

**Birkbeck ePrints: an open access repository of the
research output of Birkbeck College**

<http://eprints.bbk.ac.uk>

Fitzpatrick, Peter (2005). Access as
justice. *Windsor Yearbook of Access to
Justice* **23** (1), 3-16.

This is an author-produced version of a paper published in *Windsor Yearbook of Access to Justice* (ISSN 0710-0841). This version has been peer-reviewed but does not include the final publisher proof corrections, published layout or pagination.

All articles available through Birkbeck ePrints are protected by intellectual property law, including copyright law. Any use made of the contents should comply with the relevant law. This article was first published in *Windsor Yearbook of Access to Justice*. *Windsor Yearbook of Access to Justice* is published by the Faculty of Law, University of Windsor, Canada.

Citation for this version:

Fitzpatrick, Peter (2005). Access as Justice. *London: Birkbeck ePrints*.
Available at: <http://eprints.bbk.ac.uk/archive/00000495>

Citation for the publisher's version:

Fitzpatrick, Peter (2005). Access as Justice. *Windsor Yearbook of Access to Justice* **23** (1), 3-16.

Access as Justice

Peter Fitzpatrick*

With the considerable help of Derrida, aptly aided by Mandela, this paper advances an idea of justice as integral to law. Thence, by way of an homology with such justice, access also is shown to be integral to law. What impels the overall argument is the primacy accorded to law in the constitution of the social bond.

Introduction

The obvious twist to the title is meant not to depart from concerns clustered around “access to justice”, but rather to offer a perspective compatible with them, perhaps even a perspective on what impels them. More pointedly, I will try to show that, and how, access characterises law, and this not as a matter of some ideal or programme, or as an added right to law, but access as constituting law itself.

Initially, Derrida’s “Force of Law”¹ will be taken as the statement of the case, a statement to which my own engagement will remain true even whilst extending it to law’s intrinsic relation to access. More specifically, that “justice” which Derrida advances in terms of an entirely open responsiveness to the other is seen here to be constitutively within law, and seen to generate the operative quality of law. That same

* Anniversary Professor of Law, Birkbeck, University of London. This paper responded to Bill Conklin’s generous invitation to give an annual access to justice lecture in the Faculty of Law of the University of Windsor. The stimulating occasion itself provoked much further thought on my part. I am grateful to Bill and to Sabine Grebe for their constantly thoughtful companionship during my stay in Windsor. Abundant thanks to Richard Joyce for editorial guidance.

¹ Jacques Derrida, “Force of Law: The ‘Mystical Foundation of Authority’”, trans. by Mary Quaintance, in *Acts of Religion* (New York: Routledge, 2002) 230-98.

responsiveness is seen in turn as necessitating an access that is itself inherent to law's self-sustaining.

Forcing law

In "Force of Law" Derrida would want to "make explicit or perhaps produce a difficult and unstable distinction between justice and *droit*, between justice (infinite, incalculable, rebellious to rule and foreign to symmetry...)" on the one hand and, on the other, "the exercise of justice as law or right, legitimacy or legality, a ... calculable apparatus..., a system of regulated and coded prescriptions."² This justice for Derrida imports an unlimited responsiveness to the other (an "other" which extends in my engagement to the condition of alterity or otherness). And in this responsiveness Derrida would equate justice with deconstruction. Thus far we could have the "American Derrida" for whom deconstruction's responsive regard to alterity is "nihilistic" in its simply dissipating any determinate "presence" on which it is brought to bear – dissipated by bringing within such presence what had been excluded in its making. But an emphasis on justice will serve as a brief corrective, even reversal. The illimitable responsiveness of justice is impossible "in itself", always beyond attainment. To be made possible, in the sense of becoming existent, and given operative force, justice must be "cut" into, reduced, and in a certain sense denied.³ For Derrida the legal decision cuts into and enacts justice, even whilst denying justice as illimitably responsive. In this, "law is the element of calculation."⁴ Law, in the legal decision, can never be "presently and fully just."⁵ So, rather than starkly and simply attributing a dissipating "force" to justice as deconstruction, Derrida would see it as

² *Ibid.* at 250.

³ *Ibid.* at 252.

⁴ *Ibid.* at 244.

⁵ *Ibid.* at 253.

dependent on the determinate presence effected by the legal decision. Derrida would go so far as to find in law, and elsewhere, some surpassing reductive ability to contain responsiveness, to ensure that “the aleatory margin ... remains homogenous with calculation, within the order of the calculable.”⁶

Yet, if law is necessary for justice, justice is also necessary for law. The bringing of law to bear, the legal decision, the very call for such decision, these all involve a responsiveness which cannot be contained. Not only is it a matter that “no existing, coded rule can ... guarantee absolutely” what will be brought to bear or decided, neither the bringing to bear nor the decision can ever fully saturate its own context, can ever “provide itself with the infinite information and the unlimited knowledge of conditions, rules or hypothetical imperatives that could justify it.”⁷ Law must ever incipiently respond to an uncontainable justice, and thence its rendering of justice cannot be peremptorily aligned with justice as virtue, as the Good, for “justice is always very close to the bad, even to the worst, for it can always be reappropriated by the most perverse calculation.”⁸ In all, although “justice exceeds law and calculation”, law has also and somehow to be conceived as “exceeding” justice.⁹ We have to calculate, “incalculable justice *commands* calculation”; we have to make actuality present, and for this we must “negotiate the relation between the calculable and the incalculable”: this imperative does not *properly* belong either to justice or law. It only belongs to either realm by exceeding each in the direction of the other.”¹⁰

Derrida provided an anticipation of “Force of Law” in his “The Laws of Reflection: Nelson Mandela, in Admiration”, and I will draw on that beautiful paper

⁶ Jacques Derrida, “Psyche: Inventions of the Other”, in Lindsay Waters and Wlad Godzich (eds), *Reading de Man Reading*, trans. by Catherine Porter (Minneapolis: University of Minnesota Press, 1989) 25 at 55.

⁷ Derrida, *supra* note 1 at 251, 255.

⁸ *Ibid.* at 257.

⁹ *Ibid.*

¹⁰ *Ibid.* at 251.

now, both as situating the abstract verities derived from “Force of Law” and as focussing a challenge to the combining of law and access, for what is involved here is one of the most egregious instances of “the bad” and of law as excluding access.¹¹ I shall also draw on the thought of Mandela himself.

The momentous puzzle which Mandela presents us, and makes present, begins with Mandela as a critic of the laws, a legal realist, in describing his disenchantment with the rule of law and with the notion of equality before the law:

[M]y career as a lawyer and activist removed the scales from my eyes. I saw that there was a wide difference between what I had been taught in the lecture room and what I learned in the courtroom. I went from having an idealistic view of the law as a sort of justice to a perception of the law as a tool used by the ruling class to shape society in a way favourable to itself.¹²

And indeed, with the struggle against apartheid, it would be difficult to conceive of a situation where there was less cause for commitment to the laws, or to conceive of a person more intimately justified in refusing such commitment. And Mandela was certainly perspicacious and forthright on the matter of law’s pointed oppressions and failings, and not only in its constraining and incipiently deadly effect on him but also, and primarily, in law’s tentacular and pervasive subordination of his “people.”

All of which could be sharply set against another Mandela, a Mandela existentially identified with the law, a Mandela who in the very midst of a realist

¹¹ Jacques Derrida, “The Laws of Reflection: Nelson Mandela, In Admiration”, trans. by Mary Ann Caws and Isabelle Lorenz, in Jacques Derrida and Mustapha Tlili (eds), *For Nelson Mandela* (New York: Seaver Books, 1987) 13-42.

¹² Nelson Mandela, *Long Walk to Freedom: The Autobiography of Nelson Mandela* (London: Abacus, 1995) at 309.

critique lauds the court system as “perhaps the only place in South Africa where an African could possibly receive a fair hearing and where the rule of law might still apply”;¹³ a Mandela who presents himself before the very law he rejects, “rejects in the name of a superior law, the very one he declares to admire and before which he agrees *to appear*”; a Mandela who “regarded it as a duty which I owed, not just to my people, but also to my profession, to the practice of law, and to justice for all mankind, to cry out against this discrimination which is essentially unjust.”¹⁴ Mandela, it would seem is now of “an idealistic view” and clean contrary to Mandela the realist, but not so.

The “superior law” which Mandela affirms is not something set apart from or something simply about the existent law. Rather, it is integral to law as it is. Mandela advances a conception of professional duty which operatively respects and admires both the law and its judicial institution, even as the pervasive legal oppressions of apartheid are being brought to bear on him.¹⁵ The law which calls forth this magnanimous regard is the law that incipiently extends beyond its determinate existence, the law that integrally orients that existence towards the possibility of its being otherwise, and towards a corresponding possibility of its inclusive and equal extension to all groups in South Africa – towards a more inclusively whole South African society.¹⁶ In all, such responsiveness is intrinsic to law as it is. Law, to be law, cannot be contained in its determinate presence.

How, apart from Mandela’s luminous exemplarity, might we give that law some purchase, some quiddity? If there is no longer a transcendent referent endowing it with surpassing force, are we, we moderns, left with an impoverished positivism? And

¹³ *Ibid.* at 308.

¹⁴ See Derrida, *supra* note 11, at 27, 35 (his emphasis).

¹⁵ *Ibid.* at 15-16, 33-37.

¹⁶ *Ibid.* at 19-21.

if so, how could that law beyond determinate, posited existence ever resist the reductive pull of the positive, resist being accommodated to the existent as a matter of the marginal and occasional self-adjustment of the existent? Even the (by now) standard Derridean vocabulary of the supplement and the trace orients us towards the seemingly incidental, towards that which “is an addition that serves to complete a whole, to fill it where there is a gap and thus to carry out a program.”¹⁷ Yet we must extend (also) to “a still unanticipatable alterity ... for which no horizon of waiting as yet seems ready, in place, available.”¹⁸ And we do have the mundane if mysterious ability to orient ourselves receptively towards that alterity, an ability to relate to a world that is beyond what is in hand and immediately affective. There is, of course, a host of philosophical, and now neurological, matter that would address these abilities, but allow me to be a little evasive for now and accommodate them in law, in what must pertain to law for it to make sense in terms that we readily accept. This enquiry directed within law will prove to be companionate to, but distinct from, Bill Conklin’s into “the invisible origins of legal positivism”,¹⁹ into an authorizing origin putatively apart from law but proper to it.

For some, however, this law could prove to be one of a broad dispensation, for it is law as indistinguishable from community or from the social bond. It can be initially delineated by continuing to mine poststructural thought. To repeat somewhat, Derrida’s “deconstruction” is notoriously tied to the dissolution of “presence” or of fixed entities, but that seeming dissolution always “takes place” in a constituent relation between the entity and what is ever beyond it, and deconstruction would thence account for the iteratively enduring presence of the entity. Derrida engaged

¹⁷ Derrida, *supra* note 6, at 58.

¹⁸ *Ibid.* at 55.

¹⁹ William E. Conklin, *The Invisible Origins of Legal Positivism: A Re-Reading of a Tradition* (Dordrecht: Kluwer, 2001).

with law in those terms, as we saw, and he would evocatively combine law and the social bond within “a law of ordinary sociability ... prior to all *determined* law, *qua* natural law or positive law, but not prior to law *in general*.”²⁰ That law of and before society, a law of the law, resonates with Nancy’s uncontainable “community” of our “being-with” each other, a community set against the “stifling reign of society”, of society as positivistically contained; and it is “as law” that we appear together in community.²¹

Although he would have protested his inclusion in significant poststructural company, Foucault’s affinity to these positions is close. For Foucault, “the social” is integrally tied to uncontainable and diffused power.²² It may be wondered, then, how such unbounded power could determinately encompass law and render it in the purely instrumental terms so often attributed to Foucault – attributed admittedly not without ample warrant in his own writing.²³ Yet Foucault also saw law as inherently illimitable, as something we have to pursue “resolutely going even farther into the outside into which it is always receding.”²⁴ The parallel with Derrida and Nancy can be taken even further in Foucault’s finding that the “truth” of a society is enabled by its basic “juridical form”.²⁵

We could connect, even go so far as to identify, this law of the law with the law derived from Derrida and Mandela, the law that combines the determinate and the

²⁰ Jacques Derrida, *Politics of Friendship*, trans. by George Collins (London: Verso, 1997), at 231 (his emphasis).

²¹ Jean-Luc Nancy, *The Inoperative Community*, trans. by Peter Connor (Minneapolis and Oxford: University of Minnesota Press, 1991), at 17, 28.

²² Michel Foucault, “*Society must be Defended*”: *Lectures at the Collège de France, 1975-76*, trans. by David Macey (London: Allen Lane, 2003) at 51-6.

²³ See, eg, Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. by Alan Sheridan (Harmondsworth: Penguin, 1979) at 22, 98; Michel Foucault, *The History of Sexuality, Vol. 1: An Introduction*, trans. by Robert Hurley (Harmondsworth: Penguin, 1981) at 89, 144.

²⁴ Michel Foucault, “Maurice Blanchot: The Thought from Outside”, trans. by Brian Massumi, in Michel Foucault and Maurice Blanchot, *Foucault/Blanchot* (New York: Zone Books, 1987) at 34.

²⁵ Michel Foucault, “Truth and Juridical Forms”, in *Power: Essential Works of Foucault 1954-1984: Volume 3*, trans. by Robert Hurley and others (London: Penguin, 2001) 1-89.

responsive inextricably, and we could do this by asking “who gives the law?”. It once fell to some god or other, or to Solon or some other lawgiver coming from the “outside”, to combine determinate presence and illimitable responsiveness and thence to endow the combination as law. Such a transcendent reference anterior to and putatively generating law is not supposed to be available to us moderns. Yet Enlightenment thought still found a similar transcendent reference unavoidable.²⁶ And when Bodin decreed that “the first prerogative ... of a sovereign prince is to give the law”,²⁷ this assumed feasibility because the sovereign marvelously combined being determinate with an unconstrained efficacy, or combined finite existence with the encompassing of what is ever beyond it. That same deific ability attends the originary invocation of “society” and “the people” as the sources of law. It would seem then, in terms of Latour’s irresistible title, “we have never been modern.”²⁸

Yet sovereignty, society, the people, and other like expedients, all depend upon law for their continue constitution. We could apply to them Beardsworth’s discerning “the *essential* lack of identity to all human organizations.”²⁹ What is involved here is not simply an occasional and marginal challenge to the unchanging identity of the given organized entity as it faces the vagaries of future time. Rather, the lack is inevitable and essential to the entity itself. What the organization is “for the time being” will always lack in relation to what in time constantly comes to and impinges on it. And that lack is not something supervening on an originary and pristine stability. “All stability in a place”, says Derrida, is “but a stabilization or a

²⁶ See, eg, Jean-Jacques Rousseau, *The Social Contract*, trans. by Maurice Cranston (London, Penguin, 1968) at 84-8. See also Kant, *infra* note 41.

²⁷ Jean Bodin, *On Sovereignty: Four Chapters from The Six Books of the Commonwealth* (Cambridge: Cambridge University Press, 1992) at 56.

²⁸ Bruno Latour, *We Have Never Been Modern*, trans. by Catherine Porter (London: Harvester Wheatsheaf, 1993).

²⁹ Richard Beardsworth, *Derrida & the Political* (London and New York: Routledge, 1996) at 146 (my emphasis).

sedentarization”: “displacement” or “the process of dislocation is no less arch-originary, that is, just as ‘archaic’ as the archaism that is always dislodged.”³⁰ The initial and continuing existence of the organization will depend on its ability to form existently in a constituent combining of “itself” with its lack. To do this, the organization has only one continuously projected, pointedly amenable and ultimately enforceable means, and that means is called “law”.

The law of the law

Allow me to try and “make sense” of this law, of this law of the law, and to begin this endeavor as I mean to continue it – with the distinctly unpromising notion of an elusiveness, a vacuity to law. First, then, a little local difficulty: the modern difficulty of saying what law is, or the inability of us moderns to contain law in some saying *about* it. Yet the sanguine expectation that we can do so persists, as it has to, for does not law provide us moderns with a haven of certainty in an uncertain world? And has it not been asserted again and again that in transitions to modernity, and in the sustaining of modern economic relations in particular, it is law which provided and provides an imperative certainty and predictability? And we could expect that when this imperative certainty is allied with the numberless efforts in jurisprudence to tell us what law is, there would by now be some clear, some generally accepted outcome. Yet there is not. Perhaps, then, we are unable to say what law is. Perhaps we are unable to encompass the being of law and render it simply as existent.

That intriguing inadequacy could be approached by way of the ability of law to give recognition and effect to something about us that reciprocates the mundane and mysterious relation to alterity touched on earlier. That something is our ability to

³⁰ Jacques Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning & the New International*, trans. by Peggy Kamuf (New York: Routledge, 1994) at 82.

orient present existence beyond itself. Through law a prehensive and responsive dimension is given to our existence, and in so doing law provides a normative orientation and determination of our being-with each other. For all of which, law has to have *some* determinate existence in the world. Yet readily as this determinate existence is associated with law in various jurisprudential traditions, law cannot be thence enduringly ordered and predictable since it must change and adapt to such other things as “society” or “history”, to take only two of the overwhelming objects commonly advanced in other jurisprudential traditions. And this contrary quality, this responsiveness, this attunement and attentiveness to what is beyond, is also essential for law. Complementing now our ability to orient present existence beyond itself, law has also to be able to bring to existence what is ever beyond it – and respond to both the exigency and the possibility of what comes from beyond. More prosaically, if law were aligned with an invariant sameness, it would cease to rule the situation that would inexorably change around it. Furthermore, the very holding to a position requires a creatively accommodating responsiveness to all that would impinge upon and affect it.

To come to a point, perhaps more mundane than mysterious now, law brings together these two dimensions – the dimension of determinate existence and the dimension of responsiveness to what is ever beyond determinate existence. Even though determinate positioning and a responding to what is beyond position are different things, there can be neither enduring position without responsiveness to what is always beyond it nor effective responsiveness without a position from which to respond. However, it is the impossibility of invariant positioning that makes law possible. Even at its most settled, or especially at its most settled, law could not “be” otherwise than in a responsiveness to what was beyond its determinate content “for

the time being”. If that content could be perfectly stilled, there could be no call for decision, for determination, for law. And it is in the very response to this call, in the making and sustaining of its distinct content, that law “finds itself” integrally tied to a bringing of what is beyond into the determinate.

It is this tie, this bringing of existence to a normative futurity, this generative surpassing of any contained condition, that renders law the most independent yet the most dependent of things. Now, if law is to be illimitably responsive, it must be quite unrestrained, never bound to anything before it. It must, says Derrida, “be without history, genesis, or any possible derivation.”³¹ Yet, and here is where a seeming contradiction comes in, law’s unrestrained responsiveness, its lack of any confining ties to the past or to anything else, its vacuity or nothingness, results in its not having any enduring content of its own. It always depends for its very content and for much of its force on some power apart from itself. “Law itself”, says Nancy, “does not have a form for what would need to be its own sovereignty.”³² Yet there seems to be something making law besides power, something to do with law itself. Take the political trial. We do not consider it legal precisely because some power apart from law determines the outcome. We tend to see this as a subterfuge, as something being presented as law that is not law. What is it about law that this offends? It is law’s responsiveness, its inability to be bound definitively to any pre-existent, its incipient alterity. Law is continually oriented to, continually opening to, the possibility of its being otherwise. Law moves beyond the assertion of any singular, even predominant power and in some ultimate sense receives power in its, in law’s, own terms, filtering an intrusive power and ultimately constituting its content. Law receptively responds to possibility, uncertainty, plurality and division – to an absence of monadic power.

³¹ Jacques Derrida, “Before the Law” in *Acts of Literature*, trans. by Avital Ronell (New York: Routledge, 1992) at 191.

³² Jean-Luc Nancy, *Being Singular Plural* (Stanford: Stanford University Press, 2000) at 131.

It is, however, this very ability of law not to be dependent on other things and its ability to still the demands of an importunate world that has tied modern law to varieties of positivism. Lacking transcendent resort to tie our existence to the possibility within being, we moderns have sought consolation in a law whose own determinate existence is elevated over that possibility. Or we have subordinated law instrumentally to some other positive quasi-transcendent such as society or nation. In either case, law's main force is held to be a projection of its determinate existence, whence its responsiveness to possibility becomes a matter of adjusting the responsiveness to that projected existence.

What "makes sense" of law, and not without paradox, is its vacuity of content, its imperative ability to be ever other to what it may be "at any one time". This grounds, with a groundless ground, law's autonomy, its self-positing, its not being ultimately dependent on other things. So, in the Anglo-American tradition of legal positivism, law is constituted positively in its not being dependent on other things – or at least on some other things such as morals and politics. Yet this is a strangely suicidal legal positivism, for it also allows of law being dependent on some other things, such as a sovereign. And that dependence too is enabled by law's vacuity and law's consequent reliance for its content on something apart from itself. Yet that same vacuity, as we have just seen, enables law to transcend the determinate and to be responsively, receptively related to whatever is beyond its content "for the time being".

I will now provide some reputable ballast for this notion of law's vacuity, and in so doing provide also a prelude to a "making sense" of certain ready attributes of law germane to access. Already however, and I hope, the story so far with its coming to law's uncontainable responsiveness has at least inclined our collective thought

towards questions of access. And to take us closer to such questions by way always of law's vacuity I will resort to Kant, or rather to two somewhat opposed Kants.

For the first Kant, amenably enough, the members of society "in a civil condition ... are united for giving law" and a "*state (civitas)* is a union of a multitude of human beings under laws of right."³³ Glossing what Kant calls this "rightful condition",³⁴ such a condition, being a normative claim on futurity, cannot be hermetically contained. It has always to become other than what it "is", generatively trajecting beyond any contained entity. Such is the impelling element of a right's being "universal", of its surpassing any specificity. And so, says Kant, "all that remains of a law if one separates from it everything material, that is, every object of the will (as its determining ground), is the mere *form* of giving universal law."³⁵ A right, however, or a rightful condition must obviously have something "material" to it. Yet, whilst there has to be a pre-existent content to its assertion, a right nonetheless cannot be enduringly confined in terms of any pre-existent.

That formatively vacuous quality of law can be discerned obliquely yet even more forcefully in the difficulty the other Kant has in wanting also to affirm some supreme, some surpassing authority within national society. This would seem to be a sovereignty compatible with more standard or costive notions of legal positivism. Perhaps nowhere is Kant's difficulty in this more stark than in a certain injunction against enquiry;³⁶ and here we move closer to Bill Conklin's concept and theme of

³³ Immanuel Kant, *The Metaphysics of Morals*, trans. by Mary Gregor (Cambridge: Cambridge University Press, 1996) at 89-91 – 6: 311-12, 314 (his emphasis).

³⁴ *Ibid.* at 89 – 6: 311.

³⁵ Immanuel Kant, *Critique of Practical Reason*, trans. by Mary Gregor (Cambridge: Cambridge University Press, 1997) at 24 – 5: 27. The derivation is far too compressed and as a result may seem evasive at best. Kant is here writing of a moral imperative, of "practical universal law" (at 24 – 5: 27), but the formulation would seem to apply as well to law (cf. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. by Daniel Heller-Roazen (Stanford: Stanford University Press, 1998) at 51-3).

³⁶ Or perhaps an even more stark instance could be found in Kant's tussle when his prescribing capital punishment for murder comes up again a situation where an assiduous infliction of the punishment

“invisible origins”.³⁷ This is an injunction placed by a conservative Kant now on those very members of society whose independence he (also) affirmed – their independence of a sovereign authority which Kant sees as constituted by them. The injunction goes like this:

A people should not *inquire* with any practical aim in view into the origin of the supreme authority to which it is subject, that is, a subject *ought not to reason subtly* for the sake of action about the origin of this authority, as a right that can still be called into question (*ius controversum*) with regard to the obedience he owes it. For, since a people must be regarded as already united under a general legislative will in order to judge with rightful force about the supreme authority (*summum imperium*), it cannot and may not judge otherwise than as the present head of state (*summus imperans*) wills it to. – Whether a state began with an actual contract of submission (*pacta subiectionis civilis*) as a fact, or whether power came first and law arrived only afterwards, or even whether they should have followed in this order: for people already subject to civil law these subtle reasonings are altogether pointless and moreover, threaten a state with danger.³⁸

could deprive the state of its subjects: Kant, *supra* note 33, at 107 – 6: 334). It could be revealing to extend this conundrum to the more fashionable perception of law being constituted in the ability to exclude utterly: see Agamben, *supra* note 35, at 18 in conjunction with 8, 78).

³⁷ Conklin, *supra* note 19.

³⁸ Kant, *supra* note 33, at 95 – 6: 318.

Indeed anyone who resists such authority is quite beyond the law, an “outlaw” who can be “got rid of, expelled.”³⁹ There are many puzzles with this particular *noli me tangere*, not the least being how it can be reconciled with the Enlightenment demand that any enquiry be pursued no matter what, enquiry after all by Kant’s epistemologically supreme subject. Here puzzlement will be confined to a generalized “why?”. Kant’s humble ontology could be a reason but the injunction is too pointed, and too strident, for that to be enough. Let me take a lead from Zizek’s answer:

Kant formally prohibits the exploration of the origins of the legitimate order; arguing that such an exploration a priori puts us outside the legitimate order; it cancels its own validity by making it dependent on historico-empirical circumstances: we cannot at one and the same time assume the historical origins of the law in some lawless violence *and* remain its subjects. As soon as the law is reduced to its lawless origins, its full validity is suspended.⁴⁰

What is involved here could not be a simple violence of foundation. Many nations would revel in that, not least as legitimating the ensuing order. The violence involved, rather, is the reduction, the emplacing, the delimiting of the illimitable law along with its uncontainable opening to futurity, the denial of its protean possibility. The contentless, the unavowable quality of law’s vacuity thence takes on, as it must to exist “in any case”, a dependence “on historico-empirical circumstances”, but these are *circumstances* and they cannot comprehensively neutralize law’s vacuity and

³⁹ *Ibid.* at 95 – 6: 319.

⁴⁰ Slavoj Zizek, *For They Know Not What They Do: Enjoyment as a Political Factor* (London: Verso, 1991, at 205 (his emphasis).

endow law's being – much as a “supreme authority” would claim otherwise, and much as a conventional legal positivism would support the authority in this.⁴¹

Accessing justice

At the risk of inducing a certain weariness, let me now link access to this foundational disruption through the ur-parable of access to law, or the lack of access to law, Kafka's “Before the Law”. As is excessively well known, Kafka's naïf, the man from the country, comes before the doorway to the law believing that the law “should be accessible to every man and at all times.”⁴² Although the formidable doorkeeper refuses immediate entrance through the always open door, he does not rule out the possibility of later entry. After waiting for the rest of his life before this entrance to the law, but never being able to enter it, the man from the country is near death and “all that he has experienced during the whole time of his sojourn condenses in his mind into one question”, the question why “no one has come seeking admittance but me?”; to which the doorkeeper responds that only the man “could gain admittance through this door, since this door was intended only for you.”⁴³ When this parable ends in *The Trial* the numberless interpretations of it begin, starting with this one:

⁴¹ Kant conceives of the “law” needed to support such a supreme authority this way:

A law that is so holy (inviolable) that it is already a crime even to call it in doubt *in a practical way*, and so to suspend its effect for a moment, is thought as if it must have arisen not from human beings but from some highest, flawless lawgiver; and that is what the saying ‘All authority is from God’ means. This saying is not an assertion about the *historical basis* of the civil constitution; it instead sets forth an idea as a practical principle of reason; the principle that the presently existing legislative authority ought to be obeyed, whatever its origin: Kant, *supra* note 33, at 95 – 6: 319 (his emphasis).

Such a God can conveniently contain all that has been, is, and will be. Any more practicable ontology is not possible here even though the outcome is made necessary as a result of “a practical principle of reason”.

⁴² Franz Kafka, “The Trial”, trans. by Willa and Edwin Muir, in *The Collected Novels of Franz Kafka* (London: Penguin, 1988), at 162.

⁴³ *Ibid.*

The story contains two important statements made by the door-keeper about admission to the Law, one at the beginning, the other at the end. The first statement is: that he cannot admit the man at the moment, and the other is: that this door was intended only for the man. If there were a contradiction between the two, you would be right and the door-keeper would have deluded the man. But there is no contradiction. The first statement, on the contrary, even implies the second.⁴⁴

We cannot gain access to the illimitable law for now, for any here and now, yet in its very illimitability, in its protean possibility, the law ever holds out the prospect (“a radiance that streams immortally”)⁴⁵ of our being able to gain access to it. We are held “before the law” by such a prospect which, fittingly like Derrida’s “justice”, is always “*to come*, it remains by *coming*.”⁴⁶ But, as the man from the country began to discern at the point of his death, it will not and cannot ever come in any fully realised “sense.”

What consolation that may offer is highly attenuated. The doorkeeper – the “great man”⁴⁷ – can occupy a place of enforceable decision and refuse entry. This, in terms of another of Kafka’s parables, is “the problem of our laws.” They are ours but they are in the charge of the nobles who keep them “secret”: “it is an extremely painful thing to be ruled by laws that one does not know.”⁴⁸ Yet Kafka also says that

⁴⁴ *Ibid.* at 163.

⁴⁵ *Ibid.* at 162.

⁴⁶ Derrida, *supra* note 1, at 256 (his emphasis).

⁴⁷ Kafka, *supra* note 42, at 162.

⁴⁸ Franz Kafka, “The Problem of Our Laws”, trans. by Willa and Edwin Muir, in *The Collected Short Stories of Franz Kafka* (London: Penguin, 1988), at 437.

the laws are known, and “their interpretation has been the work of centuries.”⁴⁹ But the gist of “the problem” is this:

Some of us among the people have attentively scrutinized the doings of the nobility since the earliest times and possess records made by our forefathers – records which we have conscientiously continued – and claim to recognize amid the countless number of facts certain main tendencies which permit of this or that historical formulation; but when in accordance with these scrupulously tested and logically ordered conclusions we seek to adjust ourselves somewhat for the present or the future, everything becomes uncertain, and our work seems only an intellectual game, for perhaps these laws that we are trying to unravel do not exist at all.⁵⁰

Let me diverge from, but confirm, this seemingly dismal scene by way of a return to law, as the law of the law, as the social bond, as the law of community. If we, each of us, were to gain access to that justice suscitating law, the idea of justice Derrida gave us, then we would be responded to, recognized, interpellated by law in the fullness of our singularity, of our singular realized being. Even if such fulsome recognition were feasible, this would mean the utter dissipation of law. There would have to be as many singular “laws” as there were each distinct ones of us. But the law is the quality or condition of our being-with each other. And this being-with is imperative for our being existentially singular. If, without more, we were simply and distinctly singular yet still were within a social bond with its necessary element of commonality, we could only be completely the same as each other. The existent singularity of each depends upon a being-in-common which is neither reducible to its

⁴⁹ *Ibid.*

⁵⁰ *Ibid.* at 437-8.

component singularities nor capable of absorbing them completely. Thence, such being-in-common must have some determinate and delimited, and enforceable, presence. Yet, if it is to be and remain adequate to our being-with, it must as well be illimitable and illimitably responsive. It, infused by justice, is also and always “to come”. These two dimensions of being-in-common combine in, and as, law.

Thus far we may still not be overmuch consoled. The social bond, the law of the law, would require some determinate content to law, but it would also require that law be ever responsive to the changing conditions of our being-with each other. Law’s determinate presence, then, can only be evanescent. It is in this vertiginous alternation between the determinate and the responsive that we may find a pointed place for access.

Redolent of justice, the noun access, so the OED tells us, is “the action of going or coming to or into.”⁵¹ To have effect as responsive, as incorporating a coming justice, as the law of community or the law of the law, law must be within the accessible reach of those to whom it must respond. To take a counter-indication, we may feel a faint sympathy for a colonial governor of Bombay in the middle of the nineteenth century when he remarked on “the perilous experiment of continuing to legislate for millions of people, with few means of knowing, except by rebellion, whether the laws suited them or not.”⁵² Rather, being-in common, Nancy tells us, “always presents itself at a *hearing* and before the judgement of the law of community, or, more originarily, before the judgement of community as law.”⁵³ That is one perspective on access which I will develop in the rest of this paper: the hearing and the enhancing of the hearing in law’s intrinsic responsiveness. Yet, and to repeat somewhat, if it is to hold the commonality, the hearing cannot be a completely

⁵¹ Oxford English Dictionary, 2d ed. (Oxford: Oxford University Press, CD-Rom, 2004).

⁵² A.P. Thornton, *Doctrines of Imperialism* (New York: John Wiley & Sons, 1965), at 181.

⁵³ Nancy, *supra* note 21, at 28 (his emphasis).

responsive and differentiated accommodation of each singular voice that could be heard.

And that is where this perspective on access joins another which I will now also develop. Again courtesy of the OED, although access is left suspended as to its object or direction in the primary definition of “going or coming to or unto”, the dictionary immediately adds “coming into the presence of, or into contact with.”⁵⁴ There has, that is, to be a locus to which access is gained or oriented. The completely responsive law cannot provide any locus. And the fully determinate law, the outcome of a decision, is already and for the time being as accessed as it can be. That to which there is always pending access in law is certain mediate matter which lies in-between and combines the determinate and the responsive.

That mediate matter inheres in law’s generality. The positioning of this generality in-between the determinate and the responsive can be illustrated in two extreme views taken of it. With one, and with Benjamin, “generalization ... contradicts the nature of justice.”⁵⁵ The general cannot “do justice” to the particularity of the case. Which brings me to the other extreme, to the view, admittedly a little antique, that a decision confined to a particular determination does not count as law.⁵⁶ Yet, if the general cannot find itself in the particular, it cannot be so general that it falls completely into nothingness and has no bearing on anything particular, no operative content at all. Law’s generality, then, is accommodated in language. Like any signification, an instance of this generality will always be qualified, refined, even countered in its specific “application”. This is not only a matter of language as meaning. The relating of the instance of generality constitutively

⁵⁴ Oxford English Dictionary, *supra* note 51.

⁵⁵ Walter Benjamin “Critique of Violence” in *One-Way Street and Other Writings*, trans. by Edmund Jephcott and Kingsley Shorter (London: New Left Books, 1979) 132, at 148.

⁵⁶ See, eg: John Locke, *Two Treatises of Government* (New York: New American Library, 1965), at 409; Rousseau, *supra* note 26, at 82.

to the particular case is impelled also by right. Neither in terms of meaning nor as right is there ever a manifest, much less automatic, path from the general law to the particular case. There is always interpretation and judgement. These activities will only have sustainedly effective existence if they respond to, and enable the access of, those affected by them.

Conclusion

In all, I have tried to “place” access in a constituent relation to law by way of an equation between law and community, or the social bond. This was done not in terms of “law and society”, in terms of how social factors influence or determine access to law. It was done, rather, in terms of community’s inhering and cohering in law. Access, then, was seen as providing the pivotal place where the coordinate commonality forming community is realized in and as law. This would be a matter not only of access accorded but also of access denied, and a matter of the generative efficacy of both. To say there is such a pivotal place is not to endow it with some monadic focusing force. Law’s responsiveness and vacuity cannot abide such a force. Rather, this place will always be an assembly, a place of convergence and divergence, of association and dissociation. Nor can we discern the presence of this place through a concentration or density of being-in-common beyond which it would not exist. There is as much community or as much law as there is.