

Unmarking Equality's Others: Patrick Bernier and Olive Martin's X&Y vs. France

Matthew Rana

"Who is the subject of the rights of man?"

Jacques Rancière,

Dissensus: On Politics and Aesthetics, 2010

I have rarely felt more vulnerable than that day in the summer of 2008, while sitting in a small, fluorescent-lit holding room in Stockholm-Skavsta airport. I was being detained along with two classmates en route to Göteborg to attend a monthlong course on immigration issues in Sweden. Our trip had begun 18 hours earlier in San Francisco. Silent and exhausted, we filed into the room and sat down side by side.





Patrick Bernier and Olive Martin, *X&Y vs. France*, 2007–ongoing [photo: Cédric Schönwald]

Something was wrong with our papers; none of us had student visas or international student ID cards. But it was a minor problem. A phone call to our sponsoring institution settled the matter, and in 15 minutes we received our clearances and left the room. There's little I can recall about the room itself: the chairs we sat in, or the uniforms worn by the immigration officials and airport staff. But I do distinctly recall a small man with dark hair and olive skin who was sitting directly across from me. How long he'd been there was anyone's guess. He couldn't have been older than 40, and despite his five o'clock shadow and tired eyes, he appeared stylish in a rumpled black jacket, blue jeans, and slip-on shoes suitable for air travel. He carried a tan briefcase and a black duffel. I could see from where I sat the various documents he shuffled and reshuffled: institutional letterhead, a passport, a work visa. We never exchanged words, but I overheard him speaking English in a Spanish accent to a Scandinavian translator. The room was full of the man's doubts, his nervous energy, his fear. I remember the way he desperately shook his head and said, "They're going to send me back, I know."

I felt this way myself in the fall of 2007 at Oakland International Airport, when I was informed by a Southwest Airlines ticketing agent that I had been placed on the Transportation Security Administration's watch list and would be subject to extra screening. Not because of a bad matching algorithm or a vague entry for another selectee, but because my father, a legal citizen of the United States born

in Pakistan, was also on this list. In the case of my father, a combination of name, religious affiliation, and country of origin caused an amorphous and all-encompassing power to restrict his freedom of movement and the protections to which he had grown accustomed as an American citizen. My own appearance on the watch list was a kind of inheritance, suggesting the constructed and contradictory nature of my own citizenship—the shifting boundaries of rights, their uncertain content, and the exclusions they produce. My narrative was suddenly rewritten according to the us-versus-them endgame of the war on terror. I was now marked, forced into view as somehow foreign, suspicious, a potential threat.

The differences between my position as a United States citizen and that of the man attempting to enter Sweden on a work visa were significant, to be sure. Yet, while watching him, I was seized by the visceral intuition of what Michel Foucault describes as the power of governing agencies over life, the capacity of the state to “make live and let die.”¹ For a brief 15 minutes, we were both gripped by the institutional forces that constrain us: the instrumental logic of capitalism on the one hand, and the production of subjectivities and forms of visibility that ensure the continued exercise of state power on the other. In the midst of the arbitrary exercise of authority and my reaction to it, I confronted the fact that neither I nor the anonymous man had full control over how we “play” on the stages of security and nationality, citizen and non-citizen, legitimizing and de-legitimizing forms of visibility that constitute where and how we can legally exist.

In many respects, this episode recalls what Giorgio Agamben has described as the state of exception: the paradoxical invocation of the law in order to suspend its protections, a state of being simultaneously inside and outside the law. Opposing the liberal-humanist concept of a natural law that is both transcultural and transhistorical (in effect, preceding the development of civil society or the emergence of the state), Agamben describes rights and laws as neither inherently protective nor capacitating. Instead, he posits that law has no fundamental relation to life. The act of showing the “law in its nonrelation to life and life in its nonrelation to law” is, for Agamben, to open a space for human action apart from the forces that seek to govern it.²

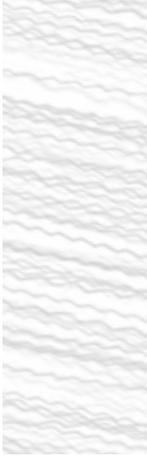
X&Y vs. France: The Case for a Legal Precedent is an artwork begun in 2007 by the French artists Patrick Bernier and Olive Martin in collaboration with Sylvia Preuss-Laussinotte, a specialist in immigration law, and Sébastien Canevet, a specialist in intellectual property law. Together with the two lawyers, the husband-and-wife team developed a legal argument whereby undocumented immigrants, posited as coauthors, interpreters, and guardians of immaterial, site-specific artworks, could avoid deportation through the application of laws relating to intellectual property





Patrick Bernier and Olive Martin, *X&Y vs. France*, 2007–ongoing [photo: courtesy the artists]

and cultural heritage. The work consists of the two lawyers performing the closing argument of a fictional deportation hearing before an audience, whose members have been given a copy of the *dossier plaidoirie*, the brief customarily provided to presiding judges containing the legal precedents for the argument being presented.



Throughout their performance, Preuss-Laussinotte and Canevet draw on human rights frameworks such as the right to participate in the cultural life of a community, legal definitions of immaterial artworks (drawn from artists such as Robert Barry and Lawrence Weiner), and actual precedents related to the hypothetical case. These last include a decision relating to author's rights in which the Russian composer Frederic Chopin was granted posthumous French citizenship due to the fact that much of his oeuvre was produced in France; the decision protected Chopin's family members, who were French citizens, from exploitation by a German publisher seeking reproduction rights for the composer's sheet music.

While each performance of *X&Y vs. France* varies slightly depending on the venue and its audience, the substance of the argument remains the same: an established French (or European) artist Y is coauthor with undocumented immigrant X of a site-specific, dematerialized artwork, of which X is the sole guardian. The integrity of the artwork depends both on its location, France, and on X's ongoing interpretation of it. As the carrier of a "work of the mind, bearing the mark of the author's personality," X is entrusted with this work for life. To deport X would thus destroy the integrity of the work, thereby violating the right of the French/European artist Y to prevent unauthorized alteration and dissemination of Y's intellectual property. Mirroring the case's subject, *X&Y vs. France* is itself considered by the artists to be an immaterial artwork, taking the form of an oral argument, of which the two lawyers are the guardians and interpreters.³ The lawyers thus periodically shift from defending their anonymous clients to defending themselves, from speaking in the third person to speaking in the

first. After the lawyers make their concluding remarks, they and the artists open the floor to the audience for questions and extended discussion.

X&Y vs. France has been performed throughout Europe, not only at art colleges and institutions, but also at local libraries, city councils, anarchist fairs, and conferences dealing with intellectual property. There is also a dedicated project website where users can access video documentation of a performance staged in 2009 at the Centre Georges Pompidou in Paris and download a PDF copy of the *dossier plaidoirie*.⁴ While this work can be situated alongside broader strategies within activist communities and left-leaning political projects that aim to ensure equality through law, it differs from legalistic approaches. Practices that focus on the law as a means of empowerment within public and political life have the effect of attenuating concepts of politics to the ability to negotiate with and make laws. This circumscription of politics within the domain of juridical processes and notions of humanitarianism and human rights does not come without a price. The assumption that increased rights and laws, and their attendant forms of visibility within the public sphere, are necessarily capacitating or protective, must remain open to critique. Contrary to these strategies, *X&Y vs. France* begins to approach the law critically and tactically, questioning not only the relationship between life and law, but also the ways that the subjects of legalism are marked by the discourses and practices that ostensibly assure their equality. Despite using protocols of law, Bernier and Martin's project actually counters the narrow concept of politics that legalism forwards as well as the tacit analogies that it draws between human rights, visibility, and political participation. Understood aesthetically—broadly defined here as the delimitation of spaces, roles, and times—*X&Y vs. France* problematizes these analogies while offering an expansive and politicized framework in which to consider debates surrounding immigration and human rights.

Bernier and Martin developed the work in 2007 as a kind of follow-up to a failed curatorial experiment by Bernier three years earlier in which he attempted to secure safe passage to England for several immigrant storytellers by framing them as interpreters of immaterial artworks by established French artists.⁵ *X&Y vs. France* was produced during the artists' yearlong residency at Les Laboratoires d'Aubervilliers, an institution devoted to supporting artistic and interdisciplinary research, located in a rapidly growing Parisian suburb. According to the artists, the environment of Aubervilliers was particularly influential on their thinking, as it is a kind of crossroads and destination for undocumented immigrants as well as for foreign students and asylum seekers.⁶ The work is also a continuation of the artists' ongoing interest in the relationships among identity, nationalism, globalization, Creolization, and forms of speech and storytelling.



Patrick Bernier and Olive Martin, *MANMUSWAK* (stills), 2005,
35-mm film transferred to DVD [courtesy of the artists]

Their short film *MANMUSWAK* from 2005, loosely based on the enigmatic character of the same name in the 1995 novel *Sozaboy* by the Nigerian author Ken Saro Wiwa, takes as its subject the somewhat paradoxical yet widespread practice of employing illegal immigrants as security personnel. In the 16-minute film, we follow over the course of a day an anonymous figure as he goes to various security jobs at a supermarket, a department store, and a nightclub. Because the film has no dialogue and the figure is distinguished only by his dark skin and his jacket—which, in the opening scenes, we watch him swap with another, equally unidentifiable figure—it remains unclear whether we are following one or many individuals. This/these shifting and enigmatic figure/s substitute their bodies for one another across various scenes, coming in and out of view as the subject/s of the camera's attention. The narrative is unclear, the various transactions ambiguous. Between jobs, this/these individual/s travel the city, having pictures taken in a photo booth, stopping at a café, performing what appears to be a ritual prayer, participating in a carnivalesque subway parade, and having a clandestine meeting with a white man in a botanical garden. The film ends abruptly with a transfer of a passport from one hand to another, marking the shift from illegal to legal, invisible to visible, anonymous to named.

The negotiation between varying modes of visibility that is so important in *MANMUSWAK* is also crucial to an understanding of the complex ways that *X&Y vs. France* operates in relationship to discourses of legal protections and human rights. The subject of *MANMUSWAK* is visible yet unidentifiable, whereas the subject of *X&Y vs. France* is both invisible and unidentifiable. Indeed, a close reading of a documentary image from the project's first performance at the École de Beaux-Arts in Paris brings into



Patrick Bernier and Olive Martin, *X&Y vs. France*, 2007–ongoing
[photo: Marc Damage]

focus the many ways in which the work invites a reconsideration of the links between visibility and political participation. The still shows a woman and a man, both white, both dressed in the formal black robes and white bavettes worn by lawyers in the European court. The lawyer on the right holds papers and a red pen in her right hand, and gestures with her left. She looks straight ahead, and her gaze meets ours. It is serious, entreating. Yet, the gravity of her gaze is somewhat compromised by the seemingly bemused expression of the second lawyer, sitting behind her. We assume that he is contemplating her arguments. His eyes are also trained on us, and we imagine ourselves as the judge or jury in whose hands the power of decision rests.

In the photograph, the two lawyers are decoupled from the context of the courtroom. They stand and sit, respectively, in front of four slate slabs bearing the marks of multiple inscriptions and erasures. Against this backdrop they argue on behalf of an X and Y who are out of view, photographically displaced and anonymous. Viewing this image, we are prompted to wonder how the hypothetical X and Y register within this imagined courtroom and its juridical frameworks. This ambiguity surrounding the individuals being represented mirrors prevailing social conditions which, like the erasures on the blackboard, at once reflect the mark of a social inscription and an erasure from the surface of political visibility.

The performance this image documents took place on the heels of a series of riots in the Parisian suburbs. These riots recalled another, three-week-long period of unrest two years prior, when the deaths of two French youths of African descent at the hands of police sparked violence in 274 towns throughout France. In 2005 France's immigration policies had become among the most restrictive in Europe. Fallout surrounding these laws was exacerbated by comments made by then–Interior Minister Nicolas Sarkozy, who called for a “war without mercy” on suburban “scum,”

linking the violence to immigration, and specifically to the country's growing Muslim population.⁷ While a number of the rioters were first- and second-generation immigrants from North African and Islamic countries, the issues underlying the violence were far more complex than culture clash.



New York Times coverage of the 2005 riots in French suburbs

Immigrants from France's former colonies in Africa and the Americas are among the most culturally, economically, and politically excluded groups in Europe, subject to widespread racial discrimination and xenophobia. While issues surrounding France's colonial history and contemporary immigration policies cannot be fully addressed within the scope of this essay, I will attempt to provide some context.⁸ Historically, France had an open-door policy for visitors and refugees and encouraged people from other European countries and immigrants from French colonies in Africa to enter the country as laborers, particularly within the industrial sector.⁹ The country's shift in policy to a "zero-immigration" stance in the 1990s made various means of (formerly legal) entry illegal, for example by prohibiting foreign graduates from accepting job offers by French employers and denying them a stable residency

status, and by denying residency permits to foreign spouses who had been in the country illegally prior to marrying French citizens.¹⁰

Furthermore, France's formal legal commitments to secularism and integration give evidence of a binary ideology of race in which Europeans and non-Europeans are posited as fundamentally different. While a majority of immigrants live in poor conditions in suburbs, are often barred entry into institutions of higher education, and occupy the lower echelons of the country's socioeconomic structure, the discourses surrounding France's integrationist policies rely on the premise that integration will lead to greater social and economic equality.¹¹ Colloquially referred to as the "visible minority," France's immigrant populations are not simply barred from legitimating forms of visibility within the public sphere, but are forced into view as

“illegitimate” and threatening to the very concept of the state. Sarkozy’s 2007 declaration, “France, love her or leave her” attests to the country’s policies in which ethnic and cultural differences are subordinated to the cultivation of a homogeneous, if not mythic, national identity. Largely ignoring the country’s lengthy history as a colonial power extending throughout parts of Africa, the Caribbean, and North America, the years 2004 through 2007 represented a moment in which French culture was reframed, specifically emphasizing a secular heritage that was uniquely French. The 2004 ban on Islamic headscarfs in public institutions and schools was perhaps the most controversial example of policies that arose during this period. However, the events in 2005 and 2007 offered the government an opportunity to tighten immigration policies and further nationalist discourses, including the establishment of deportation target numbers and the founding of a Ministry of Immigration and National Identity.¹²

At the same time that increased restrictions on immigration were being implemented, a parallel movement to expand the regulation of intellectual property was taking place. In 2006 the French government instituted a series of new laws criminalizing digital file sharing and the reproduction of copyrighted works for private use.¹³ In 2009 attempts were made to establish a government agency whose purpose was to monitor the internet activity of citizens with the aim of preventing the unauthorized sharing of intellectual property—defined as a work of the mind bearing the mark of the author’s personality.¹⁴ Copyright law has to some degree been standardized internationally since the 19th century through notions of property rights, focusing primarily on the reproduction and distribution of intellectual property. French law, however, bases its copyright concept more on the *moral* rights of the author, protecting works of art, music, and literature, as extensions of the artist’s personality, against unauthorized alteration and dissemination. Historically intended to protect authors from censorship and exploitation by publishers, copyright and related laws have been increasingly invoked in France in recent years to limit open-source and peer-to-peer practices and to ostensibly encourage competitive innovation among, for example, consumer electronics manufacturers and computer software developers.

Bernier and Martin’s project must be understood, then, in the context of this intensified period of law making in the realms of both immigration and intellectual property. In the words of the artists, it is an “open-sourcing of French national identity” that reflects a historical understanding of French culture that is more fluid than recent discourse and legislation suggests.¹⁵ Indeed, when paired with concerns surrounding intellectual property, the reduction of immigration to a cultural debate—that is to say, its framing as a threat to French national identity—demonstrates how this debate reproduces the economic logic of flexible accumulation evident in

advanced capitalist states. By drawing on the ways that laws can be redeployed by different actors, often to opposing ends and in ways that perhaps contradict the lawmakers' original intent, *X&Y vs. France* calls into question not only the mechanisms that govern the consolidation, control, and ownership of immaterial labor/commodities, but also the forms of visibility promoted by immigration policies and the language of human rights.

Julia Kristeva, writing on the historical definition of foreigners, says, "In order to found the rights that are specific to the men of a civilization or a nation—even the most reasonable and the most consciously democratic—one has to withdraw such rights from those that are not citizens, that is, other men. . . . Between the man and the citizen there is a scar: the foreigner."¹⁶ For Kristeva, immigrants and foreigners are reduced to a scar on the body politic, embodying the memory of a wound inflicted by their own exclusion. And while human rights are considered fundamental, they nonetheless demand articulation at the level of the state, which reserves the power to recognize or to withhold such rights. Undermining governmental claims to distribute justice or to capacitate individuals equally, the nexus between the rights of the citizen and rights of the human is thus broken from the moment of its inception. As individuals existing outside the realm of legal protection, but to whom the law nevertheless applies, foreigners and immigrants without documentation reside, in a sense, at the center of a crisis of state power, economics, and law. In a state of biopolitical domination, and unrepresentable within traditional frameworks of citizenship, nationality, and human rights, immigrants—as the rightful subjects of protections that they are denied—throw into question the very concepts of state and legal sovereignty.

As a model for legal recourse that exists in relationship to, yet is nevertheless outside of, traditional human rights discourse, *X&Y vs. France* points to the shortcomings of this line of thought. The argument does not propose a transfer of rights from those who have them to those to whom they have been denied. X is never granted rights (or, one might say, subjecthood) through the collaboration with Y, the French/European artist. In fact, X only gains legal protections through an acknowledgment of the rights of Y. As such, the work destabilizes the binary in humanitarian and human rights discourse between the capacitated, citizen-subject of human rights and the biopolitically dominated and incapacitated noncitizen who is unable to exercise/access the rights that they have. Bernier and Martin refuse to reiterate the logic wherein immigrants are viewed as the excluded yet rightful subjects of legal protections that are afforded citizens. They also refuse to portray the immigrant as an incapacitated, dominated body whose humanity is restored through the intervention of a nongovernmental organization or a politically engaged artist. X, in this case,

is framed as a subject who is not only in-between these binary forms of visibility, but also capable of navigating this complex and uncertain terrain.

The irresolvable tension that is created *between* X and Y is not only a tension between who is recognized as legitimate or illegitimate—and the conditions of that recognition—but also a tension between X and X—that is, of a subject disidentifying with a received identity as the incapacitated subject of European tolerance and humanitarian largesse. On the one hand, this tension questions the tacit analogy that is often made between increased visibility and political participation. On the other, it disrupts the capacity of the state and governing institutions to produce representations of populations. It is precisely this expanding and narrowing—this inclusion and exclusion of what is visible, sensible, and sayable—that the philosopher Jacques Rancière has described as the politics of aesthetics.¹⁷ For Rancière, the “distribution of the sensible” among a population refers to the ways in which an individual may be included or excluded, recognized or unrecognized. Aesthetics simultaneously reveals the existence of a world held in common by a community and the delimitation of roles, spaces, and times within that community. As both a means of inscription within spheres of visibility and a way of acquiring legitimacy within those spheres, aesthetics conditions who can do and say what (as well as when and where). Indeed, Rancière posits a notion of politics in which the subject is in constant negotiation with received modes of visibility. Rather than simply measuring the gap between citizen and “scar,” X&Y vs. *France* populates immigration debate with an unstable network of ambiguous actors—at once both artwork and artist, European and non-European, illegitimate and not-expellable—resisting inscription within the field of visibility as subjects who exist outside of the law’s purview and the protections of rights.

Through this lens, we can return to the documentary image and ask: Who are the photographically displaced and anonymous individuals invisible in the context of the courtroom? The absence of legible immigrant bodies poses many questions: Who has been removed from the image? What do illegal bodies look like? How do we recognize them?

Bringing the vocabulary of law and human rights to bear on a situation in which they are denied, Bernier and Martin do not simply denounce the law’s non-relation to life or verify that rights exist. Nor do they voice a humanitarian “wrong” of statelessness, displacement, and social



Patrick Bernier and Olive Martin, *X&Y vs. France*, 2007–ongoing
[photo: Marc Domage]

and political exclusion. In fact, this image—like the legal argument itself—projects two competing worlds: a world wherein individuals are equal, and a world wherein they are not. Neither of these worlds corresponds directly to a true world—an idealized, real, or authentic space in which the positive truth of legal protection for disenfranchised populations is confirmed and the link between human and citizen is established. Rather, it is a precarious world in which immigrants, asylum seekers, Creoles, and Muslims are alternatively forced into view as threats or as subjects who have neither rights nor the means to exercise them. It is a world in which laws governing intellectual property can plausibly apply to bodies, thereby conferring upon them an ontologically uncertain and provisional status, the merits of which are open to debate. In the chalky artifacts on the blackboard, we see the vague outlines of bodies as well as the traces left by those who wiped them away. We read these erasures as forced removals not from the public sphere or political processes, but from forms of visibility that deny the full content of equality: the unmarking of equality's others.

Notes

1. Michel Foucault, *Society Must Be Defended: Lectures at the Collège de France 1975–1976*, trans. David Macey (New York: Picador, 2003): 241.
2. Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press 2005): 88.
3. Patrick Bernier and Olive Martin in conversation with the author, San Francisco, March 2010.
4. <http://plaidoiriepourunejurisprudence.net>
5. In 2003 the Swedish artist and curator Per Hüttner invited Bernier to participate in the exhibition *I Am a Curator* at Chisenhale Gallery in London. Bernier's project "failed" in that it was proposed to the gallery, but rejected. Bernier subsequently self-published *A Tale for Creating a Legal Precedent*, a fictional account of a deportation hearing told in the first person by a woman involved in a collaboration similar to that of X and Y. <http://plaidoiriepourunejurisprudence.net/spip.php?article18>

6. Patrick Bernier and Olive Martin in conversation with the author, San Francisco, March 2010.
7. Doreen Carvajal, "Sarkozy Pledges Aid, and More Police, for French Suburbs," *New York Times*, February 8, 2008.
8. For a more comprehensive discussion of race relations and immigration in France, see Frantz Fanon, *Black Skin, White Masks*, trans. Richard Philcox (New York: Grove Press, 2008); Maxim Silverman, *Deconstructing the Nation: Immigration, Racism, and Citizenship* (London: Routledge, 1992); and Peter Fysh and Jim Wolfreys, *The Politics of Racism in France* (New York: Palgrave Macmillan, 2003).
9. Caitlin Killian, "The Other Side of the Veil: North African Women in France Respond to the Headscarf Affair" *Gender and Society* 17, no. 4 (August 2003): 567–90.
10. Virginie Guiraudon, "Immigration Policy in France" in http://www.brookings.edu/articles/2002/0101france_guiraudon.aspx.
11. Wallace E. Lambert, Fathali M. Moghaddam, Jean Sorin, and Simone Sorin, "Assimilation vs. Multiculturalism: Views from a Community in France," *Sociological Forum* 5 no. 3 (September 1990): 387–411.
12. Katrin Benhold, "Sarkozy Moves Quickly to Tighten Immigration Laws," *New York Times*, June 12, 2007.
13. DADVSI laws were an attempt by the French government in 2006 to ratify strict European Union laws governing copyright. DADVSI implementation was ruled unconstitutional by the French Constitutional Council. Read more at <http://www.edri.org/edri-gram/number4.15/dadvs>.
14. Take as an example, HADOPI, which is both a law and government agency in France instituted in 2009 to monitor the activities of internet users to prevent digital file sharing and download of copyrighted materials. Read more at <http://www.edri.org/edri-gram/number7.4/hadopi-law-france>.
15. Patrick Bernier and Olive Martin in conversation with the author, San Francisco, March 2010.
16. Julia Kristeva, *Strangers to Ourselves*, trans. Leon S. Roudiez (New York: Columbia University Press, 1991): 97.
17. Jacques Rancière, *The Politics of Aesthetics: The Distribution of the Sensible*, trans. Gabriel Rockhill (London: Continuum, 2004).

About the Images

Photographs taken at the École de Beaux-Arts in Paris, 2007, showing Sylvia Preuss-Laussinotte and Sébastien Canevet.