the instituted forms of law and justice to generate and present an alternative narrative of his period so that such discourses and practices can no longer go without saying.

As a subject whose identity ‘can deprive [him] of the very resources [he] needs in order to attain the virtue[s]’ necessary to ‘preempt or [overcome] such injustice,’ Mandela deploys his knowledge of the law to navigate through law’s gate-keeping discourses. Even then, he largely ‘remain hostage to the broader social structures in which [his] testimonial’ is heard.⁶⁶ Recognizing the prejudice that is inscribed in the nervous system of his hearers and the consequent impossibility of justice in the court of a white man, Mandela declares that his point is neither the representation of the ‘unrepresentable’ nor the promise of the impossible. The decisive point, Mandela argues, is not one that is reducible to the question of whether this conflict can be represented in law and can be heard fairly and impartially. ‘The court might reply to this part of my argument by assuring me that it will try my case fairly and without fear or favour,’ he argued, but ‘such a reply would completely miss the point of my argument.’⁶⁷ His central contention turns not so much on the juridical question of fair hearing but rather on meta-ethical questions of hearing itself. He is interested in apprehending and finally naming a domain that organizes and structures Apartheid’s unequal distribution of voice to speaking bodies. His is a concern with the ethic of reception; the conditions that need to be there for a hearing of any kind to lead to understanding. It is a concern with the responsibility of hearing the ‘Other,’ a plea for testimonial sensibility.⁶⁸

⁶⁵ Mandela, The Rivonia Trial, Transcript.

⁶⁶ Fricker, Epistemic Injustice, 17-18.

⁶⁷ Mandela, Incitement Trial, Transcript.

⁶⁸ Fricker, Epistemic Injustice, 90.

This, then, is a kind of critique aimed at generating contradictions capable of captivating the imagination of white South Africans and the world ambivalent in the face of a moral crisis in which the law is deployed to safeguard illegality—preventing the majority from changing an illegal situation by a legal means. By disentangling ‘white man’s standard of justice’ from the colourless, incalculable and singular demands of justice, by exposing the socialized nature of white justice, calling into question the ‘*ethicity* or the morality of [their] *ethics*’ as Derrida would say, his intervention displaces the existing form of epistemic sensibility and compels the system to face up to the surprising emergence of this ‘new subject in history’ who contests and interrupts the continuity of practices and ‘discourses that up until then had seemed to go without saying.’⁶⁹ By digging deep into the epistemic and ontological nature of violence and injustice in South Africa, he sought to clarify the ethical and moral decadence underlying a system in which 3 million whites invoke the ‘we’ to justify their usurpation of the speaking position of 13 million people and use the court system to preserve and conserve that original violence.⁷⁰

6.5. White Justice: ‘Black man in a White man’s Court’

Exploring the Nationalist Party’s ‘sanitizing rhetoric,’ Stephen Curkpatrick explores how the Party formulated a discourse that conceals the race element from its racist project and sought to rationalize ‘apartheid’ in terms of ‘separate development,’ ‘multiracial’ in terms of ‘multinational,’ justifying the ‘Bantustan policy’ in terms of ‘plural democracy,’ ‘self-governing territories,’ and ‘democratic-federalism.’⁷¹ In coupling this self-serving rhetoric with existing power-knowledge constellation, it defends the ‘homelands’ policy as equivalent to ‘European ethnic nationalities and statehood.’⁷² Curkpatrick goes on to state that in the struggle for the preservation of white supremacy, ‘Each period represents a shift in rhetoric for international appeasement, but no change in

⁶⁹ Jacques Derrida, ‘Passions,’ trans. David Wood, in *On The Name* (Stanford: Stanford University Press, 1995), 133. Derrida asks about the *ethicity* of *ethics*, the morality of morality, the legality of law, and what responsibility signifies by and of itself.

⁷⁰ Mandela, *The Rivonia Trial*, Transcript.

⁷¹ See Stephen Curkpatrick, *Ethical Discourse*, 99.

⁷² Ellen Armour, *Deconstruction, Feminist Theology, and the Problem of Difference: Subverting the Race/Gender* (Chicago & London: The University of Chicago Press, 1999), 228.

the fundamental characteristics of apartheid.’⁷³ Despite these efforts by the system to deploy the full range of resources—its stifling and dazzling ‘prestige of power’ that lures peoples into its lies and deceptions, Mandela’s intervention effectively infiltrated the system’s apparatus of truth generation and knowledge production to bring into view Apartheid’s oppressive underside. He argues that without a critical excavation of the racist subtext that animates the setting into motion of the justice system, the rhetoric of ‘equality before the law’ is ‘meaningless and misleading.’⁷⁴

In one of his most disruptive self-assertions, Mandela asks: ‘what is this rigid color-bar in the administration of justice? Why is it that in this courtroom I face a white magistrate, am confronted by a white prosecutor, and escorted into the dock by a white orderly? Can anyone honestly and seriously suggest that in this type of atmosphere the scales of justice are evenly balanced?’⁷⁵ It is a form of critique that Christodoulidis identifies as immanent, in that it derives its standard from the ‘material actuality’ of life as lived under Apartheid and contrasts it to the normative inscriptions of equality and justice.⁷⁶ It is a critique that turns upside down the violent underside of Apartheid normativity, and makes manifest the violence produced and conserved by a whole series of juridical codes and institutions. By revealing this intolerable judicial farce, his intervention aims to register an irreparable rupture between the system’s distinctions of guilt and innocence, and good and evil.

Unable to co-opt and integrate within its economy of containment, the system concedes to the whiteness of its laws, its institutions, and its justice at a site in which such admission is both legally and politically meaningful. The judge says: ‘*There Is Only One Court today and that is the White Man’s Court. There is No Other Court.* What purpose does it serve you to make an application when there is only one court?’⁷⁷ This is perhaps an instance of what Christodoulidis, drawing

⁷³ Id.

⁷⁴ Mandela, Incitement Trial, Transcript. For an account of how the equality of persons before the law can be manipulated for partisan political goals, see Joel B. Grossman, Political Justice in the Democratic State, 8(3) Polity, 358, (1973), 372.

⁷⁵ Mandela, Incitement Trial Transcript.

⁷⁶ Christodoulidis, Strategies of Rupture, 6.

⁷⁷ Mandela, Incitement Trial, Transcript.

on Verges, refers to as rupture. He writes ‘A rupture registers when an act appears incongruent to the logic of its representation, and with such intensity that it can neither be domesticated nor ignored.’⁷⁸ When the court of justice admits of its whiteness, clearly, this is a response that registers incongruently ‘to the logic of its representation.’⁷⁹ Speaking of the strategy of rupture he practiced in the trial of Klaus Barbie, Verges writes, ‘[R]upture traverses the whole structure of the trial. Facts as well as circumstances of the action pass onto a secondary plane; in the forefront suddenly appears the brutal contestation with the order of the State.’⁸⁰ Because of the contradictions that pervade the entire structure of the justice system that uses the devices of justice to secure racial inequality, the confrontation between the defendant and the state discloses the brutality of the system in ‘ways that excludes all compromise.’⁸¹

If ‘rupture registers in terms of a response it triggers,’ the court’s admission is a response that registers as rupture. The judge’s admission that ‘there is only one court today and that is the White Man’s court,’ first and foremost, exposes the court as something other than a house of justice; and the judge as an agent of oppression than a guarantor of justice. It authenticates and reinforces ‘the defendant’s claim that ‘I am a black man in a white man’s court’: a truth Apartheid cannot contain, or, to use Christodoulidis’ phrase, cannot ‘seal-over.’⁸² In fact, Mandela is certain, as he engages in a series of double movements that at once resists and claim authority, upholds and denounces the law, that he has already registered a disturbing surprise against the system’s normative claims when he returned to the judge’s admission of the color of South African justice. Realizing that there is nothing more politically disruptive for the system than to recite and reiterate its visible markers of injustice, Mandela pushes the judge further into a further admission about the fraudulent logic underlying the administration of justice: ‘Your Worship has already raised the point that here in this country there is only a white court. What is the point

⁷⁸ Christodoulidis, *Against Substitution*, 194.

⁷⁹ *Id.*

⁸⁰ See Jacques Verges, in Christodoulidis, *Strategies of Rupture*, 5.

⁸¹ *Id.*

⁸² *Id.* at 7.

of all this?’ Replying to his own question, he said: ‘the real purpose of this rigid color-bar is to ensure that the justice dispensed by courts conform to the policy of the country, however much that policy might be in conflict with norms of justice accepted in judiciaries throughout the civilized world.’⁸³

Switching the plane of his critique to a meta-level, Mandela asks the judge: ‘What sort of justice is this that enables the aggrieved to sit in judgment over those against whom they have laid charge?’⁸⁴ Here, Mandela speaks in the plural ‘them’-‘us’ binary; draws on the ethic of difference to challenge the system to justify its oppression of the native people, to account for socialization of the justice that tries the aspirations of the natives for liberation. Questioning authority at a site where authority is ceremonially elevated from the realm of interrogation, Mandela speaks to white South Africans, in English and as a lawyer, affirming that resistance to white justice is not merely consistent with the European legal tradition; it is indeed its very expression.⁸⁵ What is the essence and ultimate purpose of this ‘white’ justice that ‘enables’ the oppressor ‘to sit in judgment’ over the oppressed?

While seeming to ask an ethico-juridical question—‘what sort of justice enables them to sit in judgment over those they have laid charges’—Mandela has done nothing but to enable politics, to claim the right to politics, and engage the collective ‘Other.’ It is a question that transforms the personal moral struggle in Mandela into a collective political struggle between the subjugated Black majority and the ruling white minority. It is a strategic intervention that seeks to capture in one immanent intervention the rupture that navigates across Apartheid’s decadent structures. In addressing the question to the ‘other’—the oppressor—Mandela is seeking to place the ‘other’ ‘in contradiction to’ its professed values and principles.⁸⁶ By choosing to demand the judge’s recusal

⁸³ Mandela, Incitement Trial, Transcript.

⁸⁴ Mandela here deploys the inexhaustible and interruptive force of justice to expose the radically calculative and tactical nature of Apartheid law and legality. He asks, ‘what kind of justice,’ to reveal what Derrida calls the aporia or impasse between the calculable laws of nations ‘as a re-iterable register or mark of human relations’ and the incalculable presence of justice. Using justice as interruption, Mandela redirects the trial to adjudicate the inaugural justice of Apartheid law, and expose the illegal foundation of Apartheid law.

⁸⁵ See Jacques Derrida, *The Laws of Reflection: For Nelson Mandela*, In *Admiration*, in Jacques Derrida and Mustapha Talili, *For Nelson Mandela* (New York: Seaver Books, 1987), 33.

⁸⁶ Christodoulidis, *Strategies of Rupture*, 5.

from the case, he opens up the space for a defiant intervention that allows him to project this fundamental wrong that is antithetical to any conception of justice. By emphasizing the rationality and system of meaning upon which truth and justice rested in Apartheid South Africa, Mandela exposes the fundamentally inhuman logic that frames and structures Apartheid and the radical disjuncture between Apartheid and the cardinal virtues of equality, dignity and justice.

In his speech, he is re-creating a new world of possibilities and a new identity that resists its identity as passive and obedient. By unearthing the contingency of what the judge sees as self-evident—‘What purpose does it serve you to make an application when there is only one court, as you know yourself? What court do you wish to be tried by?’—Mandela insists that that is perhaps ‘my main point of contention.’⁸⁷ By problematizing the normalizing discourses of law that the court sees as self-evident, Mandela’s performative resistance prevents closure, creates an opportunity for re-opening, and compels hegemonic discourses to enter the realm of visibility.⁸⁸ We have here a politics of resistance that deploys historical knowledge of colonization and subjugation to disrupt gate-keeping legal technologies of domination that include as excluded. Indeed, the treason trial was a response to the inaugural claims of the ‘Freedom Charter’ that effectively renders the state criminal. Appropriating the amplifying potential of the courtroom, Mandela infiltrates this patronizing colonial logic, and its mode of thought to expose a singular logic that refuses to register and represent the unjust death, and grief of the excluded majority. Mandela’s repertoire of resistance successfully overruns the state’s spectacles of repression when the Judge failed to contain, suppress or integrate those destabilizing critiques that established the colour of Apartheid justice.

Whatever the liberatory potential of this admission, regardless of the transformative potential attributed to the disclosure of the racist logic that animates the operation of the system, this intervention ‘registers without being

⁸⁷ Mandela, Incitement Trial, Transcript.

⁸⁸ On the revealing potential of performativity, See Judith Butler, *Excitable Speech: A Politics of the Performative*, (New York: Routledge, 1997), 94; Vikki Bell, *Culture and Performance*, 25-27; Lois McNay, *Subject, Psyche and Agency: The Work of Judith Butler*, in Vikki Bell, *Performativity & Belonging*, eds., (London: SAGE Publications Inc., 1999), 177.

absorbed, integrated or co-opted into the system against which it stands.’⁸⁹ The question is not so much what happened to Apartheid in the immediate aftermath of this trial, but the unquantifiable truth-effects that circulated a true discourse about the legitimate aspirations of the native population that ultimately led to the demise of Apartheid. The system cannot admit to the whiteness of its justice in a black majority country and continue to pretend that Apartheid courts are sites of truth and justice. By admitting its true colour, the court can no longer boast of its European heritage. Convinced that this fundamental wrong is something much more profound than the failure of the judiciary, Mandela re-enacts life as lived in the space of the courtroom to consign and institute this story in the archive of the very state he denounces as racist and unjust. In his own words: ‘The court cannot expect a respect for the process of representation and negotiation to grow amongst the African people, when the government shows every day, by its conduct, that it despises such processes and frowns upon them and will not indulge in them. Nor will the court, I believe, say that, under the circumstances, my people are condemned forever to say nothing and to do nothing.’⁹⁰ Using his speaking position as defendant, the strategy allowed him to reveal to South Africans and the international community the fundamental inhumanity of Apartheid and therefore the utter impossibility of equality, dignity and justice within its ‘grotesque system of justice.’⁹¹

6.6. Between Law and Justice: Law’s Illegality and Immorality

I consider myself neither morally nor legally obliged to obey laws made by a parliament in which I am not represented.

—Nelson Mandela, The Incitement Trial

In ‘Mandela’s ‘Force of Law,’’ Stephen Curkpatrick draws on Derrida’s ‘Force of Law’ and ‘The Laws of Reflection’ to explore the Derridean performative that

⁸⁹ Christodoulidis, *Strategies of Rupture*, 5.

⁹⁰ Mandela, *Incitement Trial*, Transcript.

⁹¹ *Id.*

cuts through Mandela's speech.⁹² Curkpatrick says, 'The law is fundamentally illegal at the point of its performative origin. In the mystical foundation of its authority, law is legal because of convention.'⁹³ For Derrida, this inaugural aporia is not unique to the performative institution of law but the very characteristic of law in general. Law is legal because of 'the mystical foundation of authority,' those 'legitimate fictions on which [law] founds the truth of its authority.'⁹⁴ For both Montaigne and Derrida, there exists a fundamental rift between law and justice: 'justice as law is no justice.' Every decision entails unique interpretation 'which no existing, coded rule can or ought to guarantee': every decision 'must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case and re-justify it.'⁹⁵

Mandela's 'force of law' resides not only in his incisive articulation of law's divisibility and iterability, but also in his appropriation of its perpetual contestability. In this particular scene, Mandela switches the plane at which he was operating to a meta-level to deploy justice and morality as interruption—forces interruptive of the 'calculable economy' of 'law as convention'⁹⁶—to reinvent a new and radically egalitarian regime of legality responsive to justice.⁹⁷ In order to fully appreciate the attack that reveals the law as a sort of coded and institutionalized violence against Africans, allow me to reproduce his intervention:

The second ground of my objection is that I consider myself neither morally nor legally obliged to obey laws made by a parliament in which I am not represented. That the will of the people is the basis of the authority of government is a principle universally acknowledged as sacred throughout the civilized world, and constitutes the basic foundations of freedom and

⁹² Stephen Curkpatrick, Mandela's 'Force of Law,' 41 (2) *Sophia*, 63 (2002).

⁹³ *Id.*

⁹⁴ Derrida, *Force of Law*, 12.

⁹⁵ *Id.* at 23.

⁹⁶ *Id.* at 12-15; See also Kirkpatrick, Mandela's 'Force of Law,' 75.

⁹⁷ This is a classic genealogical object because instead of 'getting to the bottom of things,' to discover an essential truth of the constitutive point of politics, it aims to bring it about that the actors and the spectators of the trial—prosecution, the jury, the bench, the authorities and the body politic—'no longer know what to do,' so that acts, gestures, discourses which up until then had seemed to go without saying become problematic, difficult and dangerous.' The legal moment is appropriated as an opportunity to recount the political economy of exclusion and dispossession that secures and guarantees 'a grotesque system of justice.' It is performative too because it speaks of the idea of a law beyond Apartheid law, the law of laws, the law beyond a determinate legality.

justice. It is understandable why citizens, who have the vote as well as the right to direct representation in the country's governing bodies, should be morally and legally bound by the laws governing the country. It should be equally understandable why we, as Africans, should adopt the attitude that we are neither morally nor legally bound to obey laws which we have not made, nor can we be expected to have confidence in courts which enforce such laws.⁹⁸

This is one of the common threads that run through both the Incitement and the Rivonia trial. As a lawyer aware of the performative illegality of law's origin, and a man with access to an alternative idiom of legality—the radically egalitarian African law that the state disqualified through its inaugural violence—Mandela presents himself as having the right to law and a claim to authority. Integrating Enlightenment rationality into his strategy, he uses the discourse of equality, representation, recognition, and justice to make visible the gulf that opens up in the movement from 'European legal tradition, which seeks a universal symmetry of equality before the law' to Apartheid legality where the former is betrayed, adulterated and abused by the latter.⁹⁹

By deploying such a performative strategy in a new site—the court of law—he was trying to 'reshape and expand the terms of political debate, enabling different questions to be asked, enlarging the space of legitimate contestation, modifying the relation of the different participants to the truths in the name of which' Apartheid governs.¹⁰⁰ He is both 'critical' and 'genealogical.' When he says that 'I consider myself neither legally nor morally bound to obey laws made by a parliament in which I have no representation,' or 'It is improper and against the elementary principles of justice to entrust whites with cases involving the denial by them of basic human rights to the African people' or that 'The white man makes all the laws, he drags us before his courts and accuses us, and he sits in judgment over us,' he is raising an insoluble political and ethical objections that Apartheid can neither integrate nor suppress 'within its

⁹⁸ Mandela, Incitement Trial, Transcript.

⁹⁹ See Derrida, *The Law's of Reflection*, 16. Reflecting on this question, Derrida notes, '...is this law, which gives orders to constitutions and declarations, essentially a thing of the West? Does its formal universality retain some irreducible link with European history ...?' He concludes: 'that its formal character would be as essential to the universality of the law as its presentation in a determined moment and place in history.' See also Curkpatrick, *Ethical Discourse*, 96.

¹⁰⁰ Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (New York: Cambridge University Press, 1999), P-277. ; See also Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (London: SAGE Publications, 1999), 19, 25.

economy of representation.’ In this, Mandela’s performative mode of intervention is disruptive and constitutive. It is disruptive because it destabilizes Apartheid’s normative basis for claiming obedience to a law that is itself illegal and constitutive because this mode of critique calls into being a new subject that imagines the world of political universe differently and acts in ways that breaks from and displaces what the system recognizes as the normative.

As a ‘man of law,’ a man that makes possible the disruptive force of law, Mandela traces the genesis of Apartheid law to its European root to use this genealogy against the enemy that distort it while pretending to be true to its unsettling force. Mandela does not merely conceive the struggles and confrontations that go on within Apartheid laws and institutions in terms of what Foucault calls a race-war.¹⁰¹ He also adopts a strategic-historicist critique towards law. In reconfiguring and recounting this genealogy, rather differently, he makes visible the uncharted terrains of ‘European legal tradition, which seeks a universal symmetry of equality before the law, but is unable to tolerate such difference as to affect this universality for radical difference.’¹⁰²

The performative *coup de force* that inaugurated a legal order and concealed law’s violent gesture of exclusion is here reconfigured and used by a resistant subject to recognize his own subjection and subjectification by the order and to negotiate and transform his subjecthood.¹⁰³ As Nancy Fraser says, ‘The speaker speaks for the world, which means the speaker speaks to it, on behalf of it, in order to make it a ‘world.’’¹⁰⁴ When he says that I understand why white South Africans obey Apartheid legality and why, following the same logic, Africans ‘should adopt the attitude that we are neither morally nor legally bound to obey laws which we have not made’; he is, particularly, though not exclusively, speaking to Africans, for Africans, with the view to bringing into being a new subject and a new idiom of legality that radically breaks from and displaces the instituted model. In calling upon South Africans to defy and disobey Apartheid,

¹⁰¹ See Foucault, *Society Must be Defended*, 26.

¹⁰² See Curkpatrick, *Ethical Discourse*, 96.

¹⁰³ See Judith Butler and Athena Athanasiou, *Disposessions: The Performative in the Political* (Cambridge: Polity Press, 2013), 140.

¹⁰⁴ See Nancy Fraser, in Christodoulidis, *Against Substitution*, 201.

he performatively calls into being a new defiant subjectivity, what Foucault calls a ‘new speaking subject,’ who says ‘I’ and ‘we’ as he recounts history,’[Mandela always says I and my people] a subject who ‘tell[s] the story of his own history’; one that ‘reorganize[s] the past, events, rights, injustices, defeats, and victories around himself and his own destiny.’¹⁰⁵ In other words, this speech act re-invents a ‘subject’ that is nameless, vote-less, and invisible, into a defiant subject resistant to the invasive and productive complex of subjection.

In unmasking the deceptive logic at the heart of the constituted grid of legality, he not only dislodges the legal basis of legality itself but also prescribes his own standard of legality that promises to host the voices and aspirations of all South Africans regardless of race or colour. While he denounces Apartheid’s infelicitous illegality, he uses the law and the speaking position it offers to contest and claim authority. So he speaks not only to describe prevailing epistemic standards that frame and determine the limit of what is possible and achievable, but also to propose an alternative epistemic standard that allows us to imagine and perceive a world of politics that breaks off from the instituted model. In short, he is speaking to the world, to use Fraser’s words, ‘to create another world’—a new South Africa.

By expressing his admiration to the Anglo-American law and African traditional law, he contrasts the equity of Apartheid law to these two legal traditions.¹⁰⁶ In this comparison that traces the genesis of Apartheid law to the Anglo-American tradition that he admires, an admiration that is cognizant of law’s spectral haunting, Mandela shows his contempt for the law, the law that is the anti-thesis of justice, simply to declare his utmost respect for the law.¹⁰⁷ Here is Mandela:

Perhaps the court will say that despite our human rights to protest, to object, to make ourselves heard, we should stay within the letter

¹⁰⁵ Foucault, *Society Must be Defended*, 135.

¹⁰⁶ See Derrida, *Laws of Reflection*, 16-17. Mandela expresses his admiration for both the English parliamentary tradition and the American separation of powers principle. He is fascinated by the Magna Carta, the Universal Declarations of Human Rights and the radically egalitarian structure of African law.

¹⁰⁷ See *Id* at 36.

of the law. I would say, Sir, that it is the government, its administration of the law, which brings the law into such contempt and disrepute that one is no longer concerned in this country to stay within the letter of the law. I will illustrate this from my own experience. The government has used the process of law to handicap me, in my personal life, in my career, and in my political work, in a way which is calculated, in my opinion, to bring about contempt for the law.¹⁰⁸

In identifying the law as a normative instrument Apartheid mobilizes to close all avenues of lawful protest, leaving social agents with the only options of accepting either ‘a permanent state of inferiority,’ ‘a perpetual subordination’ or defying the government and its laws, Mandela taps a contradiction that ‘inform[s] a crisis that is experienced by social agents in the materiality of their life.’¹⁰⁹ By using the law to eliminate all forms of dissent and opposition, by using the law to prevent him from practicing law in sites where this practice is of paramount importance to his people, by using the law to outlaw a man of the law, the system shows the utmost contempt for the law.¹¹⁰

Speaking as ‘a man of law’ familiar and the nuts and bolts of legal practice, he demonstrates not only that he belongs to a tradition respectful of law, but also one committed to the law of laws, the law responsible and answerable for its normative correctness. Mandela’s contempt for Apartheid law is ‘the symmetrical inverse of [his] respect for the moral law.’¹¹¹ Taking himself as an example, he is reflecting the contempt of the white man for his own laws. More importantly, he is making the point that by scorning the law, i.e., by operating outside the framework of the law ‘to handicap me, in my personal life, in my career, and in my political work,’ the argument goes, what goes on in Apartheid courts is not judgment but a certain coalescence of what Walter Benjamin identifies as lawmaking and law preserving violence.¹¹² Reflecting on this reflection, Derrida notes, ‘those who, one day, made him an outlaw simply did

¹⁰⁸ Mandela, The Rivonia Trial, Transcript.

¹⁰⁹ See Christodoulidis, *Strategies of Rupture*, 6.

¹¹⁰ Derrida, *The Laws of Reflection*, 34-36. Derrida notes, as a man of law, Mandela ‘is reflecting the deontology of deontology, the deep meaning and spirit of the deontological laws.’

¹¹¹ *Id* at 32.

¹¹² Mandela, The Rivonia Trial, Transcript.

not have the right: they had already placed themselves outside the law.’¹¹³ If the system holds its own law in contempt, he argues, it cannot expect the subjugated to respect the very law the owners hold in great contempt. This voice that has become a mirror for the white man ‘to recognize and see their own scorn for the law reflected’¹¹⁴, as Derrida insists, does more than reflecting: it produces justice.

6.7. Conclusion

In a nutshell, Mandela’s strategy of resistance aims at infiltrating the system to expose its productive and repressive logic and lead toward the reformulation of the terms of the social contract on the basis of the principles articulated in the ‘Freedom Charter.’ Through critical and prophetic statements transformative of the moment, Mandela sought to expose the infelicitous performative planted at the heart of Apartheid legality and dismantle the fictions of law and justice that furnish the legitimacy that sustain an explicitly violent and racist order.

Whatever framework of analysis one adopts in engaging his words, the appealing force of his critique turns on its unique ability to reveal the darker side of the law, the violence it produces and conserves, the epistemic injustice it exposes, and its profound potential to imagine a world of political action differently. It is a generative claim that imagines and discloses a new political universe; that utopian universe he calls ‘a democratic and free society in which all persons live together in harmony and with equal opportunities.’ After all, one can counter a legitimate fiction only with a competing fiction, a spectacle of domination with a spectacle of liberation, ‘creating an aporia in the law that is always’ reflexive and open to new claims for dignity and justice but this time a fiction of justice that seek to supplement its inevitable originary violence with an ethic of care, justice and responsibility.

¹¹³ Derrida, *Laws of Reflection*, 32.

¹¹⁴ *Id.*

Chapter Seven

7. Terrorism, Resistance, and Occupation on Trial: Marwan Barghouti in Tel Aviv

7.1. Introduction: The Road to Tel Aviv

Despite ‘hundreds of meetings, tens of initiatives and seven interim agreements,’ the Washington-Tel-Aviv-Ramallah public performances neither secured Israel nor liberated Palestinians from colonial occupation.¹ From Madrid to Oslo; from Sharm El-Sheik to Camp David, from Tel Aviv to Annapolis, the ‘Peace Process Industry’ is a technology of power used to normalize and pacify a violent occupation.² Instead of restoring balance to a political space evacuated of the right relations, the ‘Roadmap for Peace’ came to signify a regime of ‘legitimate occupation,’ a contradiction that Hardt and Negri call ‘a perverse dialectic of Enlightenment.’³ Noam Chomsky for example writes that ‘Any discussion of what is called a ‘peace process’—whether the one underway at Camp David or any other—should keep in mind the operative meaning of the phrase: by definition, the ‘peace process’ is whatever the US government happens to be pursuing.’⁴ Instead of being a deliberative process aimed at communication and understanding, what is called ‘The Middle East Peace Process’ is a performative exercise intended to erect a permanent state of exception and necropolitical relations between the occupied and the occupier. Marwan Barghouti’s arrest and trial is a product of this arrangement and bears the hallmarks of necropolitical logic.

Let us begin at the Second Intifada- a moment that destabilized the logic that structures and regulates the relationship between the occupied and the

¹ Marwan Bishara, Peace Bullshit or ‘Bullshit,’ available at <<http://www.aljazeera.com/focus/2010/2010/07/201078154952387257.html>>, (Last accessed 08 July 2013).

² See Ahmed Qurie (‘Abu Ala’), From Oslo to Jerusalem: The Palestinian Story of the Secret Negotiations (New York: I.B. Tauris & Co. Ltd., 2006), 274.

³ Michael Hardt and Antonio Negri, *Empire*, (London: Harvard University Press, 2001), 25.

⁴ For a detailed account of the politics of the ‘Peace Process’ and the Camp David Summit, See Noam Chomsky, at <<http://www.zcommunications.org/peace-process-prospects-by-noam-chomsky>>, (Last accessed on 22 June 2010).

occupier. This is the moment at which—terrorism and resistance—the two discourses that oppose Israel and the Palestinians entered a civilian courtroom. Unlike ordinary criminal trials, this trial is not intended to weigh these disagreements on the scale of law and justice but rather to use the devices of justice and the court for ‘knowledge production and truth generation.’

Following the collapse of the ‘Final Status Settlement’ at Camp David on July of 2000, cynicism and despair reigned in the then Occupied Territories, what is now known as ‘the State of Palestine.’⁵ Contestation over sacred spaces—sovereignty over East Jerusalem and Haram-al-Sharaf (The Temple Mount)—two issues to which both Prime Minister Ehud Barak⁶ and PLO Chairman Yasir Arafat⁷ accorded exceptional significance, constituted the primary, if not the sole, reasons for the collapse of the Camp David Summit.⁸ Israel and the United States disseminated what is still the most widely accepted narrative in both Israel and the United States: Barak made a generous offer and Palestinians rejected it.⁹ Two months after Camp David came to its inevitable doom, Ariel Sharon, then leader of the Opposition, visited the Haram/Temple—the ultimate trigger for The Second *Intifadah*.¹⁰

There are two mutually exclusive accounts about the immediate cause of The Second *Intifada*. The Palestinian version holds that ‘Sharon went to the Temple Mount on 28 September 2002 with the manifest intention of provoking

⁵ Clayton E. Swisher, *The Truth About Camp David: The Untold Story About the Collapse of the Middle East Peace Process* (New York: Nations Books, 2004), 389.

⁶ See Ron E. Hassner, *To Halve and To Hold: Conflicts Over Sacred Space and the Problem of Indivisibility*, 12 (4) *Securities Studies*, 1 (2003), 1; See also Gilad Sher, *Just Beyond Reach: The Israeli-Palestinian Peace Negotiations, 1999–2001* (Tel Aviv: Miskal-Yedioth Ahronoth Books and Chemed Books, 2001), 197. Ehud Barak considered the Temple Mount as ‘the central issue that will decide the destiny of the negotiations.’ He said: ‘I have no idea how this will end, but I am sure that we will face the world united if it turns out that this agreement failed over the question of our sovereignty over the First and Second Temple. That is the Archimedean point of our existence, the anchor point of the Zionist struggle . . . we are at the moment of truth.’ (in Hassner, 27).

⁷ See Sher, *To Halve and To Hold*, 172. Arafat was quoted to have warned his team to show flexibility but ‘to not budge on this one thing: the Haram is more precious to me than everything else.’

⁸ See Hassner, *To Halve and To Hold*, 1; See David Lea, Annamarie Rowe, and Paul Cossali, *A Survey of the Arab-Israeli Relations (1947-2001)*, eds., (London: Europa Publications, 2002), 364-67.

⁹ Jeremy Pressman, *Vision in Collision: What Happened at Camp David and Taba?* 28(2) *International Security*, 5 (2003), 6.

¹⁰ See Ramzy Baroud, *The Second Intifada: A Chronicle of A People’s Struggle*, (London: Pluto Press, 2006); Pressman, *Vision in Collision*, 6.

Palestinians and ending Israeli-Palestinian political negotiations.’¹¹ The then Israeli government partly agreed with the Palestinians assessment of Sharon’s visit, with the then Likud spokesman, Ofir Akounis, describing the visit as ‘a political statement [intended] to show that under the Likud, The Temple Mount would remain under Israeli sovereignty.’¹² Nevertheless, Israel rejected the view that the visit, in and of itself, whatever Sharon’s motivation, constituted a justification for the violence. Instead, Israel held the view that ‘Arafat and the Palestinians planned and executed a violent uprising because they wanted to destroy Israel and win a Palestinian state through violent means.’¹³ In response to Palestinian violence, Israel responded with state-of-the-art military hardware in what is called ‘Operation Defensive Shield.’¹⁴ The performative politics of hope and possibilities represented by the ‘Peace Process,’ turned into screams of terror and insanity.

On 15 April 2002, Marwan Barghouti, a high profile Member of the Palestinian Parliament and a close aide of Yasir Arafat was arrested and taken to Israel for trial.¹⁵ On 14 August 2002, he was charged with multiple counts of crimes including acts of terrorism, murder and conspiracy to murder and his trial opened in the district court in Tel Aviv before a three judge panel on 5 September 2002. Juxtaposing three representative but different Palestinian organizations—Fatah, Tanzim, and Al-Aqsa Martyrs Brigade—and calling them ‘Terrorist Organizations’ throughout the indictment, the prosecution accuses, by extension, the entire Palestinian people of terrorism.¹⁶

¹¹ Jeremy Pressman, *The Second Intifada: Background and Causes of the Israeli-Palestinian Conflict* 23 (2) *The Journal of Conflict Studies*, 1 (2003), 3; Jacob Shamir and Khalil Shikaki, *Palestinian and Israeli Public Opinion: The Public Imperative in the Second Intifada*, (Bloomington: Indiana University Press, 2010), 66; See Shalomo Ben-Ami, *Scars of War, Wounds of Peace: The Israeli-Arab Tragedy* (Oxford: Oxford University Press, 2006), 266.

¹² Pressman, *The Second Intifada*, 2.

¹³ *Id* at 3.

¹⁴ Ariel Sharon, Prime Minister, Address to the Knesset, *New York Time*, 8 April 2002, available at <http://www.nytimes.com/2002/04/08/international/middleeast/08CND-MTEXT.html?pagewanted=1>, (Last accessed 12 December 2012)

¹⁵ *The Prosecutor vs. Marwan Bin Khatib Barghouti*, Magistrate Court of Tel Aviv and Jaffa, District Court of Tel Aviv and Jaffa August 14, 2002, available at <<http://mfa.gov.il/MFA/MFA-Archive/2002/Pages/Statement%20of%20Indictment-%20Marwan%20Barghouti%20-%20Aug%2014.aspx>> (Last accessed 2 September 2013).

¹⁶ *The Prosecutor vs. Marwan Barghouti*..

A fundamental assumption informs the way in which the thread running through this chapter is organized: both terrorism and resistance are discursive formations mobilized by the parties to generate power effects. Performative strategies and tactics are deployed to generate and present the materiality of their respective discourses. Drawing on key moments of the trial, the chapter will emphasize, among other things, the performative generation of the materiality of both resistance and terrorism, and questions of image-formation, visibility, and hearing in the courtroom. In the final analysis, the debate over what counts as resistance and terrorism becomes the performative kernel of Barghouti's trial.

7.2. The 'Politics' in Barghouti's Political Trial: From Domination to Resistance

Marking the essential point of difference between the political trial proper and ordinary criminal trials, Otto Kirchheimer calls attention to what he calls 'the direct involvement of courts' in purely political struggles.¹⁷ What makes the trial political is neither its distance from formal legality nor its conformity with established rites and ceremonies as the mobilization of the judicial apparatus 'to exert influence on the distribution of political power.'¹⁸ 'The regime's attempt to incriminate the public image of its political foes' with the view to facilitating the eventual eviction of its foes from the political scene, he argues, constitutes the classic case of political trials.¹⁹ This conception of the political trial draws on the Schmittian distinction between friend and enemy—the enemy that he refers to as a foe—against whom the devices of justice are strategically deployed to attain political goals.²⁰ In his own words, 'The judicial machinery and its trial mechanics are set into motion to attain political objectives which transcend both the bystander's curiosity and the governmental custodian's satisfaction in the vindication of the political order.'²¹ Writing at the height of

¹⁷ Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends*, (Princeton: Princeton University Press, 1961), 49.

¹⁸ *Id.*

¹⁹ *Id.* at 46.

²⁰ *Id.* at 16.

²¹ *Id.* at 49.

the Cold War, Kirchheimer conceived the political trial as the purest instance of political justice and a troubled juridico-political practice where political considerations dictate the elimination of a political adversary. As he put it, 'In the simplest and crudest terms . . . the courts eliminate a political foe of the regime according to some prearranged rules.'²² Barghouti's trial embodies the entire marks of the political trial.²³ At its core, the trial is a public re-enactment of Israel's notion of Palestinian terrorism and Palestinian's repertoires of resistance.

In a passage that captures the distinctions between political trials and ordinary trials, Kirchheimer says:

It is the direct involvement in the struggle for political power [by courts], rather than the long range political effect of socio-economic power contests, or the derivative political effect of the confirmation or destruction of personal power positions, which gives the political trial proper its particular colour and intensity and marks its peculiar problem areas.²⁴

In Barghouti's trial, the Israeli prosecution and the entire government was quite forthcoming about the trial's political motive. Consistent with the policy of the new Israeli government, Israel wants to delegitimize and evict the Palestinian establishment from political scene. According to the New York Times, the prosecution made it 'clear that Israel intends to use the trial to substantiate its claim that the entire Palestinian leadership of Yasir Arafat, in which Mr. Barghouti played a prominent role, is nothing more than a band of terrorists and murderers.'²⁵ Within this formula, Barghouti was a convenient scapegoat that at once embodies and symbolizes everything Israel needed to put Arafat and Palestinians on trial. In fact, Israel did not make a secret of its spectacle. The then Deputy Director General of the Ministry of Foreign Affairs, Gideon Meir articulated the logic behind Israel's mega-spectacle: 'This is an opportunity to

²² Id at 6.

²³ See Leora Bilsky, Criminal Trials in an Age of Terror, 5 *Adalah's Review*, (2009), 15.

²⁴ Kirchheimer, *Political Justice*, 50.

²⁵ Serge Schmemmann, Bitter Circus Erupts as Israel Indicts a Top Fatah Figure, *The New York Times*, 15 August 2002.

tell Israel's story. We need to tell the story of the Israeli population and what it has been through in the last two years.'²⁶

It is this direct involvement of the Israeli judiciary in the political struggle between Palestinians and Israel in general and this particular 'show' that Israel wants to show to the rest of the world, as the Minister claims, that makes Barghouti's trial a political trial in the Kirchheimerian sense of that expression. Just like the famous trials of Socrates, Jesus of Nazareth, Galileo, Joan of Arc, Suzanne Anthony, or the more contemporary political trials of the Nuremberg, the Chicago Seven, Mandela, Milosevic, and many other high profile trials, the prosecution had a case against the accused. However, the indictment against Barghouti, like the indictments against these historical figures, is primarily motivated with a political decision to eliminate Barghouti- Israel's public enemy- from the political map. If we conceive the political trial as a continuation of war by legal means, Barghouti's trial is the penultimate political trial. To quote Kirchheimer once again:

The aim of political justice [trial] is to enlarge the area of political action by enlisting the services of courts in behalf of political goals. It is characterized by the submission to court scrutiny of group and individual action. Those instrumental in such submission seek to strengthen their own position and weaken those of their political foes.²⁷

As a continuation of the struggle by legal means, Barghouti's trial is aimed at enlarging 'the area of political action by enlisting the services of courts in behalf of political goals.'²⁸ Consistent with this strategy, the state taps the court's superior ability of image creation and legitimation to generate a knowledge and truth necessary in the preservation and consolidation of existing relationship of occupation and inequality. By submitting a prominent Palestinian to the scrutiny of its own courts, the prosecution here aims to cement Israeli claims of terrorism as he delegitimizes and weakens the Palestinian struggle as

²⁶ Peter Hirschberg, Background/ Barghouti's on Trial, but Who is Really in the Dock, Ha'aretz, available at <<http://www.haaretz.com/news/background-barghouti-s-on-trial-but-who-s-really-in-the-dock-1.35045>>, (Last accessed 19 May 2010).

²⁷ Kirchheimer, Political Justice, 419.

²⁸ Id.

acts terrorism. Drawing on the resources of the state, the accused tries to expose Israel's political use of the discourse of terrorism to legitimize and validate an immoral and illegal occupation. The courtroom is used as a public re-enactment of their respective politics—a battleground for performative pedagogies of domination and resistance.

We know from John L. Austin that not all performatives are felicitous.²⁹ In order for the trial to be a felicitous performative, it must recite and reiterate its accepted conventions. Put differently, in order for the trial to generate and transmit knowledge and truths productive to the power-knowledge regime it is there to secure and consolidate, it should adhere to the norms, decorum, and normative expectations of its participants³⁰ Although Barghouti's trial is significantly different from the Stalinist forms of political show trials, it is far from a procedure Theodore Becker describes as 'judicial' and 'judicious' in his account of 'political trials.'³¹ Even if we set aside the fundamental constitutive wrongs that undercut the legitimacy of the trial, even if we take Israeli juridical structures and applicable norms as the basis of our analysis, the trial is neither 'judicial' nor 'judicious.' A legal expert commissioned by the Inter-Parliamentary Union to investigate the legality and fairness of the procedure rejected Israel's guilty verdict concluding that 'the numerous breaches of international law . . . make[s] it impossible to conclude that Mr. Barghouti was given a fair trial.'³²

²⁹ J. L. Austin, *How to Do Things With Words*, (Oxford: Oxford University Press, 1962), 22, 42.

³⁰ Sherman J Clark, 'Who Do You Think You Are?' *The Criminal Trial and Community Character*, in Antony Duff, Lindsay Farmer, Sandra Marshall, and Victor Tadros, *The Trial on Trial II: Judgment and Calling to Account*, (Oxford: Hart Publishing, 2006), 85; See also Paul Roberts, *Theorising Procedural Tradition: Subjects, Objects and Values in Criminal Adjudication*, in *The Trial on Trial II*, 57.

³¹ Theodore Becker, *Political Trials*, eds. (Indianapolis: The Bobbs-Merrill Company, Inc., 1971), xii.

³² Inter-Parliamentary Union, Case No. PAL/02—Marwan Barghouti—Palestine/Israel, (Resolution adopted unanimously by the IPU Governing Council at its 184th Session, (Addis Ababa, 10 April 2009).

7.3. Barghouti in Tel Aviv: Between a Terrorist and a Freedom Fighter

The work of decolonization requires that we change the terms of recognition. ...The crucial stakes of political struggle are the categories of perception and the systems of classification and conceptualization-in other words, names and phrases-that construct the social world, the real existing world. In this view, we must fight phrases with phrases.

—Lynn Worsham

Writing on the rhetorical dimension of the trial, Robert Burns argue, ‘The trial is spoken; it proceeds through time; it is a sort of drama; it is a rhetorical situation.’³³ Through reconstruction or deconstruction, the trial re-stages the conflict in narrative form. By re-enacting events in the courtroom, the trial offers a window, ‘however too close or too remote from the actual event,’ into the past for the purpose of shaping the future.³⁴ Just as Eichmann in Jerusalem was a public re-enactment of the Holocaust, Barghouti in Tel-Aviv was a spectacle aimed at performing Palestinian terrorism, i.e., to create a racialized image of Palestinians as dangerous, violent, and ‘enemies of the free world’ whom the ‘free world,’ and ‘everyone brought up on the values of freedom and democracy’ must recognize as such.³⁵ It is a performative stunt carefully designed to generate an image of Palestinian terrorism productive to Israel’s central political claim. In fact, the deployment of the court and the machinery of justice as a tool of historico-political instruction and ‘consciousness transformation’ is one of the constant in the history of Israel.³⁶

In her book, ‘Transformative Justice: Israeli Identity on Trial,’ Leora Bilsky analyzes key Israeli trials designed by its instigators to serve a radical political agenda: a vehicle for reconstituting and refashioning ‘Israeli collective

³³ Robert P Burns, The Distinctiveness of Trial Narratives, in Antony Duff, Lindsay Farmer, Sandra Marshall, Victor Tadros (eds.), in the Trial on Trial I: Truth and Due Process, (Portland: Hart Publishing, 2004), 164.

³⁴ Kirchheimer, Political Justice, 422-23.

³⁵ PM Sharon, Knesset Address.

³⁶ Bernard S. Jackson, Brother Daniel: The Construction of Jewish Identity in the Israel Supreme Court, 6(2) International Journal for the Semiotic of Law, 115 (1993), 19-22.

identity.’³⁷ From the trial of Kastner to Adolf Eichmann’s, from the trial of Kufr Qassem to that of Yigal Amir (the assassin of Israeli Prime Minister Yishak Rabin), from Marwan Bishara’s to Marwan Barghouti’s trials, Bilsky shows the irresistible urge by both the state and political operators to turn the courtroom into a vehicle for settling contested and contingent accounts of the past.³⁸ And of course, Israel is certainly aware of the effect of the ‘Dreyfus Affairs,’ a trial Hannah Arendt called the ‘fore gleam of the 20th century’ and helped ‘rekindle the flame of political Zionism.’³⁹ Conceiving these trials in terms of struggles in power relations, Bilsky writes, the contestation ‘in the courtroom transforms dry and distant history or abstract ideological worldviews into a living story with a name, a face, and a body.’⁴⁰ The trial provides, as Tocqueville argues, ‘a bodily form’ ‘to the mere appearance of justice’ even long after the juridical record is refuted by an otherwise irrefutable evidence.⁴¹

In Israel, courts have been used as sites of contestations over power, history, and memory since the birth of the state of Israel.⁴² Even today, Israeli courts are the primary sites of struggle and confrontation between rightwing settlers and advocates of Palestinians rights over fundamental questions of politics and history.⁴³ In a meeting of ‘senior Jewish legal experts’ convened to discuss ways of improving Israel’s public relations effort, retired Israeli Judge Hadassa Ben-Itto, suggested the use of courts to create reality in the image of the Israeli

³⁷ Leora Bilsky, *Transformative Justice: Israeli Identity on Trial*, (Ann Arbor: University of Michigan, 2004), 3.

³⁸ *Id* at 11.

³⁹ Hannah Arendt, *The Origins of Totalitarianism*, (New York: Meridian, 1958), 93; Hannah Arendt, *From the Dreyfus Affairs to France Today*, 4 *Jewish Social Studies*, 195 (1942), 200.

⁴⁰ See Alexis De Tocqueville, *Democracy in America*, trans. Henry Reeve, (A Penn State Electronic Series, 2002), 160.

⁴¹ *Id*.

⁴² Bilsky, *Transformative Justice*, 4.

⁴³ Jabareen Hassan, *Transnational Lawyering and Legal Resistance in National Courts: Palestinian Cases before the Israeli Supreme Court*, 13 *Yale Hum. Rts. & Dev. L. J.* 239 (2010), 248-49, 278. He argues that ‘The Court also tried to use the hearings to influence the international community and to legitimize the military’s operation’; See also Lisa Hajjar, *Cause Lawyering in Transitional Perspective: National Conflict and Human Rights in Israel/Palestine*, 31(3) *Law & Society Review*, 473 (1997), 479; Sharon Weill, *The Judicial Arm of the Occupation: the Israeli Military Courts in the Occupied Territories*, 89 (866) *International Review of the Red Cross*, 395 (2007), 401; George E. Bisharat, *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 *The American University Law Review*, 467 (1994), 521-25.

government.⁴⁴ ‘We must learn from the Nazi tactics,’ she said, ‘I have reached the conclusion that we must use these tactics in courts worldwide, just like the Nazis - with all distinctions - used the courts to spread their message.’⁴⁵ Indeed, the Nazis used the courtroom as a tactic. Explaining the didactic purpose behind Grynspan’s trial, Goebbels wrote to Hitler, ‘The trial thus offers a possibility to prove to the whole world the decisive participation of world-Jewry in the outbreak of the present war.’⁴⁶

Considering all the relevant facts at the time and statements of Israeli government officials, it is clear that this is precisely the logic that informed Barghouti’s trial in Tel Aviv. By accusing him of terrorism in Tel Aviv, the government presents a body of a charismatic Palestinian leader as a material form through whom they can access and comprehend what Israel means when it describes Palestinian violence as intrinsic. By associating terrorism with Palestinians, and by repeating and reiterating it, the trial embeds and cements the image that seeks to identify Palestinians with violence (people incapable of democratic and free existence) and Israelis with freedom and democracy.⁴⁷ The latter’s violence as violence meted out to protect freedom and democratic values from the intrinsically violent culture of Palestinians. In effect, Israel wanted to make Barghouti in Tel Aviv a replay of Eichmann in Jerusalem. By accusing Barghouti as ‘terrorist,’ Israel is interested in much more than finding Barghouti guilty of terrorism: by finding him guilty in accordance with a prearranged rule, it is performatively generating the very subject it names. The description associates terrorism to Palestinians, an association that conceals its mark, and creates a signification spiral that amplifies the threat represented by the association.⁴⁸ The association between terrorism and Palestinians, which is now known as ‘Palestinian terrorism,’ forges a problematic proximity between the signified (Palestinians) and the signifier (terrorism) whose ‘stereotypical

⁴⁴ Modi Kreitman, Ynetnews, available at <<http://www.ynetnews.com/articles/0,7340,L-3915394,00.html>> (Last accessed 08 September 2013).

⁴⁵ Id.

⁴⁶ Kirchheimer, *Political Justice*, 103-04.

⁴⁷ W. J. T. Mitchell, *Cloning Terror: The War of Images, 9/11 to the Present*, (Chicago: The University of Chicago Press, 2011), 128-29.

⁴⁸ Stuart Hall, Chas Critcher, Tony Jefferson, John Clarke, and Brian Roberts, *Policing the Crisis: Mugging, The State, and Law and Order*, (New York: Holmes and Meier Publishers, Inc., 1978), 223.

characteristics are already part of socially available knowledge’⁴⁹. When repeated and amplified ‘within the area of signification,’ the association eliminates the distinction between Palestinians, an occupied people, and terrorism, an altogether different problem.⁵⁰ This signification creates a dangerous parallel by converging virtually separate events and marks out the threshold of what is tolerable. Thus, the image of Palestinian terrorism projected from the Israeli court as emblematic of a much ‘deeper problem’—the ‘tip of the iceberg’—links ‘Palestinians’ protest or other acts of resistance to the altogether separate problem of ‘terrorism.’⁵¹

The acts constitutive of the sign operate to stoke fear, a red scare hysteria that institutes a cultural meaning that delineates the relationship between the threatened and those who threaten. Most importantly, the process entrenches and authenticates a higher threshold that marks out the limit of what is tolerable. Through reiteration, the referents used to describe the Palestinians—violent, murderous, dangerous, terrorist, etc—generate affects that ‘stick to bodies, shaping them, generating the material effects that they name’—terrorism. Writing on ‘the affective politics of fear,’ Sarah Ahmed suggests the view that ‘the language of fear involves the intensification of ‘threats,’ which works to create a distinction between those who are ‘threatened’ and those who threaten. Fear is an effect of this process, rather than its origin . . . Through the generation of ‘the threat,’ fear works to align bodies with and against others.’⁵² The economy of fear thus functions as a cement; to generate a sense of unity, and cohesion between the victims against those who threaten their peace and tranquillity. Every resistant act of Palestinians would be interpreted against this framework of signification to escalate their potential, therefore justifying Israel’s coercive response.

However, in spite of Israel’s carefully choreographed spectacle, Barghouti in Tel-Aviv did not rekindle the memory of Eichmann in Jerusalem. Barghouti

⁴⁹ Id.

⁵⁰ Id.; for the affective economy of these associations, See Sara Ahmed, *The Cultural Politics of Emotions*, (New York: Routledge, 2004), 62-101.

⁵¹ Stuart Hall et al, *Policing the Crisis*, 223.

⁵² Ahmed, *The Cultural Politics of Emotions*, 72.

symbolizes the irrepressible yearnings of people for freedom - a yearning that cannot be repressed or displaced by a colonizer despite its ability to create reality on the ground. In contrast to Eichmann in Jerusalem, Barghouti in Tel Aviv embodies the aspirations of people for freedom and justice. In countering Israel's 'affective economy of fear,' Barghouti speaks of the right to resistance beyond Israeli legal tradition to reclaim its radical synergy, and to call into presence a resistant Palestinian subjectivity capable of emancipating itself from the yoke of Israeli occupation. He argued, 'I am a freedom fighter, fighting for the freedom of my people and peace between the two peoples.'⁵³ What Israel refers to as an act of terrorism, Barghouti reinscribes it and names it a lawful right to resistance. Barghouti attacks the very principles of law and justice that Israel asserts to justify its right as an occupying power to sit in judgement over the leader of the occupied. He denounces the forms of rationality and modes of thought that undergirds their rhetoric of freedom and democracy. Using the limited opportunity he had, he sought to re-function, to use the Brechtian terms, the Israeli account of peace and security as a counter discourse and therefore as a power to perform Palestinian repertoire of resistance. He dismisses the trial as a show trial: 'My show trial says more about the sorry state of Israeli morality than it does about me. . . . Like President Arafat, I have become a scapegoat—my trial simply a public relations event by a morally bankrupt and visionless Israeli leadership.'⁵⁴

7.4. The Performative Generation of the Materiality of Terrorism

We shall remain or try to remain, at the level of discourse itself, ... a task that consists not-of no longer-treating discourses as groups of signs ... but as practices that systematically form the objects of which they speak.

—Michel Foucault

⁵³ Serge Schemann, Hostility and Drama Swamp Palestinian's Hearing, New York Times, (06 September 2002), available at <http://www.nytimes.com/2002/09/06/world/hostility-and-drama-swamp-palestinian-s-hearing.html>, (Last accessed 09 September 2013)

⁵⁴ Marwan Barghouti, 'It is not I Who is on Trial in Israel,' 3 October 2002, at <<http://electronicintifada.net/content/it-not-i-who-trial-israel/314>>, (Last accessed 09 September 2013).

The deployment of the courtroom as a pedagogic enterprise draws on an understanding of judicial practice as a site of truth and meaning. In 'Truth and Juridical Forms,' Foucault identifies 'judicial practices' as sites of truth and signification. He writes:

Judicial practices, the manner in which wrongs and responsibilities are settled between men, the mode by which, in the history of the West, society conceived and defined the way men could be judged in terms of wrongs committed . . . seem to me to be one of the forms by which our society defined types of subjectivity, forms of knowledge, and consequently, relations between man and truth.⁵⁵

It is precisely this recognition of the courtroom as a 'generative locus' of domains of truth and forms of knowledge that explains Israel's mobilization of its courts as a political weapon.⁵⁶ By re-enacting instances of terrorism in the courtroom, couching it in the seemingly neutralizing language of laws that do not signify the idiom of Palestinians, the trial generates forms of truth and knowledge productive to the system. As a name and sign that 'sticks to bodies,' Barghouti's terrorism trial reconstitutes and transforms Palestinians into 'terrorists,' generating the material effect the indictment names.

Barghouti's trial is the continuation of the aggressive Israeli policy aimed at solidifying the case against Arafat and the PA.⁵⁷ Ariel Sharon campaigned on the promise to remove (exile) Arafat from the West Bank.⁵⁸ He pursued a policy of discrediting Arafat and the entire Fatah establishment. Speaking of Arafat and Fatah, an organization internationally recognized as a legitimate representative of the Palestinian people, Sharon claimed, 'A murderous regime that must be removed and replaced.'⁵⁹

⁵⁵ Michel Foucault, *Truth and Juridical Forms*, in *Power: Essential Works of Michel Foucault 1954-1984*, V.3, James D. Faubian, eds. (London: Penguin, 1994), 4.

⁵⁶ *Id* at 5-7.

⁵⁷ Hilla Dayan, *State Power, Violence and Political Justice: The Case of the Barghouti Trial in Israel*, 10, available at <<http://www.newschool.edu/tcds/Hilla%20Dayan.pdf>>, (Last accessed 16 August 2010).

⁵⁸ James Bennet, *The New York Times*, *Sharon Urges Palestinians to Replace 'Murderous Regime'*, 15 August 2002, available at <<http://www.nytimes.com/2002/10/15/world/sharon-urges-palestinians-to-replace-murderous-regime.html>>, (Last accessed 17 August 2013).

⁵⁹ Sharon, Knesset Address.

By performing terrorism before its own courts, Israel wanted to formulate, circulate and made to work a reality productive to the Israeli leadership of the time. They wanted to create an alternative reality and corresponding concepts PM Ariel Sharon who promised to 'remove and replace' Arafat and the Palestinian Authority.⁶⁰ Addressing the Knesset, Sharon set the tone for what will be the framework for understanding and articulating the Israeli narrative in the political, legal and diplomatic fronts.⁶¹

And there is one dispatcher: Palestinian Authority Chairman Yasser Arafat. He is the man who, in a series of agreements, promised to abandon the path of terrorism, refrain from committing murder, use his forces to prevent it—and betrayed all his promises. . . . In the territories under his rule, Arafat has established a regime of terror, which nationally and officially trains terrorists and incites, finances, arms and sends them to perpetuate murderous operations across Israel.⁶²

Israel sought to use the trial to establish the truth of this claim. The indictment defines Fatah, the Palestinian Liberation Organization, as a terrorist organization. It accuses it of engraving 'armed struggle' on its flag as a principle of liberation.⁶³ This is evident in several statements of the Israeli government. An official from the Israeli Ministry of Justice declared that Israel will seek to convince the international community by staging a 'publicized' trial and that 'Barghouti was the central partner in the decisions made by [Fatah] organizations that in the last two years carried out a series of attacks against Israeli citizens.'⁶⁴ Deputy Director General of the Ministry of Foreign Affairs, Gideon Meir said: 'This is an opportunity to tell Israel's story. We need to tell the story of the Israeli population and what it has been through in the last two years.'⁶⁵ A Spokesman for the state of Israel, Daniel Taub, 'repeatedly insisted' that 'what is important to us [Israel] is to ensure that the world understands what it is to be a democracy fighting terrorism.'⁶⁶ Another official from Israel

⁶⁰ Dayan, *State Power, Violence and Political Justice*, 10.

⁶¹ Sharon, Knesset Address.

⁶² Id.

⁶³ See *The Prosecutor vs. Marwan Barghouti*.

⁶⁴ Dayan, *State Power, Violence and Political Justice*, 10.

⁶⁵ Peter Hirschberg, 'Background/ Barghouti's on Trial.'

⁶⁶ Daniel Taub, in Schemann, 'Hostility and Drama Swamp Palestinian's Hearing.'

Ministry of Justice declared that Israel will seek to convince the international community by staging a 'publicized' trial and that 'Barghouti was the central partner in the decisions made by [Fatah] organizations that in the last two years carried out a series of attacks against Israeli citizens.'⁶⁷ Through such a public relations exercise, Israel wanted to build an enabling international consensus which allows Israel to establish a violent snapshot of the Palestinian people, and therefore justify occupation as necessary and inevitable.

Terrorism is a performative discourse that brings into being the very subject that it names. By accusing a subject as terrorist, i.e., by hurling terrorism to individuals and groups seen as a threat to the hegemonic pursuits of the political class (both at the local and global level), the accuser transforms the subject into a terrorist, excludes him from the category of the human and therefore ineligible for the protection of the law. In Israel, the discourse serves not only to dehumanize, and exclude Palestinians from the protection of the applicable framework of international law but also constructs them as a metonym for violence. In the words of Prime Minister Ariel Sharon, they are 'murderous gangs,' 'enemies of all mankind' who 'do not distinguish between blood and blood, between Jewish victim and any other victim.'⁶⁸ Having excluded them from the category of the human, hailing them as 'enemies of mankind' and a 'danger' to the free world, he calls upon 'everyone who was brought up on the values of freedom and democracy' to 'remember that leniency toward terrorism is the same as green light to terrorists.'⁶⁹ In justifying Israeli violence as necessary and legitimate, he said: 'You cannot fight terrorism on the one hand, and condemn the victims of terrorism on the other.'⁷⁰ Because Israel is fighting to preserve the same values of freedom and democracy, because it is fighting against the same agents of fear and destruction, Israeli action must not be held to a different standard. The same logic that justifies the 'Global War on Terror,' Israel argues, justifies Israeli violence and treatment of Palestinians. The mega-spectacle in Tel Aviv courthouse was an

⁶⁷ Dayan, *State Power, Violence, and Political Justice*, 10.

⁶⁸ Sharon, Knesset Address.

⁶⁹ *Id.*

⁷⁰ *Id.*

integral part of this strategy designed to shape a ‘terrorist’ image of the adversary-Palestinians.

Barghouti’s charismatic profile and his relationship with Chairman Arafat make him a spectacular scapegoat convenient to generate the kind of ‘psychological effect on the public at large.’ Barghouti is the first ‘prominent’ Palestinian leader ‘ever been brought to an Israeli Court.’⁷¹ As Hilla Dayan writes, Barghouti’s trial ‘is the first case of a defendant, charged with terrorist offenses, not to be tried by a military tribunal, but at an ordinary civil court.’⁷² By trying a prominent political figure that embodies Palestinians aspirations for freedom and statehood, the spectacle produces a telling snapshot of the leadership—forging a lasting image of Palestinian terror that enjoys endless repetition to penetrate and inhere in the memory of its audience.

One of the most politically disarming effects of the trial is its ‘reduction of history’ into an either-or binary opposition that fits the official hegemonic account of history.⁷³ The narrow nature of the evidence offered, and the means by which they were obtained and the story reconstructed matters very little. Indeed, the confessions that were obtained to convict Barghouti from already convicted Palestinians were recanted in court.⁷⁴ However, under Israeli law, confessions cannot be recanted. Nasser Abu-Hamid, the first prosecution witness, remained silent as an act of defiance and refused to testify. In the middle of the proceeding, he ‘put his fingers in his ears and refused to listen to prosecution questions.’⁷⁵ Another Palestinian witness tore up confessions extracted from him before the testimony when handed to him by the prosecution and shouted ‘This is like a football match, not a trial.’⁷⁶ Bilal Barghouti, another Palestinian prisoner, shouted ‘Jerusalem is ours’ and asked to leave the court.⁷⁷ No matter how fraudulent the procedure, the image clings,

⁷¹ See Dayan, *State Power, Violence, Political Justice*, 10.

⁷² *Id.*

⁷³ *Id.* at 423.

⁷⁴ James Reynolds, BBC News, *Barghouti Defiant as Trial Opens*, available at < http://news.bbc.co.uk/1/hi/world/middle_east/2921979.stm>, (Last accessed 17 August 2012).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

even ‘long after the substance has evaporated.’⁷⁸ Despite legitimate concerns about the legitimacy, and even the legality of the trial, for all the reasons stated so far, ‘the criticism will neither efface nor materially rectify the permanency of the image.’⁷⁹ Let me identify two separate but overlapping images Israel’s spectacle is designed to produce and institute.

First, Israel wanted to form and circulate an image of the PA that is synonymous with violence and terrorism. Tapping the trial’s vast and superior quality of image creation, Israel re-creates its own alternative reality in the courtroom to undermine the moral and political authority of the Palestinian Authority to negotiate a final settlement on behalf of the Palestinians—exonerating Israel of any obligation to bring the occupation to an end. Sharon argued, ‘Israel wants to enter into peace negotiations and will do so as soon as two basic terms for the establishment of a genuine peace process are met: The complete cessation of terror, violence and incitement.’⁸⁰ While the Prime Minister’s sanitizing rhetoric frames Palestinian violence as ‘murderous acts of terrorism,’ denying the Palestinians any right of response to Israeli violence of multiple formation, the latter’s violence is articulated in terms of the right to self-defense; rendering it legal, legitimate, normative, and quotidian. For Israel, Palestinian violence is a pathology that needs a cure. Although there is no basis for it in international law, Israel justifies its violence as a right it has acquired by virtue of its authority as an occupying power. Palestinian resistance, on the other hand, is interpreted and officially described as ‘barbaric and murderous.’ In a statement addressed to the Israeli military court, another Palestinian leader and prisoner, Ahmad Sa’adat, sums up this point rather eloquently:

As for your judicial apparatus...: it is one of the instruments of the occupation whose function is to give the cover of legal legitimacy to the crimes of the occupation, in addition to consecrating its systems and allowing the imposition of these systems on our people through force. This judicial apparatus also supports the administration of this occupation - which is the worst form of state-organized terrorism - as if you were in a permanent state of self-defense. The legitimate resistance of our people is seen as if it were terrorism that must be

⁷⁸ De Tocqueville, *Democracy in America*, 160.

⁷⁹ Kirchheimer, *Political Justice*, 423.

⁸⁰ Sharon, Knesset Address.

combated and liquidated and judgment is placed upon those that practice or support it. And in the face of this contradiction between two logics, there would have to be a conviction.⁸¹

From the system's perspective, this is what Christodoulidis calls 'the objection that cannot be heard.'⁸² Since these claims, however empirically true, are not intelligible within the register of the system and therefore illegitimate. By judging subjects whose idiom of legality and justice cannot be heard within its exclusionary framework, Israel presents the mere act of court appearance itself as evidence of the democratic and free character of the state of Israel. In so doing, it cements the international standing of its judiciary while it incarcerates the most capable and active of the occupied people. Barghouti seeks to break out of this epistemic web by appealing to the conscience of Israelis and the international community for whose consumption the trial is staged. He told the Israelis that he is a peaceful man who wants nothing more than the freedom and democracy Israelis want for themselves. He reassures the international community, this time in English: 'I am a peaceful man. I was trying to do everything for peace between the two peoples. I believe the best solution is two states for two peoples.'⁸³

Second, there is an international dimension to Israel's performance of terrorism in the courtroom. While Barghouti is tried in the courtroom for acts of terrorism—one of the most performative and eventalizing discourse of the 21st century—in the court of world opinion, it was conjuring images that go beyond the guilt and innocence of the one man standing trial. It was trying to dehumanize the Palestinians: 'He [Arafat] is the enemy of the entire free world. Everyone who seeks freedom, everyone who was brought up on the values of freedom and democracy must know that Arafat is an obstacle to peace in the Middle East. Arafat is a danger to the whole region.'⁸⁴ By performing Palestinian

⁸¹ See Charlotte Kates, Israeli Military Courts as Enforcement Mechanisms of Occupation, available at <http://palestinechronicle.com/old/view_article_details.php?id=19122>, (Last accessed 08 September 2013).

⁸² Christodoulidis, *The Objections That Cannot be Heard*, 179.

⁸³ Zvi Harel, Tanzim Boss Marwan Barghouti Indicted for Murder, Branded 'arch terrorist,' 15 August 2002, available at <<http://www.haaretz.com/print-edition/news/tanzim-boss-marwan-barghouti-indicted-for-murder-branded-arch-terrorist-1.36858>>, (Last accessed 19 May 2010).

⁸⁴ Sharon, Knesset Address.

terrorism in ways that reveals the PLO and its leadership as ‘the enemy of the entire free world,’ it presents the occupation as a necessary bulwark against Palestinian terrorism and global Jihad. In providing his performative stunt with an international context, Sharon compared Palestinian violence with the acts of 9/11. He said, Rehavam Ze’evi’s (Israeli Minister of Tourism) murder was ‘Israel’s own Twin Towers.’⁸⁵ To further cement this nexus between Palestinian violence and global terrorism, Sharon says:

Since the horrific attack on September 11th, exactly one year after the outbreak of the Palestinian terrorist campaign against Israel, the United States has been leading the world in a heroic struggle to uproot terrorism. . . . You must remember that leniency toward terrorists is the same as a green light to terrorists, who have already proven that they do not distinguish between blood and blood, between a Jewish victim and any other victim. You cannot fight terrorism on the one hand, and condemn the victims of terrorism on the other.⁸⁶

7.5. The Performative Generation of the Materiality of Resistance

Signs can be misheard or misinterpreted by those to whom they are directed. They may also be deployed in new ways and at new sites and in ways that break with context, displacing the original meaning of a word or norm, denaturalising the concept, changing the way we think or act, even endangering new forms of the culturally intelligible.⁸⁷

—Karin Zivi

In his famous essay, ‘Necropolitics,’ Achille Mbembe regards Palestine as ‘a late modern colonial occupation.’⁸⁸ He argues that this form of occupation is different from early-modern colonial occupation in ‘its combining of the disciplinary, the biopolitical, and the necropolitical.’⁸⁹ He offers the occupation of Palestine as ‘the most accomplished form of necropower,’ a word he uses to

⁸⁵ Id.

⁸⁶ Sharon, Knesset Address.

⁸⁷ Karen Zivi, Rights and the Politics of Performativity, in Terrel Carver and Samuel A. Chambers (eds.), Judith Butler’s Precarious Politics: Critical Encounters, (London: Routledge, 2008), 164.

⁸⁸ Achille Mbembe, Necropolitics, trans. Libby Meintjes, 15 (1) Public Culture, 11 (2003), 27.

⁸⁹ Id.

account for ‘the various ways in which, in our contemporary world, weapons are deployed in the interest of maximum destruction of persons and the creation of death-worlds . . . conferring upon them the status of living dead.’⁹⁰ As a site of the ‘regulation of death,’ a necropolitical space is a site of exception, ‘the location par excellence where the controls and guarantees of judicial order can be suspended—the zone where the violence of the state of exception is deemed to operate in the service of ‘civilization.’⁹¹ Palestinians arrested by the Israeli military have never been dignified with a gesture of a public trial. They were either murdered under what Israel calls ‘targeted assassination’ or tried before military courts.⁹² To return to Hilla Dayan once more, Barghouti ‘is the first case of a defendant, charged with terrorist offenses, not to be tried by a military tribunal, but at an ordinary civil court.’⁹³ The decision to grant Barghouti a civilian trial in Tel Aviv is not a departure from the logic of necropolitics; it is indeed an integral part of its operation central to its spectacle. To manage public opinion, Israel, like other colonial states before it, needed to act in the name of reason, freedom, and civilization. This public trial is in part an ‘exercise of reason in the public sphere’ that is ‘tantamount to the exercise of freedom.’⁹⁴ The state redirects and deploys the ideals of freedom and democracy in spheres of ‘unfreedom,’ in a zone of colonial subjugation to create new culturally intelligible categories.

Writing for *Haaretz*, Gideon Levy said, ‘Following dozens of assassinations, the Israeli Defense Forces suddenly proved that when it wants to arrest someone instead of assassinating him, it knows how to do it quite well.’⁹⁵ To understand the politics at the core of this trial, one does not need to reconstruct the events of the trial themselves. Israel’s own sincere declarations furnish definitive evidence of the political rationality at work in the trial: ‘This is an opportunity to tell Israel’s story. We need to tell the story of the Israeli population and what

⁹⁰ Id at 40.

⁹¹ Id at 24.

⁹² Gideon Levy, Listen to Barghouti, available at < <http://www.haaretz.com/print-edition/opinion/listen-to-barghouti-1.47263>>, (Last accessed 19 May 2012).

⁹³ Dayan, State Power, Violence, and Political Justice, 10.

⁹⁴ Mbembe, Necropolitics, 13.

⁹⁵ Levy, ‘Listen to Barghouti.’

it has been through in the last two years,' says Gideon Mier, Israel's Director General of the Ministry of Foreign Affairs. Aware of the court's central function in the production, circulation, and internalization of hegemonic norms, Barghouti formulated strategies of resistance that resists through resignification of the same signs of freedom and justice that Israel deploys. But Barghouti deploys discourses of freedom and democracy in ways that breaks from and displaces the discourse that allows sovereignty to use 'freedom,' and 'democracy' as a 'normative basis to kill'; disrupting normative hinges that links freedom and sovereignty. In this project of emancipating sovereignty from the dazzling light of necropower, Barghouti and his co-performers aim at changing the way in which the world, including Palestinians and Israelis, think and act. It is a strategy of disruption, and self-definition (re-creation).⁹⁶ They argue that the right to resist, to respond to an attack on the human condition, whatever sovereignty's juridical constructions of who may live and die, is an inherent, and universal human norm, not only recognized by national and international norms, but also resides in the deep conscience of humanity. They protest the original meaning of the norm, to reconfigure it, and bring about a new meaning of the normative.

If Israeli production of narrative justice is designed to generate and authenticate norms that conceal, pacify and normalize occupation, framing occupation and terrorism to suit its own performative stunt, Barghouti's strategy of resistance returns these hegemonic norms into the realm of contestation, ensuring the resistibility of hegemonic norms the court is called up on to rationalize and justify. By identifying Israeli occupation as the melting pot of violence, claiming the inherent right of resistance, the defense team tries to attach the deeper logic that animates the Israeli spectacle. Appropriating the platform made available by the state, they institute Palestinian repertoire of resistance on the normative structure of the state.⁹⁷

⁹⁶ Jessica J. Kulynych, *Performing Politics: Foucault, Habermas, and Postmodern Participation*, 30 (2) *Polity*, 315 (1997), 336.

⁹⁷ See Diana Taylor, *The Archive and the Repertoire: Performing Cultural Memory in the Americas*, (Durham: N.C.: Duke University Press, 2003), 193.

On the first day of the trial, Barghouti told the judge, 'There is a mistake here. The one who should be sitting here (in the dock) is the government of Israel.'⁹⁸ As a subject engaged in the duty to resist the violence of Israeli occupation, he has no case to answer, but a legitimate cause of which he is a symbol. Challenging the authority of Israeli judges; he accuses them as 'partners' of the occupation who have vested interest in the dispute: 'the judges are just like pilots who fly planes and drop bombs.'⁹⁹ As a performative response to Israel's spectacles of legality, Barghouti replied with a counter- spectacle: 'I have a charge sheet with 50 clauses against Israel for the bloodbath of both people!'¹⁰⁰ Accusing his accusers, he dismisses the court rituals as a play of power, and uses the opportunity to offer a political testament:

I categorically reject the authority of this criminal court of occupation and I will not dignify the ludicrous claims against me by responding to them. If my trial were truly a search for truth and justice, it would be Sharon and the Israeli army behind bars - it would be the criminals of occupation who have perpetrated war crimes against the men, women and children of Palestine over decades, who continue to violate UN Resolutions and the 4th Geneva Convention with impunity.¹⁰¹

Insofar as the Israeli narrative aims to establish terror as the sign and signifier of the Palestinian Authority, using Barghouti as scapegoat, Barghouti's performative resistance does two things: it not only resists Israel's construction of his identity as violent and terrorist but denounces the court process as the mechanism through which the state produces what it calls the 'terrorist' subject. Instead of denying the accusation of violence, Barghouti claims the inherent right to a violent means of resistance and contests Israel's moral and legal authority to try him. In a performative act of self-definition- one that resists Israeli construction of his identity as a terrorist, he spoke before the court is called to order, in a fluent Hebrew he learned in Israeli jails: 'I am a

⁹⁸ Peter Hirschberg, 'Background/ Barghouti's on Trial.'

⁹⁹ Emily Bazelon, Stealing the Show: The Trial of Marwan Barghouti was Supposed to Prove That He is a Terrorist. Instead, Israel May have Created the Palestinian Mandela, Legal Affairs Magazine, available at < http://www.legalaffairs.org/issues/September-October-2004/argument_bazelon_sepoct04.msp>, (Last accessed 19 May 2010) at 3.

¹⁰⁰ Lisa Hajjar, The Making of a Political Trial: The Marwan Barghouti Case, 225 Middle East Report, No. 225 (Winter 2002), 31.

¹⁰¹ See [Palestinian Biographies](http://lawrenceofcyberia.blogspot.com/palestinian_biographies/marwan-barghouti-biograph.html), Marwan Barghouti, available at <http://lawrenceofcyberia.blogspot.com/palestinian_biographies/marwan-barghouti-biograph.html>, (Last accessed 20 May 2013)

freedom fighter, fighting for the freedom of my people and peace between the two peoples.’¹⁰² In this self-definition, the ‘I’ of ‘I am’ is laying claim to the truth, in order to redefine not only his way of being but also his mode of generating meaning. Although his status as stateless affects the meaning and veracity of his statements, his truth, including its mode of recounting, emerges, not from Israeli juridical constructions, but, from his experience as an occupied, from his relationship to the occupier, and the rest of the world. He claims: ‘I am a peaceful man. I was trying to do everything for peace between the two peoples. I believe the best solution is two states for two peoples.’¹⁰³

When Barghouti says, ‘I am a peaceful man,’ denying and denouncing the state’s mega-spectacle to construct him as violent and terrorist, he discloses a different relationship to juridical truth, and reveals the contingency and arbitrariness of power-knowledge regimes that condition juridical forms of truth. For Barghouti, the violence enumerated in the indictment misrepresents and misrecognizes the underlying conflict. What the indictment names terrorism commits an injustice of misrecognition deliberately and systematically designed to co-opt and suppress the yearning of the Palestinian people for a free and dignified life. By framing the dispute as that of terrorism, rather than occupation, the trial commits an injustice of misrecognition. For the Palestinians, the occupation, of itself, is violence, in both the ontological and epistemic sense of the term. This violence, both hot and cold, continued unabated since 1967 in flagrant violation of international law, UN resolutions, and the decisions of the International Court of Justice.¹⁰⁴ By framing Palestinian resistance to illegal and illegitimate occupation as not only national but a global security threat, the indictment securitizes, misrepresents, misrecognizes, and usurps the occupied of the *logos* with which they can articulate their grievances and give an account of themselves, according to their own experiences, their way of being and knowing.

¹⁰² Schemann, ‘Hostility and Drama Swamp Palestinian’s Hearing.’

¹⁰³ Harel, ‘Tanzim Boss Marwan Barghouti Indicted for Murder.’

¹⁰⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, International Court of Justice, 9 July 2004.

Marwan Barghouti is a politician that compels admiration. Fluent in Arabic, Hebrew, and English, prisoner garners enormous support and admiration both from his people and from his enemies.¹⁰⁵ For example, Jimmy Carter described Barghouti as a ‘revered prisoner . . . [whose] influence is enormous.’¹⁰⁶ Even Israeli General Orit Adato referred to him as ‘The Nelson Mandela of the Palestinians.’¹⁰⁷ With the Palestinian territories, he is a man with a great grassroots following and among the few politicians who can cut deals between Fatah and Hamas, even from behind Israeli prison. In 2006, he initiated what is known as the ‘National Conciliation Document.’¹⁰⁸

As a progressive politician who supported peaceful negotiation including the Oslo Framework and several subsequent initiatives, Barghouti symbolizes the despair and frustration of four decades of occupation; people, who, out of daily violence and cynicism, apparently turned into advocates of violence as a measure of the last recourse.¹⁰⁹ In a statement that captures the political core of Barghouti’s response to Israeli accusation of terrorism, an Israeli commentator writes during the trial: ‘Look at Barghouti and you will understand the entire story. The path he took was the only one we showed the Palestinians—a path on which we tripped and pushed them deeper and deeper into despair and ultimately to violence.’¹¹⁰ It is not the love of violence, but oppression, a violence Western jurisprudence calls ‘occupation’ that forced him to take the path of violence. He says, ‘I say to Israeli people that I only want for the Palestinians what you Israelis want for yourselves: peace, security and above all, freedom.’¹¹¹ When injustice itself rules, resistance is no longer a weapon of choice; it is a necessary condition of existence.

¹⁰⁵ Profile, Marwan Barghouti, available at <<http://www.bbc.co.uk/news/world-middle-east-13628771>>, (Last accessed, 09 September 2013).

¹⁰⁶ Jimmy Carter, *Palestine: Peace Not Apartheid* (New York: Simon & Schuster Paperbacks, 2007), 198.

¹⁰⁷ Mark S. Hamm, *The Spectacular Few: Prisoner Radicalization and the Evolving Terrorist Threat* (London: New York University Press, 2013), 169.

¹⁰⁸ Carter, ‘Palestine: Peace Not Apartheid, 203.

¹⁰⁹ Id.

¹¹⁰ Levy, ‘Listen to Barghouti.’

¹¹¹ Schmemmann, ‘Hostility and Drama Swamp Palestinian’s Hearing.’

As Foucault writes, ‘Where there is power, there is resistance’: power, both at the micro and macro-level, produces that which comes to resist it.¹¹² However, Foucault also reminds that resistance is ‘never in a position of exteriority’ to the power that produces and invests it.¹¹³ The particular power-knowledge regime by which Israel synchronizes physical violence with concealing and legitimizing truth-discourses generates a response specific to its original configuration.¹¹⁴ Recognizing the futility of decades of negotiation with an occupier that continues to build settlements even as it declares its desire to negotiate, Barghouti offers a counter-proposal: ‘we tried seven years of Intifadah without negotiations, and then seven years of negotiations without Intifadah; perhaps it is time to try both simultaneously.’¹¹⁵ Using his speaking position—to the extent upheld by his judges, he sought to demythologize the myths formulated, rationalized, and disseminated by Israeli judiciary as mask designed to conceal the brutal reality of occupation. He says: ‘Israelis must abandon the myth that it is possible to have peace and occupation at the same time, that peaceful coexistence is possible between slave and master.’¹¹⁶

For him, to be accused of a violent threat to occupation is a contradiction in terms. By creating a sequence between three words, ‘peace, security, occupation,’ Barghouti formulates a narrative anchor—‘No peace, no security, with occupation’—that served as a framework of meaning and interpretation for his contestations.¹¹⁷ It is an anchor that repurposed the same hegemonic discourse of his enemy, usurped Israel of its monopoly over the vocabulary; destabilizing the concepts and categories by which it legitimized occupation. Going beyond the jurisprudential, this narrative anchor channels the debate into the submerged violence of occupation which the court dismisses as irrelevant to the issue on trial. By directing his response to the central political question of occupation, he confronted the Israeli authorities and the audience, leading

¹¹² Michel Foucault, *The History of Sexuality: The Will to Knowledge*, trans. Robert Hurley, (London: Penguin Books, 1976), 95.

¹¹³ *Id.*

¹¹⁴ See Brent L. Pickett, *Foucault and the Politics of Resistance*, 28 (4) *Polity*, 445 (1996), 459.

¹¹⁵ Mark S. Hamm, *The Spectacular Few*, 266.

¹¹⁶ Marwan Barghouti, *Want Security? End the Occupation*, *The Washington Post*, 15 January 2002.

¹¹⁷ Hajjar, ‘The Making of a Political Trial,’ 32.

them beyond the absurd question of criminal responsibility to the material cause of the tragedy.

Invoking what he calls an ‘inherent moral and legal right to resist’ occupation, Barghouti reflects on the status quo and performatively discloses a new law beyond Israel’s determinate legality.¹¹⁸ Using the language of peace, freedom, resistance and occupation as a justification for his action, invoking a universal law beyond this particular tradition, he appeals to the deepest imperatives of a truly human ethic. In the courtroom, he does not merely protest his construction by Israel as violent and terrorist; he reveals legal and structural violence as the surface effects of the violence of occupation. His strategy is to create a political opening for a performative reconstitution of self and authority; to affirm difference, to refuse the limit and closure imposed by laws that proceed by mishearing and misrecognizing the subject it judges. Israel presents its culture as democratic and free. Freedom and democracy becomes its ‘cultural attributes,’ something that belongs to Israel and one it is defending from the violent culture of the Palestinians. To disrupt this discursive process through which Israel continues to use its power to generate an image of Israeli freedom and Palestinian violence, Barghouti brings up an insoluble incongruity that situate Israel in contradiction to its official claims:

We have been suffering under your sinister military occupation for over 36 years during which you killed us, tortured us, destroyed our homes and usurped our land. You made our life an enduring hell. We have an inherent moral and legal right to resist your occupation of our country. If you were in our shoes, you most certainly would do the same as we are doing. You would resist.¹¹⁹

Barghouti protested Israel’s legal, moral and ethical authority to try him. He says, ‘I do not recognize the right of Israel to try and sentence a Palestinian.’¹²⁰ For Barghouti, to use Israeli criminal law as the appropriate framework within which to explore questions of criminal responsibility is a perpetration of a fundamental wrong that proceeds from the legitimization of constitutive violence

¹¹⁸ Barghouti, ‘It is not I Who is on Trial in Israel.’

¹¹⁹ Id.

¹²⁰ Marwan Barghouti, Interview, available at <<http://www.youtube.com/watch?v=nPiVcaRGgSQ>>, (Last accessed 09 Sep. 2013)

to the legitimization of this specific misrecognition of the conflict.¹²¹ He refused to recognise Israeli jurisdiction and legal framework since to do so would be to grant recognition to the very infrastructure he seeks to escape. In denouncing Israel's law and rejecting its authority to sit in judgment over the people it colonizes, Barghouti seems to invoke, like Nelson Mandela and Martin Luther King Jr. before him, the classic natural law theorists. With St. Augustine, he says, 'An unjust law is no law.' Invoking international law as an equitable rule of judgment in matter that oppose two people, Barghouti says with Cicero:

[t]rue law is right reason in agreement with Nature; it is of universal application, unchanging and everlastingWe cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times.¹²²

In the absence of a universal law that embraces human dignity and equality, a law that represents and recognizes the grievances and speaking positions of all speaking beings, the dispute is a *différend*. As Jean-François Lyotard says, 'A case of *différend* between two parties takes place when the 'regulation' of the conflict that opposes them is done in the idiom of one of the parties while the wrong suffered by the other is not signified in that idiom.'¹²³ To accept Israeli law as an equitable rule of judgment is to concede the power of Israel to try him and therefore the legality of the very occupation he seeks to resist. Although he knows that his objections cannot register in the legal sense of the term- he knows that they prevail in the court of world opinion. So for them, the battle, to paraphrase Austin again, is to accomplish action through utterance, to advance a performative politics of resistance that disrupts juridical norms that operate to camouflage the political ontology of occupation.

¹²¹ Schmemmann, 'Bitter Circus Erupts as Israel Indicts a Top Fatah Figure.'

¹²² Marcus Tullius Cicero, *De re publica*, *De legibus*, Clinton Walker Keyes, eds., (Cambridge: Harvard University Press, 1943), 211.

¹²³ Jean-François Lyotard, *Phrases in Dispute*, trans. G. Van Den Abbeele, (Manchester: University of Manchester Press, 1988) at 9.

7.6. Barghouti in Tel Aviv and Mandela at Rivonia: Generative Historicity

The political agenda contains the stories which strike home with each of us as citizens. If the legal agenda focuses on incidents which can be dated and located, the political agenda calls up analogies from the depths of our culture that are difficult to delineate. If the legal agenda depends on a rational analysis, the political agenda summons our empathy. Both sides can invoke the political agenda.

Ron Christenson, *Political Trials*, 256

As Christenson rightly observes, stories ‘are the ones that shape our thinking about the dilemmas of law, influence our sense of justice, and change our morality.’¹²⁴ To summon the empathy of the world, ‘to appeal to the voice of conscience, to the immediate and unfailing feeling of justice,’ the parties projected stories that strike home with their respective constituencies. Israel deliberately mischaracterizes the conflict and aligns it with ‘historical constants’ and ‘desirable concepts corresponding to official needs’ to mute the audibility of Palestinian demands for homeland and dignity.¹²⁵ To delegitimize their claims, and justify its actions as necessary and proportionate, it raises the spectre of the Holocaust and 9/11, creating associations between two different conflicts to appropriate the cultural meaning these signifiers, i.e., Holocaust as a signifying historical constant and terrorism as a ‘desirable concept’ and a ‘sign’ had already accumulated. By aligning its conflict with the people whose land and livelihood it occupies with the USA led ‘War on Terrorism’ and Barghouti’s trial as a re-enactment of Eichmann, Israel appropriates the self-evidence and universality of the sign and the Holocaust as historic constant. Indeed, Israel explicitly referred to the murder of its Minister of Tourism, Rehavam Ze’evi as ‘Israel’s own Twin Towers.’

On the other hand, by identifying his trial with the trial of Nelson Mandela and the Algerian freedom fighters tried in French courts, Barghouti raises the

¹²⁴ Ron Christenson, *Political Trials, Gordian Knots in the Law*, (Oxford: Transactions Books, 1986), 7.

¹²⁵ Kirchheimer, *Political Justice*, 100.

spectre of Apartheid and French colonialism. As the focal point of political strategy, Barghouti locates his struggle within genealogies of exemplary struggles against colonialism and a former freedom fighter whose name is now inscribed in ‘architectural structures, and commemorative commodities’ and made present forever.¹²⁶ To problematize the Israeli ‘sign,’ i.e., to disrupt the self-evidence, and universality with which this master signifier—‘terrorism’—generates political values and cultural meaning, he imports a competing ‘master signifier’—‘former freedom fighter,’ to disrupt the context in which the master signifier generates its material effects. The same freedom fighter denounced as a terrorist during his struggle is now being celebrated as a global icon that symbolizes the very meaning of freedom and equality.¹²⁷ By aligning Palestinian struggle with the South African struggle and the Algerian War of Independence, Barghouti dislodges the context that supplies the master sign with the raw material to generate its political effects. The counter-sign, i.e., ‘freedom fighter,’ institute a break, what Derrida calls a ‘disjuncture,’ between the sign and the context, so that the sign no longer appear self-evident, personal, and ahistorical.

There are two processes of internationalization at work in the trial. The first is the explicit analogy between the trials of Nelson Mandela and his trial.¹²⁸ The second is evident in his decision to recruit two Jewish defense lawyers as co-performers in his trial—what he regards as the trial of the aspirations of Palestinians. To foreground the performative in the cultural, religious, and emotional politics of the conflict, the defence brought onboard two prominent Jewish lawyers—Gisele Halimi and Shammai Leibowitz, whose political profile dramatizes and generates contradictions that disrupts Israel’s central ideological-political claims. Gisele Halimi is a French Jew known for his defense of Algerian freedom fighters in French Courts during the Algerian War of Independence.¹²⁹ Shammai Leibowitz, the Grandson of the prominent

¹²⁶ Derek Hook, For the Love of Mandela, Mail & Guardian, 4 July 2013, at <http://www.thoughtleader.co.za/readerblog/2013/07/04/for-the-love-of-mandela/>, (Last accessed 09 Sep. 2013).

¹²⁷ See UN General Assembly Resolution, A/RES/63/13.

¹²⁸ See Hajjar, ‘The Making of a Political Trial,’ 35. I have not found a textual evidence of this claim but Khader Shkirat, one of Barghouti’s lawyers, stated that he has met with Nelson Mandela and obtained a ‘public statement’ comparing Barghouti in Tel Aviv with Mandel at Rivonia.

¹²⁹ Hajjar, ‘The Making of a Political Trial,’ 35.

philosopher, Yeshayahu Leibowitz, is an Israeli citizen and a conscientious objector to the occupation. Let me take each of these processes of internationalization in turn. First, the Nelson Mandela analogy:

The analogy between Mandela's encounters with the Apartheid courts and Barghouti's encounter with the court of Israeli occupation is a consequential analogy. The defence team recognized that, as Alasdair MacIntyre says, the essentially story-telling character of human beings.¹³⁰ It is in the stories, as Christenson reminds us, that societies find the crucible for understanding the basic issues of law and politics. Locating his struggle within past struggles, by establishing connections and forging relations, Barghouti is trying to raise the spectre of Apartheid South Africa and mobilize Mandela's name—which is more than a mere name—as a kind of gesture that effects something within the existing power-knowledge regime; power capable of moving people, aligning and 'sticking different bodies together.' It is an analogy that transposes the South African image onto the Palestinian scene and confronts us with fundamental ethical questions. It is transformative and generative of 'affective webs' critical for forging new solidarities and alliances.

To disrupt the Israeli spectacle and solidify the truth of his analogy, Barghouti's lawyers extended an invitation to Nelson Mandela—the man that symbolizes South Africa's 'Long Walk to Freedom'—to attend Barghouti's trial. Although Mandela declined the invitation citing busy schedule, he is nevertheless said to have issued a public statement comparing Barghouti's trial to his.¹³¹ Notwithstanding his attendance, the mere fact of naming Mandela in the course of this trial raised the spectre of Apartheid in the Israeli court, rendering the occupation synonymous with Apartheid, rather than the memory of Eichmann that Israel sought to enact. Commenting on the generative effects of this logic, an Israeli commentator observed, 'Barghouti obviously would have been overjoyed to see Mandela in [the] courthouse, but the main aim of his public relations stunt has been advanced—an attempt to burn into the international public consciousness that he, like Mandela, is the victim of an oppressive,

¹³⁰ Alasdair MacIntyre, *After Virtue*, quoted in Ron Christenson, *Political Trials*, 256.

¹³¹ Hajjar, 'The Making of a Political Trial,' 35.

pernicious regime.’¹³² His lawyers made sure that Barghouti in Tel Aviv is less like Eichmann in Jerusalem and more like Mandela at Rivonia.

Comparing his trial with Mandela’s trial; Barghouti amplifies and magnifies the parallel between Israeli occupation and South Africa’s now defunct apartheid. By identifying Israeli occupation with Apartheid, and drawing parallels between Israel’s deployment of legal technologies of oppression to protect occupation, on the one hand, and Apartheid’s deployment of pernicious laws to eliminate resistance, on the other, Barghouti exposes the occupation as the melting pot of violence and appeals to the conscience of humanity.¹³³ This parallel performs a remarkable re-constitution of Barghouti. It is not merely an attention grabbing analogy, but an analogy that functions as fulcrum for judgement on basic questions of law and justice. It transformed the ‘regular guy from the Palestinian street’ into a ‘Palestinian Mandela.’ Like Nelson Mandela, Barghouti characterized himself as a peaceful man that resorted to violence out of the desire for a dignified and just life for his people. Just as Nelson Mandela justified what he called ‘strictly controlled violence’ as a measure of the last recourse against a racist order that knows no moral or legal bounds, Barghouti argues that recourse to violence is justified by a universal norm enunciated in the Universal Declarations of Human Rights. Dismayed by the evocative power of this analogy, another commentator noted, ‘Arresting Barghouti may have been just, but it is not wise. Now he will become the Palestinian Mandela.’¹³⁴ Almost a decade after his incarceration, this narrative still resonates across the Palestinian territories and the Arab World. As Avnery writes, ‘Marwan Barghouti’s manifesto expresses the near-unanimous feelings of the Palestinians . . . Like Nelson Mandela in apartheid South Africa, the man in prison may well be more important than the leaders outside.’¹³⁵

Second, the co-performance of Israeli lawyers: The solidarity of the Jewish lawyers with a Palestinian, in defence of Marwan Barghouti before an Israeli

¹³² Hirshberg, ‘Background/ Barghouti’s on Trial.’

¹³³ See G. R. Elton, cited in Christenson, *Political Trials*, 111, arguing for ‘a recognition of . . . the truth established by a greater consensus than was available in one realm alone.’

¹³⁴ Levy, ‘Listen to Barghouti,’ 1.

¹³⁵ Uri Avnery, *The Palestinian Mandela*, at <http://www.dailytimes.com.pk/default.asp?page=2007%5C09%5C18%5Cstory_18-9-2007_pg3_5>, (Last accessed 09 Sep. 13)

court, of itself, is disruptive of Israel's oppressive spectacle of legality. Crossing cultural, national, and ethnic allegiance, their participation in the defence of Marwan Barghouti 'connects the biographical and the personal to the pedagogical and the performative.'¹³⁶

As a mode of critique and political struggle, their co-performance with Barghouti destabilizes the context necessary to generate the material effects of the signs. Drawing on their biographical record, casting themselves as both insiders and outsiders, they enacted the role of an objective observer who, by virtue of blood and lineage, cannot be Anti-Semitic or anti-Israeli. Their mere appearance in his defense calls into being a different cultural meaning of the signs and referents used as exclusionary affective technologies.¹³⁷ By attempting a reversal of established patterns, they sought to suggest a moral-ethical way of being and acting; 'a demand for collective politics, as a politics based not on the possibility that we might be reconciled, but on learning to live with the impossibility of reconciliation, or learning to live that we live with and besides each other, and yet we are not one.'¹³⁸ Their co-performance with Barghouti disrupts the narrative that divides Palestinians and Israelis along a binary line and exposes this binary structure as unnatural and contingently articulated.

Outraged by this intervention, an audience in the courtroom shouted, 'I will burn all your grandfather's books' while another tried a 'halachic insult' against the kippa-clad Leibowitz.¹³⁹ Because of the identity of the speaker, his utterances cannot be dismissed as 'anti-Israel,' 'anti-Semitic,' or even 'hostile to Israel' for to do so would be logically counter-intuitive. Pointing to the heterogeneous tissue of Israel's history, Leibowitz calls for an alternative form of relations between the two, noting that, 'Menachem Begin and Yitzhak Shamir

¹³⁶ Norman K. Denzin, *Performance Ethnography: Critical Pedagogy and the Politics of Culture* (London: Sage Publications, 2003), 239.

¹³⁷ Frederick M. Dolan and Thomas L. Dumm, *Rhetorical Republic: Governing Representations in American Politics*, (Amherst: The University of Massachusetts Press, 1993), 152.

¹³⁸ Ahmed, 'The Cultural Politics of Emotions,' 39.

¹³⁹ Moshe Goral, *Analysis: A Trying Trial for the State*, available at <<http://www.haaretz.com/print-edition/news/analysis-a-trying-trial-for-the-state-1.32471>>, Last accessed 22 May 2012).

stopped the terror against the British once they had a state and the same thing will happen with the Palestinians.’¹⁴⁰

By crossing the Jewish-Arab boundary being crystallized, they perform an ‘ethical solicitation’ that enacts ‘a politics of possibility, a politics that mobilizes people’s memories, fantasies, and desires’ for collective politics.¹⁴¹ Leibowitz and Halimi, both insiders to the Israeli political inside by virtue of their ethnicity, protested occupation as a fundamental wrong, reminded Israelis of their origin and values, to change how both communities feel about each other. As Sara Ahmed reminds us, ‘How we feel about others is what aligns us with a collective’ and it is ‘through how others impress upon us that the skin of the collective begins to take shape.’¹⁴² As citizens of Israel defending a Palestinian determined to resist Israeli occupation by force, their solidarity is expressive of an ethic of difference that seeks an active way of remaking a world of plurality and equality.

In their reference to genealogies of struggles against two of history’s known oppressive regimes, the Algerian and the South African experience, the defense intends to do more than celebrate the success of these struggles. In celebrating the struggle and the self-sacrifice of its leaders, they are reconfiguring the ‘micro-politics of personal feelings’ to force people to look deep down into their conscience. Inviting the international community to be ‘co-performers in a drama of social resistance and social critique,’ they seek to forge a new unity and solidarity between Palestinians and the rest of the world.¹⁴³ By grounding their comparison in similar and concrete historical analogies vivid in the minds of their audience, they engaged in the performance of a liberatory politics- what Paulo Freire calls ‘a dialogic way of being in the world’- to mobilize memories and history as a weapon of struggle.¹⁴⁴

¹⁴⁰ Shamaï Leibowitz, Who is the Accused and Who is the Accuser, Haaretz, 29 September 2002, available at < <http://www.haaretz.com/print-edition/opinion/who-s-the-accused-and-who-s-the-accuser-1.32996>>, (Last accessed 22 May 2010).

¹⁴¹ Denzin, Performance Ethnography, 17.

¹⁴² See Ahmed, The Cultural Politics of Emotions, 54.

¹⁴³ Denzin, Performance Ethnography, 16.

¹⁴⁴ Id at 18.

7.7. Between Moses in Egypt and Barghouti in Tel Aviv: Liberationist Counter-history

You who have faith in the destiny of the human kind, summon up your courage, the future will be yours. You will be persecuted and tortured, but you will never be defeated. Each great cause requires great sacrifices to become triumphant.¹⁴⁵

—Felicite de Lamennais

The high watermark of Barghouti's 'ethical solicitation' came when his kippa-clad human rights attorney, Shama Leibowitz, registered an unexpected and destabilizing surprise against normative expectations of the Israeli social ontology. Escalating the confrontation, Leibowitz invokes a prophetic story from the Torah to incite a political deliberation irreducible to nationalistic political calculations. He said:

Moses escaped to Midian after killing the Egyptian because he knew the occupied could not get justice in the occupier's courtroom. On the other hand, Pharaoh did not put him on trial because he understood that he did not have the authority to judge the leader of a people seeking their freedom.¹⁴⁶

This is a mode of political critique and historical analysis that is radical and subversive. In order to escape gate-keeping legal technologies constructed to protect the system precisely from these forms of sudden surprises; Leibowitz compares Marwan Barghouti, the 'other' that the state of Israel despises and dehumanizes, with Moses, Judaism's most important prophet and the author of the Torah, to enhance the receptivity of their story. The moral of the story does not end there. Implicit in this intervention is a moral outrage at the violent and oppressive rationality that betrayed this messianic tradition that leads him to compare the State of Israel with Pharaoh, a figure 'described in the Torah and is etched in Jewish consciousness as a murderous tyrant.'¹⁴⁷ These parallels seek to mediate the present sufferings of the Palestinian people with the distant

¹⁴⁵ Felicite de Lamennais, 'Preface de 1835,' cited in Roland Bleiker, *Popular Dissent, Human Agency and Global Politics*, (Cambridge: Cambridge University Press, 2000), 81.

¹⁴⁶ Goral, 'Analysis: A Trying Trial for the State,' 147.

¹⁴⁷ Uriel Simon, 'A Moral Dead End,' *Haaretz*, 14 October 2002, available at < <http://www.haaretz.com/print-edition/opinion/a-moral-dead-end-1.31562>>, (Last accessed 22 May 2012).

persecution of the Jewish people to conjure an image that operates as ‘an ethical solicitation.’¹⁴⁸

In her Nobel Lecture titled ‘Precarious Life and the Obligations of Cohabitation,’ Butler asks important questions on ‘the ethical obligation’ that ‘compels,’ ‘concerns,’ and ‘moves’ us to respond to the suffering of the ‘other’ whether in proximity or at a distance.¹⁴⁹ She asks whether human beings have the ‘capacity or inclination to respond ethically to suffering’ by others, and what makes it possible.¹⁵⁰ Working through Emmanuel Levinas and Hannah Arendt, arguing with them and against them, Butler formulates an ethics of cohabitation that accounts for the impinging power of images, i.e., images that ‘impinge upon us’ and compel us to enter into a binding ethical relation with the ‘other,’ those with whom we share a piece of the earth.¹⁵¹ She argues, ‘in spite of ourselves and quite apart from any intentional act, we are nevertheless solicited by images of distant suffering in ways that compel our concern and move us to act, that is, to voice our objection and register our resistance to such violence through concrete political means.’¹⁵² By crossing communal, racial, and religious divides, Leibowitz, the grandson of Yeshaia Leibowitz, ‘one of the most distinguished Israeli philosophers and public intellectuals,’ appropriates not only his ‘Jewishness’ but also his lineage from an ‘eminent family’ of ‘distinguished Israeli Orthodox public intellectuals,’ to express and enact ‘bonds of solidarity’ with Palestinians. Just like Bram Fischer who, having been a member of an elite Afrikaner family, sacrificed his privilege fighting against Apartheid, Leibowitz is taking a great personal risk in his defense of Barghouti.¹⁵³ Writing about Fischer’s contribution as a member of the defense team at Rivonia, Mandela writes: ‘Although he could have been Prime Minister of South Africa,

¹⁴⁸ Judith Butler, *Precarious Life and the Obligations of Cohabitation*, The Nobel Lecture, Stockholm, May 2011, 1. Butler develops this critique further in *Judith Butler, Parting Ways: Jewishness and the Critique of Zionism*, (New York Chichester: Columbia University Press, 2012).

¹⁴⁹ Butler, ‘Precarious Life and the Obligations of Cohabitation,’ 3.

¹⁵⁰ *Id* at 1.

¹⁵¹ *Id* at 2.

¹⁵² *Id*.

¹⁵³ Nelson Mandela, *Long Walk to Freedom: the Autobiography of Nelson Mandela* (Boston: Little, Brown and Co., 1994), 104.

Even his political opponents would agree with us his comrades that Bram Fischer could have become prime minister or the chief justice of South Africa if he had chosen to follow the narrow path of Afrikaner nationalism. He chose instead the long and hard road to freedom not only for himself but for all of us. He chose the road that had to pass through the jail. He travelled it with courage and dignity. He served as an example to many who followed him.¹⁵⁴

Insofar as Israel is seeking to conjure an image of Palestinian terrorism, concealing its own institutional and systematic violence, Leibowitz is trying to paralyze the power of that image from moving people to act in ways that further oppresses and denies Palestinians their yearning for a homeland. Articulating Barghouti's position, Leibowitz conjures a counter-image resistant to Israeli 'economy of fear': 'When the state of Israel cruelly rules over millions of people who live under curfews and closures and makes their lives a living hell—it is the natural and moral right of the occupied people, Barghouti argues, to fight for their freedom and independence.'¹⁵⁵ As Butler rightly points out, 'obligations to those who are far away as well as to those who are proximate across linguistic and national boundaries are only possible by virtue of visual or linguistic translations.'¹⁵⁶ Using his Jewish background to interpret the Torah, comparing those distant injustices against the Jewish people with the injustice presently perpetrated by the state that identifies itself as 'Jewish' against the Palestinians, Leibowitz is formulating what Butler calls an 'ethical quandary' that operates as a site of 'ethical solicitation.'¹⁵⁷ Butler's approach positions ethics as an active site of reinventing the world, a space from which to effect modes of intervention empathetic to images of Palestinian suffering. It is a formulation that reinvigorates the sensibility of the subject, reinforces its receptivity. Within this framework, the image Leibowitz conjures, to use Butler's formulation, 'compels our concerns, and moves us to act, that is, to voice our objection and register our resistance' to Israeli violence.¹⁵⁸

¹⁵⁴ Id.

¹⁵⁵ Leibowitz, 'Who is the Accused and Who is the Accuser.'

¹⁵⁶ Butler, 'Precarious Life and the Obligations of Cohabitation,' 4.

¹⁵⁷ Id at 2.

¹⁵⁸ Id.

The conflict on trial threatens to denaturalize as to transcend the narrow confines of the jurisprudential—opening up deeper foundational questions about the values and principles of the community exercising the right to judge a person, who, like Moses before him, is fighting to liberate his people. Invoking the Torah as the grounds from which he speaks as a Jew that embodies the principles, and community norms considered ethically binding among Israelis, Leibowitz's enactment reclaims values central to that tradition. By comparing Barghouti's leadership of the Palestinians to Moses's leadership of the Jewish people from Egyptian oppression, Leibowitz is posing subtle ethico-political questions to those, who, while seeming to uphold and preserve these values, are in fact betraying and abusing it. By framing his response as an ethical demand that derives from the Judaeo-Christian tradition, Leibowitz's likening of Barghouti with Moses, and the Israeli government with Pharaoh destabilizes the signifying logic that operates to render the government's perspective on the Israeli-Palestinian conflict normative and universal. Because of the insufficiency of the juridical to transcend the play of power and represent, recognize, and articulate the claims of those who have been usurped of the means of articulation, the communication took a theological turn into a Judaeo-Christian tradition, to reclaim not only the ethical duty to respond but also the right to resistance as such.

Whatever the factual merit of this comparison, the intervention enraged several members of the audience and destabilized the normative appeal of the juridico-political categories that operate to construct Palestinians as 'violent' and 'terrorists.'¹⁵⁹ The defense knew that this rage, as a 'material fabric,' has an affective energy. It does things: it transmits meaning in the world.¹⁶⁰ For the defense, as with the prosecution, it is not factual correctness that matters, but the disruptive potentials, and the surprising effects of the intervention. That is what makes his intervention a political action in the Arendtian sense of the term. If resistance consists in the disclosure of subjectifying norms that have become self-evident, this intervention compels reflection, and brings back the contingency of juridico-political norms that organize and structure debates over

¹⁵⁹ See Bazelon, 'Stealing the Show.'

¹⁶⁰ Reidner, Review of the Cultural Politics of Emotions, 702.

what counts as resistance and terrorism into the realm of visibility. In resisting a discourse that relies on moralizing religious narrative to repress and produce quiescent citizens, performative strategies of resistance reconfigure these norms to obliterate the power-knowledge configuration that generates cultural meanings necessary for its politics. Seen that way, Leibowitz's intervention at the theological level is a performative act of reconfiguration that provides the raw material for disruption. Speaking with the voice of a subject presumed to be his adversaries, Barghouti's claim generates a truth that brings back the constitutive mechanisms of the discourse into an arena of contestation. According to this narrative, Barghouti, just like Moses, is fighting a pernicious occupation to liberate his people. In this, he instigates a political confrontation both within and outside the courtroom.

7.8. Conclusion

Barghouti's trial is a captivating illustration of both the fragility and flexibility of the judicial space. In the chapter, I have tried to show how the courtroom functions as a site of political intervention where new meanings are generated to reconstitute the world in the image of political actors. By putting on a spectacle meant to dramatize the scale, and gravity of Palestinian terrorism, Israel sought to use its courtroom to generate meanings and values that function to hail Palestinians, without distinctions, as 'dangerous,' 'murderous,' 'violent,' and ultimately, 'terrorists' intent on destroying freedom and democracy. In a series of discursive interactions with powerful ideologies, the image of 'terrorism' that Israel seeks to impinge sticks to the Palestinian body, it shapes and transforms it, generating the 'material effect' it names. As a technology of oppression, 'terrorism' generates bodily affects that defines the categories of the human, designate Palestinians as enemies of freedom and democracy, and justifies Israel's denial of their aspiration as necessary and proportionate.

However, courtroom proceedings are not rational validity claims that proceed according to exact rules. They are not 'chess-games.' In judging its public enemy in a dispute that does not signify the idiom of the accused, the system neither integrated nor suppressed sudden surprises disruptive to its repressive and disciplinary technologies of control. Unable to control the spill over effects

of its own spectacles, Israel witnessed the reconstitution of Barghouti into a Palestinian Mandela in its own space. Using the political possibilities created by the trial, Barghouti sought to generate a new cultural meaning and social value that reconfigured discourse of terrorism, occupation, and resistance. In this act of self-definition as a 'freedom fighter,' Barghouti's counter-spectacle breaks the context under which the Israeli spectacle generates its political effects and registers a sudden surprise against the system in ways that excludes all compromise. Using a counter-sign, he enabled historical analysis and political critique the Israeli invocation of a master signifier operates to paralyze and mute. By problematizing the universality and self-evidence with which 'terrorism' generates identical political effects in different contexts, he turned shared experiences of loss and suffering into a site of collective politics to create a possibility for a new beginning.

Chapter Eight

8. Between Slave-Owners and Founding Fathers: Performative Counter-history in the Trial of Bobby Seale

8.1. Introduction

In the 1975-76 Lectures at the College de France, Foucault traces the genealogy of counter-history to 17th century England and France of Louis XIV.¹ By setting philosophico-juridical discourses of royal power against the historico-political discourses of the Puritans, the Levellers and the aristocrats, Foucault suggests an understanding and analysis of political power in terms of war and war like relations such as struggles, confrontations, and antagonisms. He conceives war not only as the matrix for an analysis of power-relations but also as the essential constitutive condition of society.² Identifying revolutionary and pre-revolutionary England and France as the originary sites of counter-history, Foucault points to a turning point at which ‘the idea that war is the uninterrupted frame of history takes a specific form.’ This war, he argues, ‘The war that is going on beneath order and peace, the war that undermines our society and divides it in a binary mode is, basically, a race war.’³ In England, it was the discourse of the Puritans and of the Levellers. In France, it was a ‘discourse of aristocratic bitterness,’ a ‘discourse of struggle against the king.’⁴ Foucault presents the historico-political discourse as a critical and resentful discourse that ‘regards the Prince as an illusion’ and sovereignty as domination. As he put it, it is ‘a discourse that cuts off the head of the king.’⁵

¹ Michel Foucault, *Society Must be Defended: Lectures at the College De France, 1975-76*, Mauro Bertani and Alessandro Fontana, eds. trans. David Macey (London: Penguin Books, 2003)

² Id at 23-27.

³ Id at 59-60.

⁴ Id.

⁵ Foucault, *Society Must be Defended*, 59.

Drawing on Foucault's analysis of counter-history as a discourse of struggle and political critique, I will analyze how Bobby Seale's deployment of counter-history created conditions of possibility for critique.⁶ Working through Jacques Rancière's distinction between police and politics, I will offer a reading of how the usurpation of Seale's speaking position discloses a fundamental wrong that disrupts the original configuration. The chapter proceeds in four parts: First, to establish a link between Bobby Seale's critique in the courtroom and the Black Panther Party's (BPP) practice of counter-history, I will turn to the BPP's constitutive instrument, 'The Ten-Point-Platform and Program,' their documented struggles and texts of some of its prominent activists: Eldridge Cleaver, Angela Y. Davis, and George Jackson. Second, taking the conflict between the system and the counter-historical subject over the distribution of speaking positions as my point of departure, I will discuss how the defendant reconfigures the space to expose the biological war that goes on underneath the surface of law and order. Third, I will discuss two scenes of counter-historical significance to show how the practice of counter-history generates an event of rupture. Finally, I will discuss Seale's transformation of the legal record into an archive of black liberationist counter-history and reflect on what it might mean for the defendant to insist on a count in which his voice is counted as uncountable.

8.2. The Black Panther Party: Counter-history as Mode of Critique and Struggle

The Black Panther Party for Self-Defense was established in the spring of 1966, in Oakland, California, to protect the black community from 'rampant police brutality.'⁷ Envisioned as a revolutionary 'community-based organization,' the party's political philosophies are co-extensive with 'the struggle of people of African descent,' a 'struggle which began on the slave ships.'⁸ Envisioned by

⁶ While there is an interesting research that traces the genealogy of Foucault's own genealogy to the works of Black Panthers, I simply wanted to note that the use of counter-hegemonic knowledge of history as a mode of political critique and struggle predates Foucault's lectures and the Black Panthers were perhaps the most prominent practitioners around the time Foucault entered the genealogical scene.

⁷ Bobby Seale, *Seize the Time: Story of the Black Panther Party* and Huey P. Newton, (New York: Black Classic Press, 1991) 10; David Hilliard, *The Black Panther: Inter-Communal News Service, 1967-1980*, (New York: Atria Books, 2007) 11.

⁸ See Safiya Bukhari-Aliston, 'On The Question Of Sexism Within The Black Panther Party,' 1995, available at <<http://www.hartford-hwp.com/archives/45a/014.html>> (Last accessed 16 November 2011).

Huey Newton and Bobby Seale, (the defendant), the BPP represented a decisive break with the political philosophies of earlier black liberationist movements. Contrary to the transcendentalist and enlightenment ideals of reason, truth, and freedom that informed the political thoughts of the civil rights movement, the BPP was historicist and revolutionary. Its constitutive instrument—'The Ten-Point Platform and Program'—is a blueprint for a revolutionary and historico-political struggle. According to former Black Panther activist Safiya-Bukhari-Alston, '[T]he Eight Points of Attention and Three Main Rules of Discipline were directly lifted' from Mao Tse Tung's Red Book: 'Quotations of Chairman Mao.'⁹ The party leadership and its organizers studied history, politics, and political economy and read thinkers from Marx, to Mao, from Nat Turner, to Martin Delaney, and from Marcus Garvey, Herbert Marcuse and Adorno to Malcolm X and Franz Fanon.¹⁰

'The Ten-Point Platform' conceptualizes American sovereignty as domination and its laws, including its constitution, as a tactical deployment in the racist exploitation and oppression of black and other oppressed people.¹¹ A certain destabilizing logic undergirds it—a logic that breaks from and displaces juridical universality to expose the violence that lies beneath the ostensible peace of liberal capitalist democracy. Rejecting the rights and freedoms guaranteed by the US constitution, Point I stipulates for the freedom of black people. It states: 'We want Freedom. We want power to determine the destiny of our black community. We believe that black people will not be free until we are able to determine our destiny'¹² Point V states: 'We want education for our people that exposes the true nature of this decadent American society. We want education that teaches us our true history and our role in the present-day society.'¹³ Calling for the freedom and the right to self-determination of black people, the BPP's founding document 'speaks of rights that survives the vicissitudes of time solely in order to declare war' on the laws and institutions establishing

⁹ Id. In its early stage, the party embraced a broad internationalist view of struggle and revolution, what Huey Newton later describes as 'inter-communalist,' and tied the liberation of peoples of African descent in America to a possibility of revolution in the whole of America.

¹⁰ Brady Heiner, Foucault and the Black Panthers, 11 (3) City, 313 (2007) 318-20.

¹¹ The Ten-Point Program, available at <<http://www.blackpanther.org/TenPoint.html>>, (Last accessed 12 March 2012).

¹² Id.

¹³ Id.

American sovereignty.¹⁴ In demanding the right to education, an education that ‘teaches [them their] true history and [their] role in the present-day society,’ this founding document identifies the present as a site of inquiry and struggle. On the 107th Anniversary of the Emancipation Proclamation, the Party formulated this counter historical knowledge, this anti-juridical knowledge, in these emphatic terms: ‘The Constitution of the U.S.A. does not and never has protected our people or guaranteed to us those lofty ideals enshrined within it.’¹⁵ For them, American sovereignty and juridical codes are not guarantors of the reign of justice but the very instruments power uses to consolidate and preserve historical force relations.

By rejecting the Constitution, laws and the courts as normative standards for equality and justice, ‘The Ten-Point-Platform’ conceives African American subjectivity as racialized colonies usurped of its speaking position as equal speaking beings. In an essay titled ‘The Land Question and Black Liberation,’ BPP Field Marshall Eldridge Cleaver succinctly formulated this notion. Distinguishing between what he called the ‘White Mother Country’ and ‘Black Colony,’ he argued against a juridical framework of understanding and articulating the claims of the black population against ‘White Mother Country.’ Instead, he urged a counter-historical framework that takes account of the constitutive and regulative conditions of the present and sensible to the silent war that organizes and structures the order:

Black people are a stolen people held in a colonial status on stolen land, and any analysis which does not acknowledge the colonial status of black people cannot hope to deal with the real problem . . . Black power must be viewed as the projection of sovereignty, an embryonic sovereignty that black people can focus on and through which they can make distinctions between themselves and others, between themselves and their enemies—in short, between the white mother country of America and the black colony dispersed throughout the continent on absentee-owned land, making Afro-America a decentralized colony.¹⁶

For Cleaver, any analytic framework that ignores the status of black people as stolen and colonial ‘cannot hope to deal with the real problem.’ In the face of

¹⁴ Foucault, *Society Must be Defended*, at 73.

¹⁵ See Heiner, *Foucault and the Black Panthers*, 324.

¹⁶ Eldridge Cleaver, ‘The Land Question and Black Liberation,’ *Ramparts*, 123-124.

normative theories of legitimation whose task is to conceal, rationalize, erase, and justify the war that rages just beneath the calm order of liberal democracy, Cleaver argues, the 'black colony' cannot articulate a liberatory claim against the order without a counter-hegemonic knowledge of the enslavement of black people. In 'Political Prisoners, Prisons, Black Liberation,' Angela Davis provides an incisive articulation of the discursive criminalization of the black body and its official association with aggression and danger.¹⁷ Reflecting on the necropolitical logic of the race-war and the role of the legal order within that racist war, she writes, 'For the black individual, contact with the law enforcement-judicial-penal network, directly or through relatives and friends, is inevitable because he or she is black.'¹⁸ The logic that organizes and structures the legal apparatus is necropolitical—a logic that deploys the 'law enforcement-judicial-penal network' as a tactic to expose the black body to the risk of death.¹⁹ Here is Angela Davis:

Whenever blacks in struggle have recourse to self-defense, particularly armed self-defense, it is twisted and distorted on official levels and ultimately rendered synonymous with criminal aggression. On the other hand, when policemen are clearly indulging in acts of criminal aggression, officially they are defending themselves through 'justifiable assault' or 'justifiable homicide.'²⁰

The law and its judicial and penal apparatus have the primary function of preserving the political economic interests of the ruling class by mishearing their voice, misrecognizing their claims, and deliberately misrepresenting their discourse. Within this exclusionary frame, the identity of the subject before the law determines how the law codes a particular conduct. Here is Davis Again:

[...] The political act is defined as criminal in order to discredit radical and revolutionary movements. The political event is reduced to a criminal event in order to affirm the absolute invulnerability of the existing order. [...] As the black liberation movement and other progressive struggles increase in magnitude and intensity, the judicial system and its extension, the penal system, consequently become key

¹⁷ Angela Y. Davis, 'Political Prisoners, Prisons, and Black Liberation,' in *The Angela Y. Davis Reader*, Joy James, eds. (Malden: Blackwell Publishers Ltd., 1998) 43.

¹⁸ *Id* at 50.

¹⁹ *Id*.

²⁰ *Id* at 43.

weapons in the state's fight to preserve the existing conditions of class domination, therefore racism, poverty, and war.²¹

Davis's critique of 'law and order' as an extension of this 'racist colonial war' exposes the biological logic that prefigures and animates the activation of the legal system. As a result of this necropolitical logic, the system criminalizes politics and politicizes crime to rejuvenate law's gate-keeping functions. The political deployment of law functions to reduce the 'political event' into a 'criminal event,' affirming the absolute invulnerability of the existing order.'²² Within this institutionally racist framework, black folks enter the litigation landscape in a conflict in which their idiom of conflict is not signified and their genre of discourse excluded.

George Jackson is the BPP's Field Marshall, who, along with Huey Newton, elaborated the notion that 'politics and war are inseparable in a fascist state.'²³ Writing from within Maximum Security Unit at Soledad Prison, a disciplinary space that he sought to transform, with some success, into a site of political organizing, Jackson launches a counter-historical attack against American sovereignty. He wrote:

The prestige of power at its maturity is a thing that will prevent people from acting against that power. This pig is a psychological thing, a state of being wherein the bourgeoisie['s] reign of terror need not rely on violence to sustain itself. It's relying on something that happened in the past, or some accomplishment, or some, let's say, coup, that went down in the past, where it secured itself . . . So, consequently, our first attack is on the prestige of power . . . destroy the prestige of power, the iconoclastic act of crushing symbols . . . Because [...] after the destruction of the prestige of power, power will be forced to revert back to its original force, raw brute force—violence.²⁴

This, then, is a counter-history that conceives law and order as a continued codification of founding violence into laws and institutions. From the Declaration of Independence to the US Constitution, from the slave codes to the Black Codes and Jim Crow Laws, from chattel slavery to economic slavery, the

²¹ Id at 44.

²² Id.

²³ George Jackson, 'George Jackson: P.S., On Discipline,' *The Black Panther*, 27 March 1971.

²⁴ George Jackson, 'Field Marshal George Jackson Analyzes the Correct Method in Combating American Fascism,' *The Black Panther*, 4 September 1971, 3.

terror inscribed in these laws, Jackson claims, ‘need not rely on violence to sustain itself.’²⁵ It thrives on past events whose violence has become rational and legitimate. Jackson’s is, to use Foucault’s formulation, a revolutionary discourse that interprets ‘the dissymmetries, the disequilibriums, the injustice, and the violence that functions despite the orders of laws, beneath the order of laws, and through and because of the order of laws.’²⁶ Jackson’s account of sovereign violence is consistent with Foucault’s account of power and counter-history. In a passage that encapsulates the core of a counter-historical discourse, Foucault begins by asking this question: ‘What is this discourse saying?’:

Well, I think it is saying this: [...] Law is not pacification, for beneath the law, war continues to rage in all the mechanisms of power, even the most regular. War is the motor behind institutions and order. In the smallest of its cogs, peace is waging a secret war. To put it another way, we have to interpret the war that is going on beneath peace; peace itself is a coded war.’²⁷

Foucault identifies counter-history as ‘Leviathan’s strategic opposite number,’ a discourse that uses a ‘historical knowledge pertaining to wars, invasions, pillage, dispossessions’ and ‘the effect of all that, the effects of all these acts of war’ as both a ‘description’ and a ‘weapon’ in that struggle.²⁸ While Jackson, writing before Foucault, conceived the ‘prestige of power’ in its historical context, ‘a state of being wherein the bourgeoisie’s reign of terror need not rely on violence to sustain itself,’ Foucault argued, ‘History is the discourse of power, the discourse of the obligations power uses to subjugate . . . the dazzling discourse that power uses to fascinate, terrorize, and immobilize.’²⁹ Whereas Jackson’s counter-history calls for the destruction of the symbols of power—‘our first attack is on the prestige of power . . . destroy the prestige of power, the iconoclastic act of crushing symbols’; the theorist of power relations and techniques of domination regards the practice of counter-history as ‘a

²⁵ Michael T. Martin, and Marilyn Yaquinto, eds., *Redress for Historical Injustices in the United States: On Reparations for Slavery, Jim Crow, and Their Legacies* (Durham, NC: Duke University press, 2007) 33-35.

²⁶ Foucault, *Society Must be Defended*, 79.

²⁷ *Id* at 50.

²⁸ *Id* at 98.

²⁹ George Jackson, ‘George Jackson Analyzes the Correct Method,’ 3; Foucault, *Society Must be Defended*, 68.

decisive displacement within the exercise of power.’³⁰ As a counter-historical subject, what Foucault refers to as the new subject of history, Jackson rejects normative theories of legitimation and denounces law as domination.³¹ He claims that ‘the ultimate expression of law is not order—it’s prison.’³² Indeed, when Foucault writes of the counter-historical subject as a subject who sees ‘the State apparatuses, the laws, the power structures’ as the very instruments power uses to pursue and subjugate them, he is most probably referring to the likes of George Jackson and the Black Panthers who transformed prisons and the penal discourse into a counter-discourse.³³ In an essay titled ‘Foucault and the Black Panthers,’ Brady Heiner provides an interesting critique of Foucault, accusing him for concealing ‘the genealogy of his own genealogies.’³⁴ Whatever the genealogy of Foucault’s genealogies, there are striking similarities between Foucault’s 1976 lectures and the BPP’s philosophy and practice of counter-history.

Contrasting this historicist analytics of law and sovereignty with the juridical analysis of the prosecutor, the judge and the lawyer, Foucault presents counter-history as a discourse ‘whose nature will allow it to get outside right, to get behind right and to slip into its interstices.’³⁵ Extending this discourse to the sphere of the courtroom, Seale registered a destabilizing surprise against the court by crushing one of the most enduring and revered symbols of American sovereignty. He told the judge: ‘You have George Washington and Benjamin Franklin sitting in a picture behind you, and they was [sic] slave owners. That’s what they were. They owned slaves. You are acting in the same manner, denying me my constitutional rights being able to cross-examine this witness.’³⁶ By using the judge’s usurpation of his speaking position as a point of departure, Bobby Seale at once invokes and contests rights, he denounces and claims authority. But most importantly, he uses his subject-position as a black man and

³⁰ Jackson, *Id*; Foucault, *Society Must be Defended*, 79.

³¹ George Jackson, *Blood in My Eye*, (Baltimore: Black Classic Press, 1990).

³² *Id*.

³³ Michel Foucault, *Society Must Be Defended*, 61.

³⁴ Heiner, *Foucault and Black Panthers*, 336.

³⁵ Foucault, *Society Must be Defended*, 131.

³⁶ *The Conspiracy Trial: The Extended Edited Transcription of the Trial of the Chicago Eight for Conspiracy to Incite Riot*, Judy Clavir & John Spitzer, eds. (London: Jonathan Cape, 1971), 159.

a defendant ‘to get outside right, to get behind right and to slip into its interstices.’ Before I proceed further, let me provide a background to set the scene.

8.3. Background: Setting the Scene

The year was 1968 and the scene was a federal courtroom in Chicago. The last week of August was a Convention week in Chicago. The city was bracing itself for an influx of delegates, activists, anti-war movements, environmentalists, and other interest groups who saw the Democratic National Convention as an important occasion to draw the spotlight on the ongoing Vietnam War, institutionalized racism and social injustice.³⁷ Bobby Seale, the Chairman of the Black Panther Party joined seven other white activists who later became his co-defendants. While Bobby Seale hails from a ghetto in Oakland, California, the seven defendants were white middle class men active in the counter-culture movement that calls itself the ‘Yippies.’³⁸ They are in Chicago to stage what they called a ‘Festival of Life’; a celebration of life through music, art and poetry to highlight the moral and social malaise dividing the American *body-politic* along binary lines. Chicago witnessed a brutal crackdown on protestors.³⁹

Despite the Walker Commission’s finding that it was the police, not the protestors, which rioted during the convention week,⁴⁰ the government announced a carefully crafted criminal charge against eight leaders that represented the various spectrums of the dissent of the 1960s. The charge was ‘conspiracy to cross state lines to incite a riot.’⁴¹ On 24 September 1969, the trial began in the Federal District Court in Chicago before a jury of eight white women, two black women, and two white men.⁴² Bobby Seale was

³⁷ Douglas O. Linder, The Chicago Conspiracy Trial: An Account, at <<http://law2.umkc.edu/faculty/projects/ftrials/Chicago7/Account.html>>, (Last accessed 12 October 2012).

³⁸ Id.

³⁹ Rights in Conflict: Convention Week in Chicago, August 25-29, 1968, A Report Submitted By Daniel Walker (New York: E. P. Dutton, 1968), 5.

⁴⁰ Id.

⁴¹ Trial Transcript, Indictment, 601.

⁴² John Schultz, The Chicago Conspiracy Trial, (Chicago: The Chicago University Press, 2009), 27.

dragged into the conspiracy indictment as part of FBI's ongoing mobilization of the legal system, according to FBI's declassified information, 'to expose, disrupt, misdirect, discredit, or otherwise neutralize the activities of Black Nationalist.'⁴³

Early in September of 1969, Charles Garry, a California based attorney who successfully represented Black Panthers in the past, filed a motion on behalf of Bobby Seale. Shortly before the preliminary hearing, Garry was admitted to hospital for gallbladder surgery. During the pre-trial hearing, Seale filed a handwritten motion asking the judge to postpone the trial until the attorney of his choice, Charles Garry, recovers from the surgery. The Judge rejected the motion, claiming that 'Mr. Seale has counsel' of record.'⁴⁴ Judge William Hoffman was referring to a *pro tem* notice of appearance filed by William Kunstler (one of the attorneys for the other co-defendants) to see Mr. Seale in prison. Seale informed the court that he has no intention of retaining William Kunstler as his attorney. Pointing to Kunstler, he said, 'That man is not my lawyer, he doesn't speak for me.'⁴⁵ He went on to say that 'I will speak for myself. They can't speak on behalf of myself. I still want to defend myself, and I know I have a right. I just want to let him know. That racist, that fascist! You know, the black man tries to get a fair trial in this country. The United States Government, huh. Nixon and the rest of them! Go ahead and continue. I'll watch and get railroaded.'⁴⁶

Despite Seale's persistent objection and public dismissal of Kunstler, the Judge continued to insist that Kunstler remains Seale's attorney of record. Frustrated and outraged with Judge Hoffman's tyrannical and racist tendencies, Kunstler told the court: 'I want the record to quite clearly indicate that I do not direct Mr. Seale in any way. He is a free independent black man who does his own

⁴³ Ward Churchill, "To Disrupt, Discredit and Destroy", The FBI's Secret War against the Black Panther Party, available at <http://racismandnationalconsciousnessresources.files.wordpress.com/2008/11/ward_churchill-the-fbis-wars-against-the-black-panther-party.pdf>, (Last accessed 17 July 2011).

⁴⁴ Trial Transcript, 89.

⁴⁵ Trial Transcript, 89.

⁴⁶ Trial Transcript, 115.

direction.’⁴⁷ Citing a Supreme Court precedent and the Canons of Professional Ethics, Kunstler went so far as arguing that ‘the Constitution does not force a lawyer upon a defendant. He may waive his Constitutional rights to assistance of counsel if he knows what he is doing and his choice is made with eyes open’ and that ‘it is essentially unethical for the lawyer to continue to represent Seale.’⁴⁸ Again, the Court rejected Kunstler’s motion.

In late October, Seale filed another motion - this time requesting the court to exercise his constitutional right to self-representation. Again, the Judge denied the motion, claiming that ‘the complexity of the case makes self-representation inappropriate and the defendant would be more prejudiced were he allowed to conduct his own defense than if his motion were to be denied.’⁴⁹ Seale protested the court’s denial of his motion in an even more disruptive manner, questioning the racist subtext underneath the judge’s reasoning: ‘Black people ain’t supposed to have a mind? That is what you think. We got a body and a mind. I wonder, did you loose yours in the Superman syndrome comic books stories? You must have, to deny us our constitutional rights.’⁵⁰ Throughout the trial, until Seale was gagged and bound to the chair and ultimately severed from the case, Judge Hoffman refused to recognize his claims to representation and self-representation.

Seale uses this violence of usurpation, a wrong that deprives him of the *logos* (as speech and account) that constitute the trial’s normative architecture, not only to demonstrate the contingency of equality—the equality of speaking beings—but also to destabilize the logic that determines the relationship between the parties. Using this episode of usurpation, Seale creates a line of flight into the founding violence of usurpation that dispossessed black people of the *logos* essential to be a part of the American *body-politic*.

⁴⁷ Following the gagging and binding of Seale, Kunstler expressed his disgust in these terms: ‘Your Honor, this is an unholy disgrace to the law that is going on in this courtroom and I as an American lawyer feel a disgrace’

⁴⁸ Trial Transcript, 113.

⁴⁹ Trial Transcript, 114.

⁵⁰ Trial Transcript, 143.

8.4. 'Calling to Account': The Usurpation of the Defendant's Speaking Position

In the second volume of 'The Trial on Trial,' the editors begin their introduction with three questions central to the legitimacy of the criminal trial.⁵¹ They asked the question of 'who is to be called to account, by whom, and by what standards?' Why does it matter for any normative community to 'call anyone to account,' instead of establishing the defendant's guilt for these are two different issues? And what it is that 'constitutes an account of the appropriate kind?'⁵² The standard response to the first question is that a political community calls to account one of its members (the defendant) before its courts in accordance with norms the community has given itself.⁵³ Dismissing this standard response as inadequate and problematic, they argue that the notion of 'calling to account' captures the trial's normative commitment to defendants, 'as responsible agents and as citizens . . . to treat them as subjects who must be allowed to speak for themselves.'⁵⁴ Calling to account means to treat the suspect 'as addressors as well as addressees of the norms that the trial is to apply, who must be allowed a voice in the interpretation of those norms.'⁵⁵ If there is a normative ring to the notion of 'calling to account,' it is the right of the defendant to be allowed to give an account of himself and the dispute in which he is named as a party. They argued, 'calling to account carries a normative 'expectation that [defendants] ought to answer the charge and offer an account of themselves.'⁵⁶

It is interesting to note that the expectation to offer an account is a necessary corollary of the 'duty to answer the charge' once the state has established a *prima facie* case.⁵⁷ According to this paradigm, the defendant has no duty to

⁵¹ Antony Duff, Lindsay Farmer, Sandra Marshall, and Victor Tadros, *The Trial on Trial II: Judgment and Calling to Account*, (Oxford: Hart Publishing, 2006), 4.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 6.

give an account but if he decides to contest the charges, he has the right to explore every angle to provide exculpatory evidence on his behalf. Contrary to these normative expectations, Bobby Seale was called to account but denied the benefit of what the notion of being called to account entails. He is usurped of his speaking position - the right to give account of himself and the conflict, the right to confront the witness and contest the charges. He is made unspeakable and uncountable but nevertheless continued to be counted as a party, what Agamben calls 'exclusive inclusion.'⁵⁸

But if calling to account also means to regard the defendant as 'an addressee and an addressor of the norms by which she is judged,' how does Judge Hoffman justify his authority to call those they excluded and marginalized to account before the very order that oppressed and marginalized them? With the announcement of the dispute in which he is counted as a party and called to account for the wrongs he has committed against the community, Seale assumes a new subject position and enters a new relationship with the community. He is silenced and rendered unspeakable. Seale also raises a different problematic - he does not regard himself as an equal member of the 'we' that called him to account. In response to this double wrong that mutes his speaking position and still continues to treat him as defendant, Seale reconfigures the space in which he is named as defendant, contests the nature of the conflict, and renames himself in ways that breaks with the original configurations.

By shifting the focus from the conflict proper to the violence of usurpation, Seale performs the impossibility of communication and understanding between a black body and a system that refuses to acknowledge them as speaking beings, that counts them as uncountable. Throughout the trial, Seale managed to redirect the exchange from the dispute named in the indictment to the distribution of speaking positions, to the logic that governs the term of visibility and hearing, the order that structures the modes of being, doing, and acting.⁵⁹ He rejects the court's authority to deprive him of the very condition of

⁵⁸ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), 107.

⁵⁹ Jacques Rancière, *Dis-agreements: Politics and Philosophy*, trans. Julie Rose (Minneapolis: University of Minnesota Press, 1999), 29.

intelligibility as a person before the law. He says: ‘The Court has no right whatsoever. The Court has no right to stop me from speaking out in behalf of my constitutional rights . . . to speak out in behalf of myself and my legal defense.’⁶⁰ Insofar as I am not granted the benefit of the law as a defendant in a criminal trial, Seale contends, ‘I am not a defendant.’⁶¹ He protests his count as ‘defendant,’ takes account of it as a miscount, renames the conflict a ‘railroad operation,’ ‘an attempt to smash and destroy loyalty to his doctrine and group.’⁶² In fact, in those motions denied by the court, Seale signed his name not ‘Bobby Seale, Defendant’; but ‘Bobby Seale, Chairman, Black Panther Party.’⁶³ Not only this, Seale refused to respect court rituals, suggesting that his obedience and respect to the law presupposes reciprocity on the part of the judge to count him as a member of the polis. He said, ‘I am not rising for him, why should I rise for him, he is not recognizing my rights.’⁶⁴ Seale transgresses the original configuration that structures the debate between the ‘part’ and the ‘non part’: he exonerates himself from the duty to obey the judge until the judge recognizes him as a being capable of speech and account.

In ‘Dis-agreements,’ Rancière begins at the beginning of political philosophy, going back to Aristotle and Ancient Greece, to the Patricians and the Plebeians of Antiquity, to retrieve ‘the logos proper to politics.’⁶⁵ By making an analytic distinction between police and politics, Rancière deploys the idea of equality of men qua speaking beings (a speech that expresses and an account that may be taken of that speech) as the site of politics proper. He writes, ‘Nothing is political in itself for the political only happens by means of a principle that does not belong to it: equality.’⁶⁶ Rancière is here referring to the equality of beings qua speaking positions. Police is the name Rancière gives to what we ordinarily call politics, to the rules and ‘set of procedures whereby the aggregation and consent of collectivities is achieved, the organization of powers, the distribution

⁶⁰ Trial Transcript, 119.

⁶¹ Trial Transcript, 160.

⁶² Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends*, (Princeton, Princeton University Press, 1961), 230.

⁶³ Trial Transcript, 114.

⁶⁴ Trial Transcript, 144.

⁶⁵ Rancière, *Dis-agreements*, xii.

⁶⁶ *Id* at 32.

of places and roles.’⁶⁷ Police is a system of legitimization and distribution; the distribution of ‘an order of bodies that defines the allocation of ways of doing, ways of being, and ways of saying,’ it is an order of the visible and the sayable that sees that a particular activity is visible and another is not, that this speech is understood as discourse and another as noise.’⁶⁸

Police, Rancière says, is ‘essentially the law,’ which determines the terms for activating its space, the conditions under which admission is granted or indefinitely deferred, the terms under which one appears before the law, within its coordinates, in the material, temporal and spatial sense of the term. As Agamben writes, ‘the open door destined only for [the man from the country] includes him in excluding him and excludes him in including him. And this is precisely the summit and the root of every law.’⁶⁹ Seale is included on strictly exclusive terms. He is counted as a miscount, rendered incapable of enunciation. The denial of the equality of men qua speaking positions assumed by law does not register as usurpation in law. In other words, law does not take account of Seale’s claims, and counts it as ‘uncountable’ both in the Agambenian and Rancièrian schemas. The treatment accorded Bobby Seale as a defendant is reminiscent of the Patrician’s distribution of speaking positions. ‘The order that structures patrician domination,’ Rancière writes, ‘recognizes no logos capable of being articulated by beings deprived of logos, no speech capable of being proffered by nameless beings, beings of no ac/count.’⁷⁰ For the judge and the prosecution, Seale is simply unspeakable and un-hearable. Just as the Patricians order of domination mishears the voices of the Plebs and recognizes it as ‘noise,’ the judge refers to Seale’s ‘uncountable’ interventions as ‘noise,’ ‘outburst,’ ‘disruption,’ ‘shrieking,’ etcetera.⁷¹

Politics for Rancière begins with the appearance of a major wrong that breaks even with the logic of the police; with the unfolding of ‘the gap created by the empty freedom of the people between the arithmetical order and the geometric

⁶⁷ Id at 28.

⁶⁸ Id at 29.

⁶⁹ Agamben, *Homo Sacer*, 49.

⁷⁰ Rancière, *Dis-agreements*, 24.

⁷¹ Trial Transcript, 155.

order.’⁷² Politics occurs by the interruption and subversion of the logic that organizes and structures the modes of being, doing, and acting inscribed by the system. Commenting on Rancière’s account of politics, Slavo Zizek observes: ‘political conflict designates the tension between the structured social body in which each part has its place, and ‘the part of no part’ which unsettles this order on account of the empty principle of universality - of what Balibar calls *égalité*, the principled equality of all men qua speaking beings.’⁷³

Using the system’s own presumption of equality of ‘all men qua speaking beings’ as his point of departure, Seale reconfigures the space in which ‘parties, parts, or lack of parts have been defined’ to expose the wrong suffered by those ‘who have no right to be counted as speaking beings.’ In this reconfiguration, Seale disrupts the logic that structures and regulates the mode of being, doing and saying in the system. He is transforming the black body from the realm of invisibility to visibility, from a being without logos to one capable of speech and account, disrupting the logic central to the harmonious operation of the system. In short, Seale is simply reinventing African American subjectivity a new, activating politics at a site where politics is deactivated.

If, as Rancière claims, ‘Political activity is whatever shifts a body from the place assigned to it or changes a place’s destination,’ Seale’s refusal of his interpellation as a ‘defendant,’ his designation of the conflict as a ‘railroad operation,’ and his designation of himself as ‘Chairman of the Black Panther Party’ is an act of political activity that destabilizes the logic of the *police*.⁷⁴ Like the Plebeians who transgressed the instituted logic of interaction and gave account of themselves, Seale uses this miscount to make account of black subjectivity, not as ‘noise’ or ‘outburst,’ but as ‘counter-discourse.’ As we will see in the following, Seale uses this fundamental wrong, this incommensurable planted at the heart of ‘the distribution of speaking bodies,’ not to demand reparation, not even to recover his speaking position, but to activate politics, to demand the right to politics.

⁷² Rancière, *Dis-agreements*, 19.

⁷³ See Slavo Zizek, *The Political and its Disavowals*, at <<http://anselmocarranco.tripod.com/id46.html>> (Last accessed 11 June 2012).

⁷⁴ Trial Transcript, 114.

8.5. Between 'Slave-Owners' and 'Founding Fathers': the Genealogy of the Constituent Moment

Genealogy is not concerned with surface problems. It is concerned with depth problems whose effects are right all across the surface.⁷⁵ Genealogy does not seek to discover self-evident truth or stable foundation. Indeed, it assumes that there are no essential truths and stable foundations—no absolutes, and no essential identities behind beings.⁷⁶ Beneath the 'measured truths' of metaphysics and humanist meta-narratives, genealogy excavates the modes of reasoning and systems of thought by which the stability and absolute of the present is 'fabricated in a piecemeal fashion out of alien forms.'⁷⁷ Through a rigorous attention to historical inquiry and 'physical materiality,' genealogy investigates the ways by which distinctions between good and evil, guilt and innocence, reason and unreason, is made. It records the historical correspondence of truth with a 'truthful discourse' and in the process unravels the ways by which the subject constitutes himself as the object of knowledge, truth, and power.⁷⁸ Drawing on Nietzsche, Foucault writes, 'truth is undoubtedly the sort of error that cannot be refuted because it has hardened into an unalterable form in the long baking process of history.'⁷⁹

'The role of genealogy,' Foucault says, 'is to record its history: the history of morals, ideals, and metaphysical concepts, the history of the concept of liberty or of the ascetic life.'⁸⁰ The genealogist operates along a 'field of entangled and confused parchments'; revealing haunting contingencies, discontinuities and

⁷⁵ Michel Foucault, *Nietzsche, Genealogy, History*, in *Language, Counter-Memory, Practice: Selected Essays and Interviews* by Michel Foucault, Donald F. Bouchard, eds. (Ithaca: Cornell University Press, 1977), 147.

⁷⁶ Vikki Bell, *Culture and Performance: The Challenge of Ethics, Politics, and Feminist Theory* (Oxford: BERG, 2007), 84.

⁷⁷ Foucault, 'Nietzsche, Genealogy, History,' 142.

⁷⁸ Michel Foucault, 'On the Genealogy of Ethics: An Overview of Work in Progress,' in *The Foucault Reader: An Introduction to Foucault's Thoughts* (New York: Penguin Books, 1984), 262-63.

⁷⁹ Foucault, 'Nietzsche, Genealogy, History,' 143-44.

⁸⁰ Id at 152.

heterogeneities that ‘deprive the self of the reassuring stability of life and nature.’⁸¹

Genealogy is particularly interested in stories of origin and ‘the meaning hidden in an origin.’⁸² By rejecting the juridical truths of origin as axiomatic, the genealogist infiltrates its abyss, examines the formative history of origin and the system of meaning presupposed by its truth⁸³, thus, unraveling the ‘proliferation of errors,’ strange singularities, and visible linkages that contingently articulate its coherence.⁸⁴ By infiltrating these hardened truths and juridical constructions, effective history hijacks juridical concepts to turn them against those who used them as a mask for power; ‘invert their meaning, and redirect them against those who had initially imposed them.’⁸⁵ In the scene that follows, Bobby Seale deploys a genealogical knowledge of the American founding fathers to expose the violent and ‘surreptitious appropriation of a system of rules, which in itself has no essential meaning’ to ensure the continuity and stability of the present. Here is an exchange that took place in the morning of 29 October 1969 that is genealogical in design and effect:⁸⁶

Mr. Seale: Before the re-direct, I would like to request again—demand, that I be able to cross-examine the witness. My lawyer is not here. I think I have the right to defend myself in this courtroom.

The Court: Take the Jury out. They may go to lunch with the usual order

Mr. Seale: You have George Washington and Benjamin Franklin in a picture sitting behind you, and they were slave owners. That is what they were. They owned slaves. You are acting in the same manner denying me my constitutional rights, being able to cross-examine this witness.

The Court: Mr. Seale, I have admonished you previously—

Mr. Seale: I have a right to cross-examine the witness.

⁸¹ Id at 154.

⁸² Id at 152.

⁸³ Shane Phelan, Foucault and Feminism, 34 (2) American Journal of Political Science, 422 (1990), 424.

⁸⁴ Foucault, ‘Nietzsche, Genealogy, History,’ 143.

⁸⁵ Id at 151.

⁸⁶ Trial Transcript, 159.

- The Court: —what might happen to you if you keep on talking.
- The Court: We are going to recess now, young man. If you keep this up—
- Mr. Seale: Look, old man, if you keep up denying me my constitutional rights, you are being exposed to the public and the world that you do not care about people's constitutional rights to defend themselves.
- The Court: I will tell you that what I indicated yesterday might happen to you—
- Mr. Seale: Happen to me? What can happen to me more than what Benjamin Franklin and George Washington did to black people in slavery? What can happen to me more than that?
- The Court: And I might add . . . I might conclude that they [the other defendants] are bad risks for bail . . .
- Mr. Seale: I still demand my constitutional rights as a defendant in this case to defend myself. I demand the right to be able to cross-examine this witness. He has made statements against me and I want my right to—
- The Court: Have him sit down, Mr. Marshal.
- Mr. Seale: I want my constitutional rights. I want to have my constitutional rights. How come you don't recognize it? How come you won't recognize my constitutional rights? I want to have the right to cross-examine that witness.

This is the high watermark of Seale's deployment of liberationist counter-history in the re-subjectification of African Americans- as subjects of wrong. Against the master-narrative by which the past is legitimized, Seale transforms black subjectivity and agency from a place previously assigned to it by the system, and gives it voice: 'it makes heard a discourse where once there was only place for noise; it makes understood as discourse what was once only heard as noise.'⁸⁷ By getting outside the juridical framework, by getting outside right and beyond right, the man 'before the law' draws attention to the cries of chattel slavery that can be heard beneath the surface of democratic capitalism. Sudden and unexpected, Seale's counter-hegemonic account of American history

⁸⁷ Ranciere, *Dis-agreements*, 29-30.

tarnished and eclipsed the uncontested glory of the founding fathers. By shifting from level to the meta-level, from claims over rights to the criminal origin of the political order, he enables a site of fundamental wrong—the founding moment—‘at the heart of the distribution of speaking positions.’

Speaking of the politics of this site, Foucault writes:

From the vantage point of an absolute distance, free from the restraints of positive knowledge, the origin makes possible a field of knowledge whose function is to recover it, but always in a false recognition due to the excesses of its own speech. The origin lies at a place of inevitable loss, the point where the truth of things corresponded to a truthful discourse, the site of a fleeting articulation that discourse has obscured and finally lost.⁸⁸

Like every other nation, the United States of America is a construct of grand historical narratives. Its history is ‘the history of power as told by power itself’; a history that presupposes and reinforces the truth of this originary site. It is a history of sovereignty that inscribes, as Foucault says, ‘rights marked by dissymmetry,’ ‘a truth bound up with relationship of force, a truth-weapon and a singular right.’⁸⁹ Within this framework, the fact that the majority of America’s prominent founders such as Thomas Jefferson, George Washington, and Benjamin Franklin held slaves is silently erased from mainstream American historiography.⁹⁰ This historical knowledge which is ‘local,’ ‘regional,’ and ‘incapable of unanimity,’ one that is ‘present in the functional and systematic ensembles,’ is systematically hidden and marginalized, and hence not ‘a common knowledge.’⁹¹

Seale’s spontaneous reactivation of this resentful knowledge at that particular moment shifts the loci of contestation from the decisional aspects of law and rights to the normative legitimacy of the order and its systems of knowledge and meaning. This ‘site of a fleeting articulation,’ as Foucault calls it, where

⁸⁸ Foucault, ‘Nietzsche, Genealogy, History,’ 143.

⁸⁹ Foucault, *Society Must be Defended*, 54.

⁹⁰ See Encyclopaedia Britannica, at <<http://www.britannica.com/EBchecked/topic/1269536/The-Founding-Fathers-and-Slavery>> (Last accessed 31 July 2013).

⁹¹ Foucault, ‘*Society Must be Defended*,’ 7-8.

those who refused to recognize and acknowledge the black body as an equal speaking being, inscribed a grid of intelligibility and a field of knowledge that continued to count them as uncountable. Seale's genealogical intervention discloses a wrong that, in and of itself, in its very proclamation, gives account of the black body, as uncountable. Against the usurpation of his speaking position, Seale imports this fundamentally aporetic history to establish a direct link between founding usurpations and the particular usurpation of his voice by the judge. In so doing, Seale uses the resources offered by the system to filter into the courtroom some of the salient counter-historical narratives of his Party. Consistent with the BPP's ideology and mode of critique, Seale draws straight line between the founding fathers that enslaved and disposed his forefathers and the present order that refuses to recognize and acknowledge the black male body as an equal speaking being. He accuses America's founding father for moral failing -'They owned slaves—and draws a straight-line between that history and the history of the present by holding the judge responsible for the same moral crisis that inaugurated the nation's founding: 'You are acting in the same manner, denying me my constitutional rights being able to cross-examine this witness'⁹².

By pointing out the powerful performative and symbolic force of the images of slave-owning founding fathers; Seale's intervention attempts to find a register for a narrative that exposes the dazzling history of the founding fathers as contingent and contested. By bringing this contradiction placed at the very heart of the justice system, Seal's counter-history shatters the illusion that slavery and racism are practices of a bygone era. By using counter-history as an interruptive discourse, Seale is exposing the various discursive and non-discursive ensembles woven together to mask the contingency and complexity that lies beneath the received history of the founding fathers.

By identifying Judge Hoffman with the founding fathers responsible for inscribing slavery into laws and institutions, including courts where Blackman is supposed to seek justice, Seale's counter-history aims at dislocating juridical universality. By introducing an element of heterogeneity that disturbs the

⁹² Trial Transcript, 159.

coherent history of the founding fathers, his intervention seeks to cut the hinge between this history and the present that reinvigorates and validates itself by reference to this history. In 'The Beginning of Politics,' Rancière argues, 'the wrong by which politics occurs is not some flaw calling for reparation. It is the introduction of an incommensurable at the heart of the distribution of speaking bodies.'⁹³ By reactivating historical knowledges of enslavement and servitude for which he holds George Washington and Benjamin Franklin responsible, Seale introduces the incommensurable into the juridical domain which supplies the raw material for continued usurpation of his speaking position.

In targeting this portrait, Seale is not merely interested in pointing out the contingent foundations of his period; he is problematizing the regulative and constitutive conditions of his period with the view to doing something with that problematization. By referring to the moral and ethical crisis revealed by America's intense celebration of slave owning founding fathers, Seale's intervention breaks the linkage between the glorious past of the founding fathers and the legitimacy of the present social order. But still, the object of his intervention remains the political practices of his time, not the past. By cutting that linkage, replacing the continuity thesis with the colonial thesis and a postulate of heterogeneity, Seale's discourse exposes the great concealing, neutralizing and ultimately legitimizing impulses of law and justice, the illusions of truth and fairness they project. By tying this usurpation to the broader history that 'miscounts' the parts—in this case by celebrating the founding fathers responsible for subjecting black people to humanity's most offensive indignities, he situates the public in direct contradiction with its professed values and principles.⁹⁴ In this, he reveals slavery as something existentially tied to the American republic, and therefore as a 'sign and signifier' of the founding fathers. This then, is not the discourse of unity and continuity but of heterogeneity and discontinuity, what Foucault calls 'a history of deciphering . . . and of the re-appropriation of a knowledge that has been distorted or buried.'⁹⁵

⁹³ Rancière, *Dis-agreements*, 19.

⁹⁴ Christodoulidis, *Strategies of Rupture*, 5.

⁹⁵ Foucault, *Society Must be Defended*, 72.

8.6. Liberationist Counter-history as Strategy of Rupture

As ‘strategy of rupture,’ counter-history aims at suspending the continuity of hegemonic forms of knowledge, to interrupt its truth effects, to ‘cut it off from its empirical origin and its original motivations, cleanse it off its imaginary complicities.’⁹⁶ In the context of trials, the phenomena of rupture denotes a disjuncture between law and justice, between what has been promised and upheld, between normative principles and actual practices and works to transform the gap into an event ‘on the stage of historical process.’⁹⁷ As Christodoulidis argues, ‘the story of rupture unfold, in the way in which an act of resistance registers without being absorbed, integrated or co-opted into the system against which it stands.’⁹⁸ Here is an exchange⁹⁹:

Mr. Seale: Since he made all of these statements, Can I say something to the Court?

The Court: No, thank you.

Mr. Seale: Why not?

The Court: Because you have a lawyer and I am not going to go through that again.

Mr. Seale: He is not my lawyer. How come I can’t say nothing? He (the prosecutor) had distorted everything, and it relates to the fact I have a right to defend myself.

The Court: Well, I have been called a racist, a fascist,—he has pointed to the picture of George Washington behind me and called him a slave owner and -

Mr. Seale: They were slave owners. Look at history.

The Court: As though I had anything to do with that.

Mr. Seale: They were slave owners. You got them up there.

⁹⁶ Michel Foucault, *Archaeologies of Knowledge* (Abingdon, Tavistock Publications Ltd., 1972), 4.

⁹⁷ Foucault, ‘Nietzsche, Genealogy, History,’ 152.

⁹⁸ Christodoulidis, *Strategies of Rupture*, 5.

⁹⁹ Trial Transcript, 162.

The Court: He has been known as the father of this country, and I would think that it is a pretty good picture to have in the United States District Court.

Mr. Kunstler: We all share a common guilt, your Honor.

The Court: I didn't think I would ever live to sit on a bench or be in a courtroom where George Washington was assailed by a defendant in a criminal case and a judge was criticized for having his portrait on the wall.

Mr. Kunstler: Your Honor, I am just saying the defendants are not for disruption. They are for peace. The judge of the court sits there and won't let a codefendant have his attorney of record or defend himself. Then I have nothing further to say, your Honor.

The Court: Bring in the Jury.

In the afternoon of 29 October 1969, the same day as the previous scene, Judge Hoffman returns to that destabilizing point of his own free accord. At this point in the course of the trial, unauthorized interventions like 'that man is not my lawyer,' 'I have the right to speak on behalf of my constitutional right,' 'I have the right to defend myself,' 'that man has distorted the point,' have been pervasive. In response to what has been a familiar objection by the defendant, the judge tries to find a way of responding to what has been said in the morning: 'Well, I have been called a racist, a fascist, — he has pointed to the picture of George Washington behind me and called him a slave owner . . . As though I had anything to do with that.'¹⁰⁰ In this response, and the conversations that followed, we see an initiative by the judge to cement the fracture sustained by Seale's temporal interruption of the history of the founding fathers. If 'rupture registers in terms of a response it triggers,' Judge Hoffman's return to that point, not necessarily to deny, justify or defend the founding fathers but rather explain how the founding fathers '[have] been known in [the] country,' is one such break that the system cannot repress nor contain within its economy of containment.¹⁰¹ Christodoulidis writes: '[A] rupture registers when an act appears incongruent to the logic of its representation, and with such

¹⁰⁰ Id.

¹⁰¹ Christodoulidis, *Against Substitution*, 194.

intensity that it cannot be domesticated nor ignored.’¹⁰² If the incongruity of the act ‘with the logic of its representation’ and the impossibility of domestication and containment constitutes the key features of rupture, I argue that this intervention satisfies these features.

First, if the courtroom is conceived as a site of truth and justice elevated beyond politics, a site at which the descendants of the slave population seek truth and justice, the portraits are incompatible with the court’s normative inscription. The judge’s willingness to keep portraits of the founding ‘heroes’ in an institution that sits in judgment over the victims of the social order created by these ‘heroes’ is incongruent to the normative inscription of the court as impartial, neutral, independent, and just. By memorializing and recounting the history of founding fathers, the Judge is reinforcing the dominant narrative to generate power effects: the portraits not only ‘establish a juridical link between those men’ and the present, but also projects their dazzling image to guarantee the truth of the present.¹⁰³ ‘The point of recounting history, the history of kings, the mighty sovereigns and their victories,’ writes Foucault, ‘was to use the continuity of the law to establish a juridical link between those men and power, because and its workings were the demonstration of the continuity of the law itself.’¹⁰⁴ Memorializing, i.e., ‘making them memorable’ at the site of truth and justice, inscribes their monumental deeds in discourse and illuminates a single side of their story forever; leaving the other in darkness.¹⁰⁵ This, I argue, is not only incongruent with the normative representation of a court of law as a site of justice; it is also a fundamental incommensurability the system cannot ‘domesticate.’

In reminding the Judge that they were slave owners and that the judge has not only accorded them pride of place in the present but also acted ‘in the same manner,’ Seale is establishing a link between the reinvigorating image projected by the portraits of the founding fathers and ongoing practices of political

¹⁰² Id.

¹⁰³ Foucault, *Society Must be Defended*, 66.

¹⁰⁴ Id.

¹⁰⁵ Id at 67.

marginalization and economic subordination of black people.¹⁰⁶ Attentive to the antagonistic logic of disruptive counter-history, Seale intervenes quickly in response to Judge Hoffman's attempt to distance himself from the guilt of slavery: 'They were slave owners. You got them up there.' By the time the judge returned to the issue with a measured tone, apparently 'to recall the context' and therefore domesticate the fracture—'He has been known as the father of this country, and I would think that it is a pretty good picture to have in the United States District Court'—it was too late. The imperative has already broken down, interrupted, and forced to enter a new time and a new normative status. By the judge's own admission, the hanging of the portraits of the founding fathers in federal courtrooms is no longer an act of symbolic, political and historic significance. The dazzling and petrifying image they project into the courtroom, that juridical link and the continuity of law they help establish, and the truth effect it generates— all these symbolic values have been reduced by the representative of the system, the judge, into something of a mere aesthetic significance—'*I would think that it is a pretty good picture to have in the United States District Court.*' This abrupt displacement of the imperative, I argue, marks a radical break with the past, a break that interrupts the continuity of the past that serve as a referent for the present. It is a break that constitutes an 'event of rupture,' what Derrida calls *a force de rupture*, and appears as an event 'on the state of historical processes.'¹⁰⁷

In this historicization and re-politicization, in the purely political act of the reconfiguration of history, Seale creates an opportunity for an event of rupture. Seale's counter history destabilizes the Judge's discursive affirmation of the history of the founding fathers. By unravelling the dirty linen that resides just beneath the glorious history of founders, Seale's account of the founding fathers represents a repudiation of the acts and gestures that legitimize it. By unearthing the contingencies surrounding the history of founders, exposing the violence that the visible order of law conceals, Seale's intervention unmasks the stories these dazzling and petrifying portraits are meant hide.

¹⁰⁶ Id at 66.

¹⁰⁷ Jacques Derrida, *Signature, Event, Context*, in *Limited Inc.* (Evanston: Northwestern University Press, 1972), 9.

Perhaps, we have seen a transformative effect of this rupture when William Kunstler, a subject that belongs, according to the logic of ‘black liberationist counter-history,’ to the hegemonic group, subscribes to Seale’s narrative of events: ‘We all share a common guilt, your Honor.’ The very subject that Seale’s ‘liberationist counter-history’ seeks to situate in ‘contradiction with its principles’ admits of such contradiction and pleads guilty as charged. It is a phenomenon of rupture that revealed the founding father and the social order they created as a sign and signifier of slavery, racism, and domination. It is this moment that exposed power for what it inherently is, a rupture that forced power, as Jackson argued ‘to revert back to its original force, raw brute force—violence’—that led to one of the most politically vital events of that eventful trial: the stunning image of a gagged and bound Blackman in the 20th century American courtroom.

8.7. The Legal Register as an Archive of Liberationist Counter-history

My life existed somewhere in the liminal space between that which is recorded officially and that which remains officially off the record. I cannot begin to explain the pain of living a life with no record, where one breathes but there is no existence.

—Yazir Henry

So far, I have been reading Seale’s deployment of liberationist counter-history, not merely as a description of black political agency but also as a weapon of reconfiguration and wrestling of the past from the totalizing discourse of history. In this section, I want to focus on a different genealogical dimension of Seale’s strategy—his belligerent insistence to transform the legal record into an archive of liberationist counter-history. But before that, it is worth pausing to ask, why Seale is interested in filtering his narrative of history into the register of the system he denounces as racist and the record of an institution he condemns as a device of oppression? In what terms do these subversive narratives register? And why does he insist on getting into the register though his unauthorized voice registers only as contemptuous, as ‘noise’ against the hegemonic and privileged discourse of the state?

In her book, ‘The Archive and the Repertoire: Performing Cultural Memory in the Americas,’ Diana Taylor distinguishes between the archive and the repertoire.¹⁰⁸ In Taylor’s performance genealogy, the archive ‘consists of objects such as documents, letters, archaeological remains, and maps—objects that seem ‘real,’ concrete, and able to transmit memory over space and time.’¹⁰⁹ On the contrary, ‘repertoire’ consists of ‘performances, gestures, orality, movement, dance, singing—in short, all those acts usually thought of as ephemeral, nonreproducible knowledge.’¹¹⁰ Bobby Seale’s liberationist counter-history is a performance of ‘repertoires of resistance,’ an ‘embodied counter-history’ that deciphers ‘the disparities between history as it is discursively transmitted and memory as it is publicly enacted by the bodies that bear its consequences.’¹¹¹ For ‘the part of no part,’ for this genealogical subject, the trial matters precisely because of the opportunity it affords for what Taylor refers to as a ‘repertoire of resistance.’¹¹²

For Bobby Seale, if the demand for the recognition of his constitutional rights matter, it is not because redress is possible for this fundamental wrong in the courtroom. For those who are counted as uncountable, at once visible and invisible to the law, those whose history is at the interstices of the ‘officially recorded’ and those ‘officially off the record,’ the trial is an opportunity to contest and displace the ‘discursive practices of officially sanctioned history.’¹¹³ More than anything else, Seale wanted to repurpose the trial and transform it into a narrative of power’s ‘lower depths,’ the racist violence that survived chattel slavery, and continued to animate American sovereignty and its institutions of justice. In denouncing American ‘law and order’ as a register of violence, Seale filters his discourse, and wrenches away the legal record from the

¹⁰⁸ Diana Taylor, *The Archive and the Repertoire: Performing Cultural Memory in the Americas* (Durham, Duke University Press, 2003) 19.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 20.

¹¹¹ Joseph R. Roach, *Cities of the Dead: Circum-Atlantic Performance* (New York: Columbia University Press, 1996), 25.

¹¹² Catherine Cole, *Performing South Africa’s Truth Commission: Stages of Transition* (Bloomington, Indiana University Press, 2010), 29.

¹¹³ Cole, *Performing South Africa’s Truth Commission*, 31.

exclusive domain of the state; transforming it into an archive of liberationist counter-history. He insists: 'Let the record show that Bobby Seale speaks out in behalf of his constitutional rights, his right to defend himself, his right to speak in behalf of himself in this courtroom.'¹¹⁴ Whether one reads his interventions as a 'noise,' 'shrieks,' 'pounding,' 'shouting,' or a 'disruptive act,' in the sense the judge uses these terms¹¹⁵, or a counter-discourse, and legitimate objections by the defendant to protest the usurpation of his voice and offer an account of himself and his people, to claim the right to politics, Seale's interventions have goal-objectives that transcend the Judge's narrow preoccupation with contempt citations. Setting his genealogical critique of law, violence and racism against juridical conceptions of law and order, Seale insists on the record to institutionalize and conserve his narrative. Here is an exchange that captures the intensity with which Seale competed with the judge for a register in the same archive:¹¹⁶

Mr. Seale: They don't take orders from racist judges, but I can convey the orders for them and they will follow them. [Seale is referring to a group of Panthers in the spectators' section.]

The Court: If you continue with that sort of thing, you may expect to be punished for it. I warned you right through this trial and I warn you again, sir.

'Bring in the jury.

Mr. Seale: We protested our rights for four hundred years and we have been shot and killed and murdered and brutalized and oppressed for four hundred years because of—

The Court: There is another instance- that outburst may appear of record and it does. 'Did you get it, Miss Reporter?

The Reporter: Yes, sir.

¹¹⁴ Trial Transcript, 123.

¹¹⁵ Trial Transcript, 155.

¹¹⁶ Trial Transcript, 122-23.

Mr. Seale: I hope you got my part for the record, too, concerning that. Did you get that, ma'am?

The Reporter: Yes, sir.

MR. Seale: Thank you.

The Reporter: And that outburst also.

Mr. Dellinger: I think you should understand we support Bobby Seale in this—at least I do.

The Court: I haven't asked you for any advice here, Sir.

Mr. Seale: All I have to do is clear the record. I want to defend myself in behalf of my constitutional rights.

The Court: Let the record show that the defendant Seale has refused to be quiet in the face of the admonition and direction of the court.

Mr. Seale: Let the record show that Bobby Seale speaks out in behalf of his constitutional rights, his right to defend himself, his right to speak in behalf of himself in this courtroom.

In 'Archive Fever: Freudian Impressions,' Derrida traces the term 'archive' to the Greek word *arkhe*, a term that designates, at once, 'the commencement and the commandment.'¹¹⁷ *Arkhe*, Derrida notes, operates according to two principles: 'the principle according to nature or history, there where things commence—physical, historical, or ontological principle—but also the principle according to the law, there where men and gods command, there where authority, social order are exercised.'¹¹⁸ This is precisely what the legal record epitomizes. It operates according to the principle of 'nature or history' and also 'according to the law.'¹¹⁹ It exhibits the characteristic of a physical, historical or ontological site 'where things commence' and a law, according to which judges command, where magistrates exercise authority, on behalf of the social order they represent. As a guardian of the documents, the archon, Judge Hoffman in our

¹¹⁷ Jacques Derrida, *Archive Fever: A Freudian Impression*, 25 (2) *Diacritics*, 9 (1995), 9.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 10.

case, is charged with ensuring content and ‘the physical security of what is deposited and of the substrate.’¹²⁰ Derrida argues, the archons, the judges who determine what legitimately belongs to the record, are ‘accorded the hermeneutic right and competence’- the authority to ‘interpret’ the documents that recall and state the law. Derrida further observes, ‘In an archive, there should not be any absolute dissociation, and heterogeneity or secret which could be separate (*secernere*), or partition, in an absolute manner.’¹²¹

The legal record is a reflexive site of consignment. It implies power, what Derrida calls the ‘power of consignment,’ the power not only ‘to consign’ as in deposit, but also the power to consign in the sense of ‘consigning through sign.’¹²² The *archontic* power presupposes the power to identify and arrange things in such a way that ‘all the elements articulate the unity of an ideal configuration.’¹²³ Whereas archives are reflexive registers that could ‘not be reduced to memory,’ the legal record embodies a unique reflexivity peculiar to its normative presuppositions. The normative assumption that underpins the trial denies the archons the exclusive monopoly over the archive. It imposes a limit on the archons,’ in our case the Court’s, authority to legitimately exclude certain contentions of the defendant. Seen from this angle, the legal record is a unique archive that admits of heterogeneity, and incongruity. Seale’s strategy here is not one of gathering together, but of gathering apart, not one of unification, but of fragmentation, introducing contingency, contradiction, and heterogeneity that sits incongruently to the homogenizing rituals of the courtroom. If the Court’s use of the legal record as a site of consignment is positivist and traditional; Seale’s appropriation of it is subversive and revolutionary.

As I argued in chapter four, if the trial is a performative ritual moment that is ‘repeated in time,’ ‘maintain a sphere of operation that is not restricted to the moment of utterance itself,’ if it at once ‘constitute and escape’ the particular instance of its speech, it is precisely because of the record.¹²⁴ In order for

¹²⁰ Id.

¹²¹ Id.

¹²² Id.

¹²³ Id.

¹²⁴ See Judith Butler, *Excitable Speech: The Politics of a Performative* ((New York: Routledge, 1997), 3.

liberationist counter-history to shape the future, to reconfigure the present configurations of power, it must be consigned, instituted and conserved for that future. Derrida writes, ‘if there is no archive without consignment in an external place which assures the possibility of memorization, of repetition, of reproduction, or of re-impression, then we must also remember that repetition itself, the logic of repetition, indeed the repetition compulsion, remains, according to Freud, indissociable from the death drive.’¹²⁵ When Seale claims that ‘We protested our rights for four hundred years and we have been shot and killed and murdered and brutalized and oppressed for four hundred years’¹²⁶, he is not offering this claim as a defense to the prosecution’s claim, he is transforming this black repertoire into an archive and crystallize the encounter with the state into what Judith Butler calls a ‘condensed historicity.’¹²⁷ In this way, he not only conserves the past from ‘Freudian death drive’ but also bears witness to the emergence of a new African American subjectivity beneath the old.

In the second part of ‘Archive Fever,’ Derrida reflects on the ‘institutive and conservative functions’ of archives:

To cite before beginning is to give the key through the resonance of a few words, the meaning or form of which ought to set the stage. In other words, the exergue consists in capitalizing on an ellipsis. In accumulating capital in advance and in preparing the surplus value of an archive. An exergue serves to stock in anticipation and to prearchive a lexicon which, from there on, ought to lay down the law and give the order, even if this means contenting itself with naming the problem, that is, the subject.¹²⁸

It is here that one finds the clearest indication of why Seale competes with the archon that commands the ‘hermeneutic right,’ and the monopoly over the right of institutionalization, i.e., inscription according to longstanding juridico-political truths.¹²⁹ Using the reflexivity of the legal record, Seale situates himself, incongruently, ‘to set the stage,’ to capitalize on contradictions and points of tension, to reject the categories and subject positions the law uses to code black

¹²⁵ Id at 14.

¹²⁶ Trial Transcript, 122.

¹²⁷ Butler, *Excitable Speech*, 3.

¹²⁸ Derrida, *Archive Fever*, 12.

¹²⁹ Id at 10.

subjectivity. Working on those ‘entangled and confused parchments,’ Seale is pre-archiving the emergence of a new language, a new subjectivity, a new epistemic standard for ‘law’ and ‘justice’ to enhance counter-history’s ‘surplus value.’ It is precisely this transgressive and resentful logic that sees history as a ‘calculation of forces,’ that conceives of ‘entangled and confused parchments’¹³⁰ as a counter-discourse and the real fabric of struggle that informed Seale’s unceasing cry to infiltrate this hermetically sealed space: ‘the domain of officialdom, the sanctum sanctorum of truth and justice.’¹³¹ He cries, ‘I want it for the record. I will present it myself in behalf of myself in my own defense.’

Seale’s insistence on the record also suggests a certain genealogical sensibility towards a written sign, sensitivity towards a mark that subsists beyond its particular author. In ‘Signature Event Context,’ Derrida offers a brilliant illustration of the performativity of writing. He writes, ‘A written sign . . . is a mark that subsists, one which does not exhaust itself in the moment of its inscription and which can give rise to an iteration in the absence and beyond the presence of the empirically determined subject.’¹³² Although Derrida argues that this characteristic mark of language is not specific to a written sign, the possibility of the moment exceeding itself, its ability to be cited and reiterated, its potential to ‘escape the instance of its utterance,’ to be deployed in ‘new ways and at new sites’ depends on its dissociability from what Derrida calls ‘the death drive.’¹³³ While its liberatory significance is always contingent on factors beyond his control, Seale’s strategy is driven by an immanent motive to document stories of struggles on the normative structures of the very system he denounces as racist and decadent. In importing into the courtroom these fractured stories, the ‘fissures, and heterogeneities’ of origin, Seale is trying to document for future invocations the perverse rationality that animates the truth of the system.

¹³⁰ Foucault, ‘Nietzsche, Genealogy, History,’ 139.

¹³¹ Pnina Lavah, Theatre in the Courtroom: The Chicago Conspiracy Trial, 16 (3) Law and Literature, 381(2004), 400.

¹³² Derrida, ‘Signature Event Context,’ 9.

¹³³ Derrida, Archive Fever, 10.

Speaking of the future and archive, Derrida notes, the question of archive is ‘a question of the future, the question of the future itself, the question of a response, of a promise and of a responsibility for tomorrow. The archive: if we want to know what that will have meant, we will only know in times to come.’¹³⁴ So at stake is not so much the past, not even the present, but the future, the future that is entangled with and shaped by present. Seale’s purpose here is to filter and accumulate as meticulously as possible, contingent fragments, traces and remainders that register incongruently to the ‘archival violence’ of the legal record. He speaks without the authority to speak: ‘Let the record show that Bobby Seale speaks out in behalf of his constitutional rights, his right to defend himself, his right to speak in behalf of himself in this courtroom.’

Seale is here building a strategic knowledge of this power for future struggles. For those at the margin of politics, those whose knowledges are invalidated by systematized knowledge, the record is a weapon. Seale’s insistence to get into the register, despite the juridical categories under which it registers, suggests his acute awareness of the iterability of written juridical signs, its future potential to function ‘in the radical absence of every empirically determined receiver.’¹³⁵ As ‘vectors of power and history,’ these destabilizing signs can be used, to use Karen Zevi’s formulations, ‘in new ways and at new sites and in ways that break with context, displacing the original meaning of a word or norm.’¹³⁶ Seen from that point of view, the legal register becomes an unparalleled grid of the political trial generally and the conspiracy trial specifically. Seale seem to have understood this logic when he asked the stenographer for a confirmation: ‘I hope you got my part for the record, too, concerning that. Did you get that, ma’am?’¹³⁷

Just as tanks and cemeteries could become sites of reconfiguration and re-function; the legal record can be, and it has been, reconfigured to function as a tool of ‘historical instruction and normative reconstruction.’ From the trial of

¹³⁴ Id at 36.

¹³⁵ Derrida, ‘Signature, Event, Context,’ 8.

¹³⁶ Karen Zivi, Rights and the Politics of Performativity, in Terrel Carver and Samuel A. Chambers, Judith Butler’s Precarious Politics: Critical Encounters, eds., (London: Routledge, 2008), 164.

¹³⁷ Trial Transcript, 122.

Socrates and Jesus of Nazareth to the heresy trials and the Inquisition of the early modern Europe, from the Amistad trials, to the trial of Susan Anthony, from the trials of Alfred Dreyfus to Nelson Mandela's, the transcripts of these trials served as the most reliable impeachment of the nature and policies of their respective systems. Against the monopolizing tendencies of the judge, Seale intervenes without authority to consign a counter-hegemonic narrative of American sovereignty into the register of the system, incongruently so, to longstanding normative assumptions and premises undergirding American 'law and order.' By turning the moment of the trial into what Lawrence Douglas calls 'didactic spectacles,' superimposing pedagogic imperative, Seale here insists to institute his protest and above all his counter-hegemonic account of the founding fathers, and the biopolitical mobilization of law and order against blacks into the legal record.

By unearthing 'the battle cries that can be heard beneath' America's politics of rights and its system of justice, Seale wanted to make the battle over the 'record' another important strategic grid of the conspiracy trial. In this scene, Seale accused the judge of racism and narrated his version of what the last 400 years represented in political-historical terms: 'We protested our rights for four hundred years and we have been shot and killed and murdered and brutalized and oppressed for four hundred years.'¹³⁸ By tracing the violence of the state against the black population back to 400 years, Seale demystifies the juridical pretense of equality and implants this new history into existing orders of knowledge to reframe African American subjectivity and agency. The recounting of 400 years of murder, brutality, and oppression, is 'not simply a matter of describing a relationship of force,' it is a way of modifying 'the very disposition and the current equilibrium of the relations of force.'¹³⁹

In disobeying and protesting this act of usurpation, Seale assigns a strategic role to the record, the only official register, and enlists it for his anti-racist and decolonization struggle. He uses the legal record to mark a break, a rupture in legality. Just as George Jackson, the BPP Field Marshall sought to transform the

¹³⁸ Trial Transcript, 122.

¹³⁹ Foucault, *Society Must be Defended*, 171.

prison system from ‘an apparatus that criminalizes and detains the radical community activists’ into a ‘tool for revolutionary mobilization’; Seale is here engaged in a transformative act of mobilizing the legal record as a reservoir of counter-historical knowledges for future deployment. Seale wanted the record to bear witness not so much to the denial of his Sixth Amendment rights but most fundamentally to the usurpation of black peoples’ speaking position as equal beings, to practices of racism and violence, and the role of the judiciary and the penal system in legitimizing and justifying them.

He wanted the legal register to bear witness to the sorry state of affairs, to the deprivation of black people of the very condition of intelligibility as speaking beings, to show that the black population of the United States has never enjoyed the lofty ideals of the Declaration of Independence or the US constitution. Instead of protecting them, the constitution condemned them to a complex and invasive violence, at once epistemic and ontological. He denounces the Constitution as a tactical deployment against black and other oppressed people; situating them at its constitutive outside, on the periphery, outside its protection but within its jurisdiction. By pointing to the strategic function of the legal system in the rationalization and justification of this violence, Seale wanted to expose the system as racist and the court process as a continuation of a biological war by other means. Inasmuch as this trial is a battle over spectacle, for Seale, it is an archival project whose purpose is to institute into the public record, via courtroom speech acts, the fundamental wrongs that the discursive practices of history and memory represses and excludes.

8.8. Conclusion

By departing from forms of critique that are possible within the logos of the trial, Seale deploys a counter-historical and anti-hegemonic knowledge of American history to create immanent possibilities for change and transformation. His counter-history stages a public and discursive affirmation of a backstage discourse that cannot be asserted in the face of power: beneath the stable continuities of laws and orders, underneath the cohesive unity of subjects and the distribution of speaking positions, counter-history distills and unravels contingency, discontinuity, heterogeneity, complexity, and dissymmetry central

to an event rupture. Against the trial's communicative distribution of speaking positions into defendants, prosecutions, jurors and courts, Seale reconfigures the space, exposes the communicative as strategic, names the conflict a 'railroad' operation; a double-wrong, that at once accuses and usurps him of the right to contest the charges as a 'defendant' in criminal law. In accusing the system for depriving him of the very conditions of visibility and hearing, his discourse aims at exposing the disjuncture between the codified rights of the defendant and the systematic and selective denial of these rights to those who belong to 'the part of no part,' those whose very look evokes suspicion.

While Judge Hoffman paralyzes Seale's right to self-representation by resorting to gate-keeping juridical constructions, Seale switches his operation from the level of rules to the meta-normative question of origin- a moment that institutes a grid of intelligibility, encoding the rules of visibility and audibility that continue to animate our present. While the judge invokes functional legal technologies to contain the usurpation of Seale's speaking position, and therefore mask the real conspiracy represented by the prosecution, Seale's strategy is to use a discourse foreign to his adversaries, from a position of inequality, from the political margin, to expose and disrupt the system of colonization that undergirds the constitution and the laws of the nation. Seale's liberationist counter-history looks to rights and laws not to secure equality and justice but to displace the law, to expose the grand schema by which law secures inequality. He is interested in discovering, in the gulf that opens up between its normative undertakings and its visible practices, a raw material that generates 'a contradiction that makes impossible a response in and by the system'—a rupture.

9. Summing Up: Toward a Performative Epistemology of Law and Resistance

Everything becomes and returns eternally

Nietzsche, *The Will to Power*

The cultural forms may not say what they know, not know what they say, but they mean what they do—at least in the logic of their praxis.

Paul Willis, *Learning to Labour*

Two provisional theses emerge from this thesis. First, law and its discourses are performative *par excellence*. From the inauguration of the body-politic to the constitution of the legal subject, from the rituals of legislation to ceremonials of adjudication, law is performative: in both linguistic and discursive terms. A performative logic and mode of reasoning animates the ways in which law structures and organizes the juridical universe. It is central to law's mode of self-production, its reception, and its effects. Though law lays claim to normativity, the normative in law is simply a metaphysical placeholder for the performative. Second, a performative epistemology of law creates conditions of possibility for a performative resistance in law. By revealing the contingency and complexity underlying the coherence, universality and normativity of the system, by disclosing the becoming central to sovereignty, the subject, and the political, a performative conception of law creates conditions of possibility for critique and political struggle. But before I proceed further, let me recapitulate, briefly, the central claims advanced in part one of the thesis.

In chapter two, I tried to demonstrate how the constitutional state and the emergence of legality as an overriding legal principle ultimately dislodged the right to resistance from the political sphere. Resistance became illegal. At the same time, the institutions, forms of knowledge and rationalizations mobilized by the new techniques of power withdrew the subject's desire for power and

entrenched a conception of law as rational, objective, autonomous, and neutral. Law came to be identified with the public exercise of reason. Working through Benjamin and Foucault's historico-political analysis of law and sovereignty, I argued against the logic and forms of rationality that animates law's depoliticizing tendencies. By transforming discontinuity into continuity, historicity into necessity, contingency into inevitability, singularity into universality, law effectively hides its salient features, its truths and its economy of power from its subjects. It is this truth of law that is forever anticipated but never definitively materialized that is central to law's operational premise: closure and foreclosure. A normative account of law—law as value-neutral, objective, and autonomous—is not only incompatible with the historical, sociological, and political realities of foundations, legislations, and adjudications but also limits the possibility of becoming, foreclosing the future to possibilities of change and transformation. Once law is framed in these strongly normative terms—objective, neutral, rational, and absolute—, that presupposition imposes closure, limiting ways of being, speaking, and acting.

In chapter three, I sought to offer a conception of law and sovereignty that breaks free with the normative claims of mainstream legal thought. I argued that law is performative at its key moments—origin, subject-formation, legislation, and adjudication. The fiction of foundations and the meaning hidden in them dehistoricizes sovereignty and depoliticizes law, concealing the antagonisms, battles, and usurpations that signifies its temporal and spatial existence. Through this performative logic, law grounds itself in invisible and empirically intangible presuppositions. By denying law's inextricable nexus with history, politics, sociology, and economics, the normative turns its back to power, oppression, and injustice. By providing the performative logic that contingently conditions sovereignty and the subject, the two constitutive elements of politics, I put forth a performative epistemology of law that keeps the political open to 'unprefigurative future significations.' By offering an account of how sovereignty and subjectivity came to have the kind of reality they have, I demonstrated how the coherence, self-evidence and unity of these formations came into being and tried to open space for the possibility of being otherwise.

Chapter four identified the political trial as specific moment that disrupts law's claims to normativity, objectivity, and neutrality. By identifying the political trial as a crisis of law and sovereignty, as a moment where the submerged crisis of sovereignty appears all across the normative structures of the system, I suggested potential sites of intervention for political critique and struggle within the legal domain. By locating the political trial at the interstices of normativity and performativity, the point at which the performative meets the normative both to deconstruct it and reconstruct it, I tried to identify the power-knowledge-discourse constellation that occupies its centre of gravity.

The political trial is a limit situation. It operates in the material gap between the 'normative elements of justice' and 'the concrete order'; the temporal gap between the submerged problems of the past and its surface manifestation; and the discursive tensions between Habermasian discursive politics and Foucauldian micro-politics. It is this liminality, this in-betweenness, and its relationships with strategy, knowledge, discourse, and power that makes the political trial such a convenient site of disruption, intervention, resignification, and transformation.

In chapter five, I offered specific strategies and tactics of resistance that may be used to open up sites of resistance and struggle in the legal domain. Drawing on Foucault's account of power and resistance, I suggested a conception of resistance as performative. Performative resistance resists not only the institutions of power but the notions, concepts and analytic frameworks, i.e., the knowledge system these institutions disseminate and its power effects. It historicizes and problematizes the very conceptual frameworks within which these thoughts occur. It resists the deliberative model, the procedures and rituals by which these discourses and frameworks generate effects of power. The framework is therefore as much an object of intervention as the content. If performative resistance is to open up thinking and acting space without unwittingly perpetuating the very power it resists, we must acknowledge the shackling bonds of language and the constructed reality of the present to begin to articulate resistance at the periphery; where both language and discourse are least stable and most vulnerable to subversive resignification. It is at the margin, away from the podium, that performative intervention creates a break between signification and context. Performative resistance pays attention to

that which normative thought forecloses, suppresses, authorizes, or produces. It intervenes precisely at sites and moments where these foreclosures, suppressions or authorizations are synchronized with the legal form to generate images and useful political concepts.

If performativity, as Sedgwick put it, is ‘kinda hegemonic, kinda subversive,’ how can we escape the risk of perpetuating and sustaining the very power networks we seek to escape? If the claim is that performativity is central to the constitutive and regulative conditions of the present, what transformative opportunity can performative epistemology bring to bear on performances of resistance in law?

Performative Epistemology

First, a performative epistemology of law is crucial not only because it generates strategic knowledge of law and the power law produces and disseminates but also because it offers a theoretically and empirically intelligible substitute to the abstract and inaccessible juridical notions of law. If we look at law’s key moments—foundations, subjectification, legislations, and adjudication—a performative logic animates, generates and presents the normative specificity and reality of these moments. A performative epistemology seeks to break free from the essentialism of juridico-philosophic thought and tilts towards a historico-political conception of law, sovereignty, the subject, and the political. It attends to the historical, political, and sociological facts within which law is produced, understood, interpreted, and applied. It recognizes contingency, deconstructs the discursive practices by which law justifies, legitimizes, and objectifies its truths, and the various ways by which brute force-violence came to be compatible with our political rationality. A performative epistemology of law designates the open-endedness of the constitutive and regulative conditions of the present, the indeterminacy of sovereignty and the irrepressible potential of the subject to be otherwise.

Second, a performative reconceptualization of law attends to law’s schematics of closure and resuscitates its emancipatory potential. If the normative conception depletes law’s potential for liberation and transformation,

constraining and circumscribing its promise for freedom and dignity; performativity's dissonant gestures break up law's illusory rationality and objectivity without pretending to offer a much deeper reality and certainty. Attentive to cognitive and affective practices that bind the subject to disciplinary power-knowledge constellations, a performative epistemology contests the logos of the system against which it stands. It makes visible the political ontology of the constitutive and regulative conditions of the present. It deconstructs sovereignty, subjectivity, and politics as assemblages of 'contingent *dispositif*,' revealing how their normativity and coherence is contingently articulated. As an explanation of the constitutive conditions of the present and its signifying forms, performativity deconstructs and reveals how sovereignty and subjectivity, and therefore politics, are constituted as natural and self-evident through performative iteration of an iterable code. To put it succinctly, performativity generates and presents law's supposedly self-evident normativity and materiality as its exteriority.

The explanatory offshoot is revealing: it reveals these three constellations as constructs, allowing those on the margin to appreciate how things came to have the kinds of reality they seem to have. It enables the subject to name the system as a system than a natural order that already is and cannot be otherwise. It reveals the order as performative and contingent than as constative and inevitable. By providing a line of flight into the constitutive and regulative conditions of the present; a performative epistemology keeps sovereignty, subjectivity and the political open to 'unprefigurable future significations.'

Questions still linger: if there can be no thinking without or outside language, as Theodore Adorno claims, or no understanding or articulation that takes place outside discourse, as Foucault argues, how can performativity escape the subjugating bonds of language and discourse? If one needs to work with concepts to capture the very conditions that constitute and regulate us, and especially when these concepts are implicated in what Butler and Athanasiou call 'authoritative forces of signification,' how can we escape what the sign signifies?

For many anti-essentialist theoreticians—Adorno, Foucault, Derrida, Butler, Giroux, McLaren—language precedes and exceeds the subject. It is always

already there, as a constitutive and regulative domain that structures the very act of thinking that is meant to resist language's subjectification. However, as discussed in chapter three, both language and discourse carry their own transformative possibilities. As Adorno himself tell us, despite the subjugating confines of language and discourse within which thinking occurs, there is a potential for subversion in thinking: *the particular refuses its subsuming under the general*. Words, signs, and symbols engender a potential for reinscription and re-description. They can be re-inflected and redeployed in new ways, at new sites, and in ways that break with their signifying logic. Between signification and context, Derrida claims, there is a disjuncture that enters the social realm as a 'trace element.' There is a possibility of disjuncture between a 'concept and what it expresses and between a sign and what it signifies.'¹

Like every concept, legal concepts exceed their particular instantiations and definitions. Legal 'rules are empty in themselves, violent and unfinalized, they are impersonal and can be bent to any purpose.'² They are replete with discursive dynamisms, points of tension, and incongruities that instigate refusals and opens up lines of flight for creative resistance. It was Nietzsche who captured, rather powerfully, this excess, this infinite character of a text, when he said, 'all concepts that semiotically subsume entire processes defy definition. Only that which has no history can be defined.'³ However concealing and domineering law's languages, discourses and deliberative frameworks, the gate-keeper cannot eliminate their underlying discursive openness and indeterminacy without risking the secret of its own remarkable resilience. By attending to points of tension that cannot be represented within law's economy of representation, a performative epistemology enables innovative rethinking and rechanneling of these representations. By recognizing the exclusionary logic by which legal language and discourse operates, acknowledging the innovative and generative functions of modern power, this approach activates performative resistance.

¹ Roland Bleiker, *Popular Dissent, Human Agency and Global Politics*, (Cambridge: Cambridge University Press, 2000), 229.

² Foucault, Nietzsche, *Genealogy, History*, 151.

³ Friedrich Nietzsche, *On The Genealogy of Morals*, Keith Ansell-Pearson, eds., trans. Carol Diethe, (Cambridge: Cambridge University Press, 2006), 53.

Performative Resistance

Performative resistance is a reflexive enterprise best suited to overcoming law's violent gestures of installing domination as necessary and inevitable. As a concept that functions across discourses central to law's technologies of truth generation, performativity allows us to appreciate 'the meaning and value-producing practices in language' and 'the relationship between utterances and their referents.'⁴ Understanding the particular form that these relations take within specific circuits of power-knowledge regime allows us to frame generative resistance sovereignty cannot ignore. It can serve as a starting point for a creative thinking that enables re-description and intervention.

It was the poet Paul Valery who ingeniously claimed that 'the secret of well founded thinking is based on suspicion towards language.'⁵ This is precisely the kind of sensitivity that performative knowledge brings to bear on performances of resistance. It recognizes that power pervades all aspects of life, including the position of the resistant subject, but calls for an acknowledgement of the contingent character of resistance itself. It tells us language's world creating potential, its power to impose closure and limit our mode of being and thinking; forcing us to frame our refusals with the vocabulary of the system often without the possibility of break. If we are sensitive to the performative dimensions of legal language and discourses, we will recognize the ways in which 'conventional linguistic practices' like deliberation, debate, and the communicative offer of the trial entrench an exclusionary mode of interaction 'defined by the very interactions it excludes.'⁶

Though performative resistance is not always elaborate and does not necessarily confront 'the public transcript'⁷ openly, performative resistance in law is a public repudiation of the constitutive and regulative conditions of the present.

⁴ See Michael J. Shapiro, 'Textualising Global Politics,' in *International/Intertextual Relations: Postmodern Reading of World Politics*, J. Der Derian and M. J. Shapiro eds., (Lexington, Mass: Lexington Books, 1989), 14.

⁵ Mauthner and Valery, in Bleiker, *Popular Dissent*, 225.

⁶ Jessica J. Kulynych, *Performing Politics: Foucault, Habermas, and Postmodern Participation*, 30 (2) *Polity*, 315 (1997) 324.

⁷ James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts*, (New Heaven: Yale University Press, 1990).

Performative legal resistance is a public transgression and reworking of the juridical regimes that constitute and regulate sovereignty, the subject, and the politics of the present. It is a struggle by the subject to reopen political closures imposed on these formations through grand historical narratives, language and discourse. While it does not claim to speak from a position of exteriority to these constitutive regimes, it calls for a more nuanced awareness of the functions, strategies, and goals of these power regimes.

From Nelson Mandela's spectacular performance of equality, inclusion and democracy before Apartheid courts to Marwan Barghouti's historicization of occupation and resistance and to Bobby Seale's transformation of the legal register into an archive liberationist counter-history, we bear witness to an art of transgression, a refusal to be governed. They were elaborate events that marked a moment of profound rupture in the order of sovereignty, the sudden appearance of a violent past and the submerged crisis all across the normative structures of the system. This, in itself, is a generative appearance. Its emancipatory potential lies in the simple fact of disclosure of that which was concealed out of view and made inaccessible to the subject; in the proclamation of that which is not permitted to be proclaimed in public.

These aporetic moments are melancholic and haunting. What remains of these moments, what survives of the disclosures and the proclamations they make, what escapes and surprises the system, touches us across time and space even long after the substance of the case has evaporated. Who knew what effects the trial of Socrates and Jesus of Nazareth would have had on the present? Who would have thought that the trial of Nelson Mandela would change South Africa? Who expected that the Rivonia Trial will be registered in 'UNESCO's Memory of World Register' and recalled in the trial of Marwan Barghouti, himself a leader of his people from a brutal colonial occupation, as a vindication of Palestinian acts of resistance? It is these remains, the remnants that events leave behind that escape their original instantiation and may be redeployed as a weapon of struggle, in new ways, in a radically different context, for an entirely different purpose. It is this legacy, what Butler calls a 'condensed historicity,' that exceeds itself in time and space, this touching image that impinges something on us and remains with us that performative resistance leaves behind. It is to that

which we are left with when everything ends that performative resistance addresses itself, that to which we respond, a kind of gesture that stands for something bigger than itself in the world. The performative subject, like the new intellectual Foucault dreamed of, is a subject that is onto something but doesn't quite comprehend what he is about: 'doesn't know exactly where he is heading nor what he'll think tomorrow because he is too attentive to the present.'⁸ He produces strategic knowledge of power, and effects of truth that will be deployed at some future time, in unexpected spaces, and forms that cannot be foreseen.

Performative resistance is not about normative distinctions. It does not seek to anchor itself in new orthodoxies; it does not aspire at uncovering an original foundation from which the subject is violently deprived. It is a plea for open-endedness, a meditation against the normative closure of sovereignty, the subject and the political. Its transformative energy lies not in suggesting a normative anchor, but in reopening closures and revealing law's logic of closure and self-reference, in disclosing new ways of being and perceiving the universe. Through gradual processes of transgression, it seeks to enter the social domain as a trace, what Derrida calls reminders, or what Agamben calls remnants, filtering a counter-hegemonic knowledge of the present, which, by its very formulation and circulation in the body-politic, resists, as epistemic resistance. It not only provides epistemic resources for those deprived of the means of understanding and articulating their grievances, but also transforms the subject's agency, and instigates other forms of direct political actions. In short, if one can speak of the justice of performative resistance, it is the materialization of conditions of possibility, a possibility of becoming, becoming something other than what one or something is.

But performative resistance does not stop at revealing what is wrong with the present. Going beyond refusals, transgressions, contestations, and self-creations, performative resistance perceives a better world the specific outline of which cannot be fully anticipated and determined. While it is not a normative enterprise, it brings normativity to its performative resistance through the

⁸ Michel Foucault, 'The End of the Monarchy of Sex,' in Foucault Live: Collected Interviews, 1961-1984, Sylvère Lotringer, eds. (New York: Semiotext(e), 1996), 55.

exercise of some kind of ethical responsibility towards the other; promising the potential universalizability of its enactments. This might sound counter-intuitive but even the foremost thinker of necessity, a priori truths, and the purity of reason, Kant, admits the foundational role of social fictions, causality, and empirical intelligibility. In ‘Anthropology from a Pragmatic Point of View,’ Kant writes, ‘Even the appearance of the good in others must have value for us, because in the long run something serious can come from such a play.’⁹

The thesis identified the trial as its primary sight of engagement not just because the trial is law’s foremost institution, but also because it is the most privileged and perhaps easily accessible site of struggle in law. It is in the courtroom that public authority eliminates its adversaries and constructs legitimacy in the name of arbitrating conflicts in the realm of reason. As a performative power-knowledge formation, the political trial creates the conditions of possibility for a performative resistance. Against the legal order that regards its mode of being and acting as inevitable and normative, the resistant subject in a political trial mobilizes this strategic knowledge of law, i.e., a performative epistemology of law, to rework the very norms and practices by which he is constituted and regulated. Indeed, nowhere else is the synthesis between power and knowledge so manifest than in the courtroom. By identifying the political trial as a specific juridico-political event that interrupts law’s claim to normativity and universality, I reinforced my general claim that the normative in law is merely a placeholder for the performative. All the three chapters presented what I called a performative-genealogical reading of three separate political trials.

In chapter six, I tried to show how the resort to the judicial apparatus instigates a destabilizing attack against the system. Locating himself within, but breaking suddenly from the system’s normative expectations, Nelson Mandela opens up space for a ‘micro-politics of resistance’ - one capable of sustaining a genealogical and performative engagement with the juridical order. To keep the space open, Mandela begins his contestations with an internal critique, from forms of critique that are possible within the terms and frameworks of the

⁹ Immanuel Kant, *Anthropology from a Pragmatic Point of View*, tran. Victor Lyle Dowdell, (Southern Illinois University Press: Carbondale, 1978), 39.

system, to maximize the responsive capabilities of the space. In so doing, he creates a condition of possibility for disruption and transformation; to reveal the biopolitical nature of the violence produced and conserved by the juridical edifice. By articulating specific and local instances of violence, exclusion, and injustice, Mandela bears witness to the rotten past of the law as a precondition for a radically egalitarian conception of legality and authority. Mandela the defendant both uses and critiques the law, resists and claims authority, prosecutes and indicts at the very site he is called upon to answer serious charges. By acting in a confining bureaucratic space with a veneer of neutrality and impartiality, where the very notion of resistance is discursively precluded, he intervenes to assert the right to politics, to create a new reality, a utopian world in which a different normative/epistemic standard is possible. He institutes a radically different way of perceiving and naming the world. He imagined a different world; a world of political action where what seems impossible within the existing political universe is conceivable. Knowing that this new world can come into effect only after action, not before, Mandela chose to act as he did, we may say he spoke ‘truth to power’ and lived to see the actualization of his utopian performance.

Chapter seven examined the performativity of the discourse of resistance and terrorism by Barghouti and Israel respectively. Subverting Israel’s established practice of using political trials for broader politico-historical projects, Barghouti registered several surprises that the system could not absorb. In the despair and anguish that moved him from a pacifist to a militant, Barghouti enacts a freedom fighter and other exemplary figures who dared to ‘speak truth to power.’ Barghouti in Tel Aviv is a clear contrast to Eichmann in Jerusalem. Barghouti, like those before him—Socrates whose only sin was encouraging critical thinking, Susan Anthony whose only crime was daring to vote as a women, Martin Luther King for defying a racist law in Birmingham, Alabama, and Mandela, for violently resisting a racist and violent order—is making a special claim that modifies and clarifies his relationship to Israeli occupation. In this resistance, in this protest against continued occupation, there is a claim to a right that is beyond specific determinate legal realm. In his act of self-definition, he resists the construction of his identity as a ‘terrorist’ and re-creates himself as a defiant and resistant subject that transcends the confines of

his construction. In this ‘double-movement’ of ‘invocation and critical reflection,’ there is a performative logic appropriate to a discourse at once repressive and productive. Comparing Barghouti with the Biblical Moses and the State of Israel with the Pharaoh is another disruptive move aimed at subverting the images and concepts Israel seeks to solidify. He argued that the issue is not merely what Israel counts as ‘terrorism’; there is something profoundly unjust taking place behind the guise of the performative label of terrorism.

In chapter eight, I analysed certain scenes from the trial of Bobby Seale during the Chicago Eight Conspiracy trial. Seale’s unrelenting insistence on the recognition of his constitutional right is a productive tactical move. The language of rights is here relied upon as a counter-discourse to open up space for politically productive interventions. Rejecting the judge’s qualification of the defendant’s right, Seale refuses his continued interpellation as a ‘defendant.’ In transforming this opportunity into a political event, Seale locates himself not outside the legal framework but within, and invokes the very constitution he denounces. Although he speaks of rights, he is not claiming the right tied to sovereignty and takes the juridical as its point of departure. Seale is performatively calling into being a right emancipated from the constraints of Judge Hoffman’s validation, but a right that shatters the confining constraints of juridical rules, a ‘right that survives the vicissitudes of time.’ His goal is not to project the ‘uneclipsed glory of the sovereign’ but to enumerate and protest the subjugations and exclusive inclusions of the last four centuries that secured the inequality of blacks.¹⁰

By amplifying the double wrong to which he is subject, a wrong that cannot be redressed within the present distribution of speaking positions, Seale recounts the polymorphous techniques of domination implemented by the field of the judiciary and the discourse of rights. By identifying the courtroom as a site at which the law establishes itself, authenticates oppressive rationalities, and produces effects of power, a ritual moment that historicizes and neutralizes the violence of exclusion and inequality, he exposes the American justice system—including the constitution—as strategic deployments that functions to conceal the silent war that rages just beneath the surface of democracy.

¹⁰ Id at 71.

In the end, this is a genealogical critique of law and sovereignty and must be read as such. As a conceptual apparatus, genealogical critique does not consist in the destruction or abolition of its object. My attempt here is not to condemn law and sovereignty but to apprehend the constitutive and regulative conditions of my scenes of analysis - law, sovereignty, subjectivity and the political trial. My purpose was not to provide a theory of law and resistance but to offer an alternative conception of law that mitigates the closures and self-evidences of the present. Towards that end, I suggested a performative epistemology of law that keeps sovereignty, politics, and the subject reflexive and open to 'unprefigurable future resignifications.' By locating law and legal institutions within an entangled web of power relations, neither its sources nor its origins, a performative epistemology attends to circuits of power within which knowledge informs power and discourse.

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