No Foundations 10

Judging Democracy, Democratic Judgment

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Editorial

Judging Democracy, Democratic Judgment

The topic of this special issue *Judging Democracy, Democratic Judgment* is raised by a paradox: on the one hand, a perceptible social dissatisfaction exists with democracy as currently experienced and/or practiced in the Western world; on the other hand, the word 'democracy' still inspires movements for social reform and is invoked in contexts or situations where democracy is absent or deficient. This paradox has led many authors, justifiably or not, to posit democracy as a more or less unsurpassable horizon, and yet simultaneously as incapable of fully delivering the promises it entails. But to what extent can one criticize democracy without necessarily abandoning democratic ideals? That is, how are we able to *judge democracy*—with what language, what criteria, what perspective—and from what position?

The title also seeks to reflect on the activity of judgment, for an extended notion of judgment would characterize it as an essentially anti-democratic, even elitist, activity. In this view, for example, the professional role of judges and the judiciary would be opposed in principle to democracy, raising the specter of counter-majoritarian difficulty. Without aiming to forestall the debate, this special issue inquires whether and to what extent judgment can ever be 'democratic'. To put it differently, how can judgment be aligned with democratic ideals, practices, and forms of participation? What would be the features of *democratic judgment*?

In the opening essay 'Judging Democracy in the 21st Century: Crisis or Transformation?', Alessandro Ferrara meets the challenge head on. While the second half of the last century already evinced increasing difficulties for democracy, Ferrara contends that the 21st century has only added 'new inhospitable grounds'—including the prevalence of finance within capitalist economies, the acceleration of societal time, globalization-induced tendencies towards supranational integration, transformation of the public sphere and the inadequacy of the traditional media, plus widespread and generalized reliance upon opinion polls.

Faced with such challenges, Ferrara undertakes the task of revitalizing the framework of political liberalism expounded by John Rawls, but beyond what he originally envisioned into the 'aesthetic sources of normativity'. Amongst these, Ferrara stresses the role of political imagination—which plays as crucial a role as

reason in struggles against entrenched interpretations and ideologies—and of 'democratic judgment' as a way of assessing whether a political process that formally appears to fulfill certain procedural requirements actually deserves the qualification of 'democratic'. In addition, Ferrara expands on Rawls' notion of public reason to conjectural arguments—arguments that do not presuppose shared premises— and alludes to new ethical dispositions, such as the virtue of 'openness,' which he distinguishes from Charles Taylor's 'agape', Derrida's 'hospitality', or Stephen White's 'presumptive generosity'. Ferrara defends rethinking democracy's ethos towards a multicultural polity and de-Westernizing it, allowing 'multiple democracies' with alternative conceptions of the just. What ultimately makes Ferrara's version of democracy 'liberal', as opposed to other conceivable forms of democracy, is his defense of the distinction between the legitimation of power through *de facto* consensus and the exercise of power that *deserves* legitimation.

One of the thorny issues raised by Ferrara is the condition of the 'hyperpluralism' of modern societies, where certain segments of the population find one or other of the basic constitutional essentials to be problematic in light of their comprehensive conception of the good. This condition leads to the problem of antagonistic social factions, analyzed by Albena Azmanova in her article 'Political Judgment for an Agonistic Democracy'.

In her article, Azmanova develops a concept of 'agonistic judgment' with the capacity to transform deep-seated, antagonistic social conflicts into an agonistic search for social justice. To this end, Azmanova recasts the communicative turn in democratic theory by way of replacing the (counterfactual) reliance on ideal conditions of deliberation with an account of the social hermeneutics of justification among antagonistic positions. She then examines the conditions under which agonistic judgment can have an emancipatory effect, in the tradition of critical social theory of the Frankfurt School. Azmanova claims that the emancipatory function of public deliberations consists in their capacity to unveil common structural sources of injustice behind seemingly opposing claims to justice.

While Azmanova addresses the political and structural sources of injustice, Sakari Hänninen wonders about the compatibility of modern capitalist societies with democracy. In 'Neoliberal Politics of the Market', Hänninen examines the obsession of neoliberal governmentality with stability and order, which are not taken for granted as an automatic outcome of a capitalist market economy, contrary to what may seem at first to be the case. For this reason, neoliberalism must exercise a 'politics of the market', the principal aim of which is to strengthen people's belief and confidence in the capitalist market economy so as to promote the 'proper' functioning of the system. In doing so, Hänninen argues, the neoliberal politics of the market paradoxically resembles the logic of populism. Thus, while political populism speaks 'in the name of the people', neoliberalism speaks 'in the name of the market'. Hänninen unveils how this resemblance to populism is no mere coincidence but stems from a similar authoritarian conception of politics, which gains ground especially in times of crisis.

The tension between neoliberalism and democracy is also the focus of our next article. In 'The Politics of Public Things: Neoliberalism and the Routine of Privatization', Bonnie Honig urges us to attend to the political role of public things (e.g., parks, prisons, schools, armies, civil servants, hydropower plants, electrical grids, water, the transportation system, and so on), against a neoliberal tendency to privatize them in the name of efficiency. Following the work of the British psychoanalyst D.W. Winnicott, who called attention to the generative power of objects in promoting lifelong authentic human relationships, Honig wishes to rehabilitate the political role of public things as part of democracy's 'holding environment' (a term she borrows from Winnicott). As explained by Honig, if public things are constitutive elements of democracy, then economies that undermine the 'thingness of things', and reflexively prefer privatization to public ownership or stewardship, are in tension with democracy. Honig connects the affective registers of Winnicott's theories with Hannah Arendt's concerns about the public world and its fragility in late modernity, both of which are commended to those who seek to apprehend the plight of public things under pressure.

Privatization is now affecting all areas of life, including functions traditionally reserved to state institutions such as courts and tribunals. In 'The Democracy in Courts: Jeremy Bentham, 'Publicity', and the Privatization of Process in the Twenty-First Century', Judith Resnik analyzes the privatization of adjudication currently underway as a phenomenon that may endanger its democratic potential.

The essay begins by exploring how, in the last few centuries, public procedures came to be important attributes defining certain decision-making institutions as 'courts'. Resnik traces the political and theoretical predicates for such practices in the work of Jeremy Bentham, who commended the utility of 'publicity' in enhancing accuracy, in providing public education, and in ensuring judicial discipline. While courts are ordinarily identified as 'open' and 'public' institutions, Resnik notes current trends that are shifting processes toward privatization—devolving adjudication to administrative agencies, outsourcing to private providers, and reconfiguring the processes of courts to render them more oriented toward settlement. For Resnik, these new trends are problematic to the extent that they reduce the opportunities for adjudication to engage in democratic practices and normative contestation through popular input. Resnik's claim about the democratic potential of public adjudication does not, however, entail that the judgments and norms developed will necessarily advance a shared view of public welfare. Hence, while seeking to re-engage the work of Bentham, Resnik offers different claims for publicity and less optimism about its consequences.

In the final essay, Jaco Barnard-Naudé connects the justification of judicial decisions with the concept of authority and, ultimately, with democracy. Drawing on Hannah Arendt and Bonnie Honig's concepts of authority, Barnard-Naudé contends that the authority of an unelected postcolonial judiciary, founded by the post-apartheid Constitution of the Republic of South Africa, crucially depends on providing justification for its decisions. Barnard-Naudé makes these considerations

against the background of a recent judgment of the South African Constitutional Court (*Le Roux v Dey* 2011) that concluded that it is not defamatory to refer to someone as homosexual or gay. Barnard-Naudé focuses on the dissent by Justice Mogoeng, who did not provide any reason for his disagreement with the majority opinion. According to Barnard-Naudé, Justice Mogoeng's refusal to provide reasons for his dissent constitutes a failure to act within the limits of his authority, which amounts to a rejection of the culture of justification itself. Following the arguments of Etienne Mureinik, Barnard-Naudé draws a necessary link between a culture of authority and a culture of justification, both of which are regarded as a break from a culture of violence, in post-Apartheid South Africa.

As a final note, we are delighted to announce that NoFo 10 inaugurates a new book review section. In this issue we include two book reviews: Luis Gómez Romero reviews Desmond Manderson's *Kangaroo Courts and The rule of Law: The Legacy of Modernism* (2012) and Benoît Dejemeppe reviews Françoist Ost's *Shakespeare: La Comédie de la Loi* (2012).

Mónica López Lerma and Julen Etxabe
Helsinki, June 2013

Judging Democracy in the 21st Century: Crisis or Transformation?

Alessandro Ferrara*

Time and again, today, the word 'democracy' is heard in association with the word 'crisis'. 'Post-democracy' has become a standard term in contemporary political theory (see Crouch 2004) and prominent global authors do not shy away from presenting democracy as 'an exemplary case of the loss of the power to signify' (Nancy 2011, 58) or as an 'emblem', and from urging on us that 'the only way to make truth out of the world we're living in is to dispel the aura of the word *democracy* and assume the burden of not being a democrat' (Badiou 2011, 7). Other intellectuals, like Wendy Brown, claim that today democracy has become a 'gloss of legitimacy for its inversion' (Brown 2011) insofar as 'even democracy's most important if superficial icon, "free elections", have become circuses of marketing and management, from spectacles of fund-raising to spectacles of targeted voter "mobilization"' (Ibid.).

This thesis of the 'crisis of democracy' strikes me as facile, glib and ultimately misleading. Not only it flies in the face of a historical process which has led democracy, in a time span of less than 4 decades, to sink roots in geographical areas where previously it never had had any strong foothold: Central and Eastern Europe, Latin America, South-East Asia, South Africa and recently, in the course of a still open-ended process, North Africa and the Middle East;[1] not only it flies in the face of the evidence of millions of people who, in all parts of the world, have risked and do risk their lives in order to obtain democracy; but above all it orients our attention in the wrong direction.

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* Alessandro Ferrara is Professor of Political Philosophy at the University of Rome 'Tor Vergata' and former president of the Italian Association of Political Philosophy.

1 This impressive affirmation of democracy during the last decades is well documented by the UN Human Development Report 2010, *The Real Wealth of Nations: Pathways to Human Development*. Written before the Arab Spring, the Report describes the advances of democracy in Europe and Central Asia, followed by Latin America and the Caribbean: 'Among developing countries in Europe and Central Asia the only democratic country in 1988 was Turkey. Over the following three years 11 of the 23 countries in the region became democracies, with 2 more turning democratic since 1991. In Latin America and the Caribbean most

Let me use a botanical metaphor to illustrate this point. A plant needs a favorable and fertile soil in order to flourish: its genetic endowment cannot make the miracle of turning it into a self-sustaining organism if the soil does not nourish its roots. Thus, the same plant, with the same genetic endowment, will flourish or will wither depending on the quality of the soil where it must grow. The soil on which the plant of democracy now depends has become increasingly inhospitable and this metaphor allows us to make sense of the moment of truth contained in the 'crisis of democracy'-thesis: namely, the observation that the historical moment when democracy becomes a 'horizon'—when for nearly half of humanity it has ceased being one out of several forms of legitimate government and it has become 'the' legitimate form of government—also marks a moment when neo-oligarchic tendencies rear their head in societies that already are democratic and when populist anti-political attitudes gain center-stage.[2]

Furthermore, the botanical metaphor in a way sets the dual task that I will pursue in this paper. In Section 1, I will focus on ten aspects that have jointly contributed to make the soil—the larger societal, historical, cultural and economic context where 21st century democracies must function—more *inhospitable* than ever. In Section 2, I will reconstruct one of the main adaptive countermeasures, contained in the framework of Rawls' 'political liberalism', that can enable the democratic plant to survive and to still remain faithful to its distinctive nature, namely to the idea of self-legislation on the part of the citizens. In Section 3, I will outline a number of suggestions for developing further such framework and enhancing the effectiveness of democracy's response to the challenge of hyperpluralism, and finally, in the concluding remarks, it will be argued that the proper description for the 'state of democracy' in the 21st century is that of a transformation, initiated but still awaiting completion, in the direction of a multivariate democratic polity sustained by an expanded and decentered public ethos.

1. Old and new inhospitable conditions for democracy

We do not start from scratch when we analyze the new inhospitable conditions that democracy has to face in order to function—as a political regime—in the complex societies of the second half of the 20th century. A copious literature exists, which cannot be surveyed here, except for briefly recalling one of the most concise accounts offered by Frank Michelman in 1997. Michelman (1997, 154) mentions:

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countries were not democratic in 1971, and several democracies reverted to authoritarianism during the 1970s. Following a subsequent wave of political change, almost 80 percent of the countries were democratic by 1990. By 2008, with regime changes in Ecuador and Peru, the share reached 87 percent. East Asia and the Pacific and Sub-Saharan Africa also reflect reforms—just 6 percent of governments in both regions were democratic in 1970; by 2008 the share had risen to 44 percent in East Asia and the Pacific and 38 percent in Sub-Saharan Africa', UN Human Development Report, 68-69. The years 2011-12 show evidence of an incipient extension of this process to several countries of the Middle East and North Africa.

2 This and other ideas presented here are developed in greater detail in my *The Democratic Horizon. Hyperpluralism and the Renewal of Political Liberalism*. Cambridge University Press, Cambridge, 2013, forthcoming.

a) The immense extension of the electorates, which in the new era of universal suffrage reach tens and sometime hundreds of millions of voters, and in the case of India one billion voters. This undisputable fact contributes to instill, or to enhance an already present perception of the irrelevance of one's vote—a perception hardly thrown into question by the 'electoral ties' that have punctuated the first decade of the 21st century (Bush vs. Gore in the US, Berlusconi vs. Prodi in Italy and Calderon vs. Obrador in Mexico)—and puts an incentive on 'rational ignorance' on the part of the ordinary citizen.[3]

b) The institutional complexity of contemporary societies—where the diverse layers of representation, from local to national, make it difficult to grasp the relation between one's vote and its real political consequences. The institutional complexity is compounded by the technical complexity of the political issues, which again discourages active participation on the part of lay persons and interfere with the accountability of elected officials. In other words, in our societies it has become more difficult than in the past for a citizen to understand who is to be considered responsible for what and to assess to what policies he is concretely contributing through her vote (Bovens 1997).

c) The increased cultural pluralism of constituencies, typical of societies where migratory fluxes combine with a public culture receptive to openness and the value of diversity. The combination of these factors renders consensus on political values and *constitutional essentials* more unstable and difficult to reach relative to societies that are either more impermeable to immigration or more inclined to accept the public hegemony of the culture of the majority—a condition of *hyperpluralism* which in the next section will form the focus of a renewed version of political liberalism, understood as one of the possible adaptive responses that democracy can develop.

d) The anonymous quality of the processes of political will-formation, i.e. the emerging of a public orientation and opinion less and less out of direct interaction among citizens assembled in public places and now almost exclusively via simultaneous, yet isolated, exposure to a variety of media outputs or at best through exposure to such messages within small like-minded groups,[4] a condition which is under reconsideration today in the light of the rise of social media and their impact on the formation of public opinion.

To these four conditions mentioned by Michelman a fifth one is worth adding, which is also rooted in the historical context of the last third of the 20th century.

e) The same migratory fluxes which have accrued societal pluralism also have contributed to make citizenship less inclusive and more selective. Contemporary

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3 'Rational ignorance' is the response of the citizen who finds futile to invest time in acquiring all the knowledge necessary for an autonomous and considered judgment on highly complex issues, given the neglectable influence of a single ballot in an election where tens or hundreds of millions vote (See Fishkin 1995).
4 See the now classical study by Habermas (1962).

democracies are further and further removed from the canonical image of a political community of free and equals encompassing all the human beings who live within the same political space, as geographically delimited by State borders. Instead, they resemble more and more the ancient democracies, inhabited by citizens who would decide of the fate of denizens of various kinds and of slaves.[5] Within the number of all those who live within the borders of a contemporary democratic nation-state are now included many who are not citizens at all: resident aliens, immigrants awaiting legal residency, illegal aliens who have no chance of becoming residents, refugees, people enslaved by human-trafficking rackets.

However, all this is history now, consolidated wisdom about the difficulties of democracy in complex societies. Entirely new conditions, even more inhospitable, have emerged, which still await full elucidation. Among these *new* inhospitable conditions, that induce a de-democratization of democratic societies, we can certainly include: f) the prevailing of finance within the capitalist economy (a factor that further increases the difficulty, on the part of government, to steer the economic cycle), g) the generalized acceleration of societal time, h) the globalization-induced tendency toward supranational integration, i) the transformation of the public sphere caused by the economic difficulties of traditional media, and the rise of new social media, j) the wide scale and generalized use of opinion polls and its influence on the perceived legitimacy of executive action. Let me briefly survey them:

f) Democracy has always had an ambivalent relation with the capitalist economy, but it is an undeniable historical fact that modern representative democracy could stabilize and flourish only in combination with a capitalist economy. During the last three decades, however, capitalism has undergone a momentous transformation, in conjunction with globalization—a transformation that has revived traits of rampant inequality and brutality typical of earlier stages of capitalism at the onset of the industrial revolution. The value of labor has constantly been diminishing in the West over the last few decades and this process, linked in turn both with technical rationalization and with the geopolitical availability of a global labor market, exerts a societal impact which goes well beyond industrial relations or even the whole of the economic sphere.[6] We are probably witnessing the terminal decline of employed labor *qua* generator of wealth and social prestige also in the tertiary sector, among white collars. Not only the great manufacturing industry undergoes a steady decline—paradoxically, Detroit has more to fear from Wall Street than from unionized labor force—but, more generally, the prevailing of financial capital in the economy tilts the scales in favor of capital and rent and mercilessly reduces the income, the relative

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5 Still enlightening in this respect are Walzer's reflections in the Chapter on 'Membership' of his *Spheres of Justice* (1984, 53-61).

6 An indicator of this general trend is the systematic decline of the labor share in favor of capital share over the last few decades in all economies, a decline that reaches beyond 10% in Finland, Austria, Germany, Sweden, New Zealand and has a peak of 15% in Ireland, as attested by the International Labor Organization, *Global Wage Report* (2010, 27). For a similar analysis, see also International Monetary Fund, *Economic Outlook "Spillovers and Cycles in the Global Economy"* (2007, 174).

wealth, the purchasing power, and consequently also the political influence, of the employed middle class. Wage labor becomes flexible, precarious, less well paid, subcontracted and outsourced and also looses its historical representation: it becomes increasingly de-unionized and loses the capacity to attract consensus on its requests. The income of high-prestige managers, top professionals, stars in the arts, in show-business and in sports reaches spectacular levels unrelated with the everyday reality of the rest of the working people. Starting from the 1980's, finance appears to be more capable of generating wealth than production and manufacture in general, and its instruments become ever more 'virtual', disjoined from all measurable and material benchmark in the 'real world'. A firm is worth what the sum total of its equities are worth, and the value of its equities becomes a function of the expected capital gain that they can generate in the short run. Paraphrasing Charles Horton Cooley, the great social theorist and associate of George Herbert Mead, one could be tempted to say that the value of a share in today's stock-exchange market is the fantasy that people make of the potential growth of its value. Even ordinary language registers this momentous change: sea-changes in the stock market, ushering in a bearish or a bullish mode, are often explained through the 'sentiment' of the operators turning positive or negative. In this respect Wall Street, not the 'real economy', calls the shots: bubbles and their bursting are entirely its own creations, first the bubble of the *dot.coms*, then the housing one, then the *subprime mortgages* one. It is not difficult to detect here yet another inhospitable condition for contemporary democracy, especially considering that it is only since the era of the New Deal, not even a century ago, that a democratic government had managed to curb the classical capitalist cycle of expansion and recession. This new difficulty is compounded by a crucial difference that separates that context from ours. Roosevelt faced an economic crisis that originated at home and at home could be solved, through appropriate legislation by Congress, supported by a large popular consensus on labor protection and needs. President Obama faces an economic crisis that originates from the Wall Street generated bubbles, but whose solution no longer depends solely on Congressional legislation, in support of which no large prevailing consensus is in sight anyway, and requires international cooperation which his Administration can only plead for. In a globalized economy, the collapse of the euro in the wake of a possible default of one or more medium-sized countries, could drag the whole world economy into a depression of catastrophic magnitude, but the measures necessary to avoid such an outcome lie beyond the legislative reach of one parliament and the executive action of one government alone, even of the most powerful.

g) The acceleration of societal time contributes to a verticalization of social and political relations. In all walks of social life, there is always less and less time for deliberation, collegiality, consultation. A political party, a 21st century global firm, but also a successful NGO which wishes to keep abreast and be visible in a crowded public sphere, the editorial staff of a newspaper which wishes not to be left behind by the competition, must take a stance, make a statement, sell and invest, make the most of an opportunity for visibility, publish news before the competition in a

world in which time is the 'real time' of Internet. In turn, this process puts a greater emphasis on the recognizability, the discretionality and ultimately on the power of the political leader, of the CEO, of the coordinator, of the editor in chief—regardless of the organizational efforts that some political, institutional, corporate cultures may make in the opposite direction.[7] It lies beyond democracy's powers to slow down the tempo of social life in the age of Internet and of global connectivity in real time, but democracy will have to face the challenge of somehow neutralizing the verticalizing, perhaps even authoritarian, implications of acceleration.[8]

h) The globalization of the finance economy and the growing inability of the 'average' nation-State to meet such global challenges as migratory waves, terrorism and organized crime, climate change and international security jointly fuel a powerful trend towards supranational integration of countries of more or less similar history, culture, traditions and geo-political location. The EU is often cited as an exemplary pacesetter in a process that has afterwards been replicated under the names of ASEAN, Mercosur, Ecowas, and so on. This process, saluted by many as a welcome beginning of a trend to overcome the political fragmentation of the 'world' in 193 State entities, in fact confronts democracy with the necessity to survive, in forms which remain to be investigated, the dissolving of that nexus of one nation, one state apparatus, one national market, and common culture, language and memories which had been at the basis of its flourishing in the modern Westphalian system of the nation-states. As Habermas pointed out over a decade ago, today it's the states that are immersed in the global economy rather than national economies being delimited by state borders (Habermas 2001, 66-67). This irreversible fact of world-history calls for new patterns of coordination and integration among existing states, and these new patterns in turn bring to the fore of political philosophy key-words such as *governance*, as opposed to classical government, *soft-law*, *best practices*, *benchmarking* and *moral suasion* (Bohman 2007). In this context it is yet to be clarified what form will be assumed by the legislative authorship of citizens—namely, that ideal of obeying laws which one has contributed to make which constitutes the definitional trait of democracy across the diversity of its manifestations, from Athenian direct democracy to Westminster representative democracy.[9]

i) The public sphere of the democratic societies is undergoing another powerful mutation after only a few decades from that 'structural transformation' described by Habermas in his pioneering work of 1962 and revisited in *Between Facts and Norms* (Habermas 1962; Habermas 1992). On the one hand, the atomized audience of the generalist big media (radio and TV) experiences forms of incipient re-aggregation

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7 After Virilio 1986, Hartmut Rosa and William Scheuerman have investigated the effects of acceleration respectively on contemporary social life and more specifically on the democratic process: see Rosa 2005; Scheuerman 2004; Rosa & Scheuerman 2010.

8 On the political consequences of acceleration and some reflections on citizenship in times of social acceleration, see Scheuerman 2010, 287-306.

9 On the case of the European Union, and critically reconsidering the imputation of a 'democratic deficit', see Moravcsik 2002, 40, 4, 603-24 and Moravcsik 2008, 331-340.

under the effect of the new *social media—Facebook*, *Twitter*, the *blogs*, etc. Now the flow of communication is addressed to tens, perhaps a few hundred people included in social networks that in turn are connected with one another by the social media. These networks, in turn, no longer consist of atoms, but of social molecules constituted by individuals who are acquainted with one another. The role of *opinion leaders* who filter communication and orient its decoding becomes relevant once again. The great gap between powerful, economically costly, broadcasting stations and a plethora of dispersed and passive individual receivers begins to show signs of being bridged. In the so-called web 2.0 the blogs, the single social networks, even the individual webmasters enjoy a much higher potential for having their messages reach the same broad audience formerly within the reach only of the big broadcasting corporations. On the other hand, however, the availability of news and information in the web is contributing to a massive and pervasive crisis of the quality press.[10] Newspapers always come late in selling already known news that can be obtained faster and free of any cost on the net. The adaptive response, on the part of the quality press, has already been widely investigated by students of journalism and mass-media: newspapers tend to become like weeklies and to offer qualified comments to the news already circulating on the net. The demand for 'authoritative comments', however, is much less robust than the demand for fresh news, and this causes both the decline of the sales of quality newspapers and their diminishing appeal on the advertising market. Hence democracy in the future will have to reckon with a public sphere and processes of public opinion formation that will be influenced by these novel trends and transformations.

j) Finally, a whole separate dimension in this transformation of the public sphere is constituted by the ever more extensive use of opinion polls in order to measure the popularity and consensus that blesses the political initiatives of the government. Why should this trend represent a potential alteration of the democratic order? Consider the perception of the legitimacy of a head of government—whether a president or a prime minister—before and after the invention of sample surveys and their massive use. Earlier, the 'perceived' legitimacy was basically linked with the latest electoral results. Its variations in between two general elections were the object of mere supposition and of polemics between opposing camps. Nowadays, instead, thanks to the regular and massive use of polls, the perceived legitimacy of a leader takes on the fluctuating pattern of the stock exchange: it rises or declines as a function of diverse variables, it exhibits different degrees depending on the kind of policies pursued, it displays ascending or declining trends, sudden falls and rebounds. These oscillations as perceived in real time bestow different degrees of force and credibility to the actions of the executive and above all induce the other branches of power to react differently—and thus basically alter the established *checks and balances*—to executive initiatives at the margins of legality and jurisdictional boundaries. For example, assertive action at the edge of the jurisdictional prerogative, and the other

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10 See Federal Trade Commission Staff 2010.

branches' response, is one thing if such action is undertaken by a head of government who is supported by a 65% consensus, and a quite different thing when the polls show a consensus declining below 50%, even if by hypothesis the latest electoral result obviously remains unchanged. On this alteration of the pattern and balance of democratic legitimacy in the United States, the country which first has experienced the regular and widespread use of opinion polls, enlightening pages have been written by Bruce Ackerman in *The Decline and Fall of the American Republic* (2010, 131-135). Finally, this new predicament becomes even more problematic if considered in conjunction with the phenomenon of societal acceleration: governments tend to commit themselves only to policies which are likely to generate good results at the opinion polls and cannot afford the luxury of suffering a decline in view of an after all uncertain come back in the more distant future.

These are some of the inhospitable conditions, inherent in the socio-historical context of 21st century complex societies, that democracy must learn to neutralize if it is to continue to flourish or at least not to turn into the empty simulacrum that crisis-theorists accuse it of having already become. In the next section I will briefly present one of the adaptive responses that can enable the democratic plant to flourish again in the more impervious soil of our time.

2. Responding to the inhospitable conditions: political liberalism and democratic dualism

Some of these conditions have already generated responses and counter-tendencies, the most important of which is the rise of a 'dualist conception of democratic constitutionalism'. According to the dualistic model, first formulated in the volume *Foundations* (1991) of Bruce Ackerman's *We the People*, in the inhospitable context described above it makes sense to apply the classical standard of the 'consent of the governed', in order to assess the legitimacy of a political order, only to the 'higher' level of law and of the institutional framework—i.e., to the level which coincides with the *constitutional essentials* or what Rawls has called the 'basic structure'. Instead, the political justification of all the legislative, administrative and judicial acts of 'ordinary' or 'sub-constitutional' level is best understood as resting simply on their consistency with the constitutional framework (needless to add, when mechanisms of *judicial review* are in place).[11] Ackerman's dualistic approach, adopted also by Frank Michelman in his reflections on democratic constitutionalism, has been subsequently integrated into Rawls' *Political Liberalism*, as attested by Rawls' 'principle of liberal legitimacy', in the following terms: 'our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason' (Rawls 1993,

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11 See Ackerman 1991, 6-7. For a critical view of this dualist view of democratic legitimacy, see Waldron 1999, 7-20.

137).

As with all definitions, also this Rawlsian reformulation of the legitimacy of government or of the 'exercise of political power' speaks to us through what it does *not* say. The crucial sentence 'in accordance with a constitution' stands over against the alternative formulations that have been used in the past and to some extent are still on offer. For example, Rawls' idea of the legitimate exercise of coercive power stands over against the idea that coercive power is legitimate when it is exercised 'in accordance with the will of the majority as expressed in the latest elections', or 'in accordance with what the public wishes, as attested by reliable polls', or 'in accordance with our political tradition', or 'in accordance with the Bible, the Qur'ân, or any other sacred text' or 'in accordance with our manifest destiny', or 'in accordance with our idea of morality'.

Furthermore, Rawls' formula sets the requirement that the constitution be endorsed, in its essential elements, by *all* the citizens (not just the well-to-do, the believers, those belonging to a certain ethnicity, a certain geographical territory, a certain gender, and so on) and be endorsed by all the citizens *as free and equal* (as opposed to being endorsed in a situation in which some are more equal than others and in a position to put pressure on the recalcitrant ones).

Finally, the citizens' endorsement of the essential elements of the constitution must proceed *from principles and ideals acceptable to their common human reason*. Also in this case Rawls' formula speaks to us through the excluded alternative. The consent of the governed must be based on considerations of justice as opposed to considerations of *prudence*, such as the fear of the consequences of refusing to consent. In other words, a constitution accepted out of preoccupation for the political consequences of the conflict ensuing from lack of agreement can at best legitimate a *modus vivendi*, a truce, a cease-fire among parties that secretly keep their arms as ultimate guarantee for their defense, but cannot legitimize the 'stable and just' society where political power is exercised 'properly' over time. This is the normative core of political liberalism, and it operates in conjunction with a number of related concepts—such as a political conception of justice, public reason, the reasonable, the overlapping consensus, the burdens of judgment, and many others that cannot be addressed here.

Let me illustrate three senses in which this definition of the legitimate exercise of democratic power can be understood as a creative self-transformative adaptation of the democratic plant to the new inhospitable conditions and then, in the next Section, I will outline a few directions in which this normative framework can be further expanded.

a) First, in incorporating, within his definition of the legitimate exercise of political power, Ackermans' view of 'democratic dualism', Rawls responds to the inhospitable conditions outlined above by revisiting the traditional liberal understanding of the 'consent of the governed' as the ground of legitimacy. Given those conditions, it is simply misguided and unrealistic to interpret that standard as the requirement that citizens should endorse, as justified by reasons of principle, *all*

details of the legislative, executive and judicial activity of the democratic institutions. If the democratic plant is to survive, we must settle for a different criterion of legitimacy that exempts single aspects of such activity from justification in the eyes of all the citizens and reconciles ourselves with the reality of groups of citizens—considered from a religious, ethnic, economic, gender or other perspective—who will always dissent and consider one or another verdict, statute, or decree unjust and coercive from their own point of view. And yet the idea of the consent of the governed must and can remain the lodestar for assessing the legitimate exercise of democratic authority when properly reformulated as a reflective judgment passed on the constitutional essentials with which all of the subordinate legislative, judicial and executive acts must conform and be consistent.

b) According to Ackerman, the *dualist* model of democratic political legitimacy implies a rejection of two competing models of democracy—the 'monist' and the 'foundationalist'—as less adequate in general and, furthermore, as less adequate responses to the new predicament of the 21st century. The monist model rejects the distinction between the two levels of constitutional and ordinary politics as paternalistic and potentially elitist, if not anti-democratic. Democracy, according to this monistic view, should vest the power of law-making—independently of the nature of the statutes approved—entirely in the hands of the legitimate winners of the latest elections, assuming these have been held under conditions of fairness and equity among the involved parties. According to this view, whenever a non-elected body or institution checks on the credentials of the legislative products of the parliamentary majority, there a democratic deficit occurs.[12] The foundationalist model instead, exemplified by the kind of rights-based approach advocated by Dworkin, shares with the Ackermanian-Rawlsian view the dualist understanding of democratic legitimacy, but conceives of the constitution as a device for safeguarding some fundamental, natural-law grounded, right, as the right to equality in Dworkin's case. No democratic deficit occurs then when rights are affirmed against majorities—usually through the intervention of deliberative bodies, courts, that are independent of electoral majorities (Dworkin 1996, 17-18). Rather, the democratic process is understood as one of the means, and often not the most adequate, for the affirmation of these rights.

c) The dualist model dissolves the imaginary, so popular in the European democracies influenced by the French revolution, of the centrality of parliamentary law-making as the branch of government most closely related to popular sovereignty. Consequently, it also deemphasizes the idea that regular parliamentary elections are the locus of the conferring of a mandate on the part of the sovereign. As Rawls eloquently puts it, 'parliamentary supremacy is rejected' (Rawls 1993, 233), but at the same time ultimate power cannot be left 'even to a supreme court': rather, ultimate

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12 For a moderate version of this monistic view, which accepts the distinction of constitutional and ordinary politics but rejects the attribution of the function of constitutional review to an unelected judicial body and favors its attribution to the some segment of the elected legislative branch, see Bellamy 2007.

power 'is held by the three branches in a duly specified relation with one another with each responsible to the people' (Rawls 1993, 232). If the legislative branch, in its daily and routine operation, is not endowed with a special relation to popular sovereignty, then normal politics, understood as puzzle-solving at the crossroads of interests and lobby-sponsored issues, cannot be demonized as a 'corruption' or highjacking of popular sovereignty, for the simple reason that during its operation the people, qua holder of sovereignty, is *silent* altogether, not active, as in the Jacobin imaginary. The sovereignty-holder does not concern itself with amendments to budget laws or with laws regulating import and export. It only speaks out when constitutional amendments are at issue, especially so in polities where popular ratification of parliamentary proposals for amendment is mandatory.

To re-cap: according to 'political liberalism', democracy can respond to the ever more inhospitable conditions under which it must operate by way of self-correcting its own central notion of democratic legitimacy along dualist lines and thus opening itself up to a judicial, over and beyond the classical parliamentary, safeguarding of its fundamental rights against the power of electoral majorities now more permeable to the influence of money and media. Much more can be done, however, and in the following section five suggestions will be offered for ways of further enhancing political liberalism's potential for helping democracy meet the challenges connected with the new inhospitable conditions of our time, notably the challenge of a ubiquitous hyperpluralism.

3. New directions for expanding the framework of political liberalism

John Rawls' political liberalism can function as a promising framework for rethinking democracy, if taken in no scholastic sense, but rather as an open project to be developed in a number of mutually enriching directions. The idea is that it contains methodological treasures whose fruitfulness for a reflection on democratic politics still awaits full appreciation—among them the idea of public reason, whose intrinsic standard of *reasonability* sits somewhat uncomfortably between the normativity of voluntary endorsement on the part of the participants and the a priori cogency of principles and is best understood in terms of exemplarity.[13] Against the widespread and influential interpretation of the work of the later Rawls as a somewhat unfortunate fall from the philosophical (foundational) heights of *A Theory of Justice* to an adaptive, quasi-realistic reorientation of the axis of inquiry from justice to stability, *Political Liberalism* still provides the most innovative political-philosophical framework for making sense of how a democratic polity can come to terms—of all the new inhospitable conditions reviewed above—with diversity and pluralism without giving up the distinction between the force of legitimate law and the force of power and hegemony. The link of the reasonable to the exemplary opens up political

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13 For a reconstruction of the nexus of exemplarity and the normativity of the reasonable, see Ferrara 2008, 72-79.

liberalism, among all the contemporary approaches to democracy, to the 'aesthetic sources' of normativity (exemplarity, identity, judgment, the imagination) which remain confined to the periphery in other approaches.

First, public reason has become a standard term in today's political philosophy, but perhaps the idea of a 'public imagination' also deserves consideration. Democracy cannot afford leaving political imagination theoretically unattended. Hence the suggestion can be put forward to understand democratic politics *at its best*—i.e., when it brings existing normative principles and practices on the ground into an *exemplary congruence* or when through exemplary practices it articulates new normative standards and political values—as a way of promoting the public priority of certain ends through good reasons that set the political imagination in motion and thus motivate people to act. The 'public imagination' is sometimes inspired by the exemplary congruence of facts on the ground and ideal norms, as in the case of the first election of President Obama. At other times, however, a more radical function is played by the public imagination when political novelty is being produced. Natural rights, legitimate government as resting on the 'consent of the governed', the right to the 'pursuit of happiness', *liberté*, *égalité*, *fraternité*, the abolition of slavery, universal suffrage, human rights, the social rights protected by the welfare state, gender equality, the idea of privacy, the idea of sustainability and of rights of the future generations: none of these notions has gained political acceptance by virtue of its following from antecedently and independently established principles, though often political rhetoric has struck that chord. Rather, these notions have come to be accepted by virtue of the new vistas they open on human dignity and what it means to respect it, relative the traditional, received views of the respective epochs. In this process, the imagination plays as crucial a role as reason. For public reason can corroborate our sense of being justified in endorsing these new norms, but only public political imagination, by offering us a prefiguration of how our life in common would be transformed by their enactment, can motivate us to go through the pains of struggling against entrenched intepretations and ideologies.

Although it cannot be expected to be in operation all the time, democratic politics at its best works as a standard for a normative understanding of democracy and is equally distinct from the routine politics—politics as 'the science and art of political government' and as 'the conducting of political affairs'—which we experience during most of our political lives and from populist mobilization. While the first kind of democratic politics prioritizes our diverse ends through reasons that even when desirably good leave however the imagination unaffected and mobilize no one, the populist imagination creates public signifiers that motivate people to act but have only a tenuous connection with good reasons.

The 'aesthetic analogy'[14]—often politics, since Plato's *Statesman*, has been compared with art—helps us once again to sharpen our perception of democratic politics. To formulate it in a Kantian vocabulary, just as the aesthetic ability of a work

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14 On the use of this phrase, see Ferrara 1999, 197-201.

of art to 'set the imagination in motion', to make the imagination enter a 'free play' with our concepts or 'the understanding' (Kant 1790, § 9) and eventually generate a sense of the 'furtherance of life' (Ibid.), depends on the co-presence of both genius and taste,[15] so we experience democratic politics at 'less than its best'—which may well be the case most of the time—both when its claims are supported by reasons irreprehensible but devoid of 'vision' or when they are fueled by imaginal constructs[16] that do not survive scrutiny in the space of reasons. So the first direction for expanding the framework of political liberalism is to put on its agenda the investigation of the public function of imagination alongside public reason.

Second, in response to the need, in turn connected with the exponential expansion of democracy worldwide, for developing a keener sense not so much of formally democratic procedures but a sense of when the operation of these procedures against the backdrop of a public ethos deserves the qualification of 'truly democratic', a case can be made for putting on the agenda of a renewed political liberalism a reflection on how to best conceive of the democratic ethos of a 'late-modern' or 'post-modern' society. If by judgment we understand the faculty of connecting a particular with some context-transcending notion—either via *subsumption* as 'an instance of' (determinant judgment), or by way of creating the context-transcending notion of which the particular is an instance (purely reflective judgment)—and by political judgment we understand the ability to exercise 'purely reflective judgment' in political matters, then 'democratic judgment' is a special case of political judgment. It is the kind of judgment through which we assess whether a political process that formally appears to fulfill certain procedural requirements in fact truly deserves the qualification of 'democratic'. If meeting procedural requisites is only one of the necessary conditions for a political process to be considered democratic, then the non-procedural aspect that enters such judgment concerns basically the kind of ethos which permeates the operation of the procedures at all level, from general elections to the local institutional segments of the polity.

Considering a democratic ethos as a catalogue of political virtues deemed desirable and striven after by the citizens, and taking once again *Political Liberalism* as a useful frame of reference, we might want to update and expand the list of political virtues that jointly enable a political conception of justice to operate and at the same time constitute the necessary dispositional prerequisites for the maintenance of an overlapping consensus over time. Rawls mentions among these virtues of political cooperation 'the virtues of tolerance and being ready to meet others halfway', the 'virtue of reasonableness' and 'the sense of fairness' (Rawls 1993, 157), as well as the 'virtue of civility' (Ibid.). These virtues can with no effort be included within the set of dispositions that, drawing on the reflections of Montesquieu, Rousseau, Tocqueville, Emerson, Thoreau and others, arguably characterizes the democratic ethos: an orientation towards the common good, towards equality and towards the

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15 For Kant genius alone without taste can produce only 'would-be' works of art, whereas taste alone without genius can at best produce 'spiritless' or manneristic pieces of fine art. See Ibid., § 48 and §49.
16 On the notion of the 'imaginal', see Bottici 2014, Part I Section 3.

value of individuality. Is this well consolidated picture of the democratic ethos fully adequate to what is demanded for democratic regimes to flourish in the inhospitable conditions of the 21st century? New and additional dispositions are perhaps needed. If, within the prohibitively extended range of these new historical conditions, we focus on hyperpluralism or permanent disagreement on a broader and deeper range of fundamental political issues than usually contemplated by liberal-democratic doctrine,[17] then we might consider adding to the received idea of the democratic ethos the virtue of *openness*. Openness—understood as the quality of a public culture oriented towards favoring unconventional solutions more often than any non-democratic public culture does, and motivated by an attitude of receptiveness to novelty, of exploration of new possibilities for a life form, a historical horizon, a social configuration[18]— somehow addresses the same concerns for which other authors in recent years have suggested *new* democratic virtues. Relative to Taylor's *agape*,[19] Derrida's *hospitality*[20] and White's *presumptive generosity*,[21] *openness* seems to enable the public culture of a contemporary democracy to address hyperpluralism without being affected by the drawbacks of a) entering a relation somehow of tension with rights and principles or b) not allowing for the conceptualization of a negative counterpart identified as 'excessive', as it seems to be the case with *agape* and *hospitality*. Furthermore, openness seems (perhaps to a greater extent than presumptive generosity) the democratic virtue that best tracks exemplarity

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17 Hyperpluralism, somewhat more technically defined, is a condition in which for significant segments of the citizenry one or other of the basic constitutional essentials—the idea of equality among all citizens, gender equality, the idea of the citizen as a self-authenticating source of valid claims, freedom of conscience, the consequent ban on apostasy, etc.—are somehow problematical in the light of their comprehensive conception of the good. See Ferrara 2012, 38, 4-5, 437-38.

18 For a more detailed discussion, see my *The Democratic Horizon*, Chapter 2.

19 *Agape* is an ethos revolving around the theistic intuition of a 'divine affirmation of the human, more total than humans can ever attain', see Taylor 1989, 521. According to Taylor, however, the original meaning of agape needs to be properly recovered if an ethos inspired by it is to exert some influence on today's democratic societies. The hero of agape is the good Samaritan, but the parable has to be reconstructed beyond its conventional, received and somewhat enervated meaning: the good Samaritan stands not simply for our universalist moral consciousness, which knows of no tribal boundaries, but also and more radically for a capacity to enter a relation of charity, benevolence or agape with a concrete person, whose path unexpectedly and contingently crosses with ours. See Taylor 2007, 738.

20 As in Taylor's *agape*, also Derrida's 'absolute' or 'unconditional' *hospitality* is predicated against the idea of a philosophical ethics based on a principle or law and the subject's ability to apply it. In Derrida's words, hospitality properly understood 'must not pay a debt, or be governed by a duty: it is gracious, and "must" not open itself to the guest [invited or visitor], either "conforming to duty" or even, to use the Kantian distinction again, "out of duty". This unconditional law of hospitality, if such a thing is thinkable, would then be a law without imperative, without order and without duty. *A law without law, in short* [emphasis mine]' (Derrida 2000, 83).

21 *Presumptive generosity,* rooted in the weak-ontological figure of foreknowledge of mortality, is meant by Stephen K. White as a virtue of limited scope and duration. It is not a recipe for leaving the democratic citizen 'weak-kneed' before arrogant manifestations of power or intolerance or oppression, on the part of the majority or of the minorities. It is only meant as an 'initial disposition', indeed very germane to the 'openness' advocated in my argument, to be practiced in moments when nascent social movements, newly politicized minorities, new political ideas begin to push their way into the public sphere. In White's words, it is meant as an 'initial gesture toward that thin bond of negative solidarity among creatures whose dignity and equality reside in their peculiar foreknowledge of mortality' (White 2009, 107).

and therefore, indirectly, the virtue that allows public reason to track what is 'most reasonable' for us.

Thirdly, over and beyond calling for an expansion of our classical democratic virtues, the condition of hyperpluralism raises for political liberalism another challenge: namely, to engage the reasons of free and equal citizens disagreeing on constitutional essentials and to do so more adequately and effectively than through the tools deployed by Rawls in order to reconcile the Lockean defenders of the 'liberties of the moderns' and the Rousseauian defenders of the 'liberties of the ancients'. Public reason risks idling unproductively when the stock of 'shared premises', to draw 'shareable conclusions' from, is too thin. Then public reason cannot be the method of choice, unless one is prepared to adopt Jonathan Quong's interpretive strategy of *immunizing* political liberalism by directing the principle of legitimacy to a subset of the citizens (*instead of all* the citizens) and excluding the less than fully reasonable.[22] This way of interpreting political liberalism creates a triple set of difficulties: a) it makes political liberalism internally inconsistent, in that the circle of 'all citizens as free and equal' undergoes a sudden reduction that turns the enforcement of the constitutional essentials on those who never *would* endorse them into an instance of 'liberal oppression'; b) makes political liberalism vulnerable to the accusation, on the part of agonist critics, of entrenching and moralizing the pure fact of hegemony; c) runs against the grain of Rawls' intention to spell out the conditions for the stability of a free and just society, in that the exclusion of potentially large numbers of citizens all too soon creates the conditions of *instability*.

A more promising strategy for reinterpreting political liberalism runs instead in the opposite direction: in lieu of immunizing the liberal principle of legitimacy against the adverse judgment of 'less than reasonable' citizens, the challenge should be taken up of making the unreasonable reasonable. This strategy can be pursued by way of supplementing public reason with recourse to 'conjectural' arguments, mentioned in passing by Rawls,[23] but never truly explored in their theoretical and ethical underpinnings. Conjectural arguments may produce the convergence on premises from which then public reason proceeds or can actually even directly deliver the goods of justifying fundamentals as the acceptance of the burdens of judgment to those not yet endorsing them—something that public reason cannot do because it *presupposes* their acceptance on the part of the reasonable actor.[24]

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22 Quong argues that a proper agenda of political liberalism includes a very modest task: 'to understand what kinds of arguments, if any, citizens *already committed* to certain basic liberal norms can legitimately offer to one another […] Political liberalism, in my account, is thus a theory that explains how the public justification of political power is possible amongst an *idealized* constituency of persons who are committed to certain fundamental, but fairly abstract, liberal values' (Quong 2011, 5).

23 'Conjecture' constitutes for Rawls one of the forms of argumentation, different from public reason, that occur in the public space. While public reason aims at generating binding conclusions from shared premises, conjectural arguments (like 'declarations' and 'witnessing') do not presuppose that premises are shared. Conjectural arguments contribute to strengthen public reason in that they can attract more citizens to participate in its process, but this is true, as Rawls reminds us, only insofar as they are 'sincere and not manipulative'. See Rawls 1999, 156.

24 On conjectural arguments, different approaches to them (e.g. by Andrew March and by Lucas Swaine), see

Conjectural arguments, however, no less than public reason, might fail at convincing the unconvinced, and this raises the most difficult challenge for rethinking political liberalism in the light of the inhospitable condition of hyperpluralism. What to do when not just public reason, but even the 'liberal principle of legitimacy' idles without grip on the political reality of the polity because not *all* the citizens endorse the constitutional essentials 'in the light of principles and ideals acceptable to their common human reason'? (Rawls 1993, 137).

In this case, a *fourth* suggestion for rethinking political liberalism consists of questioning the assumption, hitherto tacitly accepted by everyone, that the polity moves all of a piece, holistically, through the various stages of political conflict, modus vivendi, constitutional consensus and finally overlapping consensus. At this juncture, however, it might be worth to reconsider the domestic polity of *Political Liberalism* in the light of Rawls' subsequent view of a global world order. In fact, even a cursory look at *The Law of Peoples* corroborates the idea that Rawls envisaged the possibility, in the case of 'the world' *qua* political entity, of a multivariate political entity premised on a mix of principled and prudential, justice-oriented and balance or security oriented, considerations endorsed by different groups of actors. One larger component of 'the world' includes peoples that relate via principles of justice to one another in the context of a 'Society of Peoples', another component includes the same peoples as relating to other types of peoples (peoples ruled through 'benevolent absolutism', 'burdened societies' and 'outlaw states') on a mix of considerations of justice and prudential considerations about the use of force, not to mention the fact that also the three kinds of peoples not included in the Society of Peoples do interact with one another on some basis which remains to be determined.

Furthermore, the liberal-democratic and decent peoples included in the 'Society of Peoples' enter a relation among themselves that certainly cannot be understood as a modus vivendi. Rather they relate to one another on the basis of an idea of justice which must be *more limited* than the full political conception of justice at the center of liberal-democratic polities: in fact, such idea of justice in international relations includes only a very reduced version of the second principle and does not include the premise of the full equality of citizens. That premise is indeed shared only by liberal-democratic peoples. Moreover, if it were shared across the divide between liberal and decent peoples, Rawls would have no reason for devising two separate and subsequent runs of the original position for outlining fair terms of cooperation.

Thus, even when faced with a kind of hyperpluralism intractable for public reason, but also impermeable to conjectural arguments, a properly renewed and expanded political liberalism is not helpless: among the conceptual resources that it can offer to contemporary democracies we find the idea of a *multivariate polity*, where some of the citizens embrace *all* the constitutional essentials in the light of principles rooted in their comprehensive moral conceptions (as in the standard version of political liberalism), while other citizens or groups of citizens embrace

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Chs. 3 and 4 of my *The Democratic Horizon*.

some of the constitutional essentials in the light of principles and *other* constitutional essentials out of prudential reasons, and then a third group of citizens embraces *all* of the constitutional essentials out of prudential reasons. To complete this point, the multivariate democratic polity, understood as one among a series of possible models of democratic polity compatible with political liberalism, could open itself up to (though it would not necessarily need to) a multicultural version of political liberalism.

Hyperpluralism, however, represents a challenge not just *within* the domestic scale—where the three new resources of a) the political virtue of openness, b) conjectural arguments and c) the multivariate polity could be of help. It also poses a more general philosophical challenge: Is political liberalism really as neutral as it purports to be? Agonistic theorists, radical democrats and theorists of 'the political' or of biopolitics voice doubts about it. Instead, nothing in principle seems to prevent the framework of political liberalism, originally understood by Rawls as a reconstruction of how a Western society of free and equal citizens, deeply divided between supporters of the 'liberties of the moderns' and supporters of the 'liberties of the ancients', can exist over time without oppression, from being generalized and rendered applicable to a much broader range of societies deeply divided *in their own ways*.

The necessary condition for achieving this result is a re-examination of the implicit view of the democratic culture or ethos which undergirds *Political Liberalism* in order to explore whether its basic concepts—the political conception of justice, the two moral powers of the citizen, the political conception of the person, the burdens of judgment, the rational and the reasonable, the overlapping consensus, public reason and reasonability, the liberal principle of legitimacy—could have a resonance and play a similar function in the context of *significantly different* configurations of political values, political virtues, implicit democratic ethos, and competing comprehensive conceptions.

Then a *fifth* suggestion for expanding the framework of political liberalism, inspired by the studies on the Axial Age and on 'multiple modernities', leads to investigating whether democratic cultures or kinds of democratic ethos, anchored in different religious and civilizational contexts, do share enough common ground as to be considered variants of a recognizable *democratic* ethos and yet remain different enough in the political virtues and values presupposed as to generate *multiple versions* of the 'just and stable society of free and equal citizens' at the center of political liberalism.

The pluralistic spirit of *Political Liberalism* comes to full fruition in the implication, underlying the discussion of 'multiple democracies', that the important distinction, drawn in *The Law of Peoples,* between liberal and decent peoples ought to be completed with the effort to distinguish a plurality of transitional paths for the *democratization* of decent societies. A reformulated and expanded version of political liberalism as the best conception of democracy for the 21st century might want to keep the 'democratization' and 'westernization' of decent societies as

separate as the research program of 'multiple modernities' has taught us to separate the 'modernization' and 'westernization' of traditional societies (which instead the ideological theories of modernization of the 1960's conflated in one and the same notion). From this way of proceeding the Rawlsian program of political liberalism has everything to gain: from being the narrative of the transition to liberal-democracy of some mainly Protestant polities where the remote echo of the religious wars of 17th century Europe still is audible, it could become the framework in terms of which partially overlapping, partially diverging narratives can be constructed of *any* decent society's transition to democracy. From being a normative account that originated in a specific context (that of a Harvard professor reflecting on the political experience of his part of the world), the framework of political liberalism could, in the global world, receive transformative inputs from elsewhere and in response to quite diverse experiences. In a sense, openness and reflexivity—openness to diversity and the fact of pluralism, openness to the burdens of judgment, openness to non-liberal decent polities, openness to the aesthetic sources of normativity, as well as the reflexivity of philosophy's applying tolerance and pluralism to itself—are at the core of political liberalism and put it in the best position for confronting hyperpluralism and, more generally, the new inhospitable conditions of democracy.

4. Concluding remarks

Democracy's successful response to the new context within which it must operate in the 21st century cannot just rest on the quality of our theoretical grasp of it. It requires institutional design and institution-building, the alignment of interests, social groups and the favor of contingent historical processes that often lie beyond the power of politics to control. At the same time, democracy's resilience as a form of governance can only benefit from innovative reflections on central junctures of its operation, for example on what democracy 'beyond the nation-state' might mean, on the new powers that we might want to identify and keep separate and balanced, on ways of reinvigorating its public sphere and make it benefit from the new social media, on ways of curbing the new absolute power of the markets through legal and institutional devices that are more effective of the ones which were used to curb the absolute power of kings.

Political liberalism can play an important role in this process. It has broken new ground in the age-old debate on the legitimate exercise of power and on political justification. By loosening the core of normativity from the hold of first principles, 'self-evident truths', transcendentally anchored laws and harnessing it to public reason and the reasonable, it has also freed us from the spell of Plato's cave without delivering us hostage to skepticism or relativism, as in earlier attempts to rehabilitate the inside of the cave as the true locus of politics. In this new philosophical territory, yet to be fully explored, the lesson conveyed by political liberalism is that the normativity cogent for those who live in a democratic horizon marked by hyperpluralism is the normativity of what is *reasonable for us*—where what is reasonable for us cannot be determined independently of who we want to be, without at that very

moment collapsing the specificity of public reason into some form of traditional theoretical or practical reason. With this philosophical move, altogether absent from *A Theory of Justice*, Rawls ventured into a view of the normative which opens it up to its aesthetic sources—exemplarity, judgment, identity and the imagination. This is the most promising direction today towards which the legacy of political liberalism could be developed. Democracy, in the new historical context where it finds itself, can only benefit from a political philosophy built around a reflexively pluralist core and which—differently from other conceptions that also emphasize pluralism, permanent contestation and agonism—never gives up the distinction between the legitimation of power through *de facto* consensus and the exercise of power what *deserves* legitimation. In this sense, democracy in the 21st century is best described not as a form of rule confronting its terminal crisis, but as a form of rule undergoing another transformation, perhaps of the same magnitude of the one which once led from direct Athenian-style democracy to modern representative democracy. Rethinking the ethos of democracy, de-Westernizing it, devising forms of justification that truly include every citizen, loosening up the grip of the 'uniform polity', are ways to fix important parts of the boat on which we are sailing.

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Political Judgment for an Agonistic Democracy

Albena Azmanova*

1. The colonization of the economic and political systems by democratic deliberation

With a renewed ambition to salvage Enlightenment's emancipatory promise amidst the rampant social crisis in Europe, the Council of Europe is poised to adopt the Charter on Shared Social Responsibilities (Council of Europe 2011). 'Europe', the authors of the Charter note, 'seeks to secure equal access to fundamental rights, the ideal of universal social protection and a dignified life for all, enabling all individuals to freely develop their personality, retain control over their life, [and] participate in societal choices...' The obstacles to the triumph of social and political justice are identified as those 'major social changes linked to widening inequalities, the loss of jobs resulting from company relocations and technological change in the absence of retraining and product innovation, the rise in employment insecurity for young people, overindebtedness and impoverishment of a growing proportion of households, and ageing of the population', together with the depleted states' capacity to 'fulfill their role of ensuring access to social protection, health care, education, housing and common goods in general' (Ibid., 3).

Democratic deliberations are given here pride of place among the policy tools for tackling the stated deficiencies of justice, as 'shared decision-making based on impartial reasoning' is deemed 'essential in order to guarantee the principles of social, environmental and intergenerational justice' (Ibid., 5). Deliberative policies (which are mentioned 17 times on this 20-page document)[1] are an instrument to 'combat poverty, insecurity, discrimination and widening inequalities in order to further develop and pass on to future generations a universal framework of inalienable and

* Albena Azmanova teaches Political Theory at the University of Kent's Brussels School of International Studies, where she chairs the postgraduate programme International Political Economy.
1 By comparison, 'equality' is mentioned 3 times in the draft Charter.

indivisible rights and common goods' (Ibid.). Thus, while the document is silent on the social responsibility of public authorities (at national and supra-national level) to provide the socio-economic conditions of justice, it is eloquent in prescribing forms of deliberative politics, emphasizing the need to 'incorporate the negative externalities in economic deliberations' (Ibid.), 'encourage and legitimize new forms of deliberation' (Ibid., 8) and build 'renewed confidence in equitable social progress, on the basis of collective learning processes, deliberative democracy practices and new forms of partnership and multi-stakeholder and multi-level governance' (Ibid., 13). Chapter 2, which prescribes action strategies, names deliberative processes as one of the four envisaged strategies (alongside 'innovation and learning process', 'recognition of stakeholders', and 'forms of governance'—themselves based on deliberative processes). The Charter also makes a proud mention of the Social Cohesion Plan launched by the Council of Europe in 2010, whose purpose is summarized as 'to foster the involvement of citizens and players in defining priorities and responsibilities by means of deliberative democracy' (Ibid., 7).

This document, conceived after broad public consultation at what is regarded to be an international institution with an outstanding democratic legitimacy, gives deliberative judgment a conspicuous centrality. This is suggestive of a significant shift in both democratic theory and policy practice—namely, a shift from the articulation of a distinct policy agenda crafted after a model of justice, with attendant policy measures for implementing it, to focusing on the very process of judgment, and especially deliberative judgment in democratic settings of inclusive dialogues. This faith in the 'mild voice of reason' (Bessette 1994) set in motion by deliberative judgment is commendable. However, unless we provide a robust account of the manner in which democratic deliberations are able to play such an emancipatory role (not least regarding the material conditions of social justice, as the Charter purports), we will have to submit that we might be witnessing the colonization of the political and economic systems by democratic deliberations, in an ironic reversal of Habermas' diagnosis of late modernity's malaise as 'the colonization of the lifeworld by the economic and political systems', a malaise deliberative politics were meant to cure.

In this paper I critically examine the emancipatory potential of deliberative judgment. I begin by identifying three fallacies in authoritative accounts of the emancipatory capacity of such deliberations. I then offer a recasting of the communicative turn in democratic theory in order to specify the conditions under which deliberative judgment can be reasonably expected to have an emancipatory effect. On this basis, I finally clarify the particular policy utility of democratic deliberations.

2. The three conundrums of deliberative emancipation

Let us return to the draft Council of Europe Charter in order to identify the way in which democratic deliberations are expected to alleviate injustice. Deliberations' redeeming power is stated to consist in their capacity to 'reduce inequalities of

power and formulate preferences through reasoning and exchanges of views' (Ibid., 8). Giving equal voice to all affected parties in a process of free reasoning, in which otherwise disadvantaged groups are granted influence through reasoned argument designates the particular emancipatory potential of democratic deliberations—a point of agreement among the various models of deliberative judgment crafted by Jürgen Habermas, Joshua Cohen, Seyla Benhabib, Rainer Forst, John Dryzek, and Iris Young, among the plethora of scholars who have espoused deliberative democracy over the past two decades (as discussed in Knops 2006).

The conceptual flaws of this account of the emancipatory power of democratic deliberations are of three kinds. The first regards the relation between, on the one hand, the normative standard validating a rule and, on the other, the practice of this validation. The normative ideal of power-free deliberations is to allow, purely counterfactually, a judgment on the acceptability of a given norm: decisions on binding norms and rules are only legitimate 'if they *could* be the object of free and reasoned agreement among equals' (Cohen 1997, 73, italics added).

However, the actual process of reason-giving in the social practice of deliberations can never be completely free of power asymmetries and biases related to participants' particular identities. Even if we accept the principle of deliberative legitimacy (measuring up adopted rules against fictional rules elaborated in ideal conditions of deliberation), this normative stance is of little help in designing social policy unless the social conditions of equality and rationality are in place to enable rational dialogues among free and equal participants. However, if these demanding conditions were effectively already in place, the issue of justice would hardly appear— debates on justice start not in the abstract, but when specific social conditions and practices cause experiences of harm against which claims of injustice are advanced. Were the material conditions of justice practically available, deliberations (as procedures for addressing injustice) would be without an object—as grievances about suffered injustice would not emerge.

Let us call this weakness in the account of the emancipatory potential of deliberations the 'ontological conundrum'. This conundrum consists in the fact that, in deliberative theories of justice, the availability of the empirical conditions of justice (such as equality and mutual respect among participants) serves as (idealizing) presuppositions for the legitimacy of democratic deliberations as a normative ideal—what needs to obtain is presupposed to be already there in the very procedure through which it is to be obtained. Thus, when the ontology of a just society (free of political conflict over the justice of social arrangements) is presupposed in normative accounts of justice, a pernicious circularity emerges that puts into question the political usefulness of such theories of justice and judgment. In other words, if our normative goal is a political reality of justice, free of power inequalities, we cannot afford to introduce such a conflict-free political ontology as a constitutive element of the normative theory. The same goes for assumptions about the cognitive and moral capacities of individuals, as deliberative theory commonly prescribes. Such assumption might sound nice, but as Immanuel Kant

has noted in his political writings, they are unsafe when applied to political matters; as he contends, the just political order must be possible to attain 'even for a race of devils'—the categorical moral imperative (or its equivalents regarding the cognitive capacities of individuals) is out of place in such a venture.[2]

The second fallacy in authoritative accounts of the emancipatory power of democratic deliberations concerns the tension between the norms' public acceptance in a process of inclusive reason-giving and their acceptability as just norms (i.e., norms compliant with a universal notion of Right). Let us name this the 'acceptability conundrum'. This problem has been debated at length, without a solution, by John Rawls and Jürgen Habermas in an exchange they held between 1995 and 1997 about the merits of their respective models of communicative public reason.[3] In essence, while they reproach each other that their continued reliance on ideal conditions (such as the 'original position' in the case of Rawls and the 'ideal speech situation' in the case of Habermas) reduces both the democratic credentials and the practical applicability of their models of deliberative politics, they both concede that lifting all restrictions on deliberations would mean equating, unduly, the acceptability of rules as just with their mere public acceptance as binding. The consensual and inclusive nature of rule making alone cannot guarantee the justice of adopted rules.

This persisting tension between the rules' public acceptance and their normative acceptability points to what I have described as 'the paradox of judgment' that is haunting much of normative political philosophy. The paradox is this: the higher we set our normative standards, the more we lose grip on political reality—at the expense of judgment's critical power; yet, the more we weaken our normative criteria for the sake of enhancing the model's political relevance, the more the model of justice loses its critical power and with it—its political cogency. (Azmanova 2012a). Thus, while the abstract ideal of freedom might easily be discarded as unrealistic because all legitimate power implies repression, getting rid of the notion of freedom leaves us without a gauge to establish what is an acceptable form or level of repression.

In deliberative democratic theory the judgment paradox takes the following shape: in order to enhance the democratic credentials of a theory of justice, we must entrust the deliberating public with the design of binding rules. Yet, as practically everything can come out of democratic deliberations, such an approach leaves us without means for a critical stance on publicly approved norms. We need, therefore, independent validity criteria to ensure that justice be not equated with whatever the people might be pleased to endorse. Thus, theorists of deliberative democracy have sought, be it half-heartedly, a recourse to ideal theory (concerning the cognitive and moral capacities of participants, or describing the procedure of deliberation) in order to secure the justice of adopted rules. With such a move, however, the models

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2 Kant makes this methodological observation in his essay 'The Perpetual Peace'. Here Kant discusses peace in terms of lack of the reasons for conflict—thus, his object is political justice. He cautions that, in analyses of political phenomena reliance on assumptions about the moral nature of individuals is out of place.
3 The exchange appeared in the following sequence: Habermas 1995, Rawls 1995, Habermas 1998, Rawls 1997.

of justice and judgment become politically unrealistic and therefore—futile.

The third weakness in the account of the emancipatory power of democratic deliberations concerns the type of emancipation that such deliberations are meant to achieve. Even if deliberations were to be conducted in perfect conditions (approximating Habermas' 'ideal speech situation'), giving equal voice to all affected parties would remedy only injustices related to the unequal distribution of power within the model of wellbeing participants inhabit. However, since the procedural conditions of validity concern the elimination of power inequalities, it is far from certain that such deliberations would also be able to address forms of domination related to the very nature of the model of wellbeing—beyond the injustice of inequality and exclusion. I will refer to this weakness as the 'forms of domination conundrum'. Let me explain this more carefully, taking as a point of departure an example.

A gender parity law ensuring a 50 per cent quota for women in politics was promulgated in France in 2001—it obliged all political parties to present an equal number of male and female candidates in elections. The typical justification of the law ran along the logic of equality. As Denise Fuschs, head of the European Women's Lobby put it, 'Human beings are not abstract, they are men or they are women, so having a 50–50 system is a reflection of the way things really are'.[4]

The law is typical of policy measures aiming to remedy the unequal distribution of power between men and women by ensuring their equal access to, and equal positioning within, the political and economic spheres of modern societies. However, the relative success of such strategies targeting inclusion and equality within the model of wellbeing typical of modern capitalist democracies (with its stress on obtaining social status through paid work) has come at a price. Not only has this model of wellbeing remained unquestioned, but, by serving as a telos in women's struggles for emancipation from domesticity, it has gained additional value.[5] In this way, as Nancy Fraser has noted, the struggles for women's access to the labor market has made the feminist movement complicit with the productivist logic of capitalism, giving enhanced legitimacy and impetus to what Luc Boltanski has described as the flexible, 'networked' capitalism of the late twentieth century (Fraser 2009). Struggles for numerical equality among the sexes—be it in the economic or political spheres divert attention away from structural deficiencies inflicting these spheres—the highly elitist nature of recruitment into institutionalized politics in France (as in the earlier example), or the increasing commodification of labour in the case of neoliberal, 'networked' capitalism.

Regulations enforcing gender parity target what I call 'relational domination'—domination resulting from the unequal distribution of power among actors. Injustice, from this perspective, emerges in terms of power asymmetries that allow

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4 Quoted in 'French Women Taking Politics into Their Hands', *International Herald Tribune* (Feb. 12, 2001). The European Women's Lobby is an umbrella organization of about three thousand feminist associations.

5 In a similar move, one of the most prominent slogan of the Spanish Indignados (the young Spaniards protesting since the summer of 2011 against the pathological lack of employment) read: 'We are not against the system; the system is against us'.

one group to dominate another, and its remedy would necessitate equalization of power relations. However, relational domination is often but an epiphenomenon of what I have named 'structural domination'—domination to which all social actors are subjected by force of the operative logic of the socio-economic system they inhabit. (Azmanova 2012a, 48). Thus, women who effectively gained access to the labor market were not only subjected to the dynamics of commodification endemic to capitalism, but also reduced the bargaining power of labor by increasing the volume of the labor force (thereby alleviating the threat for obstructing production that labor poses to capital). Thus, while women's exclusion from the labor market is an instance of relational domination, their inclusion would remedy the particular power asymmetry while leaving intact the structural injustice of ever-increasing labor commodification in the context of globally integrated capitalism.

Let me make at this point a meta-theoretical disambiguation. The return of attention I am pleading here to the structural imperatives of the social system does not mean I am taking the side of the system in the tired 'system versus rational action' debate—a position that allegedly leaves no room for agency.[6] To recognize that there are powerful structural factors at work (or systemic logic) is not to argue that actors are prisoners of the iron laws of history. It is rather to help us appreciate the magnitude of the challenge of emancipation.

The political struggle of the Left in the twentieth century has predominantly targeted the relational dimension of domination: intellectually and politically, the critical enterprise was directed against disparities in social status, political voice and access to resources; it has sought to eliminate status hierarchies, economic inequality, and political subordination. When the source of social suffering is detected to be power asymmetries, the equalization of power relations, in order to ensure equal participation in social life, emerges as an appropriate remedy. Emancipation, from this perspective, stands in terms of participatory parity. This is the light in which the emancipatory power of democratic deliberations is usually identified: giving an equal voice to all affected parties in the design of binding for them social norms and political rules would, allegedly, ensure the justice of the socio-political order. However, as the unwitting cooptation of feminist struggles for parity by neoliberal capitalism signals, we cannot be confident that combatting relational domination necessarily entails uprooting structural domination.

It might be that democracy is constitutively prone to over-stating the relational forms of domination and overlook the structural ones. To the extent that equality

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6 At its best, this line of critique is displayed in Axel Honneth's discussion of Foucault and Habermas where he observes that Foucault's systems-theoretic analysis of power leads him to view power is an all-embracing and self-perpetuating property of the social system rather than as the product of the struggle among strategic actors. In contrast, he endorses Habermas' concept of communicative interaction among rational agents as a way out of the philosophical-historical dead-end of systems theory (as well as of critical theory infected by Adorno's negativism). (Honneth 1991). Although analyses directed at system/structure vs. rational actor explanations of humanity's predicament have a good propaedeutic value (as introductions to complex analyses), I consider the structure-agency debate to be based on a false dichotomy and therefore not to be of great use analytically.

of citizenship is definitional for democracy, democracy is naturally averse to inequalities—these are constitutively a threat to the social order of democratic societies, especially of liberal democracies whose main pledge is to equality of liberty. Moreover, with the recent advent of deliberative democracy (since the 1980s), 'for contemporary democratic theorists, democracy is largely a matter of deliberation', as John Dryzek (2005, 218) has observed. Having emerged within democratic theory, conceptualizations of deliberative judgment thus inherit the former's exclusive concern with power-equalization, rather than, say, with the political economy of capitalism and the operative logic of profit creation which are sources of structural domination beyond disparities of power.

In what follows, I will propose strategies for addressing the three conundrums in the account of the emancipatory power of democratic deliberations. In other words, we need to account for the emancipatory potency of deliberative judgment (1) without a reliance on ideal theory describing the conditions of deliberation, (2) while solving the tension between the acceptance of thus adopted rules and their acceptability as being just, (3) as well as clarifying the capacity of deliberations to unveil the common structural sources of conflicting grievances of injustice.

3. Solving the ontological conundrum: getting rid of ideal theory

The ontological conundrum consists in the latent existence of a conflict-free political ontology under the guise of idealizing presuppositions (e.g. about the rationality, equality, or authenticity of participants) describing the conditions of validity of adopted norms and rules. While such idealizing presuppositions do effectively secure the normative rigour of a theory of justice, they diminish the theory's political usefulness (the 'paradox of judgment' curse mentioned above)—as all battles over the justice of the shared social order are permeated by power inequalities and valid (and often valuable) differences, the sterile ideal conditions demanded by a normative theory render it politically inapplicable, if not dangerous. As Richard Rorty has put it, abstract foundational principles in ethics look bad because 'they never helped anyone who actually had a difficult problem, and all they could possibly do is just serve to abbreviate a set of moral intuitions' (Rorty 1998, 15).

As a matter of methodological lucidity, therefore, a theory of political judgment should not allow, be it inadvertently, its normative goals to permeate its ontological premises (as is often the case in deliberative theories of democracy).[7] In other words, as welcome as notions of individual autonomy, rationality and equality might be in their role of normative standards, they should be explicitly excluded from the theory's underlying political ontology. We cannot postulate the ontological existence of free and equal individuals as premises in the model of deliberative justification

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7 In the case of Habermas, the 'idealising pressupositions' about a conflict-free political reality that are implicit in the 'ideal speech situation' are a logical consequence of the requirement for immanency of critique (itself constitutive for critical theory of Frankfurt School pedigree), which compels Habermas to draw normative criteria from the necessary presuppositions underlying the human practices of (non-strategic) communication oriented towards mutual understanding. I cannot expound further on this here. (See Azmanova 2012a, Ch. 2).

if autonomy and equality are to be desired outcomes of judgment. Solving the ontological conundrum would therefore require abandoning ideal theories of justice in favour of a realistic political ontology. (Or, in a less radical move, combining a minimally deontological notion of justice—for instance, what Rainer Forst has conceptualized as 'the basic right to justification' (Forst 2010 & 2011), with a realist ontology of politics.) Such realist ontology rests on a notion of political dynamics as being activated by conflicts over society's normative order—conflicts that are themselves rooted in individuals' embeddedness in a social reality of inequality and domination.

To avoid a misunderstanding: I am neither refuting the normative validity of 'ideal' theories of justice, nor am I espousing an account of social interactions as exclusively a matter of conflict, rather than cooperation. In tune with Kant's warning against the unsafe nature of idealizing presuppositions (irrespectively of their veracity), I am advocating an espousal of an antagonistic model of politics (Kant's 'race of devils') for methodological reasons—for the sake of avoiding the futile circularity of achieving our normative aspirations simply by means of allowing these aspirations to describe the conditions of achieving them. It is in this sense (as a matter of methodological lucidity, as I noted) that I propose to replace the unsafe idealizing presuppositions about a conflict-free political reality underlying the process of justification, with a realistic ontology of radical, antagonistic conflict, generated by antagonistic social positions within which actors interact and make sense of their world.

Not only is the cleansing of power asymmetries, particular identities and cognitive biases from the process of deliberation impossible, it is also undesirable. These partialities and biases are often exactly what is at stake in grievances about injustice.[8] If we put aside interests and partialities as 'biases' to be neutralized by appropriate procedures and principles, the normative theory is bound to render itself politically irrelevant—those biases are part of agents' self-understanding and motivate their entering justice debates in the first place.

The endorsement of a political ontology of radical conflict changes the purpose of the inquiry—we should be able to account for the emancipatory power of deliberative justification from the premises of a non-ideal world in which social dynamics of cooperation-within-conflict trigger the political dynamics of norm-contestation (Azmanova 2012a, Ch1). It is the contestation of the norms stabilizing the conflict-ridden social order that prompts justice debates in the first place.

Here a clarification is in order concerning the relationship between politics, governance, and the proper function of judgment. The political (in French *le politique* rather than *la politique*) originates in conflicts over social practices and norms; politics is the management of such conflicts. In contrast, governance is the

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8 As Seyla Benhabib has argued against the Rawlsian move to exclude the 'background culture' from the sphere of public reason's operation, grievances related to background culture (such as identity recognition related to religious belief, gender, ethnicity, sexual orientation) can be urgent issues of justice (Benhabib 2002, 108-112).

realm of (conflict-free) application of norms agreed as binding. Political judgment is the bridge between the realm of the political and the realm of governance as, via a process of norm-construction and norm-validation, judgment puts an end, be it provisionally, to political contestation, thus enabling the transition from politics to governance (Azmanova 2012a, 23).

This transition from the realm of conflict to the realm of rule implementation passes through contestation of the normative order of society in which all concerned parties are mutually involved. This is valid even for societies marked by radical conflicts because, as John Dewey often noted, debates on justice do not start in the abstract—the question of justice only arises in normative conflicts within shared practices, when the norms governing these practices are challenged as being unjust (Dewey 1969). Even deeply divided societies are constituted by social practices in which participants are involved with each other in dynamics of cooperation-within-conflict. The conflict itself is a political engagement within a social relationship. Any contestation of the shared social order entails judgment, on the part of all concerned parties, of the practices and rules that are being contested.[9]

Deliberative judgment, from such a 'realist' point of view, is not a tool for crafting a consensus on just norms but rather a mechanism allowing actors holding antagonistic positions to enter into a dialogical contestation of the existing social order. This contestation is prompted not because of some deontologically postulated right to justification, but because the very mutual entanglement of actors in shared social practices necessitates their engagement in a contestation and defence of the social order they inhabit—thus, the impulse of mutual justification is contained in the fact of radical conflict within shared social practices. (It is in this sense that what Forst has described as the 'right to justification' can be derived as an idealizing presupposition of social practices and attendant political dynamics of conflict).[10] I will come back to this point in order to account for the transition deliberative judgment enables from antagonistic conflict to agonistic pluralism in complex modern democracies.[11]

4. Solving the acceptability conundrum: a negative ideal of justice

The fallacy I named 'the acceptability conundrum' stems from predicating the validity of norms on consensus—consensus that tends to equate the norms' acceptability with their acceptance, thereby eliminating the critical distance towards validated norms. Habermas and Rawls undertake to solve the tension between the factual

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9 Radical disruption rarely leads to normative changes exactly because of the lacking mutual engagement among all the parties in a conflict.

10 For such 'sociological' grounding of the right to justification see Azmanova 2012b.

11 I follow here Chantal Mouffe's position that the main task for democracy is to convert antagonism into agonism, enemies into adversaries, fighting into critical engagement. However, while she holds that deliberation is unfit for such a task because it is incapable of processing deep difference, in my account deliberative judgment can be one such transformative mechanism (of antagonism into agonism). See Mouffe 1999; 2000a; 2000b.

acceptance of rules and their acceptability (as being just) by stipulating that the consensus in question needs to be achieved under demanding ideal conditions. This solution, however, leads to the 'judgment paradox' discussed above—a heavy load of ideal theory is introduced to secure the acceptability of norms, which renders the model of judgment politically unrealistic and therefore useless.

The acceptability conundrum could be solved by means of redefining the normative goals of critique. I propose shifting the normative perspective from defining and achieving justice (in the abstract terms of moral universalism) to effectively addressing injustice. From a critical theory perspective[12], addressing injustice is a matter of achieving emancipation from structurally produced oppression in order to liberate human beings from the particular circumstances that enslave them (Horkheimer 2002). Hence, the emancipatory goals of deliberative politics are to be delineated not by the habitual liberal vision of an unencumbered, autonomous self, but in terms of individual and collective emancipation from structurally generated, historically specific conditions of domination, thematized as injustice in actors' grievances of suffering.[13]

The notion of emancipation, thus redefined, entails also a revision of the standard of validity for assessing adopted norms and rules. Rather than postulating the ideals of a just society on which a consensus is deliberatively either produced or achieved (in the various formats of deliberative public reason), the validity of policy measures can be assessed in terms of the extent to which they alleviate suffering— i.e. the extent to which they are an effective response to the social suffering that has sparked the debates of justice.[14]

Within a model of judgment guided by the principle of critical relevance, gender equality provides poor justification to the French law on gender parity in politics— to take the example already used. This is the case because gender is not relevant to the distribution of political office, in the way, for instance, citizenship or age is. However, the law finds stronger justification when its validity is tested on grounds of the alleviation of (social) harm. From this perspective, the proper normative grounds for the French parity law would not be the allegedly 'natural' equal ratio of men to women. The law is justified to the extent that it provides a solution to a situation of historical injustice in French society—namely the systematic marginalization of

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12 I have in mind here critical theory of Frankfurt School origin, which is ultimately concerned with the sociostructural dynamics of injustice, that is, dynamics concerning the structural sources of political order.

13 These grievances cannot be taken on their face value; their status is only as an empirical entry point of critique. I cannot address here in detail the dynamics of immanent critique, which I have discussed in Azmanova 2012c.

14 I have named this the 'principle of critical relevance' as it corresponds to the urgent nature of the political from which debates on justice originate. This principle specifies the epistemic basis of validity of norms. It is neither the 'true' and the 'rational' (Habermas) or the 'reasonable' (Rawls) but the 'critically relevant': what divergent evaluative perspectives see as relevant in the critical sense of qualifying as an object of as an object of disagreement. This allows the issue of justice to be approached hermeneutically (i.e., as a question of injustice). The idea of relevance I advance implies a correspondence between the principles that guide practices, on the one hand, and, on the other, specific societal concerns of injustice, concerns that critically (as opposed to instrumentally) motivate these practices. See Azmanova 2012a, 194.

women in the labor market, including in politics.[15] However, the principle of critical relevance would deprive a gender parity law of validity, should such a law be adopted in a context that has not been stained by gender discrimination. Moreover, when deliberative judgment is guided by the principle of critical relevance, it will be led to examine not the numerical inequality between men and women, but the way gender has become relevant to the distribution of political office—namely via a historically specific pattern of exclusion and power asymmetries (relational domination).[16] This questioning of the way claims to justice achieve political relevance would then bring to the light the fact that power inequalities between men and women in the distribution of public office are akin to other forms of relational domination that the law in question obliterates—for instance, the limited access of citizens of North African origin to professional politics in France, despite them constituting a numerically significant minority among French citizens. Thus, while the original grievance of gender discrimination serves as an empirical entry point of critique into dynamics of reasoning that would lead to the discovering of a broader pattern of injustice.

The change in the normative grounds of validity (along the principle of 'critical relevance') goes hand in hand with a change in the epistemic grounds of discursive agreement and disagreement. Here I come to the clarification of the possibility for antagonistic positions to enter into a dialogical contestation of norms. For a normative contestation to be at all possible, the parties to the conflict must be in agreement on what are the relevant issues of disagreement. The possibility for competing claims to justice to enter into dialogue does not imply a prior substantive consensus (as thin as it might be) on valid rules, rather, it implies an overlapping shared understanding of a cognitive nature—a shared understanding of the meaning of disagreement—what Arendt calls a 'consistency of arguing and reasoning'.[17] Due to their involvement in shared social practices (be it from antagonistic positions) actors develop what I have described as 'orientational phronesis'—the practical wisdom that allows them to discern issues as being relevant to public life. On the basis of shared orientational phronesis, the particular objects of judgment that are introduced via the various grievances of injustice appear to participants as significant

15 In 1995, then Prime Minister Alain Juppé dismissed eight of the twelve women ministers he had hired six months earlier. This act drew attention to the status of women in politics, making this a relevant issue for debates on justice. The highly visible gesture of disrespect for women in politics created a public feeling of injustice to which the law, passed in early 2001, was a reaction. It was not an act of the 'discovery' of an authentic situation of numerical equality among men and women.

16 Often the right to be elected preceded the right to vote as the former was granted to women from the ruling upper classes. Among the most ardent opponents of woman suffrage in Spain were two female deputies (Margarita Nelken and Victoria Kent), who argued that giving women the vote would endanger the Second Republic because, they claimed, women in Spain at that time were too ignorant and immature to vote responsibly. This reveals that power asymmetries based on gender masked asymmetries based on class (as women from the upper classes could run for public office).

17 'If [. . .] we assure ourselves that we still understand each other', writes Arendt, 'we do not mean that together we understand a world common to us all, but that we understand the *consistency* of arguing and reasoning'. (Arendt 1993, 96, italics added).

(noteworthy) issues demanding their judgment. Thus, deliberations proceed as making-sense-in-common, engendering an emergent (in the course of deliberations) shared understanding of what is at stake—a shared perception about what qualifies as a valid grievance. The early stages of deliberations usually establish such a shared matrix of relevance.[18] The tacit articulation of what is critically relevant (noteworthy) is in this sense constitutive of the public sphere; it demarcates it.

Grievances of injustice, from which debates on justice usually originate, are able to become a focus of debates on justice because such grievances put to question what 'public sense' (in Arendt's terms) holds to be of critical relevance for the public engaged in discussions of justice—issues that radically challenge and risk to destabilize the normative order of society and, thus, claim public attention. Typically, this process begins from a specific claim to injustice regarding a society's constitutive rule and proceeds as a generalization of the scope of applicability of that grievance.

Let me illustrate this process of generalization with another example of legal battles in France—those which lead to the adoption of the law on registered partnerships (Pacte Civile de Solidarité) in 1999. Homosexuals' claims to the right to marry triggered a significant debate in France in the late 1990s. The grievance which generated the debate was that denying gay men the right to marry had entailed a symbolic devaluation (through exclusion) of homosexuals, and entailed economic losses for them as they were denied the economic advantages that married couples legally have. These claims focused public attention in an urgent manner as basic, socially constitutive, norms (regarding family life) were being questioned. Within a year the debate changed its terms, as non-married heterosexual couples voiced the grievance that they were also being denied social recognition (of their commitment to each other), as well as economic advantages. The terms of the debate were thus generalized as the claim to injustice found its range of relevance beyond the homosexual/heterosexual dichotomy, thus evolving into the justice claim that any two people who have undertaken a commitment to each other in forming a family (irrespective of sexual profile) should benefit from all of the legal rights that a marriage certificate confers.

It was deliberative judgment (as the case was debated in a series of deliberative forums) that transformed the initially antagonistic positions regarding marriage into an agonistic pluralism of compatible (in their shared understanding of the matter as an issue of justice) views that, in a process of 'making sense in common' converged in their efforts to find a solution to what came to be seen as a general pattern of injustice surpassing the initial grievance that had triggered the debate. The outcome of these debates was not a consensus on a distinct norm vested in the law of registered partnerships; public deliberations' outcome was the articulation of the need to revisit the notion of the family and its legal status, as well as the articulation of the basis on which public authority was to act—namely, not remedying an injustice to homosexual couples, but providing non-exclusive terms of legal protection to

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18 Which I have described as a 'phronetic constitution of public reason' (Azmanova 2012a, 157-166).

the family. On the basis of such an agreement, deliberatively generated, the French parliament then adopted the Pacte Civile de Solidarité.[19]

What does that tell us about the nature of public deliberations and their status among the policy instruments used in liberal democracies? Deliberative reasoning about the justice of contested norms of social cooperation does not, and need not, result in a consensus on binding rules. Such reasoning resolves normative disagreement of two types—(1) disagreement over what are relevant policy concerns and (2) what are the valid grounds for public authority's making policy decisions—the right grounds on which public authority can act. It is in this way that deliberative judgment functions as a mechanism transforming the antagonistic positions of conflict (from the sphere of the political) into an agonistic mutual engagement in a dispute over the proper normative grounds for policy action.

5. Solving the 'forms of domination conundrum': agonistic judgment

The 'forms of domination' conundrum concerns the tendency to seek the emancipatory power of deliberative democracy exclusively in terms of power equalization and inclusion. This, as I noted, obscures what I described as 'structural domination'—the actors' subordination to the operative logic of the system, domination to which are subjected also the winners in the relational distribution of power.

From a critical theory perspective, normative criticism is not just a matter of continual contestation of binding norms and political rules for the sake of equality and inclusion, but is above all a matter of disclosing the sociostructural sources of injustice. This means that the emancipatory power of democratic deliberations should be sought also in their capacity to disclose the common structural sources of injustice behind antagonistic claims to justice. Can deliberative agonistic judgment, thus understood effectively disclose to participants the deep structural roots of their seemingly incompatible grievances?[20]

Drawing on empirical research on deliberative polls, I have argued that democratic deliberation can effectively bring to public visibility the structural sources of injustice (Azmanova 2012a, Ch.9). The mechanism of such a deliberative disclosure of structural domination is different from what Habermas has described as 'the better argument' dynamics of justification—a process of mutual reason-giving that generates a consensus on basic rights. Instead, I discern a process of critical justification I call 'rendering account'. How does this work?

It is exactly because deliberations are invariably marked by participants' social identities that the mutual reason-giving takes place as intersubjective (rather

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19 Eventually same-sex marriage became legal in France on 18 May 2013 when the law was promulgated after the Constitutional Council upheld it against the challenge mounted by the conservative UMP party.

20 My account of deliberative judgment's applicability in situations of antagonistic conflict is akin, in spirit, to John Dryzek's (2005, 218). However, while he is concerned with deep-seated identity conflicts, my concern is with what I have described here as structural domination and issues of social justice underlying identity conflicts.

than interpersonal)[21] dynamics of interaction between social subjects, subjects differentially positioned within the structure of social relations, but mutually related through this structure (as are employed and employers related in the dynamics of employment). To the extent that public deliberations involve the full range of socio-cultural diversity in society, they can be regarded as giving expression, in a dialogical form, of the larger dynamics of social interactions taking place in societies. Thus, the only procedural requirement is that of the full representation of society's socio-cultural profile (which in deliberative polls is ensured by random representative sampling). Such representation would enable the disclosure of the full range of social antagonism.

In the modus of 'rendering account', mutual justification proceeds as a process in which claims are directed inwardly, so to speak: participants do not present arguments in defense of their positions, they give account of the reasons for the positions they hold by disclosing their experiences of injustice. Thus, actors disclose the reasons for having reasons, that is, the second-order reasons related to who these actors socially are, reasons related to a person's position in the distribution of social status.

In this way 'rendering account' discloses the link between what Pierre Bourdieu called 'prise de position' and 'position': one's taking a position in a dispute, and one's social position.[22] In this process participants come to realize how their particular social positioning vis-à-vis one another in the structure of social relations is at the root of their disagreement. Ultimately, by disclosing the relational nature of the competing claims to justice, this process is likely to generate an understanding among participants of their mutual entanglement in the socio-structural production of injustice, thus allowing them to gain a view of the larger parameters of structural domination, irrespective of where they might be standing in the stratified distribution of power.

This understanding of agonistic judgment changes the status of democratic deliberations. Their function consists in enabling access to what I called the 'structural' dimension of domination by triggering a disclosure of the social origin of lived experiences of suffering. Due to these dynamics, the public sphere becomes a space for communicative enacting of social conflicts. It is here that antagonistic positions transform into agonistic relations, rooted in the shared awareness of the way agents are similarly subjected to forms of structural domination.

6. Conclusion: on the emancipatory potential of agonistic judgment

I offered a recasting of the communicative turn in democratic theory in which the (counterfactual) reliance on ideal conditions of deliberation is substituted by an account of the very social hermeneutics of justification in the clash of antagonistic

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21 Not interactions among individuals as unique persons, but as social subjects (marked by their particular place in the distribution of social competences).
22 He uses this distinction is a number of works. See, for instance, Bourdieu 1979.

positions contesting society's normative order. The emancipatory vocation of democratic deliberations in the modus of 'agonistic judgment' I adumbrated consists in the following: deliberations are to enable a disclosure of the way patterns of relational dominations are rooted in a larger pattern of structural domination, and to give, accordingly, a binding mandate to public authority for policy action against structural domination. Deployed in contemporary debates on justice—from gender inequality (the subordination of women in the workplace) to unsustainable growth (entailing both economic inequalities and ecological degradation)—such deliberations are likely to make it clear that neither proper inclusion of women in the labour market, nor remedial distribution of income, could be cogent solutions to the current social malaise of capitalist democracies.

Seemingly unrelated, and often mutually opposed, grievances of injustice form cognitive connections in the course of public debates—connections shedding a light on their common origin in the operative logic of the social system. It is unlikely that, when the negative externalities of production are included in economic deliberations, as the draft Council of Europe Charter on Shared Social Responsibilities prescribes, this will result in more than an increase in the products' price. However, if grievances of environmental degradation are pitted against those of developing nations' urgent need for economic growth, the very clash of seemingly irreconcilable claims is likely to draw out from the shadows of disagreement the compelling demands of globally integrated capitalism—which not only pillages nature, but defines what a valid need is—e.g. the purported needs of developing nations for urbanization and mass-scale agriculture as propagated by development aid policies.

This account of deliberative judgment is more strongly focused on the practical process of conflicting contestations of the social order, than on delineating the ideal conditions of consensus-building. With this, it has a better chance to satisfy the double imperative for political realism and social criticism.

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Neoliberal Politics of the 'Market'

Sakari Hänninen*

1. Ordering Europe

The EU and the EMU are in deep crisis. This is best recognized by people who have to carry the consequences personally, but cannot really influence the decisions of power-holders. From the perspective of the power-holders this crisis is about the order and stability of Europe. An almost apocalyptic experience of the end of history is certainly not new in Europe and could be understood as a discursive reflex of Christian tradition. According to the Christian apostles (Paul's Second Letter to the Thessalonians) and theologians (Hippolytus, Tertullian) the task of holding back the apocalypse belongs to *katéchon* who has the power to prevent the end of times from actualizing (Schmitt 1942; Hell 2009, 283). In the course of European history *katéchon* has been identified with many different actors, such as the Roman Empire and the Catholic Church. It is also too easily forgotten that the founding fathers of reunified Europe—Robert Schuman, Konrad Adenauer and Alcide De Gasperi—were all devout Roman Catholics who, in the aftermath of the tragic World War II, found their inspiration for European integration in the Neo-Thomistic revival of the Roman Catholic teaching, which was in actuality launched by Pope Leo XIII, as is evident in his encyclical *Aeterni Patris* of 1879 (Fimister 2008, 17, 32-33).

The Thomistic influence on European reunification was even more encompassing. It had already provided the foundational backbone for the integration project as an ordering mechanism. This connection was conspicuously present in the thought-collective of *ordoliberalism* which was practically responsible for originally drafting the *economic constitution*. This has steered the European integration project from the very beginning. The fixed point of the ordoliberal thinking is *order* and it can be easily traced back to scholastic doctrines of *ordo* in general and the Thomistic order-metaphysics in particular (Wegman 2002, 204-210). Besides the German ordoliberals, the Thomistic metaphysics had a profound influence also on French thinkers between the two World Wars, who were perplexed by the chaotic

circumstances of Europe due not only to fascism and communism, but the perplexities of classical liberalism. In this vein the French philosopher Louis Rougier, who had also published a book *La scolastique et le Thomisme* and was equally enthusiastic about Walter Lippmann's book *The Good Society*, made the first initiative for an international meeting, the *Walter Lippman Colloquium*, held in Paris in 1938 where the term *neo-liberalism* was first articulated (Wegman 2002, 205; Denord 2009, 45).

'Order' has been the pivotal motif and symbol of a unified Europe that was in the past dominated by empires and is still the genuine goal of European integration, which has global aspirations. World War II signified a catastrophic downfall of Europe due to rival and antagonistic national sovereignties. Against this background it could be pondered whether the coming European Community was meant to incarnate the *katéchon*, which could hold back the perpetual danger of European apocalypse. I think that this is exactly so, and, for this reason, 'order' can be understood as a symbol of European government. The important point to reckon here is that the danger of chaos, anarchy and disorder represents the most serious threat to the hegemonic 'European mind'. This is the case, now, that the European Union has ended up in the most severe crisis of its entire integration history. This is not only an economic, political and social crisis, but an existential crisis threatening people's ontological security. The experiences of insecurity and uncertainty also weaken sentiments of trust and confidence which are essential for the balanced functioning of the EU market economy.

2. Steps towards the resolution of the EU-crisis

Many Europeans are today looking at chaos and disorder face to face in their personal and communal lives, not least in Greece and Cyprus, due to the economic, political and social crises in their countries. Although the European crisis is globally orchestrated, it is basically a cross-border crisis of the banking and monetary system of the European Union culminating in the sovereign debt crisis of some member states. It would be tempting to put the blame for the European crisis on some definite actors for taking the leading steps towards the downfall, or on some dysfunctional mechanisms producing such unfortunate outcomes. In this manner investment firms, banks and other credit institutions have been blamed for greedy, short-sighted and risky behavior; politicians have been accused of unwarranted promises, counterproductive policies and reckless spending; citizens have been criticized for irresponsible exploitation of their own future on loan money; bureaucracies and clientele networks have been claimed to advance corporate interests at the expense of public good; financial markets have been argued to embody the contradictory logic of advanced capitalism, while political democracy has been finally charged as an inefficient political machine. In these debates the critique of the irrationality of the visible hand can be seen to challenge the critique of the irrationality of the invisible hand, but neither one of these critiques seem to recognize the complexity of the present crisis.

Rather than just a problem of either a visible or invisible hand, the present

European crisis is a *problem of many hands.* In situations characterized by the problem of many hands, highly unwelcome effects and outcomes occur in such a fashion that it is not possible to hold any individual actor reasonably responsible for them (van de Poel, Nihlén Fahlquist, Doorn, Zwart & Royakkers 2012). The present European crisis is a problem of many hands which has come about by a series of highly complex coincidences, multidimensional measures and asymmetric strategies. This may also explain why, in the EU, there was a lack of special powers and tools to manage the failure of banks in an orderly way when the crisis actually broke out.

In facing the crisis the authorities in the EU basically found themselves in a position to either place banks into formal insolvency procedures or to rescue the banks using public funds (Commission Staff Working Document 2012, 9). We know that the latter strategy was chosen at the expense of tax-payers. This strategy was chosen in spite of the outspoken principles and priorities claiming that the taking of responsibility should follow the taking of risks (by banks, investment firms, shareholders and their host countries) and should not be levied on the shoulders of ordinary citizens. The chosen strategy seems to even challenge the neoclassical credo that 'a voluntary market-based approach is more effective and appropriate than a unilateral, top-down approach to debt restructuring' (Report of the Joint Committee 2012, 4). By the neoclassical credo I understand a solution which lets the markets as a resolution regime decide why and how those that take the risks must carry the responsibility, even if this means bankruptcies.

Do we then have to conclude that the EU crisis management highlights that the authorities did not have enough trust in the markets? Before answering this question we should really think of a more sceptical alternative. It is possible that lobbies, interest organizations and expert agencies speaking on behalf of the big banking groups and investment firms facing great losses may have decisively influenced the adopted measures for the management of the crisis for their own benefit. By looking at the particular actors and agencies which were publicly consulted by the Commission, it is conspicuous how closely and carefully the banking group and investment firm-interests were listened to (Commission Staff Working Document 2012, 85-87). In this light it is no big surprise that the real bill of the crisis was levied on taxpayers, and not only in the host countries of the cross-border banks. It was further ascertained that the crisis management was in the proper hands of the Trilateral commission. This sceptical alternative unveils much truth about what happened, but it is still too simple an explanation of a very complex phenomenon even though it radically reminds us of the shortcomings of politics in the EU. The question about how markets were and could be trusted is of paramount importance here.

Trust is a crucial factor in the functioning of the financial markets, since the banking business is based on trust:

> Bank's most important capital is the reputation, i.e. the confidence of others
> in it. If confidence is lost depositors and other debtors immediately try to

withdraw their funds. This would make the bank unavoidably bankrupt since no bank holds sufficient liquid assets to cover all short term liabilities. Bank failures are capable of undermining financial stability, especially if they lead to a loss of depositor confidence in other banks. During this crisis these issues led Governments to, for the most part, recapitalize and save failing banks. (Commission Staff Working Document 2012, 9.)

These issues of reputation and trust led the authorities to conclude that rescuing banks with public funds (bailout) was the only solution since bankruptcies would generate mimetic panic, systemic risk of escalation and contagion of fear and anxiety as a domino effect leading to instability and disorder. Another reason that 'authorities did not oblige creditors to pay in the crisis, or eliminate the holdings of shareholders was because they did not have a legal mechanism to do so in an orderly manner without causing further financial disruption' (Commission Staff Working Document 2012, 10).

3. Neoliberalism in action

From whatever perspective one approaches the crisis management in the EU it is clear that the *telos* of market order and stability dictates the rationality for the resolution measures. It is just as evident that financial markets characterized by contagious drives and mimetic desire cannot be trusted to arrive at equilibrium automatically, especially in times of severe crisis, but that such an order must be effectively constructed. This does not mean, however, that in such governmental rationality markets were to be displaced by some other mechanism. On the contrary, markets were and are seen as the solution, but markets must be constantly constructed to function effectively. This is the point of departure for both ordoliberalism and US-type neoliberalism. A secret of the management of the present EU-crisis is the recognition that the markets should have been constructed more effectively, in spite of the internal market project. It is being claimed that in order to function optimally, and this coincides with the neoliberal ideal of market order, the markets must be constantly constructed by measures of both *rule* and *governance*. If ruling can be traditionally located in the sovereign legal rules, then the governing can be recognized in all those molecular practices of power which conduct the conduct of humans living together.

The management of the EU-crisis represents a complex, hybrid regime of government, in which neoliberal politics of the 'market' plays a crucial role in attempting to retain and restore market order. Neoliberalism is not only characterized by bail-outs and austerity measures but by its working on the sentiments and expectations of people, whose confidence and trust in the 'system' is of paramount importance. If successful, the neoliberal effect can be recognized in the market-affirmative common sense—or what Thurman Arnold calls 'folklore of capitalism' (Arnold 1937)—which coordinates human conduct. In this article I will not evaluate the success of the neoliberal effort to manage the EU-crisis, but shall focus on the

political predicament of neoliberalism which contradicts and challenges political democracy and democratic politics.

The governmental starting point of neoliberalism is that, even though markets are understood ultimately to solve any problem at hand, markets are not supposed to be 'out there' as a natural given or a gift of nature (God), but these must be constantly constructed by man. It is, though, an open question in what kind of time-span this construction of markets is understood to take place and in what kind of combination between ruling and governing. For this reason, the boundary between classical laissez faire-liberalism and neoliberalism is anything but clear.

The ordoliberals, whose influence on the concrete shape of the European integration has been decisive, were not so hostile towards national sovereign states (ruling), since they actually considered them to have a much more positive and significant role to play in the constant construction of the markets. While approaching the construction of markets within a human life-span, they were not satisfied with an ideological doctrine but wanted to find practical solutions to urgent problems of market societies, and for this pragmatic reason, they did not overlook the sovereign capabilities for ruling and governing markets so that these would better meet their own ideal. This may sound paradoxical but ordoliberalism just like neoliberalism in general is paradoxical liberalism. It acknowledges, at least implicitly, that classical laissez faire liberalism was founded upon an antinomy. This is the antinomy of automatic market equilibrium.

Neoliberalism argues that markets must be constantly constructed by agents who have deep trust in their optimality. In its radical form—in the version of Chicago neoliberalism—this implies that state and government are under the supervision of the market and the exercise of political power can be modeled on the principles of the market economy (Foucault 2008, 116). In order to accomplish this neoliberalism was ready to give up the classical liberal conviction that market economy and state politics should be definitely separated from each other, since it deemed it necessary that state politics should be made to serve the economy by adopting its rationality. Therefore, as pointed out by Rob Van Horn and Philip Mirowski (2009, 152), neoliberalism is 'more economically oriented' than classical liberalism. By making state politics systematically subservient to market economy it was thus presumed that both a self-realizing system of market economy and a self-delimiting, if not a self-annulling, system of democratic politics could be simultaneously created. It was argued that by serving the market economy successfully, democratic state politics made itself gradually marginal, if not unnecessary, since the market economy step by step started to function in such an orderly fashion that it provided a perfect balancing mechanism for solving conflicts between particular private desires and interests without negative political intervention.

Various variants of neoliberalism basically differ in their strategic judgment about the degree and speed in which these intertwined processes, often interpreted in terms of behavioral patterns of rational choice, are able to proceed in given circumstances. While ordoliberals thought that they were just in the beginning of the

process of institutionalizing the promise of market economy, they thought that the sovereign state had still a lot to offer in making the markets function more optimally. For this reason, they emphasized that the state was especially needed to guarantee the optimal conditions of the market which, above all, meant the organizing of the market order as an order of competition (Foucault 2008, 138, 141). Neoliberals of the Chicago school, however, presumed that trust in the market economy had become common sense in America and hence recognized no need to emphasize the positive role of the state in hardly any connection. In fact, the Chicago-type neoliberalism saw a real chance for generalizing the economic form of market rationality across all domains of life (Foucault 2008, 243, 323). Symptomatically Gary Becker talks about economics of life (Becker 1992). The insight behind this slogan was also quite familiar to ordoliberals. Rüstow talked about a politics of life, a 'Vitalpolitik', and evidently understood by it an entrepreneurial ethos of life, which was necessary for an active, vigilant mode of neoliberal government (Foucault 2008, 133, 148). Entrepreneurialism can be seen as a real link between these two variants of neoliberalism. Both of these understood the *homo œconomicus* as an entrepreneur (Foucault 2008, 226).

4. Paradoxical neoliberalism

Neoliberalism challenges the neo-classically understood logic of advanced capitalism on the grounds that the conditions of markets must be constantly constructed by man, and so the market order cannot be automatically taken for granted, but must be rationally promoted. But what do the construction of conditions for markets and the promotion of market order actually mean? Neoliberalism realizes that capitalist markets can function optimally (in line with their ideal) only on the condition that these are run by market agents whose policies express deep trust and confidence in their optimal functioning. It is not sufficient to assume that this kind of optimal result can be achieved by 'markets alone'. Neoliberalism has taken up the task of promoting this trust and confidence by celebrating markets in all conceivable means. Neoliberalism exercises a *politics of knowledge and truth* which aims at making us up as self-reliant entrepreneurial individuals.

Neoliberalism seems to recognize that the antinomic logic of (neo)classical liberalism necessarily moves in circles, while it proves the equilibrium of the system by positing the conclusion as a premise. In this reasoning the 'system' must be already in equilibrium in order to be in equilibrium, which is reflected in the 'proof'. In this sense, the equilibrium as order could be understood as circular-causal 'betweenness' of these terms (Korzybski 2000, 152). The practical paradox of neoliberalism is that it takes this circular reasoning one step further by actually claiming that the capitalist market economy functions optimally when it is believed and trusted that it functions optimally. Therefore, neoliberalism as an international thought-collective, at least ever since the Walter Lippman Colloquium, embarked on a mission to build up, reinforce and consolidate this belief and trust in the capitalist market economy—manifest in credibility, confidence and reputation—both in theory and practice.

Neoliberalism has been so successful globally in its politics of knowledge and truth that since the 1970s it has succeeded in becoming almost common sense, especially in the international networks of top managers, notable policy-makers, power players and other such dignitaries. Neoliberalism has penetrated deeply into the social fabric of different societies, also in Europe. This is rather a sentimental than a rational outcome, if by rationality we mean something like consistency in economic modeling. One of the most efficient means of neoliberal influence has been the commodification of its thought-forms as books and articles, policies, editorials, commercials, awards, managerial advice, consultations, movies, fashion shows, guidelines, text-books, evaluations, columns, elections, media performances and other spectacles. Perhaps the success of its influence is that it has operated in the capitalist markets—in financial markets, commodity markets, law markets, policy markets, science markets etc.—while it has simultaneously aimed at reinforcing the belief and trust in these markets. It is, therefore, not at all accidental that the triumph of neoliberalism coincided with the increasing frenzy and mania taking hold of the financial markets in the 1990s when the craving for easy money and high profits, risky speculations and hedging against risk, dud borrowings, trading with financial derivatives and like measures became a kind of 'monetary mimesis' backed up by the definite belief and trust in the optimal functioning of the capitalist financial markets. As we now know, this belief and trust was quite ill-founded. The EU-crisis is one testimony of the consequences of this euphoria.

The irony of the management of the EU-crisis is that it tries to solve this crisis with similar neoliberal measures and means which were crucially responsible for the generation of the crisis in the first place. The outspoken rationality of this crisis management is to restore the trust of the markets which is a reason that by 'personifying' the markets all of us are constantly being warned not to irritate the markets in any way since that would only make the markets mad and furious, and we would all have to carry the grave consequences of this disorder and imbalance. With this gesture of restoration there takes place a symbolic twist in words: in this crisis it is argued that markets must trust us, while before the crisis we were encouraged to trust the markets. This is a symptomatic and significant reversal of words, but it really does not change the neoliberal argument, but only supplements it with a warrant. It claims that *markets are now testing our trust in the markets*.

5. Political logic of populism

The neoliberal rationality of government, as it is applied in the EU crisis management, could be contrasted with political populism. I cannot agree with this claim. Rather, I argue that the neoliberal EU crisis management venture resembles the *political logic of populism*. This argument claims that the neoliberal mode of governing is both political and populist as it represents the populist politics of the market, the main aim of which is to build up and reinforce people's trust and belief in the market. This kind of neoliberal populist politics, however, has quite opposite aims than the cultural-conservative, nationalistic and plebeian populism present in many

European countries, even though it follows quite a similar logic. This is a surprising argument which must be further clarified.

Ernesto Laclau interprets populism to refer to a political logic rather than a type of political movement (Laclau 2007). Laclau argues that such logic is composed of the *logic of difference* and the *logic of equivalence* (or of similitude), which are the two modes of constructing social subjectivity. These were understood traditionally in terms of social differentiation and social homogeneity (Laclau 2007, 61, 78). In the first mode, a particularity of isolated democratic demands is asserted or confirmed. In the second mode, isolated demands through their equivalential articulation are transformed into popular demands, as if expressed naturally from the lips of the 'everyman', while simultaneously drawing an internal antagonistic frontier ruling out the claims of the opponent. Therefore, through their appeals to speak for the 'everyman', a plurality of isolated democratic demands are transformed into popular demands which can, then, constitute 'people' as a potential historical actor. Here we have, in embryo, a populist configuration and the two clear preconditions of populism: an equivalential articulation of demands making the emergence of 'people' possible, and the formation of an internal antagonistic frontier separating 'people' from power (Laclau 2007, 74).

The tentative conclusion is clear: populism emerges to the extent that the expansion of the equivalential logic takes place at the expense of the differential one. Even though Laclau equates the differential logic with isolated democratic demands, he does not explicitly contrast populism with democracy, since he does not relate 'democratic demands' to any kind of democratic regime. He emphasizes that these democratic demands, though, must be formulated by an underdog of sorts, and that their very emergence presupposes some kind of exclusion or deprivation (Laclau 2007, 125). I do not personally think that these qualifications are necessary, since the driving forces of populism need not be related to underdog positions or deprivation, but can be quite well generated by different kinds of dissatisfaction, anxiety, frustration and even rage towards the rival political paradigm. I argue that the populist reason, which downplays the differential logic, actually contradicts democracy whatever the particular mental dispositive behind it. In order for a populist political construction of social subjectivity to succeed, the equivalential chain has to be condensed around empty signifiers (popular identity) with maximum coverage of demands (extension) with minimum content (intension). For Laclau, this kind of design of populist reason is still too simple. Two further qualifications have to be introduced (Laclau 2007, 78-79, 117-127).

Firstly, since there is no direct conceptual transition or semiotic passage from differences to equivalences, something qualitatively new has to intervene: the retroactive effect of *naming*, which actually specifies how empty signifiers operate in this populist political construction. The name itself, the signifier, supports the equivalential ensemble. In this way a part can function as a representative of the whole, just like a *plebs* can claim to be identical with, and to represent, the *populus*. Secondly, both difference and equivalence have to reflectively relate to each other

so that the logic of the displacements at the political frontier between antagonistic forces is addressed. In this manner oppositions and antagonisms between substantial issues and interests and their exponents could be, for example, displaced or overcome by a plea for patriotism with which all responsible citizens should identify. For this purpose, the distinction between 'empty signifiers' and 'floating signifiers' becomes pivotal. Floating signifiers reveal how displacements of this frontier take place, how the meaning of particular demands is indeterminate between alternative equivalential frontiers. The crucial reason for this indeterminacy is that the equivalential chain is not only opposed to an antagonistic force, but also to that which does not have access to a general space of representation. Laclau calls this type of exteriority *social heterogeneity*, and it could be related e.g. to the 'bull's eye population', to 'people without history' or the 'socially most disadvantaged (Laclau 2007, 110-111, 123-124, 129-132, 139-156).

Even taking account of these more complex qualifications the crude political logic of populism can be claimed to be quite simple. Populism is basically linked with the equivalential construction of the 'people' so that politics can be then exercised in the 'name of the people'. The populist political construction of the social subjectivity is, thus, a question of representation by naming so that a part (plebs) can represent the whole (populus). This is a discursive construction of the social subjectivity by means of 'empty' and 'floating' signifiers. Representation must be, thus, understood as a two-way-movement between the representative and the represented so that the represented are both constituted and constitutive of representation (Laclau 2007, 157-171).

6. Populist politics of the market

Ernesto Laclau argues that neo-liberalism, just like welfare state rationality, accepts only the differential logic as the legitimate way of constructing the social subjectivity and, thus, any social needs and isolated demands should be met differentially. Laclau claims that neo-liberalism, thus, presents itself as a panacea for a fissureless society (Laclau 2007, 79). I quite disagree with Laclau, who does not seem to pay enough attention to the distinction between classical liberalism and neo-liberalism concerning the relation between market economy and politics. Neo-liberalism can only be said to present itself as a panacea for a fissureless society, i.e. through order and stability, by exercising a politics of the market which follows a specific political logic. Since neoliberalism argues that markets can function optimally only on the condition of belief, trust, confidence and reputation, it is necessary to have a neoliberal politics of the 'market' to reinforce these sentiments. My argument is that such a neoliberal politics of the market follows a political logic very similar to that of populism.

Laclau gives us an outstanding example of the successful politics of the 'market' by referring to the year 1989 in Eastern Europe: 'For a short time after 1989, for instance, the "market" signified, in Eastern Europe, much more than a purely economic arrangement: it embraced, through equivalential links, contents such as

the end of bureaucratic rule, civil freedoms, catching up with the West, and so forth'. (Laclau 2007, 95). This example points out how the 'market' was made to signify the positive symbol of government or the symbolic framework of society (Laclau 2007, 107), which nurtured confidence and trust. In this case, the 'market' was constructed politically, although it is quite another question as to what was the role of neoliberal rationality in that construction. It is evident that the political construction of the 'people' and the political construction of the 'market' can follow a very similar political logic.

The might of the 'market' could be characterized as 'virtual', 'abstract' or 'gaming', but none of these really capture the un-nameable quality of this might, which is equivalentially articulated. The might of the 'market', just like the power of the 'people', draws its strength from the coherence or unity of the equivalential ensemble as an object of identification—popular identity—which is guaranteed by the empty character of signifiers (Laclau 2007, 98). Popular identity functions as a tendentially empty signifier. When we talk about empty signifiers, in Laclau's sense, 'we mean that there is a place, within the system of signification, which is constitutively irrepresentable; in that sense it remains empty, but this is an emptiness which I can signify, because we are dealing with a *void* within signification' (Laclau 2007, 105). Laclau suggests that the 'void within signification' could be compared with the *zero* as the absence of number. He proposes, that by giving a name to that absence, it is possible to transform the 'zero' into a 'one' (Laclau 2007, 105). This is a crucial clue to understanding how the might of the 'market' functions in financial capitalism in the form of money, capital and above all 'xenomoney' such as derivatives, and how the neo-liberal politics of the 'market' exalts this might to gain popular support for its rationality.

In today's financial capitalism 'xenomoney' as a sign, which creates itself out of the future, makes it easier to understand why and how this self-referential system ran into deep crisis. This crisis was especially accelerated by the neo-liberal politics of the 'market' which built up trust and confidence in this 'system' by way of identification, imitation and mimesis. So far I have argued that the political construction of the 'market' follows quite a similar logic to that of the populist political construction of the 'people'. But is this neoliberal politics of the 'market' really populist? In this case the differential demands, which need not express any kind of deprivation even if they stem from a lack of desire satisfaction, are also equivalentially articulated and are transformed into popular demands constituting a broader social subjectivity, which makes the identification with the 'market' possible. The neoliberal political construction of the 'market' refers to the construction of the 'market identity', i.e. trust and confidence in the market, which is condensed around empty signifiers. The identification with the 'market' can mean identification with the 'capitalist market' or the 'capitalist financial market', or just identification with 'capital'. The identification with 'capital' is particularly intelligible in the discourse about varieties of capital, which are prefixed with subjective characteristics such as human capital, intellectual capital, social capital, religious capital etc. It is no big surprise that these varieties

of capital have been especially developed and advanced by the Chicago neoliberal school of economics.

Just like the *pleb* sees itself as the *populus* in the populist discourse, so in the neoliberal discourse the entrepreneur (as homo œconomicus) is pictured as embodying the legitimate 'market identity'. With this rhetorical trope of *synecdoche*, in which a part represents the whole, the neoliberal politics of the market finds in the *entrepreneur* an excellent and concrete figure for popular identification. In this figure of the entrepreneur the neoliberal politics perfects the 'market identity' as an ideal totality. In this way, the equivalential relations are crystallized in a certain discursive identity of an entrepreneur. Representing the equivalential link as such, the entrepreneur expresses the aspiration of a partiality or singularity to be seen as the social totality or universality. The plurality of equivalential links, kept together only by name (money, capital), becomes a singularity through its condensation around the popular identity of the entrepreneur (Laclau 2007, 93-94, 100). This reasoning leads to an interesting conclusion:

> The less a society is kept together by immanent differential mechanisms, the more it depends, for its coherence, on this transcendent, singular moment. But the extreme form of singularity is an individuality. In this way, almost imperceptibly, the equivalential logic leads to singularity, and singularity to identification of the unity of the group with the name of the leader. (Laclau 2007, 100.)

This is again no big surprise since the 'dirty little secret' of neoliberalism is that it represents politically authoritarian liberalism which criticizes political democracy from the exceptional point of view of the *entrepreneur* as an ideal leader: the manager.

Finally, the neoliberal politics of the 'market' fulfills another of the necessary preconditions of populism: the formation of an internal frontier separating the advocated popular identity from its antagonistic rival. In the standard version of populism this antagonistic frontier separates the 'people' from power (Laclau 2007, 74). In the neoliberal configuration the internal antagonistic frontier separates the 'market' and the 'rule of law' from the 'plan'—which is perhaps most explicitly stated in Hayek's *The Road to Serfdom* and *The Constitution of Liberty* (Foucault 2008, 172, 182). The discursive construction of the 'plan' and 'state intervention' as the antagonistic force to the 'market' and the 'entrepreneurial ethos' makes it possible for neoliberalism to depict society as staging two irreducible camps structured around two incompatible equivalential chains. The radicalness of this antagonism between the two camps involves its conceptual irrepresentability (Laclau 2008, 83-84), since the two camps do not have any common language to handle their conflict. This makes it understandable why 'naming' rather than 'conceptual determination' provides the mode in which the neoliberal politics of the 'market' expresses itself (Laclau 2008, 101).

It is noteworthy that the antagonistic internal frontier is drawn by

neoliberalism between the 'market' and the 'plan' or such 'state interventionism' which interferes with the functioning of the market. Traditionally these forces behind state intervention and planning have been equivalentially linked with the mindset of the political left and the working class. The innovative quality of the neoliberal politics of the 'market' can be recognized in the manner in which it blurs the traditional dichotomic frontier between these two camps, by downplaying the opposition between capital and labor and between the entrepreneurial class and the working class. In the discourse of the neoliberal politics of the 'market' there takes place a crucial displacement of internal antagonistic frontiers by floating signifiers so that there is no longer any place for the opposition between capital and labor, since we all could and should adopt an entrepreneurial identity. As entrepreneurs we are ourselves responsible for what happens to us in life, for good or for bad, and, therefore, there is no need to blame or praise something beyond our own radical personal investments in us. There is no reason to blame the market for ills or ask the state for help when in trouble. This is the final piece of evidence that the neoliberal politics of the 'market' follows the political logic of populism as it points out how, in this discourse, the 'market', just like in traditional political populism the 'people', is eulogized as the 'sacred' beyond critique.

7. Beyond democratic political judgment

The distinction between the liberal and the neoliberal politics of the 'market' is not often easy to make, although it is analytically quite clear. While both of them can argue that the 'market' is the optimal mechanism for managing the economy, the neoliberal politics of the 'market' goes much further by claiming that the 'market' is an optimal mechanism for the overall management of social transactions. However, in order to function optimally the 'market' and the 'market identity' have to be politically constructed. This construction follows the political logic of populism. This kind of political rationality has radical implications for judging political democracy. My basic argument is that the neoliberal politics of the 'market' not only attacks the 'plan' and 'state interventionism' as an antagonistic rival but also challenges political democracy as an outdated, crisis-ridden decision-making mechanism—something that classical liberalism does not do. A classic example of this kind of critical challenge was offered by the programmatic study *The Crisis of Democracy* ordered by the Trilateral Commission in the middle of the 1970s (Crozier, Huntington & Watanuki 1975).

The conclusion of the Trilateral Commission study was that democracy must be governmentally limited in order to better manage the flood of all isolated democratic demands encouraged by a democratic political system. It was suggested that a new governmental system of signification should be equivalentially articulated for governing democracy effectively. This is a neoliberal proposal which blurs the classic liberal distinction between economy and politics, since it definitely aims at making 'state' and 'politics' serve the market economy in the name of competition and efficiency. The new neoliberal regime is equivalentially articulated in the

language of 'governance' which, thereby, serves in the delimiting displacement of political democracy.

There are good studies which show how the neoliberal politics of the 'market' takes place. Nicolas Jabko's study *Playing the Market* (Jabko 2006) examines how the gradual liberalization of electricity supply in the EU was accomplished especially due to the determined political utilization of the 'market' as a norm exercised by the EU Commission. Without labeling the Commission's endeavors neoliberal he examines how this politics of the 'market' as the norm reshaped the expectations of the main actors, and exploited effectively 'ceremonial elements' of naming (calculating), and, in every turn, made a plea to market efficiency and competition applying also tactically the stick of competition law (Jabko 2006, 99, 101-102, 104, 107-108, 119).

While admitting that interests, ideas and institutions played a role at various points in this process of electricity liberalization, Jabko concludes that the most powerful force behind the liberalization was the politics of the 'market' exercised especially by the Commission (Jabko 2006, 119-120). Jabko, though, emphasizes that the norm of the 'market' does not in itself explain the success of the electricity reform, since this politics of the 'market' took place in a complex, strategic field of forces, where many different players had a role to play, and not just the Commission or the neoliberal forces. The example of the electricity supply liberalization, just like other European privatizing reforms of collective services, reminds of the fact that market pressures alone would not have been sufficient to bring about fully fledged liberalization (Jabko 2006, 95-96).

In his book *Imagining Markets. The Discursive Politics of Neoliberalism* P. W. Zuidhof gives a remarkable example of the neoliberal politics of the 'market': 'terrorism market'. The Defense Advanced Research Projects Agency (DARPA) unit of the US Department of Defense headed by John Poindexter, in the early 2000s, had developed a 'terrorism market' as a tool to predict the likeliness of future terrorist attacks, i.e. 'a version of policy markets used to predict events by creating a virtual market where predictions are traded as futures' (Zuidhof 2012, 2). Even if some prominent US senators, at first sight, thought that this news was just a distasteful joke, they soon realized that this was not the case, and, therefore, mobilized an opposition to the program (Zuidhof 2012, 2). Irrespective of its fate, the 'terrorist market' makes the point that in the neoliberal mindset 'it is not unthinkable to imagine a market for basically anything' (Zuidhof 2012, 5). In fact, there is now a market for basically everything, also in Europe.

In a similar manner to Ernesto Laclau, P.W. Zuidhof claims that the 'market' is increasingly perceived as the panacea for any political question (Zuidhof 2012, 5). Zuidhof's acute claim is that neoliberalism is best understood as a kind of discursive politics of the 'market metaphor' which is so elusive that it cannot be reduced to only one or two definite versions (Zuidhof 2012, 5, 10-11, 17, 21, 117, 119, 123-125). What is at stake in all neoliberal efforts, in marketing the 'market solution' to just about any politically conceived problem at hand, is not only to propose the 'market' as a substitute for the state (Zuidhof 2012, 11) but also to challenge political

democracy. Zuidhof refers to the cultural critic Thomas Frank, who has emphasized how the 'market' has been, by now, turned into a cultural icon in such a fashion that this brand could be called 'market populism' (Zuidhof 2012, 8; Frank 2001, 29). P.D. Zuidhof emphasizes the distinction between ordoliberalism and the US neoliberalism. Zuidhof relates this distinction to different kinds of constructivism:

> The market constructivism of American neoliberalism is […] much more radical than its German version […] Where the latter was primarily concerned with the active organization of the economy along the precepts of a competitive market, the American view radically reconstructs virtually every form of social action using the market grid of intelligibility. As opposed to the real or factual constructivism of the German school, the constructivism of the American school is primarily a kind of hypothetical or counterfactual constructivism. This counterfactual character is a rather logical consequence of the extension of the market beyond the scope of what counts as the real economy. The market constructivism of American neoliberalism is hence wider in scope but somewhat more virtual than the constructivism of the German neoliberals. (Zuidhof 2012, 146.)

I am convinced that neoliberalism as a politics of the 'market' challenges political democracy in general, and that the US version of neoliberalism does so in particular. In doing so it actually reminds of the political logic of populism which also argues counterfactually as if there were available unanimous and fully informed decisions by the popular leader for all the particular issues on agenda, or unanimously agreeable and valid answers to all the particular problems at hand. The difference is naturally that neoliberalism asks us to trust and identify with the 'market' rather than the political leader, but indirectly it also asks us to trust the protagonists of the market forces such as entrepreneurs, shareholders and managers.

To make my point about neoliberalism's critique of political democracy more clearly, I shall take advantage of the Douglas-Wildavsky chart of four problems of risk, in which risk is seen as a joint product of knowledge about the future and consent about the most desired future prospects (Douglas and Wildavsky 1982, 5). In facing political challenges understood as risks to order and stability, neoliberalism is inclined to 'domesticate risks' by positing them as technical problems to be solved by calculations made in the market. In this fashion problems and their solutions are performatively staged in a diagram in which consent about future prospects and alternatives is presumed to be complete while knowledge about the future is assumed to be certain.

In the context of political democracy, where proposed answers and solutions to complex political problems can be contested—just like the validity of the truth-claims and arguments behind these answers and solutions can be questioned—neoliberal assumptions (about technical calculability) must be seen as counterfactual. Problem-solving and action is possible in political democracy only if we understand ourselves to be living in a world situated between absolute certainty and absolute uncertainty.

This way of framing the question reminds of the contrast between the equivalential logic of populism and the differential logic of democracy.

There are different versions and different degrees of populism and neoliberalism, which basically depend on how the logic of equivalence and the logic of difference function in their diagrams. The most extreme mode is made possible by understanding the equivalential articulation to express complete consent and perfect certainty of knowledge, while the isolated differential demands are seen as including opposite expressions of a situation characterized by complete dissension and comprehensive uncertainty. In such a setting radical populism or neoliberalism is claimed to provide an optimal, unanimous and valid answer to problems, which are seen as impossible to solve due to complete dissension and comprehensive uncertainty. The only mode to conceive this as a possibility is pure counterfactuality, perceiving the world as if it complied perfectly with the neoliberal market model(ing). It is precisely this counterfactual strategy which challenges political democracy by displacing or passing it as an arguably inefficient and expensive means of managing humans, things and their relations.

In order to get a better picture of how ordoliberalism and the Chicago neoliberalism challenge political democracy, by following either a strong and radical counterfactual strategy (the Chicago version) or a weak and moderate counterfactual strategy (ordoliberalism), a chart *Neoliberal displacement of democracy* is drawn. In this chart the neoliberal politics of the 'market' is pictured to proceed in four major stages. First, the mobilization of the neoliberal strategy starts in the democratic political field (A), where it must compete with other political forces. Second, one can recognize, next, the neoliberal formation of an internal antagonistic frontier separating the 'liberal market' from the 'repressive plan' (B) and an equivalential articulation of demands making the emergence of the 'liberal market' possible (C). Third, it becomes evident that the more counterfactually the neoliberal strategy argues in offering the 'market' as the solution to problems at hand, the more decisively this neoliberal policy aims at bypassing or displacing political democracy. Accordingly, two trajectories can be drawn in the chart for illustrating how the US neoliberalism expresses strong counterfactualism as a radical challenge to political democracy (iii), and how ordoliberalism expresses weak counterfactualism as a moderate challenge to political democracy (ii). Fourth, neoliberalism can be finally understood to present itself performatively as the protagonist (C) of fully informed (ratio) and completely legitimate or unanimously acceptable (voluntas) answers and solutions to current problems on the agenda. This kind of performative politics of the 'market' finds expression in spectacles of truth.

I have titled the chart as *Neoliberal displacement of democracy* to emphasize that ultimately the neoliberal politics of the 'market' not only challenges 'state interventionism' or 'planning' but political democracy. It does so more or less gradually, since it aims at making itself unnecessary as politics originally rooted in the democratic field (A). This is a paradoxical challenge from the outset, since neoliberalism represents politics pushing off from the democratic field while aiming

at finding a trajectory of governance, which is altogether above democratic discussion and deliberation. The chart *Neoliberal displacement of democracy* can be outlined in the following figure:

Neoliberal displacement of democracy
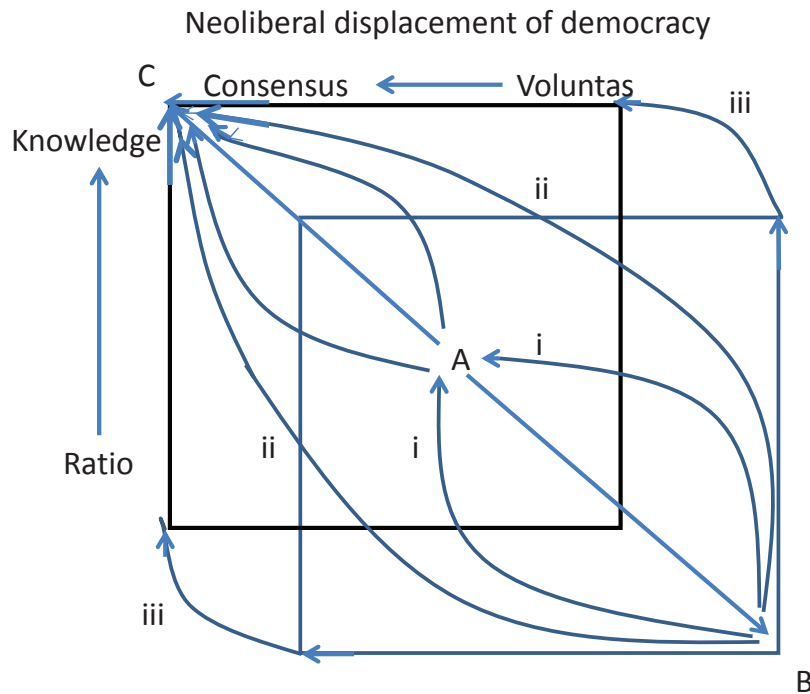
This chart 'Neoliberal displacement of democracy' pictures the neoliberal politics of the 'market' in terms of its scope or range and its degree or order. The more extensive is the scope or range and the higher the degree or order, the more radical neoliberalism is. The scope or range of neoliberalism increases in relation to the distance between the logic of difference (AB) and the logic of equivalence (AC), i.e. in relation to the real arduousness of the problem-solving task. It is possible to speak about short-range, middle-range- and long-range-problem solving efforts according to increasing arduousness. Radical neoliberalism can be claimed to treat many pragmatic short-range or middle-range problems as if they were long-range problems for which it offers ideologically premised abstract answers. The degree or order of neoliberalism increases in relation to the distance between its own problem-solving trajectory from the field of political democracy. It is possible to speak about different degrees of counterfactuality typically concealed in the foundational premises and assumptions of given problem solving arguments.

The difference between German ordoliberalism and the US neoliberalism is pictured in the chart as the two trajectories (ii and iii) that are drawn especially due to their different degrees of counterfactualism. The radically counterfactual US neoliberalism avoids re-entrance into the field of political democracy when introducing its (technically calculated) solutions and answers presented as fully informed and unanimous decisions made by the markets. The German ordoliberalism is more pragmatic and open-minded to democratic deliberation

in presenting its own market-based solutions to problems, which are perceived from a more middle-range perspective. Ordoliberalism, though, diverges from such democratically anchored problem-solving practices (trajectory i), which start by acknowledging the agonistic and conflictual nature of the issues on the agenda (B) and by seeking to present suggestions and solutions for public discussion and deliberation in the democratic arenas (A). These suggestions cannot be understood as fully informed or unanimous. The crisis management measures in the EU formulated and orchestrated by a closed circle of transnational agencies and actors beyond democratic control, on the contrary, tend to be marketed as the only valid alternative available, viable and acceptable. This is an authoritarian solution.

From the democratic perspective neoliberalism is authoritarian. The neoliberal politics of the 'market' reminds of the political logic of populism, but instead of confidence in the 'people' and their representative, 'the political leader', it is based on the confidence in the 'markets' and their representative, the 'economic(s) man'. The authoritarian quality of neoliberalism is basically *symbolic* in the sense that we are asked to freely but unquestionably identify with the 'market metaphor'. The neoliberal politics of the 'market' means governing with symbols and ruling with words in the same sense that Thurman Arnold spoke a long time ago of symbols of government (Arnold 1935) as the common folklore: the folklore of capitalism (Arnold 1937). The crucial factor in the functioning of this folklore is the mimetic mechanism of identification and imitation—the 'Is' of Identity (Korzybski 2000; Burroughs 1999)—which is also the main medium in the displacement of the political democracy of representation. By displacing representation by mimetic identification with the right answer, the neoliberal politics of the market exercises a politics of truth, a truth that has been contested in this article.

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The Politics of Public Things: Neoliberalism and the Routine of Privatization[1]

Bonnie Honig*

> *It is not unfair to say that political philosophy has been*
> *the victim of a strong object avoidance tendency.*
> Bruno Latour
>
> *human existence [. . .] would be impossible without things,*
> *and things would be a heap of unrelated articles, a non-world,*
> *if they were not the conditioners of human existence.*
> Hannah Arendt
>
> *The procedure of putting a lump of cheese on a balance and fixing the price*
> *by the turn of the scale would lose its point if it frequently happened*
> *for such lumps to suddenly grow or shrink for no obvious reason.*
> Ludwig Wittgenstein

In recent years, neoliberals have sought to privatize public things in the name of efficiency, citing waste in public bureaucracy and the unreliability of civil servants unmotivated by private market incentives. Empirical researchers and lobbyists can argue about whether we will find greater waste in the public or private sectors. But there are reasons other than efficiency for embracing public things. Public things (parks, prisons, schools, armies, civil servants, hydropower plants, electrical grids, and so on) are, we might say (borrowing from the British psychoanalyst D.W. Winnicott) part of democracy's 'holding environment'. Efficiency is one value in a democracy but it is not democracy's only or regnant value, at least not for democracies that are,

as Winnicott might say, 'in health'.[2]

In health, democracy is rooted in common love for and contestation of public things. Without such things, citizenship in neoliberal democracies risks being reduced to repetitive (private) work—what Lauren Berlant calls 'crisis ordinary'—and exceptional (public) emergencies—what we can call crisis extraordinary.[3] A symptom of that reduction—of democratic life to repetitive private work and exceptional public emergencies—in contemporary neoliberal contexts, is the prominence of mourning in recent years in Left political theory and cultural studies. One benefit of turning to 'objects' or 'things' to think about democracy's possible futures is that it invites us to turn to D.W. Winnicott—a key thinker in the British Object Relations School of psychoanalysis, working in England in the mid-20th century—who urges attention to a more diverse affective repertoire.[4]

Winnicott is usefully read in dialogue with recent work in thing theory and prior work on alienation in capitalism's world of perpetual flux. For Winnicott, objects are vital, in that they have a life of their own and the power to enchant the world around them.[5] But they are not fully autonomous of those who invest in them. Providing the human world with stability and form, Winnicottian objects are resilient, possessed of permanence, and not prone to obsolescence, though they are not immune, either, to wear and tear. Objects are essential to human development from infancy to maturity. Even those of us who never heard of Winnicott are familiar with these ideas of his and know the power of the child's blanket, pacifier, or teddy to soothe. These fabrics, pacifiers, and stuffed animals are the enchanted source of magical comfort to infants of a certain age or stage of development. They are our 'first possessions', Winnicott says, and they function as 'transitional objects', a term coined by Winnicott to refer to their role in a transitional stage of development and to infants' reliance on them to transition from dependence on the mother-figure to more independent capacities to play and to survive her absences.

Infants are desolate when such objects are lost, distraught when they are damaged or, god forbid, *laundered*, and relieved or blissful when they are found, recovered, or restored. In these cases, the object is not itself magical. In fact, it is often rather disgusting (though perhaps this is a sign of its magic). In any case,

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2 See Walzer 1984 on the importance of not collapsing economic and political values.

3 See Berlant 2011.

4 One example of Winnicott's (rather Wittgensteinian) commitment to the study of affect in its diversity is his critique of Melanie Klein's focus on aggression as if it were a single thing rather than, as Winnicott thought, a host of affects that serve various developmental purposes over time. Moreover, Winnicott argued against Klein, these affects are not just misconstrued by her, as one single thing, but also pathologized by her when she calls them 'aggression'. As Adam Phillips points out, Winnicott preferred the idea of developing instead 'a natural history of the role of aggression in natural development' (Phillips 2007, 104). We could extend that insight to mourning as well: not one single thing and not necessarily an affect to be privileged above others. This last is the argument of my *Antigone, Interrupted* (2013). More generally, Winnicott both decenters and pluralizes the affects that are important to psychological analysis. (Eve Sedgwick echoes him decades later when she says there ought to be more than one or two affects associated with a theoretical position). See Honig 2013, 19 and Sedgwick 2003, 146.

5 See Bennett 2010.

infants provide the magic that makes the object special, imbuing the object with the comfort, security, or calm that is then, in turn, bestowed on them by their precious thing. No one but the infant can appoint or designate a certain blanket as the blankie, the fabric that soothes. Such a relationship, an object relation, can be solicited by an adult, but in the end the psychic investment and the choice of object are the infant's to make, in one of her earliest acts of spontaneity and creativity.

The Marxian opposition between false, idol-like things that alienate us from ourselves versus authentic human desires and relations is upended by Winnicott who is no less attuned than Marx to the problem of authenticity, but who is interested in those *things* that play a fundamental role in promoting not thwarting the first and, later, lifelong authentic human relationships.[6] The objects that Winnicott values may have been manufactured, produced by the thousands by alienated labor, but Winnicott treats them in their singularity, following the lead of the infant who knows nothing about the means of production and simply finds sooth in his blue blanket. (And of course, the transitional object may also be a rag, found in the rubbish).

Marx might say that the infant and Winnicott both fall for the lure of capitalism's things, which promise to soothe us all. But it is fair, I think, to say that Winnicott's questions are simply not Marx's. Things perform a function in human development, regardless of their means of production. They soothe and provide the stability that only things, in their thingness, can provide. This is not to suggest their economic genealogy does not matter. It does and here Marx supplements Winnicott by pressing us to see that economies that produce and multiply things at dizzying rates, while marketing only the newest iterations of things as desirable, and while planning the obsolescence of the previous ones, arguably undo the thingness of things—attenuating precisely the qualities that Winnicott in his context, and Hannah Arendt in hers, see as the gift of things: their capacity to provide the stability and durability necessary to the stable and durable relationships that constitute human flourishing. Hence Arendt's concern about 'a world where rapid industrialization constantly kills off the things of yesterday to produce today's objects' (Arendt 1998, 52).

If public things are a constitutive element of democracy, then economies that undermine the thingness of things, as such, and reflexively prefer privatization to public ownership or stewardship, are in relations of (possibly productive) tension with democracy.[7] Other social theorists have looked at how the neoliberal workplace emphasizes a narrow notion of productivity that undoes connections between work and dignity. Neighborhood-based collective action groups see how neoliberal deracination and mobility threaten democratic deliberation and will-formation. Attending to the viability (or not) of public things in neoliberal contexts, we add

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6 Winnicott, too, will distinguish the true and false self, but will connect this to the infant's felt need to please or heal the mother-figure who is not in health, who is depressed or withdrawn.

7 Martha Nussbaum thinks Winnicott's views of a holding environment and culture could inform a democratic idea of flourishing while underwriting a commitment to a humanistic education. ('Indeed, one may learn many things about contemporary political life by posing systematically the question of what it would be like for society to become, in Winnicott's sense, a "facilitating environment" for its citizens'. (Nussbaum 2003, 39)). I agree.

another angle, and might gain a new perspective on our moment.

This requires that we analogize Winnicott's observations about infants' transitional objects and citizens' attachments to public things. Since Winnicott is not committed to a progressive nor to any linear temporality in development, we do not infantilize citizens when we think about democracy through Winnicott's categories or at least not necessarily so. That is, the various stages through which infants move in development, and the skills that attach to those stages (self-comfort, working through, acceptance of reality, and so on) are not left behind as the infant 'progresses'. Acquired skills stay in a person's repertoire. These are not infantile impulses that plague otherwise mature adults, nor are they the pathologized remnants of a stage that ought properly to have been left behind. Rather than move through time, the infant acquires in time a repertoire, a resource-rich skill-set that can be drawn upon in health over a life.[8]

Indeed, Winnicott asserts that the abundant energy conjoined early on to the transitional object is dispersed in later stages and is eventually redistributed, diffused onto culture, a transfer on whose details he is admittedly vague, as Adam Phillips also points out. Regardless of those difficulties, Winnicott offers, in any case, quite a shift in mood from Freud and Klein. As Phillips puts it in his book on Winnicott, 'Each psychoanalytic theorist, it could be said, organizes his or her theory around what might be called a core catastrophe; for Freud it was castration, for Klein, the triumph of the Death instinct, and for Winnicott it was the annihilation of the core self by intrusion, a failure of the holding environment' (2007, 149). But 'where Freud and Klein had emphasized the role of disillusionment in human development, in which growing up was a process of mourning, for Winnicott there was a more primary sense in which development was a creative process of collaboration' (2007, 101).[9] Freudian and Kleinian psychoanalysis postulated a catastrophe to which treatment needed to respond and for which culture compensated. This is true for Winnicott too, but he does not begin with the child bereft. For him, what is primary is the child at play and this colors all his analyses. Catastrophe is in the background, however. Winnicott develops his ideas in part through clinical experience with children removed from their families during WWII in England, evacuated from blitz-bombed London to the safer countryside.

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8 As Adam Phillips puts it: 'developmental stages do not progressively dispense with each other but are included in a personal repertoire'. Indeed, 'so-called developmental achievements are only achievements for Winnicott if they are reversible'. They are not signs of immaturity, regression, or failure. On the contrary, they become part of a repertoire of skills to be drawn upon later. (Phillips 2007, 82).

9 Where Freud saw human creativity as an expression of sublimated infantile sexuality, and Klein saw creativity as reparative secondary destruction inherent in infantile sexuality's depressive position, Winnicott saw creativity as a primary, presexual trait that was characteristic of a healthy, reciprocal relation with the mother-figure. In this Winnicottian world, the infant first creates out of desire for the mother who is available and ready to be found, and then is creative in response to that mother's eventual withdrawal, her autonomous comings and goings beyond the omnipotent control of the infant. (Phillips 2007, 102-103). See also his observation that Winnicott is a 'long way from Freud's view of culture as the sublimation of instinctual life, or the wishful compensation for the frustrations imposed by reality. In the Freudian scheme, culture signifies instinctual renunciation; for Winnicott it was the only medium for self-realization' (2007, 119).

Still, Winnicott switches us from the rather tragic and thwarting world of early 20th century mainstream psychoanalysis to a more beneficent domain, from that recently dominant register of mourning (influenced by Freud and Klein) in political theory and cultural studies to a family of terms that includes collaboration, spontaneity, joy, health, creativity, pleasure not compliance, love but also rage, anger, and self-surprise, all terms surely familiar to those acquainted with the political theory of Hannah Arendt, a surprising overlap given her well-known antipathy to psychoanalysis.[10] Winnicott's terms and Arendt's concerns about the public world and its fragility in late modernity are useful to those who seek to apprehend the plight of public things under pressure.

1. Public things under pressure

Sesame Street's Big Bird became a symbol of the struggle over public things in the United States in the fall of 2012.[11] The Republican presidential candidate, Mitt Romney, promised, at the start of the first US presidential debate, to cut government funding to PBS, the US public television network. 'I like PBS. I love Big Bird', he said, referring to the character on the children's television show, Sesame Street. 'Actually, I like you too', Romney said to the debate moderator Jim Lehrer, who for decades has hosted PBS's 'Newshour'. 'But I'm not going to keep on spending money on things to borrow money from China to pay for'.

The amount of money involved is relatively small (1/10,000th of the budget according to the fact-checker at the Washington Post) and most of the budget of PBS is raised already through private fundraising (after private donations and licensing fees, only 6% comes from government funds), so what was the fuss about? Commentators see this as one more meaningless cut, or as red meat for the American Right which wants cuts regardless of their size. The former dismiss the gesture, the latter appreciate it, but both see it as a gesture. But what (else) is in that gesture?

After the debate, progressives aired TV ads defending Big Bird, but critics on both the Right and the Left mocked their efforts. Were progressives really rallying people to defend Big Bird? A character on a children's show? In the brouhaha over Big Bird, the implication from critics on both the US Right and Left (Romney and Jon Stewart) was that attachment to the television character was merely fetishistic or infantile. *Grow up!* they, in effect, said. But such charges, of fetishism or infantilism, may harbor a deeper, ironic truth: Are these the only ways left to attach to one of the few remaining public things in the US? That is to say, in a world with very few public objects, and not much of a 'holding environment', we may find it hard to imagine a healthy object relation—one of deep affection, say—in anything other than unhealthy terms: infantile, fetishistic. Or maybe we assume that maintaining such relations

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10 But, then, Arendt did not know Winnicott, and was not, I think, aware of how close her phenomenology of worldliness was to the British Object Relations School of psychoanalysis.

11 The discussion of Big Bird and Hurricane Sandy expands on a blogpost for 'The Contemporary Condition' (Honig 2012). Since 2012, the more recent, salient example is, of course, Istanbul's Gezi Park.

with childhood things is a failure or a pathology rather than, as Winnicott would say, a healthy sign of a resource-rich repertoire in which our capacity to attach to all sorts of things remains vital and alive.

The issue of public funding for PBS is about the privatization and destruction of the public things of American democracy. To many American conservatives, government itself is only a necessary evil (except on the point where they split: the legislation of virtue or family values) and, these days, even those of its functions that have been historically granted by conservatives to belong properly to government, like imprisonment, border policing, and military defense, are increasingly sold off or outsourced to private industry. All that is left to government to do is to make the policies that these subcontractors then discretionarily implement. Often, the claim is that these private companies can do the job better or more efficiently.

For democratic theory, however, the issue is not about what institutions or organizations are most efficient in achieving certain ends. It is about whether democracies need public things for purposes that may not be entirely instrumental and may not rate well on the measure of efficiency. The issue is not whether conservatives or neoliberals are right to find efficiency only in the private sphere. The issue is rather whether they aid or undermine democratic politics when they promote, by way of efficiency, a political orientation rooted in fundamental antipathy to public things and their sometimes magical properties, which, not to put too flat a point on it, Big Bird represents. Everybody loves Big Bird! was the refrain after the first presidential debate. Exactly. This is not just funny. Big Bird is not just a childish thing that we all, voting adults, ought to have put away by now, in accordance with the instruction of First Corinthians 13:11, much beloved by President Obama: 'When I was a child, I spoke as a child, I understood as a child, I thought as a child: but when I became a man, I put away childish things'. Winnicott would argue that becoming a man, as it were, requires the absorption, not the renunciation, of childhood things. Democratic theory has a further argument to make: Big Bird represents the public things that make us democratic, that put us into democratic (and, often, agonistic) relation to each other in a healthy holding environment. Indeed, Romney showed he knew all of this when he himself referred to Big Bird as a synecdoche for PBS, the public broadcasting system of the US. And then Big Bird took off and helped to make the point in opposition to Romney: democracy is rooted in common love for shared objects, or even in contestation of them (which betrays a common love, more than sentimental claims of devotion do).[12] But is it the object that we love and contest (is it Big Bird)? Or is it the deeply political publicness it instantiates (PBS)?[13]

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12 Charles Blow, in his defense of the importance of the public/ness of public television, which he argued worked for him as a transitional object, pulling him from a rural home with limited opportunities into a world of education and social mobility, came closest to discussing the real issues in play. Jon Stewart, with his dismissal of the Big Bird story line as, well, childish (this was the implication), missed it.

13 '[T]he object of desire [is] not [...] a thing (or even a relation) but [...] a *cluster of promises* magnetized by a thing that appears as an object but is really a scene in the psychoanalytic sense', says Lauren Berlant in *Cruel Optimism* (2011, 16), echoing Winnicott, as we shall see, though Berlant does not, to my knowledge, engage his work. The recent, contested closure of Greece's public broadcaster, ERT, is another instance of the issue.

The public love of public objects—discernible in the public outcry defending Big Bird—is different from the mass consumerist need to all be in love with the same private object, like the newest iPhone, and to have one, of which there are millions. That said, this consumer need may well be the ruin, the remnant, of the democratic desire to constellate affectively around shared objects in their pre-commodified or non-commodified form. And sometimes, the ruin speaks.

For example, after New York City was struck, also in the fall of 2012, by Hurricane Sandy, pay phones, normally treated as part of the city's ruined landscape, emerged suddenly to become communications life-savers; relics with an afterlife. One reporter noted that 'Natural disasters tend to vindicate the pay phone', which is 'mounted high and sometimes behind glass stalls [and so] generally remains serviceable during power outages, even amid flooding'. Pay phones are, as they were indeed once called, *public* phones, situated on the streets and available to everyone. Though not publicly owned (they are now serviced by 13 different local pay phone franchises), they are regulated by New York's Department of Information Technology and Telecommunications. As one new user of this old technology said: 'It's funny what's hiding in plain sight […] it's invisible, but when you need it, it's there' (Cohen 2012).

'Hiding in plain sight'. 'Invisible, but when you need it, it's there'. These phrases excellently capture D.W. Winnicott's mother-figure, at the scene of healthy object relations, in which the child plays, observed by her, but unaware of her. Is this a metaphor for democracy, whose public things are not always in use, not always efficient, not always needed, but are always there, providing a holding environment, by hiding in plain sight (the parks, the prisons, the schools, the streets, the water, the transportation system)? When you need them or need to protest against them, they are there. The difference, and this captures the democratic quandary, is that in a democracy those things need tending. They are not the mother-figure who can, 'in health', for the most part be trusted to appear more or less when needed. These things in the world may become ruins. They may decay if untended. They may be sold off, if unguarded, privatized if undefended. They won't be there in a few years unless we commit to maintaining them so that they may maintain us.[14] In Hannah Arendt's terms, that is, these 'things' in a neoliberal context become more and more like the stuff of 'labor' (stuff like crops, food, kindling, which are used up when used, and disappear in time if left unused), and less like the stuff of 'work', like sculpture, chairs, tables, or shoes, which last, which have a kind of permanence, and outlast both use and neglect. In a neoliberal context, 'things' become more and more like Wittgenstein's imagined lumps of cheese, undergoing sudden and unimaginable changes that strike us as more fantasy-like than real.[15] Things we thought were defined by a definitive shape, morph into new things. National companies become global giants; local banks turn out one day to be arms of foreign ones; lumps of beef,

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14 This is like the paradox of politics I discuss in *Emergency Politics* (2009), in which the political is always mired in a chicken-and-egg temporality.
15 See Wittgenstein 1953, #142.

called hamburgers, turn out to be horsemeat; public parks may become malls.

Thus it is no surprise that the public telephone which returns from disuse after Hurricane Sandy is seen as a rather quaint thing. But there is more to it than that: the quaintness of the public telephone stands as a synecdoche for the quaintness, in our neoliberal context, of publicness itself. That is, it is not just the technology of the phones that is like a relic from a past time. It is also the very idea of a 'public thing', waiting in the street to be taken up when needed, and used by all sorts of people, rich and poor alike.[16] What is funny, invisible, but hiding in plain sight are public things, things that conjoin and are shared by people (who may be affectively divided by them, but this is a sharing too), people from all kinds of backgrounds, classes, and social locations.

After Hurricane Sandy, in the fall of 2012, there were calls to make cell towers more secure so as better to protect cell phone service in an emergency, next time. But no one called for better support for the public telephones that served the public so ably this time. Why not more expressions of appreciation for those phones? Why not turn them from relics of the lost past into the new stable infrastructure of a possible new, public future? The risk is that in such a scenario public phones may become mere Emergency Phones, which would be ironic since 'emergency' has fast become the only public thing left to us. On the other hand, though, as long as we have *a* public thing, the space is arguably open for the return of other kinds of public things. In the ruins of public things, the return of public things remains imaginable and realizable. Almost.

Also, in the aftermath of Hurricane Sandy (which resulted in devastating blackouts on the East Coast of the US), as the New York Times' Nicholas Kristof documented, there was a boom in demand for private generators. Costing well over 10,000 dollars, such generators are sought after because they protect those who can afford it from the ups and downs of power blackouts in the public power system. As Kristof, who spends much of his time in the so-called Third World, rightly sees: 'the lust for generators is a reflection of our antiquated electrical grid and failure to address climate change' (2012).[17] Rather than demand that the public crisis be addressed, the wealthy and powerful opt out: 'About 3 percent of stand-alone homes worth more than $100,000 in the country now have standby generators installed'. The situation is similar with public education, which could benefit from the engagement of the wealthy and the powerful, their donations, their influence, their volunteerism, their leisure, and their energy. Kristof says:

> time and again, we see the decline of public services accompanied by the rise of
> private workarounds for the wealthy. Is crime a problem? Well, rather than pay
> for better policing, move to a gated community with private security guards!

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16 It is notable that homeless people were making change for people to use the pay phones after Sandy. The privileged who had opted out via cell phones found they were dependent on the unprivileged to access this once accessible technology.

17 Kristof details: 'The American Society of Civil Engineers gave our grid, prone to bottlenecks and blackouts, a grade of D+ in 2009' (2012).

Are public schools failing? Well, superb private schools have spaces for a mere $40,000 per child per year. Public libraries closing branches and cutting hours? Well, buy your own books and magazines! Are public parks—even our awesome national parks, dubbed "America's best idea" and the quintessential "public good"—suffering from budget cuts? Don't whine. Just buy a weekend home in the country! Public playgrounds and tennis courts decrepit? Never mind— just join a private tennis club! I'm used to seeing this mind-set in developing countries like Chad or Pakistan, where the feudal rich make do behind high walls topped with shards of glass; increasingly, I see it in our country. (Kristof 2012.)

Kristof makes a good point, though his suggestions that this is a feudal tactic, new to America's rich and a familiar trait of a developing world mindset, are misleading. Kristof's mode of emplotting the story renders strange and alien the private estates and privileged life that have really always been a trait of American Gatsby living. What may be new is the wealthy's late-20th century *vocal* unwillingness to support the mid-20th century public system from which they also pay to withdraw or opt out.

Noting that 'Half-a-century of tax cuts focused on the wealthiest Americans leave us with third-rate public services', Kristof argues against this privatization by mobilizing not publicity or solidarity or even national unity, and certainly not social democracy, but rather 'efficiency'. The opt outs are, he says 'inefficient private workarounds'. Indeed, 'It's manifestly silly (and highly polluting) for every fine home to have a generator. It would make more sense to invest those resources in the electrical grid so that it wouldn't fail in the first place'. He is not wrong, but can an appeal to the inefficiency of private workarounds be effective?[18] Private workarounds are inefficient from a social or policy perspective. But they are not inefficient from the perspective of the private self-interested consumer who may well pay more for private electricity than for subscription to a public service, but who thereby gains, or think he gains, a greater degree of control. Perhaps it would be more effective to ask: What does he lose?[19]

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18 Here is another, from the same article: 'A wealthy friend of mine notes that we all pay for poverty in the end. The upfront way is to finance early childhood education for at-risk kids. The back-end way is to pay for prisons and private security guards. In cities with high economic inequality, such as New York and Los Angeles, more than 1 percent of all employees work as private security guards, according to census data' (Kristof 2012).

19 That is, he gains release from the burdens but also from the benefits of collectivity. It is worth noting that the loss of national infrastructure is accompanied by a loss of any ability to act collectively at all, even in response to (some kinds of) emergency: 'The National Climatic Data Center has just reported that October was the 332nd month in a row of above-average global temperatures. As the environmental Web site Grist reported, that means that nobody younger than 27 has lived for a single month with colder-than-average global temperatures, yet climate change wasn't even much of an issue in the 2012 campaign. Likewise, the World Economic Forum ranks American infrastructure 25th in the world, down from 8th in 2003-4, yet infrastructure is barely mentioned by politicians' (Kristof 2012).

2. Object relations

In the film *Lincoln* (2013), the President cites Euclid's first theorem—that if two things are equal to a third then the two are equal to each other. 'There it is', says Lincoln to two telegraph operators (i.e. *he* is the third thing in the scene), 'even in that two-thousand year old book of mechanical law: it is a self-evident truth that things which are equal to the same thing are equal to each other. We begin with equality. That's the origin, isn't it? That balance, that's fairness, that's justice'.

For Tony Kushner's Lincoln, the lesson is that we begin with equality.[20] He sees that Euclid's truth is geometric but that it might also be political. And indeed, Euclid himself may have known this. When Ptolemy I asked if there was an easier way to study geometry than *The Elements*, Euclid is reported to have replied, 'Sire, there is no royal road to geometry'. (That is, there is no opting out. There is no private workaround). In geometry: it is a self-evident truth that things which are equal to the same thing are equal to each other. Might it be the case that in politics, by extension, when two people occupy a relationship of equality to a third (thing), then the two (or more) people are put by the common thing into a relation of equality, as such?[21]

In Winnicott's object relations theory, the object and the relation presuppose and require each other. The object must have certain traits to work as a transitional object, yes. But even when it possesses all those traits, it is still only a necessary and not a sufficient condition of health. Our relation to it exceeds those traits and is not secured by them. Similarly, in democratic contexts, public things are a necessary and not sufficient condition of democratic health. This means that it is not fundamentally about the phone, or the bird, or the generator. It is also about how we think about the phones, the bird, the generators, in what sort of holding environment we experience them, what sort of holding environment they help constitute, and with what sorts of words we take them up or they, us.[22] Do those public objects interpellate those shaped by them into equality? Are we energized or depleted by them? Are they a prod to new forms of life, imagination, creativity, resilience, or joy?

In neoliberal economies, we are pointed to the finitude and zero-sumness of things and to their instrumentality. Do they get the job done? Are they worth

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20 Although this wording and the occasion may be of Kushner's invention, we do know that Lincoln carried around in the early 1850s the first 6 books of Euclid's *Elements* which at the time 'represented the apex of logical rigor'. Studying them, 'he came to master them, a quiet triumph of reason in an unreasonable worth' (Hirsch & Van Haften 2010, 222).

21 While other political theorists rightly emphasize the problems caused by the shift, under neoliberalism, to evaluate everything with reference to efficiency, or to prefer, almost automatically or reflexively, privatization over public investment in and regulation of collective institutions, I approach the issue from a slightly different but connected angle. Instead of asking, 'Are public or private sectors more efficient in solving certain problems?' I ask: 'What kind of problems (collective or individual) are we interpellated into when we relate to each other through certain public and/or private things?' (Dayan (2013) distinguishes three kinds of public—political, recognition-seeking, aesthetic—, acknowledging these are ideal types that shade into each other, and that different publics have different histories and biographies. They may consist of different kinds of people—audiences, activists, voters, spectators, and more—and different kinds of things may command different kinds of attention. His work is relevant to my concerns but I want to keep the attention on things).

22 Barbara Johnson (2008) amends his argument to insist on the always already linguistic character of things.

owning? Do they insulate us from 'undesirable' others? But in democratic theory, especially when conjoined with Winnicott's object relations, attention is called to the generative power of things, and their magical properties to enchant, alter, interpellate, join, equalize, or mobilize us. Here Big Bird is the rule, not the exception.

Think, for example, of Benedict Anderson's claim in his important book, *Imagined Communities* (2006), that newspapers, when read daily by diverse persons across space and time, contribute to the development of national consciousness, and imbue in us a sense of shared imagined community. Reading the New York Times in Ithaca or Providence, I read in the company of others, reading the same paper, in San Francisco and next door. Indeed, that shared newspaper experience makes San Francisco into my 'next door' and this experience of (some) others far away as neighbors in news is part of what national consciousness is. In this context, it is funny to revisit Wittgenstein's witticism in *Philosophical Investigations* (1953, #336) that we do not buy a second copy of the newspaper to confirm what we read in the first. That is true, in one way, and it is an apt critique of certain forms of self-referential argumentation (or of resort to private sensation). But in another sense, it is not true, for something is indeed confirmed (not the content of the story, true, but something else) when we as a collectivity buy second and third copies of the very same newspaper. What, in Wittgenstein, fails as logical confirmation for a doubting individual works, in Anderson, precisely, as political confirmation (or inauguration, or interpellation) for a political community in formation.

Tocqueville mentions more than once in *Democracy in America* (1994) the talismanic power of things. Noting Americans' veneration for Plymouth Rock, the place where the Puritans landed seeking refuge from religious persecution, Tocqueville says that, still, two centuries later, broken-off bits of the rock are popularly sold, like relics, so that everyone can own their own 'piece of the rock' (this is right now the slogan for an insurance company in the US). The singular Plymouth Rock is not undone by its fragmentation, multiplication, and dispersion (as we have come to expect from the Frankfurt school). On the contrary, the Rock's symbolic status as sacred is paradoxically underwritten by its commodification and dispersion, by this 'Romancing of the stone'. We could dismiss this as mere idolatry or fetishism, and decry it.[23] Or we could enter into the romance, and take its power as an invitation to think further about the power of objects, originals, copies, wholes, and shards, and about how to enlist that power on behalf of democratic forms of life (not just on behalf of commercial profit, as Apple incites us to, via the latest iPhone or iPad).[24]

In his essay, 'The Use of an Object and Relating Through Identifications' (2005b), D.W. Winnicott (seemingly channeling Wittgenstein or perhaps all ludic thinkers) defends his views against 'an armchair philosopher' and invites that philosopher to 'come out of his chair and sit on the floor with his patient', from which position

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23 The name of a late 20th century film, the phrase 'romancing the stone' is also played with by Barbara Johnson in her fabulous book, *Persons and Things* (2008).

24 It is a bit of a stretch but still hard to resist noting that D.W. Winnicott's father, Frederick, sponsored 'the memorial to the Pilgrims who set sail from Plymouth for the New World' (Rodman 2003, 30).

he would find that the clinical world is one of many middle positions and not just a world of either-ors.[25] It is one of the many democratic markers of Winnicott's work (Alison Bechdel notes several others in *Are you My Mother?* (2012)). What if we political theorists got off the chair and onto the floor, as Tocqueville himself arguably did? Working with Winnicott, approaching the topic of public things as he approaches the study of transitional objects, we would ask, from the floor: What are the properties of such objects? What makes them work?

For Winnicott (2005a, 2), analyzing the workings of transitional objects requires attending to:

1) The nature of the object (a character)

2) The infant's capacity to recognize the object as 'not me' (Big Bird)

3) The place or location of the object as outside, inside, or at the border (on TV)

4) The infant's capacity to create, think up, devise, originate, or produce an object (that is to say, the infant's imagination, creativity, spontaneity) (friends of Big Bird)

5) The initiation of an affectionate type of relationship (which could include rage, as well as love) ('everyone loves Big Bird!')

Finally, though Winnicott mentions it not here but elsewhere, it is also important that the object has the capacity to withstand the infant's rage and powerful love. The object must be resilient. In health, the object's resilience will transfer to the child. It will become their shared trait.

Playing with its blanket or teddy bear, the baby comes to know a reality beyond him or herself. When s/he cathects onto that object, s/he acquires the emotional resources to withstand the disappointments of the mother or caregiver, to feel s/he may safely rage against them, and when s/he exercises control over the blanket, hiding and finding it, for example, as in Freud's fort-da game, Freud says s/he learns mastery, control, but Winnicott emphasizes the lesson of object-permanence. The object is what enables the child to exit continuity with the mother to experience contiguity in and with the world in a healthy way. It is also what allows the child to survive temporary separations from the mother. As the woman may come and go (perhaps even talking of Michelangelo), the child's blanket (ideally) has a stubborn existence and this is how the child learns there is a world. The object can survive not only the child's rage but also the child's love, which can be powerful and destructive. Thus, the child learns that s/he, too, can survive these powerful emotions.

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25 '[H]e will find that there is an intermediate position. In other words, he will find that after "subject relates to object" comes "subject destroys object" (as it becomes external); and then may come "*object survives destruction by the subject*". But there may or may not be survival. A new feature thus arrives in the theory of object-relating. The subject says to the object: "I destroyed you", and the object is there to receive the communication. From now on the subject says: "Hullo object!". "I destroyed you". "I love you". "You have value for me because of your survival of my destruction of you". "While I am loving you I am all the time destroying you in (unconscious) *fantasy*". Here fantasy begins for the individual. The subject can now *use* the object that has survived. It is important to note that it is not only that the subject destroys the object because the object is placed outside the area of omnipotent control. It is equally significant to state this the other way round and to say that it is the destruction of the object that places the object outside the area of the subject's omnipotent control. In these ways the object develops its own autonomy and life, and (if it survives) contributes-in to the subject, according to its own properties'. (Winnicott 2005b, 120-121).

In object relations theory, certain kinds of objects and certain kinds of orientations to them and certain kinds of contexts in which to relate to them, all serve as epistemological props to enable people to transition from continuity to contiguity, from self to neighbor, from solipsism to knowledge. (In solipsism, one person tries to confirm one newspaper with another and experiences a failure. In nationalism, two people do this and it is called knowledge). Might there also be, analogously, some objects, relations, and contexts that serve as episte-political props to enable democratic citizens to make analogous *political* (and not just psychic) transitions? In that context, the transitional object, which is 'not me' and yet 'in a relationship with or to me' might offer a model of democratic orientation to public things, over which we lack mastery but which are nonetheless inescapably ours/us. The objectively permanent object would need to be, in a democratic context, not a teddy bear, as in Winnicott, or a blankie, but a 'Big Bird' (i.e. PBS, which is to say a very big 'bird'), or tax code, a constitution, a political party, a movement, a piece of Plymouth Rock, a public park, a hydroelectric plant, or public telephones.[26] And if, as Winnicott observed, children deprived of such objects, or of the contexts that help make them 'work', or of the mother-figures who secure them, if such object-deprived children fail to attach properly, and are trained by that deprivation into mere compliance and inauthenticity, might the same be true of object-deprived citizens in a democracy? They will need to seek out or establish democratic contexts, collectivities, movements, congresses, transnational alliances, to constitute a democratic holding environment that operates 'in health'.

3. Pariahs, para-politics and the quest for public things

In conclusion, I turn to Hannah Arendt, whose work has been informing this essay throughout. Her famous essay, 'The Jew as Pariah: A Hidden Tradition' (2007), makes the case for public things by a *via negativa*, detailing the distortions that happen in public object-deprived environments. Arendt had argued, in her earlier biography of one of the 19th century salon hostesses, Rahel Varhagen, that the salons that entertained Jews in apparent equality were a distorting and corrupt form of proper publicness, staged in a semi-public sphere that focused its attendees' attention on mere social equality and the good of belonging whether by way of social inclusion or by way of exoticism. Salon status-seeking, or *parvenu* behavior, betrayed the rather more desirable goods of political equality and heroic distinction in which one strives not to be 'interesting' but to be brave.

In 'The Jew as Pariah', Arendt also looks at how Jews, marginalized by anti-Semitism and deprived of access to politics and public things, before or after the Second World War, without access to a democratic or national holding environment, sought to make meaning of that deprivation, or in spite of it—seeking an unrealizable assimilation after emancipation or engaging in the para-politics of salon life. They

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26 Though of course, teddy bears are not simply private either—named for the president, Theodore Roosevelt, with a political history of their own.

mistook the salons for a common world and mistook their pretense of social equality for a real political equality. Such inclusion came at the cost of authenticity.

But some Jews, a very few, found their way, and refused to trade authenticity for anything. They embraced their pariah status and tried to work through it to access something more. As artists, writers, and activists, they chose to mock or ironize the situation rather than comply with it. Arendt tracks their shared tactic by looking at how 4 representative Jews, pariahs, embraced their role as pariahs and used that role as a way to mount a challenge to their exclusion from equality. What she does not note is the role of 'things' in these men's repertoires of resilience.

For Arendt, those Jews who do not identify as pariahs, are stranded.[27] They seek out things, specifically *public* objects, to hold and secure them, but, like many of Winnicott's patients, they are thwarted in their quest and develop parallel skills, compensations, self-betrayals (like being *parvenus*, in quest of social (salon) acceptance), and even a para-politics that functions like what Winnicott once called 'shop window faces', faces turned outward for others, but with no invitation to look in, past the surface show. What they all fail to grasp is something real. Arendt's pariahs are all distorted by their deprivations, in one way or another, but they retain some measure of authenticity when they access what Arendt dubs in the subtitle of her essay 'A Hidden Tradition'—a tradition of action and agency that wrests triumphs in the domains of poetry, literature, cinema, and pariah-politics by basing itself on the role of pariah that others seek to overcome or obscure or deny.

Arendt often sounds quite like Winnicott when she charts the soul sickness of those who succumb to inauthenticity in quest of a never fully achievable emancipation. Her *parvenu* is his *shop window face*, both are compliant and inauthentic. Hannah Arendt adds to our appreciation of Winnicott, though, when she suggests that sometimes rather than soul destruction, something else occurs in response to deprivation. The human capacities to imagine and play are not always the products of a good holding environment. Sometimes they are the resources whereby those deprived of a world enact alternatives by way of their own insistent creativity. (These success stories, presumably, do not go on to become Winnicott's patients).

In 'The Jew as Pariah', she turns to four representative figures: Heine (the poet), Lazare (the rebel), K. (the protagonist of Kafka's *The Castle*), and Chaplin (the film maker). Each is different. One, Chaplin, is not even Jewish, as Arendt concedes in what must have been a hastily added footnote. But they have one thing in common. They don't deny their pariah status, they embrace it and they adopt common tactics in response to the majority that marginalizes them: laughter, irony, and the pariah's mocking infiltration of, or resistance to, the dominant culture that excludes him, are among the strategies Arendt admires in these four men. Lazare, because he is, as she says, a rebel, is the only one of the 4 to whom political theorists have thus far paid

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27 Eric Santner's *Stranded Objects* (1993) makes use of this term in a Winnicottian way, as well. Co-teaching Arendt with Santner a year ago was also a great opportunity to think through some of the issues in play here.

much attention.[28] But the other three, all operating in the object-deprived world of European Jewry, are instructive as well. I close with some thoughts on Heine, because he represents culture, the domain in which Winnicott sees healthy object relations as ultimately resettled. Also, Heine's Sabbath poetry offers an important instance of thingification, the making of a public thing.

For Arendt, Heine is the 'poet-king' of the unassimilable Jews. He responds to their pariah status by way of universals, both low and high: food and bodily pleasure, on the one hand, and the sun, the gods, the universals of nature and culture, on the other. Heine 'turns', Arendt says, 'naturally to that which entertains and delights the common people', sharing 'their joys and sorrows, their pleasure and their tribulations, from the world of men […] [to the] bounty of the earth!' (2007, 278). Some 'stupid and undiscerning' critics see in this, in Heine, a certain 'materialism or atheism', but, Arendt says, it is in fact just 'simple joie de vivre [...] which one finds everywhere in children', a 'passion' underwritten by a 'bare fact'—that of human equality, experienced in 'the presence of such universal things as the sun, music, trees and children'. Nature is Heine's ally, enlisted in the 'spirit of mockery' and 'scorn' to deny the 'reality of the social order' that discriminates unjustly. But laughter is not enough. It 'does not kill', nor liberate.

Heine's triumph was to not just mock but to perform a catachresis, joining Jewish and German themes, particulars and would-be universals. Like a Trojan horse, he insinuates the goods of Judaism into the heart of German art. In beautiful German verse, his Sabbath poetry celebrates Cholent (or, in German, Schalet), the low stew of beans eaten by Jews on the Sabbath because it can be laid up to cook before the day of rest and thus not violate the prohibition against cooking on the sacred day.

> Schalet, ray of light immortal
> Schalet, daughter of Elysium!
> So had Schiller's song resounded,
> Had he ever tasted Schalet

Arendt argues that Heine puts Cholent alongside the universal, on 'the table of the gods, beside nectar and ambrosia', and imagines Schiller would join him in his judgment. There is, Arendt insists with admiration, no hint of chosenness here, nor of the exceptionalism of 19th century Jewish mysticism. Instead, Arendt says, Heine turned to the 'homespun Judaism of everyday life, to that which really lay in the heart and on the lips of the average Jew; and through the medium of the German language

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28 Jennifer Ring is an exception; see her 'The Pariah as Hero' (1991), especially 438, but she does not go into detail. What she does is interesting, though. Ring establishes the importance of private things, on Arendt's account, like chairs and tables, to a shared public world, and she sees the centrality to Arendt of public space. But Ring does not cross from this to wonder about the hybrid, the public things that do for the public what the chair and table do for the private, act as the stuff of the world (1991, 438). Ring also puzzles over the seeming contradiction between what Arendt says about the public sphere needing to be both permanent and portable (440). Winnicott can help solve the puzzle: these are precisely the traits he prizes about the transitional object—that it is (relatively) permanent and portable.

he gave it a place in general European culture. Indeed, it was the very introduction of these homely Jewish notes that helped make Heine's works so essentially popular and human' (2007, 282).

Unfortunately, Arendt's mention of European culture erases Heine's actual point of departure, which is not European but rather the Arabian tales of transformation, in which a human, often a prince, is changed into an animal or monster, with the occasional relief or restoration for a day.[29] This is the genre into which Heine emplots the Sabbath ritual in which the lowest Jewish man becomes a king in his house once a week as he welcomes the Sabbath bride. The Sabbath suspends the ordinary relations of social hierarchy. The Jew who lives all week long as 'a dog, with dog ideas', is on this one day, dignified, a follower of god, a man out of time.

Also, though Arendt does not note it, it is key that Cholent, a public Jewish thing, becomes a public thing by *way* of this Heinean catachresis. It is not mere food (doomed to disappear in 'use' like the stuff of Arendt's unreliable and impermanent Labor, in *The Human Condition* (1998)), nor is it obviously one of Work's objects, for it is what it is because it comes to stand for the Sabbath, in word, song, and experience. The category defiance of Cholent, which is a food and a word, a thing and an idea, is mirrored by Poetry itself, which causes Arendt quite a bit of consternation as she puzzles over where it belongs in her three part schema of Labor, Work, and Action, in her great book, *The Human Condition*.[30] In its transgressive undecidability, Cholent leads us from Work to Action, from Cooking to Fabrication to Politics: it is a public thing, around which publics constellate, by which some are interpellated into an equality that we may need to reimagine. Cholent, and perhaps also the table on which it sits (and for which it is a synecdoche), becomes a public thing once worded in poetry. This is what Heine leaves to us and it is the sort of thing—hybrid, public, magical, and nutritional—that might have the power to enchant future citizenships.

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29 'In Arabia's book of fable / We behold enchanted princes / Who at times their form recover / Fair as first they were created'. On Heine's life and this poem, see Brenner, Jersch-Wenzel & Meyer (ed) 1997, 199-218.

30 On Cholent, in German, Schalet, see Cooper (1993), especially 183 ff. Patchen Markell has also recently turned to Arendt on Work, though not to object relations, as such. In an essay published in College Literature (2011), he notes that Arendt's treatment of Work is actually full of 'torsions' that undermine the seemingly categorical distinctions in *The Human Condition* among Labor, Work, Action. Instead, Markell argues, we should see Work as partnered in separate pairs to Labor and Action, leaving us with Labor/Work, and Work/Action. These pairs undo established 'territorial' readings of Arendt, which unduly emphasize her distinctions and fault her for a rigidity that is not hers. Focused on liminal examples like art, which appears toward (though not at) the end of the Work chapter, Markell suggests that Work bridges over to Action, rather than demarcating an unbridgeable difference between them. Poetry, part of Work, Arendt decides in the end, bridges to Action, as Markell suggests, but, as Heine's Sabbath poetry suggests, it has the power also to bring food with it. On the importance of food in the context of contemporary global/local politics, see my discussion of Slow Food in *Emergency Politics* (2009).

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The Democracy in Courts: Jeremy Bentham, 'Publicity', and the Privatization of Process in the Twenty-First Century

Judith Resnik*

1. Privatizing the public: 'Most oppose terror trials in open court'

On November 17, 2009, a news service in the United States reported the results of a poll that had asked some 1,200 adults to complete the sentence: 'Suspected terrorists should be tried in ...' The pollsters offered two alternatives—either that suspected terrorists should be tried in an 'open criminal court' or in a 'closed military court'.[1] Fifty-four percent preferred the option of a 'closed military court'.[2]

The data slice is thin, but the question asked has powerful symbolism, for the poll suggested to those surveyed that the processes through which a government honors or undermines human rights could be removed from public view. Further, the questions identified one means by which public power is privatized, for in a 'closed military court', the government retains control over its activities and cuts off public oversight. Another form of privatization is the transfer of government-based activities to non-governmental actors, sometimes also screened from public oversight. Both kinds of privatization are now commonplace in courts in many countries around the world.

In this essay, I explain some ways in which courts function as sites of democratic practices and why the poll's term of 'closed military courts' erroneously suggested

1 See CBS News.com, Poll: 'Most Oppose Terror Trials in Open Court', Nov. 17, 2009, available at http://www.cbsnews.com/htdocs/pdf/poll_issues_111709.pdf.

2 According to the Poll six percent had no opinion. The survey, by random dialing with a sample split between land-lines and cell phones, had a three percent margin of error.

that processes meriting the name 'court' could be held behind closed doors. Courts provide government-sponsored opportunities to watch its obligation to provide equal treatment of all persons. Courts are government invitations to the public to invest in and engage with norm generation under structured processes imposing constraints on the authority of the disputants, the audience, and the state. Yet to do so requires that the term 'court' retain its contemporary meaning (shaped over centuries through a mix of practices and political theory) as an obligatorily open institution. If openness remains a robust attribute of 'courts', then the phrase 'closed military court' becomes an oxymoron.

Unpacking these arguments requires a review of some of the history and theories about the connection between openness and adjudicatory processes. That inquiry in turn engages the political philosophy of Jeremy Bentham, who was a major proponent of structuring encounters in many venues to provide the public with knowledge about and enable scrutiny of various actors and institutions—judges and courts, included. Open courts, codification of laws, and a free press were his methods for transferring authority to the public, forming a 'tribunal' whose opinions were to influence ruling powers.

Bentham's work on 'publicity' contributed to what contemporary theorists style the public sphere, explicated by Jürgen Habermas, or as Nancy Fraser has suggested, more aptly 'spheres', to reflect the multiplicity of venues and diversity of speakers now participating in public discourse (Fraser 1992). Yet political theorists (in contrast to social scientists[3]) have paid relatively little attention to the role that lower level courts can play in providing a venue for structured exchanges among individuals and entities that confirm legal norms and that produceducing legal innovations. In many countries commited to democratic practices, courts have been both a source and a recipient of equality mandates that make them lively institutions, contributing (often controversially) to social ordering across a range of diverse problems.

Courts' processes are, however, being reconfigured and their decision making privatized. Below, I place the proposition of 'closed military courts' in context by sketching how, during the last several decades, adjudicatory practices inside courts have been reorganized to favor private conciliation and arbitration. While the dominant example comes from the United States, I offer glimpses of parallel developments in Europe. On both sides of the Atlantic, judges and legislatures have devolved adjudication to administrative agencies and outsourced it to private providers.

Understanding the trajectory of these changes is one purpose of this essay, and another is to examine whether the trends are problematic. Bentham provides the basis for critique, for he argued that open courts educate the public and discipline the state. My concern (built on the recent book that I co-authored with Dennis Curtis[4]) rely on yet other functions of courts, changed because of the new obligations that democracies imposed on them to provide equal treatment to all persons. Political

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3 See e.g., Silbey & Ewick 1998; Lind & Tyler 1988.
4 See Resnik & Curtis 2011a.

injunctions of equality interact with ancient court obligations to 'hear the other side' (*audi alteram partem*), resulting in opportunities for participatory parity that both enable democratic dialogue among disputants and impose constraints upon them. Further, within democratic systems, the conflicts generated by courts often produce changes in legal norms—demonstrating the power of popular input and the utility of courts to contemporary democracy.

But we are less sanguine than Bentham about the functions of information and the outcomes of publicity. Public contestation and democratic iterations do not necessarily insure progressive practices. (The majority of those polled in 2009, after all, preferred 'closed military courts'). On the other hand, publicity in courts disciplines governments by making visible how they treat both their judges and disputants. Through public processes, one learns whether individuals of all kinds—including 'suspected terrorists'—are understood to be persons equally entitled to the forms of procedure offered others to mark their dignity and to accord them respect and fairness.

1.1 From 'rites' to 'rights'

The custom of open adjudicatory processes is longstanding; ancient Roman law conceived of criminal proceedings as '*res publica*'—a public event (Frier 1985; Crook 1995). Thereafter, dispute resolution was so basic to medieval communal life that some argue it was one of the first functions of cities, needing to deal with conflicts so as to facilitate commerce and provide a modicum of peace and security (e.g, Sbriccoli 1997, 37-55). Local rulers of various kinds regularly displayed their authority to make and enforce rules through public performances of their adjudicatory powers. But their processes relied on conceptions of judges, litigants, and the public that were very different than those of contemporary courts in democratic polities.

Then, judges were styled loyal servants of the states, subject to kingly (and godly) rule—in contrast to today's judiciary, comprised of independent actors entitled to pronounce judgment on the state. Then, litigants depended on the grace of rulers to be eligible to participate in courts, and not all persons were authorized to bring suits, to testify, to serve as professional or lay judges, or to assert claims for protection of their person and property. The point of open procedures then was to impress on viewers the *power* of the state.

Between the seventeenth and twentieth centuries, however, those precepts gave way in many parts of the world to new conceptions of the state, of judges, of citizenship, and of persons. Judges gained a kind of independence unique among government employees. Persons of all colors, genders, ages, and kinds became eligible to participate in the many roles within adjudication, and the entire process became 'public' in a robust sense—public ownership and funding (augmented by the investments of private litigants in developing cases), public scrutiny, public participation, public ordering. 'Rites' turned into 'rights' as rulers lost discretion to close off their courts, to fire their judges, and to preclude all persons from rights-seeking (Resnik & Curtis 2007).

My focus in this essay is on public access, a right that traces back centuries and became codified in nineteenth century constitutions of both the state and federal governments in the United States. The mandate that 'all courts shall be open' can be found in the Vermont's 1777 Constitution, followed by the 1792 Constitutions of Delaware and Kentucky; those provisions were often coupled with clauses protecting rights to justice and to jury trials.[5] By the twenty-first century, the specific words 'all courts shall be open' were a part of the constitutions of nineteen states,[6] with many more referencing 'public' or 'open' courts, and some forty including rights to remedies and due process (Resnik 2012b, 978, app. 1). The federal Constitution of 1789 was less specific, but soon thereafter, the 1791 Bill of Rights added new protections for individuals. The Sixth Amendment guaranteed criminal defendants rights to both 'a speedy and public trial'.[7] Further, the Seventh Amendment 'preserved' rights to jury trials for civil litigants when their cases 'at law' sought damages in excess of 'twenty dollars'. By the twentieth century, these guarantees, coupled with common law practices and First Amendment and Due Process rights, were interpreted to protect rights of audience for both civil and criminal trials, as well as third-party access to watch pre-trial evidentiary hearings and to read court records.[8] Moverover, from the eighteenth century onward, the injunction for public access embodied *in* the constitutional requirements of 'open courts' was not limited *to* courts. Both federal and state constitutions imposed obligations on their legislative branches to enable the public to have first-hand knowledge of government decision making.

1.2 Theorizing openness: from unruly crowds to Bentham's 'publicity'

How does one account for rise of the norms that subject judges and disputants to public scrutiny? One catalyst for these changes was the very activities of Medieval and Renaissance European rulers who had relied on open spectacles—from public hangings to royal pageants—to reinforce their claims to authority (e.g., Smuts 1989).

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5 All the original states' constitutions guaranteed jury trials for criminal defendants, as did all states entering after the Union was formed. See, e.g., Connecticut Constitution of 1818, Art. First, § 9, available at http://www.sots.ct.gov/sots/cwp/view.asp?a=3188&q=392280 ('In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to demand the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his favour; and in all prosecutions by indictment or information, a speedy public trial by an impartial jury'.).

6 See, e.g., Alabama Constitution Art. I § 13 ('That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay'.).

7 The Sixth Amendment provides: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. See generally Herman 2006.

8 See, e.g., *Presley v. Georgia*, 558 U.S. 209 (2010) (per curiam); *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1 (1986); *Waller v. Georgia*, 467 U.S. 39 (1984); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court of L.A. County*, 980 P.2d 337, 20 Cal. 4th 1178 (1999); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 96 (2d Cir. 2004). See generally Resnik 1987.

As Michel Foucault has famously analyzed, those who produce spectacles do not control their meanings or effects (Foucault 1995, 32-120).

A much studied illustration of this proposition is the practice of public executions, which would seem to be an excellent vehicle for the display of sovereign authority. In seventeenth-century Amsterdam, the burgomasters staged the ceremony in which death sentences were pronounced in a ground floor room opened to onlookers, able to watch through windows of the Town Hall; executions followed thereafter out front (Fremantle 1962, 208). But authorities elsewhere achieved less by way of decorum. In England, executions 'lurched chaotically between death and laughter' as crowds generated carnivalesque atmospheres that undermined the 'script' of a solemn ritual of state authority (Laqueur 1989, 309-311). As Mikhail Bakhtin put it, the large crowds produced 'the suspension of all hierarchical rank, privilege, norms, and prohibitions' (Bakhtin 1984, 10). The consequence was a shift in authority; hangings could only take place 'with the tacit consent of the crowd' (Laqueur 1989, 352).

Scholars of the English legal system point out that, while executions have drawn historians' attention, 'many more people of all ranks of society [...] came into contact with the legal system through the civil rather than the criminal courts' (Brooks 1989, 357). Expansion of the private sector, coupled with that of government's administrative apparatus and the growth in the legal profession, brought people into court. As diverse audiences participated and watched, they came to develop views about legitimate decision-making—and came to believe that they had a role to play in altering rulers' prerogatives.

The French and American Revolutions made that plain, offering an array of ideas about democratic governance. Jeremy Bentham, who was formulating his thoughts on public participation in governance as these revolutions were underway, was one of the few of his generation to provide a sustained examination of the role played by openness—'publicity', as he termed it—in a variety of venues, courts included.[9] Because Bentham proposed the Panopticon design for prisons, he is associated, as Foucault (1995, 200-10) examined,[10] with subjecting individuals to surveillance regimes without knowing when or by whom they would be observed.[11] But, as detailed below, Bentham also advocated designs for buildings and rules to put judges and legislators before the public eye as well. Through such openness, the public would, he thought, maximize self-interest and thwart the 'sinister interest' of

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9 Bentham 1843 'Rationale of Judicial Evidence'. William Twining, a scholar at University College London who worked on Bentham, noted that Bentham devoted more than 2,500 manuscript pages to the *Rationale* and that the discussion of publicity was likely written around 1812 (Twining 1985, 29). Quotations to 'Bentham' come primarily from a few of the volumes of the *Works of Jeremy Bentham* published in the nineteenth century by John Bowring, who served as Bentham's literary executor and who put several volumes into print after Bentham's death in 1832. For facsimiles of the *Work*, available at http://oll.libertyfund.org/index. php?option=com_staticxt&staticfile=show.php&title=192.

10 See also Gaonkar & McCarthy, Jr. 1994, 558-68.

11 'Unverifiable' was the term proffered by Foucault to capture the power that visibility of the Benthamite kind imposed through a 'state of conscious and permanent visibility' that 'automizes and disindividualizes power' (Foucault 1995, 201-202).

the political and legal establishments, collaborating to advance their own concerns rather than those of the 'community in general' (Schofield 2006, 135). Bentham's trust in the public prompted him to make a myriad of proposals for parliamentary and legal reforms and to commit (at least in theory) to universal suffrage (Ibid., 150-52, 155).[12] The '"ultimate end—political salvation", could only be achieved by democratic ascendancy' (Ibid., 152), and the goal of his many designs was 'dependence of rulers on subjects' (Ibid., 348).

1.2.1 Observing and cabining authority: the dissemination of knowledge through codification and publicity

Jeremy Bentham's advocacy of publicity relied on various techniques. Famous for his utilitarian calculus (Bentham 1843, 6), Bentham had a passion for codification (a word he is credited with inventing (Schofield 2006, 304)), deployed in service of public knowledge (Schofield 2006, 304; Schofield & Harris 1998). Illustrative is Bentham's objection to the common law, never to be 'known or settled' (Bentham 1843, 236-37). By replacing the common law with codes, legal parameters would become plain and truly derived from the 'consent of the whole' (Ibid., 235).

Bentham was particularly attentive to, and appalled by, judicial procedures in English courts. Bentham charged judges and lawyers ('Judge & Co.') with creating 'artificial rules' (Draper 2004, 7) producing a 'factitious' system (Twining 1985, 52) full of procedural obfuscation at the expense of their clients and the public (Ibid., 28, 41-42, 76-79). Civil courts were thus 'shops' at which 'delay [was] sold by the year as broadcloth [was] sold by the piece' (Draper 2004, 5).

Bentham sought instead to make procedure as 'natural' as possible, and he devoted the decade from 1803 to 1812 to drafting revised rules (Twining 1985, 23). He proposed replacing the term 'court' with the word 'judicatory' so as to avoid an association of judges with the monarchy (Rosen 1983, 149). In lieu of fragmented rules of evidence made by common law judges, Bentham turned to his favored technique of codification (Twining 1985, 3). In lieu of piecemeal adjudication, Bentham wanted judges to preside over a whole case (through what today is called the 'individual' calendar system, as contrasted with the 'master' calendar system) so as to dispense justice swiftly. And, in lieu of judgments on the papers, Bentham wanted oral procedures; he proposed that all evidence be taken through 'oral interrogation before the judge in public' (Ibid., 31).

Bentham also called for subsidies for those too poor to participate. He proposed that an 'Equal Justice Fund' be established, supported by using the 'fines imposed on wrongdoers', government funds, and charitable donations (Schofield 2006, 310; Rosen 1983, 153-54). Bentham wanted not only to subsidize the 'costs of legal

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12 Nicola Lacey interpreted Bentham to have embraced women's suffrage on utilitarian grounds but concluded that, if he were to have insisted on women's suffrage, other of his proposals for reform would be dismissed, and thus he excluded women's suffrage from his agenda on 'utilitarian grounds' (Lacey 1998, 444). Yet he 'perceived far more clearly than most of his (male) contemporaries the irrationalities and injustices which characterized women's social position in the late eighteenth century' (Ibid., 466).

assistance but also the costs of transporting witnesses' and the production of other evidence (Rosen 1983, 153-54). Bentham proposed that judges be available 'every hour on every day of the year' (Peardon 1951, 196) and he suggested that courts be on a 'budget' for evidence to produce one-day trials and immediate decisions (Draper 2004, 11). Bentham's advocacy of simplifying procedure—in part through legislative control (Draper 2004, 8-9; Schofield 2006, 308-12)—aimed to enable public opinion to function as a 'direct check' rather than be deflected through the technically abstruse system replete with 'jargonization' (Bentham 1843, 23; Twining 1985, 78, 80). Publicity, 'underwritten by simplicity', would be the 'main security against misdecision and non-decision' (Twining 1985, 48).

Bentham's focus was on trials in courts but he also appreciated aspects of what was then described as 'conciliation', for its resemblance to the more 'natural' procedure he favored (Kessler 2009). Examples of 'conciliation courts' came from several countries, including Denmark and France, but details of their actual practices are not easily found. One model, from France, likely involved witnesses testifying before lay jurists (Ibid., 435). Bentham noted that under the Danish procedures, the conciliation courts efficiently resolved a good many claims, heard together (Ibid., 436-37, drawing on correspondence of Bentham). Further, in his work on the 'Principles of Judicial Procedure', Bentham called for judges to 'exercise a conciliative function' to attempt to extinguish 'ill-will' (Bentham 1843, 47).

Yet, as William Twining's reading of Bentham manuscripts identified, Bentham preferred 'rectitude of decision, that is, a strict adherence to justice under the law', and thus accorded 'only a grudging place to compromise' (Twining 1985, 94-95).[13] Amalia Kessler has specified various bases for Bentham's 'anxiety' about conciliatory approaches. The lack of the formality of oath-taking and the absence of public scrutiny put honesty at risk (Kessler 2009, 438). Moreover, the informality of conciliation courts left decision makers free to make personal judgments rather than constrained by legal rules (Ibid.). Thus, a judge charged with compromise could permit 'partiality' for one side to provide that party a 'partial victory […] under the pretext of conciliation'[14] As a consequence, in some instances, settlements could be 'repugnant to' and a 'denial of' justice (Bentham 1843, 35).

1.2.2 The architecture of discipline: from 'Judge & Co.' to the panopticon

Bentham's commitment to publicity in trials was fierce: 'Without publicity all other

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13 Specifically, Bentham recorded his admiration for Denmark's 'Reconciliation Courts' (Bentham 1843, 46-47). Bentham's description leaves ambiguous what Danish 'Reconciliation Courts' did. His point about the lack of enforcement suggests that these courts entered some form of judgment. As he described, 'the damage, in whatever shape, from every wrong on each side, will operate as a set-off to every other; an account, as complete as may be, will be taken of what is due on each side; and a balance struck, and payment […] made accordingly' (Ibid.). Thus, reconciliation or conciliation may not parallel contemporary 'settlements', in which parties agree to an outcome in lieu of a third party rendering a decision.

14 Kessler 2009, 438 (quoting Bentham's *De l'organiziation judiciarie, et de la codification* in the edition of Bentham put out by Étienne Dumont, his French editor).

checks are insufficient: in comparison with publicity, all other checks are of small account' (Bentham 1843, 355). Yet more needs to be understood about how—from Bentham's vantage point—'publicity' did its work. Bentham made various kinds of claims about publicity's utilities, all predicated on the interaction between audience and those observed, as he argued for its application to diverse activities.

One function of publicity was truth. Bentham argued that the wider the circle of dissemination of a witness's testimony, the greater the likelihood that a falsehood ('mendacity') would be ferreted out.[15] ('Many a known face, and every unknown countenance, presents to him a possible source of detection'.[16]) Moreover, through face-to-face examinations in tribunals readily accessible across the countryside (Twining 1985, 48-51), judges could apply 'substantive law to true facts', adducing more information at lower costs (Ibid., 27-28).

A second product of publicity for Bentham was education. Bentham believed that the public features of adjudication would generate a desirable form of communication between citizen and the state. While not legally obliged to deliver opinions, Bentham thought judges would want their audience to understand the reasons behind their actions. Thus, it would be 'natural' for judges to gain 'the habit of giving reasons from the bench' (Bentham 1843, 357). Providing a stage for such dialogic exchanges, courts were 'schools' as well 'theatres of justice' (Ibid., 354).

Publicity's third function was disciplinary; 'the more strictly we are watched, the better we behave' (Quinn 2001, 277). Bentham proposed that ordinary spectators (whom he termed 'auditors' (Bentham 1843, 356)) be permitted to make notes that could be distributed widely. These 'minutes' could serve as insurance for the good judge and as a corrective against 'misrepresentations' made by 'an unrighteous judge' (Ibid., 355).[17] More generally, 'notification' of the public (Schofield 2006, 261) imposed oversight as it provided a possibility of reform. Once informed, public opinion could exercise its authority to 'enforce the will of the people by means of the moral sanction'—akin to 'judges operating under the Common Law' (Schofield 2006, 263).

Bentham's views on the importance of publicity were not, as noted, limited to courtrooms; he believed the benefits produced through the interaction of audience with those observed—truth, education, and superintendence—to be useful in diverse settings across a vast swath of social ordering. The 'doors of all public establishments ought to be thrown wide open to the body of the curious at large—the great *open committee* of the tribunal of the world' (Bentham 1843, 37, 46). Bentham's invocation of door-opening was more than a metaphor; he literally described in detail how to design structures to ensure these activities took place before the public. These many

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15 As Twining quoted Bentham, 'Falsehood—corrupt and wilful falsehood—mendacity, in a word—the common instrument of all *wrong*' was the 'irreconcilable enemy of justice' (Twining 1985, 90, emphasis in original).

16 Bentham 1843, 355 (quoting himself from an earlier volume).

17 See also Bentham 1843, 158 (writing of 'Public Opinion': 'To the pernicious exercise of the power of government it is the only check; to the beneficial, an indispensable supplement. Able rulers lead it; prudent rulers lead or follow it; foolish rulers disregard it'.).

and varied plans used architecture as 'a means of securing publicity, while publicity was a means of securing responsibility' (Schofield 2006, 259).

Bentham is (in)famous for promoting the 'Panopticon', a prison that was designed to subject incarcerated inmates to continual observation (Bentham 1843, 46).[18] Bentham proposed similar configurations for 'mental asylums, hospitals, schools, poor-houses, and factories' (Schofield 2006, 256)—subsequently prompting the Foucauldian fear of the power that the state could wield over individuals.[19] Yet Bentham was not intent on designing buildings facilitating observation of persons only confined in institutions. He also wanted to put lawmakers before the public eye, and he specified several methods of doing so. One was direct observation: he called for a debating chamber that was '"nearly circular" with "seats rising amphitheatrically above each other"'.[20] A second was to enlarge the 'audience' by facilitating the flow of public information to persons not physically present. Observers—'auditors'—taking notes in court for example, could circulate their notes to disseminate the information. For legislatures, Bentham suggested that buildings include a 'separate box for the reporters for the public papers' (Schofield 2006, 258). Third, Bentham wanted to require legislatures to provide information through an 'official report of its proceedings, including verbatim accounts of speeches where the subject was considered to be of sufficient importance' (Ibid., 258).

While creating such information-forcing methods, Bentham did not want government officials to be the sole source of such accounts. His proposal to build-in designated space for newspaper reporters freed them 'to produce unofficial records of the proceedings and thereby "prevent negligence and dishonesty on the part of the official reporters"'.[21] As for the executive branch, Bentham designed a way to link the ministers of government, physically, through 'boxes and pulleys' to permit 'instantaneous intercommunication' (Schofield 2006, 254-55). He also wanted to have the administrative branch of government compile records of and statistical information about government's output (Rosen 1983, 116-126).

Bentham's enthusiasm for openness did not render him insensitive to the burdens of public processes and the need for privacy. He advocated closure in various contexts, such as secret ballots for voting, and listed several specific instances that made closure of trials appropriate. His justifications for privacy included protecting participants from 'annoyance', avoiding unnecessary harm to individuals through 'disclosure of facts prejudicial to their honour' or about their 'pecuniary

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18 See also Schofield 2006, 255-56. 'The activities of the inmates would be open to constant scrutiny from the prison governor or inspector, and the activities of both to the scrutiny of the public at large, who would be encouraged to visit the panopticon' (Ibid., 255).

19 The Panopticon was not built in Bentham's lifetime, but some high-security prisons, called 'supermax', impose a form of surveillance, with lights on twenty-four hours a day, beyond what Bentham had sketched. The United States Supreme Court has not prohibited such oversight as violative of constitutional protections but has imposed a very modest procedural limitation on placement in such facilities. See *Wilkinson v. Austin*, 545 U.S. 209 (2005).

20 Schofield 2006, 258 (quoting Bentham).

21 Schofield 2006, 258 (quoting Bentham).

circumstances', and preserving both 'public decency' and state secrets.[22] Thus, the presumption in favor of public trials should, upon occasion, give way. (Bentham's list of circumstances for closure, like his arguments for openness, parallel those made in contemporary courts.[23]) As for other parts of government, Bentham put the executive (or administrative) sphere at an 'intermediate' level, noting that secrecy could be appropriate when issues of diplomacy and the military were involved (Schofield 2006, 270). Further, Bentham advocated an exception to his principle of publicity for voting; the secret ballot was protection against corruption (Ibid.).

The end state of the various sources of information was to inform Bentham's 'Public Opinion Tribunal' (Rosen, 1983 26-27)[24]—the general public, informed by knowing the basis for decisions, the process of decision making, and the outcomes, and thus able to assess whether the rules comported with its interests. As Bentham scholars have noted, his commitment to 'common sense' and reliance on '*observation, experience, and experiment*' have a good deal in common with John Locke's attachment to knowledge that was based in empiricism (Twining 1985, 52, emphasis in original); both men were optimistic (or naïve) about the complex relationship between knowledge and judgment.

Given his ambitions, Bentham ought to be read as broadening 'the scope of democratic theory' by expanding the means of making elites accountable (Rosen 1983, 13-14). Furthermore, he sought to facilitate participation by the non-elite, as he advocated roles for the audience and subsidies for the poor to use judicial services (Ibid., 153-55). Bentham aimed to produce what Robert Post has called 'democratic competence', which underlies commitments to free speech and a free press.[25] Thus, while a lively debate about how to categorize Bentham's philosophy is ongoing, several Bentham scholars identify him as a proponent of democracy (Schofield 2006, 147-155; Rosen 1983, 11-14, 41-54, 221-37).

Bentham's insights were plainly radical when measured against the baseline of the historical context in which he wrote. In marked contrast to the adjudicatory proceedings of Renaissance Europe, when people watching trials were not seen as

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22 Specifically, exceptions permitted expelling those who disturbed a proceeding and closing proceedings for the preservation of 'peace and good order', to 'protect the judge, the parties, and all other persons present, against annoyance', to 'preserve the tranquility and reputation of individuals and families from unnecessary vexation by disclosure of facts prejudicial to their honour, or liable to be productive of uneasiness or disagreements among themselves', to avoid 'unnecessary disclosure of […] pecuniary circumstances', 'to preserve public decency from violation' and to protect 'secrets of state' (Bentham 1843, 360). As these brief excerpts make plain, the parameters for closure were somewhat 'vague' (Twining 1985, 99).

23 For example, Art 6(1) of the European Convention on Human Rights provides that: 'Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'.

24 Bentham invoked the image as a vehicle of reform but did not specify fully how it would be formed or cohere (Rosen 1983, 38-40). See Cutler 1999, 321.

25 Post thus explored the propriety of some forms of regulation under the First Amendment in the United States as he parsed the distinct values of 'democratic legitimation' and 'democratic competence' (Post 2009, chs. 1-2).

having the power to sit in judgment of judges or to assess the decency of the state's procedures, Bentham raised the possibility that the state itself could be subjected *to* judgment. Bentham's widely-quoted phrase made that point directly: 'Publicity is the very soul of justice. [...] It keeps the judge himself, while trying, under trial' (Bentham 1843, 316; 355).

Benthamite reforms were part of what shifted 'spectators' from that role's passivity to take up a more active posture as 'observers', engaging not only in the carnival of the crowd but also in critique expressive of their developing authority.[26] By Bentham's era, the responses of observers were gaining weight and relevance. Popular opinion was coming to matter through the elaboration of what has come to be called a 'public sphere' that could affect political rulers.

1.3 Forming public opinion through complementary institutions: an uncensored press and a subsidized postal system

Thinking about courts in isolation is erroneous, for the mandate for openness that framed their work interacted with the development of other institutions also faciliting discursive exchanges about governance. While Bentham's attention to courts as places of politically relevant practices makes him especially relevant for this discussion, he was not the only theorist of his century specifically interested in the function of publicity.[27] For political philosophers, Immanuel Kant's 'publicity principle' may be the more salient, with its well-known claim that all 'actions relating to the right of other human beings are wrong if their maxim is incompatible with publicity'.[28] As David Luban has explained, Kant's formulation required policies to be subjected to public debate as a constraint (Luban 1998, 156).[29] Both Kant and Bentham wrote in the wake of David Hume, regularly cited for the proposition that it is 'on opinion only that government is founded' (Hume 1898, 110).

How does the public, in any of these postures, obtain information? As noted, Bentham's suggestions included permitting note-takers ('auditors') in court and reporters in the legislature so that the public had sources of knowledge independent of the government (Bentham 1843, 570). As he explained, 'the distinction between a government that is despotic, and one that is not so' is that 'some eventual faculty of effectual resistance, and consequent change of government, is purposely left, or

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26 The distinction between spectators and observers is drawn by Crary 1998, 1-25.

27 Bentham has, however, been praised for being 'one of the first persons to see the supreme importance of the problem of information in government' in terms of efficiency, accountability, and responsibility (Peardon 1951, 203). Later theorists also described the importance of publicity. John Rawls, for example, posited that agreements reached about justice should be accompanied by 'publicity', by which Rawls meant that 'citizens have a knowledge of the principles that others follow' (1971, 16, 275). According to Rawls, courts were also required to perform in public. Adjudication had to be 'fair and open'—enabling the public to see that the judges were 'independent and impartial' (Ibid., 239).

28 The quote is from David Luban's translation of this statement from the second appendix of Kant's *Perpetual Peace,* written in 1795; Luban argued that he had captured the German wording more precisely than had others. See Luban 1998, 154, 155 n1.

29 Distinctions between Bentham's publicity right and that of Kant are explored in Splichal 2003.

rather given, to the people' (Bentham 1843, 277). Another was an unfettered press that would help, Bentham thought, promote the requisite '*instruction, excitation, correspondence*'.[30] Indeed, Bentham thought the 'newspaper was a far more efficient instrument than pamphlets or books' because of the 'regularity and constancy of attention' it provided to unfolding events (Schofield 2006, 268).[31]

Bentham's enthusiasm for an exchange among citizens, via press and post, was shared by others on both sides of the Atlantic. James Madison's short essay, *Public Opinion*, extolled its virtues as 'the real sovereign in every free' government (Madison 1983). To enhance the 'general intercourse of sentiments', Madison wanted the ready 'circulation of newspapers through the entire body of the people' (Ibid.). This exchange could enable the public to monitor their representatives (in a Benthamite fashion) or provide citizens in a fledgling polity a means to gain a sense of affiliation with their government (akin to Hume's aspiration of gaining public confidence).[32] Thus, scholars of the theories of both Bentham and Madison[33] disagree about the degree to which they hoped to inspire participatory exchanges as contrasted with disciplinary control. Post, press, and courts could be means of engendering cohesion with the 'imagined community' of the nation-state (Anderson 2006), either to debate its norms or to bring into being Madison's 'united public reason' (Sheehan 2004, 416), with the political force to support the government.[34]

In the United States, echoes of these aspirations can be found in some state constitutions' express commitments to a free press, which were sometimes—as in Georgia's 1777 Constitution—next to jury rights ('Freedom of the press and trial by jury to remain inviolate forever'[35]). The federal 1791 Bill of Rights provided protection for the free press, complementing congressional authority under the 1789 Constitution to 'establish Post Offices and Post Roads'.[36] Congress enacted the Post Office Act of 1792, which expanded and subsidized the network of communications (mostly via stage coaches) by giving newspapers 'unusually favorable terms, facilitated the rapid growth of the press', and prohibited government surveillance of posted exchanges (John 1995, 31).[37]

Turning for a moment to Europe, a 'national network of symbolic

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30 Schofield 2006, 251 (quoting Bentham, emphasis in the original).

31 David Zaret located the development of pamphletting and the press earlier. See Zaret 2000.

32 John 1995, 60-61. John also read Madison as failing to appreciate the political force that public opinion could have and the role to be played by communications outside government channels (Ibid., 29).

33 Compare Sheehan 2004 with Gibson 2005. See also Koschnik 2001.

34 Madison's *Public Opinion* essay argued that there were cases 'where the public opinion must be obeyed by the government; so there are cases, where not being fixed, it may be influenced by the government'. Madison added: 'This distinction, if kept in view, would prevent or decide many debates on the respect due from the government to the sentiments of the people'. Further, '[t]he larger a country, the less easy for its real opinion to be ascertained, and the less difficult to be counterfeited; when ascertained or presumed, the more respectable it is in the eyes of individuals. This is favorable to the authority of government. For the same reason, the more extensive a country, the more insignificant is each individual in his own eyes. This may be unfavorable to liberty' (Madison 1983).

35 Georgia Constitution of 1777, Art. LXI, available at http://avalon.law.yale.edu/ 18th_century/ga02.asp.

36 See, e.g., U.S. Constitution Amendment I and Art. I, § 8, cl. 7.

37 The prohibition on opening letters was sometimes ignored (John 1995, 43).

communication' was put into place in the eighteenth century (Blanning 2007, 24-38). By the early 1700s, a 'cross-post system' linked cities and by 1760 most major towns boasted daily mail service. Key to the utility of mail was literacy, evidenced by the fact that in 1630, an estimated 400 books were available while, by the 1790s, some 56,000 were in print (Ibid., 479). In the contemporary world where internet broadcasts are commonplace, those achievements may be hard to appreciate but, in 1832, Francis Lieber pronounced the postal system 'one of the most effective elements of civilization' along with the printing press and the compass.[38]

1.4 Developing public sphere(s)

Bentham's optimism about public knowledge gave way to concerns about the need to revitalize the public sphere, elaborated during the second half of the twentieth century by Jürgen Habermas (1991).[39] Habermas credited Bentham with forging 'the connection between public opinion and the principle of publicity' (Habermas 1991, 99).[40] Habermas also read Bentham as seeking a transparency in parliamentary debates so that deliberations there would be continuous with those of the 'public in general' (Ibid., 100). Habermas likewise credited Kant as identifying publicity as the mechanism for a convergence of politics and morality that could produce rational laws (Ibid., 102-04, 117-18). But Habermas argued that, because only property owners were admitted to the public debate, the public sphere had become a vehicle for 'ideology' (Ibid., 117)[41] and could no longer serve as a means for the 'dissolution of power' (Ibid., 135-36).

Law has been central to Habermas but unlike Bentham, details of the practices of courts have not.[42] Habermas focused on how law bound 'state functions to general norms' that protected capital markets (Habermas 1991, 79). Habermas cited practices in Austria and Prussia as examples of when 'public scrutiny of private people coming

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38 Quoted by John 1995, 8.

39 See generally Calhoun 1992; also Goode 2005. Habermas's historical account focused on how eighteenth-century cultures of philosophy, literature, and the arts have shaped a sense of a readership/ spectatorship authorized to provide a 'self-interpretation of the public in the political realm'—with views independent of those formulated through the church or government (Habermas 1991, 55, 36-37). Zaret disputed the historical account by arguing that the origins of the 'public sphere' predated the eighteenth century (Zaret 2000, 32).

40 Habermas defined 'public' in terms of 'openness', writing, 'We call events and occasions "public" when they are open to all, in contrast to closed or exclusive affairs …' (Habermas 1991, 1).

41 Habermas there cites Hegel's concept.

42 The shaping of democratic rule of law through discourse theory is the central burden of Habermas 1998. Habermas devoted a chapter to the 'Indeterminacy of Law and the Rationality of Adjudication' (194-237), and further noted the role played by evidentiary procedures as constraints on the range of argument available (234-37). In addition, he was interested in the legitimacy of constitutional adjudication (238-86), and theories of judicial articulation of constitutional rights. Even as Habermas spoke of the infrastructure for spectatorship—'*assemblies*, performances, presentations, and so on' (361, emphasis in original),—Habermas did not return to trials as part of his discussion of 'Civil Society and the Political Public Sphere' (329). The lack of this focus could stem from a tradition in political theory of treating courts and politics separately and, perhaps, because German civil inquisitorial law traditions put the processes of evidence taking in the hands of judges who would proceed in a series of discrete intervals—thus making the impressions of the observer, so acute for Bentham in the common law, seem more remote for Habermas.

together as a public' had helped to shape civil codes relating to property (Ibid., 76). When 'legislation [...] had recourse to public opinion', it could not be 'explicitly considered as domination' (Ibid., 82). Over time, a variety of 'basic rights' (such as voting, free press, and association) protected access to the public sphere (Ibid., 83). But without 'universal access' (Ibid., 85), which nineteenth-century Europe did not provide, the public sphere could not do its work.

Habermas both admired and critiqued 'public opinion', for he saw it as subject to manufacture through the intertwining forces of the market and the state. Publicity that had once served to enable opposition 'to the secret politics of the monarchs' came instead to be used to earn 'public prestige' for specially-situated interests (Ibid., 201). The press became entangled with 'public relations' efforts, as advertisements promoted consumerism (Ibid. 181-95). The resulting consensus that might exist was superficial, 'confusedly enough […] subsume[d] under the heading "public sphere"' (Ibid., 4).[43] The public sphere thus served as a space for performance of prestige rather than as a forum for 'critical debate' (Ibid., 201).

Habermas could draw on many instances of governments deploying publicity in service of their aims. A self-acknowledged example comes from President Theodore Roosevelt who, in his first annual congressional message, explained that '[t]he first essential in determining how to deal with the great industrial combinations is knowledge of the facts—publicity' (Roosevelt 1901). He established a 'publicity bureau' as a 'Department of Congress' to investigate and disseminate data on the administrative work of federal agencies. Soon thereafter, advertising became a favored form of publicity, followed by a 'science' of publicity as well as firms marketing themselves as experts in advertising and public relations.[44]

Habermas sought to interrupt such developments through prescriptions aimed at facilitating public reasoning as members of pluralist polities communicated, discursively, so as to reach a genuine consensus. According to Habermas, individual private interests themselves were not capable of being 'adequately formulated, let alone politically implemented, if those affected have not first engaged in public discussions to clarify which features are relevant in treating typical cases as alike or different…' (Habermas 1998, 450). Positive law needed legitimacy derived through a procedure of 'presumptively rational opinion and will-formation' (Ibid., 457). Thus, the public sphere needed to be reconstituted, as such discursive space was essential in the current social order. Without gods and monarchs, one needed a vibrant public sphere to establish that the relationship between the 'rule of law and democracy' was more than a 'historically contingent association' (Ibid., 449).

Borrowing from political theorist Nancy Fraser, I have added an 's' to the term public sphere in the subtitle of this section to underscore that no single 'public' exists. Rather, a pluralistic social order, replete with racial, gender, class and ethnic hierarchies, is constituted through a series of spheres in which norms are debated

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43 Habermas argued that deployment of the press 'to serve the interests of the state administration' could be found in the sixteenth century (Habermas 1991, 20-24).
44 See generally Sheingate, forthcoming.

(Fraser 1992, 123, 128). Moreover, as Fraser has pointed out, the exchanges in these various and sometimes overlapping spheres are not equally participatory; certain voices dominate in stratified societies (Ibid., 124). Fraser also focused on the disparate capacities of those who need to be heard as she called for 'participatory parity' and argued for more structures to enable a 'plurality of competing publics' to emerge rather than aspire to the formation of a 'single, comprehensive public sphere' (Ibid., 117). Courts are one site that is responsive in some measure to the inequities that undermine the kinds of 'discourses' to which Habermas and Fraser aspire. As analyzed below, the obligations of equal treatment and open proceedings are expressly designed with participatory parity in mind.

1.5 Reflexivity: transnational signatures of justice

Before turning to these contemporary utilities of adjudication in democratic social orders, a summary of the impact of past and current trends is required. Courts have been restructured during the last four centuries. The status of the judge shifted from loyal servant of the government to an independent actor, insulated from reprisal so as to be able to sit in judgment of the government. Enshrined in national laws (such as the 1701 Act of Settlement in Britain[45] and Massachusetts' Constitution of 1780), this proposition has also become a fixture of transnational obligations. The European Convention on Human Rights of 1950 is illustrative—requiring in Article 6(1) that tribunals be 'independent and impartial'.[46]

Obligations of publicity are likewise entrenched in law, with injunctions to governments to protect the freedom of information (Ackerman & Sandoval-Bellesteros 2006). Article 10 of the 1948 Universal Declaration of Human Rights is one example: 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal' in determining criminal charges. Article 6 of the European Convention on Human Rights of 1950 frames the right more broadly, protecting openness in civil as well as criminal adjudication: '[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly...'[47] The 1966 International Covenant on Civil and Political Rights, promulgated by the United Nations, provides another example in Article 14: '[E]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal

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45 The 1701 Act of Settlement provided that English judges served 'during good behavior' and could only be swept from office upon a vote of both Houses of Parliament.

46 Article 5 also provides: 'Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals'.

47 The case law of the ECtHR has found that the right to a hearing often entails rights to oral hearings if individuals' 'civil rights and obligations' are at issue. See *König v. Germany*, App. No. 6232/73, 2 Eur. H.R. Rep. 170 (ser. A) paras. 88-89 (1978). A large body of law parses questions of when these rights are engaged and what forms of hearings suffice. See, e.g., *Riepan v. Austria*, App. No. 35115/97, ECHR 2000-XII, para. 9-41; *Göç v. Turkey*, App. No. 36590/97, 11 July 2002 [GC], para. 51.

established by law'.

Requirements of publication became codified, as did practices of judgments be 'pronounced in public' in courts around the world.[48] Court rules provide further specificity, with such requirements as having judgments be 'pronounced in public' (to borrow from the Rules of Procedure and Evidence from the International Criminal Tribunal for the Territories of the former Yugoslavia), as well as published in written form.[49] One of the newest transnational courts, the International Criminal Court (ICC) goes further, by specifying the desired composition for the audience. The ICC's rules require that decisions on admissibility of potential cases, as well as on jurisdiction, responsibility, sentences or reparations 'shall be pronounced in public and, wherever possible, in the presence of the accused, the Prosecutor, the victims […] and the representatives of the States which have participated in the proceedings'.[50]

Of course, such provisions also recognize the legitimacy of closures under specified circumstances.[51] And, while not often directly cited, Bentham's explanation of publicity's importance for adjudication (as well as his justifications for exceptions) has been echoed regularly by judges in both the United States and Europe, as they insist on public processes either when enforcing United States constitutional provisions[52] or the 'fundamental guarantee' to a 'public hearing' under Article 6 of the European Convention on Human Rights.[53]

A term from the social theorist Pierre Bourdieu—'reflexivity' (Bourdieu & Wacquant 1992, 36-46, 235-36; Bourdieu 2003; Bourdieu 1987, 838)—is apt, in that the practices of open courts have become a signature feature that helps to define an institution *as a court*. Moreover, that ambient understanding is shared not only within the professional field of jurists but more broadly in popular culture. Enactment of that precept was, in the seventeenth and eighteenth centuries, by way of foot traffic and personal visits; new techniques of dissemination developed thereafter (Martin 2008).[54] Before the contemporary era of high levels of security before one can enter many courts, paths to knowledge about what transpired within came, in many countries, by way of the open doors and windows of courtrooms, the expansion of the newspaper business, and commercial publishers who reported court decisions.

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48 See, e.g., International Court of Justice, Rules of Court, Art. 94(2); Statute of the Inter-American Court on Human Rights, Art. 24(3); International Criminal Tribunal for the Former Territories of Yugoslavia, Rules of Procedure and Evidence, Rule 98 <u>ter</u> (A). A few courts make the reading judgments optional. See, e.g., ECtHR Rules, Rule 77(2).

49 See, e.g., ICJ Rules Art. 94(2), 95; Statute of the Inter-American Court on Human Rights, Art. 24(3). Other systems make reading judgments optional. See, e.g., ECtHR, Rules of Court, Rule 77(2) (Dec. 2008).

50 ICC, Rules of Procedure and Evidence, Rule 144(1).

51 See, e.g., ECHR Art. 6(1).

52 See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press-Enterprise Co. v. Superior Ct. of California*, 464 U.S. 501 (1984).

53 See, e.g., *Schuler-Zgraggen v. Switzerland*, App. No. 14518/89,16 Eur. H.R. Rep. 405 para. 58 (1993); *Fischer v. Austria*, App. No. 16922/9020, Eur. H.R. Rep. 349 (1995).

54 The availability of information in different forms did not necessarily produce more transparency (LoPucki 2009).

Even with the new barriers to easy physical access, today's technologies amplify the options. In addition to electronic databases available on the internet and 'public information officers' ('PIOs') briefing the press, some jurisdictions televise court proceedings.[55] Examples include the Supreme Court of Canada, the International Criminal Tribunal for Yugoslavia, many states in the United States, and an occasional federal appellate court (Brown 2007, 1). Transnational courts often provide that judgments be published in more than one language; the European Court of Justice, for example, requires publication in more than twenty languages.

The right of public access to courts is synergistic with the obligations to protect judicial independence and to hear both sides. Open processes can make plain that a government must acknowledge the independent power of the judge or, alternatively, can reveal state efforts to try to impose its will on judges. Together with opportunities to be heard, open access and judicial independence have become definitional of courts.

Thus far, the focus has been on the links of some of these attributes to the past, with attention paid to the expansion and continuity of rights forged in the eighteenth century. But appreciation for differences is needed, not only in terms of the techniques for publicity but also in reference to new norms for judges and new forms of regulation of judges. The injunction 'hear the other side' is ancient,[56] but its implications have changed. While once the point of 'fair process' was to provide process in accordance with legal rules, over the last century 'fairness' came to provide a metric of evaluation, obliging that governments provide a certain quantum of process when people asserted claims of rights (Langford 2009).[57]

Moreover, aspects of Bentham's interest in oversight of judges helped to produce calls for judicial 'accountability', a proposition sometimes in tension with the ideology of judicial independence, including from popular as well as regal will (Contini & Mohr 2008, 49-65). Publicity is used to facilitate evaluations, as exemplified by a 2008 study that reviewed surveys from several European countries seeking to assess 'the quality of court performance' in providing public services. The measures, aiming to capture 'fairness' and 'efficiency',[58] included reviews of complaints against judges. Accountability has come to be linked to 'transparency', a word regularly used in

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55 Details and concerns about the impact of such technologies can be found in Mulcahy 2008.

56 The words 'Audi & Alteram partem' are, for example, inscribed on the Town Hall of Amsterdam (Fremantle 1959, 76). See also below n75.

57 See also *Caritativo v. California*, 357 U.S. 549 (1958), 558 (Frankfurter, J., dissenting) ('*Audi alteram partem*—hear the other side!—a demand made insistently through the centuries, is now a command, spoken with the voice of the Due Process Clause of the Fourteenth Amendment, against state governments, and every branch of them […] whenever any individual, however lowly and unfortunate, asserts a legal claim').

58 Contini and Mohr, for example, looked at various efforts to evaluate and control judges. Complaints were one method; of some thousand filed about judges in France and Spain, the majority involved delays and almost none resulted in sanctions against judges (Contini & Mohr 2008, 29). Similarly, a comparison of nine European countries in 2004 showed that fewer than twenty-five judges received sanctions in any one country during that year (Ibid., 30). In terms of using managerial techniques such as linking pay to output, a Spanish court ruled that approach illegal (Ibid., 44-45). Another method was surveys of attitudes toward judges (Ibid., 72-74). Contini and Mohr called for more comprehensive, interactive, and cooperative methods to enhance communications (Ibid., 94-103).

reference to courts, often clad in glass, said to embody that prescription.

As noted at the outset, another key difference between contemporary adjudication and earlier versions are the demographics of the participants. Seventeenth-century courts did not operate under mandates that 'everyone' could come and be heard or participate as witnesses, lawyers, and judges. But twentieth-century democracies came to posit that all persons, equal before the law, were entitled to seek legal redress including, at times, against the government itself. The newness of this precept bears emphasis. Only in the last half century have courts understood themselves to be required to admit women and men of all colors, ethnicities, religions, and other forms of affiliation or identity into all the roles within their halls. (One marker is that 'diversity' has become a byword in judicial selection, and many countries now boast of women and men of all colors on the benches of their highest courts). The influx of new participants has also produced new kinds of rights—from family law to environmental protection. The expansion of access, coupled with market economies reliance on courts, has transformed the volume, content, and nature of the business in courts. The result has been rising dockets and bigger courthouses.

2. Privatizing adjudication

The very practices of adjudication in democracies that have opened up a world of persons eligible to bring claims to courts pose a profound challenge *for* courts. Around the world, dockets have swelled and, despite Bentham's advocacy for an Equal Justice Fund, countries have not provided sufficient funding directly to courts or to litigants to enable all those eligible under law to pursue their claims or to support the staffing needs of judiciaries. While constitutional precepts at the transnational, national, and subnational levels extol courts, recent rulemaking and statutes about courts have diminished the information-forcing, publicity-providing functions of courts. Three of these techniques—reconfiguring court-based procedures to privilege settlement, devolving adjudication to agencies that provide less public access, and outsourcing decisions to private providers—are sketched below.

2.1 Managerial conciliation in courts

A description proffered by a distinguished trial level judge, Brock Hornby, of the federal courts in the United States, captures one set of changes. Relying on visual terms, he wrote that 'reality television' should portray a federal trial judge:

> In an office setting without the robe, using a computer and court administrative staff to monitor the entire caseload and individual case progress; conferring with lawyers (often by telephone or videoconference) in individual cases to set dates or limits; in that same office at a computer, poring over a particular lawsuit's facts, submitted electronically as affidavits, documents, depositions, and interrogatory answers; structuring and organizing those facts, rejecting some

or many of them; finally, researching the law (at the computer, not a library) and writing (at the computer) explanations of the law for parties and lawyers in light of the sorted facts. For federal civil cases, the black-robed figure up on the bench, presiding publicly over trials and instructing juries, has become an endangered species, replaced by a person in business attire at an office desk surrounded by electronic assistants. (Hornby 2007, 462.)

This picture accurately reflects that the mandate of federal judges has shifted. Some sixty years ago, when nationwide rules of civil procedure were promulgated, those rules created a 'pre-trial' procedure for judges and lawyers to meet and confer in advance of trial. The innovation aimed to simplify trials; the archival records of the rule drafters do not reflect that judges were supposed to use the occasion to encourage lawyers to settle cases or to seek methods of dispute resolution other than adjudication (Resnik 2000, 934-43; Resnik 1982, 378-80). Indeed, when in the 1950s a group of distinguished proceduralists returned from a visit to courts in Germany, they wrote of their surprise at how the German judge was 'constantly descending to the level of the litigants, as an examiner, patient or hectoring, as counselor and adviser, as insistent promoter of settlements' (Kaplan 1958, 1472).[59]

But, by the 1980s, that description became apt for judges in the United States, who were reframing their role and the rules that governed their procedures. By the early 1990s, and with enthusiastic support from Congress in provisions endorsing 'alternative dispute resolution' (ADR), what had once been 'extra-judicial' procedures have become 'judicial' procedures (Clark 1981). As Judge Hornby's description illustrates, federal judges are now multi-taskers, sometimes deployed as managers of lawyers and cases, sometimes acting like super-senior partners to both parties advising on how to proceed, sometimes serving as settlement masters or mediators, and at other times as referral sources, sending disputants either to different personnel within courthouses or to institutions other than courts. That work is one of the many factors contributing to the 'vanishing trial' (Galanter 2004; Resnik 2004), a term describing the fact that, as of 2002, fewer than two of one hundred civil cases filed in the federal courts started a trial.

2.2 Devolution to agencies; outsourcing to private providers

The reconfiguration of court-based procedures to focus on settlement is one of three principle techniques that produce the privatization of process, removing adjudicatory decisions from public purview. A second is the delegation of adjudicatory functions to administrative agencies. One way to map that shift is to consider the volume of judges and of cases in the two venues.

As of 2001, Congress had authorized some 1700 judgeships in the federal courts, with about 840 provided for trial judges constitutionally chartered and

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59 Admiration for German civil procedure can be found in a good deal of U.S.-based literature. See, e.g., Langbein 1985.

given life-tenure under Article III. Another 324 slots went to bankruptcy judges and some 470 for magistrate judges, both of whom sit for fixed and renewable terms pursuant to federal statutes. The number of judges working inside federal courthouses is dwarfed by the almost 5,000 judges serving in federal administrative agencies dedicated to dealing with disputes over decisions related to social security, immigration, employment, veterans, and the like.

Comparing the volume of fact-finding activities during 2001 in federal agencies and federal courts provides a snapshot of the shift towards administrative adjudication. That year, some 100,000 evidentiary proceedings—where a person testified, but not necessarily at a trial—took place inside the more than 550 federal courthouses around the United States. In contrast, some 700,000 evidentiary proceedings took place in four federal agencies with a high-volume of adjudication (Resnik 2004). But unlike federal courts, in which constitutional precepts insist that doors be open, many federal administrative adjudicatory proceedings are presumptively closed to outsiders. Further, even if one could attend, finding such hearings is difficult as they take place in office buildings that do not easily welcome passersby.

The third mechanism of privatization is the outsourcing of decision-making through enforcement of contracts mandating arbitration in lieu of adjudication. My own 2002 cell phone service agreement provides an example: By unwrapping the phone and activating the service, I waived rights to go to court and became obligated to 'arbitrate disputes arising out of or related to' this or 'prior agreements'. Even when 'applicable law' permitted joining class actions or class arbitrations, I had waived rights to do so. In purported symmetry, this contract stated that both the provider and the consumer were precluded from pursuing any 'class action or class arbitration'.[60]

The law of the United States once refused to enforce such pro forma contracts out of concern that one party had overwhelming bargaining power. Judges also explained that arbitration was too flexible, too lawless, and too informal as contrasted with adjudication, which they praised for its regulatory role in monitoring adherence to national norms (Resnik 1995, 246-253). However, beginning in the 1980s, the Supreme Court reversed some of its earlier rulings. It reread federal statutes to permit—rather than to prohibit—enforcement of arbitration contracts when federal statutory rights were at stake, albeit with the caveat that the alternative mechanism provided an 'adequate' mechanism to enforce statutory rights.[61] Adequacy did not, however, require the same procedures (such as discovery), and the burden of showing that costs charged to disputants are inappropriately burdensome falls on the party contesting the mandate to use the alternative to court.[62] In 2013, a five-person majority enforced an arbitration contract even though the cost of an

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60 An example can be found on the websites of many providers. One such agreement is republished in Resnik 2006a, 1134-39.

61 See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), 119; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), 640; *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985), 218.

62 See *Green Tree Financial Corporation-Alabama v. Randolph*, 531 U.S. 79 (2000), 89-92.

individual plaintiff proving the federal anti-trust violation exceeded the potential recover, and in that decision as that majority had done in 2011, the Court upheld prohibitions on 'class arbitrations'—contracts that precluded aggregation of claims in these alternative fora.[63]

The explanations proffered by judges developing this case law relied not on the differences between arbitration and adjudication, but on the similarities—both were posited to be simply variations on the dispute resolution theme. In the United States today, consumers and employees alleging that companies have violated federal or state statues of various kinds (such as truth-in-lending or anti-discrimination laws) can be sent to dispute resolution programs selected by manufacturers and employers. In addition, when parties disagree about how to interpret contractual provisions about whether arbitration is required, the Supreme Court has ruled that such issues are to be decided, at least initially, by the private arbitrators and not by judges.[64]

Yet contemporary investigations into the processes provided have raised many questions. One set of cases challenges arbitration provisions in certain kinds of contracts, such as credit cards, on anti-trust grounds, as evidence of collusion in consumer practices.[65] Lawsuits predicated on state consumer laws also object to the lack of neutrality of arbitration services; the allegations were that, in debt collection cases, one provider of services decided 'in favor of the business entity and against the consumer 100% of the time'.[66] A related federal congressional investigation concluded that in that industry, 'consumer arbitrations' were rarely filed by consumers; rather, debt collection agencies relied on contracts requiring arbitration to use such procedures 'against consumers'.[67]

Some lawmakers have translated these concerns into constraints on the use of these contracts for certain kinds of transactions. Congress has insulated poultry farmers and car dealers, who are not bound by ex ante waivers of rights to arbitrate. Other legislative proposals call for broadening those protections to civil rights

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63 See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. __ (June 20, 2013). In the *AT&T* case, the Court held that the Federal Arbitration Act ('FAA') preempted a California judicial rule that if a waiver prevented the opportunity to vindicate a right, that contractual provison was not enforceable. See generally Resnik 2012a. In contrast, in 2011, the Canadian Supreme Court declined (5-4) to insist on arbitration of a consumer dispute with a cell phone provider. *Seidel v. Telus Commc'ns, Inc*. (2011), 329 D.L.R. 4th 577, paras. 13, 31, 48-50 (Can.). Because the cell phone provision made 'the class action waiver dependent on the arbitration provision', it too was not enforceable, but the court took no position on whether a class ought to be certified (Ibid., paras. 46-49).

64 See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Rent-A-Center, West, Inc. v. Jackson*, __ U.S. __ (2010).

65 See *Ross v. Bank of America*, 524 F.3d 217 (2d Cir. 2008).

66 Complaint for Injunctive Relief and Civil Penalties for Violations of Business and Professions Code Section 17200 at 2, *The People of the State of California v. National Arbitration Forum, Inc, et al.*, No. CGC-08-473569 (California Supreme Court, August 22, 2008).

67 See Staff Report, Arbitration Abuse: An Examination of Claims Files of the National Arbitration Forum; Domestic Policy Subcommittee, Majority Staff Oversight and Government Reform Committee, U.S. House of Representatives, July 21, 2009, 7, available at http://www.clarksvilleonline.com/wp-content/uploads/2009/07/Report-on-National-Arbitration-Forum.pdf.

claimants and consumers.[68]

Across the Atlantic, the European Court of Justice (ECJ) upheld an Italian statute imposing mandatory 'dispute settlement rules' for disputes between consumers and telecommunication companies and entailing some use of the internet to file claims. Consumers had argued that the statute violated Europe's commitment to providing everyone with a 'fair and public hearing'.[69] The ECJ's Advocate General concluded that 'a mandatory dispute resolution procedure without which judicial proceedings may not be brought does not constitute a disproportionate infringement upon the right to effective judicial protection [...] [but] a minor infringement [...] that is outweighed by the opportunity to end the dispute quickly and inexpensively'.[70] In 2010, the ECJ concurred but, unlike the U.S. Supreme Court, imposed regulatory caveats: that the settlement outcomes were not binding; that the ADR efforts imposed no 'substantial delay' in bringing legal proceedings and that the ADR tolled time bars; that forms of judicial 'interim measures' remained available; and that, if settlement procedures were available only electronically, national courts were to assess the burden placed on individuals.[71] More generally, European courts have been reluctant to permit enforcement of contracts in which one party has the power to draft, making 'unfair terms' in consumer contracts unenforceable.[72] Thus, adjudicatory procedures are themselves in litigation, with ongoing debates about when to permit and when to preclude opportunities to use open courts.

2.3 Law's migration: ADR across borders

The narrative of shifting procedural norms criss-crosses juristictions. Many litigants, judges, lawyers, and law professors are members of transnational organizations that serve as mechanisms for the import and export of norms and practices (Resnik 2006b; Resnik, Civin, & Frueh 2008). During the twentieth century, many such entities promoted adjudication, both within nation-states and beyond. The growth in border-crossing courts is illustrative. In 1946, the International Court of Justice (ICJ) at The Hague became the successor institution to the League of Nations' court. In the 1950s and 1960s, the ICJ was joined by regional courts in Europe and in the Americas and, in the 1990s, by the International Tribunal for the Law of the Seas (ITLOS), the International Criminal Court, and geographically focused courts dealing with the former Yugoslavia, Rwanda, and Sierra Leone.

More recently, the transnational norm entrepreneurs have developed the market

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68 See Food Conservation and Energy Act of 2008, sec. 210 (Production Contracts, Arbitration), Pub. L. No. 110-246, June 18, 2008); Motor Vehicle Franchise Contract Dispute Resolution Process, Pub. L. No. 107-273, § 11028, 116 Stat. 1835 (2002) (codified at 15 U.S.C. § 1226 (2006)). The effort to protect consumers and civil rights plaintiffs more generally has not, as of this writing, been successful. See, e.g., Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong.

69 See Case C-317/08, *Alassini v. Telecom Italia* (Mar. 18, 2010).

70 Cases C-317/08 to C-320/08, Opinion of Advocate General Kokott (Nov. 19, 2009).

71 Case C-317/08, *Alassini*, paras. 47-67.

72 See Case C-40/08, *Asturcom Telecomunicaciones Sl v. Nogueira* (Oct. 6, 2009) (relating to a reference under Article 234 [current 267] from Spain).

of ADR, embraced by many sectors worldwide. In England and Wales, the 'Woolf Reforms' of the 1990s have put into place pre-filing 'protocols' that require lawyers to negotiate before filing lawsuits (Woolf 1996). Refusals to accept settlements and insisting on trials can put litigants at risk of cost sanctions (Genn 2010). The impact has transformed the procedure of England and Wales, as well as influenced practices in some other Commonwealth countries such as Australia and Canada (Andrews 2010, 97-111).

Linda Mulcahy has concluded that as a consequence of such changes and choices in courtroom construction, the 'spectator has been marginalized', undermining the norm of public trials (Mulcahy 2007). After studying settlement programs in English courts, Simon Roberts similarly found that courthouses have become 'increasingly symbolic' spaces; the large buildings are now used to 'legitimize the decision-making of the parties themselves' (Roberts 2009, 23). Hazel Genn in turn asked 'What is Civil Justice For', as she explored the lack of funding, the declining trial rates, and the pressures to move away from public processes in England (Genn 2010). Emblematic was the decision, in the winter of 2011, by the government which called for the closing of 142 courthouses.

Moving from this example of one country to the European Union, a 2008 Directive on Mediation called for national courts to develop that mode of dispute resolution for cross-border disputes.[73] And, just as many transnational courts exist, many private providers of dispute resolution services are competing intensely for market shares. With reforms of commercial arbitration laws in England making it more attractive,[74] new institutions—such as a 'JAMS', an acronym to denote a company providing 'Judicial Arbitration & Mediation Services'—are now proffering their services worldwide. What do these arbitrations, including when government authorities are disputants, offer? In addition to parties' abilities to pick their judges and their procedures, they can also decide that the procedures and the outcomes remain outside the public purview.

My purpose is not to homogenize the important distinctions across jurisdictions, courts, and dispute resolution mechanisms, but rather to underscore a trend. The rationales for the shift in doctrine and practice are many, as analytically different concerns (not to be detailed here) support efforts for ADR. What the various reformers share is a failing faith in adjudicatory procedure and the normative premise that parties' consent, developed through negotiation or mediation, is preferable to outcomes that judges render when issuing public judgments predicated on state-generated regulatory norms.

The twentieth century has been marked by the 'triumph' of adjudication as courts became the sine qua non of market economies and of governments. The last decades of that century and the beginning of the twenty-first present another trend, the decline of courts in favor of alternatives whose processes and outcomes are less

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73 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, Art.1, 2008 O.J. (L 136) 3.
74 See Arbitration Act 1996, c. 23 (U.K.).

public and less regulated than those of courts.

3. Adjudication as a democratic practice

What then is problematic? A Benthamite response is that the privatization of courts undercuts their accuracy, educative, disciplinary, and legitimating functions. Further, Bentham was skeptical of conciliation because it privatized decision-making, rendering litigants more dependent on judicial preferences than on law. Yet, one could concur or demur on various grounds, both empirical and normative (Duff et al. 2007; Resnik 1987). For example, in so far as Bentham argued that publicity enhanced factual accuracy, a good deal of contemporary research instead points to how visual cues can be misread and be misleading (Spottswood 2011). Further, evidence provided by 'innocence projects', examining trial records after convictions and freeing those wrongly convicted, document persons sentenced to death based on witnesses who lie in public.

In the book related to this essay, Dennis Curtis and I take a somewhat different tack, overlapping in inquiring about public courts as sources of knowledge but interested in different kinds of production. Our argument is not focused on the relationship between openness and truth but instead on how public processes of courts give meaning to democratic aspirations that locate sovereignty in the people, constrain government actors, and insist on the equality of treatment under law (Resnik & Curtis 2011a). While Bentham stressed the protective side of adjudication (policing judges as well as witnesses), we are interested in how the public facets of adjudication engender participatory obligations and enact democratic precepts. On this account, diminution of public adjudication is a loss for democracy because adjudication can itself be a kind of democratic practice. Specifically, normative obligations of judges in both criminal and civil proceedings to hear the other side,[75] to welcome 'everyone' as an equal, to be independent of the government that employs and deploys them, and to provide public processes enable two kinds of democratic discourses. One is between public observers and 'Judge & Co.'—borrowing Bentham's reference to judges and lawyers but enlarging it to include litigants as well. The other comes from exchanges among the direct participants in an adjudicatory triangle.

Before unpacking these claims, two prefatory comments are in order, one about the meaning of adjudication and the other about democracy. A good deal of the literature on trials is focused on the criminal docket, with its encounters between individuals and the state seen as politically freighted, as governments are understood to have special obligations towards the accused, as well as victims (e.g., Duff et al 2004, 2006, 2007). The question of structuring procedures to legitimate violence against

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75 A mid-twentieth century account of English administrative decision-making detailed the lineage of the phrase: 'That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca's *Medea*, enshrined in the Scriptures, embodied in Germanic proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden' (de Smith 1955, 570-71).

those violating social norms in the criminal context (e.g., Christodoulidis 2004, 179-202) has sometimes deflected attention from state power that inheres in judgments requiring the transfer of assets, the reconfiguration of families, the legitimacy of the receipt of government benefits, or the regulation of commercial transactions. Thus, our interest is in shaping an understanding of the political import of adjudication—whether denoted criminal or civil, public, administrative, or private.

Further, when democracy is mentioned in relationship to adjudication, the presumed reference is to the jury. The jury is not the focus here, nor is democracy defined only through popular sovereignty principles expressed by electoral processes. Rather, we are interested in probing how adjudication affects and is affected by a democratic political framework striving to ensure egalitarian rights and attentive to risks of minority subjugation.

3.1 The power of participatory observers to divest authority from judges and litigants

The potential roles for audiences to play can be seen by way of a return to the initial discussion of the survey, offering respondants the options of choosing a 'closed military court' or an 'open criminal court' for trials of suspected terrorists. Open courts and published opinions permit individuals who are neither employees of the courts nor disputants to learn, first-hand, about processes and outcomes. Indeed, courts—and the discussions that their processes produce—are one avenue through which private persons come together to form a public (Calhoun 1992, 1-48), assuming an identity as participants acting within a political and social order. Courts make a contribution by being what could be called 'non-denominational' or non-partisan, in that they are one of relatively few communal spaces not organized by political, religious, or social affiliations. Open court proceedings enable people to watch, debate, develop, contest, and materialize the exercise of both public and private power.

This openness changes the power relationships between the participants and their audiences by preventing the state and disputants from controlling the social meaning of conflicts and their resolutions. This point was made decades ago when Hannah Arendt observed in the context of twentieth-century Stalinist Russia that show trials were a crack in totalitarianism, for they demonstrated that a government felt the need to provide an explanation, however contrived, rather than impose its power without a façade of justification (Arendt 1973). 'The very fact that members of the intellectual opposition can have a trial (even though not an open one), can make themselves heard in the courtroom and count on support outside it, do not confess to anything but plead not guilty, demonstrates that we deal here no longer with total domination' (Ibid., xxxvii).

A disquieting example of this shift in power comes from the broadcast of the video of the death of Saddam Hussein. Hussein was hanged on December 30, 2006, five days after he lost an appeal of his sentence.[76] At first, the media reported that '14

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76 During the course of the trial, three defense lawyers were killed and two judges were dismissed (Burns,

Iraqi officials had attended the hanging' at an unspecified location and that witnesses said Mr. Hussein 'was dressed entirely in black and carrying a Koran and that he was compliant as the noose was draped around his neck' (Santora, Glanz, & Tavernise 2006). But within a day, a 'video [...] appeared on the Internet [...] apparently made by a witness with a camera cellphone'; the tape showed the 'mocking atmosphere in the execution chamber' and recorded the taunts hurled at Hussein at his death (Burns & Santora 2007). The organized media in different countries debated whether to air that video[77] but did not control all of the channels of distribution. Dissemination was decided by others, who posted the video on the web. The disclosures resulted in a torrent of reaction about the timing, fact, and process of the execution.

The uncontrollability of the dissemination of that video has its counterpart in thousands of ordinary actions that take place in low-level tribunals. Once events are accessible to an audience of third parties who are 'spectators and auditors' (to borrow Bentham's categories), they can put their descriptions and commentary into the public realm. These exchanges are rich, albeit sometimes pain-filled, sources of communicative possibilities. Diverse speakers, some of whom may respond by seeking vengeance and others by offering reasoned discourses, all understand themselves as speaking authoritatively based on what they have witnessed or read. In contrast, without direct access, non-parties must rely on insiders—government officials or disputants—for their information, inevitably filtered through their perspectives. Public procedures teach that conflicts do not belong exclusively to the disputants or to the government, as they give the public a place in which to interpret, own, or disown what has occurred.

Moreover, courts provide a unique service in that they create distinctive opportunities to gain knowledge. Conflicts have many routes into the public sphere. The media (including bloggers) or members of government may initiate investigations. Courts may help uncover relevant information in these arenas (as we have seen in the litigation related to individuals detained after 9/11). But courts distinguish themselves from either the media or other government-based investigatory mechanisms in an important respect: the attention paid to ordinary disputes. Courts do not rely on national traumas or scandals or on selling copies of their decisions. Courts do not respond only when something 'interesting' is at issue.

What is the utility of having a window into the mundane as well as the dramatic? That is where people live and that is where state control can be both useful and yet overreaching. The dense and tedious repetition of ordinary exchanges is where one finds the enormity of the power of both bureaucratic states and private sector actors. That power is at risk of operating unseen. The redundancy of various claims of right and the processes, allegations, and behaviors that become the predicates to judgments can fuel debate not only about the responses in particular cases but also

Glanz, Tavernise & Santora 2007).
77 Carter 2007 (noting that Fox News and CNN both ran the video, and that Fox had followed Al Jazeera in doing so).

about what the underlying norms ought to be. So-called 'domestic violence' provides one ready example of the role of public processes in reorienting an understanding of what was once cabined as 'private' and tolerated as within the familial realm. Civil and criminal litigation about violence against women has helped to shape an understanding of how gender-based violence is a mechanism of subordination and an abuse of power (Siegel 1995).[78]

Public knowledge gathered from open dispute resolution ought not, however, to be presumed to be generative of policies running in any particular direction or of attitudes supportive of judicial rulings. Public awareness can generate new rights, like protection against violence, as well as new limitations, such as 'caps' on monetary awards for torts because of a popular view that courts (and specifically juries) over-compensate victims (Marder 2005). Moreover, because even a few cases can make a certain problem vivid, social policies may respond in extravagant ways to harms that are less pervasive than perceived.

3.2 Public relations in courts

Bentham presumed what now seems to be a naïve faith in the free-forming public opinion. Post-Habermas commentators (with television shows such as 'Mad Men' about advertising agencies in view) are, in contrast, well aware of how 'public relations' in courts can aim to manipulate opinion (Habermas 1991, 193). In high-stakes, high-visibility litigation, disputants with resources may hire media consultants who work with lawyers to shape popular views of the merits of the claims. Courts in turn worry about distortion of their work; many now provide 'public information services' or 'media alerts' to directly disseminate decisions. Campaigns against judges also rely on publicity to pressure judges (who may, if needing to be reappointed or reelected, be vulnerable) to be responsive to opinions in ways that can undermine judicial autonomy. One anti-immigration prosecutor in Arizona, for example, has repeatedly accused the local courts and particular judges of failing to enforce laws related to unlawful entry into the United States (Welch 2007; Thomas 2007). As David Luban has thus noted, publicity itself can be used to undercut the legitimacy of the very institution making the knowledge public.[79]

High-profile cases have galvanized sectors of the public, able to use the attention brought to particular kinds of harms to change governing laws. Criminal sanctions are exemplary here, as public disclosures of particular crimes produce anger. In response, judges and legislatures have imposed enhanced sentences. Illustrative is the press coverage of individuals found to have sexually assaulted children, which has prompted new laws that require individuals who are convicted of a wide array of offenses to register so that their names and photos are broadcast and potential

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78 Efforts to address some of the injuries were enacted, at a federal level in the United States, in the Violence Against Women Act of 1994 (see generally Resnik 2001).

79 All 'actions relating to the right of other human beings are wrong if publicizing their maxim would lead to self-frustration by undercutting the legitimacy of the public institutions authorizing those actions' (Luban 1998, 192).

neighbors can be forewarned about their presence upon release from prison.[80] Thus, publicity itself has come back into vogue as a form of punishment.

How does one assess such changes? Bentham had argued that expanding the flow of information will enable public opinion to become 'more and more enlightened' (Schofield 2006, 267) to advance society's interests. That metric requires some definition of what societal interests are. Experiences since Bentham with public displays make plain that openness does not necessarily trigger reasoned discourses, nor does increased information necessarily 'produce an improvement in the quality of opinions held by the people'.[81] Further, the harms of false accusations—vivid during the 1950s as individuals were accused of being Communists—are substantial (Goldschmidt 1954)—rendered all the more powerful through the distribution mechanism of the internet.[82] Webcasting live trial testimony (as contrasted with appellate arguments) raises yet other problems, for it could turn the act of bearing witness to particular events into being put on display through Youtube.

Law has not ignored the need to impose some degree of regulation on audiences. Legal rules and doctrine insist on decorum inside courtrooms. Further, concerns that trials could devolve into carnivals or engender sentiments weighted sharply towards one party have resulted, upon rare occasion, in exclusion of the press.[83] Other rules aim to cabin efforts by audience members to influence decision makers. An example from the United States was an effort by observers to wear badges depicting a victim of a crime; the issue was whether such a display had prejudiced a jury.[84] Others report courtroom-packing to convey impressions about a defendant's contributions to segments of a community (Bucy 2010).

The development of new methods of producing public events—through web databases and broadcasts—requires in turn yet other legal precepts to address audiences that can be both virtual as well as physically present. In jurisdictions that provide for electronic filings that become available on the web, requirements now direct that certain kinds of information (such as social security numbers) be deleted.[85] Further, as discussed at the outset, when a trial judge planned to permit a video stream of the trial about the constitutionality of California's prohibition on same-sex marriage, he also limited the sites of observation to a few federal courthouses and retained discretion to exclude certain portions from the webcast.[86]

In short, to appreciate the political and social utilities of the public dimensions of adjudication is not to ignore the costs and burdens imposed (Bentham listed

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80 See, e.g., *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003

81 Bentham thought it would. See Schofield 2006, 267.

82 The utility of internet databases depends on how materials are formatted and whether charges are imposed for access (LoPucki 2009, 55; also Markoff 2007).

83 See *Sheppard v. Maxwell,* 384 U.S. 333 (1966).

84 See *Carey v. Musladin*, 549 U.S. 70 (2006).

85 See, e.g., Report of the New York State Commission on Public Access to Court Records (Abrams Commission) Feb. 25, 2004, available at http://www.courts.state.ny.us/ip/publicaccess/Report_PublicAccess_CourtRecords.pdf.

86 *Hollingsworth v. Perry*, 558 U.S. 183, 188 (2010) (per curiam).

many[87]), nor to underestimate the potential for the exploitation of courts. The immediate participants in a dispute may find the exposure to the public disquieting. Even the disclosure of accurate information can be uncomfortable. Moreover, the public dimensions of adjudication may inhibit parties' abilities to find common ground, thereby deepening discord. And, despite Bentham's confidence that public disclosure reveals falsehoods, many court records are subsequently impeached as predicated on lies by witnesses.

Further, one should not romanticize spectatorship. A 2010 decision by the United States Supreme Court about the exclusion of the public arose from a trial judge asking the 'lone courtroom observer' to leave the room.[88] Locating judgment in courthouses with windows to the streets and open doors makes publicity possible, but a question remains about how to secure an audience whose members understand themselves as participatory observers, functioning politically as responsible 'auditors' (Bentham 1843, 356) rather than indifferent viewers or as partisans. Watching state-authorized processes could prompt celebration, action, or dialectic exchanges that develop new norms of diverse kinds, but boredom can also result. Bentham saw this problem of obtaining 'an audience for the "judicial theatre"' (Schofield 2006, 310). He considered whether to have public authorities require attendance as a matter of duty, provide compensation for attendance, or devise some other 'factitious means' to bring people into the audience (Bentham 1843, 354). Another method was the printed word; Bentham advocated that permission be liberally granted for the publication of information obtained—and for its republication as well.

Technologies such as webcasting may reduce the challenges for those seeking to observe court proceedings. However, although virtual capacities make it easier to watch, they also enable snippets of information to be consumed in private, without any semblance of processes signaling civic responsibility. Technology does more; it increases the competition for attention through opening windows into many dramas, resulting in what Jonathan Crary has called a 'suspension of perception' (Crary 1999). Getting and keeping attention in a world rich or overwhelmed with a plethora of visual materials haunts all efforts at constructing shared and sustained experiences of the interactions between 'facts and norms' (to borrow from Habermas).

Thus, a host of problems haunt the project of publicity. Some problems stem from getting an audience and sustaining attention, and others relate to getting attention of the wrong kind Viewers may be episodic or distracted, and neither interested in nor able to see full proceedings and to understand and accurately put their knowledge into the public stream of information. As noted above, high profile cases may create misimpressions about the frequency or depth of particular kinds of harms and may prompt lawmaking that is either overbearing or unresponsive. Litigation develops narratives that—as an empirical matter—affect and sometimes generate public agendas and fuel social movements addressing the intersections of private interests and public rights. (In the United States, debates about abortion,

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87 See above n22 and accompanying text.
88 *Presley v. Georgia*, 558 U.S. 209, 210 (2010) (per curiam).

affirmative action, and sexuality provide ready examples (e.g., Post & Siegel 2007)). Authority is relocated but whether the results are 'enlightened' depends on views about the underlying social norms, before and after the conflicts that public court processes help to spawn.

Yet, while the desirability of the outcomes may vary depending on one's viewpoint, open courts express the democratic promises that rules can change because of popular input. The public and the immediate participants can see that law varies by contexts, decision makers, litigants, and facts, and they gain a chance to argue that the governing rules or their applications are wrong. Through democratic iterations—the backs and forths of courts, legislatures, and the public—norms can be reconfigured. Thus, to insist on courts as vital facets of democratic functioning is also to acknowledge that, like the democratic output of the legislative and executive branches, adjudication does not always yield wise or just results. The argument is that it offers opportunities for democratic norms to be implemented through the millions of exchanges in courts among judges, audiences, and litigants. Courts are an important component of functioning democracies seeking to demonstrate legitimacy through displaying the quality of governance.

3.3 Dignifying litigants: information-forcing through participatory parity

Thus far, the discussion has focused on courts as both information-forcing, information-recording, and power-reallocating. Contribution *by* courts to public discourses may not be sufficient to support a commitment *to* courts in the future. The Renaissance town hall and county courthouses were centers of communal life. These were the places were commerce and political life mixed on a small scale, where records (of land ownership and peoples' life passages) were kept, and where rituals were shared. Contrast contemporary conditions—an array of specialized public buildings providing different services, the organized press, televised broadcasts of legislative proceedings, reality TV, and diverse online media, bloggers including. Places other than courts can spark debate, even as courts offer a special contribution through responding to a volume of mundane matters along with high profile disputes.

A distinct facet of what makes courts especially useful in democracies comes from shifting attention from what potential observers may see and do to the interactions among litigants, judges, witnesses, and jurors. This aspect of our argument about the utility of open courts hinges on the view that adjudication is itself a democratic practice—an odd moment in which individuals can oblige others to treat them as equals as they argue in public about their disagreements, misbehavior, wrongdoing, and obligations. Litigation forces dialogue upon the unwilling (including the government) and, momentarily, alters configurations of authority. The social practices, the etiquette, and a myriad of legal rules shape what those who enter courts are empowered to do (Cover 1983; Resnik 2005b).

When cases proceed in public, courts institutionalize democracy's claim to impose constraints on state power. More than that: in criminal trials, the theory of trial is that defendants are enabled, by procedures, to '*contest the common*

interpretation' of their actions and to oppose government imposed meanings.[89] In many legal traditions, a conviction person has a 'right of allocution', a right to speak before being sentenced, that forces the judge to acknowledge the personhood of the defendant and to hear whatever that individual wishes to say.[90] Many commentators note that the jury—as well as lay judges more generally—infuse adjudication with democratic participation by qualified citizens who gain the stature of judge, ad hoc (Hörnle 2006). But consider also the democratic constraints imposed on professional jurists. If working in open courts, the government employees we call judges have to account for their own authority by letting others know how and why power is used. (Recall Bentham's admonition: 'Publicity is the very soul of justice [...] It keeps the judge himself, while trying, under trial'.[91])

Courts can be a great leveler in another respect, in that participatory parity[92] is an express goal, even when not achieved. 'Hear the other side' has been augmented, in many jurisdictions, by obligations to equip 'the other side'—sometimes by means of free lawyers for criminal defendants or poor civil litigants or targeted funds for witnesses and transcripts. Moreover, when government officials are parties to litigation, they are forced either as plaintiffs or defendants to comply with court rules, divulging information and responding to questions posed by opponents or the court. In countries requiring disclosures of documents through discovery, government litigants must also produce documents, files, e-mails, and other records.

Courts' processes render instruction on the value accorded to individuals and, on occasion, reveal that courts cannot or do not make good on commitments of equal treatment and respect. For example, during the 1970s and 1980s, as claims of discrimination based on race and gender were brought to courts, some judges responded as though differential treatment was natural. Lawyers and litigants sometimes found that, because of their gender and race, they were subjected to treatment they found demeaning. In response to such concerns, the chief justices of many state courts convened special projects, denominated 'fairness' or 'gender bias' and 'racial bias' task forces, to inquire into areas of law (such as violence against women or sentencing) and practices (such as modes of address or appointments to court committees) to learn about variations by gender, race, and ethnicity (e.g., Resnik 1996). Statutes, rulemaking, and case law resulted because transcripts, judgments, and public exchanges documented behaviors at odds with the provision of 'equal justice under law'.[93]

This function of courts as potentially egalitarian venues can be seen from attempts to avoid them. After 9/11, the executive branch in the United States repeatedly sought to enact legislation 'stripping' courts of jurisdiction over claims

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89 Hildebrandt 2006, 25 (emphasis in original). See also Roberts 2006; Markovits 2006.

90 See, e.g., U.S. Federal Rules of Criminal Procedure 32(i)(4)(A)(ii).

91 Bentham 1843, 316, 355. See also Andrews 2010, 79.

92 Fraser argued that such parity was requisite to the proper functioning of Habermasian public spheres (Fraser 1992, 118).

93 These are the words inscribed on the front of the facade of the Supreme Court of the United States.

that the government had wrongly detained and tortured individuals.[94] The effort to create a separate 'tribunal system' for alleged enemy combatants aimed to control access and information as well as to limit the rights of detainees by augmenting the powers of the state.

4. The press, the post, and courts: venerable eighteenth century institutions vulnerable in the twenty-first

Bentham, Madison, and their cohort helped to frame three institutions of discourse—the court system, the postal service, and the uncensored press.[95] As has become familiar in the last decade, the stability of two—the postal service and the press—is in question as both are beset by difficulties.

One report characterized the United States Postal Service as in a 'death spiral' (Lochhead 2001, 26). In 2009, 13,000 fewer post offices existed than had in 1951, with more closings underway. As the system continued to lose money (with $2.8 billion cited as the amount lost in 2008[96]), some commentators called for the dissolution of the Postal Service as an obsolete institution to be replaced by the internet and private providers (Tierney 1988, 212-218). Others worried that the Postal Service had already been transformed, favoring 'junk mailers and big media over political opinion journals' (John 2009, 23).

The contemporary defense of the post office as a public institution rests on arguments akin to those made by Madison and Bentham—that ready communication through public services binds the nation and local communities while servicing the needs of the economy.[97] Indeed, in the 1958 Postal Policy Act, the U.S. Congress made such an argument—that its establishment of the post service was 'to unite more closely the American people, to promote the general welfare, and to advance the national economy'.[98] Yet, by the 1970s, Congress had limited the cross-subsidies that made the exchange of newspapers inexpensive,[99] lessening the degree to which the public subsidized a universal service that facilitated a wide range of exchanges (Kielbowicz 2006; John 2006, 576).

A similar narrative of vulnerability envelops the press, with the decline of print media, consolidation of ownership, and diffusion through electronic sources (Baker 2007). In 1950, when the U.S. population stood at just over 152 million, some 1,700

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94 See Military Commissions Act of 2006 (codified in scattered sections of 10, 18, 28, and 42 U.S.C. (2006)). The statute's limitations on access, through habeas corpus, to courts were struck down as unconstitutional. See *Boumediene v. Bush*, 553 U.S. 723 (2008). See generally Resnik 2010a.

95 Other examples include public libraries, parks, and police.

96 See *Restoring the Financial Stability of the U.S. Postal Service: What Needs to be Done?: Hearing Before the Subcomm. Fed. Workforce, Postal Service, and the District of Columbi*a, 111th Cong. (March 25, 2009), available at http://oversight.house.gov/index.php?option=com_content&task= view&id=3865&Itemid=27.

97 *U.S. Postal Service: 101: Hearing Before the Subcomm. on Federal Workforce, Postal Service, and the District of Columbia of the House Comm. on Oversight and Government Reform*, 110th Cong. 232 (Apr. 17, 2007) (Testimony of Charles W. Mapa, President, National League of Postmasters).

98 Postal Policy Act of 1958, Pub. L. No. 85-426, 72 Stat. 134, 134.

99 See Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719 (codified at 39 U.S.C. (2006).

daily newspapers were supported through customers, resulting in a circulation of almost 54 million paper copies. By 2008, the U.S. population had doubled to 304 million, but the number of papers circulated was down; 1,400 daily newspapers delivered 48 million copies.[100] In 2009, more than a hundred newspapers closed, including large presses such as the Seattle Post-Intelligencer (Westphal 2010; Dumpala 2009). Well-known and long-solvent publishers of newspapers filed for bankruptcy (Ovide 2008 and 2009), and the revenues of the remaining papers dropped between 2007 and 2009 (Westphal 2010).

The question is whether the fragility of the press and the post forecasts what awaits courts. Evidence of deep concern about the solvency of courts can be found throughout the state systems. Indeed, in the fall of 2009, the Chief Justice of Massachusetts warned that state courts were at risk of a 'slow and painful demise' (Marshall 2009). More than 40,000 people entered the courts of Massachusetts on a daily basis, but funding for the services they sought was scarce (Marshall 2010). In her view, one ought not assume that courts were 'too big to fail', and that like other 'big' institutions critical to the country, might need 'federal assistance for infrastructure support' (Marshall 2009, 12-13).

Returning to the federal courts for a moment, a pervasive assumption has been that case filings, which grew over the twentieth century, would always be increasing. Yet, with small variations in numbers, federal court filings—aside from bankruptcy petitions—have been more or less flat in the years between 1995 and 2010. Despite the predictions of a 1995 'Long Range Plan of the Federal Courts' that, by 2010, more than 600,000 cases would be before the federal judiciary, the number of civil and criminal cases filed annually has ranged since then from about 325,000 to 375,000. Of course, many variables affect filing rates, but concerns about filing and trial data have sparked concern from congressional oversight committees. In May of 2010, a Subcommittee on Economic Development, Public Buildings, and Emergency Management of the Committee on Transportation and Infrastructure held hearings to consider curtailing funding for federal courthouse construction.

Chief Justice Marshall's comments and the data on federal adjudication capture concerns that animate this discussion. Courts have a longevity that, in addition to their girth (measured in both stone embodiments and dockets), may make them seen invulnerable. Our purpose in tracing the movement from the pageantry and spectacle (the 'rites') entailed in Renaissance adjudication to the entitlements ('rights') of democracies is to underscore the dynamic quality of courts. Just as the hundreds of courthouses built in the last hundred years provide solid testaments to judicial authority, so did many massive structures attest to the importance of the invention of the postal service. Yet various of those buildings have now been tore down or recycled for other uses.

'Bargaining in the shadow of the law' is a phrase often invoked (Mnookin & Kornhauser 1979, 950), but bargaining is increasingly a requirement of the law

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100 See Newspaper Association of America, Total Paid Circulation, available at http://www.naa.org/ TrendsandNumbers/Total-Paid-Circulation.aspx

of conflict resolution. While one might be enthusiastic about the development of institutions offering competition to the state and undermining the hegemony of it, the alternatives to adjudicatory facilities developed thus far have not been accompanied by transparent processes enabling evaluation of their contributions. Further, their use in many instances has been a mandate of the state, rather than an option proffered by a state agnostic about which route to take. And, in the end, the authority of the 'private' alternatives rests on state enforcement.

Thus, the distinctive character of adjudication as a specific kind of social ordering is diminishing. Through case management, judicial efforts at settlement and mandatory ADR in or through courts, devolution to administrative agencies, and enforcement of waivers of rights to trial, the framework of 'due process procedure' with its independent judges and open courts, is being replaced by what can fairly be called 'contract procedure' (Resnik 2005a). Despite growing numbers of persons who use the title 'judge' and conflicts called 'cases', it is increasingly rare for state-empowered actors to be required to reason in public about their decisions to validate one side of a dispute. In mimetic symmetry, both court-based judges and their counterparts in the private sector now produce private outcomes that are publicly sanctioned. Thus, the efforts to manage increased demands on courts by shifting to alternative dispute resolution represent adjudication's decline.

Bentham had proposed that the evils of 'Judge & Co.' be curtailed with simpler and more public procedures. Observation was a major part of his proposed interventions to curb the excesses. In contrast, contemporary solutions advocated by ADR proponents entail moving away from courts and privatizing procedures. No data are collected nor proceedings made open for regular observances. Some efforts are defended as responsive to woefully inadequate budgets provided for courts. And often times, judges are themselves the proponents of the alternatives.

Yet the proffered solution of privatized processes threatens not only litigants and members of the potential audience but judges as well. As efforts aim to alter juridical modes and reconfigure courts as but one of many places for dispute resolution, as judges embrace management and settlement, as they stop working before the public eye and producing results subject to public scrutiny, judges lose the argument for judicial independence from political oversight as well as for public subsidies. Further, judges themselves are protected by the public nature of their work and could be more vulnerable to political control from public and private actors, if not required to do much of their job in court.

Procedures, laws, and norms have great plasticity. In 1850, fewer than forty federal judges worked at the trial level in the United States, and no building owned by the federal government had the sign 'U.S. Courthouse' on its front door. By 2000, more than 1700 trial-level judges worked in more than 550 federal courthouse facilities. In these respects, while adjudication is an ancient practice, its current incarnation—and its theoretical availability to 'everyone'—is relatively recent. Yet, practices that seemed unimaginable only decades ago (from the mundane examples of the new reliance on court-based settlement programs to the stunning assertions

by the U.S. government of the legitimacy of according little or no procedural rights to individuals at Guantánamo Bay and the proposal for 'closed military courts') are now parts of the collective landscape. In the 1970s, consumers of goods and services and employees were not required to sign form contracts that imposed bars to bringing claims to court. In that era, those who did file federal lawsuits were not greeted by judges insistent that they explore alternatives to adjudication.

As currently formatted, most ADR procedures cut off the communicative possibilities provided through courts to record, as well as to struggle with, conflicts over meaning, rights, and facts. The new procedures also undermine the discipline to be imposed on decision makers. Various private procedures prize 'caucusing'—meeting 'ex parte' (to borrow the Latin) rather than enabling each side, as well as the judge—to 'hear the other side' (*audi alteram partem*) in front of their opponents. And the public is left utterly out. The pressures and permission for disputants to seek private and often confidential outcomes through procedures impose no accountability for decision makers (or facilitators), whether they be called judges, military judges, mediators, or arbitrators.

But the point is not to create undue dichotomies between adjudication and its alternatives. Indeed, the reconfiguration of processes in courts to produce private settlements makes plain that court-based procedures are not necessarily public ones. The parallel proposition is that one ought not assume that secrecy is an essential characteristic of ADR. Law can build in a place for the public ('sunshine', to borrow the term that legislators have used[101]) or wall off proceedings from the public. In some states, the outcomes of settlements in medical malpractice cases must be posted on the web; in others, a litigant must stand up in court to accept a settlement and acknowledge an understanding of its terms. Whatever the places constituted as authoritative, opportunities exist to engender or to preclude communal exchanges. Or, as Bentham put it: 'Considered in itself, a room allotted to the reception of the evidence in question [...] is an instrument rather of privacy than of publicity; since, if performed in the open air [...], the number of persons capable of taking cognisance of it would bear no fixed limits' (Bentham 1843, 354).

In sum, the choices of the construction of adjudication are upon us—whether to send 'suspected terrorists' to 'closed military courts', and whether to try to enlist the nomenclature of 'courts' so as to lend legitimacy to their outcomes. But 'suspected terrorists' are not the only persons who are being subjected to closed procedures authorized by the state. The display of justice is on the wane in some of the venues in which it was once vibrant, and its relocation to other locations has not been accompanied by either rites or rights of audience. If the twentieth century heralded the story of the triumph of an ideology committed to public court processes as central to responsible, democratic, national and transnational governance, the twenty-first century has thus far been marked by the retreat from those premises, literally and metaphorically.

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101 See Florida Statutes Ann. 69.081 (2009) (the 'Sunshine in Litigation Act').

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'The Greatest Enemy of Authority'— Arendt, Honig and the Authority of Post-Apartheid Jurisprudence.

Jaco Barnard-Naudé*

> *The greatest enemy of authority, therefore, is contempt,*
> *and the surest way to undermine it is laughter.*
> Hannah Arendt[1]

> *Laws are not just as laws. One obeys them not because*
> *they are just but because they have authority.*
> Jacques Derrida[2]

1. Introduction

This article primarily considers authority in the context of an unelected postcolonial judiciary founded by the post-apartheid Constitution of the Republic of South Africa. It considers this authority against the background of a recent judgment of the South African Constitutional Court (*Le Roux v Dey* 2011 (3) SA 274 (CC)) in which one of its judges (Justice Mogoeng) failed to provide reasons (justification) for his disagreement with the majority's decision that it is not unconstitutional / unlawful / defamatory to depict or refer to someone as gay or homosexual, even if that may not, de facto, be the case. The facts of the case are as follows:

While surfing the internet on a Sunday in February/March of 2006, Pieter le Roux (the first applicant in the Constitutional Court) visited the website of his school (Hoërskool Waterkloof in Pretoria) and downloaded face pictures of the school principal and Dr Dey, the deputy principal. The pictures reminded Le Roux of an episode of a television programme (South Park) he had seen recently. In the episode,

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1 Arendt 1970, 45.
2 Derrida 1990, 939.

one of the characters electronically placed the head of a boy on an image of the body of a gay bodybuilder. Le Roux then visited a website which contained depictions of gay bodybuilders. One of these images depicted two naked men, sitting next to each other on a couch in circumstances that could have been interpreted as sexually suggestive or intimate. The hands of the figures on the couch were positioned around their genitals and the left leg of one of them was placed over the right leg of the other. Le Roux downloaded the image and electronically superimposed the face pictures of the principal and of Dr Dey over the faces of the models in the image. He also downloaded an image of the school badge and superimposed this image over the genital area of the models, so as to obscure both the hands and genitals of both of them. Le Roux then sent the image to his friend's mobile phone who forwarded the image to the mobile of another learner at the school. As could be expected, the image was circulated amongst many of the learners, although Le Roux (allegedly) did not intend for this to happen.

A few days later, Christiaan Gildenhuys (the second applicant) printed the image and took it along with him to school in order to show it to his fellow learners. One of the learners to whom it was shown, suggested that the printed image be placed on the school noticeboard. Reinardt Janse van Rensburg (the third applicant) was the learner who carried out this task. The printout remained on the notice board for half an hour.

Upon the discovery of the image by the school authorities, the applicants admitted what they had done. They were disciplined by being prohibited from assuming leadership positions at the school or from wearing honorary colours for the rest of the school year. They also had to undergo detention for three hours for five consecutive Fridays.

Dr Dey, however, was not satisfied by these disciplinary measures on the part of the school authorities and insisted that the applicants be charged criminally. As a result of the criminal process the applicants were punished by way of community service: they were required to clean cages at the local zoo.

The principal accepted the apologies of the second and third applicants, but Dr Dey refused to entertain any discussion of an apology, because he obtained legal advice not to do so. Dr Dey subsequently pursued a defamation claim against the learners all the way to the Constitutional Court (to which the learners appealed, after the Supreme Court of Appeal upheld Dr Dey's defamation claim). Throughout, Dr Dey's argument was that the depiction of him was defamatory (in the sense that in the eyes of the reasonable person his reputation would be diminished) and, if not defamatory, it was a violation of his (subjective and actionable) interest in his human dignity.

The (narrow) majority of the Constitutional Court found that Dr Dey was defamed, not because he was depicted as gay, but because he was depicted as sexually immoral.[3] It is in this context that the majority of the Court (also) held that it is not

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3 Barnard-Naudé & De Vos (2011) have argued that the judgment that the depiction was one portraying sexual immorality (and hence, was defamatory) was directly linked to the fact that it was a depiction of

defamatory per se to depict someone as homosexual or gay. It is from this finding of the majority that Justice Mogoeng dissented, without having provided reasons for his dissent.

The South African Constitution famously became the first Constitution in the world to prohibit unfair discrimination on the ground of sexual orientation. The majority's reasoning for its conclusion that it is not, under South African law, defamatory to depict someone as homosexual (even if this is not the case *de facto*), flows directly from a sensitivity to the fact that unfair discrimination on the basis of sexual orientation is illegal:

> An actionable injury cannot be based solely on a ground of differentiation that the Constitution has ruled does not provide a basis for offence. The Constitution does not condone individual prejudice against people who are different in terms of race, sex, sexual orientation, conscience, belief, culture, language or birth. These are unfair grounds for differentiation and the equality provision of the Bill of Rights protects against discrimination based on them. It therefore cannot be actionable simply to call or to depict someone as gay even though he chooses not to be gay and dislikes being depicted as gay—and even though stigma may still surround being gay. To hold actionable an imputation based on a protected ground of non-discrimination would open a back-door to the enforcement by the law of categories of differentiation that the Constitution has ruled irrelevant. (Le Roux 2011, para. 185.)

It was with this part of the judgment that Justice Mogoeng disagreed, without offering reasons for doing so. This article advances the contention that the refusal of Justice Mogoeng (as he was at that time) to provide reasons for his dissent in the case of *Le Roux v Dey*, constitutes a failure to act within the limits of his authority. As an unelected judge purporting to uphold the Constitution, his authority is necessarily contingent upon providing reasons for the decisions he reaches. This claim will draw on Hannah Arendt's historical understanding of authority as unquestioning obedience-in-respect, together with Honig's claim that the performative speech-act that founds constitutionalism creates a freedom-in-obedience. The article is also inspired by Honig's claim that Arendt does not simply mourn the disappearance from the world of the above old concept of authority—she also celebrates it, precisely because it allows for the opportunity to conceive of a new concept of authority that is suited for modernity (Honig 1991, 97). Following the theoretical arguments of South African scholar Etienne Mureinik and Arendt, this piece provides the basis for recognizing a necessary link in the post-apartheid era between a culture of authority and a culture of justification.

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same-sex intimacy, in other words that it was a heterosexist judgment. I leave this argument for the reader's consideration. What I wish to focus on in this contribution is that part of the judgment in which the majority holds that it is not defamatory per se to depict someone as homosexual or gay and, most pertinently, Justice Mogoeng's dissent without reasons, from that part of the judgment—a situation which I defend as representing an implicit or explicit rejection of the authority of the post-Apartheid order.

As indicated above, the article draws on Arendt's influential account of the history of authority in her essay 'What is authority?' (Arendt 2006, 91). In the political philosophy of the twentieth century, there can be no doubt that Arendt remains the great thinker of the new, of beginning, and of birth, the thinker of the act of founding, then and so, of beginning. And not less so, of the beginning of authority.

It is in order to draw attention to the *original* (the *initial*) understanding of authority (where it first *began*), an understanding which has been so utterly occluded by ahistorical versions, that I will start with a discussion of Arendt's essay in order to foreground my ultimate contention, which is that the authority of a constitutionally established, unelected judiciary in the postcolonial context, crucially depends on providing justification for its decisions.

To be sure, then, part of my argument involves the contention that an unelected judiciary always already operates in what Arendt had identified as the crisis of the traditional concept of authority, the fact that unquestioning obedience in respect has disappeared from the world. In this sense, the argument reflects, as it were, Arendt's contention that authority has vanished from the world.

In its threadbare form, my argument is this: Each and every time a court, which derives its authority *only* from the postcolonial Constitution, provides justification for its decision, it is not only relying on the alternative concept of authority that Arendt strives to 'restore beyond modern secularism'—it also re-founds its authority, precisely by way of referring those who are expected to obey, back to the origin of its authority in the act of founding.

To put it differently, my argument is that a postcolonial judicial authority is and only can be *justified* by the justification that is its curial duty. This is crucially the case at the level of final instance, in other words, in the highest court, where there is no further possibility of appeal. In this way, I argue that the failure by Justice Mogoeng in the Le Roux case to provide reasons for his dissent represents a denial of what Arendt calls the modern 'crisis of authority' and, moreover, that it is grounded in a misunderstanding of the nature of the authority of a postcolonial judiciary.

2. Arendt and authority

In her 1954 essay entitled 'What is Authority?', Hannah Arendt advances a claim that strikes the modern ear as at least somewhat dissonant: she argues that authority has 'vanished' from the world (Arendt 2006, 91). An immediate riposte to this strange claim could refer to the proliferation of 'authoritarian' regimes throughout the modern age, culminating eventually as it did in the devastating totalitarianisms of the middle to late twentieth century—Fascism and Stalinism (Žižek 2005a). Such a riposte could then proceed to ask whether Arendt is perhaps in bad faith. Is she really in all seriousness attempting to argue that these events represented the *evacuation* of authority from the world? In any event, what does Arendt mean when she refers to 'the world'? And if authority vanished from the world, where did it go?

Arendt's answer to the latter question is intricately bounded up with her understanding of worldliness as distinctly a manifestation of the public sphere, a

sphere characterised by action and speech and thus by freedom understood not as the internal freedom of contemplation but as the external freedom of action and speech (Arendt 1958, 175).[4] The disappearance of authority from 'the world' carried, for Arendt, a technical meaning: it signified specifically the disappearance of authority from the *political* sphere where it first appeared.[5]

Any reader of Arendt will know that, she, as someone who had been displaced from her country of birth and had acquired the unenviable status of refugee as a result of the unprecedented violence perpetrated by Nazi Germany, never denied the historicity of totalitarianism, nor of so-called authoritarian regimes. What she did deny, invariably so, was that these forms of government represented a culture of authority *as it was understood in the original Roman sense*. After all, it can hardly be denied that when it comes to political concepts, Arendt was interested in originality, that is, in their origin in history, in contradistinction to their modern appropriations in political philosophy. In accordance with this penchant, Arendt would argue in her essay on authority and more elaborately in her book on the antecedents of totalitarianism, that totalitarianism represented a novel form of government, characterised by a total breakdown of authority:

> The rise of fascist, communist and totalitarian movements and the development of the two totalitarian regimes, Stalin's after 1929 and Hitler's after 1938, took place against a background of a more or less general, more or less dramatic breakdown of all traditional authorities. Nowhere was this breakdown the direct result of the regimes or movements themselves, but it seemed as though totalitarianism, in the form of regimes as well as of movements, was best fitted to take advantage of a general political and social atmosphere in which the validity of authority itself was radically doubted. (Arendt 1956, 403.)

Moreover, Arendt argues that totalitarianism could not be attributed to the rise of a culture of *power*, but rather to the rise of a culture of violence, a culture which she referred to as 'total terror' (Arendt 1973, 465-466).

In order to understand Arendt's novel claims in this regard, one needs to pursue the political taxonomy that Arendt deploys in her book on violence, a book which was a direct outcome of the earlier essays in *Between Past and Future* in which the essay on authority is contained. In *On Violence* (from 1969), relying heavily as she did on the ancient Greek and Roman categorisations of political concepts, Arendt

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4 For Arendt, modern 'world-alienation' was man's alienation from the public sphere caused by the rise of 'the social'. Worldliness corresponded to the public sphere and therefore was a condition of human freedom in action and speech. See (Kateb 1977, 163) who identifies worldliness as the commitment to maintain 'a place for the conversation of diverse equals'.

5 That Arendt regards the world as the public sphere in which men come together in speech and action, is most clear from her Lessing Prize acceptance speech. See (Arendt 1968, 4): 'the world lies between people'; (9): 'the public space—which is constituted by acting together and then fills of its own accord with the events and stories that develop into history'; (9): 'escape from the world into the self'; and (10): 'the world—the thing that arises between people and in which everything that individuals carry with them innately can become visible and audible'. Also see (Kateb 1977, 175): 'the world means, by definition, the public, what all can see (in all the ways of seeing) or hear or read about'.

draws a distinction between power, strength, force, authority and violence (Arendt 1970, 44).

Power, she argues, corresponds to the human ability to act concertedly. It is therefore always a collective concept—an ability of the multitude to act suddenly and in an unprecedented way. Strength designated 'something in the singular'—an inherent property in a person or object 'which may prove itself in relation to other things or persons'. She accordingly understands 'force' strictly as 'the energy released by physical or social movements' and berates the perfect substitution in common parlance of 'force' for 'violence'. In the Arendtian taxonomy, violence is distinct from force in that the former reveals an instrumental character—it is phenomenologically close to strength in that it amounts, through the use of instruments or 'implements', to a multiplication of natural strength (Arendt 1970, 44-45).

Crucial for present purposes, Arendt distinguishes authority in this context from all of the above by referring to what she calls its 'hallmark': 'unquestioning recognition by those who are asked to obey; neither coercion nor persuasion is needed' (Arendt 1970, 45). The political sensibility that is crucial to authority is respect for the person or office. As Arendt writes in *The Human Condition*: 'Respect, not unlike the Aristotelian *philia politiké*, is a kind of "friendship" without intimacy and without closeness; it is a regard for the person from the distance which the space of the world puts between us, and this regard is independent of qualities which we may admire or of achievements which we may highly esteem' (Arendt 1958, 243). It is this emphasis on respect which leads Arendt to conclude that contempt, the very opposite of respect, is the 'greatest enemy of authority' (Arendt 1970, 45).

Arendt's claim that authority has disappeared from the world corresponds to her claim that our world is characterised by a 'modern loss of respect' (Arendt 1958, 243). This, she continues to argue, is a symptom of a greater malady, namely the 'increasing depersonalization of public and social life' (Arendt 1958, 243)—a condition that, in turn, corresponds to the rise of the bureaucratic form—a system of pure administration and normalisation which represents the eclipse of politics understood as the realm of free action and speech: 'bureaucracy unhappily is the rule of nobody and for this reason perhaps the least human and most cruel form of rulership' (Arendt 2003, 31).

3. Revolution and authority

Arendt's definition of authority, linked as it is with respect, is more or less uncontroversial. As indicated above, it is her claim that authority has *disappeared* from our world that is more difficult to understand.

This claim will lead us to another dimension of Arendt's thought on authority. Taking as her point of departure that authority is a concept distinctly Roman in origin, Arendt construes a lengthy and fairly complex history of authority. What stands central in this history is the original understanding of authority in Rome as 'the sacredness of foundation, in the sense that once something has been founded it remains binding for all future generations'. From this point of view, political

engagement was first of all synonymous with the preservation of the founding of the city of Rome. Unlike the Greeks, argues Arendt, the Romans were unable to repeat the founding of the polis. For them, the Greek counsel to found a new city at times of overpopulation or emergency, came across as completely unintelligible. The Greek saying 'wherever you are you will always be a polis' did not make sense to them. This was the case because the Romans were, from the outset, bound to the 'specific locality' of Rome; their conquests simply added to 'the original foundation until the whole of Italy and, eventually, the whole of the Western world were united and administered by Rome'. In short, '[t]he foundation of a new body politic—to the Greeks an almost commonplace experience—became to the Romans the central, decisive, unrepeatable beginning of their whole history, a unique event'. (Arendt 2006, 120).

The primary implication of this understanding of authority was that in Rome 'religious and political activity could be considered as almost identical'. This was the case because the founding of Rome formed 'the deeply political content of Roman religion'. In this context, religion literally meant *regilare*: 'to be tied back, obligated, to the enormous, almost superhuman and hence always legendary effort to lay the foundations, to build the cornerstone, to found for eternity'. This is also why the Romans' most revered divinities were Janus, the god of beginnings and Minerva, the goddess of remembrance. (Arendt 2006, 120-121).

Arendt emphasises that the word *auctoritas* derived from the verb *augere*, to augment. The task of those in authority thus was constantly to augment the foundation. Authority was thus rooted in the past, unlike power which is rooted in the living and therefore in the present. In fact, Arendt is at pains to point out that authority, 'in contradistinction to power (*potestas*), had its roots in the past' and that 'this past was no less present in the actual life of the city than the power and strength of the living' (Arendt 2006, 121-122).

It is crucial to my argument in this article to take note of Arendt's reference in the course of this discussion, to Montesquieu's understanding of the judiciary branch of government. Montesquieu argues that the judiciary does not have power, but nevertheless 'constitutes the highest authority in constitutional governments'. The binding force of the judiciary's pronouncements consist in its augmentation of the act of founding, 'binding every act back to the sacred beginning […] adding, as it were, to every single moment the whole weight of the past'. As Arendt interprets Montesquieu, this meant that, in Rome, precedents were always binding, creating a crucial link between authority and tradition, unless those previously established precedents could themselves be found to be incompatible with the sacred act of founding and thus could be said to have undone the link between authority and tradition: '[a]s long as this tradition was uninterrupted, authority was inviolate; and to act without authority and tradition, without accepted, time-honored standards and models, without the help of the wisdom of the founding fathers, was inconceivable'. (Arendt 2006, 122-124).

Arendt did not see the decline of the Roman Empire as consubstantial with

the demise of the Roman spirit of authority, linked as it was to tradition. On the contrary, the Roman spirit passed to the Christian Church with the fall of the Roman Empire: 'the Church became so "Roman" and adapted itself so thoroughly to Roman thinking in matters of politics that it made the death and resurrection of Christ the cornerstone of a new foundation, erecting on it a new human institution of tremendous durability'. In fact, the Church's political career hinged on a distinction between power and authority—it reserved for itself the 'old authority of the Senate' and left the power to 'the princes of the world'. The result was that the properly political lost its authority 'and with it that element which, at least in Western history, had endowed political structures with durability, continuity, and permanence'. (Arendt 2006, 125-127).

The inevitable result of this configuration thus was that with secularisation, authority as such disappeared from the public realm and became the distinct prerogative of the church. It was only in the modern age that the 'usefulness of religion' for politics was rediscovered. This occurred at the time of the American and French revolutions when its leaders preached that the people must not be allowed to lose their religion, for those who tear themselves away from God 'will end by deserting his earthly authorities as well' (Arendt 2006, 134).

It was, as Arendt argues, in fact the appeal to the Immortal Legislator and a future state of rewards and punishments that sanctioned the revolutions and justified the American constitutions as 'the only true foundation of morality' (Arendt 2006, 134). But these attempts to retain the element of violence and of using it as a safeguard for the 'new, secular political order' were in vain. Rather, it was modern ideologies that served to immunise man's soul 'against the shocking impact of reality' (Arendt 2006, 135). As Arendt states: 'the pious resignation to God's will seems like a child's pocket knife in competition with atomic weapons'. For Arendt then, religion loses its political significance as a potential force or ground of authority in modernity just as 'public life was bound to lose the religious sanction of transcendent authority'. (Arendt 2006, 134-135).

Yet, Arendt admits that in our political history, there was one political event of the modern age for which the notion of founding (and thus of authority) remained decisive. These were the revolutions of the modern age. In this context she refers to the thought of Machiavelli who insisted that 'every contact between religion and politics must corrupt both' (Arendt 2006, 138). It was Machiavelli who rediscovered that the whole of the Roman political experience 'depended upon the experience of foundation' and it was he who thought that this experience could be repeated through the founding of a unified Italy that would become the precursor of the modern nation-state. (Arendt 2006, 136-138).

But, for this repetition of founding or of re-founding, Machiavelli, like Robespierre, argued that violence was indispensable. Arendt points out that when Robespierre justifies terror as 'the despotism of liberty against tyranny' he sounds as though he is repeating Machiavelli's statement with regard to the necessity of violence for the foundation of new political bodies. Machiavelli and Robespierre then,

go beyond what the Romans had understood about foundation. For the Romans, foundation was a mystical event of the past; for Robespierre and Machiavelli it was a supreme end that had to be achieved for which all means and 'chiefly the means of violence' could be enlisted. Foundation was now inextricably caught up with the act of making, which necessarily implies violence: 'You cannot make a table without killing trees, you cannot make an omelet without breaking eggs, you cannot make a republic without killing people'. (Arendt 2006, 139).

4. Post-colonial authority

Arendt concludes her essay on authority with an emphatic denial that authority has been anywhere re-established through revolution or restoration 'and least of all through the conservative moods' that 'occasionally sweep public opinion'. For Arendt this loss of authority and the concomitant understanding that the source of authority transcends all power and those who are in power, primarily means that we are 'confronted anew' with 'the elementary problems of human living-together'. (Arendt 2006, 141).

Contemporary commentators often read in Arendt a nostalgia for a conservative concept of authority (Warren 1996, 51),[6] but as Honig has argued: 'Arendt does not simply mourn the disappearance of political authority in modernity; she also celebrates it' (Honig 1991, 97). Moreover, according to Honig, Arendt, 'in the spirit of celebration', realizing that the old concept of authority was lost with the birth of modernity, constructs a replacement for a practice of authority that is suited for modernity—and for this construction she turns to a 'fabulist' reading of the American incidence of revolution.

In this regard, Arendt celebrates the American revolutionaries for 'seeking in the end not just liberation but the reconstitution of the political realm in order to enable the citizenry of the new republic to experience the happiness of public freedom and political action'. On the other hand, Arendt criticises the revolutionaries for a 'lack of faith' which led them to seek reassurance in antiquity that their actions were not 'radical but derivative'. In this they were mistaken, 'for their action *was* unprecedented'. With the Declaration of Independence the American revolutionaries founded a new authority in a new way, that is, through political action: 'a speech act that in itself brings "something into being which did not exist before"' by virtue of the enunciation 'We, the people' by way of which the legal order is reconstituted and also legitimized through the adoption of the new Constitution. And as Honig points out, since the Declaration represents the written word, we are confronted by an instance of political action so profound that it erects its own monument. (Honig 1991, 98-99).

It is this authority that 'salvages political authority for an age unable or unwilling to support the authority of tradition and religion', that is, the old concept of authority as unquestioning obedience. Honig argues that it is through this construction of

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6 Also see Flathman 1980 and Friedman 1973.

authority as grounded in the performative—action and beginning—that Arendt thus 'saves' authority, 'because she realises that without it there can be no politics' (Honig 1991, 101).

5. The founding of post-apartheid authority

I find Honig's characterization of the re-founding of authority in the act of Constitution founding as a performative act—an act that appears in (written) words—particularly compelling for the post-apartheid context. Famously, the end of institutionalized Apartheid coincided with the reconstitution of the South African legal order through the adoption of the interim Constitution of 1993 and, ultimately, the Final Constitution of 1996. By subordinating all other (pre-existing, colonial) domestic law to it, these Constitutions became the ultimate source of legal validity.

South African scholar, Etienne Mureinik, characterised this legal revolution, this shift from Apartheid to transformative constitutionalism, as a shift from a culture of authority to a culture of justification (Mureinik 1994, 32; Langa 2006, 353). Employing the metaphor of the Constitution as a 'bridge' he argued that it was a bridge from a culture in which the parliamentary sovereignty of a minority parliament reigned supreme, from a culture that taught that what Parliament says is the law, 'without the need to justify even to those governed by the law'. As Mureinik puts it: 'The effect of these teachings, at the apogee of apartheid, was to foster an ethic of obedience' (Mureinik 1994, 32). What the Constitution is a bridge *to* is what he characterized as a culture of justification: 'a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force of its command' (Mureinik 1994, 32).

Arendt's political taxonomy, linking authority to respect, would perhaps have trouble describing the totalitarianism of the Apartheid government as representing a culture of authority, given her warning, in the earlier essay on authority, 'how careful we must be lest we mistake tyrannical forms of government, which rule by order and decree, for authoritarian structures' (Arendt 1956, 404). In the same essay, Arendt writes about the often conflated notions of violence and authority: if violence makes people obey, so the argument goes, then it fulfills the same function as authority, so that the two can be regarded as perfect substitutes.

Arendt berates these arguments for confusing political issues and specifically for blurring the distinction between familiar forms of government and totalitarianism as a novel form of government: 'I do not believe that atheism is a substitute for or can fulfill the same function as a religion any more than I believe that violence can become a substitute for authority' (Arendt 1956, 417). From this vantage point, we can understand Arendt's account of totalitarian government: a government that is characterised by a breakdown of authority and which consequently rules through that extreme form of violence she calls terror. Moreover, a totalitarian government does not deploy its violence in the name of re-founding political authority, but rather, as she famously argues, in the name of death itself. (Arendt 1973, 467). A totalitarian

government enforces its decrees through the implements of violence and nothing else even when it is not yet firing the gun or launching the missile or dropping the bomb. It is this rule through violence that finally rendered the Apartheid government totalitarian.

For Arendt the central political problem of modernity was precisely the act of founding authority without appealing to what Derrida has called, following Montaigne, a 'mystical foundation' (Derrida 1990). As Honig puts it: 'Can we conceive of institutions possessed of authority without deriving that authority from some law of laws, from some extrapolitical source? In short, is it possible to have a politics of foundation in a world devoid of traditional (foundational) guarantees of stability, legitimacy, and authority?' (Honig 1991, 98). For Honig, and I agree with her, the answer to this question for Arendt was: yes, on condition that we are willing to retheorise authority for a nonfoundational politics.

I believe that Arendt would have characterized the bridge that is the post-Apartheid Constitutions as a bridge from a culture of violence to a culture of authority, but here an authority that finds its source outside government per se, an authority that is grounded in the performative, the 'We … adopt' (as it is in the preamble to the South African Constitution), in the act of founding itself. This performative speech act, as Honig points out, is uniquely human and represented for Arendt a true political act—an act in which people come together and bring something truly new into the world: 'an authoritative exemplification of human power and worldliness' (Honig 1991, 101). This, of course, implies that in the Arendtian taxonomy power (a plurality of people coming together and acting) and authority are interdependent. It also means that the appeal to a transcendent source of authority becomes redundant (Honig 1991, 101).[7] The preamble to the Constitution 'provides the sole source of authority from which the Constitution, not as an act of constituting government but as the law of the land, derives its own legitimacy' (Arendt 1963, 193).

A shift from a culture of violence to a culture of constitutional authority necessarily involves, (and here one can agree with Mureinik)—indeed necessitates— a culture of justification, in order to prevent it from regressing back into a culture of violence. For, when political authority is established by the performative act, authority is nothing without justification. This is what Mureinik meant when he characterized the shift brought about by the post-apartheid Constitution as a shift from authority to one of justification: justification is what ensures the implied but no less essential element of authority namely that it is an 'obedience in which men retain their freedom' (Arendt 2006, 105).

The reason why justification allows for this freedom-in-obedience is because it is through justification that men are referred back to the moment of their liberation from tyranny, their performative act of founding. As Frank Michelman puts it

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7 In this regard, Jean-Luc Nancy (2007, 9) has argued that the very 'invention of sovereignty' at the beginning of the modern State represented the end of the appeal to transcendent authority: 'the State, cannot by definition depend upon any authority other than itself, and its religious consecration does not, despite appearances, constitute its political legitimacy'.

specifically in the context of judicial review: 'The Court helps protect the republican state, that is, the citizens politically engaged from lapsing into a politics of self-denial. It challenges "the people's" self-enclosing tendency to assume their own moral completion as they now are and thus to deny to themselves the plurality on which their capacity for transformative self-renewal depends' (Michelman 1988, 1532). Therefore, in Arendt's terms, justification amounts to an act of authority, binding or tying every act back to the beginning that is represented in the foundation and, by doing so, augmenting that foundation (Arendt 2006, 121).

In the post-apartheid context and in the face of the reality of an unelected judiciary, former Chief Justice Pius Langa puts it succinctly: '[u]nder a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values' (Langa 2006, 353). Justification is, then, precisely the constant reference back to the act of authority-in-founding. In the South African context this authoritative act of founding is contemporaneous with the founding of freedom and the instrument of this founding is the Constitution, its liberating ideals, its ideas and its values. Frederik Schauer, in turn, picks up on Arendt's identification of the linkage between authority and respect by arguing that while authority in the traditional sense does not require reasons, in the modern age respect in law and politics must be earned. When decision makers expect respect for decisions 'because the decisions are right rather than because they emanate from an authoritative source' giving reasons becomes a way of bringing the subject of the decision into the enterprise (Schauer 1995, 658). In the context of an unelected judiciary this point seems to be particularly apposite. To a large extent, an unelected judiciary cannot but rely on voluntary compliance which is contingent upon earning respect—it cannot enforce many of its decisions across the body politic or the class of persons to whom it applies (as opposed to the narrow category of the parties before the Court). But even if compliance is not the issue 'giving reasons is still a way of showing respect for the subject, and a way of opening a conversation rather than forestalling one' (Schauer 1995, 658). Especially when a court makes decisions that seem to go against the wishes of the vast majority, giving reasons, explaining why the particular decision accords with the people's original constitutional (founding) commitment, is crucial for the maintenance of its (countermajoritarian) authority. As Ronald Dworkin puts it: 'A legislator who proceeds in this way, who refuses to take popular indignation, intolerance and disgust as the moral conviction of his community, is not guilty of moral elitism. He is not simply setting his own educated views against those of a vast public which rejects them. He is doing his best to enforce a distinct, and fundamentally important, part of his community's morality, a consensus more essential to society's existence' (Dworkin 1966, 1002).

Mark Warren (1996, 47) has linked justification to the very idea of democracy as such. Under democracy, he argues, authorities cannot legitimately hide behind the old concepts of tradition and authority: 'They must, in the final analysis, justify their decisions and convince that they are deserving of trust. The possibility that

decisions will have to be justified in the face of challenge pervades authority […] when authorities can justify their decisions, they generate a trust that does not depend on the habitual loyalty or fearful obedience of subjects'. To this Langa adds that under a transformative post-apartheid Constitution, justification renders law inescapably political in the sense that 'our constitutional legal culture requires that we expressly accept and embrace the role that our own beliefs, opinions and ideas play in our decisions. This is vital if respect for court decisions is to flow from the honesty and cogency of the reasons given for them rather than the authority with which they are given' (Langa 2006, 353).

6. Le Roux v Dey: refusing justification

But what happens when someone who is supposed to uphold authority through a justification of every exercise of power, no longer appears to believe that justification (which, in the judicial sphere essentially amounts to providing reasons for a judgment on the substantive law in the context of precedent and a commitment to transformative constitutionalism) is required for the exercise of authority? In Arendt's terms as developed by Honig, this would amount to nothing other than a breakdown of the kind of authority retheorized for modernity, precisely because it would no longer be possible to speak in such circumstances of an obedience-in-freedom. And this would represent the emergence of a power that is not vested in authoritative concerted action but rather in a power that would correspond to a nostalgic longing for a culture of violence.

These are the *ex post facto* problematics of Justice Mogoeng's refusal to provide reasons for his dissent with that part of the Court's judgment in *Le Roux v Dey*[8] that holds that it is not defamatory per se to refer to someone as homosexual or gay. Mogoeng's refusal (indicated by the dissent without reasons) to accept the majority's decision that it is not unconstitutional to refer to or depict someone as gay or homosexual (along with its reasons for this decision), itself represents a refusal not only of the authority of the Constitution's protection against unfair discrimination on the basis of sexual orientation, it would also amount to a refusal of the Constitutional Court's jurisprudence in relation to the sexual orientation cases in which the Court held, *inter alia*, that against the background of the Constitution's progressive provisions as regards sexual orientation, '[t]he concept of sexual deviance needs to be reviewed' and that the 'heterosexual norm' that was established 'ceases to be the basis for establishing what is legally normative'.[9]

The refusal to provide reasons also amounts to a refusal of the culture of justification itself. If we were to bear in mind Mureinik's logic (which sees the constitutional moment as contemporaneous with the shift to a culture of justification), then there can be no doubt that the refusal to provide reasons amounts to a refusal of

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8 *Le Roux v Dey* para. [181] – [189].
9 *National Coalition for Lesbian and Gay Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC) para. [134].

the enterprise of transformative constitutionalism itself. To be sure, Justice Mogoeng's refusal is qualitatively different. It is not, like other refusals to provide reasons for a judgment in South African law,[10] an *authorised* refusal, that is, a refusal sanctioned by the post-apartheid legal order. Nor is the phrase 'save for' in the text of the judgment (by way of which Mogoeng's dissent is indicated) the same 'save for' as the other ones that are to be located in the *Le Roux* judgment. The other 'save fors' are authorised—they indicate that there are other dissents and separate judgments. But these 'save fors' are authorised because they introduce those judgments that do provide reasons for disagreement with, or supplementation of, the majority's reasoning[11]—they are not simply terse statements recording the fact that a particular judge disagreed with the majority, as is the case in respect of the 'save for' that applies to Mogoeng.[12]

Justice Mogoeng's refusal to provide reasons in this case does not simply amount to a negligible oversight. As the Constitutional Court recently held in the *Strategic Liquor Services* case, acknowledging that there is no express constitutional obligation on judges to give reasons,[13] '[i]t is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, […]. Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the […] process'.[14]

In his address at the first orientation course for new judges in 1997, Justice Corbett remarked that it is 'in the interests of the open and proper administration of justice that the courts [where they deliver a final judgment] state publicly the reasons for their decisions', because a statement of reasons 'gives some assurance that the court gave due consideration to the matter and did not act arbitrarily' (Corbett 1997, 117). As Schauer has argued, 'whatever the hierarchy between reason and authority, reasons are what we typically give to support what we conclude precisely when the mere fact that we have concluded is not enough' (Schauer 1995, 637). In the context of an unelected judiciary, the mere fact that one has, as a judge, concluded on an issue of substantive law that goes directly to one of the most important provisions of the Constitution (the non-discrimination clause), is simply not enough. And it contributes in no way to the augmentation of the legitimacy of an unelected judiciary that locates its authority precisely in the people's act of founding *this* Constitution.

It is possible to stretch the Arendtian taxonomy in order to consider a judge's refusal to provide reasons as representing an act of violence, but here not the law preserving violence that is characteristic of every legal decision (Derrida 1990, 927),

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10 In *Strategic Liquor Services v Mvumbi* (2010) (2) SA 92 (CC) para. [17] the Constitutional Court referred to the 'long-standing practice' in the Supreme Court of Appeal not to give reasons when deciding applications for leave to appeal where there has been no oral argument—a practice that it upheld in M*phahlele v First National Bank of South Africa Ltd* (1999) (2) SA 667 (CC).

11 As alluded to before, the Constitutional Court was heavily divided: apart from a judgment authored by 'the Court' and the majority judgment authored by Justice Brand, there is a dissenting judgment authored by Justice Yacoob, a dissenting judgment authored by Justices Cameron and Froneman (parts of which also represented the judgment of the majority) and a separate judgment authored by Justice Skweyiya.

12 See *Le Roux v Dey* 2011 (3) SA 274 (CC) para. [8].

13 *Strategic Liquor Services v Mvumbi* (2010) (2) SA 92 (CC) para. [17].

14 Ibid., para. [14].

but rather something closer or related to the law destroying violence that Walter Benjamin characterised as 'bloodless' (Benjamin 2009, 24). This is the bloodless violence of the legal text's enunciation that 'save for Mogoeng, J', the other judges agreed with that portion of the judgment.[15] And this bloodless violence, the violence of the 'save for', by way of which the exception (and the state of exception in relation to this text) is created (Agamben 2005, 59); this violence of a refusal to provide reasons for a substantive decision, is not a violence aimed (as Robespierre and Machiavelli knew well) at a new act of founding. It is a violence aimed at violence itself, violence as what Benjamin called 'pure means' (Benjamin 2009, 15). It is, moreover, no coincidence that the text here involves the lexicon of salvation, of the 'save for', saving, redemption or exception, because, for Benjamin it is precisely this bloodless violence that corresponds with that violence which is called divine. It is as if, by way of a dazzling sleight of hand, a state of exception is indeed, at least momentarily and judicially, created in this judgment, in the specific sense that a judge's ordinary constitutional (one could say authoritative) responsibility to provide reasons for a judgment on a substantive matter of law is *excepted* and, more worryingly, accepted.

If all this sounds more than a bit exaggerated, somewhat evangelical and even eschatological, let us not forget to read the refusal to provide reasons in the context of the fact that (now) Chief Justice Mogoeng has unequivocally offered us the 'truth' that he had received a revelation in the form of a sign from God that the divinity wanted him to be South Africa's Chief Justice, when, in his public interview for the vacancy of Chief Justice, he stated without irony and with as much sincerity as awkward gravitas, that '[w]hen a position comes like this one, I wouldn't take it unless I had prayed and satisfied myself that God wants me to take it. I got a signal that it was the right thing to do' (Majavu 2011). The appeal to transcendent authority, divine will and signature (like the writing on the wall of king Belthazar's dining room) thus here re-inscribes itself into the office of what is supposed to be worldly authority.

But when Arendt wrote that the source of authority transcends those who are in power, she was not referring to a return of the authority of religion or the divine into the affairs of the political. Rather, she was referring to the act of founding that always transcends the particular individuals in power.

Arendt did not live to comment on the founding of post-apartheid authority, but she would certainly have cautioned that if authority did return to the political sphere through the founding, admittedly accompanied by much founding violence,[16] of South Africa's post-apartheid Constitutions through the performative 'We, the people […] adopt', it remains as precarious and in need of alarm when under threat, as it was when it first vanished from the world.

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15 *Le Roux v Dey* 2011 (3) SA 274 (CC) para. [9].

16 In this regard, Žižek's estimation of contemporary acts of founding is accurate: 'Political space is never "pure" but always involves some kind of reliance on pre-political violence. Of course, the relationship between political power and pre-political violence is one of mutual implication' (Žižek 2005b, 125).

7. Conclusion

> *[w]e are of necessity led in a twofold manner: by authority*
> *and by reason. In point of time, authority is first;*
> *in the order of reality, reason is prior.*
> Hannah Arendt[17]

It is perhaps a stroke of luck—a divine irony?—that the appellants in the very case that has been under discussion here, offer those of us who wish to counter the resistance to the culture of authority-through-justification, inaugurated by the post-apartheid Constitutions, the best manner in which to do so. The appellants in *Le Roux v Dey* rebelled against the conventional concept of authority by taking a picture of two naked men sitting next to each other on a couch and superimposing the face pictures of their school's principal and deputy-principal on the bodies. They then published the collage to friends' mobile phones and it also ended up briefly on the school's notice board. In short, some would say they were making a joke, others that they were ridiculing / resisting authority.

Arendt remarks that the greatest enemy of authority is contempt and that 'the surest way to undermine it is laughter' (Arendt 1970, 45). Yet, by the force of a strange deconstructive twist in this regard, we could argue that the greatest enemy, not of authority, but rather of a certain *resistance* to worldly authority *is*, precisely, contempt and its manifestation in laughter … this laughter that always marks—precisely as the appellants in Le Roux illustrated so vividly and I imagine knew very well—the vanishing point, the absence, the crisis and the flight of authority from our world.

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17 Arendt 1996, 5.

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Book Review

Desmond Manderson: *Kangaroo Courts and the Rule of Law. The Legacy of Modernism.* Routledge, Abingdon 2012.

Luis Gómez Romero*

Kangaroo Courts represents the height of the recent work that Desmond Manderson has developed around the nexus between 'law and literature' and the rule of law.[1] Manderson's approach to this matter is unique in taking seriously both literary theory and the aesthetic aspects of literary texts—strange though it may seem, this is an authentic *revolution* in the field of law and literature. Manderson rightly observes that back to their very origins the discourses constructed around the conjunction of 'law and literature' have suffered from two structural weaknesses: first 'a concentration on substance and plot' and second 'a salvific belief in the capacity of literature to cure law or perfect its justice' (Manderson 2012a, 9). The first fails to question the 'mimetic fallacy' that regards the imitation of nature or reality as the main function of art (Manderson 2011, 108-118; 2012a, 10-17).[2] The second fails to question the 'romantic fantasy' that sets the purpose of art in 'healing the world's wounds' (Manderson 2011, 118-121; 2012a, 17-20).[3]

Manderson contends that what makes literature worth reading is neither its coherence with the world, nor the morality it endorses. The aesthetic ideals of modernism, which so dramatically transformed the landscape of literature, philosophy and politics around the turn of the 20th century, reject precisely these claims. Modernist texts are noteworthy because of their quest for aesthetic autonomy through 'the eternal recurrence of play and form and the priority of voice over event' (Manderson 2012a, 16). From a modernist perspective, thus, reading a novel as a

* Lecturer in the School of Law, University of Wollongong, Australia.
1 See Manderson 2011, 2012, 2012b and 2012c.
2 See, for example West 1985 and 1986, Posner 1986, Nussbaum 1995 and Lacey 2008.
3 See, for example Nussbaum 1995, Ward 2003 and Williams 2005.

'normative framework to convey information concerning "the real world"' miserably forsakes to appreciate 'the dimensions of form and style in works of literature as central elements of our experience and enjoyment of them' (Manderson 2011, 116-117). Modernism simply has not happened yet in the academic field that we call 'law and literature'—that is, the study of literature by scholars who are mainly interested in law—as it clings to a time 'before the crisis of modernity' that shook both law's and literature's claims to 'the certainty and objectivity of the written text' (Manderson 2012a, 20). In this regard, it must be noted that while *modernism* and *modernity* are related, they should also be sharply distinguished. In Manderson's words:

> Modernity might be said to encompass the monumental changes in society and in belief that the Enlightenment set in motion and that accelerated and ramified with the industrial revolution right through the nineteenth century. Modernism […] refers to the paroxysms which ensued when the worlds of the arts and ideas began to depict, understand, and respond to them. Some would date modernism as early as the publication of Rimbaud's *Un Saison en Enfer* in 1873, with its ruthless rejection of romance and its ringing final sentence: 'One must be absolutely modern'. Well before the First World War […] Sigmund Freud and Henri Bergson, Cézanne, Malevich, Kandinsky and the Blue Rider School, Stravinsky's *Firebird Suite* and *Rite of Spring* and Schoenberg's *Second String Quartet* had all broken with key tenets of aesthetic and social convention. (Manderson 2012a, 26.)

The ascension of modernism overlaps with the 'crisis of modernity'—Manderson regularly uses the noun 'crisis' in its singular form—that was triggered by World War I, which in turn virtually destroyed the trust in the systems, beliefs and institutions whereon the so-called Western *civilization* was erected: reason, science, industrialization, capitalism and liberal democracy. To put it briefly, modernism is a response to the 'crisis of modernity'. Modernism signifies 'a commitment to individual over social good, a sense of rootlessness and exile, and, coupled with an emphasis on the varieties and uncertainties of individual subjectivity, the most comprehensive critiques of representation and the most radical experiments in form' (Manderson 2012a, 27).

In each of the arts, stylistic variation and reinterpretation—even parody or pastiche—of the past canon were central to the modernist period. In the literary field, modernism entails therefore an understanding of literature 'as a site of questions not of answers, of the creation of textual doubt and ambiguity not certainty' (Manderson 2011, 108). Modernism destabilized the syntactic and logical articulations which had previously communicated a story to the reader by focusing instead in fragmentation, indeterminacy and singularity both in voice and perspective (Manderson 2012a, 19).[4] Irony is thus central to our understanding of literary modernism as it juxtaposes 'the

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4 This is the case, just to mention a couple of examples, of James Joyce's *Ulysses* (1922), whose encyclopaedic intertextuality displays multiple levels of conceptual and formal structures; or Virginia Woolf's *Mrs. Dalloway* (1927), which follows the stream of consciousness of its central characters through twenty-four hours.

play of levels and registers within a text, and the tensions between levels of meaning which thereby undermine the most innocent of speech acts' (Manderson 2011, 121; 2012a, 17).

Nonetheless, the emergence of new artistic styles that stressed the importance of subjective experience was not the only effect of the horrors that emerged from the Great War's trenches. Romanticism regained momentum. Even though liberals have consistently identified romanticism either with reactionary or plainly totalitarian politics (Talmon 1960; Berlin 1999), Manderson appropriately avoids this misleading account of its political, philosophical and aesthetic ramifications. Based on the seminal work of M. H. Abrams on romanticism, Manderson identifies as its central philosophical feature 'a metaphysics of integration, of which the key principle is that of the "reconciliation" or synthesis of whatever is divided, opposed, and conflicting' (Manderson 2012a, 17; Abrams 1971, 177-183). The romantic sensibility is bound up with the painful conviction that in modern capitalist reality something precious has been lost, at the level of both individuals and humanity at large. Romanticism resists therefore the alienation of certain essential human values—*qualitative* values as opposed to the purely *quantitative* exchange value that predominates in capitalist modernity—and promises instead the overcoming of difference, the accomplishment of inward plenitude and the instauration of harmony among human beings.

Manderson diagnoses a growing dilemma between introspection, individual self-assertion, and the claims of the collective among Western intellectuals as modernism moved *in crescendo* into the political tensions of the 1920s. In the years that followed World War I 'many writers, artists and thinkers were virulently opposed to the legal and social history of positivism and rejected in almost identical terms its obsession with mechanics, systems, technology and rules' (Manderson 2012a, 40). In the writings of the German New Romantics—Eugen Diederichs, Paul de Lagarde and Julius Langbehn, among other authors—'we can observe the same fusion of nature, tradition, custom, religion; the same belief in justice as hierarchical and leadership as manifest' (Manderson 2012a, 41). I think George Orwell effectively illustrates Manderson's claim when he plunges into the belly of modernism and describes the experience of transiting from radical aesthetic individualism to the desire of collective harmony and transcendence in the following terms: 'Suddenly we have got out of the twilight of the gods into a sort of Boy Scout atmosphere of bare knees and community singing'. (Orwell 1968, 510).

Orwell sharply describes in this way the cultural mood that fostered the *reactionary* constituent of modernism, which Manderson defines as 'romanticism which has taken a political and nihilistic turn' (Manderson 2012, 15). No author better shows the implications for the rule of law of this resurgent romantic spirit than Carl Schmitt, whose work virtually dissolves law into the mutually enticing forces of politics and emotions. Manderson acknowledges that the association of Schmitt with romanticism is not obvious: his *Political Romanticism* is precisely 'a vitriolic diatribe *against* political romanticism' (Manderson 2012a, 42; Schmitt 2011). Nonetheless, Schmitt clearly fits into a pattern of anti-modernist legality that

reinstates transcendent decision as the key element of the legal system. Manderson contends that '[i]f he dismissed political romanticism as "the sovereignty of the ego", his solution merely substituted the egotism of the sovereign' by transferring it to an original and charismatic authority that is 'underived from any institutional structure' (Manderson 2012a, 43; Schmitt 2011, 65).

Schmitt's critique of legal positivism was forged out of the ashes of the Great War. 1922 marks a critical turn in his thought. The publication that year of *Politische Theologie* exhibited his decisive rejection of the liberal rule of law as expressed through positivist legal theory. Contrarily to the basic idea of the rule of law, which is expressed in the phrase 'government by law and not by men'—that is, that the government shall be ruled by the law and subject to it, making it possible for individuals to foresee with fair certainty how the authority will use its coercive powers, and to plan their affairs on the basis of this knowledge (Raz 1977, 195-198)—, Schmitt had come to believe that justice could not be achieved even by the best of rules. Schmitt's key theses can be encapsulated in the following threefold principle: i) 'Sovereign is he who decides the exception'; ii) '[t]he exception is that which cannot be subsumed [… it] appears in its absolute form when a situation in which legal prescriptions can be valid must first be brought about', and iii) '[t]he exception in jurisprudence is analogous to the miracle in theology'. (Schmitt 1985, 5, 13 and 36). For Schmitt, justice was not found in legal structures but in their exceptions; not by reference to established procedures but by summoning the voice of the people and the force of the leader who would condense and amplify it.

The exasperation that Schmitt and the New Romantics expressed about the logical and moral limits of positivism resonates today in us as forcefully as it did in 1922. The attack on the Twin Towers and their collapse on 11 September 2001 gave birth to the *brave new world* of Guantanamo Bay and Abu Ghraib. Both listlessness in regulating economic powers and corruption have spread all over the world dystopian realities in the form of a devastating economic crisis.[5] Law seems helpless to constrain public powers that have resuscitated a Hobbesian conception of untrammeled sovereignty as well as private powers that do not accept any legal limits in their quest for profit.

The traditional positivist conceptions of language, objectivity and meaning in law seem highly inefficient to address these challenges. The rule of law is lethally imperilled, but we still do not have anything replace it. Manderson asserts that D. H. Lawrence's work constitutes a timely platform for reassessing our problems with justice and judgment because no less than him 'we still face the terrible problem of what to do once we can no longer believe in our old habits of thought: for belief has died though the habit of believing lingers on' (Manderson 2012a, 3). *Kangaroo*—a novel Lawrence wrote in the sea side town of Thirroul on south coast of Sydney where he and his wife Frieda stayed for six weeks during the Australian winter of 1922—responds precisely to the disorientation caused by the Great War and its implications

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5 For a recent account on the present worldwide dystopian realities, see World Economic Forum 2012 (specifically, the section titled 'Seeds of Dystopia', 16-19).

for art, politics and law. *Kangaroo* faithfully depicts the *allure* of totalizing ideologies that promise the redemption of justice and community under the authority of a wise and loving leader—*Duce*, *Führer*, or *Caudillo*—, but ultimately Lawrence recoils from them and renounces his own fondness for authoritarian politics. Lawrence actually changed his mind about the need of leadership for achieving justice. In a much quoted letter written to Witter Bynner—dated 13 March 1928—Lawrence categorically asserted:

> The hero is obsolete, and the leader of men is a back number. After all, at the back of the hero is the militant ideal: and the militant ideal, or the ideal militant seems to me also a cold egg. We're sort of sick of all forms of militarism and militantism [...] the leader-cum-follower relationship is a bore. And the new relationship will be some sort of tenderness, sensitive, between men and men and men and women, and not the one up one down, lead on I follow, *ich dien* sort of business. (Lawrence 1991, 321.)

Manderson's reading of Lawrence's *Kangaroo* as a dialogic and polyvalent text provides us with a basis to state that this letter does not inaugurate a new stage in Lawrence's thought but rather continues an earlier one whose origins can be traced up to his brief sojourn in Australia.[6] *Kangaroo* tells the story of Richard Lovatt Somers—Lawrence's *alter ego*—, an English writer whom a group of war veterans who call themselves 'Diggers' tries to recruit to the cause of a right-wing takeover in Australia. The righteous authority of their leader, a lawyer born Benjamin Cooley and known as 'Kangaroo', is their only political creed:

> I want to keep *order*. I want to remove physical misery as far as possible […] And that you can only do by exerting strong, just *power* from above […] I should try to establish my state of Australia as a kind of Church, with the profound reverence for life […] as the motive power […] Yet there must be law, and there must be authority. But law more human, and authority much wiser […] Man needs a quiet, gentle father who uses his authority in the name of living life, and who is absolutely stern against anti-life. I offer no creed. I offer myself, my heart of wisdom, strange warm cavern where the voice of the oracle steams in from the unknown; I offer my consciousness, which hears the voice; and I offer my mind and my will, for the battle against every obstacle to respond to the voice of life, and to shelter mankind from the madness and the evil of anti-life. (Lawrence 1923, 126-127.)

Kangaroo's pretended legitimacy comes from 'the ability of a true leader to act wisely outside of the rules, to realize that the unity of the people transcends vested interests, and to receive the allegiance of his subjects […] by virtue of his natural

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6 Philip Sicker argues that Lawrence's retreating from leadership politics lasted only until 1929, at which time his Grand Inquisitor essay reasserted the importance of the hero (Sicker 1992). However, as Jad Smith observes, the question of whether or not Lawrence eventually reaffirmed his interest in leadership politics matters less than his hesitation while he was writing the 'leadership novels' (Smith 2002, 21).

and manifest authority' (Manderson 2012a, 58). Somers initially succumbs to the seduction of these ideals of cohesive community and charismatic leadership as Kangaroo directly appeals to his contempt for egalitarianism and *corrupt* modernity. He regards Australia as a loathsome '*terre* democratic' without any sense of 'class distinction', where '[t]he proletariat appoints men to administer the law, not to rule' (Lawrence 1923, 18). Somers craves instead '[t]he mystery of lordship […] the mystic recognition of difference and innate priority, the joy of obedience and the sacred responsibility of authority' that 'democracy and equality try to deny and obliterate' (Lawrence 1923, 121).

Manderson suggests that to understand *Kangaroo*'s argument properly we must pay attention not just to Somers, but to *all* its characters and to the different voices that struggle in each character's conscience (Manderson 2012a, 125). Somers' voice in the novel is constantly undermined and destabilized by others voices: by the narrator, by his wife Harriet and even by Somers himself through an internal dialogue between the yearning to lose himself into collective unity and the desire for solitude. Somers repeatedly berates himself as he acknowledges he is merely a 'preacher and a blatherer', a plain fool and even a 'beastly' and 'detestable little brat' (Lawrence 1923, 319, 327-328 and 332).

Indeed, Harriett's is the most powerful voice that subverts Somers' pretensions. Manderson calls our attention to a particular example which illustrates how Lawrence ironically modulates his own voice, citing his own opinions in contexts that subtly disrupt them (Manderson 2012a, 125-126). On a cold day at the beach—Lawrence tells us—Somers' hat is caught by the wind and carried into the waves. He clumsily manages to rescue it (Lawrence 1923, 322). Chilled and wet, he continues to lecture Harriet on the way home about the convenience of reawakening 'the aristocratic principle' that advocates the recognition of 'the *innate* difference between people'. Harriet retorts brutally: 'Aristocratic principle! […] You should have seen yourself, flying like a feather into the sea after your hat'. (Lawrence 1923, 325). Later, he sits in a little barrel with a rusty tin-lid to warm himself near the fire. She pours scorn on him again: 'Old tin lids! How can you *sit* on it? […] Is that your aristocratic principle?'. (Lawrence 1923, 326).

The novel's embodiment in multiple characters provides resistance to the claims and arguments of each of them. Somers' engagement in active dialogue with other characters' voices transmutes his viewpoints about politics and justice. As Somers gradually abdicates the hierarchical and collectivist creed he endorsed at the time he arrived to Australia, he ruminates that '[l]ife makes no absolute statement […because] Life is so wonderful and complex, and *always* relative'. (Lawrence 1923, 314). In the end, he refuses to be seduced by the promises of any man to truly possess the insight and authority that Kangaroo vindicates. Somers just wants to be left 'alone by himself, alone with his own soul, alone with his eyes on the darkness which is the dark god of life'. (Lawrence 1923, 330). Thus, he finally declines Kangaroo's suffocating embrace:

> Don't love me. Don't want to save mankind. You're so awfully *general*, and your
> love is so awfully general […] Let's be hard, separate men […] you're such a
> Kangaroo, wanting to carry mankind in your belly-pouch, cozy, with its head
> and long ears peeping out. You sort of figure yourself a Kangaroo of Judah,
> instead of a Lion of Judah […] Let's get off it, and be men, with the gods beyond
> us. I *don't* want to be godlike, Kangaroo. I like to know the gods beyond me.
> Let's start as men, with the great gods beyond us. (Lawrence 1923, 245.)

Why did Lawrence turn his back on reactionary romanticism in this way? Manderson
thinks that the answer lies in the novel itself. Mikhail Bakhtin's writings on the novel
provide us with the necessary elements to understand Lawrence's ideological evolution
through *Kangaroo*. Bakhtin highlights the novel as an inherently fragmentary and
double-voiced genre. The most powerful feature which Bakhtin recognizes in the
novel is its *heteroglossia* or polyphony, its characteristic multiplication of voices and
perspectives. In speech, 'every word is directed toward an answer and cannot escape
the profound influence of the answering word that it anticipates'. (Bakhtin 1981,
280). The novel reproduces this aesthetical—as well as ethical—quality of speech.

Bakhtin defines the novel as 'a diversity of social speech types (sometimes even
diversity of languages) and a diversity of individual voices, artistically organized'.
(Bakhtin 1981, 262). Its distinctive 'dialogic imagination' gives a particular voice to
each of the characters and sets these voices *against* one another. The novel's multiple
voices appear in many different mutual relations—of stylization, parody, hidden
polemic, and so on. Along these lines, the novel points not just to a mosaic of voices,
but at the same time to their transformation under the communicative pressure of
their contexts of utterance. This is what Bakhtin means when he speaks about the
novel as a literary genre that is basically 'dialogized, permeated with laughter, irony,
humor' and 'elements of self-parody', and also imbued with 'indeterminacy, a certain
semantic open-endedness' and 'a living contact with unfinished, still-evolving and
contemporary reality' (Bakhtin 1981, 7).

If we read *Kangaroo* from a Bakhtinian perspective, we will most probably
conclude—as Manderson does—that Lawrence did not wrote *Kangaroo*, but *Kangaroo*
rewrote Lawrence (Manderson 2012a, 90-111). Bakhtin's claims are both echoed in
D.H. Lawrence's own essays on the novel, and performed in his 'leadership novels'
(Manderson 2012a, 142-144, 152; Hyde & Clark 1993-1994, 140-141). In his 'Study
of Thomas Hardy', Lawrence contends that an authentic work of art 'must contain the
essential criticism of the morality to which it adheres' in order to create 'the conflict
necessary to every tragic conception' (Lawrence 1985, 89). *Kangaroo* similarly refers
to the 'laws of polarity', which are described as the movement between two flows,
one sympathetic and loving, the other mighty and authoritarian. Lawrence writes
that '[i]n the absolute triumph of either flow lies the immediate surety of [human]
collapse'. (Lawrence 1923, 354-355).

The Great War brought on the crisis which stimulated Lawrence to work
through the tensions between opposing principles that he refused to cap by a
fruitless appeal to some ideal state of concord. *Kangaroo* embodies 'an earnest if

perverse commitment: *not* to resolve its contradictions and tensions but to see in them its main character's essential activity' (Manderson 2012c, 492). Polarity is neither synthesis nor harmony, but plain opposition between 'forces that cannot be compromised since we are committed too much to *both*' (Manderson 2012c, 493). Polarity underscores the fragility, provisionality and temporariness of *every* textual medium—including law—and expresses an unremitting willingness to revise, rethink and renew our social conditioning, historical contextualization, and epistemic and discursive formations (Eggert 1999).

In sum, Lawrence believed (and Manderson agrees) that we should not try to eliminate or conciliate contradictory beliefs, arguments or expectations, but rather draw our strength from them. 'A man's soul is a perpetual call and answer', he writes. (Lawrence 1923, 314). Polarity is precisely the main tenet of the post-positivist conception of the rule of law that Manderson names, after *Kangaroo*, 'Thirroul of Law'. *Call and answer*: the rule of law consists in a public debate of (legal) reasons that acknowledges the unfeasibility of interpretative closure in face of the plurality and singularity of circumstances that characterize legal work. Manderson argues that the literary modernism of Bakhtin and Lawrence entails a crucial public dimension through which the pressure of conveying and justifying our judgments to others transforms our understanding of the rule of law into 'a set of ideas that institutionally protect the social and dialogic process of exposing and critiquing reasons for decision, rather than as a set of ideas that institutionally entrench the hierarchical or hieratical process of announcing them' (Manderson 2012a, 159).

According to Manderson, Derrida makes a similar point when he addresses the unavoidable aporias that burden legal judgment: 'for a decision to be just and responsible, it must […] be regulated and without regulation: it must conserve the law and also destroy or suspend it enough to have to reinvent it in each case, rejustify it, at least reinvent it in the reaffirmation and the new and free confirmation of its principle'. (Manderson 2012a, 166; Derrida 1990, 961). In other words, legal judgment is permanently torn between two contradictory directions: on the one hand, the abstract rule; on the other hand, the uniqueness of the particular case that cannot be settled in advance. Legal judgment cannot choose 'between justice (infinite, incalculable, rebellious to rule and foreign to symmetry) and the exercise of justice as law or right, […] calculable, a system of regulated and coded prescriptions' (Derrida 1990, 959). The endless cycle of tensions, oppositions and disagreements between prior rules and new circumstances render legal decision basically unstable and imperfect.

Manderson's approach to law and literature is deeply bound up in our present imperfection, our fragmentation and the imperfection and fragmentation of justice with us. Manderson opposes the configuration of 'Thirroul of Law' both against positivists' assertion of law's perfection and the romantics' of its perfectibility—the former 'a claim of purity centered on the past' and the second 'a dream of it focused on the future' (Manderson 2012a, 178). The reconfiguration of the positivist rule of law into the post-positivist 'Thirroul of Law' has therefore, at least, three salient

features. First, 'the rule of law is not the outcome of a foundation, but a process of continually putting them [foundations] in question'. Secondly, 'the rule of law is governed by reasons rather than a singular or categorical reason'. Thirdly, 'the rule of law does not present commandments that are handed down *to* us, but a discourse by which the law learns *from* us, paying attention to new circumstances and individual lives'. (Manderson 2012a, 179-180).

This way, 'Thirroul of Law' moves beyond romantic transcendence by accepting that we have not lost the foundations of law, but have always *lacked* them (Manderson 2012a, 150-152). Manderson concludes that 'Thirroul of Law' does not advance certainty, but actually enshrines uncertainty by acknowledging 'trial and error' as the legal method par excellence, and argument and doubt as a mark of success. (Manderson 2012, 23; 2012c, 504).

Manderson's *Kangaroo Courts* must be read not only as a keystone for an authentic renaissance of the field of law and literature, but also as a groundbreaking contribution to contemporary jurisprudence that interrogates and challenges the very language in which we are used to think about law. It seems to me, however, that Manderson's judgment of legal positivism is a bit too harsh. A more nuanced vision of both positivism's emancipatory horizons and discursive limits results by introducing a slight hue in Manderson's theses on the legal legacy of modernism: modernity is not unique, and its crises are plural. In this non-Eurocentric sense, *modernities* entail several competing master narratives and cultural contextualizations that result in multiple legal crises. Thus, positivism can still represent an adequate response to the problem of justice depending on the circumstances of particular contexts that are determined altogether through social institutions and systems, social agents, and cultural and symbolic forms. Let us remember, for example, that positivism played a major role in undermining the legal and jurisprudential discourses that structured the dictatorship of Francisco Franco in Spain (Díaz 1975) or the *Junta* regime in Argentina (Alchuorrón and Bulygin 1975). By considering a single crisis of modernity, Manderson narrowed the scope of his call to rethink the rule of law to the singularity of the Australian postcolonial modernity where the positivist rule of law and the liberal public sphere were, since the time in which Lawrence wrote *Kangaroo*, ongoing—though imperfect—realities.

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Book Review

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Benoît Dejemeppe*

Translated by Mónica López Lerma and Julen Etxabe

If asked 'What book should a jurist have read?', can you imagine one or another masterpiece of Shakespeare (1564-1616) missing from your list? Certainly not, if you are a regular reader of *No Foundations: An Interdisciplinary Journal of Law and Justice*, but I here confess my perplexity as a legal practitioner whose philosophical baggage weighs no more than that of a Ryanair passenger.

But then again, a classical author is a writer whose works have never fully said what they have to say: having long explored the relationship between law and literature, Belgian professor François Ost, himself an author of several theatrical plays since his early youth, has met the challenge of digging in the works of the Elizabethan master to extract the golden nuggets that will enlighten contemporary readers and persuade all to (re)read them, and to shine on for future generations. And to think that there are still those who affirm that Shakespeare did not write his texts! This is surely to avoid facing up to it that, before such a genius, one feels as if regressing to an amoeba-like state.

The Anglo-Saxon world takes Shakespeare as an exceptional 'legal storyteller', a fellow-traveller who continues to inspire United States Supreme Court judges whose rulings are studded with quotations from his works. Thus, in this culture, the multiple links between literature and the law are not forgotten. In fact, Justice Stephen Breyer of the US Supreme Court, was not slow to mention at his confirmation hearing before the Senate Judiciary Committee: 'the study of literature remains one of the most useful things in the exercise of my judicial responsibility as a judge'

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* Judge of the Belgian Supreme Court, Former Chief Public Prosecutor in Brussels; Lecturer Université Saint-Louis (Brussels).

(Ost 2007, 28). And these links come to light here, as attested by multiple studies on 'Shakespeare and the Law'. For most francophone readers, and particularly jurists, the former might be a discovery, even though some are aware that with Racine and Molière, Voltaire and Rousseau, Hugo and Balzac, Camus and Simenon, Goscinny and Hergé, and many others, francophone literature is teeming with texts that can (and would be worth) a view through the legal lens. For we see the world as we shed light on it.

1. The Law in action

Law *in* literature tells how fiction deals with the most fundamental legal and political questions concerning justice, power, the basis of the right to punish, and so on. To be sure, François Ost makes it clear from the outset that it is not possible to 'reduce all Shakespeare to law, and to interpret his thirty-something plays only in terms of power, justice, decrees, vengeance, or equity' (Ost 2012, 9).[1] But the legal key is uniquely productive in revealing a deep meaning, which in contemporary life remains a vast material source of *legal culture* [droit culturel], that is, *law in action*: not the virtual law of codes, but the law effectively put into action by the courts.

An initial question intrigued me: how is it that the legal spirit came to Shakespeare? Some affirm that the young William worked in the service of the court clerk at Stratford. For others, he worked as a notary's clerk. In any event he benefited from a library well stocked with law books. In addition, he was constantly caught up in the legal system due to endless civil and criminal disputes before religious or civil jurisdictions, local or royal. In England at the time a peculiar relationship existed between theatre and trial, between stage and courtroom, thanks notably to the Inns of Court, those small residential communities bringing together legal professionals and students eager to learn the law. Mid-way between a club and an abbey, these institutions formed one of the cultural and literary centres of London life. These were the hangouts of the most educated elites of the epoch, who cultivated the art of legal reasoning and eloquence. Shakespeare assiduously frequented these schools of law, such as Gray's Inn.

What a pity that such a thriving tradition is not available for training today's lawyers. Were we to increase the activities of comprehension, the subjects of debate, and role-playing, we would better contribute to the training of human beings capable of operating within a different world, of learning to move from obedience to initiative, from an overabundance of knowledge to creative intelligence and the value of relational thinking.

However, let us make no mistake about the playwright's scheme, warns François Ost: with the legal spirit within him, he was not a philosopher of law, for he first and foremost addressed the imagination of his audience. 'He nurtures this imagination with discourse, images, gestures, colours, music; he conveys it in the rhythm of his verb and action' (Ost 2012, 36). His plays, 'test, as if in a living laboratory, the

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1 All page references herein are to the French original version. All translations are our own (Editors' Note).

validity of political and legal constructions that confront one another in the reality' (Ibid., 41) of an England torn by social, economic, political, religious, and legal transformation.

2. The most beautiful plea for mercy in literature

We now enter upon some of the plays studied, for example *The Merchant of Venice*, and briefly recall its plot. Antonio, a wealthy Venetian ship merchant, decides to borrow three thousand ducats from the Jewish usurer Shylock in order to help his friend Bassanio to go to Belmont where he hopes to woo the beautiful and wealthy Portia. Like the other suitors, he must undergo the test her late father devised and choose between three caskets, of gold, silver, and lead. But at the moment he defeats his rivals, he learns that Antonio has just been thrown in jail for being unable to pay back his debt to Shylock (a character definitely mad about law) who insists that a pound of flesh be cut from the body of his debtor pursuant to the contract. For François Ost the play clearly highlights the absurdity of certain penalty clauses, the cruelty of legal formalism, and contains the most beautiful plea for equity (mercy/ forgiveness) in literature.

Due to the force of play [*jeu*], Shakespearean fiction acquires 'a supplementary reality, an increase of energy, a supplement of clarity showing contrasts more vividly and revealing the hidden truth' (Ost 2012, 72). Thus a less well-known play on the other side of the Channel, *Measure for Measure*, shows, centuries before French sociology takes up the subject, that non-law may still be law, and sometimes even the best law as it deals with criminal law (Angelo wishes to enforce to the letter a policy of mores somewhat rigorist to say the least) which is not always meant to be enforced. Were we to think differently we would soon be exposed to disappointments, just as Angelo learns the hard way that 'he who makes the angel makes the beast' (Ost 2012, 142).

3. The theory of law as narrative

In learned and intellectually vibrant pages, the author is also interested in politics and public law through the theory of the King's two bodies: the Body natural, subject to life's vicissitudes, and the Body mystic or politic, which is unfettered. Going back to the earliest times of the Church, this doctrine refers to the idea that, as representative of God on earth, the King would assume something of the double nature of Christ. Remnants of this exist in the famous adage 'The King is dead, long live the King!' 'Thereby a fictive persona is constructed embodying supra-human perfection: endowed with ubiquity and immortality, the kingly person is incapable of unreason and weakness' (Ost 2012, 168). This theme stands at the core of plays such as *Richard II*, *Julius Caesar*, *Hamlet* and *King Lear*.

While William Shakespeare, creator of the magical Globe Theatre, can be seen as one of the most distinguished 'legal story-tellers' from the standpoint of the 'theory of law as narrative', nonetheless his overall legal scheme, his ideal political horizon,

his vision of desirable justice remain inaccessible. Whenever a given point of view is sketched, it is questioned in the following scene. Hence the extreme ambiguity of his work, in which he tries to represent the spectacle of humanity in its infinite complexity. Hence the vitality of his inspiration, which those referring to it can use in support of their respective position, as attested by American jurisprudence.

Shakespearean comedies, in the generic sense of a theatrical representation including all genres mixed up together, enact a collective imaginary and present 'a combination of values brought together by a narrative which people believe in and is capable of stimulating their continuous engagement' (Ost 2012, 308).

At a time when lawyers in continental Europe are formatted too often in the same way that some software is learned, *Comédie de la Loi* is recommended reading for all those involved in the law, beginning with students. For the law is not just a matter of rules to be applied mechanically; rather, it requires those who practice it to understand the deepest motivations of society. In this regard, the texts that François Ost brings to our attention with his illuminating perspective give us cause not only to think, but also to decide.

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