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SONOROUS LAW II: The Refrain¹

Anne Bottomley & Nathan Moore

Part One

To the extent that it makes a systematised appearance in his work, Zizek considers law to be an institutional issue. The possibility of, for instance, both contract and convention are subsumed within this institutional framing, so that the humour we might associate with contract, and the satire of convention, disappears into a generalised irony of the institution.² This irony is apparent in two, interlocking, ways. First, the irony of the institution sets before us a choice to be made, but with the understanding that what will be chosen will not be selected through anything like free will; because there is, truly, only one option, inevitably and necessarily. Second, that what it is in any case impossible to do, must be prohibited as such, precisely because it is impossible. These are the twin poles of the legal institution: a choice that is no choice, and the prohibition on what it is impossible to do. Through these devices, a legal subject is secreted by the institution in such a way that both can indulge themselves in the appearance of free will (seemingly holding the capacity of choice),³ and of possessing a possible omnipotence or fusion with the real (since powers are only limited by prohibition).⁴

This is well demonstrated in Zizek's example of the institution of marriage, which is concerned not to strip away the twin 'illusions' of choice and fusion, but rather to reconcile those who commit themselves to it, and thereby to those 'illusions'. This is crucial for two, again interlinked, reasons: first, that the institution of marriage allows the subject(s) to transcribe their desire within the symbolic realm, and thereby give desire its proper form or structure, and inevitably so; and, second, that the idea of transgressing the institution is revealed as a naïve and futile gesture that takes, all too seriously, the possibility of fusing with the object of desire beyond the constraints of what marriage prohibits. Consequently:

¹ The paper extends a presentation and performance entitled *Sonorous Law I: Our Theme is Echo*, given at the Law and the Senses Conference, Westminster University, London, April 2013. Our thanks to Andreas, Andrea, Victoria, Danilo, and others at that conference.

² For more on the humorous and ironic dimensions of the law, see Nathan Moore (2012) 'Image and affect: between neo-Baroque sadism and masochism.' *New York School of Law review* 57 (1) pp. 97-113.

³ Slavoj Zizek and Mladen Dolar (2002) *Opera's Second Death* Abingdon & New York: Routledge, p. 112. It is at this pole that Zizek locates contract – see p.113

⁴ Zizek, *supra* at p.125: "The true trauma is thus not the intervention of external reality, which interrupts the blissful immersion, but the inversion of this joy – objective reality intervenes to externalise the inherent impediment, to sustain the illusion that without its intervention the blissful immersion would have gone on to its ecstatic climax."

... public proclamation is what marriage is ultimately all about: a symbolic commitment, not just an expression of our (fluctuating) emotions – in the marriage ceremony, one makes a vow, one gives one's word. ... So, although one should, of course, defend the right to divorce, one should nonetheless insist that marriage should be conceived of as valid forever and essentially indissoluble: if divorce occurs, it does not mean that a marriage is simply over but rather and more radically that the marriage never really existed.⁵

Zizek, rightly in our view, rejects any radical or critical possibility so far as transgression is concerned, a point he reiterates in this collection.⁶ Rather, the radicalness of marriage, as Zizek presents it, lays in its rejection of the possibility of the big Other: the big Other does not exist as a completed or whole unity, which can condone and legitimate by seeing, in the sense of recognising and thereby registering, the married couple.⁷ This is why the public pronouncement of marriage is so important: it is a proclamation necessitated by the point that there is no gaze *to see* the marriage bond, and thereby legitimate it externally, from without. Rather the proclamation comes from within the bond, as a sort of puncture or a resounding Badiouian fidelity. At the same time, he argues, one does not, cannot, join with the big Other by 'breaking out' of marriage. This emphasises an important point: not only is transgression no weapon when it comes to fighting capitalism; rather transgression is the capitalistic weapon *par excellence*, inasmuch as it discards fidelity and activates irony, not as the necessary condition of and for world-making, but as the excuse to *unmake* the world by refusing the compulsion of any possibility for commitment or responsibility.

Curiously, in making this crucial point, Zizek follows, to the letter, the teaching of Deleuze and Guattari. Under control (or axiomatic capital⁸), breaking out of institutions and confinements is no longer the problem, because this is exactly the agenda of control as it sets about freeing us so that we might finally become self-determining, under such rubrics as 'getting in touch with the real thing at last'. Control operates by breaking institutions open.⁹ Deleuze and Guattari's concept of the apparatus is key here, for thinking of how to respond to such breakings open (and down).¹⁰ However, for his part, and in an explicitly legal register, Zizek suggests a sort of supra-institutional *right* of distress, a right to protest or revolt, a superior law.¹¹ In this, Zizek seems to coincide with Sade,¹² but also – and more problematically - it seems little more than an inversion of Schmitt's famous formula, such that the 'sovereign is he who decides on the right of distress'. The institution becomes suspended in the light of a decision about when, where, and how to seize the vital, material necessities for life (along with, of course, the decision about what constitutes such necessities). In this sense, it is a de-institutionalising gesture, but one which is not aligned

⁵ *Ibid.* p. 133

⁶ Slavoj Zizek *The Rule of Law Between Obscenity and the Right of Distress*

⁷ *Supra* n. 3, pp. 221-3

⁸ See Anne Bottomley and Nathan Moore, (2012) 'Law, Diagram, Film: Critique Exhausted.' *Law and Critique*, 23 (2). pp. 163-182.

⁹ *Supra* n. 2

¹⁰ *Supra* n. 8

¹¹ *Supra* n. 6

¹² *Supra* n. 2

with the purposes of control; rather, it is self-evident, an irrefutable, ‘of course’ responding to the dilemma of those who do not have enough to sustain themselves.

However, this notion of (a right to) distress, to the extent that it exemplifies that tickling object¹³ which brings the institutionalised subject ‘face-to-face’ with the uncanny, with that which is apparently lacking in the institution, calls for a preparatory question: does the form of law determine the form of the institution, or *vice versa*? Which comes first, the law or the institution? Of course, they come together, and it is perhaps not too trite to point out why: both law and institution share, along with the unconscious (to which they are both isomorphic), the fact of being structured like a language. In this sense, to be given the choice to do what is inevitable corresponds to a pole which we might call metaphoric; whilst prohibiting what is impossible can be considered as metonymic.¹⁴ It then seems as if we do, indeed, choose one link in the chain rather than another (a decision as the substitute for the other decisions which could have been made), and that we could achieve a complete signification if only we were not prohibited from doing so (that our power could otherwise extend throughout the chains of signification).

Considering the institution in this way – as being structured like a language – then encourages us to ask: how is it that the subject is related to the institution? What is the point of linkage between subject and law? It is the parallax view, the *objet petite a* which ties body to law, whilst being absent from both. This is why Žižek is clear that it is not enough to simply gather up perspectives, because one cannot add institutions up to arrive at a complete super-institution, and neither can one simply ‘break out’. The parallax view is unavoidable, even if we imagine that it does not exist. It is this which impels the metonymic-metaphoric binding of the institution, so that the subject might then gain the decisive imaginary-symbolic screen, in front of which it can then claim that the *objet* does not exist.

If this is so, then law is to be diagrammed in the following way: the institution and the subject are ‘connected’ by way of the *objet petit a*, which belongs to neither of them. The institution operates between two poles: metaphor (the illusion of free choice), and metonymy (the illusion of omnipotence). These two poles allow the subject to exist as such, and the institution ‘holds’ the subject; providing a *katechon* warding off the diabolic forces of the *objet*. The parallax view can then be taken as that moment of dislocation, when the *objet* (as it were) comes into view, revealing not the secret knot or connection between subject and institution, but rather their alterity, their mutual misrecognition of each other, and thus of themselves. Dolar relates this specifically to the anomic state of exception and, as noted above, it seems right to us that the present diagram corresponds with that of Schmitt’s, and the expansion made upon this by Agamben.¹⁵

It therefore seems that everything is set up so as to expel the virtual: on the one hand, the exclusion of choice is necessary so that the very undecidability at the heart of the decision is

¹³ Slavoj Žižek (2009) *The Parallax View*, Cambridge, Massachusetts: MIT Press, p. 17

¹⁴ Lorenzo Chiesa *Subjectivity and Otherness: A Philosophical Reading of Lacan*, Cambridge & London: MIT Press, 2007, Chapter 2

¹⁵ Mladen Dolar *A Voice and Nothing More* (2006), Cambridge, Massachusetts: MIT Press, p. 119

warded off; whilst on the other, the imperative to decide at the heart of omnipotence is kept at bay. What do we mean by ‘the virtual’ in this context? Simply and crucially: the difference which is not lacking. Why is this important? Because it allows for a thinking of law that is not limited to the state of exception. For us, this is an essential movement of stepping back from a critical legal brink: law is not the big Other which either condemns or frees us. Rather, it is an assemblage of operations, and only if we grasp this do we begin to understand the full insight of Foucault’s point that, in the 18th Century, law became a tactic – a means to an end.

To formulate and underscore this point, we proceed by way of music. This may seem, initially, counter-intuitive. However, it becomes less so if, for the purposes of this analysis, we understand there to have been three epochs of law, sequential, and yet nevertheless existing simultaneously, which can be considered as marked by a certain musicality or, better, *refrain*. Thus, just as there is classical, romantic, and modern music; so too there is classical, romantic, and modern law. The thesis of our paper is simple: the majority of critical legal scholars have not yet thought law, been able to think law, in its modern register. The main symptom of this failure is an obsession with the origins and founding of law, sometimes encoded as ‘legal ontology’. We are tempted to refer to scholars still fixated on origins as legal romantics, but we can only do so by pointing out that Schmitt was both right and wrong to define the romantic as incapable of any meaningful decision or action.¹⁶ Without doubt, the legal romantic resides in the realm of discussion and representation, focused upon the never-ending debate (because *undecidable*) regarding the law’s origin; yet it is not quite right to say that action is subsequently necessarily absent, or even that the actions taken are the ‘wrong’ or most ineffective actions. Rather, it is a question of romantic relations or territory, and this is why it is useful to now turn to ‘the refrain’.

Part Two

Classical law – leaving to one side the rather unfortunate similes that proliferate between music and architecture – can be thought of as architectural in the sense that it involves a firm hierarchy of interdependence between norms, the relations of which are organised according to the requirements of good proportion and balance, and grounded on solid foundations. Unsurprisingly, it is best typified by the point at which it begins to become undone, to deterritorialise, in Kantian legalism. It is, in fact, a constant tension between imposing a firm order on relations, the classical, and of the deformation of order by relations, the baroque (Kant and Kafka).¹⁷ However, this doubled movement does not undermine anything, but rather provides the necessary twin poles through which the classical (and the baroque) are

¹⁶ Carl Schmitt *Political Romanticism* (1991), G. Oakes (trans.), Cambridge, Massachusetts: MIT Press.

¹⁷ Heinrich Wofflin *Renaissance and Baroque* (1964), K. Simon (trans.), London: Collins. In this sense, it is interesting, in musical terms, to imagine a sort of short circuit, by which Bach enters into direct relation with his true successors: Reich, Glass and Riley. See also Gilles Deleuze & Felix Guattari *Capitalism & Schizophrenia: A Thousand Plateaus* (1988), B. Massumi (trans.), London: The Athlone Press, p. 338; and Anne Bottomley ‘Lines of Perspective, Lines of Flight: Belly of an Architect’, (2010) *Lines of Vision, Lines of Flight: Belly of an Architect*, *Cardozo Law Review*, 31 (4). pp. 1055

able to function as such: one must decide according to the proper procedures, whilst the illusion of omnipotence is warded off by the internalisation of infinity, through the monad. The romantic appears at that point when the foundations themselves are called into question; as if the present foundations were merely arbitrary, and that either an alternative foundation might be available, or the claim that there is a deeper, more truthful foundation, repressed and concealed by that which is currently presented as foundational. We can see then why Schmitt is wary of this romance, to the extent that any decisive act related to the present foundation is de-legitimated in advance, irrespective of its efficacy or effect. From such a perspective, all acts become mere representations or, even, simulacra.

However, we do not consider the romantic to be necessarily ineffectual and withdrawn, even though *he* is in constant danger of so becoming. Deleuze and Guattari describe two elements of romanticism which we are predisposed to look benignly upon. First, romanticism, by uprooting the foundations, institutes a new kind of movement, one no longer pulsing or throbbing in the deformations of the baroque, but a vector which constantly sweeps back and forth across the earth, always gathering and distributing plots and shares in the name of a universal humanity. Second, the romantic calls forth a new people.¹⁸ To be clear, it does not institute or found a new people, but rather points to the absence of a people (we might even say, a ‘community’) through the act of calling forth. That is, the romantic evidences the necessity of deterritorialisation as the condition of any territory.¹⁹

It follows from this that the romantic is not quite as ineffectual as Schmitt would have us believe: there are romantic acts to the extent that new distributions are carried out, and the consistency of a territory is maintained through that which escapes it. In more familiar legal terms, this latter point is well illustrated by the relationship between the normal and the abnormal: as a statistical assemblage, derived from mass observations of itself, the population is constantly redistributed between the poles of the normal and the abnormal, precisely because the former can only be extracted from the latter.²⁰ Schmitt is correct to understand this as a challenge to the form of the decision as he understands it, but he is wrong to consider it as not forming a new type of decision, a new possibility for action.

¹⁸ Beethoven, obviously, but also more recent artists, such as John Coltrane (from *A Love Supreme* onwards), or even the Mahavishnu Orchestra. We would contend that dubstep also falls within the category of the romantic, as opposed to the more cosmic (and modern) expression of drum and bass, calling forth as it does an urban landscape in which the people are lacking. The crucial point is that the romantic is concerned with a sort of musical *nomos* of the earth. For the differences between Schmitt’s understanding of *nomos*, and that of Deleuze and Guattari, see Moore, *supra* n. 2.

¹⁹ See *A Thousand Plateaus*, *supra* n. 17 at pp.340-341. Such deterritorialisation is well evident in Schubert’s *Die Winterreise*, as well as Brittan’s *Billy Budd*, to pick two examples. Importantly, in both, the score does not serve to support or contextualise the voice, but precisely begins to unground it, always threatening to send it skittering across the surface of the ice or sea. In *Beau Travail*, not only does Claire Denis bring the deterritorialisation vectors in *Billy Budd* to the fore, she also uses the work as one element in her film, thereby extracting, and harnessing, extra-territorial forces, of which more below.

²⁰ See Nathan Moore *Diagramming Control* (2013) ‘Diagramming control’, in Rawes, P. (ed.) *Relational Architectural Ecologies: Architecture, Nature and Subjectivity*, Abingdon, UK: Routledge, and Francois Ewald (1991) ‘Norms, discipline, and the law’, in R. Post (ed.) *Law and the Order of Culture*, Berkeley: University of California Press. In the register of Deleuze and Guattari’s language, we would need to speak of the abnormal as becoming-minor.

With this in mind, we can return to Žižek, and ask: what is the difference between the *objet petit a* and the refrain? The short answer, in the musical register, is timbre. That is, the concreteness of sound, its presence. However, this is not presence in the way in which we might like to imagine that the big Other can be made present through some ‘act’ of transgression. Nor, and more importantly, is it the uncanny glimpse of the *objet* around which the institution gravitates, as if around a tiny black hole of lack. Rather, the concreteness of timbre requires us to reformulate the idea of presence, in complete detachment from the pairing of presence-absence. Consequently, it is a disappointment that Žižek’s account of music not only focuses upon opera, emphasising its libretto and narrative; further, to the extent that the music itself is discussed, it is as no more than a counterpoint to the libretto and, even more problematically, only in the registers of melody and harmony. Remaining in the domain of the word, Žižek does not reach (out to) the sense of music. Consequently, he is in danger of being that kind of romantic criticised by Schmitt who, unable to act, simply proposes a ‘deeper’ law (such as a right of distress).

Part Three

If we understand rhythm to be a pulse in time, then timbre cannot be dissociated from rhythm: they are always in a reciprocal relationship. The representation of sound through the Fourier transform evidences this: “the timbre of a sound is constituted by the regularities that define it.” By regularity, we must understand the change in wavelength over time, such that it is the contraction of time, in listening, which gives the frequency or pitch of the sound. More than this, the shape of the wavelength gives the quality of the sound – the sound of a violin, of a snare drum, and so on. This shape is also of time, so that timbre is always pitched. The Fourier transform is the representation, and analysis, of timbre, through a decomposition of the complexity of the shape of the wave. It is evident that timbre (and pitch) are themselves of time, of pulse, and thus of rhythm.²¹ Furthermore, if we consider timbre through the Fourier transform, what also becomes evident is that sound can be understood as a sort of auto-interference: the composition of waves into a specific shape and timbre suggests that timbre results from an internal divergence or difference from (within) itself. In this, we begin to understand, again, Deleuze and Guattari’s point about the connection between the refrain and the territory, inasmuch as the territory is constituted by that which escapes it (lines of flight).²² At the same time, territory is never any-territory-whatever, but is always specific or consistent. Differing from itself does not cause it to become ‘anything at all’, but rather to become a specific quality, affect, or perception contracted from, and in, movement.

In a different key, the ramifications of this have been admirably set out by Jean-Luc Nancy, and it is in his account that we can begin to understand a concept of a presence other than that formulated in the presence-absence pair. Nancy’s initial distinction is between hearing and listening: the sound of the voice is both heard (and understood), and listened to and, in the

²¹ Aden Evans *Sound Ideas* (2005), Minneapolis: University of Minnesota Press, pp.2-5

²²A *Thousand Plateaus*, *supra* n. 17 at pp. 508-10

latter, not so much understood as strained towards, as if the ear were trying to reach the sense of sound. Significance is carried by sound, but the latter remains distinct, not being insignificant or even meaningless but directional, in movement – a question of *sense*. Just as for Deleuze there is sense outside of the triad of denotation, signification and manifestation,²³ so too for Nancy, there is a sense which resounds as the condition of meaning, typified by the sonorous. However, the direction of this sense is, perhaps, rather chaotic, inasmuch as it rebounds, echoes back on and into itself; such that sense is first and foremost spacing, the vibration of an environment that would have to be thought of as ecological. Sense is the difference that makes a difference.²⁴

Nancy writes:

Approach to the self: neither to a proper self (I), nor to the self of an other, but to the form or structure of *self* as such, that is to say, to the form, structure, and movement of an infinite referral, since it refers to something (itself) that is nothing outside of the referral. When one is listening, one is on the lookout for a subject, something (itself) that identifies *itself* by resonating from self to self, in itself and for itself, hence outside of itself, at once the same as and other than itself, one in the echo of the other, and this echo is like the very sound of its sense. But the sound of sense is how it refers to *itself* or how it *sends back to itself* or *addresses itself*, and thus how it makes sense.²⁵

The sonorous courses through a circuit which involves the ear, the vibration of the air, and the space of the vibration as well as its duration. Analytically, we can isolate each point in this circuit, but we must not think that they are simply ready-made components that are then slotted into their proper positions, for that would be the more structural arrangement of meaning as differential referral. Rather, the sonorous circuit emerges only from the mutual implication of each of these points in a shared resonance, not as pure sound, but as a jumble of waves and interferences, so that sound coincides with itself, and interferes with itself. Again, it is possible to understand this in the abstract, as an address that is transmitted and then received (the relationship of signal to noise), but the point is that it cannot occur in the abstract: sound needs its materiality, its ecology, its territory. The refrain is always concrete.

Is it then just a matter of lapsing into a naïve notion of presence? This is the particular value of Nancy's account for us: it is not the imagined presence of the big Other, but the concrete structure of presence, of a presencing:

This presence is thus not the position of a being-present: it is precisely not that. It is presence in the sense of an 'in the presence of' that, itself, is not an 'in view of' or a 'vis-à-vis.' It is an 'in the presence of' that does not let itself be objectified or projected outward. That is why it is first of all presence in the sense of *present* that is not a being ... but rather a *coming* and a *passing*, an *extending* and a *penetrating*.²⁶

²³ Gilles Deleuze *The Logic of Sense* (1990), M. Lester & C. Stivale (trans.), New York: Columbia University Press. See, in particular, 'Third series of the proposition'.

²⁴ Gregory Bateson *Steps Towards an Ecology of Mind* (1972), London: University of Chicago Press.

²⁵ Jean-Luc Nancy *Listening* (2007), C. Mandell (trans.), New York: Fordham University Press, p.9

²⁶ *Supra*, at p. 13

This presence is not contrasted with absence – it is not either here or there (nowhere) – but rather, it is the presencing of the possibility of the present-absent difference, the concrete possibility of meaning. If we stay with the idea of spacing, sound (which is only heard in its jumble of interferences) is a sort of folding, that brings into contact, short-circuits, that which seems held apart as a vibration that runs through bodies, and is transformed by them in the process, whilst also transforming them. At the same time, the echo of sound is never heard in the instant, but comes and goes, rising and falling, in contractions of time, and the ‘shape’ of the sound. This is timbre, the material space-time of sound.

Part Four

What enables us to hold that sound, the refrain, is something different to *objet petit a*? Here, we need to consider how music is different from the voice. Mladen Dolar’s investigation of the object voice in *A Voice and Nothing More*²⁷ is exemplary; however, for us, an ambiguity runs throughout his account: the ambiguity of the difference between voice and music. It is as if sound must, from the psychoanalytical perspective, remain all-too-human, so that music itself is reduced, in distinction to the object voice, to mere aestheticisation, to fetishism. However, the difference between voice and music needs to be pushed further, because only then is it possible to escape what we might call the bad (or weak) romance of critical legal studies: that is, the fixation on the origin.

Of course, psychoanalysis recognises the dependence of meaning upon the voice, and Dolar’s account begins from the point at which the voice outlives the meaning it conveys; as something that does not simply do ‘good work and die’, but rather persists even after meaning has been conveyed. The voice “produces a remainder which cannot be made a signifier or disappear in meaning; the remainder that doesn’t make sense, a leftover, a cast-off – shall we say an excrement of the signifier?”²⁸ This is excrement on the run, set loose as the impossible juncture of body and language, subject and Other, *phone* and *logos*, *zoe* and *bios*. The voice binds both elements together, whilst being of neither of them. This is voice as *objet petit a*, as parallax view which, institutionally, separates the poles of decision and omnipotence. It seems as if we are close to the resounding space-time described by Nancy, particularly when Dolar writes, of the pre-symbolic scream:

... it appears that we are dealing with a voice external to structure, yet this apparent exteriority hits the core of the structure: it epitomizes the signifying gesture precisely by not signifying anything in particular ... For the signifier in general, as such, is possible only as a non-signifier.²⁹

²⁷ *Supra* n. 15

²⁸ *Ibid.* at p. 20

²⁹ *Ibid.* at pp. 28-9

Post-symbolically, the singing voice serves only to conceal the voice, by clamping it into “intense attention” and “aesthetic pleasure”.³⁰ However, Dolar rightly holds that the musical voice is more ambivalent than this; that music “evokes the object voice and obfuscates it; it fetishizes it, but also opens the gap that cannot be filled.”³¹ What Dolar is pointing to here is what Deleuze and Guattari call the refrain: that is, the *affect* of music. This affect is the constitution of the territory, the binding of the institution, the spacing of the echo. It is the specific, concrete presencing which is not a question of filling the gap but rather of ‘gapping’, creating the gap through the resounding space-time of the echo. However, within the register of psychoanalysis, it could appear that we remain caught within our own fetishes in asserting this - as if we could take decisions, and do whatever we have not been prohibited from doing. In short, it seems as if we are narcissists by insisting upon the refrain, by insisting upon the musical voice over and above the object voice.³²

However, this is only the case if a particular understanding of affect is heard. Specifically, if affect is caught as the supplement to meaning, it remains the thing that, up to a point, can carry meaning, and even reinforce it but that, if carried too far, if strained towards too much, threatens to undermine meaning, to explode out of the structure of negative referral. Dolar illustrates the point well by reviewing the more or less constant fear of music evident throughout history; however, he does so by creating an equivalence between music and voice, as if they were the same thing. Dolar is aware that music should, in analytical terms, be treated differently; yet he always comes back to a consideration of music as either aesthetic fetishisation or, as with his more sustained account of the fear of music, by making it indistinguishable from voice: “music, *and in particular the voice*, should not stray away from words which endow it with sense; as soon as it departs from its textual anchorage, *the voice* becomes senseless and threatening – all the more so because of its seductive and intoxicating powers.”³³ Music of itself seems to offer a dangerous and excessive (non)meaning within the psychoanalytical account, a point underscored precisely by the fact that music is understood only in contrast to language: it is either *pre-* or *post-*symbolic. The structure-like-a-language here seems inevitable, and it is no coincidence that the paradigmatic form of music for Dolar, as it is for Žižek, is opera. However, a formula subsequently put forward by Dolar strikes us as potentially more interesting, and we will return to it below: law is structured less like a language, and more as a *lalangue* or llanguage. For the moment, it is enough to say, here, that we are interested in this potential only on condition that music is not ‘beyond the word’,³⁴ but rather understood and valued as a logic of its own, as the spacing refrain or, perhaps, to adopt another configuration of Dolar’s, as a matter of “the voice against the voice”.³⁵

³⁰ *Ibid.* at p.30

³¹ *Ibid.* at p.31

³² See the discussion of narcissism, *ibid.* at pp.39-41

³³ *Ibid.* at p. 43. Our emphases.

³⁴ *Ibid.* at p.50

³⁵ *Ibid.* at p. 55

Part Six

The acousmatic voice – the voice which has no visible source – is directly linked to the law. Not knowing where it comes from, the voice without source takes on the role of source: its origin-less-ness is the condition for it becoming (treated as if) an origin. Its very hiddenness to the eye constitutes its authority: to hear is to obey.³⁶ The psychoanalytic formulation suggests something else: that there is a silence of the voice, more profound than that of the invisibility of its source, such that we might say that there is a silence of the ear that outweighs the silence of the eye. This point is a point of divergence for us. For psychoanalysis, the silence of the ear is not simply the excrement of the signifier, the voice that survives its message; rather, it is something *non-sonorous*, an echoing silence that returns in response to the word, in response to, and – crucially – as the result of, the symbolic, *after* the signifier. Nevertheless, the non-sonorous here reverberates, keeping open the non-coincidence of language and body.³⁷ In this, we would argue that psychoanalysis remains romantic, the non-sonorous reverberation being the silence of the big Other, calling for a new foundation, a new beginning, and a future to come. This is not to say that it is the bad or weak romance of the origin fixation – in fact, in Dolar’s account, this is precisely not the case: the opening of silence is the silence of the people *who do not yet exist*. It is, therefore, the potential redistribution, the founding of a new earth, which is that which Deleuze and Guattari characterise as central to the ethos and logic of the romantic. Nevertheless, a divergence for us is necessary because we do not wish to remain caught in the romantic, even in its ‘good’ or stronger form. Rather, for us, it is a question of becoming modern, and here we must return to philosophy.

Nancy’s account of silence tends to another direction. For him, silence is not non-sonorous, but is, rather, “... still a sonority – or, if you prefer, an arch-sonority.”³⁸ Silence is “an arrangement of resonance,”³⁹ which is nothing less than the differing of timbre from itself, the auto-interference by which it is shaped as a specific sound, a particular spatio-temporal arrangement. It is presencing, or the present silence achieved when the difference of the present-absent pair is silenced. This presence is the straining to hear, the expectation of sense (consistency) that is concrete because it carries the potential to incorporate:

The possibility of sense is identified with the possibility of resonance, or of sonority itself. More precisely, the perceived possibility of sense ...is overlaid with the resonant possibility of sound: that is, when all is said and done, with the possibility of an echo or a return of sound to self in self.⁴⁰

This means that voice and music cannot be quickly aligned. Whilst the object voice might be the silence of the signifier, this does not displace a sort of primacy of the sonorous, of a

³⁶ *Ibid.* at pp. 62-3

³⁷ *Ibid.* at pp. 160-2

³⁸ *Supra* n. 25 at p. 29

³⁹ *Ibid.* at p. 21

⁴⁰ *Ibid.* at pp. 29-30

refrain, which assembles elements together into a territory, a territory which will be crucial if a subject is to be seen and heard. For this reason, Nancy refuses to let the sonorous be treated solely as something ‘left-over’ from meaning, after the signifier. If silence is a resonance (not non-sonorous), this is because what sounds is always first something concrete, meaning that it is always, necessarily, in the middle of things.⁴¹ How it breaks, and what it breaks, is dependent entirely upon the territory and its refrains. Nancy is explicit: “... going once again toward music ... without letting ourselves be restrained by a primacy of language and signification that remains dependent on a whole onto-theological prevalence and even on what we can call a philosophical *anesthesia* or *apathy*.”⁴²

It is as if there were only a chaos of sound, of an infinite interpenetration of sonorities, towards which there is only, first and foremost, straining to listen and, through this straining, a selection, a subtraction from chaos, so that a territory might be formed. The universe not as celestial harmony, but as discordance, even a detuniverse, from which a refrain is pulled out: not simply as something uncanny, as a merely structural point of impossible conjunction (*objet petit a*), but rather as the possibility of sense, the echoing back of what sense will or can be. To be clear: not anything at all, not omnipotence, or even a choice; but a compulsion or seizure. The refrain, in its specificity, makes things resonate.

Part Seven

At this point, we remain romantic, inasmuch as the refrain is, itself, the calling up of a people to come, and the distribution of new resonances and vibrations. At what point, then, does the refrain become modern? When it is no longer a new earth – a new foundation – to be called forth, but the forces of the cosmos, which are to be captured.⁴³ This is not a move into a non-differentiated ‘wholeness’, nor the illusion of the profundity of transgression, but the refining of materials and techniques, a sort of minimalisation, through which the specific is put into touch with the universal.⁴⁴ As Deleuze and Guattari point out, this is a question of technique, of developing, distilling, and filtering practices so that, we might say, the arch-sonorous might be heard. What is modern is to listen for, and to render audible, the sonority of the echo itself:

⁴¹ See Nathan Moore ‘The Perception of the Middle’ in L. de Sutter & K. MacGee (ed.s) *Deleuze and Law* (2012), Edinburgh: Edinburgh University Press

⁴² *Supra* n. 25 at p. 30. Italics in the original.

⁴³ *A Thousand Plateaus*, *supra* n. 17 at p. 342. We consider the cosmos, in distinction from the earth, not as a foundation, from which good proportion and aesthetic pleasure might rise up (as so many redistributions and plots), but as a complex of seething forces, constantly passing through each other. The cosmic is self-organising non-linearity: formations, patterns and assemblages in movement, which nevertheless have specificity. See M. Mitchell Waldrop *Complexity* (1992), London: Penguin Books, pp. 65-6; and Anne Bottomley & Nathan Moore ‘Blind Stuttering: diagrammatic city’ (2008) *Griffith Law Review*, Vol. 17, No. 2, pp. 559-579.

⁴⁴ “He’s trying to get further out (more abstract) and yet more basic (funkier) at the same time”: drummer Tony Williams referring to Miles Davis’ ‘electric’ period, as related in the biography on Davis by Ian Carr, and quoted in Colin Harper *Bathed in Lightning* (2014), London: Jawbone, at p. 344.

Music molecularizes sound matter and in so doing becomes capable of harnessing nonsonorous forces such as Duration and Intensity. *Render Duration sonorous*. Let us recall Nietzsche's idea of the eternal return as a little ditty, a refrain, but which captures the mute and unthinkable forces of the Cosmos. ... If this machine must have an assemblage, it is the synthesizer ... [which] makes audible the sound process itself, the production of that process ... its synthesis is of the molecular and the cosmic, material and force, not form and matter, *Grund* and territory.⁴⁵

To begin with the concrete, with what is to hand, is to no longer seek to redistribute or re-found, but to experiment, to subject the concrete materiality to stresses, breakdowns, re-combinations, and so on, in order to see what can be captured or harnessed: "To be an artisan and no longer an artist, creator, or founder, is the only way to become cosmic, to leave the milieus and the earth behind."⁴⁶

For this reason, it does not seem to us that Zizek is right when he contrasts Schoenberg with Webern. That is, it is not enough to say that to be modern is to have done with the big Other:⁴⁷

Although Schoenberg, already totally resigned to the fact that no actual public can directly respond to his work, still counted on the symbolic fiction of the one purely hypothetical, imagined listener, which was needed for his composition to function properly, Webern renounced even this purely theoretical supposition and fully accepted that there is no big Other, no ideal listener for him.⁴⁸

In accepting that there is no big Other, we must accept that the institution does not function from the outside in, through the imposition of choice and prohibition; rather, it is a question of the object voice, the tiny black hole of the *objet petit a*, that arranges elements around itself, not as the first term, but as that left-over, uncanny silence, through which the non-sonorous reverberates. This need not be the bad weak romance of a fixation on origins (although we do consider that Zizek's theorisation of the right of distress sees him become a weak-bad romantic), but it is, nevertheless romantic. This is to say nothing about either Schoenberg or Webern, but rather that, in problematising composition with reference to the listener – whether it be the last listener, or the absent one – Zizek remains within the realm of the earth, of redistributing forces and calling forth a new people (the listener(s) to come).⁴⁹

Part Eight

⁴⁵ *A Thousand Plateaus*, *supra* n. 17 at p. 343. We might well imagine other forms of 'modern' music in this sense, with perhaps the extended techniques of free improvisation being an obvious contender. However, the perils of collapse, in the face of the cosmos, are such that perhaps at least a degree of composition is usually necessary, irrespective of whether this exists as written passages or agreed directions prior to performance, or editing post-performance.

⁴⁶ *Ibid.* at p. 345

⁴⁷ Zizek *Supra* n. 3 at p. 221

⁴⁸ *Ibid.* at pp. 221-2

⁴⁹ Admirably, for this reason, Zizek remains resolutely Wagnerian.

The romantic *nomos*, to seek the founding of a new earth and its distributions and enclosures, is not an inherently bad thing. But consider whether, rather than an artist or creator, what we need today, especially in legal theory, are artisans: that is, modernists. We noted above that, for Schmitt, the romantic condition was marked by an inability to act. Rather than a complete absence of decision, the romantic, in this formulation, has decided in favour of interminable discussion, deferred revolution, and a sort of idealised withdrawal from the reality of the world. The romantic seems overcome, consequently, by the basis of decision – what would, what could, legitimate action? Schmitt’s solution is, of course, well known to every critical legal scholar – it is the exception that ‘grounds’ the decision, being both interior and exterior to the right (or rather, the ability) to decide. We have already noted Dolar’s linking of the voice to the Schmittian exception, and it is worth returning now to that in some detail. Dolar writes:

The letter of the law, in order to acquire authority, has to rely, at a certain point, on the tacitly presupposed voice; it is the structural element of the voice which ensures that the letter is not ‘the dead letter,’ but exerts power and can be enacted. ... *the voice is structurally in the same position as sovereignty*, which means that it can suspend the validity of the law and inaugurate the state of emergency. ... The emergency is the emergence of the voice in the commanding position, where its concealed existence suddenly becomes overwhelming and devastating.⁵⁰

When things are normal, the voice functions to breathe life into the otherwise dead letter of the law. The voice is heard, but nobody listens to it. The emergency is then the reversal of this, inasmuch as the law ceases to be heard, and one begins to strain to listen for it. Precisely, such a listening, in this circumstance, is the calling forth of a new earth; the sudden perception of the territory as lacking any support, of the law becoming ungrounded, or even dethroned. If so, then we return to an earlier point, but now reversed: the notion of the exception is inherently romantic. This is why we argue that critical legal scholarship, to the extent that it remains within the compass of the Schmittian exception (whether consciously or not), is romantic. This is particularly so in the case of the espousal of rights, and, even more so, in a focus on ‘radical’ rights, such as Žižek’s right to distress, or a right to resist or revolt, or a right to the city, and so on. To the extent that such murmurings are heard through the void at the heart of the institution of law, that is, heard, here and in this case, through the silent object voice of *petit objet a*, then we must contend that the legal *objet* is romantic, and not modern. For what the *objet* does is to raise up the question of the foundation, and thereby articulate towards the possibility of a new foundation, of a foundation ‘yet to come’. It is the weak romance of a short circuit between *objet petit a* and the big Other.

If we limit ourselves to the silent, non-sonorous reverberation of the object voice, perhaps things are not so bad: we find ourselves to be the recipients of the mute excess of our own institutional discourse. However, what if the reverberation is not silent, what if it is the very echo of what comes back to us, the clearing of the space-time in which we present ourselves as subjects? What if silence is not non-sonorous, but in fact the presencing of the concrete in its possibilities, that is, the echoing of timbre? Then we are faced with a decision: either a

⁵⁰ *Supra* n. 15 at p. 120. Italics in the original

choice for the problem of legitimacy, and the assertion of a superior right to come (the weak-bad romance), or the choice for a Spinozist power that is not content to simply call forth a new earth, or to even redistribute powers, but rather insists on the need to investigate what a body can do. This is the choice for the modern which, quite clearly, is not necessarily 'distinct' or separate from the romantic, but which quickly comes to operate (requires it to operate) within its own register: resonating through the refining of techniques and the developing of artifices, focussing ever more minutely on the molecules of space-time (the cosmic), and thereby fashioning from these new arrangements and new combinations. It is the difference between, on the one hand, an abstract process of transcendental withdrawal (as in the gesture of romance) and, on the other, of an immanent world-making (the modernist capture of the cosmos in a territory).

To that end, the problem is not where to begin, but how to engage with what is already happening, to listen to that which already resounds. This requires a new training of the ear, so that we can begin to hear the timbre of those concrete artifices that are so rife in areas such as property law, contracts, intellectual property, and so on. What we find through an engagement with the sonorous is that sound does not wait for an origin, for a foundation or legitimation, before it 'begins' to resound. It is caught up in a constant becoming-timbre, which activates both the possibility of the romantic as well as, crucially, that of the potential of the modern. If the modern has not yet been fully grasped – at least in the register of (a) legal hearing – it is because the techniques necessary to achieve it have not yet been developed. Critical legal scholarship has remained caught within the romantic imaginary: seeking new pasts, rather than creating futures, we can expect it to become increasingly fixated with its own archiving.

We do not finally agree that law is structured like a language, because the big Other is not, finally, our issue. We prefer to say that it is structured like language [*lalangue*], inasmuch as there is a concrete remainder to the signifier; although, how this remainder arises, and how it operates institutionally, we can follow only so far. Not the non-sonorous reverberation for us, but rather the arch-sonority of the echo. We draw close to Dolar when he writes:

The antinomy of the signifier and the voice, which we have been pursuing from the outset, thus turns into the inner divergence [of *lalangue*] which precludes the separation of the signifier versus voice, with the consequence that we can no longer isolate the signifier on the basis of 'it speaks'.⁵¹

Yet, it is still a matter of internalising a difference, a lack. The voice penetrates the signifier as a function of the present-absent pair, creating an impossible, and interminable, circuit. It is a game of the ideal (signifier) and the material (voice). However, for us, it is necessary to push further, to strain towards virtuality and the presencing of the present-absent pair: it is not a question of silence coming back, of its uncanny and mute reverberation in 'response' to our words, our questions; but rather how silence sounds at the limit of (in)audibility, how it catches things up in a becoming-inaudible. We must, in this, understand silence as a matter of selection, of rendering (in)audible, and of unfolding at the point where the solution is not

⁵¹ *Ibid.* p. 144

yet known, where further work is required, where a sense remains to be fabricated or ‘artisaned’. Before voice and signifier, there is musicality, the refrain.

If the signifier leads to a sort of disablement, inasmuch as it raises, inevitably, the silence of what was not said, of what could not be en-acted, then there hangs over all language the spectre of what could not be, the impossibility which, precisely, must be prohibited.⁵² We are therefore led, continuously, to think in terms of presence-absence. Yet, the silence of the arch-sonority is different inasmuch as it comes first, as a great block of white noise, from which arrangements, refrains, and decisions are extracted. This is what the artisan does: not content to call forth a new earth and a new people (that is, to hear the silence of the signifier; the strong romanticism), it is a matter of extracting and making consistent another concept, affect, or function. However, we must be careful, because consistency does not mean essence, or identity, or lack of change. Rather, consistency is the duration of an affect, in both space and time, against the chaos-cosmos of arch-sonority which, at this point, we can usefully consider as white noise. Here, silence is a doubled movement of subtraction, in that one begins with the pure perception⁵³ of white noise as the resounding, and concrete, silence of the virtual; and then it is also the extraction of a cosmic force, through the silencing of what is (too) chaotic: that is, the silencing of silence. In truth, it is never one and then the other, but both simultaneously: there is a folding of silence, in the same way as there is a folding of metal for the blacksmith, and a folding of sound (echoes) for the musician.

Hence, the significance of the synthesiser for Deleuze and Guattari.⁵⁴ More specifically, it is the analogue synthesiser which is crucial here, due to its subtractive functioning. It begins with a block of sound from which frequencies and harmonics are subtracted in order to leave an affective sound, a sound resonant to the territory in which one operates, either as ‘reinforcement’ (forming a territory) or escape (leaving the territory) or, of course, both simultaneously. By filtering and using specific envelopes to *shape* sound, what is actually happening is that a sonority (a refrain) is being extracted from the chaos-cosmos of silence (or white noise): “What is added from one filter to the next are intensive subtractions ... it is thus an addition of subtractions.”⁵⁵ The refrain is the result of this ‘addition of subtractions’, so that, in each subtraction, a small piece of the cosmos is harnessed to a particular spatio-temporal sonority. It is a question of following the refrain, of finding those points of subtraction that can be made relevant or active, giving the sound a consistent and affective timbre, or force, overall. Extracting by adding subtractions, or presencing the present-absent pair – they are the same process.

Part Nine

⁵² Or, through *lalangue*, a silence to at least be enjoyed: *ibid*.

⁵³ See the discussion of Bergson in Moore ‘The Perception of the Middle’, *supra* n. 41

⁵⁴ See the quote above, *supra* n. 45

⁵⁵ Gilles Deleuze *Francis Bacon: The Logic of Sensation* (2004), D. Smith (trans.), London: Continuum, at p. 117

The link between the decision and the exception, and the resulting weak-bad romanticism of the origin, is only necessary when the decision is located in the realm of the romantic. Then it inevitably becomes a question of asking: who can decide? On what basis is there authority to decide? To what does the decision refer back? What is the decision meant to achieve? Schmitt needs the category of the exception at that point at which the older legitimations of the earth are ceasing to function, the point at which it becomes impossible to consider oneself as an autochthon. However, whilst hearing the call, Schmitt refuses to become modern, instead seeking to re-ground the law in a new earth, a new *nomos*. Therefore, to the extent that the modern appears in Schmitt's work, it is to be warded off – as the *nomos* of the sea (to an extent), the air, and finally of the astronomical.⁵⁶ In distinction, for us, to be(come) modern is to forge the astro-song, the cosmic refrain – in law, it is therefore a question of forging and following the astronomos.

We must have done with the exception as a romantic category, whether in the form of the sovereign or of those who 'oppose'. The category of the decision must be de-linked from the problematisations of legitimacy and intention, from the continued return of the foundation. Most crucially, these problematisations cannot be used to artificially limit the consequences of decisions, as if certain outcomes were to be considered merely as 'externalities', or 'side-effects', or as 'unintended'. In such cases, it is always a matter of referring the decision back to the point of its deciding, as if this point were its only flash of existence, and its sole explanation. In such an operation, the decision is like the *objet petit a*, and everything becomes an interminable question of the signifier and the voice, as Dolar clearly shows. No, now it is the consistency of decisions which must be encountered, their spatio-temporal resonances, their refrains, their territories and lines of flight. The modernist *follows* decisions, not in the sense of automatically applying them again and again (in which case there is no need to follow the decision because it doesn't go anywhere), but of extracting potentialities, new affects, new possibilities of life. To what extent can decisions be extended or varied, when and where must they be cut back and circumvented ... at what point does counter-point become a completely new key centre?

Rather than a 'law story', it might be better to think of a 'law score', but even this runs into difficulties to the extent that the score might be considered as, reduced to, a representation. More to the point, it is a question of dealing with law-sonorities, with concrete blocks, that are never decided once and for all, but which echo constantly, giving an ever varying legal timbre. Not a free-for-all, not a false choice, not a fusion, not the uncanny ... not even a hearing, but just a listening.

⁵⁶ Carl Schmitt *Land & Sea* (1997), S. Draghici (trans.), Washington: Plutarch Press.