

# SAVING HUMAN RIGHTS FROM ITS FRIENDS: A CRITIQUE OF THE IMAGINARY JUSTICE OF COSTAS DOUZINAS

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[Costas Douzinas has argued that human rights arise from a universal but unconscious need for recognition of oneself by others as unique and whole. According to Douzinas, humans' activities and interrelationships are determined by their desires and human rights are a manifestation of those same deep characteristics. Because the basic desires are by their nature incapable of being satisfied, the aspiration for human rights is likewise doomed to frustration. Douzinas' analysis of human nature is derived from a reading of Jacques Lacan's theory of psychoanalysis in which an imaginary and a symbolic realm of experience are defined. Douzinas attempts a synthesis between the Lacanian imaginary and the ethical arguments of Emmanuel Levinas. It will be argued here that the synthesis proposed by Douzinas is itself doomed to failure and that Douzinas' negative approach to human rights and to justice should be rejected in favour of a positive approach.]

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## I INTRODUCTION

Human rights, while variously defined, are widely held to be under threat. They are under threat concretely from oppressive regimes, complacent or short-sighted governments and multinational corporations around the world.<sup>1</sup> They are under threat conceptually, both from the right and from the left.<sup>2</sup> They are under threat culturally, as a consequence of the recognition of cultures other than those out of which they first emerged.<sup>3</sup> The defence of human rights is as variegated as that manifold threat, and a diversity of friends would generally be welcome in the face of a diversity of enemies. But some friends are colloquially said to

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<sup>1</sup> Michael Head, "'Counter-Terrorism' Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights" (2002) 26 *Melbourne University Law Review* 666; Garth Nettheim, 'The International Law Context' in Nicolas Peterson and Will Sanders (eds), *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities* (1998) 196, 205; David Kinley and Sarah Joseph, 'Multinational Corporations and Human Rights: Questions about Their Relationship' (2002) 27 *Alternative Law Journal* 7.

<sup>2</sup> In the traditions of Burke and Marx, respectively, among others: Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (2000) 200; Tom Campbell, *The Left and Rights: A Conceptual Analysis of the Idea of Socialist Rights* (1983); Michael Freeman, *Human Rights* (2002) 172.

<sup>3</sup> Sonia Harris-Short, 'International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN *Convention on the Rights of the Child*' (2003) 25 *Human Rights Quarterly* 130.

obviate the need for enemies. It will be argued here that Costas Douzinas<sup>4</sup> is in effect such a friend. The purpose of this article is to subject Douzinas' redefinition of human rights to scrutiny and to give consideration to some consequent issues. Rather than contributing to the 'reconstruct[ion of] legal theory for a new world of cultural pluralism, intellectual openness and ethical awareness,'<sup>5</sup> the impact of Douzinas' writings on human rights is a negative one.

Although there is much that is stimulating in Douzinas' approach, it will be argued that the grounds on which Douzinas bases his analysis are repugnant to a democratic<sup>6</sup> and justice-based orientation to human rights. This conclusion may seem surprising, since Douzinas has argued for an approach to human rights that bases human rights on an ethics, and specifically on the prioritisation of other persons. In Douzinas' words, 'the right of the other always and already precedes mine.'<sup>7</sup> Thus, human rights involve a 'loving turn to the suffering and unique other that bestows on the individual her own singularity.'<sup>8</sup> It will be suggested here that Douzinas fails to make good on his promise to articulate an approach to human rights that fulfils these desiderata. This failure, it will be argued, arises from Douzinas' reliance on claims concerning the motivational foundation of rights in the individual. These claims are derived from psychological (more specifically, psychoanalytic) theorising.

Most significantly, Douzinas appeals to the writings of French psychoanalyst Jacques Lacan in developing an account of that other to whose voice we are urged to attend. Douzinas' account is also influenced by the writings of the philosopher and theologian Emmanuel Levinas. In view of the unfamiliarity of these authors to most students and practitioners of law in the English-speaking world, it is not surprising if Douzinas' approach seems hard to grasp and to evaluate. Although the issues with which Douzinas is dealing are undoubtedly of importance, the judgment that will be reached here, following a consideration of Douzinas' claims, will be a rather severe one.

It will be argued here that the conception of human rights that Douzinas advocates has troublesome consequences. It defines the other<sup>9</sup> in ways that presup-

<sup>4</sup> Costas Douzinas, 'Prosopeon and Antiprosopeon: Prolegomena for a Legal Iconology' in Costas Douzinas and Lynda Neade (eds), *Law and the Image: The Authority of Art and the Aesthetics of Law* (1999) 36; Costas Douzinas, 'Human Rights and Postmodern Utopia' (2000) 11 *Law and Critique* 219; Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (2000); Costas Douzinas, 'The End(s) of Human Rights' (2002) 26 *Melbourne University Law Review* 445; Costas Douzinas and Ronnie Warrington, 'Antigone's Law: A Genealogy of Jurisprudence' in Costas Douzinas, Peter Goodrich and Yifat Hachamovitch (eds), *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent* (1994) 187.

<sup>5</sup> Douzinas, *The End of Human Rights*, above n 4, vii.

<sup>6</sup> On democracy, see David Jacobson and Galya Benarieh Ruffer, 'Courts across Borders: The Implications of Judicial Agency for Human Rights and Democracy' (2003) 25 *Human Rights Quarterly* 74.

<sup>7</sup> Douzinas, 'The End(s) of Human Rights', above n 4, 465. Similarly, justice is said to recognise the 'embedded voice of the litigant, when it gives the other in her concrete materiality a *locus standi* or place of enunciation': Peter Goodrich, Costas Douzinas and Yifat Hachamovitch, 'Introduction' in Costas Douzinas, Peter Goodrich and Yifat Hachamovitch (eds), *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent* (1994) 1, 24.

<sup>8</sup> Douzinas and Warrington, above n 4, 221.

<sup>9</sup> Distinctions in meaning are sometimes made in relation to the term 'other', with particular senses coded by capitalisation. Thus, for Douzinas, rights give 'formal shape to people's desire

pose certain generic desires and ‘lacks’<sup>10</sup> in those others, as well as in oneself (‘the Other is as lacking as self’).<sup>11</sup> While claiming that others are to be treated as unique,<sup>12</sup> a uniform model of those others’ characteristics is presupposed. The model is derived from psychoanalytic thinking. Thus Douzinas’ account of human rights is founded on the assumed universality<sup>13</sup> of certain desires. These desires are *defined* as being incapable of satisfaction.<sup>14</sup> In Douzinas’ words:

The subject of rights tries incessantly to find the missing object that will ... turn her into a whole being ... The impossibility of fulfilling desire leads into ever increasing demands for recognition, and every acknowledgement of recognition leads into a spiralling escalation of further claims ... the promise of self-realisation becomes the impossible demand to be recognised by others as non-lacking.<sup>15</sup>

One reason for this impossibility of satisfaction of these desires, in Douzinas’ scheme, is their surrogate nature, for ‘[h]uman rights redirect desire from its primary object, the primal union with the (m)other ... into secondary and symbolic substitutes.’<sup>16</sup> The aspiration for human rights is thus a kind of sublimation, as in the classic Freudian account of artistic endeavour as an unconscious substitute for libidinal (erotic) goals.<sup>17</sup> Selected aspects of Douzinas’ psychoanalytic claims will be examined in more detail below, but at this point a key feature of his account should be stressed: human rights aspirations are misunderstood by those who express those aspirations. The aspirations or demands are said to be expressive of processes unknown to their bearers (but apparently accessible to the informed commentator).<sup>18</sup> Models of rights derived from psychoanalysis are not alone in denying veridical self-awareness in the litigant for rights<sup>19</sup> but the repudiation of actors’ own conscious experience, and of their expression of that experience, seems especially troublesome in a supposedly ethics-focused account.

for recognition by the Other: both the other person and the big Other, the law, language, the power structures and institutions, in a word, the symbolic order of the polity’: Douzinas, *The End of Human Rights*, above n 4, 312. Except in directly quoted text no such practice will be adopted here. On ‘Otherness’ in the context of the law, see Jenni Millbank, ‘Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia’ (2002) 26 *Melbourne University Law Review* 144.

<sup>10</sup> Douzinas, ‘The End(s) of Human Rights’, above n 4, 460; Douzinas, *The End of Human Rights*, above n 4, 330.

<sup>11</sup> Douzinas, *The End of Human Rights*, above n 4, 320.

<sup>12</sup> Douzinas, ‘The End(s) of Human Rights’, above n 4, 465.

<sup>13</sup> Douzinas, *The End of Human Rights*, above n 4, 337.

<sup>14</sup> Douzinas, ‘The End(s) of Human Rights’, above n 4, 460. Desire has been defined as ‘the unstoppable in pursuit of the unattainable’: Alain Pottage, ‘The Paternity of Law’ in Costas Douzinas, Peter Goodrich and Yifat Hachamovitch (eds), *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent* (1994) 147, 185.

<sup>15</sup> Douzinas, *The End of Human Rights*, above n 4, 321; Douzinas, ‘Human Rights and Postmodern Utopia’, above n 4, 229.

<sup>16</sup> Douzinas, *The End of Human Rights*, above n 4, 321.

<sup>17</sup> Sigmund Freud, ‘Three Essays on the Theory of Sexuality’ in Angela Richards (ed), *The Pelican Freud Library* (1977) vol 7, 31, 69.

<sup>18</sup> Douzinas, *The End of Human Rights*, above n 4, 320.

<sup>19</sup> Veridical self-awareness is also generally denied by Marxist approaches to rights: Allen Buchanan, *Marx and Justice* (1982) xii.

Some general aspects of this evaluation of Douzinas' account will be sympathetic<sup>20</sup> or neutral. Some of what Douzinas proposes is unexceptionable. Thus Douzinas observes that human rights must be conceptualised as integrally intersubjective<sup>21</sup> — that is, constituted in terms of relationships between people, not in terms of the absolute property of individuals. Further, many of Douzinas' preliminary arguments concerning human rights are shared by other writers and traditions and no attempt will be made to evaluate these general claims. Thus Douzinas shares with Critical Legal Studies<sup>22</sup> and with feminist critique of law the claim that human rights are based on a bourgeois, individualistic or otherwise partial worldview.<sup>23</sup> Douzinas shares with positivist critics from Bentham onwards the view that human rights are as such an unlimited and unprincipled collection of empty entitlements<sup>24</sup> and hence constitute only superficial progress. Douzinas shares with critics such as Stanley Fish the position that words used in legal contexts are mere signifiers with no more than transient and conventional connections to shared reality.<sup>25</sup> Douzinas' view that advances in human rights encourage a fragmented attitude to human existence, rather than a recognition of whole and integrated personalities,<sup>26</sup> might be said to constitute a general humanistic perspective.

With this eclectic and possibly unstable combination of arguments, Douzinas apparently disposes of human rights in the sense generally understood, leaving the term empty of content. Yet Douzinas presents himself as a defender of human

<sup>20</sup> Thus it is not part of this article's objectives to impugn the general critical traditions — psychoanalysis, phenomenology, postmodernism — to which Douzinas appeals nor to deny the relevance of those traditions for legal studies. It is Douzinas' particular appropriation of his sources of ideas that is subjected to criticism here.

<sup>21</sup> Douzinas, 'The End(s) of Human Rights', above n 4, 463.

<sup>22</sup> The subtitle of Douzinas' *The End of Human Rights* is 'Critical Legal Thought at the Turn of the Century'.

<sup>23</sup> For Douzinas, the liberal worldview portrays an 'atomocentric' world of social contracts: Douzinas, 'The End(s) of Human Rights', above n 4, 447. See also V Spike Peterson and Laura Parisi, 'Are Women Human?' in Tony Evans (ed), *Human Rights Fifty Years On: A Reappraisal* (1998) 132; Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law* (2000) 208; Fiona Robinson, 'The Limits of a Rights-Based Approach to International Ethics' in Tony Evans (ed), *Human Rights Fifty Years On: A Reappraisal* 58, 72.

<sup>24</sup> For Douzinas, anything can become the object of a human right: Douzinas, 'The End(s) of Human Rights', above n 4, 456, 463. For Bentham's sceptical approach to rights, see Jeremy Bentham, 'Anarchical Fallacies, Being an Examination of the Declaration of Rights Issued during the French Revolution' in Jeremy Waldron (ed), *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (1987) 46, 69; David Lyons, 'Utility and Rights' in Gerald Postema (ed), *Bentham: Moral, Political, and Legal Philosophy* (2002) vol 1, 313, 341. However, Douzinas would reject legal positivism; the 'postmodern jurisprudence' he advocates is posited on a collapse of 'beliefs in a positivized and closed world of abstract legal rules': Goodrich, Douzinas and Hachamovitch, above n 7, 2. It is to be presumed that Douzinas would still adhere to these co-written remarks despite his subsequent criticism of erstwhile colleague, Goodrich (Douzinas, 'Human Rights and Postmodern Utopia', above n 4, 227).

<sup>25</sup> 'Rights ... are pure combinations of legal and linguistic signs': Douzinas, 'The End(s) of Human Rights', above n 4, 456. For Fish, words have no fixed meanings: Stanley Fish, 'The Law Wishes to Have a Formal Existence' in H Aram Veesser (ed), *The Stanley Fish Reader* (1999) 165, 171.

<sup>26</sup> For Douzinas, even where human rights seem to have been successfully established, they give rise to a 'sense of disjointedness of self': Douzinas, 'The End(s) of Human Rights', above n 4, 461. Similarly, 'no right can earn me the full recognition and love of the other and no Bill of Rights can complete the struggle for a just society': Douzinas, *The End of Human Rights*, above n 4, 318.

rights, conceived ethically. Consistent with this orientation, Douzinas' approach is affiliated with the tradition of Natural Law.<sup>27</sup> While wary of 'metaphysical' formulations, Douzinas insists that transcendent or otherwise general features of a moral kind must be recognised in relation to human rights.<sup>28</sup> Thus legislated rights as such can never suffice.<sup>29</sup> While it is a commonplace that the notion of human rights derives historically from Natural Law sources, Douzinas' substantive defence of the continuing relevance of that tradition is noteworthy. One way of framing Douzinas' project is thus as a *psychoanalytic naturalisation* of human rights. Psychoanalytic theory is not hostile toward naturalistic (biological) explanation in general,<sup>30</sup> and the psychoanalytic emphasis (perpetuated by Douzinas) on mothers, fathers and siblings assists the endeavour. Douzinas, it is true, finds psychoanalytic theory not entirely adequate to his needs. He feels it necessary to replace the 'self-centred'<sup>31</sup> ethics of psychoanalysis with the other-centred ethics of Emmanuel Levinas. However Douzinas' reservations are relatively minor, in the context of his continuing allegiance to psychoanalysis as a general explanatory framework for human motivation and experience.<sup>32</sup> In contrast, Levinas has rejected the 'ambiguous discourse' of psychoanalysis.<sup>33</sup> Even if Douzinas' employment of psychoanalytic thinking were satisfactory, his attempt to forge a synthesis with the work of Levinas would be problematic.

Because of the central place of Lacan in Douzinas' argument, this article will briefly outline relevant aspects of Lacanian theory. Some comments on Levinas will then be made. A critical overview of Douzinas' proposals, including the appropriation of Lacan and Levinas, follows. In conclusion, it will be suggested that Douzinas' account is a negative one<sup>34</sup> and it will be argued that a positive approach to human rights is to be preferred.<sup>35</sup> It may be that Douzinas' demonstration of the futility of the lack-focused approach to human rights may assist that positive project.

<sup>27</sup> John Finnis, *Natural Law and Natural Rights* (1980) 198; Douzinas, *The End of Human Rights*, above n 4, 376. Douzinas' Natural Law commitment is, however, inconsistent with his points on the conventionality of rights: Douzinas, 'The End(s) of Human Rights', above n 4, 456.

<sup>28</sup> Douzinas, *The End of Human Rights*, above n 4, 344, 347.

<sup>29</sup> Douzinas, 'The End(s) of Human Rights', above n 4, 459. It has been observed that Douzinas 'glosses over the ways in which human rights confer a genuine further layer of legal entitlement upon individual citizens that may empower them against governments': Brendan Edgeworth, *Law, Modernity, Postmodernity: Legal Change in the Contracting State* (2003) 246.

<sup>30</sup> John Morss, *The Biologising of Childhood: Developmental Psychology and the Darwinian Myth* (1990) 47; Frank Sulloway, *Freud, Biologist of the Mind: Beyond the Psychoanalytic Legend* (1979). Douzinas concurs with Freud that prohibitions on incest and parricide constitute a "naturalistic" kernel of all legality': Douzinas, *The End of Human Rights*, above n 4, 317.

<sup>31</sup> Douzinas, *The End of Human Rights*, above n 4, 379.

<sup>32</sup> Douzinas, 'The End(s) of Human Rights', above n 4, 456; Douzinas, *The End of Human Rights*, above n 4, 298.

<sup>33</sup> Emmanuel Levinas, 'The Ego and the Totality' in Emmanuel Levinas, *Collected Philosophical Papers* (Alphonso Lingis trans, 1987 ed) 25, 42. Similarly, 'I am definitely not a Freudian': Emmanuel Levinas, 'Philosophy, Justice, and Love' in Emmanuel Levinas, *Entre Nous: Thinking-of-the-Other* (Michael Smith and Barbara Harshav trans, 1968 ed) 103, 113 [trans of: *Entre Nous: Essais sur le Penser-à-l'Autre*].

<sup>34</sup> Douzinas, *The End of Human Rights*, above n 4, 380.

<sup>35</sup> Emmanuel Levinas, 'The Rights of Man and Good Will' in Obrad Savić (ed), *The Politics of Human Rights* (1999) 46, 48.

## II LACAN, LEVINAS AND LAW: IMAGINING THE OTHER

According to Douzinas, humans' activities and interrelationships are determined by their desires, and human rights arise as a manifestation or consequence of those same deep characteristics. Because human rights are constituted in this way, and not determined in some voluntary and conscious fashion, Douzinas suggests, humans do not construct human rights but rather human rights 'construct humans.'<sup>36</sup> The analysis of human nature is derived from a reading of Lacanian theory,<sup>37</sup> which in turn derives from Freud. Freud's writings include a variety of claims concerning the basis for, and the nature of, human morality and law.<sup>38</sup> Freud's approach emphasised the role of the father (especially as perceived and experienced by other family members) in transmitting a morality-based code of conduct down through the generations. The 'Oedipus complex' was for Freud a collection of processes that involve the son taking on board the father's stern and principled moral outlook, thus recognising that he cannot challenge his father's authority.<sup>39</sup>

Jacques Lacan,<sup>40</sup> the French Freudian psychoanalyst, revised Freud's account of human subjectivity in ways strongly influenced by structuralist linguistics and anthropology.<sup>41</sup> From these disciplines he derived a style of formal analysis that emphasised the role of sign systems. Thus Lacan focused on the way that systems of signs depend for their effect on the interrelationships of those signs, rather than on the connections between individual signs and their referents.<sup>42</sup> Systems of signs, such as language systems, may be thought of as pre-existing the person who employs them and whose experience they dominate. The grammatical correctness or otherwise of an utterance one makes may be said to be determined by the system, not by oneself. Lacan thus stressed the law-like effect of the impersonal meaning systems which the mature human person comes to inhabit. Being human — that is, a creature that uses language — can be said to involve one in accepting the objective adjudication of an external process.

Lacan attempted to reconstruct a developmental process by which the child comes to accept its subordinate place in impersonal systems of meaning. He rejected the liberal view that an autonomous self confronts such external

<sup>36</sup> Douzinas, 'The End(s) of Human Rights', above n 4, 457.

<sup>37</sup> Douzinas, *The End of Human Rights*, above n 4, 305.

<sup>38</sup> *Ibid* 298.

<sup>39</sup> Sigmund Freud, 'The Dissolution of the Oedipus Complex' in Sigmund Freud, 'Three Essays on the Theory of Sexuality' in Angela Richards (ed), *The Pelican Freud Library* (1977) vol 7, 313; Morss, *The Biologising of Childhood*, above n 30, 142; Pottage, above n 14, 167.

<sup>40</sup> Jacques Lacan, *Écrits: A Selection* (Alan Sheridan trans, 1977 ed) [trans of: *Écrits*]. See also Pottage, above n 14; Douzinas, *The End of Human Rights*, above n 4, 301.

<sup>41</sup> Jacques Lacan, *The Language of the Self: The Function of Language in Psychoanalysis* (Anthony Wilden trans, 1968 ed) 48 [trans of: 'Fonction et Champ de la Parole et du Langage en Psychoanalyse' in *La Psychoanalyse*, vol 1]; Pottage, above n 14, 159, 185; Stephen Rebikoff, 'Copyright Infringement of Literary and Dramatic Plots' (2001) 25 *Melbourne University Law Review* 340, 361.

<sup>42</sup> The focus on sign systems gives rise to a formal, almost algebraic style. The algebraic style of description was authorised by Freud: 'Renunciation of the penis is not tolerated by the girl without some attempt at compensation. She slips — along the line of a symbolic equation, one might say — from the penis to a baby': Freud, 'The Dissolution of the Oedipus Complex', above n 39, 321.

systems, arguing that the self is constituted by those very systems. Lacan proposed that the child moves during infancy through a series of phases in relation to experience of the self and of others.<sup>43</sup> Most significantly, its experience moves from an ‘imaginary’ basis to a ‘symbolic’ basis. The first phase to provide any coherence at all is one in which one’s sense of self has the kind of fragile coherence of an image seen in a mirror. Fragility in this imaginary phase refers both to the vulnerability of the process of reflection itself (the surface of a pool may be disturbed or a physical mirror broken) and also to the vulnerability of the child in placing trust in such transient and perceptual effects as its reflected image. For the self of which one has indirect knowledge through this process of reflection appears superior to the clumsy and uncoordinated bundle of affects and movements (one’s own body) of which one has some direct experience. The imaginary self is in some sense an ideal self, possessing a coherence and an autonomy to which one may aspire, or which one may impersonate, but with which one can never truly identify. The imaginary self is an impossible, infantile dream: a ‘fantasized realm of wholeness and plenitude.’<sup>44</sup>

In the ‘mirror stage’ of early childhood, before fully entering language as a participant, the self is thus built on a massive self-deception, an overvaluation resulting from the reflection process. The Lacanian imaginary is no golden age of childhood innocence, but a dark realm of escalating self-deceit. Moreover, the Lacanian imaginary is unstable. Remaining in it for an individual would be to court psychosis. Escaping from it is, however, at great cost, for entering the symbolic realm involves submission to an inexorable external system or frame of reference. Like Freud’s Oedipus complex, of which it is Lacan’s version, this process is therefore characterised by something like an admission of subordination or defeat. For both Freud and Lacan, the admission of defeat can be represented by castration.<sup>45</sup>

For Lacan, the external structured realm to which the subject submits is, in effect, the law — embodied in the ‘name of the father.’<sup>46</sup> At the same time this realm is language, thought of as an external structure. It is through submission to the law and to language that the human subject is constituted. That is to say, the subject does not exist prior to its submission.<sup>47</sup> For Lacan, then, the user of

<sup>43</sup> Lacan, *The Language of the Self*, above n 41, 12; Jacques Lacan, *The Seminar of Jacques Lacan Book I: Freud’s Papers on Technique 1953–1954* (John Forrester trans, 1988 ed) 146 [trans of: *Le Séminaire I*]; Pottage, above n 14, 156; John Morss, *Growing Critical: Alternatives to Developmental Psychology* (1996) 105.

<sup>44</sup> Anthony Elliott, *Psychoanalytical Theory: An Introduction* (1994) 94.

<sup>45</sup> Morss, *Growing Critical*, above n 43, 109.

<sup>46</sup> ‘It is in the *name of the father* that we must recognize the support of the Symbolic function which, from the dawn of history, has identified his person with the figure of the law’: Lacan, *The Language of the Self*, above n 41, 41 (emphasis in original). It should be noted that Douzinas distances himself from Lacan’s identification of the task of psychoanalysis as being to defend or strengthen the law-giving role of the father: Douzinas, *The End of Human Rights*, above n 4, 327.

<sup>47</sup> Lacan, *The Seminar of Jacques Lacan*, above n 43, 86. Structuralist and Marxist Louis Althusser likewise referred to the ‘hailing’ of the subject by the system or structure. See John Lechte, *Fifty Key Contemporary Thinkers: From Structuralism to Postmodernity* (1994) 40. Althusser was, like Lacan, an important critic of humanist claims in relation to subjectivity: Douzinas, ‘The End(s) of Human Rights’, above n 4, 455. Lacan’s position thus rejects the humanist approach to

language — the self that can enunciate, can refer to itself as ‘I’ — is a subject that submits. One might say that the Lacanian adult subject is a plaintiff, speaking (and being heard) only in appealing to some large and external system. Outside of the court (as it were) it is nothing. At best it is a loose collection of transient fragments of a self. It is thus in the symbolic phase that Lacan discerns the major nexus of the self and the law. These issues will not be discussed further here since Douzinas’ attention is focused on the imaginary phase in Lacan’s account.<sup>48</sup>

Lacan’s intellectual influences were many and varied, and included European traditions of phenomenology originating with Hegel.<sup>49</sup> The phenomenological tradition<sup>50</sup> was developed in the 20th century by Husserl and Heidegger, and subsequently by Levinas among others. Heidegger, in particular, focused on the relationship between language and being.<sup>51</sup> Care for physical objects in the world, and for other people, was a continuing concern for Heidegger but it was Levinas who focused most precisely on ethical processes as the heart of philosophical discourse. Levinas’ project involved the attempt to articulate obligation toward other people as the sole basis for ethical action and for knowledge of the world.<sup>52</sup> Levinas focused on the ways in which another person must be at the same time recognised as different to oneself and yet as deserving of one’s care.

For Levinas, both limbs of this process are problematic and their conjunction extraordinarily challenging. For the acceptance of responsibility for another person might seem to depend on a prior recognition of that person as *similar* to oneself, despite any appearances to the contrary.<sup>53</sup> Reciprocity as a basis for ethical action depends on some measure of communality. For Levinas, ethical responsibility does not depend on kinship with the other but arises, in precise contrast, from the ‘otherness’ of the other person. Its basis is not mutuality or reciprocity but the very absence of these comforting expectations. Indeed, expectations as such are for Levinas the denial of duty in that any expectation compromises one’s openness to the other. Levinas observes that, under most philosophical systems, people’s comprehension of other people is said to occur

the subject according to which the subject pre-exists social processes of recognition and definition.

<sup>48</sup> Douzinas seems at times to conflate or confuse Lacan’s mirror stage with castration and the entry into the symbolic: Douzinas, ‘Human Rights and Postmodern Utopia’, above n 4, 233; Douzinas, *The End of Human Rights*, above n 4, 335. See also Elliott, above n 44, 97; Jeanne Schroeder, *The Vestal and the Fasces: Hegel, Lacan, Property, and the Feminine* (1998) 72.

<sup>49</sup> Lacan, *The Language of the Self*, above n 41, 46; Douzinas, *The End of Human Rights*, above n 4, 264, 302; Elizabeth Grosz, *Space, Time, and Perversion: The Politics of Bodies* (1995) 176.

<sup>50</sup> Phenomenology has been described as ‘the methodical analysis of lived experience from which can be derived the necessary and universal truths of all experience’: Seán Hand, ‘Introduction’ in Seán Hand (ed), *The Levinas Reader* (1989) 1, 2.

<sup>51</sup> Douzinas, ‘The End(s) of Human Rights’, above n 4, 464.

<sup>52</sup> Seán Hand, ‘Introduction’, above n 50; Emmanuel Levinas, *Time and the Other* (Richard Cohen trans, 1987 ed) [trans of: *Le Temps et l’Autre*]; Emmanuel Levinas, *Existence and Existents*, (Alphonso Lingis trans, 1995 ed) [trans of: *De l’existence à existant*]; Levinas, ‘The Rights of Man and Good Will’, above n 35, 46.

<sup>53</sup> Levinas was a theologian as well as a philosopher and the biblical issues of defining who is one’s neighbour, and what obligations one has towards such a neighbour, are very salient to his project.



in cognitive terms.<sup>54</sup> That is to say, other people are fitted into a person's broader understanding of the world. It may be that this cognitive assimilation of people is significantly different from the cognitive assimilation of physical objects or even of non-human animals, but the very process of assimilation reduces the recognition of difference. Other people are in effect recognised as similar to oneself even if only as of the same species. Previous phenomenological philosophies, such as those of Hegel, Heidegger or Sartre,<sup>55</sup> present an egocentric approach emphasising the autonomy of the thinking subject.<sup>56</sup> In contrast, Levinas' aim was to articulate the radical difference from oneself that he believed to be manifested by the other. Autonomy, and the associated senses of personal freedom, are for Levinas secondary matters. Ethics precedes autonomy as well as ontology.

Levinas thus constructed a philosophy on the basis of the obligations toward the other.<sup>57</sup> He carefully distinguished the asymmetrical relationship between self and other, required under his approach,<sup>58</sup> from the various alternative descriptions of social interaction already available. The relationship he discerned is not one of mere reciprocity or shared membership of a community.<sup>59</sup> For Levinas, the other is not 'alongside' or 'with' oneself, but 'in front of': it is the face of the other that most forcibly demands our attention and requires our accountability.<sup>60</sup> There is a profound heterogeneity as between self and other.<sup>61</sup> The demand made by the other gives rise to something akin to stewardship or to the hospitality obligation<sup>62</sup> — truly I am my other's keeper. I am commanded 'to not let the Other die alone, that is, to answer for the life of the other person'.<sup>63</sup> I fear for the other.<sup>64</sup> For Levinas, justice is integrally related to these formulations. Thus, '[f]or me to catch sight of the possibility of justice ... someone must

<sup>54</sup> Emmanuel Levinas, 'Philosophy and the Idea of Infinity' in Emmanuel Levinas, *Collected Philosophical Papers* (Alphonso Lingis trans, 1987 ed) 56; Levinas, 'Philosophy, Justice, and Love', above n 33, 116.

<sup>55</sup> Emmanuel Levinas, 'Phenomenon and Enigma' in Emmanuel Levinas, *Collected Philosophical Papers* (Alphonso Lingis trans, 1987 ed) 102; Emmanuel Levinas, 'Existence and Ethics' in Jonathan Rée and Jane Chamberlain (eds), *Kierkegaard: A Critical Reader* (1998) 28.

<sup>56</sup> Levinas, 'Philosophy and the Idea of Infinity', above n 54, 48; Levinas, 'Existence and Ethics', above n 55, 28. Philosophy should be 'concerned with the absolutely other; it would be heteronomy itself': Levinas, 'Philosophy and the Idea of Infinity', above n 54, 47. See also below n 108.

<sup>57</sup> '[R]esponsibility is anterior to deliberation': Emmanuel Levinas, 'Diachrony and Representation' in Emmanuel Levinas, *Time and the Other* (Richard Cohen trans, 1987 ed) 111 [trans of: *Diachronie et représentation*]. Thus, for Levinas, subjectivity can only arise in responsibility for the other: Levinas, 'Existence and Ethics', above n 55, 32. Similarly, the concept of time could not arise in a solitary subject: Levinas, *Existence and Existents*, above n 52, 93.

<sup>58</sup> Levinas, *Existence and Existents*, above n 52, 95.

<sup>59</sup> Levinas, *Time and the Other*, above n 52, 83; Levinas, *Existence and Existents*, above n 52, 94. There is an 'asymmetry of intersubjectivity': Levinas, 'Philosophy, Justice, and Love', above n 33, 105.

<sup>60</sup> Levinas, 'Philosophy, Justice, and Love', above n 33, 116.

<sup>61</sup> Levinas, *Existence and Existents*, above n 52, 96.

<sup>62</sup> Levinas, 'Existence and Ethics', above n 55, 35; Jacques Derrida, *Of Hospitality: Anne Dufourmantelle Invites Jacques Derrida to Respond* (Rachel Bowlby trans, 2000 ed) [trans of: *De l'Hospitalité: Anne Dufourmantelle Invite Jacques Derrida à Répondre*].

<sup>63</sup> Levinas, 'Diachrony and Representation', above n 57, 109.

<sup>64</sup> Levinas, 'Philosophy, Justice, and Love', above n 33, 117.

call me to account.<sup>65</sup> Similarly, ‘this not-being-able-to-stand-apart ... is ... precisely a *doing justice* to the difference of the other person’.<sup>66</sup>

Lacan and Levinas differ on a variety of issues relevant to Douzinas’ project. Lacan’s sense of ‘other’ is either (in the imaginary realm) a distorted version of oneself or (in the symbolic realm) an objective and detached rule-giving system. Neither sense corresponds to that of Levinas. Indeed the Lacanian senses of ‘other’ might both be thought of as representing extreme opposites to Levinas’ sense. Moreover, Levinas dismisses psychoanalysis<sup>67</sup> and disdains its ‘petrifying’ employment of classical myth.<sup>68</sup> His account is not based on traditional family relationships as in psychoanalytic argument. Further, where Lacan’s approach is based on a presupposition of lack in the self, Levinas’ begins with a series of positive demands: the claims of the other on me. Douzinas’ amalgamation of Lacan and Levinas is necessarily unstable.

### III DOUZINAS’ SOCIAL IMAGINARY OF HUMAN RIGHTS

Against this background of Lacan’s and Levinas’ writings, it is now possible to evaluate Douzinas’ more precise claims. In brief, for Douzinas, the psychological processes described by Lacan in relation to the imaginary phase can be read in social terms and can then be synthesised with Levinas’ account of the primacy of the unique other. Douzinas thus articulates a ‘social imaginary’ as constituting the dynamic origin for those demands and desires which we identify in terms of human rights.<sup>69</sup> Whereas for Lacan it is not until the imaginary phase has been transcended by the developing individual that social interaction is possible (especially as represented by speech), Douzinas maintains that communication reflects imaginary dynamics.<sup>70</sup> For Douzinas, a desire to be recognised by the other as whole and complete is central to any human rights aspiration.

<sup>65</sup> Levinas, ‘The Ego and the Totality’, above n 33, 40. Similarly, ‘[d]oes not justice consist in putting the obligations with regard to the other before obligations to oneself, in putting the other before the same?’: Levinas, ‘Philosophy and the Idea of Infinity’, above n 54, 53.

<sup>66</sup> Emmanuel Levinas, ‘Uniqueness’ in Emmanuel Levinas, *Entre Nous: Thinking-Of-The-Other*, (Michael B Smith and Barbara Harshav trans, 1968 ed) 189, 194 [trans of: *Entre Nous: Essais sur le Penser-à-l’autre*] (emphasis in original). At the same time Levinas recognised that the social arrangements of the city require, on a practical level, some compromise of the absolutely altruistic form of justice; ‘[t]hus justice, here, takes precedence over the taking upon oneself of the fate of the other ... As citizens we are reciprocal’: Levinas, ‘Philosophy, Justice, and Love’, above n 33, 104, 107.

<sup>67</sup> See above n 33 and accompanying text.

<sup>68</sup> Levinas, ‘The Ego and the Totality’, above n 33, 40. Levinas says of the ‘elementary fables’, such as the Oedipus complex, ‘that they have been collected from among the remnants of most diverse civilizations and called myths adds nothing to their worth as clarifying ideas’: at 40.

<sup>69</sup> Douzinas, *The End of Human Rights*, above n 4, 340.

<sup>70</sup> The continuing relevance of primitive processes in adult mental life is axiomatic for psychoanalytic theory, but the substance of the theoretical claims of Freud or Lacan relates to complex tensions *between* those primitive processes and processes that are said to emerge with maturity. For Douzinas, in contrast, the primitive processes — in Lacanian terms, the imaginary — seem to be considered sufficient for explanatory purposes. If, as suggested by Lechte, ‘the Imaginary is where the subject mis-recognises ... the nature of the symbolic’ then Douzinas’ focus is problematic: Lechte, above n 47, 68–9. Douzinas’ occasional references to a societally shared imaginary (‘as if societies have an imagination of wholeness’: Douzinas, *The End of Human Rights*, above n 4, 340) seem confused, especially in view of his insistence elsewhere that the explanatory value of psychoanalysis is at the level of the individual psyche: at 317.

Such a desire reflects the dynamics of the imaginary phase in that an illusory, idealised self is envisioned — an idealised self that can never be attained.

Douzinas' social imaginary may be an innovative development of Lacanian theory, in that he rejects Lacan's claim that social interaction and social experience presuppose a symbolic (systemic and rule-governed) mode of existence. At the same time, Douzinas chooses to remain within a Lacanian explanatory framework. Thus, social interaction, including the expression of human rights aspirations, is characterised in terms of the fantasy-based desires of the Lacanian mirror stage. The Lacanian imaginary mode, typified by the mirror phase, is perceptual and illusory and, for Douzinas, captures the future-oriented and utopian character of human rights aspirations. For Douzinas, an expressed demand for human rights in fact represents a desire for the recognition of one's wholeness and integrity and thus a desire for the 'imaginary projection of the ideal self'.<sup>71</sup> The imaginary realm supplies the utopian vision, on the basis of which the institutionalised systems of the status quo — including legal systems — may be challenged.<sup>72</sup> In effect, Douzinas threatens the symbolic world (of law) with the imaginary weapons of personal fantasy. The person who appears to express specific human rights aspirations by means of speech is not (for Douzinas) really *speaking* at all, but rather gesturing toward a glimpsed future possibility of personal wholeness.

Significantly, Douzinas insists on the universal validity of this account of the imaginary process.<sup>73</sup> Thus, '[t]his imaginary wholeness and existential uniqueness which defines our place in the world exists equally in Western individualistic societies and in traditional communities'.<sup>74</sup> This universalist claim is generally implicit in Lacanian as in Freudian theory<sup>75</sup> but, apart from its empirical difficulties, Douzinas' version represents a formidable obstacle for a prospective synthesis with Levinas. Levinas' emphasis on the radical uniqueness of the other is hard to square with what appears to be little more than a colonialist presumption.

One of the more striking ways in which Douzinas has sought to illustrate his reformulation of human rights is his reference to the myth of Antigone. In effect, Douzinas has attempted to replace Freud's Oedipus myth with the Antigone myth as a founding text for comprehending human nature. In the words of Douzinas and a collaborator:

*Oedipus Rex* and the myth of Oedipus have been recognised as key texts for the understanding of psyche and identity ... our claim is that *Antigone* is as important for the exploration of the origins and force of law and ethics as Freud believed Oedipus was for the foundations of psychoanalysis.<sup>76</sup>

<sup>71</sup> Douzinas, *The End of Human Rights*, above n 4, 336.

<sup>72</sup> *Ibid* 318.

<sup>73</sup> *Ibid* 337.

<sup>74</sup> *Ibid*.

<sup>75</sup> Pottage, above n 14, 159. Of course, psychoanalytic theory seeks to articulate individual differences against the background of such universal features.

<sup>76</sup> Douzinas and Warrington, above n 4, 189.

Antigone was Oedipus' daughter (and his half-sister since they also shared a mother), whose sense of family duty came into conflict with the law of the city of Thebes as personified by her uncle Creon. The conflict arose when she attempted to honour the body of her brother Polynices, killed in the course of his treasonable attack on Thebes.<sup>77</sup> In its classical account, Antigone's obligation to the deceased is said to have arisen from the sibling relationship per se — her child or her parent would not have deserved the same posthumous concern. Douzinas reads the story in Lacanian terms, finding in Antigone's feelings of obligation to her deceased brother a paradigm for imaginary desire. Correspondingly, in Antigone's resistance of the law of the state Douzinas finds a paradigm for the oppressive force of the symbolic. Further, Douzinas attempts to incorporate a Levinasian sense of ethics into the account. The story is thus said to represent in some universal manner the 'loving turn to the suffering and unique other'.<sup>78</sup>

But while Douzinas' appeal to Antigone is no more (if no less)<sup>79</sup> literal than Freud's appeal to Oedipus, the narrow definition of 'other' provided by the Antigone myth seems to undermine Douzinas' claim. It may be significant that Antigone's obligations to one of two deceased brothers takes precedence over her obligations to a living sister, Ismene, who declines to join Antigone's campaign.<sup>80</sup> Certainly, as Douzinas and Warrington indicate, an obligation to a dead person is unilateral, a 'gift with no return',<sup>81</sup> which in a sense fulfils Levinas' requirement of asymmetry in the ethical relationship. An obligation to a corpse is thus far removed from the pragmatic spirit of reciprocity repudiated by Levinas. The example seems however an extreme rather than a representative example of selfless obligation or even sacrifice.<sup>82</sup>

The asymmetry of Antigone's obligation points out a deficiency in Douzinas' version of Lacan as a basis for synthesis with Levinas. Douzinas focuses on the imaginary mode of experience of the other, in which our sense of the other derives from a distorted reflection of our own body. Without neglecting Lacan's point that there is no intrinsic sense of self prior to the awareness of the reflected version, the situation might be described as narcissistic<sup>83</sup> or at least individualistic. The other is an illusion. But Douzinas elsewhere insists on a deep reciprocity of self and other in which the other is as lacking as the self,<sup>84</sup> a point which

<sup>77</sup> Mark Morford and Robert Lenardon, *Classical Mythology* (5<sup>th</sup> ed, 1995) 333.

<sup>78</sup> Douzinas and Warrington, above n 4, 221.

<sup>79</sup> Douzinas offers a redescription of Freud's prehistoric scene of the killing of the father: Douzinas, *The End of Human Rights*, above n 4, 334; Morss, *The Biologising of Childhood*, above n 30, 141.

<sup>80</sup> Morford and Lenardon, above n 77, 333.

<sup>81</sup> Douzinas and Warrington, above n 4, 208.

<sup>82</sup> Douzinas, *The End of Human Rights*, above n 4, 327. Perhaps we should look to Nausicaa rather than to Antigone. The former courageously assisted a dangerous-looking shipwrecked boat-person (Odysseus): Homer, *The Odyssey* (E V Rieu trans, 1946 ed) 102.

<sup>83</sup> That is to say, unknowingly focused on oneself as if an other, failing to recognise the 'other' as no more than a reflection (or projection) of self: Pottage, above n 14, 157; Elliott, above n 44, 94. Consistent with this, Lacan describes the mirror-stage infant's 'anticipated seizure of mastery' (Lacan, *The Seminar of Jacques Lacan*, above n 43, 146), an unpromising basis for altruism.

<sup>84</sup> Douzinas, 'The End(s) of Human Rights', above n 4, 460.

would seem otiose if self and other are mere reflections. That is to say, Douzinas appears to be positing a genuine plurality of selves — selves for whom other selves are genuinely other.

This claim concerning empirical plurality of selves is consistent with Douzinas' claim that 'Western' and 'traditional' communities both foster desiring individuals. But it is based on reciprocity and communality as between the various entities, the very feature repudiated by Levinas. The tangle arises from Douzinas' doomed attempt to synthesise Levinas with Lacan. It demonstrates that a genuine recognition of plurality — presumably a prerequisite for a democratic attitude — is extremely difficult, if not impossible, in a Lacanian perspective. The claim that everyone is the same (develops the same way or has the same desires) should be treated with suspicion, not least because the credentials of a person making such a claim require scrutiny. The claimed omniscience is arguably a matter of attempted legislation — of laying down the law concerning human diversity.<sup>85</sup> To arrogate to oneself the position of representative of the person who demands rights<sup>86</sup> might be said to reduce that person to silence.

#### IV NEGATIVE AND POSITIVE SENSES OF HUMAN RIGHTS

Douzinas' approach to human rights is a negative one in several important respects.<sup>87</sup> Rights are no more than 'a compensation for the lack of wholeness'.<sup>88</sup> For Douzinas, human rights represent expressions of a lack that can never be made good. Apparent progress in the achievement of human rights is at best reducing the gap between actuality and the ideal, and in Lacanian theory that gap is so immense that any reduction can be little more than a pitiful reminder of that immensity. Moreover, for Douzinas, the accumulation of legalised rights within (Western) society may have the effect of taking people further away from their (unconscious) goals.<sup>89</sup> So the human rights programme becomes blighted by a kind of depression. The apparently paradoxical coexistence in recent times of massive atrocities and the worldwide recognition of human rights is treated as somehow inevitable.<sup>90</sup> This despairing attitude is consistent with the populist derogation of the efforts of governments and lawyers<sup>91</sup> and with apocalyptic pronouncements on the 'terrifying trauma at the heart of the social.'<sup>92</sup>

Numerous options are available for exploring positive articulations of human rights.<sup>93</sup> For example, the recognition that human rights claims are inevitably

<sup>85</sup> Douzinas, *The End of Human Rights*, above n 4, 325.

<sup>86</sup> *Ibid* 320.

<sup>87</sup> *Ibid* 368–9. It may well be that Douzinas outdoes Lacan in this respect.

<sup>88</sup> Douzinas, 'The End(s) of Human Rights', above n 4, 461.

<sup>89</sup> Douzinas, 'Human Rights and Postmodern Utopia', above n 4, 232.

<sup>90</sup> Douzinas, 'The End(s) of Human Rights', above n 4, 446.

<sup>91</sup> Douzinas, *The End of Human Rights*, above n 4, 356.

<sup>92</sup> *Ibid* 332.

<sup>93</sup> For Levinas, the recognition of the face of the other is a positive act of generosity, not a compensatory manoeuvre: Levinas, 'The Rights of Man and Good Will', above n 35, 46. Alternative approaches to a positivity in ethics are indicated by Elizabeth Grosz in her critique of Lacan's lack-centred account of desire: Grosz, above n 49, 179, 245. Grosz's candidates include Spinoza, Nietzsche and Deleuze. On the affirmative rejection of Lacan in Deleuze, see John

contentious<sup>94</sup> implies that the claims are positive ones. One positive approach would be to take human rights demands at face value — that is, as expressions of conscious preference in relation to one's condition of life. Such a formulation does not in itself deal with the conceptual and ethical complexities that arise from human rights demands, but at least it does not concede defeat at the starting point. In the present context, the recent work of Jürgen Habermas might be mentioned<sup>95</sup> since, like Douzinas, Habermas looks to social and critical theory for an explanatory vocabulary. In addition, it might be observed that Habermas is sympathetic toward psychoanalysis as a form of systematic interpretation and has emphasised the role of inter-subjectivity in relation to social life and human institutions.<sup>96</sup>

Habermas's recent analysis of approaches to human rights discusses the relationships between human rights and popular sovereignty, a relationship also considered significant by Douzinas.<sup>97</sup> For Habermas, there have been two broad traditions by which the relationship has been articulated. The first sets the private autonomy of citizens above their political autonomy and hence stresses a moral dimension. The second tradition subordinates citizens' private autonomy to their political autonomy and hence stresses self-realisation and what Habermas terms the ethical dimension.<sup>98</sup> Habermas argues that the relationship is key to the understanding of human rights and of law, and proposes that the connection between human rights and popular sovereignty is based on the 'communicative form of discursive processes of opinion — and will — formation.'<sup>99</sup> Habermas continues, 'the system of rights states precisely the conditions under which the forms of communication necessary for the genesis of legitimate law can be legally institutionalized.'<sup>100</sup> Habermas is stressing that rights are a public matter, constructed within normative frameworks of communication — undoubtedly complex, but fundamentally rational.<sup>101</sup> Further, the increasing prevalence of

Morss, 'The Passional Pedagogy of Gilles Deleuze' (2000) 32 *Educational Philosophy and Theory* 185, 190.

<sup>94</sup> Antonio Cassese, 'Are Human Rights Truly Universal?' in Obrad Savić (ed), *The Politics of Human Rights* (1999) 149, 151.

<sup>95</sup> Jürgen Habermas, 'Private and Public Autonomy, Human Rights and Popular Sovereignty' in Obrad Savić (ed), *The Politics of Human Rights* (1999) 50.

<sup>96</sup> Anthony Giddens, *Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis* (1979) 176; Lechte, above n 47, 187, 188.

<sup>97</sup> Habermas, 'Private and Public Autonomy', above n 95, 50; Douzinas, 'The End(s) of Human Rights', above n 4, 448.

<sup>98</sup> Habermas, 'Private and Public Autonomy', above n 95, 64. Douzinas' account seems to be located in the first tradition, despite his use of the term ethical.

<sup>99</sup> Ibid 63.

<sup>100</sup> Ibid 64.

<sup>101</sup> [A]s participants in rational discourses, consociates under law must be able to examine whether a contested norm meets with, or could meet with, the agreement of all those possibly affected ... The system of rights can be reduced neither to a moral reading of human rights nor to an ethical reading of popular sovereignty ...

Ibid. Habermas may seem to be indicating a general responsibility of the citizen to participate in the ongoing debate over rights: Arthur Jacobson, 'Law and Order' in Michel Rosenfeld and Andrew Arato (eds), *Habermas on Law and Democracy: Critical Exchanges* (1998) 190, 202. In contrast, Douzinas expresses caution over the scope of personal responsibility: Douzinas, *The End of Human Rights*, above n 4, 316.

human rights discourse in society does not, for Habermas, lead to a problem of ‘atomization’,<sup>102</sup> as it does for Douzinas.

It might be suggested that Douzinas’ critique of the legal system as equating to the Lacanian symbolic realm merely rephrases his anti-positivist critique of ‘modernist’ law.<sup>103</sup> That is to say, Douzinas appears to be identifying positivism in law both with modernism in law and with Lacan’s symbolic realm of intransigent, impersonal structure.<sup>104</sup> The opposition or alternative to this oppressive legal structure, for Douzinas, is correspondingly defined by a postmodernist jurisprudence and by the Lacanian imaginary. The resulting dichotomy is a simplistic (and familiar) one between the oppressive rules of real social life and the liberating creativity of the unconscious.<sup>105</sup> The limitations of this formulation are indicated by the conclusions Douzinas draws from it: for example, Douzinas’ slogan-like proposal that ‘[w]hen we are fighting the refugee we are fighting our unconscious’<sup>106</sup> and by a stance on the military-political hegemony of the USA<sup>107</sup> that verges on the apologetic.

Douzinas’ recognition of the significance of Levinas in legal thinking is to be welcomed and may contribute to a shift of emphasis from autonomy to heteronomy in the study of justice.<sup>108</sup> We may come to recognise an obligation ‘for the other, for the stranger, the outsider, the alien or underprivileged who needs the law’.<sup>109</sup> But Douzinas’ position is vitiated by a reactionary pessimism<sup>110</sup> and

<sup>102</sup> Loughlin, above n 2, 214.

<sup>103</sup> Goodrich, Douzinas and Hachamovitch, above n 7, 7.

<sup>104</sup> Murphy has commented on the ‘fairly easy equation between secular codified law and the [Lacanian] Law of the Father’: Tim Murphy, ‘As if: *Camera Juridica*’ in Costas Douzinas, Peter Goodrich and Yifat Hachamovitch (eds), *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent* (1994) 69, 71.

<sup>105</sup> It should be emphasised that this dichotomy owes nothing to Lacan.

<sup>106</sup> Douzinas, *The End of Human Rights*, above n 4, 365. Douzinas is not alone in making slogan-level appeals to ‘desire’ and the unconscious in relation to human rights: Terry Eagleton, ‘Local and Global’ in Obrad Savić (ed), *The Politics of Human Rights* (1999) 258, 258.

<sup>107</sup> Douzinas, *The End of Human Rights*, above n 4, 329.

<sup>108</sup> A focus on heteronomy is advocated by Levinas, ‘Philosophy and the Idea of Infinity’, above n 33, 47 and by Jacques Derrida, ‘A Roundtable Discussion with Jacques Derrida’ in Laurence Simmons and Heather Worth (eds), *Derrida Downunder: Deconstructing (in) the Antipodes* (2001) 255. For postmodernist philosopher Lyotard, the affliction of contemporary societies is constituted by the ‘foreclosure of the Other ... The effort of translation [of the strangeness of the other] must be endlessly renewed’: Jean-François Lyotard, ‘The Other’s Rights’ in Obrad Savić (ed), *The Politics of Human Rights* (1999) 181, 187.

<sup>109</sup> Goodrich, Douzinas and Hachamovitch, above n 7, 22.

<sup>110</sup> Postmodern mass societies ... increase existential anxiety and create unprecedented uncertainty ... about life prospects. In this climate, the desire for simple life instructions and legal and moral codes ... becomes paramount. ... In an over-legalised world, rules and norms discourage people from thinking independently ...

Douzinas, ‘The End(s) of Human Rights’, above n 4, 459. See also Douzinas, *The End of Human Rights*, above n 4, 380. Similarly, a recognition of children’s rights is said to lead to conflict: Douzinas, ‘The End(s) of Human Rights’, above n 4, 231; and an ‘expansionist’ characteristic of human rights ‘weakens the social bond’: Douzinas, *The End of Human Rights*, above n 4, 343. John Gardner has discussed the implications of a ‘self-effacingly extreme care’ for others as a hypothetical model for tort: John Gardner, ‘Obligations and Outcomes in the Law of Torts’ in Peter Cane and John Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré on His Eightieth Birthday* (2001) 112.

populism<sup>111</sup> and not least by its overblown<sup>112</sup> style. Douzinas' arguments take us no further toward a situation in which we would welcome 'anyone, any other one, without checking at the border who he or she is'.<sup>113</sup>

- <sup>111</sup> See, eg. Douzinas' observations on 'diplomatic lunches': Douzinas, *The End of Human Rights*, above n 4, 380; on how human rights have been 'hijacked by governments and international committees': at 338. Douzinas' comments might be compared with disparaging remarks by Australia's Prime Minister John Howard on the domestic role of international human rights committees: David Kinley and Penny Martin, 'International Human Rights Law at Home: Addressing the Politics of Denial' (2002) 26 *Melbourne University Law Review* 466, 468. Douzinas' anti-professional attitude in relation to the institutionalisation of human rights is typified by comments on the 'excessive juridification of social life': Douzinas, *The End of Human Rights*, above n 4, 326, 356. Brendan Edgeworth, by reference to a phrase of Stanley Fish on anti-professionalism, suggests that Douzinas may be seen as 'a right-wing intellectual in disguise': Edgeworth, above n 29, 247. If 'Government-operated international human rights law is the best illustration of poacher-turned-gamekeeper' (Douzinas, 'The End(s) of Human Rights', above n 4, 451) then perhaps Douzinas could be described as gamekeeper-turned-poacher.
- <sup>112</sup> A style recalling Bentham, who wrote of 'imaginary rights, a bastard brood of monsters': Bentham, above n 25, 69 (emphasis in original). The term 'messianic' seems apt (used by Douzinas, 'Human Rights and Postmodern Utopia', above n 4, 226 in relation to the style of Marxists Bloch and Benjamin).
- <sup>113</sup> Jacques Derrida, 'Perhaps or Maybe' (1997) 6 *Pli: The Warwick Journal of Philosophy* 1, 8 (emphasis in original).