The following is a draft of book-chapter due to appear in an edited volume entitled “Rancière and Law,” coedited by Mónica López Lerma and myself, and forthcoming in Routledge’s series on Critical Legal Thinkers. The chapter is still in a draft format (not even English-proofread) and still misses the conclusion. I have left the provisional title of the last section in place. As a real work-in-progress, I would welcome comments about all the paper, but in particular about what it still would be needed as a way of conclusion.
When it comes to the appreciation of a thinker, there are two levels of investigation. One can examine his/her ideas, test their consistency, compare them with other thinkers’ ideas and judge the good or bad effects that they can produce when going from ‘theory’ to ‘practice’. But, at another level, one examines the way these ‘ideas’ are produced, the issues they address, the materials they select, the given they consider significant, the phrasing of their connection, the landscape they map, their way of inventing solutions (or aporias), in short their method.

Jacques Rancière

I. The Method of Jacques Rancière: Setting the Scene

In the remarkable essay “A few remarks on the Method of Jacques Rancière,” the reader and critic Jacques Rancière writes about the well-known philosopher and author Jacques Rancière in the third person, trying to elucidate what might be distinctive about the latter’s method. Contrary to grammatical expectations, the third person is not used here to create a separation between author and critic, but rather the opposite, confusion between these two roles. The confusion between speakers is actually an important stylistic trait of many of Rancière’s writings, where he introduces without markers the words of speakers—the radical pedagogue Joseph Jacotot in *The Ignorant Schoolmaster*, the romantic historian Jules Michelet in *The Names of History*, the nineteenth century joiner Louis Gabriel Gauny in *The Proletarian Nights*—with whom his own voice merges almost to the point of indistinction. The strategy serves not only to disavow a position of authority from where a method is being “explained” to the reader, but fundamentally also to flesh out an important Rancièrian presupposition: the equality of intelligence between the one who makes sentences and the one who understands them.  

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2 The equality of intelligence, borrowed from Jacotot, “does not mean that every manifestation of intelligence is equal to any other. Above all, it means that the same intelligence makes and understands sentences in general.” (J. Rancière, “The Thinking of Dissensus,” in P. Bowman and R. Stamp eds., *Reading Rancière*, Continuum: London and New York, 2011, at 14). Jacotot’s simple premise is that “all
What Rancière chiefly means by “method” is not an investigation into an author’s propositions—what an author says, the internal consistency of what he/she says, and the consequences that follow—but rather the kind of issues it addresses, the materials and givens it considers, the phrasings it articulates, the landscapes it portrays, and the solutions or aporias it generates. Such sense of a method does not proceed by Cartesian simplification into clear and distinct ideas, for it entails selecting, discriminating, valuing, intervening, and indeed inventing. Rancière writes:

A method means a path: not the path that a thinker follows but the path that he/she constructs, that you have to construct to know where you are, to figure out the characteristics of the territory you are going through, the places it allows you to go, the way it obliges you to move, the markers that can help you, the obstacles that get in the way. [...] This idea of what “method” means should never be forgotten when it comes to Jacques Rancière.³

Note first here the shift from the third to the second person, where “you” can refer either to the critic trying to make sense of the author’s writings, to the author trying to explain his own method to the critic, or to both. Additionally, “you” also alludes to the reader—say you or me—trying to make sense both of what Rancière the author does generally in his writings and to what Rancière the critic says about it in this particular essay.

As a path that the author constructs rather than follows, a method does not exist in the past in a way that prefigures, and guides, the author’s activity. Rather, the path is constituted towards the future, as an invitation to see things one way rather than another; a suggestion to consider certain issues, perspectives, connections, ways of looking—or others. A method thus enables us who wish to trace it to move within the

³ Rancière, “Remarks on Method,” at 114, emphasis added.
apperceptive sensorium of another human being and inhabit their ways of seeing and judging reality.

Rancière speaks of the method in terms of spatial categories of place, territory, and landscape, delimited by markers and prevented by obstacles, which is why a method often has a normative component that “allows,” “obliges,” “helps,” or “gets in the way.” But a method has also a *temporal* dimension, for it allows you to “move” and “go through,” and neither the path nor its stepping stones remain unchanged from beginning to end.⁴ Rancière defines a method as a form of travel, which “continuously discovers new landscapes, paths or obstacles which oblige to reframe the conceptual net used to think where we are.”⁵ Accordingly, “[w]hat he does himself is to construct a moving map of a moving landscape, a map that is ceaselessly modified by the movement itself.”⁶ To find out the characteristics of this landscape requires more than the tools of the prospector trying to extract minerals from the soil. To grasp it means to develop a sense of orientation to figure out where you are, where you are going, and where you can go with it, all of which cannot be represented as a still image. To “map” it is neither to produce a flat cartography, nor to freeze it in time, but to get in on with its movement, in order to recreate its “topography of the thinkable,” which “is always the topography of a theater of operations.”⁷

My purpose in this essay is to re-create such a Rancierian topography in order to elaborate a theatrical or dramaturgic model of law out of it. Indeed, Rancière has been said to espouse a theatrical model of politics based on scenes staged by actors who,

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⁴ As Rancière writes: “This is why, indeed, his ‘concepts’ are instable: police and politics, distribution of the sensible, aesthetics, literature, etc. don’t mean the same thing from the beginning of the travel to the end” (“Remarks on Method,” at 120).
⁵ Rancière, ibid.
⁶ Id.
acting out on the presupposition of equality, undergo processes of subjectivation that reconfigure the “sense” of the common.\textsuperscript{8} Disavowing a purified or ontological concept of “the political,” Rancière proposes instead a \textit{dramaturgy} conceived out of limit-scenes that stage its appearance and disappearance.\textsuperscript{9} Consistently, “Rancière is only interested in ideas at work: not ‘democracy’ for instance, but ‘democracy’ voiced in sentences that stage its possibility or impossibility, not ‘politics’ in general but discourses and practices which set the stage of its birth or of its fading away…”.\textsuperscript{10} I too venture in a similar manner to offer neither an explanation of his ideas, nor an application of his thoughts to a predetermined legal concept, but a re-enactment of the legal landscape he invites us to traverse.

In a nutshell, my argument tries to connect Rancière’s analysis with Robert Cover’s idea of \textit{jurisgenesis} or norm-generative capacity of legal actors. The analysis focuses on jurisgenetic moments of dissensus, where those in principle without a place in the order of legalism are nevertheless able to stage a disagreement that reconfigures the entire realm. Beyond teasing out the implications of the analogy—which is not meant as a word-for-word mimetic reflection, but as mutually enriching— I inquire how a claim perceived to be legally irrelevant could nonetheless be \textit{heard} and registered as a novel legal inscription. This will lead us to consider a (non-Aristotelian) poetics of expression and of reception, including the role of judges as audiences of improper legal claims.

I should say from the outset that at stake in this theatrical understanding is not a definition of law, but a plea to understand it in a certain way.\textsuperscript{11} As Robert Cover writes,

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\textsuperscript{8} P. Hallward, “Staging Equality.”
\textsuperscript{9} Rancière, “Remarks on Method,” at 119.
\textsuperscript{10} Rancière, “Remarks on Method,” at 116.
\end{flushright}
“[p]eople argue and fight over ‘what is law’ because the very term is a valuable resource in the enterprises that lead people to think and talk about law in the first place.”\(^\text{12}\) “The struggle over what is ‘law’ is then a struggle over which social patterns can plausibly be coated with a veneer which changes the very nature of that which it covers up.”\(^\text{13}\) In other words, “The label is a move, the staking out of a position…”\(^\text{14}\) A consistently Rancierian position leads to a radical relativization where law, just as democracy itself for Rancière, has no proper foundations.\(^\text{15}\) My aim is not so much to persuade the reader about this position as about the usefulness of entertaining it, as a possibility for a critical intervention.

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Before moving on to the rest of the argument, it is necessary to consider the role that scenes play in Rancière’s overall project, for they take center-stage in a legal dramaturgy as well. This role is fourfold: first, scenes provide a texture of the argument, for “Rancière always constructs his argumentation as a re-staging of a limited number of such scenes…”\(^\text{16}\) Scenes may include the narrative of the Plebs in the Aventine Hill, the aphorism of Aristotle about the political animal, a manifesto of tailors on strike demanding relationships of equality, or the comments of an ordinary joiner about the work of a bricklayer. “This is an unusual texture for a theoretical discourse,”\(^\text{17}\) and departs equally from syllogistic forms of reasoning, and from systematic theory-building. Rancière purports to construct not a theory of politics, or democracy, or

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\(^\text{12}\) Cover, “Folktales of Justice,” at 180.

\(^\text{13}\) Cover, “Folktales of Justice,” at 181.

\(^\text{14}\) Cover assures that his position is “very close to a classical anarchist one—with anarchy understood to mean the absence of rulers, not the absence of rules” (id.).

\(^\text{15}\) Out of Plato’s polemical definition of democracy as the power based on the absence of any qualification to rule, Rancière draws an idea of democracy as the “power without power,” that is, a power without arché, principle or foundation (“Remarks on Method,” at 119).

\(^\text{16}\) Rancière, “Remarks on Method,” at 117.

\(^\text{17}\) Rancière, “Remarks on Method,” at 117.
aesthetics, but a dramaturgy.\textsuperscript{18} Contrary to conceptual, universalizing discourses where time is suspended, a dramaturgy is necessarily situated. The same is true about Rancière’s well-known categories of analysis: police and politics, distribution of the sensible, aesthetics, etc. are neither ontological determinations, nor ahistorical essences, but ways of disentangling received classifications.\textsuperscript{19}

Secondly, a scene is a “general mode of intelligibility” that helps to frame significant turning points in history, politics, aesthetics, democracy, and so forth, without the need of a universal vantage point.\textsuperscript{20} A scene creates a certain configuration of sense, namely, a form of linkage between perceptions, decisions, and meanings that define what can be seen, said, heard, and done. “The main point is not what they explain or express, it is the way in which … they create a commonsense: things that the speaker and those who hear it are invited to share—as a spectacle, a feeling, a phrasing, a mode of intelligibility.”\textsuperscript{21} Rancière does not enclose scenes in a historicist box, but doesn’t hypostasize either a unified “time out of joint.”\textsuperscript{22} Instead, the analysis “must implement, at the same time, a principle of historicization and a principle of untimeliness, a principle of contextualization and a principle of de-contextualization.”\textsuperscript{23} That is, “you must make words resound in their concrete place and time of enunciation … [b]ut you must also draw the line of escape” where the poor bricklayer meets the aristocratic

\textsuperscript{18} Rancière, “Remarks on Method,” at 117, 119. See also “The Thinking of Dissensus,” loc. cit., at 14, where he explains the status of his discourse as a “poetica” that undoes the boundaries within which all disciplines predicate their authority.


\textsuperscript{21} Rancière, “Remarks on Method,” at 117. Importantly, for Rancière a common sense “does not mean a consensus but, on the contrary, a polemical place, a confrontation between opposite common senses or opposite ways of framing what is common.” (Rancière, “Afterword,” at 277).

\textsuperscript{22} Rancière, “The Thinking of Dissensus,” at 13.

\textsuperscript{23} Rancière, “Afterword,” at 282.
philosopher of antiquity.24 Scenes are sites of circulation which tie together “perceptions, interpretations, orientations, and movements.”25

Third, scenes are exemplary “limit-moments” where the appearance and disappearance of subjects, phrases, modes of being, roles, and powers are made visible or invisible.26 They are exemplary not in virtue of models of conduct worthy of imitation, but insofar as they are able to disclose their objects to their fullest force and intensity (e.g., equality, politics, democracy, aesthetics, or emancipation). For example, Rancière suggests that the “power of the people” can be best understood from moments where it appears in its utmost effectiveness, namely, from the moments of disruption of the hierarchical order.27 Likewise “what politics means can best be understood from the moments when the power of anybody emerges most significantly.”28 In doing so, Rancière draws inspiration from the “panecastic method” of Joseph Jacotot, which is based on the assumption that “you can see the whole in a very small fragment.”29 This does not mean that everything is on the scene, but that what appears most forcefully in it (i.e., the demonstration of equality, the power of anybody, the aesthetic reconfiguration of a commonsense, etc.) can exemplify similar processes everywhere and at every time. As a result, the exemplarity of the scene lies not at the level of mimetic representation (what the scene is shown to portray), but of poetic enactment (what it sets in motion to produce).

Finally, for scenes to deploy their full effects they must be read in a certain way, that is, their effects can be felt only on the condition that one pulls different threads.

25 Rancière, “Remarks on Method,” at 120.
26 Ibid. at 117-118
27 Ibid., at 118.
28 Ibid., at 120.
29 Rancière defines Jacotot’s panecastic method as “a method for finding in every (ekaston) peculiar manifestation of intelligence the whole (pan) of its power” (“Afterword,” at 281).
Scenes thus demand the critic “to follow these fluctuations of perception and speech and to try to let their power and their stakes be felt.”

The critic becomes not a passive onlooker, but a (emancipated) spectator, with the responsibility to perceive, and not overwrite, their eventual happening. A poetics of critical reception consists in detecting and highlighting the operations (of equality) which shatter supposedly incontrovertible situations (of inequality) by presenting alternative “as ifs” that overturn their logic.

This alternative “as if” is no illusion opposed to the real, but a redistribution of the “regime of the sensible” that opens up what can be seen, felt, and thought. The discourse of the critic is effective neither as description (is), nor prescription (ought), but as potentiality (might be). Accordingly, “‘It might be’ is a formulation consistent with Rancière’s peculiar practice of ‘theory’.”

To sum up, scenes offer a texture for the “theoretical” argument; a frame of interpretation for intersecting configurations of sense; an occasion for an exemplary appearance of the objects in questions; and a counterforce to inegalitarian expressions of “what is.” A theatrical or dramaturgical conception of law finds its correlative in the legal scene, where no external position exists for the legal theorist to describe law in its totality, or as a totality. In order to gain a synoptic vision one has to go through the scene of law as an experience, rather than as an external object, field, or social subsystem. A dramaturgy of law also connects scenes from diverse origin, making them resound in their particular context of enunciation without refusing to draw lines of

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32 This entails a first, anti-foundational move “to disentangle in every case the as if which is involved in the ‘that’s the way it is’” (Rancière, “Afterword,” 280) and a second, constructive move “specifically aimed at detecting and highlighting the operations of equality that may occur everywhere at every time.” (Ibid., at 280-281).
relevance beyond it. Scenes are chosen for their salience and ability to signify, just as “hard cases” illuminate not only themselves but the entire legal landscape. Surely, scenes have blindspots and some events are not seen on the stage. And yet absences, omissions, gaps, and silences do often leave traces of their absence that are to be interpreted, and can even be sensed, like a chill in the air, an ominous silence, or violence in Greek tragedy, which is not shown on stage, but must be re-enacted. Lastly, a dramaturgy of law critically engages, as Robert Cover perceptibly observed of the normative universe in general, “not only the ‘is’ and the ‘ought’, but the ‘is’, the ‘ought’, and the ‘what might be’.”

II. POLITICS AND JURISGENESIS:

Politics is not primarily a matter of laws and constitutions. Rather it is a matter of configuring the sensible texture of the community for which those laws and constitutions make sense (Jacques Rancière).

While on a first reading law and politics appear not to be “a matter of” each other, the above quotation actually keeps law and politics connected through the sensible texture of the community for which they make sense. This calls for a reformulation of both terms. To begin with politics, Rancière develops a particular understanding not as “the set of procedures whereby the aggregation and consent of collectivities is achieved, the organizations of powers, the distribution of places and roles, and the systems for legitimating this distribution”—which he renames police. Politics, by contrast, is a process whereby a given regime of visibility—an order that regulates what is “commonsensical” within a society—is interrupted by an egalitarian and dissensual logic that disrupts its naturalness. As an activity, then, politics “undoes the perceptible divisions”

and “makes visible what had no business being seen, and makes heard a discourse where once there was only place for noise.”

Rancière offers multiple examples: Olympe de Gouges’ famous declaration during the French Revolution that if women were entitled to go to the scaffold they were also entitled to go to the Assembly; Jeanne Deroin when in 1849 she tried to present herself as a candidate to an election where women were not legally allowed to do so; Rosa Parks when she refused to give up her sit to a white passenger in Montgomery, Alabama, and the boycott that ensued against the actions of the transportation company. Rancière builds his case on the basis of little vignettes: in the trial of Auguste Blanqui in 1832, when asked by the magistrate to name his profession, Blanqui defiantly responded “proletarian.” The magistrate replied that to be a proletarian is not a profession, to which Blanqui retorts: “But it is the profession of thirty million Frenchmen who live off their labor and who are deprived of political rights!” After the unexpected rejoinder, the judge instructed the clerk to list proletarian as a new profession.

A favorite is the scene of the Plebs of Aventine Hill in 494BC, their retreat from the city as a result of the harsh rule of Appius Claudius, their failed negotiation with the Patricians who denied them their status as proper interlocutors, and their eventual reintegration into the city with the creation of the office of the tribunes of plebs. Rather than follow Livy’s account, however, Rancière takes on the nineteenth-century retelling by Pierre-Simon Ballanche, who objected to Livy’s inability to think of the event as anything other than as an uprising devoid of all political meaning. In contrast, Ballanche restages the conflict as one in which “the entire issue at stake involves finding out

37 Central to this understanding of politics are concepts such as wrong, dissensus, subjectivation, equality, and demos, which is the supplementary name of those who find no place (are “uncounted”) in the given “distribution of the sensible” [partage du sensible].
whether there exists a common stage where plebeians and patricians can debate anything.\textsuperscript{38} The plebeians claim a symbolic place in the city in which they do not have representation yet, and the patricians are compelled in the end to acknowledge them, despite their strongest objections.

Contrary to what some commentators suppose, Rancière’s examples are not always heroic. Sometimes they are small, almost imperceptible events, and range from a modest meeting of nine persons in a London tavern creating a “Corresponding Society,” to a slight modification of the timetable of a worker’s evening. The actions seem to require some measure of courage—not least the courage of conviction and the determination to follow it through—but not a martyrology of self-sacrifice. Nor does politics consist in moments of hysterical upheaval after which all becomes to calm. In fact, politics may begin with a “tiny modification in the posture of the body,”\textsuperscript{39} even though major conclusion can follow. What these examples have in common is that the political actor must do something “unimaginable” from the perspective of the given order; something to which they are not in principle entitled, but which ends up rearranging the community’s configuration of sense.\textsuperscript{40}

Politics acts on the police. By police Rancière means not the petty police or the state apparatus, but a more general “order of the visible and the sayable” that arranges

\begin{thebibliography}{9}
\bibitem{Ranciere:Afterword} Rancière, “Afterword,” at 275.
\bibitem{Ranciere:Multitudes} Rancière understands political action not in terms of impersonal multitudes, but of actors who undergo processes of \textit{subjectivation}, which is “the production through a series of actions of a body and a capacity for enunciation not previously identifiable within a given field of experience” (Rancière, \textit{Disagreement}, at 35). A subject has no concrete faculties or properties, nor is defined in terms of an “identity”; it is not a group that ‘becomes aware’ of itself, finds its voice, imposes its weight on society. Instead, it is an “operator that connects and disconnects different areas, regions, identities, functions, and capacities” (Ibid., at 40). A political subject is a “surplus name” that sets out a dispute about who is included in their count (Rancière, “Who is the Subject of the Rights of Man?”, \textit{The South Atlantic Quarterly} 103: 2/3 (2004), 297-310, at 303 [hereinafter Rancière, “Who is the Subject?”]). For example, in the claim “we, the people” what is staged is a gap between the “we” that is speaking and “the people” in whose name this “we” purport to speak (Rancière, “The Aesthetic Dimension,” at 11). Thus, the subject is a kind of “theatrical instance” (Interview with Jacques Rancière, \textit{Dissonance} 1, 2004 (available at http://www.multitudes.net/Entretien-avec-Jacques-Ranciere/).
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the tangible distribution of society. As reformulated by Rancière, the police is a nonpejorative term which defines, often implicitly, “that a particular activity is visible and another is not, that this speech is understood as discourse and another as noise.”\(^{41}\) Thus, “[p]olicing is not so much the ‘disciplining’ of bodies as rule governing their appearing.”\(^ {42}\) Additionally, however, the police order designates a specific type of saturated community that rules out any supplement, with the motto: “a place for everything and everything in its place.”\(^ {43}\) In this restricted sense, police and policing are specific ways of dividing up the sensible \([le \ sensible]\) antagonistic to politics. Surely, then, the negative overtones of police/ing do not entirely disappear, nor are they erased under the new terminology, but necessarily intermingled—as is the distinction between politics and police itself.\(^ {44}\)

To weave a dramaturgy of law out of Rancierian threads is not simply to apply the analysis to an already constituted realm of law, but to reformulate the latter too. In this task some potential candidates are to be resisted: the first is simply to identify law with the police order, for the dissensual logic is often expressed in the language of law and Rancière generally rejects the reduction to its statist form \((l’étatique)\).\(^ {45}\) On the other hand, the task can’t be a simple reversal either, turning law into politics (e.g., law-as-resistance), for the idea of institutional arrangement cannot be realistically extricated from law altogether. Yet a third red-herring would be to posit a differentiated sphere for “the juridical” separated from economy, society, and so on. Law cannot be sealed from the rest of social life, nor is there a determinate set of issues that are by nature legal.

\(^{41}\) Rancière, Disagreement, at 29.
\(^{42}\) Ibid., at 29; Rancière, “Ten Theses on Politics,” in Dissensus, op. cit., 27-44, at 36 [hereinafter Rancière, “Then Theses”].
\(^{43}\) Oliver Davis, Jacques Rancière, Polity: Cambridge, UK (2010), at 78.
If law is conceived neither as a form of police, nor as politics, nor as a separate juridical sphere, I want to suggest a fourth possibility in the notion of law as the stage for the encounter of two heterogeneous processes. Just as Rancière argues that nothing is political in itself, but anything may become political if it gives rise to a meeting of logics never set up in advance, I want similarly to argue that nothing is legal in itself, but anything can become legal (i.e., an object of legal dis-agreement), if it gives rise to an encounter between heterogeneous worlds. As the juncture of a dis-juncture, law is not made of power relations, but of relations between normative worlds.

I would propose for law a doubling similar to that which Rancière articulates for police/politics: In lieu of the police we would have the order of legalism, namely, the set of procedures for the aggregation of consent, the organization of powers, the distribution of places and roles, the system of legitimizing this distribution. In the other direction, we could set an antagonistic logic that interrupts legalism that we may call, borrowing a term from Robert Cover, jurisgenesis. The jurisgenerative impulse would come to interrupt the logic of legalism and challenge the distribution of roles, places, subjects, and doctrines.

Legalism would fulfill essentially the same role that the police order does for Rancière. Legalism can be understood both as a set of practices that constitute (the dominant image of) the rule of law and a particular ideology that pushes out manifestations of law other than the state’s. In the sense of saturated community, then, legalism can be identified with the state as “an institution whose operation tends to transform the political scene into purely a matter of police management.” By contrast, jurisgenesis would be the process that puts a break into the order of legalism, pointing

46 Rancière, Disagreement 32.
48 Cover, “Nomos and Narrative.”
49 Rancière, “Ebbing Tide,” 249.
out to the existence of a wrong, fissure, or gap, which challenges the very boundary between law and non-law.

Despite legalism’s attempt to saturate the normative space, its completion can never be fully accomplished: “… the juridical inscription that should set things in order … constantly lend[s itself] to the construction of unforeseen trajectories of looking and speaking.” This means that jurisgenesis is always a possibility. The norm-generative capacity is not the privilege of those who hold institutional office, or who are otherwise vested with the legal authority to act. In the wake of normative pluralism, this power is acknowledged of anyone whomsoever, undergoing a process of subjectivation, who is able to instantiate a wrong in the fabric of legalism. The staging of polemical scenes brings out a contradiction with the logic of legalism that reconfigures the legally sayable, thinkable, and doable.

How norm-generative moments might emerge in specific legal settings again calls for elaboration. Taking the cue from his article “Who is the Subject of Human Rights?,” a promising avenue may be found in the double existence of rights (and arguably of written law in general), which are first inscriptions in the regime of the visible, but then require to be activated in their potential by those who can make something out of that inscription. Even though actual situations of inequality may give them the lie, these are no mere abstract ideals; they are part of the configuration of the given and a form of visibility, or inscription, of equality. Secondly, they are enacted by

51 I paraphrase from Davis, op. cit., at 79. [The relationship between legalism/ jurisgenesis could find a parallelism in another Coverian distinction between the paideic and imperial modes of organizing the normative universe, as forces of generation and stabilization respectively. The two are constantly being enacted and re-enacted: we can no more live in a pure paideic order than on a purely imperial one.]
52 In the legal setting, this raises broad issues of capability, privilege, and access (e.g., Galanter “Why the ‘Haves’ Come out Ahead: Speculations on the Limits of Legal Change,” Law & Society Review 9:1 (1974) 95-160). Rancière’s starting point is the opposite in that he wishes to demonstrate that the “incapable” are in fact capable. This is at the heart of Rancière’s controversy with Bourdieu in The Philosopher and His Poor, ed. Andrew Parker (Duke University: Durham and London, 2003).
53 Rancière, “Who is the Subject?,” at 302.
those who build a stage where the power of that inscription can be verified. This is not a point of checking whether the reality confirms or denies the rights, but to challenge what “confirmation” or “denial” mean. For example, the force of Olympe de Gouges’ declaration is not simply to show a contradiction in women’s exclusion from voting and the right to equality; rather, it is to demonstrate that the border separating political and private lives—the boundary that legitimizes both the exclusion from the public life and the relegation to private domesticity—is itself untenable: If the death of women as enemies of the revolution could be decided after a reasoned political judgment, at least this part of their existence was undeniably political, shattering the rationale for keeping them out of the quintessential public forum, the assembly.54

The staging of polemical scenes calls for a poetics of expression and the development of “the legal imagination.”55 This never develops in a vacuum: it “draws on forms of juridical inscription or forms of labour relation, on religious narratives, on models taken from school books, on ways of being alone or of meeting others that are put into circulation by literature, on definitions of bodily health and corruption circulated by life sciences, on ways of seeing and hearing formed by metropolitan cultures ….”56 An “excess of words” that turns humans into “literary animals.”57 And yet the norm-generative impulse is not just world-creating, for it must take into account the materials conditions and the limitations upon which it must act. In other words, the creation of litigious worlds is an aesthetic event, but not a mere invention of languages, for an argument must always be won on pre-existing and constantly re-enacted

54 Ibid., at 304.
distribution of languages. The emergence into the realm of legal visibility creates a friction with the order that is, and it is forced to take into account the rest of the legal actors operating in the normative world, including the expected behavior of those who might likely oppose it.

The corollary of this theatrical conception of law is a rejection of legal positivism as an order of a posited, gapless system; but it is equally separated from any idea of natural law as pre-existing, for the law is to be created together with the stage where it is to be understood as disagreement. The resulting image is not a purified jurisgenetic law, for jurisgenesis is always mixed with legalism.

III. THE LAW OF DISAGREEMENT: PUTTING TWO WORLDS IN ONE.

A dissensus puts two worlds—two heterogeneous logics—on the same stage, in the same world. It is a commensurability of incommensurables (Jacques Rancière).

A dramaturgic conception of law builds on scenes of dispute or disagreement between heterogeneous normative worlds. In Rancière’s terminology, a dis-agreement [mésentente] is not a simple case of misunderstanding when one of the parties doesn’t understand the meaning of the terms, or of misconstruction, when one of the parties does not know what she is saying through dissimulation, ignorance, or delusion. Nor is it a case of someone who says white and another who says black. Rather, “it is the conflict between one who says white and another who also says white but does not understand the same thing by it or does not understand that the other is saying the same thing in the name of whiteness.” A parallel term for it is dissensus, which is a

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58 Rancière, Disagreement, at 45.
60 Rancière, Disagreement, at x.
61 Rancière, “Ten Theses,” at 38. What dissensus “means is that every situation can be cracked open from the inside [and] reconfigured in a different regime of perception and signification” (Rancière, The Emancipated Spectator (London: Verso, 2009), at 48.
division in the sense—both sensory experience and meaning—of the common. A dissensus is not a Schmittian confrontation between friends and enemies, but a clash over questions such as “who are we?”, “what makes us a we?”, “what do we see and what can we say about it that makes us a we, having a world in common?”

Rancière situates his argument between Habermas and Lyotard (and thus between two opposing ideas of modernity and reason). Arguing explicitly against the Habermasian model of communicative action, which presupposes equal partners in a horizon of shared understandings, the specifics of dis-agreement are that its partners are no more constituted than the object or the stage itself. “Before any confrontation of interests and values,” “the place, the object, and the subjects of the discussion are themselves in dispute and must in the first instance be tested.” In such cases, “it is necessary to simultaneously produce both the argument and the situation in which it is to be understood, the object of the discussion and the world in which it figures as object,” which is no mere linguistic accomplishment.

On the other hand, the stage(ing) of disagreement cannot be said to be unbridgeable as a differend, which is Lyotard’s neologism to describe a kind of conflict that cannot be resolved for lack of a rule of judgment applicable to both parties, and/or where applying a single rule of judgment would wrong one of them. Amidst the inevitable heterogeneity of language games, the differend is marked by absences; of a

63 Rancière, “Ten Theses,” at 38. This is to say that “[p]arties do not exist prior to the conflict they name and in which they are named as parties” (Rancière, Disagreement, at 27).
64 Rancière, Disagreement, at 55.
65 Id.
66 Rancière, Disagreement, 57.
68 For Lyotard, “a wrong results from the fact that the rules of the genre of discourse by which one judges are not those of the judged genre or genres of discourse” (ibid., at xi).
69 Lyotard argues that each time that heterogeneous phrase regimens are “linked together,” there are other possible linkages that remain neglected, forgotten or repressed (Ibid., at 136, n 184). In his view, this is
common language between the parties; of a common procedure to channel their conflict; of an equitable rule of judgment; of an adequate remedy to redress the harm. In such cases, the wrong “consists not only in the fact that a party is harmed but that the injured party is divested of the means to make visible this injury as an injustice.”

Rancière’s main argument against Habermas and Lyotard alike, Fiona Jenkins explains, is that “they presume a situation of separation and then raise the question whether it can be justly constructed.” By contrast, Rancière “denies the primacy of separation by placing both contesting claims in a common situation structured by disagreement.” This is what Rancière refers to as the “rationality of disagreement,” which does not mean that the conflict itself is bound to rules of rational discourse (in the procedural or deliberative sense) or that the participants themselves argue “rationally” (as opposed to emotionally). Nor does the term allude to the idea that the conflict is geared towards a satisfactory resolution. What Rancière means is that the disagreement can be placed in a mutual space of encounter, that is, in a common stage or scene of intelligibility. As an encounter of heterogeneous worlds brought together on this very occasion, participants must put “two worlds in one and the same world.” This represents a most peculiar platform, for “the speaker has to behave as though such a stage existed, as though there were a common world of argument—which is eminently inevitable because there is no single, universal genre to subsume all genres (Ibid. at 128, note 178; at 138, note 189; also notes 179 and 231).

72 (This is why a dis-agreement may not be settled, but it can be processed. Dis. 39)
73 Rancière, “Who is the Subject?,” at 304. As Rancière writes in Disagreement, “the incommensurability on which politics is based is not identifiable with any ‘irrationality’. It is, rather, the very measure of the relationship between a logos and the alogia it defines” (at 43). In other words, the stage(ing) of disagreement is the “commensurability of the incommensurability” (Rancière, “The Aesthetic Dimension,” at 11).
reasonable and eminently unreasonable, eminently wise and resolutely subversive, since such a world does not exist.\textsuperscript{74}

If a common world does not exist, however, where does the encounter take place? There is no need to posit a logically prior space of encounter.\textsuperscript{75} Samuel Chambers rightly argues that “Rancière … does not need a third term [between politics and police] that would constitute a pure space of the encounter,”\textsuperscript{76} but that this happens “within the police order itself.”\textsuperscript{77} Nevertheless, to say that the encounter happens within the police does not explain the newness brought to the place by disagreement. For, even though “[p]olitics ‘takes place’ in the space of the police,”\textsuperscript{78} for Rancière this also “means reshaping those places and changing the status of those words.”\textsuperscript{79} There appears to be a double sense of “place” here, which is at once material and aesthetic, or, shall we say, theatrical. This theatrical stage does not preexist the irruption of the disagreement, nor can it remain unaffected by it. I would suggest accordingly that the encounter takes place not so much within, but upon an order of police/legalism it simultaneously reconfigures.

Having suggested that the stage of disagreement reconfigures also the place of encounter, several questions remain: first, are there limits to the kind of disagreements susceptible to being thus staged? Second, what would it mean to bring a Rancierian disagreement to the legal arena?

\textsuperscript{74} Rancière, Disagreement, at 52 (emphasis in the original).
\textsuperscript{75} Jean-Philippe Deranty deems this third place of encounter “the political” [le politique]. “Rancière and Contemporary Political Ontology,” Theory and Event 6:4 (2003), para 6. To be fair, Rancière himself did “tentatively” conceptualize it like that, see “Does Democracy Mean Something?,” first published in Adieu Derrida, Douzinas ed. (Palgrave: MacMillan, 2007) and reprinted in Dissensus, 45-61, at 53.
\textsuperscript{76} S. Chambers, The Lessons of Rancière, ed. cit., at 59.
\textsuperscript{77} Ibid., at 62.
\textsuperscript{78} Rancière, “The Thinking of Dissensus,” at 8.
\textsuperscript{79} Ibid.
Jean-Louis Déotte reflects on the first question by setting up Rancière against Lyotard. He argues that the blind spot in Rancière’s dis-agreement is that this genre of political discourse (which he equates with “the deliberative”) remains insensitive to cases of intercultural différend, for which there would be no a common scene of interlocution (86-7). He puts the example of a Malian mother responsible for the genital excision of her daughter, who is condemned by a French tribunal of child abuse or sexual mutilation. Déotte argues that the conflict is not political in the modern sense of the term, for she has no pretension to inscribe her law into the virtual community (of deliberation) and furthermore she will never be able to justify herself according to such norms. At the very most, Déotte writes, “an enlightened judge will attempt to render intelligible the words of the mother accused of excision; he will invoke her ethnographic baggage, but only in order to reproach her for her archaic submission to the norms of a traditional group.” Thus, the legal system requires her to accept a norm of discourse that is not that of the community that formed her identity, and hence to abandon her own relationship to the law. For Déotte, this example “demonstrates how insurmountable is the différend between those whose life on earth is predestined by stories and “us,” who … know that we must deliberate over everything.” In other words, disagreement presupposes that that the cultural-legal différend has been dealt with, for “[t]here can only be political disagreement between those … who share the same sense of history.”

81 Ibid., at 81.
82 Ibid., at 88.
83 Ibid., at 87-88.
84 Ibid., at 87.
85 Ibid., at 88.
There is lots to unpack in this passage, but the argument rests on an initial mischaracterization. Déotte subsumes Rancière’s disagreement into a genre of discourse, the deliberative, which is ill-suited to capture the ruptural logic that disagreement is meant to introduce. On the one hand, dis-agreement employs forms of demonstration beyond the usual deliberative ones (i.e., rational discussion, logical proof, empirical demonstration). These include bodily gestures, role-playing, mimicking, ironic tossing back, poetic world-openers, and dramatizations, none of which fit easily with abstract models of deliberation. On the other hand, the deliberative as a genre does not exhaust Rancierian disagreement, which not only puts forth claims and arguments, but makes visible what had no business being seen.

Mischaracterizations aside, Déotte’s analysis has the further consequence of essentializing some kind of conflicts (ethnic, cultural, religious…). Rancière rejects the implicit fatalism of a claim that plunges these conflicts into a sense of archaic destination, excluding them from history. Déotte contrasts the case of the Malian mother with the Roman plebeians, nineteenth-century women, and the proletariat in that the former is no political to the extent she wishes not to inscribe the law for the community. True, the Malian mother may have no intention of inscribing her custom as law, but living in a society where genital excision is generally seen as aberrant, she will be confronted with the disjunctive of either retracting or defending her position when challenged. She could then decide to withdraw and give up the practice, or else defend her commitment, in which case she would be asking for a reconsideration of the norms.

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86 The mischaracterization is part of a larger effort to link Rancière with the Western tradition of Aristotle, Descartes and Kant, bypassing the radical critique introduced at the heart of these three authors—the political animal endowed with logos, the autonomous subject, and transcendental Reason. Déotte turns Rancière into a Hegelian proponent of historical progress, a characterization he has explicitly denied (see Rancière, “Comments and Responses,” Theory and Event 6:4 (2003)).

87 If the community were to accept her claim, her action would no longer be framed as barbaric practice devoid of meaning. Alternatively, it may be that she changes her own perception of the practice of ablation. See http://elpais.com/elpais/2017/02/03/planeta_futuro/1486128692_612527.html
according to which her action is judged to be aberrant. Herein would lay the potential *jurisgenerative* aspect of her claim, which has nothing to do with her eventual success or failure in doing either.

Conversely, it may well be that Roman plebeians, nineteenth-century proletarians, and women were in a different situation than the Malian mother. But in a context where the plebeians were not considered “creatures of speech,” women could not participate in the electoral process, and workers were not thought to constitute a collective subject, can it really be said that they all *already* shared a sense of history with the patricians, the enfranchised men, or the factory owners who denied them?

Déotte relies on sharp distinctions between archaic and modern, myth and deliberation, stories and rational deliberation, predestination and free-will, them and us. Rancière rejects such dichotomization and situates incommensurable worlds onto the same stage. Yet the ability to dramatize a conflict, to put a conflict of a common stage, has nothing to do with the supposedly lesser severity of the conflict, nor does it justify to postulate a category of cases (cultural, ethnic, etc.) naturally excluded from being staged. At any rate, to stage a dis-agreement does not require abandoning one’s commitments, or to accept the norms of the state as neutral. 88

This leads to our second general question: What would it take to stage a Rancierian disagreement in law? The ideology of legalism presents itself as neutral language in which all claims can be made without loss. However, contemporary life is

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88 In a similar situation as the Malian mother is Antigone, who, arguably wanted solely to bury her brother in peace following time-honored burial rites, but in the process was able to reconfigure the law for the entire community. I have argued at length elsewhere that it is a mistake to suppose she betrays her commitment by the mere fact of arguing her case in the language the citizens too can understand (Etxabe, “Antigone’s Nomos,” *Animus: The Canadian Journal of Philosophy and Humanities* 13 (2009), 60-73).
fraught with examples where the legal system imposes a language that silences some claims and precludes others from even being raised.  

For example, Andrew Schaap relates how the claim of aboriginal sovereignty in Australia was dismissed out of hand as an “absurd proposition.” The state responded to nascent Aboriginal claims in a manner that exemplifies both the silencing and the impossibility to articulate the injustice being committed. The state did so by denying that courts and municipal law were competent to deal with such claims (negation of addressee); that the dispossession ever took place (negation of referent); that Aboriginal sovereignty was a legally cognizable or meaningful concept (negation of sense); and that there was such a thing as an aboriginal nation to begin with (negation of addressor). Paradoxically, some forms of inclusion are complicit in the silencing. James Tully refers to practices of assimilation, where subjects are permitted and often encouraged to participate and yet they are constrained to deliberate in a particular way, in particular places, or over a particular range of issues (but not others), so that their discussion serves to reinforce rather than challenge the status-quo.

The central issue is therefore not simply to denounce the law of state-legalism as partial, but to make legalism a party to the disagreement. That is, to turn a disagreement in law into as a disagreement of law(s), by demonstrating a fracture in the “legal commonsense” or legal aesthesis—what can be perceived as legal. The practical difficulty is how to challenge an order of legalism that doesn’t want to hear, denies a party the status of interlocutor, frames the discussion to the disadvantage of one party,


90 Schaap argues that the idea that a nation [Australia] should make a treaty with some of its citizens [aboriginals] was deemed to be an “absurd proposition” by the Prime Minister as late as 1988 (“Absurd Proposition”).

91 See J. Tully, “The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy,” Modern Law Review 65 (2002), 204-228, esp. 223 (describing the dangers of assimilationist practices of the dominant forms of reasoning and deliberation).
or denies simply that there is anything to discuss. In this discussion, I once again draw inspiration from Rancière’s understanding of the rights of man as the paradoxical enactment of “those who have not the rights that they have and have the rights that they have not”\(^92\) (e.g., when revolutionary women could demonstrate that they were deprived of the rights that they had thanks to the Declaration of Rights, and, through their public enactment, that they had the rights that the constitution denied them).

I want to illustrate this paradoxical interval with the example of former slave Frederick Douglass, as analyzed by Jason Frank reading of Douglass’ celebrated address “The Meaning of July Fourth for the Negro.”\(^93\) In Frank’s view, scholars who focus on the manifest content of Douglass’ speech, for example, on his appeal to natural law, liberalism, and anti-slavery constitutionalism neglect the dramatic staging of the address itself. The attempt to slot the speech into familiar ideological paradigms and arguments obscure its prior “opening up the world,” that is, “a prior aesthetic demonstration that … ‘sets the conditions for its own proper reception’.\(^94\) For example, Douglass radically re-appropriated America’s revolutionary topoi through a series of careful and to his audience no doubt shocking series of rhetorical maneuvers. Rather than monumentalizing the revolutionary deeds, Douglass provocatively suggested that these deeds had been drained out of significance through the very ceremonial repetition he was called to perform. Further, he located the insurgent or the escaped slave as the true inheritor of America’s revolution.\(^95\) His refusal to establish a unified “we” with his audience draws a sharp boundary between white and black America, pointing out to the absence of a common world of representation he would denounce a year later:

\(^{92}\) Rancière, “Who is the Subject?,” at 302.
\(^{93}\) The speech delivered before a largely white anti-slavery society in Rochester, New York on July 5, 1855. Jason Frank, “Staging Dissensus: Frederick Douglass and ‘We, the People’,” in Schapp ed., 87-103 [hereinafter Frank, “Staging Dissensus”].
\(^{94}\) Ibid., at 89.
\(^{95}\) Ibid., at 90.
[America] has no scales in which to weigh our wrongs—she has no standard by which to measure our right.96

And yet Douglass aimed, paradoxically, to construct a non-existent stage to bring to task the entire order of legalism on account of slavery, holding to a constitutional vision in which the entire order of American slavery would be without foundation in law.97 Douglass believed that the Constitutional preamble’s “we, the people” provided a sufficient legal basis to eradicate slavery and thus, he would challenge the infamous *Dred Scott* decision where Chief Justice Taney established that people of African ancestry were not included under the word “citizens” in the Constitution and could therefore claim none of the rights and privileges thereof. Radical constitutionalists such as Douglass not only rejected Chief Taney’s legal interpretation in terms of legal doctrine (they rejected the equation of “the people” with the “citizen”), but refused to grant him final authority on the issue, believing that “every citizen has a right to form an opinion of the constitution … and to use all honorable means to make his opinions the prevailing one.”98 Douglass maintained: “notwithstanding the impositions and deprivations which have fettered us … and scandalous efforts to blot out that right, we claim that we are, and of right ought to be, American citizens.”99

As read by Frank, “Douglass aspires not to bring African-American life into conformity with the constitutive norms of the polity, but to radically re-imagine those norms.”100 He enacts “a rupture in the fabric of time,” which cannot be retrospectively compounded in Dworkinian fashion, nor understood as compatible with the appeals to

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96 Douglass delivered these words in “A Nation in the Midst of a Nation” (Frank, “Staging Dissensus,” at 91).
97 R. Cover, “Nomos and Narrative,” at 38. In this, Douglass diverged from the followers of William Lloyd Garrison, who withdrew from the constitution as a “covenant with death, and agreement with hell.” (Frank, “Staging Dissensus,” at 95).
public reason. When viewed historically, Douglass is ‘making an inconsiderate, impertinent and absurd claim to citizenship’. 101 This is to say, in Rancierian terms, that Douglass is able to occupy the interval between “man” and “citizen” to enact the paradoxical subjectivation alluded to above: he demonstrated, thanks to the Declaration of Independence, that he was deprived of the rights of citizenship, and through his public performances, that he had the rights of citizenship that Justice Taney denied him. In other words, in staging his disagreement with legalism he put “two worlds in one and the same world” 102

IV. THE POETICS OF EXPRESSION AND THE LEGAL HEARING

*To happen, events must be perceived and acknowledged as such* (Kristin Ross). 103

If the gist of dis-agreement is to stage unreasonable and previously unthinkable demands, the established order will presumably not budge, counteracting that the claims are irrelevant, lack standing, are out of bounds, or of reason. Certainly the mere enunciation of a wrong, its appearance into the realm of visibility, does not guarantee that it will produce the desired outcome, as it cannot be assumed that the order of legalism will bend accordingly. 104

But then how are to assess whether the act (demonstration, verification, or claim) succeeds properly as an act (demonstration, verification, or claim)? Rancière does not wish to make its success depend upon what the given order does or does not do. As Todd May reminds us, it is important not to confuse the existence of politics with its effects. 105 At the same time, Rancière acknowledges that the verification of equality “becomes social,” that is, it is imbued with “a real social effect, only when it

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102 Rancière, “Who is the Subject?,” at 6.
104 Rancière, *Disagreement*, at 44.
mobilizes an *obligation* to hear.” While Rancière is not explicit about this, there appears to be a gap between the enunciation and the hearing it compels, between the expression and the response it elicits: on the one hand, something has effectively to change in the realm of the addressees for the act to come to pass. On the other hand, its success cannot be made entirely dependent upon those at whose door it lays the question, for then it would suffice to ignore the claim altogether to derail it. So what exactly must happen for the act to succeed as an act? Can it succeed even if the effects are not exactly those intended? And if (some form of) hearing appears necessary, how can it be mobilized as an “obligation” when the interlocutor refuses to hear? In the context of law: what does it take to for the jurisgenetic act to make a dent and reconfigure the order of legalism?

I want to reflect about these questions, first, by focusing on an example of failure. Indeed, that a political demonstration can fail gives us important clues as to what stands in the way of its success. Rancière offers the example of Scythian slave-revolt. As narrated by Herodotus (iv.3), the Scythians customarily put out the eyes of those they reduced to slavery, the better to restrict them to their task as slaves, which was to milk the livestock. However, this order of things was disturbed after the Scythian army left for a long war-expedition. After nearly three decades battling away in Medes, the Scythian army returned home to discover a new generation of sons fathered by their own slaves, and raised with their eyes open. Looking around the world, the slaves had reached the conclusion that there was no particular reason why they should be slaves. Accordingly, they built trenches and armed themselves, determined to prove they were equals to the warriors. Initial skirmishes to reconquer them by force failed, but then, one

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of the warriors summed up his brothers, thus: “So long as they see us with arms in our hands, they imagine themselves our equals in birth and bravery; but let them behold us with no other weapon but the whip, and they will feel that they are our slaves, and flee before us.”\textsuperscript{108} And so it was done with immediate success, Herodotus tells us, and the slaves took to their heels without a fight.

Before we move on to the ingenious stratagem of the masters, it is worth pausing on the slaves’ own assertion of equality. Rancière says that the initial egalitarian demonstration of the slaves at first throws the masters, but when the latter once more show the signs of superiority the rebels have no comeback. They are “unable to transform equality in war into political freedom.”\textsuperscript{109} This would suggest that an act may not disclose itself all at once, but as a constellation or sequence of unfolding events. Additionally, it suggests that the proper realization of an act could require a measure of commitment, most notably in the face of the reaction of those most likely to oppose it (Cover).

Some commentators distinguish between the moments of disruption and of reconfiguration, so that the slaves could be said to have interrupted, but not reconfigured, the established order. There is no need for such doubling: To count, an act must operate the reconfiguration of the social order it seeks to interrupt, and vice versa. In other words, an act (a demonstration, a claim, a disagreement) “stops the current” only if, and insofar as, it simultaneously transforms the hierarchical distribution of powers. Therefore, it is not that first there is the disruption and then the reconfiguration: the demonstration of a wrong is the act; the act is the reconfiguration. The revolt of the Scythian slaves failed also because it did not articulate another partition of the perceptible: a new distribution of the sensible that would translate their newly acquired

\textsuperscript{108} Herodotus, Histories, iv.3.
\textsuperscript{109} Rancière, Disagreement, at 13.
equality of arms (based on force) into a different equality, based on nothing other than the equality of anyone with anyone else and the sheer contingency of the hierarchical order.

But how does the ingenious response of the masters figure in, and contribute to, the slaves’ failure? Herodotus says that the warriors asserted their claim to superiority by showing only their whips, which made the slaves feel that they were indeed slaves and not the warriors’ equals. If the slaves had at any point managed to utter enunciated a claim of equality, surely they were not successful in compelling the obligation to hear. Note, however, that the case was not properly a failure of hearing. The masters were confronted by the initial assertion of the slaves and found a beguiling strategy to revert back to the situation most favorable to them. In a real sense, then, the warriors heard the claim and heard it exactly as it was intended, but acted as if they had not heard it, pretending to demonstrate with their demeaning behavior that the slaves’ assertion was null and void. The warriors tested whether the slaves were earnest in their assertion to share a common space of representation with the warriors, and the slaves’ return to their former roles without a fight demonstrated they were not. We could say the masters enacted a lie, a lie that closely parallels Plato’s myth of the three metals Rancière often analyzes, and which is equally designed to justify (and perpetuate) a system of social inequality. Here too, the slaves had their say, for in believing their masters’ lie, the slaves assented to their own undoing. “Struck by the spectacle,” they failed to stage an alternative as if that would dismantle the master’s performative ruse.

That hearing is presupposed in the act can be seen, a sensu contrario, in Rancière’s favorite story of success. In Ballanche’s restaging of the scene of the Aventine, the acknowledgment of the plebs comes almost naturally. The wise men of

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110 Rancière, Disagreement, at 12.
the senate realize that when a cycle is over it is over, whether you like it or not, and so they are led to conclude that “since the plebs have become creatures of speech, there is nothing left to do but to talk to them.”\footnote{Rancière, \textit{Disagreement}, at 25-26. Aletta Norval writes: “This little gesture covers precisely the question of responsiveness and the need, for the plebeian speech act to become effective, for it to be inscribed in the extant order”; Norval, “‘Writing a Name in the Sky’: Rancière, Cavell, and the Possibility of Egalitarian Inscription,” \textit{American Political Science Review} 106: 4 (2012), 810-826, at 824.}

Rancière remarks Ballanches’ sense of historical inevitability, derived from Vico, of cycles that can be progressively recognized by their own signs. We know, however, that for Rancière the recognition of speech as speech is never unproblematic, but itself the beginning of politics. This is in fact his foremost critique to Aristotle’s attempt to found politics on the semantic distinction between logos and phônê. Signs, Rancière argues, are not immediately recognizable by all as signifying, but raise a dispute over their status as either signifying (\textit{logos}) or simple noise (\textit{phônê}). Therefore, there is nothing automatic in hearing: it is not that someone utters speech and it is automatically credited. This “suffices to show that some type of activity, whatever it may be, is involved in the process [of hearing]”\footnote{Y. Citton, “Political Agency and the Ambivalence of the Sensible,” in Rockhill and Watts eds., 120-139, at 122.} and opens up the interesting problematic of reception.

In sum, what Rancière calls politics (and we may rename jurisgenesis) is a complex social act that requires both uttering and hearing to come fully to fruition. As Marianne Constable has recently elaborated with the help of Adolf Reinach, social acts require being heard or apprehended, but necessitate no particular response in order to be completed.\footnote{Marianne Constable, \textit{Our Word is Our Bond: How Legal Speech Acts} (Stanford University Press: Stanford, 2014) (reviewed by J. Etxabe, \textit{No Foundations: An Interdisciplinary Journal of Law and Justice} 12, (2015), 136-145).} This creates a potential

\footnote{Constable, \textit{Our Word is Our Bond}, at 91.}
mismatch between the act and its dissemination, in the echoes, resonances, reverberations, or amplifications by which it projects itself towards the future.

At the level of enunciation, these acts share features of the performative utterances famously elaborated by John Austin.115 Still, they are not subject to the “felicity conditions” Austin imagined for their success.116 They are spoken by those who are not “entitled” to speak and hence spoken inappropriately, at the wrong time or place, and with no regard for conventions or procedures. Moreover, they encroach upon the listener’s sensorium in a way that remains outside of Austin’s purview. In this sense they more closely resemble Stanley Cavell’s “passionate utterances”;117 utterances like “I insult you,” or “I seduce you,” or even “I persuade you” are designed to produce effects upon the feelings, thoughts, or actions of the audience, but there is no conventional procedure to accomplish the desired effects.118 Moreover, to be persuaded stands in need of acknowledgement (the same is true for being affronted, incited, intimidated, harassed, or offended) and the “you” comes essentially into the picture.119 In all these, “the emphasis is explicitly upon the constitution of a relation,”120 for I must declare myself to have standing with you and single you out for a response, therefore making myself vulnerable to your rebuke.121 Building on Cavell, Aletta Norval suggests that passionate utterances open up a space for novel claims to be heard, even in the context of a conventional legal setting, due to the transformative force they carry.122 As

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116 Austin linked the particular success to certain conventional conditions and procedures (e.g. that the procedures are followed, that they are performed by the appropriate persons, that they are done in earnest, with the particular intentions, etc.).
118 Cavell’s list of conditions (180-2) parallels that of Austin’s.
119 Ibid., at 180.
120 Aletta Norval, “Passionate Subjectivity, Contestation and Acknowledgement: Rereading Austin and Cavell,” in Schaap ed., 163-177, at 171. [hereinafter Norval, “Passionate Subjectivity”.
121 Cavell, Philosophy the Day After Tomorrow, at 185.
122 Norval, “Passionate Subjectivity,” at 164 and 169.
developed by Cavell/Norval, passionate utterances go a long way towards explaining the transformative effects that a claim can have on the hearers. However, in Rancière the political demonstration has force even against *or in spite of* you, forcing us to consider the kind of relation established with whom denies you.123

For Rancière, this is a polemic relation in the sense that there’s no need for the participants to share the same goals, intentions, or understanding of the situation. I want to inquire on this polemic community by deepening on the example of Blanqui. Readers of Rancière naturally focus on the trenchant rejoinder of Blanqui. Much less noted, though no less interesting, is the reaction of the magistrate, who instructed the court-clerk to inscribe proletarian as a new profession. It is important to remark that the magistrate is not simply taking stock of Blanqui’s rejoinder and recognizing its validity, because the legal order to which he is committed does not include it in the list of proper legal names. Differently, I want to argue that the magistrate’s action is instrumental in opening up the order of legalism to Blanqui’s jurisgenetic challenge.

The significance of the gesture can be noticed when we realize that it was perfectly within his rights to deny the inscription; he could have refused to add proletarian as new name, for instance leaving a blank space, or he could have ordered the clerk to translate it into one of the known professions. He did none of this. Instead he ordered the term proletarian to be written down, thereby inscribing a new name in the

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123 The issue of relation is central to what James Boyd White has coined with the term *constitute rhetoric*, which is none of the senses in which rhetoric has been understood in the Western tradition—as the ignoble art of persuading others of the sophists; as the Aristotelian science of finding the right topoi rescued by modern theorists of argumentations; or as the Ciceronian and medieval art of speaking well. In White’s sense constitutive rhetoric is not a mere linguistic endeavor, but the holistic art of creating improbable communities between different worlds, which always entails the need of translation, and hence the possibility of mistranslation. In every rhetorical engagement, I must set the tone, the context, and my own authority to speak, thus creating a character for myself, my listener, and our relationship, which calls into being a community that can be accepted, declined, misinterpreted, or actively resisted. At any rate, the emphasis lies on the *betweenness*, the relation between the interlocutors and the audience, both immediate and future, constituted by who we are to one another and how we understand our being together.
list of acceptable professions. The point is not to make Blanqui’s action dependent upon the decision of the magistrate, but rather to realize that for the sake of the inscription the latter is compelled to enact a division into the order of legalism he represents.

The reaction of the presiding magistrate is decidedly different from that of the public prosecutor (procureur Mr. M. Delapalme), who protests energetically because for him proletarian doesn’t signify a profession. The prosecutor, who belongs to the same judicial order as the presiding magistrate, and in principle shares his presuppositions, refuses to hear what the magistrate assents to inscribe. The magistrate’s different hearing crystallizes the encounter of heterogeneous logics demanded by legal disagreement.

Note additionally that this does not require the magistrate to be perfectly aware of what he is doing, or of the implications as Blanqui means them. The magistrate is unlikely to have shared Blanqui’s proposition of the proletarian as the profession of thirty million French citizens! Perhaps the magistrate wanted to go on with the trial, or simply to end Blanqui’s charade. At any rate his intention is irrelevant: he need not share the ideals and goals of Blanqui for their encounter to “take place” on a common stage: to be placed under a common scene of intelligibility does not mean there is agreement of wills and intentions, or a shared horizon of understanding—they may in fact have remained dramatically different.

Finally, that the magistrate registers the new inscription is of little consequence for the outcome of the trial: in fact, the magistrate imposed a penalty to Blanqui for his “inflammatory” speech, after he had already been acquitted of the main charge by the jury. 124 If relevant, the inscription leaves a trace that can be verified, amplified,

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transformed, and taken up further in different situations in the future. Herein lies the significance of the legal inscription, which is critically to “let the stakes and the power of Blanqui’s act to be felt.”

V. THE EMANCIPATED JUDGE: FROM JURISPATHIC TO JURISGENETIC