Normalism and Legal Representation in Canadian Art

by

Evan Curley

A thesis submitted to the Faculty of Graduate and Postdoctoral Affairs in partial fulfillment of the requirements for the degree of

Master of Arts

in

Sociology

Carleton University

Ottawa, Ontario

Abstract

In this thesis, I consider a 2014 Supreme Court hearing involving the National Gallery of Canada and CARFAC-RAAV, our nation's preeminent artists' advocacy group. It is my proposition that CARFAC-RAAV's success in the hearing – which legally required the National Gallery to pay mandatory minimum fees to artists exhibiting in their gallery – is part of a process of reification of an artistic productivism. A suite of theoretical considerations build toward this conclusion focusing on the study of the antithetical tendencies of the legal and artistic orders. I argue that the former is based on a predilection for continuity and permanence, the latter on reflexivity and a certain anomalistic acceptance of things anew. When these two orders meet in the event of the hearing, a juridical rigidity of value and vision finds mooring in the artistic field. This is pertinent today because alternative visions of arts' operation become stymied behind normalized labour-centered forms of practice. In this case then, law becomes one important sinew of normalism in the Canadian artistic field.

Acknowledgements

I would like to sincerely thank my supervisor Dr. Bernhard Leistle, my committee member Dr. Jean-Michel Landry, and the staff in the Sociology Department of Carleton University for their invaluable support throughout my degree. Dr. Leistle has been an incredible supervisor - to me, he epitomizes the qualities of an academic mentor that all students seek: intellectual curiosity and mastery, humility and openness, supportiveness, and a collaborative and respectful nature. Both Dr. Leistle and Dr. Landry have paid close attention to my work, giving me thorough constructive feedback, which is something that not all students are privileged to receive. So, I thank them both for that. The administrators in the Sociology department have also been outstanding. After spending many years in the university as a student, I understand that navigating the institution is much easier and much more pleasant when you have people who are sincere in their wish for you to be successful, and vigilant in their willingness to help you.

Lastly, I would like to thank my partner Robyn and my family Terry, Carol, and Emma for their continual support in all that I do. In so many ways, their care has made this degree possible.

Table of Contents

Introduction: Critique and Reflection

It may be said that the type of violence we conceive of as betrayal inflicted through critique is the highest form of fidelity when critique is aimed at achieving that which is also being striven toward by those subject to the critique, for they could benefit from new paths opening before them - even if they are only imaginable paths, they become travelable in their mere imaging. Or critique may shed this violent connotation altogether when conceived of as a bracketing of the taken for granted routines and perspectives of everyday life, an action that has the tendency to shake the ground of any state, and is particularly useful in pushing back against states of normalism - normalism being a state of highly exaggerated normalization in a particular order (Waldenfels 2015). What I aim to do in this thesis, with both theoretical and empirical considerations, is to rupture highly normalized visions of the artistic field through a questioning of the rigid establishment of vision belonging to juridical processes. I will do this by probing into the scene of the 2014 Supreme Court hearing involving the National Gallery of Canada and Canadian Artists' Representation-Regroupement des Artistes en Arts Visuels (CARFAC-RAAV). This hearing dealt with a conflict over a legally binding fee schedule that CARFAC-RAAV aimed to establish with the Gallery based on their right to collectively bargain for visual artists under the *Status of the Artist Act* (which will often be referred to as the *SAA* throughout this thesis). In essence, CARFAC-RAAV wanted to produce a set of mandatory minimum fees – something akin to a minimum wage - that the Gallery would have to pay whenever an artist engaged with them. When the Gallery refused to negotiate because of nuances in copyright legislation and ambiguities in art's definition as a service or an object, CARFAC-RAAV brought them to court for bargaining in bad faith. A decade long legal case then ensued, culminating at the Supreme Court where CARFAC-RAAV

ultimately won the dispute. This result legally forced the Gallery to continue negotiating and developing a fee schedule. The fee schedule has now been in place since 2015.

There were many things at stake in this hearing - CARFAC-RAAV sought to establish a mandatory remuneration at the Gallery to avoid any exploitation of artists, and the Gallery aimed to mitigate disruption of their current process of paying artists through the *Copyright Act,* amongst other things. Yet, what is most interesting to me is that what was also at stake in the hearing - and to a certain degree, I believe both parties understood this – was an official recognition of differing visions of the way art ought to be organized and produced in the cultural field of Canada. There seemed to be an understanding that the legal ritual was a powerful tool in producing an officialised, State-sanctioned, and thus highly normalized vision of the dominant mode of artistic creation. This means that the hearing impacts Canadian art much beyond the strictly legal consequences of the decision. And so, a consideration of this hearing will permit us to investigate both the contrasting visions of the contemporary cultural field and the process of their reification through law. In other words, the possibility of critique in this work spares neither the judgment itself nor its means.

The artistic field of Canada, at the time of writing, unmistakably gleams of relational thinking and acting predicated on longstanding heuristics of cultural production. These heuristics - which are tied in a complex web of metaphors, assumptions, aims, and strategies – contribute to the various practices and performances of the cultural field; a field that is forever *in statu nascendi,* in a state of *becoming*, via confrontation and struggle over the differing beliefs in the value of artistic works. This is not a struggle over whether art is valued or not, but what it is valued for. The "belief in the value of the work …is part of the *full reality* of the work of art" (Bourdieu 1993a:36, emphasis added), and belief in its value is not made solely for the audience or consumer of art, belief pervades – indeed gives rise to – the cultural field in its totality. Thus, the struggle

for recognition of one's vision of the cultural field is a struggle that will affect all aspects of cultural work. In a hearing - particularly at the level of the Supreme Court which has the primary task of clarifying parliament's intention on how we must legally act – there is an obvious, or pragmatic struggle over vision; is the National Gallery or CARFAC-RAAV's argument going to be endorsed by the officialising power of the State? This struggle will be resolved and a judgement will be given. However, there are much more diffuse processes of struggle and effect that occur in every hearing that produce a reality beyond the particular effect of the judgement. In the case at hand, there is certainly contention over the creation of mandatory fees for artists' work. However, what I propose is also wrapped up in this struggle is a less easily discernable creation of an artistic reality that tethers itself to a productivist logic in response to the difficult situation artists currently find themselves in. In other words, part of what I will argue in this thesis is that present-day Canadian artists' representation is creating and reinforcing a "labour-centered" (de Peuter and Cohen 2015) vision of art that doesn't secure the freedom of artists from economic power, but that actively ties them to a vision of production that contributes to the precarious livelihoods they seek to shed. However, this is not to say that the National Gallery's position, which exemplifies an individualized neoliberal vision of governance, does more to improve the living conditions of artists in Canada. Thus, I aim to avoid bolstering one of the precise legal positions in the hearing, and focus my attention on encouraging and enacting reflexive thought and action in the struggle to organize the cultural field. I want to create reflexive space in the cultural field to consider what certain actions say about, and consequently *do* for, art. This reflexivity surely will never be full – I cannot capture perfectly the state of affairs in the cultural field of Canada, for my own writing changes them immediately, yet I think I can engender a more robust reflexivity than what is currently occurring. It is of no use to attempt to take up a fully reflexive position in our ever-

changing cultural world – this haven will not be granted, for every act of reflection is exactly that, *an act that does*. Still, I believe my work can create the effect of opening an expanded scene of the Canadian cultural field, giving us the chance to consider where we are headed and how we might choose to get there.

The reason I see this task of creating reflexive space as important is because I see the 2014 Supreme Court hearing as a moment of sedimentation of artistic vision. I argue that this legal proceeding is a way in which a pre-existing productivism in the artistic field of Canada sets in even deeper in the attitudes and practices of artists. The productivism that CARFAC-RAAV embodies in their work pictures art as similar to many other forms of capitalist labour. It pictures the making of art as a labour that should be waged, and the products of art as objects that should have a minimum economic value. It also pictures the field of art – which involves artists and many other cultural players – as a space grounded in economic exchange. I should be clear, the present productivist vision of art is not a view of artistic practice that CARFAC-RAAV have solely authored in the 2014 hearing – as I will show in chapter one, it has historical roots, but CARFAC-RAAV's work in the hearing represents a very powerful moment of over-normalization of this vision, a moment that demonstrates how this view is not just a part of the Canadian cultural field but is dominating it.

The productivism of the artistic field impacts all aspects of artistic creation, but is very influential in what we might call the middle or intermediary stratum of the field. This means that the issue of artist's fees impacts artists, but it is most consequential for arts organizations, arts administrators, galleries, museums, and collectives who are involved in organizing the field in capacities beyond the creation of art objects. It is from my involvement in this intermediary stratum that I became interested in this case. About 5 to 7 years ago, I began getting involved in the arts. I

worked as an arts festival organizer, I volunteered at various cultural happenings, I helped manage a small studio and workshop space, and I attended local exhibits, workshops, and lectures. I quickly became aware of the relationships, tensions, antagonisms, and cooperation among various rural arts groups. Rapidly I became less interested in the art itself and more interested in the social production of the arts, which includes the production of the field's norms, values, ideologies, and social relations. From the outset, I realized that the way the arts sat in relation to the economic world and the State was of extreme importance to the operation of art in Canada. One of the very first things one would pick up on when getting involved in arts organizing in Canada is that the artist grant system – both on the federal and provincial levels - is critical to the sustenance of the arts. That is why, in my undergraduate degree, I studied the way arts grant writing influenced the production of art in my local community using Pierre Bourdieu's (1993a) work on the field of cultural production. But what I also started to get a sense of in my early involvement in the arts was that there were tensions between various actors in the way they conceived of art in relation to work, productivity, and remuneration. I began to pick up on the fact that there were very strongly held convictions that artists need to be thought of as labourers and need to be paid properly for their services. Initially, I thought there was little wrong with this stance, it seemed justified, it had a Marxist hue, and a social justice tone. Nonetheless, in certain ways this attitude started to seem overbearing, and became a point of antagonism and bitterness in the small arts community I belonged too. Antagonism and bitterness are things that could not be afforded in a small community's collective effort to sustain itself. This was the beginning of my observations of the consequences of the current artistic productivism. As I will show later in this thesis, what I witnessed in rural Nova Scotia – namely, small galleries and organizations becoming ostracized from their communities when they cannot pay artist's fees, and some arts administrators taking on

feelings of guilt and shame for not providing the compensation CARFAC-RAAV suggests – is indeed found in many communities across the country. Yet, I want to stress that I believe the biggest consequence of the reification of the productivist logic of artistic work is not that it produces antagonisms in communities, but that it hinders the creation of new ideas for arts' operation in general. Suggestions and possibilities of organizing art, which may actually serve the artistic field better and might take the cultural field beyond our present-day "work society" (Weeks 2011), become stymied behind normalized labour-centered forms of practice in the present situation. This consequence is somewhat less discernable than, say, a physical violence because it does not produce a visible scar, instead it is a consequence that conceals. It is not in the scope of this research to systematically explore what visions of artistic practice become stymied behind today's labour-centered vision, the aim is to challenge the current mode of operation in the artistic field so that the ingenuity and creativity of its practitioners can contribute to producing not only pioneering artworks, but also pioneering modes of living and working.

This thesis contains a large and vigilant theoretical exploration. In a more typical empirical case study, theory takes a back seat to the description of events, and the deep analysis of stories that reveal the effects of a case on the people involved. My work contains these things, but theory never fades into the background of these discussions. Here, theory acts as the path of intervention into the case. So, I believe we could most aptly describe this thesis as an intervention into an empirical case by way of theory, more so than an empirical analysis supported by theory. A substantial part of the theoretical approach that my work will take is based on a notion of performativity that emerges from the work of linguistic philosopher J.L. Austin, and is advanced by philosophers such as Jacques Derrida and Judith Butler. A central proposition in the theory of performativity is that speech acts and gestures do much more than describe or react to an external

reality. Instead, through their performative force, they produce the reality that we as social actors inhabit. This is a deceptive proposition – it is simple to comprehend, but has far reaching theoretical consequences when taken up as the basis of one's analysis. The consequences of taking the performative seriously impact the conceptualization of the subject, of representation, of injury, punishment, justice, ethics, creativity, and more. However, performativity is not the only theoretical tradition that will be used. I also aim to expand and extend the study of performativity by connecting it to phenomenology, primarily Bernhard Waldenfels' responsive phenomenology (2006, 2007, 2011, 2020), and to the practice theory of Pierre Bourdieu. In Bourdieu's cannon, I will lean on the work related to the cultural and juridical fields (1987, 1993a) as well as his work on symbolic power (1991). My aim in expanding the tradition of Austin's performativity is to introduce a more rounded conceptualization of structure and order as that which all performances take up in their enactment. Austin's work, which he acknowledges as something of a linguistic phenomenology (1979:182) is quite detailed in the way it addresses the speech situation - this includes the relationship of speaker and addressee, and thus brings his work toward a study of the ethical, political, and moral elements of interaction, but to substantially theorize on the intersubjective aspects of social relationships, particularly the way power and dominance play out in enacted events, I believe we must further expound the margins of Austinian discourse linking it to theorists who better grasp structure and order.

In the second chapter of this thesis, following a presentation of the context of the case in chapter one, I will begin to develop this theoretical stance and begin to explore how it shapes my thinking on the phenomenon of law and justice. My aim in this chapter is to devise a notion of what law is in performative terms and to relate the institution of law to the concept of justice. I show that seeing law as a performative ritual pushes the legal theorist to confront the ephemeral

basis of justice in the juridical process, ultimately arriving at the understanding that law and justice are ruptured phenomena. That is to say, law does not necessarily produce justice, nor is justice the essential feature of law. Nonetheless, what is possible to articulate within this deconstructive discussion, using performativity and responsive phenomenology, is that law as an institution or an order has a tendency toward continuity, rigidity, and permanence in its judgements and interventions in the social world. With this tendency underscored I can then evaluate the instance of law embodied in the 2014 hearing and investigate how this rigidity structures social action in the artistic field. This theoretical investigation will become central in what I see as a just opposition of an overly normalized productivism in Canadian art.

The theory of performativity that I am working with also has implications for one's understanding of the artistic field. In chapter three, many commonly held conceptualization of art and authorship will be challenged on the basis of performative and phenomenological insight. I discuss how the performative disrupts the notion of the artist as the unique and sole originator of their work, I question to what extent art objects have an agency in the artistic field, and I ask whether seeing art as a "field" is a good conceptualization for art, the alternative being to see art as an event. Along with presenting these general disruptions of artistic thought, I also present a new notion of artistic autonomy based on the theory developed up to that point. My notion of autonomy is indebted to Bourdieu's work on the topic, but also tries to move past his shortcomings via the confluence of practice theory with a phenomenologically-oriented performativity. This chapter will argue that artistic fields in Western modernity, at their highest functioning – which correlates to a maximization of autonomy – foster a relationship to order and structure characterized by an openness to the Other. Stated otherwise, the artistic field has the possibility to be a place that takes up a playful reflexivity toward its own order, and the wider social order. To

reach this reflexive point, however, is to rid the artistic field of overly normalized notions of art. So, in the latter half of chapter three, I begin to make the point that the 2014 hearing is not only a moment of reifying a productivist vision of art, but also that it is a diminishment of the autonomy of art in Canada.

As I tie these theoretical strands (performance, structure, autonomy, order, etc.) together in the consideration of the 2014 hearing, I am bringing the previously disparate fields of the sociology of art and the sociology of law together under one coherent theoretical nomenclature. Indeed, what I want to emphasize is that the legal framework for art is a great part of what constitutes art itself. I believe this point is often missed in academic work on the arts. What should be clear after the second and third chapters of this work is that when the orders of law and art meet in an event like the 2014 Supreme Court hearing a complexity of social forces begin to work on the processes of artistic creation. It is this complexity and its impact on autonomy that I will explore in my empirical analysis chapters.

In chapters four through six, there are multiple areas of the National Gallery v. CARFAC-RAAV hearing that I want to consider with the theoretical stance developed hitherto. In chapter four, I explore the legislative grounds of the case focusing on the *Status of the Artist Act*. Here I argue that the legal consecration of arts advocacy groups threatens the possibility of artistic autonomy. Then in chapter five, I focus on corporal gestures and speech acts within the courtroom itself. Here I show that the rituals of law, more so than the written documents, act as the sinews of legal authority – an authority that is accessible to those like CARFAC-RAAV and the National Gallery who partake in the juridical process. In chapter six, the final empirical analysis chapter, I look at the final stage of performative action – reorganization. On the surface, this could seem like a chapter on consequences, but the concept of performativity challenges our ordinary sense of

cause and effect. No longer can we claim a sovereign originator of action who singularly produces an effect, such that we could focus our analysis to a specific action's impact on social reality. What instead needs to be considered is how performative actions exist in relation to their reperformance and their anterior doings.

As a final introductory note and as another way to orient my writing, I want to mention that my work on this case stems from my interest in the idea of artistic autonomy. Autonomy is something different than order and constraint, it harkens to realms of freedom and will. However, artistic autonomy is often thought of as a state of *absolute* freedom of the individual creator – a notion developed alongside, and as a counterpoint to industrial capitalism in the age of Romanticism. I believe that any notion of absolute artistic autonomy - that is a fundamental disinterest and disconnection from the heteronomous forces of the economic and political fields – even if this autonomy is being theorized as obscured or supressed, is a simple and ultimately erroneous notion of autonomy. Throughout modernity formulations of the subject's freedom and constraint, also termed autonomy and heteronomy, have been complicated. For instance, Pierre Bourdieu (1993a) highlights the paradoxical notion of disinterestedness when he describes this aloofness and seeming freedom from the economic as a *constraint, an expectation, and a pose* in the cultural field, where if taken up through disciplined action it exacts the possibility of economic self-gain in the field. Thus, he questions whether autonomy, true *inherent* autonomy of the subject is possible, even in a field premised on its possibility. In another example, Roland Barthes has declared the death of the author in saying "the writer can only imitate a gesture forever anterior, never original" (1967:4) and for that "literature is that neuter, that composite, that oblique into which every subject escapes, the trap where all identity is lost, beginning with the very identity of the body that writes" (2). Where then is originality that can remain autonomous? In an attempt to

locate it we could consider that there are boundaries in all epochs, cultures, societies, environments, and the self. There are thresholds in the orders of the world, guaranteed by the principle that orders produce their own excess, and these orders have certain *relations to their own boundaries* (Waldenfels 2011:8-9). In the self, as in law, as in art, there are limits of prohibition, limits of structure, which contest the restraints of our "desires and deeds" (11). Thus, the contingency of order emerges as something graspable or partially understandable in modernity as we realise we are part of the establishment of the order we are beholden to. When we realize that uttering "I" produces a self as a subject we can understand that we are forever involved in our own becoming and that order doesn't simply exist immutably – it can change, disinterestedness can be contested, originality is inscribed in citation. The question then is, is there a form of artistic autonomy that emerges from this contingency? Is there a way to conceptualize an autonomy of the artist – albeit, an autonomy that is impure, if one has to regard it so as to counteract the simply romanticized notion of autonomy – as a certain relationship toward that which escapes order and thus give rise to transformation? This is what I reflect on through my critique, and perhaps through my betrayal, of current artistic visions. On this question, I aim to make new conceptual space in the field of art in Canada. As I hope to show, law is one important focus in this pursuit when considering its bearing on constraint and autonomy not through forcible denial of an inherent freedom, but through a contribution to the shape of reality through our recognition of the words, gestures, and visions of those actors in the legal theatre.

Chapter 1. Cultural Development in Canada

We should not take the economic field or the artistic field for granted. Neither of these entities, even though they may have enormous consequences for our social lives, are things that exist without contingency, nor are they entities whose origins escape construction. The same could be said about the State and the juridical field. A more precise theorization about the construction of these social fields will be developed throughout this thesis – this will include a focus on how certain orders are performatively enacted and altered. However, I want to bring up this important idea here because in this chapter I aim to present the context of the 2014 Supreme Court hearing in a way that is cognizant of the fluctuation and always contested state of these fields. To contextualize the case in this way is to do more than provide a setting for the analysis of an event. As I will show in later chapters, key to the notion of performativity is the dialectic relationship between enactment and structure - in a performative lens all events produce something in the social world, they transform the social world, but they do so only by taking up a structure of enactment. This is obviously the case when we think of performance in the colloquial sense of performing on stage. An actor must have a script rehearsed so they can recite it in the moment of performance. This is also the case when we consider a much vaster array of phenomena, including the case of a hearing, as performative events. So, what is presented in this chapter should acquaint the reader with a select history of cultural development in Canada, focusing on various relations of art, State, and economy that are relevant to the Supreme Court hearing of 2014, but it should also serve as a snapshot of the structure of these ultimately malleable fields that the performance of the hearing rehearses and transforms.

I will divide this chapter into two parts. First, I will present important historical moments of connection between the political, economic, legal, and artistic fields of Canada. This section

will focus on the various transformations and actions in the Canadian art field that were influential in producing the structure and functioning of art practices today. Then, I will present details of the 2014 hearing to hopefully set up a clear timeline of the events that will be discussed throughout the rest of this thesis. This later part will also recount some of the recent developments of the creative economy – a suite of economic policies and attitudes that bring new and complex states of artistic-economic relation to bear on cultural work. I believe the 2014 hearing can be seen as the most recent and authoritative Canadian response to the ills of the creative economy. By the end of this chapter, I hope that the state of affairs that CARFAC-RAAV and the National Gallery of Canada take up in the 2014 hearing are well-defined.

RELATIONS OF ART, STATE, AND ECONOMY

Throughout the history of Western cultural production there are many ways that the artistic field has sat in relation to the State, the legal apparatus, and the economy – often with some tension. These tensions play out in different ways across time and place. In eras of European cultural production prior to the late 19th and early 20th century, there was a distinct power of the upper echelons of society – this includes monarchs, the nobility, and the church - to arrange artistic production "by means of subsidies, commissions, promotion, honorific posts, even decorations, all of which are for speaking or keeping silent, for compromise or abstention" (Bourdieu 1993a:125). A similar kind of organization - one that produces particular arrangements of artistic order - has continued in the 20th and 21st-centuries through the conduct of nation-states. In continental Europe, for example, various institutional apparatuses such as centralized national art academies and salons have had great effect on the development of culture, and in Britain and Canada more diffuse and mediated circumstances such as State-supported exhibits and cultural identity programs have had

an impact on the way artists conduct their work (Pryke and Soderlund 2007:502-503). Thus, in various ways "the state, rather like a central bank, creates the creators, guaranteeing the credit or fiduciary currency represented by the title of duly accredited [artist]" (Bourdieu 1993a:251). However, in response to this involvement in artistic fields – done through the powerful mechanisms of recognition, celebration, and ultimately existence-giving that the State holds – artists have pushed back, attempting to exact a structure and functioning of artistic work they seek. A clear example of this kind of revolt is found in the ascension of cultural bohemias that arose in late 19th-century Europe. These were distinct social groups with their own constructed rules, norms, and structures for the operation of cultural work. As Bourdieu notes, "this [was] a truly far-reaching revolution which, at least in the realm of the new art in the making, abolishes all references to an ultimate authority capable of acting as a court of appeal: the monotheism of the central nomothete gives way to a plurality of competing cults with multiple uncertain gods" (253). In other words, artists have long challenged the dominant principles of the hierarchical organization of cultural accomplishment and have found ways to develop artistic worlds they wish to inhabit (39). This often produces something of a haven and a workroom for contentious thought and expression. The artistic field becomes a place from which more powerful critiques of the economic and the political can emerge. But this is ultimately an unstable state - something that will be negotiated time and time again.

These kinds of negotiations have occurred in Canada and are traceable through various sets of policies, institutions, and activist activity. In Canada, both the State and the economy have been forces that artist have had to contend with in their efforts to shape the cultural field. In fact, there is a longstanding relationship between the Canadian State and the artists of its nation, a relationship that is sometimes cooperative and often antagonistic. Since the first major governmental report on

the arts, the Royal Commission on National Development in the Arts, Letters and Sciences – more commonly known as the Massey Commission or Massey Report – devised in 1949, artists have engaged the State to promote their practices as an "official means of employment" and to demand better "working conditions and protection of artists' work" (Cliché 1996:197). The Massey Commission's most substantial insight was its recognition of the inability for Canadian artists to subsist on their own volition in the cultural marketplace. The art market in Canada - the sale of art through patronage, commission, or the collector-auction apparatus - was too weak for artists to subsist on alone (Nemiroff 1985:21). The Canadian State took action on this finding by developing major institutional infrastructure - most notably for visual arts, the Canada Council for the Arts. The Canada Council established a sanctioned form of organizing and making art – a jury-based granting system. The artists' grants that are awarded from this institution can be seen as fostering a certain freedom for Canadian art in the sense that the Council is set up as an arms-length institution – it is separated from direct control of the State in an attempt to create a non-coercive form of support for artists. The idea is that this institution provides an economic ground for artists' sustenance while not getting involved in the aesthetic developments of the field because the jury who decides funding allocation is taken from a pool of artists, not political officials. This signals a break from any ultimate State authority that would dictate what artistic production is worthy of being made. However, from the Massey Commission onward, artists in Canada have been heavily reliant on these grants for most of their activities, and the Council is not without its downfalls. One of its issues that I have studied previously (Curley 2018) is that even though the State attempts to excise itself from determining the direction of cultural expression there remains a subtle coercion of cultural content by their criteria of awarding. For instance, it is mandated that those who have high attendance numbers to performances, exhibits, and events will be considered as better

applicants in the funding competitions. Because of this criterion those artists and organizations who manage to produce artistic experiences that are aligned with prevailing cultural attitudes of their locale have more success in the grant system. Another issue is that even though the Council has a seemingly large budget (awarding grants to over 2000 arts organizations, and over 3000 artists totaling over $250 million in 2019-20), there are still many artists and organizations who have trouble subsisting on grants alone who end up reorienting their work considerably to have more success in commercial avenues of operation. Therefore, the autonomy that the Council provides is not complete, it has its weak points and fissures.

The Massey Report, with its focus on attending to the working lives of artists, has backdropped the entire Canadian cultural field since is institution, but it is the period beginning around 1960 where we see the biggest shift in the way artists relate to the organization of art in Canada. At this time, artists' organizations began to form across the country with the goal of increasing self-determination. Key to this shift was the burgeoning concern about artists compensation and standards of living – a concern developing, expectedly, from artists themselves. The reason I focus my discussion of the context of the 2014 Supreme Court case here is that it shows how the recent dispute between the National Art Gallery and CARFAC-RAAV continues a long story of transformation and evolution of the artistic field. The case at hand intervenes and organizes the cultural field within a history of reiterative attempts by artists, representation organizations, and the State to demand and enact their vision of how the arts should operate in Canada. This constant struggle over organization is perhaps due to the lack of a robust art-market that would be defaulted to for the principles of organization if it existed, the struggle for the vision of the artistic field is heightened in Canada as many actors attempt to enact substitute forms of organization and production.

The 1960's transformation of Canadian culture is characterized most substantially by the ascendency of the idea of an *artist-run culture* – a culture that CARFAC-RAAV has had deep connection to from its outset. Succinctly stated, artist-run culture is a movement of artists getting involved in producing an art scene beyond their role of "making" art as we traditionally know it. This involvement goes beyond the acts of painting, sculpting, performing, or other hands-on work in a specific medium, and into the intermediating activities of creating exhibitions and workspaces, producing publications and distribution channels for culture, producing festivals and events, and more. In other words, artist-run culture is characterized by artists focusing on building communities and networks of connection rather than on their individual creative practices. The culture was distinct in its response to the structure of the artistic field existing in the mid 20th-century in the way it was predicated on addressing marginality. For artist-run culture, the solution to forging strong artistic communities vastly dispersed across the country was to embrace particularity and regionalism and develop fields of artistic practice on a small cooperative level which could then connect and communicate with other local nodes. The smaller the scene, and the further away from the centers of the artworld, the more the artist is involved in all aspects of creative production (Nemiroff 1985:17). Thus, artist-run culture can be considered a network or web of interconnected communities across the country based on "ludic spirit and [a] sense of communitas" (28). This spirit and cultural arrangement seems to be uniquely Canadian, and although it has a tendency toward regional particularity, what is particular to each place is the aesthetic content of the artwork and not so much the organizational arrangement. Organizational elements of the culture like emphasizing small artist-run spaces and galleries, and the aim of democratizing all aspects of production exist in each local cultural node.

At the core of artist-run culture is the motivating idea of alternativeness (Nemiroff 1985:40) - alternative to market-oriented forms of cultural production, but also to elements of the cultural field that belong to the locus of the State and its vision. For instance, artist-run culture would attempt to provide nourishment to non-orthodox cultural styles, artist-run culture refutes a collective national artistic style – which existed in a style of idealistic landscape painting most notably produced by the Group of Seven - as well as stuffy and formalized national and provincial hierarchies of cultural organization which includes State-sanctioned galleries (20). Artist-run culture aims to develop modes of operating that are characterized by "self-determination and openness to experimentation" (18) – ultimately a practice of attempting self-rule. The network of artists in this field work within cooperatives and non-profit organizations which attempt to remove themselves from the formal competition of the economy. Blessi, Sacco and Pilati write,

> Such organizations are typically an essential component of the contemporary art system, in that they constitute the main circuit for the experimentation and diffusion of new languages and practices, allowing artists to nurture and develop their own aesthetics and methods without having to conform in principle to market standards. (2011:142)

However, the biggest challenge for an alternative and autonomous form of cultural production is "finding the conditions for the social and economic sustainability in a situation where the artistic activity in itself generates a relatively modest amount of resources and relatively low attention and visibility beyond the community's own sphere" (Blessi et al. 2011:147). To establish these conditions, many organizations in the artist-run sphere have had a somewhat contradictory and complex relationship to economic and political fields. They seek to be independent from the forces of the market and the government that might intervene in cultural production, yet these organizations and spaces often rely on government funding – both project-based and operational funding from the Canada Council - as well as various commercial streams of revenue to support their work (Nemiroff 1985:41). What obstructs artist-run culture from complete reliance on State

funding is that there is an extreme competition for grant awards, as described above, particularly for operational multi-year contracts. This is where at least a modest commercial activity enters to round out the revenue. As Blessi et al. note,

> Artist-run organizations occasionally [sell] works on exhibit to collectors or more systematically organize benefit auctions of artworks. They carry out their own fundraising activity, looking for private affiliates and sponsors, …carry out educational activities and even, in some cases, social ones, provide opportunities for professional development, residences, and even commercial representation for artists who do not have a contract with a proper art Gallery (2011:143).

What is clear then, is that artist-run cultural organization is premised on a multifaceted support system, an organized structure of spaces, people, and resources that attempts to sustain cultural production and thwart the need for individual artists to devise and maintain an entrepreneurial sustenance plan based solely on sales, which would leave them susceptible to obeying economically rewarded art making. In other words, artist-run culture is the beginning of an independent network of intermediaries in the cultural world – a middle strata of cultural organization that exists between the State, the economic mainstream, and artists. However, with that said, as much as this apparently hybrid model promises adaptability, autonomy, and perhaps even anti-capitalist practices of cultural organization, I have witnessed an overly normalized economic productivism in this field, the roots of the productivism I see being reinforced and sedimented in the 2014 hearing. I believe one of the harbingers of this productive attitude is CARFAC-RAAV's involvement in the artist-run landscape of Canada.

CARFAC-RAAV belongs to the intermediary strata of artist-run culture. One of the primary roles that CARFAC-RAAV has taken in this culture is to bolster the economic sustenance of artists by advocating for artists' rights, and particularly artist's fees. CARFAC-RAAV, along with artist-run spaces such as L'Actuelle Gallery in Montréal, 20/20 Gallery in London, and Intermedia Gallery in Vancouver were key players in the advent of artist-run culture in the 1960's.

An individual who was instrumental in the development of the culture generally, and CARFAC-RAAV specifically is Jack Chambers.

In 1960, Chambers, a painter and filmmaker, made it publicly known that the National Gallery had the intent to reproduce his work for a postcard without compensation. In reaction to what he felt was an injustice, Chambers went on to found CARFAC-RAAV which remains Canada's leading advocacy group for visual artists. CARFAC-RAAV's roots thus spread back to earlier disputes in Canadian cultural history, and to the development of an independent and self-regulated artist-run culture. The Supreme Court hearing of 2014 should then perhaps be seen as a flaring up of ongoing and deeply-seated traditions and conflicts in the organization and production of artistic work in Canada. CARFAC-RAAV was formally founded in 1968, and collective bargaining was a key aim of their work from the outset. However, a substantial focus on artist's fees didn't begin until the late 1980's and early 1990's. At this time, CARFAC-RAAV introduced a suggested tiered fee schedule. They set out recommendations on how various artistic activities should be economically compensated. Their goal was to provide organizations with a simple economic calculation for paying artists. They created a tiered system to minimize the dissonance smaller organizations felt about being recommended the same fee schedule as large-budget organizations like the National Gallery (de Peuter and Cohen 2015:338). From the moment they released this fee schedule up until the 2014 hearing, CARFAC-RAAV fees were non-binding for the entire Canadian arts sector – fee schedules worked on compliance and trust by individual galleries and organizations throughout the country (338). It wasn't until the *Status of the Artist* legislation was passed in the 90's that CARFAC-RAAV had the legal right to negotiate binding contracts with federal institutions. The *SAA* defines a "professional artist" and on the basis of that definition creates a representable group. The act then stipulates that one organization - if they prove

they satisfactorily and unitedly speak for a sector of the arts - can create binding agreements with federal institutions that would hold them to a certain contract when working with any artist in that sector. So, what CARFAC-RAAV was attempting to do in the lead up to the 2014 hearing was to create the first legally-binding contract with a gallery for artist's fees. The National Gallery was the obvious choice for them to direct their legal attention toward because out of all federal cultural institutions The National Gallery deals with the highest number of artists, and CARFAC-RAAV felt as though if they managed to create a legally binding agreement with the Gallery, all other federal institutions would comply voluntarily with the fee schedule. If they didn't, CARFAC-RAAV would have a very clear precedent from the National Gallery case to legally enforce fees on the other institutions (de Peuter and Cohen 2015:338).

Before recounting the period between 2003 and 2014 in which the legal dispute occurred, it is important to understand that although CARFAC-RAAV has been active since the late 1960's and remains the most recognized artists' advocacy group in the country, they are not the only organization that had a significant role in the history of arts law and policy in Canada. In the mid to late 1980's, an organization called the Independent Artists' Union (IAU) – composed of Ontarian artists and arts organizers - formed in response to the lack of income for artists. They said that many State-led conferences and committees had addressed this issue, but almost no artists had put forward serious proposals to deal with the issue – that was the task they gave themselves (Robertson 2006:264). In 1987, The IAU met with the Ontario Arts Council to attempt to negotiate a living wage for artists – something along the line of a universal basic income - naming the Government of Ontario as the employer. If one is unfamiliar with the arrangement of State-based intermediary arts organization in Canada, it is helpful to know that it is common for provinces to have an arms-length, board-governed, publicly-funded arts organization that is tasked with such

things as distributing funding through juried competitions, and promoting art in their provinces. The Ontario Arts Council is this body for the province of Ontario. Thus, it was this council that the IAU targeted for their initiative of a living wage. Although artists' income was a priority for the council (Robertson 2006:48), they determined that this type of funding, a living wage, was a divergence from the programs that the council exists to fulfill, namely, the rewarding of artistic funding on an excellence model through project grants. Furthermore, artists, at this time did not fall under the Labor Relations Act, which is the legislation that establishes legally-binding relationships between unions and employers in the general - that is not specifically cultural - working population of Canada, and so, the council refused to continue talks with the IAU.

Aside from the general issue of a lack of income for artists, the IAU's work was a reaction to a few important developments in the arts. First, the group was unsatisfied with the work CARFAC-RAAV was doing in the 1980's, because they felt there was an unjust conservativism in the organization particularly around their membership rules. At the time, CARFAC-RAAV was caught up in debates around whether or not non-Canadian citizens should be allowed to participate in the organization – this debate emerged from the threat of American artists taking teaching positions at Canadian institutions. Furthermore, the IAU was responding to the 1982 Federal Cultural Policy Review Committee (better known as the Applebaum-Hébert Committee), the first major report on the status of the artist since the Massey Commission. The Applebaum-Hébert Report determined that artists are a "highly specialized working poor", and that this is a fact that remains unchanged throughout the history of art in Canada. Despite this, the report did not push for an artists' living wage. The rationale was that if this were to be done, a living wage would have to be extended to all disadvantaged groups. Clive Robertson (2006:50), and Rosemary Donegan (1983:341) highlight that this rationale is not completely justified, for the report also highlights,

as mentioned, that artists are highly skilled and have a direct value to society, thus, putting them in a unique situation for which to consider providing a living wage. The IAU's work can thus be considered a protest to the lack of action on the part of the government to support artists. The IAU devised a complex and logical vision of a living wage program that consisted of a Qualifications Board that would determine the eligibility of the artist, dictating who would receive the living wage, a system of negotiating the dollar amount for the wage, as well as such details as the length of time before qualification review would be necessary, and the sliding scale that would balance the living wage with other sources of income. Although the attempts to establish a living wage at this time were unsuccessful the work of the IAU made a lasting impression, particularly in their assertion that "art is work", and that it is a specialized labour that can be organized like many other forms of labour in Canada.

The most important contribution of the IAU for the case I am considering was their impression on Paul Siren and Gratien Gélinas, the two heads of the task force which would eventually produce the *Status of the Artist Act* in Canada in the 1990's (de Peuter and Cohen 2015:336). One of the IAU's recommendations in the transition to a living wage was to establish collective bargaining rights for artists. This was one of the few recommendations that did make it into the *SAA*, and it is the basis on which CARFAC-RAAV had the right to negotiate with the National Gallery.

With this history laid out, we can now turn our attention to the contemporary contexts of Canadian art, within which the 2014 Supreme Court hearing occurs. I will start with a brief discussion of the most current arrangement of the field, focusing on the political and economic policies, attitudes, and programs that art currently faces.

THE 2014 SUPREME COURT CASE AS RESPONSE

When recounting the history of Canadian culture one must always be aware of the constantly evolving economic field that the artistic world is intertwined within. To grasp the context of art one should not think of the economy as a stable objective entity. Contemporary theorists like Timothy Mitchell are increasingly aware of this. Mitchell (2006) does not describe the economy nor the State as pre-existing objects, but instead as effects that emerge from practices. As an effect, the State and the economy are constantly vulnerable to changes of practice. The state of economics and its relationship with culture has been particularly volatile throughout the past decade or two with the rise of various economic policies and attitudes belonging to what has been deemed the "creative economy". The creative economy refers to a complex intertwining of elements of the artistic and economic fields that puts culture at the core of its productive engine and general ethic. In the creative economy, artistic work is becoming increasingly irregular and project-based, earnings are slim and unequally distributed, and career prospects are uncertain (Banks and Hesmondhalgh 2009:419-420). This is because a characteristically neoliberal attitude of individualism is often at play in creative economy policy – an attitude that promotes self-employed entrepreneurship and little government regulation and support, amongst other things. This approach can be found in Canada's most recent cultural development framework (Canadian Heritage 2017). Shorthose and Strange note that "at the most general level, this new economy can be identified as being increasingly global; increasingly about intangibles such as knowledge, information, images and fantasies; and increasingly decentralized, and characterized by networks and flexibility" (2004:43). Furthermore, creativity is now an essential economic stimulant and artists find themselves entangled in this new productive arrangement (For other academic sources on this new arrangement see Léger 2010; McRobbie 2016; Murray and Gollmitzer 2012). One of

the clearest ways this occurs is that more and more creative people who once worked, or likely would have worked in core artistic fields (painting, sculpture, illustration, composing, dance performance, etc.) are moving to peripheral creative fields such as marketing and promotion, web-design, product design, and brand crafting, because these types of services are increasing in demand within our Western digitalized and information-based economy. Movement to these peripheries is often in the aim of job security and better earnings.

Much of the research on the creative economy focuses on articulating the threats to artists working lives in terms of their sustenance and autonomy. While this scholarship is important, I think it has reached a point of saturation, and so to further our understanding of the field I believe one of the key tasks in the Canadian context is to analyze the way arts advocacy groups respond to this developing confluence of economic and cultural forces. My research on artist-run culture tells me that there has been a sizeable amount of work done on how artist-run organizations and networks respond to precarity and heteronomy and some work done on how they attempt to forge pathways toward sustained artistic production, but there is little available work on arts advocacy in the *legal realm* – this is where I can enter and contribute to this literature by analyzing the case at hand. The 2014 Supreme Court case and CARFAC-RAAV's general advocacy push for collective wages can be named as a significant response to the creative economy in Canada. "Significant" because the call for collective wages has enormous clout and energy behind it within artistic communities (as an example of this energy consider the many news reports discussing the 2014 case and artist's fees like: Canadian Art 2020; Canadian Lawyer 2014; Sandals 2014, 2016; Sibley 2014). Artist's fees is a response that is highly publicized through cases like this hearing and through CARFAC's advocacy work generally. I believe CARFAC-RAAV, as a part of artist-run culture, is in a uniquely powerful situation to create a robust response to the creative economy

through their legally-sanctioned advocacy work. Whereas in earlier decades it may have been monopolizing State-led cultural orthodoxies and institutional frameworks that artist-run culture challenged, now it is the complicated force of the creative economy that must be addressed by CARFAC-RAAV and the network of people and organizations it convenes with. This is the framework within which we can make sense of the 2014 hearing.

The relevant history leading up to the legal dispute I am considering is long, spanning the better part of the mid to late 20th-century. The actual legal dispute is also long, starting in 2003 and finally finishing over a decade later in 2014. The dispute began when CARFAC-RAAV - on the basis of their status as a representative of the visual arts sector conferred through the *SAA* - engaged the National Gallery in negotiations over artist's fees. They sought to create a contract that would hold the gallery responsible for paying various minimum fees for many different aspects of artistic work. As mentioned, artist's fees were an advocacy agenda for CARFAC-RAAV long before this hearing, but this was the first time they had the legal authority to enforce the fees, because it was the first time they had the right to create legally binding agreements with federal institutions. The National Gallery was immediately skeptical of whether or not they indeed had to negotiate fees with CARFAC-RAAV. The gallery believed that the individual's right to negotiate their own fees via the ownership of their work through copyright legislation would outweigh any collective agreement, but CARFAC-RAAV was confident in their understanding of the legislation. Ironically, the lawyer that accompanied the National Gallery in the bargaining room often helped support CARFAC-RAAV's case by simply knowing the legislated rights that CARFAC-RAAV were entitled to. By the third meeting of the groups, CARFAC-RAAV had realized that the Gallery was not going to put an agreement on the table, so they decided to create the first draft themselves (de Peuter and Cohen 2015:339). Although there were many aspects of the agreement that the

Gallery had contention with, it was the fees for exhibition and reproduction that they disagreed with most forcefully.

In 2007, four years after the initial negotiations commenced, the Gallery presented CARFAC-RAAV with an agreement of their own – it was completely stripped of any mention of exhibition or reproduction fees. The Gallery was steadfast in their argument that fees for exhibiting and reproducing artworks was covered under the *Copyright Act*, and thus need not be negotiated through a collective agreement (de Peuter and Cohen 2015:340). As is revealed to me in the recording of the hearing itself, the Gallery based this steadfastness on a single legal opinion – the opinion being that the *Copyright Act* gave sufficient grounds for negotiation between artists and the Gallery, and that a minimum fee schedule would interfere with the pre-existing legislation. The singular legal opinion is important to this case because it shows the limited attempt of the Gallery to fully grasp the legislation that surrounded their actions. The Gallery also claimed that by introducing artist's fees into a binding agreement there would be legal complications for the Gallery's work with artists as the two approaches to remuneration, copyright and artist fee schedules, interacted in practice, but nowhere in the legal documents could I find a clear list of complications that the Gallery foresaw.

CARFAC-RAAV responded to this impasse by offering to agree to an "experimental clause" (de Peuter and Cohen 2015:340) – meaning, they wanted to write a provisional clause that would set a mandatory minimum fee and test it for a period of time, if there were any issues or complication with artists wanting to assert their rights in accordance with the *Copyright Act* that would conflict with the *SAA* they could do so and the experiment would be terminated and new negotiations would take place. CARFAC-RAAV suggested this type of clause based on its success in a Québec cultural dispute. However, the National Gallery refused to accept this offer. This is

when CARFAC-RAAV decided to contact the Canadian Artists and Producers Professional Relations Tribunal (CAPPRT) and file a complaint that the Gallery breached section 32 of the *SAA* by bargaining in bad faith. To clarify, this Tribunal has a similar role to the various courts of appeal in Canada in that they deal with the interpretation and application of law. Yet, this Tribunal is slightly different in that they have a very specific area of jurisdiction which only covers legislation that impacts Canadian artists and producers. It is the initial place to work out legal matters in this field before moving into the general courts of appeal. So, when CARFAC goes to the Tribunal they are reporting a breach or a conflict in the *SAA's* application. The Tribunal agreed with CARFAC-RAAV. Their position is summarized in the Reasons for Judgement of the Supreme Court case,

> With respect to s. 32 of the *SAA*, which requires artists' associations and producers to bargain in good faith, the Tribunal concluded that the NGC failed this duty by presenting a revised draft scale agreement which excluded all matters related to the use of existing artistic works "without prior notice" (para. 147) — in contravention of its established negotiating practice with CARFAC/RAAV — without reasonable alternatives, and based solely on one legal opinion. The NGC's position on minimum fees for the use of existing works was uncompromising, and one that the NGC should have known would not be accepted by CARFAC/RAAV. (McLachlin, LeBel, Abella, Rothstein, Cromwell, Moldaver, and Wagner 2014:203)

In other words, the Tribunal found the National Gallery's actions to be in violation of the law and states that the Gallery should return to negotiations. However, the Gallery felt that this was not as clear a picture as the Tribunal made it out to be. The Gallery felt that there was still something left to explore in the relation between the *Copyright Act* and the *SAA* that would need to be combed over before they were satisfied with the judgement. Thus, they took the case to the Federal Court of Appeal. The Gallery was successful in this appeal and the decision was overturned. This left CARFAC-RAAV owing the Gallery $17,000 in court fees (de Peuter and Cohen 2015:340). The

decision at the Federal Court of Appeal stated the following (please note that "scale agreement" here means a legally-binding contract),

> Allowing scale agreements to impose minimum fees for existing works would conflict with the *Copyright Act* because only copyright holders can establish limits on how their copyright is exercised (2013 FCA 64, 443 N.R. 121, at para. 101). It found that there was no assignment in writing of copyright to CARFAC/RAAV by the artists in their sectors as required by s. 13(4) of the *Copyright Act*, meaning CARFAC/RAAV cannot impose any limits on how those artists exercise their copyrights (para. 111). In contrast, scale agreements can pertain to contracts for commissioned works as no copyright exists at the time an artist signs such a contract. (McLachlin, et. al. 2014:203)

In other words, the Federal Court of Appeal felt that there was a deprivation of artists' rights if these acts were to work in conjunction, where any artist engaging with the National Gallery would effectively step into a pre-determined contract without full control of how they managed their own work.

In 2013, CARFAC appealed this decision to the Supreme Court. The case thus arrived at the highest legal institution in Canada and would finally be settled. After a three-hour hearing, the Justices quickly made their decision that CARFAC had won the case. I will explore the exact reasons for this judgement in later chapters, but what is important to note now is that the legal crux of this battle laid in an ambiguity between the *Copyright Act* and the *Status of the Artist Act*. The *Copyright Act* is an individualized legislation - the individual sets their own parameters of copyright, meaning they hold full rights to their own work and determine the amount they sell or lease their right for. The *SAA* is a collective right – under the collective agreements that it engenders, no artist will be paid less than a certain minimum fee to avoid exploitation. CARFAC-RAAV saw the National Gallery's stance as akin to the conservative notion of the "right to work" – which argues that a worker should have the freedom to deny membership in a union and work for less if they so choose (de Peuter and Cohen 2015:341). Another ambiguity between these two pieces of legislation revolves around their stance on the fundamental character of artistic work -

art as property and art as a service. If art is property, then the individual owning that property ought to have full authority to manage its copyright. If it is a service, then there is claim to an industry-wide standard minimum fee, similar to the many collective agreements that bind countless other industries (342). So, CARFAC-RAAV's legal grievance, and the central legal question that was ruled on in this case was whether the Gallery had bargained in bad faith. This bad faith, however, is predicated on whether or not there is a conflict between the *SAA* and the *Copyright Act*. The court decided that there was no conflict, which implies that the Gallery was indeed bargaining in bad faith. If there was conflict then the Gallery would be justified in their refusal to negotiate the fees. Furthermore, because it was decided that there was no conflict in the legislation the Gallery had to return to the bargaining table and negotiate a fee structure with CARFAC-RAAV. Thus, by allowing CARFAC-RAAV's appeal, the Supreme Court decided the following things: there is no conflict between the *SAA* and *Copyright Act,* the Gallery bargained in bad faith, and the Gallery must return to negotiations.

What I hope is now clear is that this legal battle has a long genealogy. It fits into a history of struggle in the artistic field of Canada between the State and artists to produce a sustainable economic grounding for artistic work. It would be an exciting next step to begin analyzing the legal battle as an event that takes up and transform the context I have just developed, but I must put this off for now as we take a step into the theoretical domain of this thesis to develop a more productive language to consider the case. I start with the concepts of performance, law, and justice in the chapter that directly follows this, then I take a closer look at the theoretically challenging concept of artistic autonomy in chapter three. These theoretical considerations will give us a useful set of concepts with which to approach the analysis of the hearing itself

Chapter 2. Bond and Rupture:
The Performative in Law

In this chapter, I work closely with the idea of the performative and performativity. A performative conception of the social world, I believe, is a highly productive way of approaching law and art. One reason for this is that the performative grapples with the ephemeral grounds of authority. An explication of normalized practices in the artistic field is predicated on understanding the authority of the mode of their establishment – in this case, one of the prominent modes of establishment is the legal hearing. In other words, if I am to argue that the legal performance of the 2014 hearing contributes to the over-normalization of a productivist attitude – centered around the notion of artist's fees in CARFAC-RAAV's work – I must show where the law gains its authority to normalize. From here I must show how this force becomes part of the process of recognition and authority in the arts. In what follows, I outline an idea of performance that remains close to the central assumptions in the Austinian tradition, but also extends outward from this tradition to cover new theoretical ground. I aim to expand the diaphragm of the performative discourse, pushing a new performative air into the premises of phenomenological thought and practice theory. In the same movement, key concepts of phenomenology and practice theory will be dislodged from their traditions and be inhaled into the discourse of performativity. By the end of the chapter, I hope to establish a new interdisciplinary theoretical language that integrates these diverse traditions - this will all be done keeping law and art close to mind.

I believe a good way to orient and make sense of the theoretical explorations in this chapter is to recognize that I am working somewhat on the margins of Austinian discourse in that I am stamping out new grounds of the phenomenon of the performative occurrence. What I hope to do is bring more clarity to particular aspects of the performative. This work begins with expanding the idea of the performative utterance to the performative event. Doing so allows us to recognize

that many actions beyond the spoken word can be performative in nature. I then move on to the question of order and structure in relation to performance. All performance is a performance that takes up a particular structure and relates to an order of things, while also always holding the potential to transform that order. Austin has a very formal and linguistic way of talking about this aspect of performance. What I will do is use scholars who theorize on structure and order quite prolifically - Judith Butler, Pierre Bourdieu, and Bernhard Waldenfels – to expound new aspects of this discourse. I believe this is not a shocking move for someone coming from my position as a sociologist. To bolster the structural aspects of a linguistic theory of performance, I believe, is a way of sociologizing Austin. I should be clear that I do not only see this work as contributing to Austin's project, but I also see it as a new contribution to more objectivist leaning sociological theory. To mix the performative into sociological ideas of structure and order prohibits us from losing sight of the transformative character of enactment. I am not the first to make this connection, but I do hope that the ideas I develop here will serve as a contribution to this important theoretical interdisciplinary field.

FROM UTTERANCE TO EVENT

The basic premise of the performative that much of this thesis will be based on appears to be quite simple, but has far-reaching implications. As I mentioned very briefly in my introduction, the idea of the performative emerges in the work of linguistic philosopher J.L. Austin. Austin's central proposition is that speech acts and gestures do much more than describe or report on an external reality. Instead, through their performative force, they produce social reality. This is part of Austin's rebuttal to the constative assumption that all speech is a reporting of the social world and that even such things as promises are simply outward expressions of inner states. If this constative assumption were held, then the constitution of social reality would have to be assumed

to come from places beyond language; language merely would *describe* some *other* production of reality in the constative assumption. For Austin, a performative has the capacity *itself* to do something in the social world and creates bonds between people when spoken - "*our word is our bond"* (Austin 1962:10, original emphasis). Let us consider a few examples to grasp exactly how this performative constitution occurs. First, think about a promise. In the constative assumption one might argue that a promise is a mere expression of an internal commitment to an action, but what the performative assumption would argue is that regardless of the internal state of the promiser, when a promise is uttered, a promise has been made and the intersubjective world altered – two people are bonded. This aspect of speech, the power to bring about that which is referenced in the utterance is the *illocutionary* force of speech. The term "illocution" is derived from its base "locution". Locution for Austin refers to the contents of an utterance, whereas illocution refers to the force of acting on the social world that a performative contains. For instance, if someone warns "there is a bull in that field" the locutionary aspect of the utterance is the content-meaning of a bull in a field. The illocutionary aspect is the warning that is given (Loxley 2007:16-17). As long as the conditions are correct, namely the person you are talking to hears your utterance, then a warning has been given, and like the promise a bond between actors has been made. What comes out of this is that the illocutionary function of speech necessarily ties us to what we say and to the receiver of our utterance. Another example of a performative is a witness taking an oath in court. When someone takes an oath, when they "solemnly affirm" that their testimony will be truthful, they become bound by that utterance. If it is discovered they lied, they could be charged with perjury. It is the act of uttering itself that produces this bond. So, to state this all in another way, the content of a performative speech act, what an utterance seems to merely be reporting on or representing, is actually brought into existence in the act of performance. To make the idea of the

performative even clearer we should turn to a contemporary scholar, Judith Butler, who succinctly and powerfully uses the idea of performance to explain the constitution of gender. This example should help clarify how a performative works - it also presents an important shift in performance discourses that expands the discipline beyond language to actions and gestures.

Austin himself predicted that the study of performance should move beyond language into the realm of gestures and actions (1962:111-112). Even his highly linguistic concepts of locution and illocution lend themselves to the analysis of gestures – a verbal warning fits the criteria of a performative, but so too does an action like pushing someone to the ground. The push has the same illocutionary force as the utterance, and so illocution is not strictly based on verbal locution, on speaking per se. Yet, Austin did not pursue this line of thought in detail in his own work. Luckily Judith Butler has taken on this task, and has discussed fruitfully how the process of the linguistic constitution of social life also occurs in all gestures and actions. Without citing Austin directly, this corporal extension of the concept of performativity is perhaps most famously articulated in her explanation of the performativity of gender (Butler 1990). Butler works on the performative premise that what is being referenced in an action comes into being through the act of referencing itself to describe how the performances of everyday life produce our symbolic categories of masculinity and femininity. Butler says the genders male and female are not natural phenomena in the sense that they have a fundamental grounding. They are constructed entities; they are performative roles that we are all involved in either by reinforcing them or transforming them. Some may think that our gendered modes of expression, consumption habits, attitudes, behaviors, and comportments are caused by some fundamental masculinity and femininity that exists naturally in the world, say, from some tie to our reproductive organs. This kind of perspective would claim that certain “masculine” occupations, expressions, and activities are taken up by men

because it is an essential reflection of their nature, but performance completely flips this formula. Butler states that it is the way we act, the way we express ourselves, that establishes the categories of feminine and masculine action. Male and female genders are sedimented through performance. When we take up a particular role, we embody it, we perform it – this contributes to the symbolic reality of gender. As I said before, Butler's important contribution here is that this occurs not only through language but through the body. In this way, I propose that instead of only referring to performative speech acts, a common phrase in Austin's work, we can also refer more generally *to performative acts or performative events that* encapsulate the variety of ways that we perform as social actors.

The event of performing is always in dialectic relationship with social structure. Every performance, even though it produces something new, must be based on a certain structure that exists in the social world. Think about a theatre performance – an actor needs a script, a setting, and an emotional context to perform their act. This is the same in the performative actions of everyday life. If we consider gender, it is undeniable that the gender binary has been a longstanding social structure. Each time that a person performs a gendered expression or action they are taking up this structure in their performance – they are performing something that has been rehearsed, that they have learned elsewhere. Key to this premise, however, is that the structure that a performance is located within is always changed through the event of performing. No performance can ever be a complete copy of a prior performance. Even by virtue of a slight displacement of one performance from another in time, the context has shifted and the performance contains something new. This understanding reassures that transformation of social structure is always possible. Social structure doesn't merely exist outside of all social actors and works on us like a puppeteer – we perform social structure, and in each performance we have the opportunity to reinstate and protect

a particular structure, or to challenge it, and perhaps even dismantle it. In this way, we can also claim that performative events are much *more than mere cases of a rule* – they can only in hindsight be said to be examples of a category of a particular kind of event which could be replaced by many other cases like it (Waldenfels 2007:39). In other words, an event is not just a particular example of a certain kind of situation or one particular case of a pre-existing categorical set. Instead, in the midst of the event, rules, structure, and categorization are enacted and "order itself is submitted to contingent conditions" (40). However, Austin does not talk about structure exactly how I have stated it here, instead he formulates an idea of structure and constraint with the idea of *felicity*. Felicity is a state of satisfaction – satisfaction in the sense that certain conditions are being met. Austin argues that for any performative to be successful in its transformation of the social world, certain conditions must be in place. In other words, a particular structure of action must be taken up. These conditions are often comprised of conventions. For instance, for the performative "I do" uttered in a marriage ceremony to be felicitous – that is, for it to do the act of marrying - it is necessary that there be an ordained priest or a civic authority present to conduct the ceremony, certain scripts and statements must be followed, etc. The performative has to satisfy a history and a structure in order to take its effect. So again we arrive at the notion that the performative event is iterative, meaning that it cannot be cleaved from social history or structure in its ability to transform the social world.

AUSTIN AND BOURDIEU: THE PERFORMATIVE OFFICIUM

Because the performative is a process of intersubjective action, it is inherently tied up in a matrix of ethical, moral, and political concerns. We can see this clearly when considering the case of gender. By showing how performance incites a process of normalization and naturalization of

the gender binary, we can recognize that performatives incite *force* and *power* on those who defy its constructions. However, this kind of analysis actually moves beyond Austin's focus on the illocution of speech conventions. Austin remains in a somewhat formal space of consideration, thinking only of bonds in the "communal dimensions of linguistic life", but is "silent on …the moral worth of particular norms" (Loxley 2007:121) that are established through the performative. A more productive account of the performative considers the force and power that underlies the social relations among speaking bodies that performance enacts. I make this point because I think it is key to realize that Austin's initial idea of the performative is immensely important, but it needs to be expanded and morphed to become an encompassing theoretical lens – and especially if it is to act as the lens to consider processes of normalization in the artistic field. One way of doing this work is to reconsider Austin's concept of illocution as it relates to forms of dominance and authority inside what Pierre Bourdieu might call "*officiums*" (Bourdieu 2014:55) – institutions or orders of society that confer various forms of authority to the actors that hold its positions. Pierre Bourdieu is not an Austinian scholar, but he (1991) has commented on Austin's work. The claims Bourdieu makes about Austin's work will help us grasp how we can apply the theory of performance to institutions – this will certainly be useful when we begin to consider the institutions of law and art. But, before doing that let me work with the example of the institution of higher education to give us a sense of what Bourdieu wants to say about the performative.

The scholar is no less bound and animated by the performative than the statesman, or the jurist. Higher education is a performative venue, and so the academic discourse on the performative is a performance in and of itself. But would it be then, with the academies' sequestered claim to knowledge, that not all performers have the right to engage in this discourse? The answer to this question is difficult, for the theory of the performative recognizes the formal capacity of all agents

in producing the social world and thus would have to claim that even those people with no education at all could be involved in performatively fashioning academic dialogue. But surely, we can see how the scholar has a much greater authority in producing an official performative discourse. This differential power within the performative constitution of the social world is what Bourdieu is interested in. It would be necessary in this example of higher education to produce an explication of differential positions of performative power – positions *ex officio* - within the academy and beyond to explain how different social actors have more or less ability to transform their world. In this explication there is a doubling, however inseparable, of the character of the performative into formal and social strata. It is on the later that we can put emphasis in developing various concepts of power, authority and prestige. We can see how this idea would be a particularly important for a scholar like Bourdieu who holds a self-identity as a scholar who always sat on the outside of mainstream French academia because of his working-class upbringings. Once Bourdieu reaches the mainstream of the academy, once he is awarded a position in the *officium* of the university, he is able to interject and contribute to the performative discourse. In this way, he embodies his point about differential performative power and gives justification and example to his idea by virtue of his writing on the topic. The infiltration of Austinian discourse is akin to the accused acquiring the language of jurisprudence. What this indicates is that by considering *officiums* – like that of the academy – we bring new offerings to the study of performance, particularly in relation to authorizing institutions such as the State and law.

Bourdieu says to expand Austin in the direction that he proposes we should read Austin's work not as a contribution to the study of the capabilities of linguistic systems, but as a contribution to the study of the production and reproduction of symbolic power. Key to justifying this shift is understanding that

> The illocutionary force of expressions cannot be found in the very words, such as 'performatives', in which that force is *indicated,* or better, *represented* ...The power of words is nothing other than the *delegated power* of the spokesperson, and his speech – that is, the substance of his discourse and, inseparably, his way of speaking - is no more than a testimony, and one among others, of the *guarantee of delegation* which is vested in him. (Bourdieu 1991:107)

According to Bourdieu, Austin suggests that anyone *could* utter *any* speech act; the qualifying components being only the conditions of felicity of said act. However, we must recognize that felicity is not often easily achievable. Of particular concern here is the barring of access to the language of an institution based on the conventions required to perform felicitously. It is very difficult to be felicitous in, say, a university lecture hall, if one has no educational experience. Thus, we need to contextualize the concept felicity as primarily a set of *social* rather than linguistic conditions – an investiture of force in the utterer, rather than a formal capacity arising from the correct words said. Felicity is about authority, and authority "stem[s] from the position occupied in a competitive field" (Bourdieu 1991:109) or, in other words, "the social position of the speaker, which governs the access he can have to the language of the institution" (109). With this understanding, felicity as a concept could be retained, but with the qualification that it more accurately describes a class of symbolic expressions, of which the consecratory power of authority is central. This argument is rendered in a clear way by Bourdieu when he says,

> The language of authority [or authorized acts] never governs without the collaboration of those it governs, without the help of the social mechanisms capable of producing this complicity, based on misrecognition, which is the basis of all authority. In order to gauge the magnitude of the error in Austin's and all other strictly formalist analyses of symbolic systems, it suffices to show that the language of authority is only the limiting case of the legitimate language, whose authority does not reside, as the racism of social class would have it, in the set of prosodic and articulatory variations which define distinguished pronunciation, or in the complexity of the syntax or the richness of the vocabulary, in other words in the intrinsic properties of discourse itself, but rather in the social conditions of the production and reproduction of the distribution between the classes of the knowledge and recognition of the legitimate language. (113)

Although I believe Bourdieu's critique of Austin makes an important emphasis on social authority as a key aspect of the performative's force, we should recognize that Austin doesn't claim that the power of the performative is purely linguistic. A formalist reading of Austin may be common, particularly when one only considers his work on the performative and not his larger project of the speech act, a wider consideration that is needed to grasp the significance of Austin's thinking (Loxley 2007). But, if we do read Austin closer, particularly on his later return to the concept of the constative, we can see how Austin did begin a study on the way language's force was undoubtably entwined with large social processes of authority. Austin recasts the constative as an utterance containing aspects of the performative (1962:139). Austin argues that the constative, typically understood as gaining its validity from an experientially derived truth or falsity, is also caught in the forces of felicity such that the institution in which constatives are uttered, and by whom they are uttered, renders their truth as such. Thus, it is in a certain *social production of felicity* that truth emerges and language appears as forceful. In this way, Bourdieu is not so much calling for the abandonment of Austin's work, but encouraging us to recast the study of speech acts in a wider scene of symbolic struggle. A perspective that I believe remains true to Austin's original formulations and also considers Bourdieu's additions is one that recognizes that performative language is implemented by authorized figures who gain their authority by virtue of their position in an officium, but that language also *works to produce the officiums* themselves. The last part of this formulation is key because it ensures we recognize that officialising structures or institutions that consecrate authority to particular actors are not somehow produced completely outside of the matrix of linguistic life.

The question we are left with now is how the officium emerges as an officialised site? To answer this question we must morph the idea of felicity to understand it not as a set of simple

linguistic conventions that must be met, but rather as an entire context of authority through which language becomes illocutionary. I propose we do this by considering Bourdieu's concepts of recognition and misrecognition as they relate to felicity, illocution, and the not yet explored Austinian concept of perlocution.

In the many treatments of the concept of recognition, Bourdieu's stands out to me as relevant for this thesis in that it abstracts the idea of recognition to allow us to make sense of authority. To understand where Bourdieu takes the concept of recognition, it is first necessary to briefly outline his concept of knowledge. Knowledge for Bourdieu – as translated from the French word *connaissance* – includes both cognitive processes of, say, consulting a store of facts and understandings of the world, but also diluted and implicit senses of how to *act* and *be* in a social environment. This understanding is what brings David James to state that "it is only through appreciating this meaning of 'knowledge' that we can fully grasp the related terms, namely '*reconnaissance*' (knowing again – recognition) and '*meconnaissance*' (misrecognition)" (2015:100, original emphasis). For Bourdieu then, *misrecognition* refers to any social practice of reiterative individual or collective misattribution. Misattribution is to recognize something *as it seems* and to attribute the characteristics of that person or thing as they are stated and commonly known. In this light, the authority of, say, the State or an individual actor "is only exerted insofar as it is recognized (i.e. insofar as its arbitrariness is misrecognized)" (Bourdieu 1979:82-83). To explain in another way, I see authority as resting in an entity that is *misrecognized* as having that quality - someone or something that is *known and known again,* in a way that *seems* unquestionable and real. What is also key to understanding Bourdieu's concept of misrecognition, is seeing the "mis" prefix not as an unjust, or unwarranted recognition, but instead as a gesture toward the arbitrary nature of authority - arbitrary in that authority is not innate. Authority has real

consequences for the wielding of power, but it is built through recognition, not given to certain entities naturally. Recognition, understood as *knowing again,* could be considered highly analogous to reiterative performance - as a state of affairs is brought into existence through performing a known-again action, or a rehearsed action, that state of affairs takes on a reality. Although it may be an arbitrary state of affairs it has real consequences, structures, and processes that can become palpable in a particular social environment and confront the actor as they perform their way through their own experiences.

I outline the idea of misrecognition because I believe it gives us new depth to this issue of authority as arising in a sometimes concentrated and sometimes vast social environment – it provides new depth to the analysis of the felicity of performance. I have already introduced two concepts of a theoretical tryptic central to Austin's work – locution, illocution, and perlocution - and I now want to introduce the last. As a reminder, locution refers to the realm of content-meaning in a speech act and illocution refers to the performative force that an utterance has in producing the social world. The third concept, perlocution, relates to the realm of reaction within a speech situation. The simplest way to present this concept is to return to our example of a warning. If someone gives a warning "there is a bull in that field" we can identify the locutionary aspect as the content-meaning of the statement that there is a bull in a field, the illocutionary aspect is the fact that a warning has been given by virtue of the utterance. The perlocutionary aspect of this statement is the response that arises in the addressee of the utterance. So, whether the other person heeds the warning and refrains from entering the field, or whether they shrug the addresser off and enter regardless of the warning, both situations refer to the perlocution of the utterance. Austin separates perlocution because he wants to show that performatives act in the world (in this case, they bond the two people through the ethical situation of a warning giving in the face of danger)

without having any essential connection to the reaction of the addressee. In other words, Austin's theory would not require that the addressee of the warning take it seriously, which is what the addresser would intend to happen, for the claim that a warning has occurred.

To reinscribe this distinction between illocution and perlocution back into the issue of authority and felicity I want to explore a hesitation I have with the formal separation of these realms of speech that attributes illocution to the specific formal capacities of language, and perlocution to the reaction to such illocutionary force. To forewarn, I do not think we need to part with the concepts of illocution and perlocution, for the suggestion that words act beyond their ability to generate an intended effect is critical to the performative, but I do suggest we keep the concept of misrecognition in close proximity to these terms which will remind us of an inherent social aspect of the production and reception of authorized acts, and it will remind us that production and reception of social acts are not so easily discernable moments. As argued above, illocutionary force arises from felicity conditions, but felicity is always socially derived. The felicity conditions of, say, the sentencing of the accused, depends on the entire situation of the juridical field to be in place, which means a somewhat active role in the reception of the verdict by those surrounding its utterance. One needs a certain reaction and misrecognition of the people involved in the court scene (jury, defendants, council, etc.), and a certain complicity in the authority of the court for the court to act with force – that's is, to be felicitous and produce an effect. To give into the situation and be complicit, a certain form of *doxa* is needed, and thus a certain form of perlocution, a certain form of reaction is already underway. Feeling relieved at the uttering of a verdict is a perlocutionary reaction, but underlying those feelings is a more fundamental reaction, better described as a relation to the court, that of misrecognizing its authority. In feeling relief from a court verdict you are reacting with a certain doubleness –

misrecognizing the authority of the court, and then recognizing the court's verdict as relieving. In this way, we must support an inseparability between illocution and perlocution. This inseparability signals an important feature of the performative – its ability to produce a context that is laden with a structure of authority, while concealing an obvious source of authority. This subsequently makes the authority that is established in performative scenes difficult to know and thus difficult to contest.

THE PERFORMATIVE AS THE BASIS OF LAW'S AUTHORITY

In the previous section, I argued that the concept of felicity needs to be considered as a broad set of social conventions and environments. What needs to be done now is to ask of the concept of felicity how effectively can one synthesize the context that it asks us to consider? Is it possible to ascertain the conditions that bring about felicity, and thus authority, in any given speech act? Where are the boundaries of the contextual and conventional elements that ground illocution? And most importantly, if we have found the conditions of felicity, on what basis are they the conditions? Take the common Austinian example of marriage, if an ordained priest is necessary for the felicitousness of the "I do", what are the conditions necessary for a priest to be ordained? Surely, it is the work of an anterior performative – say, the consecration of the priest through the seminary. And then, the authorizing power of the seminary must be derived from the performative power of those in even higher positions in the organization of the Christian Church. Thus, authority seems to be an escaping figure always predicated on the work of an anterior signature. Let us probe this seemingly regressive nature of felicity by considering the case of law.

Imagine a bill has been passed and will be set into motion at a certain date. Who authorizes that bill? In Canada, bills pass through various sections of the State, culminating with the Queen's

signature. This is the decisive authorizing signature, but its decisiveness is not freed from question – we can still ask who authorizes this signature? If the signature has the force of law, it is because it is authorized by an anterior signature that would be preceded by another before it. Where does this regress stop? According to Derrida (1992), no justificatory discourse is ever fully present for a law. Political theorists inspired by Rousseau might claim that there is a justification located in the general will of the population, others locate the justification in a theory of the social contract, but for Derrida, if you ask of a law "why is it just?" you can forever ask the same question to the answer given. This regress brings Derrida to posit that the authority of the law is aporetic in origin, and that it is the performative nature of the signature that is at the core of its functioning. Thus, our question of "what authorizes law ?" is the same question as "what are the conditions of felicity for the performative?". Both questions stretch toward the unknowable, the mystic, the alien. This is the mystical limit (Montaigne 1993[1580]; Derrida 1992:14) that every discourse arrives at in its effort to find the origin of the force of law. And it is through this justificatory aporia that Derrida can claim that *justice is before the law.* In other words, justice and the law are ruptured, where there is law there is not necessarily justice because we cannot trace the authorization of a law, or the conventions of a performative to a final justified resting place.

James Loxley states, "in this situation, the illocutionary force that characterizes an act performed rightfully, according to prior conditions or authorisation, is intertwined with a more violent force that serves to validate the act by splitting it from itself" (2007:104). Considering this process as a system of "violence" is slightly misleading, for any and all officialised actions, regulations, laws, and conventions, are established in precisely this way. The force of law implicates *all* apparently originary acts of formation, thus partially invalidating the immorality that is seemingly tied to a "violent" act. Thus, we should asterisk "violence" as a term with double

meaning. In the symbolic sense, producing an order doesn't need to indicate a negative or physically forceful act that the word ordinarily implies. The creation of order is an act that has the character of simultaneously being inclusive and exclusive. By excluding something or someone - which all orders necessarily do, for orders are precisely a limiting and arranging of things into a coherent structure - orders always carry within them an element of injustice (Waldenfels 2007:13). However, if we consider an act like the confederation or constitution of a nation - an act that often takes on a performative quality of paradoxically basing its authority on a "people" who the act claims to officially establish through its declaration - we can recognize that the order that is fashioned is often explicitly physically violent. In Canada, for instance, this included the genocide and then forced assimilation of indigenous people. There is a profoundly violent exclusivity in this action. Thus, to use the term violence in the conventional sense is appropriate here, but to use it in the symbolic or semiotic sense to describe the process of ordering is also appropriate. It shows that violence in the semiotic sense and physical violence are connected with each other, while not necessarily being identical.

In expounding the symbolic violence in law, Derrida states that the foundation of law "performatively produces the conventions that guarantee the validity of the performative" (1992:33). Said differently, the event that founds law must be placed performatively in the past, *as it occurs presently,* thus establishing a felicitous situation in which an act of foundation is identified with an act of preservation. In other words, the ultimate unfoundedness of a contemporary performative – characterized by its ungraspable regress - must be disguised with a coherent ground. Derrida gives example of this in a discussion of the grammatical quality of revolutionary acts. Consider the phrase "our time has come" – a common slogan of revolution. Derrida states,

> In these situations said to found law (*droit*) or state, the grammatical category of the future anterior all too well resembles a modification of the present to describe the violence in progress. It consists, precisely, in feigning the presence or simple modalization of presence. Those who say "our time," while thinking "our present" in light of a future anterior present do not know very well, by definition, what they are saying. It is precisely in this ignorance that the eventness of the event consists, what we naively call its presence. (35, original emphasis)

Thus, the performative act of lawmaking guarantees the validity of the legal system presently being founded, which gives a person, group, or a State, the means to declare itself and its violence just. As Derrida notes, the eventness of this event, or that which comes into being through the event, is not willed, but unwittingly produced through the conventions of the performative. New orders are always founded on the same mechanism as the order which they replace. Thus, these acts of revolution "inscrib[e] iterability in originarity," (Derrida 1992:41) A successful revolution produces the discourse of its own self-legitimation, it produces felicitous conditions for its own reading. In this way, "that which threatens law already belongs to it, to the right to law (*droit*), to the law of the law (*droit*), to the origin of law (*droit*)" (35). The primary point here is that if every institution of order is based on a performative – remember the core premise of the performative is an action that brings about a particular effect through reference, but a peculiar kind of reference that is not merely a representation, but a moment of origination – and we cannot ever trace back the authority or justification of a performative act to clean and precise ground, it may be that no institution of order is ever fully justified.

If all orders are instituted through the same mechanism of performance whose grounds are arbitrary – but nonetheless real – can one order be said to have a more justifiable premise than its alternative? Or are we doomed to understand orders in completely relativist terms? The reason I ask these questions about the justice of establishing orders is because in the larger picture of this thesis we are dealing with the clarification of a law that gives credence to a new order. I propose

that we see law as a performative process and thus it is important to investigate the just or unjust qualities of performative legal proceeding. Although the performative establishment of order always seems to contain an element of injustice, as described above, there does seem to be a way to avoid the claim that all orders are completely relative, a claim that would make seeking justice and goodness a futile attempt. So, next I will provide a few considerations that set out the initial traces of a road on which we may be able to chart a theory of performative justice. If we do chart this theory of performative justice we can then use it as a lens to analyze the Supreme Court hearing of 2014. So, let us continue charting the theoretical ground of the performative and attempt to arrive more precisely at some notion of justice in a performative vein.

In my research, I have come across some important dialogues on the justice and injustice of order constitution. One proposition that has struck me is the claim that the injustice and violence of fashioning an order is perhaps only denied in an order of the *coming age* (Benjamin 1996[1921]:248). The only just institution of order in this perspective lies beneath the surface of current attacks on law, their presence felt in that moment when law is disrupted, but before it is settled into a new structure of social life. What this perhaps suggests is that the only just aspect of order creation is that aspect of its possibility, not its doing. We are saved only by the *possibility* of justice, and not by its mistaken and always decaying form in world-historical scenes. If we were to translate this perspective into performative language we might say it is the animating thrust *to perform* that is the just aspect of performance. The thrust being the only ultimately just aspect of the performative construction of social reality. Just violence then might be thought of as "desire" or "impulse for transforming the current world-historical conditions of existence into a more just and equal society" (Guzman 2014:58). However, when placed into our present-day political, economic, and moral world, this theory of justice presents some concerning characteristics. For

instance, if justice is always "to come" could this discourse be used to justify present suffering? I think specifically of the suffering under neoliberal austerity measures such as precarious livelihoods and a lack of social safety programs. Is the only justice we can conjure in this assumption a justice predicated on waiting while we suffer for something better in the future? Furthermore, if we emphasize change as the only possibility of justice we would be glorifying all that is new, and we would consequently deny that there is any justice in continuity. This might be a way of promoting or justify catastrophe and permanent states of emergency. What this signals to me is that while we can recognize that there is something just in transformation and change, we cannot solely think of justice as the possibility of transformation.

A different way of characterizing justice that is akin to the above articulation, but not exactly the same is to seek a measurement of justice through the degree to which structures or orders themselves have a particular relationship to that which they exclude. In other words, we should ask of particular structures of social life – which according to the opening pages of this chapter are performatively enacted – if they have a particular way of inviting and being open to further change, such that they avoid an overly normalised order which we can call a state of "normalism" (Waldenfels 2015). In what follows, I will further explore this idea of normalism, and articulate more clearly how orders that avoid normalism may be seen as bringing some justice to the constitution of social life. I will do so through an account of responsive phenomenology by Bernhard Waldenfels. Afterward, I ask whether the law is an institution that has a tendency toward normalism. I will make the claim that law indeed does have a tendency toward highly normalized social order because of the way it has to value permanence and continuity in order to obstruct views of its arbitrary performative nature. Central to this argument is the recognition that an appearance of permanence and continuity is key for the law to maintain its authority, and in the

attempt to ground its authority in these traits law also structures its tendencies toward normalism. This later claim will be support by Judith Butler's (1997) observations on law and the subject. I will also note now that this last proposition - that law has a tendency toward rigidity and normalism - is a claim I make in relation to the case at hand, and should not be taken to apply to *all* situations of law across time and space. I am discussing contemporary Canadian law, and if my line of thought is applied to other contexts, a re-evaluation of the legal tendency must be undergone.

NORMALISM AND ANOMALISM AS TENDENCIES OF RESPONSE

In demarcating his own phenomenological stance, which he calls a *responsive phenomenology,* Bernhard Waldenfels stresses that "perceiving does not start with an act of observation; on the contrary, it arises with an event of attention that is aroused and provoked by what strikes" (2011:45). Becoming ill, awakening from sleep, having a thought appear out of nowhere - these are demands from what Waldenfels calls the alien or the Other that we have to respond to. It is this constant movement of demand and response that makes up experience for Waldenfels. Waldenfels' responsive phenomenology demarcates an important shift in phenomenological thought because the Other, which strikes as an unsolicited appeal or demand does not have the characteristics of an intentional object – it seems to exist prior to intention at the moment of attention. In the tradition of phenomenology, particularly that of Husserl's phenomenology, the concept of intentionality is used to transcend our typical notions of consciousness in the way that it claims that experience itself emerges from a stock of knowledge, or positionality that constitute one's tie with the world. This is a transcendental quality that responsive phenomenology acknowledges - "there is no thinking and willing without deep convictions and habits which are far from being at our free disposal" (52). Yet, responsivity adds

to the notion of intentionality by declaring that "from the very beginning [of the demand] I am involved, but not under the title of a responsible author or agent" (46). That is, I am in relation to the demand, but I do not produce the demand or somehow structure the demand myself to which I have to respond to, I am a "patient" (46) that something is *done to.* In a fuller explication Waldenfels states,

> If practical behavior as well as other forms of behavior start with being affected and continue by responding, we encounter the enigma of a creature that moves but not completely by itself. This creature would then participate and intervene in an ongoing motion which also would precede our initiative …we are carried away (*mitgerissen,* comportés) by our own words and actions as well as by those of others, so that we are neither reduced to merely moved objects nor to simply moving subjects. (51)

What this quote clarifies is that the concepts of response and demand are not a challenge to intentionality in that they ought to replace it as a concept. It is instead a rethinking of the transcendental qualities of experience that adds the realm of the Other or the alien as a motivator or animator of change. Waldenfels does not do away with the premise that things are grasped *as* something – the thought that founds phenomenology's radical reformation of the subject/object dualism – but he does posit that the event which is endowed with intentional relations also includes a factor of change and newness sparked by the demand of what is alien to the event's order, or what is Other to one's ownness. Waldenfels conceives of the Other as a relational entity, meaning there is no absolute Other that is autonomous from any order – no common alien form that could be identified. Rather, the Other is in excess to the order it escapes. The alien withdraws from the order, but in that withdrawal is essentially related to it. What occurs in the demand of the Other is an assignment of meaning through responding to it, most fundamentally through the intentionality of consciousness. This theory of alien and order is at the basis of Waldenfels ideas of justice and law.

On prior pages, I discussed how law is always constituted by an act that is not ontologically – that is, not essentially - grounded. A responsive phenomenology follows the path of this claim, stating, "at issue here is by no means the conflict between justice and injustice, which always takes place within an order, but rather a dimension of injustice at the heart of justice, or of lawlessness in law" (Waldenfels 2006:362). Because of this messy congress between justice and injustice that is illuminated in the study of performance, and now here in phenomenology, paths beyond absolutism and relativism in the study of just action have been difficult to course. True justice remains as an evading entity. However, through the theory of the responsive event, Waldenfels attempts to present new horizons of consideration beyond the stark dialectics of good and evil, right and wrong, justice and injustice. Waldenfels proposes that within law we might view "justice as the *interruption* of the legal process, as something that belongs to the legal order *insofar as it always withdraws from that order*" (371). In other words, Waldenfels ascribes a justice to the Other in its ability to appear and demand something from the order of law. Viewing justice as that which fractures order is to see it as a disturbance from the realm of the Other. This articulation of justice shares characteristics with our prior theory of just performance as the possibility of change. The shared characteristic of these theories is the recognition that there is a justice in that which dismantles structure. However, Waldenfels shares the same concern that I presented above about glorifying newness, and only ascribing justice to that which dismantles, and not to that which remains. He articulates this concern in his discussion of normalism and anomalism, which I read as two poles in a spectrum of responses to the suggestion or sting of a new order.

In Waldenfels' understanding of experience, orders are constantly being created and changed through acts of demand and response, and these orders are partially composed of normalized values, desires, and visions of social life. To order is to draw equations of meaning, to

group phenomena together in certain structures of relation. This could also be called a process of categorization and this process is an inherent part of our functioning in the social world according to Waldenfels. But, when we closely consider what is accomplished in the act of equalizing we see that there is a necessary simplification and reduction of experience into our equations, into our own orders. Ordering is always a process of equating that which is actually unequal in experience – an act that produces a set of normalities as accepted categorizations. Yet, in the very same act of ordering there is an excess – that which is unequal and escapes, or withdraws from the order and "can be determined as an-economic, anarchic, alogical or a-legal" (Waldenfels 2015:94). In this way, "orders that do not fully support and ground themselves release forces of the extra-ordinary" (94). The extra-ordinary, which could also be termed the alien, the Other, or the anomic are the force of rupture in social experience. What is then important to consider is how various social orders treat the anomalies of their own excess differently. In other words, we must attend to how different orders respond to the Other. Waldenfels gives us one method of doing this attending. He says we should analyze the way in which orders tend toward normalism or anomalism.

Normalism for Waldenfels is a state of highly exaggerated and steadfast normalities. To caution against normalism, which Waldenfels does, is not to state that all norms, values, desires, and visions are inherently bad, nor is the process of establishing them. Experience itself is a constant process of producing normalities through responding. However, normalizations "fall upon the tracks of a normalism when normality causes its own origin and limits to be forgotten" (Waldenfels 2015:95). In other words, a state of normalism denies that norms and values are elements of social life that can be rethought and reconfigured. The drawback to a state of normalism is that it generates a pressure for leveling experience (95) – "anomalies appear as deficits, disturbing, offensive, or superfluous. If something goes wrong, it is attributed to the

expenses or to collateral damage" of the order that is taken as the ultimate state of experience (95). This means that there is an overbearing assumption of supremacy in states of normalism. Yet, to warn against states of normalism is also not a promotion of complete anomalism which would be a highly exaggerated state in the direction opposite to normalism – an exaggeration and proliferation of unwieldly change, catastrophe, and the glorification of all things new. So, in analyzing particular orders in terms of their responsive orientation – either one that stimulates normalism or anomalism – one must be cognizant of both "mediating powers that like to interfere in alien experience in a regulative fashion" (Waldenfels 2011:80) (resulting in normalism) and mechanisms that leave no room at all for some consistence and stability. What I will now do is make the case that law has a particularly rigid normalist relationship with its Other.

THE RIGIDITY OF LAW

In Waldenfels' work much time is given to elucidating the alien realm and discussing its existence as a sphere related to ordering. This work does not often engage with the modern legal apparatus, but when it does, we find important insights on how we respond to the alien in a collective and individual manner. Indeed, it is the legal system which gives us numerous ways of responding to ethical, moral, political, economic, and social demands in our everyday lives. Waldenfels states,

> The originary phenomenon of morality does not consist in the fact that there are definite laws, but therein that someone else and something else appeals to me at all, and foils my initiative. In brief, law is more than valid law. The normalization that maps the 'huge, distant and thoroughly hidden country of morality,' begins with a conversion of the 'thou shalt' into a 'he, she, everyone ought to,' similar to the way the dread-stricken self, in fear of an identifiable something, recovers its stability. As a repeatable instance, the singular demand becomes tractable. (2006:374)

Here law is presented as a particular way of stabilizing the "huge country" of morality by reintroducing the alien into the normal, that is, into order, in a particular fashion. This fashion, according to Waldenfels, is predicated on normalization. The law normalizes specific ways of responding to appeals we face in everyday life by converting the "thou shalt" into a "he, she, everyone ought to", meaning that the law takes singular instances, each with their own particularities, and equates them, finds a legal rule that can apply across events.

I believe the mode of moral responding that the law institutes in our contemporary Western world is constructed out of specific conceptualizations of the subject, their actions, and the recourses one is subject to in the instance of transgressive behavior. Most notably, in our present-day legal system we uphold the notion of the accusable injurer and the objective judge. Delving into these conceptualizations will allow me to articulate the differential power or force of legal performance as an officium predicated on appearing as objective, neutral, and transcendent. It will also allow me to make the point that the law has a tendency toward normalism instituted by its continual conformity to and production of present-day moral thinking – this is a conformity that gives it its authority. The following remarks stem from my reading of Waldenfels, but also from Butler's *Excitable Speech* (1997), in which she discusses our present-day notions of morality and law in relation to hate speech legislation. While her empirical focus is not the same as my own, she does give us a good understanding of the kind of moral thinking that our legal field operates on.

Butler claims, and I agree, that in our present-day moral thinking we largely believe in a discrete and intentional subject that acts. We need this conceptualization of the subject, Butler argues, in order to assign blame and to produce a system of accountability for the effects of social action. This is a way to respond to and moralize the pain that occurs when a being is hurt (Butler

1997:45). Because Butler is working within the Austinian tradition, she notes that a discrete and fully intentional subject is something that the performative would deny. If performance is always iterative and citational there is a loss of any singular intentional subject who *does* anything in its pure originality. Through seeing the subject as discrete and deliberate, our present everyday moral thinking also renders pain and injury as equivalents. As we fabricated the subject as a being who acts and causes a painful effect, we also recast all pain as injury and "the continuous present of 'a doing' …is reduced to a 'singular act'" (45). Again, in the discourse of the performative, one could argue that pain is possible, a certain citational utterance could cause harm, but to equate this with injury – understood as an intentional wound caused by a specific and singular action – strays from the philosophical insights of the discourse. In performative terms, but not so much in contemporary law is there a difference between the conceptualization of *an injurious act done* and *a continual forming of pain.* So, in the place of a generalized "doing" appears the discourse of accountability which posits a deliberately acting subject. However, what is most important about this form of morality for my own work is that with the assumption of accountability comes the assumption and acceptance of an institution of judgement and punishment – State law. I argue that if this system of morality based on the acting subject is to appear as legitimate then it must assume that there is a plane from which judgement can be given reliably, autonomously, and universally. There must be an ultimate and transcendent arbiter, and in this case, it is the judge. "Transcendent" in this case means to be removed from the social lifeworld of experience and to exist on a plane that is separated from everyday life from which one could take an objective and neutral view of experience and judge it without being involved in it. As everyday actors we hold these assumptions and bring about a certain natural attitude within the ephemeral and difficult experiences that are wrapped up in ethical, political, and injurious scenes. Or as Waldenfels might put it, the law

presents us with a seemingly natural system of responding to singular situations in a generalized and normalized structure of morality – which is based on the independent subject and the transcended judge.

If our moral system is based on a naturalized acceptance of certain assumptions about the subject and the judgement of the subject, those who wish to uphold the system must actively produce objective - that is, visible – "proof" that the assumptions are valid. In the case of State law, if it is to appear as the ultimate arbiter of injurious acts it must perform its institution as to give off the characteristic of being a transcended and justified place of judgement. I believe this is done through the performance of permanence, continuity and rigidness. Said differently, for the law to maintain its authority it must have some claim to objectivity and for its rulings to appear this way they cannot be continually subject to change and malleability. Law is not an institution where reading its own texts and utterances against themselves, refiguring them, and re-signifying them is a prized activity. To do this would be to openly present the fissures of law, and would dismantle its sense of authority based on its apparent objectivity and transcendence.

Returning to Waldenfels' notion of normalism and anomalism as a spectrum of responsive orders, I believe we can claim that law has a tendency toward promoting and enacting states of normalism. We must remember all ordering processes - which law certainly is - normalize certain actions, which in and of itself is not necessarily a bad thing, and is actually an unavoidable process in experience. Yet, as I articulated above, normalizations "fall upon the tracks of a normalism when normality causes its own origin and limits to be forgotten" (Waldenfels 2015:95). This is precisely what occurs in law's attempt to remain a powerful arbiter of social action through its construction of its apparently objective and neutral position. Law attempts to conceal the performative basis of its occurrence – specifically the characteristic of citationality and openness

to re-signification at the core of every performative. Law tends toward continuity and rigidity because doing so allows it to appear as authoritative. This plays out in a number of ways - as mentioned above, law prefers to keep its judgements in place over long periods of time based on the idea that an objective judgement is one that should not be overturned quickly. Law also likes to employ a particular jargon which makes its practitioners appear as neutral and objective lectors of legislation (Bourdieu 1987). Furthermore, law has a persistent physical appearance (including aspects of attire, setting, and ritual gesture) that aids in its performative attempt to appear as transcended. I will further discuss the details of these considerations in chapter four, but for now suffice it to say that law can be seen as a normalistic order because it gains its authority from enacting qualities of experience that lend themselves to overly-normalised states – continuity, permanence, and rigidity.

If it is not clear yet, what we also must realize about this system of moral thinking is that it orders the social world into differential positions of performative power. In the moral-legal arrangement described above, various social spaces, or *officiums* as Bourdieu might call them, contain more or less performative effect. For instance, we can see that the misrecognition and hence conferral of power to the State's institution of judgement based on its appearance as a transcended arbiter of experience gives the law an emphasized force when it speaks. Waldenfels recognizes a similar feature of authoritative acts in his own framework of thinking. He states that anomalies "awaken us just in time from the slumber of normality and prevent a socially cloned 'normal human being,' or a correspondingly 'normal God,' from receiving—as Nietzsche had already feared—the scepter" (Waldenfels 2015:93). Here Waldenfels is recognizing that there is a particular type of moral understanding – a "slumber of normality" - within which arises a "normal God", through the practice of misrecognizing people in powerful positions as having a certain

sovereignty or authority. The "scepter" is the symbol for this ultimate authority coming from monarchic material culture. What this quote tells us is that there is a normalist tendency wrapped up in the performance of authority. The scepter is only granted when there is a repression of the anomic, when we "slumber" - which I believe can stand in for the concept of a natural attitude – there is a lack of anomalies to guard against the rising of normalized powerful positions.

One of the primary concerns about a rigid legal system that has the power to make judgments on all of social life – including the arts - is that perhaps not all of social life should be rigidly defined and mandated. In a Waldenfelsian dictum, this is a concern of supressing the anomic. In states of normalism, anomalies which can be thought of as re-significations and challenges to meaning and order "appear as deficits, disturbing, offensive, or superfluous" (95) rather than as progressive and just. Judith Butler (1997) arrives at a similar concern in her work on hate speech. When contemplating hate speech legislation she brings up the point that rigidly defining what speech can and cannot be uttered would arrest the possibility of the re-signification of words, a process often used as an act of revolt by the people the words once hurt. Thus, Butler warns us of allowing certain cultural and linguistic matter to enter the jurisdiction of the law. Butler suggest that we leave open the possibility for cultural reforming of language, rather than subjecting speech to the rigidity that is at the base of law - a rigidity that is located there because of its ability to produce a guise of permanence and objectivity, two key traits of the law's performative power.

There seems to be something about art, and perhaps everyday speech, that calls for the preservation of its autonomy of self-transformation. This "something", I argue, is a tendency of art to oppose the rigidness of law, an anomalistic tendency in Waldenfelsian language. This quality is perhaps that which could balance the normalistic tendency of law in the greater structure of social life. This is what I will explore in the next chapter as I change my focus to conceptualizing

art and its specific relationship to Otherness. Whereas I discussed the tendency toward rigidity that is characteristic of the legal apparatus in this chapter, I will discuss the tendency toward transformation in the aesthetic field in the chapter that is to come. This tendency toward transformation – art's "highest point" - is what I deem the *autonomy* of the artistic field. "Autonomy" is a word that has a melange of meanings in the world of the aesthetic; this includes colloquial notions of artistic freedom, and intricate theoretical stances on the idea from Kant to Bourdieu and beyond. I hope to present my own notion of autonomy, one that brings clarity to the concept in relation to the themes of performance and justice. Once this is complete, the totality of the 2014 Supreme Court hearing between CARFAC-RAAV and the National Gallery – both its legal and artistic aspects – can come together under one theoretical lens. What I hope I am foreshadowing in this theoretical discussion is that there is a complex conference of autonomy and heteronomy that occurs in the 2014 hearing, a complex enmeshing of orders or officiums, and this complexity is what I attempt to parse out in the chapters still to come.

Chapter 3. Art and Autonomy

Many of the theoretical claims I have made thus far regard only the legal field. However, the aim of this thesis is not only to explore law, but to speak to the often-unnoticed contribution of the legal field to the production of art. This is an important step for the sociology of art, for the investigation of art has the tendency to remain localized to institutions frequently associated with the artistic field – galleries, museums, studios, cultural funding bodies, etc. I will attempt to show how the legal framework for art is a great part of what constitutes art itself. This may be obvious to those working and studying in arts law, but I posit that much academic work on art misses this convergence. Taking up the theoretical convergence of practice theory, performativity, and phenomenology for the study of law and art allows me to explore these previously disparate fields as one. In other words, a theory of performance that is also attuned to phenomenology and practice give us a point from which to merge considerations of the aesthetic and the legal.

The way I will approach this chapter is to first articulate some of Raymond Williams' and Pierre Bourdieu's main ideas about art and autonomy coming from their highly influential books *Culture and Society* (2017[1958]) and *The Field of Cultural Production* (1993a) respectively. This discussion will allow us to probe some of the dominant characteristics of the artistic field as we know it today, which according to Williams and Bourdieu has been highly influenced by the work of Romantic literary poets and theorists and their reaction to the industrialism of the 18th and 19th centuries. Williams work is more historical than Bourdieu's. Bourdieu tends to think more sociologically, and thus develops an abstracted theory of the social development of art. To Bourdieu's theory I want to add some novel remarks about art in the lens of performativity and phenomenology. I think these approaches contribute something new to Bourdieu's theorizing on art which has dominated much sociological thinking on the matter; they may also help provide

novel conceptualizations of autonomy. Ultimately, what I hope to show is that art in contemporary Western spaces has an important tendency in the way it treats Otherness. This tendency is characterized by an invitation to the Other rather than its suppression, and is something that is contested and negotiated, meaning it is sometimes stronger and weaker depending on the specific qualities of the artistic field in certain historical moments. I will argue that the defense of this tendency toward Otherness is an act of sustaining art's autonomy. After reading the first few chapters of this thesis it may be clear by now that the reason autonomy is a central concern in this thesis is that the 2014 hearing is one of these moments where the autonomy of the arts is contested and negotiated. As I expressed in chapter two, law has a tendency toward rigidity. It is possible that this rigidity is of value in certain circumstances, but I argue that in relation to the arts it is rather constrictive, something that threatens autonomy by way of solidifying particular visions of art, and in this case it is a productivist vision. I will dedicate much more time to exploring the hearing and the constraints that legal judgement exacts in the artistic field in the analysis chapters ahead, but to make the claim that this is an important consideration I must first express the particularities of art's relationship to Otherness, and show why it is something worth sustaining. I also want to preface my ideas here with the same remark I made about law in the last chapter, which is that my suggestions about art should not be applied unequivocally across all time and space. "Art" can and has meant many different things to different cultures and peoples. The "art" I discuss here is a fairly specific institution of Western modernity. So my remarks here should not be taken as an explication of the essential grounds of art, but instead as the grounds of a historically bound social space that is continually open to transformation. Thus, when I say that art has a specific relationship to Otherness, this is a relationship that is not absolute, but a possibility and a tendency.

THE ROMANTIC NOTION OF AUTONOMY

As mentioned just above, "Art" could have a whole melange of meaning and reference if it was addressed on the most general level, but as Raymond Williams (2017[1958]:4) notes, "art" in the way we most commonly think of the term really only took hold in the last two centuries. It wasn't until the early to mid 19th century that art took on the characteristics we most associate with the term now. At that time, the Romantic movement in literature began to construct a notion of the artist with various ideals and concepts of cultural creation that gave rise to art as we now think of it. One of the substantial changes in society at this time was the rise of industrialism and the working class. This new class arrangement led to the first widespread literary market. With this new mass market came an increasing dissatisfaction for the now vast and abstract "public" that artists had to address in the new cultural marketplace. In the eyes of the Romantics, the problem was that artworks that could appeal to a universal audience, or a multitude of readers, is what would become the most celebrated work. The Romantics wanted to place the artist in opposition to this consumer-oriented structure claiming that the artist was a special kind of person who had an ability to render an "imaginative truth" (55) – they had access somehow to a special, and better reality that they could communicate in their work. They believed to do this communication was to counteract the forces of industrialism, and to present a better reality. Another burgeoning change was the developing notion that artists were original, that they were people that produced something, not manufactured something out of pre-existing materials. The "cultivated few" would make something in the same way a plant grows from the earth – artists would make something out of nothing, appearing almost magically the way plants emerge from the soil. The craftworker, trades person, or industry worker, on the other hand, produced something out of pre-existing stock (57). What was also attached to this notion of the artist was a rejection of the "dogmas of method

in art" – the Romantics were unsatisfied with old traditional forms of cultural making, instead promoting innovation. As Williams notes, there was a real "positive consequence" in this development of art in the way "that it offered an immediate basis for an important criticism of industrialism" (65). And I argue that these changes were also the foundational moment of establishing art's tendency to be open to the Other (more on this in the latter part of the chapter). However, as we will see below, not everything the Romantics promoted in terms of the value and functioning of art was necessarily good for society in the decades and centuries prior to their own time. And in fact, a certain bourgeois aloofness emerged from the Romantic notion of art which actually suppresses the ability for art to be open to Otherness. So, this is a complex cultural moment that had lasting effects on the artistic field. Bourdieu has tried to parse out these effects in his theory of the cultural field.

I believe Bourdieu's writing on art describes the same processes as Williams' work, but in a more sociological manner. To understand Bourdieu's claims we must know the kind of theorizing of art he is responding to in his work. In Bourdieu's work on art he is primarily responding to Kant (1996[1781]). Kant grounds his own reflections on art in an ahistorical and transcendental aesthetics - he claims the unique autonomous property of aesthetic judgement is something fundamental to human existence, it is an element of the symbolic nature of humans that transcends a biological nature. According to Kant, "the taste for what appeals to us is the taste of necessity, while the taste for the beautiful is the taste of freedom" (Varkøy 2015:146). In other words, a certain disinterested pleasure is inherent to human cultural capability. For Kant there is a transcendental quality of human experience wherein every person has the capacity to sidestep any thoughts of "use", or "usefulness" – which could be considerations of economic value, or political and ideological function - when experiencing something beautiful. "The work of art is given

meaning and truth *in itself*; it receives intrinsic value, and thus art is given independence in relation to other areas of life" (146). Bourdieu disagrees with this conception, instead focusing his theory on the fundamental *social* production of the phenomenon of art. Bourdieu's account recognizes that there is something special about the art object - it has a certain gravity or authority, but for Bourdieu what establishes art as itself is not some innate quality as is described in Kant, but a consecratory process that continually inscribes objects and their makers with the status of art and artist. The art object, the artist, and the artistic gaze of a viewer are not things that could be conceived of as inherent to a fundamental order of human existence, but instead as genetic or historical components of an ultimately contingent field. In this way, Bourdieu and Williams are similar – they both recognize that art is not something that has existed in a continuous form for eternity, it has historical roots.

In Bourdieu's case, he argues that art is like a game, where what counts as art and what is appreciated as good art is socially constructed. Again, this is consistent with Williams' history – Williams agrees that the Romantics were constructing how to think of artists and instilling artists with a sense of what was good art through their writing. This aspect of game-like development is important for Bourdieu because that constructive process creates a certain competition which contributes to a dominant-dominated structure of culture. A lot of Bourdieu's work then is dedicated to explaining how at certain points in cultural history particular groups of people have had power over what counted as art and who was excluded from the position of artist. For example, Bourdieu has dedicated time to explaining how in the early to mid-19th century in France there was a very tightly controlled *nomos* in the artworld - nomos is the principle of value in the artistic field which rules what is deemed legitimate (1993a:250). This control was exerted by the State through their tightly gated cultural institutions like the École des Beaux-Arts and the Paris Salon.

These institutions had a very strict sense of what counted as art and what was deemed valuable based on various French artistic traditions. However, through various forms of resistance, like the Salon des Refusés (Exhibition of Rejects) which exhibited artworks that were denied by the State-sanctioned Paris Salon, artists pushed back against this structure of control and forged spaces in the cultural world in which they could adopt schemes of valuation on their own accord, and consequently become disinterested in and distant from political and economic valuation schemes (252). This aloofness is what is often called artistic autonomy, and it is a kind of doctrine of art which values art for art's own sake – it promotes a certain freedom of the arts to develop on their own accord, and not under the restrictions of something like a central art institute, as was the case in France in the early to mid-19th century. This artistic stance places value in the cultural contribution of art and not its economic or political contribution. Bourdieu's account of the development of artistic autonomy in France parallels Williams' account of the development of the idea of artistic autonomy in Romanticism. Both authors are interested in this period in the early to mid-19th century when the artistic field was developing as a unique space with a relative autonomy from other areas of social life. Bourdieu conceptualizes the structure of the new cultural field as a field containing a dual hierarchy (1993a:38). With the development of various Romantic notions of the artist contributing to processes of autonomization (conceptual disengagement with other fields of social life) a narrow, or restricted, artistic field is formed which has its own logic of functioning, its own hierarchy of value – as Williams' notes, what these artists valued was artistic innovation and anti-dogmatic methods which contributed to some imaginative truth of reality. Bourdieu says that largely this new field is defined by its aversion to the economic valuation of culture by the industrial capitalist society, instead opting to value artworks based on other traits such as their cultural contribution. This is where the "dual hierarchy" comes from – the hierarchy

of economic valuation in society at large, and the hierarchy of cultural value that exists within the autonomous field of art.

One of the largest looming critiques of Bourdieu's work is that he remains a disguised materialist in the sense that he seems to have an idea of a fundamental economic and class-based structure that sits at the heart of the social world, within which an apparently "autonomous" culture fails to serve as a true autonomous field because it still is operating on the economic hierarchies of the wider social world which it is subsumed within. This reading of Bourdieu would claim that there is a paradox wherein the most radical of artists – even those that claim to be autonomous from the field of power - cannot transform the artistic field because the structure of the field works on an implicit hierarchical economic structure, and to disrupt this would mean a collapse of the field. This is an understandable way to read certain sections of Bourdieu's writing (for an example, see Bourdieu, 1993a:75) and it leads to the notion that the stance of being disinterested, and the guise of autonomy that is related to this stance is actually a distracting tactical pose taken in order to move up in the economic hierarchy of the field. To think of Bourdieu's work in this way would squander any real potential of artistic autonomy to enact change. Paul Crowther takes up this reading when he states, referring to Bourdieu, "the whole thing is a game, whose ultimate unrecognized rationale is the reinforcement of class difference. Modernity is, in the field of high culture, simply an alienation from the truth of objective social relations" (1994:164).

As a scholar approaching the study of art through the lens of phenomenology, Paul Crowther (1994) gives us insight into general Bourdieusian theoretical qualms, but also the ones related to Bourdieu's theory of the cultural field specifically. Crowther states,

> He [Bourdieu] wants to show that the field of modernity is differently mediated, and that the striving for distinction and difference and the acquisition of symbolic capital is the governing logic of the field. But to express difference in these terms is to idealize it – to make it purely formal – to fetishize differentiality itself and in doing so, to suppress the

> level of particularity which makes difference *real.* The emphasis which Bourdieu gives to the 'habitus' might seem, superficially, to contradict this. However, the trajectory of his analysis is one which substantially reduces subjective dispositions to an effect of the social conditions under which they are generated. The whole function of agency in high culture disappears into an infinite regress of differentiality. (163)

In simplified terms, Bourdieu ignores particularity which not only reduces the plausibility of a theory of difference, but also of change. It is from this understanding that Crowther then cues up his more focused concerns with Bourdieu's rendering of the cultural field. He believes Bourdieu's account posits difference amongst arts practitioners to be simply a difference in opposing positions structured from an immutable social difference of economic relations. This theory, Crowther suggests, is a particularly gross mischaracterization of artistic movements. Crowther's states,

> The real basis of difference in the field is not simply a space of opposing positions or works, but in the substantial differences of *visions* – of aesthetic ideas – which create those differences. On Bourdieu's model, the field of artistic production becomes more and more autonomous to the degree that it approximates a circus of bourgeois buffoons manically pursuing the achievement of original nonsense, so as to achieve distinction from one another. (1994:167, emphasis added)

How I read this quote is that Crowther is stating that Bourdieu places too much emphasis on the "objective position" of the avant-garde artist as having a singular role within the field based on *producing difference for the sake of difference* which ultimately reinforces the "objective structures" of economic relations, rather than looking at specific avant-garde movements and closely investigating the new ways of being and of seeing that they introduce, developments that have the potential to effect differences and substantial transformative movement in the field. Crowther summarizes this in stating Bourdieu's theory of the cultural field "in effect, represents the human subject as disembodied – simply an ideal point where different forces interact. An embodied subject, however, has the power to reconfigure and thence transform forces – both conscious and unconscious – which he or she encounters" (1994: 168).

I would like to say that I am slightly less convinced than Crowther that Bourdieu's work is an egregious misstep in the social theory of art. In fact, I still hold that *The Field of Cultural Production* (1993a) is a text that cannot be ignored in any serious investigation of artworlds. So, any call for the total abandonment of Bourdieu's ideas for a pure phenomenology of art would be unjustified. What I think Crowther actually takes offense to in Bourdieu's work is not that Bourdieu has a totally misguided theory of art, but that he puts too much emphasis on the way in which the artistic field seems to be beholden to various forces. This emphasis obviously detracts from a full explanation of the way the field is transformative and how it can contribute to meaningful social change. In other words, Crowther claims that Bourdieu conceptualizes the artworld as inherently incapable of transformation because of certain structural aspects of the field. I instead think that Bourdieu acknowledges that there is a transformative power of the arts, but it is often reduced because artists are seeking distinction from other artists by creating aesthetic newness, a strategy pursued because it will afford them certain stocks of capital. To say that artists are inherently incapable of producing transformation and that they have a reduced capacity to do so because of the way the field has developed are very different claims. Crowther thinks Bourdieu is making the former, when he is actually making the latter.

I think if we read Bourdieu closely there is actually a theoretical space that opens up for the conceptualization of the artworld as a place of meaningful social critique and change – that is of embodied subjects who are able to transform and reconfigure schemes of power, which Crowther calls for in his work. I think the issue is that Bourdieu's pessimism perhaps often conceals this theorization. In Bourdieu's work, he does emphasize how the aloofness and disinterestedness of autonomy arises in the cultural field as a specific pose, and this understanding leads Bourdieu to make claims that I think are very close to those made by Walter Benjamin in his

essay “The Author as Producer” (1970). Benjamin claims that the main characteristic of the modern avant-garde artist, *as a descendant of the Romantics*, is that their disinterestedness and aloofness is not actually a detachment from economic apparatuses of the social world. I think both Benjamin and Bourdieu see complete detachment as an impossibility. In no way, can the artist remove himself from class struggle, and so the aloofness to economic and political life that the artist claims as the source position of their critique and thus transformation of the economic and politics is somewhat contradictory because it lends itself to maintaining the status quo of class relations. In other words, both Bourdieu and Benjamin see the field of art as always only partially autonomous. This means the field always has some relation to the field of economics and power and so the “pose” of autonomy, which claims to be disinterested in and thus removed from economic and political concern is always actually a position in the economic and political realms. Thus, quite explicitly in Benjamin’s reading, and more intricate and diffuse in Bourdieu’s reading, arises a pessimism toward the modern avant-garde artist as being incapable of holding any true social transformative power because they are caught up in the making of aesthetic newness which only has the aim of creating distinctions amongst artists giving them some symbolic power in their very restricted ingroup, and eventually some economic success as their work might get fed into the art market. Yet, this pessimistic reading, by virtue of being pessimistic and critical of the artistic field, opens up a space of possibility for the future of the artist – it does not, as Crowther argues, relegate or bind the artist to the position of disinterested buffoon. When I read Bourdieu’s and Benjamin’s work I see a trap of the “disinterested” artistic field in modern times – that being the continual production of aesthetic newness for its own sake which does little to impact or transform the social world more broadly. Being able to see this allows one to question and probe into the types of autonomy that can be afforded in the artistic field. This means that even if the current

autonomy of the modern Western artworld is one that does little to impact economic and political schemes of power, our recognition of its failings present an opportunity to change how we approach our conceptualization of autonomy, and thus change what exactly we are promoting in the cultural field when we call for autonomy. Instead of calling for the autonomy of the artist to be the complete detachment of the artist from the rest of society, we can call for the autonomy of the artist to be a position within society that has a bolstered emphasis and tendency for reflexive thought and action.

I think the overarching message that we should take from this reading of Bourdieu and his detractors is that the modern Western notion of the autonomy of the arts, summed up in the phrase "art for art's sake" is itself a doctrine and not a pure freedom. As Bourdieu articulates, artists who hold the stance that art should be autonomous often subscribe to this vision of the field where artists continually get to make work in the aim of distinguishing themselves aesthetically and gain cultural and symbolic capital from that process. This doctrine is replete with its own vision, ways of acting, modes of comportment, etc. One could even describe it as an ideology that at its core glorifies aesthetic newness for its own sake. As Benjamin (1970) articulates so well, this ideology is not one that is free from political and economic struggle but actually works on the side of the bourgeoisie. However, as much as the "art for art's sake" doctrine has influenced contemporary art and has perhaps created a field in which artists' adherence to the principle has resulted in a non-transformational scene (Bourdieu's argument), there is an element of the Romantic's artistic vision - which I will call it the anomalistic tendency of art – that is actually a valuable and underlying aspect of the field. I think the Romantics instituted this tendency but did not truly realize it as their vision of art got obscured behind an overvaluation of disinterested aesthetic newness.

The other message we should take from the above discussion is that Bourdieu sometimes writes in such a way that makes it seem like the Romantic doctrine of autonomy only results in a particularly inconsequential kind of artist – one that is only caught up in creating cultural distinction which is actually reflexive of some class impetus. Opposed to Crowther, I don't believe that this is the case – I believe there is a transformative potential in the field, it just can become obscured by heavily normalised visions of art. What I will try to do next is to develop a new way of conceptualizing art and autonomy primarily grounded in the theories of performativity, but also using some ideas from Bourdieu and Waldenfels' responsive phenomenology, that gives us a new language to describe how art comes about, and also gives us a way to describe a new type of transformative power of art different from that claimed by the classical art for art's sake autonomy developed by the Romantics. This new type of autonomy will be explained using the same theoretical language of normalism and anomalism that was presented in the last chapter in my discussion on law.

ART IN PERFORMATIVE TERMS

The question of what art *is* has perpetually troubled theorists – art always seems to be morphing and evading easy categorization. I believe a productive way of thinking about art that contends with its morphing character is to think of art as a continuous process of performance. This shifts the task from demarcating what art *is* once and for all, to the task of describing its ebbs and flows well. At one point in cultural history, it might have been apt to consider visual art as only objects - perhaps paintings or sculptures - that represented something in a beautiful way. But with the advancement of modern and contemporary art this is now greatly inaccurate. Consider all of the artists and artworks who have radically transformed what we think of as art – Manet's

Olympia, Goya's Saturn Devouring his Son, Marcel Duchamp's ready-mades, and on and on. All of these artists evade a simple categorization of what art is. In fact, what they are doing in their work is performatively fashioning or constructing the category of art through the production of their objects. It is not as if there is a strict criteria for what counts as art, and they make a work to fit that category – no, instead, in the moment of their artistic production they are *constructing what art is*. At the most fundamental level what these artists are doing with their creations is claiming that "this is art" – but that claim is not mere a description, it produces the category of things we deem art – this is the force of the performative that Austin articulated, and it is the basic formulation of art as a performative process. What I have described here does not only apply to artists but also to intermediary arts organizers – gallerists, arts administrators, artist collectives - they too are constantly involved in producing new ways we can live and organize ourselves as cultural communities.

The actions of artists and organizers change the structures of the artworld and performatively fashion the very understanding of what art can be and how it can be organized, but how are they able to do this? Why are their performances successful ? They are successful because they met certain felicity conditions – just like the performative "I do" in a marriage ceremony requires certain conditions, "this is art" also needs to meet conditions. An artist must be recognized as an artist in order for them to be involved in the collective work of performing and thus defining the artworld – this could be achieved by behaving in a certain manner in the company of artists, submitting works to exhibits, mastering the jargon of the artworld, or by engaging the traditions of their discipline, to name a few. In other words, artists must render the history of the artworld, its structures, and comportments, its rules, and expectations, while also taking advantage of the fundamentally transformative nature of performance to be involved in the history of art.

A performative notion of art disrupts many of our taken for granted assumptions about art objects, artists, and artistic audiences. One of the most daunting claims that a performativity of artistic works can make is that it is impossible for anyone to conceive of the work itself (Becker, Faulkner, Kirshenblatt-Gimblett 2006). This claim is based on the principle that artistic work only materializes in a series of performative events, and not as something that exists in its totality as an objective, physical whole. In other words, no art object exists as an art object outside of an event which consecrates it as one, and thus no art object is ever the exact same, because as I have outlined, in the basic notion of performance no performance is ever the exact same. On first consideration it may sound like blasphemy to claim that an object is produced anew in each encounter, particularly in the field of art where the value of originality and authenticity is highly praised. However, with further consideration it is unmistakable that objects are never still in their materiality and are particularly instable in their meaning. The occasion of the creation of an artwork is not singular – an artwork is made and remade within events. It is constantly becoming.

In a performative theory of art we should not think of making and observing as opposed events, instead they should both be conceived as momentary but everlasting contributions to the life of the artwork. What lasts is material effect, primarily enacted in the initial performances of its production, and retentions of symbolic meaning via gallery exhibits, critical reviews, observations, discussions, and more. These symbolic contributions to the work are much more slippery but are perhaps retained both in the consciousness of actors, in the performative development of texts and documents, and within the artworks themselves as a certain demanding quality. These performances can be considered reiterative makings of the work. In other words, they are different acts in the continuous performance of the artwork wherein meaning and materiality is produced, contested and changed constantly. It is a process of flow and flux which

interestingly places much less power in the subjective intention of the artist or audience member and more emphasis in the collective tuning-in of actors in the artworld. Bourdieu, although not articulated in a performative idiom claims the same thing when he says "the work is indeed made not twice, but a hundred times, by all those who are interested in it, who find a material or symbolic profit in reading it, classifying it, deciphering it, commenting on it, combating it, knowing it, possessing it" (1993a:111).

I think much of what I have to say about the performativity of art can benefit from Waldenfels' remarks on the characteristics of events. Waldenfels ensures we do not conceive of events as either situations that do nothing but confirm an order which grounds them, or situations that break an order – the Bourdieusian tendency is to focus too heavily on the former, a misstep that Waldenfels seems to avoid. Waldenfels claims that all events have the possibility to do both – confirm and change – to varying degrees. He states, "an event may primarily contribute to the testing, to the consolidation or to the reproduction of a certain order, or it may directly participate in breaking or undermining the given order and replacing it with another" (Waldenfels 2007:41). In this way, "every event is to some extent Janus-faced because it makes us look forwards and backwards" (41). The events in the production of art, then, take up the history of the artworld, its structures and comportments, its rules and expectations, while also looking forward to the tumultuousness of enactment predicated on the openness of each encounter. The openness of the event lies in its performed quality – in each event structure and convention comes to bear on the actors involved, as a script would in the conventional sense of performance, yet what occurs is pushed beyond mere script by the unpredictability of the performative play.

This account of the artwork as a performed entity blurs the grounds between production and reception in the sense that every event in the life of the artwork is part of its performative

becoming. Performance, then, strips the "author" of the artwork of their unparalleled privilege in the creation of the work. This is not to say that the diverse experiences of involvement in an artwork's production are completely equal, or explainable in the exact same terms, but it does allow us to recapitulate the life of the work in new ways. The common demarcations of an artwork's life – its "production" by the artist, its intermediary life directed by artistic organizations, and its "reception" by an audience – can be reworked into a theory of performative becoming. Yet, to do so, one must address how we can know whether an event distinctly belongs to the artistic world. What events are artistic events? What actions and utterances contribute to the life of artworks? The answer lies in an event's playing out. The artistic event is that which comes to hold the potential to enact and transform the structure and function of the artistic world, by first conjuring or performing the *artistic frame.*

In *The Transformative Power of Performance* (2008), Erika Fischer-Lichte develops the idea that reality is constructed through a performative autopoietic feedback loop, meaning through a system of interacting actors that constantly react and respond to each other which enacts, reiterates, and changes the structures and meaning of lived experience. A feedback loop can be quite democratic in the sense that all the actors involved could be part of defining the situation, but there is also a possibility that the system of feedback could be controlled to produce a certain effect. This is a description of social reality much like Waldenfels' in that reality is collectively produced, *something indeed happens* in this loop of feedback. In the world of theatre, with which Fischer-Lichte is primarily concerned, a distinction between the audience and the performer is enacted to reduce the unpredictability of the feedback loop. A distinction of roles is formed as action is corralled into specific scripts for audiences and actors in the theatre. Fischer-Lichte describes how it has become normalized that an audience member is expected to respect the actors

and not to interrupt the performance – this of course means not storming the stage, but also extends to minute details such as not shifting around in your chair too often. Violation of such normalized routines will often result in a bitterness being shown toward the violators. Ultimately, this kind of diminishing of the available forms of acting as collectively defined and patrolled by the actors involved produces a frame for the situation in which all involved know their roles and how the event should be perceived and enacted. In other words, Fischer-Lichte proposes that it is the production of the artistic frame, accomplished by "metacommunicative messages" (in the sense of Gregory Bateson, which I will discuss below) and the reduction of the feedback loop that comes to define a situation as an artistic one. The situation as produced by interacting actors conjures an event belonging to the artistic world.

My own understanding of the term "frame" also stems from Gregory Bateson who in *Steps to an Ecology of Mind* states, "human beings operate more easily in a universe in which some of their psychological characteristics are externalized" (1972: 186). Quite relevantly to this thesis, he uses the example of a frame surrounding a painting. He gives us this example because he wants to illustrate the externalization of psychological framing that humans use to differentiate types of experiences. Bateson says, "the picture frame tells the viewer that he is not to use the same sort of thinking in interpreting the picture that he might use in interpreting the wallpaper" (187). Thus, messages that either explicitly or implicitly define a frame are metacommunicative, meaning that their subject is the relationship of things in that situation – they determine what kind of event is occurring and consequently inform how subjects make sense of the situation and how they perform in relation to others, objects, and spaces. The picture frame is just one very simple and explicit example of a framing device, but in every situation, an innumerable amount of metacommunicative messages will be transmitted and impact the playing out of that event.

Many of the propositions within this formulation of performative artistic events correspond to central motifs in Bourdieu's account. In the *Field of Cultural Production,* Bourdieu includes a section on the "pure gaze" (1993a:215) of art, making notes toward a sociological theory of artistic perception. In this writing, he recognizes that the gaze that an aesthete holds in order to experience an artistic object as such is not an innate gaze – it is something learned and acquired. To me, this echoes Fischer-Lichte and Bateson in the sense that he recognizes that viewing an artwork is an accomplishment – certain conditions have to be met, a frame must be in place to conjure a certain kind of vision. But what a theory of art perception can gain from a performative lens – and especially from Bateson's remarks – is that the creation of an artistic experience does not originate fully in the subjective act of seeing where a person could simply decide the artistic experience for themselves. The human subject does not have a devouring aesthetic gaze – they do not hold a monopoly on the aesthetic experience. Instead, the objects in the situation have a certain agency, they call upon the actor and tandemly produce the situation – they give off a certain impression in the form of metacommunicative message and they appeal to the viewer. Objects and surfaces are not inactive in the definition of a situation. Consider the experience of entering an art gallery – the rooms are completely barren except the objects, there are plaques on the wall which help to initiate the consideration of the meaning of the work, the rooms perform the famous "white cube" setting common to galleries across the world, the objects constructed of canvas and paint are contained within literal frames. All these messages are of a metacommunicative sort and they produce expectation and definition – they bring out a new character in the objects and they are active even without the presence of other humans. The event becomes an artistic event, one that consolidates much of the typical structure of the artworld. In this way, the artworld is contained in the gaze of the viewer and in the objects which that gaze meets and produces - in other words, the artworld is

contained in the relationship between things, in the continual demand and response between entities. Thus, a sense of a collective enterprise of an artworld can exist over time and space, but is simultaneously and necessarily connected to embodied events.

This consolidation of structure, style, comportment, and gaze could be considered as analogous to conditions of felicity. Felicity is described as the conventions that must be met for a certain performance and illocutionary force to make its mark on social realty. The enactment or performance of the artistic world is thus brought about by adherence to these conventions (much of Howard Becker's (1982) theory on the artworld could also be seen in this way). However it is important to keep in mind that both calcification and transformation are possible in every event - change is initiated through transformations or even violations of conventions which at the same time contain references to the very structures that are being rejected. In other words, one must be disciplined in a certain sense to enact the artistic world – one has to follow conventions, but this discipline is also the precondition that opens up the opportunity to act on that world and change it.

ART IN RELATION TO THE OTHER

With a general theory of art in performative terms established, I now want to describe the relationship to Otherness that I believe art contains. I will argue that art has the tendency to take up a particularly open relationship with Otherness, a relationship of invitation rather than suppression, which we saw in the case of law. My main argument is that there is an anomalistic tendency in the modern Western artistic field - this tendency is based on a certain reflexive, playful, and disruptive aspiration in the field that is conjured in the moment of artistic events. I will rely primarily on Waldenfels account of order and the Other to make these claims.

Waldenfels' basic conception of experience is that we are constantly being met with demands that we must respond to. In this response, we order and make sense of our world, and in doing so also produce something alien or Other to the orders we build. So how does response and demand occur in the production of art? I believe that we should conceptualize artworks or artistic situations as a demand, or an appeal. As I discussed above, through the work of Fischer-Lichte and Bateson, the artistic situation arises within a confluence of metacommunicative framing devices. Within this situation one's gaze changes. Consider observing the objects hung on the wall of a gallery - these objects are not observed in the same way one might observe objects one passes on their walk along the street. The objects in the gallery demand a different kind of intention – it could be said that in this situation "there are gazes which not only originate in the Other's eyes but also in the appearances of things and in the look which comes from a painting" (Waldenfels 2011:67). Otherwise stated, the painting glances at us in the sense that it demands something of us, first of which is our initial attention. I believe that in the attention that artworks grasp from us, one is encouraged to respond with a sort of emphasized reflexivity. A contemplative space is drawn around the objects of a gallery where one is encouraged to pay close attention to message, form, content, meaning. When in this space something might shock, surprise, or otherwise move us in the act of viewing or attending to it. And so, we might say that a quality of the experiencing of art is a gaze which welcomes the demands of the Other in the way that we reflexively open ourselves up to new demands of our sensory world. Waldenfels states, the alien stings of art are "never merely optical and acoustic phenomena, that is, *what is seen* and *what is heard* or what occurs in a world of vision and sound, but are also occurrences of *becoming visible* and *audible*" (67). I think this quote is quite instructive for our understanding of art as a demand. What Waldenfels says is that art is a moment in which things become visible and audible. These things might be new ideas,

new meanings, new understandings, new frustrations, but they all are brought forth because we are attending to the objects with a heightened reflection. This is opposed to other everyday occurrences of things being seen and heard which often do not have the same effect because we are moving about our day paying little close attention to our sensory world. In this way, artistic works have the special character of being what Waldenfels would call "laboratories of the senses" (67) – we do not simply experience them as some*thing*, some object that we go to, they also call on us. This experience is described by Waldenfels as a sting, something truly or radically alien becomes visible. Waldenfels describes the radical character of this sting when he states,

> Radical otherness means more than something unknown or something exotic, it literally touches the roots (*radices*) of the things and the core of ourselves. The radical other is neither susceptible to being learned like a foreign language or a special skill, nor is it good for satisfying our curiosity. It arises here and now, but as something distant in the midst of our proximity. It emerges whenever something goes wrong, when something deviates from the usual and when what is taken for granted moves. Otherness manifests itself by escaping our grasp. It affects us before we become aware of it. It turns up as a kind of pathos. We encounter it as something touching, moving, amazing, violating, frightening and thrilling. (2020:101)

Another way of thinking about Waldenfels' position is to recognize that there is never something there in its totality to be heard or be seen when encountering art. Instead, through the encounter with the object something *becomes* visible, something is made in the relationship of viewer and object – meaning begins to shine through, one's own positionality begins to partake in the reception of the work, and the object might challenge or confirm the order of one's self. And it is true that all objects and experiences might affect one's self-order, but the difference is that artworks seem to produce a space in which this possibility is heightened, the possibility is actually invited. In other words, there is a moment of shifting ground in the encounter with the art object. It is like each encounter produces the conditions for a small revolution of one's own understanding.

Waldenfels states that this openness presents us with "ways out of the normal", it creates deviations from our everyday life "as if we were entering the world of dreams" (2020:100).

This conceptualization of art as a space of open reflexivity is not fully explained yet. What could be asked of my above remarks is, why exactly is there this particularly open experience when viewing art? To answer that question, we must invoke the theorizing I have laid out at the beginning of this chapter. The particular way we approach art arises through the event of conjuring the artistic field, which means that we participate in the performance of art by *rendering its performative structure, or history.* What this means is that there are elements of artistic history inscribed in the art experience. I believe that the tendency toward reflexivity, of being open to newness comes from the structures or performative conditions of art established in the Romantic era of art. Remember, in the Romantic notion of art, the artist is the originator of newness, they are the ones who cultivate some imaginative truth, they are the ones who defy dogma. Even if this prophetic picture of the artist is not quite accurate, even if the artist doesn't have this almost mystical clairvoyant power, there is a particular kind of way of approaching art objects that has been instilled in the aesthete from this time – it calls on us to approach the artistic event with a particular openness, looking for the "imaginative truth" of the artists' expression. The intensive and inviting gaze of art that Waldenfels describes comes from this time and has remained to this day. So, the reflexivity of art should be understood as a way of producing conditions under which Otherness is allowed to manifest more openly, and this is the case because the normal orders of experience are suspended by means of aesthetic reflection, a type of attention and viewing that really took hold when the Romantics suggested that the artist had the ability to tell us something important about the wider social world. Even though the artistic field has transformed in numerous ways since the time of the Romantic movement, this openness is a lasting effect that the period has

instilled in the field of art – it is a sedimented tendency. This tendency could be grouped with the Waldenfelsian notion of anomalism. Because the artistic field was instituted in opposition to the ordering powers of industrialism, it has taken on a tendency of anomalistic action. To value autonomy, freedom, originality, genius, and anti-dogma pushes the arts toward the side of rupturing order, rather than the strict institution of order that I highlighted in law in the previous chapter in relation to law.

One thing that is clear from the first section of this chapter on Williams, Bourdieu, and Benjamin is that the world of art is susceptible to normalism. In particular moments of modern Western artistic history there have been challenges to the open character of art. If we want to take an example from the Canadian context, we could look at the early 20th century State-orchestrated effort to establish a normalized Canadian school of painting, largely based on a form of idyllic landscape painting embodied in the work of the Group of Seven. At this time, the Canadian State, through various forms of praise and financial support, attempted to instill the notion that the unoccupied landscapes of the Canadian hinterland as depicted in the Group of Seven's work represented the vast potential of the State to expand and establish a country with a claim to national greatness. This ideologically-loaded cultural form was certainly ethnocentric and colonialist in the way it erased the indigenous people from its view, a fact that deserves much attention, but for now this snapshot illustrates how art can be oriented toward a specific dogmatic vision, taking on a highly normalised state. In this situation, the possibility of being struck by Otherness in artistic world is supressed because there is such a strong control over what can emerge in the work. Meaning, there was a highly controlled narrative about what the Group of Seven's work represented, which played a large role in the viewers' experience with the paintings. What this means for my arguments here is that the basic dynamic of social life between order and Otherness

is always also present in art. There is always the possibility of normalism setting in – which I actually see in the present-day through the productivism of artist's fees. Thus, when engaging in the artistic world through study, we have to be constantly aware of this dynamic. Openness to the Other should not be taken for granted - we need to constantly investigate this tendency.

A NEW APPROACH TO AUTONOMY

What remains to be articulated in this scheme is how a field that is open to Otherness, or has an anomalistic tendency, relates to autonomy. What is autonomy within this new theory of performative artistic production? To answer these questions perhaps we should first consider the common notion of artistic autonomy that we are taking to task here. Artistic autonomy is normally conceived of as the freedom of the individual creator of the work to produce what they choose unobstructed by various heteronomous forces. This is the classical notion of autonomy which has its roots in Romanticism. But this conceptualization faulters in many ways in the performative theory of art I have described here. First of all, in my account there is no individual creator who could be protected from outside influence as art is produced collectively - every actor is a micro-order in and of themselves, they are brought forth as a subject through a particular ordering of their own being, and so there are always going to be certain forces which include cultural background, knowledge, and positionality that come to play in their act of making art. In this sense, there is no individual genius that could be ruptured from influencing forces if those influencing forces are the preconditions of becoming a subject. So, what then is left of autonomy? If we want to speak of autonomy within a performative phenomenological theory of art how can we approach it? I believe what we can do is recognize that in the normal conception of artistic autonomy – although it sometimes becomes an ideological stronghold in itself - what is being called for is conditions of

the artistic world to be such that something new can emerge, challenges to the order of art and the social order in general can be staked by actors with the means to do so. I believe aspects of this conventional conception of autonomy can be retained, the goal can still be worked toward, but it can be rearticulated more clearly with the addition of performative and phenomenological theory. The way we produce the conditions of change in the artistic world is by somehow bolstering the open relationship to Otherness that is found in the artistic world, and guarding against the forces that would manipulate this relationship to a state of normalism. What this means is that a way we can conceptualize autonomy in the arts is to think of it as an anti-normalism. I believe this concept recognizes autonomy as something that is contested, negotiated, and always in a state of flux.

The history of aesthetics and the sociology of art are plagued by what Bourdieu calls the "ambition of capturing a transhistoric or and ahistoric essence" (1993a:255). Meaning, that philosophers and sociologists have continually attempted to distill an essential quality of the art object – something unique and universal contained within art itself, unbeholden to historical construction. What typically emerges from these accounts is a notion that art has an *inherent* autonomy – that it somehow transcends the various realms of social life and exists on a plane of its own. Bourdieu's (255-258) attempt to build a genetic structuralism of the artworld is his attempt to move past this tendency. And so he claims that autonomy is something that is constructed in specific times and places. The qualities of the artistic world for Bourdieu then, like its openness to the Other, are not qualities that are uncontestable, they are not essential. The theory of art presented above perhaps has a shadow of essentialism, in the way that it claims art has a particularly important relationship to Otherness, but I don't believe this is an essentialism like the one Bourdieu warns against. Conceptualizing art as a scene of Otherness *does not mean that art has a unique monopoly on Otherness*. The relationship art has to its alien is a relationship that may be fostered

in other structures of experience, or in other frames of experience. In this theory, openness to the Other is not essentially grounded in art. Instead, Otherness is a transcendental quality of reality – a basic trait of experience. A particular field's relationship to Otherness is then a variable that we can analyze and theorize on. The way we can conceptualize this variable status is through the concept of autonomy. Autonomy is no longer the unobstructed force of an individual genius, but a general openness to change that can be fostered throughout the artistic field as a whole.

From this understanding, the opposite of autonomy is a field that is overly normalized, it is a field in the state of normalism. Theory on the process of normalization is highly developed in Bourdieu's work and in responsive phenomenology. Waldenfels states that even if a demand of the Other challenges an order, "the trouble caused by otherness continuously rouses forces of protection" (2020:102) - there is the tendency when appealed to by the Other, to integrate Otherness into order and to strengthen the barriers of that order so it is not easily transformed. This is the case in the artistic world as well. Waldenfels states,

> Like any other cultural institution the theatre is by no means immune to being *normalised*, which tends to deprive it of the sting of otherness. The process of normalisation can take on religious, moral, political or aesthetic traits. Such processes take place when the theatre merely serves as a holy place like Richard Wagner's Bayreuth, as an institution of morality, as a political forum, as an aesthetic playground or as an entertainment program. (102)

Art then is an order of experience that *can* foster an openness to the Other at its "highest point" (Waldenfels 2011:68), but does not essentially nor necessarily do so. The forces of regularity and normalization challenge the openness of artistic experience. As Waldenfels points out these forces could be political or economic forces which narrow the purview of art, or aesthetic forces – for example, this could be an aesthetic trend that becomes so engrained and rewarded in the artistic field that artists begin to align themselves with it in their wanting to be successful. However, the question becomes how do we distinguish a convention like an overbearing trend, or politically

heteronomous force with conventions that make it possible to render the artistic world in the first place? Remember that the initial conceptualization of the possibility of art in performative terms lies in its ability to take up certain conventional structures. This is a somewhat aporetic point in the theory of performance. We need to recognize here that there is constraint in every action. If all actions are citational, they all are reperformances of certain structures that bear on them. But it is only in the uptake of structure that transformation occurs. In this way, all actions have an element of autonomy and heteronomy within them. What a sociology and a phenomenology of artistic autonomy can then become is an exploration of various moments and performances where change and constraint are played out. We can discuss the strengthening and waning of certain forms of constraint and freedom within artistic performance, and we can theorize on what happens to the relationship between transformation and sedimentation when the artistic world meets another social order. This last possibility is largely what the next three chapters focus on as the artistic field meets the juridical field.

The ideas I have developed so far will serve as the basis of my intervention into the 2014 hearing in the coming analysis chapters. Because art and law have vastly different relations to the alien, we need to analyze what occurs when these two fields collide and collectively produce effects on artistic practice. To do this, in the next chapter I explore how the conferral of union rights to CARFAC-RAAV established through the *SAA* threatens the possibility of artistic autonomy. Then, turning away from text and legislation in chapter five, I focus on corporal gesture and speech acts within the courtroom itself. My analysis here demonstrates how the performative basis of social life is utilized to consolidate and impose power within the rituals of law, and importantly to this case, shows where the authority of the final Supreme Court decision emerges from – a decision that was in CARFAC-RAAV's favour. In the final analysis chapter, chapter six,

I look at what could be considered the final stage in a circle of action characteristic of the performance of social life. This final stage could be called reorganization, or the settling of structure, but I label it reiteration. It refers to the consequences of performative action, most easily classified as either a consequence of the rupture of order, or the sedimentation of order. Yet, I prefer to call it reiteration because in Derrida's sense of the word, which is where I derive my own understanding from, reiteration implies both an old and a new component – there is a connotation of differences and sameness. This word also captures the nature of performance as a ceaseless process - even when a performative utterance or ritual produces an effect, it is quickly swept up with the threat of being transformed again.

Chapter 4. Legislating Normalism

In this chapter, I discuss the *Status of the Artist Act* (*SAA*), the piece of legislation that is at the heart of the 2014 Supreme Court hearing. The *SAA* was passed in 1992 based on the work of a governmental taskforce headed by Paul Siren and Gratien Gélinas. The act contains two parts. First, it outlines the definition of a professional artist. Then, on the basis of that definition it gives negotiating rights to organizations who can demonstrate that they represent a particular section of the artistic field. The inclusion of the latter part of this legislation was largely influenced by the work of the Independent Artists' Union (IAU) who aimed to establish a universal living wage for artists by providing a strategic plan to the act's taskforce. The living wage was never enacted, but the IAU was successful in communicating the importance of collective bargaining. Collective bargaining rights did end up making it into Canadian arts legislation in the second half of the *SAA,* and it is on the basis of these rights that CARFAC-RAAV can negotiate with the National Gallery. In what follows, I will argue that the first half of the *SAA* aligns nicely with a performative understanding of the artistic field, but that the second half of the legislation - the half that consecrates particular artists' organizations as sole representatives of the field - impacts autonomy by establishing a hierarchy of performative ability. I claim that the ethos of the juridical field, as a field with a penchant for decisive repressive action against its Other based on values of continuity and permanence, comes to bear on the openness that is possible in the artistic field. This phenomenon impacts the autonomy of the arts by way of reducing the apparatuses of change in the artworld that are sometimes available to a wide set of actors. In other words, I argue that the second half of the *SAA* legislation establishes the conditions for a strict normalism to arise in the artistic field.

STATUS OF THE ARTIST: DEFINITION

To develop any legislation that applies to a particular subset of people in the Canadian nation, legislators must begin with definitions. Although defining artists as a homogenous group has been a historically difficult task, the SAA addressed the problem head-on with a particularly open approach. This is perhaps surprising because legislation that applies to a group usually involves quite a deliberate approach to defining that group as clearly and coherently demarcated people. In the eyes of the State, professional artists are people who

> (i) are author(s) of artistic, dramatic, literary or musical works within the meaning of the *Copyright Act*, or directors responsible for the overall direction of audiovisual works,
> (ii) perform, sing, recite, direct or act, in any manner, in a musical, literary or dramatic work, or in a circus, variety, mime or puppet show, or
> (iii) contribute to the creation of any production in the performing arts, music, dance and variety entertainment, film, radio and television, video, sound-recording, dubbing or the recording of commercials, arts and crafts, or visual arts, and fall within a professional category prescribed by regulation. (*SAA*, Section 6b)

Status is also predicated on if an artist

> (i) is paid for the display or presentation of that independent contractor's work before an audience, and is recognized to be an artist by other artists,
> (ii) is in the process of becoming an artist according to the practice of the artistic community, or
> (iii) is a member of an artists' association. (*SAA*, Section 18)

The former part of this legislation, section 6b, pragmatically states that one must be working in some form – authoring art, contributing to its creation, performing, etc. The latter part of this legislation, section 18, notes that this work must be a recognized form of artistic work – either recognized by other artists, recognized in the marketplace of art, or recognized by an artists' association. In abridged terms, to count as an artist under the *SAA* one must be working in a way that is *recognized by the artistic field as artistic work.* This legislation is oddly circular – it says to count as an artist legally one must count as an artist in the present cultural context. This is an indeterminate approach to definition, where whatever occurs in the artistic field becomes what is

recognized legally. The vagueness of the legal definition of the artist, I believe, reflects a prevailing and unavoidable feature of the artistic world - its indeterminacy and constantly changing character. This indeterminacy partially emerges from the permeability of the artistic field. Bourdieu recognizes this when he states that there is "extreme permeability of [the artistic field's] frontiers and, consequently, the extreme diversity of the 'posts' it offers, which defy any unilinear hierarchization" (1993a:43). The artistic field is a place of action where agents can enter, take up position, and play a role in "the site of struggles [where] what is at stake is the power to impose the dominant definition of the [artist]" (1993a:42), and while perhaps not easily dominated, the field remains relatively open to new competitors. However, this structural conceptualization doesn't address the actual phenomenon of "entering" a field - the Bourdieusian nomenclature denies this possibility and seems to portray the field as a welcoming place. Yet, if we think of permeability as the ability to *take up the performance* of a field, which doing so allows one to enter into it, we can recognize that being welcomed into the artworld is a matter of fulfilling the felicity conditions of its conventions, and unlike many social fields - consider academia, the financial sector, or politics and government – the cultural world in Western modernity has few institutionalized barriers, such as, entrance examinations, requirements of capital, requirements of experience, or requirements of citizenship. This quality of permeability ensures that there is access to the field, an access that is necessary to enter it and transform it, to be a part of the process of defining art. Thus, returning to the definition of the artist in the *SAA*, I believe what has been written into law accurately reflects the real permeability and openness of the field. It also reflects a performative notion of the way social reality is produced – it is through action, particular ways of being, particular ways of performing what an artist is, that shape is given to the field itself. Certain ideas or visions of the social world are taken up in performance and consequentially form

the social world through their enactment. These performances might embed a certain notion of artistic work, they may reinstate a former dominant notion of the artist, or they might suggest a new definition of the artworld. With each piece of art made, but beyond this, with all action in the cultural field – which includes organizing and attending exhibits, writing criticism, opening a new artist space, attending a rally calling for artists rights, etc. - art becomes itself.

These performances in the artistic field should not solely be conceived of as persuasion in the sense that someone has a particular idea that they *intend* to put out into the cultural field and thus persuade others in the cultural field to accept their ideas of art's definition. This is certainly possible, with, say, an explicit curatorial statement on redirecting the artworld. Yet, in performative terms, we have to recognize that the social event exceeds a singular person in a discrete situation with a unified intentional presence of meaning that can be transmitted succinctly from a creative subject. As we explored previously, when I utter a performative it is not completely my own, it is a gesture that is in a certain sense ruptured from me, that I am citing, that I am performing, and thus, there is no basis to claim that what I utter is somehow essentially tied to my intention as it becomes active in the world. It is on this ground that we claim a baselessness of distinguishing fictive and "serious" intentional performative utterances, for all utterances once they are uttered do something in the world. There is convention and iterability in all language and action, which renders the presence of a coherent meaning suspect in every speech situation. Intentionality does not come before language as if language was simply an inert tool, a technical system to carry meaning; meaning is *in* language sometimes dissociated from intentionality. So, when we describe the cultural field as a place of struggle to legitimize a certain vision of art, we could reconceptualize this in performative terms by saying that the field is a place of performative gestures that enacts ways of creating art. This process is not fully willed and intended, but can be

characterized in the sense that certain visions do, at various moments in time, win and lose within the field which gives it its changing character.

I believe the first half of the *SAA,* its attempt to define art, has little implication for our interest in the autonomy of the arts. Indeed, the openness of the definition aligns with a performative understanding of the social world in the way that it acts as a malleable concept. This legislation defies the narrowing tendencies of law oriented around permanence - the law's ability to garner the power to act in such a way that takes a larger stake in the finality of performative judgement is not in motion here, in the sense that the definition does not impose a State-produced idea of the artist. Instead, it disperses the power of definition into the actors of the artworld.

STATUS OF THE ARTIST: COLLECTIVE BARGAINING

The second half of the *SAA* confers certifications to representation groups to collectively bargain on behalf of artists in the field. The definition of "professional artist" is written in the *SAA* itself, the second aspect of the legislation, the conferral of official bargaining status, is tied to another legal body, the Canadian Artists and Producers Professional Relations Tribunal (CAPPRT). CAPPRT, which is now subsumed under the Canadian Industrial Relations Board (CIRB) is the body that certifies organizations to represent artists, based on their members' qualification of being an artist from the first half of the *SAA*. Organizations have to apply to the CIRB and show that they indeed represent a prominent subsection of the artistic field to gain their certification to collectively bargain. The importance of this collective bargaining scheme was communicated to Paul Siren and Gratien Gélinas, those at the helm of the *Status of the Artist* task force, by the Independent Artists' Union (IAU). Prominent members of the IAU such as Carole Condé and Karl Beveridge later went on to participate in chair positions of CARFAC-RAAV's

bargaining committees in the 2014 hearing. So, this hearing is intimately tied to the history of the legislation in the way that the actors involved in establishing the *SAA* were also involved in the 2014 hearing.

On the basis of certification by CIRB, organizations can officially lobby and negotiate on behalf of artists with what are technically called "federal producers". Federal producers are any federal cultural institutions (National Gallery, National Museums, etc.). When organizations, in this case CARFAC-RAAV, establish a scale agreement with a producer it binds all people in the sector who will engage with that institution. This means that an artist doesn't have to be a CARFAC-RAAV member to be subject to the CARFAC-RAAV fee schedule if they were engaged by the National Gallery. This is stipulated in in the *SAA* in section 33,

> For the term set out in it, a scale agreement binds
> the parties to it *and every artist in the sector* engaged by
> the producer, and neither party may terminate the agreement
> without the Board's approval, except when a notice
> to bargain is issued under subsection 31(3). (Section 33 (1), emphasis added)

This is an important feature of the legislation because the certified organizations have sway over the means of production of the sector far outside of their membership. This sector-wide bargaining can certainly be seen, and is seen (de Peuter and Cohen 2015), as a positive development in the power of unionization. But, it can also be argued that there is a non-consensual imposition in this legislation that binds artists to a system of operation they may have had little to no hand in developing. For example, under the new mandatory minimum fee structure, an artist working with the National Gallery cannot refuse their pay, for if they did, they would be undercutting the artists who want CARFAC-RAAV's mandated compensation and thus create a "race to the bottom". You may ask pragmatically, as the Justices in the case did, why would this ever be an issue? Why would an artist not want to be "protected" by this minimum? As Guy Dancosse, the lawyer for the

National Gallery argued, by allowing CARFAC-RAAV to represent visual artists, even those who perhaps have never heard of CARFAC-RAAV, the State is giving a piece of the rights of individual artists to an organization which they did not consent to. Seemingly, the reason why the Justices didn't like this argument from the National Gallery is because they perceived it to be a way of fulfilling an agenda which had nothing to do with the rights of artists – they perceived the Gallery as simply not wanting to pay minimum fees to help their financial accumulation.

There is an important implication of the National Gallery's position that I would like to highlight. A position I don't think comes across clearly in Dancosse's arguments - and this may be the explanatory factor of the Justices' adverse reception of their position – which is that this legislation allows a very small number of people (CARFAC-RAAV) to enter into the nexus of power that is the State and appropriate the performative force of a court hearing to reproduce their vision of the artistic world in a way that will allow it to be more easily taken up and embedded in the cultural field. In other words, this legislation has the potential to act as an echo chamber where what becomes normalized in the artistic field as counting as art automatically has the reinforcement of the law and ultimately the State, as those normalized practices become legally defendable under the artists' associations certified by CIRB to promote and secure their vision of the artistic field. What might be said about this aspect of the legislation is that the openness of the artistic field, as a place that has the permeability to constantly accept new visions of the artistic world diminishes when legislation that acts as a reinforcement of a particular vision of the field is reified. I believe a legal apparatus that does this work of reification could be described as an apparatus of normalism in the Waldenfelsian sense.

With the *SAA* legislation one could argue that the performance of art law, which is a performance that melds the field of the State and the field of artistic production, has more power

in reproducing a vision of the field than most other actions. If I, say, band together with other likeminded people that have a differing vision of the cultural field than CARFAC-RAAV's and form an artist collective to communicate our ideas, this would be one action where we could attempt to produce the field of cultural production with the goal of instituting our vision of the field, but this is certainly not as powerful as CARFAC-RAAV winning a legal battle in the Supreme Court and having their vision of the artistic field enacted every time an artist engages with the National Gallery. This insight could be explained by using Bourdieu's notion of the cultural field as a field within the field of power. Bourdieu sees the cultural field as sitting inside and thus partially dominated by the field of power such that certain positions in the cultural field take on a wealth of capital and authority by virtue of aligning their strategies and values with homologous ones in the field of power. My suggestion is that because CARFAC-RAAV have engaged in a form of advocacy sanctioned by the State, and they are arguing for the institution of mandatory wages – a largely accepted form of organizing work - they have mobilized dominant political and economic values and processes in their struggle in the artistic field, which gives those actions more authority because they work with and not against the grain of the field of power. I believe we could say that they are performing elements of the State and the dominant economic institutions, and by virtue of this they have managed to be consecrated as the official representors of visual artists which gives their performance a high degree of performative force. Performative power, that power to enact the social world, has the potential to exist in a quasi-democratic state in the artistic field where any social actor can relatively easily participate in the becoming of art, but in this case it is becoming skewed toward a very specific set of actors. What this all means is that if we consider artistic autonomy to be the ability and ease of actors to be involved in cultural

transformation uninhibited by strict normalism, then artistic autonomy for most actors in the field is reduced.

It is true that any text, or in this case, legislation, can be read against itself and re-signified. However, as I have stated in the previous chapters, law in the Context of Canada is not an institution where reading its own texts against themselves, refiguring them, and transforming them is a particularly prized activity. It is a possibility that in the future the structure of bargaining rights conferred onto CARFAC could be challenged and changed, but there is an ideal in our system of law that is based on the idea of the objective judge – an aspect of maintaining this symbolic status is an attempt to solidify and maintain a consistent set of laws and acts, for if laws and acts had to be reconstituted often, the idea that our judges are able to give objective judgements, that seemingly should hold for a long time, would be challenged. When the law has been misrecognized as the ultimate judge, there is an impetus within the juridical system to maintain the monopoly or over the performative act of judging. Thus, it is not unexpected that even when the first half of this legislation tends toward a non-monopolized array of the performative, conferring the ability to define the field to the actors of the artistic field, the second half reinscribes the act with law's tendency toward consolidation and normalism.

As I briefly hinted to above, we can rearticulate this phenomenon – that is, the normalistic tendency of the second half of the *SAA* - through the concept of felicity. If we recognize that there are certain felicity conditions and conventions that must be met for an artist to gain their authority in the field – to take up the position of artist, and make objects that will count as art objects - then we can analyze what those conditions are. Howard Becker's (1982) articulation of the conventions and cooperation of the artistic field is perhaps the most thorough treatment of these conditions, but some of the obvious ones to point out here as example could be certificates of training, a record of

exhibiting, or a devotion to the traditions of a discipline. However, these are only the most obvious. An actor could also be recognized as an artist without formal training, exhibiting, or adherence to a long-standing discipline. And this is again a classic aporia of the performative where the felicity condition, the context that must be present for the performative to gain its illocutionary force, is never obvious. As an analyst one can never fully render the complete context of a performative as to clarify the origins of its authority. But I argue that it is possible to recognize when the conditions for the effective performance become overly burdensome. For instance, we know at least some of the demanding barriers that must be passed to gain the illocutionary power to judge in the court of law – beginning with upwards of six years of institutional training in a recognized university's law school, then there is the period of articling, the Bar exam, etc. And within this juridical context, the extensive conditions for illocutionary power may be important to regulate the powerful institution of law – it is not my intention to make a judgement on this definitely here. But, in other contexts such as the artistic field, a myriad of barriers blocking access to the illocutionary force of the field should be considered as counterproductive to the field's possibility of autonomy. This implies that an overly-rigid idea of the artist, a narrow conception of how art should be organized, and a daunting set of felicity conditions - all of which are traits of normalism and can established by writing the organization of art into law - challenges the openness of the field and its highest function of relating to the Other in the context of modern Western culture. So, when CARFAC-RAAV succeeded in the 2014 hearing, forcing the Gallery back into negotiations to establish an artist fee schedule, which sets a very forceful precedent across the artistic field, they are initiating a whole new set of felicity conditions on art. In the first part of the *SAA,* which I signaled as being complimentary to a performative notion of the artist, there are many ways of being counted as an artist – one could get paid for sales, one could belong to an arts organization, or one could simply

be recognized as an artist by others. This means there were many sufficient conditions of felicity for artistic work. But, with CARFAC-RAAV's work in the Supreme Court sanctioned by the second half of the *SAA* what it means to be an artist is narrowed. Now, to be an artist is to be an artist who receives fees, and who engages in economic contracts. In other words, with their win in the hearing CARFAC-RAAV sets up a script of action that must be followed in order to be a part of the artistic world. This is important because the definitions of the artist are the felicity conventions needed to enact the artistic field and transform it further.

It seems to me that there is more clarity that should be brought to the concept of felicity, if I am to argue that there is a constraint on the autonomy of the field of art by way of an impermeability of its borders. In Austin's account, felicity is conceived of as a set of conditions that must be met for a ritual performative to occur happily, to have an illocutionary force (1962:14-15). These conditions are characterized by a procedure that must be done correctly and completely. What has become a central concern for philosophers of performance, particularly Derrida (1988), is that "proper procedure done completely and correctly" is predicated on a definable context and determinate and saturated conventions. The concern is that there is a certain recourse to *intention* in Austin's concept of felicity. If we say that to christen a ship with a name a certain context has to be present and that certain conventions must be followed, this only makes sense if there is a predetermined outcome that we could lay the event next to in an attempt to determine whether or not the performance of that outcome occurred successfully. In this way, it is accurate that performative force only occurs when a ritual is done fully and completely, but as I have discussed earlier, in relation to authority in the performance of law, it is impossible to determine with full saturation, as an analyst, whether all of these conditions are met. What is of central importance here is to think about how this concept of felicity distinguishes what is and is not a performative.

If we take that all actions, or "marks" as Derrida might say, are citational, iterable, then aren't all actions performatives in the sense that they exist as rehearsed convention, as a quotation? I believe so. This is an aspect of performance that seems to escape Austin. We cannot say that a ritual has failed and performative force has not occurred because there is a failure to fulfill felicity. We cannot say a ritual has not been enacted, because a ritual - in the sense of a performed quotation – is *always* occurring, it is an essential quality of all action. There is ritualization in all marks. As Derrida would say, "'ritual' is not a possible occurrence [*éventualité*], but rather, *as* iterability, a structural characteristic of every mark" (15). What this means for my present argument is that we cannot say that if the felicity conditions of the artist – understood in the present circumstances as being narrowed into an *artifex economicus* – are not met, that a contribution to the artistic field is never enacted, that a performance that *does* did not occur. We cannot say this because with the above Derridean insight, performance always happens, and a certain structure or order of the artist can be performed differently, perhaps, in spite of the prevailing structure. In a general sense, that is, not in relation to the arts or artists, Derrida states that we should address this issue by producing a typology of iteration (1988:18). He proposes this because we cannot deny Austin's version of felicity and infelicity. It is undeniable that a ship is christened, that marriages occur, and that warnings are issued because of the proper doings of certain conventional structures. There is an iterable structure in all these cases that is met with a certain felicitousness, but this is only a part of a more general iterability of all marks. We cannot say that *nothing* would have occurred if the performance of any of these rituals had failed to meet certain expectations, but we can say that a particular illocutionary effect failed to occur if we center and make present a certain predetermined aim of the ritual. Therefore, we can say that if a particular artist fails to meet the felicity conditions of the present order of the artist in general, that they might fail to grasp the benefits or power

attached to that *officium* of the artist position, just like if a marriage is unsuccessful in fulfilling the conventions of the marriage ritual access to the *officium* of marriage is lost. But that is not to say, that one cannot enter into the nexus of the artist position if they fail to meet the conditions, it is only to say that the power they have to gain, the force of their illocutionary acts as an artist, can be established only by transforming the *officium* of the artist, altering the order of art by performing the post differently. How is it that there is always access to this *officium,* while also being constraints to access? It is because the conventions that one must meet to perform the position are always indeterminate in their totality. We could perhaps say there is a threshold that must be passed, a certain number of conditions or conventions that must be enacted to bring about the artistic frame, to supplant action within the artistic field, but not *every* condition must be met. There is no way of determining every condition. Thus, when enough of the conventions of the artistic post are met an actor who defies other aspects of the position – say the economic or productivism aspects – can begin to transform the position. But there is a tendency, a thrust, to meet the dominant conventions of a post in order to uptake that position when one desires to do so. The more dominant and present a convention becomes, the more sedimented it becomes, and the more it contributes to a high threshold of felicity. This high threshold should be considered as one important aspect of a state of normalism. In the artistic world, then, my concern is that the productivist quality of art is becoming one such dominating condition, reified through the legal reification of artist's fees in the hearing which contributes to an overly normalized field.

As a final note in this chapter, I want to make it clear that even though the *SAA* appears as an inherently economic legislation, in the sense that it was set up to create collective bargaining agreements, this is not necessarily the case. Collective bargaining, although traditionally used as a means of improving the position of workers, does not need to be used in a narrow economic sense.

In the contract between the Gallery and CARFAC-RAAV, established after the hearing, that the *SAA* has authorized, there seems to be little consideration of other aspects of cultural production outside of the economic. Yet, this is due, I believe, to CARFAC-RAAV's vision of artistic practice, and not the *SAA* legislation itself. The first half of the *SAA* legislation is decidedly open – artists are deemed as artists based on their recognition in the field – making money for your art is mentioned as well as membership to professional associations, but these are only possibilities of criteria for what counts as an artist, there is also a more general note that anyone recognized by their peers can count. The second half introduces a representation structure, and that is the section that creates the tendency toward consolidation, because it enforces a strict set of felicity conditions on the artist, and it is the vision that belongs to the group that has been consecrated to represent artists that stipulates what these conditions are. I make this point because I want to differentiate the ideas I have proposed in this chapter from very common anti-economy ideas that exist in popular thinking on art. My concern with this legislation is not based on a romanticized anti-economic sentiment, it is rather based on an interest in exploring the ways concise and limiting scripts for making art contribute to a state of normalism which marginalizes the thrust to consistently transform how artists work.

What I hope has become apparent in this chapter is that the legal field seems to have a dominance over the artistic field in the way that it enforces its normalizing tendencies. To understand where this dominance comes from, I turn next to the ritual of the courtroom, to the embodied events of law. Looking at the ritual event is important because performativity does not exist only in text and utterance, it exists also in the body and in gestures. To leave an analysis of this hearing at the level of legislation would be a disservice to the insights of performativity and phenomenology that highlight the inescapable corporeal nature of social life.

Chapter 5. Juridical Gesture, Language, and Effect

The aim of this chapter is to explore how the juridical field gains its authority in embodied events. The grounding idea is that authority is not somehow conferred from outside sources, but is enacted through performance. A person, a group, or an entire institution like the law or the State can gain authority by appearing in particular ways. Through performative reiteration, law has developed a strong, but not absolute wielding of performative power. It is my suggestion that as the frame of the legal bears on the artistic field this concentrated power of law consolidates a particular artistic order. Showing this is a prerequisite to my main argument that law acts as a reification of CARFAC-RAAV's vision of the artistic field. To show how the law gains its authority, I will analyze two aspects of the theatrical ritual of the 2014 hearing. First, I will discuss the material, physical, and bodily aspects of court performance - this is an essential empirical focus for a thorough analysis of this case as the discourse of performativity has expanded well beyond Austin's work on spoken utterances. To capture the full effect of what a performative analysis can offer we must look at gesture, space, physical posture, maneuvers, and ornamentation. In the first section, I will consider the ritual of entrance, the performative quality of the Justices wardrobe, and the setting of the ritual, the courtroom itself. Second, I will discuss speech acts and the effects of normalizing language – here I work with Bourdieu's (1987) account of juridical discourse, but apply his ideas in a slightly different way. Where Bourdieu focuses on the jargon of legal talk which makes the law seem neutral and objective, I focus on the more colloquial forms of rhetoric that produce the same effect in the court.

You will notice in this chapter that I discuss many theorists in making my analysis, but I heavily rely on the work of Bourdieu. I have mentioned this previously, but I believe that Bourdieu offers something unique to the study of performance. What this chapter will show – and I discuss

this more explicitly at the end of the chapter - is that while the fundamental force of the performative is developed in the work of Austin, Bourdieu gives us a way of talking about the differential efficacy of performative acts that emerge through the *officium* of the law. This allows us to talk about the domination of the law in the social world at large. Butler's work does a similar thing – it has a sociologically rather than purely linguistic lens which puts more emphasis on how the performative can be used to garner authority and power. So, as I develop a theory on how the law gains its authority through empirical observation, I am also implicitly making the case that Bourdieu's work can link up with studies of performativity and contribute to our understanding of enacted authority with great worth.

The writing in this chapter emerges from my analysis of the recorded hearing. Having a full visual and auditory recording is no substitute for being in the room when the hearing occurred, but it is an invaluable resource when analyzing this case from a performative standpoint. Surely, if I were in the courtroom as this event played out, I would have attempted to synthesize and report on the ritual from a much different plane of observation, but this is not the case. My observations are thus relegated to the positionality of the camera. All that lies outside of the frame of the camera is inaccessible to my analysis. However, this is not to say there isn't value in this position. The camera is a mediating representation and the recording of the hearing is in itself a reperformance of the event, but there is no escaping positionality when conducting empirical analysis. A researcher always has to deal with layers of positional effect in every study. The methodological complications of witnessing an event via camera is an interesting topic, particularly in today's highly digitalized world where most of our connection to others occurs through digital mediation. But it is not my intent to spend time on this here – that is a phenomenon that deserves its own

study. For now, I simply want to highlight that the camera is my access to this event, it is the position that I begin my analysis from.

DETACHMENT, CONTINUITY, AND UPRIGHTNESS

As the hearing begins, the first thing that we witness is the entrance of the Justices into the courtroom. In the recording, we see a large room with wood panelled walls and a red carpet. The seven Justices step through an opened wooden door at the front of the room far from the position of the camera that is placed behind the audience as if it were looking at a stage from a balcony. The door is centered in the frame located behind the Justice's chairs that line the front of the room. Their chairs are raised on a platform a few feet above everyone else in attendance. What is lost as the Justices enter is any sense of authority that the public who have arrived to witness the proceedings, may have felt moments ago. I believe that any self-definition of authority that the public may have held fades as the State performatively fashions its authority on the hearing's stage. As the Justices enter they appropriate and command authority. What is gained, or rather, what descends on the room are the bodies and, soon to be, voices of legitimized judgement. The justices file in and proceed to their chairs and sit down. During this entrance all in view stand – a small act of politeness, important for its conferral of misrecognition, in Bourdieu's sense. The Justices now fill the front of the courtroom sitting side by side, each in their own throne. Exceeding mere bodies in seats, these people tangibly bring to fruition, through the highly choreographed performance of their role as Justices, the understanding that the State is an entity closed off from the strata of the common social world. The theatricality of the beginning of the hearing renders the State according to the metaphors that pervade our understanding of this entity – the *State as above, encompassing*, and *detached* (Ferguson and Gupta 2002). It is significant that this rendering occurs in the court of

law, because it is crucial that the law appears to transcend the ills that we normally ascribe to any single person's intuitions of fairness and justice: passion, ideology, partisanship, ignorance, coercion. *Detachment* establishes the appearance of a universal plane from which the law judges and this detachment is visible in the performative ritual signified by the Justice's seats raised on a platform above the public, and through their entrance from an unknowable place behind the wooden door.

As the Justices sit, the doors behind them begin to close and there is an urge to peer through to try to get a glimpse at the chamber behind. Arrival and departure from this chamber seem to be the most significant movements of the hearing because they bring experiential weight to the "is" in *the State is beyond, and the State is detached.* The doors are manned by a keeper, allowing only the admittance and exits of the berobed. To me, the brief moments of the doors opening and then closing behind the Justices in the hearing rears a sense of the law as ultimately open but remarkably difficult to transcend or invade. The entrance and exits of the Justices from the courtroom show that the authority of the State does not simply exist in an imagined or ideological way imposed and reiterated in discursive or conceptual metaphors; it also exists in movement, in action, "slip[ping] below the threshold of discursivity but profoundly alter[ing] how bodies are oriented, how lives are lived, and how subjects are formed" (Ferguson and Gupta 2002:984). By closing off the Justices in their chamber between legal proceedings, they are physically distanced from the reality of the parties being heard. Excised from the particular, the State and its decision-making body becomes universal (986-988). This detachment is a condition for the enactment of the exaggerated force of the law's performative. Detachment is part of our moral system which is based on an understanding of the law as a transcendent entity that can judge through a performative utterance

grounded in an essential, natural, and universal source of legitimacy. From this apparently transcendent plane the law judges those whose actions exist in the plane of ordinary everyday life.

The Supreme Court's apparent universality is compounded by its placement near Parliament Hill – the clearest and most persuasive display of the gated and bound State towering above all surrounding land and infrastructure. Timothy Mitchell states, "the ability to have an internal distinction appear as though it was an external boundary separating objects is the distinctive technique of the modern political order" (Mitchell 2006:170). The importance of recognizing that the line that distinguishes the State is an internally drawn line is that it shows how all social actors are not removed from the social order which produces the State. Although the State seeks to appear as a transcendent entity, it nonetheless remains a part of our social world and is thus vulnerable to infiltration and decay if those upholding its authority act in subversion. It is only the apparent distinction of the State as an external entity that gives it its monopoly over the illocutionary word. Although I use the words "apparent", we should not confuse the power of a Justice with an unreal or illusionary power – it surely is real, as their word can incarcerate, but this force is contingent on the continual production of difference. I posit that the Justice must *perform the State* as to give it life and to mobilize the symbolic power of their actions. The State's autonomy must be continually reconfirmed for it to exercise its power (176). The Justices, as performers, express this autonomy of the State through their outward "appearance" (Goffman 1959) in the courtroom, and in their position on Parliament Hill.

Appearing as detached, above, and beyond are key to the authority that the law performatively fashions, but so is the appearance of being upright. I see uprightness as a defining quality of the setting of the courtroom – it is the trend of the objects, architecture, and ornamentation to convey a sense of uprightness. We can perhaps see this most clearly at the

halfway mark of the 2014 hearing when the court retires and the Justices stand in front of their seats, turn to face away from the public, and leave two by two through the doors behind them. It is at this point, we can see clearly the empty red angular thrones, tall enough that they had just towered above the Justices heads extending their physicality upward. This uprightness is supported also by the platform that the chairs and lecterns sit upon removed by steps of marble from the area where the counsel works. The Justices are flanked by tall Canadian flags, and three-tiered light fixtures placed high alongside the wooden doors which also extend 12 or so feet high, with large brass handles. This arrangement is meaningfully expressive, it portrays all that is associated with uprightness and upstandingness: "austerity, inaccessibility, decisiveness, domination, majesty, mercilessness, and unapproachable remoteness" (Straus 1966:145). The upright character of the courtroom brings a certain sense of legitimacy to the setting and portrays the doing of law as an authoritative act.

Another important and intriguing aspect of the performance of court is the dress of the Justices. The Justices wear stark black robes with white collars. Hartigan (2018:78-79) states that the robe of the judge has an *aesthetic of tradition* and it enacts a perceived stability of the law's past. The robe performs continuity, making the current proceedings of law read like they are tied to ancient order and thus must be true and impartial. This is a characteristic that plays a large part in the law's authority, for law "relies on the ongoing (if intermittent) disavowal of the theatrical nature of its utterances" (104). In this way, "the visibility of the judge's performance is no less than a mechanism for securing the rule of law itself" (79). The judge needs to be seen by spectators as representing the impartiality of the court which is at the core of its authentication as a system able to deliver pure justice. The law cannot merely be done, it must also be *seen.* Yet, exactly how

the robe represents impartiality is not answered fully - we must ask how a certain formalization of aesthetics produces authority.

In an anthropological analysis of religious ceremony Maurice Bloch (1974) develops a notion of formalized speech and gesture – a notion I believe we can also apply to the formal aspects of speech and gesture in legal proceedings. Bloch regards formalized acts as an impoverishment of the creative choices of ordinary action, because they are a concise script. In a formal setting there are strict stipulations of who can say and do certain actions. Minute details are choreographed, and once you consent to be part of the ritual you must follow the conventions. Formalized language differs from propositional language through bypassing the truth/false opposition – propositional language being that which is purported as being true based on evidence and perception of the past. Formalized acts gain their effect because they usurp the power of traditional authority. This kind of force is illocutionary - it communicates without explaining and without recognition of this exclusion. Aspects of the formalized ritual of court are: the judges' wardrobe, the spectators' code of conduct, the expectation of dress of the parties involved, the banning of interruption, the judges' seats on raised platform, and the differing entrances of participants, and more. All these formal procedures produce what Bloch would call an "arthritic" conduct. Importantly, it is very difficult to argue with this arthritic script – it evades propositional communication because it speaks with illocutionary and emotional force. Illocutionary force is strong in ritual where language and action is severely limited. In other words, once one agrees to be involved in the ritual – with Bourdieu we could call this a misrecognition of the ritual - a strict procession of actions carries them away where the event communicates to them but does not allow any contestation on behalf of the people involved. Symbolic materials and actions in ritual hold very little meaning in themselves as units of communication – it is the context of the entire ritual

that is saturated with meaning. What is important to note in returning to the object of the robe is that language and communication is not strictly verbal. The above remarks can be made about bodily movement and material symbols. So, when the robe is said to harken back to medieval aesthetics (Hartigan 2018), which gives it a sense of continuity to our State – our State as somehow essentially grounded in historical justification – we must keep in mind exactly how the *robe* communicates this. It is through illocutionary, or performative force that emerges from a particular, formal, felicitous context. The robe does not *say* "continuity" on its own, but does so within the conventions of law that give it its illocutionary force.

What I have hoped to express in these above paragraphs is that the law has to physically perform in particular ways to uphold the authority that is associated with its institution. The expressions of detachment, continuity, and uprightness which convey the law as a transcendent entity, as something beyond the realms of the everyday life, are crucial for the law to appear as the transcendent arbiter of our moral world. As I stated in chapter two, the law has a tendency toward normalism, and this emerges from the fact that their authority is predicated on appearing as an objective judge. To appear as an objective judge of our social world the law must develop a penchant for permanence, continuity, and neutrality. The wardrobe, the setting, and the ritual maneuvers of the court, as I have described here, contribute to this appearance and thus help to solidify the authority of law while also contributing to the tendency toward normalism characteristic of this institution.

NEUTRALIZATION AND UNIVERSALIZATION

What I aim to do in this section is to continue assessing how the law performatively fashions authority by considering utterances in the hearing that produce effects of neutrality and

objectivity – qualities that the court must maintain to appear as legitimate. This appearance of neutrality and objectivity is tied to the court's effort to act in ways which appear as continuous and permanent. An objective judgement is one that should be permanent because to be objective implies seeing a situation for exactly what it is, from an outside position, and thus being able to make a decisive judgement from that position. As the legal field attempts to uphold these virtues of objectivity and permanence they deny much of the grounds of transformation and change. This is a contribution to the normalist tendency of law. In what follows, I will consider a few concepts from Bourdieu's (1987) work on the juridical field and apply them to quotes from the lawyers in the 2014 hearing.

In Bourdieu's analysis of law, he places emphasis on the authority gained through the mastery of the juridical corpus. The mastery of a corpus being the "socially recognized capacity to *interpret* a set of texts sanctifying a correct or legitimatized vision of the social world" (1987:817). What Bourdieu is interested in is the capacity language has to establish the juridical field as a relatively autonomous space. He claims it is this technical capacity, the ability to perform the interpretation of the legal corpus, which causes a "symbolic effect of 'miscognition'" – the same as "misrecognition – "…of the law's absolute autonomy in relation to external pressures" (817). Bourdieu asserts that every rule or order has a point of fissure. Every order has a door,

> a release constitutive of its unmaking. He who is able to open the door is the person capable of uttering a transgression of the order in the language of the order. To be able to do this you have to know the rules especially well, and moreover, be mandated as a holder of the rule, thus being the only one with legitimacy to transgress it. (Bourdieu 2014:331)

In other words, one has to know the language of the rules of law - which most laypeople do not - in order to performatively, felicitously, change them. This conceptualization is not completely accurate to the discipline of performance, nor to the actuality of legal history. There have been cases where actors refute and dismantle legal systems not through the uptake of their language,

but through inciting a revelation that the authority of these systems is indeed constructed and able to be deconstructed. In other innumerable cases, law has been refuted with a pure physical violence. Nonetheless, there are very important language practices in law that can be utilized to enter into the corpus of legality and either affirm or transform that *officium* (Bourdieu1987:820). Bourdieu discusses two of these effects which work to give law its authoritative stance; the *neutralization effect*, in which passive and impersonal language seem to establish the speaker as a disembodied and neutral subject, and the *universalization effect*, in which statements are expressed as factual, official, and definite. It is understandable to separate these effects as Bourdieu does. Language of neutralization, being that which is centered on the fixing the addresser in a disembodied stance, is distinct from utterances dominated by a focus on establishing the definite, and unquestionable truth of the content of the message. Yet, we should recognize that language contains a dimensionality of functions wherein the multidimensional effects of language may be attributed to the simultaneity of these functions (Jakobson 1960). Meaning, that in many instances the effects of universalization and neutralization emerge from the same speech acts – they are often codependent aspects of speech.

As with the above discussion of the embodied rituals of court, the formalized language of the court plays into the tendency for the court to be an apparatus of normalism. Both performative gestures and expressions – like the wardrobe, setting, and movements of the court – and the language of universalism and neutrality are used to signal continuity, uprightness, and detachment which are key to the court's maintenance of authority. Because the court gains its authority from appearing as objective, permanent, rational, and continuous it necessarily has to orient its actions and words in normalistic ways. If an institution gained its legitimacy from other traits, say, being innovative, revolutionary, and disruptive – we could think of certain activist organizations who

ground their authority in upholding these traits – then they would likely orient their work to much more anomalistic activities, but this is not the case in law. Thus, the present discussion of neutralization and universalization should be seen as bolstering the claim that law has normalistic tendencies.

The way I would like to apply the concepts of neutralization and universalization are slightly different from Bourdieu's application. Bourdieu focuses on how a jargon-laden discourse excludes lay people from legal talk, and thus produces a certain autonomy in the legal sphere, separating it from "ordinary" life and giving it a specialized plane from which it can embody an appearance of neutrality and universality. What I want to explore are examples of persuasive rhetoric, which are also key to legal testimony, but that are made up of more or less colloquial language. Nonetheless these examples show how certain forms of utterances produce neutralizing and universalizing effect, even if they are not specifically utterances of legal jargon.

Let's consider a few quotes from David Yazbeck and Guy Dancosse, the lawyers representing CARFAC-RAAV and the National Gallery respectively. In the follow quote Yazbeck is defending artists for wanting artist's fees based on what he sees as a brute reality that remuneration is highly important to precarious artists. He states, "this is the first time these visual artists are negotiating [fee structures], the most important thing for them is money, *that's a fact given the history and that's the reality*, and the information is in the material about how destitute artists can be" (Supreme Court 2014:41:28). Minutes later he also states, "at the end of the day, whether or not somebody is bargaining in good faith or bad faith is a *matter of fact*" (54:29). In remarking on the various courts that this case went through Guy Dancosse states, "what the federal court of appeal did, and what I think has to be done here, is to apply the proper rules of statutory construction*, it's not very complicated*. In the context of this issue, "provisions of services" should

be read in their grammatical and ordinary sense" (Supreme Court 2014:1:29:21) and in defending the Gallery's position he later states "the copyright, *essentially, again it's simple,* is not a service, no matter which way you look at it, it is not a service" (Supreme Court 2014:1:31:13). In all these remarks we have examples of how language can fashion a sense of neutrality and objectivity. In the italicized sections of these quotes we find the language of facticity, essentialism, brute reality, and clarity. This is a sort of metacommunicative language where the lawyers are attempting to define their own statements as true, as a given and irrefutable reality. They also communicate about the ability of the lawyers themselves, and the ability of Justices to execute pure law – this is particularly the case in Dancosse's statements where he is remarking on the simplicity of the task of legal interpretation. In other words, these are aspects in the utterances that remark on the speaker, not in the sense of expressing simple emotional states such as confidence or calmness, but in that they establish the addresser as competent and passive. What we can also recognize in these quotes is that the establishment of neutrality, competency, and passivity in the speaker is enmeshed in the establishment of the position of lawyer in the juridical field, a position that when taken up, immediately has the consequence of universalizing utterances. Meaning, that in each utterance there is the possibility of an effect being produced on the speaker, which is *always tied* to the effect of the content of the message and also tied to the exchange of recognition present in the performance of the juridical field. What this means for our conceptualization of neutralization and universalization is that they will always occur at once, perhaps in varying degrees of dominance, and they will only occur within a scene, within a context where speech is not dissociated from the complex forms of symbolic recognition which give rise to the relations of authority that the actors involved in each speech act embody. To explore this further, and to bring some concreteness to these conceptualizations, let us consider two more moments in the trial where

the attempt to institute universality and neutrality is easily seen. First, we will look at the question of the subjectivity and objectivity of the court system. Second, we will look at an invocation of religious symbolism as a metaphor for law.

About two hours into the trial Dancosse is making his case to the Justices. Remember, the legal wrongdoing of the Gallery, which is only alleged at this point in the hearing, was their apparent bad faith in negotiation with CARFAC-RAAV. The professional arts Tribunal - formerly CAPPRT and now under the CIRB - agreed with CARFAC-RAAV that the Gallery was unwilling to compromise and was giving no other avenues of negotiations to come to agreement. However, Dancosse argues, "the Tribunal relied on the *subjective perception* of the CARFAC-RAAV negotiator only" (Supreme Court 2014:2:05:30). Here Dancosse is trying to denounce the Tribunal for not relying on an "objective" stance of perception of how the negotiations were occurring. He continues, "on that day there was no rigid stance, it was not an impasse, it was exploration to find a solution and what the Tribunal took was the subjective comprehension of the RAAV-CARFAC negotiator who took it this way, and [the Tribunal] only relies on that" (2:07:31). Soon after these remarks, Justice Abella questions Dancosse's characterization of the Tribunal and she refutes his claims of subjectivity. She says the Tribunal saw the entirety of the evidence, followed the procedure and script of law, and thus ruled objectively. Abella is perplexed that Dancosse would essentially ask the Supreme Court to change the ruling of the Tribunal – in fact, she feels like *this act* would be the moment of subjective and unjust action in law. Meaning, the Tribunal executed its objective ruling and if the Supreme Court were to overrule that decision they would be the ones suggesting that ordinary legal procedures are void. She states, in a somewhat sarcastic and perplexed tone,

> What do we do about the finding of fact that there was in fact an impasse? You're proposing we look at the affidavit which says it really wasn't an impasse? At paragraph 144 of the

> Tribunal's decision, the Tribunal says 'the evidence is clear that the parties had different views on how close they were to concluding a scale agreement' and then they go on to say that the presentation, the next day of a letter saying we don't think these matter should be negotiated and a new collective agreement which excludes all of these issues was an impasse, I sense what you are doing is inviting us to review these findings of fact, where they're clearly in dispute and ask us to substitute our view of the findings of fact for those of the Tribunal which were made after hearing the evidence of all sides (2:18:25).

What makes this exchange so important is that I believe it is a moment that reveals a key element of the authority of the 2014 court hearing based on the Supreme Court's performative function in the legal sphere at large. I propose that the Supreme Court is the ultimate performative grounding of law because of its relation to the levels of conflict apparent in the juridical field. The Supreme Court is the place where law itself needs to be considered. The Supreme Court parses out nuances of law itself, which do indeed result in topical consequences, but the conflict the court is actually resolving is a conflict within the law. For instance, in this hearing depending on which way the court sided it would result in the Gallery having to negotiate minimum fees or not, but this isn't exactly what the court was ruling on. They were explicitly ruling on the nuances of *SAA* and the *Copyright Act* such that they could determine whether the Gallery was bargaining in bad faith. In other words, they were ruling on which aspects of artistic production could be considered under the *SAA* and the *Copyright Act* – if they ruled that only pre-existing works could be covered in negotiations then the Gallery was not bargaining in bad faith and vice versa. The primary point is that the Supreme Court engages in resolving conflicts of a second-order, conflicts within law. Waldenfels also discusses second-level conflict in law which he describes as an event that is not an application of law, but a *consideration of* the application. The primary goal of this consideration is to maintain order. Waldenfels states "that which disturbs an order is integrated into this order by being named, classified, dated, localized, and subjected to explanations" (2011:31) - this is the job of the Supreme Court. The Supreme Court then, should be thought of as the highest system of

reintroducing the Other into the order of law – it is the safeguard for once unknown intrusions in the way it mediates second-level conflict through a reassertion of the laws' authority. Thus, in the example above, I see Justice Abella's remarks as an example of her duty to maintain the Supreme Court - and the courts below it - as "objective" institutions that have the ability to parse out conflicts objectively. Even though rulings are overturned in courts of appeal, which reveals that there is some room for making wrong decisions perhaps based on subjective biases in law, Justice Abella's remarks try to counter the claim that the legal system in its totality is predicated on subjectivity and individual interpretation. She is trying to give the legal system an objective covering. She feels that siding with Dancosse and overturning the law would suggest that its original findings were ungrounded. This is the last action that the Supreme Court wants to take as they try to make the law appear as *neutral.* As the final line of defense for the performative grounding of law they ought not dismantle faith in the law which it is supposed to maintain.

To conceptualize the above argument in terms of normalism we can recognize that the operation of ordering at what could be considered the ultimate level in Canadian law also signifies that the Supreme Court, more so than any other lesser arbitration system in the juridical field, is an apparatus of normalism – it is their job to be the utmost objective, the most rational, and most authoritative voice of ordering. Once a ruling is passed at the Supreme Court it is not supposed to be quickly reconsidered, it is supposed to be the final step of consideration and thus the one that permits and sometimes criminalizes actions with the most strictness – this strictness is the trait that leads to states of normalism on the matters they rule on. This finitude of the Supreme Court also signifies that it is the institution with the most force in their utterances and judgements – there is no court beyond it to appeal. The Supreme Court is the final juridical response to any demand, and so their utterances appear with great conviction as the final word.

Waldenfels states that there are many ways of controlling conflict - tradition, functionalism, etc. - but normalism is key to the control of law. Normalism is the process of universalizing certain rules or maxims which concern all parties. This normative process happens through law, but we also must note that law, the legal proceedings themselves, are normatively regulated. Thus, "the legitimacy of law would be, as it were, a legitimacy both granted and borrowed, hence ever subject to revocation" (Waldenfels 2006:366). Meaning, there is a certain giving into the procedure of law as a normal way of establishing norms. Waldenfels states, "the continuity between law and justice is achieved by means of performative validity claims, which are already raised in legal practice and law enactment (*Rechtssetzung*), rather than on the plane of moral action" (366). These validity claims performatively establish law as normal and somehow ultimately grounded by occurring in legal enactment rather than on some other plane of combat. To invoke a sense of combat presupposes that all parties accept the regulative and necessary ground of the *field and rules of combat*, which brings Waldenfels to claim that "[legality] requires acting *for the sake of* the law, and not merely acting in accordance *with* the law" (367, emphasis added). And so, "the facts established and the judgements passed do not exhaust the performativity of juris-diction" (368). Thus, what we can understand from this situation is that those who submit themselves to the legal sphere, and particularly those who enact the legal sphere, like Justice Abella, must maintain a faith and recognition of law, they must act *for the sake of the law* if they are to contribute to upholding the institution they reside in – they must assume and perform the authority of law, even when law is being submitted to questioning, as it is in the Supreme Court.

The second example of neutralization and universalization that I want to present relates to religious language in the courtroom. I use this example because I think the language is quite striking, and although it is a small excerpt from the hearing, I believe it strongly represents the

way in which symbolism and metaphor secure the effects of neutralization and universalization. Part of Dancosse's defense of the National Gallery was to argue that the *SAA* had the same aim as the Labor Code, which allows collective bargaining for workers, specifically for workers who are involved in production. This means that Dancosse was arguing that the collective bargaining act applies to all the *services* the workers provide the employer after its ratification. What becomes a point of conflict, in Dancosse's view, is that in the artistic field much of the work that will be dealt with through collective bargaining has already occurred, the products – artworks - have already been made. If one were to read the *SAA* exactly like the Labor Code, which is what Dancosse thinks should occur – this is what he thinks will win the case for the Gallery - there is a possibility that one would exclude pre-existing works and only allow collective bargaining to be applied to newly commissioned pieces. This is Dancosse's view and he attempts to support it by harkening to religious symbolism. He states,

> I submit that what the writers [SODRAC, interveners] are telling you that they agree, restates what this court and the law says: that the purpose of the act, the *SAA*, is not to settle economic issues or other issues, or technical issues between two laws, but it is to foster *the sacred principle of collective bargaining* …and if you look at the introduction or the purpose of the Canada labor code, which is the *bible* in the field, it says the objective of the act is to foster collective, fruitful, collective bargaining (Supreme Court 2014:2:16:24 emphasis added).

As Dancosse tents the legal world in ecclesiastic image, I believe he is both invoking the universalism that has been established, and is still widely accepted, in religious ritual by way of associating law with the ungraspable and thus irrefutable notion of sacredness, but he is also establishing himself as a neutral conveyor of legal scripture. Dancosse is neutralizing his position in the legal officium. As Bourdieu notes, the division of labor in the juridical field is established through acts that produce, to greater and lesser effect, a stance of neutrality and transcendency. This process, he notes, "explains the relatively weak tendency of the legal habitus to assume

prophetic poses and postures and its inclination, visible particularly among judges, *to prefer the role of lector"* (Bourdieu 1987:823, emphasis added). Meaning, that the felicitous performance of mere interpreter allows the judge, justice, or lawyer to appear as conveyer of truth emerging from some transcendent place - "transcendent" meaning to exist on a plane somehow outside the goings on of everyday life which grants a position of objectivity – rather than appearing to apply their own personal, subjective opinions on legal matters. The more transcendent and neutral a position appears, the less subjective its violence seems, and the more the grounds of law are obscured and consecrated. By introducing religious language and taking up the position of lector, Dancosse enacts this appearance. Of course, in this situation we can again assert that the law is showing its tendency toward normalism – the role of the lector, rather than say the role of the revolutionary or radical, is a role that upholds and reifies a pre-existing vision.

LAW AS THE VISION OF THE STATE

To finish analyzing the force and authority of law through gesture and language, let us connect it to a consideration of the State at large, for if the Supreme Court is the final performative defense of the law, it is also where a defense of the State as a performative effect occurs. Engaging in the relationship between the law and the State will also allow us to understand how CARFAC-RAAV enters the powerful nexus that is the State and employs its power in their favour to produce a certain performative effect in the struggle of establishing their vision of artistic practice within the artistic field. To explore the relationship between the State and law I will begin with Bourdieu. He states,

> The trial represents a paradigmatic staging of the symbolic struggle inherent in the social world: a struggle in which differing, indeed antagonistic world-views confront each other. Each, with its individual authority, seeks general recognition and thereby its own self-realization. What is at stake in this struggle is the monopoly of the power to impose a

> universally recognized principle of knowledge of the social world – a principle of legitimized *distribution*. (1987:837, original emphasis)

Thus, for Bourdieu, symbolic struggle is ever-present in the social world – this struggle is animated by antagonistic, or perhaps merely differential worldviews, a difference we can attribute to the holding of different positions and orientations to social reality. What is important is that the law is predicated on its service to the State which erects it, and so the law is perhaps the "sovereign vision of the State" (1987:838). Bourdieu claims it is the State that has its view objectified in the world through the consecratory powers of law, because it is the State that is at the helm of the game of symbolic struggle as it is played out in the juridical field. In relation to the case at hand, it is important to remember that this is a hearing between CARFAC-RAAV and the *National* Gallery, the latter being a State institution. With Bourdieu's explanation of the power of the trial enforcing the sovereign vision of the State, one might assume the trial would go the way of the National Gallery – which is not what happened. We must then ask, is CARFAC-RAAV enacting a prophetic power within the realm of the State where its own institution is expected to win out? It is important to note that symbolic power can emerge in "prophetic, heretical, anti-institutional, subversive mode[s]" (839), but this power - which does the very same thing as that of the State's law – i.e. dictates a new vision and division of the social world - "can only succeed if the resulting prophecies, or creative evocations, are also, at least in part, well-founded *pre*-visions, anticipatory descriptions" (839, original emphasis). Echoing elements of Austin's and particularly Derrida's concept of performative origins of order, Bourdieu continues in saying, "these visions only call forth what they proclaim – whether new practices, new mores or especially new social groupings – because they announce what is in the process of developing" (839). In other words, the ephemeral foundation of law's authority, is indeed the same ephemeral foundation of all symbolic violence. Yet, I do not believe CARFAC-RAAV has somehow flanked the process of the State asserting its

vision. I don't believe this is a case of prophetic power in the courtroom. Instead, I think we can say that CARFAC-RAAV successfully wielded the power of the State in their favour, and they did this by entering the nexus of the State as they became a legally-recognized advocacy group through the *SAA.* In this act, CARFAC-RAAV produces the opportunity for their view of the social and artistic world to be ratified by the decision, and they also conceded to the State's ultimate ability to do this ratification by conforming to and participating in the performative scripts of law. Thus, what we need to keep in mind when thinking about this case is not only what the *decision* means and does in the social world, but also what the *decision-making ritual* means and does in the social world. CARFAC-RAAV is certified by the State to represent artists through the *SAA.* Thus, CARFAC-RAAV has a particular relation to the State wherein their win is not a prophetic force acting from outside of the State but a ratification of the State's mandate. We see this play out in the trial when all parties refer to the trial as a clarification of "parliament's intent" – this shows it is indeed the State's vision that is being clarified and enacted. What we could perhaps also say then is that regardless of the way this hearing went, the State is already a "winner" in the situation, for each group has already decided to play by the rules of the State – both groups abide by the performative scripts of the State in this situation, and thus, because CARFAC-RAAV is bringing the artistic field into contact with the State in this moment we could say that it was inevitable that the authority and normalism of State law was going to take root in the artistic field through the ritual of the hearing.

In conclusion, I want to explicitly recognize that while the most fundamental force of the performative is captured in the work of Austin and Derrida, it is Bourdieu's interest in not only the generally illocutionary power of utterances and gestures, but also the differential efficacy of

performative acts that gives us a potent ground for the kind of critique that has occurred in this chapter. As Barbara Leckie notes, reflecting on Bourdieu's essay *The Force of Law* (1987),

> Bourdieu's point is that certain institutions are given the authority to name and to institute; he thus rigorously exacts an interrogation into "who makes the rules". …He further adds to this inquiry into power relations a consideration of what makes one force more persuasive or "violent" than another (1995:7).

Thus, it is significant that CARFAC-RAAV establishes their vision of the artistic world through legal, legitimized naming and judgement, because it is specifically the legal theatre that makes their performative actions that much more forceful. In recognizing this, we can see how this case demonstrates "who makes the rules" but also who, by doing so, "creates the creators" (Bourdieu 1993b:145), another longstanding concern for Bourdieu. What is at stake in this situation is the creation of an entire field of labour-centered Canadian artists who base their values on the particular "problem area" of economic stability and autonomy within the field. This field has had the extreme benefit of having their vision recognized in the Supreme Court. Yet, I would be remiss if I did not recognize that the process of instituting visions of the artistic world does extend beyond the law. Bourdieu writes,

> There is no other criterion of the existence of an intellectual, an artist, or a school than his or its capacity to win recognition as holding a position in the field, a position in relation to which the others have to situate and define themselves; and the 'problem area' of the time is nothing other than the set of these *relations* between positions, which are also, necessarily, relations between aesthetic and ethical 'positions'. Concretely, that means that the emergence of an artist, a school, a party or a movement as a position within a field (an artistic, political or any other field) is marked by the fact that its existence 'poses problems' for the occupiers of the other positions, that the theses it puts forward become an object of struggles, that these theses provide one of the terms of the major opposition around which the struggle is organized (for example, left/right, clear/obscure, scientism/anti-scientism, etc.) (1993b:145)

What is significant to me about this quote is that it shows how by writing this thesis, and forming a notion of art and autonomy/heteronomy – a prominent opposition on which struggle in the artistic field is organized - I am instituting my own position within the field of art through the performative

power gained in my position in the *officium of the academy,* which is highly similar to CARFAC-RAAV's work in the *officium of law.* This may be said to expound the difficult truth that "while critique produces something new, it does so from within the structure with which it takes issue; the critic is always tied, through the available critical tools, to the system that is criticized" (Leckie 1995:5). Yet, the notion of autonomy that I am developing – autonomy as the permeability of new vision in the field's ongoing development through a counteraction of normalism – may indeed be one way out of this difficult aporia when we understand that an openness to that which is Other to the order being established is consistent with the pursuit of just action.

Chapter 6. Reiteration: A Chronology of Productivity

The 2014 Supreme Court hearing concluded swiftly. It was a mere twelve minutes between the moment the Justices retired the court and the time that they returned from their chamber to announce that the appeal was allowed and that CARFAC-RAAV was successful in their efforts. What this means legally is that the court found the National Gallery to be bargaining in bad faith, based upon the conclusion that there is no conflict between the *Copyright Act* and the *SAA.* Before arriving at the Supreme Court, the Federal Court of Appeal had decided that if both acts were working simultaneously that there would be a deprivation of rights in that artists wouldn't have full control over the management of their copyright if the *SAA* was acting as a base-contract in engagements with the National Gallery. The Supreme Court disagreed with this decision. In the *Reasons For Judgement* the Justices state,

> In drafting the *SAA*, Parliament is presumed to have knowledge of the *Copyright Act* and to have intended that the two statutes not conflict …The *SAA*'s explicit reference to the *Copyright Act* in s. 6(2)(b)(i) supports that presumption. In the absence of evidence of conflict or that one of these laws is intended to provide an exhaustive declaration of the applicable law, the two statutes must be read together in a manner that allows them to work in a complementary fashion. (McLachlin, LeBel, Abella, Rothstein, Cromwell, Moldaver, and Wagner 2014:208)

The decision continues,

> The collective bargaining conducted by artists' associations such as CARFAC/RAAV under the *SAA* in respect of scale agreements covering existing artistic works does not contradict any provision of the *Copyright Act.* Artists' associations are simply bargaining agents. They have not taken or granted, and do not purport to have taken or granted, any assignment or exclusive licence, or any property interest, in any artist's copyright …Establishing a minimum fee for the use of existing works does not affect any of the rights conferred on copyright holders under s. 3 of the *Copyright Act*. Minimum fees may, in some circumstances, affect whether and under what conditions artists will provide a producer with the right to use their artistic works, namely preventing an artist from doing so if no producer is willing to offer him or her the minimum amount under the applicable scale agreement. Ultimately, however, the decision of whether or not to provide the right to use an artistic work remains with the copyright holder. (208)

In other words, the Supreme Court doesn't see the *SAA* interfering with the rights of the artist. No property or copyright is given to CARFAC-RAAV and so, the artists maintain their rights throughout the entire process of engagement with the Gallery. The only time the Supreme Court sees these acts conflicting in a negative way is when an artist would like to show at the Gallery, but the Gallery is unwilling or unable to pay the minimum fees – a situation that is unlikely to occur with the nation's premiere gallery that is amply funded.

CARFAC-RAAV's win in the hearing thus pushed the Gallery back to the negotiating table with no legal grounds to avoid producing an artists' fee schedule in their contracts. The first binding agreement was established in 2015, and was updated in 2018 (CARFAC-RAAV and National Gallery of Canada 2018). The current version stands until 2022 unless the groups renegotiate prior to that date (CARFAC-RAAV 2018). This agreement seemingly encompasses the entire process of artistic creation. Within the agreement there are economic parameters for the production and preparation of artworks, standardized fees for professional services, consultations, lectures, installations, artist conversations, guided tours, skills and techniques workshops, and exhibition openings. There is also a complex of fees for various sorts of exhibits. This includes different levels of compensation for temporary exhibits, displays in the Prints and Drawing Gallery, displays in the National Gallery's library display case, group exhibits, as well as one-time performances and repeat performances. Within the agreement they have also included a formula for reproduction, say in an artist book, which includes variables for the number of illustrations in the reproduction, the number of pages on which those illustrations appear, the retail price of the reproduction, and the print run for the reproduction, amongst other details. The list of what is included in these agreements extends on into further and further minutia, but what is listed already demonstrates that the agreement does not allow any detail of the life of an artwork to escape the

calculation of the agreement. Once this agreement was set in motion, every artist, regardless of their involvement or awareness of CARFAC-RAAV is subject to the rigours of this system when they engage with the Gallery. What is so important, however, is not that this is a tedious agreement to invoke in each encounter with an artist, it is that this type of procedure and economic frame of mind - while only being *mandatory* at the National Gallery - is imposed on much of the artistic field through a process of normalization and reification of the productivist ethos of the agreement.

I think it would be difficult to say that this chapter and the ones coming before it encapsulate the entirety of the hearing when understood in the theoretical perspective I am working within. But certainly, the context, which I have explored in relation to the field of Canadian cultural organization, the legislative grounds of the *SAA,* and the theatre of the courtroom, including all of its materiality, embodiment, language, and gesture, represent something of what could be called the first two processes of performance. Those being, the structure or conventions that come to bear on a performance through their enactment, and the enactment itself central to the illocutionary force of the event. What is left to explore is what occurs after the event – the effects of normalism and reification. Yet, I hesitate in using the word "after" because I believe a performative analysis blurs the boundaries between events. Earlier in this thesis I discussed how we could conceive of an artworld as a spatially and temporally diverse field through the lens of the event. These things, a field and an event, seem oppositional – it might be tempting to think of the artistic field as somehow transcending its own events, but this would demean the performative notion of the event that says each event is not *of a type* prior to its doing and cannot be completely integrated into a type after its happening. If somehow there were an artistic field that existed in a void of its own – exterior to society and not as an effect of it as Mitchell might say - the important insights related to the artistic frame would be lost. What needs to occur is that we consider the artistic field to be

an interconnectedness of events. The idea of reiteration helps us do this. What is difficult but necessary to let go of is the idea that there is a singular event that can be demarcated and separated in space and time. If one forgoes this idea, we can begin to think of a field as a set of interconnected events, fused by the conventions that are taken up, sedimented, and transformed in performance, but separated in the radical possibility that each performance has the productive capacity to bring something new to emergence. Consider that as an analyst to this Supreme Court case, I did not experience the hearing firsthand, I was not a part of the eventness of the hearing, but I am a part of the eventness of my own writing on the hearing which has an effect on the meaning of the hearing. Furthermore, a reading of this thesis is yet again a rearticulation of the hearing, a reperformance of the hearing, fraught with new positionalities of the performer, and new possibilities in the creation of resignification of the hearing. In my own articulation of the hearing, I come to invoke the conventions of the artistic field - by claiming that I am writing a sociological paper on the artistic field I bring it into enactment and thus into a possibility of change, but I also am performing a set of structures and conventions that make up my own order. Then, in the reader's consumption of my writing, the hearing is recontextualized once again. This process denies any clear demarcation of events and contexts. It is a fallacy of performance studies to assume that the context or conventions of a performance along with the effects or outcomes of a performance can be articulated once and for all. There is an aspect of performance that escapes each time, but it is that which escapes that seems to guarantee the interminable quality of performance as well as the complex interconnectedness between what we can only hope to demarcate as singular events.

To do justice to the blurriness of events, in this chapter I will not only analyze that which happened after the hearing, but I will attempt to create a chronology of performative effect. To do

so, I focus on how the 2014 hearing sits at the middle of a reiterative consolidation of a particular artistic vision. This work will corroborate my proposition that this trial is a prime example of a *strengthening* of a widely accepted, but inherently narrow vision of the possibilities of artistic organization. In what follows, I will analyze a set of empirical data that is pulled from moments both before and after the trial to show how the productivism that is reiterated in the hearing is not an invention of the hearing, but a repetition of sorts. This data includes news reporting both from the legal and artistic fields, statements by the Gallery and CARFAC-RAAV, policies and fee structures that were developed in negotiations after the case, and other information from arts organizations, galleries, and centers that have taken up the fee schedule voluntarily or are otherwise responding to this case. I have split my analysis into three themes, productivity as solution, voluntary agreements, and the precedent of morals.

PRODUCTIVITY AS SOLUTION

What I notice in the reporting on this case is that CARFAC-RAAV's win, which pushes the National Gallery back into negotiation, is dissociated from the effects that CARFAC-RAAV and other artists see as associated with the win. As evidence of this consider an article by Don Butler in the *Ottawa Citizen* (2014). In this piece Gerald Beaulieu, a mid-career sculptor from Prince Edward Island who is also part of the bargaining committee for CARFAC complains that "it's always feast or famine" for artists, meaning, there is an unpredictability or inconsistency of when projects or sales will come up in his regional area. Some years, he states, he can live on art, in others he has around $8000 of income. Later in the article Beaulieu argues that the Gallery would currently pay a mere $3000 for a solo exhibit, half of what his daughter's high school paid in royalties to the playwright for their musical production, showing that there is an inequity in

various kinds of artistic activity. He seems to suggest that CARFAC's win in the hearing would alleviate these problems. Yet, the Gallery having to pay fees does not have much to do with the instability of artists' contracts and sales - Beaulieu may get an exhibit with the Gallery and be compensated with CARFAC-RAAV's fee calculations, but the negotiations with the Gallery do not guarantee more regular and consistent shows for artists in the corners of the nation. Beaulieu's comments are part of a rhetoric of "making a difference" that revolves around CARFAC's work in the hearing. What this suggests to me is that CARFAC-RAAV members and other artists in the field see this hearing as much more than an institution of a new system of remuneration at the Gallery, but that the "difference" brought about in the hearing is something that will be transformative much beyond the relationship between artist and national Gallery administration. They see a win in the hearing as a solution to a lack of consistency in regional shows, and to an imbalance of compensation from federal institutions down to community educational productions. This transformation that they see occurring by virtue of CARFAC-RAAV's win in the hearing only could occur by the consolidation, emphasis, and expansion of a labour-centered organization of art much beyond the narrow changes that will happen with the Gallery's compensation agreements. What interests me in this rhetoric is the performative process in which the telling of the story in this way, the narrative of the hearing "making a difference" is an aspect of that difference, in that it leads the reader to move outward from the details of the hearing to an expanded notion of how fees play into the wellbeing of artists whether they truly do or not. To suggest to the reader that CARFAC-RAAV's win will alleviate problems much beyond its own immediate circumstance, implicitly tells the read that CARFAC-RAAV's work, and the productivist attitude at its core, is a way to secure artists wellbeing in all circumstance. This kind of new article, then, can be seen as one method of normalization in the reiterate tellings of the case.

What is also of interest is that not only does the reporting of this case suggest that the economic logic at the core of the hearing will solve the precarity of artists in Canada, but it also claims that it is the *only way forward*. The suggestion that increasing artist's fees is the singular way of improving the conditions of artists' lives is a suggestion that is given both before and after the trial had occurred. Consider this excerpt from a report published in *Canadian Art* leading up to the hearing. It states,

> Artist Karl Beveridge has been involved in CARFAC and RAAV's negotiations with the NGC for roughly 10 years. He notes that "there are not many ways artists can actively improve their livelihoods. We can lobby the Canada Council, but lobbying is a ball game. And you can't control the market—that is, whether your work will sell or not. So setting mandatory minimum fees are the only way we have that we can negotiate an improvement in our livelihoods." Beveridge also says that if CARFAC and RAAV win the case, it would set an important national precedent, prompting major regional museums to follow suit. (Sandals 2013).

This is an example of a common type of performative utterance that permeates the whole hearing. It is a statement that creates a particular artistic vision by simply saying it – and it is the act of uttering that does this work. By stating that this is the "only" way for artists we stint our work on imagining alternatives because with each performative enactment of a particular order certain values are revealed and presented, with all others being excluded, pushed to the margins of order, or sinking back into what Waldenfels would call the alien realm. Because the particular vision of CARFAC-RAAV is rendered as the "only" possibility, the act of imagining other alternatives is deemed an impossible task – to stifle the possibility of something ulterior is to promote a state of normalism, a state of finitude.

This act of stating that the hearing was the only way forward is a common sentiment. After the hearing Karl Beveridge states, "as we see it" referring to himself and his partner Carole Condé, "artists have three sources of income: sales, grants, and fees. You have no control over sales that are run by dealers in the private market. With grants, all you can do is lobby for more funding.

Negotiating fees is the *only way* you can directly affect artists' incomes and gain increases" (de Peuter and Cohen. 2015: 338, emphasis added). Again, I believe the rhetoric of the "only way" is a method of definition, and if we can consider the reader of such an article, and the participants involved in the discussion and writing of the article as involved in acts of performative definition of the structure for artistic becoming, then this is a strong – strong in the sense of the force of the performative accumulated in the officium of the journalism industry – act of definition consolidation. Let us consider a few more instances.

A point that was first raised in the chapter on legislation is that the *SAA seems* to be a piece of legislation that is centered on the economic. However, as I argued before, it is only the second half of the *SAA* - which introduces a representation structure - that has the faculty of orienting the effects of the act toward the economic. The reason the *SAA* appears to be tied to the economic aspects of art is because the group that has been consecrated as representatives to the visual arts has a labour-centered vision. Yet, in the reports on the hearing, there is an attempt to define the *SAA* as an inherently economic act. Doing so, pushes the highly important legislation that brings artists into existence as a group in the eyes of the State into view as an economic policy. It also suggests that whoever was to be appointed as the representative of the visual arts was *bound to be* an advocate for specifically economic purposes. Again this kind of statement acts to reinforce the sense that what happens in the hearing is inevitable, and thus justified. Consider this quote from David Yazbeck, CARFAC-RAAV's lawyer, when he discusses the relevance of artist's fees to the *SAA,*

> It makes no sense that Parliament would have intended to prevent artist associations from negotiating what is a crucial issue…Why would you take the most important aspect of any agreement with an artist out of the *Status of the Artist Act*? Why would Parliament have done that? And the answer obviously is, no, it never intended at all. (Canadian Lawyer 2014).

What Yazbeck is stating here is that economic agreements are the most crucial issue to artists in their relationship with the State. This quote clearly tries to distill the possibilities of the relationship between artists and the State to mere economic terms. He is stating that artist's fees are the "most important" aspect of any agreement within the arts. Meaning any relationship that artists have with this nation and its institutions are dominated by economic concern. To me, this is again a narrowing of the imagination of the act and what it can do. I still hold that the *SAA*, because of its establishment of a narrow system of representation will tend toward consolidation, but the particularly economic character of this consolidation is something produced through the normalized sense of art as work which CARFAC-RAAV continuously upholds.

There is another quote that I want to look at coming from Guy Dancosse, the Gallery's lawyer – it is a slightly more curious quote than those I have presented so far. It considers the underside of CARFAC-RAAV's labour-centered vision. CARFAC-RAAV argue that having a labour-centered artistic world is the only way forward, it is the route we ought to pursue. The underside of this is the implicit assumption that those who reject artist's fees are somehow "obscure" or wrong in their beliefs. Dancosse recognizes this when he states, "while the ruling helps to clarify the bargaining authority of artist associations under the *SAA,* it will also have serious implications for more obscure artists who may want to waive their minimum fee and negotiate freely with the gallery" (Canadian Lawyer 2014). I was not expecting a statement phrased this way from the Gallery's lawyer – I did not expect him to say that this legislation would only effect "obscure" and connotationally, unimportant, and subsidiary sectors of the arts field. If Dancosse wanted to performatively enact an order that supported the Gallery's position he would be more successful if he defined those who go against the labour-centered route as normal and justified. By taking on the Gallery's position in the hearing he is arguing for a position that actually

intended to prevent a labour-centered order from emerging, an order that would relegate dissenters to obscurity, and yet after the fact he seems compelled to invoke this order once it has been established. In other words, he has become part of the process of definition in a way that is counter to his goals as the Gallery's lawyer. What we can take from this is that the process of normalization central to performance always relegates elements of the order to obscurity, to the arcana of the abnormal, and this relegation supersedes intentionality and will.

David Yazbeck contributes to the process of normalism in a similar way. He states that "you have to look at what happens without a minimum wage …essentially what happens is that you have a race to the bottom. You have a situation where artists are being paid less and less" (Canadian Lawyer 2014). Here Yazbeck assumes that the wage labour system is the only form of artistic organization, the only way artists could work. Under this assumption it is true that the absence of a minimum wage would result in a race to the bottom. It would also be true, if wage labour was the only system, that those who didn't want to engage in this form of remuneration would be the obscurities in the artistic field. But this is all assumed and thus normalized through that written assumption as a reiteration of the way the hearing has structured artistic reality.

The examples I have given so far have centered around the idea that the productivist ethos of CARFAC-RAAV will be the solution to the precarity of Canadian art. It has been portrayed that artist's fees are the only way of securing stability for artists and that CARFAC-RAAV's win will permeate into and change all aspects of precarious artistic life. What is connected with this type of reiteration is the narrowing of other options, of other possibilities of artistic becoming. That is what the following example deals with in relation to representation.

The performative event that I have been working with in this thesis is highly disruptive to many notions that the political and legal fields leave unquestioned. One such notion is the idea of

representation. Returning to the core proposition of the performative, that performances bring about that which they claim to merely represent, we can see how the act of political representation can be shaken at its core. In a performative lens we can no longer be content with asking whether or not a particular group, accurately synthesizes the polity they speak for. Instead, we must ask how the speaking-for speaks the polity into existence. The erasure of such an insight is then a key mechanism of securing the notion of representation that obscures the transformative and controlling power of representation as an act. This is seen in the reporting by CARFAC-RAAV that "artists across Canada have voted in record numbers to ratify Canada's first scale agreement for visual artists at the National Gallery of Canada". CARFAC-RAAV state, "the results of this vote indicate artists' confidence in CARFAC and RAAV as bargaining representatives, as well as the certainty that we have achieved a fair and reasonable agreement with the National Gallery of Canada,". They continue,

> The vote on this agreement closed on February 23rd at 5pm EST. Ballots voted on by CARFAC members were delivered to external vote scrutinizers Welch LLP, who reported back to us on February 24th that our members were overwhelmingly in favour of ratifying the terms of settlement negotiated between CARFAC and the National Gallery of Canada. In Quebec, RAAV conducted an online vote, collected externally by Sémato. On February 23rd, Sémato informed RAAV that artists in Quebec unanimously approved the agreement. (CARFAC 2015)

The statement that the vote overwhelming went in the favour of the action is not to be contested. But what should be considered is the excess of this process, that which escapes the vote entirely, all those forms of organization barred from imagination in this hearing. In this case, representation should not be challenged in its purely quantitative efficacy. But what can be contested is that representation is not only a way of communicating the vision of a group, it is the occurrence of producing the group – of producing subjects. What I mean by this is that although CARFAC-RAAV claims to represent a group of artists, they also have considerable amount of power in

influencing the values of their constituents. The theoretical consequence of this is that it is hard to claim that there is ever a representable group that is not swayed by the act of their representation. Particularly for the case at hand, I am concerned that there is a stifling of the artistic subject's process of imaging when CARFAC is authoritatively leading the movement toward a labour-centered artworld. The lacunae of experience, the versions of order that remain possible but not enacted, are shrunken and pushed outside the frame of the current order – they become almost unimaginable.

The language that is used to describe legal proceeding is another exemplar of this exclusionary thinking. Consider a report on the hearing in *Dispatch* by Tara Mazurk that states,

> On May 14th, 2014, CARFAC Ontario headed to Ottawa to witness the final showdown between CARFAC National and the National Gallery of Canada (NGC). Our victory was documented in articles across the nation, as the Supreme Court came to an immediate and unanimous decision to hear our appeal. In the words of Past President and negotiator Gerald Beaulieu: "we were vindicated". (2014:4).

The language of confrontation, war, vindication, and victory, while appearing as simple poetic flourish, has a much greater structuring effect than first thought – these words through their uttering extend beyond the confines of language into thought and action. When we map the experience of war onto legal proceeding we begin to govern our experience of the law as a confrontation wherein the victor is the decided winner, the outcome is unambiguous, and most importantly, the positions that were contested are seen as a strict duality, the resolution of which could only move in one of two directions. I propose that this conceptualization is the basis for how we remember the legal experience – the result being as immutable as the outcome of a war. Conceptualizations are not only thoughts or matters of the intellect, they ground our actions in everyday life (Lakoff and Johnson 1980). It is not just that legal proceedings can be easily described by comparing them to war, instead by constantly being exposed to this metaphor we orient and change our action to fit

the metaphoric understanding. What I believe this iteration of the hearing does, then, is reify the idea that legal decision is final, and that there was no other possibilities for its resolution. This language of law as war is not isolated to Mazurk's report. We see it elsewhere, for instance, in Leah Sandal's report for *Canadian Art.* Sandals uses the language of a "historic win" (2014) to describe the hearing, which again moves the event into association with war and especially with revolution. To claim a legal outcome as a "historic win" is a method of establishing a justifying reading of the performative event. As I explored in my chapter on the law, the authority of the legal sanction is always a deferred authority. To trace the authority to an ultimate ground is an aporetic task. And so, to maintain a performative sense of justice, a performative must make the ground for its own justified reading. Establishing the metaphoric relation between law and war is one such way of doing this. Finally, this metaphoric thinking also connects to my remarks on subject formation above. When we think about law as war, we also create an us-them identity on either side of the legal argument. Much of the reporting on this case seems to pit a labour-centered vision of art against any other prevailing notions of organization. This leaves little room for exploring the grey middle ground of organizational conduct in the arts.

VOLUNTARY AGREEMENTS

A central proposition in my overarching argument is that there is a performative consequence to CARFAC-RAAV's success in the hearing. "Performative" in the sense that this consequence may not be completely willed by the participants in the event, but nonetheless occurs through the illocutionary forces inherent in performance. "Performative" also in the sense that what occurs becomes part of the structure of the artistic world, it becomes a convention that must be met in realizing the artistic frame in future reiterations of the process of artistic creation. To

give more credence to this proposition, we must look beyond the reporting on the hearing itself and analyze the uptake of the productivist vision of art that is sedimented through the hearing in other areas of the cultural field related to artist's fees. In this section and the next, I present data from both before and after the hearing. The data produced after the hearing is often an example of direct reiteration or performative consequence, the data produced before the hearing suggests that this productivism was not completely invented in the hearing, but was solidified, sedimented, and promoted. Together they demonstrate the key insight that productivism has become the central tenet of an economic normalism in Canadian art. In this section, I take a look at the voluntary agreements that various artistic institutions have made with CARFAC-RAAV which demonstrates their uptake of the productivist logic of art. Afterward, I present evidence that artist's fees have become a benchmark for moral goodness in the artistic field.

Some of the clearest examples of how a productivist logic is embedded in the artistic field are the voluntary agreements between CARFAC-RAAV and other influential artistic representation organizations in Canada. These are agreements stating that the organizations will follow a fee schedule that CARFAC-RAAV sets, very similar to the one that the National Gallery is contractually obliged to follow. Outside of the federal producers that CARFAC-RAAV can create legally binding agreements with all other organizations follow CARFAC fees based on their own choice to do so. Yet some organizations such as the Canadian Art Museum Directors Organization (CAMDO) and Canadian Museums Association (CMA) don't simply follow CARFAC-RAAV's guidelines on their own accord, they have entered into a voluntary collective agreement with the organization to be held accountable. An agreement with these parties began in 2017 and CAMDO/CMA called it a "major breakthrough that deserves mention" in their annual general meeting (Canadian Art Museum Directors Organization 2008:3). Furthermore, CAMDO's

Organizational Plan from 2015 includes exhibition and reproduction fees, identifying artist's fees as a "strategic issue" (Canadian Art Museum Directors Organization 2015:7). This agreement was ratified by both CAMDO's and CMA's boards and an official recommendation was made to all the members of CAMDO/CMA (Canadian Museum Association 2017) to adopt the CARFAC-RAAV fee schedule. I believe we can read this as an action taken on the precedent of the hearing, and a clear example of how umbrella organizations transmit the productivist logic of the field. This is a particularly potent process considering that CMA represents almost 2000 organizations ranging from small volunteer-led organizations to national institutions. Furthermore, CAMDO represents over 80 Executive-Directors, Presidents, and CEO's of art museums and galleries around the country.

Although CAMDO and CMA are highly influential organizations in the Canada arts sector, they represent a specific section of cultural producers. Namely, organizations focused on the exhibition of art in a Gallery or museum context. The other major category of artistic intermediary groups is the network of artist-run centers in Canada. The Artist-Run Centers and Collectives Conference (ARCA) is a representation group for this sector. They represent over 180 artist-run centres and collectives that span the visual and media arts, contemporary craft, and architecture fields. They do so through their conglomeration of nine artist-run centres' associations that form its membership. ARCA membership is granted only if the organization seeking membership is in agreement with the principle that "fees should be paid, and be subject to annual cost of living increases" (Artist-Run Centers and Collectives Conference 2013). Agreement with a principle is an interesting performative instance in the way that the intention behind the agreement or proclamation is not the only aspect of the phenomenon of agreeing. In performative terms, this proclamation produces a certain illocutionary effect – when you proclaim that you agree to this

principle, whether you do or not, you give credibility to the power of principle itself by your association with it. This is a powerful occurrence, especially because ARCA represents a wide gambit of organizations. Looking through their members descriptions you are able to identify how pervasive the adherence to this agreement is, and how often the organizations like to publicly reaffirm their stance on fees. For instance, 221A artist-run center in Vancouver proclaims its adherence to CARFAC-RAAV fees in their self-description on their website, Art Space in Peterborough states, "we are proud to compensate with fees that exceed recommended CARFAC rates", the G44 Center for Contemporary Photography boasts that it pays approximately $80,000 per year in fees directly to artists, Open Space adheres to the fee schedule, as well as Sans-Atelier artist-run center, just to list some examples.

What is also important to note is that this statement by ARCA - that their membership is predicated on an agreement with the logic of artist's fees – was found in a 2013 statement, a year before the hearing. What this tells me is that the artist-run culture in Canada – a culture that CARFAC and its founding members played a large role in – stood behind the productivist logic of artist's fees before many of the larger museums and galleries represented in the CAMDO/CMA agreements. We cannot be certain that CAMDO/CMA members did not also support the logic of fees before the hearing, but they did not choose to not make an official agreement until the legislation was cleared at the Supreme Court. I argue that this demonstrates a sedimentation of logic – before the hearing we had an important, but partial public support for artist's fees in the artist-run sector, but after the legitimacy building performance of the court hearing, we have a much more pervasive and powerful backing of fees by almost all major institutions in the field.

The extent of voluntary agreements does not end with non-profit organizations, galleries, museums, and artist-run centers, but also includes many public funding bodies such as the Canada

Council for the Arts (CARFAC-RAAV 2021). When the Council awards core-funding, meaning grants that contribute to the general running of an organization rather than a specific project, they stipulate that the organizations must provide "professional working conditions", and must discuss how they plan on doing this in their application for funding. This language of "professional" is important, for the *SAA* is the piece of legislation that sets out the parameters of the professional artist, and it is also the legislation that grants CARFAC-RAAV the sole position to represent these artists. In other words, "professional" in the artistic world of Canada is highly associated with the system of artist's fees created by CARFAC-RAAV. In this sense, the Council's core funding has a pseudo-requirement to pay CARFAC-RAAV fees – it does not outright require the fees be paid, but it can enforce the position that artists' must be treated in a "professional" manner, where that professional standard is instituted by CARFAC-RAAV in cases like the 2014 hearing.

Many of the provincial public funders follow a similar requirement. For instance, Arts Nova Scotia requires that for operational funding an organization must "support the work of Nova Scotian artists, and pay artists professional fees in keeping with established national guidelines" (Arts Nova Scotia. N.d). In the competition for operating assistance from the BC Arts Council, applications are assessed by "commitment to the development of B.C. artists and cultural practitioners, including the level of professional fees and other compensation to artists and cultural workers" (British Columbia Arts Council 2019). The main point that can be made when looking at CAMDO/CMA, ARCA, and the public funders collectively is that there are very few artistic projects that would escape the system of recommended fees set out by CARFAC-RAAV – almost all artistic projects in Canada are either organized by artist-run centers, museums, or galleries, or are enabled by operational grant funding or project grants, and thus operate on the same economic logic as the National Gallery now is obliged to follow.

THE PRECEDENT OF MORALS

I argue that the idea that artists should work for a mandatory and legislated fee schedule has become so pervasive in Canada that it has become something of an artistic sin or artistic blasphemy to denounce this logic of operation. This is precisely the definition of normalism that Waldenfels gives when he says that in a state of normalism, any anomalies "appear as deficits, disturbing, offensive, or superfluous" (2015:95). When you have most of the artistic field adhering to a narrow productivist logic there creates a very strong "us" feeling, wherein the "them", those that don't pay artist's fees, or reject its productivist logic, are cast as outsiders, and moral transgressors. In this section, I hope to give evidence to this claim by demonstrating the way the productivism characteristic to CARFAC-RAAV's work seeps into the everyday moral fabric of Canadian artistic practices. First, I will describe the touting associated with the payment of fees, contrasted by the shaming of not paying fees. Second, I demonstrate how arts organizers feel guilt when it is not viable for their organization to pay fees. I will note, it is not out of place to have certain moral impetuses in the artworld, but from what I have observed the moral tint that artist's fees takes on in the field is highly exaggerated, again this exaggeration of what is deemed good or normal is characteristic of a state of normalism in Waldenfels' sense. The fear is that with too strict a sense of morality, there is little room for contemplation or consideration of alternative ways of acting and being – anomalies become disturbing deficits.

A very simple example of the way the productivist logic takes on a moral character is the way that organizations include a statement on fees in their description of their organization – often this is in the very first few sentences of the description. For example, Sean Brady (2018), discussing Arnica, a former artist-run center and Gallery, describes the history of the Gallery as follows,

> Arnica was first incorporated as a society in 2003 by students from the University College of the Cariboo. In 2008 it became a charity and has paid artists CARFAC fees. CARFAC is a national artists' representation organization that sets minimum fees artists should be paid for exhibiting their work.

This kind of statement is very common for arts organizations on their website and in public statements – it appears as a form of solidarity with CARFAC-RAAV's programs but also as self-promotion and praise. The opposite of this phenomenon of praise – that being, flak - also occurs frequently. For instance, when reporting on the economic situation of artists on Prince Edward Island, Shane Ross (2016) noted that "there is only one gallery — the Confederation Centre of the Arts — that pays professional fees consistently" and imploring others to follow he states that only having one gallery do so is "a real challenge or barrier" to the success of art on the island. This type of reporting purports that any organization that does not pay fees is stunting the flourishing of artistic creation. In the next example, we see how the criticism for not paying fees is not always so mild. In a 2019 article (Fortin 2019) concerning the Yukon Arts Center that displayed an artist's work without permission or compensation, there was a comment that jumped out at me as a prime example of the criticism art centers receive for not paying artist's fees. The following comment was not in the article itself but was in the public comments section found below the article. Helga Schmidt wrote,

> I applaud Owen Williams for taking this action, and the Whitehorse Star for reporting it.
>
> What is not mentioned in this article, and many members of the public might not know, is that in Canada artists are compensated for the use of their work when their artwork is exhibited in publicly funded exhibition spaces for non commercial purposes. These are often referred to as CARFAC Fees.
>
> Owen Williams is out of pocket for CARFAC exhibition fees. At 2019 rates this is $2036. If a work is exhibited in without consent this fee is doubled, so $4072. Owen Williams was very generous to the Yukon Arts Centre in only asking for an apology. The Yukon Arts Centre needs to be audited. The curator removed. Their funding cut. How many other artists have been ripped off??? YAC's behaviour is unacceptable.

To highlight this comment and to use it as an example of how a moral precedent for paying fees has been set in the Canadian artistic field, is not to say the Gallery did not commit a wrongdoing, but it does show how this logic emerges in unexpected places – like in the comment box on a local newspaper. Furthermore, the declaration that the Yukon Arts Center "needs to be audited, the curator removed, and their funding cut" which essentially means the center should cease to exist, is an extremely passionate call – one that only has the intensity it does because this kind of economic malpractice is transgressive of a deeply engrained ideology of productivity in the arts. Other forms of malpractice, say the disrespect for the artist's input in the exhibition, are not the concern here – it is specifically the economic wrongdoing.

The deep moral character of paying artist's fees in Canada plays out in another interesting way – many organizations end up feeling guilty about their inability to pay fees. What is somewhat ironic about this situation is, as I have discussed above, that the system of artist's fees is billed as the solution to all forms of artistic precarity, yet when this system confronts shrinking budgets in small organizations, it cannot help, all it can do is impose a feeling of guilt on the organizers. This is perhaps best exemplified in a report that ARCA produced on the adherence to fees in their membership. Most of this report was concerned with the amount of money that artist-run centers spend on artist's fees in comparison to their annual operating budget, but it is the qualitative comments that organizations were able to add to their reporting that proves the moral or ethical quality of arts' productivity. I will also note that this study was done before the hearing, but as I have been conveying in this chapter what happened at the hearing is a sedimentation of a pre-existing logic. What the following quote shows is that there has been a moral quality in artist's fees for decades, and the hearing only amplified this. An anonymous organization in the report stated,

> Not having the 2007 artist fees published prior to 2007 presented us with the dilemma, do we follow CARFAC guidelines (which in principle we agree with), or do we adhere to our budget and deficit reduction plan and shaft the artists? While some artists don't know about CARFAC and one could take advantage of their innocence (again another ethical dilemma), the two artists we programmed are very familiar with the CARFAC system and I felt I had no choice but to adhere to CARFAC rates in this instance to retain some integrity in the community. (Artist-Run Centers and Collectives Conference 2007:12)

To me, this quote is striking. Not only does the organizer explicitly portray paying artist's fees as an ethical decision, but they also state that in order to maintain "integrity" in their artistic field they felt they had to pay the fees. The adherence to the productivist logic is evidently seen as a key component to the moral character of an organization if they felt they would lose their integrity if it was not fully met. Consider another example from the same report – again from an anonymous organization. They state,

> Amount per solo show - for the 2007-08 year, five exhibitions are at $1450 as that is what the rate was when the 2007-08 budget was drawn up and contracts were signed. Two exhibitions in 2007-08 are at $1550 as we had to program two new exhibitions due to a cancellation and postponement. In good conscience I felt I had to give the artists $1550 as that rate was posted at the time of the contract even though I hadn't budgeted for it. We are a small organization wrestling with reducing a deficit. (Artist-Run Centers and Collectives Conference 2007:12)

Here there is a similar feeling – the only way they could have a "good conscience" about their actions was to pay the recommended artist's fees, even if this meant straying from the budget they had planned in an attempt to reduce their deficit, which would be an important accomplishment in the longevity of the organization. Again, this quote shows that the particular kind of organizational practice that CARFAC-RAAV established with the National Gallery exists everywhere in the artistic field of Canada but not as a contractual obligation, but as a highly normalized ethical and moral duty.

The organizations above, who feel a moral commitment to this form of artistic practice while also finding it difficult to maintain that practice, are not alone. William Acri reports that the

Estevan Art Gallery is also struggling with artist's fees in the wake of budget cuts. He states, "CARFAC's [artist's fees] have been increasing three to five per cent every year, consequently having art on loan is increasingly becoming more expensive" (Acri 2017).

These last few examples certainly show that the productivist logic of the artist's fee is built into the moral fabric of Canada's art scene. But they also show the seeming inflexibility of the artistic field to organize the production of art in any way but what has become normalized in this field. In discussing their success in the 2014 hearing, CARFAC President Grant McConnell states "through hearing our appeal, Canada has proclaimed the value of artists' concerns. Just as our creative works embrace transformation and advance understanding, our professional relationships must also adapt" (Mazurk 2014:5). I disagree with McConnell – I don't feel that this hearing is an example of adaptability. I argue that the hearing has only made artistic organizations less adaptable, and less open to transformation in the way it has heightened the state of normalism in the field. In opposition to McConnell's statement I have shown in this chapter and throughout this thesis that because of law's tendency to bring about states of normalism - which is demonstrated clearly in the *SAA* legislation – that this hearing is an occasion of preserving productivist relationships and practices rather than a moment of transformation.

Conclusion: Against and Beyond

A key premise in Waldenfelsian phenomenology is that orders structure possibilities, expectations, and understandings, yet no order is all-inclusive, something always evades order, which when returning to demand something of the order it withdrew from produces the possibility of new orders. The entity that has the function of creating new orders is the Other, or alien – that which stings the present structures of the self, of institutions, and of States from places unknown and unexpected (Waldenfels 2011:18). However, I have argued here that orders, while not being the author of transformation per se, often have a tendency for relating to Otherness in particular ways. What has been essential to this claim is articulating the tendencies in which the modern Canadian legal and artistic realms approach Otherness. As I have shown in chapter three, because the institution of Western art contains a playful reflexivity and general openness to change, the objects of its field hold the quality of being somnambulistic – they are sleepwalking entity straddling the orders of the self and the Other, like straddling the states of being awake and asleep in a dream world. In this way, they produce spaces of reflection and anomalistic experience. Through conjuring an artistic experience and an aesthete's gaze through the enactment of the performative frame of art, art can invite the alien, and it does invite the alien at its highest functioning, in a state of non-normalism.

This idea of normalism, which is central to my thoughts on this case, has come about through my explication of law's tendency for treating the Other in a repressive way. law urges the continuity of experience void of any alien sting. As shown in chapter two, this repressiveness is related to the way law structures the force of the performative asymmetrically, which forms an inequity in whose performances hold efficacy in their ability to transform the social world. When they law's transcendency is enacted in the juridical field, their word becomes thought of as final,

and thus their judgements are upheld in perpetuity. The permanence and continuity of law is essential for the law to maintain its appearance as objective and neutral, and it is this web of performative traits that leads law to operate with normalistic tendencies. The artistic field, on the other hand, can render a more equal distribution of performative efficacy based on its permeability and anomalistic tendency. This is an important distinction and plays into the autonomy of the artistic field when these two orders – art and law – meet. To state this argument differently, not all performances have the same efficacy to bring about the social world, they do not all have the same power or force. The ideal of artistic autonomy that I have developed here is predicated on having a high degree of equality in the way various cultural actor's performances contribute to the artistic world. I clarified this theorization by asking the question, how do we know when this equality or its absence has occurred? One way we can investigate this question, which I have done in chapter four on the *SAA,* is by considering the constraints on performance – if there are highly controlled notions of what an artist is - in the case of Canada's present field it is a highly influential productivism - then there is a great inequality as to whose voices count. Those who conform or felicitously render those conventions have easier access to the *officium* of the artist position, and thus have more power to make the social world. Those who do not easily meet these conditions have trouble enacting transformative performances. To diminish the opportunity to transform the artistic world through being a part of its operation is to dimmish the possibilities found in the event of experiencing art – it is to diminish the sting that is a part of artistic experiences.

To write on the diminishing possibility of transformation is perhaps something of a betrayal of a responsive phenomenology, and a betrayal of the study of performativity – two disciplines whose most profound contributions relate to their description of the ultimate openness of experience. What has been promoted as the radical potential of performativity is its explication of

the way that performances transform - there is always the potential for something new, a *re*iteration. In a responsive phenomenology, there is the development of the idea of radical otherness or the alien, and it is through this concept precisely that we have a notion of the unexpected demands placed on orders that moves them to react and thus morph. Affectively, these are hopeful philosophies. Perhaps, I have betrayed this affective quality in my emphasis on sedimentation and reification. Yet, I do believe that I have given something to these philosophies, moving them forward, even if it emerges from a structuralist pessimism characteristic of the discipline of sociology, and even more characteristic of the sociology of Pierre Bourdieu, the tradition that I come from in writing this thesis. I believe by working against the leanings of the performance and phenomenology I have more fully developed a concept of reification and calcification of order within these disciplines. This is a simple and well-worn development in many other fields of social science, but here, in performance and responsivity it has been underexplored, and thus brings the discussion beyond where it once was. Through the application of various concepts and theories of structure, I have developed an idea that even though there is an ultimate openness to performance, various orders and states of affairs do not bolster this openness - they close the door to transformation to the point where only a crack in the sash of a window to the realm of the Other remains.

However, to bring an emphasis on sedimentation to philosophies of change is also to bring philosophies of change to the sociological focus on sedimentation and structure. This is what I believe I have contributed to Bourdieusian discourse in this thesis, particularly in the theory chapters (chapters two and three). Going forward, if Bourdieusian scholars could utilize some of the understandings of embodied transformation that are so well developed in performance and phenomenology, they would be better equipped to theorize about change. Bourdieusian

Scholarship tends to remain closed off to new forms of articulating social events because of the massive toolbox of concepts that already exists within its tradition. I believe this is a downside of the tradition, and here I hope I have ruptured this singular discourse and brought it into communication with a much richer and more interdisciplinary set of academic ideas.

Just as this thesis may seem like a betrayal of academic hopefulness, it may also seem like a betrayal of the achievements that arts advocates like CARFAC-RAAV have realised - achievements that many in the artistic field feel are good steps toward a less precarious working environment for the arts. Yet, what I hope I have expressed in this work is that the artistic field could benefit greatly from betraying its own normalistic operations – by going against and beyond the prevailing productivism found in the field. It has not been my goal in this thesis to demarcate or advocate for one or some of the possible arrangements of the artistic field that move beyond the present productivism, but I will mention two as I now conclude this project. To conclude in this way is one final method of drumming up a reflexivity in the arts, because by beginning to discuss novel arrangements of the artistic field, we begin to imagine new ways artists could work that may circumvent the labour-centered production currently dominating the field. Two arrangements of the artistic field that might push it beyond its present productivism are: art as a space of gift relations, and art as a space of universal basic income (UBI). The first possibility – which for me is sparked by the anthropological work on gift giving by Marcel Mauss (1990[1925]), and more specifically by the work by Ailsa Craig (2007) – sees art as a place that could be sustained not by ordinary capitalist economic exchange, but by relations of gift giving. A gift economy is a web of exchange that is "not mediated through price, immediate reciprocation, or other key aspects of market economies" (Craig 2007:259). The forms of giving that could support a community are diverse – they could include the exchange of material goods like food and housing, affective goods

like sociability, and what Craig calls "effective resources" or "resources of opportunity" which include things like professional opportunities, chances to be published, and more. As Craig highlights in her work (2007), artistic communities are already engaged in various forms of gift-giving, but at present time these forms of giving are complexly interwoven with typical capitalist economic relations. Gift-giving is often only a supplementary form of sustenance, but I can imagine a field that more robustly embraces gift giving to the point where there is a vast rejection of ordinary economic exchange. This would of course disrupt the current labour-centered vision of artistic work we find in Canada.

Another way of arranging the artistic field that could possibly move it beyond today's productivism is to ground it in a universal basic income for artists. This is a call I have seen recently in response to the COVID-19 global pandemic. For instance, the Media Arts Network in Ontario has recently hosted a two-day panel that brought together artists from around the country to testify to sector experts in the hopes of creating a report that can be used to lobby UBI to the government in the lead up to the next federal election (Pacheco 2021). The calls for UBI are quite important to my work because if they are acted upon by the State, there would be a radical transformation in the way that art is organized in Canada. The relationships between State, economy, law, and culture that I have investigated here would be upended in a way we have not seen since the Massey Commission. Although UBI operates like a minimum wage, somewhat akin to what CARFAC-RAAV instituted at the National Gallery, there are important differences that give it the possibility to move the artistic field beyond its present productivism. The most important of which is UBI's ability to produce some distance between people and the capitalist work economy to which they are currently bound (Weeks 2011). By not having to work wage labour, if they chose, people would have more time to consider the hold capitalist productivity has on our everyday lives and would

subsequently have more opportunities to enact systems of living that move away from traditional work. In this case, UBI would not be consolidating a specific kind of artistic organization – as the artist's fees system does - but would be giving an economic grounding from which to explore alternatives.

Whether it is by reflecting on these two above examples, or by considering the conclusions I have drawn throughout this thesis on the rigidity of present artistic vision, I believe my work has provided the grounds for the betrayal of today's artistic productivism, and has given Canadian arts practitioners the opportunity to think about new paths into the future of art in our country. As I mentioned in the very opening paragraphs of this thesis, to bracket the taken for granted routines and perspectives of everyday artistic life is to push back against a state of normalism as instituted through the legal processing of art. The artistic world "is replete with identifiable lineages, styles, themes, and means of production" (Schechner 2010:898), but there is an important anomalistic tendency in the midst of these things, and so to continually make space to rethink current organizational principles, which might make room for new ones, is a worthy task.

References

Acri, William. 2017. "Estevan Art Gallery and Museum hit with budget cuts." *Estevan Mercury,* Retrieved from https://www.estevanmercury.ca/news/arts-entertainment/estevan-art-gallery-and-museum-hit-with-budget-cuts-1.23130581

Artist-Run Centers and Collectives Conference. 2007. "Artist's Fees in Artist-Run Centres." Retrieved from https://www.arca.art/en/resources/study-artists-fees/

Artist-Run Centres and Collectives Conference. 2013. "CARFAC Fee Schedule for 2013 -15" Retrieved from https://www.arca.art/en/arca/

Arts Nova Scotia. N.d. "Operating Assistance to Arts Organizations." Retrieved from https://artsns.ca/programs/operating-assistance-arts-organizations

Austin, J. L. 1962. *How to Do Things with Words.* Oxford: Clarendon Press.

Austin J. L. 1979. *Philosophical Papers,* Third Edition. Oxford: Oxford University Press.

Banks, Mark. 2010. "Autonomy Guaranteed? Cultural Work and the "Art-Commerce" Relation." *Journal for Cultural Research,* 14(3): 251-269.

Banks, Mark and David Hesmondhalgh. 2009. "Looking for work in creative industries policy." *International Journal of Cultural Policy,* 15(4):415–30.

Barthes, Roland. 1967. *The Death of the Author.* Sourced at UbuWeb Papers, Retrieved July 7th, 2020.

Bateson, Gregory. 1972. *Steps to an Ecology of Mind.* San Francisco: Chandler Publishing Company.

Becker, Howard S. 1982. *Artworlds.* Berkeley: University of California Press.

Becker, Howard S, Robert R. Faulkner, and Barbara Kirshenblatt-Gimblett. 2006. *Art from Start to Finish: Jazz, Painting, Writing, and Other Improvisations.* Chicago: Chicago University Press.

Benjamin, Walter. 1970. "The Author as Producer." *New Left Review*, 62:83-96.

Benjamin, Walter. 1996[1921]. "Critique of Violence." In *Selected Writings, Volume 1: 1913 -1926.* Edited by Michael J. Jennings. Cambridge: Harvard University Press.

Blessi, Giorgio Tavano, Pier Luigi Sacco, and Thomas Pilati. 2011. "Independent artist-run centres: an empirical analysis of the Montreal non-profit visual arts field." *Cultural Trends*, 20(2):141-166.

Bloch, Maurice. 1974. “Symbols, Song, Dance and Features of Articulation Is religion an extreme form of traditional authority?” *European Journal of Sociology,* 15(1):55-81.

Bourdieu, Pierre. 1979. “Symbolic Power.” *Critique of Anthropology,* 4(13-14): 77-87.

Bourdieu, Pierre. 1987. “The Force of Law: Toward a Sociology of the Juridical Field.” *Hastings Law Journal,* 38(5): 814-853.

Bourdieu, Pierre. 1991. *Language and Symbolic Power.* Cambridge: Polity

Bourdieu, Pierre. 1993a. *The Field of Cultural Production: Essays on Art and Literature*. New York: Columbia University Press.

Bourdieu, Pierre. 1993b. *Sociology in question*. London: Sage.

Bourdieu, Pierre. 2014. *On the State: Lectures at the Collège de France, 1989-1992.* Malden, Cambridge: Polity Press

Brady, Sean. 2018. “Arnica will turn to mentor program after gallery closes its doors.” *Kamloops This Week,* Retrieved from https://www.kamloopsthisweek.com/entertainment/arnica-will-turn-to-mentor-program-after-gallery-closes-its-doors-1.23500489

British Columbia Arts Council. 2019. “Program Guidelines 2019/20, Operating Assistance: Community Arts Organizations.” Retrieved from https://www.bcartscouncil.ca/app/uploads/sites/508/2019/09/PROGRAM-GUIDELINES_-Operating-Assistance-Community-Arts-Organizations_FINAL.pdf

Butler, Don. 2014. “Artists begin Supreme Court fight against Gallery for minimum fees.” *Ottawa Citizen,* Retrieved from https://www.pressreader.com/canada/ottawa-citizen/20140513/281505044243099

Butler, Judith. 1990. *Gender Trouble.* Abingdon: Routledge.

Butler, Judith. 1997. *Excitable Speech: A Politics of the Performative.* New York: Routledge.

Canadian Art. 2020. “Canadian Artist Fee Standards Include 2% Annual Increases to 2023.” *Canadian Art,* Retrieved from https://canadianart.ca/news/canadian-artist-fee-standards-include-2-annual-increases-to-2023/

Canadian Art Museum Directors Organization. 2008. “AGM Minutes” Retrieved from http://www.camdo-odmac.ca/depot/2/AGM_jun2008.pdf.

Canadian Art Museum Directors Organization. 2015. “Organizational Plan.” Retrieved from http://www.camdoodmac.ca/depot/2/CAMDOOrgPlanSummary_05_09.pdf

Canadian Heritage. 2017. *Creative Canada: Policy Framework*. Ottawa: Government of

Canada Publications.

Canadian Lawyer. 2014. “Artist associations have broad negotiating powers, SCC rules.” *Canadian Lawyer,* Retrieved from https://www.canadianlawyermag.com/news/general/artist-associations-have-broad-negotiating-powers-scc-rules/272640

Canadian Museum Association. 2007. “Fee Schedule Agreement.” Retrieved from https://www.museums.ca/uploaded/web/docs/Fee_Schedule_Agreement_11_20_07.pdf

CARFAC. 2015. “Artists overwhelmingly approve Canada's first labour agreement with the National Gallery.” *CARFAC,* Retrieved from https://www.carfac.ca/news/2015/02/25/voteresults/

CARFAC-RAAV. 2018. “Agreements.” Retrieved January 28, 2021 from https://www.carfac.ca/agreements/

CARFAC-RAAV. 2021. “CARFAC-RAAV Minimum Recommended Fee Schedule.” Retrieved from https://carfac-raav.ca

CARFAC-RAAV and National Gallery of Canada. 2018. *Scale Agreement.* Retrieved from https://www.carfac.ca/carfacwp2019/wp-content/uploads/1.-Scale-Agreement-2018-rev-2020.pdf

Cliche, Danielle. 1996. “Status of the artist or of arts organizations: a brief discussion on the Canadian Status of the Artist Act.” *Canadian Journal of Communication,* 21(2):197-210.

Craig, Ailsa. 2007. “Sustainability, Reciprocity, and the Shared Good(s) of Poetry.” *The Journal of Arts Management, Law, and Society*, 37:3, 257-270.

Crowther, Paul. 1994. “Sociological Imperialism and the Field of Cultural Production: The Case of Bourdieu.” *Theory, Culture & Society*, 11: 155-169.

Curley, Evan. 2018. *In Field and Impasse: Artistic Practice and the State in Rural Nova Scotia.* Unpublished Manuscript, Undergraduate Thesis, Saint Francis Xavier University

de Peuter, Greig and Nicole Cohen. 2015. “The Art of Collective Bargaining: An Interview with Carole Condé and Karl Beveridge.” *Canadian Journal of Communication,* 40(2):333-346.

Derrida, Jacques. 1988. *Limited Inc*. Evanston: Northwestern University Press.

Derrida, Jacques. 1992. “Force of Law: The ‘Mystical Foundation of Authority’.” In *Deconstruction and the Possibility of Justice.* Edited by Drucilla Cornell, Michel Rosenfeld, and David Gray Carlson. Abingdon: Routledge.

Donegan, Rosemary. 1983. “The Applebert Collapse: Visual Art. *Fuse,* 6(6):340-342.

Ferguson, James, and Akhil Gupta. 2002, "Toward an Ethnography of Neoliberal Governmentality." *American Ethnologist*, 29: 981-1002.

Fischer-Lichte, Erika. 2008. *The Transformative Power of Performance: A New Aesthetics.* London: Routledge.

Fortin, Gord. 2019. "Artist dissatisfied with art center's apology." *Whitehorse Star,* Retrieved from https://www.whitehorsestar.com/News/artist-dissatisfied-with-arts-centre-s-apology

Goffman, Erving. 1959. *The Presentation of Self in Everyday Life.* New York: Anchor Books.

Guzmán, Luis. 2014. "Benjamin's Divine Violence: Unjustifiable Justice." *The New Centennial Review,* 14(2):49-64.

Hartigan, Ryan. 2018. "Chapter 2: 'This Is a Trial, Not a Performance!': Staging the Time of Law." In *Law and Performance*. Edited by Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey. Amherst: University of Massachusetts Press.

Jakobson, Roman. 1960. "Closing Statement: Linguistics and Poetics." In *Style in Language.* Ed. Thomas A. Sebeok. New York: The Technology Press of Massachusetts Institute of Technology and John Wiley & Sons, Inc.

James, David. 2015. "How Bourdieu bites back: recognising misrecognition in education and educational research." *Cambridge Journal of Education*, 45(1): 97-112.

Kant, Immanuel. 1996[1781]. *Critique of Pure Reason.* Indianapolis: Hackett Publishing.

Lakoff, George and Mark Johnson. 1980. *Metaphors We Live By.* Chicago: The University of Chicago Press.

Leckie, Barbara. 1995. "The force of law and literature: critiques of ideology in Jacques Derrida and Pierre Bourdieu." *Mosaic*, (28)3.

Léger, Marc James. 2010. "The Non-Productive Role of the Artist: The Creative Industries in Canada." *Third Text*24, (5):557–70.

Loxley, James. 2007. *Performativity.* Abingdon: Routledge.

Mauss, Marcel. 1990[1925]. *The Gift: The Form and Reason for Exchange in Archaic Societies.* Abingdon: Routledge.

Mazurk, Tara. 2014 "CARFAC's Supreme Day in Court." *Dispatch,* June:4-5. Retrieved from https://www.scribd.com/document/232911881/CARFAC-s-Supreme-Day-in-Court

McLachlin, Beverley, and Louis LeBel, Rosalie Abella, Marshall Rothstein, Thomas Albert

Cromwell, Michael J. Moldaver, and Richard Wagner. 2014. “Reasons for Judgement.” In *Supreme Court Reports,* 2014(2):197-211.

McRobbie, Angela. 2016. *Be Creative: Making a Living in the New Culture Industries.* Polity Press: Cambridge.

Mitchell, Timothy. 2006. “Society, Economy, and the State Effect.” in *The Anthropology of the State: A Reader*. Edited by A. Sharma and A. Gupta. New York: Blackwell.

Montaigne, Michel de. 1993 [1580]. *Essays.* London: Penguin.

Murray, Catherine and Mirjam Gollmitzer. 2012. “Escaping the precarity trap: a call for creative labour policy.” *International Journal of Cultural Policy,* 18(4):419–38.

Muster, Judith. 2016. “Nuit Blanche: is it worth it?” *Now Toronto,* Retrieved from https://nowtoronto.com/is-it-worth-it-nuit-blanche

Nemiroff, Diana. 1985. *A History of Artist-Run Spaces in Canada, With Particular Reference to Vehicule, A Space and the Western Front.* Unpublished Dissertation, Concordia University.

Pacheco, Paloma. 2021. “Canadian Artists Testify on the Dire Need for Basic Income.” *The Tyee.* Retrieved from https://thetyee.ca/Culture/2021/02/02/Canadian-Artists-Testify-Dire-Need-Basic-Income/

Pryke, Kenneth G. and Walter C. Soderlund, eds. 2007. *Profiles of Canada*. 3rd ed. Toronto: Canadian Scholars Press.

Robertson, Clive. 2006. *Policy Matters: Administrations of Art and Culture.* Toronto: YYZ Books.

Ross, Shane. 2016. “The art of making money as an artist on P.E.I.” *CBC,* Retrieved from https://www.cbc.ca/news/canada/prince-edward-island/pei-art-income-1.3839176

Sandals, Leah. 2013. “5 Things You May Not Know About the National Gallery Artist Fee Fight.” *Canadian Art,* Retrieved from https://canadianart.ca/news/carfac-national-gallery-supreme-court-over-artist-fees/

Sandals, Leah. 2014. “Artists Win Appeal Against National Gallery of Canada.” *Canadian Art*, Retrieved from https://canadianart.ca/news/artists-org-wins-appeal-against-national-gallery-of-canada/

Sandals, Leah. 2016 “Finally: An Artist-Fee Calculator For Canada.” *Canadian Art,* Retrieved from https://canadianart.ca/news/finally-artist-fee-calculator-canada/

Schechner, Richard. 2010. “The Conservative Avant-Garde.” *New Literary History,* 41(4):895-913.

Shorthose, Jim and Gerard Strange. 2004. “The new cultural economy, the artist and the social configuration of autonomy.” *Capital & Class,* 28(3):43–59.

Sibley, Robert. 2014. “Supreme Court Gives Artists Victory Against National Gallery’s Bad Faith.” *Ottawa Citizen.* Retrieved from https://ottawacitizen.com/news/politics/supreme-court-gives-artists-victory-against-national-gallerys-bad-faith

Status of the Artist Act. 1992. Supreme Court of Canada, c. 33.

Straus, Erwin W. 1966. “Chapter 7. The Upright Posture.” In *Phenomenological Psychology.* New York: Basic Books.

Supreme Court 2014. Canadian Artists' Representation/Front des artistes canadiens, et al. v. National Gallery of Canada, case 35353. Webcast of the Hearing Retrieved from https://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=35353&id=2014/2014-05-14--35353&date=2014-05-14&fp=n&audio=n

Varkøy, Øivind. 2015. “Chapter 10. Pierre Bourdieu and the Autonomy of Art: The Idea of Art as Critique.” In *Bourdieu and the Sociology of Music Education,* edited by Pamela Burnard and Ylva Hofvander Trulsson. Farnham: Routledge.

Waldenfels, Bernhard. 2006. “Inside and Outside the Order: Legal Orders in the Perspective of a Phenomenology of the Alien.” *Ethical Perspectives: Journal of the European Ethics Network*, 12(3): 359-381.

Waldenfels, Bernhard. 2007. *The Question of the Other: The Tang Chung-I Lecture for 2004.* Hong Kong: The Chinese University Press.

Waldenfels, Bernhard. 2011. *Phenomenology of the Alien.* Evanston: Northwestern University Press.

Waldenfels, Bernhard. 2015. “Equating of the Unequal.” *Social Imaginaries*, 1(2):92-102.

Waldenfels, Bernhard. 2020. “Chapter 7. Theatre as a Scene of Otherness.” In *Phenomenology and the Arts: Logos and Aisthesis,* Edited by Kwok-Ying Lau and Thomas Nenon. Cham: Springer.

Weeks, Kathi. 2011. *The Problem with Work: Feminism, Marxism, Antiwork Politics, and Postwork Imaginaries.* Durham: Duke University Press.

Williams, Raymond. 2017[1958]. *Culture and Society: 1780-1950.* London: Vintage.