

Editorial

The eleventh issue of *No Foundations* is proud to publish five articles that cover a range of timely topics. In the opening article entitled ‘Law & Society and the Politics of Relevance: Facts and Field Boundaries in “Transnational Legal Theory in Context”’, Peer Zumbansen aims to contribute to a ‘transnational legal sociology’ fit for the changing environment of global processes of disaggregation of state functions. Since arguably no fixed point exists from which to treat law as ‘given’ and then to analyze how it changes under the influence of outside pressures, Zumbansen explains that ‘transnational legal theory in context’ emphasizes the need to engage in particular processes of ‘translation’ in order to grasp the dynamics, as well as the consequences, of allegedly clearly defined legal-regulatory fields.

Zumbansen illustrates his argument with two relatively recent fields of study: Law & Development and Transitional Justice. In a well-known legal realist vein, Zumbansen argues that the boundaries of, and within, these fields remain *political*, but suggests further that the critique of ‘hidden politics’ might not prove sufficient to grasp what lies at the centre of these relatively ‘new’ fields. In his view, underlying these distinctions lies a fierce struggle over competing and mutually exclusive models of society, and in fact about the very ‘concept’ of law, which cannot simply be grasped by the conventional lawyerly distinction between relevant and irrelevant facts. Therefore, attention to the politics of these demarcations must be accompanied with corresponding attention to the far deeper-reaching question of how law ‘knows’ the reality it seeks to depict and to regulate. This task demands both a radical self-reflection of law’s historical and socio-economic underpinnings as well as a dialogue with those other disciplines that place the questionable, fragmentary and precarious nature of knowledge at the centre of their inquiry.

According to Zumbansen, this task of constant translation risks destabilizing established ways of seeing, understanding and judging ‘the law’, as well as losing the ‘outside’ position external to the sphere we are purporting to study. All the same, an awareness of the relativity and fragility of one’s knowledge, coupled with an introspection into the presuppositions of all attempts at boundary drawing (both normative and epistemological), appears more pertinent than ever in the face of the dominant culture of expertise.

While Zumbansen sets limits to law’s domain of exclusive knowledge, the following article by Richard Sherwin challenges the roots of law’s legitimacy. In

‘Law in the Flesh: Tracing Legitimation’s Origin to *The Act of Killing?*’, Sherwin pursues a question that has haunted contemporary theory since early modern times. According to Sherwin, ‘fleshless’ liberal-democratic theory from Hobbes to Rawls cannot account for the way states begin and end in history, nor can it account for the libidinal source that, in whatever form, drives and sustains fidelity to law. Therefore if we want to understand and revitalize the act of legitimate investiture we must return to the original scene—the primal scene of political violence and unstable desire—in order to explore, theorize and judge it.

In his quest, Sherwin turns to Joshua Oppenheimer’s film *The Act of Killing*, which tells the story of a self-professed killer and thug in Indonesia, who actively participated in the killing spree that launched general Suharto’s ‘New Order’ in 1965, after which more than a million people were massacred. The film’s premise is an invitation of the filmmaker to one of the most ruthless killers, Anwar Congo, to film his own re-enactments of gruesome acts of torture and killing. In Sherwin’s reading, Oppenheimer’s movie takes us uncannily close to the political unconscious—or ‘law in the flesh.’ Under the skin of Anwar Congo we glimpse the usually hidden, even taboo site of origin (and end) of sovereign states, the stage upon which law’s beginning and end are performed and judged. If the political challenge par excellence is to continuously seek to renew the binding power of foundational narratives, including the underlying desires and affects that constitute it, the question becomes: ‘what form of meaning (if any) will it animate?’

According to Sherwin, disembodied concepts, descriptive categories, and models of rational choice theory cannot adequately capture the way political beliefs are formed, sustained, and/or fail. In their stead, experience, desire and affect—the ‘pulse of the flesh’—have yet to be adequately tapped as resources for understanding fidelity to law in the legitimation process, for which new interpretive and critical methods and interdisciplinary alliances are necessary (e.g., phenomenology, psycho-political theology, visual jurisprudence...). Absent these new methods of assessment and experience, liberal theory will continue to falter in a world of legal validity without significance.

Following Sherwin’s interrogation of the primal scene of political foundation, the next two essays confront the very idea of philosophical foundations, though from slightly different perspectives.

In ‘No Foundations?’ Mark Antaki turns the ordinary trope of ‘(no) foundations’ into a keyword, in order to spell out what we take for granted in the conventional use of the term. He does so by exploring James Boyd White’s metaphor of a law as an inherently unstable structure built upon tensions, very much like a poem, which is interpreted as a subversion of the extended notion of the legal system as a structure or edifice. Rather than as outright rejection of foundations, however, to think of law as poem is to think of a structure we no longer use or utilize, but inhabit. Drawing a parallel with Heidegger, for Antaki the metaphor reveals how doing law involves *dwelling* poetically in language, which opens it up to the way law is experienced and lived.

This re-appropriation of the building metaphor deprives it of the stability and solidity of rules, doctrines, and principles, and resists reduction of law to a system of positive law, and its demands of coherence, systematicity and rationality. Thus beyond rejection of metaphysics, a further challenge confronts dominant legal epistemology. Away from conceptual and propositional knowledge, Antaki traces a movement from *ratio* to *logos*, from science to rhetoric, from theoretical episteme to practical deliberation, where the key human faculty is no longer reason but imagination, which is not asked to do the systematizing work of reason.

Moreover, while propositional discourse is structurally coercive in that it demands assent even of the unpersuaded and would make all exercise of translation unnecessary, the view of language presented here is understood as a series of gestures, like dance, and measured not so much by their truth-value as by their appropriateness to context.

Ultimately Antaki reads this movement from the solid and stable ground of foundations to the fluid and unstable musicality of language, as the act of uncovering something more originary than propositional logic: the unrepresentable grounds and musicality of speech. In his reading, 'No Foundations' emerges as neither a warning sign, nor as a rule for interdisciplinary engagement, nor as self-congratulatory celebration but as a poetic call, an invitation.

The editors did not plan the sheer coincidence of the next article also dissecting the idea of 'no foundations'. In 'Pots, Tents, Temples', Angus McDonald struggles with the twofold and seemingly contradictory commitment of this journal to a non-foundational view of law and justice, which can be recast as the classic debate between positive law and natural law over its concept. After underlining several of the problems intrinsic to the task of trying to make justice intrinsic to law but still with a contingent non-foundationalist theory, McDonald argues that what the debate requires is a shift of perspective beyond the dualism of either physics or metaphysics, either empiricism or idealism, either positivism or natural law. As developed further in the article, the issue is whether law can open itself to both the transcendent and the immanent and yet remain non-foundationalist.

McDonald pursues his query with the particular case of the UK constitution, wondering about an appropriate metaphor in which 'to house' law. Rather than the foundational monument of stone masonry imagined elsewhere, McDonald suggests that the English constitution might be better seen as a sort of tent, which he explores through a careful exegesis of the Biblical narrative of the Ten Commandments, with its false beginnings and violent pre-history. What McDonald mostly wishes to stress about this metaphor is its spatial mobility, that is, the ability of the tent to accompany the people in their nomadic wandering. The tent is also instructive in that its openness towards the transcendent appears solely as a fugitive gesture, towards values that are evoked but not defined, summoned up solely as a tentative equilibrium of forces in permanent tension. In this vein, McDonald argues for the need to resist an impelling teleology, present both in the biblical narrative and in current calls for written boundaries to the constitution, with the final aim of transforming the tent

into a temple. Contrarily, McDonald thinks, at a time of legal and political crises, the ability to develop images to express the juncture and interaction of the transcendent and the immanent might be more necessary than ever.

In the concluding essay 'Is Justice for Sale? Further Readings on Saramago and the Law', Joana Aguiar e Silva is concerned with the fate of legal studies in the context of the current economic and cultural crisis and the dominant utilitarian ideology of the university, where courses not matching the mercantilist model are replaced by their technocratic counterparts. According to Aguiar e Silva, by adopting economic efficiency as the criterion for law, not only is law unwittingly separated from its historical, ethical and cultural roots, but the fact that the evaluative issues that law has to deal with are irreducible to numbers and resist calculation is ignored.

While siding with those who wish to strengthen the cultural and humanistic aspects of law in legal education, Aguiar e Silva considers that such a path is no simple renewal of tradition. In her view, the intense scrutiny to which most recent studies have submitted the idea of culture may force us to abandon stereotypes such as coherence, homogeneity, stability, which are inadequate to understand contemporary culture as a controversial reality constantly created and recreated in particular settings, through constant movements of people, capital, and symbols. And yet the fact that culture is never entrenched in stable, uniform, or standardized frameworks does not prevent it from becoming a point of reference in the daily practices through which societies develop and circulate a world of meanings and values.

Aguiar e Silva closes her essay with a short story by Portuguese Nobel Prize winner José Saramago about a XVIth century Florentine peasant who climbs to the village church tower to toll the death knell for justice. She interprets Saramago's allegory not as the voice of a prophet pointing the path towards certain salvation but as a rhetorical device that incites our minds and urges us to rethink our actions. While law and culture, as justice and morality, may no longer represent universal or univocal truths, they may still convey a sense of collective living and thinking, complex enough to accommodate difference and change by way of argument, dialectics and rhetoric.

In addition to these five articles, NoFo11 also features three book reviews written in a longish essayistic style. Andrew Halpin reviews Hanoch Dagan's *Reconstructing American Legal Realism & Rethinking Private Law Theory* (OUP 2013). In turn, Leslie Moran offers a review of Gary Watt's *Dress, Law and the Naked Truth: A Cultural Study of Fashion and Form* (Bloomsbury 2013). Finally, Jack Sammons reviews Richard Dawson's *Justice as Attunement: Transforming Constitutions in Law, Literature, Economics, and the Rest of Life* (Routledge 2014).

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