

## PERFORMATIVITY BETWEEN LOGOS AND NOMOS: LAW, TEMPORALITY AND THE “NON- ECONOMIC ANALYSIS OF POWER”

RITU BIRLA\*

Judith Butler’s signature theorizing of performativity requires attention to the full ethico-political range of the meanings of law, from self-discipline to convention to the juridical logic of sovereignty. That is, performativity spans the continuum across political rule and ethical rules, and the play of processes of subjectivization, subjecthood and subjection. Problematizing the sovereign subject, Butler unpacks the *a priori*, intending legal subject by reading law at once as text, thus cracking open the self-referential and universalist moves of sealed juridical logic, and also as context, as norms that are always on the move. Considering law’s performativity challenges the authorial and authoritative transparency of law—its sovereignty—by demanding a temporally robust approach to the very idea of context. A theorizing of iteration and citationality, performativity poses context as more than just the historical and empirical framework *for* law, contemplating it instead as the historicity of law itself, of law understood as ever-shifting convention, or the always already situated norms that become sites for citation.

My work on the installation of rule of law in colonial India, particularly colonial law’s staging of society as market, and its temporal politics, that is, its production of modern, contracting economic subjects as opposed to the anachronistic subjects of custom, brings me back to these thematics of convention, context and historicity in Butler’s work. In British India, a mission to systematize law confronted the array of customs and conventions among local populations. Butler innovatively engages such tensions across different forms of law. A deconstruction of the speech act, the idea of performativity reveals itself as a temporal play that cuts across two broad

concepts of law: *logos* and *nomos*. *Logos*, traditionally translated as reason or speech, also evokes a divine performative, the word or sovereign command, as well as the notion of law as a sealed logic or system. Law as *nomos*, on the other hand, refers to law as convention, what is done and what is accepted. The idea of *nomos* evokes ways of being, settled norms and values, while at the same time exposing a problem of agency: who is the agent of convention? In legal scholarship, both explicitly and implicitly, the concept of law as *nomos* has informed robust readings of legal regimes as lived worlds, as normative universes that are made, maintained and remade.<sup>1</sup> Butler's performativity complicates and finesses such critical approaches. To show how, I draw attention to the temporal and spatial situatedness of convention and pose *nomos* as a marker of context, its consistent remaking, and so its (im)possibility.

I would like then to emphasize Butler's wide-angle approach to law, which renders her a unique legal theorist whose legal philosophy stems from a relentless focus on the slippages across, and temporalities of, law as *nomos* and as *logos*. After discussing *Excitable Speech* to highlight these moves, I will consider the ways in which they cite and speak to another influential mapping of the ethico-political continuum of law: Foucault's analysis of discourses of governing/government, particularly in his late *Collège de France* lectures, and what he calls the "non-economic analysis of power," which informs his

---

\* Associate Professor, Department of History and Director, Centre for South Asian Studies, University of Toronto.

<sup>1</sup> Robert Cover's classic essay "Nomos and Narrative" famously deploys the term *nomos* to draw attention to the narratives that give law meaning; once so understood, "law becomes not merely a system of rules to be observed but a world in which we live." His legal hermeneutics focus on the making of normative universes, and "the force of interpretative commitments." Robert Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 5–7 (1983). Cover's work resonates with the classical sociology of Max Weber, as well the poststructuralist interventions of Foucault and Derrida, though his thesis does not explicitly extend in these directions. Since Cover's article, a wide range of research in the sociology of law, legal realism and critical legal studies has variously addressed the force of norm-making, but not further theorized the concept of *nomos*, which I revitalize here. Butler's elaboration of performativity, I would like to emphasize, is a key tool for understanding the dynamics of agency and subjectivity in the making, and challenging, of normative universes.

genealogy of governmentality.<sup>2</sup> In a much-cited early lecture, Foucault asks if it is possible to imagine relations of power differently from the classical models of social contract that structure liberal democratic legal systems today, models which conceptualize power as an economy or exchange of rights.<sup>3</sup> Butler's theorizing of performativity challenges liberal templates of law and legal procedure in just this way.

To further pursue this connection between Butler and Foucault on the relationship of law and governmentality, and to bring the early Butler of *Excitable Speech*<sup>4</sup> to the Butler of *Precarious Life*,<sup>5</sup> I will pose questions that are opened by the story of the rule of law in British India, especially the legal institutionalization of that ubiquitous modern social imaginary, "the economy." As I have asserted in my research, British colonial liberalism's investment in the rule of law relied on institutionalizing the market as a model for all social relations. The history of British colonial liberalism demands that we address forms of legal subjecthood and rights *alongside*, rather than as the antidote to, the proliferation of governmental technologies directed at managing bodies and enforcing authority over political subjects. A fruitful way to do so, I argue,

---

<sup>2</sup> MICHEL FOUCAULT, *Two Lectures, in POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977* 78, 89 (Colin Gordon ed., Colin Gordon et al. trans., Pantheon Books 1980) (1977) [hereinafter POWER/KNOWLEDGE]. Foucault defines governmentality as the discourses and practices of governing that emerge with the development of modern disciplines of political economy after the late eighteenth century. These are forms of governing directed at managing bodies and populations. MICHEL FOUCAULT, *Governmentality, in THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* 87 (Graham Burchell et al. eds., 1991). In his Collège de France lectures on neoliberal political economy, Foucault emphasizes that these new forms of governing address citizens, legal subjects of right, as subjects or bodies to be managed. See MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE DE FRANCE, 1978–79* (Michel Senellart ed., Graham Burchell trans., Palgrave MacMillan 2008) (2004) [hereinafter THE BIRTH OF BIOPOLITICS].

<sup>3</sup> See FOUCAULT, *Two Lectures, in POWER/KNOWLEDGE, supra* note 2, at 78.

<sup>4</sup> JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* (1997) [hereinafter EXCITABLE SPEECH].

<sup>5</sup> JUDITH BUTLER, *PRECARIOUS LIFE: THE POWERS OF MOURNING AND VIOLENCE* (2004) [hereinafter PRECARIOUS LIFE].

is to consider the performatives of law in its production of the market as sovereign—as a name for the social itself—a project relevant to the study of both nineteenth-century colonial and contemporary forms of governing.

Butler's work asks: how can we conceptualize and operationalize law within our ever more fine-tuned governmentalities? With this basic and crucial question in mind, I would like to emphasize that Butler's theorizing of the performative constitution of the subject and sovereignty, as well as the impossibility of radical autonomy (that is, *auto-nomos*, or a kind of self-regulation) elaborate a "non-economic analysis of power" in three broad ways: by unpacking the legal subject with unmediated intention, by locating juridical sovereignty as an effect of technologies of governmentality and by challenging universalizing legal monopolies on definitions of the social.

To supplement, I would like to connect the situated politics of performativity, which appropriate established conventions to enact new forms of community, with a robust reading of the idea of economy. Such a reading embraces the located historicity of law as *nomos* to challenge the universalizing *logos* of neoliberal market sovereignty. In its most classical sense, economy, from the greek *oikonomia* or the *nomos* (law/convention) that regulates the *oikos* (household), is itself a notion of law. Through economy, law as convention is embedded within a concept of community and kinship (*oikos*). Here, I read performative politics as the critical inhabiting of the classical concept of economy and its intimate linking of law, kinship and community. Emphasizing that performativity is an approach to law that addresses the embeddedness of subjects within conventions *and* insists on the opening up of new temporalities and socialities, I would like to briefly consider in closing analytical approaches that would challenge that thing we call (and are called to protect and obey), that is, "the market" and its *logos*, its divine performative, or "established conventions of universality," to use Butler's phrase.<sup>6</sup> Interested in the sovereign performatives of law and in the very context-making possibilities that challenge those sovereign performatives, Butler offers tools for reading law as

---

<sup>6</sup> EXCITABLE SPEECH, *supra* note 4, at 90.

governmentality, tools relevant for unpacking colonial liberalism as well as contemporary neoliberal forms of governance.<sup>7</sup>

Before launching into a closer reading of Butler, let me offer a brief elaboration of the historical lens I bring to this analysis: I have charted the installation of law standardizing the free circulation of capital in British India, not only as case study, but also a site and citation of the genealogy of capitalist modernity itself.<sup>8</sup> This is a story about how the fortification of the rule of law produced a new object of sovereign management, “the market” or “the economy,” a supra-local abstraction that introduces and stands in for a novel understanding of community—the notion of the “the public.” The history of jurisprudence and statute on market practice in South Asia during the late nineteenth and early twentieth centuries marks the installation of contract law in an arena where extended kinship and customary practice ruled. These dynamics reflect a historical situation in which law as *logos*—the rule of law manifest in an obsessive Benthamite standardization of market practice—confronted law as *nomos*, in its most situated sense as shifting customary practices (practices that Hindu and Muslim legal traditions had adjudicated with attention to the specificity of context). Indeed, as many critical scholars have highlighted, the colonial legal regime codified custom itself, casting shifting, situated conventions into the scripted logics of religious personal laws and thus rendering formerly negotiable hierarchies and differences (themselves oppressive, and so not to be celebrated)

---

<sup>7</sup> The legal dilemmas posed by new flows of global capital offer many sites for the study of tensions between formal state law/national sovereignty and neoliberal social formations. New work on the emergence of market-based non-state law is one example. See Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL LEGAL STUD. 447 (2007). New approaches to the distinctions between political citizenship in law and economic agency also evince these new dilemmas. Questions about the distinction between citizenship versus domicile and the status and rights of economic migrants from skilled workers (in the United States, those with H1B visas, for example) to, more prominently, migrant domestic and unskilled labor are important issues. See generally Karen Knop, *Citizenship, Public and Private*, 71 LAW CONTEMP. PROBS. 309 (2008).

<sup>8</sup> RITU BIRLA, *STAGES OF CAPITAL: LAW, CULTURE AND MARKET GOVERNANCE IN LATE COLONIAL INDIA* (2009).

as rigid and fixed.<sup>9</sup> In other words, colonial legal pluralism evinced governmental imperatives to locate and classify communities, rather than any benign interest in promoting arenas of self-governance, as official policy would claim.<sup>10</sup> I have therefore been especially concerned with colonial law's production of a modern economic subject, as well as the concomitant production of a pre-modern, ancient cultural subject as its Other and its effect. This temporizing of modern self and its anachronistic Other reflected colonial liberalism's remapping of social relations, one which produced new stages—spatial and temporal—for enacting politics: the modern public space of “economy” and the supposedly age-old private arena of native “culture.”<sup>11</sup> Especially after 1858, colonial authorities claimed not to interfere with indigenous culture, elaborating a dual legal system in which modernizing civil and criminal law governed “the public,” while the domains of personal law regulated the “private” realm of religio-cultural practice, including matters concerning extended family, inheritance and women's status. Thus, in addition to codifying fluid forms of customary practice in the personal law, the colonial legal regime recoded sociality itself along the axis of public (the realm of economy) and private (the realm of culture).

# I. PERFORMATIVITY, TEMPORALITY AND THE PROBLEM OF CONTEXT

Performativity plays with temporality, and so with the very notion of context itself. The problems of context and historicity structure the early pages of *Excitable Speech*, where Butler announces her project to “show how a theory of the performative

---

<sup>9</sup> For a foundational analysis of colonial law in India, see BERNARD COHN, *From Indian Status to British Contract, in AN ANTHROPOLOGIST AMONG HISTORIANS AND OTHER ESSAYS* 463 (1990); BERNARD COHN, *Law and the Colonial State, in COLONIALISM AND ITS FORMS OF KNOWLEDGE* 57 (1996).

<sup>10</sup> The classic study of British colonial legal pluralism in this vein is MAHMOOD MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* (1996). On technologies of classification of communities and castes, see NICHOLAS B. DIRKS, *CASTES OF MIND: COLONIALISM AND THE MAKING OF MODERN INDIA* (2001).

<sup>11</sup> For my argument on colonial sovereignty and law, and its staging of the distinction between economy/public and culture/private, see BIRLA, *supra* note 8.

is already at work in the exercise of political discourse.”<sup>12</sup> The range of arguments made in this series of essays expose the limitations of politics focused on the speech act, that is, on the collapse of speech and conduct—whether in hate speech or in the presuppositions of the US military’s “don’t ask/don’t tell” policies. It is important to remember that performativity as a concept does not refer to just simple performance, or the enacting of a role by an already constituted subject; it is rather a rigorous critique and elaboration of the linguistic philosophy of performative speech—speech that “acts,” does something, or effects a result.

Of special concern is the first essay, “On Linguistic Vulnerability,” a finessed unpacking of the theory of performative speech as elaborated by the philosopher J.L. Austin. As Butler summarizes, Austin distinguishes between two kinds of speech acts, perlocutionary and illocutionary:

The illocutionary act is one in which in saying something, one is at the same time doing something; the judge who says “I sentence you” does not state an intention to do something or describe what he is doing: his saying is itself a kind of doing . . . . Perlocutionary acts, on the other hand, are those utterances that initiate a set of consequences . . . [that] are not the same as the act of speech.<sup>13</sup>

*Excitable Speech* breaks down the distinction between these two, and does so in three major moves that map the analytical ground for performative politics. First, the temporality of illocutionary speech—its immediacy—is questioned and opened to expose a gap between speech and effect that characterizes perlocution; second, the causal and chronological relationship between speech and its expected effects is destabilized; and finally and most broadly, Butler exposes how political discourses that rely

---

<sup>12</sup> EXCITABLE SPEECH, *supra* note 4, at 40.

<sup>13</sup> *Id.* at 17.

on a notion of illocutionary speech constrain ethical and political agency.

The analytics of performativity thus investigate the claims and power of speech as *logos*, as the sovereign act of naming and making; Butler pursues this through a key theme in Austin—the problem of convention (*nomos*) or the context through which meaning is established. According to Austin, performative speech attains meaning through what he calls the “total speech situation” or the context of the utterance: the force of the speech act “I sentence you” is enabled by the appropriate context.<sup>14</sup> For example, the phrase “I sentence you” acts and attains its force when a judge, not clown, states it. But as Jacques Derrida exposes in his reading of Austin in *Signature, Event, Context*, a text that informs Butler, the concept of the “total speech situation” relies upon placing an absolute value on the idea of context, on the very concept of a stable, *a priori* context.<sup>15</sup> Butler elaborates by detailing the temporal presuppositions of Austin’s claims, especially in the immediacy of the illocutionary speech act, the model for hate speech.

Early on Butler asks, “how does one go about delimiting the kind of “convention” that illocutionary utterances presume?”<sup>16</sup> She highlights that according to Austin, convention gives illocutionary speech meaning through the accepted norms of ritual. Butler turns to the iterative quality of ritual—that any moment of ritual iteration marks, in its very repetition of past iterations, a difference from them—to rethink the temporality and immediacy of illocutionary speech. Thus “the ‘moment’ in ritual” must be “a condensed historicity” since “it exceeds itself in past and future directions, an effect of prior and future invocations that constitute and escape the instance of

---

<sup>14</sup> *Id.* at 3, 17.

<sup>15</sup> According to Derrida, “Austin’s analyses at all times require a value of context, and even of context exhaustively determined, in theory or teleologically.” The very success (or “felicity” as Austin calls it) of a speech act, Derrida emphasizes, always returns to a “total context.” JACQUES DERRIDA, *LIMITED INC.* 13 (Samuel Weber Jeffrey Melham trans., Gerald Graff ed., 1988) (1972).

<sup>16</sup> *EXCITABLE SPEECH*, *supra* note 4, at 3.



utterance.”<sup>17</sup> Deconstructing Austin’s “total [speech] situation,” she challenges any totalizing force of convention by excavating the “open temporality of the speech act”<sup>18</sup> (This central feature of the performative, its challenge to any totalizing process, structures Butler’s conversation with Foucault, and the questions about law and governmentality posed here.). Like every ritual “moment” or iteration, the speech act collapses time and destabilizes any chronological causality between its intention and its effects: “The possibility for a speech act to resignify a prior context depends, in part, upon the gap between the originating context or intention by which an utterance is animated and the effects it produces.”<sup>19</sup> The transformative possibilities of performative citation, iteration and resignification therefore operate through a constitutive contradiction, manifest in what Butler calls an “open temporality.”

Citing political currencies, Butler thus asserts: “[P]erformativity has its own social temporality in which it remains enabled precisely by the contexts from which it breaks,” indeed the “resigni-fication of speech requires opening new contexts, speaking in ways that have never been legitimated, and hence producing legitimation in new and future forms.”<sup>20</sup> In this precise, potent formulation, the practice of citation animates the idea of context, challenging any temporizing of “context” as just the register of the past. In jurisprudence and case law, citation marks the authority of the past as precedent; in a performative reading of citation, the very production of new contexts contests the binding power of the past. The appropriation and recoding of hate speech by “injured” parties is a potent example of this generative process. Thus the conventions and norms that structure social meanings cannot be understood as simply

---

<sup>17</sup> *Id.* at 3.

<sup>18</sup> *Id.* at 15.

<sup>19</sup> *Id.* at 14.

<sup>20</sup> *Id.* at 40–41.

conveying the authority of the past or "tradition."<sup>21</sup> Instead, elaborating a critical reading of law as *nomos*, Butler engages the temporal situatedness of social conventions and norms, the radical historicity of all contexts and the concomitant possibilities for new agency and sociality. To summarize, drawing attention to the "condensed historicity" of ritual convention that gives utterance meaning, Butler's virtuoso reading of Austin marks the performative as a space of agency between the subject enacting convention in the realm of *nomos*, and the sovereign speaking subject of *logos*.<sup>22</sup>

## II. CONVENTION AND THE AUTONOMOUS SUBJECT

The figuration of a performative subject situated in convention, but transgressing temporal logics of past, present and future to resignify speech, opens to a critique of the autonomous and sovereign subject, that is, to a subject with an agency reducible to intention, as in the legal subject. Butler returns to Althusser to read the speech act as interpellation and contemplate the subject as embedded within social norms and conventions, a figure who is folded into the social.<sup>23</sup> Her reading of interpellation begins with a series of questions about convention, temporality, and the agency of the speaking subject: "Who speaks when convention speaks? In what time does convention speak? In some sense, it is an inherited set of voices, an echo of others who speak as the 'I'."<sup>24</sup> These queries imagine a subject channeling the force of convention, an echo of established authority, and so a subject that is always already subjected to law and constituted "through the address of the

---

<sup>21</sup> Histories of colonialism have highlighted the powerful effects of just such a reading of the past; in India, colonial administrators understood indigenous conventions in just this way, as exercising such a binding authority of tradition that "natives" were locked in primitive pasts.

<sup>22</sup> EXCITABLE SPEECH, *supra* note 4, at 3.

<sup>23</sup> Broadly speaking, Althusser theorizes interpellation to detail the mechanics of agency in the ideological production of the subject.

<sup>24</sup> EXCITABLE SPEECH, *supra* note 4, at 25.

Other.”<sup>25</sup> How then can this subject, an instrument enacting a script, become an agent “capable of addressing others”?<sup>26</sup> With a subtle Hegelian echo, Butler poses a productive contradiction as an answer: “The address that inaugurates the possibility of agency, in a single stroke, forecloses the possibility of radical autonomy.”<sup>27</sup> That is, a subject’s agency cannot articulate itself as a sovereign command outside or standing above sociality; the very possibility of agency emerges from “the address,” the moment of sociality.

The kind of subject conceptualized here of course opens to many directions of analysis, including Butler’s well-known problematizing of the *a priori* materiality of the body and of sexual difference in *Gender Trouble*<sup>28</sup> and *Bodies that Matter*.<sup>29</sup> In *Excitable Speech* and later, it also challenges the legal subject adjudicated through an *a priori* intentionality unmediated by convention and context, one who contracts and wills into the future<sup>30</sup> (It is the installation of such a subject that we can clearly see in the case of colonial liberalism, which, through a host of acrobatic legal citations managed even to declare that the deity of a Hindu temple was a legal subject, all in the service of instituting the principle of mortmain in British India.<sup>31</sup>).

The destabilizing of a cause-effect temporizing or chronology structures Butler’s elaboration of the discursive constitution of the subject *and* of agency. She thus supplements Foucault’s assertion that the “time of discourse” is radically

---

<sup>25</sup> *Id.* at 26.

<sup>26</sup> *Id.* at 26.

<sup>27</sup> *Id.* at 26.

<sup>28</sup> JUDITH BUTLER, *GENDER TROUBLE* (1990).

<sup>29</sup> JUDITH BUTLER, *BODIES THAT MATTER* (1993).

<sup>30</sup> Butler’s readings of Nietzsche, especially the *GENEALOGY OF MORALS*, of course resonate here.

<sup>31</sup> For the history of the installation of the principle of mortmain in India, and the making of the Hindu deity as legal subject see BIRLA, *supra* note 8, at ch. 2.

incommensurate with the “time of the subject,” by observing that the multiple, collapsed and expansive temporality of discourse also “*makes possible* the speaking time of the subject . . . . Autonomy in speech, to the extent that it exists, is conditioned by a radical and originary dependency on a language whose historicity exceeds in all directions the history of the speaking subject.”<sup>32</sup>

I am drawing attention to the politics of temporality to emphasize that Butler’s political and ethical subject is both embedded in time and context and, at the same time, disembedded through performative citation, becoming a kind of time-traveler, called to the responsibility of “negotiating the legacies of usage that constrain and enable” speech.<sup>33</sup> But such citation does not produce a simple kind of subjectivity that is reducible to identity. In fact, Butler’s focus on the iterative, and, to put a Butler-style spin on a Freudian term, the temporal condensation of the iterative, elaborates a radical historicity that requires a constant self-making, through the recognition of an always-already established convention. We might pose this iterative temporal condensation (a term which, in the Freudian dreamwork, challenges the logic of cause-effect) over and against the temporality of the contracting legal subject, who wills into the future causing effects, and indeed as against the logic of law as *logos*, for the very project of an hermetically sealed legal system is to map and manage future contingencies. In the spirit of Butler’s writings on the body, iteration might also be posed as distinct from reproduction, biological or otherwise. This would be a distinction between what Butler calls an “open future” and receptivity to alterity as “unknown contexts,” on the one hand, and on the other, the inclination to script the future mimetically, in one’s own image.<sup>34</sup>

Butler’s call to resist the desire to “foreclose futurity” pushes us to imagine social kinship differently, challenging the naturalized division of the social as a collective contract of legal

---

<sup>32</sup> EXCITABLE SPEECH, *supra* note 4, at 28.

<sup>33</sup> *Id.* at 27.

<sup>34</sup> *Id.* at 161–62. I thank John Ricco for a stimulating discussion on iteration/reproduction.

subjects, and as privatized, reproductive family.<sup>35</sup> That is, the iterative marks the agency of citationality through attention to othering, rather than an interest in sameness. If we are to take Derrida's *Signature, Event, Context* as an important influence, then we should also pay attention to his observation that "*iter* . . . probably comes from *itara*, *other* in Sanskrit [instituting a] logic that ties repetition to alterity."<sup>36</sup> To appropriate Gayatri Spivak's important formulation, citationality would open to an ethics of alterity rather than the politics of identity.<sup>37</sup> Butler highlights Foucault on the subject and power in this vein. In the *Psychic Life of Power*, she reminds us that Foucault's conceptualization of "the disciplinary apparatus of the state and its totalizing production of individuals" challenges exactly the "'identity politics' produced by a state which can only allocate recognition and rights to [totalized] subjects."<sup>38</sup> Indeed, Foucault "is not calling for the release of a hidden or repressed subjectivity, but rather, for a radical making of a subjectivity formed in and against the historical hegemony of the juridical subject."<sup>39</sup>

### III. PERFORMATIVITY, THE JURIDICAL SUBJECT AND THE "NON-ECONOMIC" ANALYSIS OF POWER

Butler's theorizing of performativity shares in and elaborates Foucault's critique of the historical hegemony of the juridical subject in two broad ways. First, as I have tried to highlight so far, performativity allows for a situated account of

---

<sup>35</sup> *Id.* at 162. Butler's performativity, which opens to robust notions of kinship, in other words, challenges social contract theory and the public/private distinction in new ways. There is a kinship here with the early Marx.

<sup>36</sup> See DERRIDA, *supra* note 15, at 7.

<sup>37</sup> For a basic framing of this distinction see GAYATRI SPIVAK, DEATH OF A DISCIPLINE (2003); Gayatri Spivak, *A Moral Dilemma*, in WHAT HAPPENS TO HISTORY: THE RENEWAL OF ETHICS IN CONTEMPORARY THOUGHT 215 (Howard Marchitello ed., 2001).

<sup>38</sup> JUDITH BUTLER, THE PSYCHIC LIFE OF POWER: THEORIES IN SUBJECTION 100 (1997) [hereinafter THE PSYCHIC LIFE OF POWER].

<sup>39</sup> *Id.* at 100-01.

subjectivity and subjugation in subject-formation, thus unpacking the sovereign, autonomous subject. Secondly, it provides a lens through which to read juridical sovereignty, law and the mechanics of governmentality alongside each other. Performativity enables critical analyses of both the ethical subject as sovereign, willing agent *and* of political sovereignty by engaging the slippage between word and deed, fixed logic and fluid convention. Butler's critical moves bring not just the model of law but the model of power itself as *logos*—the sovereign command that dissimulates disembodied authority—to a mechanics of power as *nomos*, that is, the layers of inheritance that structure convention and context, in which any sovereign command is enmeshed.

A potent example can be found in the critique of Althusser's account of the workings of ideology in *Excitable Speech*. Butler argues that, "in claiming that social ideology operates in analogous way to the divine voice," Althusser "inadvertently assimilates social interpellation to the divine performative" in which "power is understood on the model of the divine power of naming, where to utter is to create the effect uttered."<sup>40</sup> She then makes a telling point about the effecting of a divine performative through the force of law and the state apparatus: "Human speech rarely mimes that divine effect except in the cases where speech is backed by state power, that of a judge, the immigration authority, or the police, and even then there does sometimes exist a recourse to refute that power."<sup>41</sup> Said differently, interpellation is a form of situated agency, located in time and sociality, which cannot generally be thought on the model of a sovereign or divine performative. In making this point, Butler also highlights the monopoly of the political as staged in state power, which seems only to offer up, and that too only "sometimes," the legal "recourse" she refers to. By acknowledging the ultimate power of the state apparatus, is Butler posing a limit to performative politics here? A productive path for response, let me suggest, would be to place her recent readings of sovereignty and governmentality alongside the robust possibilities of performativity. One way to pursue this is

---

<sup>40</sup> EXCITABLE SPEECH, *supra* note 4, at 31–32.

<sup>41</sup> *Id.* at 32.

to consider how Butler elaborates Foucault's call for a "non-economic analysis of power."

The problem of a non-economic analysis of power and the thematics of economy are addressed explicitly in Foucault's 1976 lectures published in *Power/Knowledge*, and then elaborated on in his writings on governmentality, especially in his 1978–79 lectures, *La Naissance de la Biopolitique/The Birth of Biopolitics*.<sup>42</sup> What does Foucault mean when he asks, "what means are available to us if we seek to conduct a non-economic analysis of power?"<sup>43</sup> This is a familiar argument to many, but I would like to highlight the thematic of economy here as a path into Butler on sovereignty, governmentality and performativity. Foucault poses economy as a commonality between the juridical, or as Foucault highlights, the "liberal conception of political power (found in the *philosophes* of the eighteenth century)" and the "Marxist conception."<sup>44</sup> Foucault uses "economy" to refer to both an exchange-arrangement and an overdetermined origin of relations of power. He emphasizes that the juridical model of power as established in social contract theory is one in which "power is taken to be a right, which one is able to possess like a commodity, and which one can in consequence transfer or alienate . . . through a legal act."<sup>45</sup> In this model, *a priori* individuals hold power, and give part of it up to establish "political power or sovereignty[—][t]his theoretical construction is essentially based on the idea that the constitution of political power obeys the model of a legal transaction involving a contractual type of exchange."<sup>46</sup> It is important to note that in the spirit of his broader critique of liberalism, Foucault's reading of sovereignty posits a continuum from the "sovereign right" of pre-modern monarchies to the

---

<sup>42</sup> THE BIRTH OF BIOPOLITICS, *supra* note 2.

<sup>43</sup> FOUCAULT, *Two Lectures*, in POWER/KNOWLEDGE, *supra* note 2, at 89.

<sup>44</sup> *Id.* at 88.

<sup>45</sup> *Id.* Here, Foucault addresses Rousseau, and especially the critique of legal right in Rousseau's THE DISCOURSE ON THE ORIGINS OF INEQUALITY next to the Rousseau of THE SOCIAL CONTRACT.

<sup>46</sup> *Id.*

“rights” of modern parliamentary democracy: it is in the eighteenth century that the absolute sovereign right of pre-modern times is “re-activated through the doctrine of Roman Law . . . [and found] in its essentials in Rousseau and his contemporaries, but now . . . it is concerned with the construction, in opposition to the administrative, authoritarian and absolutist monarchies, of an alternative model, that of parliamentary democracy.”<sup>47</sup>

This “economism in the theory of power” is reproduced, Foucault argues, alongside the other dominant model, the “economic functionality of power,” in which a materialist determinism structures all configurations of power.<sup>48</sup> Foucault reconfigures both of these as he develops his analysis of governmentality, which examines the eighteenth century emergence of *political* economy as a discourse of governing, and the emergence of new technologies of managing bodies and populations, even as juridico-legal citizenship is affirmed and extended.

I have taken a few moments to return to the basics of the non-economic analysis of power to emphasize that Butler’s theorizing of performativity speaks directly to the economism of juridical power and law and pushes the analysis in new directions. Performativity challenges not only the *a priori* individual who holds and exchanges power as right, but exposes

---

<sup>47</sup> *Id.* at 103. Legal scholars addressing Foucault’s analysis of law have critiqued it for posing law as simply a modern tool for absolutism. *See, e.g.,* ALAN HUNT GARY WICKAM, *FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF GOVERNANCE* 45 (1994) (arguing that Foucault does not distinguish between modern discourses of “rights” and the notion of sovereign “right,” therefore confusing the pre-modern king’s right as imperative command with modern notions of civil and human rights: “This slippage from right to rights . . . leads Foucault . . . to disparage the transformative capacity of rights within modern political systems”). *Id.* In my view, such assessments miss the point of Foucault’s critique of liberal governmentality, which seeks to locate the mechanics of power *even in* discourses of liberal freedom. Foucault’s analysis addresses the full register of the force of law, a move especially useful for colonial studies, where discourses of rights—legal, political and cultural—emerged *through* and not just in opposition to sovereign right. Butler’s analytics of performativity elaborate Foucault’s genealogical analysis of law and rights.

<sup>48</sup> FOUCAULT, *Two Lectures, in* POWER/KNOWLEDGE, *supra* note 2, at 88–89.



the ways in which our liberal investment in that intending subject dissimulates a dangerous disjuncture between law and power, posing law as *only* a remedy and as *the* only remedy. Said differently, Butler details the ways in which the economic model of power enables law as a tactic of governmentality, legitimizing the management of bodies while dissimulating the freedom of citizens. Butler's influential reading of the coding of racist hate speech as illocutionary speech act is just one very important example:

By locating the cause of our injury in a speaking subject and the power of that injury in the power of speech, we set ourselves free, as it were, to seek recourse to the law—now set against power and imagined as neutral—to control that onslaught of hateful words.<sup>49</sup>

That is, the focus on the individual with racist intention diverts attention from the racialized mechanics of power as dispersed and incorporated in institutions and bodies. Law is thus conceived as *opposed to* power, and indeed as its antidote. This is an effect of law's role as kind of negotiable instrument for power, its operation as a tactic of governmentality. Indeed, the "idealization of the speech act as sovereign action"—that is, the act in which the citizen appears as sovereign ("that one who has the power to make happen what one says"):

[A]ppears linked with the idealization of sovereign state power . . . It is as if the proper power of the state has been expropriated, delegated to its citizens, and the state then reemerges as a neutral instrument to which we seek recourse to power to protect us from other citizens, who have become revived emblems of a (lost) sovereign power.<sup>50</sup>

Through a debate in recent United States' politics, Butler offers a critique of the sovereignty staged in the liberal social contract,

---

<sup>49</sup> EXCITABLE SPEECH, *supra* note 4, at 80.

<sup>50</sup> *Id.* at 82.

one which echoes Foucault's continuum across sovereign right and modern citizenship rights, to give an account of the performative power of the liberal-democratic state as grounded in law. As sovereignty devolves to citizens through the rule of law, the sole authority of the state to manage and protect them is only reinforced: to read the law as performative then *requires* a relentless analysis of the relationship between sovereignty and governmentality.

#### IV. GOVERNMENTALITY, PERFORMATIVITY AND ECONOMY

In her recent writing, Butler pushes the non-economic analysis of power, that is, the critique of jurido-legal discourses of sovereignty grounded in the contracting and exchanging of rights, through a reading of indefinite detention and the workings of an absolute sovereignty in contemporary United States democracy. She engages the collapsed temporalities at work in the contemporary invigoration of older despotic forms of sovereign authority: “[T]he historical time that we thought was past turns out to structure the contemporary field with a persistence that gives the lie to history as chronology.”<sup>51</sup> The analysis focuses, via Agamben, on the logic of sovereign exception, that is, on sovereignty's inverse relation to the rule of law. Here, it is the suspension of law that produces sovereignty as an effect of new governmentalized configurations of power: “It is not, literally speaking, that a sovereign power suspends the rule of law, but that the rule of law, in the act of being suspended, produces sovereignty *in its action and as its effect*.”<sup>52</sup> Performativity is again the key lens for situating the relationship of sovereignty and governmentality: “[W]e have to consider the act of suspending law as a performative one which brings a contemporary configuration of sovereignty into being or, more precisely, reanimates a spectral sovereignty within the field of governmentality.”<sup>53</sup>

---

<sup>51</sup> PRECARIOUS LIFE, *supra* note 5, at 54.

<sup>52</sup> *Id.* at 66. Agamben's discussion of the logic of sovereign exception can be found in GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE (Daniel Heller-Roazen trans., 1998) (1995).

<sup>53</sup> PRECARIOUS LIFE, *supra* note 5, at 61.

Butler emphasizes here that law is not just a tactic of governmentality, that is, a tool for managing bodies, but also “has to be seen in this context [that is, through its suspension] as also making room for the resurgence of sovereignty.”<sup>54</sup> I would like to suggest that it would be productive to elaborate by specifying the character of the sovereignty that is animated, since law produces a sovereign-effect even in the context of democratic liberalism—that is, the sovereignty of the people. In my view, Butler here seeks to draw an important distinction between law’s buttressing of governmental disciplines in the juridico-legal regimes of liberal democracies, and the evacuation of law itself, a fascist performative that animates absolute sovereignty *in the name* of popular sovereignty. We might say that if in *Excitable Speech* it is the rule of law exercised as a tactic of governmentality that dissimulates popular sovereignty, in *Precarious Life*, it is the suspension of law, exceeding tactics of governmentality, which revitalizes a despotic sovereignty.

How might we consider both of these configurations law, sovereignty and governmentality—democracy and fascism, perhaps—at once attending to their simultaneous functioning as a central feature of the United States today? I would like to propose that one way in is to consider another famous specter, capital, and its spectral sovereign-effect—“the market” or “the economy.” The history of colonial liberalism offers an angle through which to assess configurations of power today. In the South Asian context that I have examined, the kind of despotic sovereignty that Butler addresses in *Precarious Life* operates from outside law *as well as* through the installation of the rule of law. As I mentioned earlier, in British India, the legal installation of that modern imaginary, “the market” or “the economy” as an abstract site of sovereign management (one that overrode the territorial sovereignty of various local despotisms) fueled the civilizing mission and so the legitimizing claims of colonial sovereignty. This was a liberal improving mission of “moral and material progress,” to cite one official mantra for the installation of the rule of law in British India. Here, the installation of the rule of law was characterized by the accelerated standardization of law on companies, income tax, negotiable instruments, trusts and financial speculation at the turn of the twentieth century—

---

<sup>54</sup> *Id.* at 54–55.

all forms of contract which installed the intending legal subject as economic agent.<sup>55</sup> In the late nineteenth and early twentieth centuries this legal standardization of market practice mapped the market as an abstract arena of sovereignty and as a name for that modern concept of sociality, the public. Under colonial liberalism, the rule of law produced a public of subjects but not citizens, and modern subjects were coded first and foremost as economic, and not political actors. In fact, in the late nineteenth and early twentieth centuries, limited forms of political representation emerged through a slow and cautious devolution of political authority, while the same period witnessed an accelerated re-presentation or staging of the very domain of colonial sovereignty as the market.<sup>56</sup>

To historicize the production of a thing called the market—the health and safety of which we check every morning in the news—requires attention to the performativity of law, and its effecting of origins. In the story I have told and summarized briefly here, law brings this new terrain into being, announces it as an already established thing, and thus produces it as the ultimate source and authority of colonial sovereignty—its divine right. A genealogy of “the economy” as the making of a sovereign *logos* therefore problematizes the “economic functionality of power” that Foucault contests by challenging “the economy” itself as an *a priori* thing. Foucault’s detailed reading of political economy as a discourse of governing is useful here.<sup>57</sup> Classical political economy condenses, in the figuration of the invisible hand (a divine performative, perhaps?) the totality of social and material processes. It is the very

---

<sup>55</sup> For a detailed analysis of the statutes and jurisprudence on markets in late colonial India, see BIRLA, *supra* note 8, at chs. 1–4.

<sup>56</sup> Here, I am drawing attention to the distinction between the emergence of liberal political representation and the re-presentation, or re-staging, of the social as market. For an elaboration, see *Id.* at intro. The distinction between representation (as political proxy) and re-presentation (as staging) is borrowed from Gayatri Spivak’s reading of Marx. See, e.g., GAYATRI SPIVAK, *CRITIQUE OF POSTCOLONIAL REASON: A HISTORY OF THE VANISHING PRESENT* ch. 3 (1999). On the role of this distinction in history writing, see Ritu Birla, *History and the Critique of Postcolonial Reason: Limits, Secret, Value*, 4 *INTERVENTIONS: INT’L J. POSTCOLONIAL STUD.* 175, 175–85 (2001).

<sup>57</sup> See *THE BIRTH OF BIOPOLITICS*, *supra* note 2.

impossibility of governing so totally that requires new technologies of managing bodies and populations.<sup>58</sup> In India, what has been called a “jurisprudence of emergency”<sup>59</sup> working alongside the “despotism of law”<sup>60</sup> institutionalized political economy as discourse of governing, and the market as its sovereign origin-effect, one that legitimized the scripting of a future as economic development and the production of modern subjects as economic subjects.

Butler’s theorizing of performativity, which demands citations of the future by contemplating the production of new forms of community inside/outside law, opens new ways to approach and unpack such totalizing power and its impossibility. In closing, I offer two broad channels for further inquiry. First, to further elaborate the relationship between law and governmentality, it would be worthwhile to pursue a genealogy of the sovereign performatives of law *as* economy. Such a project would link histories of colonial liberalism, as this article has outlined briefly here, with current neoliberal formations. One potent site for analysis in this vein would be the buttressing of the “free marketplace of ideas” and the personhood of the corporation, recently enforced, for example, in the United States Supreme Court decision in *Citizens United v. Federal Election Commission*.<sup>61</sup> A case much discussed in the popular press, it considered whether United States federal campaign laws applied to a film about a political candidate (Senator Hilary Rodham Clinton), a question that the court investigated as a question about the constitutionality of limiting the spending of corporations during elections. The final ruling and majority opinions emphasized the long-established legal personhood of the corporation over and against other key precedents, particularly the 1990 decision in *Austin v. Michigan Chamber of*

---

<sup>58</sup> For a discussion of Adam Smith’s invisible hand, see THE BIRTH OF BIOPOLITICS, *supra* note 2, at ch. 11.

<sup>59</sup> NASSER HUSSAIN, THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW (2003).

<sup>60</sup> RADHIKA SINGHA, A “DESPOTISM OF LAW”: BRITISH CRIMINAL JUSTICE AND PUBLIC AUTHORITY IN BRITISH INDIA 1772–1837 (1998).

<sup>61</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 50 (2010).

*Commerce*, which restricted the power of “huge corporate treasuries” to “influence unfairly election outcomes.”<sup>62</sup> *Citizens United* thus gave the corporation new life, coding the corporation as a kind of citizen and emphasizing its right to free speech. It affirmed the corporation’s right to speech by overruling earlier decisions that had limited corporate electoral spending and had emphasized that such limitations, while possibly burdening “the exercise of political expression,” were justified in their prevention of state corruption.<sup>63</sup>

Equally as significant, *Citizens United* also confirmed the collapse of speech with financing or funding: corporations’ (profit or non-profit) use of their coffers to fund the communication of political opinions is equivalent to speech. This collapse of speech and finance, a version of the overdetermination of speech and conduct that Butler masterfully deconstructs, demands that we bring Butler’s attention to the slippages across law as *logos* (as performative speech and as systematized logic, especially market logic) and *nomos* (as the range of conducts that constitute convention) to new contexts. If, as *Excitable Speech* so persuasively argues in the case of hate speech, the collapse of speech and conduct enforces the power of the state and its legal economy, this merging of speech and finance enforces the authority of the market as model for all social relations and communication.

Stepping outside the logic of the law and its labyrinths of precedent, a performative analysis of law’s fortification of market sovereignty foregrounds the temporalities, spatialities, and indeed virtual realities produced by law and legal fictions. For example, a history of the legal “personality” of the corporation—which is a global history—would have to elaborate on the multifarious conventions of sociality and subjectivities that are overridden by its legal template.

As I have argued, in the frenzy of legal rationalization that marked late colonial India, the introduction of the public limited liability corporation sought to not only to modernize kinship-

---

<sup>62</sup> *Austin v. Mich. Chamber of Com.*, 494 U.S. 652, 669 (Brennan, J., concurring) (1990).

<sup>63</sup> *Citizens United*, 558 U.S. at 50.

based forms of commercial practice, but also to produce a template for contract-based civic association more broadly.<sup>64</sup> In a world without citizenship, it was the law on economic matters that sought to institute Henry Maine's famed transition from "status to contract" that structured the civilizing mission of legal modernizers.<sup>65</sup> Indeed, the question of the history of corporate or "group life" drew great attention from influential legal theorists such as Henry Maine and F.W. Maitland (and among many other influential social thinkers, most obviously Max Weber) throughout the late nineteenth and early twentieth centuries, a telling sign that legal modernity had already begun to rewrite and standardize a wide range of informal group socialities.<sup>66</sup> Moreover, the limited liability corporation is a virtual body whose history and legal fortification arguably corresponds with what Butler calls the "de-subjection" of the body of bare life: Legal fictions like the corporation flourish as political subjects are managed as subjected bodies, rather than addressed as citizens with abstract rights.<sup>67</sup>

Finally, a second broad path for further inquiry would supplement the analysis of the sovereign performatives of law as market *logos* by engaging critically with the concept of law as *nomos* to elaborate the range of conventions and practices of sociality, the performative sites and citations of kinship, ephemeral or otherwise, that challenge the market's monopoly on defining the space and contours of the social. This would be one way to recognize that "radical making" of subjectivities "formed in and against the historical hegemony of the juridical

---

<sup>64</sup> BIRLA, *supra* note 8, at ch. 1.

<sup>65</sup> See HENRY MAINE, *ANCIENT LAW* (Oxford Univ. Press 1931) (1861).

<sup>66</sup> See, e.g., FREDERICK WILLIAM MAITLAND, *STATE, TRUST AND CORPORATION* (David Runciman Magnus Ryan eds., 2003); MAINE, *supra* note 65; MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETATIVE SOCIOLOGY* (Ephraim Fischhoff et al. trans., Guenther Roth Claus Wittich eds., Univ. of Cal. Press 1978) (1946). For my reading of these themes, and an elaboration of the project of analyzing law as economy see Ritu Birla, *Law as Economy: Convention, Corporation, Currency*, 1 U.C. IRVINE L. REV. 3 (forthcoming).

<sup>67</sup> PRECARIOUS LIFE, *supra* note 5, at 98.

subject.”<sup>68</sup> As a concept that plays with the possibilities of iteration, performativity works differently than discourses of “resistance” or “collaboration,” which can presuppose and so reinscribe the governing logic of the market. Attending to the politics of the performative in this way would contest the legal systematizing of the social as market by drawing attention to the vast range of context-making practices that challenge and reconfigure the dominance of its public/private logic, evinced today in the resurgence of discourses celebrating marriage. This would be a call to think the slipperiness of conventions and conducts, the ever-shifting forms of situated agency, as a supplement to the abstract definitions of group life that have been established by legal systems, definitions of the “family,” “corporation,” and “association.” The abundance and extended range of networks of kinship and care—fictive and biological—that make social contexts and exceed models of reproductive heteronormativity might then understood not just as legal challenges, but as reinventions of law.<sup>69</sup> Remembering Butler’s robust reading of kinship and performativity in *Antigone’s Claim*, we might then ask, what “conditions of intelligibility,” what “rearticulations of kinship,” that is, what expressions of the “very webs of relations that make our lives possible,” would challenge the monopolistic coding of society as a market of self-interested actors?<sup>70</sup>

---

<sup>68</sup> THE PSYCHIC LIFE OF POWER, *supra* note 38, at 100–01.

<sup>69</sup> The conventions of kinship among migrants, the elderly, unmarried, homosexual, transgender persons, and the childless reflect the range of such socialities.

<sup>70</sup> JUDITH BUTLER, *ANTIGONE’S CLAIM: KINSHIP BETWEEN LIFE AND DEATH* 24 (2000).