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Just art. Documentary Poetics and Justice



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## **Introduction**

### **Just Art. Documentary poetics and justice**

Naomi Toth

A landmark death penalty case in New Zealand is reopened, following the publication of an investigative novel two years earlier. A well-known law professor in New York steps down following a television series recounting her role in the wrongful conviction of five black youths from Harlem. A trustee of a prestigious American art institution resigns when the museum exhibited a work that presented evidence of his commercial activities. In each of these situations, the publication, screening or exhibition of documentary works of art had a concrete effect in pointing out and redressing injustice. Each work asks us what it might mean for art to be *just*.

From their beginnings, the forms and methods of documentary art and literature have been bound up with legal norms and practices. The framework of the judicial enquiry structures much investigative non-fiction; the judicial regime of proof has inspired works that contest or establish recognized facts concerning all manner of crimes, both specific and systemic; witness accounts have traditionally taken for their model the court deposition,<sup>1</sup> the theatricality and suspense of the trial has informed documentary and verbatim theatre<sup>2</sup>; the documents produced for and during judicial procedure appear in appropriated form in innumerable works of collage and conceptual art, poetry and prose; and means of punishment, from prison to the death penalty, have also attracted many documentary artists and writers.<sup>3</sup> But if such works are saturated by the judicial imaginary and often depend on the legal system for their source materials, they nonetheless distinguish themselves from this institution. *For they claim to be art*. This means they circulate in extra-judicial spheres and invite forms of judgement that differ from those administrated by the legal system. Moreover, attracting

audiences well beyond police stations, courtrooms and prisons, they create an extra-judicial forum where the legal system might be called into question, where its very materials might deviate from their intended course, and where alternative conceptions of justice may be forged. This issue of *Synthesis* investigates how and why such works of documentary art and literature may — or may not — be *just*.

The pact documentary works establish with their audience contains, in germ, three conceptions of art's justice that serve as a guide for this inquiry. This pact is distinct from that of fiction, which seeks first and foremost to develop aesthetic truths. It also differs from that of much discursive non-fiction, such as essays, philosophical treatises and the publications of the social sciences, which aim primarily to argue, persuade or assert empirical truths.<sup>4</sup> For documentary art and literature seek to do both. On the one hand, such works ask to be considered as *art*, which involves an injunction to the reader or spectator to suspend forms of ordinary understanding, beliefs and judgement, to engage with a work's formal features, to experience subjective emotional reactions and aesthetic pleasure, and to bring to play judgement criteria that, in the long tradition inherited from Kant which is still alive today, is supposed to be *disinterested*, disconnected from moral or political imperatives. On the other, they make epistemic and critical or political claims. *Epistemic*, in the sense that they often seek to uncover or show a reality considered insufficiently known or recognized, and thereby seek to contribute to knowledge of the world.<sup>5</sup> *Critical*, in that documentary works are never *simply* presentations of facts or recycling of documents. Explicitly or implicitly, they stake out an interpretative position concerning the reality they relay, one that proposes or effectuates a transformation the reality in question.<sup>6</sup> They thus clearly call on faculties of judgement that fall well beyond the realm of the aesthetic.<sup>7</sup>

In other words, a documentary work simultaneously asks its audience to assess it as being *just art* — to be experienced and appreciated for its formal qualities and affective charge alone — *and just art*, that is, art that is fair and exact concerning the referential reality to which it voluntarily submits itself and seeks to expose, and art that furthers the cause of justice. Yet the aesthetic claim often contradicts or, at best, competes with both the epistemic and political claims. Therein lies the paradox of documentary works that engage with the justice system.

Two responses to this paradox predominate. The first is to minimize the potential conflict between the competing claims and assert instead their compatibility. Thus the influential French theorist Marielle Macé,

assimilating the aesthetic truths of literature with the empirical truths of the social sciences, sees the accurate description of the world as leading to works that are simultaneously poetically satisfying and politically just.<sup>8</sup> In a similar vein, Dominique Païni writes of the Chinese documentary film maker Wang Bing, that “to be politically just, one must be aesthetically just.”<sup>9</sup> But can we really take it as self-evident that aesthetic success leads to political potency? Or that that factual accuracy, poetic qualities and politically desirable outcomes mutually engender one another? The second response to the paradox has been not to set aside but to exacerbate the conflict between the divergent claims made by documentary works. Indeed, the simultaneous call upon aesthetic, epistemic and critical forms of judgement has attracted criticism for confusing epistemological regimes better kept distinct, as many have argued in contemporary debates concerning the fictionalisation of fact in the public sphere,<sup>10</sup> or, just as problematically, for illegitimately manipulating public emotion. In her 2021 book-length charge against documentary art, Carole Talon-Hugon argues that these works’ epistemic and aesthetic claims cancel each other out, turning them into, at best, didactic political tracts.<sup>11</sup> And yet, the proliferation and success of such works in our contemporary world testifies to a persistent need to understand the real through forms which do not evacuate but attempt to account for its affective and imaginary charge, speaking to a desire to understand, both intellectually *and* emotionally, the nature of a reality whose foundations no longer seem secure. Like experimental movements of the past, documentary works break with established codes of literary and aesthetic realism, no longer considered adequate, in the name of greater realism,<sup>12</sup> and, in so doing, they revive a form of disciplinary fluidity that, only a few centuries before now, was not exceptional.<sup>13</sup>

Rather than minimizing the paradox inherent in documentary works’ reception pact, rather than dismissing such works and refusing to engage with their capacity to simultaneously touch, inform and, potentially, transform the reality they present, it is just as legitimate, and much more productive, to envisage these forms of aesthetic, epistemic and critical judgement as being concurrent without always being compatible, interacting with one another in the process of reception—be it through fruitful dialogue or the equally fruitful clash of discord. Indeed, negotiation between these claims becomes a necessary part of the audience’s experience of a documentary work. Each spectator or reader is obliged to determine the weight and measure of the different forms of judgement in their own reaction, and consider the tensions between them. Experiencing ethical or moral discomfort with a text or image

we find aesthetically appealing, feeling bored when faced with descriptions of violence, being brought to doubt the veracity of facts we would like to believe or, on the contrary, to recognise the veracity of facts that seem unbelievable—all such reactions create friction in the audience. They jolt the reader or spectator into a reflexive attitude concerning their own response to a work, obliging him or her to decide what to do with the sometimes contradictory emotions or reflex judgements a work solicits.

Aesthetic, epistemic and critical claims are all present to differing degrees in each documentary work. As the articles, reflection piece, poets' conversation, and interview in this issue of *Synthesis* show, the claim that dominates determines in important ways *how* a given work seeks to be just, and the relationship it establishes with the justice system in place. Let us consider each of these in turn.

### **Just art: aesthetics as pragmatics**

Merging from the margins of aesthetic and literary fields in the early twentieth century, documentary art and literature have in recent years taken centre stage. What Mark Nash qualified in 2004 as the 'documentary turn' in contemporary art has only been reinforced since: across the globe, hardly a biennale goes by without works that present themselves as documents or use documents as their primary source material. The Nobel committee's decision to award their 2015 Prize for Literature to Svetlana Alexeivitch consecrated the literary nature of texts that compile witness accounts of historically real events and phenomena.<sup>14</sup> Never before has the institutional recognition of documentary works of art and literature *as art* been so well assured. Such recognition is not anecdotal. At least since Duchamp, we have known that authorial, but above all, institutional designation of an object *as art* is capable of transforming a bottle holder or an abandoned toilet in the street awaiting the garbage collector, into a sculpture. This is especially true for documentary art works, primarily for those that appropriate documentary material produced for other fields, for other purposes (Théval, also Zanetti 291-329), but also for those that produce documents that could be, and sometimes are, put to other uses.<sup>15</sup> Institutional recognition is constitutive of the very "artcity" or "literary" nature of documentary works, transforming raw material which is not necessarily predestined for aesthetic contemplation into works of art or literature (Pouillaude 147-152).

Transporting documents out of their context of production—the judicial system, in the case of the works this issue addresses—and into the aesthetic realm necessarily establishes a relationship, close or distant, with the

interpretative and pragmatic economies—or, to use the term preferred by Franck Leibovici, *ecologies* (2020, 83-99)—in which the documents were produced, circulate and function. By extracting documents from their context and use value within the judicial system, the artist or writer invites a new gaze upon the documents and also upon their original function. The aesthetic nature of the work thus allows the source material to acquire what some practitioners have called an “infra-thin” difference (Fitterman and Place), or an “n+1” dimension (Liebovici 2020, 176-183), in relation to the source document, opening it up to readings that release the spectator or reader’s aesthetic, but also political imagination. Such a withdrawal—or, to use the Duchampian term that would be taken up by Situationists, *détournement*—may involve de-activating certain functions and narratives inherent in the source document’s original context, and activating other meanings that hitherto lay latent. In order to take stock of how a work’s aesthetic status might allow it to serve the ends of justice, then, the reader or spectator must take into account the distance—or lack thereof—taken from the narrative and interpretative economies in which the source document participated. It is not just that immanent critique, which treats the work as sufficient unto itself, is not enough, it is that such critique risks missing the point altogether, for the “n+1 dimension” or “infra-thin difference” can only be measured by contrast with the way the source document functions in its original context.

The numerous art works that reprise the final statements of executed offenders in the state of Texas might serve as an illustration. These final statements are recorded by the state during each execution and are subsequently exhibited for all to see on the Texas Department of Criminal Justice’s website. This public archive plays a role in the death penalty narrative the state elaborates: as the only sign that differentiates the file of a death row prisoner from that of an executed offender on the website, the publication of the final statement relays, albeit in a mediated fashion, the spectacle of the execution. Historically, the spectacular nature of the death penalty has played a central role in shoring up the practice, making the power the state exercises over its own citizen’s visible to all subjects and re-establishing the sovereign’s wounded authority (Foucault, opening chapter of *Surveiller et punir*; Derrida, *Séminaire. La Peine de mort*, Chapter 3 in particular). And since the final statements act as a proof of death, they also form a counter-weight to the description of the crime that features on the same page, balancing out the scales of justice according to the eye-for-an-eye retributational logic inherent in the death penalty, which is reserved for capital offences alone. The final statement also evokes the literary tradition of

Famous Last Words, in which Christ's last words play a significant role. This allows for the final statements to be all the more easily integrated into ambiguous narratives of sacrifice for communal salvation, reinforcing both the potential fascination with state power and with the figure of the monstrous, but perversely redeeming criminal.

By extracting these words from the website in which the last words function to shore up the practice of the death penalty and having them circulate in other spheres, the artists reprising these texts risk extending the reach of the state's spectacle of punishment, thereby supporting as much as confronting the practice itself. Yet it is in removing the final statements from the narratives of justice the state of Texas relays, and inserting them in other narratives, that this archival material might also begin to clearly signify something other than that which the state would have it mean, opening up a space arguments that question rather than support the death penalty.<sup>16</sup>

Luis Camnitzer's *Last Words* (2008) might serve as an example. This work comprises six panels of ink on parchment presenting a series of sentences extracted from the final statements recorded on the Texas State Department of Criminal Justice website. These sentences are not full final statements, but citations from many different ones, each sentence being selected according to the presence of the word "love". They are then printed one after the other with no line breaks, using reddish-brown ink — the colour of dried blood — on human-body-sized sheets of parchment. The layout of these panels resembles a book chapter, a clear indication that an alternative narrative is being constructed. This presentation makes it difficult to trace each sentence back to the website to identify the individual speakers, their crimes, etc. The six panels therefore read as a declaration of love proffered not by particular executed offenders but by the executed *in general* to the spectator, who, scanning the page as he or she would a body, is placed in a position that may be analogue to those attending the execution (family of the executed and of the victim of the crime), the warden, or the doctor administering the lethal dose. In detaching the documentary material from a particular executed offender, Camnitzer's work forecloses the possibility of reimagining a particular scene of execution and prevents the reincarnation in the spectators' mind of a glorious criminal, complete with an individual identity and a description of horrific crime. This disjunction from the reference therefore cuts short any attendant fascination with the spectacle or the criminal, a necessary step in countering the logics of the death penalty. It also confronts the spectator with his or her potential implication in the spectacle, causing a feeling of great discomfort concerning all this love

expressed.<sup>17</sup> In such a manner, Camnitzer's work creates the conditions for a critique of the death penalty.

In his article in this issue, Francis Haselden identifies a similar deliberate disjunction between the source document and its reference in Vanessa Place's *Statements of Fact*. This work, which exists both as a book and as a performance, reprises the statements of fact Place herself has written in her practice as an appellate lawyer for indigent sex offenders. Place anonymises the texts so that the people concerned, both victims and convicted offenders, are not identifiable. Following Place's own statements on her work, Haselden argues that this gesture makes the poetic text more about language itself than about the specific, historical facts related. Thus deprived of that which assures its legal efficiency—its ability to assert that such and such an event is really purported to have happened—the text directs the spectator's attention towards his or her own affective reaction. This, argues Haselden, allows for the traumatic affects associated with rape, to be acknowledged and expressed, in a manner which, he claims, cannot take place in the courtroom in a satisfactory manner due to the drive to determine objective facts. Following Lyotard, Haselden argues that a faithful expression of trauma depends precisely, and paradoxically, on the distance from any reference instituted by representation. Thus, though it matters that Place's text reappropriates an independently existing document that refers to real events, according to Haselden, it matters just as much that these events be received by spectators and readers as representations, functioning independently from specific people and places involved. Haselden mentions that Place's text has been subject to criticism for re-inscribing violence and addresses this critique, albeit indirectly, by arguing that this is necessary for the experience to be acknowledged as such. This allows for the associated affects to be transformed into something cognisable, which in turn lays the ground for responding more appropriately to rape as a social phenomenon, not just a specific case of rape in particular.

Catherine Bernard's article in this issue, "Out of Bounds: Confronting War Crimes and the Breakdown of Justice with Contemporary Art", also explores documentary art's aesthetic claim as the basis of its political pragmatics in her study of contemporary art works that engage with political violence and incarceration in the context of war, notably Mark Quinn, Trevor Paglen and Lawrence Abu Hamdam. The efficiency of these works, she argues, is a result not of activism—none of the artists define themselves as activists—but arises from their status as *art*. She identifies two fields in which the works have an effect: the world of contemporary art and the socio-political sphere



beyond the gallery. In the first case, the conscious importation of documentary traces of political violence into the art world forces a reflexive take on the practices of art creation, exhibition and reception, forcing the museum, the gallery, the curator and the spectator to interrogate the limits of what does and does not constitute art, and the kinds of subjects their exhibitions engage with. It is precisely because these works are not ‘just’ art but appear nonetheless in all their heterogeneity within the hallowed halls of art, that they may articulate this institutional criticism. Bernard then claims that *because* they are viewed in such spaces as art, they solicit emotional responses that come closer to recognising human dignity than the reactions engendered by the raw presentation of the same source material circulating in extra-aesthetic spheres, such as the media. Properly aesthetic reactions thereby lay the grounds for political action. Of Marc Quinn’s 2008 bronze sculpture *Mirage*, depicting “a three dimensional replica of [a] photograph [from Abu Grahیب] featuring a hooded detainee perched on a narrow box and whose open hands are attached to electric wires,” Bernard writes:

The exalted nature of the auratic work stands in exacting contrast with the degraded images that circulated on the web and made the headlines. The all too easy circulation of these cheap images compounded the degradation of the human reduced to being “the means” (Ogilvie 77), the channel, of shameless affects. *Mirage* aims at turning the degraded means back into an end, a human end.

Bernard argues that Quinn’s displacement of the Abu Ghraib torture photographs into the aesthetic sphere, reinforced by his use of bronze, a noble material traditionally associated with the fine arts, forces a revalorisation of human life according to a Kantian moral imperative, putting a halt to the reactions generated by sensationalist press treatment of these torture images and reaffirming of the dignity of human life, in an attempt to redress the wrongs represented in the original photograph.

Yet, we might also wonder if exhibition in museum spaces and the use of traditional art material are sufficient to guarantee these critical effects. Arguably, people encountering the Abu Ghraib torture photographs in the media could also have such an emotional response: entry into the cloistered spaces of the museum is not a prerequisite for being ethically interpellated by images such as these. Mark Quinn’s sculpture also does not structurally prevent another, less ethically palatable reaction on the part of the British spectator. Indeed, in 2008, British troops were fighting alongside the Americans in Iraq: the body represented is that of the sculptor’s country’s official enemy. It is therefore a suffering enemy body, reduced to a posture in

which he is demanding mercy from soldiers fighting for Britain's powerful ally. This might conceivably solicit voyeuristic pleasure if not fascination with the victim's pain, or even serve to reinforce British spectators' own feelings of power in being associated, if only through their nationality, with the actions of their army, all the more so as the suffering figure is no longer represented in a scrappy, low-quality original photo, but aestheticized, elevated into a polished work of art in bronze. Bernard also points out that the figure plays into Christic narratives of sacrifice and redemption that correspond to the culture and history of the British viewer. The Iraqi's body is thereby appropriated into cultural narratives at a certain remove from those with which he himself may be familiar, such that he can be seen as prop, a means in a demonstration rather than as Kantian end in himself. We might therefore see in this work not only an attempt to restore dignity to the Iraqi prisoner represented, but also an ambiguous exploration of the complicity of the British viewer both inside and outside the museum.

For though the aesthetic status of documentary works *may* provide the grounds for articulating a demand for greater justice, transporting documents into the halls of art does not in itself ensure such an outcome. As Susan Briante notes in the poets' conversation convened by Philip Metres published in this issue, "It's not enough to represent injustice in our writing. In fact, simple representation of violence can produce its own kind of violence." This is particularly the case when artists and writers appropriating documentary material do not take into account the full scope of the economy of meanings the original document is situated in. Kenneth Goldsmith's 2015 performance of the autopsy report of a young black man killed by the police that same year and Dana Schutz's painterly appropriation of the photo of Emmett Till's coffin in *Open Casket* (2017) are two well-known recent examples: in both cases, the artists seem to have ignored the history of white American appropriation of black bodies both in and outside of the arts, and the ambivalence that therefore inevitably characterizes displays of black suffering by whites. Their works therefore acted against their declared intentions, drawing ire not only from the American black community but from anti-racist activists more generally. If the claim to be art might open up political possibilities, these range from a conservative extension of the logics inherent in source material, or even an exacerbation of these, to the construction of alternative narratives that attack these logics and propose alternatives.

### **Just art: referential fidelity**

Other branches of documentary work have historically eschewed incorporation into the vast house of art, such that their aesthetic claim is minimal, or at the most, secondary. This is particularly the case of witness accounts, the subject of Frédérik Detue and Charlotte Lacoste's essay in this issue. The publication and circulation of witness accounts emerged in the face of the large scale political violence that characterised the early twentieth century, and modelled itself on legal deposition. Writers of such texts sought to be taken seriously, as if they were relating "the truth, the whole truth, and nothing but the truth" about their experience of the horrors of war or genocide. Assuring the authenticity of their testimony was necessary in order to establish the factual nature of their experience against the discourse of the more powerful. Presenting their texts as *literature* ran the risk of being assimilated into the model of truth dominant in fiction, which depends not on the referential verifiability or veracity of events related, but on the capacity of the work to extract from the narrative generalisable, universal truths about the laws of human nature or functioning. For a soldier recounting his experience in the trenches of World War I, or Primo Levi relating Auschwitz, it is paramount that the referential exactness of their testimony be recognised, that the events related be read literally and not metaphorically. The genre of the witness account thus emerged *against* the Romantic idea of literature and art not only as autonomous, but also as capable of relating 'higher' truths, valorising instead what Detue and Lacoste, after Miguel Abensour, call "the choice of the small." Detue and Lacoste call for the establishment of witness accounts as a specific genre with a number of defining stylistic features, such as sobriety, and ethical concerns, such as homage to the dead. This genre, they argue, should nonetheless be considered as a literary practice, of the same dignity and value as fiction, and call for a post-Romantic redefinition of literature and its role within society, one that is to be considered in materialist and ethical terms.

Detue and Lacoste note that the testimonial genre was founded by texts written not by the powerful, but by the victims and survivors of the violence in question. Establishing the truth about the past from the point of view of the victims is also central to the 2017 immersive film *Parragirls Past, Present*, discussed by the artist Lily Hibberd and myself in the "Reflections" section of this issue, in which former interns at the Parramatta Girls Home, Western Sydney, Australia, present the now-abandoned site of this institution which bears the marks of Australia's colonial past, and relate their experience of abuse there. But here, in contrast to the cases Detue and Lacoste present,

the recourse to art is considered not as a hindrance but as a tool for better establishing historical truth and palliating the failures of the justice system. Comparing the testimony provided by former interns to government enquiries with the accounts of their experience presented in the art film, our discussion explores the reasons why these victims felt the need to relate their stories *outside* of the courtroom, in art. Where court testimony, like that solicited by government inquiries, is individualised and considers each person's experience separately, the film-making process allowed for collective remembering, such that connections were drawn which highlight the structural nature of the abuse suffered. Where the justice system and government enquiries, sometimes in spite of themselves, reproduced the very authority structures that had perpetrated abuse on these former wards of the state, the creative process allowed for a less threatening context in which victims felt they might be believed and wouldn't be punished again. Where the government inquiries and justice system often reopened and reproduced feelings of shame and trauma, becoming the authors of their own story through the creative process allowed for emotional work to transform feelings of shame into a feeling of empowerment. Indeed, it shifted the shame from the victim to the institutional perpetrator, an essential step in allowing victims to feel strong enough and legitimate enough to speak out. Art therefore created a context in which certain truths about these victim's experience could emerge, such that this film might represent a real contribution to the complexification of historical narratives of Australia's institutional past.

Whether defining themselves against or as art, then, witness accounts seek recognition as precise and reliable representations of the real in order to further the cause of justice.<sup>18</sup> For works that appropriate rather than generate documents, however, the justice of the work depends less on the assertion of referential fidelity, generally mediated by the appropriated document, than on the relationship they establish with the interpretative regimes the document participates in beyond the work. Common to both forms of documentary work, however, is a certain conception of the kind of truth the work seeks to establish. As Frédéric Pouillaude has argued, the nature of the truth of documentary works differentiates itself from, firstly, the Romantic conception of art that elevates itself metaphorically above the particularities of narrative, secondly, from the speculative truths of philosophy, and, finally, from the positivist affirmation of supposedly bare and objective facts championed within certain sectors of the social sciences (though such positivism cannot be considered dominant). Pouillaude turns instead to the paradigm of clues and traces developed by Carlo Ginzburg in his seminal *Clues, Myths and the*

*Historical Method*, which re-evaluates Peirce's concept of the index, to assert that documentary works seize upon objective *traces* of the real, which they present and, through the formal practices engaged in this presentation, interpret (186-190). Indeed, processes of selection, editing, juxtaposition, collage, montage, etc., inevitably generate an *interpretation* of these traces. One which is more or less subjective, more or less convincing, more or less oriented or open-ended. Such an epistemological stance requires both a certain humility—the trace does not say *all* there is to say about the real it testifies to—and audacity—it is up to the artist or writer, to propose a viable interpretation, however minimal, of the traces presented.

The task of drawing the audience's attention to specific traces of an objective reality is in and of itself one that could qualify as an act of justice, in that it expands the audience's understanding of the real to include unseen images, unheard voices, unrecognised realities. As such, documentary works may contribute to the effort Jacques Rancière argues to be central to any contemporary consideration of the politics of art, that of intervening in the "division of the sensible" that reigns within a given community, determining the visible from the invisible, the audible from the inaudible, the speakers within society from the spoken-to (2000). Documentary works often give themselves the task of shifting these lines by mining traces of the real for what has been minimised, silenced and rendered invisible. In the poets' conversation convened by Philip Metres in this issue, the Caribbean-Canadian poet M. NourbeSe Philip describes her own poetic work as the reconstitution of the "forensic landscapes"<sup>19</sup> of our contemporary world, "where the laws function to erase and destroy evidence", such that:

documenting assumes a different and perhaps greater significance. I am thinking of 'documenting' here in a sense different from the way we usually think of it—as using the archive or preexisting documents. I'm thinking of the poet as documentarian, documenting the Silence of the archive [...]. In pursuit of another system of justice.

### **Just art: attacking, redressing, or confirming the justice system**

This *pursuit of another system of justice* animates many documentary works, and constitutes not only their referential but also their critical and political claim. These works claim to be *just art* because they explicitly seek to further the cause of justice, often by pointing to the distance between the *legal*, the system that exercises the force of the law, and the *just*, an ideal whose definition, though never fixed, is that in which in the name of which the law is exercised.<sup>20</sup> Such a critique is more or less fundamental.

M. NourbeSe Philip's *Zong!*, a work fast becoming a landmark of contemporary documentary poetry, mounts a radical attack on the law in place in the late eighteenth century, a legal system that legitimated slavery and dehumanised black people. *Zong!* reappropriates the text of the Gregson versus Gilbert decision concerning the 1781 massacre aboard the slave-ship of that name, for which the company claimed insurance compensation for lost goods. In a text that shreds the decision into linguistic pieces and recomposes it so as to form an elegy to the dead, M. NourbeSe Philip mounts a frontal attack on "the law/a lie" (Philip). Yet Philip does not content herself with denouncing a now-redundant legal framework; it is not by chance that such a work has been published and has such resonance <sup>21</sup> two centuries after the event. Philip's performance of the work at a wake for Trayvon Martin, the black adolescent killed in Stanford in 2012, has the law's sombre history resonate with contemporary questions concerning the status and place of black bodies before the forces of the law—police, judges, prisons—suggesting that old logics have not died definitive deaths, but have taken on new forms. How can the law be just when it officially or in practice considers some lives those of the indigenous, the migrant, the colonised, the descendants of slaves—matter less than others? This question traverses the poets' conversation published in this issue, in which M. NourbeSe Philip participated along with Susan Briante, who practices documentary poetry on the US-Mexico border, Craig Santos Perez, an indigenous poet from Guam, and the Arab-American poet Philip Metres, a conversation held over the summer of 2020, in the immediate aftermath of the death of George Floyd at the hands of white police officers.

Using narrative as a means to right the law's wrongs is also the subject of Sofia Balino's article focussing on two narrative approaches to the highly mediatised New York Central Park Jogger case of 1989. Balino discusses how recourse to narrative in contemporary and more recent accounts of the trial of the Central Park Five, now known as the Exonerated Five,<sup>22</sup> subtly but surely exposes the narratives of race, class, and the identity of the city of New York itself at the heart of the trial, playing into the decisions of the jury and contributing to the wrongful conviction of five black boys from Harlem. Joan Didion's non-fictional essays, published at the time of the trial, and the recent re-dramatisation of the trial in Ava Duvernay and Attica Locke's Netflix mini-series entitled *When They See Us*, which places the point of view of the wrongfully condemned at the centre of the narration, not only probe the power of such narratives *within* the law, but propose alternative narrative structures to counter them. In this sense, Balino's article shows the continued relevance

of a now well-established tradition in the Law and Literature movement, which applies narrative theory to the law so as to better understand its logics, and sees in literature the exploration of subjective positions and alternative narratives that form a palliative for the law.<sup>23</sup>

Other documentary works seek not so much to attack the law from without, but to work within it in order to influence decisions or provide a necessary complement that falls out of the scope of the justice system. This might be said of the Forensic Architecture research institute's approach,<sup>24</sup> one that inspired M. NourbeSe Philip's use of the word 'forensic' above. Led by Eyal Weizman and based in Goldsmiths, University of London, the institute conducts research into human rights infractions where local government investigations are considered lacking. Using the tools of architecture to conduct investigations, they produce reconstitutions in various formats, primarily film, that are often presented before courts both national and international, and seek to weigh in on legal decisions. This production of expertise *for* the legal system shows yet again the power of the legal imagination in the very framing of forms of contestation of the law.<sup>25</sup> But these reconstitutions have also been presented outside of the judicial system, in galleries, biennale, and museums, where they have met with such critical success that Forensic Architecture was shortlisted for the prestigious Turner Prize in 2018, exposing the issues in question to a much broader audience. Such a gesture points to a need to go beyond the legal system in order to obtain justice, the legal system alone being seen as insufficient in and of itself. This attempt to draw greater public attention to particular wrongs committed was also at play in the decisions of the 'Parragirls,' formerly incarcerated in Parramatta Girls Home, to create the artwork with Lily Hibberd, discussed in this issue. Seeking reparation that cannot be measured in financial terms, these victims of institutional abuse wanted to restore their reputation and ensure that steps were taken to prevent the repetition of their experience by ensuring an audience beyond readers of official government inquiries.

Another way of working within the law that also seeks to bring about change *within* the system as it stands may found in Franck Leibovici and Julien Serroussi's project with the International Criminal Court, one which gave rise to the book *bogoro*, and the exhibition of evidence presented to the court, *muzungu*. The target audience of these works includes International Criminal Court judges themselves, in order to raise their awareness of their own relationship to documents and suggest alternative ways of considering them in the decision-making process (Leibovici 2020, 160-176). A further stage in their work is the creation of an audio version that the Court may use

in its outreach programme in the Congo, showing the extent to which the authors are embedded with the International Criminal Court, and the tools they forge in their poetic work are reappropriated by the Court itself to contribute to its functioning.<sup>26</sup>

*Zong!* then attacks the legal system head on; *When They See Us* aims to denounce and right a wrong decision, *bogoro*, whose target audience includes the judges themselves, seeks to effectuate incremental change on decision making in the ICC; Forensic Architecture's investigations seek to enter into and use the legal system *and* the museum in the name of the human rights causes they defend. Still other works act, if only in part, to consolidate certain aspects of the functioning of the legal system and seek to preserve them in the face of potential attacks viewed as regressive. This may be one effect of Place's *Statement of Facts*, which, as the discussion of this work in the interview with Marjorie Perloff published in this issue draws out, forces the reader to examine the position of the convicted party and to take seriously the adversarial structure of the system in which everyone has, or is supposed to have, a right to defence. As the Central Park Jogger case showed, verdicts of guilt in rape cases do not always correspond to objective facts in societies traversed by structural discriminations, inequalities and violence. The history of death penalty condemnations for rape in the USA, which overwhelmingly concerned cases of black perpetrators and white victims, rarely white perpetrators or black victims, only confirms the fact that punishment for this crime does not fall with equal weight on all those convicted of the same offence.<sup>27</sup> Place's text, however, doesn't so much address the question of the wrongful conviction of innocents or the severity of punishments as it serves to undercut tendencies to dehumanise perpetrators who have indeed been found guilty "beyond reasonable doubt."<sup>28</sup> Such a recognition of convicted criminals' humanity is central to attempts to analyse, understand, and take steps to remedy rape culture, and therefore represents a crucial step in any effort to imagine a different society.<sup>29</sup> *Statement of Facts* thereby doesn't so much question the legal system as it supports its adversarial structure and the role of the defence, while also using it as a source material that allows us to better understand, affectively (as Haselden argues) and intellectually, the stakes of sexual violence in our society at large.

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Works of documentary art and literature which engage with the justice system are thus never *simply* art or literature. Explicitly or implicitly, as art and as literature, they attempt to do justice. Not to substitute for the justice system, but to interact with it, drawing on its forms and documents, actively bearing



witness, conducting investigations, or providing evidence, seeking to redress its failures and faults—or, in some cases, attacking its very foundations. The impact such works might have in practical terms are sometimes palpable. Fiona Kidman's investigative novel *This Mortal Boy* (2019) led to a request to reopen the case Albert Black, one of the last New Zealanders to receive the death penalty. Following the screening of Ava Duvernay's Netflix series, *When They See Us*, Elizabeth Lederer, chief prosecutor in the Central Park Jogger case, had to resign from her teaching position at the law school of Columbia University in 2019. Forensic Architecture's reconstructions of crime scenes have been presented to the International Criminal Court, and the screening of their film *Triple Chaser* at the 2019 Whitney Biennale of American Art led to the resignation of one of vice-chair of Whitney's board of trustees, whose commercial activity implicated him in the production of tear gas. This year in France, Camille Kouchner's witness narrative of incest in *La Familia Grande* led to the resignation of Olivier Duhamel, former member of the European Parliament and director of the prestigious Fondation nationale des sciences politiques (FNSP). But the effects are often less easily localisable, residing primarily in the minds and bodies of spectators and readers, where they continue to act, expanding our notion of the real, and transforming, perhaps, our idea of what a more just society might look, feel and sound like, and, perhaps, inciting spectators to action. If justice is the horizon that the law strives towards, then documentary works, by attaching themselves to what *is*, have much to tell us about what that justice *could be*.

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<sup>1</sup> Cf Frédéric Détue and Charlotte Lacoste's article entitled "What Testimony Does to Literature" in this issue.

<sup>2</sup> See Minou Arjamand, *Staged. Show Trials, Political Theatre and the Aesthetics of Judgement*.

<sup>3</sup> A recent overview of many documentary (but also non-documentary) art projects connected to the US carceral system is Nicole Fleetwood's *Marking Time. Art in the Age of Mass Incarceration*.

<sup>4</sup> See on this question the introduction by Aline Cailliet and Frédéric Pouillaude to their edited volume *Un art documentaire*, Rennes: Presses universitaires de Rennes, 2017.

<sup>5</sup> In his recent work *Représentations factuelles*, Frédéric Pouillaude identifies the central and defining element of contemporary documentary works as "factual representations", which rely on one or more of the following techniques: recording (audio or visual), witnessing, and the document, and affirm in each case an especially tight *correspondence* between the representation and external reality. See chapter III in particular. Marie-Jeanne Zenatti emphasizes that the attestation of referential accuracy occurs on both an explicit level, usually in the peritextual and on an implicit, formal plane (81).

<sup>6</sup> This has been established by many critics, from Marjorie Perloff in *Unoriginal Genius*, which deals with citational practices in art in general, Patrick Greaney, in *Quotational Practices: Repeating the Future in Contemporary Art*, and, more recently by Aline Cailliet and Frédéric Pouillaude in *Un art documentaire*, and in a position Pouillaude develops in his recent work *Représentations factuelles*, in particular ch. VI.

<sup>7</sup> This is what Minou Arjamand notes about her reaction to Anna Daevere Smith's play *Notes from the field* (2015): Smith's play asked her to react to the individual testimonies staged not primarily as aesthetic objects but on an ethical and political plane. See *Staged*, Conclusion.

<sup>8</sup> Most notably in *Styles* (2016), see the introduction, p. 14 in particular. This principle is reinforced in her later works such as *Sidérer, considérer* (2017).

<sup>9</sup> "pour être politiquement juste, il faut être esthétiquement juste" (my translation). See Dominique Païni, curator of the Wang Bing exhibition at the Parisian art space *Le Bal*, quoted in Barbara Marty, "Wang Bing. La face cachée de la Chine", *France Culture*, <https://www.franceculture.fr/cinema/wang-bing-filme-la-face-cachee-de-la-chine>, published 21 June 2021, consulted 13 July 2021.

<sup>10</sup> See in particular Françoise Lavocat, *Fait et fiction. Pour une frontière*.

<sup>11</sup> Carole Talon-Hugon's argument is based on an institutional definition of knowledge and a relatively conservative definition of aesthetics as linked to beauty. Indeed, she argues that as documentary art fails to meet the methodological criteria of the institutionalized social sciences, it therefore fails to fulfil its epistemic or epistemological promise, thereby risking undermining or even negating the social sciences with which it, she claims, competes. She also claims that documentary art fares no better on the aesthetic front, its institutional recognition notwithstanding, as such recognition is only a further sign of the lamentable "de-artification" of art. Failing to meet the criteria of art or of science, the critical power of the work is eroded, as it becomes simple didactics in the service of activist causes.

<sup>12</sup> Mark Nash (2008) discusses this feature of documentary aesthetics, referring back to Jakobson, who argued in 1921 that "avant-gardes were forever breaking with the established codes of realism—to which the conservatives held as a rule—in the name of a greater realism which their art provided." Amongst many possible examples of this now common-place feature of avant-garde literary manifestos, see Alain Robbe-Grillet's opening to the essay "Du réalisme à la réalité" in his manifesto for the New

Novel, *Pour un nouveau roman*, or, more recently, the opening passage of David Shields' *Reality Hunger*.

<sup>13</sup> The distinction of aesthetics and literature as separate fields of study usually dates back to the late 18<sup>th</sup> and early 19<sup>th</sup> century in Europe, under the influence of the Romantics.

<sup>14</sup> See in particular *Zinky Boys: Soviet Voices from a Forgotten War* and *Chernobyl Prayer*.

<sup>15</sup> Gaëlle Théval explicitly explores the link between Duchamp's ready-mades and the techniques employed in documentary poetry over the twentieth and twenty-first centuries. Marie-Jeanne Zennatti has also studied the links between practices of appropriation in the visual arts and practices which emerge in documentary works (291-329), which, however she defines in a much broader sense than the one used here, including much discursive non-fiction and autobiographical works not discussed here.

<sup>16</sup> I have analysed this in more detail in "Echoing Last Words", *Textual Practice*, vol. 33, n° 9, pp. 1555-1576, published online on 06 April, 2018.

<sup>17</sup> See Toth, see also Greaney 2014b.

<sup>18</sup> Leona Toker emphasises the importance of attestation of reality in the contract drawn up by testimonial literature, be it modeled on the court deposition or otherwise.

<sup>19</sup> A notion which she adopts from the work of the Forensic Architecture institute, Goldsmiths, London University, discussed further below.

<sup>20</sup> This is a common distinction made by both legal theorists and philosophers, but also writers in their attempts to articulate calls for justice. See, for a recent example, Paul Audi, *Réclamer justice*. See Rainer Maria Keislow's discussion of Paul Audi's *Réclamer Justice*. In "Le Spectre du juste," Keislow defends a form of legal positivism, suspicious of all attempts to fuse legal practice with an ideal of justice, necessarily understood as universal and abstract, given the propensity of such an ideal to be bent to ideological ends, and seeks to set notions of ideal justice aside from debates concerning the decisions of the law. Note that is it possible to state a distance between the law's application and ideals of justice without considering the content of these ideals to be abstract and universal, but rather as a culturally and historically situated production. Therefore this distinction still seems to be useful, so long as one takes into consideration the historically bound nature of conceptions of justice, understood as the product of a given society, rather than as a universal, abstract ideal.

<sup>21</sup> Recently selected as one of World Literature Today's 21 books for the 21<sup>st</sup> century.

<sup>22</sup> See Nicole Fleetwood, *Marking Time. Art in the Age of Mass Incarceration*.

<sup>23</sup> See, for a synthetic overview of this position, Austin Sarat, Catherine O. Frank and Matthew Anderson's introduction to *Teaching Law and Literature*

<sup>24</sup> See the institute's website: <https://forensic-architecture.org>. See also the publication *Forensis. The Architecture of Public Truth*, published online by the institute and freely available: <https://content.forensic-architecture.org/wp-content/uploads/2019/05/Forensis-interior-FINAL.pdf> Accessed 25 June 2021.

<sup>25</sup> This point is made by Liora Israel in her discussion of the mobilization of the law within social movements of contestation.

<sup>26</sup> See Frank Leibovici and Julien Serroussi's "Licence esthétique" seminar at the Université Paris Nanterre, 20 May 2021. Recording available here: <https://crea.parisnanterre.fr/seminaire-licence-esthetique-bogoro-livre-et-muzungu-exposition-rencontre-avec-franck-leibovici-et-julien-serroussi-1009726.kjsp?RH=1540646851180&RF=1455273055373> Accessed 25 June 2021.

<sup>27</sup> See "Race, Rape and the Death Penalty," The Death Penalty Information Centre, <https://deathpenaltyinfo.org/policy-issues/race/race-rape-and-the-death-penalty>, Accessed 25 June 2021.

<sup>28</sup> This is part of Vanessa Place's broader interest in the social construction of guilt and the possibility of measuring a society's level of justice according to how it treats "its most despicable members" (dust jacket blurb, Vanessa Place, *The Guilt Project. Rape, Morality and the Law*).

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