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The Exercise of Jurisdiction and the Absent Author of Law's Speech

Although it is not uncommon for a court to consider the question of whether an authority (or which authority) may possess 'jurisdiction' (over a matter, a space, persons, etc.) it is less common for a court to enquire as to what jurisdiction means in the first place. This paper considers what we may mean by the idea that 'jurisdiction' has been exercised, both for the purposes of providing a tool in identifying and critically engaging with its performance, but also as a lens through which to consider the production of legal authority. In bringing philosophy of language and literary theory to bear on the question, it is proposed that jurisdiction is the performance/speaking of law in which the audience/addressee is pre-supposed as subject to that law in a process that is productive of legal authority.

Keywords: Jurisdiction; Legal Theory; Speech Act Theory; Performativity; Literary Theory; John L. Austin; ECHR

Although it is not uncommon for a court to consider the question of whether an authority (or which authority) may possess 'jurisdiction' (over a matter, a space, persons, etc.) it is less common for a court to enquire as to what jurisdiction means in the first place. In this regard, *Al Skeini*¹ was an exception to the norm. The case concerned whether or not Iraqi civilians in occupied Basra had rights under the European Convention on Human Rights (the Convention) against the United

Kingdom (UK) in relation to the actions of UK troops. The central legal question was whether or not the civilians were within the jurisdiction of the UK at the time the alleged offences occurred. If they were then they would possess rights under the Convention against the UK as a signatory to the Convention. In the process of considering the case, the courts moved from an essentially territorial notion of jurisdiction to one that emphasised the relationship between those in a position of authority and those subjected to that authority. Thus, rather than considering a dispute over whether the UK *ought* to have jurisdiction, the question concerned *whether* jurisdiction was exercised.

An instinct to resist ‘recognising’ or ‘acknowledging’ an exercise of jurisdiction is understandable where jurisdiction is equated with an (abstract and normative) obligation or duty on those subject to it. Certainly those asserting a position of legal authority may presuppose precisely this. Where a jurisdictional competence is not perceived as justified (whether this be in the context of international norms, competing jurisdictional claims, or other normative criteria, for example) there is an appeal to rejecting that jurisdiction is in effect at all. This may explain, for example, the House of Lord’s embrace of the Secretary of State’s claim in *Al Skeini* that to recognize a jurisdictional relationship between UK troops and Iraqi civilians so as to provide them rights under the Human Rights Act 1998 would amount to ‘human rights imperialism’.² The irony of the state that is “bountiful with military imperialism but bashful of the stigma of human rights imperialism”³ brings us to the heart of an important distinction: the distinction between the exercise of a kind of power and whether we consider that exercise legitimate or right.

In its most basic definition the term ‘jurisdiction’ refers to a legal power or capacity. But such definitions seldom capture the varied and sometimes opaque ways in which a concept occupies our world (nor do they do the work of excavating the possibilities and implications of a living concept). In this paper I seek to say something about the form and features of this ‘kind of power’, and more specifically its exercise in relation to those considered subject to it. *Juris-diction*⁴ (law’s speech) is theorized here as a legal performance in which the addressee of law’s speech is pre-supposed as subject to it, and in which the authority of the performance is derived from an (absent) authorial force conceived of as ‘law’. When the police hails or a judge gives a verdict (for example) they act not just as individuals: These actors who give the law its voice defer, or attribute, the source of the ‘force’ of their actions as coming from the law and pre-suppose the addressees of that performance as subject to it.

This theorization can be seen as broadly fitting within an academic discourse that considers the productive power of legal performances. Unlike critical legal scholars such as Daniel Matthews or Costas Douzinas, however, in looking at the way in which jurisdiction constitutes (its own) legal authority I focus on the relation between the legal performance and law as its authorial source rather than the relation between law’s force and narratives of legitimacy (such as reference to a sovereign source founding and providing legitimacy to the law).⁵ By focusing the view more narrowly on the relationship between the legal performance and law as the author and authorizing force of the performance (rather than a mythical constituting ‘we’ for example) it provides an alternate (although not mutually exclusive) means of considering the production of authority. Importantly, it also provides a mechanism for

examining and identifying instances where the exercise of jurisdiction is divorced from such narratives – as may be the case in a military occupation.

Similarly, the theoretical engagement with law as performance has commonalities with Elena Loizidou's work on law and performativity⁶ and Marianne Constable's work on law and speech act theory⁷ – however, there is, again, a marked difference in focus. Where both the above scholars emphasise the responsive and open nature of law, and in particular the capacity of various 'performers' (not just those who claim jurisdictional competence) to engage and transform law, the work here is instead focused on the relationship between those whose actions are considered 'authored' and 'authorised' by law and those considered addressees of these performances and 'subject to' law. In other words, the focus concerns those who present themselves as possessing the power of law in relation to those who are subject to that power in a jurisdictional relationship.

In the first section of the paper, contemporary engagements with the idea of jurisdiction as a productive power is considered so as to situation both the question of jurisdiction within the literature as well as what my own contribution brings to this conversation. The second section begins the substantive engagement with the question of what we mean by 'jurisdiction' and how we might identify its exercise. This is considered through an examination of how 'speaking the law' presupposes the subjectivity of the addressee and how this, in turn, is constitutive of legal authority. Drawing from John L. Austin's speech-act theory (with reflection on Louis Althusser conception of interpolation), *juris-diction* is explored with an emphasis on the materiality of the primary performative. The third part of the paper considers a further dimension to the constitution of authority in the legal performance, this time the

relationship between an ‘author’ and a performance. Looking to literary theory, the way in which law is both absent as an authorial source at the same time as providing ‘authorisation’ for a particular performance that is proposed as constitutive of legal authority. Where the second section looks at the presuppositions in relation to the addressee of *juris-diction*, the third section looks at the presuppositions of the authorial force of the law.

The fourth part of the paper considers the above theoretical investigation in relation to *Al Skeini* to demonstrate the ways in which we might identify the exercise of jurisdiction (with a notable absence of associated narratives of legitimacy) but also to indicate why the question is important. In practical terms, identifying an exercise of jurisdiction in the case significantly expands the United Kingdom’s accountability for its actions extra-territorially under a regional human rights treaty (and through the HRA, under domestic law). However, considering the nature of the power exercised against civilians in *Al Skeini* this question also draws our attention to the nature of authority and the legal form. In considering what it means to exercise jurisdiction we examine characteristics of a particular performance of power.

The Question of Jurisdiction

A rich tradition of theoretical (and ‘critical’) scholarship has emerged in recent years that orients itself around the question of what jurisdiction is, how it functions, and what this might tell us about the legal form. This work can be described as clustering around three key themes. The first carries forward a tradition in critical legal thought that interrogates the ways in which law produces categories of being and forms of

relationship;⁸ the second is the way in which jurisdiction is productive of legal authority in a more general sense; and the third is the opportunity an enquiry into jurisdiction provides for critical interventions that challenge the nature of that authority.

Within this first category, Richard Ford has considered ways in which space is constituted by jurisdictions. He argues that territorial jurisdiction is a foundational technology of political liberalism and the modern state, highlighting the ways in which “territorial identification encourages particular types of political and personal intersubjectivity while discouraging others.”⁹ Shaunnagh Dorsett has similarly taken up the question of the jurisdictional mapping of space to argue that the cartographic method (graticulation) used in the shift from status-based to territorial-based jurisdiction in Australia rendered “indigenous understandings of country incommensurable with the legal doctrine of native title.”¹⁰ This productive capacity of jurisdiction is further considered by others in terms of space and bodies,¹¹ what becomes excluded from the ‘legitimate’ register of jurisdictional reach,¹² or what is enabled juristically through differing categories of legal personality.¹³ Dorsett and McVeigh have identified some of this work with an understanding of jurisdiction as the exercise of a technology that can be creatively and critically engaged: “An exercise in jurisdiction is always an exercise of a technology, or an assemblage of devices, that authorises law, and in a general sense institutes a life – or at least a life before the law.”¹⁴ The ‘technical’ interpretation of jurisdiction allows the jurist the opportunity to engage ‘creatively within its medium’¹⁵ and for some scholars provides a method of critical scholarship that gets stuck in with the practices of law rather than theorising in the abstract. But whether it is a metaphysical enquiry or an immanent

one, the critical potential of theorising jurisdiction derives from exposing its productive relationship not just to law's particular categories, subjects and objects, but also to law's authority.

In *A Power to do Justice*, Bradin Cormack explores discourses on common law jurisdiction through literature. In looking to the ways in which literature is part of the “technical production of the legal order”¹⁶ Cormack seeks to investigate how legal ideology emerges “as the artefact of technical practice”.¹⁷ Jurisdiction is theorised as “an inherent, grounding instability within the configuration of juridical authority” where “the literary investigation of juridical normativity fits itself into this instability, and this haunting.”¹⁸ In emphasising the broader question of how ‘jurisdiction’, or the expression of a legal power over its subjects, is involved with the production of legal norms, Cormack ultimately makes a link with jurisdictional practice and sovereignty:

[J]urisdiction is the principle, integral to the structure of law, through which the law, as an expression of its orders and limits, projects an authority that, whatever its origin, needs functionally no other ground. . . [it] cannot be fully described within the juridical conception of power it describes.¹⁹

By exposing ways in which legal authority is produced through jurisdictional discourse, Cormack also seeks to show its contestable nature.²⁰ The contestable nature of jurisdiction is further considered by Daniel Matthews when he introduces the concept of ‘juris-writing’ as a practice (of legal fiction-making) that uses jurisdiction’s instability to create opportunities for critical intervention. For Matthews, this instability is discovered by challenging the myths of an originary sociability that founds the common law by re-thinking that sociability through Jean

Luc Nancy's ontological concept of 'being-with'. Unlike an understanding of sociability that provides for a stable foundation from which law can be declared, 'being-with' involves an inoperability of community that disrupts the perceived stability of such a foundation. As all law involves a process of fiction-making, juris-writing is conceived as that creative and critical practice that challenges jurisdiction's current fictions for new or alternate ones.

In various ways each of the above scholars consider jurisdiction as an activity that is productive: productive of categories (of subjects, beings, relationships, spaces, etc.) but also productive of legal authority, and it is at the limits of jurisdiction that the law reflects on (and asserts) its own powers. When a court considers, for example, whether a matter is 'within its jurisdiction' (and what characteristics must be identified in the process to make this decision) they are contemplating not only the appropriate exercise of their power but are also producing a power, the power to decide the question in the first place.²¹ Perhaps more fundamentally jurisdiction can be thought in terms of the law speaking itself into existence, and for Matthews, this is precisely the point at which we can illuminate its unstable foundation for critical and creative intervention.²²

The analysis of jurisdiction offered in this paper affirms the productive power of *juris-diction* as a legal performance, but proposes a particular thesis on the form and features of this performance that also involves an account of *how* this is productive of legal authority. Thus, where Cormack, for example, described the jurisdictional performance as projecting 'an authority that, whatever its origin, needs functionally no other ground,' I have sought to both elucidate a theory of how this occurs and how we might identify its exercise.

Speaking the Law

The illocutionary speech act

In *How do to Things with Words*, a series of lectures given in 1955 and published as a book posthumously, John Austin challenged the idea (popular at the time) that for a statement to be meaningful it must be verifiable.²³ He did this by initially suggesting that we might distinguish between statements that are ‘performative’ and statements that are ‘constative’. Where constatives are statements of fact that can be described as either true or false, performatives are statements that do something rather than describe something, an exemplar of which is the statement ‘I promise’. Rather than being verifiable, Austin suggests that performatives can be described as either happy or unhappy. A happy performative statement would be, for example, one that is successful in its utterance as well as made in good faith. An unhappy performative may be unsuccessful (i.e. ‘misfires’) or may be unhappy because the person making the statement lacks the intention to follow through (which Austin describes as an ‘abuse’).²⁴ A promise made without the intention to follow through (an ‘abuse’) would be unhappy according to Austin’s schema, although it would still have been successfully achieved – the promise would have been made.

Ultimately, by the end of the lecture series Austin abandons the strict dichotomy between performatives and constatives since ultimately ‘all speaking is to act’.²⁵ In exploring the originally proposed distinction, however, he suggests new sets of categories to describe different ways in which we do things when we speak. Firstly, he proposes that we can think of the act of speaking according to three key

types. The first is a locutionary act: an act of speech which has both sense and reference - that is to say that the speech act is not just comprised of meaningless sounds, or sounds which 'sound like words' yet have no meaning. The second is an illocutionary act: an act of speech that is a locutionary act, but which also has a specific kind of force, or, which 'takes effect'. The final category he proposes is perlocutionary acts, precisely those acts that have an effect rather than 'take effect'.²⁶ The illocutionary act is the kind of action 'done' when speaking that is of interest to Austin, and, with which he associates the kind of action he had in mind when talking about 'performatives'. Unlike perlocutionary acts which identify those speech acts that may result in certain types of consequences (such as upsetting, reassuring, or educating someone as a result of the speech act), the 'taking effect' of an illocutionary act brings about "[T]he understanding of the meaning and force of the locution. So the performance of an illocutionary act involves the securing of uptake."²⁷ This 'uptake' indicates the specific social nature of the speech act. It is not 'just' a statement, but it is a statement with a shared understanding of social implications.

Uptake

A promise is thus an example of a statement with a shared understanding of social implications. Even where a promise is made in bad faith and broken, its illocutionary power remains fully intact. In fact the very abuse of the promise indicates the power of the force. A promise has been made, and the person who has made it in bad faith precisely relies upon the shared understanding of the meaning of the promise despite the intention not to follow through. Here, 'uptake' has occurred because regardless of the actual intention of those involved, or the outcome, a 'promise' was made.

Austin's further discussion of uptake, however, indicates that the concept as he uses it encompasses much broader phenomena than a meaning provided to certain utterances as having a shared understanding of social implications. It is in relation to this broader approach that I suggest a departure from Austin's work by further distinguishing between the kinds of social phenomena that he is referring to when he describes this 'uptake'. What I wish to draw out specifically is the way in which illocutionary force of legal speech does not have to rely upon the kind of uptake that involves the acceptance of a subjective notion of obligation on the part of the addressee/hearer which Austin associates with utterances such as 'commands'. This falls under one of the requirements Austin deems necessary for a speech act to have illocutionary force, which is that: "*There must exist an accepted conventional procedure having a certain conventional effect, the procedure to include the uttering of certain words by certain persons in certain circumstances.*"²⁸

The act of ordering (in the sense of commanding someone) is instructive of the kind of uptake where Austin has presented subjective 'acceptance' as required for the speech act to have illocutionary force. According to Austin, an order is not just any command but is ". . . an order only when the subject of the verb is a 'commander' or an 'authority'."²⁹ For the illocutionary act to take effect the authority or power of the person to complete those acts must also be accepted. This is not simply a recognition of socially established roles and practices for Austin, but involves a subjective acceptance of obligation in relation to that power. This also means that the order can be rejected and *cease to function as an order* if that subjective acceptance is missing. This would be the case even where convention or previous acceptance would appear to establish the authority of the procedure:

[F]or a procedure to be accepted involves more than for it merely to be the case that it is in fact generally used, even actually by the persons now concerned; and that it must remain in principle open for anyone to reject any procedure – or code of procedures – even one that he has already hitherto accepted³⁰

Much like Herbert Hart's concept of the Rule of Recognition, in which to recognise law as being law is to accept it as having a certain kind of obligatory power³¹, it appears that the 'order' for Austin can only be counted 'as an order' if it is accepted as such by the recipient. In this case the illocutionary act is more than the performance of an utterance in accordance with the relevant conventions that give the performance (or action) its generally accepted meaning as 'having done something' (in a social sense). Its meaning also incorporates the success of that act in relation to a particular type of (individual subjective) response to the performance. And it is this characterisation, if applied to legal performances, that I suggest caution is required. I would also add a caveat here: Austin's distinctions and categories in *How to do Things with Words* have a very explorative rather than determinative quality. Austin often comments on the imperfection and fluidity of the categories he proposes. Precisely in this spirit I would argue that in relation to legal performances the illocutionary force is not derived from individual acceptance, but rather a context of a shared social understanding of certain types of actions having taken place as a result of certain performances.

Thus, in the process of drawing from Austin's work to explore what jurisdiction as a performance (and a kind of speaking of the law) might involve I would want to make a distinction that Austin himself doesn't in terms of his notion of

uptake. For reasons that will be further elucidated as the paper progresses, I want to bracket the question of whether that uptake involves an ‘acceptance’ that suggests a subjective sense of (normative) obligation to comply, and instead focus on the nature of the performance that is understood as ‘doing’ something in a social sense. An addressee of a legal command, for example, may not recognise the law as legitimate - nor even recognise the command as conforming to their understanding of ‘law’ – but within a particular context it may still be understood as a type of illocutionary speech act (a ‘legal’ one) that carries with it certain kinds of consequences, regardless of whether the addressee accepts an ‘obligation’ in relation to it.

The example of an arrest is illustrative. An arrestee may have no sense of subjective obligation to the law. She³² might resist arrest or she might comply to avoid the potential violence that could occur as the result of resistance. It is likely that she recognises the established social implications of an ‘arrest’ as having been made. But regardless of how the individual subjectively experiences the arrest, it would still generally make sense to speak of her as having been successfully ‘arrested’ provided the correct procedures were followed by law enforcement. This sense derives from those whose legal performances are considered authored/authorised by law. Whether the arrest is considered successfully made might depend (for example) on whether a court judgement considered the arrest to have conformed to the relevant legal requirements. Without denying the agency of the hearer of the speech-act or the subject of language in their participation (and transformation) of phenomena we might generally characterise as legal performances³³ the idea of *juris-diction* also captures those instances where the *acceptance* (or any other particular subjective response) of the individual in receipt of the address may be absent.

Primary performatives

In the above section, the illocutionary speech act (associated with specific conventions and shared understanding of social implications) was introduced as an initial approach to thinking about the ways in which law is spoken or ‘performed’. However, it is actually what Austin describes as a ‘primitive’ or ‘primary’ performative that I would propose provides greater insight into both what it means to exercise jurisdiction and how that exercise is constitutive of legal authority.

‘Go get the wood, George’ would be described by grammaticians as a sentence in the imperative mood. This means nothing more than a way of looking at a sentence and trying to capture a kind of sense in which it was uttered. In this case, the sense, or ‘mood’ is such that we would say someone is telling someone to do something, someone is ‘commanding.’ In this assessment, there are no assumptions about why George should or should not get the wood. There is no assumption that the person making the statement has any particular position or ‘right’ to ‘command’. To say the statement is of the imperative mood simply describes something basic about the nature of the utterance itself. Austin picks up on this simplicity when he considers what he describes as a primary utterance. Unlike an explicit performative such as ‘I order you to get the wood,’ Austin introduces the primary performative to demonstrate the difficulty in his previous formulation that conventions are essential to giving force to a performative. While Austin’s interest in this discussion is to develop a way of advancing the position that his original performative/constative distinction

ultimately fails as a dichotomy, it provides a useful point of engagement for the presuppositions at work in certain kinds of illocutionary acts.

The primary performative (which is used interchangeable with the 'primitive performative' later in *How to do things with Words*) is described as a necessary precursor to the explicit performative in evolutionary terms:

The explicit performative must be a later development than certain more primary utterances, many of which at least are already implicit performatives . . . [primary performatives] will not make explicit the precise force of the utterance. . . but sophistication and development of social forms and procedures will necessitate clarification. But note that this clarification is as much a creative act as a discovery or description!³⁴

The explicit performative is the result of a (creative process) that moves from statements like 'Get the wood, George,' to 'I order you to get me the wood.' Of course many orders do not preface their command with 'I order.' We might even say that orders that are not in the least ambiguous are not explicit in the sense that there are already established norms (conventions) which communicate the meaning of an 'order' even without the explicit element of stating the nature of the performance as part of the illocutionary act.) The implicit performative, according to Austin, often involves some kind of statement of fact (and thus troubles the performative/constative distinction). When Austin discusses how performatives imply truth statements, he generally refers to those statements that imply something about the intention of the speaker. So to say that 'the cat sleeps on the mat' implies that the speaker of the statement believes this to be true (this would of course depend

upon the context in which it is spoken.) But, in comparing explicit versus implied performatives, I would argue we could take a broader approach to the concept of ‘implied’ to include presuppositions.

Presuppositions are powerful things.³⁵ They can introduce into communicative practice assumptions (of ‘fact’) that are not made explicit and so are not put forward by the speaker as a proposition to be contested. If we consider a primary performative, such as ‘get me the wood,’ this could imply a request or a threat - or, the utterance might be interpreted as presupposing that the person making the statement can expect the recipient to comply leaving the ‘why’ ambiguous. Rather than beginning from a notion that the person performing the illocutionary act has the authority to do so, the very performance of the act itself appears to presuppose an authority that may eventually constitute a relationship where such an authority is accepted. A useful example of how this process may work is Luis Althusser’s theory of ‘interpellation’.

In *Ideology and Ideological State Apparatuses*, Althusser sought to challenge and expand the notion of the State Apparatus (as introduced by Marx and conceived of as ‘Repressive’ or coercive) by theorising how ideology functions in the reproduction of relations of production through ‘Ideological State Apparatuses’ (ISAs). Unlike previous theorisations of ideology, Althusser argued that ‘What is represented in ideology is . . . not the system of the real relations which govern the existence of individuals, but the imaginary relation of those individuals to the real relations in which they live.’³⁶ Ideology in this sense concerns our understandings, perception, or ‘representation of ourselves in relation to the world’. Althusser further argued that this is not just an issue of having certain ideas (about ourselves in relation

to the world) but that ideology has a material form. It has a ‘material reality’ in the sense that the individuals in question behave in certain ways and participate in certain practices as a result of the function of ideology.³⁷

Ideology functions because the individual understands herself to be a subject in the sense that she is the author of her own thoughts and free as the agent of her own practices. This is not a representation about the nature of reality, but about an individual’s relationship to that reality. Althusser further describes this as material in the sense that this self-understanding then informs actions – actions that are ‘inserted into material practices’. At the same time, it is these very material practices that shape and form the individual as a ‘subject’. Ideology, according to Althusser, is made possible by the category of the subject and this, in turn, brings him to his central thesis: that ‘Ideology interpolates subjects.’³⁸ Famously, Althusser described this process of interpellation through the example of the hail of the police:

I shall then suggest that ideology . . . ‘transforms’ the individuals into subjects (it transforms them all) by that very precise operation which I have called interpellation or hailing, and which can be imagined along the lines of the most commonplace everyday police (or other) hailing: ‘Hey, you there!’ . . .

Assuming that the theoretical scene I have imagined takes place in the street, the hailed individual will turn round. By this mere one-hundred-and-eighty-degree physical conversion, he becomes a subject. *Why? Because he has recognized that the hail was ‘really’ addressed to him, and that ‘it was really him who was hailed’ (and not someone else).* . . .³⁹

The individual in the street is addressed by the officer and is 'hailed' in such a way that the individual understands herself to be addressed by the hail. In this simple process the subject recognises herself as the addressee in a speech act that includes significant presuppositions about a power relationship between the addressor and the addressee. It is not that the individual chooses to accept the presuppositions in the address; they respond by recognising themselves as the addressee and are thus 'constituted' as a certain kind of subject. However, this conceptualisation of the hail is not necessarily fully faithful to Althusser's analysis. Although Althusser describes all State Apparatuses as having an ideological component, the police (along with the courts and the executive) are theorised as primarily 'repressive' in nature. More significantly, it suggests a reading of 'the hail' that is not focused on Althusser's own primary point about the process of interpellation in which the subject understands herself in relation to her own agency.⁴⁰ Rather than the hail of the police (so often quoted) it is Althusser's description of religion that gives us a better sense of what he means by this.

'Kneel down, move your lips in prayer, and you shall believe' Althusser paraphrases from Pascal. Instead of beginning from beliefs that inform a practice, we return to the *materiality* of practice that constitutes the subjects as endowed with a consciousness that has 'ideas' in conformity with which she acts. These ideas are perceived as 'freely chosen,' as are the actions that are practised in conformity with them. By considering the effects of the materiality of the way in which law is 'spoken' it not only moves us away from Austin's notion that for language to have illocutionary force means that the recipient of the utterance in question consciously

accepts/agrees it: It is not that the legal ‘subject’ must consider herself bound to ‘law’ nor even the claim that the address is in fact lawful, but it is to recognise herself as addressed by a form of speech which pre-supposes her subjectivity. This marks an important difference from the early Anglo-analytic jurisprudence of John Austin⁴¹ or Herbert Hart, for example, in which the experience of law would involve either a conscious decision to avoid ‘evil consequences’ (Austin)⁴² or some implicit ‘acceptance’ that includes an accepted ‘obligatory’ force in law (Hart).⁴³ The idea of interpellation introduces into the discussion the ways in which the simplest ‘hail’ can have force and consequence, and in particular, the way in which relations of power might be constituted from them.

It might be objected that material practices such as prayer, or the hail of the police, are examples that involve pre-existing conventions and norms. If this is the case than interpolation might be a poor fit for thinking through how primary performances may ‘take effect’ . However, the primary performative as considered here should not be taken as something that is conceived as outside, or prior to, the social world. It is, perhaps, beyond the scope of this paper to fully imagine (or propose) examples of the various states of development of norms or conventions (or institutions or apparatuses) and how material practices play a role in constituting these at different specific stages of their ‘establishment’ . Instead I would propose the primary performative as a means if thinking about the emergence and development of norms or conventions – specifically to highlight the power of presuppositions within the speech act (whether that be in relation to the emergence of norms, their on-going forms of affirmation, or their transformation). In considering interpolation in relation to the primary performative, I wish to draw upon the way in which interpolation then

gives us a lens through which to contemplate the materiality of how pre-suppositions in language are performed and how this performance can be constitutive of relationships (in this instance the distinction between the addressor and the addressee of law).

However, where interpolation is concerned with (and advances) a specific way in which the subject internalises (and thus is constituted) by these material practices, it is the form of the legal expression itself (rather than the specifics of how it is received) that I want to explore here. Individuals may receive legal performances in different ways. It may be that a subject experiencing the legal address is obedient to law and feels this to be freely chosen as a result of what Althusser describes as the ‘duplicate mirror of ideology’ and (or) she may feel compelled by law (or not) due to notions legitimacy or morality. The subject experiencing the legal address might also feel compelled (or not) by law because of the very real coercive threats backing the legal form (for example). But, whatever the specificity of how the legal address is received individually, I would argue that what is common to *the way* law is spoken (as an exercise of *juris-diction*) is the presupposition that the addressee of law’s speech is subject to that law. This presupposition is indicated not by an explicit justification (or threat) to give this obligation force in a way that seeks to persuade⁴⁴ or compel. Rather, the subjectivity of the addressee is presupposed as a fact by the form of the legal performance and thus the ‘authority’ of *juris-diction* is constituted in its very expression.

The Absent Author of Law’s Speech

While the primary performative provides a way of thinking about the presuppositions involved in the legal address, there is another dimension to the jurisdictional relationship that I propose is constitutive of the authority of the legal form. When the police hails (a subject/addressee of the law), or when the judge decides a case or passes down a sentence, they not only presuppose the power to do so, but the power exercised is always derivative from something/somewhere else. For legal critical legal scholars such as Costas Douzinas or Daniel Matthews, this ‘somewhere else’ is a mythical referent external to law that provides it with legitimacy.

Matthews’ reference point is the early common law tradition that looks to myths of originary sociability to ‘found’ its authority and to thus speak the law. The creative paradox is that those who refer to this fiction as an external referent authorising their legal declaration are in fact creating the referent in their activity of referring to it. It is this ‘circular logic’ that is central to the way in which jurisdiction is thought as productive of legal authority more generally.⁴⁵

In *The metaphysics of jurisdiction* Costas Douzinas also draws attention to the ‘presupposition’ of a mythical past that is brought into existence through a legal declaration and notes a lack of distinction between two types of speakers that are invoked in the concept of jurisdiction. In the context of a constitutional moment such as an assembly declaring law (as opposed to the application of law) the ‘author’ of law is the assembly, yet the fictional narrator (that which provides the inaugural moment legitimacy) is ‘God’, ‘humanity’, or ‘the people’, for example. The function of jurisdiction, he argues, is to “bring the sovereign to life and give him a voice and then, by confusing the person who speaks and the subject who states, to conceal

sovereignty by confounding its creative, performative aspect with the declaration of the law . . .”⁴⁶

It is attentiveness to this distinction between author (the particular constitutional assembly, for example) and speaker (reference to a non-particular source of legal authority such as ‘the people’, for example) that exposes the violence of jurisdiction and the opening for critique.⁴⁷ Both Matthews and Douzinas emphasise a source for authority that is presupposed (and created) in the declaratory moment, manifesting as a myth that grounds the authority of law. In drawing attention to the paradox of this productive moment it can be unsettled and challenged. I would argue, however, that the somewhere else does not have to be a ‘something’ external to law. Instead, the derivative sense of the legal performance that is constitutive of authority can be far more local (as it were) and indicate the way in which a legal performance refers simply to law as its authorial (and authorising) source. When judges adjudicate they do so in relation to those persons and matters over which they are said to have jurisdiction. The judge, as a judge, only possesses her authority as a judge so long as that authority is an expression of (and in conformity with) law. Similarly, we may say a police force ‘has jurisdiction’ in relation to specific spaces, specific legal subjects, and certain types of events and actions. This jurisdiction allows them to ‘enforce’ the law – to search persons, apprehend suspects, make arrests, and inflict violence. Their power is authorised by law in the sense that the form of enforcement is legally prescribed, and that which is enforced is the ‘law’. When police actions are not in conformity with the powers prescribed by law, it is said they are acting without jurisdiction – beyond or outside of their powers (*ultra vires*). And, while a legislature creates the law and delineates jurisdictions (such as authorising the enforcement of

law), a legislature can also be said to operate as ‘authorised’ by (constitutional) law. Or, in some cases, as ‘limited’ by international law when its ability to ‘speak the law’ may be curtailed by a lack of recognition that what is being spoken constitutes valid law in the context it is being invoked.⁴⁸

If *juris-diction* is law’s speech, it is in the sense that it is a performance, an act, or some form of expression (including a text), that can be considered as authored by law. To say that such expressions are ‘authored by law’ is also to say something about their relationship to authority. When the police hails or a judge gives a verdict they act not just as individuals. Their actions carry the weight of being expressions of law (when exercised within their powers). These actors who give the law its voice thus defer, or attribute, the source of the ‘force’ of their actions as coming from the law. Even law in textual form involves a reference to an author (the law) that is not directly present (the constitutive moment that produces the text must always be interpreted through its words).⁴⁹ And yet this practice of interpretation is constitutive of the law as it is interpreted and applied. What is also significant about this authorial relation is that the performer is never also the author. The author is always absent and unaccountable.

Roland Barthes’ (in)famous text *The Death of the Author* liberated literary theory from its concern for an ‘authentic’ or ‘correct’ interpretation of the text: an interpretation which claimed its authenticity by divining the intention of the author. The text was perceived as independent of originary intention, something that could be read and interpreted in a plurality of ways.⁵⁰ The law – as an author – is perhaps the example *par excellence* of the author’s absence. Those who make the law, who iterate it even in a performative event such as the passing of an act, are not themselves the

‘law’ – they are those who have performed its inception whilst also being constituted by law as those with the authority to do so. The text, the record of what was said to be law in this moment, is not authored by a legislature so much as the ‘law’ - but there is no intention to the law, no consciousness behind the veil, only its words and the interpretation of those words: ‘It is language which speaks, not the author.’⁵¹

Jacques Derrida in turn argues that from observing the absence of the author (as well as intention, presence and even the referent) in relation to a text we can derive this same absence from language more generally. In *Signature, Event Context*, Derrida argues that the emphasis Austin placed on the role of context in his theory of illocutionary speech acts, along with the idea of an ‘ordinary’ use of language, failed to attend to the iterability of language. This iterability, much like that of the iterability of the text, meant that an utterance could be repeated such that its ‘original meaning’ was lost completely. Rather than signalling a failure of language, the possibility of ‘citation’ and parasitic (non-‘ordinary’ uses of an utterance such as during a play for example) is constitutive of language. The performative speech act, Derrida asserts, is itself a citation. Without repeatability there would be no context dependent illocutionary speech act to begin with, and this constitutive element of repeatability or iterability signals the necessity of a distance between the utterance (or sign) and an original intention or meaning:

Could a performative utterance succeed if its formulation did not repeat a ‘coded’ or iterable utterance, or in other words, if the formula I pronounce in order to open a meeting, launch a ship or a marriage were not identifiable in some way as a ‘citation’? . . . Given that structure of iteration, the intention animating the utterance will never be through and through present to itself and

to its content. The iteration structuring it *a priori* introduces into it a dehistence and a cleft [brissure] which are essential.⁵²

This argument opens toward a much broader one about the nature of language and communication more generally. In Derrida's following exchange with John Searle, and then later with Hans-Georg Gadamer, the very possibility of communication is challenged, or at least communication as Derrida ascribes to these authors: i.e. communication understood as transporting the idea (the signified turned sign) from one consciousness to the other. Iterability, according to Derrida, captures the way in which language is never about pure presence. The distance between the sign and its context means that every sign, every utterance, not only persists in absence of this context (of intention, of code, and of referent), but that language itself is constituted by this iterability: the possibility of grafting the sign and the utterance into new contexts.

As Austin himself was rather silent on such issues, I would argue we can read him with Derrida's insight on the iterability of language. However, I would also argue for a further distinction between an absence of authorial presence in literary theory that applies to language more generally (reading the performance of law as 'language'), and the kind of absence involved in the authorship of jurisdictional speech. The signature – the authorial attempt to own a text – may be forged, may be copied, may never be attributable to an 'individual' as a singular thing or source. (The individual in *limited inc* who signs is never just one.) However we can make certain kinds of distinctions between where authorship of the content of a performance is *attributed* to the being-that-performs and where the being-that-performs attributes authorship elsewhere. This 'elsewhere' in the utterances of those who are performing

law is the law. Their performance is an expression of an author that is absent not just in the sense of Derrida's *brissure* but in the more specific sense where an author is imagined, but always imagined elsewhere, and it is this form of distance that is productive of legal authority.

Authority has been described as a type of political power (the power of a sovereign to compel its subjects, for example); a power that is exercised by right; a power to command; a power to enforce obedience, and *et cetera*,⁵³ but it is perhaps Hannah Arendt's concept of authority that is closest to the way in which authority is considered here. Arendt has argued that authority (as distinct from Tyranny, for example) does not refer to political power (*potestas*) but involves a "force external and superior to its own power" and that "it is always this source, this external force which transcends the political realm, from which authorities derive their 'authority', that is their legitimacy, and against which their power can be checked."⁵⁴ Although Arendt argues that this concept of authority is something lost in the modern world, her emphasis on the implicit hierarchy and the asserted (rather than justified) nature of authority is something that this exploration of jurisdiction develops – albeit in relation to a different 'source' of authority than that identified by Arendt (or Douzinas or Matthews). When law is spoken (or performed) the power of that performance is derivative in the sense that it is authorised by law. Thus, when the judge exercises her jurisdiction in deciding a case, or a police officer exercises her jurisdiction in making an arrest, they are 'performing' law where the force of their performance is derivative as a form of legal expression. Law, the source and authorising force of this performance - which does not have the body or voice to perform itself – remains absent. In considering jurisdictional competence, the source of authorisation itself is

always ‘asserted’ (rather than justified), because jurisdiction precisely *is* law’s speech and performance. In this sense law’s performance (by its actors) is productive of the authority of an (absent) author (the law) because the performance is based on the presupposition of the authorising force of the law to begin with.

Al Skeini and the Addressees of Law’s Speech

When *Al Skeini* was first brought before the domestic courts in the UK the question of whether Iraqi civilians killed by UK soldiers could have their deaths investigated under section 1 of the Human Rights Act 1998 (and thus article 2 of the ECHR) depended on the preliminary question of whether the legislation could be applied at all. The crucial issue to be determined was whether, as per article 1 of the Convention, the Iraqi civilians killed were ‘within the jurisdiction’ of the contracting party (in this case, the UK) when their rights were allegedly breached. The House of Lords finally determined that only Baha Mousa, a man who was tortured and then killed whilst in detention, was within the jurisdiction of the UK at the time of his death. In coming to this decision, the HoL took a view of jurisdiction following a problematic precedent of the ECtHR – *Banković v United Kingdom* (2007) 44 E.H.R.R. SE5. In *Banković*, it was determined that what was meant by the exercise of jurisdiction for the purposes of article 1 of the Convention was essentially territorial, but that there were exceptions either where a member state had ‘effective control of an area’, or, where jurisdiction was legitimately exercised according to norms of international law. This meant that while Baha Mousa was deemed to have been within the jurisdiction of the UK at the time of his death (a military detention unit was

considered a proxy for territorial jurisdiction in an exceptional manner much like an embassy or consulate), Ahmed Jabbar Kareem Ali, a 15 year old boy who had been detained by UK troops under suspicion of looting, and who was brought to a river where he was forced to jump in and subsequently drowned, would not have been. The comparison is striking. Due to the special status of a detention unit, UK troops carrying out a public security role in Basra during its occupation were ‘exercising jurisdiction’ in relation to the death of Baha Mousa, but not in relation to Ahmed Jabbar Kareem Ali.

When the case reached the ECtHR, however, the reasoning for what constituted an ‘exercising jurisdiction’ for the purposes of interpreting article 1 was significantly different. A line of previous case law (not easily reconcilable with *Bankovic*) had emphasised a relation of ‘authority and control’ in the finding of jurisdiction - and it was upon this basis that the court found that instances of extra-territorial jurisdiction could be exceptionally exercised whenever “the state through its agents exercises control and authority over an individual, and thus jurisdiction”.⁵⁵ This was a radical departure from the findings of the UK courts and clearly demarcated within Strasbourg jurisprudence a broad notion of what the exercise of jurisdiction may entail. Significantly, the ‘legitimacy’ of jurisdiction (according to internationally recognized norms) was not considered necessary for the finding of its exercise. It could, as it did in this instance, involve jurisdiction exercised in the capacity of a member state unlawfully occupying another state. Although the occupation was unlawful, the form of power being exercised was not the same as simple military power in relation to enemy combatants. Rather, in taking on duties of public order, there was a relationship in which UK troops exercised ‘authority and

control' over individuals – and it is this relationship in which *authority* was pre-supposed that I would argue is the heart of the question of how to identify the exercise of jurisdiction, and why the ECtHR was able to distinguish the decision in *Al Skeini* from *Banković*.⁵⁶

Thus, *Al Skeini* demonstrates an example of state agents exercising jurisdiction where that exercise of power is unlikely to be conceived of as 'legitimate' according to either international norms, or, even, the standard narratives of popular sovereignty. It was not necessary to determine if the occupation of Basra by UK forces was 'legal' in terms of international law, nor whether the troops effectively controlled the area. Instead, the question was about the nature of the power performed by UK troops in relation to Iraqi civilians. Whether the civilians respected the authority of the troops, or the legitimacy of the 'law', were ultimately separate questions from the nature of the way in which power was being performed. The troops arrested, detained, and killed Iraqi civilians as an expression of their (imposed) legal authority and in that sense were 'performing' jurisdiction. Even when acting *ultra vires* the very nature of the relationship and power exercised was conditioned by their role as a 'public authority'.⁵⁷ What *Al Skeini* also demonstrates is the importance of the question: what do we mean by the exercise of jurisdiction?

UK public authorities have a duty to exercise their powers in conformity with human rights provisions. Acknowledging against whom that power and authority is being exercised regardless of 'where' maintains the UK's accountability to their legal commitments. However, although accountability is both pragmatically and politically important in this context, I would argue that *Al Skeini* also demonstrates another reason for why the question is important. Despite the fairly well received distinction

between law as it is and law as we think it ought to be⁵⁸ there remains a strong temptation to sustain the bonds between narratives of legitimacy and legal authority where the former is conceived as necessary for the later. After all, it may be argued, law is unlikely to function as ‘law’ without some normative force, or, perhaps some form of generalised recognition that there is a duty to obey.⁵⁹ *Al Skeini*, however, shows us instances in which legal authority is unlikely to be recognised by its addressees (those subject to that legal authority) as compelling obligation in anything but a coercive sense. Is this to say that such instances ought not be counted as legal authority? I would suggest quite the contrary, what it does is lay bare the legal form.

When UK troops detained Ahmed Jabbar Kareem Ali before forcing him into the river, the way in which they would have expressed their power (as agents of an occupying state with responsibility for public order) would have been within a system of authorisation. They were not just individuals with guns backed by a coercive threat (although they would be this too) their expression of power as agents of the state was as ‘authorised’ to execute certain kinds of functions by a legal system. Their address to Ahmed Jabbar Kareem Ali would have pre-supposed as a fact that he was subject to that authority - authority given form and expression by their performance. This performance, I would suggest, is thus an exercise of *juris-diction* due to the way in which it is authorised (the always absent authorising force being ‘law’) and the presupposition in its address that the addressee is subject to that authority.

Conclusion

Drawing from a consideration of Austin’s speech-act theory it has been proposed that a feature of jurisdiction is the presupposition that the addressee of the jurisdictional

performance is subject to the law as performed. Even where the recipient of that speech-act (or ‘legal expression’) does not accept the legitimacy of the law, does not feel bound by the law, or resists the legal performance (perhaps rejecting the performance as expressing ‘law’ altogether), in recognising herself as the addressee of the performance that pre-supposes her as a subject to its ‘law’ we may still meaningfully refer to something identifiable as an exercise of *juris-diction* (and, indeed, to a productive power of this performance.) In exploring literary theory it was further advanced that while the distance between any linguistic iteration and its authorial intent could be generally applied to the legal performance, there was a distinct sense in which an absence of authorship applied in *juris-diction* (the speaking of the law). Whether it was the judge, the police, or even the bureaucrat, the actors who give the law its voice defer, or attribute, the force of their expressions as coming from an elsewhere (the law). Not only does the performance presuppose the power of law to ‘authorise’ its performance, the authorising force is never present to account for itself. This paper thus seeks to respond to the question of *what we mean* by the exercise of jurisdiction by giving an account of the jurisdictional performance that allows us to make sense of when it is asserted in a context where markers of legitimacy (usually associated with jurisdictional competence, such as popular sovereignty) may be lacking – an example of which would be an instance of military occupation. This provides a tool in the analysis of jurisdiction with relevance from Strasbourg human rights jurisprudence. It also provides an opportunity to develop our understanding of how authority may be constituted through legal performances.

¹ I am using the name *Al Skeini*, unless otherwise indicated, to refer to a series of cases that began in the divisional court in the UK, and culminated in a case decided by the European Court of Human Rights (ECtHR). The cases considered in UK courts and that considered by

the ECtHR do differ slightly in terms of the test cases included, however, the majority of test cases remain the same as did the legal question of relevance, which was whether the Iraqi civilians killed by UK troops during the occupation of Basra were within the UK's jurisdiction for the purposes of article 1 of the Convention. The cases were: *R (on the application of Al Skeini) v Secretary of State for Defence* [2004] EWHC 2911 (Admin); [2005] EWCA Civ 1609; [2007] UKHL 26; and *Al-Skeini v United Kingdom* (55721/07) [2007] UKHL 26

³ *Al-Skeini v U.K.* (55721/07) (2011) 53 E.H.R.R. 18, at paras O-II37 and O-II38.

⁴ Where 'juris-diction' is written instead of 'jurisdiction' it is to emphasize the theorization offered here of jurisdiction as a kind of legal performance and its association with speaking the law.

⁵ Daniel Matthews, "From Jurisdiction to Juriswriting: At the Expansive Limits of the Law," *Law Culture and the Humanities* 10 no 1 (2014): 17; and Costas Douzinas, "The Metaphysics of Jurisdiction" in *Jurisprudence of Jurisdiction*, ed. Shaun McVeigh (London: Routledge, 2007), 26. Both Matthews and Douzinas emphasise the *mythical* dimension of an external authorising force. This can be contrasted with Kaushal, for example, who argues that jurisdiction is inherently linked to the legitimacy of political community. Asha Kaushal, "The Politics of Jurisdiction," *Modern Law Review* 78 (2015): 759

⁶ Elena Loizidou, *Judith Butler: Ethics, Law, Politics* (London: Routledge, 2007)

⁷ Marianne Constable, *Our Word is Our Bond: how legal speech acts* (Stanford: Stanford Law Books, 2014)

⁸ See, e.g., Peter Gabel, "Reification in legal reasoning," *Research in Law and Sociology* 3, no. 1 (1980): 25-51. (Gabel's work on legal reification is an example of an early account within critical legal thought that provides an abstract account of such a process. Gabel's account draws specifically on the Marxist tradition in Critical Legal Studies).

⁹ Richard T. Ford, "Law's Territory (A History of Jurisdiction)," *Michigan Law Review* 97 (1998-1999): 922

¹⁰ Shaunnagh Dorsett, "Mapping Territories," in *Jurisprudence of Jurisdiction*, ed. Shaun McVeigh (London: Routledge, 2007), 139

¹¹ Leslie Moran, 'Placing jurisdiction,' in *Jurisprudence of Jurisdiction*, ed. Shaun McVeigh (London: Routledge, 2007), 159-180

¹² Stewart Motha, "Guantanamo Bay, abandoned being and the constitution of jurisdiction" in *Jurisprudence of Jurisdiction*, ed. Shaun McVeigh (London: Routledge, 2007), 63 - 83

¹³ Edward Mussawir, *Jurisdiction in Deleuze: The Expressions and Representations of Law* (Oxon: Routledge, 2011).

¹⁴ Shaunnagh Dorsett and Shaun McVeigh, 'Questions of Jurisdiction' in *Jurisprudence of Jurisdiction*, ed. Shaun McVeigh (London: Routledge, 2007), 12.

¹⁵ Mussawir, *Jurisdiction in Deleuze*, 159.

¹⁶ Brandon Cormack, *A Power to do Justice: Jurisdiction, English Literature, and the Rise of Common Law, 1509-1625* (Chicago: The University of Chicago Press, 2007), 12

¹⁷ *Ibid.*, 24.

¹⁸ *Ibid.*, 10.

¹⁹ *Ibid.*, 9.

²⁰ *Ibid.*, 21.

²¹ See for example: Justin B. Richland, "Hopi Tradition as Jurisdiction: On the Potentializing Limits of Hopi Sovereignty," *Law & Social Inquiry* 36 (2011): 201-234; and, Richland, "Jurisdiction: Grounding Law in Language," *Annual Review of Anthropology* 42 (2013): 209-226. Both articles address (in different contexts) the way in which courts, in assessing whether they have jurisdiction over a subject matter, are simultaneously asserting their jurisdiction to decide what their jurisdiction is.

²² Matthews, *From Jurisdiction to Juriswriting*.

²³ John L. Austin, *How to Do Things with Words* (Oxford: Oxford University Press, 1962)

²⁴ An early critical intervention on Austin's categorization of a 'happy' versus 'unhappy' was presented by Derrida in *Signature Event Context*. See Jacques Derrida, *Limited Inc* (Northwestern University Press, 1977). Derrida was concerned both with the way in which 'intention' in actions like a promise could suggest a pure conscious presence. Derrida also objected to Austin's description of parasitic or 'non-serious' utterances which might be taken as denying the iterable nature of language. However, Derrida himself concludes that there could potentially be a kind of typology in which a category of intention, for example, would not disappear, but would 'have its place'. Without delving further I would suggest that the loose and quite exploratory categories of happy versus unhappy, or serious versus non-serious, do not need to be taken as indicative of pure presence in language nor as privileging the serious against the non-serious – but as attempts to describe language being performed in different ways.

²⁵ Austin, *How to do Things With Words*, 91.

²⁶ The distinction between perlocutionary and illocutionary opens itself to many potential critical interventions. One type of speech act appears defined by the nature of the action, while the other is identified by an effect, whether intended or not – yet both are described as types of (distinct) (speech) acts. The lines may be further blurred by the 'uptake' required for an illocutionary speech act to be illocutionary. This suggests, at a minimum, that the hearer of the illocutionary speech act must understand it is a certain kind of way – which could be described as a certain kind of 'effect' (reliant on convention). While some of these issues are discussed in the paper in relation to the role of 'acceptance' and 'interpolation', as with many of the potential issues that arise with a close consideration of Austin's work, a full engagement with speech act theory is not within the scope of this particular paper.

²⁷ Austin, *How to Do Things with Words*, 115.

²⁸ *Ibid.*, 25.

²⁹ *Ibid.*, 28.

³⁰ *Ibid.*, 30.

³¹ H. L. A. Hart, *The Concept of Law* (Oxford University Press, 2012) (1961).

³² Rather than using a gender-neutral pronoun to indicate a generalised singular person, I sometimes use the female pronoun instead. This reflects a conscious decision to challenge those instances where the generalized singular person is (consciously or unconsciously) imagined as 'male'.

³³ On the agency of the hearer and subject of language in the performance of law there has been significant critical engagement with Austin's reliance on 'convention'. Marianne Constable, for example, argues that conventions do not capture the persuasive nature of the relationship between law and language and that a focus on convention 'does not go far enough in recognising the role of the hearer'. Constable, *Our Word is Our Bond*, 13. Here she indicates towards the ways in which 'unconventional speech appeals are made, successfully and unsuccessfully, strategically and sincerely, falsely and felicitously, even when formal law and legal conventions are not, or do not turn out to be, on their side . . .' *Ibid.*, 34. Loizidou similarly takes up the significance of the 'unconventional' in thinking the relationship between law and language. Drawing from Butler's work on performativity, Loizidou recognises the importance of the 'conventional' in terms of subject formation but also emphasises the agency of the subject of language (the being that comes forth through language). It is in this relationship where one is both already immersed in language (named and interpolated in the context of conventions, norms and codes) whilst productive of language that resistance is the 're-signification of the ideality of the norm and an aspiration and a continuous possibility for re-drafting the parameters of the livable.' Loizidou, *Judith Butler*, 155. From this I would draw the intervention that in a broad sense we are all involved in performative language – whether illocutionary, perlocutionary, as speakers and as hearers, in conformity with convention or unconventionally, etcetera.

³⁴ Austin, *How to do Things with Words*, 72.

³⁵ Presuppositions, according to Austin, are those ‘facts’ which are presumed to be true as part of a statement. So, the statement ‘John’s children are all bald’ presumes the fact that John has children.

³⁶ Louis Althusser, “Ideology and Ideological State Apparatuses: Notes towards an Investigation,” in *Lenin and Philosophy and Other Essays*. *Monthly Review Press* (1971)

³⁷ *Ibid.*, 170.

³⁸ *Ibid.*, 171.

³⁹ *Ibid.*, 175. (emphasis added)

⁴⁰ Interpellation, according to Althusser, also constitutes the subject such that they subject themselves and are obedient to ‘. . . God, to their conscience . . . to the boss, to the engineer . . . their concrete, material behaviour is simply the inscription in life of the admirable words of the prayer . . .’ *Id.*, at 182. What this last quote alludes to is the ‘duplicate mirror structure of ideology’ that Althusser proposes explains the specific way in which interpellation happens. I have invoked Althusser’s analysis, however, to slightly different ends. Remaining agnostic on the way in which an individual subject experiences legal performance, I have sought to draw on the significance of the materiality of law’s address, and the significance of recognising oneself as an addressee of that performance.

⁴¹ Note that although previous reference to John Austin has been to the author of *How to do Things with Words*, in this instance I am referring to the distinct John Austin who wrote *The Province of Jurisprudence Determined*.

⁴² John Austin, *The Province of Jurisprudence Determined: And, The Uses of the Study of Jurisprudence* (Indianapolis: Hackett Publishing, 1998) (1832).

⁴³ Hart, *The Concept of Law*, 16.

⁴⁴ The focus on presuppositions that are distinctly *not justified*, marks an important difference between, for example, Constables characterization of law as language in general, and the characterization of *juris-diction* provided here.

⁴⁵ Matthews, *From Jurisdiction to Juriswriting*.

⁴⁶ Douzinas, *The Metaphysics of Jurisdiction*, 26.

⁴⁷ *Ibid.*, 27.

⁴⁸ In Joseph Beale’s formulation, for example, it is international law that defines the limits (and thus ‘borders’) of sovereign power: a formulation which implies that sovereignty itself is firstly a recognition among other ‘sovereigns’ of that sovereignty. Joseph H. Beale, “The Jurisdiction of a Sovereign State,” 36 *Harv. L. Rev.* (1923)

⁴⁹ For example, as the word ‘act’ suggests, we might say that the text is a record of a performative event: the moment and *act* of creation that produces legislation. We could also say that once the event has passed, the only way in which to apply law is by reference to its record: However, this record must then be interpreted by those who would enforce it (the police for example, and ultimately a court). Even in cases in which the court process allows for consideration of the ‘purpose’ of the legislation (by examining relevant documentation that provides a record of discussion and debate around the legislative act) such consultation can only ever refer to another kind of record that informs the interpretation of the court. The event has been completed, the law made, and it is then up to the court to interpret and apply. The legal text, such as a record of an act (whether an online text or an original signed ‘act’ in physical form) takes on a life that is independent of that which created it. As a record it becomes the source of what is ‘the law’ – but by source, it is the information, the data as it were – law that can only be accessed through its record. This data must then be interpreted in its application. Interpretive practices vary widely, from those who still tend toward the more literal (and within this there may be a significant variation between those who tend toward a ‘technical’ interpretation of language versus ‘ordinary’ one) and those who tend toward the ‘purposive’ or ‘teleological’ approaches to interpretation. The point here is not about the particular approaches which may be taken to interpreting the ‘record’ of the law, or even that there is such a variance. Rather it is to consider the legal text as occupying an intermediary

space: between the event of law's creation and the interpretive practices that may rely upon the text to speak the law in any particular instance.

⁵⁰ Roland Barthes, "Death of the Author." *Aspen Journal* (1967).

⁵¹ *Ibid.*, 3.

⁵² Jacques Derrida, *Limited Inc* (Northwestern University Press, 1977),. at 18.

⁵³ *See, e.g.*, "authority, n." OED Online. September 2013. Oxford University Press.

<http://www.oed.com.ezproxy.lib.bbk.ac.uk/view/Entry/13349?redirectedFrom=authority> (accessed November 16, 2013); and Christiano, Tom, "Authority", *The Stanford Encyclopedia of Philosophy* (Spring 2013 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/spr2013/entries/authority/>

⁵⁴ Hannah Arendt, *Between Past and Future* (New York: Viking Press, 1961), 97

⁵⁵ *Al Skeini v UK* (2011) 53 E.H.R.R. 18, at para 137.

⁵⁶ Although the facts could be distinguished, it's notable that the ratio for Banković is remains incompatible with the rest of Strasbourg jurisprudence. This was irreconcilability noted in the report from the ECtHR in *Al Skeini*.

⁵⁷ Although it could be argued that anytime an agent of the state exercises powers beyond what is lawful (and in that sense – *ultra vires* – i.e. doing something a court may find to be beyond the powers authorized by law) and therefore no longer 'within their jurisdiction', the entire structure of the Convention is such that a jurisdictional relationship must first be established before its legality considered. In this sense, the jurisdictional relationship can be found to be in effect even where individual actions are deemed unlawful.

⁵⁸ For what is perhaps the most well-known articulation of this distinction, see, H.L.A. Hart, Positivism and the Separation of Law and Morals, *Harvard Law Review* 71: 593.

⁵⁹ For the proposition that there is some inherent, abstract 'duty' to obey law, see for example: Hart, *supra* note 16. For a discussion of the extent to which law must be generally accepted as 'law' to be law, see for example Kelsen's idea of 'efficacy', Hans Kelsen, *General Theory of Law and State*, (Harvard: Harvard University Press, 1945).