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*Moments of Negation, Duration, and Human Rights Law
without Judges*¹

Introduction

The critiques of the neo-liberal legal system are well-rehearsed. Law is an integral part of hegemonic discourses enacted by elites to distribute goods to themselves and to placate the masses so they do not challenge existing hierarchies. Real change rarely happens within law because of its tendency to reproduce itself and the socio-economic system. The extent and creativity of the system's resilience is impressive as numerous seemingly potent revolutionary forces are co-opted making the system even stronger. Capitalism and its dear comrade consumerism have been actualized as global hegemonic forces with tentacles seemingly in all aspects of life in all reaches of the globe. The system incorporates billions of peoples' interests. It provides for so many and yet so many others are left out. Countless desires go unfulfilled. Attempts at radical insurgency against this ineluctable force – such as those that adopt a “proletarian culture” or the “voice of the Other,” or those that rely on transnational activist networks – have occasionally made the system shudder, but have rarely made even semi-permanent fissures in the edifice. Theoretical and legal interventions based on radically new anti-hegemonic philosophies also offer little in terms of lasting change. Nevertheless, some tenuous change has occurred, often localized and driven by marginalized groups who patiently and thoughtfully navigate the perils of the prevailing hegemonic discourses.

This paper begins by highlighting a passage in Emmanuel Levinas' work that refers to “moments of negation” that unsettle the state. Understanding what Levinas means by “moments” requires exploring Bergson's and Heidegger's divergent conceptions of time that both influenced Levinas. Ultimately, Levinas relied too heavily on the masculine and heroic conception of the “instant” (*Augenblick*) made famous by Heidegger (and Kierkegaard before him²). He would have been better served to embrace Bergson's conception of time as duration (*la durée*) as a model for destabilizing totality.

Gilles Deleuze has famously spurred a re-birth in Bergson's thought including his sense of time and how it relates to multiplicity; and scholars are now starting

1 This essay has been greatly enriched by stimulating dialogues with John Randolph Leblanc, Lori Bable, and Ferdinando Menga.

2 See K. Ward, *Augenblick. The Concept of the 'Decisive Moment' in 19th- and 20th-Century*, Ashgate Publishing, Aldershot 2008.

to rely on Deleuze and Bergson to develop a radical view of law and jurisprudence which goes a long way to thinking otherwise (e.g., Lefebvre 2008; de Sutter and McGee 2012, Bignall and Patton 2010). I argue though that much of this work on Deleuze and jurisprudence still embraces a heroic conception of law and philosophy indebted to Heidegger's heroic *Augenblick*, and thus, they do not tap fully into the radical potential of Deleuze's and Bergson's views on time. Focusing on time as duration leads to a de-territorialization of law and a de-positionalization of the judge, or what Deleuze calls a jurisprudence without judges. In the final part of the paper, I briefly discuss several social movements that are more Deleuzian than Heideggerian. For instance, I introduce Richa Nagar's searching and brutally honest writings on coauthoring feminisms through activism and scholarship as an alternative form of heroism that patiently works through the lived reality of duration, multiplicity, and immanence to create a law without judges.

Levinas' Moments of Negation

There are numerous ways to enter into Levinas' rich ethical phenomenologies, but here I want to focus on the temporal aspects of a long footnote in *Otherwise than Being* that has received significant attention, especially by commentators on Levinas' politics (i.e., Simmons 2011, 104; Critchley 2015, 72; Horowitz 2006, 42). Levinas writes,

Anarchy cannot be sovereign like an arche. It can only disturb the State – but in a radical way, making possible moments of negation (*instants de negation*) without any affirmation. The State, then, cannot set itself up as a Whole (Levinas 1981, 194n3).

This is a pithy statement of Levinas' an-archical infinity in relation to the totality of the state and the hegemonic system. Levinas' writings often spiral back upon themselves in altered terms and with different phenomenological analyses: these an-archical "moments of negation without any affirmation" resonate with similar phrases on temporality in Levinas' other works. Early on, Levinas writes that "time becomes unhinged" through insomnia and other personal experiences including extensive time in a hard labor camp (1978, 36-7), and later he discussed the diachronous encounter with the Other as opposed to the synchronous time of the realm of the Said (Levinas 1987, see Llewellyn 1995). In each iteration, a concrete moment or moments is experienced by the ego as outside of the traditional (or vulgar) conception of time; it disrupts the series of instants that follow each other in sequence into eternity.

Levinas frequently gave credit to Bergson for this "disruption" or "discordance" or "deformalization" of traditional philosophies of time (i.e., Levinas 2001, 268-9; 1987, 119). He even says, "Bergson's theory of time as concrete duration (*la durée concrète*) is, I believe, one of the most significant, if largely ignored, contributions to contemporary philosophy" (1986, 13). The long footnote from *Otherwise than Being* cited above on "moments of negation" even begins by referring the reader

to “the pages Bergson wrote in *Creative Evolution* concerning the notion of disorder, which deserve close attention” (1981, 194n3). Nevertheless, Levinas’ most extensive writings on time, especially in his later works, rely on Bergson only for the insight that time can be disrupted in a concrete way. He elides Bergson’s extensive writings on time as duration (Severson 2013). Instead, the main influence on Levinas’ conception of temporality appears to be Heidegger, especially his account of the instant (cf. Chanter 2002 and Severson 2013).

Before his famous phenomenologies of the face-to-face relationship with the Other, Levinas explains that Bergson had unfruitfully dismissed the “instant” because Bergson could not envision an instant that stood outside of time. For Bergson, to do justice to time we must not reduce it to the instant, we must consider the experience of the duration of time. He usefully compared the duration of time to a melody with each note serving as an instant. “If we interrupt the rhythm by dwelling longer than is right on one note of the tune, it is not its exaggerated length, as length [i.e., as quantity] which will warn us of our mistake, but the qualitative change thereby caused in the whole of the musical phrase” (Bergson, 1910, 100-01). Levinas contra Bergson proposes to conduct a phenomenology of the instant outside of being. He writes, “to scrutinize the instant, to look for the dialectic which takes place in hitherto unsuspected dimension, is the essential principle of the method which we have adopted (1978, 30). Bergson’s denigration of the instant, Levinas writes, “would be legitimate if it is true that the instant has to be understood in function of time, and that the relationship between time and existence is clear by itself” (1978, 74), but for Levinas time is not reducible to existence.

In *Otherwise than Being* and after, Levinas holds that the ethical relationship with the Other stems from a diachronous exposure to the Other, an instant that occurs outside of Being.³ As he writes, “responsibility for the Other signifies an original and concrete temporality” (1987, 104) but that this diachronous instant quickly succumbs to the realm of the Said, with its thematizations, justice, and language. In the realm of the Said, “theoretical language . . . ‘gathers’ the diachrony of time into presence and representation” (1987, 104-105). Thus, Levinas can claim that ethical responsibility comes like a trace from a past that was never present. The relationship with the Other therefore is an-archival, in that it comes from a primordial time. It is a “de-formulation” of synchronic time derived from the alterity of the Other that disturbs all those elements of the totality, that is, of justice, the state, and institutions, “in a radical way, making possible moments of negation (*instants de negation*) without any affirmation.”

With “moments of negation” being read as quickly succumbing to the rational order, many authors doubt that Levinas’ ethics is sufficient to build a politics. For instance Simmons (2011) writes,

3 Severson (2014) develops a similar, though not perhaps equivalent, argument: “Levinas’s new pathway forward on time breaks, at this point, from both Bergson and Heidegger by proposing a stoppage of time, an instant when time turns upside down” (140).

this moment of negation may suspend, for a moment, the certainty of any decision, but most likely will not even be capable of providing a modicum of normativity or substance to any decision... The hegemonic system, the violence of democracy and human rights, is so proficient at reproducing itself, at conserving its violence, that more than moments of negation are needed to “get to ethics or politics (87).

It is important to note that while Levinas favors the instant over duration he distances himself in important ways from Heidegger’s famous account in Part II of *Being and Time* of the instant that is part of resoluteness and *ekstasis*, whereby “authentic *Dasein*” in attunement to Being stands out from the flow of time in authentic presence by grasping the moment at the right time (*Kairos*) and heroically embracing itself as a being toward death. In such moments, a new beginning, a new revolution is possible if it is seized by the right person at the right time. Levinas rails against Heidegger’s “moment of egoism” (1987, 98) with its focus on mine-ness (*jemeingkeit*) against the ethical relationships with the Other. In addition, Levinas’ focus on a past that was never present goes a long way to stripping intentionality from the instant, while Heidegger’s instant is aimed toward futurity. His *Being-ahead-of-itself*, is perhaps the epitome of intentionality (Severson 2014, 129). Yet, Levinas still relies on the concept of the instant and its general structure. Both of their philosophies of temporality share the stoppage of ordinary time as experienced by a subject. This moment occurs in the blink of an eye and can inaugurate a new history for the subject and beyond. Though Levinas would be loath to use the term, both involve resoluteness on the part of the subject, especially in maintaining the instant in the face of ordinary time and the current hegemonic system.

Duration and Multiplicity in Bergson

What is lost in choosing this structure of the instant over Bergson’s duration? Here I will focus on the central place of multiplicity in duration, and the prominent role of heroism in any philosophy of the instant.

First, Bergson’s conception of time as duration cannot be read separately from his important contributions to a philosophy of multiplicity while Levinas’ thought struggles to find a place for multiplicity outside of totality. Levinas, heavily influenced by Derrida’s criticism of *Totality and Infinity*, stripped *Otherwise than Being* and his later works of most spatial metaphors. His transcendence had to sacrifice any form of concreteness in order to be truly transcendence. Thus, Levinas could consider the Other as a totally other, but could not consider the Other as a concrete person with numerous qualities that differentiate the Other from other Others. Infamously, he could not consider the Palestinian as the Other (Simmons 2011) or woman as Other (Sikka 2001).

Bergson’s duration though provides resources for thinking the ineffable in concrete terms, while simultaneously thinking a true multiplicity as opposed to alterity. In *The Introduction to Metaphysics* Bergson offers three metaphors to explain

time as duration and the central place of multiplicity. Each metaphor is suggestive, but they all fail to adequately capture duration, as will any metaphor “because the unrolling of our duration resembles in some of its aspects the unity of an advancing movement and in others the multiplicity of expanding states; and, clearly, no metaphor can express one of these two aspects without sacrificing the other” (1999, 4). Though imperfect, let me offer the second of his metaphors along with its weaknesses as they are suggestive of duration and point to the important places that multiplicity and affect plays in Bergson’s overall thought. Consider a

myriad-tinted spectrum, with its insensible gradations leading from one shade to another. A current of feeling which passed along the spectrum, assuming in turn the tint of each of its shades, would experience a series of gradual changes, each of which would announce the one to follow and would sum up those which preceded it. Yet even here the successive shades of the spectrum always remain external one to another. They are juxtaposed; they occupy space. But pure duration, on the contrary, excludes all idea of juxtaposition, reciprocal externality, and extension.⁴

From this metaphor we can see why Lawlor (2003) pithily suggests: “duration equals memory plus the absolutely new” (ix). We experience time as laden with memory but we are constantly confronting novelty. An infinite number of possibilities can come from our experiences in the duration. Bergson, can conclude, along with Spinoza and recent affect theorists, that “all reality, therefore, is tendency, if we agree to mean by tendency an incipient change of direction” (1999, 15). Duration is the subjective experience of this passage of time and the unfolding of this infinite variability, thus it can only be understood through intuition and not through analysis. While analysis deals with “unchanging elements” that vary among each other, intuition concerns “variability itself” (1999, 11) and involves entering into duration itself. Philosophical and legal concepts established through analysis are attempts to freeze the flux of reality. However, “when I replace myself in duration by an effort of intuition, I immediately perceive how it is unity, multiplicity, and many other things besides” (1999, 6) all simultaneously.

Bergson’s influential distinction between qualitative and quantitative multiplicities from his early work *Time and Free Will* tracks a similar logic as his discussion of duration. Quantitative multiplicity can be counted as a series of objects such as marbles that are reducible to the space in which they reside. Children are often taught to understand the basic functions of mathematics through spatially represented numbers or discrete objects. Such a multiplicity of adding up homogenous objects is a unity. While each homogenous object is distinct it can be reduced to a concept whereby it can be counted along with similar objects. A qualitative multiplicity, on the other hand and like duration, is irreducible to representation and thus to space. Such a multiplicity is inherent in “purely affective psychic states,

4 These metaphors show how Heidegger could incorrectly dismiss Bergson’s conception of time as still attached to the Aristotelian conception of time as a series of instants that proceed in a linear fashion.

or even mental images other than those built up by means of sight and touch” whereby I “limit myself to gathering, so to speak, the qualitative impression produced by the whole series” (Bergson 1910, 86). This series may be representable so that its elements can be subject to mathematics, but not without reducing the experience of the entire affect. Bergson usefully provides the example of a distant bell tolling. It is possible to count the individual tolls of the bell, but, according to Bergson, most folks intuit the bell ringing in succession without separating the individual sounds and gather “the qualitative impression produced by the whole series” (1910, 86). If someone was to count the bell tolls, they would separate the sounds from each other and from the silent intervals. The resulting parts would not equal the whole. As Deleuze and Guattari (1987) summarize, “duration is in no way indivisible, but is that which cannot be divided without changing in nature at each division” (483).

Levinas, with his focus on the *instants de negation* appears to be the exemplar of a philosopher of alterity and transcendence while Bergson, especially read through Deleuze, is a thinker of multiplicity and immanence. Philosophers have recently questioned whether Bergson’s focus on duration has closed off any transcendence or has he provided us another conception of transcendence, one that maintains multiplicity and difference? Perhaps, the ineffability of multiplicity in duration in Bergson that leaves the door open for freedom and a certain form of transcendence, especially when read with his later work on mysticism.⁵ Even so, unlike Levinas who following Hegel can claim a positive infinite as a form of negation, Bergson avoids any conception of negation. Therefore, Levinas’ phrase “moments of negation” makes little sense to Bergson or Deleuze as there are no transcendental moments outside of time, and definitely no Hegelian negation of Being.

Second, by eliding Bergson’s conception of time as duration, Levinas retains the heroic structure of Heidegger’s sense of time. Levinas’ severe ethical philosophy is already often criticized for presenting a heroic or saintly role model that is impossible to emulate. After all, his philosophy is built upon the messianic time of the ego exposed to the Other where I am called to take the bread out of my mouth, to be persecuted, to be hostage to the Other. Like Alyosha Karamazov, I have one responsibility more than all the others. I must respond infinitely, no matter who the Other is or what the Other has done to me. Levinas claims to have stripped all elements of intentionality from these moment of negation in that the subject is called to respond even before it is subject. Even if Levinas’ subject is shorn of intentionality we must remember that many heroic actions are not explained by some type of plan of action or specific decision of the hero. Instead, the hero, upon later reflection, felt that circumstances compelled the heroic action.

5 While Deleuze reads Bergson as an immanent philosopher, many have focused more heavily on his later writings on mysticism to see him as a philosopher of transcendence. Lawlor, for instance, vacillates between labeling Bergson a philosopher of immanence and a philosopher of transcendence. For nuanced understandings of Levinas and the Bergson/Deleuze nexus on immanence and transcendence see Warren (2010) and Lawlor (2010).

The choice of the instant as a temporal model adds another layer of heroism. In the moment that the Other approaches from a past that was never present, the subject is compelled to act. In that moment, the ego must respond. For Heidegger, *Dasein's* existence is authentic to the extent that he can separate from Being, while for Levinas the subject literally gains its subjectivity in subjection to the Other. Levinas' ego stands up in responsibility for the Other. Either way, the background of existence recedes at least for a moment. Levinas repeatedly states that some individuals will not respond to the Other; that they will continue to enjoy their life. So, even in this moment of exposure to the Other there is something resembling a decision.

This might not be an intentional decision in Levinas' phenomenology, but it appears to carry many of the characteristics of a decision.

One wonders if the instant (*Augenblick*), heroism, decision, and negation all form some sort of gravitational constellation where each inevitably attracts the others. The same constellation appears in Kierkegaard's writings on faith and Derrida's later writings especially his phenomenology of the judicial decision in the extended essay "Force of the Law" (1992). There, Derrida outlines three aporiai of the judicial decision, basically judges must follow laws but each case is singular; any decision of the judge is actually based on undecidability, there is no recipe for any decision; and justice requires speedy decisions, but judges require near infinite time to weigh all decisions. From these aporiai, Derrida can conclude that the moment of decision is madness. The judge must decide in a specific instant, he must take a leap of faith (Cf. Derrida 2008). This is a high-risk decision as the judge can get the decision wrong. Once a decision is made, it is no longer a decision, it has become reduced to a formula. There is something heroic or Heideggerian about all this; that there is a right decision to be made by the right person based upon incomplete information just in the nick of time (cf. Grosz 2004). There is also a connotation that a lone judicial decision could change everything, it could make all the difference. Such thinking is reminiscent of philosophies that promised final answers; that claimed they could formulaically address what is to be done.⁶

This formulation of the heroic judicial decision leads to glorification of judges, especially, pace Simmons (2011), those who suspend the law in an instant of madness. It resonates with Dworkin's (1977) famous account of the heroic judge Hercules who is able to juggle constitutional principles, legal theory, relevant statutes, and the facts of the case to come up with the best decision. For Dworkin, the judge's personal discretion plays no role, instead the judge comes up with the best decision and the best justification for the decision based upon legal standards. Such a subsumptive theory of law as Dworkin's (see Lefebvre 2008), or a philosophy based upon the instant that provides for transcendence and alterity but

6 Critchley recently criticized Badiou's philosophy for its infatuation with the decision: "Seductive as it is, Badiou's conception of politics suffers from a heroism of the decision, a propaganda of the violent deed in all its deluded romance" (2007, 34). Badiou though in recent essays is adamant that philosophy does not have the answer about what is to be done (2012).

struggles with multiplicity like Levinas', is exactly what Deleuze, with his heavy indebtedness to Bergson, has in mind when he sharply chides law and human rights.

Deleuze on Human Rights, Jurisprudence and the Law

In several interviews, Deleuze blasts the notion of human rights and those who set up human rights as some type of universal ideal. For instance, he seems on the verge of nausea or a fit as he says:

The reverence that people display toward human rights — it almost makes one want to defend horrible, terrible positions. It is so much a part of the softheaded thinking that marks the shabby period we were talking about... I mean, we say "human rights", but in the end, that's a party line for intellectuals, and for odious intellectuals, and for intellectuals without any ideas of their own (1996).

Further in the interview he rants:

It's really nuts. Or, worse, I think they're hypocrites, all these notions of human rights. It is zero, philosophically it is zero. Law isn't created through declarations of human rights. Creation, in law, is jurisprudence, and that's the only thing there is. So: fighting for jurisprudence. That's what being on the left is about. It's creating the right.

Of course, Deleuze is not bemoaning individuals and groups fighting for their dignity and freedom or to create or claim rights. He is critical of abstract conceptions of rights and their enshrinement into international declarations and treaties, especially without considering concrete situations. Deleuze's critique of abstract human rights complements his critique of law and philosophy as discussed below and has strong resonances with Bergson's critique of analytical thought which attempts to capture or freeze the flux of reality by applying concepts. For Deleuze law, including human rights law, is made from concrete cases and not from applying universal laws to specific situations. "It's a matter of jurisprudence. All of the abominations through which humans have suffered are cases. They're not denials of abstract rights; they're abominable cases. One can say that these cases resemble other, have something in common, but they are situations for jurisprudence" (1996). So, we can assume Deleuze would praise the rich body of human rights jurisprudence which has developed in the past two decades, though he might bemoan the fact that most of the tribunals and cases started from international documents that many have argued, rightly or wrongly, are grounded in abstract rights.

We must be careful though not to minimize the radicality of Deleuze's formulation of jurisprudence. He is not referring to the standard definition of jurisprudence as a philosophy or analysis of law, at least not in the traditional sense as I will explain below. He is not even equating jurisprudence with a robust form of common law. Recall, that in common law systems, a body of cases can be applied just as rigidly as a statute or a treaty, and often can become quite abstract through repetitive cases. For Deleuze, jurisprudence refers to specific concrete cases, singu-

lar in nature, though they may be grouped into various categories. However, these categories like his use of concepts in philosophy are not rigid.

The radicality of Deleuze's understanding of jurisprudence deepens when he says: "what interests me isn't the law [*la loi*] or laws [*les lois*] (the former being an empty notion, the latter uncritical notions), nor even law or rights, but jurisprudence. It's jurisprudence ultimately, that creates law, *and we mustn't go on leaving this to judges*" (1995, 169; emphasis added). What does it mean to have a jurisprudence without laws, rights, and judges? Mussawir (2011) summarizes the radicality of this approach: "jurisprudence for Deleuze remains not so much a court scene as a street scene" (89). Jurisprudence as a street scene completely alters our sense of human rights and law. "There are no human rights, there is life, and there are life rights. Only life goes case by case" (1996).

We now can appreciate Deleuze's nausea in thinking of abstract human rights treaties and scholarship. His concrete and situational understanding of jurisprudence stands in sharp contrast to the voluminous academic literature of the 1980s and 1990s whereby mostly male theorists in their well-adorned offices in developed countries formulated lists of human rights that they claimed were universal. Deleuze says bluntly: "so those who are content to remind us of human rights, and recite lists of human rights — they are idiots. It's not a question of applying human rights. It is one of inventing jurisprudences where, in each case, this or that will no longer be possible" (1996). Thankfully, human rights as it has evolved in practice and scholarship has largely moved away from such abstractions. These interviews with Deleuze occurred before recent academic, legal, and activist work that has organically created a more expansive understanding of human rights instruments deriving from concrete situations. Even human rights instruments, such as the latest UN documents on indigenous peoples' rights and rights for people with disabilities, are now substantially shaped by marginalized peoples operating from concrete situations.

Deleuze's work provides an outline for a new image of human rights and law that closely tracks his new image of philosophy. In fact, one might be hard pressed to distinguish Deleuze's conceptions of philosophy and jurisprudence. Deleuze is suggesting a novel paradigm for both. Above I said that his view of jurisprudence is not a philosophy of law in the traditional sense, but in another interview he says, "jurisprudence is the philosophy of law, and deals with singularities, it advances by working out from [or prolonging] singularities" (DeSutter and McGee 2012, 3). We must remember that for Deleuze philosophy is not asking the big questions, but it is applying concepts to reality to understand situations and problems. For Deleuze, jurisprudence when properly done can serve as a model for philosophy and vice versa (see DeSutter and McGee 2012, 3-7; cf. Patton 2012, 21).

This is a much more radical view of jurisprudence than is usually outlined in philosophy of law textbooks. By reading Deleuze through Bergson, in opposition to Levinas, we can conclude that Deleuze is critiquing the heroic view of the judge who is able to serve as a funnel by which all of the past of the law and of the situation is actualized into a final judgment, all done in an instant. A judge pronouncing "It is so ordered" or "Affirmed" or any such final word would not be doing

justice to a singularity in flux. This method of judgment is reminiscent of Bergson's critique of analysis and this is what Derrida meant when as soon as a decision is made it no longer is a decision. Rights could be created with such a method, but this does not do justice to the singularity of the case. Each subsequent case would then be subsumed under the new universal created by this standard definition of jurisprudence (Lefebvre 2008).

Elements of a Deleuzian Jurisprudence: The Plane of Immanence, Concepts, and the Encounter

A few points central to Deleuze's project need to be clarified to better understand this radical jurisprudence; and to explicitly tie it to his radical philosophy. Here I will also draw on recent important works by Alexandre Lefebvre⁷ and Hans Lindahl to extend Deleuze's scattered references to jurisprudence and human rights.

Deleuze pushes Bergson's notion of duration and multiplicity to its logical conclusion through his "plane of immanence." First, for Deleuze, like Bergson, there is no moment outside of existence, there is no transcendence or hierarchy of being. For instance, against Badiou he holds that there is no negation and to posit negation is to posit a hierarchy of being, which Deleuze abhors. However, there is something that is transcendent within this immanence, and that is a "virtual sphere" out of which actuality arises. But we cannot know the virtual until the actual appears. Deleuze is following Bergson to develop an immanence that admits almost infinite variability.

There are no long longer any forms or development of forms; nor are there subjects or the formation of subjects. There is no structure, any more than there is genesis. There are only relations of movements and rest, speed and slowness between unformed elements, or at least between elements that are relatively unformed, molecules and particles of all kinds (Deleuze and Guattari 1987, 266).

These "unformed elements" or things are different, and any attempt at reducing them to their similarities through identity or resemblance removes the affirmative difference between them.

While the concepts and norms of traditional philosophy reduce difference, "philosophy" as envisioned by Deleuze and Guattari (1994), "is the art of forming, inventing, and fabricating concepts" (2). However, concepts are not judged by how well they represent reality. They are "self-referential" (30) with the variable components of a concept hanging out in "zones of neighborhood" (3). This

7 In a series of works Lefebvre has creatively developed a philosophy of human rights in a Deleuzian/Bergsonian key. His latest work is a fascinating development of Bergson's *Two Sources for Morality* for a new conception of human rights one based on an open morality that includes self-care, conversion, and love.

variability within concepts keep them in flux as they are mobilized to address different situations and problems over time and space. The creation of concepts is provisional: to do philosophy, is to make decisions as to what part of reality will be the subject of study and what concepts will be applied. As we move through the plane of immanence, situations and problems change, and thus philosophy, like jurisprudence, must be creative in its use of concepts. “I make, remake and unmake my concepts along a moving horizon, from an always decentered centre, from an always displaced periphery which repeats and differentiates them” (1994, xix). Thus, jurisprudence, philosophy, and human rights require creativity, the ability see situations anew, to allow situations to disturb the dogmatism of thought.

Any philosophy, jurisprudence, or human rights worth their name for Deleuze would constantly be in flux as its practitioners encounter new situations. Of course, this is in stark contrast to the claims to universality by academicians and jurists. Let’s compare the justification for human dignity and human rights in an international declaration with Lefebvre’s Bergsonian human rights. The Vienna Declaration on Human Rights from 1993, in response to various universalism-relativism debates, re-affirmed the universality of human rights regimes and claimed that “all human rights derive from the dignity and worth inherent in the human person, and that the human person is the central subject of human rights and fundamental freedoms” (Preamble). In contrast, Lefebvre’s used Bergson’s account of the fabulating function to argue that the resurgence of the concept of human dignity after World War II, was a creative enterprise to counter the brutality of totalitarianism. It was what Bergson called a “truthful fabulation.” According to Lefebvre, totalitarianism was a wholly new type of regime, one founded on the superfluity of human beings. This is a “terrifying new problem,” one that traditional moralities are incapable of addressing adequately. Thus, human dignity, an idea that predates totalitarianism, is given a rebirth as a new primary religious idea, in Bergson’s terms, to counter totalitarianism (Lefebvre 2013, 128-132).

How is such a creative and truthful fabulation created in jurisprudence? What is it about the singular case that leads to such a fabulation function? A singular case when perceived by an attentive judge can serve as what Deleuze calls an encounter which occurs when thought is unable to comprehend or recognize a thing (Cf. Lefebvre 2008, 72-7). To go through life subsuming objects under pre-existing concepts is dogmatic. Thus, an encounter does violence to dogmatic thought. When approached by a novel case such as totalitarianism, a new concept is needed to address the situation. Through fabulation, the judge is able to make actual what was previously only virtual. Through an encounter, something strange approaches.

Jurisprudence without Judges

We should take seriously Deleuze’s claim that we need a jurisprudence without a judge, but jurisprudence as a street scene is only hinted at in previous attempts to develop a Deleuzian jurisprudence. Lefebvre (2008), for instance, makes the judge the “conceptual persona” of his work. He suggest that there could be a similar

analysis with an entire legal plane of immanence as its focus that examines “the totality of rules (and conventions and customs, etc.) (254). But even here, such an analysis would “appreciate the role of the judge as the basic propagator of this plane insofar as he or she takes parts of law from past contexts in order to reinstate them in new ones” (255).⁸ By asking for a judge to exercise creativity in crafting or fabricating decisions, we are asking for a judge to not only be encyclopedic and computing, but to know when to throw off the dogmatism of previous jurisprudence and fabricate new concepts. Now we have a heroic artist judge who is called to formulate or fabulate a decision. Granted, the judgement is provisional, and adds to the legal plane of immanence, creating more possibilities that can be actualized. Lefebvre writes, “with every new judgment the law grows and expands, and over time it locally constructs a plane of immanence with ever more parts able to be actualized in ever more judgments” (254). Nevertheless, the judge through the decision remains the “the basic propagator of this plane” in Lefebvre’s work. The omnipresence of the heroic even in Deleuze and Deleuze-inspired writings suggest that we should add the concepts “encounter” and “event” to the gravitational constellation posited above of instant (*Augenblick*), heroism, decision, and negation.

Hans Lindahl’s (2013) recent book-length work on a-legality is a lengthy meditation on the strange in law and takes seriously the possibility of jurisprudence without judges. A-legality is “strange behavior and situations that, evoking another realm of practical possibilities, question the boundaries of (il)legality” (3). These moments of strangeness correspond to a “normative blind spot” where the legal order does not have an answer. This would be very similar to what Lefebvre has called an encounter in the Deleuzian sense. It is in responding to these blind spots that a legal order defines itself. Lindahl’s examples of a-legality include a number of movements and individuals that challenge the system, such as the Landless Workers Movement in Brazil who by occupying unused land are pushing back against a law that has withheld the right to property from them. They introduce strangeness into the polis, they create an encounter, where the legal system must decide how to respond, but normative and legal recipe books offer little guidance. The response of the Brazilian legal and political system in this time of undecidability will determine what it means to be Brazilian and how one is supposed to act.

A particularly rich example of a-legality is the well-known non-violent protest by 30 *chômeurs* (unemployed) in Rennes before Christmas in 2008 (2013, 31). The activists entered an upscale department store and filled their baskets with gourmet food items including foie gras. They queued up at the checkout counters but refused to pay, thereby stopping the other customers from completing their purchases. Capitalism and consumerism were stopped for 40 minutes. The *chômeurs*

8 Similarly, when Patton writes, that “the creation of rights that is called for by Deleuzian jurisprudence inevitably involves both micro and macro politics, along with legislative and judicial decisions” (2012, 26), we must ask why there needs to be all of those components. It may be that Patton’s references to judicial and legislative decisions are referring to metaphors or types of decisions and not specific personae or institutions. Otherwise, what would jurisprudence without judges mean?

refused to move until the store manager allowed them to leave without paying. After much confusion the manager negotiated and allowed the activists to leave without paying for ten baskets of food that were then distributed among the unemployed in Rennes. For Lindahl, these liminal actions are neither legal nor illegal. Instead, they make up the strangeness of a-legality. The protestors disrupted the legal order but not through illegal actions. Their actions also made larger points about the inequality of wealth, the rights of the unemployed to enjoy a fine holiday meal, and the relentless machine of consumerism.

While some of Lindahl's examples of a-legality involve formal legal institutions and judges, this one does not. Indeed, those who made the decision as to what is right and wrong here were a *mélange* of the *chômeurs*, presumably other members of the activist organization, the store manager, the employees, and the people inconvenienced. This seems to be a prime example of what Mussawir meant when he wrote that "jurisprudence for Deleuze remains not so much a court scene as a street scene" (89).

The *chômeurs* have, like Levinas argued, de-formalized or disrupted time, but they have done so in an intentional way.

By refusing to pay, the *chômeurs* seek to throw this ought-temporality out of joint: they claim that now is the 'right time' to take food to the needy, precisely because they cannot pay for it; waiting until they find work is 'too late'. Their point is normative: they expose the normative principle that differentiates and interconnects past, present, and future as ought-times, namely the principle of means; and they seek to question it: need, not means, ought to determine how a legal order organizes past, present, and future" (33).

This disruption of normative time is not done in an instant, but through duration. The action was planned over some time by those who were unemployed themselves. They entered the department store, they engaged in a prolonged action, and the action continued into the future. Indeed, the debates about the group's tactics continue to interrogate the system to this day.

Clearly the *chômeurs* were involved in pushing for an alternative normative order, but in his review of Lindahl's book Loughlin (2014) asked, "would we agree that all such normative orders deserve the epithet 'law'" (966)? Presumably Loughlin is not hurling the more judgmental meaning of epithet here, but Deleuze would likely approve of using the term "law" as a pejorative.

What is lost by not calling the street scene part of jurisprudence or part of law? Here let me briefly lay out one important consequence: , for many it minimizes the importance of street action, especially in cultures that over-legitimize the law. Consider Thurgood Marshall's infamous comments after the successful conclusion of the Montgomery Bus Boycotts that started with the non-violent protest of Rosa Parks in 1955. Most history books focus on the pivotal roles played by Parks, Martin Luther King, and the many everyday heroes of Montgomery who put themselves at risk and greatly inconvenienced themselves to stand up economically and symbolically against an unjust law. However, what finally brought the boycott to an official end after more than a year was a ruling by the U.S. Supreme Court in the

case of *Browder v. Gayle* (352 U.S. 903, 1956). Thurgood Marshall as head of the NAACP's Legal Defense Fund consulted on the case and when the Court ruled against the city of Montgomery, Marshall unjustly dismissed the year of protests. "All that walking for nothing. They might as well have waited for the court decision" (Powe 2000, 74)

Similarly, the 1963 March on Washington is often framed as a contest between larger than life heroic figures such as Martin Luther King, John Lewis, and A. Philip Randolph, with Bobby Kennedy and President Johnson, along with the ghost of President Kennedy playing pivotal roles in the subsequent legislation. But to focus merely on them is to do a disservice to the organizers led by Bayard Rustin and all the participants and the volunteers that made the March such a success. Just a slice of the enormous unprecedented logistical feat suggests how many hero-volunteers it took to change the law:

On the National Mall, over 100 portable toilets were set up along with 16 first-aid stations. Eight 2,500-gallon water tanks were set up, which fed some 21 portable water fountains. Additionally, spouts were attached to fire hydrants so marchers would have access to drinking water. Volunteers prepared some 80,000 boxed lunches—sold for 50 cents each—consisting of a cheese sandwich, an apple, and a slice of cake (Dierenfeld 2013).

Labeling cheese sandwich makers as heroes is a long way from Heidegger's *Dasein* standing out from existence and the mass of *das man* celebrating its mine-ness. Engaging in such a mass movement as the Civil Rights Movement is not an act that involves an instant, but is creating strangeness in the law through duration. Pace Levinas, it is celebrating a multiplicity, and not relying on transcendence and alterity.

While Heidegger lionizes *Dasein* who is able to stand out from existence, many have found existence, even mundane existence to be a form of heroism. The simple act of continuing with one's life can be heroic in some circumstances and can force an encounter with law. During the Israeli occupation, many Palestinians including the poet and attorney Raja Shehadeh, have embraced the word "sumud" or steadfastness. Despite having the means to leave Palestine, Shehadeh practices resistance by remaining. As Leblanc (2014) writes, "in choosing to stay, Shehadeh enacts a first form of resistance, namely, refusing to be made invisible by insisting on one's own presence, that is, by carrying on with everyday life" (7). Indeed, Rijke and van Teeffelen in their genealogy of the concept "sumud" show how the term itself has been quite resilient and has undergone a great deal of creative alteration as the conditions on the ground changed. Today, it has attained a meaning where all of life can be a form of resistance. They quote Abdel Fatah Abu Srour, a director of an NGO in a Palestinian refugee camp who says:

Sumud is continuing living in Palestine, laughing, enjoying life, falling in love, getting married, having children. *Sumud* is also continuing your studies outside, to get a diploma, to come back here. Defending values is *sumud*. Building a house, a beautiful one and thinking that we are here to stay, even when the Israelis are demolishing this house, and then build a new and even more beautiful one than before – that is also *sumud*.

Conclusion: Duration and Human Rights Activism without Judges

To separate law from activism and both from life is to denigrate the work of activists and the possibilities of encounters that might disrupt the system. A legal decision does not end a struggle. There may be legal interludes, but struggles do not and should not go dormant during such an interlude. There is work to be done before, during and after the legal decision. There is life to live before, during, and after as well. Law doesn't stop and start, it is part of activism and activism is part of it. The judge is often merely a bit player in most struggles. Hercules is not as crucial as he thinks he is. Philosophers too are rather marginal to most struggles. If we take away the importance of the instant, de-prioritizing Levinas' moments of negation, we are left with a continuous struggle, with thousands of decisions, many of which are provisional, many of which are mistaken, and need to be re-thought.

I conclude with the work of Richa Nagar a professor of Gender, Women, and Sexuality Studies at the University of Minnesota. In India Nagar was exposed to activism, performance, and feminist causes at an early age. Throughout her distinguished academic career she has also worked closely with a women's group in Uttar Pradesh and she has published two groundbreaking books *Playing with Fire* and *Muddying the Waters*, the first of which is every bit co-authored with the mostly lower-class women in India that she works with. Each work details the various pitfalls of decades-long work together navigating their various forms of privileges. To co-author feminisms involves thousands of decisions, building relationships, learning from, listening to, admitting mistakes. As she writes,

These are journeys enabled by trust with the ever-present possibility of distrust and epistemic violence; journeys of hope that must continuously recognize hopelessness and fears; and journeys that insist on crossing borders even as each person on the journey learns of borders that they cannot cross—either because it is impossible to cross them, or because it does not make sense to invest dreams and sweat in those border crossings (Nagar 2014, 6).

This is a journey of vulnerability and love, of telling stories, of poetry, of tears and smiles, of trust and hope, distrust and hopelessness. I would like to suggest this is what is possible when we take Deleuze seriously, that “there are no human rights, there is life, and there are life rights. Only life goes case by case” (1996).

This is creating jurisprudence, in its broadest meaning, from the singularity of cases. This is work, co-authored, reflective, and reflexive. “If alliance work can be imagined as dance choreography, then coauthorship in alliance work is precisely about building singularities that roil and clash and teem with life” (Nagar 2014, 168). This is employing research methodologies, theoretical advances, and academic knowledge in solidarity with marginalized communities. But, it is not applying these tools uncritically. It is not employing academic techniques on a group as analysis from the outside, but employing in solidarity with. Likewise, it is employing human rights and jurisprudence with the same self-criticism and with

solidarity. This is not done in an instant, it is done over years. It is not done with no second chance as the heroic act. It is done knowing it will probably need to be re-done, that no step is final. It is creation, continuous creation.

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