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COURTS, CRISIS, AND CONTESTATION

Democratic Judicial Decision-Making in Times of Crisis

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Courts, Crisis, and Contestation

Democratic Judicial Decision-Making in Times of Crisis

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A Word

A word is dead
when it is said,
some say.
I say it just
begins to live
that day.

Emily Dickinson

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CHAPTER I

INTRODUCTION

Times of 'crisis' reveal something about the law that is always there, but is often concealed. The law is a system of inter-subjective meanings, a system that does not always determine one clear answer to a legal question. Instead, this system of inter-subjective meanings, the law, is a site of *hegemonic struggle* and *agonistic contestation*. Crisis reveals the always-already present political nature of the law.

In the first fifteen years of the twenty-first century, the Western legal and political discourse has largely been characterized by two different 'crises'. First, in 2001, the crisis of international terrorism entered onto the scene with the War on Terror and the posited existential threat posed by international terrorist groups such as Al Qaeda. Second is the global financial crisis that started in 2007 and whose effects are still being felt. These two crises will surely not be the only ones to characterize the years to come, nor will they likely even be the greatest. A refugee crisis, fed by global conflict and instability has fanned the flames of political crisis in Western Europe. The catastrophic, global environmental turmoil of global warming will likely – perhaps later rather than sooner – be viewed as a crisis as fundamentally threatening as international terrorism was perceived to be. And this is not to mention the threat of nuclear war that has reappeared on the horizon of public perception of risk. 'Crisis', it is clear, is here to stay.

Importantly, what characterizes all these crises – as crises – is to me *not* an objective threat level. This book does not define crisis as a verifiable threat to property, life, or the very existence of a nation state, a people, or the entire planet. While not necessarily disputing the utility of measuring threat levels in some instances, this work disputes the utility of such an approach for understanding how crisis affects the law, and most interestingly, for understanding how crisis reveals the political in the legal. Thus, instead of referring to any objective measure of crisis, I approach crisis as a discourse and, for the remainder of this book, I will speak of crisis discourse instead of simply 'crisis'. By emphasizing the discursive nature of crisis I view 'speaking crisis' as a set of linguistic practices that construct the collective social meaning of reality and that are, in turn, constructed by social meaning. Crisis discourse is a way of constructing this social reality that has three crucial components. Firstly, it discursively posits a threat. Secondly, it constructs this threat to be caused by a fundamental, structural flaw in the current systems, structures and/or procedures of the status

quo. And, finally, it proposes one way – and one way only – to deal with this threat: fundamental change to these current systems, structures and/or procedures. These components make crisis discourse an inherently *progressive* discourse, given that progressive is used here to mean a discourse that strives for radical change to the status quo. In politics and law, crisis discourse functions to call for this change and attempts to convince others of this change's justification by appealing to the large threat it will eliminate, and it constructs – and gets others to construct – this change as the *only possible* way to deal with this threat. In this way, crisis discourse is a tool, a tool that can be used by those hoping to bring about change in law or politics.

This book is about crisis discourse, but it is also about what crisis discourse reveals about the law, and specifically, about judicial decision-making. By studying judicial decision-making in times of crisis discourse, I gain insight into a moment when judicial discretion is at its highest. When crisis discourse enters into political and legal speech, it widens the space for change and gives participants in political and legal discourses more possibilities than in 'normal times' to shape the content of the new discourse that takes hold after the crisis passes. Yet, importantly, while this space for change is most apparent during times of crisis (discourse), I contend that it is not exclusive to these times. In lesser or greater amounts, this space is available in non-crisis times as well, as a very function of the language we use. Thus, the ability of judges to involve themselves in this shaping of legal discourse – and the *responsibility* to do so – is present in times of crisis, certainly, but is much broader than only that. Crisis simply reveals what was already there: the inescapable imperative for a judge to in fact *judge*. This book then asks the question how crisis discourse can impact upon judicial decision-making: what role does crisis discourse play in constructing legal meaning, making legal change possible and what room is there to escape the meaning imposed by crisis discourse? The chapters that follow also address a second question: how *should* judges judge when confronted with discourses of crisis and what does this mean more broadly for the role of the judge? This normative question arises from the fact that attending to the role of judicial discretion in times of crisis calls into question the relation between the judiciary and the other branches of government more traditionally seen as democratically legitimized. If crisis discourse widens the space for judicial discretion, I ask what this crisis discourse means for democracy and the role of the judge within that democracy. What authority or legitimacy does a judge have to use the discretion she has and what does this say about how she should use that discretion?[1] These questions are questions relating to the *political* role the judge plays in her decision-making, the role she plays in deciding on social meaning and particularly on the

[1] In this dissertation I use feminine pronouns to speak of the judge and the subject and masculine pronouns to speak of the 'other'. In the spirit of the discursive theory this book is based on, I choose this particular use of gender to push in some small way our understanding toward a greater acceptance of women as holders of institutional power and personal subjecthood. In using the masculine pronoun used to denote the 'other' it is my hope that my male reader will feel some level of heightened solidarity with the outsider, a position the average (heterosexual, white) male is often unfamiliar with. Inevitably, I exclude by making these choices and for this I take full responsibility.

meaning of the people. I aim to find the answer to these questions in a normatively democratic perspective on the role of the judge.

In answering the descriptive and normative questions this dissertation poses, I start from a post-foundational ontology that emphasizes the impossibility to find an ultimate ground for our interpretation of social meaning. While acknowledging the importance of meanings given by the different traditions we find ourselves in, and while acknowledging these meanings can hold a fundamental place in human interaction, post-foundationalism stresses that these foundational meanings are also always contestable and contingent. As I develop this perspective in the following chapters, and with my focus on judicial decision-making, I use the political theory of agonism to put forward a normative claim. Agonism starts from the post-foundational assumption described above but adds the normative assertion that this contestability and contingency of meaning must be preserved and promoted. In what follows, it is my hope to contribute to understanding about how to operationalize and institutionalize agonism in current structures and practices of law and governance. Thus far, only a limited amount of scholarship has focused on the institutionalization of agonism[2] - and even less on what agonism could mean for legal practice and legal decision-making.[3] It is a secondary aim to show both legal professionals and citizens that they do not have to wait for some all-encompassing structural change to use the discursive tools they have to practice law and agitate for the practice of law in ways that acknowledge the always-present element of the political in legal decisions. I argue further that this is not just a possibility but a responsibility; a responsibility arising from the agonistic conception of democracy.

While I recognize the value of the rule of law and of the authors who take this approach to studying crisis and judicial decision-making,[4] I thus position my work differently so as to focus on how the judge's decisions can be legitimated from a democratic perspective. Whereas attention to the rule of law would emphasize, rightfully, the fundamental rights

[2] Ed Wingenbach, *Institutionalizing Agonistic Democracy: Post-Foundationalism and Political Liberalism* (New York: Routledge, 2016), xi.

[3] For notable exceptions, see Hans Lindahl's broad work on agonism and (a)legality, for example in 'The Opening: Alegality and Political Agonism,' in *Law and Agonistic Politics,* ed. Andrew Schaap (Exeter: Ashgate, 2009), 57-70 and Irena Rosenthal's 'Democracy and Ontology: An Agonic Encounter between Political Liberalism, Foucault and Psychoanalysis' (PhD diss., Vrije Universiteit Amsterdam, 2012). These works make important connections between agonism and the law but do not delve as deeply into agonism's application to judicial decision-making as is my ambition here.

[4] There are many notable and valuable contributions to the literature on the tension between times of crisis and the commitment to the rule of law and the attempts to protect the rule of law while also recognizing the exigencies of the emergency situation, see for example David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006) and Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2005). A particularly fruitful approach in this regard has been Marc de Wilde's historical approach to the concept of the state of exception and his emphasis on the role *fides publica* ('public trust') has played in both constraining executive power when such trust is absent and legitimizing executive power when such trust is present (see 'Just Trust Us: A Short History of Emergency Powers and Constitutional Change,' *Comparative Legal History* 3 (1) (2015): 113-114). The appeal of this approach to public trust lies in the recognition of the role the people have in constraining or expanding interpretations of law.

potentially violated by crisis discourse and the way crisis discourse can shut down democratic debate, it can have the unfortunate side-effect of masking how crisis can have pro-democratic outcomes, by giving rise to possibilities for resistance and creating the possibility for inclusion of groups previously excluded from the status quo. Moreover, a focus on the judiciary's role within the rule of law in times of crisis can artificially cover the role law plays as part of the political contest[5] and could hide the fact that the rule of law is *dependent* on the rule of man.[6] Failing to attend to these aspects of crisis does not make them go away, but does limit the ability of legal scholars, legal practitioners and citizens in general to accurately perceive and more consciously participate in the already-present struggle over legal meaning. By attending to the role of the judge in a democracy, I thus hope to highlight the democratic possibilities crisis offers, as well as the responsibility of those engaged in legal interpretation for the interpretations they give.

This interest into the descriptive and normative aspects of crisis discourse in judicial decision-making shapes the inquiry in this book and can be brought together in the overarching question: *what force can crisis discourse have on judicial decision-making and how should judges, particularly in times of crisis, take account of this impact on their decision, given the role of the judge in a democracy?*

Crisis Discourse and Discourse Analysis

This publication is a collection of essays and articles, some of which have been published elsewhere or have been accepted for publication.[7] Because of this, the methodology and theoretical assumptions take a slightly different form in each piece. Chapter two sets out the theoretical underpinnings of my approach to decision-making, focusing on to what extent judges' decisions are bound by law and asking how one can ground a decision if we assume that meaning is ultimately a human-made construction with no final, ultimate ground on which it is based. This question demands a normative answer, one that I give in the form of agonistic democracy. Chapter three asks how crisis discourse can affect judicial decision-making (in at least some cases) by exploring in detail the workings of crisis discourse in the particular instance of the politics and law of counter-terrorism after the terrorist attack on 11 September 2001. After this exploration into the effects of crisis discourse on legal decision-making, I attend in chapter four to the agonistic aspects of crisis discourse as a way to push for deep, structural change. Here, I am forced to ask what *limits* there must be to the use of

[5] Bonnie Honig, *Political Theory and the Displacement of Politics* (Ithaca: Cornell University Press, 1993), 15.
[6] Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton: Princeton University Press, 2009), 66.
[7] Chapter three has been accepted for publication by the *Netherlands Journal of Legal Philosophy,* chapter four has been published as 'Speaking Crisis in the Eurozone Debt Crisis: Exploring the Potential and Limits of Transformational Agonistic Conflict,' *International Journal of Political Theory* 2 (1) (2017) and an earlier version of chapter five has been published as 'Crisis Discourse: A Catalyst for Legal Change?,' *Queen Mary Law Journal* 5 (1) (2014): 1-13.

this discourse in its framing of the threat and change it proposes. This chapter explores where, according to the own principles of agonism, one should draw the line between acceptable and unacceptable conflict. Chapter five revisits one of the cases dealt with in chapter three, *Hamdi v. Rumsfeld*, to highlight a different aspect of the case. Instead of showing how crisis discourse can call for deep change, this chapter asks what space is available to resist this discourse. In effect, this chapter searches for the space for agency in judicial decision-making and asks how the judge should use this space. Chapter six also asks the normative question of how a judge should judge, but focuses instead on the judge's inevitable role in the political conflict over the construction of the people. This chapter deals with the question how a judge can account for her inescapable interference with political conflict by deciding in the undecidable terrain of the political.

To address these matters, each chapter looks at a specific instance of crisis, in different settings. The third and fifth chapter both attend to the presence of crisis discourse in judicial rulings on post-9/11 terrorism cases. The former focuses on decisions from national courts from three different countries, while the latter looks at the rulings from multiple judicial instances at different levels in the judicial hierarchy in one particular case. The fourth chapter focuses on the use of crisis discourse by political parties in the Netherlands. Finally, the sixth chapter deals with the way national courts in the European Union (and more specifically the Eurozone) deal with crisis discourse and contestation in relation to two crisis measures that were taken to deal with the Eurozone crisis. I intentionally choose to focus this study on two specific instances of crisis discourse: crisis discourse used in relation to national security threats (terrorism) and economic stability threats (economic crisis). The reason for this approach is that, by looking at two different types of crisis, I forced myself to think outside the ideological box that many succumb to when thinking about crisis. The reader will notice my own critical approach to the use of crisis discourse in the context of counter-terrorism. By including economic crisis, I challenge myself to discover the principled foundations of my rejection and ask myself whether crisis discourse is *always* incompatible with democracy. Is it the construction of crisis itself that is to be rejected, is it the *way* in which the crisis is constructed, or is it simply a matter of political preferences; do the ends justify the means? By including economic stability threats in my analysis, a context in which I feel far less uncomfortable with the use of crisis discourse, I force myself to make explicit *why* crisis discourse as it was used in the War on Terror is more problematic from a normative standpoint, while crisis discourse in relation to the global economic crisis was used both in normatively acceptable ways and in normatively unacceptable ways. Thus, my scrutiny of crisis discourse both in the context of the War on Terror and the global economic crisis pushes the understanding of crisis discourse's normative value past a superficial one-size-fits-all conclusion to understand the normative relevance of the possible variations in how crisis discourse is used.

Moreover, my view is broader than one domestic legal system and expands itself to include courts dealing with terrorism in US, the UK and Canada; Eurozone courts reviewing Eurozone crisis measures; and the use of crisis discourse within the political debate on the Eurozone crisis in the Netherlands. My choice to study these two crises in different national contexts is defensible based on the goals of this study, namely to investigate how crisis discourse *can* work in law and politics and, moreover, to draw conclusions on how judges do and should deal with this discourse, given an agonistic perspective of democracy. Therefore, I study those cases on terrorism and economic crisis that have been both legally and politically controversial and that are key cases in the development of judicial review of crisis measures. In the case of terrorism, I focus on three seminal cases in important jurisdictions for the War on Terror: the United States, the United Kingdom and Canada. In relation to the Eurozone crisis, I study all accessible cases against the biggest Eurozone crisis measure (the European Stability Mechanism) from the final judicial instance in Eurozone creditor states. My approach is theoretical and overarching; I do *not* ask how an Estonian judge should deal given the Estonian legal system or how a Canadian judge should deal given the Canadian legal system. I intentionally seek out uses of crisis discourse in different *contexts* – common law and civil law, crises of national security and of economies – not to compare its uses, but rather to show that crisis discourse and its effects are not limited to one country or one political or legal context. I intentionally seek out judicial decisions from different countries to display how judges across countries are confronted with the use of this discourse and are challenged to deal with its use in their courtrooms. At the same time, I do not pretend to argue that crisis discourse will always function identically in each national legal context or that the courts in these national systems will be confronted with identical challenges. This study is an attempt to show that there are *enough* similarities to argue that crisis discourse is not limited to one particular context and that this discourse's prevalence justifies a principled, theoretical approach to questioning the implications of this discourse and of judicial decision-making when this discourse is present.

Further, this study focuses on bodies of texts in different judicial and political institutional settings. Chapters three, four and six focus on the production of discourse by actors in similar levels in institutional hierarchy, with no institutional or legal authority to overrule each other. The third chapter looks at the final rulings of three national courts on terrorism cases to show how crisis discourse worked to justify the precautionary turn in law after 9/11. Since the interest in this chapter is legal change, these final decisions (often from the highest courts in the national systems) are a logical place to focus our attention. It is these highest courts that are most able to effect change in their respective legal systems, because of their final institutional responsibility for constitutional interpretation and their institutional authority. The fourth chapter focuses on use of crisis discourse in the public arena by political parties and thus locates crisis discourse in political parties' speeches, campaign programs and advertisements. This chapter's diversion away from crisis discourse in the judicial institution to focus instead on crisis discourse by political parties shows how crisis discourse is used

politically to create a people and an other and to claim the need for radical, deep change to democratic structures. My attention to how this discourse functions politically allows me to take the first steps toward forming a normative framework for the use of crisis discourse.

To complement the focus on discourse produced by actors in similar levels of institutional hierarchy, chapter five focuses on the production of discourse by actors at varying levels within the judicial hierarchy: the court of first instance, the court of appeals and finally the highest national court. This chapter uses all manner of court documents, going beyond the judicial ruling itself and looking at transcripts of oral arguments, telephone calls between judge and parties, and the briefs of the parties. This in-depth approach is called for by the aim of this chapter: to show the variations and similarities in the way judges deal with crisis discourse at all different levels of the judicial institution. By looking at all levels along the hierarchical axes of judicial decision-making, this chapter reveals the power of iteration and the space for dissent – even in the face of a strong and comprehensive discourse fiercely backed by the executive. Finally, the sixth chapter in this study returns to the method used in chapter three and looks at highest national courts' rulings in cases pertaining to the Eurozone crisis measures. A notable difference with chapter three, however, is that this sixth chapter does not aim to show how crisis discourse led to change in the law but rather addresses how judges do and should allow for contestation of this discourse in their courtrooms. Thus, the method used departs from a focus on what crisis discourse 'does' in courts and instead attends to how judges do – and should – respond to crisis discourse.

While each chapter deals with different cases, from a different perspective, the overall methodology is the same. In all chapters, I use a form of discourse analysis, the point of departure of which is that language *does something*. Words themselves, independent of the words' truth or the speakers' intention, act. I do not primarily concern myself with the truth of the words or the speakers' intentions – since these matters are not directly relevant for what the words do. Instead, I focus on how crisis discourse works in legal and political language to perform – and thus call into being – the existence of certain realities. This way of looking at language is inspired by J. L. Austin's work on performatives and speech acts, whose lecture series *How to do Things with Words* set out important differences between language that is meant to describe reality (constative utterances) and language that is not (in whole or in part) meant to describe, but to create or transform reality (performative utterances).[8] Performative utterance, such as saying "I do" as the to-be-wedded spouse in a marriage ceremony, or saying "I swear", or "I promise" create a new situation independent of whether the person doing the saying meant it or not, and independent of whether the person doing the saying was telling the truth. Just by uttering the "I do" or the "I swear" or the "I promise", the speech has done something. Austin goes on to expand this idea of speech doing something to a broader

[8] J.L. Austin, *How to Do Things with Words* (Oxford: Oxford University Press, 1962), 4-6.

understanding of performativity[9] by his introduction of the concept of the *illocutionary* force of language. With this concept he shows how even non-formulaic language – even language that does not explicitly make something happen – can still act. Thus, Austin moves beyond his attempt to catalogue all explicit performative verbs[10] and instead calls attention to the aspect of performativity that can be present in all language. By attending to the illocutionary force of language, Austin shows how even if a statement is not informative, even if a statement does not achieve the desired effects from its audience, the statement still performs. From this perspective, Austin's theory of performativity and his attention to language's illocutionary force focuses on the aspect of language that is not referential but that constitutes subjects and subjects' realities. In this way, speaking is not just the activity of engaging in description that may or may not be true, but is itself an event with a force.

I use discourse analysis to study this performative side of discourse by looking at how socially constructed ideas, truths and accepted ways of doing things are created and maintained over time.[11] Discourse analysis explores how language creates reality through its performative force, and thus not how it reflects a pre-existing, 'out there' reality.[12] How is one to do this? How can discourses be found, pinned down and catalogued? Discourse analysis recognizes that it is impossible to ever fully localize a complete discourse and instead looks to texts as artifacts that can give analysts indications about what social discourses entail. In this way, the text – as a written or spoken selection of language[13] – serves as crystalized point of discourse, as evidence (and to some extent a simplification) of the complex and dynamic language games that produce our social reality. At the same time, while I view texts as an artifact of discourse, texts should not be seen as passive reflections of discourse but rather as the medium through which discourse is produced. In order to do justice to these characteristics of texts as both reflective of discourse and productive of discourse, as both points of crystallization and parts of larger language games, it is important that texts are not looked at in isolation. Instead, one must focus on analyzing bodies of texts and must also attend to the social context to show how these texts relate to one another and to other discourses in society.[14]

While each chapter focuses on different aspects of crisis discourse, each chapter has the following similarities in approach. First, each chapter takes crisis discourse to be a speech act

[9] Austin, *How to Do Things with Words*, 99.
[10] Austin, *How to Do Things with Words*, 108.
[11] Nelson Phillips and Cynthia Hardy, *Discourse Analysis: Investigating Processes of Social Construction*. Sage University Paper Series on Qualitative Research Methods, Vol. 50 (Thousand Oaks, CA: Sage, 2002), 6.
[12] Phillips and Hardy, *Discourse Analysis,* 6.
[13] I do not go into how images can also be artifacts of discourse here, not because I mean to deny the role images can play but simply because images fall outside the scope of this research. I believe that my focus on the relationship between political and legal discourse justifies my attention to written and spoken text, as political and legal discourse is traditionally a very language-dominated arena. It would nevertheless be fascinating to look more into the role images play in this arena.
[14] Phillips and Hardy, *Discourse Analysis,* 5.

with both an illocutionary and perlocutionary force. The main interest of this work is crisis discourse's illocutionary force, its ability to enact the existence of a new reality just by it being uttered, although this interest cannot be pursued without attention into its perlocutionary force as well. The perlocutionary force of crisis discourse, its ability to effect a change of perception in its audience, is particularly visible in chapter three in this book, where I attend to the ability of crisis discourse to cause a shift in legal discourse. The assumption that crisis discourse has this perlocutionary ability, the ability to change the perception of its audience, is the backdrop to the other chapters as well, but remains largely implicit. Instead, I focus mainly on the way crisis discourse shifts the register of the political and legal debate, by virtue of its introduction to the debate alone and regardless of whether one is convinced of its content or not. Second, in each chapter I consciously downplay the intentions of those people who use crisis discourse. I must be clear here, this decision is *not* based on a conviction that intentions do not matter. Yet, in the first instance, this study is not about the intention with which crisis discourse is used. Not only is it often impossible to uncover in any scientifically valid way what the intentions of speakers were, my very concept of the subject is such that intentionality is in itself not completely attributable to the subject. Intention is, in fact, never fully present to the speaker in the moment[15] and, importantly, the power of the speech is not related to the will of the speaker but is derived from a performance that heralds back to previous performances, previous iterations of the speech.[16] In this sense, the speaker's intention – however (in)disputably present – will always be exceeded and undone by the performative power of her utterance.[17] By instead focusing on the effects of crisis discourse (*regardless of intentions*) and looking at how the judiciary can and should deal with these effects, I highlight that intentions (good or bad) are less relevant to both the descriptive and normative question this dissertation asks than results.

Finally, each chapter sees crisis discourse as a language and language practice that frames an event as an urgent, existential threat and, subsequently, claims that the only way to avoid that threat is through a particular sort of structural change. Crisis discourse is thus composed of three distinct moments: a) the discursive construction of a threat, b) the discursive construction of this threat as *systematic*, or in other words, inherent to the current system, and c) the discursive construction of radical systemic change as the *necessary* and *only* solution to this threat. To a large extent, this discourse does not depend on factual threat analyses to have its force. Its force comes from the claim, and in claiming crisis, something is done. At the same time, this force of the claim must be seen in context: the authority of the speaker, the intensity of the repetition, the comprehensiveness of the discourse all contribute to the effects of the discourse. An especially important aspect of this context is the event that is framed as a crisis. Crisis discourse needs an event which it frames as its trigger, and this event is located

[15] Jacques Derrida, 'Signature Event Context,' in *Limited Inc* (Illinois: Northwestern University Press, 1988), 18.
[16] Judith Butler, *Bodies that Matter* (New York: Routledge, 2011 (1993)), xxi.
[17] Honig, *Emergency Politics,* 128.

in an actual "real-life" event.[18] Yet, what determines whether this trigger leads to crisis is not only its severity, threat, or consequences. In fact, whether the event is perceived as severe, threatening and consequential does not need to correspond in a rational way to scientific analysis of the threat.[19]

Naturally, this does not mean that discourse determines whether an event, say a large bombing of civilians, killed people, nor whether it could – in all fact – happen again. What it does mean is that discourse determines the *social* meaning we attach to these deaths, to the threat of it happening again and what importance we attach to preventing a recurrence of the event. Let me explain this by setting out the different framing contests that take place after such an event. I will stay with the example of a large bombing of civilians. First, this bombing can be framed as either an existential threat linked to a structural flaw in some order (option A) or simply a bump in the road, an unfortunate event that is regrettable but does not reveal any larger underlying problem (option B). If option A takes place, the second question is what cause is attributed to this threat. If the existential threat is seen as inevitable or unpreventable, the status quo will not be called into question. There might be a larger underlying problem, but not one that is deemed solvable (option C). The alternative is that the existential threat is coupled with a solution to that threat, a solution to the structural flaw that caused this existential threat (option D). It is only when option A is accompanied by option D that I speak of crisis discourse.[20]

As a method, the discourse analysis I employ in this dissertation does not entail a particular normative commitment.[21] It is a way to understand and lay bare the manner in which social reality is created, from a particular theoretical framework that assumes strong social constructivism.[22] If one subsequently wants to *evaluate* or normatively characterize the particular manner of social construction that discourse analysis uncovered or the particular social reality being created, another measuring stick is necessary. In order to evaluate how crisis discourse is produced and what it means for how judges should judge, I use the theory of agonistic democracy set out in the following chapter as the normative framework against which I judge the meaning and desirability of the results of my discourse analysis. Before I

[18] Arjen Boin, Paul 't Hart and Allan McConnell, 'Crisis Exploitation: Political and Policy Impacts of Framing Contests,' *Journal of European Public Policy* 16(1) (2009): 83.
[19] Think for example of the lack of urgency surrounding global warming as an existential threat despite scientists' estimates that the point-of-no-return will be reached in the immediate future, if we have not already passed it. At the same time, the perceived threat of international terrorism is used to justify far-reaching and extreme measures despite the fact that in the United States, for example, the chance of being killed by a terrorist attack committed by a foreigner is 1 in 3.6 million. See Alex Nowrasteh, 'Terrorism and Immigration: A Risk Analysis,' *CATO Institute*, September 13, 2013, available at https://www.cato.org/publications/policy-analysis/terrorism-immigration-risk-analysis.
[20] Boin, 't Hart and McConnell, 'Crisis Exploitation,' 85-88.
[21] There are varieties of discourse analysis that have a thicker normative framework than the type of discourse analysis I employ here, see for example Norman Fairclough's *Critical Discourse Analysis: The Critical Study of Language* (London: Routledge, 2013 (1995)).
[22] Phillips and Hardy, *Discourse Analysis*, 5.

delve into the justification for this particular perspective, let me give the reader a general outline of the argument this dissertation makes and the path along which I reach that destination.

Roadmap

The general argument of this study is structured as follows. After this first introductory chapter, chapter two presents the theoretical background to my descriptive and normative approach to judicial decision-making. Here, I describe a way of looking at decision-making within a partially-structured, yet also partially-undecidable context. Within such a context, I use an agonistic theory of politics to provide the normative framework to justify decisions in this partially-undecidable terrain. Chapter three presents the first case study of this dissertation, delving into the use of crisis discourse in political and legal discourse on the War on Terror. This chapter starts by showing how crisis discourse made possible a shift in legal discourse from a preventive approach to terrorism to a precautionary approach, thus focusing mainly on the role crisis discourse can play in judicial decision-making to make legal change possible. In this way, this chapter supports other research that shows how, in the War on Terror, the judiciary often failed to contest the extremes called for by the executive and instead played a crucial part in legitimating these extremes. It does so by focusing on the specific discursive construction of dislocation and rupture in a way that adds to our understanding of how exactly crisis discourse can make legal change possible.

Chapter four focuses on crisis discourse as a speech act that reveals the agonistic features present in current political discourses by highlighting the conflictual aspects of these discourses and the deep structural change they aim to create. This analysis subsequently asks a fundamental question that too often remains unanswered in agonistic theory: where are the limits of acceptable conflict in an agonistic account of the political? Does agonism, despite its valorization of conflict and contestation, require the condemnation of particular types of discourses? This chapter explores this issue by looking at the crisis discourse on economic stability threats used by two Dutch political parties, at opposite ends of the political spectrum, and reveals the ability of crisis discourse to argue for very different results. Within the context of agonistic political contestation, factual analyses of the veracity of the crisis, and legal analyses of the legality of crisis measures, cannot provide a 'neutral' point of evaluation for the legitimacy of crisis discourse. This chapter thus develops a normative framework for agonistic speech acts that will be a necessary starting point for the discussion in later chapters on how judges should judge in times of crisis.

Chapter five combines the descriptive and normative interests of this book, while taking a second look at the way the judiciary dealt with crisis discourse in one specific terrorism case, *Hamdi v. Rumsfeld*. This study of legal discourse throughout the judicial institution, focusing on the interaction between judges at different levels (the court of first instance, appellate level

and Supreme Court), shows strikingly how different judges dealt with this discourse differently. This chapter focuses on the iterability of crisis discourse and shows how different judges are able to repeat this discourse in different ways, some more subversive than others. This chapter closes by asking what responsibility the judge has for the particular iteration she employs, linking the '*output'* of the judicial decision and the normative framework developed in chapter two.

Chapter six of this book focuses most directly on the question of democracy and the role of the judge in a democratic state. This chapter explores the way national courts of Eurozone Member States reviewed crisis measures taken in response to the economic instability in the Eurozone after 2007 and shows how these cases assume particular conceptions of the people, conceptions that include some while excluding others. This chapter explores the role a judge should assume in cases like these that reveal the political aspect of law – the aspect that draws boundaries between the us and the them – and argues that the main requirement of judicial decision-making in such cases is that the judge allows her decision to be informed by those voices who were excluded from the particular hegemonic conception of the people. In this way, this chapter takes account of the situatedness of the judge as a subject and attempts to think through how the judge can more actively take responsibility for her own subjectification in a way that allows her notions of (political) belonging to be challenged by those not recognized within the legal order. This chapter's attention to the *'input'* in the judicial decision-making process complements the previous chapter's interest in the 'output', and gives a number of possible ways in which the judge can organize the input to her decision so as to promote space for agonistic contestation.

Chapter seven brings together the interim conclusions drawn in each chapter in an answer to the main question posed in this introduction. With this, this book presents a more general normative theory of judicial decision-making that takes account of the ineradicable political element in human interaction. Here, my attention to the *input* to and *output* of the judicial decision are emphasized, as I argue that judges have a responsibility to allow their decision to be haunted by undecidability at both moments in the judicial process.[23] While the judge's decision cannot help but exclude some while benefiting others, and while this exclusion – I argue – cannot, in the end be based on some ultimate ground, it can be made legitimate. This legitimacy requires the judge, in her decision-making process, to allow the excluded other to provide input into the decision and to ensure that the result of her decision (the output) does not permanently and irreversibly exclude the other from contesting his exclusion. With this concluding chapter I also hope to provide some concrete guidance to judges confronted with crisis discourse as well as to scholars and citizens who have discovered the potency of crisis

[23] See Derrida's reference to the 'ghost of the undecidable' in Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority",' in *Deconstruction and the Possibility of Justice*, ed. Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (New York: Routledge, 1992), 24.

discourse and who are eager to employ this powerful tool in a way that enhances democracy while minimizing its risk for undermining the democratic principles of inclusion and equality. Crisis discourse – and democracy itself – remain risky. But with this study, some guidelines are given that can aid in avoiding the most treacherous terrain in the political and legal landscape of judicial decision-making. While recognizing the importance of institutions in democracy, I end with a warning against abdicating our democratic responsibility to these institutions. Institutions like the law and the judiciary – while necessary – remain exclusionary and we can only work toward realizing our democratic ideals if those both inside and outside those institutions act not only according to their institutional duties but also in accordance with their democratic responsibility.

CHAPTER II

DECIDING THE UNDECIDABLE:
A THEORETICAL FRAMEWORK

This work does not stand alone. Like all thought, what is set out in the pages that follow is both consciously and unconsciously inspired by what has come before it. In order to understand the approach I take in this study and the claims I make it is therefore useful to have some idea which particular work I build upon. In the chapters that follow, the reader will come across many of the concepts and authors I discuss here. A chronological overview of the scholarship that forms my theoretical framework would imply a far too linear progression of knowledge. Instead, I start this chapter with the *decision*; in its very nature both an arbitrary closing off of other possible alternatives and at the same time an inauguration of new possibilities for contestation. In expanding on decision as a theoretical category, I will let my reflections be guided by the descriptive element of this book's research question: how *do* judges decide in times of crisis? I will expand on notions of discourse, hegemony and iterability and how they relate to decision-making processes. This will bring me to the theoretical framework I use to address the normative question in this book: how *should* judges judge in times of crisis? Here, I will set out my agonistic conception of the political, touching on the role of the political and the people in democracy.

1. The Structured Undecidability of the Decision

The first main inquiry of this book relates to how judges judge and what impact crisis discourse can have on this process. The 'how' of decision-making requires an understanding of what a decision is and of the nature of the subject making that decision. These two issues form the main themes of this Section.

The Decision

The question of the decision is really a question of whether rules exist whose application is self-evident and which necessitate one outcome and one outcome only. If this is the case, after all, there would be no real need for decision. Instead of deciding, so-called decision-makers would simply compute. They would apply a rule whose application follows inescapably from itself. To be fair, few legal theorists accept such an unqualified view. In what follows I will

first discuss H.L.A. Hart and Ronald Dworkin's views on the decision and the binding nature of law. Despite their significant differences of perspective on what 'law' is and the degree to which it can be uncertain, I argue that, in the final analysis, they both adhere to the view that law, either as a set of rules or principles, provides sufficient binding force in such a majority of circumstances that we can reasonably speak of the judge being bound by law. After discussing these scholars, I move on to the legal realist Carl Schmitt who views law's binding power in much more skeptical terms. I close this part with a proposal for looking at law's binding force from what has been called a post-foundational perspective. I argue that law indeed exerts binding force but that this force remains incomplete and cannot eliminate the need for decision.

Legal positivists like H.L.A. Hart maintain that, *on the whole*, legal rules are clear and determinate. While it is true that in cases where the "open texture"[1] of language means that some rules will contain a margin of uncertainty as a virtue of them being encapsulated in language, this uncertainty is not more than *marginal*. Hart certainly sees that in some cases language can be used in a way where its meaning becomes unclear, and that in such cases the judge must use her own discretion to choose a particular interpretation, "even though [the choice] may not be arbitrary or irrational."[2] Here, the judge engages in *rule-making* that is based on "striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case."[3] However, Hart emphasizes, this penumbra of uncertainty[4] is only "at the margin of rules." To a "very large extent" the practice of law is made up of determinate rules which do not require such choices and rule-making.[5] Hart critiques those who are skeptical of the binding force of rules as greatly exaggerating the scope of applicability of their argument.[6] In his view, it is only at the "fringe" that binding force of the rule comes into question, and it is only here "at the fringe that [the rule skeptic] is welcome."[7] The rule skeptic must "not blind us to the fact that what makes possible these striking developments by courts of the most fundamental rules is, in great measure, the prestige gathered by courts from their unquestionably rule-governed operations over the vast, central areas of the law."[8] In this way, Hart domesticates indeterminacy in law, relegating it to the peripheries of a system of law which is characterized – exceptions not withstanding – by rules that are plain and whose application does not require any choice.[9]

[1] H.L.A. Hart, *The Concept of Law* (Oxford: Claredon Press, 1994 (1961)), 128.
[2] Hart, *The Concept of Law*, 127.
[3] Hart, *The Concept of Law*, 135.
[4] Hart, *The Concept of Law*, 134.
[5] Hart, *The Concept of Law*, 135.
[6] Hart, *The Concept of Law*, 147.
[7] Hart, *The Concept of Law*, 154.
[8] Hart, *The Concept of Law*, 154.
[9] Andrew Altman, 'Legal Realism, Critical Legal Studies, and Dworkin,' *Philosophy and Public Affairs* 15 (3) (1986): 206.

Ronald Dworkin goes a step further than Hart, disputing even the existence of such fringe indeterminacy in law. By introducing legal principles to the mix of relevant legal guidelines, Dworkin attempts to limit (if not eliminate) the indeterminacy of legal rules.[10] Dworkin's view of legal principles is that, while not necessarily codified in positive law or linked to a rule of recognition, they are as relevant in understanding how law binds judges as legal rules are.[11] When legal rules conflict with each other, or when there is a penumbra of uncertainty, principles offer a way forward. In this way, when confronted with a hard case, the turn to principles gives force to "preexisting legal obligations" and should not be seen as a choice that could be unbound by the law.[12] This is not to say that Dworkin refutes the role of judicial creativity in the process of legal interpretation. Indeed, Dworkin acknowledges that in order to decide the new case put before her, a judge engages in a *constructive* practice, whereby a pre-given, pre-apparent law is not applied – but made.[13] But note here that this construction of the law is *not* unbounded. It is in fact a construction restrained by the judge's view of the law as a coherent whole and the judge's search for the principle that best fits into this system.[14] For each individual that applies herself to a case, there is one right answer – the answer that best respects the law as a "seamless web,"[15] as a coherent set of rules and principles that has a particular inner logic. While this right answer might be different for each individual that so applies herself, Dworkin claims that each individual's attempt will result in one right answer that satisfies that individual's view of the integrity of the law. Thus, while Dworkin does not dispute the importance of judicial interpretation of the law, nor the possibility that different judges will do this differently, he holds in the end that for each judge this interpretation will be *determined* by her assessment of which interpretation best fits the legal practice and the point of the legal practice as it stands.[16] In this sense, there is for Dworkin no room for the judge to "strike out in some new direction of his own,"[17] no room for a fundamental indeterminacy of law.

Despite the great differences in view between Hart and Dworkin, both reject any significant role for indeterminacy of law. Hart admits some marginal legal indeterminacy stemming from the fact that language itself can be unclear, but relegates to the periphery of law. Dworkin limits the margin for legal indeterminacy even further, by theorizing that even in hard cases, principles guide the judge to her one right answer. Thus, for the parts of the law that Hart and Dworkin consider most important, the judge is by and large bound by the law (whether it be in the form of legal rules, principles or the construction of the law as a coherent web). The decision-maker has very little actual deciding to do and is instead tasked with diligently and

[10] Ronald Dworkin, *Taking Rights Seriously* (London: Bloomsbury, 2013 (1977)), 48-56.
[11] Dworkin, *Taking Rights Seriously*, 62.
[12] Altman, 'Legal Realism, Critical Legal Studies, and Dworkin': 214.
[13] Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), 159.
[14] Dworkin, *Taking Rights Seriously*, 53.
[15] Dworkin, *Taking Rights Seriously*, 141-145.
[16] Dworkin, *A Matter of Principle*, 159.
[17] Dworkin, *A Matter of Principle*, 159.

thoroughly examining the law to apply (in Hart's terms) or construct (in Dworkin's terms) the one right answer.

Legal skeptics take issue with such conceptions that present the law as a set of rules and principles that fully bind the decision-maker in her decision. Scholars within this approach emphasize instead the role that considerations external to law play in decision-making. Within this broad tradition of legal skepticism, theorists argue that the law is radically indeterminate and thus that every case is decided not according to legal rules but rather as a result of some combination of political ideology, psychology, or indeed "what the judge had for breakfast."[18] The indeterminacy of law has to do with the fact that multiple rules can apply to the same situation and the judge has a choice which rule, principle or precedent she invokes to justify her decision.[19] Moreover, indeterminacy is furthered by the judge's ability to choose which facts of the case she holds legally relevant.[20] Together, the non-prescriptiveness of both the relevant rules and relevant facts means that the judge is unconstrained by either rules or facts and instead can decide based on whatever non-legal considerations she deems relevant.[21]

Carl Schmitt is perhaps one of the most famous proponents of the idea that, in the most important instances, the law does not bind.[22] Schmitt's work takes issue with legal theorists who attempt to purify sovereignty of personal subjectivity,[23] and Schmitt argues instead that the law cannot be disconnected from the will.[24] According to Schmitt, the connection between sovereignty and will is most apparent during times of exception – a state declared by the sovereign as an act of will that suspends the existing legal order. In such a state of exception, the law is suspended and the moment of pure decision comes to the fore.[25] It is then that a new law can be established, a new order, a new will. As Andreas Kalyvas has noted, it is this "moment of crisis, this openness and contingency that provides the available space for the re-activation" of the power to found new legal and political orders, a power that "up to this

[18] Judge Jerome Frank is often credited with this statement, although it is unclear whether it is really attributable to him. See Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, Mass.: Harvard University Press, 2009), 129 at footnote 15.
[19] Altman, 'Legal Realism, Critical Legal Studies, and Dworkin,' 186-187.
[20] Iris van Domselaar, 'The Fragility of Rightness: Adjudication and the Primacy of Practice' (PhD diss., University of Amsterdam, 2014), 16, available: http://hdl.handle.net/11245/2.135758. See also Jerome Frank, *Law and the Modern Mind* (New York: Brentano's Publisher, 1931), 116.
[21] Altman, 'Legal Realism, Critical Legal Studies, and Dworkin,' 189.
[22] Although certainly not an adherent of critical legal studies, Schmitt can be categorized as a legal skeptic nonetheless. While his theory lacks the agonistic appreciation for pluralism within political orders, his skepticism in the ability of reason and rationality to purify law of personal subjectivity has parallels with post-foundational thought. See Montserrat Herrero, *The Political Discourse of Carl Schmitt: A Mystic of Order* (London: Rowman & Littlefield International, 2015), 5. See also George Schwab's introduction to Carl Schmitt, *Political Theory: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Cambridge, Mass.: MIT Press, 1985 (1922)), xii where Schmitt is characterized as a 'political realist'.
[23] Schmitt, *Political Theory*, 29-30.
[24] Herrero, *The Political Discourse of Carl Schmitt*, 56-58.
[25] Schmitt, *Political Theory*, 13.

moment remained in a dormant and subterranean form."[26] Schmitt sees this moment of decision as most apparent in the state of exception but, unlike Hart, does not relegate this moment of exception to the fringes of the law. To the contrary, this moment of exception – the moment where the law does not and cannot bind – is for Schmitt the very foundation of the law. The sovereign and the state of exception the sovereign can decree are prerequisites for the order that law relies upon. Schmitt sees law as only able to function in a space characterized by order but he rejects the idea that this order is created by law. For Schmitt, order is not the consequence of law. Instead, law follows from a concrete order and Schmitt presents the sovereign as that which ensures the order necessary to allow for the normal functioning of rules and norms.[27] The sovereign's decision on the existence of a state of exception is necessary when the space in which law is to function has become so disordered, so chaotic, that the law does not apply.[28] In such times, the sovereign can and must declare a state of exception, in which the sovereign, unbound by law, can reinstitute the order necessary for rule by law to return. In this way, the exception and its lack of binding law, while rare, is at the core of law.

Schmitt further defends his interest in this moment of exception where the law does not bind based on his interest in engaging in a "philosophy of concrete life:"

> Precisely a philosophy of concrete life must not withdraw from the exception and the extreme case, but must be interested in it to the highest degree. … The rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception. In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition.[29]

Schmitt points out that a realist approach to politics and law means that we must acknowledge how the exception can challenge and alter the rigidity of sedimented practices and norms. Further, Schmitt clearly sees how this priority of concrete life over highly-abstracted theories of how law and politics *should* work allows us to notice the failure of laws or norms to regulate the most intense moment in Schmitt's view of social interaction: the identification of the enemy. The identification of the enemy and the threat it poses are not the result of objective analysis based on legal scientific criteria by some neutral outside observer.[30] Instead, "only the actual participants" are in a position to "recognize, understand, and judge

[26] Andreas Kalyvas, 'Hegemonic Sovereignty: Carl Schmitt, Antonio Gramsci and the Constituent Prince,' *Journal of Political Ideologies* 5 (3) (2000): 351.
[27] Schmitt, *Political Theory*, 13. See further Herrero, *The Political Discourse of Carl Schmitt*, 63.
[28] Kalyvas speaks of this moment with reference to Gramsci's "organic crisis", a moment "where the closure of the social explodes to bring about a dislocation among the different structural levels of the social, including the legal system," see Kalyvas, 'Hegemonic Sovereignty,' 351.
[29] Schmitt, *Political Theory*, 15.
[30] Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: The University of Chicago Press, 2007 (1932)), 27.

the concrete situation and settle the extreme case of conflict."[31] While Schmitt puts forward the argument that the enemy must pose an existential threat to be a real enemy, this criterion is for Schmitt not one that can be objectively analyzed by outsiders. For Schmitt, deciding on who the enemy is, is something only participants in the concrete situation can do.

Moreover, Schmitt recognizes that even during normal times the need for true decision (instead of application) in law is present, although certainly less prominently than in the state of exception.[32] In normal times, the presence of a concrete order provides the context necessary for the application of a legal rule to seemingly follow in determinate fashion from the norm at hand. But, Schmitt emphasizes, while the concrete order might significantly limit the gap between norm and application, it can never fully eliminate it. A legal decision remains a "transformation", derived "from the necessity of judging a concrete fact concretely even though what is given as a standard for the judgment is only a legal principle in its general universality."[33] The transformation takes place because the "legal idea cannot translate itself independently."[34] In times of exception, the moment of decision that was always there but latent comes explicitly to the fore. In Schmitt's eye, the decision as to whether a political community is in normal or exceptional times is the ultimate decision, and it is this decision that determines whether the sovereign's actions will be based purely on its will (in exceptional times) or whether the law exerts some limiting force (in normal times). Whereas Dworkin rejects the possibility of any moment where legal principles would not apply, Schmitt argues that the law can only bind when a structured order is present. Outside of this order, and to a far lesser extent even within it, the sovereign decision – unbound by law – is necessary. And while the moment of being completely unbound by law may for Schmitt (as for Hart) be exceptional, it is – unlike for Hart – foundational.

The approach this dissertation takes to crisis derives, to a large extent, from a desire to participate in a "philosophy of concrete life." Like Schmitt, the pages that follow focus on exceptional situations in order to say something about the force of law and they attempt to show how crisis as the moment of exception can function to dislocate dominate systems of meaning or, as Schmitt says, to "break through the crust of a mechanism that has become torpid by repetition."[35] I am also inspired by Schmitt to highlight the aspect of political meaning-making processes in the identification of the threat posited by crisis discourse. In concrete life, the existential threat upon which crisis discourse is based need not be a threat that is identified based on neutral analysis, just like the solution crisis discourse proposes need not be the result of rigorous scientific study. Both the threat and solution that crisis discourse frames are in fact *politically constructed*. Yet, my approach also departs from Schmitt.

[31] Schmitt, *The Concept of the Political*, 27.
[32] Schmitt, *Political Theory*, 12.
[33] Schmitt, *Political Theory*, 31.
[34] Schmitt, *Political Theory*, 31.
[35] Schmitt, *Political Theory*, 15.

Whereas Schmitt highlights the moment of extreme decision in times of exception and deemphasizes this moment in normal times, in what follows I try to provide a more nuanced picture of the (non)binding capabilities of law and, in doing so, I explore an alternative to both the more deterministic view of legal decision-making and the legal skeptical view. I present a theory of judicial decision-making that shows how law – as a discourse – has some binding force, but at the same time is not dispositive. The exception as the moment of founding not only comes to the fore in moments of (perceived) social upheaval but is present and active in everyday moments of legal interpretation.[36] Crisis is not exceptional, but rather part and parcel of daily legal practice. At the same time, this moment of crisis is never completely unbound, the moment of founding is never completely novel, but is always linked to the chains of meaning that we use to make sense of our social world. Yet, while these chains of meaning provide some binding force, they cannot prevent the necessity for decision nor, I argue (contra Dworkin), the necessity for a judge to every day anew 'strike out on her own.'

The starting point for such a theory is the assumption that meaning emerges historically and contingently instead of being a product of god or nature. In the first place, the meaning humans attribute to the social world is the product of "specific events, actions, and practices enacted by human beings"[37] instead of a predetermined, pre-given truth that can be discovered in the essence of things. This does not mean that there is no 'reality', but simply that the meaning that reality holds is constructed through processes in which humans play a necessary role. For example, the existence of Hurricane Katrina and the damage and destruction that occurred in the moment of the storm's arrival and thereafter is a fact; but the meaning given to the existence of the hurricane and to that damage and destruction is not found in the existence of the storm. Whether the storm and the damage that followed was seen an act of a god punishing the sinful inhabitants of New Orleans, a tragic but unpreventable natural disaster, the preventable result of human-made climate change or a disaster whose damage was exacerbated by systemic racism and neoliberal disregard for human life cannot be determined by the 'essence' of the storm. The meaning given to the hurricane was constructed by human processes of meaning-making and *even if there was a true meaning,* its identification would be reliant on this human process of meaning-making and whatever one identifies as this true meaning will be susceptible to confrontation by competing claims from another. Michel Foucault's genealogical project makes a similar point. His genealogies show "how that-which-is has not always been; i.e., that the things which seem most evident to us

[36] See Bart van Klink on Hermann Lübbe's critique of Schmitt, in 'Adjudication and Justification: To What Extent Should the Excluded Be Included in the Judge's Decision?,' in *Argumentation and Reasoned Action: Proceedings of the 1st European Conference on Argumentation Vol. II*, ed. Dima Mohammed and Marcin Lewinski, (Lisbon: 2015), 647.

[37] Ed Wingenbach, *Institutionalizing Agonistic Democracy: Post-Foundationalism and Political Liberalism* (New York: Routledge, 2016), 94. For more on the importance of the 'otherwise' in post-foundational thought, see Ferdinando G. Menga, 'Antagonism, Natality, A-Legality. A Phenomenological Itinerary on the Democratic Transgression of Political-Legal Orders,' *Ratio Juris* (forthcoming): 6 (on file with author).

are always formed in the confluence of encounters and chances, during the course of a precarious and fragile history."[38] By showing how rationality is itself a human product of historical struggle and by showing that a particular type of rationality had a specific starting point in history, we are also able to conceive that it could have been different and that it can be different. As Michael Kelly has pointed out, "Foucault's strategy is to argue that since forms of rationality have been *made* they can be *unmade*."[39]

The only ontological ground we have is that which is constructed by ourselves and there is no final arbiter for the competing ontological claims. There is thus no possibility to *ultimately* base our rules, norms and morals on some ultimate, final ground; there is no justification for our rules, norms and morals that is not human-made (or if there is we would not agree on it) and, since the shared meaning we collectively give our social world does not rest on an ultimate ground of truth or design, we must acknowledge that this meaning is contingent: it *could have developed otherwise*.[40] But this does not mean that the human-made, contingent justifications humans have created do not matter.[41] On the contrary, the importance of the foundational meanings humans create – however contingent – is at the cornerstone of the approach pursued in this dissertation, an approach that can best be called *post-foundational*.[42] This approach does not deny the need for foundations, but calls on subjects to recognize that these foundations might have been otherwise. It is an approach that calls for the "ontological weakening of the status of foundation without doing away with foundations entirely"[43] or, as White has put it, "first, it holds that one's most basic commitments regarding self, other, and the beyond human are taken to be both fundamental and contestable; and, second, it holds that this contestability extends as well to one's assessments of the strong ontologies of others."[44] It recognizes that the "contingent foundations"[45] that humans construct together, foundations that could have been otherwise but are nonetheless as they are, both constrain possibilities for human agency and are the condition of its possibility. As the following Part shows, it is these foundations (in the form of hegemonic discourses) that form the subject and thus are the prerequisite for any action on the part of the subject. And while this agency is on the one hand *limited* by the confines of these hegemonic discourses, the contingency of these discourses means they can never fully exhaust all possibility for meaning otherwise, leaving us with

[38] Michel Foucault, 'Critical Theory/Intellectual History,' in *Critique and Power: Recasting the Foucault/Habermas Debate*, ed. Michael Kelly (Cambridge, Mass.: MIT Press, 1995), 127.
[39] Michael Kelly, 'Foucault, Habermas, and the Self-Referentiality of Critique,' in *Critique and Power*, ed. Kelly, 373, emphasis added.
[40] Wingenbach, *Institutionalizing Agonistic Democracy*, 94.
[41] Oliver Marchart, *Post-Foundational Political Thought: Political Difference in Nancy, Lefort, Badiou and Laclau* (Edinburgh: Edinburgh University Press, 2007), 14.
[42] Marchart, *Post-Foundational Political Thought*, 14.
[43] Marchart, *Post-Foundational Political Thought*, 14.
[44] Stephen K. White, *The Ethos of a Late-Modern Citizen* (Cambridge: Cambridge University Press, 2009), 815.
[45] Judith Butler, 'Contingent Foundations: Feminism and the Question of "Postmodernism",' in *Feminists Theorize the Political*, ed. Judith Butler and J.W. Scott (New York: Routledge, 1992), 3-21.

what Ernesto Laclau has termed the "*failed* structural identity" of the subject.[46] In this failure of our contingent foundations to permanently structure identity, the subject finds – and cannot escape from – the freedom to act.

Structured Undecidability in the Subject, Discourse, and Hegemony

The subject this dissertation presupposes is a situated subject;[47] a subject whose identity, preferences and beliefs are constructed in relations with others and which are ultimately contingent. This is a subject who is made – not given[48] – and the way in which this subject is fashioned has large implications for how this subject will decide. Following Foucault, this dissertation sees the subject as something created through a process of *subjectification*. If there is no pre-given, pre-social individual who has preferences and goals separate from the social context in which she lives, "human beings are *made* subjects,"[49] and the force that does this is what I, with Foucault, call power. This power is exercised between humans (either individually or collectively, as in institutions) and can be most properly located in relations between humans (again, either individually or collectively). When speaking about 'power', it would be a mistake to see the exertion of this power as separate from human actions, although I certainly grant that the question of whether humans have agency over these actions is a different matter. This finally-human aspect of power leads me to refer further in my discussion of this force to power *relations*: the interactions, dealings, negotiations, manipulations and associations between humans that exert this subjectivizing force.[50]

Discourse plays a large role in power relations, as the way in which truth and knowledge are constructed and delimited and as the way in which the subject is created. I use discourse here

[46] Ernesto Laclau, 'Deconstruction, Pragmatism, Hegemony,' in *Deconstruction and Pragmatism*, ed. Chantal Mouffe (London: Routledge, 1996), 55, emphasis added. It is this aspect of post-foundationalism that distinguishes it from existentialism. One is free not because they do not have a structural identity but because the one they have – however formative it may be – can never fully succeed in representing all possible meaning.

[47] It might seem as though this book's emphasis on decision-making implies an interest in the individual. While it is indeed the case that this study looks at how specific individuals – judges – make decisions in specific cases, it would be a mistake to conceptualize those decision-makers as atomic subjects separate from the social context in which they operate.

[48] As will become clear below, I draw on Michel Foucault's conception of the subject here. See for example Michel Foucault, 'Two Lectures,' in *Power/Knowledge: Selected Interviews & Other Writings, 1972-1977*, ed. Colin Gordon (New York: Pantheon Books, 1980), 98 where Foucault expands on his view of the subject: "The individual is not to be conceived as a sort of elementary nucleus, a primitive atom, a multiple and inert material on which power comes to fasten or against which it happens to strike, and in so doing subdues or crushes individuals. In fact, it is already one of the prime effects of power that certain bodies, certain gestures, certain discourses, certain desires, come to be identified and constituted as individuals. The individual, that is, is not the *vis-à-vis* of power; it is, I believe, one of its prime effects. The individual is an effect of power, and at the same time, or precisely to the extent to which it is that effect, it is the element of its articulation. The individual which power has constituted is at the same time its vehicle."

[49] Michel Foucault, 'The Subject and Power,' *Critical Inquiry* 8 (4) (Summer 1982): 777, emphasis added.

[50] I am not disputing that institutions, as well as physical constructions such as buildings, parks and prisons can exert power but aim to emphasize that without the actions of human beings in these places, this exertion of power would be impossible.

as a particular set of linguistic practices that weave together to give social meaning to the reality around us. Language is the medium through which meaning is constructed and discourse is the particular set of linguistic practices that creates this meaning in relation to particular events or issues. These linguistic practices are disciplinary, in the sense that accepted discourses set out the limits within which one can speak about an issue and be deemed intelligible and reasonable. If one strays outside of the discourse, one risks being perceived as irrational, unreasonable and unintelligible. Truth and knowledge are thus not seen as a "universal understanding beyond history and society"[51] and are not external to power relations, but rather the very mode through which power relations exert themselves.[52] The language practices one lives within set out the limits of acceptability and truth in a way that rewards those who stay within the limits of discursively-created truth and knowledge by making this human recognizable as a *subject*. If one does not stay within the limits of the discourse, one is punished for straying outside of these limits – this human is denied recognizable subjectivity and is instead derided as a fool, irrational or mad. It is *discourse* that constitutes the situated subject and, as we will see below, it is through discursive struggles that a particular way of viewing the world gains hegemony over others. Who uses language as their medium to construct meaning? The very subjects who are created in this meaning-making process. Discourse is not disembodied and relies totally on those who use it, and how they use it, while also affecting those who use it. Without users, discourses are forgotten and replaced by new ones. But at the same time, the subject is not able to fully consciously choose how it employs discourse, since the subject is itself produced by discourse. To summarize, discourse creates shared social meanings (truth, knowledge, common sense) that impact upon the process of subjectification. In turn, the created subject engages in discourses in ways that maintain herself and others as subjects and create new subjects. Yet, focus on the concepts of discourse and the subject leaves unanswered the question how the subject relates to the collective action that is needed for one discourse to gain prominence over another. In short, it in itself cannot explain how it is that one particular discourse manages to structure meaning in subjectifying ways, while another falls into disuse. Here Antonio Gramsci's concept of hegemony provides a way forward.[53]

According to Gramsci, writing in the early 1930s, the state does not only *coerce* its inhabitants into compliance with force but is crucially able to elicit "the active consensus of

[51] Paul Rabinow, introduction to Paul Rabinow, ed., *The Foucault Reader* (New York: Pantheon Books, 1984), 4.
[52] Rabinow, introduction to *The Foucault Reader*, 6-7.
[53] For more on the complementarity between Foucault's views and Gramsci's interpretation of Marxism, see specifically Chantal Mouffe, 'Hegemony and Ideology in Gramsci,' in *Gramsci and Marxist Theory,* ed. Chantal Mouffe (London: Routledge, 1979), 201 and more generally David Kreps, ed., *Gramsci and Foucault: A Reassessment* (New York: Ashgate Publishing, 2015). An important difference between Gramsci's worldview and that of post-foundationalists relates to the role of class. Where Gramsci, in the final analysis, held fast to class as the fundamental ordering principle of society, post-foundationalists dispute that there is any final essence to society, see Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards A Radical Democratic Politics* (London, Verso, 2014 (1985)), 59.

those over whom it rules"[54] by exerting moral and intellectual leadership in ways that "modify the common sense of the masses and realize an intellectual and moral reform."[55] Civil society is not as a sphere autonomous from political or class interest, but rather the very site of political (and class) struggle and dominance. The influence the state exerts to gain this "consensus" is grounded in the ruling class and operates by linking "the interests of the fundamental class to those of its allies in order to form a collective will, a unified political subject."[56] This is what Gramsci calls *hegemony*. It must be emphasized that the type of "consensus" Gramsci speaks of above is different to notions of consensus used by more liberal thinkers. Gramsci's consensus is used to denote non-coercive exercises of power of the ruling class over allied groups. This is dissimilar to for example John Rawls' notion of consensus as a process by which free individuals come to agreement guided by reason and uninfluenced by other parties' power in the process. Gramsci conceives of hegemony and its "consensus" as a way to explain how the dominant economic group can articulate their particular (economic) interests in such a way that these *particular* interests are presented and perceived as *general* interests. In doing so, the ruling class elevates its particular interests to a seemingly general, universal will of the state and exerts "political, intellectual and moral leadership over allied groups."[57] This process is not that of political compromise or exchange; it is not a rational weighing of how your interests might align with my interests. It is instead a *power relationship* that depends on and creates realities and common sense notions that are accepted as given in a society. It is a "pragmatic formation of collective wills through contingent articulations whose success [is] entirely context dependent"[58] and that relies on a process of representation. A particular social group is discursively constructed as the "representation of a totality."[59] This totality is seen as a universal but it can only ever be a partial universal that remains contaminated by the particular social group that has been elevated to the political (not ontological) status of the universal and is always reversible if another group successfully articulates itself as the true representative of the social.[60] Hegemony and discourse are intimately connected. Hegemonic articulations – and counter-hegemonic challenges to those articulations – take place by deploying certain discourses,[61] in a *discursive* struggle over power. Discourse is also, to a large extent, the aim of hegemonic struggles, in the sense that the ability to determine discourse is what translates to hegemony as control over social and political meaning. Finally, discourse is what gives hegemony its

[54] Antonio Gramsci, *Selections from the Prison Notebooks*, ed. and trans. Q. Hoare and G. Nowell Smith (London: Lawrence & Wishart, 1973), 244.
[55] Chantal Mouffe, 'Introduction: Gramsci Today,' in *Gramsci and Marxist Theory*, ed. Chantal Mouffe (London: Routledge, 1979), 8.
[56] Mouffe, 'Introduction: Gramsci Today,' in *Gramsci and Marxist Theory*, 10.
[57] Mouffe, 'Introduction: Gramsci Today,' in *Gramsci and Marxist Theory*, 10; Gramsci, *Selections from the Prison Notebooks*, 161.
[58] Laclau, 'Deconstruction, Pragmatism, Hegemony,' 62.
[59] Laclau and Mouffe, *Hegemony and Socialist Strategy*, x.
[60] Laclau and Mouffe, *Hegemony and Socialist Strategy*, xiii.
[61] See also Norman Fairclough's view on the connection between hegemony and discourse in *Critical Discourse Analysis: The Critical Study of Language* (London: Routledge, 2013 (1995)), 61-67, 95.

ability to affect ideas of common sense and reality. In effect, the terms hegemonic and counter-hegemonic *discourse* might be more specific than speaking of hegemony or counter-hegemony as if these were self-standing or disconnected from that which gives them force and relevance.

Gramsci's notion of hegemony problematizes the idea of objectivity.[62] The very notion of what is deemed rational or objective in a particular time is seen as being constituted by the power relations that exist in that historical period, as the hegemonic group is able to transform its own particular interests and truths into interests and truths that are perceived as universal. So in some sense, we are caught in the hegemonic rationality that our society imposes upon us. It is inescapable and there is no external vantage point from which it can be critiqued. The 'rule' of the hegemonic discourse, as it were, dictates certain outcomes as rational and common sense while placing others outside the realm of acceptability or intelligibility. But this does not mean that hegemonic discourses are permanent or stable. In fact, any semblance of permanence or stability is only appearance, and any "equilibrium" of power relationships is always only temporary.[63] Conflict over hegemonic meaning is the key characteristic of political and social order, and from this conception of social order, Gramsci sets out his program for social change: the subordinate class must engage in struggle over all sites where hegemony is exerted and must do so by articulating a new hegemonic constellation of interests. The allied groups must be peeled away from the "consensus" with the current ruling class and reconstituted so that they are aligned with the interests of the subordinate class attempting hegemony, "in a common vision of an alternative society, an alternative normality."[64] A Gramscian view of hegemony emphasizes that politics is not an activity limited to a specific sphere of life, but that rather that it is "a dimension which is present in all fields of human activity,"[65] including law.

While Gramsci might have conceptualized hegemony as the alliances between groups based, in the end, on a fundamental class identity, neo-Marxist conceptions of hegemony replace any such essentialism with the view that social interests are created through the discursive process of articulation of social identities.[66] This social identity – and the interests linked to that identity – is the product of hegemonic struggles. This conception of hegemony thus returns to the post-foundational theory set out above. Yet, at the same time, if there is no pre-given meaning to social reality, no hegemonic articulation can succeed in fully representing this meaning. The underlying ontological lack of meaning means that the hegemonic structure can

[62] Ernesto Laclau, 'Identity and Hegemony: The Role of Universality in the Constitution of Political Logics,' in *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left*, ed. Judith Butler, Ernesto Laclau and Slavoj Žižek (London: Verso, 2000), 49.
[63] Fairclough, *Critical Discourse Analysis*, 61.
[64] Robert Cox, 'Review: Unravelling Gramsci: Hegemony and Passive Revolution in the Global Political Economy,' *Capital and Class* 31 (93) (September 1, 2007): 258.
[65] Chantal Mouffe, 'Hegemony and Ideology in Gramsci,' in *Gramsci and Marxist Theory*, ed. Mouffe, 201.
[66] Jacob Torfing, *New Theories of Discourse: Laclau, Mouffe and Žižek* (Oxford: Blackwell, 1999), 14.

never fully succeed in its attempted representation of the universal. The hegemonic discourse provides a structure for the underlying ontological lack of essential or fundamental meaning by putting forward a particular set of values as universally valid, but this structure remains imperfect; it remains no more than an impersonation of the universal.[67] There is always space for some new discourse to present a new understanding of the social. And the decision that is taken in this context is, in the final analysis, a decision in a field of "structured undecidability."[68] In the end, the decision is at most a "regulated madness"[69] – regulated by hegemonic discourses that can never fully represent all meaning, leaving a space between structure and decision that can only be traversed by experiencing the "ordeal of the undecidable."[70] In the end we are "condemned to" some type of freedom in determining which meaning we choose, which decision we make.[71]

We can now see a connection between decision, hegemony and discourse. Through a hegemonic discourse, influence is exerted to structure a field of meaning so that some ways of thinking, of arguing, of speaking are sanctioned as rational and acceptable while others are excluded from the acceptable range. This subject within this structure is formed such that her 'choices' will be limited, will be regulated by the ranges of acceptability set out by this hegemonic discourse, if it is to be deemed an acceptable choice. The hegemonic articulation of identities does not bring together things that are essentially similar, but rather makes them similar by virtue of articulating a discursive relationship. The "hegemonic link transforms the identity of the hegemonic subjects"[72] in *both* directions: the identity of those who are subsumed into the representation by the hegemonic group is changed, but so is that of the group that becomes seen as representative. Such a view encourages a way of looking at decision in law that departs from either/or debates over whether law binds or not. The act of deciding should not be seen simply as the identical repetition of past precedents or the perfect translation of a rule to a situation, nor as a completely unbound act taken on a blank slate. The decider can diligently endeavor to repeat past decisions – but will never succeed in replicating them. The decider can strive to find the most faithful application of a general rule to a specific situation – but will in her application have to contend with new contexts and thus new links in the chain of meaning.[73] And, finally, in some circumstances the decider might have space to explicitly and consciously break with past chains of meaning but will never be able to escape the previous incarnations of the links in the chains she disassembles.

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[67] Laclau, 'Deconstruction, Pragmatism, Hegemony,' 59.
[68] Laclau, 'Deconstruction, Pragmatism, Hegemony,' 57.
[69] Laclau, 'Deconstruction, Pragmatism, Hegemony,' 58, referring to Kierkegaard's idea of the decision as madness.
[70] Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority",' in *Deconstruction and the Possibility of Justice*, ed. Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (New York: Routledge, 1992), 24.
[71] Laclau, 'Deconstruction, Pragmatism, Hegemony,' 55.
[72] Laclau and Mouffe, *Hegemony and Socialist Strategy,* xii.
[73] Derrida, 'Force of Law,' 22-23.

The theory of decision this dissertation articulates shows that the law is not (only) a space of logical argumentation but (also) a site where struggle takes place over hegemonic (legal) discourse. Power relationships have an ineradicable role in this struggle, not just because these relationships are that which determines the outcome of the hegemonic struggle but because power relationships are that which produce subjects as those who can speak and be heard in this struggle. The room left for subjects to 'decide' is not space for a free and rational decision, but is rather only the space to repeat differently.[74] Moreover, the legal status quo has no final moral grounding since there is no superior source of meaning it can appeal to for such moral status. Instead, the status quo is the current crystallization of hegemonic relationships of power and as such is temporary and exclusionary. The frontier between legal and illegal, legitimate and not, is thus also a *political* one and not only the result of rational argumentation or an objective application of legal principles.[75] How is one to find any stable normative footing in such a theory? In the following Section I explore the theory of agonism and explain how it provides a vision of the political that accounts for the roles discourse, hegemony and decision play in social meaning-making. I argue that despite the lack of ultimate, pre-existing meaning, agonism is able to give us the coherent normative framework needed to answer the second main question of this book: how should judges judge.

2. Grounding Groundless Decisions

Agonistic political theory forms the normative backdrop to my study of judicial decision-making in times of crisis. Generally, despite differences in emphasis, agonists adhere to a post-foundational perspective that sees the struggle (*agon*) over social meaning, and particularly over the boundaries between who is included and who is excluded from the determination of that meaning, as a fundamental aspect of human interaction. The only ground that can be relied on is that the meanings we create with discourse can – as an ontological matter – never succeed in exhausting all possible meanings, and can never succeed in completely and permanently occupying the field of meaning, and as such, there will always be conflict and struggle over meaning. The very process of maintaining discourse entails a constant struggle against the iterability of language and this iterability gives those who wish to undermine a hegemonic discourse the tools to attempt to do so. Agonists take this post-foundational perspective as their ontological starting point and subsequently add a normative aspect. Agonists share the conviction that conflict is not something democracy must seek to overcome or subdue but rather as something that must be acknowledged as the "driving force" of democracy, because this conflict hearkens back to the contingent

[74] See also Judith Butler's work on the reiteration of performative practices of gender and the possibility to engage in "different sorts of repeating," in Judith Butler, 'Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory,' *Theatre Journal* 40 (4) (1988): 520 and Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1999 (1990)), 148 where Butler explains: "The task is not whether to repeat, but how to repeat or, indeed, to repeat and, through a radical proliferation of gender, *to displace* the very gender norms that enable the repetition itself."
[75] Chantal Mouffe, *The Democratic Paradox* (London: Verso, 2000), 49.

foundations of any political order, and thus also their ability to change.[76] Agonists thus not only accept conflict as a given aspect of human interaction, but argue that political contestation must be preserved and promoted.

Agonistic Politics

The field of agonistic scholars is diverse and rich,[77] and what I present here is not any one particular scholar's views of this field. Instead, I present a synthesis of the most important concepts in agonism, including the 'political' and the 'people', inspired mainly by two of the most influential writers on the topic: Chantal Mouffe and Bonnie Honig. Although Mouffe and Honig are often seen as representing different strands of agonism,[78] I view their differences not as insurmountable but rather as complementary to the other's work. In my view, the key difference between the work of Mouffe and Honig is that while Mouffe's approach to agonistic politics is, in the end, focused on creating an institutional structure that will produce concrete policy outcomes in a more just way than they currently do, Honig focuses less on creating agonistic institutional constellations of power and instead stresses the need to engage in a strategy of democratic self-creation.[79] This means that whereas Mouffe readily acknowledges that hegemony cannot be escaped but instead must be given the form most amenable to the contingent nature of social meaning, Honig finds it more important to emphasize the need to ward against all forms of permanent closure.[80] While this is certainly a difference in emphasis, I do not see Mouffe and Honig's views on agonism as opposing each other but as necessary complements to each other and in what follows, I present a version of agonistic politics that integrates Mouffe and Honig's insights. My point of departure is Mouffe's insistence on the inescapability of hegemony and the need for institutional structures with which conflict is channeled. From within this framework, I view Honig's determined attention to the role of the subject as well as to the imperative of contestation as a necessary ingredient in the search for more-democratic decision-making procedures. In this sense, the normative framework that follows is my own assemblage of agonism as a theory of conflict as the motor of meaning-making in the political.

In this dissertation I am, like many agonists, interested in the political dimension of society. The term 'political' can give rise to confusion. It is used here *not* to denote merely partisan politics in a structured system of political parties, voting procedures and negotiations. For the remainder of this dissertation, my reference to the political relates to the processes of and contests over meaning-making. Given the contingency of meaning, effort is needed to

[76] Menga, 'Antagonism, Natality, A-Legality,' 2.
[77] For more in-depth analyses of the various schools within agonism see Andrew Schaap, introduction to *Law and Agonistic Politics*, ed. Andrew Schaap (Exeter: Ashgate, 2009) and Wingenbach, *Institutionalizing Agonistic Democracy*, 41-78.
[78] See for example Wingenbach, *Institutionalizing Agonistic Democracy*, 41-78.
[79] Wingenbach, *Institutionalizing Agonistic Democracy*, xv.
[80] Wingenbach, *Institutionalizing Agonistic Democracy*, xv.

stabilize a seemingly coherent[81] system of meaning and this effort is undertaken in the realm of the political.[82] It is, as Mouffe describes in Heideggerian terms, "the ontological level" of existence and it "concerns the very way in which society is instituted."[83] The meaning we give to our social world is thus the product of political activity, and distinctions that might be recognized between 'political' and 'non-political', 'public' and 'private', 'legal' and 'illegal' at a particular point in time are in fact distinctions that result from political struggle over those boundaries.[84] Within this concern for the struggle over establishing more or less stable meaning within a context governed by contingency, the *core political question* is who belongs to the constituent power of this meaning: who belongs to the people? When the composition of the people, the group perceived as the legitimate constituent force of meaning, is confirmed or contested, the political dimension of human interaction comes to the fore. The conflict over in- and exclusion in the political community, the conflict over the boundaries of the 'us' and the 'them', is at its core political.[85]

The boundary between 'us' and 'them' is a hegemonic boundary: it is constructed by the alignment of different particular identities and their subsequent identification with one identity as 'universal'. As a hegemonic boundary, it appears to be stable and inevitable while in fact being temporary and contingent. The people is in fact never fully formed, but is always – daily – in a process of becoming. This is a process that can solidify past iterations of the people into a hegemonic order or, alternatively, can undo past iterations, challenging the hegemonic order and can perhaps lead to the imposition of a new order. The people – like the self – is not given, but made, by denying some possible identities in favor of others. The people is never really full, never really unified. Its apparent unity is the result of hegemony and, thus, the particular formation of the people, and of the 'general will' linked to the people, is never truly general or universal. As Honig explains, a 'general will' is never equally in everyone's interest or equally willed and even if it were, "its authors nonetheless experience it as alien when it becomes a source of rule, and they are no longer only its authors but also law's subjects."[86]

According to Mouffe, the activation of the us/them distinction always bears within it the possibility of antagonism – the moment at which one might potentially resort to (physical) violence against the enemy.[87] She bases this insight on Schmitt's claim that a true political

[81] The ontological contingency of meaning prevents any such stability from being *in fact* coherent or *permanently* stable.
[82] Wingenbach, *Institutionalizing Agonistic Democracy*, 92.
[83] Chantal Mouffe, *On the Political* (London: Routledge, 2005), 8-9.
[84] Bonnie Honig, *Political Theory and the Displacement of Politics,* 121.
[85] And can thus only be solved by politics, not ethics or economics (see Mouffe, *The Democratic Paradox*, 96 where Mouffe refers to Carl Schmitt, *The Concept of the Political* (New Brunswick, NJ: Rutgers University Press, 1976), 70).
[86] Bonnie Honig, 'Between Decision and Deliberation: Political Paradox in Democratic Theory,' *American Political Science Review* 101 (1) (February 2007): 5.
[87] Mouffe, *On the Political*, 10.

moment is one of concrete standoff between people who have grouped themselves into friends and enemies.[88] Moreover, as discussed above, the content of the friend/enemy distinction is not one that can be rationally or objectively determined or justified but is – in the end – purely political.[89] But Mouffe does not follow Schmitt all the way. For Schmitt, the true political unit was the nation, made up of a homogenous *demos.* There was no room for pluralism inside such a political community.[90] Mouffe, in contrast sees the political dimension of relationships being present also within a political community. In order for this to be possible, however, Mouffe argues that the element of antagonism that is always present in the political must be sublimated, so as to prevent the political unit from destroying itself. On the one hand, Mouffe's concept of the political relies on the need for a "constitutive outside"[91] in order for the identity of the people to exist. She explains that, for her, identity is relational and constructed by opposing the identity of an 'us' against that of a 'them'. Constructing an identity "implies the establishment of a difference, difference which is often constructed on the basis of a hierarchy, for example between form and matter, black and white, man and woman, etc."[92] In this way, she seems to follow Schmitt's emphasis on the inevitable need for an 'other'. But, Mouffe insists against Schmitt, this relationship need not be characterized by the possibility of existential violence and is thus not necessarily an antagonistic relationship.[93] While Mouffe acknowledges the ever-present *possibility* of relationship turning antagonistic, the very point of politics for her is to channel such potential existential violence against the other into a less intense agonistic contestation. Agonism, by refusing to relegate dissenters to the realm of the unreasonable and unhearable, and by instead giving these 'remainders' a way to voice their grievances within the political debate, hopes to channel potential antagonistic relations (relations governed by existential violence) into the realm of the political[94] – a realm where the potential of antagonism is present, but temporarily deferred in favor of conflicts over power conducted via hegemonic and counter-hegemonic discursive struggles.[95] To put it more simply – by giving space to conflict over the very deepest principles of a society, the hope is subordinate groups will feel less need to resort to existential violence. Instead, these subordinate groups have the means and the opportunity to struggle for their principles through political means.

[88] Herrero, *The Political Discourse of Carl Schmitt*, 101.
[89] Schmitt, *The Concept of the Political*, 1932 (1996), 27.
[90] Mouffe, *On the Political*, 14.
[91] Henry Staten, *Wittgenstein and Derrida* (Oxford: Basil Blackwell, 1985), 16, 23.
[92] Mouffe, *On the Political*, 15.
[93] The approach to antagonism Mouffe takes here seems to be slightly different from that of her earlier work with Ernesto Laclau in, for example, *Hegemony and Socialist Strategy*, xiv, 112. See *infra* chapter four, footnote 80 for more on the notion of antagonism within Mouffe's work and on how it has changed throughout the years. In this dissertation I use antagonism to denote a type of relationship where the one aims to exterminate the other. Mouffe uses the category of antagonism similarly in *On the Political.*
[94] Schaap, introduction to *Law and Agonistic Politics*, 1.
[95] Schaap, introduction to *Law and Agonistic Politics*, 12.

According to Mouffe, this must be done by way of seeing the other as a "*friendly* enemy,"[96] something that can be achieved by constructing a common framework of ethico-political values that ensure political actors do "not treat their opponents as enemies to be eradicated."[97] Here Mouffe makes a surprising move: instead of continuing to see agonistic political conflict as legitimately putting at stake the composition of the political association and engaging in transformative conflict, Mouffe posits a strict division between an (undesirable but always-present possibility of an) antagonism where political opponents try to eradicate each other and a (desirable) agonistic politics of sublimated conflict within a *shared framework* of values. This is where Mouffe, in my view, commits a misstep. The type of agonistic politics she seems to argue for becomes a politics in which the foundations of the political cannot be challenged and is thus a politics in which little of import is actually at stake.[98] It seems as if Mouffe's tendency towards institutionalization directs her to an endeavor to *save* the liberal state.[99] In this way, Mouffe argues that while conflict is the fundamental characteristic of the political, this conflict must not entail dispute over shared values,[100] seemingly undermining the critical thrust of her theory.

I find Bonnie Honig's attention to the remainders of every institutionalization of politics helpful here. I rely on Honig's work to draw out the more radical agonistic view, present but sometimes overshadowed in Mouffe's own concept of agonism, that the only limit that can be properly placed on political activity is that between activity that allows for the political contest to continue and that which tries to permanently close this contest. Honig's reminder is that every conception of order will fail to fully fit and express the subjects it claims to represent; that every type of politics will engender 'remainders'. The excess of identity – of the self and the people – means that no social order or hegemony will perfectly be able to capture that fullness of identity. What Honig argues often happens in liberal exercises of politics is that these remainders or, as she also calls them, "the excess that haunts the formation of the self into a subject," are eliminated and their potential for disruption is "expelled from politics."[101] When political and moral orders try to establish themselves as the only possible just order, they "conceal, deny, or subdue resistances to their regimes."[102]

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[96] Mouffe, *The Democratic Paradox*, 13.
[97] Mouffe, *On the Political*, 20.
[98] Keith Breen, 'Agonism, Antagonism and the Necessity of Care,' in *Law and Agonistic Politics*, 139-140.
[99] Thomas Fossen, 'Agonistic Critiques of Liberalism: Perfection and Emancipation,' *Contemporary Political Theory* 7 (2008): 381. I do not mean to claim that all agonists must – on a personal level – disagree with the particular conception of justice promoted by either a deliberative democratic or political liberal – it is simply to say that the agonist must acknowledge that that particular conception of justice has no more claim to truth than any other, and thus that its imposition would be hegemonic. It does not necessarily follow that it shouldn't be imposed – after all, hegemony cannot be escaped, and that is not the goal. It does however mean that whatever consensus on justice emerges must be recognized – *as Mouffe herself notes* – as an "expression of a hegemony and the crystallization of power relations. The frontier that it establishes between what is and what is not legitimate is a political one, and for that reason it should remain contestable," see Mouffe, *The Democratic Paradox*, 49.
[100] Mouffe, *On the Political,* 120-121.
[101] Honig, *Political Theory and the Displacement of Politics*, 3.
[102] Honig, *Political Theory and the Displacement of Politics*, 3.

Instead, Honig proposes, an agonistic conception of the political must acknowledge and honor this resistance by attempting to ensure the "perpetuity of political contest."[103] This is not to say politics must (or can) be free of force, indeed hegemony is the exertion of force. And it is not to say this force does not have some quite violent consequences; think for example of criminal punishments or the unequal distribution of resources that a particular hegemonic constellation might attempt to justify. But I take Honig's urging to preserve this political contest as an argument in favor of a conception of agonistic politics that makes a distinction between exclusion that takes place "at the cost of the other" and a violence "directed against the other as other."[104] In essence, this approach does not reject Mouffe's view of agonism but rather uses Honig's work to call to the fore a particular strand of Mouffian thought (her own recognition for the importance of keeping the boundaries of contestation open) while disposing of Mouffe's curious refusal to apply this insight to her own view of shared ethico-political values.

Agonism, Deliberation, and Democracy

My views on normative value of deep conflict and the impossibility of an all-inclusive consensus highlight the differences between the agonistic approach taken here and more deliberative notions of democratic politics. Deliberative democrats, such as Jürgen Habermas, theorize that particular procedures of communicative rationality can guarantee outcomes of deliberation that will be impartial and noncoercive.[105] According to Habermas, deliberation can take place in which all participants work toward building an intersubjective consensus through processes of recognizing the better argument, which relies on the "non coercively unifying, consensus-building force of a discourse in which the participants overcome their at first subjective based views in favor of a rationally motivated argument."[106] Although Habermas acknowledges that such communicative rationality is an ideal, an ideal put under significant pressure by actual forms of modern communication, Habermas nevertheless maintains such communicative reason as central to how human beings construct intersubjective meanings that coordinate human action.[107] As such, Habermas strives to describe procedural requirements of discursive interaction that will lead to the necessary consensus upon which human coordination is based, without force. He argues that it must be possible for all affected by a particular norm to freely and without force "accept the consequences and the side effects that the *general* observance of a controversial norm can be

[103] Honig, *Political Theory and the Displacement of Politics*, 3.
[104] Menga, 'Antagonism, Natality, A-Legality,' 16, citing Bernhard Waldenfels, *Schattenrisse der Moral* (Frankfurt a. M.: Suhrkamp, 2006), 191. Menga gives a detailed discussion of the relevance of this distinction for Mouffe's reliance on Schmitt's notion of antagonism.
[105] Bent Flyvbjerg, 'Habermas and Foucault, Thinkers for Civil Society?,' *British Journal of Sociology* 49 (2) (1998): 214.
[106] Jürgen Habermas, 'Questions and Counterquestions,' in *Habermas and Modernity*, ed. R.J. Bernstein (Cambridge, Mass.: MIT Press, 1985), 196.
[107] Jürgen Habermas, *The Theory of Communicative Action vol. 1* (Cambridge, Mass.: MIT Press, 1983), 316.

expected to have."[108] Bent Flyvbjerg has summarized the five procedural requirements Habermas sets out to reach such a freely accepted norm as follows: all affected parties must be able to participate in the discourse, all participants should have equal opportunity to bring claims in the discourse, those partaking must be willing and able to empathize with each other's claim, differences in power between participants must be neutralized, and participants must be transparent about their intentions in the discourse.[109]

I do not reject Habermas' desire to devise processes of political interaction that lead to more democratic results. Indeed, in the chapters that follow (especially chapter six), I myself argue for a particular type of decision-making process that contributes to the legitimacy of the decision. I do, however, take issue with Habermas' view of power and with what this means for the processes he believes in. Habermas sees power differences as something to be eradicated from the public space in order to have a purer form of democracy. While he acknowledges the practical difficulties in achieving this result,[110] he remains committed to it as the ideal democratic outcome. There are two reasons for my disagreement with Habermas on this point. Firstly, as explained in the previous Section, the very existence of a subject able to participate in democratic interactions is itself a product of power relations. This delimitation of the subject by power means that we must design processes of decision-making that allow for those to participate who are *not* recognized as having a legitimate voice. Secondly, I argue that the force of the better argument is a result of power differences and not of reason purified of power, from which I deduce the need for a criterion of legitimacy that is not only process-based but that sets limits on the types of outcomes that can be justified by any procedure. I will discuss both critiques in turn before concluding that Habermas' view of power is not only insufficient but deprives subjects of crucial insights and tools to be able to strive for more democratic forms of power.

The participant in Habermas' communicative rationality, her identity, her ability to reason according to Habermas' rules, and the interests she defends in the process all result from the effects of power on her as a subject, power exerted by the very discourse Habermas aims to construct consensually and without force. The particular relevance of this process of subjectification for democratic politics relates to the construction of subjects who 'count' as democratic subjects and the creation of those who do not. Habermas' emphasis on participation of all affected parties and these parties' equal abilities to claim remains troubled by an inability to move beyond a focus on participation of all *recognized* actors and the introduction of new issues by those *recognized* as legitimate participants to the debate. Despite its necessity, the procedural requirement that all relevant actors be able to participate in deliberation cannot prevent the meaning of 'relevant' being filled in normatively, in a way

[108] Jürgen Habermas, *Moral Consciousness and Communicative Action,* trans. Christian Lenhardt and Shierry Weber Nicholsen (Cambridge, Mass., MIT Press, 1990 (1999)), 65.
[109] Flyvbjerg, 'Habermas and Foucault,' 213.
[110] Habermas, *Moral Consciousness and Communicative Action*, 209.

shaped by the subjectifying effects of discourse. By focusing only on the procedural requirement, the danger is that one unintentionally limits the democratic debate to those already considered part of the people. He fails to understand that what democratic politics often demands is a transformation of the speech situation to allow those *unrecognized* as subjects to reconstitute the prominent conception of the people.[111] As Leah Bassel points out in her detailed study of the political agency of refugee women, deliberative democracy does not pay sufficient attention to the fact that not all voices are recognized as making claims and does not address the fact that, for example, refugee women are only listened to when they comport themselves and their claims with the accepted set of fixed identities.[112] What is needed is an awareness that power relations shape who is deemed a rightful participant in political discourse and, subsequently, a normative theory of politics that gives space for those "who 'do not exist' in the script as it stands" to transform the political space.[113] In such an agonistic politics, "the production of who counts as a speaker" becomes part of the political contestation[114] and allows us to see as legitimate political action that is not characterized as such by Habermas' requirement of transparency of intentions and aims. Those who aim to transform the political space often employ means which are not based on argumentation in the Habermasian sense, means such as politics of activism, power politics, hunger strikes, riots and the like. Instead of rejecting such means as irrational or apolitical, agonism calls on us to see such actions as attempts from those excluded from formal political debate to force their way in. We must go beyond the (necessary but insufficient) procedural requirement that all relevant actors must be able to participate to the understanding that that procedural requirement is itself the object of political meaning-making processes. If one accepts the ineradicable role power relations play in constructing the democratic subject, then the deliberative democrat's attempt to eliminate power from public discourse is not only futile, it works to mask that very power and remove it from the realm of contestation. An agonistic approach would reply that the goal must not be to eliminate power, but to "constitute forms of power more compatible with democratic values."[115] The attempt to do just that is the normative aim of this dissertation.

The second point of disagreement with Habermas' deliberative notion of democracy is his – in my view unfounded – confidence in the ability to distinguish the better argument from the argument that is sanctioned by power.[116] While it might be possible for participants in political deliberation to reach agreement on which argument should carry the day, it is unclear that such agreement is properly conceived as the result of a noncoercive process. In the first place, the noncoercive nature of such a search for the better argument is called into question

[111] Leah Bassel, *Refugee Women: Beyond Gender versus Culture* (London: Routledge, 2012), 20.
[112] Bassel, *Refugee Women*, 21.
[113] Bassel, *Refugee Women*, 23.
[114] Bassel, *Refugee Women*, 24.
[115] Mouffe, *Democratic Paradox*, 96.
[116] Flyvbjerg, 'Habermas and Foucault,' 216-218.

by the role power relations play in creating the very notions of reason we use to determine what the better argument might be. The hegemonic exertions of force that create subjectivities also determine what types of reasoning shall be sanctioned as rational. So, even if it might be possible to give all participants in a deliberative forum equal power so that they could apply their ability to reason in an uncoerced way in their determination of the better argument, the content of what we consider to be reason and how to apply it are the products of relations of power, rather than neutral or transcendent givens. This raises the question whether a purely procedural notion of legitimacy can suffice or whether an a priori limit on potential legitimate outcomes is necessary. Chapters two and five explore this question in more depth. In the second place, the practical incongruity between Habermas' ideal and the reality of differential power relations in deliberative contexts – *for the foreseeable future* – means that a theory that does more justice to the factual role power relations play in constructing discourses better fits the reality of our political existence. From such a perspective, it is not the better argument that leads to consensus, but hegemonic discourses that shape individual and group identities so as to gain support for a particular order. While this process of hegemony is non-violent in the sense that the state does not achieve support directly through the use of physical force – it remains a process characterized by power relations, whose result is never equally in the interest of all, and a process backed up by the threat of the use of physical force on those who venture outside the accepted hegemonic discourse. We better equip ourselves to understand, critique and participate in these relations if we acknowledge that what is seen as the better argument is the result of a political process of meaning-making.[117] In doing so, we can attend to the performative aspect of deliberation and see how, even while engaged in the practice of argumentation with a more or less sincere desire to convince based on rational arguments, deliberators are in fact both creating and being created by discursive social reality. Agonism's goal is to make this process visible so it can be engaged in democratically.[118]

Despite these differences with Habermas, we have a common goal: the reduction of dominance and the increase of freedom. The difference is that I do not see power relations as

[117] The question remains: on what basis do I hope to be able to convince my reader that my own argument is 'the better one' if I problematize the very possibility of the better argument being recognized (uninfluenced by power). I am not deaf to the somewhat paradoxical nature my argument. I am however not saying it is impossible to recognize better arguments, but that this recognition is influenced by power. There are ways in which power relations determine my ability to argue and (hopefully) convince here. Academia itself is characterized by rules of argumentation that are enforced and policed by gatekeepers such as hiring committees, doctoral review committees, editorial boards, grant application procedures and such. Rules of acceptable argumentation are shaped by those individuals and groups who are put in a position to decide which types of arguments to accept. Moreover, as Lianne Boer has shown, one very common form of academic argumentation is largely based on consensus claims and appeals to authority – and the power of speakers to engage in these claims and appeals is not equal. See Lianne Boer, 'International Law As We Know It: Cyberwar Discourse and the Construction of Knowledge in International Legal Scholarship' (PhD diss., Vrije Universiteit Amsterdam, 2017), particularly chapters four and five for further analysis on the often uncritical way in which these citations to 'consensus' are used to lend an argument credence. The disciplining force of the rules of argumentation in academia is in *itself* neither negative nor positive but must be acknowledged as part and parcel of discursive practice. Only once it is recognized can we proceed to assess the relative merits of different exertions of power.
[118] Wingenbach, *Institutionalizing Agonistic Democracy*, 43.

such as standing in the way of these goals and instead adopt a more Foucauldian vision of power. Relationships characterized by power differentials are not necessarily relationships of dominance, and the absence of power does not equal the absence of dominance. Power, simply, "is a mode of action which does not act directly and immediately on others. Instead, it *acts upon their actions*: an action upon an action, on existing actions or on those which may arise in the present or the future."[119] Power refers to relationships between two or more people in which one can act to "structure the possible field of action of others."[120] Importantly, power must be distinguished from violence, although power can be implicated in maintaining relationships of violence. Relationships of violence act upon a body or a thing, forcing a bend or a break or a particular movement, instead of action upon action. Escaping and preventing such relationships of domination is certainly a legitimate moral goal,[121] but does not mean that one has escaped power. In relationships of power the key characteristic is that the one over whom power is exerted "be thoroughly recognized and maintained to the very end as a person who acts."[122] The subject of power maintains the freedom to either comport itself to the demands of the relationship, or not. The subject of power remains an *acting* subject – and it is upon this capability of action that power exerts itself. If the subject no longer has any agency, no range of actions from which she can choose, when the "determining factors saturate the whole", we speak not of powerlessness but of enslavement.[123] In such situations of domination, power has become so consolidated that there are no significant options left for the subject to act. In such cases of domination, both sides are paralyzed as "stable mechanisms replace the free play" of agonistic struggle and there are no (viable) options left for escape or strategies of resistance.[124] Domination entails the blocking of a field of power relations, "immobilizing them and preventing any reversibility of movement"[125] and it is domination – not power – that must be resisted.

If we see power in this manner, then freedom becomes a precondition for power relations and power can only exist so long as some measure of freedom remains. Freedom is not some type

[119] Foucault, 'The Subject and Power,' 789, emphasis added.
[120] Foucault, 'The Subject and Power,' 790.
[121] In 'Politics and Ethics: An Interview' in *The Foucault Reader*, ed. Paul Rabinow (New York: Pantheon Books, 1984), 379, Foucault explains his view that "it is perhaps a critical idea to maintain at all times: to ask oneself what proportion of nonconsensuality is implied in such a power relation, and whether that degree of nonconsensuality is necessary or not, and then one may question every power relation to that extent. The farthest I would go is to say that perhaps one must not be for consensuality, but one must be against nonconsensuality."
[122] Foucault, 'The Subject and Power,' 789.
[123] Foucault, 'The Subject and Power,' 790. Foucault distinguishes relations of power – which always entail some choice in action – from physical relations of constraint "when man is in chains." However, we must be careful that such a distinction does not mask the creative forms of resistance that those held as slaves have engaged in, see for example Aspha Bijnaar, Karin Lurvink and Katharina J. Joosen, 'Reframing Criminalized Resistance Strategies of Female Slaves in the Dutch Caribbean and Suriname during the Era of Colonialism,' in *Caribbean Crime and Criminal Justice: Impacts of Post-Colonialism and Gender*, ed. Katharina J. Joosen and Corin Bailey (London: Routledge, 2018), 10-27.
[124] Foucault, 'The Subject and Power,' 790, 794.
[125] Michel Foucault, 'The Ethics of the Concern of the Self as a Practice of Freedom,' trans. P. Aranov and D. McGrawth in *Ethics: Subjectivity and Truth (Essential Works of Foucault, 1954-1984, Vol. 1)*, ed. Paul Rabinow, trans. Robert Hurley and others (London: Alan Lane, The Penguin Press, 1997), 283.

of essential, pure state free from the actions of others but rather denotes "a field of possibilities in which several ways of behaving, several reactions and diverse comportments, may be realized."[126] A free subject is one who recognizes this field of possibilities and engages in a sustained interplay with the relations of power in which it finds itself, inciting, struggling with and questioning these particular power relations. Freedom can best be seen as a practice instead of a state of being or an absence of power and the task is not to "dissolve [relations of power] in the utopia of a perfectly transparent communication, but to give one's self the rules of law, the techniques of management, and also the ethics, the *ethos*, the practice of self, which would allow these games of power to be played with a minimum of domination."[127] If we can find modes of being that allow us to engage with power as "an open-ended strategic game where the [power relation] situation *may be reversed*,"[128] we can practice freedom.

My emphasis on the agonistic view of the political calls attention to the inescapable presence of conflict and the need to participate in this conflict. Ignoring this conflict that is inherent in the political will not make it vanish; to the contrary, he who ignores this aspect risks (political) annihilation.[129] One cannot rely on rationality or reason to replace this need for engaging in conflict and, instead, must become aware of how the labels 'rational' and 'irrational' are weapons in this very conflict. By approaching matters from this point of departure, agonism helps us to be sensitive to how crisis discourse functions in this conflict over meaning. Discourses of crisis are not primarily about rational threat assessment analyses or dispassionate scientific evaluations of risk. By breaking up hegemonic formations and constructing new realities with new constellations of groups belonging to the people and to the other, crisis discourse functions as a speech act that brings into existence new social meaning. It is this aspect of crisis that agonism calls our attention to. Further, such a perspective recognizes that if power, through discourse, constitutes the subject and the people in contingent, non-necessary ways, then achieving 'justice', 'equality' or 'liberty' is not simply a matter of letting the subject live a life of self-realization. The subject must be shaped in ways to promote their participation in political conflict and must deal with questions of how one should one relate to these arbitrary constellations that so effect legal and practical outcomes. We must ask how a judge – who herself is inculcated in and shaped by these discourses – can become aware of and take responsibility for the role conflict over the political plays in her own decisions.

It should be apparent that for the agonist *democracy* is thus more than a sum of institutional arrangements (separation of powers, voting, particular representative organs) or set of

[126] Foucault, 'The Subject and Power,' 790.
[127] Michel Foucault, 'The Ethic of Care for the Self as a Practice of Freedom: An Interview with Michel Foucault on January 20, 1984,' *Philosophy & Social Criticism* 12 (2-3) (1987): 129.
[128] Foucault, 'The Ethics of the Concern of the Self,' 298, emphasis added.
[129] Schmitt, *The Concept of the Political*, 1932 (1996), 53.

principles. Both the institutions and principles of democracy are, from the perspective sketched above, not beyond contestation. Indeed, an agonistic notion of democracy emphasizes the democratic contest going down all the way to include these institutions and principles.[130] For the agonist, democracy is conceived more as a practice of democratization that is animated by a spirit that recognizes that any and all order is temporary and political – not neutral or objective.[131] This spirit requires acceptance of the fact that democracy is never done, never finished, but a process that is constantly in search of itself.[132] The people whose will is expressed in democracy is never complete, never full, and as such – the place of legitimate power itself remains empty. Even in a democracy (especially in a democracy), it remains impossible for anyone or any party or any elected official to truly speak on behalf of the people, as the people itself are constantly in flux and never fully present.[133] Yet, she who nevertheless must attempt to speak on behalf of the people (the lawmaker, the judge) depends on the people as a multitude accepting her as such to establish her as representative of the democratic voice of the people. Thus, the practice of democratization centers on the "incessant debate" about who the people are, who the legitimate voice of the people is and what is legitimate and what is not.[134] In this practice of democratization, it is *the legitimacy of this incessant debate about what is legitimate* instead of the notion of the rule of law or the legitimate exercise of power that grounds a regime.[135] And this debate is one "necessarily without any guarantor and without any end."[136] No one person or group can take the place of the "supreme judge" [137] meaning that, in democracy, "there is no getting away from the need … for the people to decide – on which is the truly general will, whose perspective ought to count … what are the right conditions for their lives, which enduring institutions deserve to endure and which should be dismantled, which would-be leader to follow, whose judgments to take seriously and so on."[138] So long as the debate over such decisions remains possible and the place of people not permanently occupied, the practice and spirit of democracy are present.

Such a view of the political and democracy entails a particular vision on the role of the law. Once one sees political principles and institutions as temporary constellations of hegemonic

[130] Schaap, introduction to *Law and Agonistic Politics*, 1.
[131] Craig Borowiak, 'Disorienting Cosmopolitanism: Democratic Accountability and the Politics of Disruption,' *Constellations* 20 (3) (2013): 379.
[132] Romand Coles, *Beyond Gated Politics* (Minneapolis: University of Minnesota Press, 2005), xi.
[133] Claude Lefort theorized that the difference between a democratic and authoritarian state is precisely whether the people is seen as a complete, self-transparent whole without any internal division. From this perspective, authoritarianism is not the opposite of democracy, but its "pathological form", as it rejects the ambiguity of the people inherent in democracy. See Claude Lefort, *Democracy and Political Theory*, trans. David Macey (Cambridge: Polity Press, 1988), 13 and Bert van Roermund, 'Questioning the Law? On Heteronomy in Public Autonomy,' in *Law and Agonistic Politics*, 122.
[134] See Van Roermund, 'Questioning the Law?,' in *Law and Agonistic Politics* and Schaap, introduction to *Law and Agonistic Politics*, 7.
[135] Lefort, *Democracy and Political Theory*, 39.
[136] Lefort, *Democracy and Political Theory*, 39.
[137] Lefort, *Democracy and Political Theory*, 39.
[138] Honig, *Emergency Politics*, 23.

power, law and rights become instruments and aims of political struggle. From this perspective, law is not (only) a way to create order or ensure justice – but something that constantly creates remainders that challenge and undermine any partially-achieved order.[139] The following chapters flesh out the impact of crisis discourse on judicial decision-making and show that even in times of crisis and emergency (or perhaps especially so) the law holds within it opportunities to engage in political struggle over the hegemonies the law reflects and reinforces. It is an attempt to think through what a post-foundational agonistic politics means for the judge confronted with the need to decide in terrain characterized by a structured undecidability and highlights the judge's responsibility to decide in a way that, while inevitably taking sides in ongoing hegemonic struggles, preserves the never-ending debate about who the people are and who they otherwise could be.

[139] Honig, *Political Theory and the Displacement of Politics*, 15.

CHAPTER III

CRISIS IN THE COURTROOM:
THE DISCURSIVE CONDITIONS OF POSSIBILITY FOR RUPTURES IN LEGAL DISCOURSE[1]

Contemporary approaches to terrorism are characterized by a turn to a logic of precaution.[2] Political actors speak in terms of risk, and political action has become structured by a desire to avoid this risk at any cost.[3] Yet, this is not just a characteristic of political language. This precautionary turn can be seen within legal discourse as well and the judiciary has proven itself intimately involved with this discourse of precaution, using the same logic of prevention that guides political action against terrorism.[4] However, while the judiciary's precautionary approach to terrorism has been evaluated and critiqued for what it means for the rule of law, explanations of *how* this precautionary shift in legal discourse was able to come about are missing from the literature. This chapter aims to fill this gap by exploring the discursive conditions of possibility that gave rise to this shift. I focus on the conditions of possibility that allowed for the break with the previously dominant approach to terrorism, as well as on the crisis discourse that provided discursive justification for the new preventative approach. I argue that the executive and judiciary's use of this crisis discourse (the discursive construction of an existential threat that necessitates a structural change) is what made the precautionary turn possible.

While the events that precipitated this shift occurred more than a decade-and-a-half ago, the insight this chapter offers into crisis discourse is relevant today. The prevalence of crises – and crisis discourses – in the modern risk society has certainly not diminished since 2001, as

[1] This chapter will be published as Laura M. Henderson, 'Crisis in the Courtroom: the Discursive Conditions of Possibility for Ruptures in Legal Discourse,' *Netherlands Journal for Legal Philosophy* (forthcoming).
[2] Rens Van Munster describes this shift as "a move from defense to prevention," see 'The War on Terrorism: When the Exception Becomes the Rule,' *International Journal for the Semiotics of Law* 17 (2) (2004): 142. See further Marieke De Goede, 'The Politics of Preemption and the War on Terror in Europe,' *European Journal of International Relations* 14 (1) (2008): 163-165 and Filip Gelev, 'Checks and Balances of Risk Management: Precautionary Logic and the Judiciary,' *Review of International Studies* 37 (2011): 2237-2252.
[3] De Goede, 'The Politics of Preemption,' 164.
[4] Marieke De Goede and Beatrice De Graaf, 'Sentencing Risk: Temporality and Precaution in Terrorism Trials,' *International Political Sociology* 7 (3) (2013): 328.

the global financial crisis[5] and the refugee crisis have shown. By returning to a number of well-known terrorism cases, I call on the reader to look again at these cases and to look for the discursive mechanisms of crisis. This analysis also provides a new way of viewing shifts in legal discourse in general. No longer does the discussion merely focus on whether such a shift like the precautionary turn was a threat to the rule of law or, alternatively, a rational response to the threat of terrorism. Instead, shifts in legal discourse can be seen as the result of struggle and contest, a process that can be actively interfered with and engaged in once one is aware of the discursive parameters. Such a perspective empowers – and perhaps requires – those who come into contact with this discourse to decide how they wish to participate in this struggle.

In order to address the issues set out above, the chapter will proceed as follows. First, I will discuss the precautionary turn in the judiciary's legal discourse. Drawing on studies of the judiciary in North America, Western Europe, and Australia, this Section will show that the shift toward precautionary logic was not just a political shift, but one that took place in legal discourse as well.[6] Further, this Section will show that although the studies conducted on precautionary discourse in the legal realm are convincing, they lack sufficient exploration of how this shift was able to come about. In Section 2 I address this lacuna, focusing on how the conditions for possibility for this shift came about. I introduce Laclau and Mouffe's notion of *dislocation,* a concept that has been under-theorized and under-operationalized.[7] I argue that the events of 9/11 were unable to be incorporated in the existing discursive structure at the time, leading to a 'discursive void' after 9/11.[8] Next, in Section 3, I explore how this void was filled by a new discourse, the discourse of crisis. This crisis discourse engaged in a "double articulation."[9] First, it called into being a rupture with the past and, subsequently, it articulated a 'new era' that was characterized by preventive action against terrorism. This crisis discourse framed the events of 9/11 in such a way that preventive action became the only seemingly logical solution to the constructed problem of international terrorism. Importantly, I show not only that this discourse was adopted by the executive in its public speeches, but also by the judiciary in the courtroom (Section 4). Here, I argue that another look at a number of the key cases exhibiting precautionary logic in legal discourse can reveal how crisis discourse was used by the judiciary in a way that made the shift toward precautionary logic possible. In this way, it can be said that crisis discourse provided the necessary discursive conditions for the precautionary turn in legal discourse. Finally, Section

[5] Alon Lischinsky, 'In Times of Crisis: A Corpus Approach to the Construction of the Global Financial Crisis in Annual Reports,' *Critical Discourse Studies* 8 (3) (2011): 153-168.
[6] This article characterizes discourse as 'legal' when a discourse is employed by actors dealing with questions of interpretation of legal norms and rules.
[7] For a rare example of operationalization, see Chris Methmann, 'The Sky is the Limit: Global Warming as Global Governmentality,' *European Journal of International Relations* 19 (1) (2013): 69-91.
[8] I borrow the term 'discursive void' from Jack Holland, see 'From September 11th, 2001 to 9-11: From Void to Crisis,' *International Political Sociology* 3 (3) (2009): 275-292.
[9] Jack Holland and Lee Jarvis, '"Night Fell on a Different World": Experiencing, Constructing and Remembering 9/11,' *Critical Studies on Terrorism* 7 (2) (2014): 17.

5 concludes that an understanding of the mechanisms of crisis discourse is a necessary starting point for further research on the normative implications of this type of speech as well as for further theorization on the role of the judiciary in times of (discursive) crises.

1. The Precautionary Turn in Legal Discourse

After 11 September 2001, the starting point for approaches to national security became "prevention rather than defense against actual threat."[10] A "discourse on eventualities" emerged in the US that called for a "permanent military policing through the mechanisms of prevention and pre-emption."[11] Although it might be assumed that the judiciary would remain immune to such changes in political discourse, a number of studies on the role of the judiciary in reviewing counter-terrorism measures indicate that this "fundamental change"[12] in approaches to terrorism also occurred in the legal discourse used by the judiciary. In the years since 9/11, an "alternative, military-based approach [to terrorism], rooted in the language and logic of a global armed conflict against al Qaeda and associated terrorist organizations"[13] has become an institutionalized and normalized part of *legal* practice and *legal* discourse. This has been shown to be the case not only in the US, but broadly throughout courts in the West. Studies of judiciaries in the US, and also in Canada, Australia and the Netherlands, confirm this trend.[14] "While courts have resisted some aspects of this new paradigm, they have not, for the most part, challenged its underlying premise that holding terrorism suspects outside the criminal justice system is a legitimate exercise of wartime power."[15] Judicial review may give "the appearance of scrutinizing acts of parliament or executive actions" but nevertheless upholds "their validity using the logic of precaution."[16] "The judiciary adopts the logic of precaution in exactly the same way as the other two branches of government."[17] Instead of acting as a counter-weight toward the precautionary shift in politics and law, "courts are central to the precautionary risk rationality of government."[18] The previously dominant legal way of approaching counter-terrorism – namely by prosecuting acts already carried out[19] – was replaced with a different, *precautionary*, approach.[20]

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[10] Van Munster, 'The War on Terrorism,' 146.
[11] Van Munster, 'The War on Terrorism,' 142.
[12] Van Munster, 'The War on Terrorism,' 146.
[13] Jonathan Hafetz, 'Military Detention in the "War on Terrorism": Normalizing the Exceptional after 9/11,' *Columbia Law Review Sidebar* 112 (2012): 31.
[14] See Hafetz, 'Military Detention in the "War on Terrorism",' Gelev, 'Checks and Balances of Risk Management,' and De Goede and De Graaf, 'Sentencing Risk,' respectively.
[15] Hafetz, 'Military Detention in the "War on Terrorism",' 37.
[16] Gelev, 'Checks and Balances of Risk Management,' 2239.
[17] Gelev, 'Checks and Balances of Risk Management,' 2241.
[18] Gelev, 'Checks and Balances of Risk Management,' 2240.
[19] Douglas Feith, 'Council on Foreign Relations: Progress in the Global War on Terrorism,' Washington DC, November 13, 2003.
[20] The precautionary approach and the precautionary (legal) discourse that supported it are not unique to the post-9/11 context, although the approach and discourse discussed here are limited to that context. Precaution is intimately related to risk; the sooner a measure addresses a potential risk and the more-strictly it limits the assumed cause of the risk, the more precautionary the measure is, see J.B. Wiener and M.D. Rogers, 'Comparing

The new approach to counter-terrorism affected many areas of legal discourse, including both administrative and criminal law.[21] The effect of the precautionary turn is not only the increase in preventive administrative measures but also a change in criminal law itself, "in order to enable the prosecution of potential future terrorists. This has taken place most notably through the criminalization of ancillary offenses, such as facilitation, training, financing, or incitement."[22] Marieke de Goede and Beatrice de Graaf wish to impress upon their audience that these changes must not be viewed as enacting "a space *beyond* the law." Instead, they argue that "through these changes, notions of risk and future threat are interpellated into legal practice, and behaviors increasingly removed from the act of violence are brought within the remit of criminal law."[23] These authors conclude that the infusion of precautionary reasoning into the criminal law itself, leads to "legalized" exceptional measures.[24]

Evidence of a precautionary turn in legal discourse after 11 September 2001 can be found in both administrative law and criminal law, both in the US and in other Western judiciaries. Yet, no detailed explanation for *how* this precautionary turn was precipitated is offered. Each study dealt with above addresses this issue merely briefly. While Jonathan Hafetz speaks of the "language and logic of a global armed conflict"[25] playing a role in justifying this shift, he does not further explain what this role is. De Goede and De Graaf touch upon the interaction between law and politics, noting that the precautionary turn "can be related to shifting notions of public and political responsibility" and processes and cycles of secondary risk management,[26] but do not make clear what the connecting and mediating factor is between these changing notions of risk management in the social realm and in legal discourse. Finally, Filip Gelev attributes the judiciary's use of a logic of risk to the influence of the "politics of fear"[27] but fails to explicate how this influence is exacted. The remainder of this chapter seeks to further understand how the precautionary turn was made possible by using a theory of discursive dislocation and rupture and connecting this to a crisis discourse that emerged after 11 September 2001.

Precaution in the United States and Europe,' *Journal of Risk Research* 5 (4) (2002): 320. Moreover, precautionary discourses have been described as politicizing decisions about risk, see Steven Bernstein, 'Liberal Environmentalism and Global Governance,' *Global Environmental Politics* 2 (3) (2002): 12. In general, the precautionary approach can be described as a shift from assuming something is safe until it is demonstrated to be risky to assuming something is potentially dangerous until it is demonstrated safe, see Steve Maguire and Jaye Ellis, 'The Precautionary Principle and Risk Communication,' in *Handbook of Risk and Crisis Communication*, ed. Robert L. Heath and H. Dan O'Hair (Routledge: New York, 2009), 125.

[21] Hafetz, 'Military Detention in the "War on Terrorism",' 42 and De Goede and De Graaf, 'Sentencing Risk,' 314.

[22] De Goede and De Graaf, 'Sentencing Risk,' 315.

[23] De Goede and De Graaf, 'Sentencing Risk,' 315.

[24] De Goede and De Graaf, 'Sentencing Risk,' 315.

[25] Hafetz, 'Military Detention in the "War on Terrorism",' 31.

[26] De Goede and De Graaf, 'Sentencing Risk,' 327.

[27] Gelev, 'Checks and of Risk Management,' 2242.

2. Discursive Dislocations

In this Section I argue that the precautionary turn in legal discourse can be best understood with the concepts of lack and discursive dislocation that Ernesto Laclau and Chantal Mouffe have pioneered. After a brief introduction into Laclau and Mouffe's general theory of social meaning, I will proceed to elaborate on these concepts. In the next Section, I operationalize these concepts by linking them to the discursive experience after 9/11 and in Section 4 I discuss how previously dislocated discourses were finally ruptured by crisis discourse used in legal reasoning.

Laclau and Mouffe have developed a post-foundational theory of meaning that starts from the notion that social meaning is a product of discursive construction. While Laclau and Mouffe recognize a "real" world outside of discursive construction, they contend that humans' ability to perceive that "real" world is always mediated by discourse:

> The fact that every object is constituted as an object of discourse has nothing to do with whether there is a world external to thought … An earthquake or the falling of a brick is an event that certainly exists, in the sense that it occurs here and now, independently of my will. But whether their specificity as objects is constructed in terms of 'natural phenomena' or 'expression of the wrath of God', depends upon the structuring of the discursive field.[28]

For Laclau and Mouffe, our conception of reality is created through discursive struggle. Because discourse is that which produces meaning, all identities, social practices and social meaning are radically contingent upon the particular power relations that go into supporting various discourses that manage to gain enough prominence and credibility to order social, religious, political and economic life. There is no 'inevitable' or 'essential' meaning of social reality and, importantly, discourse can only temporarily and partially describe reality.[29] Often, this fundamental inability to capture the (nonexistent) essential meaning of social reality is masked by discursive structures that purport to represent an essential meaning. Yet, at times, discursive structures no longer succeed in masking social contingency, revealing the inevitable incompleteness of discourse. It is these times, when contingency is made visible, that we speak of a dislocation.[30] The temporary and partial nature of discourse is revealed through an experience of the "failure of 'structural conditions' to continue to interpellate subjects."[31] The previously existing discourse that constituted social meanings and identities

[28] Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (New York: Verso, 1985 (2014)), 94.
[29] See further Chris Methmann and Delf Rothe, 'Politics for the Day After Tomorrow: The Logic of Apocalypse in Global Climate Politics,' *Security Dialogue* 43 (4) (2012): 326.
[30] David Howarth and Yannis Stavrakakis, 'Introducing Discourse Theory and Political Analysis,' in *Discourse Theory and Political Analysis: Identities, Hegemonies and Social Change*, ed. David Howarth, Aletta J. Norval and Yannis Stavrakakis (Manchester: Manchester University Press, 2000), 13.
[31] Aletta Norval, *Deconstructing Apartheid Discourse* (London: Verso, 1996), 13, 26.

is revealed as incomplete. Thus, for example, when inflation and unemployment simultaneously occurred in the early 1970s, the then-hegemonic Keynesian discourse that proclaimed such 'stagflation' would never occur was unable to incorporate this event. The experience of that which was excluded from the realm of possibility led to a dislocation of the Keynesian orthodoxy.[32]

Within this view, it must be emphasized that it is not the dislocation itself that makes the previous discourse incomplete. Rather, this is attributed to the fact that discourses can never fully succeed in constituting the social. There is always emptiness, or a lack, that remains unconstituted. It is this lack that becomes apparent again in dislocation; indeed, it is this lack that makes dislocation possible. "Dislocation is not just an empirical imperfection, but designates the impossibility of closure."[33] Dislocations are, as it were, the result of this lack becoming visible. A lack can become visible when the "constitutive outside"[34] of a discourse disrupts the discursive structure. Here, the constitutive outside can be seen as that which was excluded as a necessary condition for forming the discourse, and when it reveals itself as present, it reveals the impossibility of the fullness of the now-dislocated discursive structure. This "literally induces an identity crisis for the subject," as the previously existing identities and social meanings are no longer possible. The dislocated discourse can no longer "fulfill its function of interpellating subjects into stable, 'normalized' forms of identification."[35] At the same time, dislocations are "the foundation on which new identities are constituted."[36] After the previous discourse is dislocated and the lack is made visible, one of two things can happen. Either the dislocated discourse is able to recover and reconstitute itself as a mask for the lack, or the dislocated discourse will not recover and will experience a definitive *rupture*, and will be replaced by an alternative discourse that succeeds in filling the void. This new discourse must successfully rearticulate the social in a fictitiously complete way, so as to mask the lack that is ever-present.

Let us now attempt to operationalize the concepts of *lack* and *dislocation* by use of the discursive structures that were in play after 9/11. My argument will be developed as follows: immediately after 9/11, a dislocation occurred as the events of 9/11 revealed a lack. The attacks on US territory were initially inexplicable. There were no words, no current discourse, to explain or understand these events. The attacks had shown that the previous discourses were unable to fully incorporate all of reality and the lack had become apparent. Evidence of this dislocation can be found in the initial silence from media and politicians as well as in interviews immediately after the attacks with US residents. This dislocation created room for

[32] Jacob Torfing, *New Theories of Discourse: Laclau, Mouffe and Žižek* (Oxford: Blackwell, 1999), 240.
[33] Urs Staheli, 'Competing Figures of the Limit: Dispersion, Transgression, Antagonism, and Indifference,' in *Laclau: A Critical Reader*, ed. Simon Critchley and Oliver Marchart (New York: Routledge, 2004), 238.
[34] Henry Staten, *Wittgenstein and Derrida* (Oxford: Basil Blackwell, 1985), 16, 23.
[35] Norval, *Deconstructing Apartheid Discourse*, 27.
[36] Ernesto Laclau, *New Reflections on the Revolution of Our Time* (New York: Verso, 1990), 39.

a new discourse and quickly, but not immediately, a discourse emerged that would end up once again covering the lack revealed by the events on 9/11. Section 3 will show this discourse was one of international terrorist threat and the need for prevention over prosecution of terrorist activity. Section 4 will show that these discursive elements were present in legal discourse as well and were the key justification for the precautionary turn therein.

A Lack Revealed; A Discourse Dislocated

Immediately after the events of 9/11, a feeling of confusion and disorientation prevailed, "as language failed to adequately or consistently regulate the meaning of the unfolding events."[37] The very first response of the Bush administration, on the evening of September 11th, was lacking the decisiveness and unity of later executive discourse and was "little more than 'a doughy pudding of stale metaphors' lacking the moral clarity of subsequent speeches."[38] Individuals also showed an initial inability to attribute any meaning to these events. Based on interviews conducted directly after the events of 9/11, Jack Holland concludes that the events of that day were "unable to be incorporated into existing discourses."[39] These are the symptoms of a lack (or void in Holland's terms) being revealed. Existing discourses failed to adequately explain or give meaning to the events of 9/11.[40] As this lack was revealed, previous security discourses were dislocated, as they were unable to incorporate the events of 9/11 within their structure of meaning. The discursive dislocation that 9/11 precipitated, this 'void in meaning' that was revealed as previous security discourses became unable to provide social meaning, acted as a vacuum that needed to be filled.[41]

The way in which this vacuum would be filled was not inevitable. The filling of the gap in meaning was the result of a struggle between different discursive constructions – and different agents employing these discourses – for acceptance by relevant audiences. "Initially unregulated by discourse, the 'events' did not mean anything for certain."[42] To put this in more concrete terms, this is to say that a different discursive response could have been launched, for example one "in which a solution is sought within the *pre-existing and largely unmodified structures of the state regime*, generally in the absence of a crisis narrative."[43] In

[37] Holland, 'From September 11th, 2001 to 9-11,' 275-276.
[38] David Frum, *The Right Man: An Inside Account of the Surprise Presidency of George W. Bush* (London: Weidenfeld and Nicolson, 2003), 127 as cited in Holland and Jarvis, '"Night Fell on a Different World",' 194.
[39] Holland, 'From September 11th, 2001 to 9-11,' 278-279. Holland shows one respondent's difficulty in finding a way to describe his experience of 9/11: "[I]t made it difficult to talk … speaking clearly wasn't really happening at that point, it was very difficult." Another respondent echoed this sentiment: "I felt nothing because I couldn't understand."
[40] Holland, 'From September 11th, 2001 to 9-11,' 276.
[41] Holland, 'From September 11th, 2001 to 9-11,' 289.
[42] Holland, 'From September 11th, 2001 to 9-11,' 283.
[43] Colin Hay, 'Crisis and the Structural Transformation of the State: Interrogating the Process of Change,' *The British Journal of Politics & International Relations* 1 (3) (1999): 329.

such a case, the dislocated discourse would have been 'patched up' and repaired; modified and reformed, but not definitively ruptured. In that case, the new precautionary discourse would not have gained traction. But this is not what happened. Instead, as the following Section will address, a crisis narrative emerged and was successfully deployed by actors within the executive and media,[44] and – as we will see – the judiciary as well, and the previous discourse on terrorism and international security was not just dislocated but ruptured. The rupturing of the old discourse and the imposition of a new trajectory "relied upon the success of the articulation of the events of 9-11 – as symptomatic of a wider crisis – and on the success of the articulation of the decisive intervention that deemed a War on Terror as urgent."[45] "9-11 *became* a crisis through a process of discursive construction"[46] and in doing so, set the new policies of the War on Terror underway.[47]

3. Crisis in a Post-9/11 World

This Section attempts to shed light on the conditions that made the precautionary shift in legal discourse possible. First, this Section introduces the idea of 'crisis discourse' as a particular type of discourse with a particular effect: the rupturing of already-dislocated discourses. In this Section, I start from the assumption that in order to understand what made the shift in legal discourse possible, one must look *beyond* legal discourse to the general context of post-9/11 discourse.

As sketched above, the immediate response to the events of 9/11 was that of disbelief and an experience that language was not sufficient to describe or understand these happenings. Yet, this response, although immediate, was certainly not long-lived. In the days and weeks that followed the 11 of September 2001, a new discourse was pieced together that attributed meaning to the events of this day. Although the executive's initial response was reflective of the confusion and dislocation that occurred after the events of 9/11, by the time of the President's address to Congress on September 20th, the executive's discourse had become "clear and powerful."[48] This new discourse is described here as a 'crisis discourse' that engaged in a "double articulation,"[49] simultaneously identifying systemic problems as well as "a solution to the morbid, underlying condition they were claimed to represent."[50] The acts of the day were attributed with meaning and, at the same time, a plan of action was articulated.[51] It is this double articulation that makes 'crisis discourse' a particular discursive construction

[44] See generally Stuart Croft, *Culture, Crisis and America's War on Terror* (Cambridge: Cambridge University Press, 2006).
[45] Holland, 'From September 11th, 2001 to 9-11,' 285.
[46] Holland, 'From September 11th, 2001 to 9-11,' 283.
[47] Holland, 'From September 11th, 2001 to 9-11,' 283.
[48] Frum, *The Right Man*, 127 as cited in Holland and Jarvis, '"Night Fell on a Different World",' 194.
[49] Holland and Jarvis, '"Night Fell on a Different World",' 17.
[50] Holland and Jarvis, '"Night Fell on a Different World",' 195.
[51] Holland, 'From September 11th, 2001 to 9-11,' 283.

that, if successful, leads to the final rupturing of dislocated discourses by constructing a threat that demands deep change to existing (discursive) structures. This double articulation is clearly evident in the post-9/11 crisis discourse.[52] The events of the day were framed as evidence of the new, existential threat international terrorism posed to the US and the international community (the problem)[53] and the discourse claimed that this threat could only be dealt with by precautionary means (the solution). Below, I work out each articulation in turn; but first, three qualifications are in order.

Firstly, in what follows, particular attention will be paid to the executive discourse on crisis as an indication of how this discourse functioned after 11 September 2001. This is not to say that the executive was the only relevant actor using this discourse, but rather to highlight the privileged position the executive had in setting the terms of the discourse. The specifics of the situation in the early weeks after 9/11 lent itself to a large role for the executive in determining the fate of the discourse dislocated by the events of 9/11.[54] The initial silence of the media,[55] the failure of political opposition to oppose the administration's discourse,[56] and the administration's successful efforts to delegitimize alternative discourses,[57] contributed to the Bush administration's ability to "quickly assert its narrative as the authoritative one among other possibilities."[58] Secondly, although the following focuses on crisis discourse within the United States, there is evidence that similar mechanisms are also in play in elsewhere. As Marieke de Goede concludes regarding Europe, "European leaders … may have challenged the war in Iraq, but they are themselves vigorously appropriating and developing important aspects of preemptive security, especially those that make 'precautionary logic part of everyday life'."[59] While it is undoubtedly the case that the precise parameters of crisis discourse differ per context, what follows can be seen as a general indication of the arguments the post-9/11 crisis discourse was used to make. Finally, it is important to note that the prevalence of crisis discourse in both official and unofficial speech after 9/11[60] does not mean that resistance was completely absent. In fact, sites of resistance

[52] Holland and Jarvis, '"Night Fell on a Different World",' 195.
[53] This particular framing of the events of 9/11 has of course been challenged on a factual basis (see for more on this Lasse Thomassen, 'De/Reconstructing Terrorism,' review of *Philosophy in a Time of Terror*, ed. Giovanna Borradori, *Theory and Event* 7 (4) (2005). I do not argue here that this threat indeed was new, empirically speaking, but rather simply that the discourse framed it as new.
[54] See Croft, *Culture, Crisis and America's War on Terror* for more on the role of culture as relevant for creating and supporting discourse.
[55] Holland, 'From September 11th, 2001 to 9-11,' 281; Richard Jackson, 'Culture, Identity and Hegemony: Continuity and (the Lack of) Change in US Counterterrorism Policy from Bush to Obama,' *International Politics* 48 (2-3) (2011): 398.
[56] Jackson, 'Culture, Identity and Hegemony,' 398.
[57] Jackson, 'Culture, Identity and Hegemony,' 398.
[58] Jackson, 'Culture, Identity and Hegemony,' 398.
[59] De Goede, 'The Politics of Preemption,' 175, citing Richard V. Ericson, *Crime in an Insecure World* (Cambridge: Polity Press, 2007), 39.
[60] See generally, Holland, 'From September 11th, 2001 to 9-11,' 285; Richard Jackson, *Writing the War on Terrorism: Language, Politics and Counter-Terrorism (New Approaches to Conflict Analysis)* (Manchester: Manchester University Press, 2005), 155; and Croft, *Culture, Crisis and America's War on Terror.*

certainly existed as Colin Wright has for example identified in relation to the "Not in Our Name" movement.[61] Importantly, and as will be discussed in further detail at the end of Section 4, such sites of resistance can also be found within the judiciary itself.[62] Yet, this resistance remained marginal and was quickly sidelined by the crisis discourse that increasingly came to be the accepted story of 9/11.

The first articulation crisis discourse engaged in was the construction of an existential threat. The crisis discourse used by the executive framed the events of 9/11 as a threat not only to the lives of Americans, but also to continued existence of the values of all of the civilized world. The day after September 11th, President Bush declared "the deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror. They were acts of war." He went on to assert that "freedom and democracy" were under attack and that this attack was not just on "our people, but all freedom-loving people everywhere in the world." According to the President, a "monumental struggle of good versus evil" had begun.[63] An opinion article in the New York Times by Secretary of Defense Rumsfeld stated that the President was "rallying the nation for a war against terrorism's attack on our way of life."[64] Rumsfeld described the opponent in this war as "the global network of terrorist organizations and their state sponsors, committed to denying free people the opportunity to live as they choose."[65] In August 2002, Attorney General Ashcroft decried the attacks as an attempt "to disrupt and destroy our system of ordered liberty … The terrorist desires not simply to hurt individual Americans, but to transform America or destroy us if we will not accede to his will."[66] In addition to being existential, this threat was constructed as unending. The Authorization for Use of Military Force granted the president the power to "use all necessary and appropriate force" to "prevent *any* future acts of international terrorism against the United States"[67] and in his address to Congress, President Bush emphasized the seemingly unattainable goal of rooting out and defeating "every terrorist group of global reach."[68] In 2002, Secretary of Defense Rumsfeld reminded his audience of the persisting threat of

[61] Colin Wright, 'Event or Exception?: Disentangling Badiou from Schmitt, or, Towards a Politics of the Void,' *Theory and Event* 11 (2) (2008).
[62] Laura M. Henderson, 'Crisis Discourse: A Catalyst for Legal Change?,' *Queen Mary Law Journal* 5 (1) (2014): 11.
[63] G.W. Bush, 'Remarks by the President in Photo Opportunity with the National Security Team, The Cabinet Room,' 12 September 2001, available at http://avalon.law.yale.edu/sept11/president_054.asp.
[64] Donald Rumsfeld, 'A New Kind of War,' *New York Times,* 27 September 2001, available at http://www.nytimes.com/2001/09/27/opinion/a-new-kind-of-war.html.
[65] Donald Rumsfeld, 'A New Kind of War.'
[66] John Ashcroft, 'Remarks of Attorney General John Ashcroft: Eighth Circuit Judges Conference,' 7 August 2002, available at https://www.justice.gov/archive/ag/speeches/2002/080702eighthcircuitjudgesagremarks.htm.
[67] Public Law 107-40, 18 September 2001, 'Authorization for Use of Military Force,' 115 Stat. 224, available at https://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf, emphasis added.
[68] G.W. Bush, 'Address to a Joint Session of Congress and the American People (As Delivered Before Congress),' 20 September 2001, available at http://avalon.law.yale.edu/sept11/president_025.asp.

terrorism, warning that another attack "will be attempted. The only question is when and by what technique. It could be months, a year, or several years. But it will happen."[69]

The events of 9/11 were discursively constructed as exceptional and demanding of action, thus preparing the way for the second articulation made by the crisis discourse. The exceptional nature of the era was deemed a 'rupture in time.'[70] The problem was presented as one that could not possibly be dealt with by using existing strategies and measures. 9/11 was presented as a fundamental break with previous ways of conceiving of terrorism and security, the "dividing line in the life of" the nation.[71] As Vice President Cheney remarked,

> [T]hings have changed since last Tuesday [September 11th 2001]. The world shifted in some respects … We've been subject to targets of terrorist attacks before, especially overseas with our forces and American personnel overseas, but this time because of what happened in New York and what happened in Washington, it's a qualitatively different set of circumstances.[72]

The crisis discourse maintained that the events of 9/11 shattered previous myths, including "the illusion that the post-Cold War world would be one of extended peace."[73] It succeeded in the "widespread production [of 9/11] as an interruption of 'normal time'"[74] and constructed "'9/11' as a moment of temporal rupture … Juxtaposed against an imaginary and static pre-'9/11' time of individualism, security and peace, this event emerges, simply, as a sudden, unpredictable, bringer of temporal discontinuity."[75] Importantly, this construction of 9/11 as a time of 'dusk' "drew upon the lived experience of the events,"[76] contributing to the credibility of the discourse. In this way, the already-dislocated discourse of punishment instead of precaution was pushed toward the point of rupture.

In this discursive reality, a *new* approach to fighting terrorism was deemed necessary. This is the point at which the executive's crisis discourse engaged in the second of the two

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[69] Donald Rumsfeld, 'Prepared Testimony of U.S. Secretary of Defense Donald H. Rumsfeld before the House and Senate Armed Services Committees regarding Iraq,' 18 September 2002, available at http://www.sscnet.ucla.edu/polisci/faculty/trachtenberg/useur/rumsfeld180902.html.
[70] Richard Jackson, 'The Politics of Threat and Danger: Writing the War on Terrorism,' (paper presented at the British International Studies Association 29th Annual Conference, University of Warwick, 20-22 December 2004): 6.
[71] Holland and Jarvis, '"Night Fell on a Different World",' 194, citing G.W. Bush, 'President George W. Bush Signs 9/11 Commission Bill,' 27 November 2001, available at http://www.911memorial.org/sites/all/files/President%20Bush%20Signs%20911%20Commission%20Bill.pdf.
[72] R.B. Cheney, 'The Vice President Appears on Meet the Press with Tim Russert,' 16 September 2001, available at https://georgewbush-whitehouse.archives.gov/vicepresident/news-speeches/speeches/vp20010916.html, emphasis added.
[73] Donald Rumsfeld, 'Fiscal 2003 Defense Budget Testimony – House Armed Services Committee (transcript),' 6 February 2002, 4, available at http://www.globalsecurity.org/military/library/congress/2002_hr/Rumsfeld.pdf.
[74] Holland and Jarvis, '"Night Fell on a Different World",' 190.
[75] Lee Jarvis, 'Times of Terror: Writing Temporality into the War on Terror,' *Critical Studies on Terrorism* 1 (2) (2008): 250.
[76] Holland and Jarvis, '"Night Fell on a Different World",' 195.

articulations discussed above. After a meaning of threat and rupture had been discursively attributed to the events of 9/11, the discourse proceeded to formulate a *solution* for the threat. After the delegitimation of previous approaches to terrorism, crisis discourse "took the vital step of (re)constructing the attacks, also, as a moment of dawn."[77] This discourse posited that a "genuinely new historical era"[78] had started, bringing with it a new approach to international terrorism and security. No longer would the "old, Cold War doctrines" be sufficient.[79] Rather, 9/11 "demand[s] we think anew and act anew in order to protect our citizens and our values."[80] The discourse ushered in "a new era in which the United States would be focused on fighting and killing terrorists."[81]

As the *prevention* of terrorism was emphasized over the *prosecution* of terrorism suspects, the criminal law approach to terrorism receded and an administrative approach took its place. The validity of this new approach relied, discursively, on the weight given to the need to act speedily to prevent new attacks instead of waiting for them to occur and then prosecuting the perpetrators after the attack. In the words of Attorney General Ashcroft "We must prevent first – we must prosecute second"[82] and, as President Bush emphasized, the United States "must look at security in a new way, because our country is a battlefield in the first war of the 21st century."[83] The administrative approach posited a larger prerogative for the executive in dealing with terrorism than the criminal law approach did: under this new approach, the executive's powers could be used to deal militarily with the terrorist threat, to impose measures designed to reduce potential risk posed by individuals, groups or in particular situations. Moreover, the executive traditionally enjoys more discretion when acting within the purview of administrative law than within criminal law. By claiming that the aim was not to punish perspective terrorists, but merely to contain the risk they posed with administrative measures, the government expected more legal room to maneuver.

This approach, based on prevention, was discursively used to color the 'new era' of the post-9/11-world and the approach this new era demands. The unprecedented uncertainty of the existential threat terrorism supposedly posed was used within this discourse to justify the exceptional and unprecedented response to this threat and the necessity for prevention over

[77] Holland and Jarvis, '"Night Fell on a Different World",' 195.
[78] Jarvis, 'Times of Terror,' 247.
[79] R.B. Cheney, 'Remarks by the Vice President to the Heritage Foundation,' Washington DC, 1 May 2003, available at https://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030501-9.html.
[80] John Ashcroft, 'Statement of John Ashcroft Attorney General of the United States before the Committee on the Judiciary United States Senate concerning Oversight of the Department of Justice,' 25 July 2002, available at https://www.justice.gov/archive/ag/testimony/2002/072502agtestimony.htm.
[81] Holland and Jarvis, '"Night Fell on a Different World",' 195.
[82] John Ashcroft, 'Testimony before the House Committee on the Judiciary,' 24 September 2001, available at https://www.justice.gov/archive/ag/testimony/2001/agcrisisremarks9_24.htm.
[83] G.W. Bush, 'Full Text: George Bush's Speech to the American Enterprise Institute: US President's Address Yesterday Evening on the Future of Iraq,' 27 February 2003, available at https://www.theguardian.com/world/2003/feb/27/usa.iraq2.

prosecution.[84] The success of framing 9/11 as such a fundamental break with the past meant that the already dislocated security narratives became ruptured. "The sense of rupture and crisis" engendered by the 9/11 attacks "opened the necessary discursive space" for the articulation of an alternative approach to terrorism.[85] The crisis discourse that emerged post-9/11 was ubiquitous in executive speech, the media, think tanks,[86] and quickly took hold among the US public, as shown by the interviews Holland analyzed. Holland concluded, "if on September 11th the events of the day were relatively meaning-less, in the days that followed, the meaning of 9-11 was increasingly homogenous and hegemonic."[87] According to Richard Jackson, who examined over 300 pages of executive speeches, there were "virtually no instances of deviation from the primary narratives; the words used were almost identical, the grammatical structures the same and the meanings remained constant."[88] Jackson explains how such strong coherence reinforced the believability of the narrative and increased the influence among its audience.[89] This did not mean that all dissent was absent, but that overall 'crisis' was becoming the prevailing lens through which to view the events of that Tuesday morning in 2001. Importantly, it was this crisis discourse that provided the conditions of possibility for the judiciary's participation in the post-9/11 precautionary turn. As the next Section shows, the crisis discourse that emerged in political and cultural spaces after 9/11did not stop at the door to the courtroom and was exhibited in legal discourse as well.

4. Crisis in the Courtroom

This Section will consider crisis discourse as it appears in a number of terrorism cases. I propose another look at cases where the shift toward precautionary logic in the judiciary is particularly evident, in light of the dislocation after 9/11 and the rupturing effects of crisis discourse described in the previous Sections. The cases I will deal with below, *Hamdi*, *Suresh*, and *Barot*, are cases used by Hafetz, Gelev and De Goede & De Graaf, respectively, to show that the precautionary shift has taken place in the judiciary. My analysis of these cases takes our understanding of this shift a step further as I show how these cases also provide insight into *how* this logic entered into judicial discourse by highlighting the role of crisis discourse in articulating a threat of terrorism and positing need for exceptional solutions.

After the events of 9/11 had exposed the inability of previous discourses to fully describe all social reality (thus uncovering the inevitable *lack* or gap between discourse and human experience), the discourse of a purely criminal law approach to terrorism was dislocated. The

[84] Jarvis, 'Times of Terror,' 251.
[85] Jackson, 'Culture, Identity and Hegemony,' 397.
[86] Croft, *Culture, Crisis and America's War on Terror.*
[87] Holland, 'From September 11th, 2001 to 9-11,' 285.
[88] Jackson, *Writing the War on Terrorism*, 154.
[89] Jackson, *Writing the War on Terrorism*, 155.

crisis discourse that subsequently emerged in the political sphere worked to finally rupture this weakened discourse and replace it with one of prevention. In this Section, we will see that crisis discourse not only ruptured the discourse of a criminal law approach to terrorism in the *political* sphere, but also had this effect in the *legal* judgments inspected here. The double articulation crisis discourse engaged in – the articulation of the existential threat of terrorism and the articulation of preventive action as the only solution to this threat – ruptured the already-dislocated criminal law discourse by providing the legitimation and the perceived necessity of the precautionary approach. In this way, in the courtroom as well as in the political debate, crisis discourse ruptured the previous discourse of criminal law, subsequently piecing together a new discourse based on the existential threat of terrorism and the necessity of preventive measures.

The US Supreme Court's decision in the *Hamdi* case is exemplary of how the crisis discourse used by the executive created the conditions of possibility for the precautionary turn in the law. In this case, the Court considered whether the preventive, administrative detention of Mr. Hamdi had been legally authorized and whether it complied with the constitutional right to due process. The Court in *Hamdi* began its ruling on the case with a candid admission of the "difficult time in our Nation's history" in which the case took place.[90] The following paragraph spelled out the context in more detail, referring to the "acts of treacherous violence" committed by the perpetrators of the 9/11 attacks.[91] The problem discursively constructed by the Court specifically related to the "armed conflict"[92] the US was engaged in, which was connected to a threat from persons closely related to those who planned the attacks of 9/11, and a concern with preventing such individuals from engaging in the international conflict that had been ongoing since those attacks.[93] The Court found the preventive, administrative detention of such individuals to be "clearly and unmistakably" an instance of "necessary and appropriate force."[94] The threat posed by these individuals was found to make it necessary to preventively detain these individuals; not as *punishment* but as *prevention* of future risks. It is interesting to note that while the Court was deciding on what procedural protections apply to these detainees, it acknowledged the importance of protection of the right to liberty but nevertheless held that in this context of "international conflict" the "full protections that accompany challenges to detentions in other settings" need not apply.[95] The Court authorized the "tailoring" of legal proceedings "to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."[96] In this way, individuals who were preventively detained fell outside a criminal law detention regime and did not receive the protections (criminal) detainees received. Instead, an ad-hoc, administrative law regime

[90] Supreme Court of the United States, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), slip op., 1.
[91] Supreme Court of the United States, *Hamdi v. Rumsfeld*, 2.
[92] Supreme Court of the United States, *Hamdi v. Rumsfeld*, 9.
[93] Supreme Court of the United States, *Hamdi v. Rumsfeld*, 9, 23.
[94] Supreme Court of the United States, *Hamdi v. Rumsfeld*, 12.
[95] Supreme Court of the United States, *Hamdi v. Rumsfeld*, 28.
[96] Supreme Court of the United States, *Hamdi v. Rumsfeld*, 27.

was created and, by adopting this approach, the Court sanctioned a preventive mode of counter-terrorism. The government was found able to detain an individual based on the risk of future damage and *before* that individual had committed any crime.

In *Suresh*, at issue was whether the Canadian Charter of Rights and Freedoms would allow the deportation of a refugee who posed a threat to Canada to a country where the refugee faced a risk of torture. The Supreme Court of Canada decided that there could be 'exceptional' cases in which such deportation could be justified.[97] As Gelev pointed out, "the judiciary showed a real willingness to assist the executive in its fight against terrorism through precautionary justice."[98] In *Suresh*, the judges employed crisis discourse to articulate a problem and solution that matched the problem and solution formulated in the broader political use of crisis discourse. First, the judiciary pointed to the existence of the threat posed by terrorism, acknowledging the presence of: "the manifest evil of terrorism and the random and arbitrary taking of innocent lives, rippling out in an ever-widening spiral of loss and fear", [99] which was, according to the Supreme Court of Canada, "a worldwide phenomenon."[100] According to the Court, "after the year 2001" the old approach to this threat (assuming that terrorism in one country does not affect other countries) was "no longer valid."[101] The Court continued to suggest a solution to this problem: "preventive or precautionary state action may be justified; not only an immediate threat but also possible future risks must be considered."[102] It is this articulation of problem and solution, in line with crisis discourse as described above, that provided the justification for the Court's decision to allow the possibility to depart from normal rules in order to prevent terrorism.

Crisis discourse was also used by the UK Court of Appeals in *Barot*. In this case, the Court dealt with Mr. Barot's conviction of conspiracy to murder, related to Mr. Barot's preparations of a terrorist attack. The Court had to decide whether imposing a sentence of indeterminate length, with a minimum of 40 years imprisonment but no maximum, was excessive. In this case as well, the Court used crisis discourse. The Court articulated the problem certain terrorists pose as serious and potentially unending:

> A terrorist who is in the grip of idealistic extremism to the extent that, over a prolonged period, he has been plotting to commit murder of innocent citizens is likely to pose a serious risk for an indefinite period if he is not confined.[103]

[97] Supreme Court of Canada, *Suresh v. Canada*, 2002 SCC 1, para. 129.
[98] Gelev, 'Checks and Balances of Risk Management,' 2251.
[99] Supreme Court of Canada, *Suresh v. Canada*, para. 3.
[100] Supreme Court of Canada, *Suresh v. Canada*, para. 88.
[101] Supreme Court of Canada, *Suresh v. Canada*, para. 87.
[102] Supreme Court of Canada, *Suresh v. Canada*, para. 88.
[103] UK Court of Appeal, Criminal Division, *Regina v. Barot* [2007] EWCA Crim 1119, para. 37.

More generally, the Court also discussed the overall threat posed by terrorism as "rampant in the world" and expressed concern about "many other terrorist plots," referring to the "carnage" terrorists are bent on committing.[104] The Court further noted that the House of Lords had recently decided a case in which it found "the terrorist threat represented 'a pubic emergency threatening the life of the nation'."[105]

Similar to *Suresh*, the UK Court of Appeal in *Barot* qualified this problem as "different in degree"[106] to that posed by earlier episodes of terrorism in the United Kingdom. The Court found that "terrorist offences today are capable of being more serious [than those dealt with previously] … This case demonstrates the search by the terrorists for a means of causing death on an even greater scale than results from the destruction of a passenger plane and the events of 9/11 show that this can be achieved."[107] These considerations led the Court to conclude that previous guidelines for sentencing must be reconsidered[108] and held that an indeterminate sentence can be an appropriate sentence.[109] We see that, here too, the Court used crisis discourse to articulate a threat of terrorist attacks that demanded exceptional, preventive measures, thus making the precautionary turn.

These three cases provide an illustration of crisis discourse at work in the judiciary's legal discourse. I have attempted to build on previous analyses of these cases, which highlighted the presence of precautionary logic in the judiciary's discourse. What my analysis adds is a focus on how crisis discourse and its particular articulations of problem and solution provide the conditions of possibility for the judiciary's adoption of the post-9/11 precautionary logic of counter-terrorism in its judgments. By showing crisis discourse at work in these cases, an indication is given of how crisis discourse is able to construct *legal* problems and, subsequently, provide *legal* solutions. At the same time, this analysis suggests that a better understanding within the judiciary of the mechanisms of crisis discourse and the assumptions it relies on would have positioned the judiciary to interrogate these assumptions more rigorously. The majority decisions in these cases show evidence of judges adopting crisis discourse and building upon its assumptions without an extensive examination of or defense of their validity.

It is important to note that the adoption of crisis discourse by the judiciary in these cases, and the precautionary shift this discourse was used to justify, were not inevitable. They were the product of "decisive interventions"[110] by the executive and other actors at a time when previous discourses were unsettled and vulnerable. Even after the emergence of the crisis

[104] UK Court of Appeal, *Regina v. Barot*, para. 42.
[105] UK Court of Appeal, *Regina v. Barot,* para. 55.
[106] UK Court of Appeal, *Regina v. Barot*, para. 54.
[107] UK Court of Appeal, *Regina v. Barot*, para. 55.
[108] UK Court of Appeal, *Regina v. Barot*, para. 55.
[109] UK Court of Appeal, *Regina v. Barot*, para. 37.
[110] Hay, 'Crisis and the Structural Transformation of the State,' 323.

discourse, the possibility of closing the dislocation and preventing a rupture in the previous discourses on terrorism was still a possibility. This is evidenced particularly convincingly in the court of first instance's ruling on *Hamdi*, in which the presiding Judge Doumar resisted the framing of the crisis by the government, even in the face of orders from the Appellate Court to show more deference to the executive. Judge Doumar challenged the government's claim that this case was being heard at a time of war,[111] pointed to the threat involved in the government's undermining of constitutional protections[112] and reframed the appeal to the exceptional nature of the case at hand to relate to the government's extraordinary detention of Mr. Hamdi.[113] In the end, however, Judge Doumar's refusal to adhere to the crisis discourse was met with the threat of a clash between the executive and the judiciary – with the executive refusing to comply with Judge Doumar's order to provide Mr. Hamdi access to an attorney. Judge Doumar accepted that since he was not prepared to "throw[…] the Secretary of Defense in jail,"[114] he had to allow the government to proceed with appeal instead of enforcing his order. On appeal, the crisis discourse and the precautionary approach to counter-terrorism it discursively justified prevailed. While this is just one example of how resistance to crisis discourse and the shift toward precautionary measures was both possible and, at the same time, met with powerful opposition by both the executive and the larger judicial organization, it indicates that even the powerfully hegemonic crisis discourse nevertheless left some room for challenge.

5. Conclusion

The emergence of a crisis discourse after the initial dislocation of 9/11 made the precautionary turn in legal discourse possible. This crisis discourse engaged in a double articulation: first, this discourse constructed 9/11 as an existential threat and definitive break with the past that called for new ways of dealing with terrorism. This construction led to the decisive rupture of the dislocated, and thus weakened, pre-9/11 discourses on security. Secondly, this crisis discourse articulated the necessity and appropriateness of preventive approaches to counter-terrorism in this 'new era' of (in)security. Without a post-9/11 crisis discourse, and without the specific double articulation it employed, the shift from criminal-law logic to the precautionary logic that emerged would have been unthinkable.[115]

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[111] United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, Transcript of Proceedings before the Honorable R. G. Doumar (29 May 2002) Joint Appendix I, 2004 WL 1120871 (U.S.), 34.
[112] United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, Order (16 August 2002) Joint Appendix II, 2004 WL 1123351 (U.S.), 9.
[113] United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, Transcript of Proceedings before the Honorable R. G. Doumar (13 August 2002) Joint Appendix I, 2004 WL 1120871 (U.S.), 85.
[114] United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, Transcript of Telephonic Conference before the Honorable Robert G. Doumar (20 August 2002) Joint Appendix II, 2004 WL 1123351 (U.S.), 13-17.
[115] See for more on how discourse fashions the limits of the (un)acceptable, Stuart Hall, 'The Work of Representation,' in *Representation: Cultural Representations and Signifying Practices*, ed. Stuart Hall (London: Sage, 1997), 44: "Just as discourse 'rules in' certain ways of talking about a topic, defining an acceptable and

The mainly descriptive approach I take in this chapter provides a necessary foundation for exploring the normative implications of crisis discourse. By setting out a theoretical and descriptive account of how crisis discourse is able to call particular change into being, this chapter provides a starting point for further research. In order for one to examine the way crisis discourse might affect normative principles, one cannot ignore the specific ways in which and the specific context within which crisis discourse is used. Moreover, while this chapter highlighted crisis discourse's role in facilitating the shift toward a precautionary approach to terrorism, showing how crisis discourse served to discursively justify this shift, it is important to note that crisis discourse's emergence and success was not inevitable. While discourse might create meaning and determine our perception of reality, the success of this discourse depends on its use by specific actors at specific points in time. The insight this chapter gives into crisis discourse's contribution to shifts in legal discourse challenges those engaged in legal discourse to be conscious of their role in either using or contesting crisis discourse in the struggle over legal meaning.

intelligible way to talk, write, or conduct oneself, so also, by definition, it 'rules out', limits and restricts other ways of talking, of conducting ourselves in relation to the topic or constructing knowledge about it."

CHAPTER IV

SPEAKING CRISIS IN THE EUROZONE DEBT CRISIS:
EXPLORING THE POTENTIAL AND LIMITS OF TRANSFORMATIONAL AGONISTIC CONFLICT[1]

At the beginning of the second decade of the 21st century, Europe was in crisis. Greece was no longer able to service its debt, and began to request a series of loans from the International Monetary Fund and European Union. Spain, Portugal, Ireland and Cyprus soon followed.[2] Concerns about weak national economies with high sovereign debt collapsing and bringing the other Eurozone economies down with them were rampant, both in Europe and globally.[3] In 2010 national elections were held in the Netherlands and, only two years later, after the government fell due to discord over austerity measures responding to the Eurozone crisis, another election was held. During both of these elections the concept of crisis loomed large. Political parties on the right and left mobilized a discourse of crisis that constructed specific threats to the political community and that worked to justify the necessity of certain deep changes to legal and political structures to remedy these threats, even going so far as to propose retroactive legislation and stripping certain Dutch citizens of their nationality. This chapter argues that the crisis discourse used by two specific political parties in the Netherlands, the Socialist Party and the Freedom Party, is both an example of agonism at work in political discourse and that this example can help us think through more carefully a

[1] This chapter was published as Laura M. Henderson, 'Speaking Crisis in the Eurozone Debt Crisis: Exploring the Potential and Limits of Transformational Agonistic Conflict,' *International Journal of Political Theory* 2 (1) (2017).

[2] For a good overview of the chronology and legal implications of these early months of the Eurozone debt crisis, see Claire Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?,' *European Constitutional Law Review* 10 (2014): 393-421 and Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts,' *Oxford Journal of Legal Studies* 35 (2015): 325-353.

[3] See for example Virginia Mayo, 'Eurozone Seeks to Stop Debt Crisis Domino Effect,' *CBS News*, 11 July 2011, available at http://www.cbsnews.com/news/eurozone-seeks-to-stop-debt-crisis-domino-effect/; Giles Tremlett, 'Fears Portugal May Be Next to Fall in Debt Crisis,' *The Guardian*, 28 April 2010, available at https://www.theguardian.com/business/2010/apr/28/portugal-debt-fears-mount; and Elena Moya, 'Spain Seeks to Calm Fears it is 'Next Greece' as European Markets Plunge,' *The Guardian*, 5 February 2010, available at https://www.theguardian.com/business/2010/feb/05/spain-bid-calm-turmoil.

key, yet underdeveloped, debate in agonistic theory: whether agonism accepts any limits to political contestation. When does the conflict agonists so value become unacceptable?

Agonists approach politics from the starting point that political systems depend on contingent foundations that produce and sustain relations of power that benefit some while excluding others.[4] Political struggle is seen as legitimately focusing on challenging those foundations, thus including contest over the very principles, procedures and foundations of political life. In this sense, the democratic contest is seen as going "all the way down"[5] to the fundamental principles of a political system. Since agonists reject the possibility of ever eliminating contingency or the influence of power relations on political decision-making,[6] agonistic politics is about the struggle over *which* particular "configuration of power relations around which a given society is structured" gains hegemonic status.[7]

Over the past decade-and-a-half, multiple theories of agonism have appeared, been fleshed out and analyzed. Many scholars have attended to the different streams of agonism,[8] the *ethos* needed for agonism to thrive,[9] and most recently, what agonism means for the institutional structure of democratic political systems.[10] Yet, during this period, the issue of the *limits* to acceptable political activity within an agonistic conception has remained unsatisfactorily conceptualized. If agonist theories promote and value conflict and contestation, argue that legitimate political debate can include dissent over the fundamental values of society and changes of the most basic institutions all while claiming that any given society cannot avoid exclusion and othering – the question becomes whether agonist theory posits any *limits* to this contest? Can *any* values and *any* type of change be legitimately argued for? Are all exclusions to be accepted?

The answers that some agonists have attempted to give to these questions remain unsatisfactory. Chantal Mouffe gives us the most guidance on these questions, arguing that in order for political action to be acceptable, it must take place within a shared symbolic space of equality and liberty. According to Mouffe, once a political actor leaves this symbolic space and no longer accepts the values of equality and liberty, her actions can no longer be considered acceptable from the perspective of agonism and she becomes an enemy.[11] This approach however seems to reveal an underlying reliance on more consensus-oriented

[4] Ed Wingenbach, *Institutionalizing Agonistic Democracy: Post-Foundationalism and Political Liberalism* (New York: Routledge, 2016), 6.
[5] Andrew Schaap, introduction to *Law and Agonistic Politics*, ed. Andrew Schaap (Surrey: Ashgate, 2009), 1.
[6] Chantal Mouffe, *The Democratic Paradox* (London: Verso, 2000), 96-98.
[7] Chantal Mouffe, *On the Political* (London: Routledge, 2005), 21.
[8] See for example Schaap, introduction to *Law and Agonistic Politics,* Wingenbach, *Institutionalizing Agonistic Democracy* and Robert W. Glover, 'Games without Frontiers? Democratic Engagement, Agonistic Pluralism and the Question of Exclusion,' *Philosophy & Social Criticism* 38 (2012): 81-104.
[9] William E. Connolly, *Pluralism* (Durham: Duke University Press, 2005).
[10] Wingenbach, *Institutionalizing Agonistic Democracy.*
[11] Mouffe, *On the Political*, 121.

deliberative democracy – the very strand of thought that agonism aims to critique. After all, if the point agonist scholars are making is that the political is about the contestation of the very foundations of a particular society – how can values such as equality and liberty be placed beyond this space of contestation? Moreover, Mouffe's insistence on shared political values fails to accurately identify the real risk of agonistic conflict: not that values are contested, but that conflict leads to the permanent destruction of the other. While Mouffe's work does recognize the need for agonism to prevent such permanent destruction, the importance of this insight is weakened by Mouffe's attention to other more substantive limits to political conflict.

I argue that a more satisfactory approach to the limits of conflict can be found by attending to how agonism plays out, concretely, in the language political actors use. Attention to political discourse clarifies how agonism works in the everyday business of politics and, by doing so, reveals the concrete implications of an agonistic attitude towards politics, including the risks conflict can entail. This attention to the discourse of agonism as used in actual political practice remedies the shortcomings of agonism's traditional approaches to the limits of acceptable politics in two ways. First, by attending to the actual practice of the political and by seeing language as a site of agonism, we are able to more clearly grasp the risks inherent in agonism and more clearly specify what can be done about these risks. As we move from the abstract level of agonistic theory to the very concrete level of agonistic practice, it becomes apparent what exactly is at stake in agonistic contests. In other words, by taking language seriously, we are able to take the risks of agonism more seriously. Second, in attending to discourse as a tool of agonism, we stay true to agonism's post-foundational commitment to the importance – and contingency – of meaning in the political. It is this contingency of meaning that eventually leads us to a more sufficient conceptualization of the limits of acceptable political activity, thus avoiding Mouffe's proposal that these limits can only be found in consensus-based liberal democratic ideas of a shared commitment to equality and liberty.

The particular type of language use this chapter focuses on is what I call crisis discourse: a narrative that discursively constructs a threat and that frames a fundamental change to the legal, social or political order as the only way to address that threat. In doing so, crisis discourse has the potential to (re-)constitute the friend/enemy distinction in a political community around the constructed threat and act as a catalyst of structural change.[12] These two characteristics of crisis discourse – its ability to call into being a people and call for radical change make crisis discourse a tool of agonistic politics. In this sense, when one 'speaks crisis', something is done. Crisis discourse is often approached as a 'speech act': it does more than simply reflect reality as it already is. Speaking crisis can be seen as a

[12] Laura M. Henderson, 'Crisis Discourse: A Catalyst for Legal Change?,' *Queen Mary Law Journal* 5 (1) (2014).

'performative utterance'[13] that – when successful – brings a reality into existence that was not there before. In this way, my approach to crisis discourse can be reconciled with agonism's post-foundationalism. Within post-foundational theories, language and language games are acknowledged as the means by which humans attribute meaning to the world and by which humans are turned into subjects. It is through discourse that power is exercised and through discourse that power is challenged.[14] This discursive aspect of politics – and of the construction of crises – drives my focus on the specific language used by those invoking crisis discourse. By examining this site of power in a systematic way, as the following Sections will do, we can see more concretely how exclusion takes place in political activity, what its effects are in a particular case and take the risks of this exclusion seriously. Attention for the illocutionary force of crisis discourse will highlight the possibility of viewing the risks of agonistic speech as part of a continuum of risk: while risk cannot be eliminated from political speech, we can analyze political speech as bringing us closer to or further away from the limit between the conflict agonism values and that which it cannot.

In what follows, I will define crisis discourse in more detail and show how it is used in political communication (Section 1). I apply my analysis to the crisis discourse employed in relation to the financial upheaval that has marked the second decade of the 21st century, focusing on the discourse used by two Dutch political parties in relation to what is often termed the 'European sovereign debt crisis'[15]. Section 1 further explores how crisis discourse functions as a tool of agonistic politics as I emphasize crisis discourse's ability to (re)constitute a people and to call for fundamental change. The concrete examples of crisis discourse in Section 1 set the stage for the subsequent exploration of where agonism sets the limits to acceptable political speech in Section 2. Here, I acknowledge the risks attendant in using crisis discourse, risks that agonists seem too often to underestimate and I explore where the limits of using crisis discourse as a political tool lie, by taking language – and the risks – seriously. At the same time, I ensure that I maintain the possibility of perpetual contestation over political values and institutions, an emphasis particularly present in Honig's work on agonism.[16] In the end, I propose viewing the dangers of agonistic speech as part of a continuum of risky illocutions with a clear boundary between the *agonistic* behavior that can be positioned on this continuum and unacceptable behavior that crosses the boundary into *antagonism*: the realm of the destruction of the other.

[13] Bonnie Honig, *Political Theory and the Displacement of Politics* (Ithaca: Cornell University Press, 1993), 84.
[14] Michel Foucault, *'Society Must Be Defended': Lectures at the Collège de France, 1975-1976*, trans. D. Macy (New York: Picador, 2003), 24.
[15] Although I will use the term 'European sovereign debt crisis' for the remainder of this article as a short-hand for the complex set of events and reactions in the Eurozone countries starting in the first half 2008 with concerns about Greek ability to pay off state debt, it must be noted that this label in itself masks the contestation over the existence of a crisis and whether such a crisis has to do with sovereign or private debt, see Mark Blyth, *Austerity: The History of A Dangerous Idea* (Oxford: Oxford University Press, 2013 (2015)), 5-7.
[16] Honig, *Political Theory and the Displacement of Politics*, 3.

IV. Speaking Crisis in the Eurozone Debt Crisis

1. Crisis Discourse as a Tool of Agonistic Politics

Crisis discourse has been impossible to ignore during recent years' developments in financial markets. During the financial crisis that started after the fall of a number of systemic banks in 2007 and 2008, political and economic actors employed crisis discourse that framed these events and attributed causes and responsibilities to certain actors and objects.[17] Different variations of crisis discourse were pervasive in the public speech of international corporations and national political organizations.[18] With his seminal article in 1999,[19] Colin Hay provided a framework for understanding when and how crises can arise, and what effects they have on the state. Although not focusing specifically on the role of discourse, Hay's work provided the basics necessary for later exploration of how crisis discourse can be constructed by political actors.[20] Most recently, crisis discourse has been explored within critical discourse studies.[21]

My concern with crisis discourse as a tool of agonistic politics leads me to focus my analysis on *public* discourse in this chapter. To illustrate the main characteristics of crisis discourse, this Section draws on instances of crisis discourse used by two Dutch political parties during the so-called 'European sovereign debt crisis'. These two political parties, the Socialist Party (*Socialistiche Partij*) and the Freedom Party (*Partij voor de Vrijheid*) are situated at opposite ends of the Dutch political spectrum. The Socialist Party is the most left-leaning party in Dutch parliament, and the Freedom Party the most right-leaning party in Dutch parliament.[22] Based on the realization that crisis discourse can be a tool for structural change, it is a logical assumption that the parties furthest from the political status-quo would be most likely to employ crisis discourse (although this is certainly not to say centrist parties never attempt to change the status quo through crisis discourse). While this chapter focuses on crisis discourse as used in the Netherlands, the speech used by the left-populist Socialist Party and the right-populist Freedom Party echoes that employed by other anti-establishment parties and

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[17] Friederike Schultz and Julia Raupp, 'The Social Construction of Crisis in Government and Corporate Communications: An Inter-Organizational and Inter-Systemic Analysis,' *Public Relations Review* 36 (2010): 112-119.

[18] Schultz and Raupp, 'The Social Construction of Crisis' and Alon Lischinsky, 'In Times of Crisis: A Corpus Approach to the Construction of the Global Financial Crisis in Annual Reports,' *Critical Discourse Studies* 8 (2011): 153-168.

[19] Colin Hay, 'Crisis and the Structural Transformation of the State: Interrogating the Process of Change,' *The British Journal of Politics and International Relations*, 1 (3) (1999): 317-344.

[20] See for example Jack Holland, 'From September 11th, 2001 to 9-11: From Void to Crisis,' *International Political Sociology* 3 (2009): 275-292; Jack Holland and Lee Jarvis, '"Night Fell on a Different World": Experiencing, Constructing and Remembering 9/11,' *Critical Studies on Terrorism* 7 (2014): 187-204; and Arjen Boin, Paul 't Hart, and Allan McConnell, 'Crisis Exploitation: Political and Policy Impacts of Framing Contests,' *Journal of European Public Policy* 16 (1) (2009): 81-106.

[21] See, among others, Lischinsky, 'In Times of Crisis;' Antoon De Rycker and Zuraidah Modh Don, ed., *Discourse and Crisis: Critical Perspectives* (Amsterdam/Philadelphia: John Benjamins, 2013); and Yiannis Mylonas, 'Crisis, Austerity and Opposition in Mainstream Media Discourses of Greece,' *Critical Discourse Studies* 11 (2014): 305-321.

[22] This was, at least, the case in the time period studied here.

candidates, on both the left and the right in other Western democracies, for example in France (with *La France insoumise* on the left and the *Front National* on the right) or the United States (with Democratic primary candidate Bernie Sanders on the left and Donald Trump on the right). As will be shown below, a survey of the Socialist Party and Freedom Party's discourse between 2010 and 2014 provides us with an example of the use of crisis discourse during the critical years of the European sovereign debt crisis.

The key characteristic of crisis discourse is its ability to discursively frame events in ways that define a particular problem and postulate a seemingly necessary solution, thus "selectively legitimating certain courses of action."[23] Constructing a moment as crisis requires "a double articulation of the events themselves and of a solution to the morbid, underlying condition they were claimed to represent."[24] In crisis discourse, the first of these articulations diagnoses, naming a problem or threat, the latter proposes a specific change necessary to solve of this problem.

Framing the Threat of Crisis

In its framing of the problem, crisis discourse creates an urgent threat that is posed by a 'them' to an 'us'.[25] The problem is attributed to a group that is constructed as being opposed to the 'us', the group who is unduly threatened by the problem. If the crisis is to be taken seriously, and if the solution is to be justified, the threat must be construed as an existential threat: a threat to the physical survival of an individual or group or a threat to the survival of the individual or group's identity.

Crisis discourse's framing of the problem as a threat to a current way of life can be seen in the language used by both the Socialist Party and the Freedom Party regarding how they perceived the threat posed by the Eurozone crisis, although it is clear that the parties differ in their definition of this threat. The Socialist Party's use of crisis discourse focused specifically on the economic causes and effects of recession and budget cuts, and placed the blame squarely on the financial sector and the politicians who facilitate it:

[23] Lischinsky, 'In Times of Crisis,' 155.
[24] Holland and Jarvis, '"Night Fell on a Different World",' 17. This insight into discourse's ability to define problem and solution stems originally from Benford and Snow's frame analysis, which distinguishes diagnostic from prognostic frames, see Robert D. Benford and David A. Snow, 'Framing Processes and Social Movements: An Overview and Assessment,' *Annual Review of Sociology* 26 (2000): 611-639.
[25] Ruth Wodak and Jo Angouri, 'From Grexit to Grecovery: Euro/crisis Discourses,' *Discourse and Society* 25 (2014): 418.

> The Netherlands is at a crossroads. Our economy is in a recession that threatens to deepen into a great crisis. A crisis with lost jobs, lower wages and threats to our pensions. A crisis with great social consequences. One that undermines solidarity, shared destinies and confidence in the future. This is not a natural disaster that just happened to us. It is the consequence of a derailed financial sector. A consequence of a system that favors the short term interests of shareholders and consumers above the long term interests of citizens, employees and our society as a whole.[26]

> Serving the bill of the crisis to those who had no part in the cause of the crisis, causes more crisis. Not less. [This is] an approach that ensures that thousands of people are sitting at home unemployed and that smothers the recovery of the economy. That is a costly lesson history has taught us before. A lesson this cabinet has forgotten.[27]

In constructing this threat, the crisis discourse used by the Socialist Party presupposed an 'us', a 'people', who is being threatened by a 'them', the most-rich, bankers and speculators as well as the political parties whose policies allowed for these enemies to have their way:

> In the past years, European leaders have paid more attention to the financial markets than to the needs of the citizens. The Dutch government is participating in that.[28]

> The government … lets the most-rich do whatever they want. And imposes cuts of billions on citizens. … Such austerity politics enlarges the division in society and suffocates economic growth.[29]

In contrast to the Socialist Party's framing of the threat as mainly economic, caused by the financial sector, the Freedom Party constructed a far broader threat. Although the threat of economic crisis was discussed explicitly, often the Freedom Party expanded the crisis to include a threat posed by 'Europe' and immigrants to the Netherlands. So, for example, the Freedom Party discursively linked a threat to the welfare state in the context of the European sovereign debt crisis with immigration from Muslim countries:

> Only the Freedom Party is standing up to protect the welfare state and is therefore in favor of stopping immigration from Islamic countries. You can't have both: either you are a welfare state or an immigration country. All other parties choose the latter.[30]

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[26] Socialistische Partij, 'Samen de Crisis te Lijf' ('Fighting the Crisis Together'), 14 January 2012, available at https://www.sp.nl/opinie/emile-roemer/2012/samen-crisis-te-lijf, author's translation.
[27] Socialistische Partij, 'Samen de Crisis te Lijf,' author's translation.
[28] Socialistische Partij, 'Nieuw Vertrouwen: Verkiezingsprogramma SP 2013-2017' ('New Faith: Election Program Socialist Party 2013-2017'): 7, available at https://www.sp.nl/sites/default/files/sp-verkiezingsprogramma-nieuw-vertrouwen.pdf, author's translation.
[29] Socialistische Partij, 'Nieuw Vertrouwen,' 5, author's translation.
[30] Partij voor de Vrijheid, 'De Agenda van Hoop en Optimisme. Een Tijd om te Kiezen: PVV 2010-2015' ('The Agenda of Hope and Optimism. A Time to Choose: Party for Freedom 2010-2015'), 21, available at https://www.parlement.com/9291000/d/2010_pvv_verkiezingsprogramma.pdf, author's translation.

The Freedom Party claimed that the Dutch state was in a crisis that was the biggest since the introduction of liberal democracy into the Dutch constitution by Thorbecke and linked this, again, to a threat posed by immigration:

> Our democracy is in the biggest crisis since Thorbecke. More and more Dutch people are wondering why The Hague is pushing on with these disastrous measures that are not supported by our people. In the meantime, many have the feeling that we are losing the Netherlands. Neighborhood after neighborhood, school after school is being islamified.[31]

Part of the threat perceived by the Freedom Party during the European sovereign debt crisis was the power the Freedom Party saw the European Union as having over the Netherlands:

> Brussels, keep your hands off our taxes. Never, ever European taxes! We citizens are not here to finance your undemocratic organizations. Look up how the Eighty Year War started (Hint: it started with the *tiende penning*, a tax of the European superstate of those days).[32]

> And why does the Netherlands give seven billion euro to Brussels each year, while our elderly have pajama days and have to pay for their own walker? Did *they* rebuild the Netherlands after the war or did those Greek swindlers?[33]

> Brussels wants to control the Netherlands to the last detail … Bye, bye freedom.[34]

In the Freedom Party's crisis discourse, just like in the Socialist Party's, a clear 'us' is created and juxtaposed against a 'them' that is causing the threat. However, the Freedom Party's 'us' and 'them' are differently composed than the Socialist Party's. For the Freedom Party, the group being threatened by the crisis was ethnically and nationalistically defined: the Dutch, non-Muslim citizen was the 'us' set against the 'them' of the European Union and of Islam.

Framing the Call to Change

The framing of the urgent and existential threat posed by the crisis is linked to the solution the crisis discourse calls for. How this solution is framed is the second unique aspect of crisis discourse. "Defining the solution is fundamental to the construction of crisis."[35] There are two types of solutions that can be proposed to the 'problem' or 'threat' defined in the diagnostic crisis frame: the first is when "a solution is sought within the *pre-existing and largely*

[31] Partij voor de Vrijheid, 'De Agenda van Hoop en Optimisme,' 5, author's translation.
[32] Partij voor de Vrijheid, '*Hún* Brussel, *Óns* Nederland: Verkiezingsprogramma 2012-2017' ('*Their* Brussels, *Our* Netherlands: Election Program 2012-2017'), 21, available at https://www.parlement.com/9291000/d/2010_pvv_verkiezingsprogramma.pdf, author's translation.
[33] Partij voor de Vrijheid, '*Hún* Brussel, *Óns* Nederland,' 11, author's translation.
[34] Partij voor de Vrijheid, '*Hún* Brussel, *Óns* Nederland,' 12, author's translation.
[35] Holland, 'From September 11th, 2001 to 9-11,' 290.

unmodified structures of the state regime, generally in the absence of a crisis narrative."[36] This is to say, when this response is employed, the particular register of 'crisis' is downplayed. Instead, it is argued that the events are not rightly interpreted as crises, but rather as incidental failures that can be dealt with by using the current measures in place. The second type of solution that can be offered is one in which "the very institutional form of the system of reference … is fundamentally transformed." A restructuring of the system is proposed as the necessary solution.[37] It is only when this solution is offered, in addition to the diagnostic frame of a threat that I speak of crisis discourse. Crisis discourse is characterized by a call to take action that breaks with past approaches; action that entails structural change. As Hay argues, "during moments of crisis, indeed, during the very process of crisis identification, the state is discursively reconstituted as an object in need of decisive intervention and as the object of strategic restructuring."[38]

The Socialist Party called very explicitly for structural change in response to the crisis and proposed a shift away from austerity and towards active investment and solidarity. The Socialist Party appealed to the people to take an active part in this moment in history and to decide what type of society they want to live in, thus doing the work of positing the state as in need of the 'decisive intervention' Hay speaks of:

> The way out of this crisis will also not just be something that happens to us, that presents itself naturally … This is not the time to sit on your hands. It is time to roll up your sleeves. To make the right choices for the future. So that the derailed financial system gets back on track and the long-term interests of the Netherlands prevail over the short-term profit hunting or short-sighted austerity. A recession must be fought with cuts based on solidarity, smart investments and reforms. Not just with cold austerity such as the cabinet is doing.[39]

> These elections will determine whether our society becomes even harder and the division even bigger, or that we now make another choice and start building a more social, more humane and more sustainable Netherlands.[40]

> Future generations will look at us critically. And ask why this crisis wasn't used to make the transition to a more sustainable future. Clean energy, dealing with pollution and protecting the environment. They will ask themselves why only a few years after the crisis in the financial sector it is back to business as usual and a new crisis has not been prevented. Future generations will wonder why the causes of the crisis have not been dealt with.[41]

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[36] Hay, 'Crisis and the Structural Transformation of the State,' 329.
[37] Hay, 'Crisis and the Structural Transformation of the State,' 328.
[38] Hay, 'Crisis and the Structural Transformation of the State,' 331.
[39] Socialistische Partij, 'Samen de Crisis te Lijf,' author's translation.
[40] Socialistische Partij, 'Nieuw Vertrouwen,' 5, author's translation.
[41] Socialistische Partij, 'Roemer: "Ons Belastingstelsel is een Kopstoot voor de Gewone Man"' ('Roemer: "Our Tax System is a Punch in the Head to the Average Man"'), 17 September 2014, available at

The Freedom Party also proposed certain solutions to the threats their crisis discourse constructs. Their solutions were less concrete, but no less clear. In the words of the Freedom Party, on the issue of the threat posed by the EU and Islam in the context of economic crisis:

> Our battle is a just one and we are standing on the shoulders of those who went before us. And we must do the same as our ancestors: Parliament must issue a serious warning to the most powerful institute of Europe, in this case the multicultural superstate with its capital in Brussels – the empire that wants to impose more Islam on us and take away every memory of an independent and recognizable Netherlands. Again: a people that is led by the wrong leaders has to be able to say goodbye to the ruling ideology.[42]

> We are the only ones who are saying to the unelected eurocrats: your end is our beginning. Your dream is our nightmare. Your loss is our gain. We are the only ones saying: it has to end somewhere. Now it is time to be the boss in our own country. Our flag is red-white-blue.[43]

This call for change, if accepted by sufficiently powerful and numerous groups, can indeed lead to structural change. In this way, the use of crisis discourse implies a "moment in which the unity of the state is discursively renegotiated and, potentially, reachieved and in which a new strategic trajectory is imposed upon the institutions that now (re-)comprise it."[44]

Above we have seen the characteristics of crisis discourse, particularly focusing on the discourse used in relation to the European sovereign debt crisis. The next two parts of this Section focus on how crisis discourse acts as a tool of agonism. By attending to the ability of crisis discourse to create us/them distinctions and call for and justify change, these next parts explore how crisis discourse reflects the agonistic characteristics in political interaction.

(Re)Constituting 'the People'

Despite great variety within theories of agonism,[45] agonists share the assumption that politics is not a matter of rational deliberation between equally powerful parties, but rather that the key characteristic of the political is the distinction between a 'we' and a 'they', an inside and an outside to the political community. How this distinction is given shape is not fixed or natural, but is rather the object of political activity and contestation. In this contest between defining and shifting the boundaries of insiders and outsiders, a conception of the people – and what this people want – is at stake and this struggle is the "political act par excellence."[46]

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https://www.sp.nl/nieuws/2014/09/roemer-ons-belastingstelsel-is-kopstoot-voor-gewone-man, author's translation.

[42] Partij voor de Vrijheid, 'De Agenda van Hoop en Optimisme,' 6, author's translation.

[43] Partij voor de Vrijheid, 'De Agenda van Hoop en Optimisme,' 14, author's translation.

[44] Hay, 'Crisis and the Structural Transformation of the State,' 331.

[45] Glover, 'Games without Frontiers?,' 89-91.

[46] Ernesto Laclau, *On Populist Reason* (London: Verso, 2005), 154-155. See further Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton: Princeton University Press, 2009), 19.

This emphasis on in- and exclusion in political activity is grounded on the ontological assumption that difference is "an axiological principle of our collective lives."[47] Agonists see it as ontologically impossible for any one regime or ideology to encompass and represent all the interests and identities of all people.[48] Every consensus, every constellation of political power, is "based on acts of exclusion" and reveals "the impossibility of a fully inclusive 'rational' consensus."[49]

Crisis discourse engages in this political act 'par excellence' of creating a people, by discursively creating an us/them division. Crisis discourse's construction of a threat discursively creates an 'other' who is framed as the cause of the threat and must be excluded from the people – an inside – who is threatened and must be protected. By naming a threat broad enough to threaten more than one particular group, crisis discourse is able to bring various groups together into a coalition that sees itself as sharing an overarching interest in dealing with this threat. It articulates a discourse that emphasizes common interests instead of differences between the groups that are formed into a people.[50] This discourse masks and depoliticizes differences between the different groups and individuals that comprise the 'us' while it (re)politicizes differences between the 'us' and the 'them'.

This construction of the people goes beyond only reflecting or reinforcing a construction of a people that is already present in political discourse. As we see in the Freedom Party and Socialist Party's use of crisis discourse, crisis discourse can also *reconstitute* the distinctions between the 'us' and the 'them', disrupting previously constituted coalitions. Coalitions are destabilized as crisis discourse (re)politicizes the differences *within* the group and crisis discourse can peel away particular groups from the destabilized coalitions, subsequently discursively joining them with other groups to form new coalitions. For example, the Socialist Party's use of crisis discourse attempts to (re)constitute the people around class lines, positioning "shareholders and consumers" against "citizens, employees and our society as a whole."[51] The Socialist Party referred to the interest the people have in not enduring the deep austerity cuts and argues that these cuts should instead be borne by the "most-rich" so as to discursively link the many diverse groups outside the "most-rich" together in a people. All who are not the "most-rich" are discursively linked together in a common project.[52] The Socialist Party called this people into being, while it acted on its behalf. The Freedom Party also called a people into being, and did so by referring to the threat 'Islamification' posed to traditional Dutch identity (to be found in the welfare state, neighborhoods and schools) and by placing Dutch financial interests against those of the larger European Union. The people the

[47] Glover, 'Games without Frontiers?,' 88.
[48] Glover, 'Games without Frontiers?,' 88.
[49] Mouffe, *On the Political*, 11.
[50] Hay, 'Crisis and the Structural Transformation of the State,' 331-332.
[51] Socialistische Partij, 'Samen de Crisis te Lijf.'
[52] Socialistische Partij, 'Nieuw Vertrouwen,' 5.

Freedom Party created is one that is nationalistically, but also ethnically, defined. Only those within the borders of the Netherlands – and only those who did not get there as the result of immigration from Muslim countries – are counted as belonging to the people. Again, here too, the Freedom Party linked together the many diverse groups that can be found within the ethnically Dutch in opposition to the 'threat' posed by Islamification,[53] the 'European superstate'[54] and 'Greek swindlers.'[55]

Changing the Rules of the Democratic Game

Agonists emphasize that political conflict between groups includes conflict over basic ideas about what is "reasonable or unreasonable, legitimate or illegitimate political action and speech."[56] From this perspective, agonists argue that the possibility to contest the very procedures and agreements of democracy is vital; these procedures and agreements must always be open to change. Politics "is the type of game in which the framework – the rules of the game – can come up for deliberation and amendment in the course of the game."[57] This room for conflict and contestation must be preserved and, as Chantal Mouffe explains:

> "… the specificity of modern democracy lies in the recognition and the legitimation of conflict and the refusal to suppress it though the imposition of an authoritarian order. A well-functioning democracy calls for a confrontation between democratic political positions, and this requires a real debate about possible alternatives."[58]

Here, again, we see crisis discourse having a role to play. As we saw in the Freedom Party and Socialist Party's use of crisis discourse, this particular discourse allows the speaker to call for change to the structure of the current system. The Socialist Party called for major, structural change to the economic system and argued that the cause of the crisis can only be solved if the foundational principles of the capitalist economy are overhauled.[59] The Freedom Party's solution to the threat posed by Islamification and Europe is found in defending the Netherlands against this influence. It implies rejecting the "ruling ideology," the multiculturalism that the Netherlands – and Europe – has built its democracy on since World War II, and means far-reaching change to the Dutch state's current legal and political links to the European Union, as well as to guarantees and protections of rights of immigrants.

In practice, this rhetoric crystalized into the Socialist Party supporting a thorough reform of the financial sector, setting caps on incomes for managers in the public and semipublic sector,

[53] Partij voor de Vrijheid, 'De Agenda van Hoop en Optimisme,' 5, author's translation.
[54] Partij voor de Vrijheid, '*Hún* Brussel, *Óns* Nederland,' 21, author's translation.
[55] Partij voor de Vrijheid, '*Hún* Brussel, *Óns* Nederland,' 11, author's translation.
[56] Andrew Schaap, 'Political Theory and the Agony of Politics,' *Political Studies Review* 5 (2007): 61.
[57] James Tully, 'The Agonic Freedom of Citizens,' *Economy and Society* 28 (1999): 170.
[58] Mouffe, *The Democratic Paradox*, 113.
[59] Socialistische Partij, 'Roemer: "Ons Belastingstelsel".'

limiting the power of shareholders and criminalizing financial mismanagement. The Socialist Party proposed a new top tax rate of 65% and a new way of taxing wealth so as to combat unequal distribution of wealth in the Netherlands.[60] The Socialist Party was in favor of "clipping the wings" of private equity funds that take over companies and "suck them dry as locusts do."[61] The Socialist Party has moreover argued in favor of the retroactive application of legislation banning bonuses for managers at financial institutions that received state support after the crisis.[62] In practice, this meant arguing in favor of 100% taxation rate on any bonuses given to such managers, even if the bonuses were given before the proposed law passed. The Freedom Party used the 'crisis' to justify its calls for banning immigration from "Islamic countries."[63] Moreover, the Freedom Party proposed stripping convicted criminals who have double nationalities of their Dutch citizenship, deporting non-Dutch citizens who commit a crime[64] and criminalizing being in the Netherlands without a valid permit.[65] The Freedom Party argued in favor of stripping non-Dutch citizens of their voting rights in local elections and stripping Dutch citizens with a second nationality of the ability to be a member of the government, parliament and local political organs.[66]

These calls for change are buttressed by reference to the supposed existential threat the crisis discourse is based on. The claim crisis discourse makes is that the threat occurred because current structures failed to prevent it, and this threat must be dealt with by changing the structures that allowed this threat to materialize. These calls for change concern the very rules of the democratic game, including changes to fundamental political and legal procedures (for example stripping people of voting rights and retroactive application of the law) and fundamental rights (stripping people of citizenship). In this way, the crisis discourse fits within an agonistic view on what political conflict is about: conflict over the very ideas upon which a current political system is based. Moreover, as shown above, crisis discourse can create extremely exclusive conceptions of the people, conceptions based on race, religion and class. These concrete examples of exclusion and calls for change raise concerns about whether agonism can see *all* calls for change as legitimate political action. Do proposed

[60] Socialistische Partij, 'Nieuw Vertrouwen,' 65-67.
[61] Socialistische Partij, 'Een Beter Nederland voor Minder Geld: Verkiezingsprogramma SP 2011-2015' ('A Better Netherlands for Less Money: Election Program Socialist Party 2011-2015'), 8, available at https://www.parlement.com/9291000/d/2010_sp_verkiezingsprogramma.pdf, author's translation.
[62] Socialistische Partij, 'Kamer Steunt SP: Totaalverbod op Bonussen bij Gesteunde Banken' ('Parliament Supports Socialist Party: Total Prohibition on Bonuses by Banks that Received State Support'), 11 October 2011, available at https://www.sp.nl/nieuws/2011/10/kamer-steunt-sp-totaalverbod-op-bonussen-bij-gesteunde-banken. Interestingly, the Socialist Party was not the only party in favor of the retroactive application of such legislation. The Freedom Party, along with the Green Left (*GroenLinks*) and Labor Party (*Partij van de Arbeid*) also supported retroactive application in this instance, see Author unknown, 'Kamer wil Bonusses Steunbanken 100% Belasten' ('Parliament Wants to Tax Bonuses at Banks that Received State Support at 100%'), *Financieel Dagblad*, 22 March 2011, available at https://fd.nl/frontpage/Archief/737475/kamer-wil-bonussen-steunbanken-100-belasten.
[63] Partij voor de Vrijheid, 'De Agenda van Hoop en Optimisme,' 57, author's translation.
[64] Partij voor de Vrijheid, 'De Agenda van Hoop en Optimisme,' 11.
[65] Partij voor de Vrijheid, 'De Agenda van Hoop en Optimisme,' 15.
[66] Partij voor de Vrijheid, 'De Agenda van Hoop en Optimisme,' 19.

changes ever go too far for agonists or does the importance of contestation and conflict mean that no type of change can be off-limits?

The ability of crisis discourse to create, solidify and break the us/them distinction and the ability of crisis discourse to justify structural change reveals its deeply political potentials. The use of crisis discourse in this way, to participate in the struggle over meaning, gives us an example of agonism at work in current politics. Yet, this analysis also made concrete just how far the othering and calls for change can go within crisis discourse. This Section showed how the Socialist Party and the Freedom Party used crisis discourse to discursively exclude the other and to justify fundamental political and legal change, including the retroactive application of laws, labeling all the inhabitants of particular countries determined "Islamic" unwelcome in the Netherlands and stripping certain Dutch citizens of their nationality. The following Section explores the question whether agonists must accept all such exclusions and calls for change or whether agonists must admit limits to the conflict and contestation they so value. I will start by exploring the answer Mouffe gives to this question, and proceed to argue that this answer is insufficient as it relies too much on the very consensus-oriented politics agonism aims to critique and fails to take seriously the risks posed by crisis discourse. Instead, I propose a theory of the limits of legitimate political activity that draws on tenets inherent in the values agonism itself professes. I develop the idea of a 'continuum of risky illocutions' that helps us better conceptualize agonism's boundaries of the acceptable.

2. Speaking Crisis

Crisis discourse can be a powerful tool for shifting the boundaries of the people and for calling for foundational change. But it also has the potential to activate a type of conflict in which no limits are placed on the destruction of the other.[67] Moreover, crisis discourse can construct an argument for change that impacts the very foundations of political, social or legal orders. This type of change often entails an increased willingness to deviate from political and legal procedures, as well as from the protection of fundamental rights. This willingness is supported by the logic of necessity that crisis discourse invokes: the link discursively made between the threat and the seemingly necessary solution. As we have seen in the examples of crisis discourse discussed above, this type of speech can pit the 'average' person against the most-rich,[68] compare private equity funds to locusts,[69] evoke imageries of past wars,[70] and claim that Dutch citizens are being robbed of their freedom,[71] as the EU "impose[s] more Islam on us."[72] The past Section showed how this discourse can intensify the exclusion of an

[67] Claudia Aradau, 'Security and the Democratic Scene: Desecuritization and Emancipation,' *Journal of International Relations and Development* 7 (2004): 388-413.
[68] Socialistische Partij, 'Nieuw Vertrouwen,' 5.
[69] Socialistische Partij, 'Een Beter Nederland voor Minder Geld,' 8.
[70] Partij voor de Vrijheid, '*Hún* Brussel, *Óns* Nederland,' 21.
[71] Partij voor de Vrijheid, '*Hún* Brussel, *Óns* Nederland,' 12.
[72] Partij voor de Vrijheid, 'De Agenda van Hoop en Optimisme,' 6, author's translation.

'other' and justify departures from the rule of law and human rights violations against this other. Yet, from the perspective agonists take on politics, attempts to change the political system are not exceptional or extraordinary but rather part and parcel of the political. Moreover, conflict between groups is seen as an inevitable part of the struggle that characterizes the political, and is an aspect that must not be suppressed. However, agonists also acknowledge the possibility that the us/them distinction can become too hardened, at which point the contest can no longer be characterized as agonistic, but rather as antagonistic. At that point, contestation is no longer productive but becomes destructive, and should be considered unacceptable.

This Section will explore how the line between agonistic and antagonistic conflict should be drawn. It starts with Chantal Mouffe's conception of this boundary and her insistence on the necessity of such limits between acceptable agonistic political behavior and unacceptable antagonistic relations.[73] The first part of this Section will critically reflect on the utility of Mouffe's suggestion that the realm of antagonistic relations is entered once participants of a political conflict reject a shared symbolic space characterized by acceptance of the values of equality and liberty and argues that Mouffe's approach fails to take sufficiently seriously the risks of agonistic speech. I will show that Mouffe's proposal is internally inconsistent and, in its current form, not able to perform the important function of distinguishing between agonistic and antagonistic forms of political action.

In the second part of this Section, I propose an account of the limits of agonism that uses Honig's insistence that every consensus produces remainders to radicalize Mouffe's view of a shared symbolic space. I argue in favor of conceptualizing this space differently from Mouffe. Instead of seeing this space as being characterized by shared values that may not be departed from, it is belonging within this space that is seen as the very object of contestation. Who is inside and who is outside this space of the political community is what is at stake in agonistic politics and, as such, in order for politics to *remain* agonistic, this conflict must always remain possible. In other words, agonistic politics requires two things: first, that the boundary between the inside and the outside of this shared space is drawn and, second, that this boundary always only be drawn as a temporary and thus permeable boundary. Unlike Mouffe, I show that where the boundary is drawn between the inside and the outside cannot be evaluated based on the insistence of shared liberal democratic values, but rather only based on whether the second criteria – the temporary and permeable nature of the boundary – is respected. I proceed to analyze the crisis discourse used by the Socialist Party and the Freedom Party with this distinction between agonism and antagonism. To do so, I develop the notion of a continuum of risky illocution in order to position these uses of crisis discourse based on whether they move towards or away from antagonistic relations. This has the

[73] See for example Mouffe, *On the Political*, 120-123, but also Glover, 'Games without Frontiers?,' 90.

function of emphasizing that even agonistic speech, speech that does not directly call for the eradication of the other, carries with it the risk of antagonism.

Finding the Frontier Between Agonism and Antagonism

In this Section, I examine Mouffe's approach to the risks attendant in agonism and attempt to remedy her reliance on a shared liberal democratic political space, a reliance that fails to take seriously the necessity of deep conflict over political values and the risks inherent therein.[74] I argue that there can be limits to the acceptable use of crisis discourse that are based on agonistic values themselves. In doing so, my aim is not to reject Mouffe's view of agonism but rather to show how her own agonistic convictions can sustain a theory of responsible use of crisis discourse, without either relying on consensual liberal democratic ideals based on a common core of shared substantive values or accepting any and all types of struggle.

Mouffe is clear that adhering to agonism does not imply accepting all demands as legitimate.[75] She distinguishes between those demands which can be accepted as a legitimate part of the agonistic debate and those which should be excluded, not because they are morally unacceptable but because "they challenge the institutions constitutive of the democratic political association."[76] While Mouffe also acknowledges that contestation of the nature of these institutions is, at the same time, the very thing that agonism sees as core to political debate, she argues that this contestation can only take place if the actors engaged in such contestation share a symbolic space, characterized by the ethico-political values of liberty and equality.[77] In her view, the conflict and contestation valued in agonism is a conflict and contestation that must occur within the bounds of agreement on these values, even while the *meaning* of these values is disputed. In her words, "a line should … be drawn between those who reject those values outright and those who, while accepting them, fight for conflicting interpretations."[78] Accordingly, once the political debate moves outside of this shared symbolic space, adversaries turn into enemies and agonism into antagonism. Those who reject these values "cannot form part of the agonistic space" and thus can only be dealt with as the 'enemy' relevant for antagonistic relations.[79] At this moment, politics is no longer possible and instead human interaction is characterized by violence and domination.

Mouffe thus attempts to draw a clear line between agonistic politics and antagonism by pointing to the importance of accepting the values of equality and liberty. According to Mouffe, agonism is characterized by conflicts over the meaning of these values, while

[74] Keith Breen, 'Agonism, Antagonism and the Necessity of Care,' in *Law and Agonistic Politics*, 137-140.
[75] Mouffe, *On the Political*, 120.
[76] Mouffe, *On the Political*, 120-121.
[77] Mouffe, *On the Political*, 121.
[78] Mouffe, *On the Political*, 121.
[79] Chantal Mouffe, 'Agonistic Democracy and Radical Politics,' *Pavilion* (2014), available at http://pavilionmagazine.org/chantal-mouffe-agonistic-democracy-and-radical-politics/.

antagonism occurs when these values are themselves rejected.[80] There are two problems with this approach. Firstly, it brings Mouffe very close to the consensual deliberative democracy she critiques and, secondly, it fails to acknowledge that the very questions of who have liberty and how much and who are equal, are at the core of the political. I will explain each critique in turn.

Mouffe's emphasis on the need for a shared symbolic space characterized by the acceptance of the values of equality and liberty seems to contradict the importance she places on deep conflict, conflict that supposedly includes the foundational values of a political community. Mouffe's need for a shared consensus characterized by particular values whose acceptance (but not meaning) are beyond the pale of political contestation within which citizens can engage in agonistic politics, mirrors the consensus-focused forms of democracy she aims to critique.[81] Mouffe's solution is particularly problematic because it implies that political opponents who explicitly reject and attempt to bring change to the shared symbolic space are risking devolution into antagonism. Yet, this very change is what agonism says politics is about. If Mouffe's perspective on agonism requires the rejection of political projects that call for changes to accepted political ideals and institutions, little room is left for any attempts to change the 'rules to the game', attempts that agonists profess to accept – and promote – as part of a healthy political encounter. Mouffe's conception of the limits of the acceptable appears to preclude that very political struggle from taking place, resulting in the end in a "politics of minor stakes"[82] in which contestation is only accepted if it does not strike too deeply at the heart of the existing hegemonic constellation.

Mouffe explicitly acknowledges that her approach to the frontiers of the acceptable is informed by the liberal democratic principles that are constitutive of "our form of life."[83] Mouffe's frontier is in essence not one between agonism and antagonism, but between the liberal democratic principles that currently inspire the ethico-political nature of contemporary Western political institutions on the one hand and threats to liberal democracy on the other. From this perspective, we can say that Mouffe is attempting to broaden the register of

[80] Mouffe's approach to antagonism in her early work with Ernesto Laclau seems to differ somewhat from the conception of antagonism she discusses later (the approach presented here). In *Hegemony and Socialist Strategy* for example, her discussion of antagonism (with Laclau) emphasizes the actual presence of antagonism in all of society and as *constitutive* for society. See Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (London: Verso, 2014 (1985)), xiv. In *The Democratic Paradox* and *On the Political* however, antagonism is seen only as a *possible* presence in human relations and one that should be tamed. Additionally, antagonism is portrayed more neutrally in her earlier work. Instead of antagonism being the element of existential violence in which one enemy tries to physically eradicate another, an element that thus therefore must be 'kept at bay, it is discussed in more structural terms as a "witness to the impossibility of a final suture" and as the "'experience' of the limit of the social." See *On the Political*, 16 and Laclau and Mouffe, *Hegemony and Socialist Strategy,* 112. In the current text I take Mouffe's position toward antagonism to be best characterized by her statement in *On the Political* (20) that while antagonism is an ever-present possibility, it is the task of democracy to "transform antagonism into agonism."

[81] Breen, 'Agonism, Antagonism and the Necessity of Care,' 138.

[82] Breen, 'Agonism, Antagonism and the Necessity of Care,' 140.

[83] Mouffe, *On the Political*, 121.

acceptable political discussion *within* political liberalism, arguing contra many deliberative democrats that the definition of reasonable pluralism cannot be determined based on rationality or morality, but is rather always an object of political contestation.[84] In the end, Mouffe's approach is far less a determination of the difference between legitimate and illegitimate political demands and action in general and far more a determination between legitimate and illegitimate *liberal democratic* political demands and action. By taking the values of liberty and equality as an unassailable starting point, she positions the 'acceptable' only within the realm of liberal democratic political possibilities. This approach may certainly be a valuable addition to liberal democracy, but fails to provide much guidance on where the line can be drawn between agonistic politics in general (without any particular allegiance to liberal democracy) and the antagonism agonists try to keep at bay.

Moreover, I argue that Mouffe's distinction reveals a failure to account for the fact that debates over the very appropriateness of liberty and equality in particular circumstances are at the core of the political choices we make. This failure makes her distinction both under- and over-inclusive, and thus lacking in utility. Let me explain this claim. On the one hand, this distinction lacks the ability to recognize the threat to agonism posed by political actors who pay lip service to the values of liberty and equality, all the while using these professed values to justify the destruction of the other. Surely a person calling for the death of all monarchs based on the reasoning that all people are equal and the very existence of monarchy threatens that equality would not still fall within the acceptable limits of agonism, despite the fact that the person advocated for such a measure on the basis of equality. In this way, Mouffe's focus on adhering to the values of liberty and equality fails to accurately classify those who engage in antagonistic behavior as antagonistic, thus being an under-inclusive test. On the other hand, this distinction is over-inclusive, because if lip service is not enough to prove one's adherence to these values, then the whole matter becomes a question of which engagements fit within the *acceptable range* of a debate over the meaning of these values and which fall outside the acceptable range.[85] And if *this* is actually the question, and not whether one uses the terms equality and liberty with which to frame one's demands, then it does not automatically matter whether one rejects the use of these terms. It is possible that political speech rejects equality or liberty on some register, while not necessarily being antagonistic. One can, for example, very well argue that inequality is appropriate in a certain circumstance and still be found adhering to the broader value of equality overall. For example, one can argue that someone who is convicted of murder should be deprived of liberty and lose some equality *vis-à-vis* someone who has not been convicted of murder, and still conceivably not be considered as

[84] Mouffe, *On the Political*, 121.

[85] Mouffe does acknowledge that the decision whether one's political activity falls within the realm of respecting the values of equality and liberty is a *political* decision, a decision that will always be the topic of political contestation, but subsequently fails to draw the logical conclusion that, if this is the case, these values cannot add anything to her initial focus on the need to keep the space for political contestation open, see Mouffe, *On the Political*, 121.

ushering in antagonistic relations from Mouffe's perspective. Moreover, the whole agonistic political endeavor of constituting a people, a 'we' over and against a 'them', implies *some* inequality on *some* register. Thus to say that agonistic political behavior must accept these values of liberty and equality seems to strip agonism of much of the analytical value that Mouffe believes it has.

These two flaws in Mouffe's approach ultimately lead her to underemphasize the real challenge inherent in agonism itself: the very present risk that the (politically necessary) creation of the 'other' – and thus of some measure of inequality – leads to the idea that the other must be destroyed. While Mouffe certainly acknowledges this risk, her subsequent focus on the need for 'common values' distracts from its primacy. As the next part will show, this is when relationships become antagonistic and is the point at which conflict no longer promotes the political, but destroys it.

A Continuum of Risky Illocutions

What are the actual boundaries between agonistic politics and antagonistic violence? I argue that the answer to this question is implicit in Mouffe's view of agonism, but requires a radicalization of the concept of Mouffe's shared symbolic space to empty it of the adherence to any particular set of political values. Here it is worthwhile to examine what Mouffe sees as the function for this shared symbolic space – how exactly, in Mouffe's understanding, a shared symbolic space prevents antagonism. Mouffe sees the shared ethico-political values as a 'common bond' that ensures political actors do "not treat their opponents as enemies to be eradicated."[86] While engaged in conflict with each other, this common bond leads political actors to "see themselves as belonging to the same political association"[87] and to recognize that all conflict must take place within this shared space. What Mouffe is getting at is that the us/them divisions and exclusions that agonistic politics acknowledges as a legitimate part of politics, must not lead to the other being expelled from this shared space or, in her words, being "eradicated."[88] The reason for Mouffe's insistence on this particular *inclusion* does not contradict her acknowledgement that *exclusion* cannot be overcome.[89] Instead, she insists on include *because of* agonism's ontological starting point that exclusion is the inevitable result of any conception of the people and of any hegemonic ordering based thereon. It is this inherent exclusion that requires a normative appreciation for pluralism.

These insights are, however, underemphasized in Mouffe's thoughts on boundaries. Other agonistic thinkers place more importance on preserving pluralism. Bonnie Honig makes this clear in her thoughts on the inevitable remainder of politics. Honig calls attention to the fact

[86] Mouffe, *On the Political*, 20.
[87] Mouffe, *On the Political*, 20.
[88] Mouffe, *On the Political*, 20.
[89] Mouffe, *On the Political*, 121.

that no one conception of the people can ever fully incorporate all individuals and groups. There will always be remainders that can never completely be included in the hegemonic 'we'. It is this impossibility of completeness that leads to the normative stance that agonistic conflict must preserve possibilities for those left out of the hegemonic order to contest their exclusion and demand a new constellation of the people, one that will be more inclusive of this excluded group (but, inevitably, will exclude some other identities).[90] No regime or ideology should ever try to subdue or eliminate the contestation of who belongs and who does not, since to do so would silence those whose interests and identities inevitably cannot be successfully incorporated into that regime. In other words, those excluded from the people, must not be so finally excluded that they have no way of challenging their position. The distinction between the 'we' and the 'they' must always remain open to future contestation and any attempt to impose a fully unified and conflict-free society can only end in totalitarianism.[91] Contra to Mouffe's interpretation of Honig's work on this issue,[92] Honig is not arguing that agonism requires a cessation of othering or the end of hegemony, but that othering and hegemony must never be final. It is not that Honig thinks that exclusion of hegemonic closure can be avoided, but simply that this closure must not be total. It must be acknowledged that the people is never fully constituted, that certain individuals and groups fall outside the people and that the people must always be open to contestation and re-constitution by shifts in the us/them distinction. In this way, Honig's attention to the remainder of politics provides an important perspective when thinking about the limits of agonism.

This attention to preserving the possibility of contesting political belonging allows us to radicalize Mouffe's idea of a shared symbolic space. The boundary between agonism and antagonism is not about those who reject any particular shared values, but deals with the question who can participate in the contest about who belongs in the political community, in the shared symbolic space – whatever its contents might be. The line between agonism and antagonism is a division between, on the one hand, exclusion in a way that allows for contestation of that exclusion versus, on the other, exclusion without any possibility to challenge the exclusion. In other words, for the contest to remain open, the excluded individual or group must not be posited as never being able to enjoy the rights, liberty and equality of those within the political community, and the excluded individual or group must not be stripped of all ability to continue to struggle for those rights, liberty and equality. The

[90] Honig, *Emergency Politics: Paradox, Law, Democracy*, 39.
[91] Glover, 'Games without Frontiers?,' 89; see also Claude Lefort, *Democracy and Political Theory*, trans. David Macey (Cambridge: Polity Press, 1988), 13 and Bert van Roermund, 'Questioning the Law? On Heteronomy in Public Autonomy,' in *Law and Agonistic Politics*, 122. According to Lefort, whether the people is seen as a complete, self-transparent whole without any internal divisions is what determines whether a society is democratic or not. In his view, authoritarianism is not the opposite of democracy, but its "pathological form", as it rejects the ambiguity of the people inherent to democracy and replaces it with the myth of a unified, complete whole.
[92] See for example Mouffe, 'Agonistic Democracy and Radical Politics,' and Mouffe, *On the Political*, 131.

point is not so much that all legitimate participants in the agonistic debate must frame their arguments in terms of liberty or equality or even that they must accept these values as the aim of political life, but rather that no legitimate participant can put forth demands that would entail stripping the other of the *potentiality* of enjoying whatever rights are granted to the political community constructed by that participant. To state Mouffe's ideas with a slightly different emphasis, the othering must not lead to the other being seen as an enemy to be permanently excluded from the shared symbolic space, while at the same time acknowledging that othering always attempts to *temporarily* exclude the other from that space. This conclusion, that there must always be space open for contestation of the boundaries of the shared space and who belongs inside and out – *by* those who are considered the other – necessitates that defeat must only ever be political – and not defeat of the other's very existence. Agonism accepts that an individual or group can be *temporarily*, discursively, placed outside of the political community but this othering must never be so complete that the individual or group has no way of re-entering the political community. The possibility must remain open for the people to be *re*constituted in such a way that the other becomes one of the 'us'. The realm of antagonism, on the contrary, is characterized by the discursive creation of an other who could never re-enter the political community, an other who has no ability to contest his othering.

In practice, this means that the realm of antagonistic relations is entered as soon as an other is discursively constructed who must be eradicated or expelled from the space of the political – with no possibility to discursively challenge this expulsion. What does this mean for the types of exclusion that politics can legitimately create and those it cannot? We must be clear that such a view does not preclude politics from striving to permanently eliminate certain *behaviors* from the political community (think for example of murder, rape or pedophilia). The concern is, thus, not so much that such activity is othered – even if permanently. What is vital, though, is that in aiming to eliminate certain behaviors, the individuals who commit those behaviors are not constructed as someone or something to be permanently excluded from the political community. Thus, whereas attempts to permanently exclude behavior can be accepted as part of normal politics, this can never be the case for exclusion of the people 'behind' the behavior.

There are some similarities between my emphasis on agonism as precluding a permanent defeat of the other and Keith Breen's attitude of care towards the enemy. Breen explains that the enemy will be seen as one to be defeated but that this defeat may only be in "respect to that which he represents a serious threat, not in terms of the totality of his person."[93] Yet, my approach differs in two important ways from that of Breen. First, I reject Breen's assumption that by only focusing on the threat posed by the other, and not the totality of the person, antagonism can be avoided. In fact, all too often antagonism is triggered by the conviction

[93] Breen, 'Agonism, Antagonism and the Necessity of Care,' 145.

(however errant) that it is the very person of the other himself who poses the threat. It is the (however mistaken) belief that the other cannot be separated from the threat that often ushers in the perceived necessity of eradicating the other, as a person. Thus, instead, I argue that the emphasis must simply be placed on the distinction between behavior and the person as such, while intentionally precluding the possibility that the other as person is ever excluded, no matter how serious the threat the other is perceived as posing. From this it follows that exclusion cannot be based on characteristics that are perceived as unchangeable. If it is a characteristic such as race, sex or sexuality that is perceived as posing the threat, and society perceives these characteristics as an unchangeable, inherent part of the person who has them, the individuals targeted could not be separated from those characteristics and thus would be permanently excluded.

Moreover, it is important to note that Breen characterizes *antagonism* as the realm of othering as such, whereas I stress that othering takes place within the limits of acceptable agonistic behavior as well. In my view the boundary then is between agonism on the one hand and antagonism on the other, where agonism is the realm of passionate struggle to defeat the other *politically* and antagonism is the – unacceptable – realm of passionate struggle to defeat the other in their very existence.

This boundary between agonism and antagonism does not mean that political activity that falls on the agonism side of the line is necessarily safe. There is no risk-free way of doing politics; the instability of politics is irreducible and the possibility of antagonism cannot be eliminated without eliminating the possibility of politics itself.[94] It is, however, possible to identify political activity that moves toward the boundary between agonism and antagonism versus other types of activity that move further away from that frontier. In this way, within agonistic politics – within the limits of the political – one can position behavior on a continuum between anti-political antagonism (relations that make politics impossible because they end the possibility of contestation) on the one hand and apolitical pluralism (relationships characterized by individual freedom, without any representation of interests as relating to the common good and thus also without any politics) on the other. The area between antagonism and complete pluralism is where politics is possible, is where the *agon* is found. As one approaches the boundary between agonism and antagonism, the risk of antagonism becomes greater and as one moves away from that boundary, the risk of antagonism lessens.

This is not to say that the position furthest from the antagonistic boundary – complete pluralism – is the most desirable position on the continuum. Adherence to an agonistic view of politics does not reject the idea that decisions must be made and that ground must be found

[94] Chantal Mouffe, 'Deconstruction, Pragmatism and the Politics of Democracy,' in *Deconstruction and Pragmatism*, ed. Chantal Mouffe (London: Routledge, 1996), 9.

(temporarily) for shared political identity. Nor does it mean that closure over meaning should be avoided. And for these decisions and shared political identity, some form of othering is necessary, and thus a move toward antagonism. The necessity of keeping space open for contestation should not be interpreted as a prohibition on political actors aiming to have their claims hegemonically entrenched. The aim of agonism is not to escape hegemony; power and hegemony cannot be escaped and there is no "beyond hegemony."[95] Neither does agonism require or presuppose politico-socio-legal fields without the constraints of power on the people living within those fields. What matters is that those being constrained have the possibility to contest and actually change these constraints. The foundation of decisions and the basis of stable ground are not the neutral outcome of a rational deliberation process, but are rather the result of the exertion of power – not in the form of explicit violence, but in the form of hegemonic power. And since these foundations will never represent all people, interests and identities, they must be open to contestation and change, even while functioning as the (temporary) hegemony that politics results in.

Let us now explore what this insight on the boundary between agonism and antagonism means in practice by turning our attention to the most proximate tool of politics – language. As shown above in relation to crisis discourse, it is speaking crisis that not only illustrates, but calls into being, the risk of permanently excluding the other. By focusing on the illocutionary force of crisis discourse, we can evaluate the position a particular use of crisis discourse inhabits on the continuum of risk. Thus, if we go back to the use of crisis discourse by the Socialist Party and the Freedom Party, we can attempt to place the parties on this spectrum. We see that the two parties engaged in different types of othering. On the one hand, the Socialist Party discursively constructed the 'other' based on changeable characteristics and behavior, as a group engaged in a particular activity or having a particular amount of wealth (bankers and the very rich). While 'bankers' and the 'very rich' are more than just behaviors, they are not characteristics that are perceived as an unchangeable part of their holders' identities. This is reflected in the measures proposed by the Socialist Party, which relate to changing particular activities the rich engage in to promote their wealth (for example the Socialist Party's plan to deter bonuses by taxing bonuses retroactively). These proposed changes do not target specific, unchangeable identities and do not have the effect of permanently excluding those they target from the people.

The Freedom Party, on the other hand, defined the other with reference to the indelible identity of ethnicity. The Freedom Party aimed to exclude the Muslim 'other' permanently from the political body of the people, for example by banning all immigration from Muslim countries. Other measures proposed by the Freedom Party, although formulated neutrally and thus not targeting Muslims specifically, still had the effect of permanently excluding those they affect from the political community, for example by excluding those who have double

[95] Mouffe, *On the Political*, 118.

nationality from representative government functions or by stripping Dutch citizens with double nationality of their Dutch citizenship if they commit a crime. This difference in how the two parties spoke crisis, puts the Socialist at a different position on the continuum of risk than it does the Freedom Party. While the Socialist Party certainly engaged in othering (even going so far as to speak of bankers as insects) and calls for fundamental change, their discourse stayed more removed from constructing the other as something to be *permanently* excluded from the realm of political contestation than that used by the Freedom Party. The Socialist Party constructed the other based not on characteristics perceived as unchangeable but on behavior and it proposed changes that did not exclude this other from the political community. The Freedom Party's use of crisis discourse, however, crossed the border into the antagonistic. First, the Freedom Party framed the 'other' based on the unchangeable characteristic of ethnicity. Next, the Freedom Party used its crisis discourse to call for changes that would permanently exclude this other from the Dutch community, such as the party's demand to stop immigration from "Islamic countries." This combination of constructing an other based on the very identity of the other instead of his behavior, along with calls for change that exclude the ability of the other to gain admittance to the political community, crossed the line from agonistic to antagonistic speech.

3. Conclusion

This chapter sheds light on agonism – and its limits – by viewing crisis discourse as an agonistic political practice. By viewing the speech act of crisis discourse through the lens of agonism, I interpret crisis discourse's ability to create us/them divisions and call for change as part and parcel of the agonistic political struggle. As the discourse used by the Socialist Party and the Freedom Party shows, crisis discourse was employed during the European Sovereign Debt Crisis to (re)create the people, albeit in very different ways by the two parties, and to call for change in economic and social structures. However, the Freedom Party's calls in particular highlighted a certain uneasiness in agonism itself. The Freedom Party's constitution of the people by distinguishing between a native Dutch, non-Muslim population on the one hand and the EU and Muslims on the other, and the Freedom Party's claims that the discursively created other threatened the very identity of the people, raised the question where agonists would place limits on speaking crisis. Certainly, agonism always presupposes a type of othering and sees deep change to the political community as a legitimate aim of political activity, yet at the same time Mouffe in particular stresses that conflict cannot be without any bounds. Mouffe's insistence that *antagonism* must be avoided in political struggle gives us a place to start inquiring into these potential limits, although Mouffe herself fails to expand upon these limits from an agonistic perspective and succumbs to the consensus-focused deliberative democratic temptation of the need for a shared symbolic space characterized by set values. I argue instead that the issue of limits can be more adequately addressed by reference to the aim of agonism itself: to preserve struggle over political processes and norms. What distinguishes agonism from antagonism is thus not a *lack* of othering or exclusion but

rather the way in which this other is constructed. Contra Mouffe, I do not see a role for values of liberty or equality here. Rather, I emphasize the importance of ensuring the *temporary* and *reversible* nature of exclusion. Agonism requires that the other, even though certainly excluded from the people in one particular political moment, retains the ability to contest and reconstitute the people, in the next political moment. The constant possibility of struggle must be preserved in order for othering to remain agonistic and to avoid the dangers of antagonism.

Based on these insights into the limits of agonism, I propose viewing political activity – and particularly the use of crisis discourse – as occupying particular places on a continuum of risky illocutions. On the one end of this continuum is antagonism and on the other complete pluralism. The space in between is where politics takes place; where agonism can be found. This continuum gives us the tools to evaluate political speech from an agonistic perspective and to acknowledge and manage the risk inherent in political behavior. At the same time, this continuum identifies a clear outer limit of acceptable political speech: once the elimination of the other – qua human – is called for or the boundaries of the people are created based on unchangeable characteristics, the agonistic morphs into the antagonistic. From this perspective, the Freedom Party's use of crisis discourse to construct an other based on (perceived) unchangeable characteristics and to argue for the permanent removal of the other from the Dutch political community crossed into the antagonistic end of this continuum. On the other hand, while the Socialist Party also engaged in a harsh rhetorical campaign of crisis, it did so without constructing the other based on inherent characteristics and instead focused on changeable behaviors. In this way, the Socialist Party used a crisis discourse that remained more securely in the space of the political.

This study's view of crisis discourse as an agonistic speech practice provides a tool to evaluate the use of crisis discourse in current political discourse. It proposes a measure for critique of crisis discourse decoupled from whether the discourse justifies for deep, radical change to the status quo of legal of political structures, and from whether the discourse creates an other. Indeed – true political discourse will always create an other and it is the very struggle over the foundations of the political community that characterizes true political interaction. Moreover, in a Western political landscape increasingly (once again) characterized by anti-establishment politics that presume and construct a threatening other, often based on views of the social that are not based on scientific facts, this agonistic view calls attention to the fact that crisis discourse is constructive, not constative; it is a speech act that aims to create the reality it claims already exists. Thus, instead of 'fact-checking' or accusations of irrationality, this chapter calls for evaluative criteria of crisis discourse based on whether the reality it aims to create is one in which the other is permanently excluded from the political community. What is important in this view, is not shared values or even a shared political space. Rather, what matters is that the political space of the people – however contested membership therein might be – remains a place that the other can re-enter. The

contestation itself must remain possible, and permanent exclusion from the political space is unacceptable.

CHAPTER V

DECIDING TO REPEAT DIFFERENTLY: ITERABILITY AND DECISION IN *HAMDI V. RUMSFELD*[1]

After the attacks on the World Trade Center in New York and the Pentagon in Washington DC on September 11, 2001 a political and legal discourse of crisis was deployed to justify and make possible the shift from a criminal law, prosecutorial approach to terrorism to an administrative law, precautionary approach to terrorism.[2] In the weeks and months that followed 9/11, this discourse found broad support within the executive branch of the US government. As the first post-9/11 anti-terrorism actions came to court in the US and other countries, scholars noted the propensity of these courts to adopt a similar precautionary approach to terrorism, buttressed by a similar discourse of crisis.[3] This crisis discourse emphasized the (supposed) unique and existential threat posed by international terrorism to civilization and posited that this threat could only be avoided if ways of dealing with terrorism underwent a fundamental change - a change from after-the-fact prosecution of terrorism as a crime to preventive military or administrative action. In effect, this crisis discourse was a tool in a hegemonic struggle to rupture the previously dominant legal discourse of prosecution and to replace it with a discourse of prevention. Importantly, crisis discourse succeeded in creating this shift from a discourse of prosecution to a discourse of prevention, at least for a number of years after 9/11.[4]

This chapter aims to show that despite the force of this strong and unified crisis discourse in the political arena, space was available to resist this discourse and it argues that judges had a responsibility to do so, to the extent the discourse called for the permanent exclusion of a

[1] An earlier version of this chapter was published as Laura M. Henderson, 'Crisis Discourse: A Catalyst for Legal Change?,' *Queen Mary Law Journal* 5 (1) (2014).
[2] Rens van Munster, 'The War on Terrorism: When the Exception Becomes the Rule,' *International Journal for the Semiotics of Law* 2004, 17 (2): 141-153, Douglas Feith, 'Council on Foreign Relations: Progress in the Global War on Terrorism,' Washington DC, 13 November 2003.
[3] See Marieke de Goede and Beatrice de Graaf, 'Sentencing Risk: Temporality and Precaution in Terrorism Trials,' *International Political Sociology* 7 (3) (2013): 328 and Filip Gelev, 'Checks and Balances of Risk Management: Precautionary Logic and the Judiciary,' *Review of International Studies* 37 (2011): 2237-2252 and Laura M. Henderson, 'Crisis in the Courtroom: The Discursive Conditions of Possibility for Ruptures in Legal Discourse,' *Netherlands Journal of Legal Philosophy* (forthcoming).
[4] See generally Henderson, 'Crisis Discourse,' 1-13.

person from the political community. This argument takes the perspective that interpretation of what the 'law' 'is' is an activity inescapably affected by discourse that structures the field of meaning, making some interpretations acceptable and intelligible and while ruling others out.[5] Both legal and political discourses affect the final interpretation of the law, and we have seen how the crisis discourse that becomes hegemonic in political speech can make its way into legal discourse.[6] These discourses are not neutral or natural but are characterized by power relations that both use and are maintained by discourses as these discourses vie for hegemonic status. Yet, despite the strong structuring force of hegemonic discourses on the field of (legal) meaning, this structure retains a residual ambiguity[7] and it is this residual ambiguity that provides the interpreter with space - albeit limited - to subvert the hegemonic discourse. I refer to this dual nature of legal interpretation (its determination by discourse and its ambiguity) in this chapter as a *structured undecidability*,[8] meaning that law is structured by discourse, but is at the same time never fully saturated with the meaning given by this discourse. The notion of structured undecidability highlights how interpretation of law's meaning is both subject to the disciplining force of discourse that imposes meaning on us, while this meaning always also remains partially ambiguous. This ambiguity gives space for undermining the force of the discourse, by allowing for a deferral of dominant meanings in favor of other possible readings.

In the face of this undecidability, however structured it may be, legal interpretation is a process that can only be resolved by decision. By attending here to the moment of decision, it becomes paradoxically clear that the rule of law is *dependent* on the rule of man.[9] The law *depends* on judicial decisions and "forms of popular political action that engage in agonistic struggle with legal structures and institutions"[10] to enact the law in concrete situations. Without, in fact, doing two impossible things at once – enforcing "the law in a non-arbitrary way" and at the same time respecting "the ways in which each case is different", the general, underdetermined law cannot be automatically applied to particular cases – and it is for this application that the law depends on individual, (wo)man-made decisions.[11] This necessary moment of decision in the face of undecidability pushes this chapter beyond discussions over

[5] Stuart Hall, 'The Work of Representation,' in *Representation: Cultural Representations and Signifying Practices*, ed. Stuart Hall (London: Sage, 1997), 44.
[6] See chapter three above.
[7] Hans Lindahl speaks of also of a "residual groundlessness." While I believe that I am discussing something similar here, I prefer to speak of the residual *ambiguity* to specifically refer to the incapacity of language – due to Lindahl's residual groundlessness, but distinct – to fully express all potential social meaning. For Lindahl's take on this residual groundlessness see 'Law's "Uncanniness": A Phenomenology of Legal Decisions,' *Netherlands Journal of Legal Philosophy* 2 (2008): 142-144.
[8] Ernesto Laclau, 'Deconstruction, Pragmatism, Hegemony,' in *Deconstruction and Pragmatism*, ed. Chantal Mouffe (London: Routledge, 1996), 57.
[9] Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton: Princeton University Press, 2009), 66.
[10] Honig, *Emergency Politics*, 66.
[11] William W. Sokoloff, 'Between Justice and Legality: Derrida and Decision,' *Political Research Quarterly* 58 (2) (June 2005): 342.

which legal interpretation is 'right' to instead aim to give guidance to judges on how to responsibly engage in the conflicts of interpretation they will inevitably encounter - conflicts that in the end must be resolved through decision.

Section 1 of this chapter uses the Derridian concept of iterability to show the space of undecidability in legal interoperation, despite the strongly hegemonic crisis discourse that structured much legal interpretation after 9/11. It starts with a brief introduction to the case *Hamdi v. Rumsfeld*, the case I use to highlight the iterable nature of law, and the crisis discourse used therein by the different levels of the judicial institution that ruled on this case. After a basic explanation of iterability, I subsequently engage in a close reading of *Hamdi v. Rumsfeld* to show how the judge in the court of first instance played with the terms of the crisis discourse already present in both the government's public speech and legal submissions to make them mean something different, while at the same time repeating them. Section 2 of this chapter moves on to ask how judges should judge in this context of structured undecidability. Here, I compare my view on the iterable nature of law, to Ronald Dworkin's famous call for judges to interpret based on the principles of fit and justification and based on the political morality of a legal system. While Dworkin acknowledges the aspect of construction inherent in legal interpretation, he fails to fully recognize the power struggle involved in the construction of unity out of an undecidable field of legal meaning. Instead of denying this, legal scholars should ask the question how the judge can still legitimately decide in these conditions of undecidability and hegemonic struggle. I conclude with some suggestions on how this can be done.

1. Iterability in the Crisis Discourse of *Hamdi v. Rumsfeld*

The first case heard by the United States Supreme Court on the post-9/11 anti-terrorism measures was *Hamdi v. Rumsfeld*. This case dealt with the issue whether the detention of Mr. Hamdi, a US citizen captured in Afghanistan, without any subsequent criminal charge (and initially without access to a lawyer) violated the due process clause of the US Constitution. The government argued that Mr. Hamdi was an enemy combatant and that, together, interests of national security, the threat posed by terrorism, and the ongoing hostilities meant that Mr. Hamdi should be held preventively, without access to a lawyer, and with only highly deferential judicial review of his detention.[12] In this case, the US Supreme Court ultimately held the detention to be unconstitutional, but not because preventive detention as such was unconstitutional. The Court rejected the government's claim that the factual basis for Mr. Hamdi's detention was not subject to judicial review, but accepted the government's argument that it was authorized to detain Mr. Hamdi preventively, as an unlawful enemy combatant. Further, the Court accepted that the standard of review for preventive, administrative detention should be lower than that for detainees suspected of a criminal

[12] Henderson, 'Crisis Discourse,' 10.

offense, so as to "alleviate … [the procedural guarantees'] uncommon potential to burden the executive at a time of on-going military conflict."[13] The Court thus upheld the precautionary approach to terrorism engaged in by the government, although it ensured that *some* judicial review of the government's factual assertions would be possible.

Both the Court of Appeals and the US Supreme Court's decisions were characterized by crisis discourse, a discourse that linked the (presumed) existential threat of terrorism to the (presumed) need for structural legal change. This discourse emphasized the existential and unique nature of the threat posed by international terrorism and used this threat to rhetorically justify a departure from normal (legal) rules and procedures. The Court of Appeals for the Fourth Circuit employed this discourse by highlighting the unique nature of the case under consideration and arguing that the normal way for such a case to proceed was not appropriate under the current circumstances:

> The [lower] court's order was not merely a garden-variety appointment of counsel in an ordinary criminal case. If it had been, the lower court's discretion would be almost plenary and hardly a subject for appeal, much less reversal. But the June 11 order was different in kind. In the face of on-going hostilities, the district court issued an order that failed to address the many serious questions raised by Hamdi's case.[14]

Further, this court saw a risk of "saddling military decision-making with the panoply of encumbrances associated with civil litigation"[15] and decided "the development of facts may pose special hazards of judicial involvement in military decision-making."[16] In articulating these risks, the court adhered to the terms of the newly hegemonic crisis discourse, which portrayed the normal legal rules as posing too large a risk in such exceptional times and thus warranting change. The US Supreme Court's decision in this case evidenced a similar use of crisis discourse. The Supreme Court reasoned that "the exigencies of the circumstances may demand that … enemy combatant proceedings may be tailored to alleviate their *uncommon* potential to burden the Executive at a time of on-going military conflict"[17] and pointed out that "the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy combatant setting…"[18] Justice Thomas' dissent went even further than the majority opinion in its use of crisis discourse. According to Justice Thomas, the Supreme Court's ruling's failure to understand the new reality of the War on Terror posed a threat to security of the nation: "the Government's factual allegations will probably require the Government to divulge highly classified information to the purported

[13] Supreme Court of the United States, *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004), slip op., 26-27.
[14] United States Court of Appeals for the Fourth Circuit, *Hamdi v. Rumsfeld*, Decision on Appeal before Judges Wilkinson, Wilkins and Traxler (12 July 2002) Joint Appendix II, 2004 WL 1123351 (U.S.), 24, internal citations omitted.
[15] United States Court of Appeals for the Fourth Circuit, *Hamdi v. Rumsfeld* (12 July 2002), 25.
[16] United States Court of Appeals for the Fourth Circuit, *Hamdi v. Rumsfeld* (12 July 2002), 26.
[17] Supreme Court of the United States, *Hamdi v. Rumsfeld,* 27, emphasis added.
[18] Supreme Court of the United States, *Hamdi v. Rumsfeld,* 28.

enemy combatant, who might then upon release return to the fight armed with our most closely held secrets."[19] The Supreme Court and Court of Appeals' ruling in the *Hamdi* case exemplify how crisis discourse made possible a shift in legal discourse from prosecution toward prevention after 9/11.

Yet, while such attention to the force of the hegemonic discourse of crisis on legal decision-making shows how crisis discourse can rupture and (re)create legal discourse, it gives the (mistaken) impression that the decision in this case was *so fully determined* by the crisis discourse that the decision could not have been any different. This perspective ignores what Jacques Derrida has called the iterability of language: while discourse can have a highly disciplining effect, constituting the subjects who live within it and making certain outcomes thinkable and others not,[20] it is at the same time impossible for a discourse to be reproduced without its meaning changing, however slightly, at the same time. This iterability is at the core of law's undecidability. The following part will introduce Derrida's iterability, after which I will use this concept to analyze a particular part of the *Hamdi v. Rumsfeld* case history to highlight the space that was available for the judge to resist the discourse of crisis.

Iterability in Language and Law

One of Jacques Derrida's main contributions to a theory of meaning is the idea that language's meaning is not stable or perfectly present but rather always ambiguous. This ambiguity is not merely a flaw or defect of language, but fundamental.[21] Neither the author's intention nor the text can limit meaning totally and, instead, Derrida stresses the multiple ways in which meaning escapes and transcends language. It is in this light that Derrida's concept of iterability should be seen. Derrida explains that each time a word is used, its meaning results from a combination of past uses of the same word as well as from the unique context in which it is used. Words are situated within chains of meaning (the previous uses of words linked together with the meanings attributed to them in the past), but each time a word is used, that chain is slightly changed. Each time a word is used it is thus both the same and different: it relies upon its sameness with past uses, while at the same time its meaning can never be identical to that of past uses due to the influence the present context has on its meaning. It is this ability of a word to be repeated, while being altered, that Derrida calls iterability.[22]

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[19] Supreme Court of the United States, *Hamdi v. Rumsfeld,* 18.
[20] Hall, 'The Work of Representation,' 44
[21] Here Derrida departs from the structuralists he critiques. While structuralists acknowledged as well that language could be ambiguous, they saw this as a flaw to be overcome. Derrida, on the other hand, argued that this ambiguity was ineradicable. See further David Aram Kaiser and Paul Lufkin, 'Deconstructing *Davis v. United States:* Intention and Meaning in Ambiguous Requests for Counsel,' *Hastings Constitutional Law Quarterly* 32 (3) (2005): 741.
[22] Jacques Derrida, 'Signature Event Context,' in *Limited Inc* (Illinois: Northwestern University Press, 1988), 9. It has been noted that Derrida's iterability is similar to hermeneutics as set out most prominently by Hans-Georg Gadamer, see Michael N. Forester, 'Hermeneutics,' in *The Oxford Handbook of Continental Philosophy*, ed.

Derrida's notion of iterability emphasizes the indeterminacy of meaning but should not, I believe, be interpreted to mean that language can gain radically new meaning without being affected by its previous incarnations. It might be the case that the particular context in which a word is spoken cannot fully enclose or saturate the meaning of the word but at the same time the previous contexts in which the word was used and was known to the receiver will always still impact upon the word, even in its new context. By the very fact that it is intelligible, the word's identity must be recognized as something used before, but at the same time the word will always carry with it more richness of meaning than can be exhausted by one particular usage of it. Thus, instead of interpreting Derrida's position to be that language is completely without meaning as some critics have done, I follow those who interpret Derrida's work to highlight the fluidity of meaning and who see meaning as a product of negotiation rather than pure understanding.[23]

Judith Butler takes pains to show that this fluidity of meaning, while inescapable, does not mean it is *easy* to free oneself from the dominant meaning of a word. She gives the example of how using the word 'queer' creates a "social bond among homophobic communities … The interpellation echoes past interpellations, and binds the speakers, as if they spoke in unison across time."[24] In her words, "discourse has a history" and each performative has a place in a "chain of historicity" that constrains past and future use.[25] In this way, Butler points to the force exerted by past uses of discourse and to the limits on individual agency in simply changing the meaning of a word. In her example on the use of the word 'queer' she argues that attempts to renegotiate or reappropriate the word by LGBT communities will always have to reckon with this force of past meanings. There is no blank slate upon which new meanings can be inscribed; instead words have places in chains of historicity that impede attempts to break those chains and insert the word into a new chain. Discourse exerts power by "echo[ing] prior actions, and *accumulat[ing] the force of authority through the repetition or citation of a prior, authoritative set of practices*."[26]

Brian Leiter and Michael Rosen (Oxford: Oxford University Press, 2007), 66. While I do not deny this similarity, I choose here Derrida's perspective because of the emphasis Derrida placed on the importance of ambiguity and alterity. While Gadamer and other followers of hermeneutics certainly would not reject these notions, they view them as less central to language and meaning than Derrida did. Derrida's emphasis on ambiguity means that Derrida's approach to meaning aims to keep the process of interpretation as open and on-going as possible. As Pierre Legrand notes, citing Colin Davis, '[h]ermeneutics would like to bring interpretation to a close, at least provisionally, though it knows it may not be able to; deconstruction would like not to stop, though it knows it will have to.' Pierre Legrand, 'Derrida's Gadamer,' in *Law's Hermeneutics: Other Investigations*, ed. Simone Glanert & Fabien Girard (London: Routledge, 2017), 160, citing Colin Davis, *Critical Excess: Overreading in Derrida, Deleuze, Levinas, Žižek and Cavell* (Stanford, CA: Stanford University Press, 2010), 55.

[23] See for example Judith Butler, *Bodies that Matter: On the Discursive Limits of 'Sex'* (New York: Routledge, 2011 (1993)), 172; Kaiser and Lufkin, 'Deconstructing *Davis v. United States,*' 741; Legrand, 'Derrida's Gadamer,' 152; Sokoloff, 'Between Justice and Legality,' 343-344; and Henry Staten, *Wittgenstein and Derrida* (Oxford: Basil Blackwell, 1985), 152.

[24] Butler, *Bodies that Matter,* 172.

[25] Butler, *Bodies that Matter,* 172, 174.

[26] Butler, *Bodies that Matter,* 172, emphasis in original.

V. Deciding to Repeat Differently

Legal decision-making presumes the pole of iterability that emphasizes the repeatability of meaning; the force of law rests upon the citational force of language. Certainly, these types of 'chains of citationality'[27] are familiar to every lawyer. One only has to glance at any judicial decision to see these chains appear as the judge refers to past decisions and legislative documents that link together to justify the decision the judge renders. The chains of citationality that are weaved into a legal decision mean that the judge never speaks alone. It is this very reference back to past speakers that creates a "citational force" "that establishes the authority" of the judge's speech act.[28] The force of the decision is not a product of the judge's intentionality; her own preferences or values are irrelevant to the formal or persuasive power of the decision. Even if she wished her decision to be purely a function of her intention, so long as she stays within the citationality of the law, the terms and concepts she uses will always "exceed and undo the intentions and aims of any particular speaker in time."[29] It is, instead, these citational chains that produce the legal authority of the decision and it is because the decision is framed in terms of these chains, is bound to past speakers, past judges, "as if they spoke in unison across time"[30] that the decision has the force of law.

It is important, however, to realize that despite the constraining, disciplining force of discourse, perfect replication remains impossible. In addition to the pole of iterability that emphasizes the repeatability of language, there is a second pole, the alterity of meaning and it is this aspect of discourse that gives one the possibility to engage in a "different sort of repeating."[31] Contemporary post-foundational thinkers, like Judith Butler and Bonnie Honig, have developed this pole of iterability to show that while hegemonic discourses can produce and regulate meaning and subjectivities, these discourses and the meanings and subjects they create are always "internally discontinuous."[32] Even when a word is used with the intent of its dominant meaning, this dominant meaning is always supplemented by opposing or differing meanings. While these other meanings might temporarily defer to the dominant meaning, they remain present in the margins. It might thus *seem* as if permanence is possible – the permanence of a particular articulation of power or of the identity of the subject – but language in fact makes such permanence impossible.[33] While this pole of iterability often receives less attention in judicial decision-making, the inevitable non-identical repetition of chains of citationality means that law cannot be applied in a machine-like way.[34] Even despite

[27] I use this term to refer to what Butler calls "citational chains": "…every 'act' is an echo or citational chain, and it is its citationality that constitutes its performative force," see *Bodies that Matter*, 214 note 5.
[28] Butler, *Bodies that Matter*, 214 note 5.
[29] Honig, *Emergency Politics,* 128.
[30] Butler, *Bodies that Matter*, 172.
[31] Judith Butler, 'Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory,' *Theatre Journal* 40 (4) (1988): 520.
[32] Butler, 'Performative Acts and Gender Constitution,' 520.
[33] Bonnie Honig, *Political Theory and the Displacement of Politics* (Ithaca: Cornell University Press, 1993), 123.
[34] Or perhaps more accurately, even a machine's behavior is not fully present to the machine itself as even machines can have parts that bend, break off and be melted (see Ludwig Wittgenstein, *Philosophical*

our very best attempts to repeat identically, it is impossible for a repetition to ever be an exact copy of the 'original', whatever that original might be: "[e]ach case is other, each decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely."[35] And so, in law, even when a judge attempts to most faithfully reconstruct the chain of citationality that leads back to some original intention or law (if such an original moment exists) she will never be able to do so without in some way *altering* that chain. By applying the law to a new situation, the judge cannot help but detach 'the law' from part of the chain in which it was previously inserted, subsequently grafting it onto a different chain. A new link is added to the chain of citationality that is discursively posited by the judge, and in doing so, the chain itself changes. In the next Part, I use this concept of iterability with its poles of repetition and alterity to take a second look at the force crisis discourse exerted on the decision-making in *Hamdi v. Rumsfeld*.

Repeating Differently in Hamdi v. Rumsfeld

Derrida's concept of iterability highlights the failure of discourse to fully bind, to fully control legal interpretation. In this Part, I use the lens of iterability to look at the judicial proceedings at the court of first instance in the case of *Hamdi v. Rumsfeld*. I hope to show how, throughout the hearings at this level, the judge explored, pushed and was pulled by the iterability of law and, in doing so, I emphasize the *decision* - the act - that the judge takes in ruling a certain way. By looking at *Hamdi* from this perspective instead of attending to the effects of the dominant discourse, a different picture of how crisis discourse affected legal discourse emerges. While the court of first instance's judgment was overturned on appeal, and thus not relevant for purposes of legal precedent (and therefore often ignored by legal scholarship) this lower-level decision shows that even in the context of a highly coherent, hegemonic discourse like the crisis discourse employed in the War on Terror, space for resistance is possible. It also shows, however, the repercussions of engaging in such resistance.

When *Hamdi* came before the District Court for the Eastern District of Virginia, the presiding Judge Doumar was initially highly critical of the government's use of crisis discourse to justify its actions. Judge Doumar questioned the executive's claim that the US was in a state of war, asking the lawyer for the government whether there had been a declaration of war, and after the lawyer answered that there had not been a formal one[36] the judge explicitly voiced his uncertainty about the current state of affairs and doubt as to whether to go along with the discourse of war: "There have been a lot of people who say we have a war, but I don't know

Investigations, trans. G.E.M. Anscombe (Oxford: Basil Blackwell, 1958) nos. 193-94, cited in Honig, *Emergency Politics*, 55).

[35] Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority",' in *Deconstruction and the Possibility of Justice*, ed. Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (New York: Routledge, 1992), 23.

[36] United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, Transcript of Proceedings before the Honorable R. G. Doumar (29 May 2002) Joint Appendix I, 2004 WL 1120871 (U.S.), 34.

if this is really a war or what it is."[37] The judge continued on to question the government's assertions regarding the exceptionality of the circumstances, probing what the government's position was on any foreseeable end. Judge Doumar asked the government to clarify "when are these hostilities going to end? Is he [Hamdi] going to be held forever? Can he be held for life?"[38]

Judge Doumar's skepticism of the government's use of the crisis discourse was interrupted by the government's interlocutory appeal to the Court of Appeals for the Fourth Circuit.[39] In their ruling, the Court of Appeals instructed Judge Doumar to show more deference to the executive in considering the national security aspects of the case. It was at this point that Judge Doumar began to emphasize the importance of national security, taking care to note for example that "the judiciary has traditionally shown 'great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs.'"[40] Yet, while Judge Doumar complied with the Court of Appeals' order to take more account of the need for deference to the executive in matters of national security, Judge Doumar managed to give this concept of national security a somewhat different shape than the Court of Appeals did. He framed his ruling in terms of national security, but did so in a way that emphasized a particular side of the national security concept: the national values deemed worthy of protection. By citing a case not cited by the Court of Appeals, and neglecting to cite those the Court of Appeals does cite,[41] Judge Doumar acknowledged the national security interest but interpreted this concept differently than the Court of Appeals had. Whereas the Court of Appeals linked national security to times of active hostilities and military affairs, Judge Doumar expanded it to include the protection of individual liberty:

[37] United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, (29 May 2002), 34.
[38] United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, (29 May 2002), 36.
[39] United States Court of Appeals for the Fourth Circuit, *Hamdi v. Rumsfeld*, Decision on Appeal from the United States District Court for the Eastern District of Virginia (12 July 2002), Joint Appendix II, 2004 WL 1123351 (U.S.), 21-26.
[40] United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, Order (16 August 2002) Joint Appendix II, 2004 WL 1123351 (U.S.), 5, citing the United States Court of Appeals' ruling *Hamdi v. Rumsfeld,* 2000 (sic) WL 1483908.
[41] The United States Court of Appeals used a number of cases to ground its claims on national security (*Dames & Moore v. Regan, United States v. The Three Friends*, *Stewart v. Kahn* and *The Prize Cases*) that the District Court did not refer to. Instead, the District Court based its concept of national security on *United States v. Robel*, a case not mentioned by the Court of Appeals. For the Court of Appeals' references in this regard, see United States Court of Appeals for the Fourth Circuit, *Hamdi v. Rumsfeld*, Decision on Appeal from the United States District Court for the Eastern District of Virginia (12 July 2002), Joint Appendix II, 2004 WL 1123351 (U.S.), 23-34. For the citation used by the District Court, see United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld,* Order (16 August 2002) Joint Appendix II, 2004 WL 1123351 (U.S.), 5.

> The standard of judicial inquiry must also recognize that the 'concept of "national defense" cannot be deemed an end in itself, justifying any exercise of [executive] power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideals which sets this Nation apart … It would indeed by [sic] ironic if, in the name of national defense, we would sanction the subversion of one of those liberties … which makes the defense of the Nation worthwhile.' *United States v. Robel*.[42]

Judge Doumar was thus able to follow the instruction of the higher court to, as it were, rule within a discourse of crisis that highlighted the threats to national security while at the same time detach 'national security' from the chain of meaning in which the Court of Appeals used it, grafting it instead onto a different chain, giving the words a different meaning.

In a similar vein, the District Court judge worked in other elements of crisis discourse to his rulings, while at the same time warping their use to mean something different than how they had been used by the government in its legal arguments or in its public pronouncements on terrorism. One typical element of crisis discourse as used by the government and the higher courts was the emphasis on the unique nature of international terrorism. In court proceedings, the executive often asserted that the "forces responsible for the September 11 attack pose an '*unusual* and *extraordinary* threat to the national security and foreign policy of the United States'"[43] and, according to the government, the wartime nature of the case meant that an entirely different paradigm should be applied to the case.[44] In the rulings from the higher courts, a similar conception of the unique nature of the case was echoed, as was shown above in the citation from the Court of Appeals.[45] Judge Doumar emphasized the novel elements of this case as well. Yet, instead of the singular threat posed by international terrorism, it was the unique nature of the government's action he focused his attention on. The judge asked the government's lawyer whether "there [is] any case that you know of, any habeas corpus petition that you've ever heard of, prior to this case where counsel could not speak to the person being held?"[46] The government could not provide the court with such a precedent, upon which the judge noted in his decision: "this case appears to be the first in American jurisprudence where an American citizen has been held incommunicado and subjected to an indefinite detention in the continental United States without charges, without any findings by

[42] United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, (16 August 2002), 5. Additions in brackets are Judge Doumar's.
[43] Respondents' Response to, and Motion to Dismiss, the Petition for a Writ of Habeas Corpus, *Hamdi v. Rumsfeld*, 1120871 (U.S.) 56, citing congressional language from the Authorization for the Use of Military Force, among others, emphasis added.
[44] Brief for Respondents-Appellants (Secretary of Defense) on Appeal to the United States Court of Appeals, Fourth Circuit, *Hamdi v. Rumsfeld*, (4 October 2002), 12. The respondents speak here of "The entirely different paradigm in which this case arises – wartime detention of combatants, rather than criminal punishment."
[45] At *supra* footnote 14.
[46] United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, Transcript of Proceedings before the Honorable R. G. Doumar (13 August 2002) Joint Appendix I, 2004 WL 1120871 (U.S.), 85.

a military tribunal, and without access to a lawyer."[47] By pointing out the unique nature of this case, Judge Doumar adopted the terms of crisis discourse but decoupled crisis discourse's emphasis on uniqueness from the threat posed by international terrorism. While the government emphasized the existential threat of terrorism in general[48] and the risk that judicial involvement in this case could diminish "the prestige of our commanders; divert[…] their attention from the war effort and possibly require[…] them to return from abroad to be called to account in our courts; and risk[…] a conflict of military and judicial opinion",[49] the threat Judge Doumar spoke of is an existential threat to the identity of the United States, the values of the Constitution and the risk of chaos that comes with undermining that identity and those values. Judge Doumar detailed this risk elaborately:

> We must protect the freedoms of even those who hate us, and that we may find objectionable. If we fail in this task, we become victims of the precedents we create. We have prided ourselves on being a nation of laws applying equally to all and not a nation of men who have few or no standards. The warlords of Afghanistan may have been in the business of pillage and plunder. We cannot descend to their standards without debasing ourselves. We must preserve the rights afforded to us by our Constitution and laws for without it we return of the chaos of a rule of men and not of laws.[50]

Unlike in the dominant use of crisis discourse by the government, Judge Doumar did not interpret the novelty and severity of the threat to mean that completely new procedures were necessary for dealing with it. To the contrary, Judge Doumar seems to be pointing out the uniqueness of the detention of Mr. Hamdi and the threat this poses to constitutional values to reject the government's crisis discourse.

By using the elements of crisis discourse in his ruling, but decoupling them from previous chains of meaning, Judge Doumar engaged in the "different sort of repeating" that Butler notes iterability makes possible.[51] As Judge Doumar's approach to this case shows, the shift toward precaution in post-9/11 counter-terrorism cases was a shift that was not inevitable, nor one that went uncontested. Whether intentionally or not, Judge Doumar entered into the space available to repeat differently and employed the terms of crisis discourse in a way that challenged and undermined that same discourse. But this resistance to the hegemonic crisis discourse was not successful in this instance. Judge Doumar ruled that Mr. Hamdi should be allowed access to a lawyer but the government subsequently refused to comply with this order. The government's denial to comply threatened a clash between the judiciary and the executive, a clash Judge Doumar had no desire to engage in, explicitly remarking that he was

[47] United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld* (16 August 2002), 2.
[48] Henderson, 'Crisis Discourse,' 6.
[49] Brief for Respondents-Appellants at the United States Court of Appeals, Fourth Circuit, *Hamdi v. Rumsfeld* (June 19, 2002) 2002 WL 32728567 (C.A.4), 6.
[50] United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld* (16 August 2002), 9.
[51] Butler, 'Performative Acts and Gender Constitution,' 520.

"not interested in throwing the Secretary of Defense in jail" for contempt of court.[52] In the end, the Court of Appeals for the Fourth Circuit overruled of the District Court's rulings on the case, holding that Mr. Hamdi had no right to a lawyer or to contest the facts presented by the government as to his enemy combatant status. According to the Court of Appeals, this was the appropriate attitude a court must show toward the executive in a time of war. After the decision of the Court of Appeals, the case was heard by the Supreme Court, which affirmed many of the District Court's orders, but did so far more clearly within the framework of preventive, administrative law than the District Court did. The Supreme Court accepted the argument that the standard of review for Mr. Hamdi's detention should be lower than the standard of review for the detention of someone charged with a crime, because of the criminal law standards' "uncommon potential to burden the executive at a time of on-going military conflict."[53] With that decision, the US Supreme Court made the shift from a criminal law approach to a precautionary, administrative law approach to terrorism.

2. The Decision and Responsibility

The first Section of this chapter discussed the aspect of iterability that is present in judicial judgments: judgments are rendered in terms of chains of citationality that restrain and limit possible meanings of the law, while at the same time the judgment cannot help but have an aspect of alterity. I showed how Judge Doumar's use of this space for changing meanings made certain terms of the crisis discourse used by the executive and the Court of Appeals on the War in Terror mean something different. In this Section I consider how a judge should go about using this space for repeating differently. Should the judge maintain the fiction of the law as decidable and unified or rather intentionally engage with and take account of its undecidable aspects? To answer this question, I start with Ronald Dworkin, a legal scholar who was heavily influenced by questions of meaning-making and helped develop a hermeneutic theory of law, and discuss his views of how judges interpret the law. Dworkin acknowledges that law is not unified but argues that the judge, in her construction of the law *as if it were,* can come to an answer that she is convinced is the one right answer. I proceed to critique Dworkin's view of adjudication based on a reading of Derrida influenced by a post-foundationalism that highlights the role of power relations in attempting to unify law. In the end, I return to Derrida's understanding of undecidability in law to present the judge with a possible way forward.

[52] United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, Transcript of Telephonic Conference before the Honorable Robert G. Doumar (20 August 2002) Joint Appendix II, 2004 WL 1123351 (U.S.), 13-17.
[53] Supreme Court of the United States, *Hamdi v. Rumsfeld*, 27.

V. Deciding to Repeat Differently

Dworkin's Undecidable Chain of Meaning

Ronald Dworkin sets out a theory of legal meaning that sees law as an argumentative practice.[54] Instead of relying on the original intent of the author of the law, Dworkin proposes that the meaning of law is *constructed*; meaning is made – not found. This interpretive process is one that combines a responsibility to remain faithful to legal tradition with the recognition that, in order to do so, the judge must engage in some type of creative activity.[55] Approaching the issue from the perspective of the judge presented with a question of interpretation, Dworkin uses the metaphor of a chain novel to show how this interpretive activity takes place. Dworkin explains:

> Each judge must regard himself, in deciding the new case before him, as a partner in a complex chain enterprise of which innumerable decisions, structures, conventions, and practices are the history; it is his job to continue that history in to the future through what he does on that day. He *must* interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own. So he must determine, according to his own judgment, what the earlier decisions come to, what the point or theme of the practice so far, taken as a whole, really is.[56]

The first task of the judge is thus to construct a view of the law as if it were a "coherent whole" and decide the case at hand in a way that best fits within this coherence.[57] As Dworkin explains it, still in terms of his chain novel metaphor, it is the judge's job to as much as possible write "a single, unified novel rather than, for example, a series of independent short stories with characters bearing the same names."[58] In Dworkin's comparison between interpretation of art and law, he explains that in his view interpretation must attempt to show the text "as the best work of art *it* can be", insisting that the 'it' of the text must be respected, instead of "changing it into a different one."[59] The judge must decide which reading of the chain is the best one, and continue that reading.[60]

In addition to this faithfulness to the enterprise and the avoidance of taking "some new direction of his own," Dworkin acknowledges the judge does more than simply *receive* the meaning of the law. Creativity is necessary to advance legal history into the future, to interpret what that history means for us today.[61] Dworkin does not deny that in this process of

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[54] Ronald Dworkin, 'Law and Interpretation,' *Critical Inquiry* 9 (1) (1982): 179.
[55] At least in the case of interpreting principles, see John McGarry, *Intention, Supremacy and the Theories of Judicial Review* (London: Routledge, 2017), 21-22.
[56] Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), 159, emphasis in original.
[57] McGarry, *Intention, Supremacy and the Theories of Judicial Review,* 19.
[58] Dworkin, *A Matter of Principle,* 159.
[59] Dworkin, 'Law and Interpretation,' 183.
[60] Dworkin, 'Law and Interpretation,' 194.
[61] Anne Barron, 'Ronald Dworkin and the Challenge of Postmodernism,' in *Reading Dworkin Critically,* ed. Alan Hunt (Oxford: Berg Publishers, 1992), 148.

construction, the judge will be affected by politics. Indeed, he remarks that "interpretation in law is essentially political,"[62] that law is "deeply and thoroughly political"[63] and that legal interpretation will be linked to the interpreter's views on political morality, to "beliefs other judges need not share."[64] But, according to Dworkin, one can only speak of a judge making *new* law in a "trivial sense."[65] Instead of setting out to depart from the law as it stands, it is the judge's duty to – with the aid of political morality – construct a theory of law that best fits the legal practice as it currently is and that provides the best normative justification of this practice.[66] In effect, the judge is to endeavor to unify the diffuse nature of law, to "*construct* a unity from the disparate elements"[67] of legal history and practice and to "impos[e] purpose" on the law to "make of it the best possible example of the form or genre to which it is taken to belong."[68] While Dworkin acknowledges that in fact "the law may not be a seamless web," he entreats the judge to "treat it as if it were."[69] This shall subsequently provide the judge with the soundest theory of law, based on which she can interpret the law. The judge's soundest theory of law constrains her in her interpretation of the particular law at hand: the answer she must give is that which best fits within the web of meaning she has constructed. The creativity necessary in legal interpretation is, for Dworkin, not the creativity of a judge faced with a blank slate upon which any interpretation can be projected.[70] The limit to this creativity is found in the judge's duty to remain faithful to advancing the enterprise at hand,[71] an enterprise characterized by the "integrity and coherence of law as an institution."[72] In every judge's political morality, there must be some sense of this integrity of law that subsequently acts as an "overriding constraint" on the judge's decision.[73]

In many ways, Dworkin's 'chain novel' approach to law echoes Derrida's iterability. Dworkin's indebtedness to the larger hermeneutic tradition, and particularly to Gadamer, is an indebtedness Derrida shares, though fails to acknowledge.[74] This connection to hermeneutics gives both authors a particular eye for the dual nature of the determinedness *and* ambiguity of meaning in law. Yet, while Dworkin's hermeneutics – as Gadamer's – remains focused on striving for unity, in Derrida's 'radical hermeneutics'[75] the emphasis is on the discord ever-present in this constructed fiction of unity. As Derrida stresses, "conventions, institutions and

[62] Dworkin, *A Matter of Principle*, 162.
[63] Dworkin, 'Law and Interpretation,' 179.
[64] Dworkin, *A Matter of Principle*, 162.
[65] Ronald Dworkin, *Law's Empire* (Oxford: Hart Publishing, 1998), 6.
[66] Dworkin, *A Matter of Principle*, 160.
[67] Barron, 'Ronald Dworkin and the Challenge of Postmodernism,' 149.
[68] Dworkin, *Law's Empire*, 52.
[69] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass., Harvard University Press, 1977), 116.
[70] Dworkin, *A Matter of Principle*, 164.
[71] Barron, 'Ronald Dworkin and the Challenge of Postmodernism,' 149.
[72] Dworkin, *A Matter of Principle*, 161.
[73] Dworkin, 'Law and Interpretation,' 195.
[74] See footnote 111 in Forester, 'Hermeneutics,' 66.
[75] John Caputo, *Radical Hermeneutics: Repetition, Deconstruction and the Hermeneutic Project* (Bloomington: Indiana University Press, 1987).

consensus are stabilizations (sometimes stabilizations of great duration, sometimes micro-stabilizations)" and "this means that they are stabilizations of something *essentially* unstable and chaotic."[76] The stabilization – the construction of the purpose and integrity of law – is necessary because of the very fact that "stability is not natural."[77] How does one get from chaos to a non-natural stability? The construction of a unified version of law from an inherently non-unified field of meaning requires an exercise of power, an imposition of will, that suppresses certain alternatives while favoring others. Derrida's work on deconstruction has been read to highlight the power play present in this striving for unity and, importantly, to show how simulated stability remains contaminated by the non-unity out of which it is constructed.[78] These readings acknowledge the possibility of constraint that discourse brings, but highlights that the stability and unity interpreters might perceive are not neutral constructions but the result of contingent processes characterized by power relations. And even after an exertion of power has constructed one fiction of unity over another, the alternatives do not disappear. As a number of contemporary scholars have emphasized, relying on Derrida, these possible alternatives remain present and continually challenge the boundary as drawn.[79] These 'remainders,' while relegated to the margins in the attempt to construct a unified interpretation of law, cannot be expunged.[80] They continue to exist, continue to threaten the destabilization of the constructed unity in favor of other possible unities.

Dworkin does not deny that something external to law is necessary to make the step from the non-unified field of meaning to the coherent construction of law; he assumes the judge's access to a political morality will provide the concrete ground necessary to bridge this gap. Dworkin, however, filters out all of the conflictual, contradictory and power-related aspects of both (legal) interpretation and the political morality the judge needs for this interpretation. He thus fails to realize that this political morality is itself "the contingent outcome of a perpetual and radically undecidable conflict of interpretations."[81] Thus while the political morality a judge uses might constrain her interpretation, and in this sense provide some ground, it is also

[76] Jacques Derrida, 'Remarks on Deconstruction and Pragmatism,' in *Deconstruction and Pragmatism,* 83.
[77] Derrida, 'Remarks on Deconstruction and Pragmatism,' 83.
[78] Staten, *Wittgenstein and Derrida*, 152.
[79] Aletta J. Norval, 'Hegemony after Deconstruction: The Consequences of Undecidability,' *Journal of Political Ideologies* 9 (2) (2004): 142; E.E. Berns, 'Decision, Hegemony and Law: Derrida and Laclau,' *Philosophy & Social Criticism* 22 (4) (1996): 74. Both Norval and Berns attribute this insight to Ernesto Laclau in, among others, Ernesto Laclau, 'The Impossibility of Society,' *Canadian Journal of Political and Social Theory* 7 (1983): 21-24.
[80] Honig, *Political Theory and the Displacement of Politics*, 143-146.
[81] Barron, 'Ronald Dworkin and the Challenge of Postmodernism,' 150. Dworkin certainly mentions the role of *politics* in interpretation but the politics that is implicated in his process of constructing this soundest theory of the law is a form of politics *purified* of power relations. All actual conflictual aspects of politics seem to be given no meaningful role to play in Dworkin's theory of law. See Alan Hunt, 'Law's Empire or Legal Imperialism?,' in *Reading Dworkin Critically*, 41; Andrew Altman, 'Legal Realism, Critical Legal Studies and Dworkin,' *Philosophy & Public Affairs* 15 (3) (1986): 216; Barron, 'Ronald Dworkin and the Challenge of Postmodernism,' 150 and David Couzens Hoy, 'Interpreting the Law: Hermeneutical and Poststructuralist Perspectives,' *Southern California Law Review* 58 (1985): 174.

a contingent, human-made product of power relations, which means the ground it provides cannot be stable or final. To put this in other words, Dworkin seems to assume that the judge's political morality is the starting point in the interpretive process, instead of the object of a political struggle. Instead of political morality providing the solid ground Dworkin seeks to avoid arbitrariness, political morality is itself the product of contingent hegemonic struggles that are never finally settled and are constantly characterized by relations of power. The political morality that the judge must use to solve the interpretive conflict entails choosing sides in the political conflict[82] and is itself not grounded on anything outside of the struggle the judge chooses sides in. If political morality is itself a contingent outcome, the judge's interpretation is not the end of an interpretive conflict but rather a step in the chain of political conflict that, while creating the fiction of unity, "does not transcend the political fray" but is in fact at its center.[83]

We are left with the image of law as a partially structured, partially unstructured field; a field of "structured undecidability."[84] Interpretation of this field is indeed constrained by chains of meaning and discourses of political morality but these constraints fail to ever fully eliminate the remainders that will continue to challenge the fictional unity. If the construction of (legal) meaning is characterized by hegemonic struggles over the type of fictional unity that is constructed, and if the political morality that provides so much guidance to Dworkin's judge is itself nothing more than the product of such hegemonic conflict, we lose any ultimate ground with which to justify (legal) interpretation. This is not to say that there are no grounds, no discourses that exert power to constrict possible meanings and enable others, but rather that the ground these discourses provide are in the end contingent and do no rest on any ultimate justification.[85]

Lucidly Plunging into the Night of Undecidability[86]

In the midst of this lack of final justification, the instant of decision is "madness."[87] The decision acts "in the night of nonknowledge and nonrule"[88] – not because the judge has not

[82] See for example Hoy's interpretation of Roberto Unger's critique of Dworkin in Hoy, 'Interpreting the Law,' 175.
[83] Bonnie Honig, 'Between Decision and Deliberation: Political Paradox in Democratic Theory,' *American Political Science Review* 101 (1) (2007): 6.
[84] Laclau, 'Deconstruction, Pragmatism, Hegemony,' 57.
[85] Judith Butler, 'Contingent Foundations: Feminism and the Question of 'Postmodernism,' in *Feminists Theorize the Political*, ed. Judith Butler and J.W. Scott (New York: Routledge, 1992): 3-21. See further Oliver Marchart, *Post-Foundational Political Thought: Political Difference in Nancy, Lefort, Badiou and Laclau* (Edinburgh: Edinburgh University Press, 2007), 14.
[86] Derrida speaks of the aporia of forgiveness and claims "[f]orgiveness is thus mad. It must plunge lucidly into the night of the unintelligible," see Jacques Derrida, *On Cosmopolitanism and Forgiveness* (London: Routledge, 2001), 49. I take his plea to combine the plunge necessary to act in conditions of madness with a lucid and well-prepared mind and apply it here to undecidability.
[87] Derrida, 'Force of Law,' 26 (with reference to Kierkegaard).
[88] Derrida, 'Force of Law,' 26.

prepared herself with "knowledge, by information, by infinite analysis"[89] but because undecidability means that any interpretation is an imposition that cannot be grounded in final, ultimate knowledge or guarantees.[90] At the same time, the structured nature of this undecidability means that the decision is not an *absolute* beginning.[91] Instead, this decision is a *derivative* beginning and is influenced, shaped and determined *to a large extent* by the chains of citationality of hegemonic discourses. Discourse and the power it exerts on subjects and social meaning remain significant and inescapable. What Derrida's perspective highlights is that, at the same time and despite the strength of these discourses, they ultimately remain *ungrounded.* These discourses retain a measure of disorder that can never be erased from the incomplete and unstable (dis)unity of meaning.

Recognizing the lack of ultimate ground for (legal) interpretation does not mean law should be abandoned nor that construction of unity should be avoided. While it may not be possible to purify oneself of the wish for unity and integrity, we must realize that unity remains a fiction, even if perhaps a useful or even necessary fiction.[92] And, importantly, the point is to show that this fiction of unity is the result of power exercised in relations between those struggling over multiple different possible constructions of unity. This realization calls on those involved in decision-making to at the same time recognize that their "most basic commitments regarding self, other, and the beyond human are … both *fundamental* and *contestable.*"[93] Decision-makers are to recognize that despite their conviction that their answer is the one right answer, it is in fact but one of many possibilities. There is, in the end, no way "I can never be completely satisfied that I have made a good choice since a decision in favour of one alternative is always to the detriment of another one."[94] If the decider acknowledges that "I have not done enough,"[95] that she can never do enough to find a final ground for her decision, she is confronted the question of how she can take responsibility for the alternatives she has excluded with her decision. For Derrida, the moment a decision-maker is confronted with undecidability is where responsibility comes in. Responsibility starts, Derrida says, "when I *don't* know what to do."[96] Now, it is likely true that the judge will feel the conviction Dworkin speaks of that she has found the one right answer. But if, like

[89] Jacques Derrida, 'Hospitality, Justice and Responsibility: A Dialogue with Jacques Derrida,' in *Questioning Ethics: Contemporary Debates in Philosophy,* ed. R. Kearney and M. Dooley (London: Routledge, 1999), 66.
[90] Derrida, 'Force of Law,' 26-27.
[91] Butler, *Bodies that Matter*, xxi.
[92] According to Henry Staten, Derrida's work calls on us to deconstruct the unity of law, "not in disrespect for truth and disobedience to the law, and certainly not in flight from the demands of a reality which is too stern and fatherly to be faced, but because it is the fantasized fulfillment of an infantile wish." He admits that there is no "purifying ourselves of this wish, but we can see it in its primitive intensity," see Staten, *Wittgenstein and Derrida*, 154.
[93] Stephen K. White, *The Ethos of a Late-Modern Citizen* (Cambridge: Cambridge University Press, 2009), 815, emphasis added.
[94] Chantal Mouffe, 'Deconstruction, Pragmatism and the Politics of Democracy,' in *Deconstruction and Pragmatism*, 9.
[95] Derrida, 'Remarks on Deconstruction and Pragmatism,' 87.
[96] Jacques Derrida, 'Following Theory: Interview with Nicholas Royle, Christopher Norris and Sarah Wood,' in *Life.after.Theory,* ed. Michael Payne and John Shad (London: Continuum, 2003), 31-32.

encouraged above, she simultaneously recognizes that this conviction, while fundamental, is also contestable, the only way to move forward with the decision is by showing responsibility for the other possibilities her decision has foreclosed.

What would such a responsibility to the other entail? If the judge takes account of the fact that she can never be sure her decision is the one right one, despite her deep conviction that it is, she is placed before the responsibility to form her decision in such a way that is *less* exclusionary of the other possible decisions, by ensuring that her decision's exclusionary effects aren't irreversible. The decision must ensure that "the memory of the undecidability … keep[s] a living trace that forever marks a decision as such … the undecidable remains caught, lodged, as a ghost at least, but an essential ghost, in every decision, in every event of decision."[97] Thus, while each judgment remains lacking an ultimate, non-contingent ground, this need not be a call to refrain from judgment. Instead, it is an appeal to ensure the judgment acknowledges its groundlessness by keeping open the possibility that the other who was excluded by her interpretation of the law can work to reverse his own exclusion by continuing to participate in the hegemonic struggle over meaning. While the judge cannot help but take sides in this hegemonic struggle with her decision to construct one vision of the meaning of the law over another, she can ensure that her intervention remains contestable by those she excluded. Practically, this means ensuring that the judge's decision does not result in what has been termed legal invisibility,[98] the situation in which the other is not just excluded from the fictional unity of the decision, but is put in the position where he lacks the right to be recognized under the law. This type of civil death excludes the other so fully that he loses his right of independent action and is treated as a passive object to be possessed or ruled over instead of a legal subject. He is, in fact, subjected to law without the corresponding rights of a legal subject.[99] In such instances, the other is left with no (legal) means to challenge the decision which excluded him and the discourse that supports that decision.

Let us now apply this conclusion to the instance of preventive detention discussed above, in *Hamdi v. Rumsfeld.* The argument set out in this chapter is not that the judge should have *necessarily* resisted the rupture in legal meaning crisis discourse precipitated, nor that the judge should have *necessarily* comported herself with this newly hegemonic discourse. My argument is not one about the merits of the various legal or political arguments put forth within this struggle over meaning. Instead I argue that the judge in her search for the 'one

[97] Derrida, 'Force of Law,' 253.
[98] I take borrow this term 'legal invisibility' from Bernadette Atuahene, 'From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility,' *Southern Methodist University Law Review* 60 (2007): 1425-1431 and Wouter Veraart's (Dutch) discussion of 'juridische onzichtbaarheid', see 'Het slavernijverleden van John Locke. Naar een minder wit curriculum?,' in *Homo Duplex: De dualiteit van de mens in recht, filosofie en sociologie,* ed. Britta van Beers and Iris van Domselaar (Den Haag: Boom juridisch, 2017), 218.
[99] Marc de Wilde, 'Safeguarding the Constitution with and against Carl Schmitt,' *Political Theory* 34 (4) (2006): 514.

right answer' must take into account the possibility that the hegemonic discourse of crisis might be wrong. The threat presumed to justify the indefinite detention may not actually be present. It might be the case that preventive detention might not actually deal with the threat, even if one is in fact posed. It might be that the employed political morality is actually immoral. The judge should reckon with these possibilities by ensuring her decision does not permanently prevent future decisions from correcting such possible mistakes. Thus while it may be impossible for the judge's interpretation to avoid being influenced by the political division in society and the conflict between political groups, and while it may be impossible for the judge's interpretation to avoid taking sides in this political conflict, the task of the judge must be to decide in a way that does not shut down this conflict permanently. In this particular case, I would call upon judges to take account of the effects of their decision on Mr. Hamdi's ability to be able to participate in the discursive struggle over his construction as an other. Such taking-account could include asking whether the preventive detention of Mr. Hamdi called for by the government and discursively justified by the crisis discourse restricts his ability to participate in public and legal debate, denies him recognition under the law as a legal subject and whether his detention will in fact be indefinite, without a clear way to know when it must end. If the answer to these questions is in the affirmative, the judge should engage in a "subversive repetition" of the law to result in a decision with less exclusionary effects.[100] In this way, the judge can take responsibility for the inevitably exclusionary nature of her decision, by ensuring that this exclusion is not permanently entrenched but instead remains contestable. By doing so, the dilemma posed by the need for decision and the impossibility of grounding this decision can be temporarily mediated to such an extent that the groundless decision can be taken responsibly.

Let me be clear, judges will undoubtedly differ over how such 'taking account' will look in practice and will disagree on the interpretation of the exclusionary effects of their decisions. And certainly, criminal and administrative sanctions often have the explicit aim of removing someone from society (either for punishment or protection), as was of course the case in *Hamdi*. Yet, in holding this consideration of undecidability present by attending to the exclusionary effects of their decisions, judges can bring Dworkin's theory of interpretation to its logical conclusion: if political morality is necessary to interpret law, and if political morality is undecidable, then so are decisions based on that political morality. While, as Dworkin proposes, a decision that *constructs* unity is a necessary response to such undecidability in law, the decision must acknowledge the fiction of this construction by deciding in a way that shows responsibility toward the excluded other.

[100] Honig, *Political Theory and the Displacement of Politics*, 124.

3. Conclusion

This chapter shows how attention to iterability reveals the unstable and internally discontinuous nature of dominant hegemonic discourses, such as the crisis discourse that took hold after 9/11. Judge Doumar's ruling shows how chains of citationality can be opened up and reconstructed, leading to new meanings and "subversive repetitions."[101] Yet, the intention of Judge Doumar, present to some extent in the instant of decision, is not fully determinate. He is bound by the language game of the law and, in order for his rulings to be intelligible as law, he must remain within this language game. What this case also shows is the institutional backlash that is often the consequence of failing to be coopted by the hegemonic discourse.

The conclusion is that law – like language – is characterized by structured undecidability. There is always an element of alterity in every repetition, which means that the law cannot simply be applied without changing the meaning of the law itself. Every decision a judge renders implies some sort of change. And, at the same time, the structure of intelligible language requires speakers to remain within the particular language game they are playing. Chains of citationality lend language its seemingly determinate quality, and make a completely present intentionality of the speaker impossible. Within this undecidability, Dworkin and Derrida would agree, unity and meaning must be constructed. But, importantly, a post-foundational interpretation of Derrida shows that this construction of unity out of dissensus requires the exertion of hegemonic power and the judge cannot engage in such a construction of unity without becoming a participant in the hegemonic struggle over meaning. The question the last part of this chapter discussed is how the judge should respond to her inevitable implication in this struggle. The *Hamdi* case as addressed above shows how judges can take different orientations in a case involving a strong hegemonic discourse and how even in such cases space remains for alterity. In my analysis above I identify the main quality of a proper judicial decision in conditions of undecidability: whether the judge recognizes the contingency of her own decision by ensuring that her decision does not lead to the permanent exclusion of the other. The fundamental instability of meaning presents us with a chance[102] to put "pressure on [law] to be something more than maintenance of the dominant power relations of the community."[103]

[101] Honig, *Political Theory and the Displacement of Politics*, 124.
[102] As Derrida says, "Chaos is at once a risk and a chance," see 'Remarks on Deconstruction and Pragmatism,' 83.
[103] Sokoloff, 'Between Justice and Legality,' 347.

CHAPTER VI

INTERNALIZING CONTESTATION IN PROCESS-BASED JUDICIAL REVIEW

The Eurozone debt crisis has questioned, challenged and pushed the boundaries of EU and Member State law, and courts have played a key role in this process. In the creditor states of the Eurozone a broad political debate has been waged about the impact of the most important permanent crisis measure, the European Stability Mechanism (ESM), and about its effect on the creditor states' right to democracy. This debate has extended into the courtroom as the ESM has been the subject of constitutional challenges in Austria, Belgium, Estonia, Germany, Ireland and the Netherlands. These cases confronted EU Member State courts with the question whether the national parliament's ratification of the ESM Treaty violated the national constitution's protection of the right to democracy.

Constitutional review of parliamentary action in a democracy is fraught with tension, as these cases also show. How can an unelected judiciary legitimately strike down the decision of a democratically-elected parliament? One particularly elegant answer to this question has been proposed by John Hart Ely. Ely argued that constitutional review of legislation can only be justified if it does not substitute the values of the people for that of the judge but rather is done only to preserve and protect the proper functioning of the *democratic process.*[1] Ely's process-based review sees judges as entrusted with the responsibility to ensure that the challenged law was enacted via a democratic process that included adequate possibilities for those affected by the law to affect the legislative process and that the law itself does not unduly limit the ability of a certain group or individual to participate in the democratic process. While Ely himself did not delve into the finer points of political theory, one can detect in his theory a conviction shared with contemporary agonists: it is important to keep the political process open to all participants and to prevent those with power from using their power to entrench their power by setting up rules that limit the ability of political outsiders to challenge the power of the insiders.[2]

[1] John Hart Ely, *Democracy and Distrust: A Theory of Judicial* Review (Cambridge, Mass.: Harvard University Press, 1980).
[2] Ely, *Democracy and Distrust*, 74.

A number of the judgments rendered by the EU Member State courts on the ESM reflect an understanding of the role of the judiciary in constitutional review similar to that of Ely, pointing out that the judiciary must leave the substantive judgments to the legislature and will only intervene when the proper functioning of democracy is threatened. It is true that Ely's theory claims to solve the tension between constitutional review and the prerogative of the democratically-elected legislature to make decisions on values, and that his approach seems to match what many of the courts studied here see themselves as doing. Yet, my analysis of the concrete cases in which such a process-based review is used will show that judges, even here, cannot avoid making substantive decisions. Decisions about the proper functioning of democracy are substantive in the sense that they presuppose a normative theory of democracy and of rights and require the positioning of a 'people' over and against an 'other'. The people are those on whose behalf the decision is made, those whose perspective is taken to be the legitimate interest at stake in the decision at hand and who, in the end, are able to decide on the meaning of the social world. The other is he whose perspective is rejected – or never even taken into account as having a role in the meaning-making process. The boundary that is drawn between the people and the other is always political,[3] and thus substantive, and its substantive nature becomes even more visible in times of crisis. During such moments, the failure of any conception of the people to fully represent all becomes visible. While the 'remainders' that do not fall within the conception of the people always problematize the seemingly natural divide between the people and the other, their ability to trouble this boundary increases during times of crisis.

This chapter does not conclude that the inevitably substantive element of Ely's procedural review means Ely's approach should be abandoned. Instead I argue that the utility of Ely's theory is based on the assumption that the judiciary – more than any other branch of government – is suited to protecting the functioning of democracy, particularly by ensuring that political 'insiders' do not exclude 'outsiders' from the democratic process, since the judiciary is the branch that is the least active participant in that process. While this decision cannot help being substantive to some extent, this does not detract from the fact that the judiciary is still best positioned to make this decision. What it does mean, is that attention is due to *how* this substantive decision be made. This chapter closes with some initial thoughts on how the judiciary can best attempt to ensure that political outsiders are not excluded from the political process by allowing these outsiders' input into the judicial decision-making process. This argument will proceed as follows: Section 1 sets the stage by providing a short overview of the Eurozone crisis and the adoption of the ESM Treaty and sets out how the national courts' judgments on the ESM Treaty largely reflected a process-based approach to constitutional review. Section 2 challenges the assumption that process-based review is free of substantive decisions. Here, I argue that these decisions have inescapable substantive

[3] Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: The University of Chicago Press, 1996 (1932)), 26.

components, but that there is nevertheless still utility to process-based review. In order to realize this utility, courts must expand their concern for the preservation and promotion of democratic procedures to include concern for the input into their own decision-making.

1. The Protection of the Democratic Process in Judicial Review of the European Stability Mechanism

National courts within the European Union have rendered several decisions on the permanent measure created to deal with the Eurozone crisis: the European Stability Mechanism. In these decisions, the courts frame their interventions largely in terms similar to Ely's process-based review, focusing on the role of the court in protecting the functioning of the democratic process. This Section gives a brief introduction to the European Stability Mechanism and the context in which it was created and then shows how the national courts' decisions fit within Ely's theory of judicial review. By doing so, this Section sets the stage for the remainder of this chapter, which will inquire whether such process-based review can really be free of substantive judgment and, if not, what this is to mean for a theory of judicial review.

In the years after the start of the global financial crisis in 2007, a number of the European Union Member States' public finances were – for varying reasons – so deteriorated, that the EU deemed it necessary to engage in full or partial bailouts, via varying mechanisms.[4] Immediately after providing Greece with 80 billion euros in loans from Eurozone states, and an additional 30 billion from the International Monetary Fund, the European Union created two temporary bailout mechanisms to further regulate the provision of emergency funds: the European Financial Stabilization Mechanism (EFSM) and the European Financial Stability Facility (EFSF).[5] Yet, as both of these measures were only meant as temporary solutions to an immediate problem, the governments of the Eurozone states soon decided that a more permanent solution was desirable. Less than a year later, on 25 March 2011, a European Council Decision was passed to amend Article 136 of the Treaty on the Functioning of the European Union (TFEU) so as to clarify the ability of Eurozone states to establish a

[4] Three of the EU states that received bailout funds were non-Eurozone states (Hungary, Latvia and Romania) and received a bailout via the already-existing Article 143 of the Treaty on the Functioning of the European Union. The bailouts of the Eurozone states, however, fell less clearly under EU law. The bailouts of Ireland and Portugal were based in part on EU law, but the bailouts of Greece and Cyprus were conducted through international agreements between Eurozone states. Greece was the first of these states to be offered a bailout completely outside of EU law, see Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts,' *Oxford Journal of Legal Studies* 35 (2) (2015): 326-237. For arguments on how even such international agreements are still linked to EU law, see Claire Kilpatrick, 'Are the Bailout Measures Immune to EU Social Challenge Because They Are Not EU Law?,' *European Constitutional Law Review* 10 (2014): 393-421.

[5] The former was based on Article 122(2) Treaty on the Functioning of the European Union (TFEU) and had a budget limited to 60 billion Euro. The latter was formed by an international agreement with an initial budget of 440 billion Euro (an amount later more than doubled in October 2011).

permanent stability mechanism.[6] Then, in July 2011, the Eurozone states signed an initial treaty on a European Stability Mechanism (ESM) before signing the final version of the Treaty in February 2012. The ESM Treaty is governed by international law between the Eurozone states and was not intended to be an EU treaty.[7] The Treaty binds all contracting parties to make a predetermined amount of capital available to the Treaty body. The Treaty body is authorized to decide when to distribute parts of this capital to contracting parties in financial need when certain requirements are met and under the strict conditionality of the receiving state agreeing to certain reforms decided upon by the EU Commission and under the condition that the money must be paid back. After the establishment of the ESM on 27 September 2012, the ESM provided financial assistance to Spain, Cyprus and Greece.[8]

This crisis measure has been the subject of much litigation, both at the level of the individual Eurozone Member States and at the EU level.[9] In 2012, the Estonian Supreme Court, the German Constitutional Court (in preliminary judgment), a Dutch court in The Hague, the Irish Supreme Court, and the Belgian Constitutional Court all dealt with claims brought against the ESM Treaty.[10] After a preliminary reference from the Irish Supreme Court, the Court of Justice for the European Union (CJEU) ruled on the ESM on 27 November 2012. In 2013, the Austrian Constitutional Court followed with its own judgments on the ESM and in 2014 the German Constitutional Court ruled in main proceedings on the ESM. The national judges who heard these challenges to the Eurozone crisis measures largely positioned their review as a limited interference: limited to what was necessary to ensure the proper functioning of democratic processes. In this way, but without explicit reference, these decisions show parallels with John Hart Ely's theory of process-based judicial review.

Ely's theory aimed to provide a justification for judicial review of democratically adopted legislation. He argued that while it is true that judges who apply higher (constitutional) norms to override democratically adopted legislation are confronted with norms that are often open-

[6] European Council Decision of 25 March 2011 Amending Article 136 of the Treaty on the Functioning of the European Union with regard to a Stability Mechanism for Member States whose Currency is the Euro, 2011/199/EU, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:091:0001:0002:EN:PDF

[7] Despite the formal intergovernmental character of the ESM, the EU Commission and European Central Bank play very important roles in the workings of the ESM. After the submission of a request for assistance from a Eurozone state, the Commission, in liaison with the European Central Bank, is responsible for assessing the existence of a risk to the financial stability of the euro area as a whole or of its Member States, assessing whether public debt is sustainable, and assessing the actual or potential financing needs of the requesting state. See article 13(1) ESM Treaty.

[8] European Stability Mechanism, 'History: The Programmes,' available at https://www.esm.europa.eu/about-us/history#the_programmes

[9] One of the temporary crisis measures, the EFSF, was challenged early on before the German Constitutional Court. This case falls outside of the scope of this article.

[10] The case against the Belgian law ratifying the ESM challenged before the Belgian Constitutional Court was dismissed after the parties dropped their appeal. The parties had been informed that their appeal was lodged after expiry of the appeal deadline and would be declared inadmissible. See Het Grondwettelijk Hof [Belgian Constitutional Court], 156/2012, 20 December 2012, available at http://www.const-court.be/public/n/2012/2012-156n.pdf

textured and broad, the discretion judges use to fill in these open-textured norms must be used only to provide neutral rules for the operation of democracy. In an attempt to constrain the indeterminacy of law, Ely proposed that judges should not search for or rely on any "external source of values"[11] to shape their decision, but instead act purely in the service of the democratic process.[12] For Ely, protecting "the process by which the laws that govern society are made" meant "ensur[ing] that the political process … was open to those of all viewpoints" and that this political process did not lead to disparate treatment for groups just because of majority biases against those groups.[13] The main focus in protecting the democratic process was thus to ensure that processes were in place that served to reinforce representation of those taking part in the democratic process. From this perspective, Ely argued that process-based review tasked courts with the very thing they were uniquely suited to do: use their position as relative political outsiders (who are in any case independent from current political power holders) to objectively assess whether the current majority is (ab)using its power by restricting the political process to "ensure that they will stay in and the outs will stay out," or to systematically disadvantage a minority group "out of simple hostility or a prejudiced refusal to recognize the commonality of interests."[14] For Ely, judicial review that focused on ensuring representation reinforcement processes was the only way that judges could avoid (the illegitimate) substituting of their own substantive value judgments for those of the democratically elected legislature.[15]

In the constitutional challenges to the ESM before national courts, the focus was on alleged violations by the ESM Treaty of the right of national parliament to determine the budget,[16] parliament's right to information,[17] state sovereignty[18] and of EU law.[19] In each case, the

[11] Ely, *Democracy and Distrust*, 73.
[12] Ely, *Democracy and Distrust*, 73.
[13] Ely, *Democracy and Distrust*, 74.
[14] Ely, *Democracy and Distrust*, 103.
[15] Ely, *Democracy and Distrust*, 67.
[16] *See* Rechtbank Den Haag [District Court of The Hague], *Wilders tegen de Staat der Nederlanden [Wilders v. The Dutch State],* 1 June 2012, para 2.2. The right to parliamentary budgetary autonomy is set out in article 105 of the Dutch Constitution. Although Wilders also submitted other claims, this was the main claim addressed in this case. See also Riigikohus [Estonian Supreme Court] *en banc*, *Request no. 8 of the Chancellor of Justice of 12 March 2012*, 12 July 2012, case number 3-4-1-6-12, para. 4; and Irish Supreme Court, *Pringle v. Ireland*, 19 October 2012, para. 10 ii.
[17] Bundesverfassungsgericht [BVerfG] [German Federal Constitutional Court], Judgment of the Second Senate of 12 September 2012 - 2 BvR 1390/12, para. 157, available at http://www.bverfg.de/e/rs20120912_2bvr139012en.html.
[18] The ESM Treaty allows a departure from decision-making based on unanimity in times of emergency, raising concerns of undermining state sovereignty and the right to democracy. This concern was especially emphasized by the plaintiffs in *Pringle v. Ireland*, para. 10. ii, and in the judgment of the Estonian Supreme Court, *Request no. 8 of the Chancellor of Justice of 12 March 2012*, paras. 141-153. Moreover, the ability to suspend voting rights in the ESM Treaty Body if a Member State defaults on its obligations was claimed by plaintiffs to be a violation of the right to democracy, see BVerfG, Judgment of the Second Senate of 12 September 2012, para. 156.
[19] Many of these cases attend to whether the use of the simplified revision procedure to amend the TFEU to clear the path for the ESM was a violation of EU law and whether the ESM itself violated EU law, in particular the no

plaintiffs positioned their claims within a discourse of a right to democracy and called upon the courts to help enforce this right, framing this right as a right to domestic, parliamentary democracy. Many of the decisions from the national judiciaries on the ESM Treaty justified the courts' (lack of) interference in the democratic process with considerations similar to those that led Ely to develop his process-based review. In what follows I set out how the German Federal Constitutional Court, the Irish Constitutional Court, the Estonian Constitutional Court and the Dutch District Court for The Hague justified their (lack of) interference in this way. This chapter does not consider the case brought before the Belgian Constitutional Court, since it was declared inadmissible due to procedural grounds and no substantive considerations were given by the court. Moreover, I also exclude from my analysis the decision by the Austrian Constitutional Court since, unlike the cases from the German and Estonian courts (which are published also in English), this document was not available in a language I read.

In all these cases, the reviewing court declined to declare the ESM Treaty unconstitutional, but not before reflecting on the particular role the court must play in upholding democracy. The German Constitutional Court was most explicit about its role as the protector of the democratic process, explaining that in principle that Court must give priority to parliament's decision-making powers in adopting the ESM Treaty:

> [I]t is primarily the duty of the *legislature* to weigh whether and to what extent, in order to preserve the discretion for the democratic shaping of affairs and making of decisions, commitments with regard to spending behavior should be entered into for the future … In this connection, the Federal Constitutional Court may not with its own expertise usurp the place of the legislative bodies, which are first and foremost entrusted with this.[20]

The German Constitutional Court acknowledged it was primarily up to parliament to balance competing interests and that the Court must not replace parliament's judgment with its own, clearly echoing Ely's position that parliament – not courts – are to be entrusted with such matters since it is parliament that is directly democratically legitimated.[21] This attitude is evident, moreover, when the Court dealt with assessments of risk on which there was no clear consensus among experts. The German Constitutional Court deferred to the legislature's assessment of the risks of the ESM and of economic instability, refusing to put the Court's own judgment on this matter above that of parliament:

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bailout clause of Article 125 TFEU. These questions on to the relationship between the ESM and EU law will not be attended to in this article.

[20] BVerfG, Judgment of the Second Senate of 12 September 2012, para. 228, emphasis added.

[21] Ely, *Democracy and Distrust*, 67.

> In the oral hearing, the Bundestag and the Federal Government stated in detail that the risks involved with making available the German shares in the European Stability Mechanism were manageable, while without the granting of financial facilities by the European Stability Mechanism the entire economic and social system was under the threat of unforeseeable, serious consequences. *Even though these assumptions are the subject of great controversy among economic experts*, they are at any rate not evidently erroneous. Therefore the Federal Constitutional Court may not replace the legislature's assessment by its own.[22]

In addition to emphasizing the limits to its review, however, the German Constitutional Court noted that deference to the legislature is not *always* appropriate on all matters: according to the Court, the judiciary has a legitimate role to play when it comes to ensuring the *preservation* of democratic procedures. The German Constitutional Court strongly echoes Ely, seeing itself as having a special duty to "ensure that the democratic process remains open and that legal re-evaluations may occur on the basis of other majority decisions, and that an irreversible legal prejudice to future generations is avoided."[23] This approach is clear in the German Constitutional Court's ruling, on summary review, that the German government must ensure that no provision of the Treaty may be interpreted (especially the Treaty's provisions on professional secrecy) to "stand in the way of the comprehensive information of the Bundestag and of the Bundesrat."[24] Parliament's right to be informed by the government is a necessary requirement for democratic decision-making and is something the Court saw itself called to protect, even while acknowledging the prerogative of that same parliament to – primarily – decide how to preserve its own decision-making powers.

The German Constitutional Court also took this democracy-preserving approach in its ruling in its main proceedings on the ESM. Despite the Court's dismissal of the main claims, the Court insisted that parliament take the necessary steps to prevent German voting rights from being suspended, [25] since such a suspension would lead to Germany being bound by decisions that were not legitimized by parliament. This became relevant in relation to Article 4(8) of the ESM Treaty, which provided for the suspension of voting rights of a member that fails to meet a capital call on time. According to the Court, not meeting a capital call on time and the subsequent suspension of German voting rights would also mean that "the German Bundestag's participation in the decisions of the bodies of the European Stability Mechanism, which is required under national law, would fail for so long as the voting rights are

[22] BVerfG, Judgment of the Second Senate of 12 September 2012, para. 271, emphasis added.
[23] BVerfG, Judgment of the Second Senate of 12 September 2012, para. 228.
[24] This was one of the two requirements the Court set out for constitutionality of the Treaty. The other was that the government had to ensure under international law that "no provision of th[e] Treaty may be interpreted in a way that establishes higher payment obligations for the Federal Republic of Germany without the agreement of the German representative." See BVerfG, Judgment of the Second Senate of 12 September 2012, page 4.
[25] Bundesverfassungsgericht [BVerfG] [German Federal Constitutional Court], Judgment of the Second Senate of 18 March 2014 - 2 BvR 1390/12, para. 158, available at http://www.bverfg.de/e/rs20140318_2bvr139012en.html.

suspended."[26]Accordingly, "this would mean that the decisions taken in this period would not be legitimized and monitored by the German Bundestag."[27] The Court stepped in to prevent such an infringement on the democratic process by ordering that parliament use its budgetary powers to ensure that Germany would always be able to meet capital calls.

The Irish Supreme Court was less explicit than the German Constitutional Court on their role in protecting the functioning of the democratic process, but it is apparent that this Court's review also concerned itself with such matters. This was especially the case in the Irish Supreme Court's review of whether the ESM's emergency voting procedure and possibility for suspending voting rights limited the possibility of Irish democratic decision-making to an unacceptable extent. The Irish Supreme Court observed that under the emergency voting procedure and the stripping of voting rights when a country fails to meet its payments, decisions could be taken that would bind Ireland, without the consent of Ireland. This raised the concern that the ESM shut down the democratic process within Ireland. However, the Court found that since the only decisions possible in such cases did not "(i) determine policy, (ii) create a mechanism of policy determination, or (iii) increase the State's specified maximum financial contribution,"[28] they were thus not important enough to entail an unacceptable transfer of decision-making power.[29] In effect, the Court considered the impact such decisions taken under the emergency voting procedure or in the case a country was stripped of its voting rights would have on the ability of the Irish democratic process to regulate certain matters deemed at the core of the right to democracy. Since the Court found that decisions by the ESM in these cases would not impact policy, policy determination or the State's maximum financial contribution, the Court ruled that the EMS's decision-making powers did not infringe on the Irish right to decide on matters at the core of Irish sovereignty. The Court's analysis shows a concern for the preservation of democratic decision-making within the Irish state and a focus on preserving the space for democracy.

The Estonian Supreme Court's review of the ESM was more substantive than the German and Irish Supreme Court's review and was the court that most departed from Ely's procedural review. Instead of focusing on whether the conditions for democratic procedures were still in place or on whether the decisions taken without the consent of the state unacceptably limited democratic possibilities within the state, it engaged a proportionality analysis to set out the conditions under which it would defer to the legislature's decision on the ratification of the Treaty. The Estonian Supreme Court started by finding that the emergency voting procedure in the ESM Treaty interfered with the Constitutional budgetary rights of the Estonian parliament, as well as with the "state's financial sovereignty … and the principle of a democratic state subject to the rule of law due to the possibility that at the request of the ESM

[26] BVerfG, Judgment of the Second Senate of 18 March 2014, para. 199.
[27] BVerfG, Judgment of the Second Senate of 18 March 2014, para. 199.
[28] Irish Supreme Court, *Pringle v. Ireland*, para. 17. ix.
[29] Irish Supreme Court, *Pringle v. Ireland*, para. 17. xii.

the callable capital must be paid in the future."[30] However, even in the rather substantive proportionality review employed by the Court to evaluate whether the interference was justified,[31] considerations of democracy played an important role. As is common in such review, the Court considered that so long as the interference pursued an objective that was legitimate in a *democratic state*, and so long as the interference was necessary, appropriate and reasonable,[32] the Court would hold that the legislature had acted within its scope of constitutional power. The Court ruled that all these conditions were met and thus that the emergency voting procedure of the ESM Treaty did not violate the Estonian Constitution.[33]

The last challenge to the ESM studied here was brought before the Dutch District Court in The Hague. Because of the Dutch constitution's prohibition of constitutional review of legislation, this Court ruled that it had no competence to review the claim of unconstitutionality brought before it.[34] Interestingly, the Court nevertheless took the opportunity to emphasize the importance of political debate on the matter of the ESM and pointed out that the complaints brought by the plaintiffs have the possibility of being the subject of such debate that has been or will be conducted throughout the legislative procedure.[35] While not implying that the Court would have interfered if due democratic process had been violated, the Court nevertheless found it relevant to mention the importance of the availability of such democratic process, noting that the plaintiff's objections to the ESM were "subject of political debate that in the legislative process surrounding the ESM-Treaty has already or still will be conducted by the current representatives of the people, a process in which the judge cannot intervene."[36] This court did entertain a claim from the plaintiffs against the ESM Treaty based on international law. The plaintiffs argued that the right to democracy encapsulated in a number of international human rights treaties was violated by the fact that the government put the ESM Treaty to parliament to be ratified without waiting until after the parliamentary elections that were planned for later that year. The Dutch court dismissed this claim, holding that the members of parliament are elected directly by the Dutch electorate and that it could thus be concluded that the Dutch population was represented by parliament in their decision on the ESM Treaty.[37]

Largely, these ESM cases are examples of judges engaging in constitutional review with the aim of protecting the proper functioning of democracy. We see especially the German, Irish and Dutch courts note this aspect in their rulings. The German and Irish courts note their duty to intervene when they find that the measure challenged interferes with possibilities for

[30] Estonian Supreme Court, *Request no. 8 of the Chancellor of Justice of 12 March 2012*, para. 206.
[31] Estonian Supreme Court, *Request no. 8 of the Chancellor of Justice of 12 March 2012*, para. 207.
[32] Estonian Supreme Court, *Request no. 8 of the Chancellor of Justice of 12 March 2012*, para. 209.
[33] Estonian Supreme Court, *Request no. 8 of the Chancellor of Justice of 12 March 2012*, para. 210.
[34] District Court of The Hague, *Wilders v. The Dutch State*, para. 3.3.
[35] District Court of The Hague, *Wilders v. The Dutch State*, para. 3.3.
[36] District Court of The Hague, *Wilders v. The Dutch State*, para. 3.3, author's translation.
[37] District Court of The Hague, *Wilders v. The Dutch State*, para. 3.4.

democratic processes. The following Section asks whether this method of constitutional review is really as devoid of substantive decisions as Ely proposes and as the courts considered here seem to assume. I consider a critique of Ely's theory that highlights the inherently substantive nature of democracy and propose to refine his theory by devoting more attention to the input to the judicial decision-making process.

2. 'Democracy' as Substantive Criterion and the Need for Democratic Input

In process-based review, judges use their competence for constitutional review to ensure the basic functioning of democratic processes and make clear that it is not their role to substitute the legislature's decisions on political and moral values with their own. The previous Section showed how EU Member State courts' review of the ESM Treaty largely followed this philosophy of judicial review. The current Section first explores a critique of the assumption that process-based review is value-free and concludes by proposing an extension of Ely's theory that addresses this critique.

Thoughts on the Substantive Nature of the 'People' and Their 'Right to Democracy'

The attempt to eliminate all substantive judgment from constitutional review in order to do justice to the legislature's democratic role runs up against a problem: the inherently substantive nature of democracy itself. The very choice to focus on preserving the functioning of democratic process is underpinned by a normative judgment on the value of democracy. There is, in other words, a *reason* why we care about democratic procedures. According to constitutional scholar Lawrence Tribe, if process is to be valued it "must be valued not only as a means to some independent end, but for its intrinsic characteristics."[38] This brings us necessarily to the question *why* democracy is important? Without first answering this question - this *substantive* question - the judge will have no guidance in ensuring that her decisions protect democratic decision-making. Since the very measures and laws judges are called to review are often adopted by accepted democratic procedures and often claim to themselves further some democratic end, the judge needs some higher principle of democracy against which she can evaluate the matters being challenged. For Ely, the guiding principle of his democracy-review is the prevention of political insiders from permanently excluding political outsiders from the possibility of gaining political power. This very claim that it is important to prevent the entrenchment of power, to "ensure that the political process … [is] open to those

[38] Laurence Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories,' *Yale Law Journal* 89 (1980): 1070-1071. Tribe presents a second critique on Ely's theory, namely that judges applying process-based adjudication cannot help but take a position on the intensity of participation certain measures or laws require. The judge's position will be based on a normative appreciation of the importance of the interest the measure or law interferes with. As Tribe explains, the very question of "what *kind* of participation" is necessary "requires analysis not only of the efficacy of alternative processes but also of the character and importance of the interest at stake – its role in the life of the individual as an individual" (1069). In this way, according to Tribe, "process itself, therefore, becomes substantive" (1070-1071).

of all viewpoints"[39] is based on the assumption that there is *intrinsic worth* in making sure all viewpoints can participate in political decision-making.[40] This is an assumption that shows similarities with Claude Lefort's famous observation that the key to modern democracy is ensuring that the place from which political power is exerted is not permanently occupied by some force that is seen as the full and final materialization of the people. Unlike previous forms of government where some creed, body or identity (for example God, the King, or 'reason') was the final guarantor, in a democracy this place of power must remain empty.[41] With this, the unity of society disappears and the foundations of society are no longer grounded on an ultimate, final ground that can be found outside of society. With the "dissolution of the markers of certainty," which is inherent in democracy, an "experience [of] a fundamental indeterminacy as to the basis of power, law and knowledge, and as to the basis of relations between the *self* and *other"* is inaugurated.[42] This ultimate indeterminacy is dealt with, in democracy, by the people's sovereign decision. It is only the people - and no longer a creed, identity or body - that can provide the foundations necessary for the institution of society.

To come out in favor of democracy is to thus take a normative stance, based on ontological assumptions about how meaning is created and the proper role of the people therein. Ely's assumptions about the necessity of democracy evoke the Lefortian claim that democracy is about preventing the place of power from being permanently occupied, a claim which itself is grounded on the assumption that in democracy we accept the absence of a final guarantor of meaning. There is no essential meaning, no pre-given answer on how best to organize society. Instead, humans create, in concert, the *contingent* foundational meanings that shape society. Because these meanings can never exhaust the full range of possible meanings, these contingent foundations[43] are always contested by those with other views of what the proper meaning and organization of society is. The lack of certain, ultimate foundations is what makes democracy possible and desirable. After all, as Laclau notes, "if history were the theatre of a process that has been triggered off outside people's contingent decisions - God's will, a fixed world of essential forms, necessary historical laws - this would mean that democracy [could] not be radical, as the social would not be constructed politically, but would be the result of an immanent logic of the social, superimposed on, or expressed through all political will."[44] Since this is not the case, it is the people who must institute the foundations of the social.

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[39] Ely, *Democracy and Distrust*, 74.
[40] This argument is similar to Ely's own admission that "[p]articipation itself can obviously be regarded as a value" (Ely, *Democracy and Distrust*, 75). Yet, while acknowledging this, Ely fails to then recognize that this undermines his claim that process-based review can avoid substantive choices.
[41] Claude Lefort, *Democracy and Political Theory*, trans. David Macey (Cambridge, UK: Polity Press, 1988), 17.
[42] Lefort, *Democracy and Political Theory*, 19.
[43] Judith Butler, 'Contingent Foundations: Feminism and the Question of "Postmodernism",' in *Feminists Theorize the Political*, ed. Judith Butler and J.W. Scott (New York: Routledge, 1992), 3-21.
[44] Ernesto Laclau, *New Reflections on the Revolution of Our Time* (London: Verso, 1990), 192.

At the same time, and crucially, the identity of this people can never be definitively given. As Laclau also notes, *this people is just as contingent as the foundations they impose.*[45] Just as the foundations of society are not pre-given, neither is the people. Just as the foundations are the product of political decision, so is the people. In fact, the creation of the people is the "political act *par excellence*"[46] since from it all other politics flows. However, if we attend to the "act whereby a people is a people"[47] we are presented with a paradox: in a democracy with popular sovereignty it is supposed to be the people who decide, the people who determine who belongs to the political community. Yet at the same time, this people that must decide does not exist until the political community has been instituted. How is the political community to be created when its creation presupposes a decision from the very community that is yet to be created? Jean-Jacques Rousseau pondered this question more than two hundred years ago and argued that the solution to this paradox could be found in the intervention of a 'lawgiver,' a wise, transcendental figure who posits the will of the people that is yet to be.[48] Yet, as Bonnie Honig has shown, Rousseau's solution does not in fact escape the paradox: indeed, it remains up to the people to identify this lawgiver, to recognize her authority for lawgiving and to distinguish between legitimate lawgivers and charlatans. As Honig explains, "the lawgiver may offer to found a people, he may even attempt to shape them, but in the end it is up to the people themselves to accept or reject his advances."[49] Here we find the "ineliminable moment of popular sovereignty:" who the true lawgiver is, is no more truly identifiable than who the people is.[50] Any claim to who the people is or any claim to being the lawgiver cannot help but inaugurate a contestatory politics[51] as individuals disagree over the veracity and appropriateness of those claims. Even more fundamental than the reasonable disagreement that is possible over what is moral or good, this contestation goes to the very heart of whose voice counts in the debate over the moral and the good. In the end, there is, in a democracy, no way to avoid the "need … for the people to decide – on which is the truly general will, whose perspective ought to count, who is a true prophet, what are the right conditions for their lives, which enduring institutions deserve to endure and which should be dismantled, which would-be leader to follow, whose judgments to take seriously, and so on."[52] Crucially, this moment of decision on who is the people takes place not only once, at the institution of a political order, but each day anew. Every day the people is re-instituted as new members are born, immigrate or as old members die, leave or simply change

[45] Laclau, *New Reflections*, 193.
[46] Ernesto Laclau, *On Populist Reason* (London: Verso, 2005), 154-155.
[47] Jean-Jacques Rousseau, 'That it is Always Necessary to Return to a First Convention,' in 'On the Social Contract or Principles of Political Right (1762),' in *The Broadview Anthology of Social and Political Thought, Vol. 1: From Plato to Nietzsche,* ed. Baily et al. (Toronto: Broadview Press, 2008), 668.
[48] Jean-Jacques Rousseau, 'The Law-Maker,' in 'On the Social Contract or Principles of Political Right (1762),' in *The Broadview Anthology of Social and Political Thought, Vol. 1: From Plato to Nietzsche*, ed. Baily et al., 677-679.
[49] Bonnie Honig, 'Between Decision and Deliberation: Political Paradox in Democracy Theory,' A*merican Political Science Review* 101 (1) (February 2007): 6.
[50] Honig, 'Between Decision and Deliberation,' 6.
[51] Honig, 'Between Decision and Deliberation,' 6.
[52] Honig, 'Between Decision and Deliberation,' 7.

their beliefs and opinions.[53] Thus, every day this paradox of who creates a people that can only be created by an already-created people presents itself. This paradox is not only a paradox of institution but is a recurring paradox of politics. The imposition of a lawgiver is not only an imposition at the beginning – it is an imposition each day anew and one that ultimately depends on the people to recognize it as the legitimate lawgiver. And here we come to the core challenge to the neutrality of process-based review. In order for a judge to engage in process-based review with the aim of ensuring the preservation of democratic procedures, the judge must have some conception of the people of the political community on whose behalf she is adjudicating. Yet, the recurrent paradox of democratic politics makes it impossible for the judge to simply refer back to an original moment of institution in order to find the 'true' people. As such, the decision about who belongs to the people and who does not cannot be predetermined by rule or principle and is thus not a procedural decision but a substantive one.[54] To speak in terms of jurist and political theorist Carl Schmitt, the decision about which 'friends' belong to the political community and which 'enemies' fall outside is at its core political.[55]

Below, I show how the courts in the ESM cases constructed the political community on whose behalf the courts protected the right to democracy. We will see that they constructed a people that was limited to those within the national – and at times – ethnic political community. Particularly in the context of the ongoing Eurozone crisis, a crisis which highlighted the extreme interdependency between Eurozone states at an economic, political and human level (as financial instability in one state led to economic and political instability in others, not to mention the human suffering across borders that resulted from this instability) and showed the often inadequate nature of interests and identity based on national citizenship, the possibility was available to judges in these cases to problematize the utility of national boundaries. Indeed, a judge of the German Supreme Court noted in her dissent to a case on a different Eurozone crisis measure (the introduction of the possibility for outright monetary transactions) that it was not evident that "the national perspective … [was] still the appropriate and the constitutional one where a decision may have legal and factual consequences of the magnitude and reach at issue here."[56] In what follows I show how, concretely, in the cases addressed in this chapter, the courts engaged in the substantive

[53] Honig, 'Between Decision and Deliberation,' 3.
[54] Note: the argument is *not* that there aren't any thinkable, reasonable rules that could *guide* this decision. In fact, the classic democratic ideal that those affected by a matter should be able to influence that matter is such a guiding rule. It can be read as saying that those who are affected by a matter are – in that particular instance – the relevant people. Yet, what I mean by saying that who belongs to the people and who does not is a decision that cannot be bound by a rule, is that any guiding principle must always be *interpreted* before it can be applied to a concrete situation. This interpretation requires *decision*. See further William W. Sokoloff, 'Between Justice and Legality: Derrida on Decision,' *Political Research Quarterly* 58 (2) (2005): 341.
[55] Schmitt, *The Concept of the Political*, 26.
[56] Bundesverfassungsgericht [BVerfG] [German Federal Constitutional Court], Order of the Second Senate of 14 January 2014 - 2 BvR 2728/13, dissent Lübbe-Wolff, para. 28, available at http://www.bverfg.de/e/rs20140114_2bvr272813en.html.

construction of a people - a people that could have been constructed otherwise.

Written between the lines of the deliberations on EU economic policy is the courts' construction of the meaning of the *people* whose rights to democracy are being protected, and an *other*, who is positioned as outside of the court's scope of interest. In all of the decisions studied, the courts' dominant discourse on the people was framed in national terms. The German Constitutional Court did so by linking the people to representation in the *national* parliament, and by doing so, the Court clearly constructed the people as those citizens of the nation state with the right to vote for parliament. The Court spoke for example of the German parliament as "representative of the people"[57] and focused on the right to vote as a guarantee for "self-determination of the citizens" and a guarantee of "free and equal participation in the exercise of public power in Germany."[58] In this way, the German Constitutional Court conceived of a people comprised of those who are citizens of the German state with the right to vote in German parliamentary elections. Despite the German Court's assurance that it would "ensure that the democratic process remains open and that legal re-evaluations may occur on the basis of other majority decisions, and that an irreversible legal prejudice to future generations is avoided,"[59] its subsequent analysis in the case showed that even in exercising this special duty to protect the openness of the democratic process, the other was excluded. The Court consistently limited the people whose 'majority decisions' must count to those who are represented in *German* parliament and limited the 'future generations' who must be taken into account to future generations of *German* voters.

The Irish Supreme Court's decision in *Pringle* also evidenced a national construction of the people. The Irish Supreme Court instructed the reader that "the common good of the *Irish people* is the ultimate standard by which the constitutional validity of the conduct of foreign affairs by the Government is to be judged."[60] Moreover, even in "circumstances where the interests of others may supersede the interests of the State," the Government must not abdicate its powers under the Constitution "as the powers that are given to the organs of the State under the Constitution are *for the common good of the people of Ireland*" and thus not to be used for the good of others without the Irish people first having consented to the abdication of those powers.[61] The Irish Supreme Court thus reinforced the national context from within which it viewed the people as Irish citizens (and perhaps residents), and the State's powers as only being legitimately used for the good of that particular subset of human beings – even when the interests of others *supersede* those of the Irish people.

The Estonian Supreme Court adopted a national framework for the people as well, although it

[57] BVerfG, Judgment of the Second Senate of 18 March 2014, para. 162.
[58] BVerfG, Judgment of the Second Senate of 18 March 2014, para. 159.
[59] BVerfG, Judgment of the Second Senate of 12 September 2012, para. 228.
[60] Irish Supreme Court, *Pringle v. Ireland*, para. 14.xvii.
[61] Irish Supreme Court, *Pringle v. Ireland*, para. 17.ii, emphasis added.

went a step further than the German and Irish Constitutional Courts. In this instance, it was no longer simply all enfranchised citizens of the nation state who were considered belonging to the people. Rather, the Estonian Supreme Court – by reference to the Estonian Constitution – took a culturalist turn, limiting the lens through which the court views the people to one of Estonian language and culture. Thus, when the Estonian Supreme Court deliberated on whether participation in the Eurozone furthers Estonian interests, it was the *particular* interests of a subset of Estonian people – the Estonian language and culture – that were taken into account, while those of the many minority groups living within Estonia's borders were not mentioned:[62]

> Estonia's interests are advanced by cooperation with various international organization and other states. This is the way to carry out the foreign and security policy which is at the final stage aimed at guaranteeing the preservation of the Estonian people, the Estonian language and the Estonian culture through the ages provided for in the preamble to the Estonian Constitution.[63]

A similar view of the people as nationally bound and of the role of the State in furthering the interests of this limited set to the exclusion of other interests is given space in the Dutch court's summary of the applicant's arguments. Although not explicitly endorsed by the Dutch court itself, the court also fails to reject this view. Moreover, this excerpt shows that it is not only the courts that take this view of the people, but (at least one of) the plaintiffs as well:

> In this procedure, they [Wilders and his co-plaintiffs] will act in their capacity of Dutch citizens whereby they, at the same time, as elected representatives wish to defend the interests of the *Dutch citizens*.[64]

The position taken by the German, Irish, Estonian and Dutch courts could have been different. It is not inconceivable that these courts could have looked beyond the "national box"[65] to take account of those most affected by their decision. The crisis measure under review arguably has the largest effects on the residents of the Eurozone debtor states – the people who both rely on these measures to prevent the failure of their economies and whose lives and livelihoods are affected as a result of the strict conditionality terms of the loans given. These terms often include the forced reform of pensions and health care and welfare systems and there is evidence that such measures lead to significant increases in the number of suicides and a sharp decrease in the in the standard of living.[66] It is these people whose lives were

[62] In 2013, approximately 30% of Estonia's population was composed of ethnic minorities, see Statistics Estonia, P*opulation by Ethnic Nationality, 1 January, Years,* available at https://www.stat.ee/34278.
[63] Estonian Supreme Court, *Request no. 8 of the Chancellor of Justice of 12 March 2012*, para. 201.
[64] District Court of The Hague, *Wilders v. the Netherlands*, para. 2.2, author's translation, emphasis added.
[65] BVerfG, Order of the Second Senate of 14 January 2014, dissent Lübbe-Wolff, para. 28.
[66] See Gonzalo Cavero and Irene Martín Cortés, 'The True Cost of Austerity and Inequality: Greece Case Study,' *Oxfam International* (September 2013), 5, showing that the suicide rate in Greece increased 26.5% from 2010 to 2011 and has increased by 104.4% in the case of women, see further Lucy Rodgers and Nassos Stylianou, 'How Bad Are Things for the People of Greece?,' *BBC News*, 16 July 2015.

(also) immediately and directly affected by the ESM and it is these people who had no voice in the review of these measures by the creditor state courts. The courts in the judgments rendered on the ESM Treaty cannot escape the substantive decision on the people by deferring to the constitutional order for the decision on the political community. Every day the people is inescapably re-instituted in a way that cannot be captured by a static constitutional order and in a way that cannot be justified by reference back to some original moment of institution. Every day the people must create itself anew by deciding on what it recognizes as the 'true' original moment of its institution and how its boundaries should rightfully be drawn.[67] As Hans Lindahl has noted, "boundary enforcement and constitution are always intertwined" and an enforcement that is purified of all new constitutions is as impossible as a constitution purified of claims to enforce some 'real' or 'right' essence.[68] Instead, each act of enforcement by the people includes within it an act that inaugurates that people, and each act of inauguration is justified with an appeal to enforce a particular boundary. Seen in this way, who is included and who is excluded in the people is more than a procedural matter. Each day the people must be constructed anew and in this recurring construction, one cannot escape the role of the people in deciding which construction of themselves to accept.

This brings us to the original dilemma of constitutional review: how to justify that in a democracy an unelected judiciary can use its interpretation of the constitution to overrule democratically adopted legislation? Ely argued that process-based review is more legitimate than other theories of constitutional review because it avoids substantive decisions and instead only focuses on the democratic procedure – something that the courts are particularly qualified to do.[69] Yet, if substantive, political decisions are inherent even in process-based review, Ely's argument seems to miss its mark. It is no longer clear that process-based review can be promoted only because of its supposed substantive-judgment-free adjudication.

Internalizing Contestation

In the remainder of this chapter, I present the argument that Ely's theory of constitutional review can be salvaged, but only if we recognize that it is *incomplete*. The problem is not that protecting democratic procedures requires substantive judgment, but that Ely presents no clear theory for how the judiciary should engage in such substantive review, based on a normative conception of democracy. First, I will review Ely's argument in favor of judicial review of legislation against the constitution against legislative supremacy. I will show that this argument stands, regardless of the substantive nature of the judgment involved in constitutional review. Next, I propose an expansion of Ely's theory. If judges cannot avoid

[67] Hans Lindahl, 'Law's "Uncanniness": A Phenomenology of Legal Decisions,' *Netherlands Journal of Legal Philosophy* 2 (2009): 144.
[68] Lindahl, 'Law's "Uncanniness",' 144.
[69] Ely, *Democracy and Distrust*, chapter 3 and 4.

making substantive decisions, then they should do so in a manner that fits with the aim of process-based judicial review, namely ensuring that the political outsider (the 'other'), is not excluded by the political insiders from the democratic decision-making process.

As mentioned above, Ely's argument in favor of constitutional review had to do with his conviction that courts occupy a unique institutional position, namely that of political outsider who are not direct participants in the political 'game'. This outside position makes courts the most suited branch of government to ensure that the political insiders do not manipulate the rules of the political game to exclude participation by outsiders.[70] As Ely so wryly put, "lawyers do seem genuinely to have a feel, indeed it is hard to see what other special value they have, for ways of insuring that everyone gets his or her fair say."[71] Ely added this justification for judicial review to his conviction that the judiciary would be able to protect against the exclusion of outsiders in a purely procedural manner. The question is whether this second claim is necessary for the first to stand. In other words, does the substantive nature of courts' judgments detract from the suitability of courts ensuring the fairness of the political rules of the game? Let us, for the sake of argument, accept that *some* branch should be entrusted with this guardianship – that one of the three branches should be the one to have the final word on the constitutionality of the law. We can then argue that even though the courts might have to engage in substantive decisions to execute this guardianship, the institutional position of the courts still does make them *better suited* to this guardianship than the legislature or the executive. Far more than is the case for the legislature or the executive, the courts are removed from the current political constellation of insiders and outsiders and are in any case not directly affected by their own rulings.[72] This is not to say that the courts protect the functioning of democracy perfectly or objectively or neutrally, but that they do it better than the alternative branches would. Thus, while perhaps not only procedurally oriented (if we accept that substantive aspects of a decision are inevitable), the courts – unlike the legislature and the executive – are at least *independent* of the political procedures they are reviewing.

In this way, Ely's argument is still able to counter those who object to constitutional review on the grounds that constitutional rights are moral rights (and thus substantive). From the perspective of this critique of constitutional review, the review of legislation against constitutional rights always turns on a substantive question about what is moral or good. Because reasonable people can disagree about the precise content of rights and, moreover, because there is no agreed upon manner to resolve moral conflicts, this critique holds that it

[70] Ely, *Democracy and Distrust*, 103.
[71] Ely, *Democracy and Distrust*, 102. Note that Ely does not claim that lawyers are the only ones who are able to do this. He points out that other "full-time participants" in legal and political procedures will also have such expertise. Instead, his point is that lawyers' particular perspectives (as outside the immediate political game) give them a unique ability to attend to such procedures.
[72] The exception would, of course, be cases in which the judiciary has to decide on its own powers.

should be up to the representatives of the people – the legislature – to resolve these moral conflicts politically.[73] There certainly is an argument to be made that from this perspective of *moral* rights, legislatures are far better positioned than judges to determine the moral priorities of a society – and Ely accepts this argument wholesale.[74] But what Ely says is that when it comes to ensuring that those very processes that the legislature uses to determine those moral priorities are fair, open and free of bias, the courts do have a particularly useful role to play. The fact that the decisions on what is fair, open and free of bias cannot avoid questions about *whose* interests are taken into account and questions about what the true value of democracy is, does not undercut the unique position of the judiciary as a player outside of the (directly) political arena and the unique ability that follows from that to ensure the political arena remains democratic.[75]

If one accepts that the judiciary is at least more well-suited than other branches of government to ensure laws do not exclude the 'outsiders' of politics this does not, however, excuse us from the matter of how the judiciary can best make the substantive decisions it must inevitably engage in. If it is true that decisions on democratic procedure are also always substantive, we can no longer rely only on a technocratic version of the judge who uses her skills to tweak the democratic system to be the objectively best possible system. Instead, a theory of judicial decision-making that accounts for the substantive aspects in process-based review is necessary. Here, I make two claims that form the starting point for such a theory.

First, the contingent, non-essential nature of the people means that the very concept of who is the 'true people' can always be contested, always be challenged by those who are excluded from that concept. And, inevitably, people will be excluded from the hegemonic conception of the people. It is impossible to construct a people that is truly universal, and it is therefore structurally unattainable to create a people without remainders. This structural impossibility of creating a universal identity of the people stems from the fact that identity can only be constructed relationally, based on a process of positioning the identity of the 'us' over and against that of an 'other' that functions as a "constitutive outside," a necessary element that determines the identity of the 'inside.'[76] The contingency of an ever-changing and always-exclusionary people means that no stabilized form of exerting power, no guise of institutionalized democracy, can ever represent fully and universally. However, the fact that institution will always fail to represent the ever-changing people and that every concept of the people will itself be exclusionary need not delegitimize the establishment of institutionalized democratic orders, nor the inevitable participation of the judiciary in the construction of the

[73] See Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), 224-227, 176-186.
[74] Ely, *Democracy and Distrust*, 103.
[75] It is important to note that Ely himself mentioned briefly that judges' evaluations will be "full of judgment calls" (Ely, *Democracy and Distrust*, 103). Yet, he paid little attention to the implications of this acknowledgment and did not see these judgment calls as substantive, political decisions.
[76] Henry Staten, *Wittgenstein and Derrida* (Oxford: Basil Blackwell, 1985), 16, 23.

people, *if we acknowledge* the constant failure of the people to represent all and the ever-present gap between institutional structures and our democratic ideals of full representation. By making the gap between people and all and between institution and people apparent, it in itself becomes a site for democratic engagement. And it is this possibility of democratic engagement with the construction of the people by those who are excluded from it that can rescue the project of democracy from its inevitable exclusionary nature.

This brings me to my second claim: once we acknowledge this failure of institutions to fully represent the people, and the failure of the people to fully represent all, the democratic move is to work toward designing *avenues for contestation in institutions* of the sedimented boundaries of the people to be used by the remainders the system inevitably produces. While such avenues cannot prevent the existence of an other (indeed, the necessity of this avenue is predicated on the ever-existing nature of an other) it ensures that this other has the ability to participate in the political contest that resulted in their exclusion from the people. It in effect ensures that the people as represented in democratic institutions remains open to future reformulations. In this process, the decision-maker must be pushed to see the contingency of the otherness of the other, to realize that the other, while other, is always *potentially* a member of the political community, if that community were to be shaped differently. This need certainly not automatically translate into a judgment that these outsiders have been treated unjustly – indeed the judge might find there was a legitimate ground for excluding their participation (for example the exclusion of those from the political game who advocate racist or violent measures can be justified based on the protection of other others' rights of participation). It does however ensure that the judge is not *limited in advance* in her conception of the people by the current - *contingent* - hegemonic conception of who the people is. Instead, by facilitating and encouraging input form the other in the judicial decision-making process we can do justice to the reality of a contingent, contestable people and keep open the possibility that this people is reconfigured to include outsiders (while inevitably creating new outsiders that must themselves be able to make use of the avenues of contestation).

What could such an approach mean, concretely, if we apply it to the cases dealt with above? In general we can conclude that the position taken by the German, Irish, Estonian and Dutch courts, described above, failed to give the 'other', the non-enfranchised, any voice in the judicial process.[77] If the courts studied here were to attend to the democratic nature of the input to their decisions, the judges in these ESM cases would have to take into account those who were not able to participate in the political debate on the ESM within the national

[77] Interestingly, the Irish Supreme Court did mention the possibility that Ireland might receive assistance from the ESM in the future, noting that "any terms for such funding would be required to be within the constitutional ambit," see Irish Supreme Court, *Pringle v. Ireland,* para. 17.vi. The Irish court did not, however, attend to what constitutional standards the Irish government would be held to when participating in setting terms for the granting assistance to other states.

context: those who fell outside the category of enfranchised citizens. The ways in which the courts could have translated the quite abstract principle of acknowledging the other's potential membership of the political community into concrete judicial practice are many. In the remainder of this chapter I propose three ways the courts in these Eurozone crisis measure cases could have taken account of the voice of the other.

Firstly, the courts could have nuanced the grounds given for their deference to the legislature's decision-making process and noted explicitly who their conceptions of the people excluded. Both the German and the Dutch courts explicitly saw their role as limited because of the legislature's duty to weigh the different rights and interests involved in the case. Yet, since in these countries only citizens of that particular state can vote in parliamentary elections, the residents of those states who are not citizens and the residents of debtor states have no formal avenue to have their voices heard in the legislative decision-making process. These others are excluded from the formal political process and, in such cases, the perspective taken here argues for a more active role for courts in engaging these others. At the very least, courts should acknowledge the restricted nature of the people who were able to participate in the national political process and thus note that the legislature's weighing of rights and interests was in fact incomplete.

A further step would have been for the courts to actively entertain challenges from the excluded other to the dominant discourse of the necessity of the crisis measures and regarding the specific threats they posed, either through the use of dissenting opinions or by noting these controversies in the main judgment. We saw above how the German Constitutional Court refused to entertain competing claims in relation to threat the "entire economic and social system" would be under if the ESM was not adopted. The Court acknowledged the claim of this threat was the "subject of great controversy among economic experts" but held that the Court must defer on these matters to parliament's assessment.[78] A number of judges in the Estonian case did, however, express some competing knowledge claims. Ten of the nineteen judges on the Supreme Court expressed their dissents to part or all of the decision in five dissenting opinions.[79] These dissenting opinions were the place for judges to express their concerns on the "concealed purposes" of the ESM treaty[80] and the emotional nature of the arguments used to justify the majority's decision.[81] Yet, it is hard to argue that the alternative knowledge claims given space by the judges in this case represented the excluded other. Instead, these claims seem linked to discussions about the necessity and utility of the

[78] BVerfG, Judgment of the Second Senate of 12 September 2012, para. 271.
[79] The dissenting justice Villu Koye disagreed with the majority on the issue of the admissibility of the plaintiff's claim but nevertheless supported the majority's decision on the merits of the case (see Estonian Supreme Court, *Request no. 8 of the Chancellor of Justice of 12 March 2012*, Dissenting Opinion Villu Kõye, para. 3).
[80] Estonian Supreme Court, *Request no. 8 of the Chancellor of Justice of 12 March 2012*, Dissenting Opinion Jüri Ilvest.
[81] Estonian Supreme Court, *Request no. 8 of the Chancellor of Justice of 12 March 2012*, Dissenting Opinion Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Lea Kivi, Ants Kull and Lea Laarmaa, para. 0.

ESM *within* the national context. In a dissenting opinion signed onto by six judges, the dissent argued that the necessity of the ESM Treaty in "safeguarding the economic and financial stability of the euro area and of Estonia, and through it also the protection of fundamental rights and freedoms" that the majority of the court used to justify the interference with the right to democracy, was unfounded.[82] Instead, the dissenting judges argued, "such a position should have been based on an economic-scientific analysis" and pointed out that "the fulfillment of financial obligations arising from the Treaty presumably decreases the allocation of state budget funds to Estonian institutions which guarantee the protection of fundamental rights."[83] Further, in judge Jaak Luik's dissenting opinion, the entire premise of the ESM was called into question. Jaak Luik's critique on this matter is worth quoting in full:

> [R]egardless of how hard I try, I cannot understand how emergency assistance/assistance increasing the burden of debt of a state/bank allows in the long run to guarantee the economic and financial sustainability thereof and of the entire euro group… So I find that the beliefs of the Supreme Court *en banc* in the mystical efficiency of the ESM in safeguarding the prosperity of the euro area Member States, including Estonia, … do not fit in the boundaries of intelligent probability.[84]

If the courts were really to take heed of the voice of the other, they would have had to take account of arguments from those not able to participate in decision-making through the formal political channels. A conceivable step in this regard would have been for the courts to give some mention of the human rights violations expected as a result of the conditionality required by the ESM. The conditionality requirements for states receiving assistance often raise considerable human rights concerns relating to socio-economic rights such as the right to health, housing and work (in the International Covenant on Economic, Social and Cultural Rights) and the rights to collective bargaining, the entitlement to social security guaranteed by the European Charter of Fundamental Rights, not to mention the fundamental right to protection of human dignity that informs the entire Charter.[85]

A broader account of such arguments in the court's decision would have at least two democratically beneficial effects: it would give a voice to those excluded, and it would also send a message to these groups that the court is aware of potential claims to be made on their behalf in a way that a can act as an invitation to further litigation. Such invitations to civil society to embark on strategic litigation allow courts to take a step toward attaining more

[82] Estonian Supreme Court, *Request no. 8 of the Chancellor of Justice of 12 March 2012*, Dissenting Opinion Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Lea Kivi, Ants Kull and Lea Laarmaa, para. 11.
[83] Estonian Supreme Court, *Request no. 8 of the Chancellor of Justice of 12 March 2012*, Dissenting Opinion Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Lea Kivi, Ants Kull and Lea Laarmaa, para. 11.
[84] Estonian Supreme Court, *Request no. 8 of the Chancellor of Justice of 12 March 2012*, Dissenting Opinion Jaak Luik, para. 19.
[85] See for a more detailed analysis of the rights possibly violated by the conditionality required by the ESM, Margot E. Salomon, 'Of Austerity, Human Rights and International Institutions,' *European Law Journal* 21 (4) (2015): 521-545.

democratic input into their decisions while at the same time highlighting the responsibility individuals and groups have to participate in the political process that is the determination of the people. It is this latter aspect of invitations to strategic litigation that, if answered by action from civil society, can help overcome the problems inherent in expecting a judge to speak on behalf of the other, an other who the judge may not always be aware of.[86] And even if the judge is aware of this other, how is the judge to be aware of the other's interests, demands, desires?

My third proposal argues for a revisiting of the use and purpose of amicus curiae briefs. Such submissions from 'friends of the court' allow participation of the other in a way that lets the other speak for himself, avoiding to some extent the pitfalls of expecting the judge to be able to speak on behalf of an other. With the exception of the Irish Supreme Court, none of the courts discussed here accept amicus filings as a regular practice. If the courts in these cases had the practice of admitting amicus curiae briefs, a formal avenue would be present for the inclusion of voices excluded from the formal political process. A step further would have been for these courts to specifically invite un(der)represented groups affected by the outcome of the case to submit amicus briefs so as to aid the court in their deliberations. While the practice of admitting amicus curiae briefs is underdeveloped in civil law jurisdictions, indications are present that this is changing. French and Polish courts have accepted submissions from amicus curiae in recent years[87] and European Council regulations on antitrust require a type of amicus participation: EU Member State courts must allow written observations from antitrust authorities of Member States and the European Commission in antitrust proceedings.[88] In the challenge to the ESM before the Estonian Supreme Court, the Court invited certain scholars to submit their expert opinions on whether the ESM Treaty violated the Estonian Constitution.[89] It is, however, important for the amicus practice to be extended beyond scholarly arguments (however useful) to include submissions from those who have been excluded from current hegemonic constellations in ways that allow them to contribute their counter-hegemonic discourse to the discursive struggle of legal interpretation. By entertaining submissions from these groups, the court can avoid being put in the position of having to speak on behalf of the other and instead allow the other to directly provide their voice in the proceedings.

These suggestions provide a possible way forward for judges - and civil society - to challenge the dominance of the idea of a people as a static entity based on national boundaries of citizenship. I have presented three ways in which this can be done within current the current

[86] Martha Nussbaum has in this regard proposed the use of literature by judges to become more familiar with the emotional and personal world of those who are othered by the community in which the judge herself was socialized, see generally Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Massachusetts: Beacon Press, 1995).
[87] Steven Kochevar, 'Amici Curiae in Civil Law Jurisdictions,' *The Yale Law Journal* 122 (2013): 1661.
[88] Kochevar, 'Amici Curiae,' 1660.
[89] Estonian Supreme Court, *Request no. 8 of the Chancellor of Justice of 12 March 2012*, para. 5.

institutional judicial setting. Let me be clear, attention to the input to the judicial decision cannot rid decision-making of its exclusionary effects altogether. The decision by its very nature takes sides in the political question of who is the people. The aim is not to try to "assimilate" the other into the realm of the people in an attempt to create a truly universal people, but rather to "shatter the confidence" in the dominant conception of the people, to "show how equivocal its claims to universality are" and to provide openings "towards alternative versions of universality."[90] Such a conception of the judge's role implies an important responsibility for individuals and civil society as participants in the democratic process. It emphasizes the necessary involvement of individuals and civil society in providing the judge with this input, not only by submitting the amicus curiae briefs mentioned above, but also by involving themselves in the political debate over the construction of the people and by bringing cases that push the boundaries of the hegemonic conception of the people.

3. Conclusion

The cases challenging the Eurozone crisis measure show the concern courts have with protecting and promoting democratic procedures and, in doing so, show how courts see their own legitimacy as linked to this democratic concern. Ely's theory of process-based review provides the theoretical basis for understanding how attention to democratic procedures contributes to the legitimacy of courts reviewing legislation against higher, constitutional norms. By avoiding substantive questions of values and morals, Ely argues, courts can issue judgment on that which they are most competent to assess – the openness and fairness of the rules of the political game – while avoiding the imposition of their own morals and values. Yet, as the analysis of the Eurozone crisis measure cases also showed, even a process-based approach cannot avoid substantive judgments about who the right to democracy applies to and what exactly democracy entails. The presence of substantive judgment does not undermine Ely's argument in favor of process-based review, but it does mean that attention has to be paid to the process of the judicial decision-making itself. In order for the judiciary to maintain its allegiance to the preservation and promotion of democratic procedures, it is important for the judiciary's own decision-making procedure to be informed by democratic values that ensure an openness to the other. Since substantive decisions are inevitable, I propose that the democratic way for judges to make these decisions is to ensure that avenues for contestation are available in the courtroom. By attending to the input to the judicial decision, and ensuring that the other is able to provide such input, it is possible to maintain the justification of constitutional review in democracy, namely the preservation of space for contestation of the current political status quo by those it excludes. There are many different possibilities for how these avenues of contestation can be constructed, but here I made three concrete suggestions to open up judicial decision-making to the other: firstly, courts could be more aware of and

[90] Judith Butler, 'Competing Universalities,' in *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left,* ed. Judith Butler, Ernesto Laclau, Slavoj Žižek (London: Verso, 2000), 179.

acknowledge those who are excluded by the concept of the people used by the court and the legislature. The courts can explicate what this exclusion means for the legitimacy of the legislature's decision, as well as for the legitimacy of the court's restrained approach to reviewing that decision. Secondly, the courts could actively entertain alternative knowledge claims when reviewing the necessity of the crisis measures in a way that encourages strategic litigation; and finally, courts can allow – and perhaps even invite – amici curiae to intervene in the deliberations on the case so as to give some voice to those who otherwise would be absent from the debate on the matter.

A final note is due regarding the application of these conclusions to other types of cases. The cases dealt with here were adjudicated in a context of crisis and were characterized by multi-level governance and a high level of interdependence between the Eurozone countries. In times of crisis, dominant discourses (including those on the constitution of the people) are dislocated and are more open to challenges from outsiders. While the judges in the cases considered here did not avail themselves of this opportunity, the context of crisis in which the cases were heard did give them the possibility to rupture the hegemonic discourse of the people and move toward new articulations of the people. Moreover, the level of interdependence between Eurozone countries meant that the decision taken on the constitutionality of the measures in one Eurozone state would have consequences that reached far outside of its own national borders. It also meant that the national decision-making procedures – focused on the national legislatures – were not able to give any type of (formal) representation to those non-nationals who would be affected by that legislature's decision on the crisis measures. In short, the complex, international nature of these cases makes it clear that national parliamentary decision-making bodies were insufficiently able to ensure their democratic procedures were truly open to those who had an interest in participating in the political debate on this issue. This should, however, not be taken to mean that *only* such situations warrant the conclusion that judges have a democratic responsibility in ensuring the openness of their own decision-making procedures. The core argument made here – the inevitability of substantive decisions – and the consequential necessity for the internalization of democracy in the judiciary's own decision-making procedures holds for other, more mundane, cases of judicial review as well. The question of who the people is, the question of whose interests are rightfully furthered by the state and, fundamentally, of who institutes social meaning are constantly contested questions, and this contestation need not wait for the dislocation caused by a crisis. Indeed, those wishing to contest the composition of the people can *evoke* a crisis: crisis need not always proceed the questioning of the people; it can also by precipitated by this questioning. And this contestation of the people occurs as much between groups *within* the nation as it does between groups in different states. Within the state there is also constant competition between different groups for formal and informal representation and for inclusion in the 'us' on whose behalf decisions are made. A most poignant example are undocumented persons who have no formal and little to no informal representation in national politics, but think also of non-naturalized immigrants, disenfranchised (ex)detainees,

and children. Because of this constantly-challenged construction of the people, judicial decisions on the right to democracy and how exactly this right should be translated into practice remain substantive decisions, even within the purely national context. Thus, here too, judges should ensure that their decision-making gives heed to those the law excludes.

CHAPTER VII

COURTS, CRISIS, AND CONTESTATION: A SYNTHESIS

In the previous chapters of this dissertation, I have explored different aspects of crisis discourse and judicial decision-making. In this chapter, I integrate the different threads set out until now, so as to provide a more synthesized theory of judicial decision-making in times of crisis and to answer the research question posed in this dissertation: *what force can crisis discourse have on judicial decision-making and how should judges, particularly in times of crisis, take account of this impact on their decision, given the role of the judge in a democracy?* In order to parse apart my interest in a descriptive account of the effects of crisis discourse from the normative theory of decision-making, I proceed as follows. Section 1 starts by sketching the picture of the impact crisis discourse has on judicial decision-making that has emerged for me out of the four case studies in this dissertation. In Section 2, I tie together the aspects of post-foundational theory explored in these case studies into a proposal for how judges should decide in times of crisis that focuses on the *input to* and *output of* the judicial decision. The overarching concern of this Section is to theorize how the individual decision-maker can use the various strands of post-foundational theory discussed so far in the current political and legal context. I attempt to further think through the institutionalization of agonism and I make a number of suggestions for how this can be done, focusing not on a radical overhaul of the function or purpose of the legal system but rather on what the judge can do within the current structures to adjudicate more justly. This normative proposal subsequently leads me to say something about the *subject* I call on to decide. Section 3 takes as its point of departure the desire to highlight the possibility of agency and potential for realizing oneself in the search for ever-more democratic forms of being, while also acknowledging the constraints posed by the hegemonic discourses in which we find ourselves. I highlight the lack of freedom the (juridical) subject has, as she is formed by the discursive fields she must navigate, but at the same time I hope to show how these discursive fields provide us with agency's "most enabling conditions."[1] Once we free ourselves "from the illusion of freedom, or, more exactly, from the misplaced belief in illusionary freedoms"[2] we place ourselves in a better position to exercise the agency we have - an agency not of the

[1] Judith Butler, *Bodies that Matter* (New York: Routledge, 2011 (1993)), 174.
[2] Pierre Bourdieu, *In Other Words*, *Essays towards a Reflexive Sociology* (Stanford CA: Stanford University Press, 1990), 15-16.

unitary, uninfluenced actor but of the subject who finds herself thrown into chains of meaning she did not choose but nevertheless must relate to. I close this dissertation by attending to the self-creation of the agonistic judge and of the agonistic citizen. It is in taking responsibility for how the subject relates to the chains of meaning in which she finds herself and for her role in the production and reproduction of meaning that the subject can find, within the structured undecidability to which we are condemned, a space of freedom to decide more justly.

1. Crisis Discourse and Ruptures in Legal Meaning

The first aim of this dissertation was to describe the ways in which crisis discourse can impact judicial decision-making, specifically in the case of crisis discourses on post-9/11 international terrorism and on the Eurozone sovereign debt crisis in the second decade of the 21st century. I defined crisis discourse as a way of speaking that discursively constructs a threat that is subsequently framed as necessitating structural change. The case study approach I adopted was intentionally limited: instead of describing all possible ways crisis discourse could affect judicial decision-making or saying something about the most common ways in which it does, I aimed to use the instances of crisis discourse I studied to be able to make some claim about the force this type of discourse is capable of exerting on judicial decision-making. In this sense, my intention was to see whether crisis discourse had the potential of exerting any influence on the decision-making process and, in the instances where I could find some such force, explore how it was exerted.

This study uncovered four distinct elements of the force crisis discourse can have on judicial decision-making and of how it is exerted. First, it showed that crisis discourse can rupture hegemonic discourses and create new discourses from the elements of those ruptured and, importantly, that crisis discourse can act in this way in relation to *legal* discourse employed by judges in their judicial decisions. Second, crisis discourse is able to function this way, in the final analysis, by discursively creating and positioning a 'people' who is seen as the legitimate decider on social meaning over and against an 'other' whose presence threatens the existence of the people. Third, like all discourses – even ones that attain hegemonic status – we saw that crisis discourse can never fully stabilize the meanings it gives to events, nor the content and relations of the people versus the other. Indeed, these meanings, content and relations are only ever *partially solidified* and the possibility for a rearticulation of the elements to create new meanings, content and relations always remains. This possibility for rearticulation, or what I refer to in the Derridian sense as iterability, is also always present in the judge's decision-making. The judge can never fully replicate the legal rule and instead must always choose a particular iteration of the rule – a repetition that is nevertheless also always an altered version of the original. In this way, whether consciously or not, the judge wades into a hegemonic struggle over meaning-making. Fourth, it showed that a judge cannot escape her role in this hegemonic struggle by showing deference to the legislature or the executive. Even in the most marginal of review, the judge is forced to make substantive

decisions that are both structured by the force of hegemonic discourses such as crisis discourse and, at the same time, retain an aspect of undecidability, as they cannot find full and final ground in previous decisions. Let me expand on these four elements in turn.

(1) *Crisis discourse and the rupture of hegemonic discourses*: The most potent force of crisis discourse is its ability to rupture old hegemonic discourses and institute new ones. This force was on full display in chapter three, where I discussed how crisis discourse precipitated the shift from a criminal law approach to terrorism to a precautionary approach. First, I showed how the events of 9/11 weakened the discourses that had prevailed in the areas of national security and appropriate approaches to terrorism. The attacks on September 11th dislocated these prevailing discourses, laying bare the always-present impossibility of any discourse to fully cover all social meaning. After the attacks, government and individuals were initially unable to grasp what had happened within the terms of previous discourses and experienced something that is usually concealed: the failure of discourse to *fully* interpellate subjects into stable and normalized forms of being.[3] This dislocation, which "literally induce[d] an identity crisis for the subject,"[4] produced at the same time the possibility of the discursive creation of new identities.[5] It is important to stress here that this discursive creation of new identities is not something that happens automatically or naturally, but is rather deeply contingent. In other words, after dislocation, a discourse can either be repaired and recover or it can be ruptured. If ruptured, the elements that constituted the initial discourse are rearticulated into a new discursive structure that replaces the old one as the hegemonic discourse. Chapter three showed, in this particular context, that the crisis discourse deployed after 9/11 was successful in its rupturing of the past paradigms of international terrorism. The crisis discourse contained a particular double articulation that both gave meaning to the events of 9/11 as an existential threat and, at the same time, presented a solution to this asserted threat: preventive measures. In addition to rupturing the previously dominant criminal law approach to terrorism, the solution presented by the crisis discourse - a precautionary approach to terrorism - succeeded in becoming a new hegemonic legal discourse on terrorism.

(2) *Crisis discourse and the discursive construction of the 'people' and the 'other'*: Chapter four shifted the focus from crisis discourse in the War on Terror to crisis discourse as used by two Dutch political parties during the Eurozone sovereign debt crisis. Here, I studied the rhetoric of the Socialist Party and the Freedom Party to see what it is about crisis discourse that allowed it to achieve the rupture described in the previous chapter. I showed how the crisis discourse as used by these parties distinguished between an 'us' and a 'them': an 'us' who is threatened by a 'them,' a 'them' whose threat is subsequently discursively constructed as demanding structural change to the political and legal order. The Socialist Party did this by

[3] Aletta Norval, *Deconstructing Apartheid Discourse* (London: Verso, 1996), 26-27.
[4] Norval, *Deconstructing Apartheid Discourse*, 27.
[5] Ernesto Laclau, *New Reflections on the Revolution of our Time* (New York: Verso, 1990), 39.

emphasizing the threat posed by the 'very rich' to the 'real' citizens of the Netherlands by way of the very rich's reckless financial behavior. The Freedom Party identified a different other, the Muslim and the European Union, and argued that these posed a threat to the 'real' Dutch man and woman. This ability of crisis discourse to separate a people from an enemy is fundamentally *political*. In the final analysis, drawing inspiration from Carl Schmitt and the later reworking of his thought by democratic agonists, I conceptualized politics as centered on the question of who belongs to the political community. The main political move is, from this perspective, the discursive construction of the people over and against an other who falls outside the boundaries of the political community. In this way, crisis discourse engages in a fundamentally *political* distinction that discursively divides the world into those who belong to the political community and those who are excluded from this community. The case study in this chapter showed how the Socialist Party and the Freedom Party mobilized a discourse of crisis that fulfilled this very political function. In the framing of a threat that necessitated structural change, both parties proposed an other that was the cause of the threat to the people that needed protecting. This threat was subsequently discursively linked to fundamental change that would benefit the people while excluding the other. It is this divisive quality that gives crisis discourse its ability to rupture hegemonic discourses, as it peels away groups previously connected in the former conception of the people, linking them together in new formations to institute newly constituted chains of meaning. Crisis discourse can thus be characterized as a tool in political conflict and, as such, is part of normal politics and is not an exceptional mode of politics that inherently threatens democracy. Any creation of identity will necessarily exclude something from the content of the identity, and any political measure will benefit some while excluding others, but this in itself need not be undemocratic.

While chapter four did not directly engage in the *legal* use of crisis discourse, it allowed me to better conceptualize what someone *does* when they 'speak crisis'. By highlighting the performative power of utilizing crisis discourse, I could show that its main force lies in dividing the political community into those who belong and those who do not. As we will see in the next Section, this chapter also allowed me to develop the beginnings of a normative framework that I could use in the subsequent two chapters to say something about how judges should deal with crisis discourse, taking into account both the productive role of hegemonic conflict and the necessary limits to this conflict. But before being able to address the question of how judges should deal with crisis discourse, I had to ascertain what space judges, in fact, have to *choose* how to respond to this discourse. Where chapter three and four emphasized the force crisis discourse can have in shaping legal discourse and political communities, chapter five addressed whether this force was the whole story. Does a hegemonic crisis discourse become completely determinative of political and legal meaning or is there room for resistance?

(3) *Crisis discourse and the failure to fully structure the field of meaning*: Chapter five explored whether a powerfully unified discourse like the crisis discourse used in the War on Terror left a judge any space for escaping the hegemonic imposition of legal meanings. This chapter argued that it is impossible for any hegemonic articulation to fully and finally structure meaning and explored how the judge should relate to this impossibility. It showed how the iterability of discourse allowed Judge Doumar in the District Court hearings of the *Hamdi* case to play with the terms of the crisis discourse, repeating the discourse while at the same time altering it. While using terms familiar to the crisis discourse such as national security, the extraordinary nature of the threat and the existential threat posed, he managed to make them 'mean differently.'[6] Judge Doumar linked national security to the protection of important national values such as individual liberty instead of to physical security, pointed to the extraordinary nature of the government's actions instead of the extraordinary nature of international terrorism and emphasized the existential threat posed not by international terrorism but by undermining constitutional values. This chapter showed that while a strongly coherent discourse like the crisis discourse used in the War on Terror is a powerful tool in the hegemonic struggle over political and legal meaning and is capable of catalyzing a change in accepted legal meanings, the discourse is not all-determining. Indeed, the very undecidability of meaning that makes hegemonic struggle possible is what also makes its complete success impossible: social and legal meaning can and must be created by hegemonic discourses because there is no already-present, essential social meaning. This lack of essential meaning also entails that any meaning a hegemonic discourse attributes can never exhaust all possibilities of meaning. This overdetermination of the social means that alternative articulations remain possible and can, when activated, challenge the dominance of the established articulation. Yet, at the same time, this case study also showed that breaking out of the discourse of crisis is no simple matter. When Judge Doumar challenged the hegemonic discourse, the government simply refused to comply with the court's order, forcing as it were a clash between the courts and the government and reminding us that when the form of 'consent'[7] that hegemony relies on disappears and the hegemony is challenged, the hegemonic group will resort to more overt domination.[8] Knowing that in such a clash the court could not win, the judge relented, declined to enforce his judgment and gave the government a way 'out' by allowing it to proceed with its appeal. In the end we saw that the fundamental undecidability of legal meaning - despite the strong structuring effects exerted by crisis discourse - forced the judge to take sides in the hegemonic conflict over meaning.

[6] Judith Butler speaks of a "different sort of repeating" and of "subversive performances." Bonnie Honig refers to "subversive repetition." See Judith Butler, 'Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory,' *Theatre Journal* 40 (4) (1988): 520 and 531 and Bonnie Honig, *Political Theory and the Displacement of Politics* (Ithaca: Cornell University Press, 1993), 124.
[7] Antonio Gramsci, *Selections from the Prison Notebooks of Antonio Gramsci*, ed. and trans. Quintin Hoare and Geoffrey Nowell Smith (New York: International Publishers, 1971 (1932)), 12.
[8] Gramsci, *Selections from the Prison Notebooks of Antonio Gramsci*, 12.

(4) *Judicial interpretation cannot avoid the conflict crisis discourse exposes over the determination of legal meaning and of the construction of the people*: In chapter six I return to the crisis discourse in the Eurozone sovereign debt crisis, this time focusing on how courts in Eurozone Member States dealt with the constitutional challenges to the European Stability Mechanism (ESM), the five-hundred billion euro crisis measure designed to deal with the crisis of financial instability in the Eurozone region. In this chapter, I show that even judicial review that is highly deferential to the political decisions made by other branches of government cannot help taking sides in the substantive struggle over the construction of the people and the determination of (legal) meaning. My analysis of the judicial decisions in the national constitutional challenges to the ESM showed that even when focusing only on ensuring the basic functioning of the democratic process, trying to avoid all substantive judgments, a judge cannot avoid the substantive judgments inherent in her conceptions of the democratic process she is trying to protect. Her decision will be based on normative evaluations regarding, particularly, who the people are whose democratic rights are at stake. As we have seen, the question of who belongs to the people is inherently political and a matter decided through discursive conflict over hegemonic articulations of the identity of this people. This chapter showed that deference to the previous decisions of the political branches of government on the constitution of the people does not allow the judge to avoid taking sides in this hegemonic conflict. The construction of the people is something that must be reaffirmed each day anew, as new members join a political community and old ones leave. Each day, and at multiple locations, decisions are needed as to the 'true' meaning of the people. These decisions do not only take place at the level of formal representative politics but are – among others – also necessary in the courtroom. The issue of who the 'true' people was on behalf of whom the judge was to decide became particularly poignant in the case of the Eurozone crisis as those most affected by the ESM were formally excluded from the parliamentary decision-making process over who the people is. Since the political branches of government only gave formal rights of participation to citizens of the particular state in which the court was located, it was impossible for those most affected by the ESM – citizens and residents of the debtor states in the Eurozone – to be represented in the decisions made by the political branches of government. Additionally, in times of crisis the debate in the political branches of government is often further restricted by appeals to the need for urgent decision-making leaving less time for debate and by delegitimizing those who refuse to accept the rhetoric of crisis by portraying them as 'traitors' at the worse and 'out of touch' at the best. These factors showed that, since a judge cannot avoid such conflicts over the meaning of the people and must inevitably support one conception of the people over another, the judge cannot avoid being political in her decision.

These four conclusions as to the force of crisis discourse on judicial decision-making contribute to a picture of conflict as an ontological aspect of human society. If there are no permanent, universal foundations upon which decisions can be grounded, decisions are always susceptible to contestation from other discourses vying for hegemonic status. Each

hegemony creates 'remainders,'[9] people and identities that are excluded from the hegemonic view of the people and these remainders continue to trouble the boundaries of the hegemonic order. While the hegemony is stable, these remainders stay at the margins of the hegemonic order, only able to pose peripheral challenges to the order. But hegemonic stability is only ever temporary and the breaking apart of the hegemonic coalition remains an ever-present possibility. If the hegemonic discourses are dislocated, they can be restructured in ways that include previously excluded groups while excluding previously included groups. This dislocation and restructuring are not coincidental, nor are they the result of some essential necessity. Instead, destabilization and reconstitution of discourses are the result of both inter- and intra-group conflict over who rightfully belong to the (hegemonic) political order and who do not, a conflict that can be waged effectively with crisis discourse. What does such a view of conflict mean for judicial decision-making? In the following Section I set out the beginnings of such a theory.

2. An Agonistic Theory of Judicial Decision-Making

This dissertation has showcased instances of powerful discursive conflicts centered around 'crisis'; conflicts about the nature of threats, the cause of threats and the groups that deserve protection at the expense of the threatening other. These conflicts take place through discourse and are deeply political as, in the end, they revolve around the issue of what the identity is of the legitimate political community that is able to decide on social meaning. Additionally, these conflicts cannot be decided by reason or rule but must instead be decided by decision – by an exertion of power that cannot be completely grounded in preconceived norms but is instead at least partially lacking in foundation. In effect, the force of crisis discourse on law and legal interpretation alerts us to a broader question of judicial decision-making: how is a judge to decide in conditions of fundamental undecidability? How is a judge to decide, given that crisis discourse can pull the judge into a hegemonic conflict over who belongs to the political community and who does not?

In chapters five and six I reflected on two opposing theories of judicial decision-making, the first inspired by Ronald Dworkin and the second by John Hart Ely, and concluded that neither was able to sufficiently take account of the undecidable – and thus conflictual – nature of judicial decision-making. Dworkin's theory of judicial decision-making proposes a judge whose duty it is to engage in law as an argumentative practice, in which the best answer is that which best fits judicial practice and which can best be justified with the underlying political morality of the legal system. While Dworkin does not deny that this practice inevitably calls on the judge to construct the law, his view does not take account of the role power relations play in shaping law. What shapes the construction of the law is not only the neutral efforts of the judge but the exercise of power, through hegemonic discourses. And this

[9] Honig, *Political Theory,* 127.

exercise of power is not only present in the construction of the law by the judge, but in the construction of the very political morality Dworkin finds to have a vital role in the interpretation of the law. While it is certainly true that these discourses pose constraints on interpretation, these constraints must be recognized as the contingent product of power relations with no final moral grounding. John Hart Ely criticizes Dworkin's acceptance of the role of morality in judicial decision-making[10] and instead argues that all substantive decisions on political morality must be left to the legislature, so as to protect the ability of the people to democratically decide on such matters. I read Ely here from an agonistic perspective, understanding his claim as a response to the conclusion I draw in chapter five and as the beginning of an answer to the second half of the main question posed in this book: how are judges to take account of this impact on their decision? If it is true that there are no final grounds or essence of meaning, including in the interpretation of the law or political morality, but rather that these meanings are attributed by humans through decisions that are shaped by power relations exercised through hegemonic discourse, then perhaps the only legitimate ground to be found is in ensuring that these decisions are made democratically. Ely underscores the importance of protecting the ability to make decisions democratically and argues that the judge's legitimacy to overrule democratically adopted legislation stems only from the judge's superior ability to protect the functioning of the democratic process itself.

Yet, while Ely's theory shares many concerns with agonistic writers who point out the importance of recognizing the deeply political nature of normative decisions, and thus the importance of these decisions being made by the people and not unelected technocrats, his theory fails to recognize that even the most marginal judicial review cannot avoid deciding on the most fundamental political question: who is the people on behalf of which democracy functions? While Ely implicitly assumes that this question can be deferred to the legislature or the constitution, I maintain that the decision on who the people is cannot be grounded in previous decisions by the legislature or even by a constitutional assembly, since such previous decisions resulted in no fewer ungrounded exclusions than those decision that deference to such originary moments would try to avoid. Moreover, even the attempt to accurately *recognize* such originary moments is troubled by those excluded. These excluded groups and individuals contest the boundaries of the 'true' people, and this contestation makes a simple reference back in time impossible without also deciding on the identity of the people who decide what that reference back means today. The decision of who the people is, is thus a decision that cannot be avoided, each day anew and by any actor who is confronted with the question of who the people truly is. In conclusion, if the judge's business in judging cannot be adequately described with either Dworkin's appeal to political morality or Ely's deference to the legislature – since the judge cannot avoid being political, while at the same time cannot

[10] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980), 58, 59.

presume to find any fully stable ground on which to base her decision – the question remains: how is a judge to judge in these circumstances?

Before sketching the lines along which I will answer this question, let me first emphasize that a lack of foundation for legal decision does not mean that law should be conflated with partisan politics. It is true that I wish to highlight the political aspects of the law and of decision-making, and to do so I specifically address the aspects of the law and decision-making that deal with the questions of meaning, particularly the meaning of the political community and I argue that the answers to these questions are not the product of reason but of hegemonic conflict. This political aspect of legal decision-making does not mean, however, that I see legal decision-making as identical to decision-making in more overtly political bodies, such as a legislature or a political party. Instead, I would argue along the same lines as Alan Hunt that legal discourse is rightfully seen as a *special type* of politics in which certain principles, such as for example coherency or consistency, play a more important role than in other political practices, for example that of representative democracy.[11] Law is a type of political interaction, but still a unique type that follows certain discursive practices that give it its identity as *legal*. The lack of ultimate foundations does not mean that (legal) order is impossible or that we should strive for the least amount of order possible; to the contrary, we must readily acknowledge that hegemony is not escapable. The lack of final, ultimate foundations does not mean that there is a complete unfixedness of meaning. There is meaning that exerts power, restricting some interpretations and enabling others, and this meaning matters. This meaning stems, however, only from human-made discourses and can only ever restrict and enable partially and incompletely.

Agonistic Decision-Making in Times of Crisis

This dissertation's post-foundational approach revealed the following paradox: decision is needed in a field characterized by hegemonic conflict over fundamental meaning but there is no way to ground this decision on a final appeal to a universal that is not itself the product (and target) of hegemonic conflict. I argue here that agonism, with its emphasis on the normative role of contestation, provides a way to negotiate this post-foundational paradox of partially undecidable decisions. I use agonistic theory to highlight that, in the inevitability of non-universal hegemonies and the conflict over their construction, it is possible to strive for more negotiable, more contestable hegemonies and, indeed, that this is where legitimacy can be found.[12] I come to this conclusion as follows: I start with the question whether, considering

[11] Alan Hunt, 'Law's Empire of Legal Imperialism?,' in *Reading Dworkin Critically,* ed. Alan Hunt (Oxford: Berg Publishers, 1992), 41.
[12] As Ed Wingenbach notes, "The goal of agonistic democracy is not to replace stability with contingency, but to use the fact of contingency to make institutional politics transparent and negotiable," see Ed Wingenbach, *Institutionalizing Agonistic Democracy: Post-Foundationalism and Political Liberalism* (New York: Routledge, 2016), 93.

that foundations are meaningful, but ungrounded in any final essence, we can find a way for the foundations we create together to have some type of legitimacy. This legitimacy would need to relate to the reason why foundations matter and I submit that foundations matter not just because they provide social meaning but because they do so in a way that is inherently exclusionary and contestable. Some views of the world, some identities, some interests will be disadvantaged and excluded from the 'truth' provided by these ultimately ungrounded foundations. It is this exclusionary aspect of the meaning we attribute to our world that is problematic about the ungroundedness of meaning and it is this aspect that a search for legitimacy must attend to. Certainly, agonists and I do not contend that complete *inclusion* is possible, so how are we to deal with this ungrounded exclusion? I argue that the lack of final justification for this exclusion means that we must never be so sure of ourselves and the exclusion we create, that we allow this exclusion to become irreversible. Since there are no final grounds for this exclusion, we must admit that the hegemonic order that leads to this exclusion might be the wrong one; we must admit that despite our deepest conviction that we have chosen well, we cannot be sure. The only way to find legitimacy in this terrain of structured undecidability is to search for the construction of meaning that preserves the reversibility of power relations, and preserves the political contest over who belongs to the political community and who does not. This leads to me Claude Lefort's conception of democracy as a way of engaging in politics in which power is "involved in a constant search for a basis."[13] Because of the very fact that there is no ultimate ground, because "law and knowledge are no longer embodied in the person or persons who exercise it,"[14] decisions must constantly search for legitimacy. This entails, according to Lefort, "a society which accepts conflicting opinions and debates over rights because the markers which once allowed people to situate themselves in relation to one another in a *determinate* manner have disappeared."[15] He points out that such political activity rests on the acceptance of a single fact: "power must now win its legitimacy without becoming divorced from competition between parties."[16] In the end, Lefort concludes, democracy is about doing away with the notion of power legitimized by law or knowledge and replacing it with a power legitimized by the "debate as to what is legitimate and what is illegitimate."[17] In this debate, there is *necessarily* no "guarantor" and it is a debate "without any end."[18] This ongoing, groundless debate is necessary for power to be exercised legitimately as it provides those excluded the chance to vie for a competing notion of what is legitimate. It preserves the ability of the other to engage in the ever-ongoing contestation over both *meaning itself* and the construction of *those who get to determine meaning.*

[13] Claude Lefort, *Democracy and Political Theory*, trans. David Macey (Cambridge: Polity Press, 1988), 34.
[14] Lefort, *Democracy and Political Theory*, 34.
[15] Lefort, *Democracy and Political Theory*, 34, emphasis added.
[16] Lefort, *Democracy and Political Theory*, 34.
[17] Lefort, *Democracy and Political Theory*, 39.
[18] Lefort, *Democracy and Political Theory*, 39.

What does such a conception of legitimacy mean for crisis discourse? Firstly, it calls on us to recognize that in the discursive contest over the meaning of the crisis we can never be sure that we have identified the real threat, the true culprit or the best solution. Our notions of threats, culprits and solutions are discursively formed through hegemonic struggle – a process of meaning-making that is grounded by decision. Secondly, crisis discourse cannot avoid othering. The identification of a threat implies the division of the political world into a people that deserves protection and an other who poses a threat to this people. The solution, it follows, will in some way aim to exclude the threat posed by the other from the political community. Thirdly, we must realize that this lack of ground does not mean we need refrain from these processes of identification of threats, culprits and solutions. This dissertation neither calls for apathy nor for abandoning the attempt to best identify the 'real' threat, culprit and best solution. It does, however, demand attention to the fact that these attempts will always be affected by the political decision about *who* can rightfully make these decisions and on whose behalf.

While the othering inherent in crisis discourse is not in itself a problem, not all types of exclusion of the other can be accepted, and not all conflict over who belongs to the political community is legitimate. Yet, the normative framework with which to evaluate crisis discourse cannot depend on the 'objectivity' of the threat or the 'necessity' of the solutions, since crisis discourse - as a hegemonic discourse - shows no necessary link to the reality of threat levels or likely effective solutions. One can thus not rely on whether the crisis discourse identified an 'actual' threat and proposed a 'realistic' solution. The inherently performative nature of this discourse made it clear that such rationalistic classifications miss their mark: as a tool in the hegemonic struggle over meaning, crisis discourse engages in the very contest over what we deem to be actual and realistic and, in the end, this question is answered by the determination of who the people is who is seen as legitimately able to decide on these issues. Moreover, the discourse's ability to affect legal interpretation means that one cannot rely on whether the crisis discourse proposed *lawful* measures or not. Chapter three and five showed, after all, that one of the effects of crisis discourse is the shifting of estimations of what is legal and what is not, based on justifications that are not – in the final analysis – ultimately grounded in a foundation immune from the influence of power relations. Thus, instead, my normative framework theorizes that the limit of legitimacy lies between a crisis discourse that, on the one hand, excludes the other from the political community in a way that retains the possibility for the other to contest his exclusion and, on the other hand, a crisis discourse that attempts to *permanently* and *irreversibly* exclude the other from the political community. In chapter four I noted that attempts at permanent exclusion often take the form of constructing an other based on indelible characteristics, traits he cannot change about himself. Acceptable attempts at temporary exclusion, on the other hand, frame the other as someone engaged in a particular behavior and struggle for the exclusion of that behavior. Practically, this means in my estimation that crisis discourse is only acceptable to the extent it constructs threats as being posed by the other's behavior and not the other's identity or person since the

construction of the other based on characteristics considered indelible would prevent this person from ever being able to shed these excluded characteristics to re-enter the political community.

To make this distinction I propose between indelible characteristics and behavior more concrete, let us discuss the example of an other on which there is broad consensus: the pedophile.[19] A common discourse on pedophilia is that it poses a threat to children who are coerced into sexual relationships they are unable to consent to and that the solution to this threat is to criminalize sexual relationships with children. From this, it follows that those convicted of pedophilia are subject to criminal sanctions such as imprisonment. This type of discourse falls within the acceptable range of othering, as it focuses on a *behavior* that society deems threatening. Yet, when focus on the behavior of pedophilia is replaced by a focus on the very existence of the person of the pedophile, the crisis discourse becomes unacceptable. Thus, for example, if a crisis discourse was used that connected a threat posed by the pedophile as a person to the need to eradicate all such persons, this discourse would shift toward permanent, irreversible exclusion. Calls for the death penalty, or life imprisonment without the possibility of parole, or the permanent stripping of voting rights, and perhaps even mandatory castration change the focus from the behavior to the person to a problematic refusal to acknowledge that the person can ever distance himself from the behavior society deems threatening and extinguishes the ability of other to contest the discourse that excluded him.

To summarize thus far, we can say that threats must be addressed, culprits called to account and solutions proposed – but this must be done in a way that respects the fact that we can never be certain we have the right ones. My proposition is that we engage in these processes of meaning-making in a way that *refuses to make the exclusion of the threatening-other permanent and irreversible*. The other may not be excluded to such an extent that his re-entry into the political community is made impossible and he must remain in a position to participate in the discursive struggles that mark his exclusion. He must remain able to contest the discourses that have excluded him. The next part of this chapter applies this insight to the field of legal interpretation. This is based on the assumption that the importance of decisions remaining open to contestation by the other they exclude is not only relevant to the sphere of explicit political debate but also to other spheres where decision is needed to find stability in a field of competing interpretations without the benefit of a stable foundation with which to make that decision. In what follows, I propose a theory of judicial decision-making centered

[19] This consensus might be nearly complete, but dissent still remains at the margins. See for example the now-defunct Dutch Party for Neighborly Love, Freedom, and Diversity, commonly known as the "pedo party." The party's platform consisted of, among other things, advocating that the age of consent be lowered to 12 and that bestiality and child pornography be legalized. This party had no representation in any representative body in the Netherlands and had only three known members, see Author Unknown, 'Dutch Will Allow Paedophile Group,' *BBC News,* 17 July 2006, available at http://news.bbc.co.uk/2/hi/europe/5187010.stm

on the necessity of preserving contestation in the context of both the *input to* and *output of* the judicial decision.

The Agonistic Output of the Judicial Decision

The judge's decision is necessary to find a way forward in the structured undecidability of law. This decision, while itself ungroundable on any ultimate foundation, is nevertheless structured, albeit incompletely, by the power exerted by the hegemonic discourses of law and politics. These discourses and the chains of citationality they create constrain meaning and confine interpretations of law but, in the end, can never fully saturate the field of meaning and the decision remains the result of a leap over the abyss between structure and decision. The resulting decision will inevitably exclude some, in favor of others, in a way that cannot be finally grounded. In chapter five I appealed to the judge to appreciate this lack of final ground and to take responsibility for the other she excludes with her decision. I argued that the judge, in order to decide legitimately, must recognize that she can never be sure her decision was right; despite her best efforts she must acknowledge that she has "not done enough."[20] Not because she has not followed every legal procedure, but because adhering to one's legal duty does not absolve one of the responsibility for the other who was excluded by one's ultimately contingent decision. I focused on the need for the judge's attention to the effects of the judicial decision in the case of the preventive detention of Mr. Hamdi. In this case, crisis discourse ruptured the traditional discourse of criminal law approaches to terrorism, replacing it with a precautionary approach that discursively justified the preventive detention of Mr. Hamdi without criminal charges for the (uncertain) duration of the hostilities against international terrorism. I concluded that this discourse, while highly successful in structuring the field of legal meaning, nevertheless left space for the judge to play with the terms of the discourse to make it mean differently and I called on judges to, in such cases, indeed do so to the extent the hegemonic legal discourse constructs the other as permanently and irreversibly excluded from the political community. To operationalize this conception of exclusion in law, I used the notion of legal invisibility.[21] If the judicial decision (re)produces the other as legally unrecognizable, as unable to have standing as a person under the law and unable to participate in both the legal and political debate over this status, we can speak of a decision that results in legal invisibility. Such a decision fails to take the responsibility for the other I speak of here. In the case of preventive detention, the relevant questions for the judge to ask relate to whether the preventive - often indefinite - detention of an individual denies them recognition under the law and in the political sphere. Does this measure stand in the way of

[20] Jacques Derrida, 'Remarks on Deconstruction and Pragmatism,' in *Deconstruction and Pragmatism,* ed. Chantal Mouffe (London: Routledge, 1996), 87.

[21] See Bernadette Atuahene, 'From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility,' *Southern Methodist University Law Review* 60 (2007): 1425-1431 and Wouter Veraart, 'Het slavernijverleden van John Locke. Naar een minder wit curriculum?,' in *Homo Duplex: De dualiteit van de mens in recht, filosofie en sociologie*, ed. Britta van Beers and Iris van Domselaar (Den Haag: Boom juridisch, 2017), 218.

the individual's participation in the political debate, does it prevent the individual from challenging his detention in court, is the other constructed as an object that can only be spoken about instead of himself being able to participate in the conversation? If the answer to these questions is affirmative, the judge's responsibility consists of engaging in a "subversive repetition"[22] of the legal discourse to form a decision that does not result in such legal invisibility.

This attention to the agonistic output of the judicial decision is comparable to John Hart Ely's emphasis on the democracy-preserving aim of the judicial decision, as discussed in chapter six.[23] According to Ely, a judge must refrain from making decisions based on her own views of morality or politics and must instead focus only on ensuring that the decision leads to a situation in which the democratic procedures remain open and fair. This idea is based on Ely's conviction that decisions on morals and politics must remain with the people and not be usurped by judges. Ely argues that judges have no particular expertise or added value when it comes to issuing judgment on morality or politics and that these decisions should thus be left to the voters. Where judges do have added value, according to Ely, is making sure agreed-upon procedures are respected and that political insiders do not abuse these procedures to protect their power against challenges from political outsiders. Due to their legal training and institutional independence from political power holders, the judiciary is the best positioned branch of government to make such decisions and it is in such instances – and only in such instances – that it can be justified for the judiciary to overrule democratically adopted legislation. In this way, Ely's theory of judicial decision-making answers my appeal to judges to attend to the effects of their decision on the ability of the excluded other to participate in the democratic contest.

In the constitutional challenges to the European Stability Mechanism studied in chapter six, I showed that the majority of the judges involved attended to the output of their decision in a way similar to what I propose here. In their judgments, a clear commitment to Ely's type of procedural review was visible as the courts justified their decisions based on their assessment of the impact of the ESM Treaty on the rights of nationals to an open and well-functioning democratic process. The courts were in general highly deferential to the decisions taken by the legislature, out of respect for this democratic process, but emphasized their right and duty to intervene if and when legislative action threatened to undermine the democratic process. It is this preparedness to intervene if the output threatens to have exclusionary, anti-democratic effects that I argue is relevant to the legitimacy of the judicial decision. Whether the intervention made by the courts here actually had the effect of preventing the permanent exclusion of the other is a question that will be discussed below, but for now we can say that these courts took a step in the direction I propose. For example, in the challenge to the ESM

[22] Honig, P*olitical Theory*, 124.
[23] See generally Ely, *Democracy and Distrust.*

Treaty brought before the German Constitutional Court, this court ruled that the ESM Treaty must not be interpreted so as to limit parliament's right to information[24] and ruled that parliament must take the necessary steps to ensure that Germany's right to participate in the ESM Treaty Body decision-making procedures was not suspended.[25] The Irish Court ruled that the Treaty was constitutional, *so long as* decisions that impinged on the core of Irish democratic sovereignty were not removed from Irish influence.[26] In the case before the Estonian Supreme Court, the level of review was far stricter than at the German and Irish courts, but regardless the Estonian Court was similarly attentive to the effects of its decision. While not framing this concern explicitly in terms of democracy or the importance of democratic participation, the Court noted the contribution the ESM made to the protection of Estonia's fundamental rights. The Court reasoned the "extensive and consistent guarantee of fundamental rights is extremely complicated, if not impossible, without a stable economic environment" and saw a role for the ESM in providing such stability.[27] The Dutch Court, while unable to review the ratification of the ESM Treaty against the Dutch constitution because of the constitutional ban on such review, nevertheless was able to review this legislation against the international human rights claims brought by the plaintiffs. While this review was extremely deferential to the political branches of government, the Dutch court did attend (albeit marginally) to whether passing this Treaty violated the rights to democracy of the Dutch citizens.[28]

Ensuring the agonistic nature of the output of the judicial decision, by requiring the judge to consider whether her decision results in legal invisibility, puts us on track toward negotiating the post-foundational paradox of decision in undecidable terrain. I follow Ely's argument that the judiciary is the most appropriate branch of government to ensure the perpetuation of contestation in the democratic process. The fact that the judiciary is not directly connected to the current holders of political power, places it in a position to more independently ensure that those current power holders do not abuse their power to shut down avenues of contestation that could threaten their power. This is not to say that the judiciary engages in such protection of contestation perfectly, but simply that it is better positioned than the other alternative actors with which one could entrust this ability. Based on this, I conclude here that my argument for ensuring the possibility of contestation and the reversibility of power relations leads to a position in favor of a judiciary that is able to overturn legislation, whether it be based on a

[24] Bundesverfassungsgericht [BVerfG] [German Federal Constitutional Court], Judgment of the Second Senate of 12 September 2012 - 2 BvR 1390/12, page 4, available at http://www.bverfg.de/e/rs20120912_2bvr139012en.html.
[25] Bundesverfassungsgericht [BVerfG] [German Federal Constitutional Court], Judgment of the Second Senate of 18 March 2014 - 2 BvR 1390/12, para. 158, available at http://www.bverfg.de/e/rs20140318_2bvr139012en.html.
[26] Irish Supreme Court, *Pringle v. Ireland*, 19 October 2012, para. 17. xii.
[27] Riigikohus [Estonian Supreme Court] en banc, Request no. 8 of the Chancellor of Justice of 12 March 2012, 12 July 2012, case number 3-4-1-6-12, paras. 165-166.
[28] Rechtbank Den Haag [District Court of The Hague], *Wilders tegen de Staat der Nederlanden [Wilders v. The Dutch State],* 1 June 2012, para 3.4.

right to *constitutional* review of legislation or review of legislation against international human rights norms.

Agonistic output is, however, not enough. To explain why, let me first summarize the argument I have made, which will lead us to the need for another criterion for legitimacy: agonistic input. So far, I have argued above that the ultimate groundlessness of (legal) interpretation necessitates decisions that ensure the preservation of contestation in order to be legitimate. This is based on my claim that despite a judge's deepest convictions that she has the right answer, despite her best efforts to decide well, her decision will always have some exclusionary effects and she can never be sure that those who are excluded are done so rightfully. If we acknowledge that our decisions are (partially) structured by discourses produced by hegemonic power struggles, we must acknowledge that our decisions to some extent reproduce those power relations in a way that privileges the hegemonic status quo. We can strive to decide in ways that acknowledge this lack of certainty and the exclusionary effects of power by ensuring that the exclusion remains reversible, by ensuring that those excluded can remain able to contest the hegemonic order that excludes them. However, at the same time I argued that no discourse can ever fully structure reality, can ever completely saturate social meaning. This lack is what gives us the freedom to break out from the hegemonic discourses that partially structure legal interpretation. Yet this lack also means that it is ontologically impossible to ever completely, irreversibly exclude a particular alternative meaning from the discursive order. There will always be some space - however small - for that meaning to reappear to challenge the hegemonic discourse. Does this invalidate the argument made above? Is it useless to say legitimacy is related to preventing permanent, irreversible exclusion if such full exclusion is actually impossible? I think not, provided the following two caveats are made. Firstly, we must distinguish between the ability of an alternative meaning becoming permanently impossible and the ability of the carrier of that meaning being permanently excluded. While it is true that in a structural sense no alternative meaning can be permanently removed from the realm of possible future meanings, this is of course not the case for the agent needed to engage in the hegemonic contest necessary to allow that meaning to gain prominence. That might sound unnecessarily technical, but what I mean is that alternative interpretations cannot fight for themselves, they cannot give voice to themselves. They need a human[29] to convey them. The concern is thus not that potential alternative meanings will be excluded permanently but that the human who conveys them will be. Humans, unlike meaning, can be permanently rendered unable to engage in contestation by death. The outcome of a judicial decision that allows the death of the other, either as a penal or preventive measure, clearly falls on the side of unacceptable, permanent exclusion.

[29] At least according to currently accepted insights. It remains possible that at some point non-human animals or robots might become similarly capable of such struggle over meaning.

However (and here is my second caveat), all other facets of the question of what 'permanent exclusion' is, and who the relevant 'other' that must not be permanently excluded is, are *themselves the subject of political decision*. One might claim (I certainly would and have) that decisions that focus on excluding the existence of the other based on indelible characteristics, instead of their behavior, result in legal invisibility and cross the line into unacceptable permanent exclusion, or more specifically that measures such as disenfranchisement, incommunicado detention, and stripping nationals of their citizenship are undemocratic. I think that this distinction between indelible characteristics and behavior is a most helpful one but I cannot deny that in the end these judgments are political judgments that, although they must be made by the judge as she attends to the output of her decision, remain themselves both partially structured by the hegemonic discourse and at the same time partially ungrounded. The very question of what is in fact indelible and what we can or should be expected to change about our identities is subject to hegemonic articulation. This is why I conclude that attention to the output is by itself cannot be enough. This brings me to my second claim: in order for judicial decisions to be legitimate, the judge must also facilitate the agonistic nature of the input to her decision.

Agonistic Input to the Judicial Decision

If the concern for avoiding permanently exclusionary effects of the judicial decision is to have meaning, it is because it is important that that which structures those decisions remains contestable. In this case, it is not enough that the judge strives for an outcome that promotes this contestability; she must also strive to allow her own decision-making process to be opened up to contestation from those excluded by the hegemonic order. The ESM cases aptly show that the very questions of who the other is and what is acceptable exclusion of the other are themselves political decisions. While the courts in the ESM cases discussed above took measures to ensure the democratic process remained open and thus on its face seemed to meet the requirement of preserving the space for contestation, the very decision about *who* the process must remain open for is one to which there is no simple answer. The courts in these cases assumed that the relevant participants in these decisions were the citizens of the state the court was located in and thus focused on the effects of their decision for the ability of those citizens to participate in democratic contestation. In doing so, their decisions failed to take account of the (im)possibility of non-citizens of that particular Member State to contest that decision, even though they were people who would be affected by the court's decision. Chapter six also took issue with Ely's assumption that a judge could completely avoid making political decisions. Despite a judge's best attempts to remain purely procedural, the decision for one interpretation over another, the decision for one conception of the people over another, is a political one. While attention to the output of the decision helps to ensure that this political decision will at least remain contestable, chapter six proposes going a step further to attend to the *input* into the judge's decision. In effect, this chapter calls on judges to be aware that their decisions on who the people rightfully are, and whether the exclusion of

the other is acceptable, are shaped by the productive power of discourse in a way they are likely not even aware of and cannot become aware of. What they can do, however, is take account of the ways in which they expose themselves to hegemonic and counter-hegemonic discourses. Here, it is the possibility of participation by those excluded by the hegemonic discourse that must be ensured at the front-end of the decision-making process. The judge thus is called on to hear the other, despite the other's exclusion from the people. This need not mean that the other must be successful in changing the construction of the people. The othering of the other need not cease, but the judge must not come to her decision before she allowed the other the opportunity to enter into the discursive conflict over meaning and thus the opportunity to reverse the power relations that resulted in his exclusion.

I call here for a space in which the judge makes it possible for the radical re-thinking of the people on whose behalf she adjudicates, but creating this opening need not require radical change to positive law. In chapter six I set out three ways the judge can attend to the democratic nature of the input to her decision that can largely be implemented within the current structure of legal decision-making. If judges were to (1) identify the restricted nature of the hegemonic notion of the people on whose behalf they are called on to decide, (2) address challenges to the hegemonic (legal) discourse by the excluded other, and (3) actively facilitate and encourage amicus curiae submissions from the excluded other, the judge could help nurture an openness to the excluded other that would allow the input to her decision to be less exclusionary.

This need to attend to the input to a decision is most obvious when those affected by the judge's decision were not able to participate in the political debate about the (legal) rule and its interpretation, as was in the case in the ESM cases. In each creditor state in which the ESM was challenged, only the citizens of that particular nation state had the (formal) ability to participate in the political decision-making on these measures. Those most affected by the crisis and by the proposed solution to the crisis – the citizens and residents of the debtor states – were given no (formal) voice in these decisions and were excluded based on their identity as non-citizens from being able to contest the crisis discourse and the measures it was used to justify. In such cases, it is most clear that the judge must take account of the voice of the other, so as to ensure the other's ability to participate in the hegemonic conflict over the discursive construction of itself as an other since this other was unable to participate in the debate on this matter in the parliamentary forum. What does this emphasis on input mean in instances where those affected by the decision did have a (formal) ability to influence the decision in the political sphere? Can the judge justify her decision on the identity of the people by arguing she simply showed deference to the decisions already made by the political bodies (for example parliament)? I have rejected such a conclusion, arguing that such a line of reasoning ignores the fact that these political bodies were instituted by an act of founding that was, in itself, a contingent act of exclusion. Moreover, this act of institution must recur each day anew, as the people is re-constituted when members are born, immigrate or old members

die, leave or change their beliefs about who the true people is.[30] These daily (re)institutions of the people over and against an excluded other require the people itself to decide on who belongs and who does not. This decision is not one that can be deferred back in time to some originary moment of institution nor to one particular political body but is one constantly being re-made, re-negotiated and contested – even in the most deferential of judicial decisions.

The importance of the input to the judicial decision can be seen in the *Hamdi* case as well. A great deal of the dispute between the parties (and the judges at the different courts that heard the case) was what role the defendant, Mr. Hamdi, should be allowed to play in the proceedings. Initially, the government refused to allow Mr. Hamdi any access to a lawyer and for a large part of the case the government afforded Mr. Hamdi no opportunity to speak to the lawyer representing him or to the judges hearing his case.[31] During the proceedings at the District Court, Judge Doumar ordered the government to allow Mr. Hamdi access to the lawyer arguing his case, thus attempting to create a possibility for the other to challenge the (crisis) discourse of the executive. In this way, the judge tried to turn towards the other and give him a voice in the proceedings. While the judge would still have to make a decision that would inevitably shut out certain possibilities in favor of others and in this way could not avoid the exclusionary nature of the law, his attention to the voice of the other would have allowed this other to participate in the construction of the discourse that would have shaped the judge's decision. Unfortunately, Judge Doumar never got the chance to hear Mr. Hamdi's side of the story. The Court of Appeals ruled, contrary to Judge Doumar, that Mr. Hamdi should not be granted access to a lawyer and there was therefore no possibility for Mr. Hamdi himself to challenge the government's crisis discourse that presented him as a threat to the people, as the other who must be excluded. In the end, after extensive appeals, the Supreme Court affirmed the right to access to a lawyer for (suspected) enemy combatants like Mr. Hamdi and upheld the possibility of judicial review of the executive's decision on detention that allowed the suspected enemy combatant a voice to challenge the executive's assertions, doing some justice to the requirement to allow input from the other into the judicial decision-making process.

In addition to the question of the other's ability to procedurally participate in the decision-making process, the crisis discourse during the War on Terror framed the potential terrorist 'other' as someone to be permanently excluded from the political community. The prevalent crisis discourse portrayed terrorists as enemies of all mankind and as a threat to all of civilization and these others had no practical way to be taken seriously in the debate about the War on Terror. Understanding of and conversation with terrorist(s) (suspects) was excluded by the terms of the discourse, thus also excluding any possibility for them to change the terms

[30] Bonnie Honig, 'Between Decision and Deliberation: Political Paradox in Democracy Theory,' A*merican Political Science Review* 101 (1) (February 2007): 3.
[31] Mr. Hamdi's lack of access to a lawyer meant that he was not even in the position to challenge his own detention. His case was not initiated by Mr. Hamdi, but by his father.

of the debate that demonized them. Further, those *within* the political community – citizens and politicians – who challenged the crisis discourse were painted as traitors to the nation and conflated with terrorists. The ability to challenge the crisis discourse in the public debate by those excluded or by those within the political community who argued for a different conception of the threat or solution at hand was minimal, if not practically non-existent. The unusually speedy adoption of laws responding to 9/11, such as the Authorization for Use of Military Force[32] or the USA PATRIOT Act, additionally limited the ability for those affected by these measures to participate in the political decision-making process.[33] If the judges in this case had taken account of these limits to the input of their decision-making process, the final decision in the *Hamdi* case would have been more legitimate.

Does this mean that the judge is called on to give space to the other who is threatening the destruction of the judge's legal order, the other who refuses to recognize the legitimacy of the judge's legal order? Does it mean the judge must allow the other who poses an existential threat to the democratic order to influence her decision? In order to answer this question, we must return to the original reason for calling on the judge to nurture an attitude of openness to the other: the recognition that the judge's interpretation of the law is structured, partially, by hegemonic discourse but that there is at the same time room for the judge to repeat this discourse differently, more justly. The decision required in how to use this space to come to her interpretation of the law in the particular case at hand is not - in the final analysis - bound by the hegemonic discourse or by an appeal to another fundamental ground but can be legitimated by ensuring that those disadvantaged by the decision have the opportunity to contest it, to strive for a different interpretation that would be less to their disadvantage. If this is the case, the whole point of encouraging a judge to democratize the input to her decision is to dissuade her from making judgments *ahead of time* as to the existence of threats or of legitimacy. The judge is called on to temporarily suspend judgment; instead of seeing the decision as emanating from a pre-constituted law or a pre-constituted judicial subject she is called on to let the decision come as a 'surprise' that contributes to the formation of the law.[34] Certainly, the judge must eventually decide, but this decision must take place after the opportunity for contestation has been given and not beforehand in an attempt to exclude views deemed illegitimate in advance of the contestation. The point is explicitly not to give up on the idea of the decision but to allow "it to open out onto some possibilities that have not been conceivable under the old formulas."[35] In my view, it is this willingness to be surprised

[32] The Authorization for Use of Military Force was passed by Congress only three days after 9/11 and signed into law by President Bush on 18 September 2001, see https://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf.
[33] The USA PATRIOT Act was adopted two days after the bill was introduced, and little more than six weeks after 9/11, although the USA PATRIOT Act did incorporate provisions from two earlier anti-terrorism bills, which passed the House on October 12 2001 and the Senate on 11 October 2001, see https://www.congress.gov/bill/107th-congress/house-bill/3162.
[34] Jacques Derrida, *Politics of Friendship*, trans. George Collins (London: Verso, 1997), 68.
[35] Henry Staten, *Wittgenstein and Derrida* (Oxford: Basil Blackwell, 1985), 24.

that allows the judge to decide in ways that are potentially transformative.[36] The limits to this potential transformation are not found in limits to who is included in the input to the decision but on the limits put on the possible outcome of the judicial decision, discussed above.

With this theory of agonistic judicial decision-making, I hope to advance thinking on an agonistic view of institutions, particularly the judicial institution. In doing so, I have attempted to reconcile one of the main differences of approach within agonistic thought. This difference relates to the two ways agonists approach the role of institutions. On the one hand, agonists like Bonnie Honig emphasize that institutions can never fully do justice and instead always create remainders that are excluded by those institutions in a way that cannot be finally grounded on universal norms or truths. Other agonists, like Chantal Mouffe, impress upon us that the hegemonic discourses that serve as our human-made foundations cannot be avoided. These human-made foundations coalesce into and buttress institutions that are undeniably exclusionary and hegemonic but, at the same time, there is no point beyond such hegemony we can hope to reach. The argument I have made here sees these two approaches as complementary, not opposing. I attempt to integrate these difference emphases by arguing that the basis for legitimacy of these institutions can be found in their acknowledgment of their own exclusionary nature and by ensuring that avenues of contestation exist through which those excluded can participate in the ongoing conflict over social and legal meaning. Specifically, my focus has been on the judicial institution, and on thinking through what this agonistic imperative toward contestation means for the law and those who are tasked with its interpretation. The normative argument set out above is my attempt to make progress on this question. In the next Section, I will discuss what this rather abstract normative theory can mean concretely for the everyday practices of legal interpretation. I come to the conclusion that this theory places demands on the judge and citizen to comport themselves in ways that allow for the progressive realization of an agonistic democratic ideal, a democracy that is never done, never fully achieved, but that is ever becoming that which it is to become,[37] and that adhering to one's institutional duties does not absolve one of the agonistic democratic responsibility to facilitate - and participate in - contestation.

[36] Note here an important difference between the sovereign and the judge. Whereas the sovereign is invested in preserving her identity, in creating a world that matches her vision, the judge allows herself to be transformed. See also William W. Sokoloff, 'Between Justice and Legality: Derrida on Decision,' *Political Science Research Quarterly* 58 (2) (2005): 345.

[37] Derrida speaks of "democracy to come" ("*la démocratie à venir*"), making sure to note that "this does not mean that tomorrow democracy will be realized, and it does not refer to a future democracy, rather it means that there is an engagement with regard to democracy which consists in recognizing the irreducibility of the promise when, in the messianic moment, 'it can come'." The "democracy to come" entails an opening of the future and leaving it open. See Jacques Derrida, 'Remarks on Deconstruction and Pragmatism,' in *Deconstruction and Pragmatism*, ed. Chantal Mouffe (London: Routledge, 1996), 83.

3. The Agonistic Subject: A Contribution to Practices of Legal Interpretation and Legal Resistance

The backdrop to all my thinking about the 'decision', particularly in the partially undecided sense described above, is the question of the subject and its fraught relationship with this decision. This issue of the subject was discussed in chapter two, where I built upon Foucault's conception of the subject as something always already both determined by power relations and also given freedom by these power relations. While attention to the *partially structured* nature of the subject was not made explicit in the chapters thereafter, the question of the subject and its uncertain ability to make decisions with agency drove this inquiry into judicial decision-making. This conception of the subject as something that is at the same time partially structured by power relations through hegemonic discourses, while also having some measure of freedom, was the backdrop to each chapter. The effect of hegemonic discourses such as crisis discourse raises questions particularly related to the *determination* of the subject through discourse. We have seen that crisis discourse managed to frame the threat of and solution to international terrorism in terms of preventive military and administrative measures, thereby challenging a view of the self-present, neutral subject's ability to evaluate the threat level and the appropriateness of the solution as matters of objectivity. The assumptions about the seriousness of the crisis are not only the result of objective measurements but are rather also always the products of discursive struggles that take place not at a rational level, but at the level of the discursive construction of accepted knowledge. Given the role of discourse in the construction of accepted knowledge, the subject can never be sure that what she knows is an accurate representation of reality. While it might be possible for the subject to be aware that her knowledge is affected by power relations, she can also never escape this effect. There is no point of objectivity outside of discourse from which she can evaluate her knowledge. In the end, the subject can never be sure of herself or of her ability to grasp reality.

Above, I called on the judge to show responsibility for the input to and output of her decision. I have argued that the judge is inevitably implicated in decisions that cannot be grounded on an ultimate ground but that can find legitimacy by ensuring that the other they inevitably exclude remains in the position to contest those decisions. The judge needs to facilitate contestation of the discourses she is exposed to and facilitate contestation of the outcome of her decision because of the fact that these discourses construct social meaning that include some while excluding others, while lacking grounding in any universal truths. This places heavy demands on the judge, a subject who I attribute with the responsibility to use her agency in a certain way but at the same time see as a subject whose agency is produced and constrained by discourse. In attending to the subject, finally, after a dissertation that has in large part focused on the collective production of social meaning and identity of the people, I hope to highlight that the normative conclusions I draw have implications not just at the political and institutional level, but also at the personal level. This is not to replace or detract

from the importance of collective action but rather to show that agonistic collective action (whether institutionalized or not) requires the construction of agonistic subjects. If the subject is not a given, pre-existing identity but instead created in discursive interactions characterized by power relations, we must focus on this creation of the self.[38]

The Agonistic Judge

Undecidability (of law in particular and meaning in general) gives the subject space in which she is "condemned to be free."[39] This subject's freedom does not stem from a lack of structural identity; the subject is not free because of pure self-presence, but rather because she has "a *failed* structural identity."[40] The subject is partially determined by discursive structures, but since these structures always retain some aspect of undecidability and will inevitably fail to create a fully closed identity, the subject is also partially self-determined.[41] From this perspective, the subject can be found *in between* the undecidable structure and the decision. Despite the structure provided by discourse, this structure remains incomplete and requires an intervention of a decision to re-suture it. This intervention is where the subject becomes visible.[42] This dissertation is an appeal to the subject to take advantage of this failure in her identity, to take hold of the gap between the undecidable structure and the decision, to take responsibility for what she does with the freedom she is condemned to have. If she can turn her attention to the failure of identity, the condemnation to freedom, she can – and must – take responsibility for how she uses this freedom. The subject is forced to confront the exclusionary elements of her decision and ask herself how she can make sure that, despite these inevitable exclusionary elements, her decision can avoid permanently entrenching its exclusion as if it were the product of objective truth and universal reason.

My argument that attention to the exclusionary effects of the decision is required for legitimacy in the face of the structured undecidability of law invites judges to first and foremost ask themselves whether their decision has the effect of removing someone from the protection of the law, stripping them as it were from the "right to have rights."[43] This is not a question of whether the case results in punishment, loss or whether the case finds that a

[38] I draw here on Foucault's explanation of the difference between his view of the constituted subject and Sartrean existentialism. In the exchange between Foucault and his interviewer, Foucault distances himself from Sartre's reliance on authenticity and instead emphasizes the role of "creat[ing] ourselves as a work of art." He further distinguishes himself from Sartre as follows: "…we should not have to refer the creative activity of somebody to the kind of relation he has to himself [as Foucault claims Sartre does], but should relate the kind of relation one has to oneself to a creative activity." See Michel Foucault, 'On the Genealogy of Ethics: An Overview of Work in Progress' in *The Foucault Reader*, ed. Paul Rabinow (New York: Pantheon Books, 1984), 350-351.
[39] Laclau, *New Reflections*, 44.
[40] Laclau, *New Reflections*, 44.
[41] Laclau, *New Reflections*, 44.
[42] Aletta J. Norval, 'Hegemony after Deconstruction: the Consequences of Undecidability,' *Journal of Political Ideologies* 9 (2) (2004): 142.
[43] Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Books, 1966), 296.

particular right simply does not entail the result argued for by any particular plaintiff. It is rather a question that goes to the core of the space of the political community: does the decision result in someone being placed outside that community in such a way that he is no longer recognized as someone who potentially can re-enter it? As argued above, decisions resulting in death clearly have this effect. Death results in an indisputable, unovercomable division between the political community and the other who has been excluded from it by death. Other decisions that must be scrutinized with the strictest of suspicion are, in my view, decisions that block active or passive suffrage rights, that lead to or maintain the inability to bring legal suit, incommunicado detention, stripping someone of their nationality or other rights held fundamental in a particular legal system. Such decisions take away (or maintain the deprivation of) the ability of those affected from engaging in a lawful manner in the political and legal contest over the discourses that exclude them. They are no longer be recognized as someone to whom the law applies, no longer able to vote or run for office, or to communicate with the political community, are exiled physically from the political community or are denied the rights that are held fundamental to being considered a fully functioning human being under the law and thus are placed in a position where it becomes impossible to lawfully engage in the hegemonic struggle over their exclusion. The legal invisibility[44] that results from such measures places such a burden on the ability of the excluded other to reverse his exclusion that it is highly problematic from the perspective of agonism. Moreover, while legal invisibility might be most clearly present in decisions where the law itself places the other outside the scope of the law, I also call on the judge to be aware of the social effects of her legal decision, the real-world implications of the decision outside the realm of law or politics. This means that the judge should become sensitive to the structural inequalities of society that can lead to such stigmatization or stereotyping of the identity of the other that they are unable to participate in the political contestation of their stigmatization or stereotyping. This asks even more of the judge: it asks her to be aware of the biases that can be perpetuated by her decision and that can lead to discrimination and social, political, and legal exclusion. This calls on the judge to be aware of the disproportionate way in which the law is applied, which leads to a more permanent exclusion of some than others, and it calls on the judge to realize that this type of exclusion limits the ability of the other to contest his exclusion.

What is, precisely, a judge to do when faced with making such a decision on exclusion? I have argued that while permanent and irreversible exclusion is a bright-line between legitimate and illegitimate effects of decisions, it can also be misleadingly simplistic. Indeed, what is permanent and what is irreversible is very often the subject of political debate and (for

[44] See Bernadette Atuahene, 'From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility,' *Southern Methodist University Law Review* 60 (2007): 1425-1431 and Wouter Veraart, 'Het slavernijverleden van John Locke. Naar een minder wit curriculum?,' in *Homo Duplex: De dualiteit van de mens in recht, filosofie en sociologie*, ed. Britta van Beers and Iris van Domselaar (Den Haag: Boom juridisch, 2017), 218.

anything but death) is a matter of degree. Moreover, and perhaps more fundamentally, the question of the exclusion itself is one that is not always clear. Exclusion implies the removal of someone who was previously included or who in any case had a right to be included. Can we speak of exclusion from the political community in relation to those who were never a part of it to begin with? Are residents of Canada 'excluded' from the Dutch political community if they lack enfranchisement in the Dutch political system? Are animals 'excluded' from the political community if they lack the ability to be holders of rights under the law? Are minors 'excluded' from the political community by their inability to run for office? The ultimately *political* answer to these questions brings us to the second task I impart on the agonistic judge: the task of democratizing the input to her decision. Here, I call on judges to open their decision-making process to those seen as legitimately excluded from society, those who either were never part of the political community to begin with or who are threatened with such exclusion. This step functions to ensure that the participation in the debate about what 'irreversible' and 'permanent' exclusion is, and about what 'exclusion' is, is as open to contestation as possible. In this dissertation a number of possible ways have come to the fore for how the judge can create avenues for such inclusion. I discussed the importance of judges explicitly acknowledging the exclusionary nature of their decisions, the importance of the judge giving space to claims brought by those excluded from the legal community (for example in dissenting opinions) and the importance of judge encouraging amicus curiae briefs as well as strategic litigation so as to create a forum for those excluded to participate in the discursive struggle over the hegemonic order. I have also noted, in relation to the *Hamdi* case, the importance of the judge ensuring that the other excluded by the hegemonic order is not physically denied the possibility from being heard by the court, for example because the other is being detained incommunicado by the government.

Note, however, that while such recommendations are relatively procedural, they can only function to truly facilitate contestation if the judge follows such procedures with an attitude of openness to the other that recognizes that there is no *fundamental* reason he could not at some point be part of the political community. The judge must attempt to suspend her judgment on who is legitimately excluded from the people so as to facilitate the diversity of input into her decision,[45] while at the same time recognizing that she can never completely escape the discourses that structure her views on this and thus must attempt to allow the other a voice in the input to her decision-making process *despite* her views on who should be excluded and who not. Without a willingness to see the other as a *potential* member, to recognize that his exclusion is contingent and *could have been otherwise,* procedural avenues will remain barren. I do not pretend to have a complete answer on how such an attitude can be nurtured, let alone how it can be institutionalized, but let me end this Part with reference to an example

[45] I am reminded here of Henry Staten's observation that Derrida's deconstruction highlights the "admission of the not-itself into the citadel of the as-such", which "open[s] the way to … flux" of the notions of unity and self-identity, see Staten, *Wittgenstein and Derrida,* 23.

of judicial writing that I believe succeeds in evidencing such an attitude. In her dissent to a ruling by the US Supreme Court that found a suspicionless stop and search of an individual to be lawful, Justice Sonia Sotomayor of the US Supreme Court shows the openness to the other I advocate here. Let me take the reader through the steps Justice Sotomayor takes to see if we can glean some inspiration from her approach. First, Justice Sotomayor makes a detailed effort to appreciate how the person affected by this decision experiences the measure at issue here, the stop and search:

> The indignity of the stop is not limited to an officer telling you that you look like a criminal … As onlookers pass by, the officer may '"feel with sensitive fingers every portion of [your] body. A thorough search [may] be made of [your] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet."' The officer's control over you does not end with the stop. … At the jail, he can fingerprint you, swab DNA from the inside of your mouth, and force you to 'shower with a delousing agent' while you 'lift [your] tongue, hold out [your] arms, turn around, and lift [your] genitals.'[46]

Justice Sotomayor then proceeds to acknowledge the disproportionate effects such a suspicionless stop and search can have:

> [M]any innocent people are subjected to the humiliations of these unconstitutional searches. The white defendant in this case shows that anyone's dignity can be violated in this manner. … But it is no secret that people of color are disproportionate victims of this type of scrutiny.[47]

Then she allows the social experience of the other to enter in, to move her and her decision. To do this, she draws on famous essays by Black authors over the course of the last century, explicitly citing such books as W. E. B. Du Bois' *The Souls of Black Folk,* James Baldwin's *The Fire Next Time,* and Ta-Nehisi Coates' *Between the World and Me* in her attempt to let this other speak to her, finally noting that:

> For generations, black and brown parents have given their children 'the talk' - instructing them to never run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger - all out of fear of how an officer with a gun will react to them. … By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. … It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be catalogued.[48]

[46] Supreme Court of the United States, *Utah v. Strieff*, 579 U.S. (2016), 20 June 2016, Sotomayor, J., dissenting, 11, citations omitted.
[47] *Utah v. Strieff*, Sotomayor, J., dissenting, 11-12, citations omitted.
[48] *Utah v. Strieff*, Sotomayor, J., dissenting, 12, citations omitted.

In this way, Justice Sotomayor follows the first two procedural steps I propose above[49] to ensure agonistic input to her decision, and does so while exhibiting the attitude of openness I advocate. First, she acknowledges that such police stops serve to dehumanize a particular group of people disproportionately, explicating as it were that the people who are served by such stops is not an all-encompassing people but excludes a very particular group. To do this, she uses the input from those most affected by her court's decision to shape her impression of its exclusionary effects. She actively searches out the experience of those affected by the measure at hand and she enquires into its exclusionary effects and the disproportionality of these effects. Secondly, she allows the excluded other to challenge the hegemonic discourse on the effects of politics stops by drawing on literature produced by those traditionally excluded in a similar fashion. She is attuned to the counter-hegemonic discourses surrounding the measure under review and opens herself up to these discourses in order to give them a chance to partake in the contestation over legal meaning. She closes her dissent with a counter-hegemonic move: decoupling the black and brown people who are routinely targeted by the police from the 'other' and linking them with the "everyone," arguing that the rightful position of the other created by the measure under review is *not* as other but as a "citizen of a democracy." She ends with an appeal to what her construction of the people means for the law: "Until [the] voices [of the countless people who are routinely targeted by police] matter too, our justice system will continue to be anything but."[50]

The need for input from the other into the judicial decision seeks to respond to the understanding of the subject as something always partially decided by the discourses it is exposed to. The (juridical) subject is called into being, interpellated, by the hegemonic articulations she is implicated in. While my argument for the need for democratic output highlights the *agency* of the judge in urging her to take account of the effects of her decision, this criterion calls on us to return our attention to the *constraints* imposed upon her by these hegemonic articulations. Despite recognizing that these constraints are in large part unavoidable – and largely not even something we can be conscious of – these proposals seek to emphasize the fact that we can be conscious of the way we *expose ourselves* to the discourses that form us. The final decision might remain a moment of madness to some extent, but – as Derrida notes – "not knowing what to do does not mean that we have to rely on ignorance and to give up knowledge and consciousness. A decision, of course, must be prepared as far as possible by knowledge, by information, by infinite analysis."[51] Our responsibility for the decision must be twofold: in addition to the responsibility for the outcome of the decision, described above, we must also take responsibility for the preparation of the decision. If the decision itself cannot be fully determined – neither by discursive

[49] See *infra* page 158.
[50] *Utah v. Strieff*, Sotomayor, J., dissenting, 12.
[51] Jacques Derrida, 'Hospitality, Justice and Responsibility: A Dialogue with Jacques Derrida,' in *Questioning Ethics: Contemporary Debates in Philosophy*, ed. Richard Kearney and Mark Dooley (London: Routledge, 1999), 66.

structures nor by the individual's agency – the task is to shift our attention to the way in which the decision is prepared, the input the judge receives in her decision-making process. If we recognize that the decision will remain at least partially undecidable – a decision without final foundations – then the just decision is one that acknowledges this aspect of undecidability. Whereas the call to prevent a permanently and irreversibly exclusionary output acknowledges one aspect of the undecidability of the decision, attention to the input calls on judges to acknowledge this aspect *before* the decision as well.[52]

In the end, this dissertation turns toward individual decision-makers with the claim that formal democratic procedures and democratic institutions in themselves can never be enough to guarantee democracy. Procedures and institutions will always reflect a sedimented hegemony and thus exclude in an essentially ungrounded way. Institutions, structures and rules rely on the application of the general to the particular – a process in which decision-makers play an important role and have a specific responsibility to deal with the inevitable imperfect rendering of democracy by democratic institutions, structures and rules. The most democratic institutions are those that allow for the contestation of their fundamental principles, a process in which the individual judicial decision-maker plays a vital role. This is a call for those decision-makers, the judge in particular, not to simply accept, excuse or ignore the imperfect status quo of institutionalized democracy but to shape themselves and their decision-making procedures in a way that can best deal with democracy's inevitable failures.[53] I grant that this places the judge before a somewhat daunting task. It asks the judge to encourage and invite challenges to her own and society's own conceptions; it asks the judge to include actors in her decision-making process who are excluded by the hegemonic discourses that shape the legal subjectivity of both the institution and person of the judge. This is a task the judge can only fulfil if the other's discourses are made known to her, and is a task that is inevitably impacted by the political context that debates the legitimacy of the other's exclusion. In short, the agonistic judge cannot operate without the activities of the agonistic citizen who takes part in the conflict over legal meaning as well as in the conflict over the rightful construction of the people who decide on that meaning.

The Agonistic Citizen[54]

This dissertation has developed a picture of, as Bonnie Honig has put it, the "dependence of the rule of law on the rule of man."[55] While not disputing the existence of the rule of law, in

[52] "Undecidability should haunt decisions *before* and *after* they are made," Sokoloff, 'Between Justice and Legality,' 345, emphasis added.
[53] Stanley Cavell, *Conditions Handsome and Unhandsome: The Constitution of Emersonian Perfectionism* (Chicago: The University of Chicago Press, 1990), 18.
[54] I use 'citizen' here in the general sense of a political actor and not in the legal sense of someone *recognized* by the law as a rightful political subject.
[55] Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton: Princeton University Press, 2009), 66.

the sense of a structure of law that confines outcomes, it does complicate both this legal structure's independence from other structures and the absoluteness of the confines it provides. Instead, I propose that law is best seen as a discourse that *together with other discourses* provides *some* constraints on the acceptable range of action and interpretation. The law is not isolated from other discourses in society and discourses such as crisis discourse can have a large impact on the content of legal discourse. Moreover, since neither legal discourse nor any other discourse can ever bind completely or dictate specific outcomes, a space of undecidability is left which demands a human-made decision. As described above, this human-made decision is not unbound in its totality but is structured (albeit partially) by the discourses we, together, construct and are constructed by. I have argued that while institutions (such as the judiciary) can never be fully inclusive or fully just, some institutional forms are *more* just than others. Institutions that allow for the contestation of the discourses that support their existence are more just and in the case of the law, the role of the agonistic judge as set out above is particularly important in facilitating this contestation. This cannot, however, be the full answer. The judge that facilitates contestation cannot succeed in creating a more just legal institution if this facility for contestation is not actively engaged in by agonistic citizens. The rule of law depends not only on the judge's decision but on the citizen, and this dissertation is also and importantly a call for us all to own the responsibility to engage in agonistic conflict. It is a call for citizens and lawyers to engage passionately in debates over legal interpretation, to engage in litigation that pushes the boundaries of current interpretations and to realize while doing so that these debates and this litigation is at its core about who the true people is who can rightfully decide on social and legal meaning. In their engagement with the law, citizens and lawyers who bring claims that challenge the current conception of the people and their interpretations of the law are a vital component of agonistic institutions, as are citizens who partake in expressions of counter-hegemonic discourse in ways that are made available to judges in the input to their decision. This means participation in amicus curiae submissions, but also in forms of political expression and in forms of cultural expression such as literature and art.

My attention to crisis discourse leads me to particularly call on citizens and lawyers to realize the potency of 'speaking crisis' in this regard. It is a discourse that is strongly suited to the type of conflict over meaning-making discussed above, strongly suited to participating in the debate over what it means to be excluded, who is rightfully excluded and what permanent exclusion entails and, in this sense, I by no means *discourage* its use. To the contrary, it is precisely this type of discourse that can lead to the greatest shifts in conceptions of who is included in the political community and who is not and, from my agonistic perspective, it is precisely these shifts that must remain possible always again. I do, however, issue a word of caution to the agonistic citizen who uses this discourse: the realm of antagonism, the realm of the permanent destruction of the other, is never far away. She who employs crisis discourse finds herself on a continuum of risk that characterizes political activity and she risks devolving into the existential conflict that characterizes the antagonistic interaction between

enemies aimed the final and ultimate destruction of all difference. Yet, avoiding all othering and difference is also not a solution. While antagonism might be anti-political as it destroys the politically necessary other, its polar opposite, pure pluralism, is apolitical as it refuses to negate any difference, refuses to engage in any othering and thus fails to engage in the political move toward representation of the people. The realm of politics is found in between, and the agonistic citizen must traverse this continuum with the conviction of her most deeply held beliefs intact, while - at the same time - recognizing she can never be sure.

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~St. Thomas Aquinas

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SUMMARY

This dissertation explores two main questions related to a type of political rhetoric I call crisis discourse. The first question is descriptive and asks *what force can crisis discourse have on judicial decision-making?* Second, I attend to a more normative question: *how should judges, particularly in times of crisis, take account of the impact crisis discourse has on their decision, given the role of the judge in a democracy?* Guiding my attempts to answer these questions is a post-foundational theoretical framework (developed in chapter two) that acknowledges a lack of ultimate meaning, other than that made by humans in political activity. Within this meaning-making political activity, crisis discourse is a powerful tool. I define crisis discourse as a type of speech act that discursively constructs a threat, claimed to be caused by an other, that is seen as requiring fundamental change to political and legal structures.

In addition to the introduction (chapter one), the theoretical framework (chapter two) and a concluding chapter (chapter seven), this dissertation comprises four substantive chapters. Chapters three, four and five have been published or are based on articles that have been published in academic peer-reviewed journals. I will summarize the results relevant to my two main research questions below.

The Force of Crisis Discourse on Judicial Decision-Making

From the case studies this book explores, four elements emerge of the force crisis discourse can have on judicial decision-making and of how this force is exerted. The first of these elements is that crisis discourse is capable of rupturing hegemonic discourse and of creating new discourses from the elements of those that are ruptured. My analysis of crisis discourse in the War on Terror (chapter three) reveals that crisis discourse can act in this way in relation to legal discourse employed by judges in their judicial decisions. I discuss how crisis discourse succeeds in rupturing the previously dominant discourse on terrorism (one based on criminal prosecution) and in replacing it with a new approach based on precaution.

The second element of crisis discourse that this study discusses (in chapter four) is its ability to discursively create and position a 'people' who is seen as the legitimate decider of social meaning over and against an 'other' whose presence threatens the existence of the people. I argue that this ability is, in fact, what gives crisis discourse its capacity to rupture and reconstitute hegemonic discourses.

The third and fourth aspects of the impact of crisis discourse on decision-making are not

unique to crisis discourse, but do become more apparent in cases dealing with crisis. In chapter five, this book highlights that even the most forceful crisis discourse can never fully succeed in stabilizing the meanings it gives to events, nor the identity of the people that is set against the other. I argue that this lack of final stabilization is a feature of all discourses, including legal ones, and that as a consequence the judge is pulled into a hegemonic struggle over legal meaning. While this struggle is highly structured by discourses (both ones of legal and crisis-related natures), these discourses can never fully determine the judge's decision. In this way, whether consciously or not, crisis discourse forces the judge into a hegemonic struggle over meaning-making and this is the third aspect of crisis discourse this study reveals. Chapter six discusses the fourth and final element of crisis discourse, namely that judges cannot escape their role in the hegemonic struggle highlighted by crisis discourse by showing deference to the legislature or the executive. Even in the most marginal of review, the judge is forced to make substantive decisions that, although structured by the force of hegemonic discourses, at the same time, retain an aspect of undecidability as they cannot find full and final ground in previous decisions. This structured undecidability confronts the judge with the question of how to decide in the face of this residual ambiguity.

The Agonistic Judge

My examination of these four aspects of crisis discourse and the structured undecidability they reveal brings me to the conclusion I set out in chapter seven: in order to decide legitimately, the judge must acknowledge that despite her best efforts, her decision will never be fully-inclusive. Despite her most diligent attempts to follow the law, she can never be certain she has made the right decision. The judge must acknowledge this by ensuring that her decision does not result in the permanent entrenchment of the exclusion it inevitably creates. In this way, the judge ensures the preservation of contestation over what is the right and wrong decision. I link this criterion to Claude Lefort's reflections on democracy as an order in which power must constantly search for legitimacy. Moreover, as Lefort explains, in a democracy the only basis for legitimacy is found in the very debate over what is legitimate and what is not, instead of in some final appeal to truth or right. In order to preserve the never-ending debate that Lefort calls for, the other who is excluded by the judge's decision must remain in a position to contest the structures of discourse that are used to justify his exclusion. I argue that this criterion for legitimacy in the face of structured undecidability means, in the context of the judiciary, that the judge must show responsibility for the *output* of her decision as well as for the *input* to her decision. In doing so, the judge must ensure that at neither point in the decision-making process the other is permanently and irreversibly excluded.

In the context of responsibility for the *output* of the decision, the judge must attend to how her decision affects the participation of the other in future legal and political contestation. Legitimacy is found here in the refusal of the judge to decide in a way that would

permanently and *irreversibly* prevent the other from being able to challenge the legal and political meaning that led to their exclusion. Concretely, this means preventing 'legal invisibility'; a state of being in which one is not recognized as a subject able to have legal and political rights under law, and is instead treated as a passive object of the law.

In addition to this attention to output, I additionally call on the judge to attend to the *input* to her decision: to the discourses that provide the structure to her interpretation of the law. The judge must facilitate the other's ability to participate in the contestation over the discourses that inform the judicial decision, at the front-end of the decision-making process. I give a number of suggestions for how a judge might ensure this type of input to her decision, including acknowledgment of the exclusionary nature of the people, hearing challenges to hegemonic discourses by the excluded other and the active facilitation and encouragement of amicus curiae submissions from the excluded other. These more procedural suggestions must be accompanied by a judicial attitude of openness by which the judge allows her deepest legal and political convictions to encounter contestation by the excluded other.

In the end, the judge must decide. She must do so realizing that her decision will exclude, yet that it must not do so permanently.

Agonistic Citizen

The judge that facilitates contestation cannot succeed in creating a more just legal institution if this facility for contestation is not actively engaged in by agonistic citizens. This dissertation is a call for citizens in general and lawyers in particular to engage passionately in debates over legal interpretation, to engage in litigation that pushes the boundaries of current interpretations and to realize while doing so that these debates and this litigation is at its core about who the true people is who can rightfully decide on social and legal meaning. In their engagement with the law, citizens and lawyers who bring claims that challenge the current conception of the people and their interpretations of the law are a vital component of agonistic institutions, as are citizens who partake in expressions of counter-hegemonic discourse in ways that are made available to judges in the input to their decision. This can be done by participation in amicus curiae submissions, but also through forms of political expression and in forms of cultural expression such as literature and art.

My attention to crisis discourse leads me to particularly call on citizens and lawyers to realize the potency of 'speaking crisis'. Crisis discourse is a discourse that is strongly suited to conflict over meaning-making and to participation in debates over what it means to be excluded, who is rightfully excluded, and what permanent exclusion entails. In this sense, I by no means *discourage* its use. To the contrary, it is precisely this type of discourse that can lead to the greatest shifts in conceptions of who is included in the political community and

who is not and, from my agonistic perspective, it is precisely these shifts that must remain possible always again.

I do, however, issue a word of caution to the agonistic citizen who uses this discourse: the realm of antagonism, the realm of the permanent destruction of the other, is never far away. She who employs crisis discourse finds herself on a continuum of risk and she risks devolving into the realm of antagonistic interaction between enemies aimed the final and ultimate destruction of all difference. Yet, avoiding all othering and difference is also not a solution. While antagonism might be anti-political as it destroys the politically necessary other, its polar opposite, pure pluralism, is apolitical as it refuses to negate any difference, refuses to engage in any othering and thus fails to engage in the political move toward representation of the people. The realm of politics is found in between, and the agonistic citizen must traverse this continuum with the conviction of her most deeply held beliefs intact, while - at the same time - recognizing she can never be sure.