

*William Rasch (ed.)*

**»Tragic Choices«**

**Luhmann on Law  
and States of Exception**

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*ed. by William Rasch***

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William Rasch

## Introduction: The Form of the Problem

*Abstract:* In asking the question about indispensable norms, Luhmann does not look to give a normative answer, but rather explores what he sees as the »form of the problem.« This introduction places Luhmann's discussion of undecidability and the aporias of communication media of the various function systems within the larger »form of the problem« of modernity as Luhmann sees it, in particular the dissociation of reason and moral order. This introduction then uses this larger picture to examine the arguments of the various contributors to the volume.

### I

The aim of this issue of *Soziale Systeme* is, yet again, to encourage the Anglophone world to engage with Niklas Luhmann's brand of systems theory. As in so many other ways, the United States remains obdurate, but interest in Luhmann's work, especially in the areas of political theory and law, has taken hold in the United Kingdom. To accelerate further engagement and perhaps to familiarize German-speaking readers more with British and North American scholars working in these areas, we present seven responses to two essays by Luhmann published here in English translation: »Are There Still Indispensable Norms in our Society« (hereafter: »Norms«; Luhmann 2008) and »Beyond Barbarism« (hereafter: »Barbarism«; Luhmann 2008a). As readers of these pages will see, Luhmann raises issues, using strikingly topical examples, that have become even more theoretically and emotionally fraught since their original publication in the early to mid-1990s. The question to be asked of these examples (e.g. torture or the *favelas*) is to what they point. To themselves? Or to the structure of Luhmann's social theory? When entertaining, for example, the legitimacy of torture in extreme cases, is Luhmann more interested in settling the question or in observing how best to pose the problem? Luhmann explicitly claims the latter. Indeed, the need for more complex modes of observation that »adequately« capture the intricate contours of social structures and the problems that may inhere in them became Luhmann's stock answer to those who, in their insistent defense of the necessity for critical or normative theory, accuse the systems theorist of complacency and conservatism; and Luhmann does not pass the opportunity of repeating his demand for greater theoretical complexity in the texts translated here. But in the responses we solicited from scholars who work within the ambit of systems theory as well as from those

who view Luhmann's contribution to social thought in a more negative light, we received both answers. To put it in a nutshell: Those who approach the problems raised by Luhmann from a perspective informed by systems theory tend to treat norms as social facts and ask of their function; others approach the discussion of norms normatively, remaining, as it were, on the level of the self-description, not the social or *wissenschaftlich* description, of norms. The latter group, in other words, seems to exemplify a more immediate concern with upholding legal and moral norms in »our society« that the former group attempts to observe and explain. Though Luhmann might have denied the theoretical *Satisfaktionsfähigkeit* to the »normative« thinkers represented in this volume,<sup>1</sup> their enactment of the steadfast, counterfactual expectations that, according to Luhmann, necessarily characterize adherence to legal norms serves as exemplary and instructive model of the behavior under investigation. In the various responses, therefore, we have not only descriptions (of Luhmann's description) of the problem, but also explicit, normative answers to the dilemmas the examples pose. In both sets of responses, criticism of »the master« is not neglected.

Before allowing Luhmann and his interlocutors to have their say, I offer some opening reflections.

## II

In »Norms«, Luhmann (2008, 18) enjoins us to imagine the following situation:

You are a high-level law enforcement officer. In your country – it could be Germany in the not-too-distant future – there are many left- and right-wing terrorists. Every day there are murders, fire-bombings, the killing and injury of countless innocent people. You have captured the leader of such a group. Presumably, if you tortured him, you could save many lives – 10, 100, 1000 – we could vary the situation. Would you do it?

»One can vary the hypothetical case,« he adds. »The terrorists have a nuclear bomb, and it must be found and disarmed. Would you use torture?« Empirically we know the answer. Yes, almost every one of us »ordinary men« (and women) would be capable of doing it, and worse, under the (im)proper circumstances.<sup>2</sup> But the question is not empirical. »Would you do it?« asks for a normative answer. Still, to whom is this question addressed? To *you*? Would *you* do it? Not, at any rate, to the sociologist. »As a sociologist, one is interested in the *problem* ... in the *form of the problem*.« As to any concrete answer, »One can only get it wrong. It is a matter of »tragic choice.« (2008, 19) Pre-

1 On theoretical *Satisfaktionsfähigkeit*, see Moeller 2008.

2 Reference is to Browning 1998. See especially the references to the Zimbardo and Milgram experiments, 167-68, 171-176, 184.

cisely because the question is »ultimately undecidable,« because, as Luhmann implies, no set of rules or definitive guidelines can provide one and only one legitimate answer, the »form of the problem« can be of no direct help to one struggling with the dilemma. Understanding the problem, observing its »form,« in no way provides an unambiguous answer to the unavoidable challenge of the question, »Would you do it?« Yet, proper observation of the form of the problem must do something, otherwise why the following claim that ends his essay? »Ultimately, this situation confronts us with the question: What can we do? But before we can ask that one, there is a vital preliminary question: How can one observe and describe adequately?« (2008, 35) Why is this preliminary question vital when its answer will still leave us with ultimate undecidability? Is it both preliminary and vital because »tragic choices« and resultant undecidability *presuppose* a particular way of observing, a particular form of the problem, *Luhmann's* form of the problem?

I think it is fair to answer »yes« to that last question. This is not to say that Luhmann rigs the game, but that he works within a long-standing tradition and draws what seem to be the necessary consequences from it. The legal form of the problem of norms is but a particular manifestation of the general form of the problem (and solution) Luhmann calls modernity. We will see that to observe »adequately,« as he instructs us to, is to recognize limits, but also, in an odd, almost Nietzschean way, to embrace fate.

Readers of Luhmann will know that to observe adequately – to observe at all – we must start with a distinction. In the case of legal norms, we start with the distinction between normative and cognitive expectations. When cognitive expectations are thwarted or contradicted, we learn from our failure to understand and thus alter our communications accordingly. One can think of the idealized form of the scientific experiment (falsifiability) as one mode of cognitive expectation, or, perhaps, something like Aristotle's notion of *phronesis* in the realm of the political. In any case, the ability to learn and thus alter expectations defines the cognitive. Normative expectations, however, are stubborn. No matter how often they are disappointed, one refuses to learn otherwise and thus sticks with them through thick and thin. Here then is the form:

Our functional definition of law leads to certain consequences concerning the concept norm (or more pedantically: the concept of the normative mode of expectations). In contrast to a large body of literature in legal theory, the concept norm is not defined by special attributes of the character of a norm but by a distinction; this distinction refers to the possibilities of responding in the case of disappointment.

Expectations are either given up when they have been disappointed or they are retained. If one anticipates such a bifurcation and opts in advance for one of its strands, one predetermines one's expectations as cognitive in the first case and as normative in the second. In this way, the concept norm defines the one side of a form, which form also has another side. The

concept does not exist without that other side; it must be pitched against it while keeping options open for transition from the one side to the other. The concept norm is the result of an option that an observer has, and it occurs empirically only when this form is used for making distinctions. (Luhmann 2004, 149)

Again, readers of Luhmann will recognize the moves made in this passage. All terms are part of a two-sided form, for no term is comprehensible in isolation. Norms are defined as a particular type of expectation in contrast to another type and can be understood only with reference to its paired counterpart. The apparent psychological mode implied in the word »expectation« should not fool us, for expectations in the social realm reveal themselves only as communication, as a communicated anticipation, confirmation, satisfaction, or disappointment. What distinguishes normative expectations from cognitive ones is precisely the type of its communicated reaction. Norms, like the little train that could in the children's story, never lose heart.

A counterfactual (Luhmann's term, though one suspects a gentle poke in Habermas's ribs) normative mode of expectation does not serve to guide or dictate motivations, but rather to stabilize expectations and thus make them predictable. »Norms,« in other words, »do not promise conduct that conforms to norms but they protect all those who are expecting such conduct« (Luhmann 2004, 150). Norms *guarantee* nothing, but do give »legitimacy« to the communications of those whose actions count on the counterfactual persistence of belief in the »validity« of norms, even when they are violated with impunity. If I lend money to a friend, even in an informal manner, it is reasonable to expect repayment without appearing foolish. And if the friend should fail to repay the debt, I may never lend *him* (or, of course, *her*) money again, but I do not give up the belief in the social fact that a debt incurs an obligation. I have learned something about my friend, but have learned nothing new about the obligation to repay debts. More drastically, refusal of Israel, Europe, and North America to respond meaningfully to the ruling of the International Court of Justice condemning the construction of the wall in Palestine may lead to further knowledge about the political commitments of Israel and its powerful helpmates, but if one treats the ICJ seriously, one ought not alter one's expectations about the legitimacy of that institution or its rulings. As a norm, »justice« (which, according to its name, the Court claims to embody) prevails, even when existentially thwarted. Thus, the distance one achieves from unlinking one's faith in norms from their day-to-day, hit-or-miss, empirical efficacy produces a sense of security, of certainty – nothing more (the friend still refuses to pay; construction continues on the wall), nothing less (one continues to lend money to others; one continues one's faith in the legitimacy of the ICJ). In each case, normative expectations are maintained, no matter the empirical outcome. From this rather minimalist perspective Luhmann concludes that the *legal* norm is not a special type or quality of norm, but rather the »form of a general stabilizing

function, which derives its specific legal quality only from being differentiated as and in the legal system« (Luhmann 2004, 151).

But, as Peggy Lee famously asked in song: Is that all there is? Certainly the type of »critical« thinker that Luhmann habitually disdained, the »normative« thinker who derives the function of a norm from its content and thus sees it as a tool, a form of »soft power« to be used for affecting behavior – such a thinker would not find Luhmann’s description satisfying. Norms, they might insist, must be thought – well – normatively. And in a clever and typically well-crafted passage, Luhmann concedes the point:

[I]t is normatively expected that one must expect normatively. Law is, in other words, not indifferent towards itself. Neither does it merely demand that it be obeyed. It transforms the distinction between cognitive and normative expectations into an object of normative expectations in its own right. (Luhmann 2004, 157)

This, of course, Luhmann, »as a sociologist,« does not do. His is not the self-description of the normativity of the norm, legal or otherwise. Rather, he observes the distinction he has made cognitively, from the perspective of *Wissenschaft*. Indeed, the distinction itself could be made only from that perspective; it is a cognitive distinction that purports to describe, not a normative distinction that insistently prescribes. Defining the function of norms as, essentially, a component of the rationalization of society that makes life more calculable would seem to some to be woefully insufficient; for it says nothing about the quality or normative validity of that society itself. To observe norms from a normative position would have to use something like a normative / deviant distinction, a specifically evaluative distinction that upholds the upholding of norms and that could, presumably, judge the deficiencies of society with a view toward correcting them. But such an assertion, according to Luhmann, would not be theoretical (*wissenschaftlich*), at least not social-theoretical, and thus not adequate to the society it describes – in short, not *satisfaktionsfähig*, not worthy of an intellectual dual, but also not very satisfying as a position from which one might start to understand the peculiarities of our age, »our society.« *That* position has to be the position of society itself.

Here then we run up against the form of the problem, the vital knowledge of which, according to Luhmann, should be more important than the answer to the secondary question: Would you do it? The form of the problem looks something like the following: Even ostensibly symmetrical distinctions cannot help but skew symmetry into its opposite. More specifically: Even ostensibly symmetrical distinctions made from the point of view of knowledge cannot help but privilege its own position, explicitly or implicitly. There is not only no unity of the difference that distinctions make, a point Luhmann repeats incessantly; there is also no agreement on distinctions themselves, how they are made, who ought to make them, and thus ultimately what they display. Only

from the position of science (*Wissenschaft*) is the cognitive / normative distinction »self-evident.« With regard to expectations, this distinction may be construed to represent two separate but equal systems (»science« and »law«), but is itself cognitive and therefore »scientific.« The distinction makes a claim to knowledge – to description, explanation, understanding; to science (*Wissenschaft*), theory, reason – about the world (including itself), and thus creates a universe (of, for instance, »expectations«) in which cognitive and non-cognitive varieties of communications exist. The world that is so created is, however, a »cognitive« world (a world that theory is able and called upon to describe) and thus draws the distinction cognitively. Thus one side of the distinction describes itself and its others in its own terms. The model of such an operation is none other than the age-old distinction between Greeks and Barbarians. The Greeks can observe Barbarians only as non-Greek; conversely can see themselves as a unity only by locating their barbarian others *within* their world but not *of* it. Similarly, in the world that theory describes – and, for Luhmann, theory is Luhmann's theory, systems theory – theory is always Greek. All else stammers an incomprehensible or at best antiquated language.

None of this is a critique of Luhmann but rather, it seems to me, an inevitability – not just an inevitability of systems theory but of »modern«, »post-metaphysical«, »subjective« reason. The world Luhmann describes – or, more accurately – the world we see Luhmann describing is the world we see ourselves inhabiting, even if we protest our enforced tenancy and prepare elaborate plans for escape. When we moved from substance to function in our understanding of the universe (to pick in near-arbitrary fashion Cassirer's (1953) account that can stand in for a myriad of other intellectual-historical examples, one that reflects Luhmann's own use of terms), we gave up the last vestiges of imagining a classically and thus morally structured order of the universe. One may decry the specter of a historicist, relativist, perspectivist, pluralist, and finally functionalist universe all one wishes; one may point to the difficulty logical reason may have in forming a consistent, non-contradictory, paradox-free image of such a universe; but the suspicion remains that one can deny such »nihilist« modes of description *only* by way of what Weber called a »sacrifice of the intellect« (Weber 2004, 31). Lamentations of near Biblical proportions – from Leo Strauss, from Husserl and Heidegger, from the current Pope, and not least from Habermas, whose *Philosophical Discourse of Modernity* is one long excoriation of the Great Betrayal of Reason perpetrated by Nietzsche, Adorno, Heidegger, and Habermas's French contemporaries – all point to the degeneracy of modern reason, its devolution into scientific rationality.<sup>3</sup> Once upon a time, so the story goes, reason stabilized human counterfactual expectations by upholding the metaphysical fundament that undergirded our world. Even with the loss of its

3 Relevant texts include, among many others, Strauss 1953; Husserl 1970; Heidegger 1977; Benedikt XVI 2007; Habermas 1987.

metaphysical foundations, so the story continues, a self-validating, procedural rationality is available (thanks to Habermas) to serve as the functional equivalent of god, nature, and whatever else once stood as unmoved mover of all rational and moral inquiry. And the moral of the story is: To deny reason this quality, is to declare that all is lost.

Luhmann abides by this historical trajectory but rejects the fable-like ending. Here is (one of) Luhmann's version(s) of the story, a kind of update of, and comment on, Weber's account (Weber 2004, 14-18). Only Europe, Luhmann writes, »has brought forth worldwide social descriptions« (Luhmann 1998, 22); but this ability is only possible due to »the dissolution of a rationality continuum that had connected the observer in the world with the world« (23). For articulations of this continuum, reference could be made to Greek reason with its invention of the concept of nature; to medieval reason, which forges the link between the divine spark of human rationality and God (Jerusalem) or nature (Athens) to form a single moral order; and finally to »[t]ranscendental philosophy« and the »figure of the autonomous subject«, which »may have been Europe's final attempt to achieve ... an order of knowledge that obligates cognitively, ethically, and aesthetically« (1998, 37-38). Indeed, the so-called rationality continuum, the great chain of being, is all about the unity of the True, the Good, and the Beautiful, a unity that Kant knew no longer existed, yet wished to will back into being, at least as a conditional (»as if«) imperative. Since Luhmann sees himself as a sociologist and not an intellectual historian, he must associate this semantic »erosion« with »a radical structural transformation of society since the late Middle Ages« (22). Belief in the unity of the eternal verities that the rationality continuum guarantees requires a society in which privileged centers – Luhmann habitually refers to stratified hierarchies, at the pinnacle of which lie aristocratic courts and/or urban centers – become the nodes of decision that are able to distinguish true from false descriptions of the cosmos. One need only think of the medieval Catholic Church as the institutional embodiment of substantive reason and natural law.<sup>4</sup> And for its part, a stratified society requires a metaphysical notion of cosmic order to serve as its source of legitimacy. Hierarchies can be non-arbitrary only in a non-arbitrarily ordered universe.

What caused this neat, tightly coupled, mutually reinforcing social and intellectual order to fail? The sociological answer: functional differentiation. How did functional differentiation come about? The sociological answer: evolution.

4 »In addition to divine revelation itself, an authentic and authoritative interpreter of both divine revelation and the natural moral law, the Church, is likewise morally necessary to safeguard and inculcate moral truths and values, to supply with sureness explicit and implicit moral principles to concrete, complex, and changing circumstances of human life and activity, and to settle moral difficulties and doubts that harass even the most learned ... It is indeed undeniable that the great development, refinement, and certainty of rational ethics in Christian circles owe very much to the extrinsic aids afforded by divine revelation and Christ's Church« (Hanley 1998, xxvi).

As with all socio-historical trajectories and causal schemes, Luhmann's sketch is fine in broad strokes, but may lose clarity when examined in detail. This, however, should not overly concern us. Whether we believe that today's general incredulity regarding the rationality continuum is the result of structural change or merely a fall from grace, this fallen state remains the one we inhabit and the one that gives shape to the form of the problem we are pursuing. The European rationality continuum – more conventionally called substantive or objective reason – relied upon both a metaphysical (God, nature) and a social-structural (e.g. the Church) ground that blocked endless regress and self-reflection. Yet, corrosive reflexivity always accompanied self-confident reason, as Sophism in Greece, as nominalism and voluntarism in the Middle Ages, and as modernity's enlightenment of enlightenment, best (but certainly not exclusively) represented by Nietzsche. The serpent has always already been there, apple at the ready. Reason invents nature to serve as critical ground from which one could authoritatively attack the authority of convention; but what prevents the same critical impulse from seeing that nature is no ground, just another floating island awaiting its own deconstruction? God, first reduced to omnipotent but arbitrary will and then mere contingency, suffers the same fate. And finally reason itself is subjected to its own exacting mode of interrogation. What Kant exposed (and tried to cover up again); the scab that Nietzsche mordantly picked at; what Weber clarified as the reemergence of warring gods; and what much of the 20<sup>th</sup> century tried feverishly to immunize itself against is reason's original sin, its quest for knowledge of itself. Reason, then, is modernity's paradise lost. And the serpent always has the last word:

Is it possible in this world of magic and irony, imagination and mathematics, schizophrenia and individualization to seek rationality through an observation-of-the-self-as-observer? Certainly not if we think we can describe the world as it really is and then communicate to others how they ought to think and act. No distinctions-logical concept of rationality would ever lead back to this position of unity and authority. Reason – never again! (Luhmann 1998, 34-5)

*Nie wieder Vernunft!* Instead: distinctions, both socially (functional differentiation) and cognitively (observation of observation). This is the fallen state from which we will never recover; this is the state from which – and *only* from which – theory can perform its observations.

So: Would you do it? Theory can help us realize that theory *cannot* help us prestidigitate an answer and make it look necessary, determined, and incontrovertible. In the absence of a final ground, we are left to our own devices. This, after all, is the definition of undecidability – namely, the ineluctable necessity of coming to a decision, not arbitrarily, but without determinate criteria or guidelines that would absolve us of the responsibility for the decisions we come to. Neither can theory answer the titular question: Are there still indispensable norms in our society? If we say that modern, complex, functionally differen-

tiated society – and perhaps all forms of society – needs at least a modicum of rationalization and predictability and therefore needs to have expectations stabilized, then we can say that norms as the counterfactual stabilization of expectations are necessary. But to say norms are necessary (from such a functionalist perspective) is not to say that any *particular* norm is necessary. Let us remind ourselves: functionalism is all about functional equivalency. It is as if norms comprised a gaseous cloud which was crucial for life on earth. The cloud is indispensable, but is each and every molecule indispensable? To find out we would have to isolate and subject each to specially devised tests, just like the test Luhmann devises with regard to torture. If, however, all we can say is that as a conglomerate norms are indispensable, we have no guidelines to determine whether norm A, B, or C is in itself necessary. Social theory – »science« – reaches its limit. Luhmann, »as a sociologist,« provides no answer, no outcome of his own molecular experiment, except the outcome that says theory can provide no definitive criteria for an answer.

### III

Perhaps the »form of the problem« of Luhmann's theory could be phrased best in the Möbius-like words of Michael King (2006, 52):

[Luhmann's] message is ... that there are other possibilities, other ways for society to organize itself, other ways of conceptualising society and its problems ... [T]he downside of Luhmann's message is that continuing to believe that solutions are just around the corner and can be achieved through more effective social regulation or control is paradoxically likely to decrease the chance that these possibilities, these new ways of conceptualizing society, will eventually become visible ... Luhmann's *usefulness*, therefore, might well lie precisely in the *uselessness* of his theory as a blueprint for the improvement of social systems and those who try and make his theory useful in this way may well be contributing to the theory's ultimate *uselessness*.

This sounds almost like the classical German *Bildungs*-ideal: Learn Greek (and Greek antiquity) not for the practical knowledge thus gained but for the conceptual exercise of imaging things other than the way they are and the formal exercise of learning to learn. Nevertheless, Chris Thornhill (2008), in his article included in this volume, detects a potential normative thrust to Luhmann's version of »Greek.« Referring to Luhmann's work as perhaps the first thoroughly *social* theory of norms, Thornhill views the notion of »adequacy« to be of use. By construing social semantics as only marginally related to social structure and viewing semantics, therefore, as the repository of norms, social theory may help determine which norms of the prevailing repertoire best serve the continuing of modern society. The imperative might then be phrased some-

thing like: Act such that your decisions are in accord with the preservation of functional differentiation. This may smack some as an odd sort of normativity since it stands in the service of »power« (»capitalism,« »globalization,« etc.) and not in the service of »truth,« and the imperative does seem to echo the 1950s triumphalism of the Weberian modernization thesis in which the gradual universalizing of functional differentiation would eventually cure all of society's historically inherited ills; but Luhmann was surely no blind optimist, and the triumphalist mode of rhetoric was equally foreign to him. The imperative is consonant with an »indispensable« Luhmannian postulate, namely that society can only be observed and described from within society and not from outside the city walls. Still, Thornhill's contention gives substance to what is clearly Luhmann's semi-acknowledged normative stance, namely the command »Thou shalt not de-differentiate,« until, of course, »catastrophe« reveals a new form of social organization.

Thornhill's panoramic essay does more than just tease out the normative implications inherent in Luhmann's social theory. It also gives a good account of what it means to treat norms as social facts. And it nicely explains the function of legal and political rights as a means for depoliticizing more and more aspects of society. If Luhmann's political and legal theory can be said to resemble some of the more pronounced aspects of neo-liberalism (in, for instance, his critiques of the welfare state), then Luhmann's view on rights (as explicated by Thornhill) might also confirm Carl Schmitt's fears about the juridification and de-politicization of society. As Niels Werber has noticed before (Werber 1995) and revisits in this volume (2008), Luhmann walks up to the edge of a political theory of the exception (or emergency), but each time he does he evades addressing the issue head on. Werber's piece is an extended meditation on the exceptional torture scenario and its not so distant cousins. Werber too comes to some troubling conclusions about systems theory's own tragic choices between normative and tactical, pragmatic decision-making. If systems theory precludes the type of normative procedures dictated by traditional and modern natural law doctrines, say, or Habermas's version of rational grounding, the type of »maneuvering without principles« that results might be equally damaging to the function of modern social systems and their codes. »Tragic choice« is not just the convenient label applied to abstract thought experiments, but also to the reality of a normality that at any time can be challenged at its core, a normality that Luhmann can defend, it seems, by assuming its dogged endurance. Thinking the exception is quite literally thinking the unthinkable.

Thornhill reminds us that Luhmann not only saw norms as social facts but also that the »normative reality of law ... duplicates itself, reflexively, in the normative reality of the theory of law, and both the norms of law and norms of law's theory are then conjoined to constitute the elements of society's factual normativity« (2008, 47). John Paterson (2008) gives us then a direct investigation of the »form of the problem« as it is reflected in law's theory. Luhmann

acknowledged that the legal system of modern society has two competing self-descriptions, legal positivism and *Vernunftrecht* (rational principles), a descendant of natural law (Luhmann 2004, 448). Paterson (using John Finnis and Ronald Dworkin as his chief examples) nicely shows how each runs up against the same aporia, no matter how finely each argues its case. Furthermore, Paterson discusses interesting recent judgments in British Common Law to point to similar entanglements, concluding, not with regret, but with the realization that judgment entails responsibility that cannot be relegated solely to procedures or fundamentally established norms.

Two of our contributors, however, William Scheuerman (2008) and Costas Douzinas (2008), wish to make the case for the indispensability of proclaiming single, indispensable norms (in this case, the ban on torture) from within normative theory, located roughly within politics and law. Both refer to natural law, Scheuerman in passing, Douzinas in a particularly Derridian way. Scheuerman operates in the field staked out by debates between idealists and realists in international relations and law. While he understands that the extreme versions of each side of the debate ignore value conflicts and »tragic choices« by insisting on the purity of moral norms or *Realpolitik*, Scheuerman nevertheless insists that norms do more than stabilize expectations, they shape them and thus actively direct behavior. On the one hand, this seems obvious, but taken in its strongest form, which I believe Scheuerman does, it states that moral and legal norms have the power to oppose and vanquish political force, which makes the counterfactual assertion of threatened norms by way of principled argumentation all the more urgent. In asking whether there are aspects of the natural law tradition that might be salvageable, he seems to agree with Thornhill that it is possible to unlink semantics from structure and view semantics as the repository of norms that may be called upon at different times and in different circumstances. However, Thornhill's view of the latent normative potential of Luhmann's theory would radically differ from Scheuerman's, as it would from the type of normative urgency espoused by Douzinas as well. Douzinas views natural law as an empty »shell« that retains its original form of opposition (nature vs. convention) even as it loses all elements of its former substance. Nature, he writes, is »philosophy's tool« that, as an »evaluative standard ... emancipates reason from the tutelage of power and gives rise to natural right.« (2008, 120) Like Scheuerman, Douzinas would resist the »nihilist« trajectory of reason I outlined above and identified with Luhmann's notion of the »form of the problem«, the »form« that bedevils us in the exceptional scenarios we construct and which we face. It is clear that for Douzinas the empty shell of natural law stands in close proximity to Derrida's notion of justice, and both – the shell of natural law and justice as deconstruction – could, it seems to me, quite easily be covered by Luhmann's notion of justice as contingency, the distance from positive law that shows that things (laws) could be other than they are. Douzinas, however, wishes to give directionality to contingency, wishes

to speak of the justice to come and the magnetic horizon toward which all our thoughts and, we hope, history itself are drawn. Positing natural law as an empty signifier, but gracing it with the pathos of emancipation, is meant to limit contingency's contingency, for contingency left to its own devices is quite literally a roll of the dice.

Hans-Georg Moeller (2008) returns to the question of theory's adequacy by focusing on Luhmann's critique of the humanism inherent in the enunciation of human rights. Explicitly arguing against a leftist discourse of *human* emancipation, Luhmann, Moeller argues, sees rights as a form of *social* inclusion. Again, there are hints in Luhmann of modernization triumphalism, but the real challenge to Luhmann's notion of world society and the possibilities (along with problems) that it may bring came from Luhmann's epiphany, as it were, that not just modernity but society itself seemed to have its limits at the entrance to the *favelas*. The super-coding inclusion/exclusion that Luhmann surmises may overarch the serial inclusions and exclusions managed by social differentiation might best be marked by Ernesto Laclau's notion of heterogeneity. For Laclau, the possibility of forming political »hegemonies« (such as popular movements) requires antagonism (friend/enemy, oppressor/oppressed, or, more benignly, government/opposition) within a shared representational space. Likened, however, to Hegel's notion of »peoples without history«, heterogeneity is an »outside« that »does not have access to the space of representation« and thus is simply a »leaving aside«. Like the »residue left in a tube after a chemical experiment,« Laclau explains, »[t]he break involved in this kind of exclusion is more radical than the one that is inherent in the antagonistic one: while antagonism still presupposes some sort of discursive inscription, the kind of outside that I am now discussing presupposes exteriority not just to something within a space of representation, but to the space of representation as such« (Laclau 2005, 140).<sup>5</sup> Laclau's heterogeneity might well apply not just to the barbarians outside the gates of our shining cities, but to the peoples without personhood, the bodies who are held in our camps, both the ones we know about and the ones we do not. How does systems theory confront bodies that lie outside the social, that is, outside the space of representation? Andreas Philippopoulos-Mihalopoulos (2008) attempts to answer that question in the only article in this issue that directly confronts Luhmann's »Beyond Barbarism«. Thus, Philippopoulos-Mihalopoulos addresses not exclusion itself, but Luhmann's theory construction, postulating a necessary »space of absence« within the theory's social architecture to allow for the »trace«, the possibility of »seeing« the peo-

5 One might take Laclau's analysis further and ask whether Luhmann's inclusion/exclusion super-coding is a logically necessary and constitutive element in the formation of modernity; whether, in other words, the pure, homogenized (even if neatly differentiated) space imagined as world society is even possible without an excluded outside. Such a question might bring us back once again to Schmitt and the logical necessity of exclusion for the smooth functioning of Europe (now: Europeanized world society). For more on heterogeneity see Laclau 2005, 139-156.

ples without history who otherwise, apparently, strike us dumb whenever we approach the edge of the »known« world at the gates of the *favelas*.

#### IV

»As a sociologist« Luhmann need not answer the question – »Would you do it?« As citizens we must. But can we? I close with another scenario, one Luhmann did not live long enough to formulate.

Imagine: You are the citizen of a country that claims to be democratic – that is, that claims its actions represent the will of »the people« – and has an electoral form of politics. Collectively binding decisions are legitimated every bit as much by »no« votes as by »yes« votes. Opposition, in other words, is part of the form of the political system. This country, of which you are both a citizen and an embodiment of »the people«, has now formally (by law) declared that a former normative expectation – that the torture of prisoners was constitutionally prohibited – has been declared no longer normative. The new norm reads something like: »Torture [now cowardly phrased as »enhanced interrogation techniques«] is permitted under certain circumstances, to be determined exclusively by the executive branch of government and its agencies.« What would you do?

Note that what is postulated is not a state of exception, but legal normality; and note that the question has changed. Not: Would you do it? You are not asked to commit the act in question. A cadre of professionals, especially trained for that purpose, has already been pressed into service and is »doing it.« Rather: What would you do? How would you react to a legislative change performed in your name that asks you to dispense with a normative expectation you had previously been taught was indispensable? Would you adamantly continue to communicate the normative expectation that you hold to have been violated? Or do you react cognitively and understand that the rules of the game have changed? What does it mean to react cognitively, to change your former normative expectation to a cognitive one? Let us suppose that you still oppose the legalization of torture. (One assumes that one can learn from the violation of an expectation without necessarily accepting the consequences of that violation. One can learn, for example, that the International Court of Justice is a sham without ceasing to be concerned about the construction of the wall.) Is your reaction and are your resultant actions different, depending on the mode of expectation you hold? It must be remembered that within the political system of your state, you are not absolved of responsibility for the change, no matter what you may personally say or think. With your indispensable »no«,<sup>6</sup> your support of the opposition (in, say, an election held 2004), made the political

6 Parody of Habermas is intentional.