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VOICES ON LAW AND ACTIVISM

ADDRESSING THE WORK OF ADAM GEAREY

Editor: Maria Grahn-Farley

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Ed. Maria Grahn-Farley

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Preface

The preface to this anthology, Voices on Law and Activism: Addressing the Work of Adam Gearey, is written with both joy and gratitude. It is with joy because of the creativity and intellectual curiosity so generously shared among our authors and with the reader. It is with gratitude because of the willingness of our authors to create new original works engaging in the long history of critical scholarship of examination and social engagement in our times, spanning across the academic traditions of the United States, the United Kingdom and the Nordic countries. It is also with some pride that we at Uppsala University can present so many of our young researchers through the included works written by several of our doctoral candidates in law.

This publication is sprung out of a Symposium hosted by Uppsala University, and co-hosted by Professor Joel Samuelsson and Associate Professor Maria Grahn-Farley, August 23–24, 2019. I want to thank Joel for his part of the planning and work with the Symposium, without him – it would not have happened.

Maria Grahn-Farley
Uppsala, June 18, 2021

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Adam Gearey*

Critical Theory as an Art of Notice: Reification, Alienation, Kaleidoscope

"If the satisfaction of an old man drinking a glass of wine counts for nothing, then production and wealth are only hollow myths"
Simone de Beauvoir[1]

"Philosophy is to reflection what the work of hands is to action"
Simone Weil[2]

Introduction: The Kaleidoscope

This paper presents critical legal theory as an art of notice. Why? We are latecomers to critical thinking, the inheritors of various legacies in a time when radical thought is both necessary and compromised. Necessary because left or progressive thought needs to be defended and developed. Compromised because our inheritance is a scatter of fragments. These fragments appear to be divided between identity politics and 'proper' left politics (Marxist or otherwise); between 'literary' post modernism (frivolous, queer, the voice of the marginalised) and philosophy (straight, white, serious, universal). This is, of course, a simplification, but these comments are not meant to preface an argument that seeks to unify. Its aim is to plot one way in which themes that run through different critical

* My thanks to Maria Grahn-Farley for comments on an early draft of this paper and my thanks to both Maria Grahn-Farley and Joel Samuelsson for organizing the Uppsala Symposium.

[1] Simone de Beauvoir, *The Ethics of Ambiguity* (New York: Citadel Press, 1949), 37.

[2] Simone Weil, "Sur La Pensee et Le Travail", *Premiers Ecrits Pilosophiques, Oeuvres Completes I*, ed. Devaux, D and de Lussy, F (Paris: Gallimard, 1988), pp. 378-79, 378.

traditions can be put into dialogue with each other and kept spinning, so that critical thinking emerges out of its own active ambiguities.

To this end, critical thought might take shape as an art of notice. An art of notice is merely a way of proceeding; or, more precisely, of remaining open to possibilities so that one might proceed. There is no recommended method or required text. An art of notice is, arguably, configured differently depending on the practitioner of the art and the task in hand. However, in critical legal theory these themes have gathered around concerns with commodification, alienation and reification; the vital coordinates of intersectional critical thought. These crucial terms must be taken up from the point of view of a self-reflexive consciousness working on its own self-examination. Intersectional thinking on alienation and reification provides the terms through which thinkers examine their troubles.[3] This kind of thinking does not lead to essentialism but thrives on tensions and ambiguities, cross-cuts. Dialectical? Yes, but not mechanical and deathly: rather – the way in which a kaleidoscope brings together a fragmentary picture choreographed by two reflecting surfaces. The kaleidoscope is a figure of critical thought twisting around itself.

The argument will develop in the following way. The first part of the chapter outlines the legacies of critical legal studies (CLS), the critique of CLS and the critique of the critique. We will then look in slightly more

[3] This notion of trouble is taken primarily from C. Wright Mills' *The Sociological Imagination* (Oxford: OUP, 2000). However, there are also certain points in common with Donna Haraway's *Staying with the Trouble* (Durham: Duke UP, 2016). Building on the etymology of the term, Haraway write that we live in "mixed up" and "troubling" times. To "stay with" the trouble, we need to "make kin in line of connection as a practice of leaning to live and die well with each other in a thick present" (Haraway, 2016, 1). These "inter-species" practices are definitely intersectional, but in senses far extended from those at play in this essay. Haraway is also arguably concerned with the creation of a form of ethical thinking. This point will not be developed in any great detail in this essay, but living and dying well in a "thick present" could be understood as one of the valences of an art of notice. Trouble, in a Millsian sense, begins with the experience of being trapped in social relations. Within crippling frustration, an intimation remains that life could be lived differently. The sociological imagination allows one to understand the connections between the bigger picture and one's actions and one's "inner life". Trouble interrupts the routines of daily business, precipitating a sense of anxiety and unease. Mills explicitly links trouble to "alienating methods of production" that are working "pervasive transformations of the very 'nature' of man and the conditions and aims of his life" (Mills, 2000, 13).

detail at notions of commodification, alienation and reification.[4] The next part of the argument introduces the idea of the reflexive work on the self. This opposes the art of notice to alienation and reification. We then turn to an in depth consideration of arts of notice. Our argument requires a combination of points of reference: theoretical, philosophical, experiential, and literary. We will look at texts by Wangari Maathai, Adrien Wing, John McGahern, Simone de Beauvoir and Maria Grahn-Farley. A concluding section will relate these themes to an ethics of ambiguity. An ethics of critical reflection that celebrates the creative, kaleidoscopic power of negation and re-arrangement.

Alienation, Reification and Notice

The conventional account of CLS's legacies is well known. The mandarin nature of CLS was subjected to withering critiqued by feminists and the first generation of critical race theorists. This critique, in turn, was then also subjected to critique. Those calling for a rejection of certain theoretical voices or styles were themselves criticised for introducing choices between modes of thought that are not necessarily in opposition.[5]

Where does this leave us?

[4] Concerns with alienation and reification run through Critical Race Theory (CRT), LatCrit, queer theory, feminism and other congruent currents of legal theory. For a review of the relevant literature, see Adam Gearey, "The Parable of Bill Ayres," in Thomas Giddens, ed., *Critical Directions in Comic Studies* (Jackson, Mississippi: University of Mississippi Presss, 2020), 288-309. There have been a couple of extended engagements with refication in recent years. See Douglas Litowitz, Reification in Law and Legal Theory, Southern California Interdisciplinary Law Journal 9, no.2 (2000): 401-428; see also Rhonda V. Magee Andrews, "Racial Suffering as Human Suffering," Temple Political and Civil Rights Law Review 13, no.2 (Spring 2004): 891-926. Andrews is committed to elaborating an "ongoing project of human liberation from dehumanized (alienated, inauthentic) existence" (Andrews 2004, 899). Litowitz's review of reification does not engage with "this kind of CRT approach to reification" nor does he consider feminist or Lat Crit approaches. Thus, whilst a useful review, it is rather limited in its framing its themes. Likewise, Fejfar takes Peter Gabel as his focus. There is no consideration of reification outside of Gabel's deployment of the term. See Anthony Fejfar, "An Analysis of the Term Reification in Peter Gabel's Reification in Legal Reasoning," *Capital University Law Review* 25, no.3 (1996): 579-612.

[5] The critique of the critique emanated from the work of the latter generations of critical race theorists, the Lat Crits, Queer Crits, Class Crits and other groupings of outsider scholars.

Rather than see the various tendencies of critical thought as separate and mutually antagonistic, can we not also find relations and patterns? Take, for example, the notion of intersectionality. Intersectionality was central to the advances in theory and practice that came out of the critique of CLS. Contrary to certain arguments from the left, intersectionality was not restricted to identity politics. These themes are marked in the work of Angela Harris, and were certainly active in early Lat Crit with its emphasis on the "multiple, variegated" nature of identity.[6] Harris had stressed the "interconnection" of gender, race and class – and urged the development of modes of critical thinking that can grasp how "thingification" flattens out the complexities of interiority.[7] Intersectionality – in this tradition – was always concerned with relationships between different ways of thinking and the complex ways in which identity is understood and acted out.

Anthony Farley's notion of the 'commodity that talks' is apposite. In Farley's formulation race and racism are "ideology made flesh"- they are the way in which economic differences are made to signify in racial terms and become a constitutive wound to consciousness. Racism and capitalism reproduce themselves – but the two phenomena are distinct and need to be understood as such. Farley frames this in a particularly useful way. Reified consciousness is a "spectacle" of itself as it lacks substantial, self-determined being. Objectification is covered up – or "denied" through a "discourse" which positions whiteness and blackness as "natural categories" rather than mutually defining symbols – ideological counters that are "acted out" and made real through practices.[8] The discourse of racism is the constant repetition of this moment of subordination and dominance. The black body is the result of this convergence of power, knowledge, and objectification – as transmitted through social and cultural institutions.[9]

How can we develop these ideas?

[6] Berta Hernandez-Truyol, Angela Harris, & Francisco Valdes, "Beyond the First Decade: A Forward-Looking History of LatCrit Theory, Community and Praxis", *Berkeley La Raza Law Journal* 17, (2006): 187.

[7] Angela P. Harris, "Theorizing Class, Gender, and the Law: Three Approaches," *Law and Contemporary Problems* 72, (Fall 2009): 54.

[8] Anthony Farley, "The Black Body as Fetish Object," *Oregon Law Review* 76, no.3 (1997): 475.

[9] Farley, "The Black Body as Fetish Object," 475.

First of all, it is necessary to make clear that these terms are a second order language – an instrument of thought: a philosophical vocabulary that has its own peculiar political and intellectual dynamic. The complex commodification/ alienation/ reification allows a thinker to work at the interface between "outer and inner lives" – between the personal and the social.[10] Thinking the intersection of outer and inner lives borrows from Mills' framing of troubled thought as a way of grappling with private and public concerns. The individual, in his/her/their "biographical" life may have an inchoate sense that things are not right. This sense becomes social when the troubled thinker relates their condition, their personal "milieu" to an "historical" structure – working through the overlapping of "various milieux". We will return to this metaphor presently as it is distinctly intersectional. Emotional and intellectual engagement with the troubles that one experiences requires consciousness to catch onto what explains the "drift" of a world becoming increasingly alien – a creation of forces outside of political or personal control. The troubled thinker grapples with the meaninglessness of the work in which s/he/they are engaged; the stultifying boredom of 'being managed' – the "dull comfort" of consumerism, the fetishistic cult of wealth; the loss of time for family (in all its manifold forms), for idling, for love; the disappearance of a decent society; the marginalisation, denigration and exclusion of those 'that don't belong'; the impossibility of a future that might be different from the compromised present.[11]

[10] The quotation in the text above has been modified. Whilst Lukács' text has "life", it is perhaps more realistic to see the point of intersection as plural: there is no single ideology that can speak for or represent a totality of lives. Hardly surprisingly, the analysis that follow does not draw specifically on Lukács' *Reification and Class Consciousness*. George Lukács, *History and Class Consciousness: Studies in Marxist Dialectics* (Cambridge, MA: MIT Press, 1971), 83.

[11] Mills, *The Sociological Imagination*, 8. See also Motro on the scholar as a "compromised academic" in law schools dedicated to the reproduction of alienated forms of legal thought: a repetition of the certainties of more or less mainstream law and economic thinking that "jeopardizes the intellectual mission of the university." The way out of the fly jar is provided by ideas that are only "wild" and "impractical" to those lost in ideology. The isolation and bad faith that comes from "dil[uting] radical views", squanders opportunities to build forms of intellectual community that would bring together "other colleagues at the margins". Shari Motro, "Scholarship Against Desire," *Yale Journal of Law and Humanities* 27, no.1 (2015): 118.

The meditations of the troubled thinker are experienced as the failure of solidarity. How does the "I" relates to "you" or even to a "we"?[12] This approach is rooted in a thinking of ethics. The "properly human" finds itself through action; those activities in which it creates itself.[13] In order to bring this tradition of ethical thinking together with an intersectional approach, to appreciate the lacing together of "outer and inner lives", we need to keep in view a critique of the way the market determines the psychic, social and communal forms of experience. Alienation is complete in the anti-solidaristic assertion of the exclusive community of a 'we' without difference from itself and dedicated to the preservation of its wealth. A self-enclosure that is only possible if certain ways of being (and certain people) are denigrated, forbidden access, unrecognised, marginalised or expelled. The polity as a statue of itself, frozen in its own self-regard. With these essential insights one can work from the "inarticulate and perhaps even unexpressed" negation of one's situation to the sense that "[n]o one should be treated like this" – in other words – to solidarity. My own diminishment is inseparable from that of those others whom I see as crippled by exclusion from viable community.[14]

[12] Hanna Fenichel Pitkin, "Justice: On Relating Private and Public", *Political Theory* 9, no.3 (1981): 347.

[13] Pitkin, "Justice: On Relating Public and Private," 347.

[14] See Kimberle Crenshaw, "Intersectionality, Identity Politics and Violence against Women," *Stanford Law Review* 43, no.6 (July 1999): 1241-1299. Crenshaw's writing on intersectionality give the sense that the term is a way of reading experience. As a method of reading, it can perhaps be seen as a way of re-validating experiences that are not understood for what they are – as they are articulated in terms removed from the lived world of experience. As a 'method', this way of reading seems tentative, and radically open to the notion that those who reflect on their experiences face the task of developing the terms of their own accounts, their own "telling" of themselves and their experiences (Crenshaw, 1991, 1242). There are thus some links between Crenshaw's elaboration of intersectionality and themes within the literatures we have been examining. Whilst alienation is not a key term 'alienated experience' is used as a meaningful category (Crenshaw, 1991, 1273). But intersectional reading is resistant to "either or propositions" and is not a "totalising theory". As such Crenshaw's engagement with alienation could not be related to the kind of thinking that one finds for example in Lukács. But it might have a closer relation with arts of notice practiced either as critical legal theory or in anthropological studies of experience (Crenshaw, 1991, 1244). There is an interesting link between Crenshaw's line of analysis and Collins' notion of "hidden consciousness": the act of not talking, or even appearing to act in a conventional manner that may conceal existential resistance to imposed social terms. These ways of living are not 'data' for social science. See Patricia Hill

But, solidarity does not exist without ambiguity. To assert solidarity with others is not to dissolve difference into bland, infinite sympathy, or, to claim the licence to mandate the meaning of the experiences of others. Solidarity is difficult. A later section will go into a more detail on this point. As work or craft, or as an art of notice, solidarity involves an ethics that demands a fair amount of discipline, luck and judgement. This is because it is an articulation of those ambiguities that exist in the very 'substance' through which the troubled thinker thinks. Ambiguities are hooked up to the milieux of those who object to their common diminishing. It would be very difficult to posit a single 'element' which mediates this commonality, although arguably a Bataillean mangling of Hegel's notion of thinking 'substance' (at once both private and social; a folding of interiority and exteriority; a self grappling with itself) gets at its doughy, malleable plasticity. The plasticities that constitute solidarity are the lived and overlapping experiences of class, race, gender and other forms of social and intimate identity. It is for this reason that we must think in terms of work on the self that is rooted in the experience of ambiguous modes of identification.

Thus, solidarity is neither possible nor impossible. It is a difficult articulation of modes of 'being with' that are rooted in resistances to alienated and commodified being. Provided one can understand the logics, it might be possible to summon sufficient creative power to will modes of collective identity that create a viable communal sense of being.

To further this argument, it is necessary to review Marx and Engels' account of alienation. In order to position the analysis of alienation alongside intersectional thinking, we need to begin with the commodity (to follow the analysis of commodification back to the ambiguities of solidarity).[15] A capitalist mode of production is based on commoditisation

Collins, "Learning from the Outsider Within," *Social Problems* 33, no.6 (1985-1986): 23. I am indebted to Maria Grahn-Farley for pointing out these themes to me.

[15] See Huey P Newton, *Revolutionary Suicide* (New York: Random House, 1973). Newton is getting at the way in which racism determines a form of being. Racism lays down internalised patterns in which one's own being is experienced or 'internalised' as inferior to dominant ways of being. Newton's key question: how is it possible to confront your alienation? How is it possible to make the link between your own degradation and social degradation. How can one bring together "street philosophy" and "academic work" (Newton, 1973, 76). This point is also made very explicitly by Angela Davis in her autobiography: there is no such thing as a private, individual life. One must grasp the links between economic power and the determination of modes of consciousness: "The power

– or the economic drive to ensure that anything can be bought and sold on a market for a profit. The exchange value of a commodity relates to the average amount of socially necessary labour time that predominates in any given sector of the economy that produces a particular kind of commodity.[16] To brutally summarise the first chapters of *Capital*, the socially necessary labour time for the production of commodities in capitalist markets is obscured. But it can be understood through the concept of abstract labour. Abstract labour describes the combination of labour, technology and productive machinery-deployed competitively – in order to put social labour power 'to work' at an average rate of profit. Without doubt, these are complex matters. The point is that we don't notice, or are encouraged not to understand an interconnected global network for the creation and extraction of value. In brief: "the products of labour are prized to the exclusion of the labour that created them."[17]

We are enmeshed in global networks of production and consumption. Champions of the market might see this as the realisation of Milton Freedman's "fecundity" of human freedom. This sentiment is not generally shared. The more one thinks about the inefficiencies of markets, their tendencies to waste, the creation of poverty, social degradation and environmental destruction, the more one begins to appreciate the reality of this mode of economic organisation. To understand alienation is to begin to realise the "dead weight of things." Closely related to alienation, reification draws attention to the ossification of emotional and intellectual responses. At its most simple, reification announces itself in the sentiment that the world is the way that it is and it cannot change. Reified thought begins with the acceptance and deployment of concepts and patterns of knowledge that are more or less unquestioned givens. Reified thinking

structure [is] based on the economic infrastructure, propped up and reinforced by the media and all the secondary educational and cultural institutions". See Angela Davis, *An Autobiography* (New York: Random House, 1974): 4.

[16] It is easier not to think about the commodity and the conditions of its production, distribution and consumption. Of course, the commodity can announce its place of creation through a label added to it at some point in its journey from maker to consumer. But, as they confront us – things to be used – the mystery of the commodity is either effaced by use, or something of a strange remainder. In order not to overburden the analysis by bringing money – that ultimate fetish – into account – the point is that any attempt to notice commodities for what they are builds on the 'classical' analysis of use and exchange value.

[17] "Factory Work," *Politics* 3, no.1 (1946): 371.

resists ambiguity, or engagement with difficulties or paradox. Becoming different is impossible. The reified world is the permanent repetition of the world as it is.[18]

The preceding paragraph is offered as a basic sketch of the coordinates of the commodification/ alienation/ reification complex. A real difficulty with the analysis of this complex is the very question of how to proceed. How can lived experience be understood? It is not necessary to assert an 'outside' to capitalism.[19] As we suggest below, working through the trouble means grasping the potential of ambiguities to open something up. There is no single philosophical language that delivers the necessary purchase on this condition of thought and being. Despite the central importance of Marx and Engels for its articulation, this approach is neither dogmatic, nor Marxist. Different techniques and strategies are necessary. Reading between texts is hopefully one way of evoking the necessary energies. Articulating together different texts, languages and reference points might, with a measure of luck, create the necessary patterns – brief awakenings of possibilities. Whilst this might upset some, philosophical or methodological purity should not distract us from putting together the means of addressing our troubles.

So, how more precisely does the complex of commodification/ alienation/ reification enmesh inner and outer worlds? The original term used by Hegel, Marx and Engels is *Entfremdung*. This has been translated as estrangement as well as alienation. There is certainly the sense in which alienation carries with it the estrangement from the social world. We can thus perhaps think of alienation as the failure of the dialectic of recognition. We fail to recognize ourselves and each other in a world made strange by processes that appear to be beyond our control. It is important to link alienation to reification. Reification has been used to translate *Verdinglichung* or 'thingifying.' Whilst these terms come from different phases of Marx and Engels' writings, they can arguably be coordinated in the following way. In *The 1844 Manuscripts* Marx argues that under the

[18] What is the relationship between the critique of ideology and an art of notice? The latter inherits many of the problems of the former. However, it may be the case that an art of notice, unlike the critique of ideology, can thematise the work on the self. It might be necessary to spend more time on the fraught relationship between arts of notice and the critique of ideology. But not now.

[19] J.K. Gibson-Graham, *The End of Capitalism (As We Knew It)* (Minneapolis: University of Minnesota Press, 2006), xxiii.

social conditions of a capitalist mode of production, one is alienated from *Gattungswesen*, "species-essence" or species being.

Let's not become distracted by the conventional arguments about the recovery of some sort of 'human essence.' The complex can be seen as the way in which we are prevented from experiencing ourselves and our constitution as 'world making' creatures. Alienation/reification is, in truth, an account of how our conception of ourselves can become thinkable in and against the dominant terms that frame our identities. Species being is this fold in the human substance; a set of coordinates for those points where one begins to access oneself as 'thinking substance.' This in the mark of a being that can become its *own* object. To take oneself as one's own object, though, is not to see oneself as a thing.[20] This would be to reify thinking substance. Rather, the thinking substance is its own object because it is what is thrown up ahead of itself: "living" and "free" to the extent that – in troubled thinking – one becomes aware that one is more than how one has been defined. Object in this sense means to *object to something*, and in so doing conceive of one's self as an object of thought: to think oneself as a potential or a possibility: something still to come. Species being is not a noun at all. The term describes an active process as the thinker notices their own thought.

So, *Gattungswesen* can be understood as a term that requires engagement with the meaningful nature of social being.[21] The analysis of alienation/reification only really begins to make sense once it takes into account the structural determinants of one's place within a capitalist division of labour. In other words, we can use an understanding of intersectionality to get at the interior effects of alienation and reification. To be meaningful, these modes of self-identification must be thinkable. To be thinkable,

[20] These themes echo within reification. The root of reification is the Latin *res* or *rem*. This can be translated as thing, but can also be extended to the idea of an assembly or gathering – and thus, perhaps, the sense of people talking to each other.

[21] Recent scholarship has picked up on this kind of interpretation – finding in reification an understanding of a "stance" or an attitude of mind that can be understood as "empathetic engagement" or a "qualitative experience of interaction". See Axel Honneth, *Reification* (Oxford: OUP, 2008), 56, 57. This has some overlap with the argument thus far. We reify other people to the extent that we do not recognise them as human beings and, indeed, we suffer from reification to the extent that we forget or limit our own emotional responses to others. However, against Honneth, we should not lose sight of "the sphere of commodity exchange" if we want a sophisticated understanding of the interior effects of reification (Honneth, 2008, 24).

the thinker must become aware of a certain slippage or ambiguity; a gap between the imposition of a meaning and a projected meaning where the self becomes the object of thought. It may even be that this projection is inseparable from a kind of pause in thought, where meaning catches or coagulates in thinking. The intersection, then, or the thickening of thought, is the self-interrogation of one's own thought once one attempts to think one's own being.

These contours are laid bare in the following passage:

> "[A]t [the] intersection: theoretical reflections start in and through a silhouette of life, after the fact, with all the countless, priceless, motionless layers of time folded, compressed … and the various corners of the world suddenly brought to light, to the center stage. This seems how a life, instantly, becomes an afterlife, serial constellations of Nachträglichkeit (belatedness or deferred effects), as one seeks to "find an order in the drama of time."[22]

The intersectional voice discovers life in vague figures and shadowy representations. The intersectional thinker is focused on the hold of these reified and alienated forms of consciousness. How can "silhouettes of life" be "brought back to centre stage" so that one can find "an order in the drama of life"? Is it a question of how we can read the patterns? How can we see ourselves seeing? It might be said that "[o]ne needs to stand back in order to reflect." This stepping back is a form of self-examination. We cannot capture all its forms and processes – and it is different for all those who engage in its different practices. Self-examination picks at the complex knot of self-constitution and the inter-weavings of the personal and the historical. One must confront what one has become: a personal or familial drama that is, at one and the same time, an articulation of impersonal social, economic and political forces. One's embodied nature may be what self-examining consciousness snags up against: those intersecting planes of gender, class, ethnicity, sexuality and ability. One can engage in self-analysis using these terms, or supplement them, or make use of an entirely different problematic. As Lee suggests, the 'feel' of self-analysis is of an unwrapping of layers, a movement through accretions, forms of solidified time, a realisation of constellations or relationships in which one's being is enmeshed. One does not necessarily find a core or a substra-

[22] Kyoo Lee, "Rethinking with Patricia Hill Collins," *The Journal of Speculative Philosohpy* 26, no 2 (2012): 468.

tum of personality. One might find a puzzle: swirling nodes; plasticity; magma. What does this mean?

We can turn to a recent piece of writing by Maria Grahn-Farley:

> "The most "localized disruption" of all takes place within oneself. The self is a site from which to reject "totalizing theory". Totalizing theory takes away one's ability to experience disruption from within. Totalizing theory prevents one from being aware of one's own existence. The experience of internal disruption, of ambiguity, is necessary if one is to develop an awareness of one's own existence as a human being."[23]

The 'self' is not something self-same, self-recognising. The self is disrupted by its own living of itself, and demands its own 'theory' – an account of its own self-puzzling that cannot be 'totalizing theory'. Lee and Grahn-Farley are urging us to think about the reified – frozen out self that is no longer capable of becoming new or different. To get at this idea we need to look at what the word experience actually means. The root of the word is 'per': "to lead, pass over" which in turn can be linked to *peritus* – "tested" – even a reflexivity – the sense of testing the self – and perhaps into *perius* – peril – putting something at stake; risk, anxiety. It would seem, then, that the process of experience, of putting in question, is an opening of one's self to experience and personal change. The etymology of experience provides the basic coordinates of our understanding of notice. The root of notice is **gnō-*. The Proto-Indo-European [PIE] root word meaning "to know" also carries the meaning of "having power". This power is related to what can be found in the Latin *gnoscere* – the process of "com[ing] to know, Etymologically, the PIE roots bring together the idea of cognizance or knowledge with ability or power. Etymological study also shows that common root of intersection and notice in the PIE root word *sek-.[24] Bringing these meanings together suggests that we are concerned with noticing.

What, then, is an art of notice?

Nelson puts the kaleidoscope to his blind eye…

[23] Maria Grahn-Farley, "The Law Room, Hyperrealist Jurisprudence and Postmodern Politics," *New England Law Review* 36, no 1 (2001): 29

[24] Julius Pokorny, *Indogermanisches Etymologisches Wörterbuch*, Vols I, II and III, Francke Verlag, (1969), 373, 939.

Arts of Notice

The section above has attempted to explain the work on the self from the perspective of being in a commodified world. This, of course, begs the question about how one thinks about the commodified world. How does one notice commodification?

Rather than a definitive definition, a working outline might be better. An art of notice addresses how we live with commodities – with things, with people and with people who have become things. To connect to themes developed above, it is important to note that in Tsing's deployment of an "art of noticing", our attention is directed towards "unpredictable encounters" that "transform us" – and throw us into "shifting assemblages."[25] Working on the disturbance in the self brought about by noticing is thus an essential element of the art. The art of notice has to address what is invisible but constitutive of the everyday world.[26] An art

[25] Anna Lowenhaupt Tsing, *The Mushroom at the End of the World: On the Possibility of Life in Capitalist Ruins* (Princton University Press, 2015), 20.

[26] We cannot fully elaborate what we mean by an art of notice as it would overburden this chapter. However, this footnote serves to link some of the themes developed in the first part of this essay to a brief elaboration of a concern with an art of notice. We can follow Dewey in resisting the fetishistic reduction of art to works of art. Art has to be found in the experiences of productive practices. A clue can be found in jazz, movies, comics and sensational novels – not in the dead world of the museum and the gallery, John Dewey, *Art as Experience* (Ontario: Capricorn Books, 1958), 5-6. Thus, the task of art is to repair the breach between representation and "human effort" – between "refined and intensified forms of experience" and "the everyday events, doings, and sufferings." Art is, in this sense, about responding to the world. Art is grounded in those events that grab one's attention: "the fire engine rushing by; the machines excavating enormous holes in the earth…the men perched high in the air on girders, throwing and catching red hot bolts." It is interesting that these are all examples of work – or more precisely observing people at work – but – it would extend to the "tense grace" of the baseball pitcher, gardening, or simply sitting in front of the fire and poking it so that sparks fly up into the air. What cuts across the various examples is absorption in a task; a kind of craft experience, of discovering satisfaction in work well made. Dewey starts to read very much like William Morris. Shoddiness in production is blamed on a market that requires cheap, mass production. This point can be refined from the view point of contemporary accounts of craft, see Richard Sennett, *The Craftsman* (London: Allen Lane, 2008). Sennett notes that in archaic Greece, a craftsman was *demioergos* – a combination of the words for public (demios) and productive (ergon). The category included "skilled manual" work, but extended to professions of "doctors, lower magistrates and "professional singers" (Sennett, 2008, 22). This was not the case in classical times – Aristotle made use of a word which means 'hand worker'. Plato was much more sympathetic to the classical idea – tracing the

of notice counters modes of not seeing. Mohammed Bedjaoui provides us with the essential insight. People can be "deprived of the means to understand and master their social and political environment" once "a system of unequal economic relations" becomes invisible or unthinkable.[27] Thus, to study arts of notice, we have to examine those texts which allow us to experience the coming together of inner and outer worlds. Wangari Maathai, the Kenyan intellectual and environmental activist, is an exemplary practitioner of the art of notice. Speaking in May 2005 about problems faced by Kenyan farmers, at Howard University, Maathai pointed out:

> "Most of these farmers that I'm talking about grow tea and coffee. But when they grow this tea and coffee and they send it to the international market, there are some rules of the game—I don't know whether the food law [programme] looks at that—there are some rules of the game that do not allow this farmer to get enough for his labor. He gets very little from the international market, and he has no control over that. When he needs inputs for his coffee and tea he has to buy [them] at a price that has been set by somebody else, and he has no control over that. Somehow there is a law that does not create justice for this farmer, and as a result, because he doesn't get enough for his labor, he continues to scrape, to scratch this land and get very little out of it. So we call him poor, and we begin to say that it is partly because of his poverty that the environment is being degraded."[28]

Maathai describes the 'rules of the game' that may or may not be visible but nevertheless determine whether or not a "farmer [will get] enough for his labour". As the farmer does not receive a fair price for his labour, because of the way the market 'works' (a market over which the farmer has no control) – the farmer becomes poor. People bear the costs of a sys-

word for skill back to 'making' or poesis – and the idea of "quality driven work" – aimed at "arête" – "the standard of excellence, implicit in any act" (Sennett, 2008, 24). Sennett links this account of art to a point made by Marx: "[i]n the *Grundrisse*, Marx, "framed craftsmanship as "form giving activity"…Before Marx became an analyst of economic justice, [he] promised to realise the dignity of labour…the utopian core of Marxism survived even as the older Marx hardened in a bitter, rigid ideologue" (Sennett, 2008, 29-30). Sennett is wrong about Marx becoming a "rigid ideologue", but we can certainly begin to appreciate the links between art, notice and making: in craft and in thought.

[27] Mohammed Bedjaoui, *Towards a New International Order* (New York: Holmes and Meier, 1979), 5.

[28] https://www.greenbeltmovement.org/wangari-maathai/key-speeches-and-articles/inaugural-world-food-law-distinguished-lecture.

tem's pathologies: "we call him poor, and we begin to say that it is partly because of his poverty that the environment is being degraded." Social and environmental degradation are the effects of the invisible forces that constitute the price of coffee on world markets.

To elaborate this concern, we can make reference to what Wing has called spirit murder. Spirit refers to the soul, the aniumus/a; another name for species being. Reading Wing's work in and against *The Paris Manuscripts* – and – attempting to make the idea of the work on the self clearer is a salutary experience.[29] The word salutary is related to the ecclesiastical Latin term which gives us the contemporary English words describing redemption from sin. Hardly surprising, the work on the self is unthinkable without these ideas. Perhaps one theme stands out. It is necessary to confront one's own implication in a particular history (with all the questions of how to make recompense). Arts of notice are bound up with understanding the history of a racialized mode of production. In particular:

> "[S]pirit-murder consists of hundreds, if not thousands, of spirit injuries and assaults--some major, some minor-the cumulative effect of which is the slow death of the psyche, the soul, and the persona. This spirit-murder affects all blacks and all black women, whether we are in the depths of poverty or in the heights of academe."[30]

Spirit murder is a general condition: the erosion of a sense of being whole and a failure of viable reflexivity. But what does this mean to me? How, at very least, does this become a matter of concern to someone who has not experienced 'soul murder'? We can continue thinking along the line opened up by the word salutary. Salutary derives from the PIE root **sol*, which means 'whole, or well-kept" and has links with the Latin word *salus*, which can be translated as health, and which in turn derives from the PIE root **solh*$_2$ – which also carries meanings of whole or completed.[31] Salutary thus takes us back to the discussion of the self – that which,

[29] Perhaps it is difficult for late comers to realise the risks, the dangers of this kind of writing; the way it was tested and put other texts to the test. One of the real impacts in the world of scholarship opened by a generation of CRT scholars was exactly the space in which voices like this could be heard.

[30] Adrien K. Wing, "A Brief Reflection towards a Multiplicative Theory and Praxis of Being," *Berkeley Women's Law Journal* 6. no. 1 (1990), 186.

[31] Michiel De Vaan, *Etymological Dictionary of Latin and the Other Italic Languages* (Leiden: Brill, 2008), 537.

at least at one level is 'us' – whole and completed. But "whole and completed" would be a somewhat inaccurate description of CRT understandings of consciousness. The self is experienced, rather, as a contradiction, something of shifting valences; the self is "indivisible" and "multiple."[32] Wing's writing suggests something strange and worth hanging on to-something that communicates with Rimbaud's 'Je suis un autre': a poetic or literary way of thinking.

To follow this element of Wing's self notice we can turn to a short story by the Irish writer John McGahern. Why McGahern? McGahern, like Maathai writes about work. Work is bound up with the complex of alienation/reification; and, to borrow a salutary theme from Wing – some kind of transcendence; some kind of redemption:

> "I love to count out in money the hours of my one and precious *life*. I sell the hours and I get money. The money allows me to sell more hours. If I saved money, I could buy the hours of some similar bastard and live like a royal incubus, which would suit me much better than the way I now am, though apparently even as I am now suits me well enough, since I do not want to die."[33]

In McGahern's story – a labourer 'just over on the boat' from Ireland – reflects on his work on London building sites. McGahern describes the boring, backbreaking labour of the site and the relationships between the workers. Despite its specificity, McGahern's story exists in a field set up by Maathai's observations on Kenyan famers, the value of their labour and a process that remains mysterious to them. True, it is a story about migrant labour – not agricultural labour – but, like Maathai's farmers, McGahern's grafters know no more than the dull repetition of work that does not pay. In the extract above, the narrator tells us that he could "buy the hours of some similar bastard and live like a royal incubus." Can we say that this story is about a labourer (or the labourer who writes) becoming cognisant of his own position? But what does he find out – is it no more than the overpowering normality of the "way things certainly are"? Not really.

Read the line carefully – it is about a most peculiar gap – about imagining a situation that would "suit me much better than the way I am

[32] Wing, "A Brief Reflection," 191.

[33] John McGahern, 'Hearts of Oak and Bellies of Brass', in *Creatures of the Earth* (London: Faber and Faber, 2007), 35.

now." In terms of the grammar of the paragraph, this means simply living like a royal incubus on the labour of others – having "saved" one can now "buy" the "hours of some similar bastard." Money buys an equivalent amount of labour. But, this remains inaccessible. How the speaker is now "suits [him] well enough." He cannot save his money. But then the most strange point: "since I do not want to die." This sets up another equivalent – not so much money for work – but – the terms of a life lived. The passage sets up a false equivalent: being satisfied with work/drunkenness, on one hand, and being dead on the other. It is as if this false equivalent is itself a product of the dulling process of work.

This kind of paralysis – or – rather the thinking that McGahern's text focuses on the reader, names the difficult space in which an art of notice forms itself. There is multiplicity of consciousness in this story. The "iterative strategy" that the story performs is a kind of growth of consciousness, the development of a perspective on the self that comes through experience.[34] The peculiar grammar of the section cited above is important because its tortuousness enacts the very process of gaining a perspective on something that is hard to name: the 'shifting'[s], frustrations and contradictions that characterise multiple consciousness. Of course, this is not legal analysis or political theory – it's a short story after all. The key thing is that it produces a particular technique of analysis – a particular 'local disturbance' of a self otherwise lost.

An Ethics of Ambiguity

An art of notice is a way of going about things. In this final part of this essay, we will borrow from Grahn-Farley to further this point and argue that arts of notice provoke an "ethics" that "does not furnish" recipes – but proposes 'methods."[35] Ethics, in this articulation, is meant in a very precise way. We are not describing codes of right and wrong. Ethics names something that has animated our argument thus far. We have been focused on a nameless quality – the 'knot' of the intersection, the puzzle or the magma. We have also linked this namelessness with self-reflexivity. It might also be what twists the kaleidoscope of thought around:

[34] Wing, "A Brief Reflection," 182.

[35] Simone de Beauvoir, *The Ethics of Ambiguity* (New York: Citadel Press, 1949).

> "The path to a society in which people regard others and themselves as human beings is a question of ethics. It is a question of choice. It is a question of rejecting the totalizing system of marks and the totalizing system of law and the way that our understandings of others and ourselves are fixed… It is an ethics of ambiguity. The ethics of ambiguity is an invitation to always question and to always remain in the position between the poles. It is about always questioning one's way of being and others'…[and] through the choice of constant questioning, creating a localized disruption from within."[36]

If critical legal thinking practices arts of notice, it can be imagined as an "ethics of ambiguity" – where ambiguity is rooted in the difficulty of the work on a self that exists in and between thought and action. The "poles" that are evoked above are many and various. Like the reflecting mirrors of the kaleidoscope. If we want to reclaim the language of mediation and complexity, it is perhaps from within this tension; and ethics is the practice of this difficult questioning.[37]

Grahn-Farley is borrowing from de Beauvoir. Indeed, Grahn-Farley and de Beauvoir become the reflecting mirrors in a kaleidoscope that attempts to articulate a relationship between poles; the 'mechanism' that allows the reflecting surfaces to reflect each other. Ethics, as the articulation between poles, is always a way of thinking this 'in between.' As an 'in between' it is thoroughly positional. Ethical relationships cannot be resolved by some idea of a dialectical process that will reach its realisation in a 'higher' resolution of the opposites at its heart. It's not Hegel (at least, not Hegel read badly). Hegel might make sense in the library, but once one is in the streets, one finds that the world does not conform with totalising theory.

[36] Maria Grahn-Farley, "The Law Room," 57.

[37] It is worth pointing out the links between craft, art and ambiguity. Sennett argues that Ruskin "sought to instil in craftsmen…the desire, indeed the demand, for a lost space of freedom" where it was possible to "experiment" and even "lose control" (Sennett, 2008, 114). Sennett stresses Ruskin's aesthetic of "hesitation [and] mistakes" – something entirely incompatible with working to the rhythms of the machine. Sennett links together commitment, decision and obligation, and relates them all to a notion of practice. In making a decision we affirm that an act is worth doing; in an obligation we "submit to a duty, custom, or to another's need" – organised by a 'rhythm' – a duty that has to be performed "again and again." The drive to do good work can give people a sense of a vocation. In a broader sense, poorly made institutions will ignore their denizens' desire that life add up…" (Sennett, 2008, 267).

We must, however, nuance de Beauvoir's *aperçu* a little further. We are not concerned with a relationship between the reality of the street and the silent space of thought in the library. An ethics of ambiguity is the library in the street, the street in the library: a creative tension between terms that are seen as opposites. It would therefore also be wrong to simply see Grahn-Farley as a realisation of de Beauvoir: the truth of the former as given by the latter. We have to find subtler ways in which these two texts speak to, and past, each other. What resonates between these two texts is the necessity of choice:

> "Regardless of the staggering dimensions of the world about us, the density of our ignorance, the risks of catastrophes to come, and our individual weakness within the immense collectivity, the fact remains that we are absolutely free today if we choose to will our existence in its finiteness, a finiteness which is open on the infinite."[38]

Grahn-Farley is not writing a treatise on existentialist ethics but she shares something of the *anima* of de Beauvoir's text. Nothing will come from totalising theory. If ethics names the explosion of creative magma, or a localised disruption form within, we can see it as an analogue to the moment when one chooses to will something into being. Whilst Grahn-Farley might not call this the moment of freedom, it is effectively the moment at which a creative power asserts itself from a realisation of its intersectional being; its being between poles. At the same time as one wills, one negates. One negates a situation that is intolerable. From this we can derive two further points. The impersonal creative power is what Grahn-Farley calls questioning – which is, in turn, related to our being with others who are also questioning or seeking to evoke their own creativity. If we twist between the arguments of Grahn-Farley and de Beauvoir a little further, we nuance the latter's language of the finite and the infinite. We might say that the finite coordinates with what we have so far called alienation/reification. Alienation/reification is finite because the complex is inseparable from the repetition of a particular form of economic, political and social organisation. The infinite appears in the finite to the extent that one can think 'between the poles' – in other words – at the intersection where the negating power of ethical thought seeks something else; and carries on asserting its creative power.

[38] de Beauvoir, *The Ethics of Ambiguity*, 64.

The infinite 'coordinates' with ethics as it propels the emergence of what is different from what was. As infinite, it is beyond the finite co-ordinates of the situation from which it emerges. Ambiguity is another name for this "staggering" assumption of the power to think. It appears against the "density" of "our own ignorance" – as a moment of doubt. Etymologically, doubt is what "moves from side to side" – trembles at the moment that the fixity of a pattern is challenged by something that it cannot accommodate. There is within ambiguity a drive, a movement. To see the word as describing no more than a kind of paralysis of uncertain meaning is wrong: the ambiguous one is the thinker who is moved by the experience of thinking towards what remains in excess of the situation at hand. We can carry on twisting the kaleidoscope so another fragment comes into view: the notion of species being. The ethics of ambiguity articulates the complex need of the human being to interpret and create the world in a way in which they find themselves. Twist again. It is the knot of the intersection as the 'not' of negation: the rotating poles of the personal and the impersonal reflecting against each other.

This is not a fantasy on the dynamics of thought. Thought can only think about the world and the world for thought is composed alongside those others with whom one shares one's being. The difficulty is the movement between the human being thinking out of their own existence, and the thought produced. This difficulty constitutes arts of notice as exploratory, non-doctrinaire projects that are nevertheless serious about advance[ing] an understanding of what has called "general human needs."[39] McCluskey's expression takes us back into the theory of alienation and Marx's famous idea of the "complexity of human needs." Solidarity is indeed this complex of ambiguous needs. Is it a need for redemption? A redemption that can only come through work with others and an acknowledgement of legacies of past suffering? Is it a guilt that comes from appreciating that one has done rather well out of the forms of commodified labour to which one objects? Perhaps the complex need that is brought into focus is the troubled sense that one's own luxury exists in a world of endemic poverty. What should I do? How should I act? These ethical questions return us to the demands of ethical philosophy that provides no easy answers. If the art of notice contests with complex

[39] Martha McCluskey, "Eleven Things They Did Not Tell You About Law and Economics", *Law and Inequality: A Journal of Theory and Practice* 37, no.1 (2019), 106.

needs, it is a spirit, an *anima* – a way of keeping one's own life, and the lives of others, firmly in view.

Kaleidoscope: the Lobachevskian Geometry of Critical Theory

Can we return to the kaleidoscope?[40]

Dialectics as kaleidoscopic thinking happens at intersections; saddle points; at the crossings of rising and falling waves. Might the 'dia' (διά) of dialectics, be this twisting of things alongside each other? Thought, in this sense, is a passage formed by its own curvature. These are metaphors for reflexivity, the folding of thinking substance as it troubles itself. Thought twisting itself is self-questioning. As such, it works with the material conditions of commodification/ alienation/ reification that define the context of the thinker's being. Critical thought, as a working through of one's troubled condition is thus an engagement with the disappearance, or the difficulties of noticing, those ways in which a public and private world can be created communally. Reflexivity, as the activity of thought has been described as the work on one's self. To make the self a piece of work is to confront limiting assumptions that social role or character are fixed and the world is simply what it is. This work on the self – as the mediation of self and world, world and self – is carried out as an art of notice. An art of notice is itself dialectically charged – existing between the poles of the worked self and the world. From a slightly dif-

[40] The link with notice, or seeing is certainly contained in the etymology of 'scope' – the practice of looking or observing – of being somewhat removed in order to see. The notion of an instrument – an artificial way of seeing – which also plays in the word scope elaborates this line of thought: a scope is, in Bachelard's sense, an instrument of thought. See Gaston Bachelard, *Le Nouvel Espirit scientifique* (Paris: Presses Universitaires de France, 1973), 54. To the extent that we are concerned with an instrument, then, we are examining a way or a means to read between texts, so that new shapes come into view. In the same way that the kaleidoscope needs to be worked, turned by hand, we are concerned with a technique for seeing. If we twist the etymology of κᾶλος (*kálos*), we can move from the idea of beauty to the idea of moral worth; a sense that picks up on our concerns with ethics as an essential element of a technique of thinking. *Eidos* εἶδος – another exacting term – could here be initially understood as the form that makes something visible (as opposed to the concealed ethos): and so, in this invented understanding of thought as kaleidoscope, the re-arrangement of the texts – those visible traces – become the working method for seeing more than we otherwise would.

ferent perspective, the art of notice can be understood as the existential or psychic correlative of noticing something so that it produces an effect on the self. The thinker troubles what had once been taken for granted or sees clearly what was previously obscure. Notice could manifest itself as an unanswerable question or an ambiguity or something that thought snags upon. Thought whose movement has been snagged or caught, and which twists itself around this imaginary axis, is thought hooked up with complex needs: those of the thinker and those with and about whom the thinker thinks. Thought arrested by itself is the pivot of ethics. Ethics requires forms of conviviality and solidarity. Solidarity demands that we should become other to what we are: re-arranged.

Adrien K. Wing*

Poverty, Lawyering and Critical Race Feminism in the Trumpian Era

Introduction

The Faculty of Law, Uppsala University hosted an impressive symposium[1] in August 2019 featuring University of London Professor Adam Gearey's book Poverty Law and Legal Activism: Lives that Slide Out of View.[2] The event brought together scholars from Finland, the United Kingdom, Hong Kong, and the United States, as well as faculty and graduate students from Sweden. It was my pleasure to be one of the primary respondents to Gearey's lecture as well as a presenter at the symposium. First, this chapter will briefly summarize Gearey's book. Second, it will focus on my remarks for the lecture he presented at the symposium entitled "Critical Thinking as an Art of Notice." Third, it will discuss some perspectives left out of his treatment of poverty law, specifically, critical race feminism. Finally, I will conclude with an example emphasizing a critical race feminist perspective in the era of U.S. president Donald Trump.

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[1] I would like to thank Uppsala University, the Faculty of Law, and especially professors Maria Grahn-Farley and Joel Samuelsson for making my attendance at the August 23–24, 2019 symposium possible. Additionally, the following Iowa research assistants provided great support – Efe Ayanruoh, Jessica Maharaj, Caroline Pappalardo, Alexandra Pecora, Natasha Riggleman, Riley Sexton, Rachel Shuen, Anayo Umeh, Keith Verschoore and Jacklyn Vasquez.

[2] Adam Gearey, Poverty Law and Legal Activism: Lives that Slide Out of View (2018).

The Book

In his book, Gearey uses the lens of critical legal theory to raise a bricolage of issues about poverty law and the role of poverty lawyers, particularly in the United States. He emphasizes lawyers in the 1960s, but his insights apply to the situation in the early twenty-first century, perhaps even more so in the Trumpian era. None of the challenges that affected lawyers in the twentieth century has been resolved in the early twenty-first century. The COVID-19 pandemic during the Trump administration exacerbated wealth and health disparities, a situation that the legal system was not equipped to handle.

According to Gearey, critical legal theory has emerged as a continuation of Critical Legal Studies (CLS)[3] and is an umbrella term informed by "a radical sensibility inherited from the new left, the NWRO [National Welfare Rights Organization], radical constitutionalism, CRT [Critical Race Theory] and LatCrit [Latino/a Critical Theory]:[4] a complex of theory/praxis."[5]

CLS evolved in the 1970s when politically radical white male academics, sometimes called "Critters," criticized the conservative nature of the law. European post-modern philosophers like Jacques Derrida and Michel Foucault influenced the Critters.[6] Using Derrida's deconstruction analysis, Critters picked apart or deconstructed the idea that law was objective and neutral, and instead emphasized that the law was designed to benefit the wealthy and powerful. While many progressive legal scholars were attracted to CLS, some noted that the analysis omitted or largely ignored discussions of race and gender, and that the Critters were primarily elite white males.

[3] *See* Mark Kelman, A Guide to Critical Legal Studies (1987); Critical Legal Studies (James Boyle ed., 1992); Critical Legal Studies (Peter Fitzpatrick & Alan Hunt eds., 1987); Critical Legal Studies (Alan Hutchinson ed., 1989); Roberto Unger, The Critical Legal Studies Movement (2015).

[4] See Francisco Valdes et al, AFTERWORD: What's Next? Into a Third Decade of LatCrit Theory, Community, and Praxis, 16 Seattle J. Soc. Just. 884 (2018); The Latino Condition: A Critical Reader (Richard Delgado ed., 2011); Francisco Valdez, LatCrit: A Conceptual Overview, http://www.latcrit.org/content/about/conceptual-overview/ (last visited Nov. 29, 2019).

[5] Gearey, *supra* note 2, at 164.

[6] *See* Christopher Watkin, Jacques Derrida: Great Thinkers (2017).

Progressive law scholars of color such as Derrick Bell,[7] Richards Delgado,[8] and others had been influenced by the U.S. Civil Rights movement and began to write beyond the CLS class analysis, and emphasize issues of race and ethnicity. For these authors, aspects of CLS were appealing, but many social and legal phenomena could not be properly understood unless race and ethnicity were central, rather than marginal or nonexistent. For example, to approach class without seeing race made the analysis of housing law incomplete, considering the long legacy of red-lining and both de jure and de facto housing segregation.[9] Patricia Williams offered an argument in favor of formalism when it comes to protection against discrimination and racial subjugation.[10]

The number of scholars of color, many of whom specialized in race issues in the legal academy, increased greatly in the 1980s. CRT held its first workshop in 1989, with much of the scholarship building in part on CLS and the work of the more senior scholars of color.[11] CRT became a race intervention in progressive legal discourse. Simultaneously, it became a progressive intervention in civil rights scholarship. Authors write from an anti-subordination and color conscious perspective.[12] They are concerned not only with theory, but also with praxis, how the theory is put into practice.

[7] *See* The Derrick Bell Reader (Richard Delgado & Jean Stefancic eds., 2005); Derrick Bell, Faces at the Bottom of the Well (1992); Derrick Bell, Confronting Authority: Reflections of an Ardent Protester (1994); Derrick Bell, Gospel Choirs: Psalms of Survival for an Alien Land Call Home (1996); Derrick Bell, Afrolantica Legacies (1998); Derrick Bell, Ethical Ambition: Living a Life of Meaning and Worth (2002); Derrick Bell, Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform (2004).

[8] *See* The Law Unbound!: A Richard Delgado Reader (Adrien K. Wing & Jean Stefancic eds., 2007).

[9] John O. Calmore, *Racialized Space and The Culture of Segregation: Hewing a Stone of Hope from a Mountain of Despair*, 143 U. Pa. L. Rev. 1233 (1995).

[10] Patricia Williams, The Alchemy of Race and Rights (1991) at 146.

[11] *See* Critical Race Theory: The Key Writings that Formed the Movement. (Kimberlé Crenshaw et al eds., 1996)[hereinafter Key Writings]; Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction (3rd ed. 2017); Khiara Bridges, Critical Race Theory: A Primer (2019).

[12] For more on antisubordination, see Key Writings, *supra* note 11; Critical Race Theory: The Cutting Edge (Richard Delgado & Jean Stefancic eds., 3rd ed. 2013). For more on color consciousness, see Neil Gotanda, *A Critique of 'Our Constitution Is Color-Blind,'* 44 Stanford L. Rev. 1 (1991); Gary Peller, *Race Consciousness*, 1990 Duke L.J. 758, 760.

One controversial aspect of CRT has been the use of the narrative or story telling technique, in addition to traditional academic discourse.[13] The oral tradition not only has historical importance, but also serves as a form of communication from the old generations, to new generations in many communities of color. In addition, telling stories may help connect outsiders more directly with people of color, rather than trying to interpret arcane academic jargon. Some opponents of the narrative technique find it to be highly subjective, nonquantifiable, overly emotional, as well as lacking in intellectual rigor.[14]

CRT favors a multidisciplinary approach in order to develop the rights of people of color. By taking a multidisciplinary approach, CRT situates the law within society and refuses to disconnect the social experiences of people from the law that governs their lives. The law is necessary, but not sufficient to overcome discrimination and achieve success. It is essential that various disciplines play a role. Thus, all social science and humanities fields should be involved.[15]

Since that first CRT workshop, there have been numerous CRT-oriented books and anthologies, many conferences, as well as hundreds of law review articles. UCLA Law School has developed a Critical Race Studies program, which is a specialization that students can choose to pursue, and there are interdisciplinary programs and collaborations with the community.[16] CRT now spans many legal topics.[17]

A variety of other trends spun off from CLS or developed simultaneously or subsequently, including, as Gearey notes, FemCrit (feminist jurisprudence).[18] At the same time that many scholars were attracted to CLS and CRT, women began to become professors in larger numbers as well. Second wave feminists outside of law from the 1960s and after-

[13] *See, e.g.*, Richard Delgado, The Rodrigo Chronicles (1995)(exemplifying the narrative technique).

[14] *See, e.g.*, Richard Posner, *The Skin Trade*, reviewing Daniel A. Farber & Suzanna Sherry's Beyond All Reason: The Radical Assault on Truth in American Law, New Republic, Oct. 13. 1997, at 40.

[15] *See*, *e.g.*, Menah Pratt-Clarke, Critical Race, Feminism, and Education: A Social Justice Model (2011).

[16] *See* About the Critical Race Studies Program, UCLA LAW, https://www.law.ucla.edu/centers/social-policy/critical-race-studies/about/.

[17] *See infra* notes 23–30.

[18] Gearey, *supra* note 2; *See, e.g.*, Catharine Mackinnon, Feminism Unmodified: Discourses on Life and Law (1987); Catharine Mackinnon, Feminist Theory of the State (1989).

wards influenced many legal feminists. Feminist jurisprudence developed since neither CLS nor CRT nor traditional legal jurisprudence focused on gender.

Gearey acknowledges the importance of LatCrit, which developed as scholars from Hispanic/Latinx backgrounds were attracted to CLS and CRT, but felt that CRT overemphasizes the black/white binary, i.e. seeing racial issues as mainly involving African Americans and whites. These scholars may have seen CRT as ignoring issues relating to language, immigration status, and religion that may disproportionally affect Latinx people, who may be of any race or ethnicity.

Finally, Gearey discusses ClassCrit, which started in workshops held at the University of Buffalo Law School. ClassCrit represents modern and creative thinking on Marx influenced by CLS and affiliated networks.[19] Maria Grahn-Farley,[20] Athena Mutua,[21] and Martha McCluskey[22] are among the scholars who have written in this field.

Interestingly, Gearey does not mention some of the other jurisprudential strands that have also developed. These include: AsianCrit (focusing on Asians);[23] QueerRaceCrit (focusing on LGBTIQ communities of color);[24] Global CRT;[25] IndianCrit;[26] DesiCrit (South Asians);[27] and

[19] *See* Symposium on ClassCrits IX, 39 Western New Eng. L. Rev. (2017); *See generally* ClassCrits: A Network for Critical Analysis of Law and Economic Inequality, https://www.classcrits.org/ (last visited Nov. 29, 2019).

[20] *See, e.g.*, Maria Grahn-Farley, *Race and Class: More than a Liberal Paradox*, 56 Buff. L. Rev. 935 (2008).

[21] *See, e.g.*, Athena Mutua, *Introducing ClassCrits: from Class Blindness to a Critical Legal Analysis of Economic Inequality*, 56 Buff. L. Rev. 859 (2008).

[22] *See e.g.*, Martha McCluskey, *Constitutionalizing Class Inequality: Due Process i*n State Farm, ClassCrits Essay Issue, 56 Buff. L. Rev. 1035 (2008).

[23] *See* Robert Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Poststructuralism, and Narrative Space*. 81 Calif. L. Rev. 1241 (1993); Robert Chang, Disoriented: Asian Americans, Law, and the Nation-state (1999).

[24] Darren Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory, and Anti-Racist Politics*, 47 Buff. L. Rev. 1 (1999).

[25] Francisco Valdes and Sumi Cho, *Critical Race Materialism, Theorizing Justice in the Wake of Global Neoliberalism*, 43 Conn. L. Rev. 1513 (2011).

[26] *See* Robert Williams, *Vampires Anonymous and Critical Race Practice*, 95 Mich. L. Rev. 741 (1997).

[27] *See* Vinay Harpalani, *To Be White, Black, or Brown? South Asian Americans and the Race-Color Distinction*, 14 Wash. U. Global Stud. L. Rev. 609 (2015).

Critical White Studies.[28] Even more recently, eCrit (focusing on empirical analysis),[29] and DisCrit (focusing on disability issues)[30] have emerged as well. CRT literature has attained a global presence and is being written in Europe and other parts of the world too.[31]

Gearey would like the reader to pull from the more recent strands of critical thinking he acknowledges and apply them to our understanding of modern poverty law. While his book mainly focuses on the United States, it clearly could be relevant to progressive lawyering in other jurisdictions. He calls for the poverty lawyer to be an ethical actor who recognizes the potential and limits in the struggle against twenty-first century economic inequality.[32]

The Lecture: Critical Legal Thinking as an Art of Notice

During Gearey's lecture at the symposium he expanded upon a number of themes developed in his book,[33] but I will restrict my comments to what I discussed in my response to the lecture. He credits the phrase "art of notice" to Anna Tsing, an University of California at Santa Cruz anthropology professor. This term deals with how we engage with commodities and people, and how some humans have come to be regarded as objects or things. Poverty status can reduce and alienate people such that they are not noticed as humans by others around them.

[28] *See* Critical White Studies: Looking Behind the Mirror (Richard Delgado & Jean Stefancic eds. 1997).

[29] *See* Osagie K. Obasogie, Blinded by Sight: Seeing Race Through the Eyes of the Blind (2013).

[30] *See* Rabia Belt, *Contemporary Voting Rights Controversies through the Lens of Disability*, 68 Stan. L. Rev. 1491 (2016).

[31] *See, e.g.*, Jean Stefancic & Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate Speech Regulation*, 78 Iowa L. Rev. 737 (1992–1993); Carol A. Avlward, Canadian Critical Race Theory (1999); Mathias Moschel, *Race in Mainland European Legal Analysis: Towards a European Critical Race Theory*, 34 Ethnic & Race Studies 1648 (2011); Debito Arudou, *Japan's Under-Researched Visible Minorities: Applying Critical Race Theory to Racialization Dynamics in a Non-White Society*, 14 Wash. U. Global Stud. L. Rev. 695 (2015).

[32] *See supra* note 2.

[33] Adam Gearey, Critical Legal Thinking as an Art of Notice, lecture presented at Uppsala University Law School, Sweden, Aug. 23, 2019 [hereinafter "Lecture"].

> In the lecture, I was honored that Gearey referenced my work on "spirit murder."[34]
>
> [S]pirit-murder consists of hundreds, if not thousands, of spirit injuries and assaults—some major, some minor—the cumulative effect of which is the slow death of the psyche, the soul, and the persona. This spirit-murder affects all blacks and all black women, whether we are in the depths of poverty or in the heights of academe.[35]

It is clear that the cumulative process of being ignored that happens to poor people results in murder of the spirit. My own work notes how this alienation occurs with respect to black people and many people of color, regardless of their class status, and thus exposes how class alone, whether through Marx, CLS, critical legal theory, or ClassCrits is not enough to precisely analyze the deeply embedded hatreds that existed historically and still existed in the Trumpian era.

Despite my relatively privileged status as a tenured law professor in the United States now, I can never forget that I am the descendant of slaves, who were literally considered less than a person in our constitution. The three-fifths clause in the American Constitution – the foundation of the U.S. as a nation stated that for purposes of representation in Congress, enslaved blacks in a state would be counted as three-fifths of the number of white inhabitants of that state.[36] Blacks are still living with that legacy more than two hundred years later as our votes continue to be suppressed, stolen, and gerrymandered in the electoral process.[37] The Russian government may have taken exclusionary measures to a new level and conspired to lower black voting numbers in the 2016 U.S. presidential election via clever misuse of social media.[38]

[34] *See* Adrien K. Wing, *Brief Reflections towards a Multiplicative Theory and Praxis of Being*, 6 Berkeley Women's L. J. 181 (1990–91).

[35] *Id*. at 186.

[36] U.S. Const. art. 1, section 2.

[37] Gerrymandering involves political officials redrawing voting district boundaries, often in unnatural configurations, to give one political party an advantage over another in an election. David Daley, *The Secret Files of the Master of Modern Republican Gerrymandering*, New Yorker, Sept. 6, 2019,

https://www.newyorker.com/news/news-desk/the-secret-files-of-the-master-of-modern-republican-gerrymandering.

[38] Scott She & Sheera Frenkel, *Russian 2016 Influence Operation Targeted African-Americans on Social Media*, N.Y. Times, Dec. 17, 2018, https://www.nytimes.com/2018/12/17/us/politics/russia-2016-influence-campaign.html.

Police treatment of blacks nationally has resulted in us being overrepresented in the prison industrial complex.[39] We used to pick the crops during slavery and thereafter. Now, we are the crop, the inhuman crop. We can be injured or killed for doing almost anything or nothing while black. These situations have occurred while blacks were breathing, driving, thinking, sleeping, sitting, counseling, playing, barbecuing, or shopping.[40]

The black community has relatively little net worth financially, as we are still the objects of property, rather than subjects/owners of property. In 2016, the median net worth of whites was ten times ($171,000) that of blacks ($17,600), and the gaps are still growing.[41]

My own family provides examples of the wealth disparities. My relatives owned two brownstones in the poor area known as South Bronx, New York for many decades. When they sold one of the houses a few years ago, it was worth 350,000 dollars. A similar type of home in Manhattan would be worth several million dollars. Of course, they were fortunate enough to own a house at all, compared to many blacks. My son, who is 35, is the only cousin of his generation of more than 30 people, who has been able to buy property at all. In his case, being able to buy property was easier because he married a white woman whose physician father paid for all her schooling through her master's degree. She had no educational or consumer debt. She was an ideal candidate for the mortgage lender and co-op board. Most of his other cousins may be renters for life.

As UCLA law professor Cheryl Harris has written, whiteness itself, is a form of property interest.[42] Thus, no matter how high I rise in U.S. society, I can never obtain that property interest. Perhaps, some of my grandchildren and great grandchildren will be able to obtain it if they intermarry with whites, such that the tinge of tan skin tone is gone. Two

[39] *See, e.g.* Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2010).

[40] *See, e.g.* Lauren Williams, *21 Things You Can't Do While Black*, Mother Jones, February 12, 2014, https://www.motherjones.com/politics/2014/02/21-things-you-cant-do-while-black/.

[41] Tracy Jan, *White Families have nearly 10 Times the Net Worth of Black Families. And the Gap is Growing*. Wash. Post, September 28, 2017, https://www.washingtonpost.com/news/wonk/wp/2017/09/28/black-and-hispanic-families-are-making-more-money-but-they-still-lag-far-behind-whites/.

[42] Cheryl Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707 (1993).

grandchildren are currently capable of passing as white. There have been some situations where the most white-looking blacks who are discovered to be black, then descend to being treated as black, i.e. an inferior status.[43] My aunt passed for white in New York in the 1940s and thereafter. She was able to hold a job at the AT &T phone company that would not have gone to her if she had revealed that she was a Negro, the term of that era for black people.

My seven children (two biological) and fifteen grandchildren span the rainbow in skin color. My two daughters are Ethiopian refugees. One is a Muslim who wears a hijab. She is in medical school and she has been mistreated by fellow students, doctors, nurses, patients, and their family members. Three sons are biracial, where their birth mother was white and their fathers were black. One biological son could be seen as black, Hispanic, Indian, Hawaiian, Muslim, whatever that latter category looks like. None of them can pass for white, however, and all have experienced being not noticed or being noticed as inferior.

For critical thinkers, including Gearey's poverty lawyers, the art of notice requires that they see the art as a spirit, an anima –a way of keeping my family firmly in view as their own.[44] Based upon my almost forty years as a lawyer, I think we are very far away from a day where those with various forms of privilege, including the privilege of being noticed, will see my rainbow family as their equal.

Critical Race Feminism (CRF)[45]

To enable critical thinkers to notice the nonprivileged, they must expand their understanding to embrace another jurisprudential stream Gearey ignored – Critical Race Feminism (CRF). Professor Richard Delgado coined the term "Critical Race Feminism" in his 1995 anthology Critical Race Theory: The Cutting Edge.[46] CRF involves an emphasis on the status of women of color. In the United States, women of color may

[43] *See, e.g.*, Gregory Williams, Life on the Color Line: The True Story of a White Boy Who Discovered He Was Black (1995).

[44] Gearey, Lecture, *supra* note 33.

[45] This section in particular and other parts of this chapter draw from Adrien Wing, *Critical Race Feminism, in* Sage Encyclopedia on Higher Education (Marilyn J. Amey ed. 2020).

[46] *See* Critical Race Theory: The Cutting Edge (Richard Delgado ed., 1995)(coining the phrase "Critical Race Feminism.")

include blacks, Latinos, Asians, Native Americans, Arabs or other minority groups. In other countries, women of color may be from a majority group in the developing world or a minority group in Europe or other predominantly white countries. Whether in the United States or in other countries, these women exist at the bottom of their societies economically, socially, politically, and often educationally. Applying a CRF perspective highlights the specificities of discrimination affecting women of color. Acknowledging their specific problems can enable the creation of relevant solutions in the areas of poverty law and lawyering so central to Gearey's book.

Origins

CRF derives from the intertwining of three jurisprudential movements: CLS, CRT, and feminist jurisprudence/womanist theory. CLS, CRT and feminism were attractive to some women of color as they became academics, but many felt that all these movements omitted the perspectives of minority women. The genres assumed that women of color faced the same challenges as white women or men of color. Women of color legal academics also resonated with feminist or "womanist" theory written by women of color outside the law, including Patricia Hill Collins, belle hooks, Toni Morrison, Alice Walker, and Angela Y. Davis.[47]

CRF literature began to flourish in the last decade of the 20th century. It became a race intervention in traditional feminism and a gender perspective in CRT. A number of articles have been written and several symposia have been held. Two New York University Press anthologies I edited exist: Critical Race Feminism: A Reader[48] and Global Critical Race Feminism: An International Reader.[49] Legal scholars authoring some CRF scholarship include: Kimberlé Crenshaw, Angela Harris, Lani Guiner, Mari Matsuda, Patricia Williams, Cheryl Harris, Dorothy Roberts, Berta Hernandez, Margaret Montoya, Celina Romany, and myself Adrien Wing.[50]

[47] *See, e.g.* Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment (2d ed. 1990); belle hooks, Feminist Theory: From Margin to Center (1984); Toni Morrison, Beloved (1987); Alice Walker, The Color Purple (1982); Angela Y. Davis, Women, Race & Class (1981).

[48] Critical Race Feminism: A reader. (Adrien Wing ed., 2d ed. 2003)[hereinafter CRF].

[49] Global Critical Race Feminism: An International Reader (Adrien Wing ed., 2000).

[50] See articles in CRF, *supra* note 48.

Contributions of Critical Race Feminism

CRF has contributed to and expanded upon various concepts in law and social science. This section will discuss several notions: anti-essentialism, demarginalization, intersectionality, identity, and praxis.

Anti-essentialism

In 1990, UC Berkeley law professor Angela Harris wrote a foundational CRF article entitled *Race and Essentialism in Feminist Legal Theory*.[51] She vigorously critiqued the idea that there was one essential female voice, i.e. all women would feel one way on a particular issue. Any attempt to claim women speak in one voice actually privileges the views of middle class or elite white women, and ignores the views of all other women, including women of color. Moreover, arguing that there is one essential black voice, ends up privileging black male voices and assuming black women think the same as the men. CRF challenges the idea that the black males' experiences are identical to black females' experiences. Thus, CRF is anti-essentialist, and requires acknowledging the differences and complexities in individual lives.

Demarginalization

Professor Crenshaw, a UCLA/Columbia law professor, wrote a foundational CRF article in 1989 entitled *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*.[52] She called for the law to demarginalize the status of women of color. Rather than ignoring such women in publications about race or gender, it was necessary to center them in the analysis, whether the area be in education, affirmative action, employment, housing, personal injury, or traditional female subjects such as sexual harassment, reproductive rights, welfare reform, domestic violence, or poverty lawyering.

[51] Angela Harris. *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581 (1990).

[52] Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Leg. Forum 139.

Intersectionality

Crenshaw's *Demarginalizing* article introduced the notion of intersectionality into American legal discourse, and the concept is now broadly applied in a number of disciplines.[53] To fully understand the situation of women of color requires not only looking at their racial identity and their gender identity, but also exploring the intersection of these identities. For example, a black woman is not black or a woman, but a holistic black woman. Mari Matsuda developed the notion of "multiple consciousness"[54] to describe how women of color may view the world based upon their several identities. I use the term "multiplicative identities" in my scholarship.[55]

Identity

While the initial CRF scholarship emphasized the intersection of race/ethnicity and gender, publications began to complicate the analysis of the intersections by bringing in other identities. Some identities may permit you to experience privileging, while others may subject you to discrimination, simultaneously. For instance, being a professor may give you a privileged status at a university, but being a black person may subject you to police harassment on that very same campus. Among the additional identities that can come into play are: nationality, color, class, sexual orientation, religion, age, disability, language, minority, marital, and parenthood status.

Praxis

Like CRT, CRF can involve praxis. For example, Crenshaw co-founded and is the Executive Director of a nongovernmental organization, the African American Policy Forum (AAPF).[56] Established in 1996**,** this intersectional feminist group promotes the rights of women and girls of color

[53] Kimberlé Crenshaw & Devon Carbado, *Intersectionality at 30: Mapping the Margins of Anti-essentialism, Intersectionality, and Dominance Theory*, 132 Harv. l. Rev. 2193 (2019).
[54] Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 Women's Rts. L. Rep. 7 (1989).
[55] Adrien K. Wing, *Brief Reflections, supra* note 34.
[56] *See generally* The African American Policy Forum, http://aapf.org/ (last visited Nov. 29, 2019).

in the U.S. and beyond its borders. It is an academic think tank, but also has been linked to the Black Lives Matter, #Me Too, and the Times Up! movements. AAPF launched the #Say Her Name movement to highlight the lack of attention to the deaths of black women at the hands of the police across the country. The organization has hosted a summer camp and a social justice writers retreat as well as has held conferences, webinars, and participated in marches.

Global contributions

CRF literature has evolved beyond the borders of the United States. Intersectionality analysis has been applied in many contexts.[57] Women of color around the world are marginalized and essentialized. Global CRF promotes women of color perspectives in the development of international and comparative law, including public international law, human rights, and international business transactions. Global CRF analysis offers transnational perspectives and contributes to postcolonial theory and global feminism in all disciplines. Debates about issues such as cultural relativism and universalism of human rights are more meaningful when the views of women of color are fully represented. Indeed, some women might be viewed as disloyal to their community and their lives may be at risk if their views are outside of deeply held patriarchal customary and religious norms. In addition to previously mentioned topics affecting all women, publications concerning customary law, inheritance and property, dowry, sex selection, bride burning, polygamy, and female genital surgery/mutilation have also been the subjects of analysis.

[57] *See, e.g.*, Shreya Atrey, *Women's Human Rights: From Progress to Transformation, An Intersectional Response to Martha Nussbaum*, 40 Hum. Rts. Q. 859 (Nov. 2018); Ana Martin Beringola, *Intersectionality: A Tool for the Gender Analysis of Sexual Violence at the ICC*, 9 Amsterdam L. Forum 84 (2017); Gauthier de Beco, *Protecting the Invisible: An Intersectional Approach to International Human Rights Law*, 17 Hum. Rts. L. Rev. 633 (2017); Pok Yin S. Chow, *Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence*, 16 Hum. Rts. L. Rev. 453 (2016); Shreya Atrey, *Lifting as We Climb: Recognizing Intersectional Gender Violence in Law*, 5 Onati Socio-leg. Series (Online) 1512 (2015); Aisha Nicole Davis, *Intersectionality and International Law: Recognizing Complex Identities on the Global Stage*, 28 Harv. Hum. Rts. J. 205 (2015).

An Example in the Trumpian Era

This final section applies a CRF analysis to the area of poverty law and lawyering in the Trumpian era. The Trump administration has implemented policies that benefit the wealthy white elites while encouraging xenophobia, racism, and Islamophobia on the governmental and private levels. Being an effective poverty lawyer requires noticing the intersectional and multiplicative nature of your clients' lives in this historic period, i.e. going beyond a sole emphasis on their class status as poverty-stricken.

We shall imagine a client, Fatima, who comes in with a housing problem. She is facing eviction. She does not speak English very well, and you find out her native language is Arabic. No one in your office speaks it, but Fatima's seven-year-old daughter Sara, has some command of both English and Arabic. Fatima has taken her out of school to assist with translation. You deduce that there is a sexual harassment problem with the property owner, but Sara's language skills are not up to the complexity to explain the precise situation.

You find out that Fatima is a non-US citizen, from a country under the Trump administration travel ban. Her husband Abdullah has been arrested and is going to be deported for unknown reasons. She rarely hears from him and she does not know where he is being held. Their home country is undergoing severe civil unrest, and the family has published social media posts critical of the regime. Fatima is severely depressed as she fears what will happen if Abdullah is returned to their native land. He had always told her to stay in America at all costs if she can.

Abdullah was the breadwinner and his job provided medical coverage for the family. Fatima is pregnant with their third child. Sara is asthmatic, and mold in the apartment may be affecting her. The oldest son, Nidal, is in high school. He is hanging out with a bad crowd, and faces Islamophobic bullying at school. Fatima is worried that Nidal may be attracted to the global jihad websites in his social media.

As a single parent now, Fatima needs to work, but she lacks a work visa and she needs a consultation with an immigration lawyer to see if she is even eligible to work. Additionally, she has been very sick during the pregnancy. The mold may be affecting her as well. Sara needs to go to the hospital a lot for the asthma, but Fatima is afraid they will be rejected now because their health insurance has lapsed. Between their medical problems and Fatima's lack of English skills, it might be impossible for

her to get a job even if she obtained a legal visa. Moreover, Sara is too young to be left alone after school.

The entire family can face Islamophobia in the street and schools, especially since Fatima wears a hijab. Their Muslim dietary requirements mandate halal meat, which is more expensive and less available. Since the local stores do not carry it, Fatima must go to a farm that is thirty minutes away. There is no public transit available and Fatima does not have a driving license, much less a car. She fears the landlord will turn her in as a terrorist if she does not comply with his demands to engage in sexual contact.

Because Fatima and her family are dark skinned, such that they cannot pass for white, they face race discrimination as well. They would not approach the local Black American community, as the family is culturally very different. Unfortunately, there are not people from Fatima's country in the local community to the best of her knowledge.

Overall, it is clear that the multiple complexities involved in her "simple" housing issue require attention beyond your abilities. You realize you need translation that will not require a seven year old staying out of school or her being exposed to sophisticated adult subjects. You find out that the many dialects of Arabic may mean that the translator you may find may not be able to really understand Fatima very well. Nidal, who also speaks some English, has been skipping a lot of school, and is not helpful at this point.

You realize that Fatima is a devout woman, and she seems very uncomfortable around you, a white male. Maybe, it would be better if you got a female lawyer involved in her case. To try to get some understanding of her culture and religion, you do a little research and discover there are many different ways Islam is practiced in different countries, and it will be too difficult to figure it all out in the context of your very limited time to work on her case, one case among dozens. In addition, you are not sure if anything you would do would make a real difference.

Effective poverty lawyering will mean more than handling complexity on an individual client basis with a predominantly white professional staff. You need to hire lawyers and professionals with various identities that have prepared them to handle multiplicative discrimination. Imagine how Fatima might react if her lawyer came in wearing a hijab as well and was a recent immigrant! Imagine if your paralegal spoke Arabic. If Fatima spoke a different dialect, maybe the paralegal would have access to someone who knew someone who spoke that dialect. Maybe the pa-

ralegal would know a discount place to get halal goods. Imagine if everyone on staff had complex diversity, equity, and inclusion training once a year. This training would not merely be normed to black-white racial issues, but would be representative of the broader array of communities in your area.

Imagine if the elite white male Harvard graduate who is a poverty lawyer could commit "class suicide" as the late Guinea Bissau revolutionary leader Amilcar Cabral[58] called for doing. That lawyer would then viscerally identify with his clients and denounce his own white privileging.[59]

Above all, your client needs to be treated with dignity, a concept the U.S. legal system does not quantify. You could learn much from the South African Constitution that does mention dignity in article 10: "Everyone has inherent dignity and the right to have their dignity respected and protected."[60] The South African courts have applied the dignity concept in family law and other fields.[61] Dignity was the theme for the Washington-based Law & Society conference in May 2019. "Dignity embraces justice, rights, rule of law, respect for humanity and diversity as well as a commitment to human engagement, subjects that have been central in the law and society tradition. Dignity is a core idea in many different legal traditions and is shaped by a variety of struggles. It provides a bridge across cultures intersecting with diverse values and identities."[62] Even if the U.S. does not have the dignity concept, there is nothing to prevent your work place from infusing its efforts with a commitment to providing dignity for all your clients. Imagine if one backlash from the Trumpian era was a national conversation on the need to treat all people residing within U.S. borders with dignity, especially as we head toward a mid-century country where people of color will be the majority.[63]

[58] Amilcar Cabral. Revolution in Guinea: Selected Texts by Amilcar Cabral (1970).

[59] Peggy McIntosh, White Privilege: Unpacking the Invisible Knapsack (July/Aug.1989), www.nymbp.org/uploads/2/6/6/0/26609299/whiteprivilege.pdf.

[60] S. Afr. Const. art. 10 (1996).

[61] *See* Volks NO v Robinson and Others, (CCT12/04) [2005] ZACC 2; 2005 (5) BCLR 446 (CC) (21 Feb. 2005).

[62] *See* Law and Society Association Annual Meeting 2019, https://www.lawandsociety.org/WashingtonDC2019/Washington2019.html.

[63] *See* William Frey, *The US will become 'Minority White' in 2045, Census Projects*, Brookings Institution (Mar.14, 2018), https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects/.

Conclusion

Gearey's book and lecture raise much food for intellectual thought in the Trumpian era. Those interested in or committed to critical legal theory should immerse themselves in the rich discussion on a variety of interwoven topics. The need for more sophistication in poverty lawyering in the twenty-first century will only continue to grow no matter who is the president of the United States.

Anni Carlsson

Reclaiming Platforms and Capitols: Feminist Activism and Free Speech on Social Media

I have always depended on the kindness of strangers.
Blanche DuBois in Streetcar Named Desire by Tennessee Williams

The master's tools will never dismantle the master's house.
Audre Lorde

Protesting Outside the Houses of (Hopefully) Kind Masters

In his book *Poverty Law and Legal Activism*, Gearey explores the efforts of lawyers and activists to combat poverty.[1] The title shines the spotlight on two phenomena: law and activism. On the one hand, there are the *laws* regulating the everyday fates of the poor, and on the other hand, there is the *activism* aiming to change, preserve or enforce these laws in order for them to better cater to the interests of the poor. As laws as a rule originate from the public authorities, it is only natural that those wanting to see laws changed should direct their activism towards the state as the principal creator and enforcer of laws. This is also what was done by Gearey's poverty activists. And, if the fates of the poor were not the responsibility of the state the lawmaker, what would be the alternative? Gearey writes

[1] Gearey, Adam, *Poverty Law and Legal Activism: Lives that Slide Out of View*, Abingdon, Oxon; New York, NY: Routledge, 2018.

about the weakening of the welfare system that took off in the US during the George W.H. Bush presidency, when the voluntarism and charity of kind-hearted Americans were offered as substitutes for a state-subsided system of welfare.[2] Hence, instead of relying on state-maintained welfare schemes, the poor could just as well depend on the kindness of private actors.

The questions of law, activism and the kindness of private actors also arise in the field of freedom of expression when looking at the relationships between social media platforms and their users. Here, I choose to focus chiefly on the role of the social media companies in the context of feminist activism of the 21st century. The platforms have featured both as sites and objects of feminist activism – sometimes both at the same time. On the one hand, social media platforms have provided arenas for feminist activism with global reach and reverberations, with the #MeToo-movement standing out as the leading legacy of digital feminist activism.[3] However, in parallel with establishing new opportunities for feminist expression, the social media platforms have given rise to new modes of suppressing that very same speech. Many women engage in self-censorship on social media or have abandoned the platforms because of online hate and harassment, which the companies have failed to address.[4] Also, the platforms themselves limit feminist speech by taking down content and blocking accounts that engage in such expression. Facebook's Community Standards constrain how the female body can be visually presented on the platform by, for instance, prohibiting pictures of "uncovered female nipples" with some exceptions, such as breastfeed-

[2] Ibid., 136–142.

[3] E.g. Loney-Howes, Rachel et al., Digital footprints of #MeToo, *Feminist Media Studies*, 2021, DOI: 10.1080/14680777.2021.1886142; Trott, Verity, Networked feminism: counterpublics and the intersectional issues of #MeToo, *Feminist Media Studies*, 2020, DOI: 10.1080/14680777.2020.1718176.

[4] Amnesty International, *Toxic Twitter*, 2018, ch. 5 "The silencing effect", https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-5/#topanchor (Accessed 2021-04-26). As one woman told Amnesty: "The main thing that goes through my head every time I tweet anything feminist in nature is I'll probably get death threats if this gets any traction", Ibid. See also e.g. the special issue on online misogyny in *Feminist Media Studies*, vol. 18, no. 4, 2018; and Citron, Danielle Keats and Penney, Jonathon W, When Law Frees Us to Speak, *Fordham Law Review*, vol. 87, no. 6, 2019, 2317–2336.

ing, birth giving and protest.[5] Moreover, Facebook has blocked accounts of women who had posted phrases such as "men are scum" in the context of discussion on sexual harassment, as these comments were regarded as hate speech under the Community Standards.[6]

The relationship between feminist activism and social media platforms is consequently multifaceted and full of contradictions.[7] While social media platforms have provided the feminist struggle with a new valuable arena in the (digital) public sphere, new tools have emerged in parallel to dismantle it. The detrimental aspects of social media have prompted activism aimed directly towards the fathers of all these digital troubles, namely the platforms themselves. Some examples of protests directed towards the social media companies include: protestors stomping on printouts of sexist, racist and violent tweets outside Twitter's Tokyo office;[8] a topless protest by feminist activists outside Facebook's Korea office, after the company removed topless photos taken during an earlier protest;[9] and a protest outside the Facebook headquarters in New York, where the protestors covered their naked bodies with stickers of male nipples,

[5] Facebook's Community Standards on Adult Nudity and Sexual Activity, https://www.facebook.com/communitystandards/adult_nudity_sexual_activity (Accessed 2021-04-26). See also e.g. Petersson, Charlee and Ottosson, Johanna, *Den nakna sanningen om blottande censur: om algoritmisering och fyrkantig disciplinering på Facebook*, Lund: Media and Communication Studies, Lund University, 2017, for a study of fourteen cases where Facebook has removed content depicting female nudity; and Are, Carolina, How Instagram's algorithm is censoring women and vulnerable users but helping online abusers, *Feminist Media Studies*, vol. 20, no. 5, 2020, 741–744.

[6] Gibbs, Samuel, Facebook bans women for posting 'men are scum' after harassment scandals, *The Guardian*, 5 December 2017, https://www.theguardian.com/technology/2017/dec/05/facebook-bans-women-posting-men-are-scum-harassment-scandals-comedian-marcia-belsky-abuse (Accessed 2021-04-26); van Zuylen-Wood, Simon, "Men Are Scum": Inside Facebook's War on Hate Speech, *Vanity Fair*, 26 February 2019, https://www.vanityfair.com/news/2019/02/men-are-scum-inside-facebook-war-on-hate-speech (Accessed 2021-04-26).

[7] E.g. Locke, Abigail, Lawthom, Rebecca and Lyons, Antonia, Social media platforms as complex and contradictory spaces for feminisms: Visibility, opportunity, power, resistance and activism, *Feminism & Psychology*, vol. 28, no. 1, 2018, 3–10.

[8] Thompson, Nevin, At Twitter's Tokyo Office, Protesters Stomp on Hateful Tweets, *Global Voices Advox*, 11 September 2017, https://advox.globalvoices.org/2017/09/11/ at-twitters-tokyo-office-protesters-stomp-on-hateful-tweets (Accessed 2021-04-26).

[9] He-rim, Jo, Feminist activists protest topless, Facebook Korea apologizes, *The Korea Herald*, 3 June 2018, http://www.koreaherald.com/view.php?ud=20180603000178 (Accessed 2021-04-26).

protesting against Facebook's and Instagram's policy banning photos of female nipples.[10] There have also been temporary boycotts of the social media platforms due to, for example, the companies' inaction against hateful content directed against women.[11] In addition, when women were blocked from Facebook for posting "men are scum", a group of 500 female comedians co-ordinated a protest through a Facebook group where they simultaneously posted versions of the phrase on the platform (almost all were banned).[12]

Without aiming to downplay the importance and results of the above-mentioned activism, in the following I will suggest that future protests having the goal to change the behaviour of social media companies as masters of free speech should not, first and foremost, be directed towards the companies themselves. Rather, just like in the case of Gearey's poverty activists, the protests should be directed towards the lawmakers.

Free Speech by Virtue of Some Kind Strangers or Some Kind of Law

The fact that activists who are unhappy with the actions of the social media platforms choose to direct their protests against the companies and not the state might appear to be completely sensible at first sight. The relationships between the platforms and their users are regulated by contractual agreements, which the users have to accept when they start using the companies' services.[13] Accordingly, it is the companies that set the rules as to what type of content is allowed and not allowed on their platforms. It is also the companies that are responsible for the actual hands-on enforcement of these rules. Sometimes, the activism has even yielded results, as when Facebook changed its policy on breastfeeding

[10] Kari, Paul, Naked protesters condemn nipple censorship at Facebook headquarters, *The Guardian*, 3 June 2019, https://www.theguardian.com/technology/2019/jun/03/facebook-nude-nipple-protest-wethenipple (Accessed 2021-04-26).

[11] Griffin, Kathy, #WomenBoycottTwitter: Rose McGowan's suspension prompts protest, *The Guardian*, 13 October 2017, https://www.theguardian.com/film/2017/oct/13/women-boycott-twitter-rose-mcgowan-protest (Accessed 2021-04-26).

[12] See note 6 above.

[13] E.g. Facebook, *Terms of Service* (last revised on 20 December 2020), https://www.facebook.com/legal/terms/update (Accessed 2021-04-26); Twitter, *Twitter Terms of Service* (effective as of 18 June 2020), https://twitter.com/en/tos (Accessed 2021-04-26).

pictures after persistent protests from a group of users.[14] How could it then be a problem to aim the activism against the very companies who are directly responsible for making and enforcing the rules, and who also seem to be kind enough (at least once in a while) to change their policies as a result of the activism?

In order to understand why it might not be completely satisfactory from the free speech perspective to put pressure only on the social media companies themselves, it is helpful to look at the distinction drawn by Pettit between two concepts of freedom of expression: unhindered speech and protected speech.[15] I will make use of Pettit's distinction in order to propose that the foremost target of the feminist activism that wants to promote freedom of expression and combat hate and harassment on social media platforms should be the lawmakers at the capitols, not the CEOs and coders on corporate campuses.

According to Pettit, *unhindered speech* means that one can express herself without anyone, whether public or private officials or other individuals, hindering her. Imposing penalties on speech or removing the option of expressing something are examples of hindrances that can be imposed on expressive activities. Consequently, speech is unhindered when it is not interfered with.[16] In order to enjoy unhindered speech, it is enough that no one interferes with one's speech or is likely to do so. As long as this is the case, it is irrelevant that the others retain the power to interfere and that the speaker remains unprotected against that power. From the perspective of unhindered speech, one thus enjoys freedom of expression

[14] Gillespie, Tarleton, *Custodians of the Internet*, New Haven: Yale University Press, 2018, ch. 6 "Facebook, Breastfeeding and Living in Suspension". The forms of activism employed included, for example, "nurse-ins" outside the Facebook headquarters and (of course) a Facebook group "Hey Facebook breastfeeding is not obscene". The above-mentioned protests outside Facebook's Korea headquarters resulted in Facebook apologising and restoring the censored pictures, see note 9 above. Also, after the nude protest outside Facebook's New York headquarters, the company agreed to a meeting with a group of stakeholders in order to discuss possible changes in the company's policies on nudity, National Coalition Against Censorship, Facebook Agrees to Reconsider Artistic Nudity Policies, *NCAC*, 5 June 2019, https://ncac.org/news/facebook-agrees-to-reconsider-artistic-nudity-policies (Accessed 2021-04-26).

[15] Pettit, Philip, Two Concepts of Free Speech, In *Academic Freedom*, Jennifer Lackey (ed.), 61–82, Oxford: Oxford University Press, 2018.

[16] Ibid., 62–64.

when no one either interferes or is likely to interfere with her expressive activities.[17]

Consequently, a Facebook user enjoys unhindered speech as long as the company does not interfere with and is unlikely to interfere with her expressive activities on the platform.[18] This means that activists who manage to make Facebook change its content policy with regard to, say, photos depicting female nipples can attain unhindered speech as they became free to post pictures of female nipples without interference, while Facebook is rendered unlikely to interfere as their content rules now allow such pictures. The same applies to activists whose protests result in Twitter taking action against hateful content and thus enabling them to engage in expressive activities on Twitter without being exposed to harassment. Accordingly, as long as there is no actual interference on the part of these companies with regard to the users' free speech exercise, it does not matter that they retain the power to – whenever they so wish – change their content policies and once again start banning nipple photos or allowing hateful content, while users lack protection against such interference.[19]

Protected speech, in contrast, is focused on protecting speakers from "the very possibility of" others interfering with their speech.[20] One's speech is protected when the others' option of interfering with her speech has been removed or such interference has been penalised. Speech becomes protected when obstacles have been put into place to guard the speech against the interference by others, regardless of how likely they are to actually interfere.[21] Consequently, if freedom of expression is regarded as protected speech, then more is required than just the absence and unlikelihood of interference from the part of the others. Speech cannot be

[17] Ibid., 66.

[18] The fact that the users are *forced* to accept the terms of service of social media companies in order to use the platforms can of course be regarded as an interference by the companies as well. However, I choose to focus here on situations where the social media companies interfere with the actual expressive activities of the users on the platforms.

[19] Within the framework of the republican conception of freedom as non-domination, which forms the basis for Pettit's concept of protected speech, acts of omission can also, in some situations, amount to interference, Pettit, Philip, *Republicanism: A Theory of Freedom and Government*, Oxford: Oxford University Press, 1999, 53–54. This means that by not addressing the hateful content that chills some users' speech, the platforms can be regarded as interfering with their free speech exercise.

[20] Pettit, Two Concepts of Free Speech, 64.

[21] Ibid.

protected as long as others retain the power to interfere, even though they would be unlikely to use that power. It is therefore necessary that those with the power to interfere are actually kept from interfering, either by blocking the interference entirely or making it difficult or costly.[22]

This means that a Facebook user who is merely free to post pictures of female nipples without interference cannot be said to have freedom of expression, understood as protected speech. In order for the user to enjoy protected speech in relation to the company, it is necessary that the very possibility of Facebook interfering with her free speech exercise is blocked or penalised. Similarly, a user who can express herself freely on Twitter without the fear of being muzzled by hateful attacks cannot be regarded as enjoying free speech as protected speech, as long as the very possibility of Twitter interfering with her speech by allowing her to be targeted with hate and harassment exists.

It is consequently easier to enjoy freedom of expression if it is regarded as unhindered speech than if it is equated with protected speech.[23] According to Pettit, unhindered speech is also the concept that is dominating in jurisprudence and politics.[24] However, Pettit presents normative, sociological and historical arguments in order to show why protected free speech should be regarded as superior to unhindered free speech.[25] In addition, he discusses the benefits associated with protected speech, related to it granting people the status of free speakers, enfranchising their silence and making them personally responsible for their speech.[26]

But who is then responsible for making sure that the expressive activities of individuals are protected against the mere possibility of interference by others, for instance, by social media companies? According to

[22] Ibid., 66.

[23] Ibid., 64, 66.

[24] Ibid., 61.

[25] Ibid., 69–71. Perhaps the most interesting justification in this context is the historical argument, which connects the protected free speech to the republican tradition of ideas and the conception of freedom as non-domination (also called republican freedom). If freedom is regarded as non-domination, it is not enough that others do not interfere with one's actions, but the individual must also be *protected against arbitrary interference* by others. Apart from absence of interference, absence of domination is thus also required. See e.g. Pettit, *Republicanism: A Theory of Freedom and Government*, ch. 3 "Liberty as Non-Domination".

[26] Pettit, Two Concepts of Free Speech, 73–77. On enfranchisement of silence, see also Pettit, Philip, Enfranchising silence, In *Rules, Reasons, and Norms*, Oxford: Oxford University Press, 2002, 367–377.

Pettit, this protection "is provided by law […] that is subject to democratic, constitutional control, not exposed to an unconstrained will on the part of those in power", together with social norms.[27] Consequently, protected speech cannot be achieved by legal protections "provided at the whim of a benevolent autocrat or elite body".[28] The legal regulations providing for protection of speech can take many forms, from constitutional provisions through criminal sanctions and tort remedies to local norms at an institutional level.[29] This means that in order to guarantee social media users protected speech, the state the lawmaker has to get involved and create a system of regulations that keeps the social media companies from interfering with the users' free speech exercise.

So, this is where the law steps in as an essential tool for creating the necessary safeguards for protected free speech. By protesting outside the corporate headquarters instead of the houses of parliaments, users can at best achieve unhindered freedom of expression, but not protected freedom of expression. As Pettit puts it: "It is only by dint of law and regulation—and supportive social norms—that speech gets to be protected, and gets to count as free."[30]

Depending on the Kindness of Platforms or Positive Tools of the State

One reason for the lack of protests against the power of social media companies outside parliaments may be found in the way in which the right to freedom of expression has historically been perceived. In its classic guise, freedom of speech has chiefly required that the state refrains

[27] Pettit, Two Concepts of Free Speech, 65. According to Pettit, protected speech requires that speech is "protected by public law or by the public rules of a corporate body like a university, which has its own domain and government." Ibid., 61. Pettit thus seems to suggest that it is sometimes possible for private corporate bodies, rather than the state, to provide protection for speech. He also maintains that protection is necessary only "when there is no natural obstacle or hurdle stopping some from interfering with others", Ibid., 65.

[28] Pettit, Two Concepts of Free Speech, 65.

[29] Ibid., 65, 67–68.

[30] Ibid., 67.

from interfering with citizens' free speech exercise.[31] Freedom of expression has thus traditionally been regarded primarily as a negative right that applies against the state. Therefore, it may seem counterintuitive that the state should actively interfere in the relationships between private social media companies and their individual users. In the context of freedom of expression, "[f]reedom is not thought to involve the state acting so much as the state not acting."[32]

Recently, the under-appreciated positive dimensions of freedom of expression have gained more attention in the free speech scholarship.[33] However, this does not mean that freedom of speech would previously have been some kind of stranger to positive elements. Examples of positive aspects of the right to freedom of expression include: the right to use some public (and sometimes private) places for expressive activities, the right to not have one's expressive activities interrupted by a hostile audience, the right to reply in mass media, government subsidies for media and arts, and media ownership controls.[34] The right to freedom of expression could accordingly be conceptualised as covering additional positive aspects in the context of social media as well.

Pettit's dichotomy between unhindered and protected speech is rooted in the distinction between the liberal conception of freedom as non-interference and the republican conception of freedom as non-domination. The concept of protected speech grows out of the republican conception of freedom, which entails that anyone who is subject to a master – no matter how gentle or kind – cannot be regarded as free.[35] According to Carolan, the republican tradition accords well with a more positive conception of freedom of expression, as republicanism "views positive action

[31] E.g. Stone, Adrienne and Schauer, Frederick, Introduction, In *The Oxford Handbook of Freedom of Speech*, Adrienne Stone and Frederick Schauer (eds.), xi–xxiii, Oxford: Oxford University Press, 2021, xx; Kenyon, Andrew T, Complicating Freedom: Investigating Positive Free Speech, In *Positive Free Speech: Rationales, Methods and Implications*, Andrew T Kenyon and Andrew Scott (eds.), 1–9, Oxford: Hart, 2020, 1; Barendt, Eric, *Freedom of Speech*, 2nd ed., Oxford: Oxford University Press, 2007, 14.

[32] Kenyon, Andrew T, Positive Free Speech: A Democratic Freedom, In *The Oxford Handbook of Freedom of Speech*, Adrienne Stone and Frederick Schauer (eds.), 231–248, Oxford: Oxford University Press, 2021, 231.

[33] E.g. Kenyon, Andrew T and Scott, Andrew (eds.), *Positive Free Speech: Rationales, Methods and Implications*, Oxford: Hart, 2020.

[34] Kenyon, Complicating Freedom: Investigating Positive Free Speech, 2–3; Barendt, *Freedom of Speech*, 100–108.

[35] E.g. Pettit, Two Concepts of Free Speech, 70–71.

in defence of freedom to be a legitimate, if not the primary, purpose of the state".[36] It is the duty of the state to address the potential of domination and the issuing imbalance of power – both between the state and citizens and between private actors.[37] It is thus the mission of the lawmakers to start looking for legal tools to dismantle the power imbalance between the social media platforms and their users.

Just as it is difficult to imagine a functioning welfare system that would solely depend on the charity and kind-heartedness of private actors, it is impossible to "enjoy free speech by the gift or tolerance or indifference of others". Instead, enjoying protected free speech requires having the "robustly entrenched rights of a free speaker".[38] Consequently, laws are needed in order to establish a functioning system of freedom of expression, just as they are needed to create a functioning welfare system. It is always possible that free speech activists manage to make the social media companies change their minds with regard to the permissibility of some kind of content. The companies may very well be kind enough to change their rules and help the users achieve unhindered speech without a need for the state to step in. Accordingly, with regard to unhindered free speech, "protection of the law is just one of many possible means for removing hindrances to speech" and speech is equally free when the companies themselves act in order to remove barriers to free speech.[39] In contrast, if the users do not want to depend on the kindness of social media companies in order to be able to express themselves freely, but

[36] Carolan, Eoin, Promoting Civic Discourse: A Form of Positive Free Speech under the Constitution of Ireland?, In *Positive Free Speech: Rationales, Methods and Implications*, Andrew T Kenyon and Andrew Scott (eds.), 65–81, Oxford: Hart, 2020, 71. For a justification for regulating hate speech in order to protect free speech on the basis of the republication conception of freedom, see Bonotti, Matteo, Religion, Hate Speech and Non-Domination, *Ethnicities*, vol. 17, no. 2, 2017, 259–274. On the relationship between hate speech and republican freedom, see also Di Rosa, Alessandro, Performative Hate Speech Acts. Perlocutionary and Illocutionary Understandings in International Human Rights Law, *The Age of Human Rights Journal*, no. 12, 2019, 105–132. See also Pettit, Two Concepts of Free Speech, 66–67 regarding hate speech. On the relationship between republican freedom and free speech in social media, see Ardito, Alissa, Social Media, Administrative Agencies, and the First Amendment, *Administrative Law Review*, vol. 65, no. 2, 2013, 301–386.

[37] Carolan, Promoting Civic Discourse: A Form of Positive Free Speech under the Constitution of Ireland?, 71.

[38] Pettit, Two Concepts of Free Speech, 61.

[39] Ibid.

instead enjoy protected free speech, then protection provided by the law becomes "essential".[40] I have chosen to exemplify this digital free speech dilemma by focusing on the example of feminist activism, but much of what is said here could be applied to other expressive activities on social media as well. All social media users are but strangers in the houses of these masters of the platforms, depending on their kindness.

Postscript – Platforms' Kindness Will Not Solve Platforms' Problems

The power of social media companies over the public sphere, free speech and democracy became tangibly clear in January 2021 when supporters of President Trump stormed the Capitol in Washington D.C. after being spurred on by his activities on social media. Twitter, Facebook and several other social media companies reacted by clearing out Trump from their platforms, demonstrating thus that not even the president of the country whose laws made the rise of these companies possible can be sure of enjoying unhindered or protected speech against them. As a result, Trump is gone not only from the Capitol but also from the platforms. There is now a chance to reclaim both of these spaces as sites of peaceful protest and democratic activism. As argued above, in order to reclaim the platforms, one must start by reclaiming the capitols. Because that is where the lawmakers with the (positive) tools for dismantling the platforms sit.

[40] Ibid.

Martha T. McCluskey

Critical Legal Power for Twenty-First Century Change

In his book *Poverty Law and Legal Activism*, Adam Gearey studies a prime period of 20th century U.S. poverty law to illuminate critical legal studies as a theory of activism.[1] Gearey recounts how radical anti-poverty lawyers of the 1960s and 1970s reflected on their work with clients as a process of seeing and struggling together with "lives that slide out of view."[2] This essay explores how today's critical legal activists and academics continue this commitment to developing law's transformative power.

Turning from academia to poverty lawyering as a ground for legal theory, Gearey offers a refreshing response to the idea that critique is an "an unaffordable luxury."[3] Critical Legal Studies has been faulted for taking a "traditionally elitist approach to law by remaining confined within elite institutions and purveyed by law professors, sometimes in impenetrable language."[4] By focusing on the everyday struggles of poverty law work, Gearey identifies legal critique not only as thinking about law, but as a practice of changing what we do and who we are.[5]

This vision suggests how critique can respond to the current era's multiple crises in the face of a tidal wave of disdain for reason, law, and

[1] Adam Gearey, Poverty Law and Legal Activism: Lives that Slide Out of View (2018).

[2] *Id.*, at 1, 7–8.

[3] Wendy Brown & Janet Halley, *Introduction*, in Left Legalism/Left Critique 4 (Wendy Brown & Janet Halley, eds. 2002) (criticizing this view as anti-intellectualism).

[4] Amna Akbar, Sameer Ashar, and Jocelyn Simonson, *Movement Visions for a Renewed Left Legalism*, LPE Project: LPE Blog (March 5, 2019), https://lpeproject.org/blog/movement-visions-for-a-renewed-left-legalism/ (last visited April 24, 2021).

[5] Gearey, *supra* note 1, at 161, 175.

democracy.[6] Across the political spectrum, a widespread culture of fear, division, and distraction seduces people into complicity with systems of personal and mass destruction. In this context, social change will require more than revealing the irrationality and injustice of existing institutions or defending noble moral principles. It will also require collective practices of learning and caring to generate power for good.

This essay begins with insights from contemporary social movements that are working to transform the structures keeping many lives and communities "in close proximity to death," as Gearey describes the condition of poverty.[7] Three themes from contemporary grassroots activism can guide legal responses to today's human and environmental disasters. First, solutions to poverty require a comprehensive redesign of law, politics, and economy,[8] not simply targeted inclusion or redistribution within existing institutions. Second, collective praxis is fundamental to resisting poverty and other socioeconomic harms. Third, political economic transformation involves affirming and redirecting law's structural power.

The next section of this essay situates today's struggles for socioeconomic justice in a context of disillusionment with legal liberalism's capacity to correct the systemic failures underlying poverty. The law-and-economics school of thought answers liberal law's shortcomings with a deceptive ideal of efficiency.[9] That ideal has helped to rationalize and amplify conditions of growing inequality and insecurity, fueling popular support for authoritarianism. Critique must now challenge both the liberal ideal of law's neutrality and the neoliberal and illiberal valorization of law's inequality.

The final section considers how critical theory can follow activists' lead in affirming law's power for social and economic justice. I highlight two recent strands of critical theory, one focused on human vulnerability and the other on money, both of which offer ambitious visions for changing the systems that make poverty and other catastrophic conditions appear reasonable, tangential, or intractable.

[6] *See generally*, Daniel P. Tokaji, *Truth, Democracy, and the Limits of Law*, 64 St. Louis L.J. 569 (2020) (discussing how anti-truth politics threatens law and democracy).

[7] Gearey, *supra* note 1, at 108.

[8] *Id.* at 166–74.

[9] Martha T. McCluskey, *Defining the Economic Pie, not Dividing It*, 5 Critical Analysis of Law 77, 78–80 (2018).

Anti-Poverty Praxis as 21st Century Theory

Reflecting on critical legal studies in the late 20th century, Robert Gordon argues that "it ought to be of some value to demonstrate, over and over again, the arguments why nothing important can change are no good."[10] Mainstream legal education tends to present law as a technical tool for cautiously and sparingly fine-tuning systems presumed to generally further widely accepted goals. In this approach, professionalism requires *not seeing* severe flaws in the current system, such as the persistence of poverty under liberal democracy and seemingly neutral law.

This professional cynicism combines with the current context of economic, political and environmental insecurity to foster legal denial, defeat, or despair. If we defend liberal ideals of democracy, equality, and fairness, will those principles primarily operate to protect those bent on destroying those ideals? If the U.S. Supreme Court is governed by Justices who idealize arbitrary plutocratic power, what is the point of earnest legal attention to precedent, facts, and fundamental principles? If U.S. political leaders and their global authoritarian allies can traffic profitably in blatant lies, hate-mongering, and criminality with the comfortable support of popular media platforms, legal authorities, billionaire funders, and well-paid experts, then what is the point of exposing official wrongdoing – especially if the ensuing spectacle of distrust in truth, democracy, and law is part of the authoritarian strategy? If carbon emissions are quickly leading us off a global climate cliff that promises unimaginable destruction of human well-being, then how must we fundamentally rethink prevailing legal ideas about what is reasonable and fair?

Integrating Theory and Practice

Critical legal scholars Amna Akbar, Sameer Ashar, and Jocelyn Simonson press for legal expertise grounded in the theory and practice of contemporary social movements that "rise rather than shrink in the face of immense challenges."[11] They give examples of diverse grassroots initiatives, including the Sunrise Movement, Black Lives Matter, the Occupy Move-

[10] Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, in The Politics of Law: A Progressive Critique 658 (David Kairys ed., 3d. ed., 1998).

[11] Amna Akbar, Sameer Ashar, and Jocelyn Simonson, *Movement Visions for a Renewed Left Politics*, LPE Project: LPE Blog, (March 4, 2019) https://lpeproject.org/blog/movement-visions-for-a-renewed-left-politics/ (last visited May 5, 2021).

ment, Mijente and the U.S. prison abolition movement, that "galvanize a different kind of force in politics, one of hope and collective action rather than cynicism and alienation."[12]

As these initiatives demonstrate, today's movements address poverty as a problem of multiple mutually reinforcing systems of subordination, requiring multi-faceted solutions. For example, the law reform platform developed by a Black Lives Matter coalition responds to anti-Black police violence by advocating a range of social and economic policies, including restructuring the tax code, breaking up large banks, enhancing labor rights, and protecting clean water.[13] The Sunrise Movement addresses climate change by promoting a Green New Deal program of expansive protections against poverty.[14]

Moreover, Akbar, Ashar, and Simonson note that these social movements show us how to "hold conflicting ideas in our heads," following the method of critical race theory.[15] Grassroots activists on the frontlines of struggle teach strategies for navigating the double binds inherent in current politics and law,[16] rather than treating law's contradictions as an excuse for ceding its power. As Akbar further explains, recent social movements have developed "non-reformist reforms" that de-legitimate the basic premises and parameters of current systems even while achieving practical gains within those systems.[17]

Like Gearey, Akbar affirms the demands of social movements not to detach from theory but to develop and deepen it. Rather than limiting policy solutions to what is possible, this praxis of non-reformist reforms draws critical attention to what should be made possible.[18] For example, the movement call to "defund the police" works to limit police violence

[12] *Id.*

[13] Movement for Black Lives, *2020 Policy Platform*, https://m4bl.org/policy-platforms/ (last visited April 24, 2021).

[14] Sunrise Movement, *What is the Green New Deal?*, https://www.sunrisemovement.org/green-new-deal/?ms=WhatistheGreenNewDeal%3F (last visited April 24, 2021).

[15] Akbar, Ashar & Simonson, *supra* note 4.

[16] *See* Martha T. McCluskey, *Thinking with Wolves: Left Legal Theory After the Right's Rise*, 54 Buff. L. Rev. 1191, 1201 & note 41 (2007) (critiquing liberal double binds); see also Maria Grahn-Farley, *Race and Class: More than a Liberal Paradox*, 56 Buff. L. Rev. 938–39, 943–44 (2008) (explaining how liberalism's binary conception of race and class impedes equality).

[17] Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 Harv. L. Rev. 90, 98–106 (2020).

[18] *Id.* at 102–103.

while also promoting a vision of public safety that is not centered on state violence.[19] Similarly, radical goals like abolishing incarceration and eliminating fossil fuels become reasonable and credible through collective actions that keep these goals in public view and demonstrate why they matter.

In contrast, writing at the start of the twenty-first century, Wendy Brown and Janet Halley warn left legal theory to resist the confines of current politics by maintaining distance from activists' demands.[20] They explain that giving authority to personal experiences of subordination can reify identity categories and close down creative imagination of more liberating alternatives. They argue that questions like "what can all these abstractions *do* for a woman living in a fifth-floor cold water walkup" may derail careful analysis of competing claims and complexities by deferring to an anti-intellectual common sense.[21]

This effort to defend theory against practicality itself risks being confined by an uncritical and hierarchical dichotomy between the two.[22] Gearey's study of critical praxis pushes beyond this binary trap, studying radical anti-poverty activists not as authentic or politically innocent informants but rather as agents of critical subjectivity and action who deserve to be engaged as theoretical collaborators. Gearey shows how close attention to clients' experiences of poverty was integral to the critical theory of radical lawyers Ed Sparer and William Stringfellow.[23]

By asserting the power and value of theory outside the academy, critical praxis directly challenges the contemporary neoliberal and illiberal politics that constructs intellectualism itself as elitist and frivolous. Further, critical praxis challenges uncritical thinking about the politics of theory.[24] It challenges us to question whose concerns count, and whether arguments about the complexities confronting movement demands indeed reflect intellectual courage instead of complicity with a system de-

[19] *Id.* at 108.
[20] Brown & Halley, *supra* note 3, at 1–5.
[21] *Id.* at 2–3.
[22] McCluskey, *supra* note 16, at 1234–60.
[23] Gearey, *supra* note 1, at 44–56, 95–113.
[24] *See* McCluskey, *supra* note 16, at 1211 & n. 79 (noting critical legal literature on the interrelationship between critical praxis and critical theory).

signed to impede clear thinking about the urgency and rationality of transformative change.[25]

Gearey's analysis grounds theory in ethics, showing that critique does not stand safely apart from the limits of law and politics. As embodied beings, our thinking is always a social and political act of relationship embedded in larger systems of unequal power. By focusing on lawyers committed to an ethics of "being with"[26] those struggling against poverty, Gearey explores what Akbar, Ashar and Simonson similarly describe as the intellectual and political value of learning "how we should relate to the state and to each other"[27] through collective activism.

Activist Theories for 21st Century Economic Justice

Another recent anti-poverty initiative, The Movement Generation Justice and Ecology Project[28] provides further lessons for integrating theory and practice. Using the tagline "Opening Eyes. Sharpening Lenses. Focused on Action,"[29] this California-based group trains young people of color and low-income community members to become leaders in political economic transformation. I learned of their work through their collaboration with an economic justice advocacy group in my local community, People United for Sustainable Housing (PUSH Buffalo).[30]

Challenging Poverty as Multifaceted and Systemic

In the current climate emergency, the economic insecurities of living in or near poverty are inseparable from displacement, injury and death from environmental, social, and political degradation and destruction. As the

[25] *See id.* at 1226–37 & n. 214 (arguing that critique should engage the politics of legal theory).

[26] Gearey, *supra* note 1, at 107–09.

[27] Akbar, Ashar, & Simonson, *supra* note 4.

[28] Movement Generation Justice And Ecology Project, https://movementgeneration.org/ (last visited April 24, 2021).

[29] *Id.*

[30] PUSH Buffalo, https://www.pushbuffalo.org/ (last visited April 25, 2021).

Movement Generation declares, "transition is inevitable, justice is not."[31] The Movement Generation critically re-positions poverty: it is not about being left behind the global economy's successes but instead about being on the frontlines of its catastrophic failures. That frontline position is a key site of practical and conceptual resistance against ecological disaster driven by a global economy designed for extraction and plunder.[32] The Movement Generation insists that "workers and communities impacted first and worst must lead the transition to ensure it is just."[33]

In collaboration with Movement Generation, PUSH Buffalo responds to poverty with a call not merely for equality but rather for an economy with a fundamentally different quality. PUSH Buffalo articulates a theory of affirmative change centered on both vision and practice:

> We strive to focus our campaign attentions at the roots of our crisis so that we can holistically build a regenerative, living economy that is rooted in care, sacredness and joy. Together we engage in national, state and local campaigns that work to draw down money and power to our people because we know that "if we are not prepared to govern, we are not prepared to win."[34]

This critical analysis of social change combines substantive solutions to interrelated injustices with transformative process. To address multifaceted problems like poverty, climate disruption, and white supremacy, this vision strives not only to oppose the particular injuries and injustices its members experience directly. This non-reformist approach further challenges activists to expand their understanding of what and who matters, to reject the boundaries imposed by current politics, and to build their capacity for wielding responsible power.

Like the lawyers in Gearey's study, PUSH Buffalo cultivates a new ethics in the changers themselves, not only in the systems they aim to transform. A series of "value filters," drawn from the Movement Generation, detaches PUSH Buffalo's community organizing from a reactive politics

[31] Movement Generation Justice And Ecology Project, https://movementgeneration.org/transition-is-inevitable-justice-is-not-a-critical-framework-for-just-recovery/ (last visited April 24, 2021).

[32] *Id.* at https://movementgeneration.org/movement-generation-just-transition-framework-resources/ (last visited April 24, 2021).

[33] *Id.*

[34] PUSH Buffalo, *supra* note 30, at https://www.pushbuffalo.org/organizing/ (last visited April 25, 2021).

to a process of expanding awareness and commitment. For example, the "Seven Generations Principle" guides activists with questions for reflecting on both goals and tactics:

1. Will the decision we are making today create a sustainable world for seven generations forward? Will it reverberate to heal our ancestors seven generations back?
2. "If it's not soulful, it's not strategic"
3. Does this decision help to create real community power by drawing down money, power and other resources? Does it set us up for structural reforms that will get us closer to our "north stars"?
4. Does this decision move the needle towards real solutions being more politically realistic? Does it work to expose that the current system does not serve us?
5. Does this decision help to build or strengthen our movement infrastructure and collective practices of liberation?
6. Does this decision allow for more space for communities of care, dignity and joy?[35]

These value filters affirm the experiences and judgments of frontline activists, not as evidence of pure righteousness or truth, but instead as the basis for developing a new state of being and acting not yet fully envisioned or realized.

Affirming Collective Critical Praxis

Social movements also highlight the transformative power of *collective* reflection and action. PUSH Buffalo's principles serve as "a point of aspiration in our practice together as a team and within the larger organization of PUSH Buffalo– we are constantly growing, changing, learning, practicing and figuring it out."[36] Freedom and justice, in this view, does not consist of casting off external constraints to enable autonomous individual self-expression. Instead, this praxis recognizes that individual subjectivity and agency are inherently political and social, requiring ongoing collective resources and mutual accountability.

[35] *Id.* (click on "Seven Generations Principle" to see questions).
[36] PUSH Buffalo, *supra* note 34.

In PUSH Buffalo's guiding theory, the act of governing stands not in opposition to radical liberation, but rather as its core practice. By preparing to win real power both within and without the state, critical praxis creates communities that can come together across differences and traumas. As Akbar explains, the collective processes of movements "become schools of democratic governance in action; processes of enfranchisement and self-determination that build power and motivate further action."[37]

In this vision, democracy requires constituting collectives stronger than the sum of their individualized members. Akbar argues that the most powerful organizing does more than win concessions: it creates solidarity and "builds analysis and capacity to respond to intersecting crises."[38] She notes that the Standing Rock protests of the Keystone pipeline became a fulcrum for broader organizing for indigenous rights and political power.[39] This organizing likely contributed to the appointment of Standing Rock supporter Deb Haaland to become the first indigenous U.S. Secretary of the Interior, committed to climate action, environmental justice, and Native rights.

Influential social movements have often collaborated with researchers to study and teach effective methods of social change. The Climate Advocacy Lab, for example, informs activists with evidence that mass mobilization and material resources are valuable but not sufficient for gaining "durable political power."[40] Using examples of Standing Rock, Black Lives Matter, and other recent movements, it explains that effective activism depends on combining collective capacity for protests, strikes, or other forms of disruption with building capacity to advance affirmative narratives and relationships with institutionalized authorities.[41] This critical research suggests that the goal of shifting power requires a deliberate collective practice of turning contestation and criticism into leadership and leverage.

[37] Akbar, *supra* note 17, at 106.

[38] *Id.* at 116.

[39] *Id.*

[40] Carina Barnett-Loro & Jack Zhou, *Turning Grassroots Political Action into Durable Political Power*, Climate Action Lab (Dec. 6, 2018) (Powerpoint presentation available at https://powerlabs.io/turning-grassroots-activism-into-durable-political-power-social-movement-theory/) (last visited Mar. 28, 2021).

[41] *Id.* (drawing on Zeynep Tufecki, Twitter and Tear Gas: The Power and Fragility of Networked Protest (2017)).

Further illuminating the importance of collective action, the organizing principles of PUSH Buffalo and Movement Generation recognizes that human freedom, rationality, and agency require both material and emotional support; dignity and creativity as well as information and argument. The value filters link analysis and opposition to experiences of shared care and joy. Similarly, Gearey highlights poverty lawyers' practice of "joyous despair,"[42] an approach especially appropriate for today's world, where prosperity, democracy, and a life-sustaining planet are at risk of sliding out of reasonable view.

Neoliberal politics also goes beyond material interests and logical argument to cultivate feelings, identities, and communities. One example is twentieth century writer Ayn Rand, whose influential novels continue to inspire and guide prominent political and economic leaders.[43] Lisa Duggan attributes Rand's influence not to any coherent body of ideas but rather to her success in legitimating an "affective neoliberalism" centered on "optimistic cruelty."[44] Duggan analyzes Rand's assertion of ruthless selfishness as the ultimate virtue, glorified through fantasies of strong and superior wealthy white male "producers" entitled to wield destructive power over others portrayed as unworthy "looters" and "parasites."[45] This neoliberal sensibility encourages and legitimates the scapegoating and violence of new authoritarian movements and policies.

To resist the resulting harms, both those who are targeted and their allies will need courage and hope along with knowledge of current dangers. As Robert Gordon explained, "[p]eople don't revolt because their situation is bad; they can suffer in silence for centuries. They revolt when their situation comes to seem *unjust* and *alterable*."[46] Direct personal experiences of solidarity, dignity, accountability and care provide powerful evidence of the possibilities for governing through a politics and law of shared well-being.

[42] Gearey, *supra* note 1, at 14; *see also id.* at 38, 160 (describing a radical sensibility and relational ethics as the core of critique).

[43] *See generally* Jennifer Burns, Goddess of the Market: Ayn Rand and the American Right (2009) (assessing Rand's ideas and impact as a cultural promoter of capitalism and limited government).

[44] Lisa Duggan, Mean Girl: Ayn Rand and the Culture of Greed 5–10 (2019).

[45] *Id.* at 73.

[46] Gordon, *supra* note 10, at 657.

Affirming Law in Critical Praxis

A third theme of recent critical praxis is its ambitious legal activism. Gearey distinguishes critical praxis from the "heroic poverty lawyer litigator."[47] The immediate relief from successful welfare rights litigation efforts typically left the fundamental problems of poverty, race, and class, in place.[48] After initial 1960s court victories, U.S. liberal hopes for constitutional rights to protection against poverty[49] were dashed by conservative courts as well as by bipartisan legislative support for "welfare reforms" curtailing benefits.[50]

As Gearey recounts, by the early 1980s, "hostile and unrelenting political pressures" put U.S. poverty law and activism in crisis,[51] leading to efforts to define a newly "constrained legalism."[52] For example, some turned poverty law away from national rights and regulatory initiatives toward small scale community economic development projects that emphasized enterprise and market power.[53]

Litigation and lawyers are not in the forefront of Movement Generation, PUSH Buffalo, or the social movements mentioned by Akbar, Ashar, and Simonson. The Movement Generation rejects traditional appeals to legal authority, yet its politics does not purport to stand outside or against law. Instead, it claims and re-defines law's power. A guiding principle holds that, "If it's the right thing to do, we have every right to do it."[54] For example, an Occupy the Farm initiative organized community members to grow food for local use on contested property as

[47] Gearey, *supra* note 1, at 137.

[48] *Id.* p. 42.

[49] *Id*. at 57–74.

[50] Julie A. Nice, *Welfare Servitude*, 1 Geo. J. on Fighting Poverty 340–83 (1994).

[51] Gearey, *supra* note 1, at 131 (quoting Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 Geo. L. J. 1529, 1531 (1995)).

[52] Gearey, *supra* note 1, at 138.

[53] *Id.* at 139; *see also* Wendy A. Bach, *Governance, Accountability, and the New Poverty Agenda*, 2010 Wis. L. Rev. 239, 275–78 (2010) (questioning programs designed to treat poverty as a "market failure").

[54] Movement Generation Justice and Ecology Project, The Work of Love and the Love of Work, Resilience-Based Organizing as a Path Forward (2013) https://movementgeneration.org/the-work-of-love-and-the-love-of-work-resilience-based-organizing-as-a-path-forward/ (last visited April 26, 2021).

a strategy for challenging sales of farmland to corporate development interests.[55]

For another example, PUSH Buffalo's anti-poverty activists took a major role in a coalition that led the state of New York to enact comprehensive climate justice legislation.[56] Their campaign helped highlight the multifaceted problems of fossil fuels, such as the health hazards of diesel truck traffic concentrated in low-income communities.[57] Although the final version of the law eliminated key labor protections and weakened race and class equity requirements, activists continue to mobilize law for economic change.[58]

In coalition with other frontline organizations, PUSH Buffalo has been working to develop and pass the Climate and Community Investment Act, which would charge corporate polluters $15 billion a year to support new state investments in frontline community organizations, jobs programs, and large scale infrastructure to implement a just transition to an economy freed from poverty and fossil fuels.[59] This attention to law goes beyond individual rights or incremental reforms to address law's pervasive role in shaping social and economic conditions. It models the non-reformist reform strategy of using law to build political and economic power, by shifting collective control over investment away from corporations to community and worker organizations as well as to state agencies.

[55] *Id.*

[56] Climate Leadership and Community Protection Act, 2019 N.Y. Laws 106 (codified in scattered sections of N.Y. Envtl. Conserv. Law and N.Y. Pub. Serv. Law).

[57] Luz Velez, *Another Voice: Climate Act's Needed to Protect Vulnerable Communities*, Buffalo News (June 3, 2019).

[58] PUSH Buffalo, *Today in New York State…Planet First, People Second* (June 20, 2019) https://www.pushbuffalo.org/today-in-new-york-state-people-and-planet-first/ (last visited April 26, 2021).

[59] *See* S. 4264A 2020–2021 Leg., Reg. Sess. (N.Y. 2021) (Climate and Community Investment Act) https://www.nysenate.gov/legislation/bills/2021/S4264; *see also* Rahwa Ghirmatzion, *Another Voice: Initiative to "Bring Home" Benefits of Climate Bill*, Buffalo News (April 21, 2021) (PUSH Buffalo Executive Director summarizing plans to mobilize communities to support proposed legislation).

Liberal Legal Theory in Neoliberal Crisis

These three themes from current grassroots activism help to counter the fissures and failures of liberal law as well as the contemporary neoliberal and illiberal hostility to liberal ideals. Liberalism and neoliberalism now work in tandem to make ambitious social and economic justice appear impossible and irrational. Critical legal theory is especially known for debunking liberal legal claims to tame unjust power through neutral principle and process.[60] But this strategy of deflating and discrediting liberal law now tends to reinforce a right-wing politics of inequality.[61] This section explores the current ideological landscape to show the need to critique both the liberal denial of law's politics and the neoliberal capture of law's politics.

Liberal Legal Theory's Troubled Response to Poverty

Liberal political theory generally places poverty in a social or economic sphere where it does not appear to threaten the basic legitimacy of law or democracy.[62] It assumes poverty is largely a problem of failures at the margins of an economy that supports individual autonomy through formal rights to contract and property. In this view, some individuals fail due to misfortune or inability, and some institutional policies and practices produce harmful unintended consequences.[63] For example, advances in technology may leave some workers behind, or gains from economic growth may bypass some people due to occasional bias or geographically mismatched jobs, education, and investment.

[60] *See* E. Dana Neacsu, *CLS Stands for Critical Legal Studies, If Anyone Remembers*, 8 J.L.Pol'y 415, 421–27 (2000) (linking the decline of critical legal studies to its overemphasis on liberalism's flaws, with insufficient attention to countering conservative legal theory and politics).

[61] *See* Corinne Blalock, *Neoliberalism and the Crisis in Legal Theory*, 77 L. & Contemp. Probs. 71, 91–94 (2014) (discussing how left critiques of liberal law can reinforce neoliberal antidemocratic logic).

[62] *See* Nimer Sultany, *What Good is Abstraction? From Liberal Legitimacy to Social Justice* 67 Buff. L. Rev. 823, 824–25, 885–87 (2019) (arguing that liberalism legitimates regimes of poverty and inequality that violate liberal standards of justice).

[63] *See generally* Martha T. McCluskey, *How the Unintended Consequences Story Promotes Unjust Intent and Impact*, 22 Berkeley La Raza L.J. 21 (2012) (critiquing the logic and effects of the "unintended consequences" concept).

This liberal frame justifies some legal action to correct or compensate economic disadvantages, but it limits that action to avoid disrupting a legal and economic system generally presumed to reward productivity and responsibility.[64] Construed as support for abnormal incapacity, welfare programs appear most legitimate and effective when targeted to deliver the most benefits to those with the least political economic power. But that ground makes welfare programs appear most legitimate if designed to enforce and sustain powerlessness among people in poverty.[65]

Further, this frame fuels political opposition by constructing anti-poverty measures as redistribution that risks taking away freedom and security from others.[66] For instance, increasing public spending for children in poverty appears to divert middle class families' hard-earned gains through tax increases or lower public expenditures on jobs or infrastructure.[67] This view tends to obscure analysis of the structures that create costly and divisive barriers to alleviating poverty.[68] Rules governing fiscal and monetary policy, for example, limit government power to invest in social needs, and the legal rules governing private economic organizations like corporations, unions, and global supply chains are skewed to foster harsh competition among workers and communities while strengthening coordinated power of wealthy investors.[69]

Gearey discusses how Frank Michelman developed John Rawls' liberal ideals of neutrality and fairness to justify fundamental rights to protection from poverty.[70] But a deeper critique reveals those principles are inevitably inchoate and contested, so that liberal welfare state and regulatory policies are likely to strengthen opposition and division as much as

[64] Daniel Markovits, *How Much Redistribution Should There Be?* 112 Yale L. J. 2291, 2321–29 (2003) (arguing that state support for equality should be limited to protect freedom to pursue benefits from inequality).

[65] Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State* 78 Indiana L. J. 783, 808–17 (2003).

[66] McCluskey, *supra* note 9, at 95–96 (critiquing the idea of equality as redistribution).

[67] Martha T. McCluskey, *Framing Middle-Class Insecurity: Tax and the Ideology of Unequal Economic Growth*, 84 Fordham L. Rev. 2699, 2702–08 (2016).

[68] Martha T. McCluskey, *The Politics of Economics in Welfare Reform*, in Feminism Confronts Homo Economicus: Gender, Law, & Society 193, 215–217 (Martha Albertson Fineman & Terence Dougherty eds. 2005).

[69] Martha T. McCluskey, *Subsidized Lives and the Ideology of Efficiency*, 8 Am. U. J. of Gender, Social Pol'y and the Law 115, 147–49 (2000).

[70] Gearey, *supra* note 1, at 60–66.

consensus.[71] Critical legal strategies rely not on finding consensus but on actively transforming the politics that limits social justice.

Late twentieth century critiques of the "politics of law"[72] analyzed how neutral procedures and principles are insufficient to tame unjust power.[73] Following early twentieth century legal realism theory and practice, critical legal studies scholars showed that legal rules of contract and property do not firmly ground the market in mutual gain, equal opportunity, or individual freedom.[74] Instead, contract and property law inevitably direct collective power toward some contested interests and values at the expense of others.[75]

In addition, critical legal feminism and critical race theory have extensively described how formally equal rights and procedures reinforce systemic socioeconomic and political disadvantages.[76] For example, gender neutral family law principles tend to undermine economic security for divorced women who have invested decades of labor in unpaid child care and homemaking.[77] Political resistance and judicial interpretations narrowed civil rights laws to exclude covert, implicit, and systemic racial subordination, while providing new rights to challenge law reforms aimed at racial integration and compensation.[78]

The tensions and insufficiencies within liberalism have helped infuse anti-poverty policies with a politics of division, dissatisfaction and distrust. By the 1970s, many of the progressive civil rights and regulatory protections won during the 1960s were being cut, compromised, coopted, and stigmatized. Costly and complex administrative rules in

[71] Sultany, *supra* note 62, at 854–62.

[72] *See generally*, The Politics of Law: A Progressive Critique, (David A Kairys ed., 3d. ed. 1998) (collecting essays by critical legal studies scholars).

[73] *See* Neacsu, *supra* note 60, at 420–32 (arguing that critiques of legal liberalism's indeterminacy and incoherence often gave sufficient attention to substantive social change).

[74] *See generally* Joseph W. Singer, *Property*, in Politics of Law: A Progressive Critique 240–257 (David Kairys ed., 3d. ed. 1998); Peter Gabel & Jay Feinman, *Contract Law as Ideology*, in Politics of Law: A Progressive Critique 497–509 (David Kairys ed., 3d. ed. 1998).

[75] Duncan Kennedy, *The Role of Law in Economic Thought: Essay on Fetishism of Commodities* 34 Am. U. L. Rev. 939, 950–52 (1985).

[76] See, e.g., Critical Race Feminism: A Reader (Adrian K. Wing ed., 2d. ed., 2003).

[77] Martha Albertson Fineman, The Illusion of Equality: Rhetoric and Reality of Divorce Reform (1991).

[78] Charles R. Lawrence III, *Race and Affirmative Action: A Critical Race Perspective* in The Politics of Law: A Progressive Critique 312–27 (David Kairys ed., 3d. ed. 1998).

the U.S. welfare system have criminalized, racialized, and sexualized poor people.[79] Dependent on cash-strapped states and local governments and private business contracts, anti-poverty programs have often been mismanaged, misinformed, biased, and subject to capture by those with the most power at the expense of the most deserving.[80]

Building on critical race and feminist theory, Wendy Brown has explained how legal rights create double binds for subordinated groups, becoming "that which we cannot not want."[81] Framed as formal or universal principles, legal rights can operate to deny or ratify existing inequalities and to protect dominant powers. On the other hand, rights that protect against specific inequalities tend to reinforce inequality and stigma for those who appear to need special protection.[82] Duncan Kennedy has critiqued rights as a strategy for disguising political preferences that can readily be flipped or compromised by competing preferences.[83] In this view, if subordinated groups cannot win in the political arena, then it will do no good to assert the same interests as legal rights.[84]

In the current context, these critiques risk reinforcing a neoliberal and illiberal politics that actively disparages liberal social and economic rights such as universal health care, basic income, workplace safety, or living wage laws as ineffective and costly efforts to evade inevitable economic tradeoffs.[85] Faced with loss of faith in liberal idealism,[86] many scholars have turned to pragmatic doctrinal adjustments or to descriptive or empirical work detached from larger questions of justice.

By trying to minimize controversy in the face of growing problems, mainstream liberal legal theory has ceded moral and political power to the

[79] *See generally* Kaaryn Gustafson, Cheating Welfare: Public Assistance and the Criminalization of Poverty (2011).

[80] *See generally* Daniel L. Hatcher, The Poverty Industry: The Exploitation of America's Most Vulnerable Citizens (2016).

[81] Wendy Brown, *Suffering the Paradoxes of Rights*, in Left Legalism/Left Critique 420–21 (Wendy Brown & Janet Halley eds., 2002).

[82] *Id.* at 422–23.

[83] Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in Left Legalism/Left Critique 188–90, 197–98 (Wendy Brown & Janet Halley eds., 2002).

[84] McCluskey, *supra* note 16, at 1263 (summarizing and critiquing this view).

[85] Martha T. McCluskey, *All Costs Have a Right* in Frank Pasquale et al, *Eleven Things They Don't Tell You About Law and Economics: An Informal Introduction to Political Economy & Law*, 37 Law and Inequality 105 (2019).

[86] *See* Kennedy, *supra* note 83, at 191–94 (reflecting on his experience of loss of faith in law).

right. Neoliberal challenges to liberal human rights claims[87] dovetail with neoliberal efforts to expand rights to private property protection[88] and to establish new rights to restrict unions, Congress, antidiscrimination laws, political equality, along with new rights to resist regulations protecting consumers, environment, health and safety, workers, and financial market integrity.[89] Without affirming an contrary politics of rights, left critique may reinforce a submissive legal centrism that entrenches liberalism's weaknesses.[90]

Neoliberal Law and Economics Answers Liberalism's Failures

The influential law-and-economics movement[91] of the late twentieth century has responded to liberalism's flaws by replacing justice with efficiency as law's primary function.[92] This shift purportedly disciplines law's politics with the market's impartial power to optimize societal welfare. In this framework, poverty and inequality appear to be the legitimate and productive results of market prices calibrated to further the overall good.

[87] *See, e.g.*, Eric Posner, *Human Welfare, Not Human Rights*, 108 Colum. L. Rev. 1758 (2008) (using neoliberal economic logic to argue that rights to social goods like education will reduce other social goods like health care).

[88] *See, e.g.*, Benjamin Chen & Robert Cooter, *The New Economic Freedom*, 23 Supreme Ct. Econ. Rev. 59 (2015) (asserting the right to gain wealth "unburdened by regulation" as the basis for freedom and general prosperity).

[89] *See* Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 188 Columbia L. Rev. 2161, 2164–70 (2018) (critiquing newly anti-distributive, anti-democratic U.S. constitutional doctrine and theory); Robin West, *A Tale of Two Rights*, 94 B.U.L. Rev. 983, 987–905 (2014) (criticizing new U.S. constitutional rights to exit from support for collective protections).

[90] *See* Blalock, *supra* note 61, at 94–95, 97–102 (arguing for disrupting neoliberal rationality's power in order to advance alternatives).

[91] *See* Elliot Ash, Daniel L. Chen & Suresh Naidu, *Ideas Have Consequences: The Effect of Law and Economics on American Justice*, (March 20, 2019) (working paper available at SSRN: https://ssrn.com/abstract=2992782) (last visited April 29, 2021) (finding that after attending law-and-economics trainings, U.S. federal judges were more likely to rule against business regulations and to impose longer criminal sentences).

[92] *See* Martha T. McCluskey, Frank Pasquale & Jennifer Taub, *Law and Economics: Contemporary Approaches* 35 Yale L. and Pol'y Rev. 207, 297–98 (2016) (describing and critiquing the legal focus on efficiency).

Echoing Ayn Rand's morality of cruelty,[93] law-and-economics helps make lack of empathy a professional virtue.[94] As technicians of efficiency, legal authorities evade moral accountability by claiming to be passive agents of an omniscient market that constantly re-calibrates and corrects for imperfect individual knowledge and judgment.[95] Law-and-economics purports to solve any legal problem by applying formal principles reflecting market forces imagined to exist above and beyond law.

Its largely circular market precepts have proven especially useful for securing and obscuring law's power for right-wing politics. For instance, it teaches that law promotes efficiency by reducing transaction costs, because this will encourage market transactions that produce mutual gain. But this principle begs the political question of how to distinguish "real" costs (prices) representing efficient transactions from the costly "friction" or "red tape" taken as barriers to efficient transactions.[96] Similarly, another principle holds that efficiency depends on legal support for competition, unless efficiency depends on protection from competition through rights to firms, trusts, intellectual property, or mergers.[97]

The "rational choice" theory popularized by law-and-economics further fashions critiques of liberal law's politics into a sweeping right-wing challenge to democracy. This idea reduces politics to an illegitimate system of self-serving gain undisciplined by market competition or freedom. In this view, democratic social programs and regulatory initiatives inevitably belie professed public purposes, as individual officials and constituents normally and naturally use state power to put individual gain above concern for others. Poverty eludes deliberate government solution, in this view, because those in poverty will have the least power to "buy" public policy that reliably advances their interests.

[93] Duggan, *supra* note 44.

[94] *See* Robin West, *The Anti-Empathic Turn*, 53 Nomos: Am. Soc'y. Pol. Legal Phil. 243, 257–59 (2013) (critiquing arguments that judicial rulings should rely on formal market logic insulated from emotional concern for harsh effects on people in poverty).

[95] *See* Douglas A. Kysar Regulating from Nowhere: Environmental Law and the Search for Objectivity 196–99 (2010) (explaining how law-and-economics' theory of objective rationality drains decision making of agency and responsibility).

[96] Pierre Schlag, *The Problem of Transaction Costs*, 62 So. Calif. L. Rev. 1661, 1663–64, 1672–78 (1989).

[97] *See generally* Sanjukta Paul, *Fissuring and the Firm Exemption*, 82 Law and Contemp. Probs. 65 (2019) (showing how antitrust doctrine's incoherent economic ideal of competition protects some rights to coordinate while penalizing others).

In short, neoliberal law-and-economics encourages a cynical, self-serving legal theory and praxis that reifies unequal power as an essential economic condition that must be accommodated: resistance is futile, self-serving and deceptive. At the same time, it promises that by unleashing rather than controlling this harmful power, legal and economic elites will lead society to greater well-being in the long run. In this theory, the rich will use their power to expand the "economic pie" to provide a bigger and better share for the poor as well as themselves.[98]

In the shorter run, following the rise of neoliberal theory and policy, poverty has permeated upward through the economy, spreading insecurity to much of the middle class.[99] In the US, many well above the official poverty line, including professionals like lawyers and academics, will struggle with the costs of family, housing, education, health care, credit, retirement, and leisure, all of which are becoming luxury items for the wealthy rather than normal expectations of the middle class. Moreover, an impending climate catastrophe, overlapping with continued global risks of pandemic as well as financial and political instability, threatens to bring a future of further precarity, displacement, sacrifice and loss.

These conditions of insecurity and loss have fostered a new illiberal politics that takes rising poverty as grounds to blame, exclude, and subjugate demonized others.[100] By cultivating deference to a harsh, unequal market power freed from legal or democratic accountability, neoliberalism gives credibility to unequal and cruel political authority beyond law. In place of democracy, reason, or ethics, illiberalism popularizes rule by hostility, deception, and aggression as strategies necessary to survive a zero-sum hypercompetitive struggle for increasingly insecure resources. This politics of amplified scarcity and cruelty not only discredits law's power and responsibility for alleviating poverty and other injustices. It also invites a

[98] *See* McCluskey, *supra* note 9, at 88–90 (critiquing this argument).

[99] *See, e.g.*, Jacob S. Hacker, The Great Risk Shift: The New Economic Insecurity and the Decline of the American Dream (2d. ed. 2016); Alissa Quart, Squeezed: Why Our Families Can't Afford America (2018).

[100] *See* Wendy Brown, *Neoliberalism's Scorpian Tail*, in Mutant Neoliberalism: Market Rule and Political Rupture 39, 52–53 (William Callison & Zachary Manfredi eds., 2020) (linking right-wing nihilism to neoliberalism's valorization of a "will to power" freed from social responsiveness and democratic precepts).

converging neoliberal and illiberal "truth" where what counts is not specific words or deeds but the power of whoever is the master.[101]

Critical Legal Responses to Twenty-First Century Crisis

Today's multiple crises have sparked new interest in critical legal theory that builds on the themes of twenty-first century social movements. First, this scholarship illuminates the ways law produces and perpetuates poverty as part of multiple interrelated systems of inequality and extraction; second, it focuses on how collective power and process are central to advancing justice; and third, it counters both neoliberalism and illiberalism by affirming law's transformative potential.

Confronting Poverty as the Core of the Legal Economic System

A newly reinvigorated "law and political economy" (LPE) movement picks up various strands of critical theory to analyze economies as systems of contingent and contested institutional power.[102] One academic initiative under the LPE banner is ClassCrits, a group I co-founded in 2007 with Athena Mutua,[103] and referenced in Gearey's book.[104] Its name reflects both its roots in critical legal theories and its goal of integrating economic inequality with other forms of subordination, such as race, gender,

[101] One U.S. Constitutional Law textbook introduces the challenges of interpreting the Constitution by referring to Lewis Carroll's famous children's book: Humpty Dumpty tells Alice in Wonderland his words mean whatever he wants, because meaning is not about which words are used but about "which is to be master." Processes of Constitutional Decisionmaking: Cases and Materials 35–39 (Paul Brest et al., 4th ed., 2000).

[102] *See generally* Frank Pasquale et al., *Eleven Things They Don't Tell You About Law and Economics: An Informal Introduction to Political Economy and the Law*, 37 Law & Inequality 145 (2019); Jedediah Britton-Purdy et al., *Law and Political Economy: Toward a Manifesto*, LPE Project: LPE Blog (Nov. 6, 2017) https://lpeproject.org/blog/law-and-political-economy-toward-a-manifesto/ (last visited April 30, 2021).

[103] ClassCrits: A Network for Critical Analysis of Law and Economic Inequality, www.classcrits.org (last visited April 30, 2021); Athena D. Mutua, *Introducing ClassCrits, From Class Blindness to a Critical Legal Analysis of Economic Inequality*, 56 Buff. L. Rev. 859–913 (2008).

[104] Gearey, *supra* note 1, at 72–77.

sexuality, nationality, and disability.[105] ClassCrits has recently launched a new interdisciplinary scholarly publication, the Journal of Law and Political Economy, co-edited by Angela Harris and James Varellas, integrating insights from many fields, including critical geography, sociology, political science, to develop analysis of the problems and potential for transforming political economic power.[106]

Other recent LPE initiatives include the Association for Promotion of Political Economy and the Law (APPEAL), an organization I also co-founded with Frank Pasquale and Jennifer Taub.[107] This group integrates law and heterodox economics, examining money, finance, technology, and the firm (corporations) as systems of legal power structuring economic, social, political, and environmental conditions. Another new initiative, the LPE Project, features the LPE blog (www.lpeblog.org) and has helped to galvanize a network of new law student groups in the U.S. and beyond.

These LPE perspectives tend to present poverty as a feature rather than a bug in legal economic systems designed to make many (or even most) people powerless. Like various branches of Marxist political economy, LPE scholars often analyze liberal and neoliberal economies as hierarchical relationships of capital, fundamentally shaped by firms and finance, rather than as "markets" comprised of formally equal, decentralized consensual exchange. At the same time, contemporary LPE initiatives have especially focused on law's role in shaping neoliberal capitalism's varied and evolving dynamics of power. These LPE initiatives encourage legal analysis that sees poverty everywhere in law – and that sees everywhere in law and politics a potential legal strategy and responsibility for eradicating poverty.

Like earlier legal realist and critical legal challenges to liberalism, LPE considers how unjust power gets obscured by misleading conceptual divisions like public versus private, political versus economic, and efficiency versus redistribution. Contemporary LPE also explores how power operates through connections between various legal subject areas. The 2008

[105] Justin Desautels-Stein, et al., *ClassCrits Mission Statement*, 43 Sw. L. Rev. 651–53 (2014).

[106] Journal of Law and Political Economy, University of California eScholarship (https://escholarship.org/uc/lawandpoliticaleconomy/about (last visited April 30, 2021).

[107] Association for the Promotion of Political Economy and the Law (APPEAL) www.politicaleconomylaw.org (last visited April 30, 2021); *See also*, McCluskey, Pasquale & Taub, *supra* note 92, at 297–308.

financial crisis, for example, revealed how laws governing securities, monetary and fiscal policy, housing, and banking operated together to increase poverty, precarity, and racial inequality.

ClassCrits conferences regularly address poverty as a multilayered legal problem implicating intersecting inequalities. For example, a 2015 conference panel on food and structural inequality included presentations on copyright law, the racial structure of farming, local policing of public food sharing, and community economic development.[108] A 2011 conference on the criminalization of poverty analyzed laws governing migrant labor, reproductive rights, homelessness, mental illness, municipal fees and fines, forced labor programs, global economic development, and the racialized policing of public education.[109]

APPEAL workshops have similarly analyzed poverty as problem implicating multiple legal issues. For example, economist Lenore Palladino presented research on how corporate governance and tax rules induce firms to shift to producing financial returns rather than goods or services, thereby depressing workers' wages and bargaining power while also draining long term value from communities and the broader economy.[110] Another APPEAL workshop featured Mehrsa Baradaran's historical analysis of how Black capitalists have been locked out of systems of legal and monetary protections.[111] In her keynote address to the 2019 APPEAL workshop, Angela P. Harris linked ongoing racial segregation and discrimination to a cross-racial crisis of declining life expectancy and increased chronic stress and disease in the United States, as white Americans reject law reforms (like public health insurance) vital to their own health and well-being in order to avoiding benefiting racialized others.[112]

[108] *Past ClassCrits Conferences* (Program 2015), Classcrits https://www.classcrits.org/content.aspx?page_id=22&club_id=459418&module_id=273352 (last visited May 2, 2021).

[109] *Past ClassCrits Conferences, 2011: Criminalization of Economic Inequality*, Classcrits https://www.classcrits.org/content.aspx?page_id=22&club_id=459418&module_id=273352 (last visited May 2, 2021).

[110] Lenore Palladino, *Corporate Financialization and Worker Prosperity: A Broken Link*, Roosevelt Institute, (January 17, 2018), https://rooseveltinstitute.org/corporate-financialization-and-worker-prosperity-broken-link/ (last visited May 2, 2021).

[111] Mehrsa Baradaran, The Color of Money: Black Banks and the Racial Wealth Gap (2019).

[112] Angela P. Harris and Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. Rev. 758 (2020); *see also* Jonathan M.

Confronting Poverty through Professional Praxis

Bernard Harcourt argues that twenty-first century crises require critique that is engaged in uncertain praxis, tailored to a specific time, place, and politics, and subject to continual reflection and redirection.[113] He argues that there is no single answer to the question of "what is to be done," only a responsibility to act, right now, in our particular situations.[114]

Recent initiatives in law and political economy cultivate this responsibility by creating opportunities to reflect and strategize collectively. Social movements show how effective politics involves practicing mutual empowerment and learning, not just taking sides in zero sum struggles. ClassCrits and APPEAL, for example, shape scholarly events to foster community, solidarity, and equity, not just to showcase individual work. These groups strive to provide mentoring opportunities and other forms of support for aspiring academics and junior scholars.[115] ClassCrits conferences have included discussions of how to integrate intellectual and activist work with personal health, social, and spiritual well-being. In addition, ClassCrits challenge the hierarchical division of theory and practice by featuring panels of local activists and clinical faculty.

Neoliberal politics and anti-left intellectuals have targeted the professions in general[116] and the legal profession in particular for disruption and degradation,[117] characterizing the collective power and protection of professional licensing as inefficient rent-seeking that enriches lawyers and stifles innovation.[118] In this reasoning, legal services can be more efficiently delivered to non-wealthy clients through the collective power of corporations to standardize and economize legal advice through au-

Metzl, Dying of Whiteness: How the Politics of Racial Resentment is Killing America's Heartland (2019).

[113] Bernard E. Harcourt, Critique & Praxis (2020).

[114] *Id*. at 9–10.

[115] Athena D. Mutua, *ClassCrits Time? Building Institutions, Building Frameworks*, 1 J. of Law & Political Econ. 333, 339–40 (2021).

[116] *See, e.g.*, Brink Lindsey and Steven M. Teles, The Captured Economy: How the Powerful Enrich Themselves, Slow Down Growth, and Increase Inequality 90–108 (2017).

[117] Alfred S. Konefsky and Barry Sullivan, *In This, the Winter of Our Discontent: Legal Practice, Legal Education, and the Culture of Distrust* 62 Buff. L. Rev. 659, 661–65, 692–93 (2014).

[118] Sandeep Vaheesan & Frank A. Pasquale, *The Politics of Professionalism: Reappraising Occupational Licensure and Competition Policy* 14 Annual Rev. of Law and Soc. Sci. 309, 310–12 (2018) (critiquing this argument).

tomated online products and global call centers staffed by low-paid law laborers.[119] This market theory of lawyering treats personalized relationships of trust between lawyers, clients, and communities as a wasteful luxury to be reserved for elites. Challenging this anti-professional politics, ClassCrits, APPEAL and other recent LPE initiatives strive to change the economic conditions that make critical legal praxis costly for both individuals and institutions.

Declining government funding for higher education and for public service law leaves many law students, faculty, and practitioners in long term debt. A 2017 ClassCrits conference featured a panel of young poverty lawyers who identified their own condition of near-poverty as a major ongoing professional challenge. Prominent commentators fault non-elite schools for squandering money on social justice clinics,[120] critical theory, or faculty job security rather than competing to reduce educational quality as the market price of diversity and access.[121] In this context, collective action and solidarity within legal academia as well as the profession will be necessary to sustain robust critical theory.

Affirming Transformative Law in Critical Theory

Reflecting on late twentieth century left activism, Wendy Brown and Janet Halley fault tendencies to focus on liberal legal strategies rather than political action.[122] Using the example of anti-pornography activism, Brown and Halley argue that tactics like walking into porn shops to shame the customers can be more liberating, democratic and transgressive than proposals for regulation or rights to sue for damages.[123] Individual rights are insufficient for undoing systemic subordination,[124] while

[119] *See* Frank Pasquale, *A Rule of Persons, Not Machines: The Limits of Legal Automation* 87 Geo. Wash. L. Rev. 1, 4–5, 11–12, 28–31, 54–55 (2019) (defending the value of human lawyering).

[120] *See* Jennifer Lee Koh, *Reflections on Elitism After the Closing of a Clinic: Justice, Pedagogy, and Scholarship* 26 Clinical L. Rev., 263, 266–69, 279–80 (2019) (explaining clinics' valuable integration of theory and praxis).

[121] *See* Lucille A. Jewel, *Tales of a Fourth Tier Nothing, a Response to Brian Tamanaha's Failing Law Schools*, 38 J. Legal Prof. 125, 135, 141–42, 144–51 (2013) (criticizing this line of argument).

[122] Brown & Halley, *supra* note 3, at 7–20.

[123] *Id.* p. 20–22.

[124] Brown, *supra* note 81, at 421–22.

regulatory strategies for reform – which Brown and Halley characterize as "governance legalism" – rely on hierarchical administrative systems likely to generate new inequalities and injuries.[125]

But the ideal of a "raw" and "fertile" politics freed from the "impoverished," "narrowing," and unequal force of law,[126] can lead to uncritical thinking and action.[127] In the current context, left legal cynicism risks reinforcing a core message of both neoliberal market ideology and illiberal political authoritarianism: real power stands outside and above the law. Countering that message, two recent critical approaches push law beyond liberalism's limited legal strategies for structural change.

Critiquing the Law versus Politics Frame

Political action pervasively depends on law even when it resists particular laws. Our ability to disrupt, protest, and debate is thoroughly intertwined with the changing legal rights and legal institutions that shape whether our political action and speech will likely subject us to violence or to the loss of our work, family, property, or liberty. Law will further shape the material conditions that support or limit our political engagement, including our access to communities that share knowledge and organize support for collective action. Indeed, both neoliberal and illiberal strands of right-wing politics deceptively deploy anti-legal rhetoric on behalf of campaigns for newly revised legal rights and regulations designed to impede left politics or even to encourage its violent suppression.

Critical legal theory must question both the rule of law and the forms of power that deny, evade and corrupt the law. In her classic critical legal studies essay, Mari Matsuda articulated a legal method of multiple consciousness, using an example from the praxis of radical activist Angela Davis. Matsuda explains:

There are times to stand outside the courtroom door and say:

> "this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom." There are times

[125] Brown & Halley, *supra* note 3, at 10.

[126] *Id.* at 21–23.

[127] Martha T. McCluskey, *supra* 16, at 1272–75; Martha T. McCluskey, *How Queer Theory Makes Neoliberalism Sexy*, in Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations 115, 119–20 (Martha Albertson Fineman, Jack E. Jackson, & Adam P. Romero eds., 2009).

> to stand inside the courtroom and say "this is a nation of laws, laws recognizing fundamental values of rights, equality and personhood." Sometimes, as Angela Davis did, there is a need to make both speeches in one day. Is that crazy? Inconsistent? Not to Professor Davis, a Black woman on trial for her life in racist America. It made perfect sense to her, and to the twelve jurors good and true who heard her when she said "your government lies, but *your* law is above such lies."[128]

Matusda shows how legal professionals need not confine justice to small steps of resistance or relief within the corners left unpatrolled by the reigning thought and action police. Nor does law inherently produce complicity, bureaucracy, and complacency that detracts from seemingly more authentic power struggles. Informal relationships or small scale communities offer insufficient and unequal security against the large scale effects of concentrated corporate power, surveillance capitalism, political authoritarianism, global pandemic, and impending climate devastation.

Grounding Law and Politics in Human Vulnerability

Building on earlier critiques of liberal law, the crises of the twenty-first century have generated new energy for ambitious legal theories of social and economic justice. Vulnerability theory, developed by Martha Fineman, grounds law's legitimacy in its provision of affirmative, equitable support for the fundamental human condition of vulnerability.[129] Replacing liberalism's mythical autonomous individual subject, vulnerability theory recognizes that human beings are universally embodied and embedded, inevitably and pervasively dependent on substantive conditions and collective power beyond individual control. "[W]e are born, live, and die within a fragile materiality that renders all of us susceptible to destructive external forces and internal disintegration."[130] Law cannot meaningfully advance freedom, prosperity, or equality guided by an ideal

[128] Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 Women's Rts. L. Rep. 7, 8 (1989).

[129] Vulnerability and the Human Condition Initiative, Emory University, http://web.gs.emory.edu/vulnerability/index.html (last visited May 2, 2021).

[130] Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 Yale J. L. & Feminism 1, 12 (2008).

of a sovereign individual who comes into being as an independent adult to take charge of self, others, and the natural world.[131]

By positioning vulnerability as normal and constant in human life, Fineman rejects the standard analysis of vulnerability as a characteristic of particularly disadvantaged or deviant "populations."[132] At the same time, vulnerability "is experienced uniquely by each of us,"[133] as all human capacity operates through particular bodies distinctly situated in webs of social, political, and economic relationships. If some people appear to be distinctly self-reliant and independent, that appearance is a feature of their access to substantive privileges and protections selectively conferred and obscured by the specific legal institutions (such as the corporation, family, employment, and property).

In addition, Fineman flips the conventional understanding of vulnerability as a negative condition representing a lack of power and capacity. Instead, as many philosophical, cultural, and spiritual traditions affirm, human vulnerability is generative, the source of individual and societal resilience, wisdom, value, and growth.[134] Vulnerability centers law on the fact that "human beings need each other."[135] Legal institutions of collective protection, provision, and meaning are normal and pervasive – though widely structured to undermine equality, democracy, and overall well-being.[136]

In that lens, justice requires holding the state accountable for enabling all human beings to adapt, grow, and flourish in the face of inevitable uncertainty, change, and loss.[137] Poverty represents a state failure, not a problem of individual dependency: a costly and unjust denial of the institutional investments and protections that all of us require to survive and thrive in our inherent dependence on society and environment. The legitimacy of particular legal and social structures, including privatized systems of work, family, education, and housing, turns on how effectively and equitably these arrangements provide resilience against the risks of loss and deprivation to human well-being, in the long term as well as the

[131] Martha Albertson Fineman, *Vulnerability and Social Justice*, 53 Val. U.L. Rev. 351, 356 (2019).
[132] Fineman, *supra* note 130, at 8–9.
[133] *Id.* at 10.
[134] Fineman, *supra* note 131, at 358.
[135] Fineman, *supra* note 130, at 12.
[136] Fineman, *supra* note 131, at 362.
[137] *Id.* at 363.

short run.[138] Further, vulnerability theory pushes law's responsibility for human well-being beyond correcting or compensating particular injuries or inequalities and beyond providing the minimum conditions for human survival. By focusing law on the goal of creating and sustaining human resilience, the vulnerable subject holds the state accountable for continually protecting, improving and sustaining the particular and diverse capacities and mutual dependence of embodied, embedded life over time, including future generations.[139]

The climate emergency and the global pandemic (among other crises) underscore the dangers of a legal and political system that imagines risks are best judged and managed by atomized individuals competing for resources likely to become increasingly scarce and insecure. Given human dependence on larger societal and environmental conditions, we inevitably operate as potential fiduciaries, beneficiaries, or victims of others' actions, through institutions that give us varying and unequal degrees of power to change, and to be changed by, others' opportunities and risks. Law must confront poverty as a problem of insufficient and unequal institutional power to legitimately govern the collective conditions of public and private spheres, not mainly as a problem of individual well-being.

Rethinking Law's Economic Power for Justice

Recent critical legal scholarship on money is another example of growing attention to law's affirmative power to change the politics of poverty and precarity. As legal historian Christine Desan explains, "money is a piece of legal engineering all the way down."[140] Desan has organized a new project, *Just Money*, to advance scholarship, teaching, and policy focusing on money as "an essential dimension of governance" with potential to promote democracy and justice.[141]

This attention to money counters the conventional myth of money as a neutral unit of account for individualized exchange. More accurately, money is both central to state power, and centrally governed by state

[138] *Id.* at 362–67.

[139] Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 Emory L.J. 251, 255–56, 272–75 (2010).

[140] Christine Desan, *Money as a Legal Institution*, in Money in the Western Legal Tradition: Middle Ages to Bretton Woods 18, 30 (David Fox & Wolfgang Ernst eds., 2016).

[141] Christine Desan, ed., Just Money, https://justmoney.org/about-just-money-page/ (last visited May 2, 2021).

power.[142] Monetary systems and markets inherently depend on state power to define, distribute and enforce the legal obligations and rights that produce and sustain money's value.[143] Reliable systems of credit are fundamental to organizing and coordinating the collective capacities needed to provide resources and to secure and maintain political power. Private financing systems rely on public backing and substantive legal and political judgments to define what is and will be scarce, for whom, under what terms, shaping markets and prices. As a governance system, money can be engineered to support democracy,[144] shared prosperity and mutual care, or to encourage violence, inequality, extraction, and austerity.[145]

One strand of this new scholarship, Modern Monetary Theory (MMT), focuses on how governments can mobilize currency power to address crises of climate, health, democracy, and social justice. Countering neoliberal policies of austerity and scarcity, MMT analyzes current possibilities for designing ambitious public deficit spending to avoid runaway inflation.[146] A number of MMT economists advocate a right to a publicly funded living wage job as the basis for ensuring full employment, so that income for human needs would be far less scarce and unequal.[147] Public jobs funding could also support major new collective investments in developing economic capacity and social well-being. In particular, new public jobs could be the basis for a Green New Deal that would transform systems for providing energy, physical infrastructure,

[142] Jamee K. Moudud, *The Janus Faces of Money, Property, & Governance: Fiscal Finance, Empire, & Race*, Political Economy Research Institute Working Paper No. 524, 8–9 (Sept. 2020), https://www.peri.umass.edu/component/k2/item/1346-the-janus-faces-of-money-property-and-governance-fiscal-finance-empire-and-race (last visited May 2, 2021).

[143] Desan, *supra* note 140, at 31.

[144] *Id.* at 30.

[145] Scott Ferguson, Declarations of Dependence: Money, Aesthetics, and the Politics of Care 4–6, 184–85 (2018).

[146] *See generally*, Stephanie Kelton, The Deficit Myth: Modern Monetary Theory and the Birth of the People's Economy (2020).

[147] Pavlina R. Tcherneva, *The Job Guarantee: Design, Jobs, and Implementation*, Levy Econ. Inst. of Bard College. Working Paper No. 902 (April 2018), http://www.levyinstitute.org/publications/the-job-guarantee-design-jobs-and-implementation_(last visited May 2, 2021).

transportation, agriculture, and human caretaking.[148] In short, job guarantee proposals show how individual legal rights could be constructed to upend liberal individualism by leveraging large scale transformation of work and economy.

Conclusion

As intellectuals and legal experts in a political economy resistant to reason, ethics, and law, we need to develop institutions for critical reflection and action that hold us accountable to the lives and losses we tend not to see. The twenty-first century's overlapping clouds of crisis cannot be lifted without collective power and purpose directed at expanding our capacity for ambitious multilayered social change. Today's frontline activists and critical academic movements show us how we can go further to cultivate the courage and imagination for justice that pushes beyond the limits enforced by liberal and neoliberal law or illiberal authority.

[148] *Id.* at 17–19; *see also* Yeva Nersisyan & L. Randall Wray, *How to Pay for the Green New Deal*, Levy Econ. Inst. of Bard College. Working Paper No. 931 13–14, 17–20 (May 2019), http://www.levyinstitute.org/publications/how-to-pay-for-the-green-new-deal (last visited May 6, 2021).

Marigó Oulis*

In Sweden we have a system…and it's not poverty law

I first encountered the concept of poverty law through the writings of Adam Gearey. This was somewhat of an overwhelming experience as it completely flipped my view of the world upside down. I will try to describe why.

Let us start by moving approximately a hundred years back in time to the period before both of the world wars, and before the great depression and before women could vote in Sweden. We are at the end of the époque of great codes.[1] Sweden is trying to develop its own private law code, but no general code like the code civil or the BGB turned out to be possible.[2] The essential content of a commercial code was instead enacted in parcels

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[1] I move too quickly through history here to do it justice, but think of the Code Civil and the BGB and all of their "spin offs" and predecessors in Europe and you roughly get a starting point around the Enlightenment and a fierce energy to complete and perfect the systematizations and the codes during the 19th century and the beginning of the 20th century.

[2] Sweden did look to Germany for guidance. There were drafts of a commercial code in the 19th century, but the Swedish way was never to muster a creation of a great code, instead several shorter acts on the most central areas of private law were developed and enacted.

by the Swedish legislator (and together with our Nordic neighbours but that is another story). The first one was the Sales of Goods Act in 1905 and then came the Contracts Act in 1915. At the same time as the Contracts Act the much less discussed Instalment Sales Act was also passed.[3] The Instalment Sales Act was in force until 1978 when it was replaced by two new Acts on the same subject matter, one for consumer credits and one for non-consumers.[4]

The Instalment Sales Act[5] together with the Contracts Act, form an important part of the Swedish system of "wealth law" (*förmögenhetsrätt*).[6] See, Sweden does not have poverty law. Sweden has wealth law.

What is wealth law? It is a considerable part of Swedish private law; it is not family law (although family law also has a wealth side to it). It does not deal with personal status.[7] It is not a plastic concept the way

[3] Lag (1905:38 s.1) om köp och byte av lös egendom, "Sales of Goods Act", lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område, "Contracts Act" and lagen (1915:219) om avbetalningsköp "Instalment Sales Act". Of these three Acts the Contracts Act is still in force today.

[4] This is a slight simplification as the Consumer Credit Act came first and then the other changes followed, but more or less everything happened causally and connectedly. Before 1977 (when the consumer credit act went into force) consumer credits and non-consumer credits were treated the same in the Instalment Sales Act.

[5] In this context it is not really relevant if one looks to the old one from 1915 or the one from 1978 which is still in force. The actual legislation has only gone through marginal changes primarily connected to the removal of all consumer credits from the applicability of the act, see prop. 1977/78:142, p. 28 f. Where the preparatory works from 1914 speaks of sewing machines and pianos, the new preparatory works discusses agricultural machines and trucks used in small businesses. This is still a very important part of the wealth law context as one of the official goals with the legislation is to "protect" poor buyers, see for instance prop. 1977/78:142, p. 11, 29 and 54.

[6] Wealth law is a very poor and direct, but still correct, translation of "förmögenhetsrätt" which is elaborated below. This area of law would probably be translated as contract and property law (but property law would include other things as well and the concept is problematic from a Swedish point of view for other reasons). One could obviously also discuss the etymology of the word, but I will not.

[7] For a discussion in Swedish on the definition and what to include or not, see for instance Rodhe, Knut, "Obligationsrätten," 1956, p. 1 f. It could of course also be made very easy; Swedish private law consists of family law and förmögenhetsrätt (wealth law). It's just when one takes a closer look that it becomes all muddled and difficult…

poverty law is described by Gearey, but it is still not static.[8] One would not discuss wealth law in relation to wealth (although there is obviously a connection otherwise it could have been called something else).[9] It has to do with assets but not necessarily money as an asset, for instance the Instalment Sales Act and the legislation following form part of the Swedish wealth law. It is a division of law, a non–systematic system. It is also not (perceived as) political but more of an umbrella term used in Swedish private law. Wealth law is also the law on that of which you are capable – it holds promise.

The timing of the Instalment Sales Act had to do with the fact that instalment sales had become more and more common. Apparently, at this point in time, everything could be bought and sold in instalments.[10] The Instalment Sales Act was part of a package together with a new article on *lex commissoria* (and similar situations) in the Contracts Act.[11] The intention was that through these legislative measures the common man would be protected from unconscionable contracts. The fear of the legislator was that the seller would reclaim goods sold in instalments even if only one instalment was missing and even if it was the last remaining instalment while, at the same time, keeping all prior instalments, i.e. without set off. Judging from the description in the preparatory works this fear was not without grounds.[12]

[8] Gearey, Adam, "Poverty Law and Legal Activism," Routledge, 2018, Chapter 1, see particularly p. 11, 12 and 16 where Gearey discusses poverty and how it can be understood from time to time. See also Chapter 9, p. 149 ff. that focuses on the 'reproduction of lawyering' and concept of 'being with' the poor. "To get at this broken middle of our being with others we need to focus on the fundamental sense that any theory of poverty law must be one that works on the quiddity of the 'in between'. Poverty law theory is located in a constant learning and shifting of positions.", p. 162.

[9] A major difference to poverty law is that it is not necessary to understand what wealth is in order to understand what wealth law is. Although it could be helpful of course.

[10] The Preparatory works on the Contracts Act, p. 171 ff. at footnote 1.

[11] "New" is perhaps a bit of a stretch. Sweden did have legislation on *lex commissoria* until 1907 through an analogous use of one of the articles in the Commercial Code. When the article in the Commercial Code was abolished there was no legislation on *lex commissoria*, neither express nor implied. This was perceived as a problem – hence the "new" legislation. See Förslag till lag om avtal och andra rättshandlingar på förmögenhetsrättens område avgivna den 31 januari 1914 ("the Preparatory works on the Contracts Act"), p. 154 ff.

[12] The Preparatory works on the Contracts Act, p. 171 ff. at footnote 1.

The Swedish legislator believed that the new legislation was needed because without instalment sales trade would not expand. With this new legislation on instalment sales and on *lex commissoria*, the playing field would (at least) be more level between the parties. But not just that, with this new legislation the "people without means"[13] could get access to expensive things like furniture in order to create a home. It is also explicitly mentioned in the preparatory works that pianos and sewing machines could be, and often were, purchased using this type of financing.

A sewing machine made it possible for a woman to provide for herself (though she still could not vote).[14] A sewing machine made it possible for the people without means to take power over the means of production.[15] At least that is what is stated in the preparatory works. The 1914 preparatory works however never mentions the "working class" or the "proletariat" in relation to the means of production. It only discusses the people without means.

One could, and I do, question why people without means, i.e. poor people, needed debt.[16] Why was it a good thing for a poor person to borrow money in order to buy furniture? A sewing machine could potentially (but it did not have to) create an income, but why was it so important for the people without means to be able to buy pianos? On this the preparatory works are silent. It was however very important for trade to keep the wheels spinning and after all, how many pianos could one person purchase?

It was acknowledged in the preparatory works that loans obviously could be taken in order to put food on the table, or to buy other things

[13] The term used in the preparatory works on the Contracts Act is "obemedlade".

[14] As of 1874 (SFS 1874:109) even married women were allowed to decide on their earnings. Twenty eight years earlier (SFS 1846:39 and SFS 1846:40) widows, unmarried and divorced women had become allowed to work in certain trades and crafts. On the development of rights for women in Sweden see http://www.jamombud.se/omjamstalldhet/jamstalldhetiar/ [viewed 28 June 2019].

A sewing machine could therefore potentially change a woman's life profoundly as well as the life of her family.

[15] The preparatory works on the Contracts Act actually uses the phrase "the means of production" but only once.

[16] For a modern in depth analysis of inter alia workers and debt, see McCluskey, Martha T, *Are we economic engines too? Precarity, productivity and gender*, University of Toledo Law Review, vol. 49, no. 3, p. 631–656 passim, see particularly p. 640 f., p. 651 ff.

which would not create yield, or which would only decrease in value.[17] Loans of this type could, potentially, be used just to get by. And that was all good and fine for the legislator. People, i.e. poor people, would just have to be mindful.

It was expected by the legislator, no more than that – it was presupposed – that people without means would not do foolish things when presented with the opportunity of money instantly. Why? Because the money would have to be repaid. Poor people would be mindful because they would have to repay the loan; after all it was not a donation.[18] These loans were part of the market and they were needed in order to reinforce trade and the general turnover.[19] The reasoning was maybe along the lines of "if more people had money, more people could take part of trade and everyone would win". The legislation does however not seem to have been interpreted as part of a liberal political act; if anything it was protective[20] as it protected the poor against greedy repayment clauses.

In 2015 the Institute for Future Studies[21] published the result of the latest World Values Survey. The survey explores people's values in a total of 100 countries. The World Values Survey has been done in six waves since the 1980's and consists of interviews with citizens in all of the participating countries.[22]

The result of the survey was presented in what the Institute for Future Studies calls "a cultural map". The vertical axis measures Traditional ver-

[17] Veitch, Scott, *The sense of obligation*, 2017, Jurisprudence, 8:3, p. 415–434, see particularly p. 425 ff. for a discussion on the workings of obligations and debt.

[18] Preparatory works on the Contracts Act, p. 171 f.

[19] See along these lines preparatory works on the Contracts Act, p. 171 and p. 175.

[20] See for instance the preparatory works on the Contracts Act, p. 176 and 182. In the later legislation the protection aspect has shrunk due to the division between consumer relations and commercial relations (although it is still an important part of the legislation) see prop. 1977/78:142, p. 30 and footnote 6 above.

[21] Institute for Future Studies is a Swedish independent research foundation consisting of researchers from different social science disciplines. The Institute relays its own history like this: "In 1971, a government commission was set up in Sweden to investigate what form futures studies should take. It was led by cabinet minister Alva Myrdal and its final report was entitled Choosing One's Future (SOU 1972:59). The Government followed its recommendation and in 1973 the Secretariat for Futures Studies was established, which was originally accountable to the Prime Minister's Office. In 1987, the Government decided to transform the Secretariat into an independent institution, whereupon the Institute for Futures Studies was established." https://www.iffs.se/en/about-us/history-of-the-institute/ [viewed 28 June 2019].

[22] https://www.iffs.se/en/news/sweden-the-extreme-country/ [viewed 28 June 2019].

sus Secular–Rational Values and the horizontal axis measures Survival versus Self–Expression Values.[23] So for instance a country far to the right and high up on the vertical axis would be a country with Secular–Rational values focused on Self–Expression. Or in short – Sweden.[24] According to the survey Sweden is one of the most extreme countries in the world. The result is mind boggling for a Swede.

Anyone slightly familiar with Sweden knows that we also pride ourselves on being "*lagom*" which is a word with a sui generis meaning but which perhaps could be translated as "moderate and well balanced" – not too extreme or as "no exaggerations". Moderate and well balanced does however not really rhyme well with the result of the World Values Survey.

Swedes are proud of being *lagom*. *Lagom* however only seems to be what we tell ourselves is characteristic for Sweden because simultaneously a Swedish person apparently is no stranger to start any international speech or statement with "In Sweden we have a system…".[25] This statement is then usually followed by some kind of explanation as to why the Swedish system is superior to all other systems.[26] Apparently not even Germany, a country that has been called "Sweden for grow-ups", has this "grandiose self-image."[27] Swedes simply do it better (according to the Swedes themselves). This is in fact in line with the World Values Survey, albeit perhaps not with the Swedish self–image in general.

[23] For a lawyer this is confusing, it seems very unclear how this measurement is carried out, but this is how it is presented.

[24] In the middle of the graph you find countries like Greece, Portugal, Macedonia and Vietnam. For some reason the map also illustrates religion or region (it appears as if this is randomly picked since "Baltic countries" and "English Speaking" are marked as well as "Catholic Europe" and "Confucian") and has included Greece in the catholic countries. I am not sure how the predominantly Greek-Orthodox population of Greece feels about this, but regardless of faith Greece is in the middle of the graph.

[25] At least this is the notion of the former Swedish foreign minister Margot Wallström whom was quoted by a former member of the European Parliament, Christofer Fjellner, in one of Sweden's largest morning papers prior to the elections to the European Parliament in 2019, Svenska Dagbladet, 4 May 2019, p. 2. On this particular point the two were in agreement (not on much else though).

[26] On another theme of jurisprudence but with conclusions along these lines, see for instance Martinson, Claes, "*How Swedish Lawyers Think about 'Ownership' and 'Transfer of Ownership' – Are We Just Peculiar or Actually Ahead?*" in "Rules for the Transfer of Movables. A Candidate for European Harmonisation or National Reforms?" European Legal Studies, Band 6, edited by Faber, Wolfgang and Lurger, Birgitta, Sellier European Law Publisher, 2008, p. 69–95.

[27] Quotes are all from Svenska Dagbladet, 4 May 2019, p. 2.

So Sweden does not have anything called poverty law, only wealth law – so what? One should not read too much into these labels. These labels are technical and not political.[28] Wealth law is certainly not an extreme perception of the law and it is not a point of view. Wealth law does not require a "constant learning and shifting of positions."[29] Wealth law is more of a fact. Wealth law creates possibilities for everyone. Let's not forget that Sweden through the Instalment Sales Act did create a barrier against unconscionable repayment clauses when people without means bought things they could not afford using money they did not have (although we did not regulate when instalment sales should be possible since that would have been a market issue). Poverty law would on the other hand imply poverty in Sweden which would be a political issue. According to the preparatory works Sweden did not have poor people, or proletariat one hundred years or so ago; Sweden only had people without means (although we did have means of production).[30]

Poverty law or wealth law. Political issues versus technical issues. It makes you wonder, if Sweden is the most extreme country in the world, could our perceptions of the law sometimes be... not "lagom"?

[28] Kennedy, Duncan "*The political stakes in merely 'technical issues' of contract law*" European Review of Private Law, Vol. 10, Issue 1 (2002), p. 7–28, passim. Gearey also touches upon this issue of hiding politics in technical issues, "Poverty Law and Legal Activism," Routledge, 2018, p. 11 (with reference to Law, "*Edward V. Sparer*", University of Pennsylvania Law Review, vol. 132, no. 3, p. 426).

[29] Gearey, Adam, "Poverty Law and Legal Activism," Routledge, 2018, p. 162.

[30] In 1914 (when the Instalment Sales Act was presented to parliament) Sweden, according to the online tools of Gapminder, was only slightly more equal than the US is today. Gapminder uses the gini coefficient for measurements of inequality. http://gapm.io/ddgini. I've used Gapminder's numbers for 2015 since later numbers are extrapolations from 2015.

Autilia Arfwidsson*

The Introduction of the Concept "financial instrument" in EU Tax Law: A Shift in the Separation of Powers Between the EU and its Member States?

Introduction

In *Poverty Law and Legal Activism: Lives that Slide out of View*, Geary paints an intriguing picture of the lawyer as an ethical actor in the center of both critical and liberal thinking. One interesting topic that is highlighted, is that of how Michelman and Edelman advocated for a reinterpretation of the 14th amendment to include notions of self-respect, by discussing it in the context of moral philosophy.[1] This illustrates how a shift in the context of which a concept is discussed can open up for a corresponding shift in its meaning.

This article will highlight a similar shift in context and, possibly, meaning of a national concept when it is introduced in EU law. The discussion will be linked to the tension between the European Court of Justice (ECJ) and the national sovereignty of the member states in the field of direct taxation. In the article, I aim to show that fundamental questions of

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[1] Adam Geary, *Poverty Law and Legal Activism: Lives That Slide Out of View* (2018), 72–73.

power are hidden behind technical and seemingly neutral rule solutions that deal with complexities in international tax law.[2] More precisely, the aim is to contribute with a Swedish perspective of whether the introduction of the term "*financial instrument*" in the context of EU tax law, may affect the separation of powers between the EU and its member states.

The Topic: Relevance and Background

In the wake of the financial crisis in 2008, there has been an increased international focus on the prevention of so-called base erosion and profit shifting (BEPS).[3] A joint international tax coordination project has been initiated by the European Union (EU) and the Organization for Economic Cooperation and Development (OECD). One of the project's outcomes is the development of rules that prevent so-called "*hybrid mismatches*". A hybrid mismatch can be described as double non-taxation of income, which stems from discrepancies in different countries' tax laws. For example, this could be the case if a payment is deductible in the payer jurisdiction and not taxed in the jurisdiction of the recipient.[4]

Within the EU, hybrid mismatch rules were adopted in 2016 through the Anti-Tax Avoidance Directive (ATAD).[5] The rules target several hybrid mismatch situations: One of them is when the mismatch stems from

[2] For an enlightening discussion on this issue in the field of contract law, see Duncan Kennedy, 'The Political Stakes in "Merely Technical" Issues of Contract Law', *European Review of Private Law/Revue Européenne de Droit Privé/Europäische Zeitschrift Für Privatrecht*, 10/1 (2002), 7–28.

[3] BEPS is described by the OECD as referring to "*tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity or to erode tax bases through deductible payments such as interest or royalties.*", http://www.oecd.org/tax/beps/about/#mission-impact (retrieved 19 August 2019). See also Robert Dover and others, *Bringing Transparency, Coordination and Convergence to Corporate Tax Policies in the European Union Part II: Evaluation of the European Added Value of the Recommendations in the ECON Legislative Own-Initiative Draft Report on Bringing Transparency, Coordi*, 2015, 5.

[4] OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 – 2015 Final Report*, OECD/G20 B (Paris, 2015).

[5] *Council Directive (EU) 2016/1164 of 12 July 2016 Laying down Rules against Tax Avoidance Practices That Directly Affect the Functioning of the Internal Market*; The directive was amended in 2017. The scope was extended to include hybrid mismatches involving third countries (i.e. non-EU countries). Certain hybrid mismatch arrangements not covered by ATAD were also included; *Council Directive (EU) 2017/952 of 29 May 2017 Amending Directive (EU) 2016/1164 as Regards Hybrid Mismatches with Third Countries* (2017).

payments under "*financial instruments*". As it is both extensive and complex, it is not possible to give an exhaustive account of the rule in this article. In a nutshell, the financial instrument rule applies when there is a difference in the classification of income between at least two jurisdictions due to the character of a payment or a financial instrument (the "*hybrid*" element), which has resulted in double non-taxation (the "*mismatch*"). In these situations, the main rule is that the payer jurisdiction should deny deduction of the payment. If the payer jurisdiction does not have hybrid mismatch rules, the payee jurisdiction should include the income in the tax base.

In other words, by targeting the result – the double non-taxation outcome – the difficult task of interpreting complex terms and conditions of a specific contract (i.e. the financial instrument) is seemingly avoided. Instead, it has been left to the member states to decide the more detailed meaning of the term financial instrument.

Direct Taxation in EU Law: The Separation of Powers Between EU and Its Member States

Within the EU, direct taxation is a matter of national sovereignty. Directives may, however, be issued to harmonize specific areas of direct taxation.[6] These harmonized areas of tax law fall within the Union's shared conferred competences. Provided that the national rules fulfill the purpose of the directive, the member states are free to implement the directives to fit into their national legal systems.[7] This separation of powers is designed to manage two conflicting fundamental principles in EU law: harmonization and sovereignty.[8]

[6] Article 115 of the Treaty on the Functioning of the European Union (TFEU). A requirement is that the principles of proportionality and subsidiarity are complied with.

[7] This structure of the power division reflects the conflict between the EU as an entity and as a union of free states. Pursuant to article 288 of the Treaty of the European Union (TEU), directives are only binding with regard to the result to be achieved, except in situations when they have direct effect.

[8] It also relates to the tension between the EU as an entity and as an international institution, see Julie Dickson and Pavlos Eleftheriadis, 'Introduction: The Puzzles of European Union Law', *Philosophical Foundations of European Union Law*, 2013, 9; Jan Klabbers, International Law (2017), 329–331.

In the field of direct taxation, it is arguably particularly important to balance protective measures, such as the hybrid mismatch rules, with national sovereignty, as taxation of income is closely connected to the idea of the nation-state. The harmonization of direct taxes is typically justified by the objective of realizing the internal market. This was also the case in the adoption of the ATAD.[9] As the realization of the internal market demands neutral taxation of cross-border payments, the principle of neutrality is important – although its meaning is somewhat unclear.[10]

A consequence of the separation of powers in EU tax law is that the financial instrument rule will only function as long as the member states strive towards harmonization. This requires that the member states have a homogenous view of different economic objectives. Such objectives are, for instance, to *improve the resilience of the internal market* and to achieve *neutral taxation of cross-border payments*.[11] However, allowing economic objectives to govern the harmonization raises several interpretative questions, since member states are likely to view such concepts differently. For example, the meaning of neutrality will always be unclear in the EU tax law context. What each member state considers to fall within its tax base varies and thus, the neutrality concept diverges between member states.[12]

[9] *Council Directive (EU) 2016/1164 of 12 July 2016 Laying down Rules against Tax Avoidance Practices That Directly Affect the Functioning of the Internal Market, section 16 of the preamble*.

[10] On the different principles of neutrality in international taxation, see Kristina Ståhl, *Aktiebeskattning Och Fria Kapitalrörelser* (1996), 87–127; Martin Berglund, *Avräkningsmetoden: En Skatterättslig Studie Om Undvikande Av Internationell Dubbelbeskattning* (2013), 89–100; Linus Jacobsson, *Permanent Establishment Though Related Persons: A Study on the Treatment of Related Persons under Article 5 of the OECD Model Tax Convention* (2018), 59–73.

[11] The objective of the directive is to "improve the resilience of the internal market as a whole against hybrid mismatches". This is achieved through "neutralising" hybrid mismatches, see *Council Directive (EU) 2017/952 of 29 May 2017 Amending Directive (EU) 2016/1164 as Regards Hybrid Mismatches with Third Countries, section 5 and 27 of the preamble*.

[12] A parallel can be drawn to a similar discussion in the private law context. Also within private law, the neutrality concept will always be unclear. What each member state considers to be within the leeway of the economy varies in a liberal market economy. Consequently, the neutrality concept will also vary between member states. Only in a complete planned or market economy, the concepts will have a harmonizing effect in specific cases. The issues concerning harmonization of abstract objectives in EU law are complex and will, for reasons of space, not be addressed further in this article. For an detailed analysis of these questions in the context of the harmonization of EU Contract law through the

Disputes will arise if a sovereign state insists on its sovereignty when facing the call for harmonization.

In case of a dispute, the ECJ is the exclusive interpreter of the financial instrument rule.[13] Considering both the complexity of the rule and the inbuilt conflict in the separation of powers within EU tax law, it seems like it will not be long until cases on its interpretation will be in front of the court.[14] A central criterion of the rule is the use of a "*financial instrument*". As the final interpreter, the ECJ will have to determine how this term should be understood. Or put differently: Even though the hybrid mismatch rules were originally designed within the OECD to sidestep the task of interpreting and classifying complex contracts on the international level, the separation of powers within the EU results in that the ECJ will not be able to escape this issue.

To Say What A Financial Instrument Is: The Interpretative Method of the ECJ

In each specific case, the interpretation of the term financial instrument also means the interpretation of a specific contract – which is something that cannot be generalized.[15] An interesting question is how the ECJ will act when faced with the challenge of determining if one of these complex contracts should be classified as a financial instrument. The methods of interpretation by the ECJ were laid out in *C-283/81 CILFIT*, namely

PECL, see Thomas Wilhelmsson, 'International Lex Mercatoria and Local Consumer Law : An Impossible Combination ?', *8 Unif. L. Rev. n.S.*, 141–153 (2003).

[13] Article 19 of the Treaty of the European Union (TEU).

[14] Due to the recent adoption of the ATAD, there are no cases as of today on the interpretation of the hybrid mismatch rules.

[15] The importance of contextualization in the interpretation of contract terms and conditions can be illustrated by statements made by judges in British case law. As was said by Buckley L.J in *Cave v Horsell*: "*There are few words, if indeed there be any, which hear a meaning so exact as the reader can disregard the surrounding circumstances and the context in which the word is employed*". Similarly, in Philips and *Strattan v Doctrinal Insurance Ltd*, Steyn J said, "*Words and phrases in contractual documents do not usually have one immutable meaning. Often there is more than one meaning available for selection. One cannot then simply turn to a dictionary for an answer, in choosing the appropriate meaning, the contextual scene is usually of paramount importance*.", see Sir Kim Lewison, *The Interpretation of Contracts*, 5th edition (2011), 251–252. This issue has been also highlighted by, for example, Joel Samuelsson, *Tolkningslärans gåta* (2011), 154–157.

literal, contextual and teleological interpretation.[16] Considering the term financial instrument in the ATAD, article 2 of the directive states that term means:

> "…any instrument to the extent that it gives rise to a financing or equity return that is taxed under the rules for taxing debt, equity or derivates under the laws of either the payee or payer jurisdiction and includes a hybrid transfer."[17]

The definition gives the impression that the term financial instrument should be regarded as an autonomous concept within EU law, whose meaning can be positively defined. However, the scope of the term is broad – it covers "*any instrument*", which, in simple words, means that "*any contract*" could potentially be a financial instrument.[18] Moreover, the contract should be taxed as debt, equity or derivatives in either the payer or payee jurisdiction, which means that the perception of the concept will vary depending on the laws of the countries involved in the transaction. This criterion is difficult to reconcile with the idea of a common understanding of the concept within the EU. The terms "*financing or equity return*" are not elaborated in the directive. Instead, the preamble of the directive refers to the explanations and examples of the OECD re-

[16] Case 283/81 CILFIT. For a comprehensive description of the interpretative methods used by the ECJ, see Koen Lenaerts and Jose A. Gutierrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, *Columbia Journal of European Law*, 2014.

[17] Although the wording indicates that a hybrid transfer has to be included for a contract to qualify as a financial instrument, this does not seem to be the case. Instead, the hybrid transfer criterion extends the scope of the hybrid financial instrument rule to include arrangements that involve the transfer of a financial instrument, cf. the definition of a "*hybrid transfer*" in article 2 ATAD and OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 – 2015 Final Report, 26*.

[18] It can be noted the broad definition opens up for the ECJ to make statements about general civil law concepts, which have diverging meanings in the different legal traditions of the member states. Such a development would be problematic, as the meaning of general civil law concepts are outside the competence of the EU. A comparison can be made with the interpretations of the court in case *C-168/00 Simone Leitner*. In the context of interpreting the provisions of the Package travel Directive 90/314/EEC, the court made general statements about the concept of damages in tort law. This has been discussed in, for example, Vernon Palmer (ed.) The Recovery of *Non-Pecuniary Loss in European Contract Law* (2015), 358–380.

port on hybrid mismatches, BEPS Action 2.[19] Interestingly, the position in BEPS Action 2 is that the terms are intended to be in line with those used in "*internationally and generally recognized accounting standards*".[20]

Considering these different criteria, their degree of generality opens up for a set of interpretative possibilities and attendant arguments.[21] This issue has already received some attention from the OECD, as it is highlighted in BEPS Action 2 that there will be difficulties in determining the demarcation of financial instruments and contracts that are not intended to fall within the scope of the rule, such as sales contracts and contracts for the assumption of non-financial risk.[22] In addition, the interpretative challenge of the ECJ is not reduced, but increased, when the concept is put in the context of the multiple purposes of the ATAD. Two objectives of the directive are to prevent BEPS and to achieve neutral taxation of cross-border payments.[23] An immediate question of interpretation is what neutral taxation means in this context, as there are several neutrality principles in international taxation, which generally cannot be met simultaneously.[24]

Faced by these different interpretative possibilities, the court may turn to other sources in EU primary and secondary law. Apart from the ATAD, there is no legislation within the field of taxation that includes the term

[19] *Council Directive (EU) 2017/952 of 29 May 2017 Amending Directive (EU) 2016/1164 as Regards Hybrid Mismatches with Third Countries, section 28 of the preable*. Under BEPS Action 2, a financing return means a return that is economically equivalent to interest or when the arrangement is calculated by reference to the time value of money provided under the arrangement. An equity return is described as an entitlement to profits or eligibility to participate in the distribution of any person, see OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 – 2015 Final Report*, 122.

[20] OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 – 2015 Final Report, 35*.

[21] Cf. Pierre Schlag, 'On Textualist and Purposivist Interpretation (Challenges and Problems)', in *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of the Courts in the European Union*, ed. by Tamara Perišin and Siniša Rodin (2018), 23.

[22] OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 – 2015 Final Report, 36*.

[23] Cf. *Council Directive (EU) 2016/1164 of 12 July 2016 Laying down Rules against Tax Avoidance Practices That Directly Affect the Functioning of the Internal Market, section 5 and 13 of the preamble*.

[24] Ståhl, Berglund and Jacobsson, *supra* n. 9.

"*financial instrument*". The concept is, however, used in the MiFID[25], the Directive 88/361 on Free movement of Capital[26], and in the standards of the IAS regulation[27]. In the MiFID, the concept is explained in the annex by an extensive list of different contract types. As all the contracts are derivate contracts[28], the meaning of the concept seems to be narrower for the purpose of MiFID, compared to how it is understood in the ATAD. Similarly, the annex of Directive 88/361 provides a non-exhaustive list of examples of different financial instruments. Although case law on the concept exists, the term financial instrument is generally only mentioned in the periphery of questions about the interpretation of other criteria or legal questions.[29] In respect of the term financial instrument, these cases may practically be considered *in casu* decisions.

Compared to both the MiFID and the Directive 88/361, the ATAD seems to put a stronger emphasis on function over form in the classification of contracts as financial instruments. Indeed, it seems like only the IAS regulation provides a detailed, function-based approach to the

[25] For the purpose of this article, "MiFID" refers to both, 'Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on Markets in Financial Instruments Amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and Repealin' (MiFID I); and 'Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on Markets in Financial Instruments and Amending Directive 2002/92/EC and Directive 2011/61/EU (Recast)' (MiFID II). Compared to the MiFID I, additional types of financial instruments have been included in the MiFID II. Pursuant to article 4, financial instruments are the instruments that are specified in Section C of Annex I.

[26] Although the directive is no longer in effect, the nomenclature in Annex I of the directive has been applied regularly by the ECJ, see, for example, *C-452/04 Fidium Finanz; C-222/97 Trummer and Mayer; C-376/03 D.; Case C-265/04 Bouanich*.

[27] *Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the Application of International Accounting Standards*. The regulation was amended in 2008; *Regulation (EC) No 297/2008 of the European Parliament and of the Council of 11 March 2008 Amending Regulation (EC) No 1606/2002 on the Application of International Accounting Standards, as Regards the Implementing Powers Conferred on the Commission*.

[28] Although there is no definition of what a derivate contract is, it has been described as a contract which can be used for hedging or speculative purposes because a future price, rate or value of the underlying asset is fixed beforehand, cf. the Opinion of the Advocate General in C-312/14.

[29] See, for example, Case *C-208/18 Jana Petruchová v FIBO Group Holdings Limited, Case C-658/15 Robeco Hollands Bezit NV and Others v Stichting Autoriteit Financiële Markten (AFM)*, Case *C-312/14 Banif Plus Bank Zrt. V Márton Lantos, Mártonné Lantos*, and Case *C-648/15 Austria v Germany*.

interpretation of the term financial instrument – although for financial accounting purposes. Pursuant to the IAS regulation, listed companies must prepare their consolidated financial statements in accordance with the IFRS[30] standards.[31] One of these standards, IAS 32 Financial Instruments: Presentation, establishes principles for presenting financial instruments as liabilities or equity, as well as for offsetting financial assets and financial liabilities.

But, to return to the main theme, the question remains: How will the ECJ approach the task of interpreting a specific contract to decide if it should be classified as a financial instrument for tax purposes?[32] Although it is not possible to make an exhaustive analysis of all the likely (and unlikely) different interpretative approaches, an attempt at a preliminary hypothesis will be made. Out of the many possibilities, *one* approach is to interpret the concept in line with that of financial accounting standards. An immediate objection against such an approach may be that financial accounting law is a separate area of law with rules that have distinctly different underlying goals and purposes from those of tax law.[33] Nonetheless, there are also several reasons that speak for this interpretative outcome; four of which will be highlighted here. First, this interpretation would be in agreement with the explanations under BEPS Action 2.[34] Second, the court seems to have drawn inspiration from financial ac-

[30] International Financial Reporting Standards.

[31] Article 4 of Regulation (EC) No 1606/2002. The regulation requires all listed companies to prepare their consolidated financial statements in accordance with a single set of international standards. These are the IFRS, previously known as IAS (international accounting standards). Every time a new standard is endorsed at EU level, the Commission publishes an amending regulation which is directly applicable in all EU countries.

[32] Apart from being technically challenging, the task creates a tension between, on the one hand, the judicial role of the ECJ in the interpretation of the term financial instrument for tax law purposes, and on the other hand, a fundamental principle in EU private law: that the interpretation should do justice to the individual contractual agreements (i.e. the will of the parties). For an in-depth comparative analysis of the interpretation of contracts in English, German and French private law, see Mark Van Hoecke, Deep level Comparative law (2002), 17–27. Van Hoecke concludes that the same competing theories and concepts, including the will theory, are at large found in all three legal systems.

[33] This and other arguments against using financial accounting rules in the interpretation of tax law concepts will be discussed further in Section 5.

[34] Supra n. 18.

counting standards in previous cases on indirect taxation.[35] Third, the financial accounting standards are detailed and harmonized EU rules. An interpretation in line with the rules would thus, be a step towards the realization of the internal market, which is an important policy objective of the ECJ. Fourth, and perhaps most important from a practical perspective, none of the other legal sources have an approach on how to classify financial instruments that works for the purposes of the hybrid financial instrument rule.

Based on these reasons, a hypothesis is that the ECJ, under the cover of traditional legal reasonings, will (at least to some extent) use the IFRS standards to determine what kind of contracts that should be considered financial instruments.[36] In such a case, specific questions of tax law would be resolved by financial accounting standards. A follow-up question is how this approach would affect the division of powers between the EU and Sweden?

Financial Instruments in a Swedish Context: A Question of What or When?

When defining taxable income, two questions generally have to be answered: *What* should be taxed, and *when*? For Swedish tax purposes, there is a long tradition of only allowing a link between tax and accounting in respect of the latter question (*when?*), as the first question (*what*?) has generally been considered an exclusive tax question.[37]

[35] See, for example, *C-209/14 NLB Leasing; C-118/11 Eon Aset Menidjmunt*. In the cases, the classification for financial accounting standards under the IAS regulation has been taken into consideration in the assessment of the VAT consequences of a particular act for tax purposes. This trend has been described by, for example, Mikael Ek, *Leveranser och unionsinterna förvärv i mervärdesskatterätten* (2019), 172–179.

[36] It should be underlined that there are, of course, other interpretative possibilities for the ECJ.

[37] The link between tax and accounting in respect of the latter question (*when?*) is regulated in ch. 14 s 2 of the Swedish Income Tax Act (1999:1229) (ITA). The relationship between tax and accounting has been discussed by, for example, Mattias Dahlberg, *Ränta Eller Kapitalvinst*, 124–126; Jan Bjuvberg, *Redovisningens betydelse för beskattningen* (2006), 191–262. Also from an international perspective, it is unusual to classify the financial instrument according to its characterization for financial accounting purposes; Jakob Bundgaard, *Hybrid Financial Instruments in International Tax Law* (2016), 62.

Although financial accounting rules can be attributed the advantage of reflecting the "*genuine financial reality*" of transactions,[38] there are several reasons against linking the first question (*what*?) with accounting standards. One of the reasons against a link that is that tax and accounting have diverging underlying goals.[39] These different goals and purposes mean that diverging considerations have been taken into account in the design of the rules. For example, accounting rules are known for having the valuation of an asset at "*fair value*" or at market value. Put in the context of taxation, this approach could, for example, result in companies being taxed before having made a profit for tax purposes. Another issue is that tax rules are devised for mass administration. Accounting rules are, on the other hand, designed to classify a specific contract based on its individual components, which is ill-suited for the instrumental administration within tax accounting.[40]

The adoption of the ATAD means that the term financial instrument is being implemented in Swedish tax law through the hybrid mismatch rules. In Swedish tax law, the concept has historically been used as a collective term for a number of different securities and similar assets. However, the concept has, with few exceptions,[41] been removed and replaced with the terms share, claim, security and asset.[42] Compared with the financial instrument term in the ATAD, the Swedish approach can be described as more form-based. In the classification of financial instruments not defined under Swedish tax rules, the position of the Swedish

[38] See, for example, Jan Bjuvberg, *Skattemässig behandling av "tvingande" konvertibler – en rättsfallskommentar*, SvSkT 2014:2, 160.

[39] For example, financial accounting rules are designed for the stakeholders of the company, which generally means that companies have incitements to demonstrate high equity and profit, whereas debt and costs should be low. For tax purposes, the incitements are the opposite, as low taxable income results in lower taxes.

[40] Cf. Dahlberg, *Ränta eller kapitalvinst*, 123–141. For a detailed analysis of pros and cons of linking the tax law classification with the "fair value" valuation in financial accounting law, see also Jan Bjuvberg, *Redovisningens betydelse för beskattningen* (2006), 89–105.

[41] It can be noted that the term is used in ch. 17 ITA for the valuation of stocks.

[42] Swe: "*delägarrätt*", "*fordringsrätt*", "*värdepapper*" and "*tillgång*". One of the reasons for removing the term financial instrument from the ITA seems to have been to avoid confusion with how the term is used the Swedish Act on trade on trading in financial instruments (1991:980). For a comprehensive description of how the term financial instrument has been used in Swedish tax law, see Mattias Dahlberg, *Ränta eller kapitalvinst* (2011), 139–140.

Supreme Court has been that financing accounting rules can be used as a "*starting point*" in the assessment. Still, the final tax law classification can differ from the treatment under financial accounting rules and each contract should be assessed on a case by case basis.[43] Nonetheless, there has been some debate in legal doctrine about whether the Swedish Supreme Court has not in fact used financial accounting rules to determine the tax law classification in a case concerning a specific type of convertible bonds.[44] This illuminates the short step that is required to bridge the "gap" between tax and accounting in the classification of financial instruments for Swedish tax purposes.

What then, could the introduction of the term financial instrument through the ATAD entail? One obvious answer to this question is that it calls for an EU law understanding of the concept, with the ECJ as its exclusive interpreter. The broad, function-based approach used to define the term in the ATAD creates an opportunity for the court to make general judicial comments about how a wide range of different contract types should generally be interpreted. A less obvious answer is that the ECJ, in its interpretation of the technical term "*financial instrument*", could force a bridging between tax and accounting in the classification of

[43] The demarcation between tax and accounting in the classification of income for tax purposes has been tried in a number of cases. For example, in HFD 2014 ref. 10, which concerned deduction rights for convertible bonds, it was stated that financial accounting rules which are in line with GAAP can be used as a starting point in the tax law classification. It was, however, emphasized that the taxation should be conducted on a case to case basis. In RÅ 2004 ref. 83 and RÅ 2007 ref. 70, deduction rights were granted for employee stock option expenses even if the tax law valuation did not follow the valuation for accounting purposes. In RÅ 2000 ref. 64, which concerned dividends from a subsidiary to its parent company, the court stated that a starting point in the tax law assessment is that an expense for financial accounting purposes should also be treated as an expense for tax purposes.

[44] This question has been discussed in relation to the Court's ruling in HFD 2014 ref. 10, cf. Jan Bjuvberg, *Skattemässig behandling av "tvingande" konvertibler – en rättsfallskommentar*, Svensk Skattetidning (2014), 153–168. In the article, Bjuvberg argues that the court used financial accounting rules to determine the classification of the financial instrument. The interpretation is, however, refuted by Ulf Tiveus, Tvingande konvertibel – eget eller främmande kapital?, Skattenytt (2014), 274–285. Tiveus argues that although financial accounting rules were used as a starting point in the Court's assessment, the final tax law classification was not determined by financial accounting rules.

certain income (i.e. the question of *what*?), also in situations where there are specific national Swedish tax rules.[45]

Since control over one's own tax base is essential to retain national sovereignty, this would also mean that power is shifted from the national sovereign to the EU. Put differently, the interpretative approach by the ECJ may lead to that the Swedish national development of law will be steered towards interpretations that satisfy the realization of the internal market, also in areas of tax law that are not within the competence of the EU.

Conclusion

Will the introduction of the term financial instrument in the context of EU law affect the separation of powers between the ECJ and its member states in the field of direct taxation? Although the question cannot be answered with certainty, a hypothesis is that the ECJ – faced by the task of interpreting the technically complex term financial instrument – will choose the interpretative alternative most in line with its policy objective of realizing the internal market, under the cover of traditional legal reasonings. Such an interpretation of the concept can affect other areas of law outside the ECJ's competence. For Swedish tax purposes, it may be the final step towards the creation of a direct link between tax and accounting in the classification of contracts. Put differently, ECJ may, through its interpretation of the term financial instrument in the context of the ATAD, steer the development of law outside its competence towards the realization of the internal market. In the field of direct taxation, this would entail a shift in power from the member states to the EU.

[45] A step in this direction can already be noted in the recent Swedish proposal to implement the hybrid mismatch rules. In the proposal, legislator made the principal statement on that general accounting standards should "*determine*" the classification of financial instruments; *Genomförande av regler i EU:s direktiv mot skatteundandraganden för att neutralisera effekterna av hybrida missmatchningar* (2019), 43.

Sara Hovi*

Transforming Court Costs into Damages: Noticings on NJA 2013 s 762 and NJA 2018 s 1127

In his Key Note given on the Critical Legal Studies Symposium in Uppsala, August 2019, Adam Gearey spoke of CLS as an *art of notice*. For me, this expressed a call for attentiveness and scrutiny in our handling of legal materials – how else would we as scholars notice what forces are working within the law, and towards which results? What slides out of view[1] when we do not notice, when there is no art, but an absence of notice – an un-notice? What happens to that which is left out of the frame?

The art of notice, as I see it, can, among other things, help us to observe certain changes in relationships marked by tension. In his article *Authoritarian Constitutionalism in Liberal Democracies* Professor Duncan Kennedy writes: "*Over time, many small victories for one side, which are defeats for the other, can move the compromise a long way in one direction, possibly passing a threshold of transformation into a new kind of regime*."[2] By devoting ourselves to the art of notice, we are more equipped to identify these small steps moving in a certain direction, and thus also notice when a change of regime is closing in on us. In this essay I have chosen to focus on the potential tension between the supremacy of EU law and

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[1] Gearey (2018) Poverty Law and Legal Activism – Lives that Slide out of View, Routledge.

[2] Kennedy (2019) Authoritarian Constitutionalism in Liberal Democracies, in eds Alviar, Helena & Frankenberg, Gunter, *Authoritarian Constitutionalism*, Edward Elgar p 3.

the supposed procedural autonomy[3] of the Member States when it comes to the public authorities' tort liability in cases of infringement of public procurement law. The limitations and expansions of this form of liability are formed both in the European Court of Justice (the ECJ) and in the domestic courts. The Swedish Supreme Court (the SSC) has in two cases, NJA 2013 s 762 and NJA 2018 s 1127, ruled that a tenderer in a public procurement process can be awarded compensation, in the shape of damages, for court costs arising from a previous review proceeding. In this essay I try to notice the mechanisms that made this transformation from court costs to damages possible and reflect shortly upon the consequences it brings concerning the question of procedural autonomy.[4]

A First Case

In NJA 2013 s 762, the SSC for the first time ruled that a tenderer could be compensated for court costs from a previous review process in the form of damages. The background was as follows: the tenderer had challenged the procurement decision in the administrative court, had won the case, but was not given the opportunity to compete in a new procurement process, since the contracting authority decided to cancel the

[3] Provided no EU law provisions exist, Member States are generally supposed to have procedural autonomy when it comes to enforcing EU law on the national level as long as the national procedures meet the conditions of equivalence and effectiveness, see ECJ 16 December 1976, C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989 para 5. This autonomy includes how to determine conditions for damages, see ECJ 5 March 1996, C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029 para 98. This principle has been upheld also in cases of infringement of EU law on the award of public contracts, see for example ECJ 9 December 2010, C-568/08, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others v Provincie Drenthe* [2010] ECR I-12655 para 90–91. The principle of procedural autonomy has however been the target of scepticism, see for example Kakouris (1997) Do the Member States possess Judicial Procedural "Autonomy"?, Common Market Law Review, Vol 34, Issue 6 pp 1389–1412, Galetta (2010) Procedural autonomy of EU Member States: paradise lost?, Springer, Bobek (2012) Why There is no Principle of 'Procedural Autonomy' of the Member States, in eds de Witte & Micklitz, *The European Court of Justice and the Autonomy of the Member States*, Intersentia pp 305–323.

[4] The purpose of this essay is thus not to state various reasons why the transformation is "bad" – there are valid arguments for transformation, see Andersson (2017) Ersättningsproblem i skadeståndsrätten, Iustus pp 232–234 and p 254.

procurement. According to the applicable domestic statute,[5] the tenderer should be compensated for losses caused by the contracting authority's infringement of the same statute. However, the general rule in Swedish administrative procedural law is that the parties concerned carry their own court costs, regardless of the outcome of the case. This also applies in procurement review proceedings.[6]

The SSC's argumentation towards the transformation from court costs to damages can be divided into the following themes: first it concluded that the wording of the applicable tort rule expresses a possibility for compensation of court costs, since it does not contain any restrictions regarding what kind of damages that can be compensated – only that the loss should be caused by the infringement.[7] Secondly, it pointed out that without a possibility to be compensated for court costs when successful in the administrative court, the tenderer might refrain from challenging the awarding decision. This is, according to the SSC, at least the case when the tenderer cannot be sure to win the new procurement process – and it would, according to the SSC, counteract both the effectiveness of the review process and the reparative and preventive functions of damages.[8] The SSC's conclusion is that the administrative court costs can be compensated in the form of damages. Even if this case opened up for transformation from administrative court costs to damages, the situations in which the transformation can be motivated are thus somewhat qualified: the tenderer has to be successful in the preceding review proceeding and the costs must be reasonable. Furthermore there has to be

[5] Paragraph 6, chapter 7 in the Public Procurement Act of 1992 (lag (1992:1528) om offentlig upphandling), which transposes article 2.1c in directive 89/665/EEC (the first remedy directive), later amended through directive 2007/66/EC (the amendment directive). Article 2.1c express a duty for the Member State to provide a possibility for a tenderer to be awarded damages if an infringement has taken place.

[6] The reasons for this practice are many: an administrative proceeding is supposed to be simple enough for an individual to take part in without being represented by a counsel. The case is usually settled through written procedure, without a hearing, and there are no court fees. The administrative court also has a duty to make the necessary enquiries in order to contribute to a substantially correct outcome of the case in question, see paragraph 29, The Administrative Procedural Act (Förvaltningsprocesslag (1971:291)).

[7] NJA 2013 s 762 para 21.

[8] NJA 2013 s 762 para 22. The SSC refers to a previous case, NJA 2007 s 349, where the SSC states that the function of the domestic tort rule, which builds on the remedy directives, is both reparative and preventive.

a close connection between the tenderers loss in form of the court costs and the infringement.[9]

In the majority's opinion, the consequences regarding the administrative procedural rule on (non)compensation for court costs in administrative proceedings are not discussed. The dissenting judges however identified several potential problems with the transformation from court costs to damages: the transformation would create an imbalance between the parties in the review process, since the contracting authority, even if it won the case, would never be compensated for its court costs. The minority also held that the possibility of being compensated for administrative court costs in the shape of damages would increase the number of court proceedings and expressed concern for the fact that the claim for compensation would be tried in a different court than the issue itself.

A Second Case

In the latter case of 2018 the background was slightly different: after a tenderer successfully had challenged the procurement decision in the administrative court, it did not take part in the new awarding process. Nevertheless, the tenderer filed a claim for damages regarding the administrative court costs. The SSC stated that even though the general administrative procedural rule on court costs had been upheld in procurement review proceedings, case law (meaning NJA 2013 s 762) had opened up for compensation for these costs in the form of damages. The court also made an additional qualification[10] as to when the transformation from court costs to damages is motivated: the successful tenderer must have been denied the possibility of winning the contract because of reasons for which the tenderer cannot be blamed for. The possibility to get compensation in these situations is, according to the SSC, necessary in order to guarantee the full impact of the EU public procurement rules and the individual's right to effective remedies.[11] Here the SSC refers to its previous statement about the aims of the tort articles of the remedy directives: reparation, prevention of infringements and full impact of the EU law

[9] NJA 2013 s 762 para 23.

[10] See Andersson, Upphandlingsskadeståndsrätt (VI) – frågor om skadesamband och skadelidandes begränsningsåtgärder, InfoTorg Juridik, accessed July 16th 2019.

[11] NJA 2018 s 1127 para 30–32.

on the national level.[12] The SSC reasoned that even though the review process itself can act as a preventive factor, the possibility of damages is nonetheless necessary in situations where otherwise the EU law would not reach its full impact and the individual's right to effective remedies would not be guaranteed.[13] The additional qualification led to a rejecting of the tenderer's claim for damages. Since the tenderer in this case had refrained from competing in the new awarding process, it was not eligible for damages.[14]

Mechanisms Working Towards Transformation from Court Costs to Damages

The Member State's criteria for determining and estimating the damages do not overrule any EU substantive provisions – the criteria decided by the Member State can exist only in the absence of criteria decided by the EU. Neither the remedy directives that the national statutes build upon, nor the case law of the ECJ give any specific provisions for the authority's liability regarding the tenderers administrative court costs. This is important to notice, since it affects the Member State's discretion to decide on what principles should be applied when the tenderer in national court claims the right to damages for previous administrative court costs.

The interpretation that made the transformation possible was in NJA 2013 s 762 and NJA 2018 s 1127 performed by the domestic court itself. The mechanism in force is above all a teleological approach towards the national statutes, where the full impact of the EU law and the right to effective remedies serves as a backdrop. In both cases, the functions of damages become the focus of the SSC's argumentation. This teleological approach where arguments such as effectiveness and the functions of damages are in focus could of course be taken to an extreme, leading to a general right for the tenderer to be compensated for the administrative court costs. However, the SSC in NJA 2018 s 1127 explicitly rejected

[12] NJA 2018 s 1127 para 20.

[13] NJA 2018 s 1127 para 21. This statement indicates that the SSC was of the opinion that a general rejection of the transformation alternative would be in conflict with the principle of effectiveness. The court in the same case stated that the principle of effectiveness requires the Member State to ensure that the national law provides the remedies demanded by EU law and that these are effective enough to guarantee the individual the protection and rights it enjoys under EU law, see para 22 in the opinion.

[14] NJA 2018 s 1128 para 39.

such a general right by stating that neither EU law nor domestic law demands the tenderer to be compensated for the administrative court costs in all possible situations.[15] This is important to notice since it underlines that the case is not a leap into a new regime of limitless possibilities of compensation.[16] The arguments of effectiveness, prevention etc. are counteracted by the general tort law principles, which results in the qualification that the right to compensation demands that the successful tenderer looses the opportunity of the contract due to reasons it cannot be blamed for.[17]

What Slides out of View?

Above, I have been trying to notice the mechanisms that operate in the SSC's judgments, resulting in the transformation from court costs to damages in the field of public procurement law. The step taken in the SSC's judgments is one where the transformation is sometimes deemed necessary to fulfill Sweden's duties under EU law. Has the SSC not then acted within its discretion to decide on the criteria for determining and estimating the damages? Is there anything left to notice?

In order to notice that which slides out of view, we have to further scrutinize the step taken in the two cases. By stating that the tort rule, in the name of effectiveness (and not just any effectiveness but the effectiveness of the EU law) in some situations must be used to grant the tenderer a right to compensation for previous court costs in the form of damages, the SSC lets the administrative procedural rule regarding the distribution of court costs slide out of view. And what is not in view is easier to bypass. Of course, if one were to search for a formal redefinition of the administrative courts practice to not grant the winning party compensation for its court costs, one would search in vain. The administrative procedural rules of compensation for administrative court costs as such remains, since the tenderer still cannot be compensated

[15] NJA 2018 s 1128 para 32. It also stated that such a general right is for the legislator to decide upon.

[16] For a connecting discussion, see Andersson, Upphandlingsskadeståndsrätt (VI) – frågor om skadesamband och skadelidandes begränsningsåtgärder, InfoTorg Juridik, accessed July 16th 2019.

[17] The SSC did however not restrict the possibility of transformation only to situations where the authority cancels the procurement, but to any situation where the tenderer, due to reasons it cannot be blamed for, is denied the possibility of winning the contract.

in the administrative court. The following transformation of the costs into damages will, however discreetly and in limited situations, weaken the administrative procedural rule and disregard the reasons behind it. To me, it is interesting to notice that the SCC chooses (and it is indeed a choice, since there is no clear duty under EU law to compensate the administrative court costs) to open up for transformation, basing its decision on teleological function-friendly argumentation, and not addressing the conflicts this interpretation of the tort rule potentially creates in the national legal system. One could say that by avoiding a conflict between EU law and national law, the conflict is transferred to the national level.

From Autonomy to Submission?

If we turn back to the theme of regime-changing steps, we should look at the context in which the step of transforming court costs into damages is taken. Because of the qualifications made by the SSC, the step taken in these cases is perhaps not very big, and most importantly, applies only in the field of public procurement law. However, as an effect of the SSC's interpretation of a tort rule, the EU law's call for effectiveness subsequently affects also the administrative procedural rules in a sideway manner – a side step.[18] This leaves us with the question: How many steps can be taken, either directly or to the side, before the supposed default of procedural autonomy changes into procedural submission.

[18] The Swedish legislature is now in a process of reviewing the administrative procedural rules, possibly changing them by making it possible for the parties in a public procurement review process to get compensated for court cost and thus making an exception from the main rule, see SOU 2018:44. I will follow with great interest how and if the cases of 2013 and 2018 will contribute to actual legislative reform.

Therése Fridström Montoya

On the Anxiety of Decisions and Supported Decision-Making: A Critical Reflection on the Right to Equal Recognition Before the Law for Persons with Disabilities

"Freedom's possibility announces itself in anxiety."
Søren Kierkegaard, The Concept of Anxiety

To be, or not to be: that is the question

Equal recognition before the law – the right for persons with disabilities to be recognized and respected as *persons with legal capacity on an equal basis with others* – is one of the most discussed topics in contemporary disability rights discourse. Assuming that equality before the law is "a basic general principle of human rights protection and is indispensable for the exercise of other human rights",[1] Article 12 of the UN Convention on the Rights of Persons with Disabilities (the CRPD) demands that States' parties "reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law" (12:1) and "shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life" (12:2).

[1] General Comment No 1 (2014) Article 12: Equal recognition before the law, CRPD/C/GC/1, Committee on the Rights of Persons with Disabilities, p. 1.

The right to equal recognition before the law has no exceptions, not even for persons who lack the abilities needed to make legally valid decisions.[2] A person with disability must never be denied legal capacity *because of* his or her disability.[3] However, depending on the disability in question, this is sometimes difficult to uphold, especially for those with intellectual, cognitive and/or psychosocial disabilities. Normally, if a person lacks the abilities needed to understand and to make a rational decision, the decision is not legally valid; "the question of whether or not each individual's decision will actually be respected is dependent on whether she meets the legal standard for capacity in respect of the decision in question".[4]

The response to this problem in the context of the CRPD is *supported decision-making* (CRPD Article 12:3). States' parties shall provide access to support in the exercise of legal capacity. Such support can vary in form, but "must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making".[5] This statement raises, along with many others, the question of *how* support must be arranged to guarantee that the supported person's will and preferences are truly respected, and, as follows from the CRPD Article 12:4, that the support is exercised "free of conflict of interest and undue influence". However interesting this question might be, there are also other, more profound problems to discuss in the context of supported decision-making.[6]

[2] CRPD/C/GC/1 p. 5.

[3] A. Bruce, *Which Entitlements and for Whom? The Convention on the Rights of Persons with Disabilities and its Ideological Antecedents* (Lund, 2014) p. 174 ff; A. Nilsson, *Minding Equality. Compulsory Mental Health Interventions and the CRPD* (Lund, 2017) p. 151 ff. As both Bruce and Nilsson point out, the negotiating parties behind the CRPD were, of course, aware of the difficulties that can arise from this, for example, in relation to mentally ill persons in need of coercive care, but the final text does not reflect the discussions on this matter. See also Yana Litin'ska, *Assessing capacity to decide on medical treatment. On human rights and the use of medical knowledge in the laws of England, Russia and Sweden* (Uppsala, 2018) p. 122 ff.

[4] M. Donnelly, *Healthcare Decision-Making and the Law. Autonomy, Capacity and the Limits of Liberalism* (Cambridge, 2010) p. 2.

[5] General Comment No 1 (2014) Article 12: Equal recognition before the law, CRPD/C/GC/1, Committee on the Rights of Persons with Disabilities, p. 17.

[6] My co-researcher, Linus Broström, and I are currently investigating these questions for a law and ethics project, financed by Ragnar Söderbergs Stiftelse. This article is written as part of that project, which addresses questions regarding supported consent from persons

When recently reading Adam Gearey's thought-provoking book, *Poverty Law and Legal Activism*, some of the themes raised by Gearey struck me as relevant to address in relation to disability and equality before the law – although the problems, and also my theoretical framework for understanding them, are somewhat different.[7] As Gearey clearly shows, *alienation*, *anxiety*, and *difficulties of "being with"*, in the sense of truly meeting and understanding "the other", are relevant themes in poverty law, and it is not difficult to see that this is also the case in disability law, and especially so in the context of supported decision-making. A person with disabilities who needs support to make decisions might, like a poor person in a rich man's world, feel alienated in a society that presupposes human abilities he or she lacks.[8] A person entrusted to support someone in the disabled person's decision-making might, like a poverty lawyer, also face alienation, anxiety and difficulties of "being with".[9]

The theme I will develop here, though, is neither alienation nor difficulties of "being with" but, rather, *anxiety*.[10] Turning to the thinking of Nietzsche and Kierkegaard, and assuming that decision-making is an individual issue of freedom of choice and anxiety, I will argue that anxiety is an important missing piece in the context of disability law and supported decision-making. Freedom of choice comes with anxiety, as two sides of the same coin. You cannot have one without the other. However, in disability rights discourse which focuses on autonomy, equality and inclusion, the perspective of anxiety as an inescapable aspect of freedom of choice seems to be completely absent. When flipping the coin of freedom and taking a closer look at anxiety, interesting things are revealed that might call for changes in the way we think about equal recognition before the law and supported decision-making.

with intellectual, cognitive and/or psychosocial disabilities, and the ways in which support can be arranged to guarantee equality before the law in the CRPD sense.

[7] A. Gearey, *Poverty Law and Legal Activism. Lives that Slide Out of View*. (New York, 2018).

[8] As McRuer puts it: "Able-bodiedness […] still largely masquerades as a nonidentity, as the natural order of things". R. McRuer, *Crip Theory. Cultural Signs of Queerness and Disability*. (New York, 2006) p. 1.

[9] A. Gearey, *Poverty Law and Legal Activism. Lives that Slide Out of View*. (New York, 2018) p. 95–129.

[10] I have, in fact, experienced some anxiety of my own, wondering why I may be wasting my time in academia, when I could be out in the real world facing and hopefully helping real people with real problems. Gearey's writing that "one's actions in the world are definitional of the self" (p. 124) had a great impact on me.

Anxiety works on different levels in the context of supported decision-making; it has a bearing not only on ethical questions and questions of identity, but also on questions regarding the legal subject *per se*. In the everyday meaning of the word, it is easy to understand that anxiety might be experienced at the surface level of supported decision-making, as this is an emotion often experienced when we face situations which are hard to handle. As already mentioned, to comply with the CRPD, supported decision-making must respect the rights, will and preferences of the person in need of support. How to fulfil this in practice is an ethical question that might cause a supporting person to feel anxiety. This, however, is a small problem. As will be further discussed later in this text, bigger problems in connection with supported decision-making concern anxiety in connection to legal capacity, agency, and freedom of choice.

Equality before the law presupposes recognition as a legal subject with legal capacity. In the context of the CRPD, legal capacity is viewed as

> "an inherent right accorded to all people, including persons with disabilities. It consists of two strands. The first is legal standing to hold rights and to be recognized as a legal person before the law. […] The second is legal agency to act on those rights and to have those actions recognized by the law."[11]

Clearly, legal agency is important and necessary for access to justice in a broad sense.[12] However, it must be noted that legal agency has two sides: The upside being equal recognition before the law and freedom, and the downside being responsibility, potentially negative outcomes of free decisions – and anxiety. Bearing this in mind, one can argue that recognition as a legal agent, with rights but also duties on an equal basis with others, might not always be a preferred position for everyone. So, why is that the assumption in the CRPD?

I suggest that part of the answer to this question is deeply embedded in our cultural understanding of what it means to be a human being. *To be or not to be* a human – and therefore an equal person before the law – is a question of freedom and anxiety, and the choices we make. In further

[11] CRPD/C/GC1 p. 14.

[12] Legal capacity (Article 12) and access to justice (Article 13) are closely connected, as pointed out in P. Weller, 'Legal Capacity and Access to Justice: The Right to Participation in the CRPD', in A. Arstein-Kerslake (ed.) *Disability Human Rights Law*. (Printed Edition of the Special Issue Published in *Laws 2016*), p. 43–53.

explaining this statement, I will turn first to history and the way persons with disabilities have been treated in the past, then to the thinking of Friedrich Nietzsche and Søren Kierkegaard.

Though this be madness, yet there is method in it

The CRPD, effective since 2006, must be understood in light of history. In the past, persons with disabilities – especially intellectual disabilities – were excluded from society and treated inhumanely in various ways. During most of the 20th century, many were forced into life-long "care" in institutions, where the living conditions were poor and differed extensively from normal everyday-life. They were often exploited, subject to hard labour and medical experimentation. Many were sterilized without consent, and denied rights on an equal basis with others, such as the right to marry and start a family.[13] They were declared legally incapable and therefore denied legal capacity, and under guardianship they were denied self-determination in almost all areas of life.[14]

Bearing this history in mind, it is no wonder that the right to equal recognition before the law is so strongly emphasized in the CRPD. Article 12 states the following:

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

[13] Regarding these practices during the 20th century in the USA, see L. Carlson, *The Faces of Intellectual Disabilities. Philosophical Reflections* (Bloomington, 2010). Regarding the same in Sweden, see T. Fridström Montoya, *Leva som andra genom ställföreträdare – en rättslig och faktisk paradox* (Uppsala, 2015); K. Grunewald, *Från idiot till medborgare* (Stockholm, 2008).

[14] About the development of Swedish law regarding guardianship (förmyndarskap) into two different forms of legal representation, called "the good man" and "the administrator" during the 20th century, see T. Fridström Montoya, *Leva som andra genom ställföreträdare – en rättslig och faktisk paradox* (Uppsala, 2015) p. 269–293, see also T. Fridström Montoya, "Supported Decision-Making in Swedish Law – Is the 'Good Man' a Good or Bad Guy in Light of the CRPD?", which is the English version of "Unterstützte Entscheidungsfindung im schwedischen Recht – der 'Gute Mann': Held oder Schurke im Licht der UN-BRK?", in M. Zinkler, C. Mahlke, R. Marschner (Eds.) *Selbstbestimmung und Solidarität Unterstützte Entscheidungsfindungin der psychiatrischen Praxis* (Köln, 2019) p. 222–232.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

In May 2014, following interactive forums with various interested parties, the Committee on the Rights of Persons with Disabilities issued a general comment for the interpretation of Article 12.[15] The Committee explains that Article 12 must be interpreted in light of the general principles of the CRPD,[16] which are outlined in Article 3: Respect for inherent dignity; individual autonomy including the freedom to make one's own choices; independence of persons; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; equality between men and women; respect for evolving capacities of children with disabilities; and respect for the rights of children with disabilities to reserve their identities. These principles speak a clear language of individuality, autonomy and inclusion.

In line with the general principles, it follows from Article 12 that everyone has a right to legal capacity in two meanings – to be recognized

[15] According to the CRPD/C/GC/1, p. 2, the Committee interacted with States' parties, disabled persons' organizations, non-governmental organizations, treaty monitoring bodies, national human rights institutions and UN agencies.
[16] CRPD/C/GC/1, p. 4.

and respected as a *person* as well as an *actor* before the law. States parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life (CRPD 12:2), meaning that they shall be recognized as agents with "the power to engage in transactions and create, modify or end legal relationships".[17] In situations where an individual, due to disability, lacks the abilities needed to make legally valid decisions and/or to engage in legal actions, States parties have an obligation to provide access to support in the exercise of legal capacity (CRPD 12:3).

Even though it is widely held that the CRPD does not give persons with disabilities any additional rights, and that Article 12 "simply describes the specific elements that States parties are required to take into account to ensure the right to equality before the law for people with disabilities, on an equal basis with others",[18] Article 12 is held to represent *a paradigm-shift*.[19] Practices of *substituted decision-making* are to be replaced by *supported decision-making*. States parties "must refrain from denying persons with disabilities their legal capacity and must, rather, provide persons with disabilities access to the support needed to enable them to make decisions that have legal effect."[20] This means that different kinds of guardianship, where a person's right to make decisions are substituted, are not compliant with the CRPD. And, as already stated, support in the exercise of legal capacity "must respect the rights, will and preferences of persons with disabilities and should never amount to substituted decision-making".[21]

All very good, if you agree that autonomy and self-determination are worthy goals in every situation. In light of history, this position in the CRPD is understandable. Persons with disabilities have hardly been treated as human beings in the past, and they have been deprived of

[17] CRPD/C/GC/1, p. 12.

[18] CRPD/C/GC/1, p. 1.

[19] P. Bartlett, "Supported Decision-Making in English Legislation" p. 9, the English version of "Unterstützte Entscheidungsfindung in der englischen Rechtsprechung", in M. Zinkler, C. Mahlke, R. Marschner (Eds.) *Selbstbestimmung und Solidarität Unterstützte Entscheidungsfindungin der psychiatrischen Praxis* (Köln, 2019) p. 206–221; M. Bach & L. Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity. Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (Commissioned by the Law Commission of Ontario, 2010).

[20] CRPD/C/GC/1, p. 16.

[21] CRPD/C/GC/1, p. 17.

human dignity and self-determination. However, even if it is a desirable shift to move away from systems based on mental capacity and on the appointment of formal guardians making best-interest decisions on behalf of persons with disabilities, there are also some problems that need to be addressed in this new paradigm.

Something is rotten in the state of [the CRPD]

One unanswered question concerning Article 12 and supported decision-making is whether equal recognition before the law "in all areas of life" can ever be fully achieved through supported decision-making; or, in other words, whether supported decision-making really is the gamechanger that it is held out to be. It is hard to envision how every kind of decision can be legally valid if they have been supported. For example, can supported decision-making ensure that all persons with intellectual, cognitive and/or psychosocial disabilities are able to enter into marriage?

According to Article 23 of the CRPD, it is a right "for all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses". It is noteworthy here that Article 23 includes *all* persons with disabilities, at the same time as the requirement is a *free and full consent*. But what if a person's disability affects precisely the abilities needed to be able to give a free and full consent – can support always help in that situation? This is an unanswered question. There is no specification on how "free and full consent" in Article 23 is to be understood.[22] It must also be noted that how, and to what extent, a person's disability affects his or her abilities in a specific situation varies greatly from person to person, depending on the severity of the impairment. It is impossible to draw conclusions about the ability of an individual simply because someone has a certain impairment or illness. To what extent support is needed – and for what exactly – is also unclear.

What instead *is* clear, is that something more is needed for a legally valid consent than merely a statement from the intended spouse that he

[22] A. Nilsson, *Minding Equality. Compulsory Mental Health Interventions and the CRPD* (Lund, 2017) p. 63, footnote 176.

or she agrees to marriage.[23] In general, consent in a legal context means that someone rationally (not under the influence of drugs or a mental deviation) and freely (without manipulation or force from someone else) agrees to something that he and she can fully understand the consequences of.[24] Given this understanding of what constitutes a legally valid consent, it could in some cases be argued that if a person is supported into consenting to marriage, the consent does not, in fact, reflect that person's own rational and free will, and is therefore not legally valid.[25]

Of course, this argument depends on the meaning of legal demands for consent. Scholars have suggested that consent as a concept can be legally reframed from a disability perspective, with the consequence that "mental (in)capacity is no longer a relevant issue". Instead of demands for consent meaning to make sure that someone understands and agrees to something, they propose that demands for consent should "ensure that the consenting parties have freedom to negotiate and freedom to refuse, with active communication between parties to ascertain will and preferences and to demonstrate consent or refusal".[26] However, this view on the issue of consent from persons with intellectual, cognitive and/or psychosocial disabilities seems to miss parts of the problem. What about situations in which the person *de facto* lacks the abilities to "negotiate and to refuse" and to "communicate actively"? Is supported decision-making the solution in these situations?

[23] In Swedish Family Law, the requirement is that the intended spouse must consent to marriage, and the consent must be free. Regarding this, Agell and Brattström write that even if persons with severe mental disorders are no longer prohibited by law to marry (before 1973 they were), they cannot enter into marriage because they lack the legal capacity that is required; there must be an understanding to some extent of what a marriage means. A. Agell & M. Brattström. *Äktenskap Samboende Partnerskap* (Uppsala, 2011) p. 31.

[24] Regarding consent in different legal contexts in Swedish law, see for example, E. Rynning, Samtycke till medicinsk vård och behandling (Uppsala, 1994) p. 168 ff.

[25] In this specific area of law, it is interesting to note that in Swedish law, legal representatives such as the "good man" (god man), the "administrator" (förvaltare) and the "framtidsfullmaktshavare" are prohibited by law to represent someone in strictly personal matters ("frågor av utpräglat personlig karaktär"), such as entering into marriage. See the Parents and Children Code (1949:381), Chapter 12, § 2, section 3 and the Act (2017:310) regarding future power of attorney, § 2, section 2.

[26] L. Brosnan & E. Flynn, *Freedom to negotiate: a proposal extricating 'capacity' from 'consent'*, International Journal of Law in Context, 13, 1 p. 73.

In addition, a number of challenges arise from the demand that support in the exercise of legal capacity *must respect the rights, will and preferences* of persons with disabilities.[27] First, it can be noted that truly knowing the will and preferences of someone else is always a difficulty – and especially so if the person in need of support, due to his or her disability, understands and views the world in a different way than the person providing support. Communication is about interpretation and understanding, and the risk of getting lost in translation increases if the persons involved have different understandings of the world. Also, how can it be guaranteed that a supported decision is the deciding person's own decision, and not the result of manipulation or undue influence from the person providing the support? Second, there is the problem of knowing whether what someone expresses as his or her will is actually their own will, and not a statement reflecting a wish to please someone else whom the person with the disability is dependent on. If you are dependent on others, it is often a wise strategy to try to please them. This fact needs special attention, since dependency on others is a reality for many persons with disabilities. This is, at least, something to note if the aim is self-determination in a true sense.

On top of these problems, concerns can also be raised in relation to the expressed will itself. Is every sort of will expressed by a person with a disability to be supported into a legal decision, even if it is perceived to be a "bad" decision, in the sense that it can, or clearly will, harm the supported person – or someone else, close to the person with the disability?[28] Whose responsibility is the outcome of such decisions? One also wonders if the possibility of receiving support in order to be able to make decisions in all areas of life means that there is an expectation or even an obligation for persons with disabilities to do so? As anyone who has agonized over an important decision knows, freedom of choice is not only and always something enjoyable. For some individuals, however, free will can be directly harmful. Consider, for instance, a person with an intellec-

[27] CRPD/C/GC/1, p. 17.

[28] In the context of decisions concerning medical treatment, the answer to this question is no. The law does not support all kinds of decisions. As Donnelly points out, the right to refuse medical treatment is limited by four interests: the preservation of life, the protection of the interests of innocent third parties, the prevention of suicide and the maintenance of the ethical integrity of the medical profession. M. Donnelly, *Healthcare Decision-Making and the Law. Autonomy, Capacity and the Limits of Liberalism* (New York, 2010) p. 66.

tual disability who does not understand that he or she is manipulated or persuaded into giving away property but truly believes it to be his or her own decision, or a person who, under the influence of a mental illness, is convinced that she will die tomorrow and therefore spends all her lifesavings today. And think about the fact that the right to self-determination not only means being able to decide what you want, but also what you *don't* want, which might, for example, result in your refusal of help that is crucial for your health.

There is a clear conflict in law between the right to autonomy and the aim to protect vulnerable individuals. The human rights perspective on this conflict seems to be that States must primarily protect "the right of individuals to choose and pursue their own life path, and all the decisions that entails along the way"[29] – even if this means that individuals are harmed in the process. In the context of the CRPD, legal capacity is viewed as so important that it is described as "an inherent human right".[30] How can this uncompromising stand on legal capacity be understood? To answer this, I think it is necessary to take a closer look at the legal person and the legal person's presumed abilities – in other words, what constitutes a legal person.

…that is the question: Whether it is nobler in the mind to suffer

All human beings are *legal persons*, and human rights, as well as law in general, apply to *humans* exclusively.[31] Given this, it matters where we draw the line between humans and other beings – the underlying question being *who is law for?*

Quite surprisingly, given its importance and foundational character, this question is not easy to answer. In her book, *Law's meaning of life*, Ngaire Naffine sought to "find out about legal persons and the systems of belief that bring them into being" in the common law Anglophone world. In so doing, she encountered the problem that the law of persons

[29] M. Bach & L. Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity. Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (Commissioned by the Law Commission of Ontario, 2010) p. 6.

[30] CRPD/C/GC/1, p. 14.

[31] However, law also applies to companies and other associations.

"is not a discrete field of study in the common law world, such as torts, or contract or criminal law, but a pervasive underlying concept throughout the different branches of law".[32] Naffine points to the fact that "the entire topic of persons in law, of who and what can and should bear rights and duties, is very slippery because there is so little carefully considered reflection in legal judgements and treatises and yet it is utterly fundamental to legal thought".[33] (After undertaking a similar project a few years ago, I might add that the same can be said regarding the legal person in Swedish Law.[34])

Naffine summarizes her findings by suggesting that the idea of what constitutes a legal person is quite different, depending on four metaphysical approaches or world views: Legalism, Rationalism, Religionism and Naturalism. The Legalists[35] believe that law has its own constructed person who should not be confused with real human beings; the Rationalists[36] put human reason to the fore and "are convinced that it is reason which most defines and dignifies us and which law should reflect and preserve"[37]; the Religionists[38] insist that law must respect human sanctity, dignity and integrity; whilst the Naturalists[39] see humans as natural, evolved, biological creatures, not very different from other animals and therefore not entitled to the legal exceptional status that we have over

[32] N. Naffine, *Law's Meaning of life. Philosophy, Religion, Darwin and the Legal Person* (Portland, 2009,) p. 14–15.

[33] N. Naffine, *Law's Meaning of life. Philosophy, Religion, Darwin and the Legal Person* (Portland, 2009), p. 9.

[34] T. Fridström Montoya, *Homo juridicus. Den kapabla människan i rätten* (Uppsala, 2017).

[35] Examples of Legalists being Hans Kelsen and HLA Hart, see N. Naffine, *Law's Meaning of life. Philosophy, Religion, Darwin and the Legal Person* (Portland, 2009), p. 33–43.

[36] Examples of Rationalists being Ronald Dworkin and Dena Davies, see N. Naffine, *Law's Meaning of life. Philosophy, Religion, Darwin and the Legal Person* (Portland, 2009), p. 81–98.

[37] N. Naffine, *Law's Meaning of life. Philosophy, Religion, Darwin and the Legal Person* (Portland, 2009), p. 22.

[38] Examples of Religionists being Eleanor Roosevelt and John Finnis, see N. Naffine, *Law's Meaning of life. Philosophy, Religion, Darwin and the Legal Person* (Portland, 2009), p. 99–117.

[39] Examples of Naturalists being Peter Singer, Steven Wise and Gary Francione, see N. Naffine, *Law's Meaning of life. Philosophy, Religion, Darwin and the Legal Person* (Portland, 2009), p. 127–142.

animals.[40] Those who take a strong stand on any one of these views tend to communicate poorly with those holding different views when it comes to the meaning of law and what it should reflect.[41]

Perhaps most of us have not given much, if any, thought to the question of what constitutes a legal person, nor that there are different views on this reflected in law. However, the different approaches to what constitutes a legal person result in quite different outcomes of legal dilemmas and therefore merit our attention and reflection. Given the fact that the legal personality and its ensuing rights are not something natural and eternal, but vary with time and place, the question of what constitutes a legal person truly matters. This is especially so in disability law, since legal status in the past has varied greatly, not only between free persons and slaves, and between men and women, but also between persons fully capable and persons with disabilities.[42]

In the context of legal personality being unstable, it should be noted that the concept itself is a modern baby, born in the 19th century.[43] During this time, western societies changed in ways that placed the free individual at the centre of law. To flourish, industrialization and capitalism required that individuals strove to gain capital to maximize their own well-being.[44] Drawing on Foucault's theories on normalization and governmentality, Samuli Hurri explains that, during this period of time, the human being (a man, mostly) was perceived primarily as a competitive creature, driven by egoistic desires of various sorts. These desires were a precondition for the spinning of the economic wheels and therefore important to endorse, but at the same time it was thought that these should be controlled through law; law was needed to contain the desires that are man's "rational reality".[45] Hence, a "fundamental difference between the

[40] N. Naffine, *Law's Meaning of life. Philosophy, Religion, Darwin and the Legal Person* (Portland, 2009), p. 20–21.

[41] N. Naffine, *Law's Meaning of life. Philosophy, Religion, Darwin and the Legal Person* (Portland, 2009) p. 167.

[42] A. Supiot, *Homo Juridicus. On the Anthropological Function of the Law* (London, 2007) p. 22; Wijffels, "Legal Capacity in Historical Perspective", in S. Deakin and A. Supiot (eds.) *Capacitas. Contract Law and the Institutional Preconditions of a Market Economy* (Oxford, 2009, p. 56 ff; T. Spaak, *The Concept of Legal Competence* (Suffolk, 1994) p. 12.

[43] H. Gustafsson, *Dissens* (Göteborg, 2011) p. 129.

[44] B. Wennström, *Rättens individualisering. Mot en ny juridisk antropologi* (Uppsala, 2005) p. 9; C. Sandgren, *Utvecklingstendenser inom avtalsrätten* (Stockholm, 1993) p. 115.

[45] S. Hurri, *Birth of the European Individual. Law, Security, Economy*. (New York, 2014), p. 49–60.

theory of subject of the law and theory of subject of liberal economics lies in the way they relate with desire. The one says 'no' to desire, the other says 'yes'."[46] According to Hurri, both the *homo juridicus*, the juridical individual, and the *homo æconomicus*, the economic actor on the free market, sprung from the idea of the social contract; both the *homo juridicus* and the *homo æconomicus* were seen as free, competitive and self-interested beings driven by their desires, but responsible for their actions and subjugated to the social contract to avoid chaos.[47]

As Nietzsche has pointed out though, the doctrine of free will, along with the notion of responsibility that comes with it, is a much older invention than the legal subject and has served several ends – the most important one being the *making* of the human being into the *promising*, *conscientious* being we believe ourselves to be.[48] And this free, sovereign man, Nietzsche remarks, is made *genuinely calculable* because:

> "the proud knowledge of the extraordinary privilege of *responsibility*, the consciousness of his rare freedom, of his power over himself and over fate, has sunk right down to his innermost depths, and has become an instinct, a dominating instinct – what name will he give to it, to this dominating instinct, if he needs to have a word for it? But there is no doubt about it – the sovereign man calls it his *conscience*."[49]

When reflecting on decision-making and legal capacity, it is almost impossible to avoid the notion of free will and responsibility. Much can, and has, been said about the idea of man's free will. Today, some might argue that there really is no such thing, that humans are simply biological creatures reacting to chemical impulses in the brain that are beyond our conscious control. Others might argue that we are not as rational as we believe ourselves to be – that the thought processes in the brain work quite differently than we have previously understood.[50] Regardless of objections such as these, the idea of man's free will is deeply rooted in our civilization and in law. Free will is central in law; consider, for instance, legal demands for free and full consent in different situations, or the free

[46] S. Hurri, *Birth of the European Individual. Law, Security, Economy*. (New York, 2014) p. 55.
[47] S. Hurri, *Birth of the European Individual. Law, Security, Economy*. (New York, 2014) p. 49.
[48] F. Nietzsche, *The Genealogy of Morals* (New York, 2003).
[49] F. Nietzsche, *The Genealogy of Morals*, p. 36.
[50] D. Kahneman, *Thinking, Fast and Slow* (New York, 2011).

entering into a contract as a prerequisite for the validity of the contract. Consider, too, that if someone has committed a criminal act, it matters for the question of responsibility and punishment if the wrongdoer understood what he or she was doing and could foresee the consequences of the act, but (freely) chose to act anyway.

There seems to be an underlying assumption, at least in Swedish law, that legally capable persons need to not only understand what they are doing in a rational/practical sense, but also in a qualitative sense that can be described as a *moral ability*. If a person lacks the ability to make moral, responsible judgements, his or her actions will not render the normal legal consequences. This is explicitly evident in certain situations in which children are denied legal capacity, but the same idea is also evident in certain legal rules,[51] in reasonings in preparatory works and in court cases in relation to adults with disabilities or illnesses.[52] In considering the notion of free will and responsibility in connection with the right for persons with disabilities to be equally recognized as persons with legal capacity, it is now time to turn to the concept of anxiety.

In his mid-19th century essay, *The Concept of Anxiety*,[53] Søren Kierkegaard explored the Genesis story and the Fall of Adam and Eve "in such a way as to have in mind and view the dogma of hereditary sin".[54] According to Kierkegaard, what constitutes a human being is the freedom of choice and the anxiety that accompanies it; our ability to experience anxiety is what makes humans different from animals. "That there are some who notice no anxiety at all may be understood in the way Adam would have experienced none had he simply been an animal."[55] As Kierkegaard points out, freedom announces itself in anxiety, "anxiety

[51] See for instance the Act (1924:323) regarding the effect of contracts entered into under the influence of a psychological disorder.

[52] T. Fridström Montoya, *Homo juridicus. Den kapabla människan i rätten* (Uppsala, 2017).

[53] However, like many of Kierkegaard's works, the essay was published under pseudonym, in this case, "Vigilius Haufniensis".

[54] S. Kierkegaard, *The Concept of Anxiety. A simple Psychologically Oriented Deliberation in View of the Dogmatic Problem of Hereditary Sin* (New York, 2014) Edited and translated by Alastair Hannay, p. 19.

[55] S. Kierkegaard, *The Concept of Anxiety. A simple Psychologically Oriented Deliberation in View of the Dogmatic Problem of Hereditary Sin* (New York, 2014) Edited and translated by Alastair Hannay, p. 65.

is freedom's actuality as the possibility of possibility".[56] The possibility, however, is not the ability to choose the good or the evil.

> "The possibility is to *be able*. It is simple enough in a logical system to say that possibility passes over into actuality. In actuality itself it is less easy and an intermediate term is required. This intermediate term is anxiety, which no more explains the qualitative leap than it can justify it ethically. Anxiety is not a category of necessity, but neither is it a category of freedom; it is a hobbled freedom where freedom is not free in itself but tethered, not in necessity but in itself. If sin has entered the world by necessity (which is a contradiction) there can be no anxiety. If sin has entered through an abstract *liberum arbitrium* [free will] (which existed no more in the world in the beginning than it did later, since it is a conceptual monstrosity), then there is no anxiety either."[57]

Combining the thinking of Kierkegaard and Nietzsche, one could say that it indeed seems "nobler in the mind to suffer",[58] meaning that what is expected from the human being – and the legal person – is the ability to experience the anxiety that freedom entails. Anxiety is what makes us human, and the anxiety is what makes us calculable in a legal system as conscientious, responsible creatures. Not only are we expected to be able to decide what we do or do not want, but we are also expected to experience anxiety – to dwell on the options and consequences of our decisions and actions.

Returning to the thinking of Naffine, the four metaphysical approaches to determining what constitutes a legal person that she identified seem to have one trait in common: the idea of the human being as something exceptional.[59] Regardless of whether the foundation rests on our reason, our sanctity, or our evolved state compared to other animals, law has *de facto* constructed a legal person and has endowed the human being –

[56] S. Kierkegaard, *The Concept of Anxiety. A simple Psychologically Oriented Deliberation in View of the Dogmatic Problem of Hereditary Sin* (New York, 2014) Edited and translated by Alastair Hannay, p. 51.

[57] S. Kierkegaard, *The Concept of Anxiety. A simple Psychologically Oriented Deliberation in View of the Dogmatic Problem of Hereditary Sin* (New York, 2014) Edited and translated by Alastair Hannay, p. 60.

[58] When gathering my thoughts for this article, I found it irresistible to use quotes from Shakespeare's Hamlet – one of the most well-known anxiety-driven figures in Western culture – as headings for the different themes.

[59] Even though the Naturalists oppose the idea that law and rights cannot extend to other sentient beings, able to suffer and to experience in a similar way as humans.

but no other sentient beings – the status as its subject. And law serves purposes based on assumptions about its subjects, for example, that the human being has certain abilities and shares certain desires – such as the will to be a free, sovereign, autonomous being who makes decisions for him- or herself. This, I believe, is *the dogma of legal personality*. However, there appears to be an underlying, but unspoken, assumption that this self-determining human being has *moral ability*. And this assumption seems to be overlooked in the context of equal recognition before the law for persons with disabilities and supported decision-making.

The rest, is silence

Assuming that the dogma of legal personality is that autonomy is a human desire, it is understandable why legal agency is held to be something unnegotiable for persons with disability, despite the potential downsides of legal capacity. As Bach and Kerzner put it: "The ability to make one's own decisions based on personal values and in the context of meaningful choices is a defining feature of what it means to be a person and a full citizen".[60] If the belief is that we all seek self-determination, if only given the opportunity, it seems almost unthinkable in the context of human rights to deny persons with disabilities the support needed to be able to exercise and enjoy legal capacity like everyone else, however unenjoyable this exercising might be in reality.[61]

Also, for those of us who today possess the abilities to make rational, responsible decisions, it is an agonizing thought that we might, one day, lose that capacity. Being aware that our present abilities might change in the future due to, for example, illness or trauma, but being unable to imagine that we would not still wish to exercise self-determination, supported decision-making seems like a good idea – especially as there is also a deeper fear to be acknowledged here. If what makes us humans in the eyes of culture and law is the ability to make decisions then we

[60] M. Bach & L. Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity. Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice* (Commissioned by the Law Commission of Ontario, 2010) p. 6.

[61] For instance, statements like this are common in disability rights discourse: "From our standpoint […] all adults are de facto legal agents competent to consent, and possess the necessary legal capacity to have their consent or refusal recognised in law." L. Brosnan & E. Flynn, *Freedom to negotiate: a proposal extricating 'capacity' from 'consent'*, International Journal of Law in Context, 13, 1 p. 61.

fear that if we lose these abilities, we will no longer really be humans and full participants in society. This is a reasonable fear, as it is precisely what persons with disability have experienced in the past. Consequently, supported decision-making for those not able to make decisions on their own is something which, in human rights discourse, is almost unthinkable *not* to endorse.

However, if what is expected from the legal person is the ability to not only make rational but also moral, conscientious and responsible decisions, it is not certain that supported decision-making will do the trick. Can support ever compensate for a lack of the abilities needed for decisions with a moral, conscientious kind of quality? Is self-determination something we are willing to support no matter what the decisions are? I am convinced that everyone wants to be recognized as a human and respected in their own right, regardless of diverse abilities, but I am not convinced that autonomy always should be guaranteed over protection.[62] Respect for self-determination must not be synonymous with leaving every kind of decision to every individual. On the contrary, it could be argued that it is *disrespectful* to deny persons the protection they need, and perhaps would ask for, had they not been made to believe that what constitutes a real human being is the desire to be sovereign and autonomous.[63]

Maybe the problem is not whether everyone, through support, can be enabled to make decisions. Maybe the dogma of legal personality is the problem. Questioning the dogma is, however, easier said than done, because this dogma is clearly expressed in the first article of the founding

[62] C. A. Riddle, *Human Rights, Disability and Capabilities* (New York, 2017) suggests that "the capabilities approach" of M. Nussbaum is the way to go if we are serious about making disability a question of justice. According to Riddle, the primary focus in disability rights discourse should be on health issues for persons with disabilities. Taking Nussbaum's list of ten basic capabilities seriously, we need to analyze human rights in the light of individuals capabilities as "a cornerstone of basic justice" promoting equality, dignity and autonomy.

[63] There is a long tradition of neither asking nor listening to persons with intellectual disabilities. They have been treated as objects of knowledge, politics, care and so forth, but not as knowing subjects. See, for an investigation into Swedish history and living conditions for persons with intellectual disabilities, T. Fridström Montoya, *Leva som andra genom ställföreträdare – en rättslig och faktisk paradox* (Uppsala, 2015) p. 68–144. See, for an investigation into American history and living conditions for the same group, L. Carlson, *The Faces of Intellectual Disability. Philosophical Reflections* (Bloomington, 2010) p. 15 and p. 21–101.

document of human rights, Article 1 of the UN Universal Declaration of Human Rights:

> "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

And, as Alain Supiot has put it: "[w]e all believe in the first article of the Universal Declaration of Human Rights, which states that human beings are born free and endowed with reason, and so we have difficulty admitting that reason and freedom are precarious constructions which have an institutional basis."[64]

I believe the key word here is "admitting". In order to *avoid* admitting that the dogma of legal personality might be problematic, we search for ways to make sure that everyone can fit the description, rather than reflecting on human diversity and the fact that many individuals do not fit the description of what constitutes a human being in Article 1. This is because in the context of human rights, human beings *are* free, reasonable and conscientious. It does not matter whether this is a true description of the human condition or not; this is the declaration that provides the foundation for all human rights treatises.

The question remains, however, of how to deal with the fact that, in reality, not all persons are "endowed with reason" and perhaps not with conscience either. Does this mean that they are not really human beings in the context of human rights, and that rights do not apply to them? It is doubtful that many people would agree to that, I for one do not, and the CRPD clearly states that all persons with disability shall be respected as persons before the law on an equal basis with others in all areas of life. But is there no other way to guarantee that respect than by offering them support to make sure they can meet the ableist-norm? Surely, the effect of thresholds for legal capacity, unreachable for some, is systematic exclusion. Exclusion sounds bad. But is it necessarily a bad thing that some persons are excluded from the legal consequences of decisions that might be harmful to them – or to others? From whose perspective is that a bad thing? Do we really not care about outcomes of decisions that might compromise other rights, such as the right to life or the right to health?

[64] A. Supiot, *Homo Juridicus. On the Anthropological Function of the Law* (London, 2007) p. 4.

Is the very possibility of making decisions, with support if necessary, *all* that matters?

This question leads us back to anxiety. Anxiety is an emotion, experienced by individuals. But perhaps anxiety can also be used to describe something that is akin to a cultural blindfold, at a cultural level. The dogma of legal personality is not merely a legal construction, but a reflection of a deeply rooted cultural understanding of what it means to be a human. To question this dogma, we need to put our understanding of what it means to be human to the test. It is only if we truly consider the fact that not many persons – if any – live up to the ideal of the rational, free and responsible agent, that we may find an alternative point of departure for thinking about equality before the law for everyone. However, in societies based on the liberal world view, it is a painful – agonizing – thought to admit that the understanding of what constitutes a human being in the eyes of law might be… wrong.[65] It is difficult to hear things we do not want to hear; it is difficult to hear things that shake the foundation of our thinking. Hence, *the rest, is silence*.

[65] This does not mean that there are no voices trying to point to this fact. To mention one, Martha Fineman has pointed out that the abstract legal subject of liberal western democracies must be questioned in discussions on equality, and has developed a theory based on human vulnerability. See for example, M. Fineman, *Vulnerability and Inevitable Inequality*, Oslo Law Review, Vol. 4, p. 133–149; M. Fineman, *Vulnerability and Social Justice*, 53 Val. U. L. Rev. 341 (2019).

Lucy Finchett-Maddock

A Poverty of the Spirit: Law, Property and Addiction

Introduction

In Adam Gearey's 2018 'Poverty Law and Legal Activism'[1], he narrates the origins of the critical legal tradition, back through the role of the lawyer within the community, in service, seeking to advocate for those denied access to justice. Poverty law as a term emerged to described forms of social justice lawyering concerned with welfare rights, democracy and activism[2], through practices such as legal aid lawyering, *pro bono*, class actions, that Gearey traces back through the twentieth century in the United States.[3]

Gearey speaks of poverty law as "illuminat[ing] a vital, articulate and eclectic tradition that links to contemporary struggles for social justice."[4] Within the text he highlights the intersectional critiques levied at the critical legal tradition, whilst arguing the diverging strands of critical legal thought found in Critical Race Theory, LatCrit, ClassCrit, are not so the disparate afterall. The concerns of poverty law are accentuated as a philosophical tradition based in action, where the Marxin concern of

[1] Adam Gearey, Poverty Law and Legal Activism: Lives that Slide out of View (London, Routledge, 2018).

[2] Ibid, 14.

[3] *Pro bono* lawyering, the giving of legal advice free at the point of service, and without payment to the lawyer concerned, is a tradition found more predominantly within the US, however, also has a strong tradition within the UK context and other common law jurisdictions.

[4] Op.cit., 14.

praxis is central; the lawyer as the point of contact for practical demands and demands being met.

Poverty is a laden term and one that has the potential to Other as much as the economic and spiritual structural processes of deprivation themselves. Critical legal studies have sought to interrogate the legitimacy law gives to these perturbations of power, Gearey not least highlighting the detachment of the soul from its creative potential though the existential trauma of labour conditions under capitalism. He states, "poverty is not just lack of income or opportunity but alienation from participation in social and political life and the reification of a sense of self that results in psychic and civic death."[5]

This Thanatos is very clear when we are presented with addiction, a preponderance that lattices the lives of the clients poverty lawyers work with. Poverty law is almost silent on addiction[6], as is critical legal studies.

There have however been some very relevant and important contemporary interventions on the role of law in addiction. Kojo Koram's edited collection 'The War on Drugs and the Global Colour Line' (London, Pluto Press, 2019)[7] on race and the global drug trade is an important interjection on the role of law in the development of the racial embeddedness of narcotics markets across the world and the colonial genesis that continues to formulate drug policy today.

There has also been some significant work conducted in socio-legal scholarship, that offers critical insights into the agentic role of the lawyer in the cultivation of addiction. Kate Sear's 'Law, Drugs and the Making of Addiction: Just Habits' (London, Routledge, 2019)[8] uses internationally-based empirical research on substance misuse, interpolating and analysing the intersection between lawyering and addiction-making. Simon Flacks similarly bridges the addiction gap in legal research, dissecting the occlusion of substance misuse and substance dependence from anti-discrimination law through discussing addiction and disability.[9]

[5] Ibid.

[6] Addiction should be treated as a problem requiring a therapeutic solution (Stringfellow, 1964, p. 47) in Gearey, 2018.

[7] Kojo Koram (ed) The War on Drugs and the Global Colour Line (London, Pluto Press, 2019).

[8] Kate Sear Law, Drugs and the Making of Addiction (London, Routledge, 2019).

[9] Simon Flacks Deviant Disabilities: The Exclusion of Drug and Alcohol Addiction from the Equality Act 2010 Social and Legal Studies 21(3) 2012 395–412.

Addiction expert Bruce Alexander calls addiction the poverty of the spirit.[10] Alexander recounts the genealogy of addiction in free-market society, through the impact of dispossession and colonialism and resultant pain of 'dislocation' as a result. Dislocation refers to the process of First Nation peoples removed from their land, their home, their soul. The prevalence of addiction is clear in the peoples of the Vancouver streets on which he bases his account; however, it is through this that Alexander argues addiction as an individual and collective consequence of psychosocial separation through market capitalism, most lucidly within the collective consciousness of homeless nations.

This alienation takes us back to Gearey's framework within *Poverty Law and Legal Activism*, and how he uses the Marxin notion relating poverty with consciousness. The soul, the living being, the animate, as that which springs forth and is suffocated or damned by dependence and destruction, infers a human, subjective or spiritual concern that we may not extend to nonhuman entities. The paradigmatic shift within epistemologies across the social sciences and humanities that infer speculative and nonhuman knowledges, might allow for otherwise organic entities to also manifest addictive tendencies; or a method through which to consider a poverty of the spirit that might be attached to law itself. Thinking *speculatively* to see beyond addiction as a human concern might allow us to see the productive nature of addiction, as well as its deathly capacity. What more life-giving and life-determining can there be, other than the constructive capability of law.

What I would like to speak of in this piece is not only to discuss the way addiction is formulated by the practices and tactics of law whether through poverty law or otherwise, but to say that law itself is addition, and addiction is law. Combining *desire* and *destruction* through the work of Gilles Deleuze and Catherine Malabou, both addiction and law are explored as cumulative processes of material and immaterial yearning emanating from and within thermodynamic movements of order/disorder, destruction/creation and the tightrope of equilibrium known better as *entropy*, within and outside, human and other bodies. Addiction is described as rule-making, through the funnelling of attention to sediment layers of law as habit, routine and custom through repetition, leading to the ultimate expression of law, that of subjectivity and the crystallisation

[10] Bruce Alexander The Globalisation of Addiction: A Study in Poverty of the Spirit (Oxford, Oxford University Press, 2008).

of form - the institutionalisation of property and the overcoming of uncertainty through control. Addiction is argued as the very extremity, the ultimate meaning, the very motor of legal morphology itself; the striving of life against death, a *speculative* genesis and the baroque pathways carved in the process.

Addiction

What is addiction? We've all heard someone say, 'I've got an addictive personality', or 'I'm totally addicted to …', a given something – maybe we've even uttered the words ourselves. Yet addiction, despite its prevalence and huge amount of research undertaken from psychology and neurology, to cultural studies and reprobate tropes within literary characters, remains a complex anathema that infers subtexts of will power, brain function, chemical reactions, early traumas, anti-social and abusive behaviours, spiritual awakenings, genetic scripts and the very crux of questions around nature and nurture, structure and agency (to name but a few).

Nothing so apparently *human* comes to mind such as the state in which we arrive when in the grip of longing around some substance, person, object, state of consciousness or thing. There is a whole, and the part has been removed, or was never there, and the whole seeks its completion. It is perhaps the most frustrating and humbling realisation of imperfectability, of uncertainty, a coping strategy for nature's agitations of which we are not in control. Yet what can be more organic, visceral and almost *nonhuman* than the consumption, merging and ingestion of elements, a reforming of boundaries, coagulation of life itself as it absorbs, responds, chemically reacts, and continues on in its determination to find its next source.

Addiction has been described as the opposite of connection[11], where the search for the affirming being, soul, element, turns inwards and occupies the trinity of the person to the point where the quest for oneness becomes isolation, infamy, and separation itself. This most tragic of stories has the capacity to be ignited in each of us; afterall, as humans we are social beings, we need the touch, sight, and sound of the Other in a Levinasian empathy, even if we may deny such a need. Interestingly, the

[11] Gabor Maté In the Realm of Hungry Ghosts: close Encounters with Addiction (Vintage Canada, 2009).

etymology of addiction derives from the Latin *dicere* (say, relate), which further links to the Greek *deiknunai* to 'show, point out, bring to light'.[12] Some, explained through various research which we will look at shortly, wear the scars and bear the brunt of their wonting more brutally and fatally than others, where *compulsion* and *dependence* become the rituals of their yearning.

In early definitions of addiction within the World Health Organisation, the term dependence was used in place of addiction, such as the definition in 1969.[13] Dependence has been described as,

> "a state, psychic and sometimes also physical, resulting from the interaction between a living organism and a drug, characterised by behavioural and other responses that always include a compulsion to take the drug on a continuous or periodic basis in order to experience its psychic effects, and sometimes to avoid the discomfort of its absence."[14]

It appears only in the early part of the Twentieth century that the word addiction itself, appeared within the Oxford English Dictionary. The first entry for the term was relating to drug use dated 1906, followed by the first use of 'addict' as a noun from 1909.[15] Poststructuralist interpretations of the power of language to construct reality will be familiar with how these definitions determine how addiction as a phenomena may have developed as a result. The determining role of discourse in the formulating of a formal account of addiction is just as present as in the case of the interpretation and defining of 'homosexual' (and the consequences therein), described by Brodie and Redfield as where, "the addict emerged […] a little more than a century ago, of a medico-legal discourse capable of reconceiving human identity in the language of pathology."[16]

How many of us truly know what it's like to be an addict, know their ins and outs, what it's like to flounder on the ground scratting for the next morsel of respite from that search for the outside? And if we cannot relate to that level of boundary-work, then perhaps we all at least can

[12] Janet Farrell Brodie and Marc Redfield (Eds) Hight Anxieties: Cultural Studies in Addiction (Berkeley, University of California Press, 2002), 1.
[13] Gary Watson Disordered Appetites: Addiction, Compulsion, and Dependence (Oxford, Oxford University Press, 2004), 3.
[14] Grinspoon and Bakular 1976, 177 in ibid, 3.
[15] Op.cit. Janet Farrell Brodie and Marc Redfield, 1.
[16] Ibid, 2.

bring to mind one family member, one colleague, a celebrity, where the task is so clearly all consuming, the cliché of the distant cloudy eyes and the stance of dissociation ringing so true.

Recent research and scholarship, echoing therapeutic and treatment practices on the ground, have highlighted the pervasiveness of addiction beyond this most obvious of depictions, beyond substance 'misuse' and dependence, to *process* addictions such as food, sex, money, shopping, abuse, violence and status itself; to describe it as characteristic of late capitalism, propelled into a functioning part of our day, through developments in technology in turn structured by finance and privilege.

The idea that it is an individual's choice to use and misuse substances is interesting when considered in relation to specific trials that were undertaken in Miami, where participants suffering with crack-cocaine addiction predominantly of African-American and Latino descent, were given the option to use money provided by the trial, to either continue their drug habit or to invest it in an opportunity to get out of their drug habit.[17] Most in the study chose to invest the money outside of their addiction. This has been given as a demonstrable example of the exercising of will power within the decisions made by addicts around their drug habits. Yet this may not consider the layers of racial oppression and ghetto-isation played out in such an example of drug-taking where the participants used in order to escape the inevitability of their situation. Given another option, an opportunity to better themselves and practice some element of social mobility previously structurally unavailable, the participants saw a chance to no longer need to escape – a pull that was much stronger than the pull of the crack cocaine.

This example of choice theory is quite different from a Lombrosian essentialism, a presumption of the addict as irresponsible and confounded by demons, sketched and marked within their physical attributes and stigmatised for their individual lack of discipline. The organisational societal stratifications are present within the decision that addicts concerned made. According to phenomenologist Schalow,

> "by the word *addiction* we no longer simply mean a clinical or medical diagnosis concerning a person's dependence on a specific substance, e.g., drugs

[17] Found in Bruce Alexander, supra note 10.

> or alcohol, but instead designate a broader historical and cultural transformation of our way *to be* (as well as an individually-based problem)."[18]

An astute summary of the choice model is given by recovered addict, neurologist and academic, Marc Lewis. He explains how addiction as volition comes from a cerebral perspective, from changes in thought processes. Addiction within behavioural economics is considered a rational choice, albeit not a very good one, whereby the short-term pleasure enjoyed from the decision to act out their desire outweighs that of other longer-term options. Hitherto this model encourages unsympathetic responses to what someone in the grips of a compulsion to use, really experiences, and the pain ensued. As Lewis states, "the choice model provides a convenient platform for those who consider addicts indulgent and selfish. If addiction is a choice, they reason, then addicts are deliberately inflicting harm on themselves and, more seriously, on others."[19] Following developments in understandings of unconscious and autonomic reactions within our nervous system, the breaking down of the division between the Cartesian body and the mind through biological and neurological understandings of embodiment (confirmed ironically through the scientific method that Descartes promulgated), research has shown that our decision-making is never based on reason alone. Even if an addict may *think* they are choosing to take their drug, they may well be driven by an array of other unconscious and subconscious motivators that render choice as "… nearly always irrational."[20]

The disease model of addiction is sympathetic to the involuntary determination of the repeated infliction of a habit upon the seemingly helpless vessel of the person. Instead of categorising addiction as a singular and moral process, the disease model medicalised addiction, where addiction is seen as a malady of the reward system of the brain, and thus considered as a *disorder*. Understandably the categorisation of disease and disorder, infer a maladjustment, a medical underpinning that despite the conferment of it away from a social, psychological or existential part of being a being, also allow for funding for treatment and rehabilitation

[18] Frank Schalow Toward a Phenomenology of Addiction: Embodiment, Technology, Transcendence, Contributions To Phenomenology (Springer International Publishing, 2017), 4.

[19] Marc Lewis The Biology of Desire (New York, Public Affairs, 2015), 2.

[20] Ibid, 22.

programmes as opposed to more draconian sanctions that continue to be reinforced through choice-based policy.

Lewis' 'The Biology of Desire: Why Addiction is not a Disease' is a neurobiological argument for the compulsion, dependence, withdrawal, as directed purely by habit and the funnelling of attention within the brain. Rather than the choice or disease model, Lewis describes the learnt nature of addiction, where it "results from the motivated repetition of the same thoughts and behaviours until they become habitual."[21] The reason the progression of the pattern becomes so overpowering is, according to Lewis, because it is learnt more deeply and more quickly than others, where all *attention* is focused on the drug of choice (whether that be a mind-altering substance, the nearest packet of biscuits or the reach for the smart phone). This is where the focus of want becomes so channelled to that one object, that all others become less appealing, resulting in the engrained recurrence of the habit that changes the brain's inner cabling.[22] This is not argued as a disorder but something entirely normal and a characteristic of being alive and living in the world we live in.

Brain changes that are rendered disordered therefore support the idea of the alcoholic or the drug addict 'losing control'. Environmental interventions from a very early age forge new pathways in reaction to trauma, leading to a personality that is sedimented with coping mechanisms, seeking control of external circumstances, that eventually manifest as habits to manipulate and transcend the experiences ensued and in the moment around them. It is easy to see how this might be understood again as a natural and fixed persona, addiction as an inimical part of someone since birth given the way it evolves within someone throughout their lifetime. The question of nature and nurture, the crux of all questions, we will return to in considering the role of desire in law (or desire as law). The Twelve Step recovery movement uses the disease model within its literature, albeit the original texts being unchanged since the 1930s and 1950s. This can assist the recovering addict as they can understand they are not a 'bad person getting good, but a sick person getting well'. The flip side of this is the connotation of a person always being an addict, as that which someone is born into. For anyone who has undergone the journey of recovery they will know how life altering, and ongoing the process truly is. The neural pathways *can* be changed, but it takes a lot

[21] Ibid, x.
[22] Ibid, x.

of work, vigilance, and awareness of how one's substance of choice was purely a temporal preoccupation of something much more soul-encompassing. The addiction lives on through other forms of obsessive, controlling, paranoic tendencies, way beyond the point of giving up where unless continued work on the self is ensued, those old neural pathways are inclined to revert once again[23].

Relational addiction scholars[24] would argue against control as a driver, or destroyer, in addicts. They concur that the addict is not propelled by an internal drive to destroy or to be, but they are responding to relational and environmental circumstances mapped as assemblages. Inspired by the Bruno Latour's understanding of the body as a learning organism[25], combined with researchers who have used Gilles Deleuze and Felix Guattari's *complex-desiring assemblages*[26], this explains the way a person is attracted to their drug of choice due to being part of a wider encirclement of factors that create an accumulated almost collective moment of obsession. This territorialising and reterritorialising energy emanating from Deleuzian thought "enslaves by appeal, rather than by brute force."[27] Scholars who have started to use assemblage theories such as those found within continental philosophy have found ways of accounting for the spatio-temporal determiners of what it means to be addicted, how, where and the push/pull of other strange attractors in the mix. A lucid depiction of this is in Fay Dennis' work on the role of the 'trigger' within the life-world of the addict.[28] Triggers are deeply embedded past events, traumas,

[23] Praxis creates, in a hesitant way, the new. It does not simply reproduce a "pre-established order" – a "stable, limited, dead artefact" (Castoriadis, 2005, p. 77) – praxis as a work on the self (Gearey).

[24] Cameron Duff The place and time of drugs International Journal of Drug Policy 25 (2014) 633–639; Fay Dennis Injecting Bodies in More-than-Human Worlds (London, Routledge, 2020); Fay Dennis Encountering 'Triggers': Drug-Body-World Entanglements of Injecting Drug Use, Contemporary Drug Problems, 43 (2), 126–141; Peta Malins Machinic Assemblages: Deleuze, Guattari and an ethical-aesthetics of drug use Janus Head 7(1) 2004 84–014; Peta Malins Desiring assemblages: A case for desire over pleasure in critical drug studies International Journal of Drug Policy 49 (2017) 126–132.

[25] Bruno Latour How to Talk about the Body? The Normative Dimension of Science Body & Society 10(2–3), 205–209.

[26] Gilles Deleuze Desire & pleasure (trans. M. McMahon), unpaginated. http://www.artdes.monash.edu.au/globe/delfou.html (originally published as Désir et plaisir, in Magazine littéraire 325, October 1994, 59–65), accessed 9 October 2020.

[27] Gary Watson supra note 13, 7.

[28] Op.cit. Fay Dennis (2020).

beliefs, that are reignited through an action, a response, any exchange be it verbal, physical, sensorial responses to being in particular places that are reminiscent for the person triggered, and impel their own individual – and decisive – emotional response. Dennis demonstrates through her research with heroin injectors, how their cravings can become stronger when approaching a given place they associate with their drug, and other instances, that demonstrate the relational and assemblant formation of these extreme forms of habit. Helen Keane equally talks of 'substances as events'[29], and similarly Peta Malins' beautiful reliquary to the entrancement of dependence demonstrates the lived and embodied experience of addiction, within space and time:

> "The aesthetic beauty of smoke curling upwards; the new relations forged with the lungs and breath; the shifting sensations of the body and its postures; the thrill of altered temporalities, spatialities and social connections; the visceral intensity of life and death so acutely inter-twined."[30]

The nature of the assemblage infers the surrounding structures, where the notion of addiction as an individual choice is rejected and the role of generations upon generations of psychological, social, cultural, economic and political conditioning, renders a person confined to the genealogies within which they sit. No more prescient of this is Bruce Alexander's dislocation theory, that explains the split between a person and society, where 'psychosocial integration' is lost through the expropriating practises of settler colonialism and the onset of free market society; where not just those bodies who were sold and removed from their lands by the colonisers suffer from psychosocial dislocation, but their ancestors, and so too society as a whole. If culture is the state of health of groups of people, then addiction may be the sickness.[31] Inversely, the imbibing of mind-altering substances, and the need to escape, has been marked as the beginning of culture in its very early stages.[32] Poignantly, Schalow asks, "Could it be the case that addiction is […] is as much emblematic

[29] Helen Keane Disorders of Desire: Addiction and Problems of Intimacy, Journal of the Medical Humanities, 25(3) (2004) 189–204, 13.

[30] Peta Malins supra note 24, 126.

[31] Janet Farrell Brodie and Marc Redfield supra note 12, 1.

[32] Louis Lewin's classic 1931 survey of the use of mindaltering plants—Phantastica—In Anna Alexander and Mark Roberts (Eds) High Culture, Reflections of Addiction and Modernity (Albany, State University of New York Press, 2003), 1.

of an impending (human) crisis as a whole, rather than only a medical or clinical problem?"[33]

Addiction in Law

> "If addiction is a disease, then science will soon find an effective treatment for it, as has been the case for many other diseases, but that if addiction is a matter of choice, then the appropriate response is punishment."[34]

Addiction is regulated and defined by law, most notoriously through the banning of certain substances across the Anglo-American world from the Twentieth century onwards, and the domino effect felt globally as a result. Firstly, this is through the regulation of substances such as heroin, crack-cocaine, marijuana, amphetamines, psychotropics; of which feeds into public health and harm reduction policies around *substance dependence*, relying on classification in medical terms for the law to respond accordingly. The use of language is, just within all legal perturbations, agential, catalytic, giving life to content and how those involved are protected, punished or otherwise. As such "a drug's legal status influences choices concerning its use",[35] and prohibitions establish the connection between addiction and criminal activity.[36] Just as conversed by Jacques Derrida,

> "the concept of drugs is not a scientific concept, but is rather instituted on the basis of moral or political evaluations: it carries in itself both norm and prohibition, allowing no possibility of description or certification—it is a decree, a buzzword (mot d'ordre). Usually the decree is of a prohibitive nature; occasionally, on the other hand, it is glorified and revered: malediction and benediction always call to and imply one another."[37]

Over the years there has been a shift in semantics away from the lack of will and discipline of the classically portrayed alcoholic, to responses at

[33] Frank Schalow supra note 18, 4.
[34] Gene M Heyman Addiction: A Disorder of Choice (Cambridge, Harvard University Press, 2009), 19.
[35] Ibid, 19.
[36] Ibid, 2.
[37] Jacques Derrida The Rhetoric of Drugs in Anna Alexander and Mark Roberts (Eds) High Culture, Reflections of Addiction and Modernity (Albany, State University of New York Press, 2003), 20.

the international level recognising drug and alcohol addiction as a syndrome; interestingly some thirty years after the Temperance movement that encouraged Prohibition in the US during the Great Depression. Clinicians during the nineteenth century would respond to alcoholism with psychological categorisations of weak individual willpower[38], then using terms such as 'dypsomania', habitual inebriation, followed by alcoholism, disease of inebriation, to finally end up with the 1957 WHO definition of alcohol and drug addiction as,

> "Drug addiction is a state of periodic or chronic intoxication produced by the repeated consumption of a drug (natural or synthetic). Its characteristics include: (i) an overpowering desire or need (compulsion) to continue taking the drug and to obtain it by any means; (ii) a tendency to increase the dose; (iii) a psychic (psychological) and generally a physical dependence on the effects of the drug; and (iv) detrimental effects on the individual and on society."[39]

The transformation of addiction into a categorised medical concern came hand in hand with the development of the law. In the UK, the criminalisation of drugs began with the Defence of the Realm Act 1916 followed by the Dangerous Drugs Act 1920, although opium use had been regulation since the Pharmacy Act 1968. Opiate use was predominantly contained within the middle classes, such as opium smoking and the sniffing of laudanum. The Opium Wars and their racial percipience were still infiltrating the conception of drug use along discriminatory lines. The way that the use or misuse of substances was construed with the UK has stemmed from a largely colonial Othering of opium use connoted as Asian, as degenerate. This story echoes in the US, where those 'deviant subcultures' deemed to be a threat to civil society through their criminal engagement with narcotics, were actually the urban poor, racial minorities and those who had recently emigrated to America. Addiction soon became the focus of an Anglo-American moral panic and a technology of exclusion, where in the words of Brodie and Redfield,

> "it as a concept and a discourse in modern American culture resonated […] around stereotypes of the opium-smoking Chinese immigrant, the "co-

[38] Mariana Valverde Diseases of the Will: Alcohol and the Dilemmas of Freedom. (Cambridge, Cambridge University Press, 1998).
[39] WHO, www.WHO.org accessed 28 October 2020.

> caine-crazed" and sexually threatening African-American male, the marijuana-smoking and violent Mexican youth of the Southwest."[40]

In the US, the Harrison Narcotics Act 1914, was passed by Congress, to regulate the distribution of opiates and cocaine. Heroin had been developed and derived from morphine by Bayer, a pharmaceutical company, and made marketable in 1898 as a cough suppressant for pneumonia and tuberculosis. Those who were tested using the drug had no addictive side affects reported at the time. Recreational heroin came on to the streets in the early 1900s, used in East Coast cities by 'heroin boys' whose lower status in society made them vulnerable to the onset of the Harrison Act, moving from recreational social high to criminal act, as opposed to the opium eaters of the upper classes who were left to be dealt by physicians not the law.

The banning of substances and the black market effect of criminalisation, continued on into the globalised 'War on Drugs' throughout the Twentieth Century[41], originally a US policy that Desmond Manderson describes as implemented through modern drug laws around the world "[that] are a collection of extravagances, an expression of fury in legislative form."[42]

Achille Mbembe's 'necropolitics' comes to mind throughout the regulation of substance and the development of sections of society's unhealthy patterns around their intake incurred through legally-enforced stigma, where the "ultimate expression of sovereignty resides, to a large degree, in the power and the capacity to dictate who may live and who must die."[43] The necropolitical role of law within the classification of the addict has been documented by Sear through the reinforcement of sterile norms and tropes around addiction within the embedding of medical terms by

[40] Op.cit. Janet Farrell Brodie and Marc Redfield, 3.

[41] As Koram states, the focus of most scholarship within drug studies is on the US in relation to the overrepresentation of African-Americans in US penitentiaries, incarcerated for drug-related offences. This is not surprising given the 2018 statistics of 33% of prisoners in the US being black males which is triple that their overall 12% of the US population, compared with 30% representation of white males who make up a majority 63% (supra note 7). Nevertheless, there has been a need to look at the ways in which drug laws are implemented globally. *See* also Desmond Manderson Substances as Symbols; Race Rhetoric and the Tropes of Australian Drug History Social and Legal Studies 6(3) 1997 383–400.

[42] Ibid, 160–178.

[43] Achille Mbembe Necropolitics Public Culture 15(12) (2003) 11–40, 11.

lawyers within cases involving intoxication.[44] Razack similarly demonstrates the manner in which the 'medicalisation' of alcohol addiction has been used by authorities in Canada to justify deaths in custody of Aboriginal communities "with the inevitable consequence that they cannot be connected to the violence of an ongoing colonialism."[45]

Within the criminal law, committing an offence whilst intoxicated is widely sentenced no differently than whilst intoxicated within common law jurisdictions, as *per Majewski* [1977] AC 443 and *Kingston* [1994] 3 All ER 353. Within the UK context, addiction is not included as a disability under the Equality Act 2010 despite 'substance dependence' being classified internationally within systems of disease classification as a disability.[46] This power of the law to create addicts, whilst to also protect them, is clear, and yet this capacity seems to predominantly produce addiction rather than an informed therapeutic response of legal concession, questioning whether all "notions of addiction support neo-liberal governance strategies."[47]

Law as Addiction

> "When the sky of transcendence comes to be emptied, a fatal rhetoric fills the void, and this is the fetishism of drug addiction."[48]

Addiction has been described as a 'threshold concept' where a being's lived inner world meets with the outside, to create an infused experience where each percolates the other. The threshold or boundary is familiar within legal thought so too, where the existence of a space between law and non-law is an important ongoing philosophical question. This recognition of the porosity of self and the corporeal is familiar to those in touch with recent scholarship of materialist feminism and speculative philosophy. New materialism posits variances of a modern-day animism,

[44] Kate Sear supra note 8.

[45] Sherene H Razack Timely Deaths: Medicalising the Deaths of Aboriginal People in Police Custody Law, Culture and the Humanities 9(2) 2013 352–374.

[46] Simon Flacks supra note 9, 395–412.

[47] Robin Mackenzie Feeling Good: The Ethopolitics Of Pleasure; Psychoactive Substance Use and Public Health And Criminal Justice Governance: Therapeutic Jurisprudence And The Drug Courts In The USA Social And Legal Studies 17(4) 2008 513–533.

[48] Jacques Derrida supra note 37.

speculative thought gives prescience to the existence of realities external to the human mind; and both bodies of thought decentre and flatten ontological biases to account for the nonhuman as a result. As if the antennae of experience, Henri Bergson explicates an early notion of speculation as "to intervene […] actively, to examine the living without any reservation as to practical utility […]. Its own special object is to speculate, that is to say, to see."[49] Addiction and the extremity attached, is a speculative probing – a radar for the soul, a search party for meaning that continues incessantly whether consciously or otherwise. The motivation to consciously extend and expand one's self, to alter and to own one's experience in the world, is a "striving for Transcendence."[50] Whether a relational extension of early or latterly trauma, a person seeking escape may also be experiencing an array of possibilities within a given moment that project them into a safe space, a comfort blanket of numb that also may be generative of inspiration and visionary mindscapes.

Much as speculation within contemporary realist epistemology, the work of lawyers has been described by Sear as 'addiction-making' where through a process of legal practice as *anticipation*, lawyers antedate what the courts may do with their clients. In the process, she argues addiction discourses are materialised and stabilised, sometimes for the positive and other times, not so. Criminal justice interventions are reliant on 'psy' identities such as the addict in order to enforce available sanctions, where in "this sense, the role of psy in the justice system can be both productive and repressive."[51] This normative response by legal professionals, is a "legal strategy […] central to the emergence of addiction in law."[52] Sear's account of law in the making of addiction demonstrates the spatio-temporal, representational and material intra-actions that come together to create the fate of those clients who need help with their dependence to whichever drug it may be. The potential positive legal effects of 'onto-advocacy' as she calls it[53] is clear through the work of the lawyer with the addict, and reminiscent of the work of poverty lawyers themselves, where the self-reflexive role of the lawyer as law-maker is ever present. The cre-

[49] Henri Bergson Creative Evolution (CreateSpace Independent Publishing Platform 2014 [1907]).

[50] Op.cit. Frank Schalow, 22.

[51] Dawn Moore, Lisa Freeman and Marian Krawczyk Spatio-Therapeutics: Drug Treatment Courts and Urban Space Social and Legal Studies 20(2) 2011 157–172.

[52] Op.cit. Kate Sear, 69.

[53] Ibid.

ation of life worlds through the interpretation of text, is the bread and butter of law, a *diffractive* day job that gives rise to new thinking and new being through material happenings, just as Barad has described in her onto-epistemics.[54]

This account of law-making rests upon once again the agents of law as its vanguard, whether they be the judges, the lawyers, or the addicts themselves. What about the way in which law is formed and the features it produces. Some of these characteristics that are found in both law and addiction, are *repetition*, *desire, control*, and *destruction*. We will consider each of these similarities in order to see how law may be addiction and addiction may be law.

Repetition

Both law and addiction are actualised through repetition, the detournement that happens as a result of their litany. Both are potentially different to other kinds of reiteration as they incur patterns that, according to neurology, are "learned more deeply and often more quickly than most other habits, due to a narrowing tunnel of attention and attraction."[55] Within the processes of addiction, the brain identifies desire, and the most attractive goals will therefore be followed accordingly. Neurology tells us as the repeated and engraining of an action will change a brain's circuitry and reinforce some neural pathways to the detriment of other ones. With law, the repetition of an act over time creates habit, which then turns into routine, tradition and custom. At what point the law is 'ratified' is a performative question, whether there may be force prior to legitimation or only once a custom becomes a rule. It is this embedding of attention, this digging of legal pathways, that creates confluences through which law can flow, much like the synaptic rivers within the brain.

Derrida spoke specifically on addiction in his reading of in Plato's *Phaedrus*, where he interrogates the iterative nature of compulsion and dependence, through the power of the *pharmakon* and its generative/destructive nature. He considers,

> "the technical possibility for an individual to reproduce the act, even when alone (the question of the syringe, for example, […]). It is this crossing of a quantitative threshold that allows us to speak of a modern phenomenon

[54] Karen Barad Meeting the Universe Half-Way (Durham, Duke University Press, 2007).
[55] Marc Lewis, supra note 19, x.

> of drug addiction: namely, the number of individuals who have easy access to the possibility of repeating the act, alone or otherwise, in private or in public, and throughout that zone where this distinction loses all pertinence or rigor."[56]

The *pharmakon* within Western philosophy, is the remedy, the poison, and the scapegoat, with an additional fourth meaning of the capacity to produce. In Phaedrus, the *pharmakon* (or drug) is presented to the king, as writing, for its capacity to repeat and therefore to hold memory, however the king rejects this as not for memory (mneme) but recollection (hypomnesis). Thus this is not a life-giving memory but acts as a "*pharmakon* [that] dulls the spirit and rather than aiding, it wastes the memory …"[57] Whether bad or good repetition, a good drug or a bad drug, it is repetition all the same, where the *pharmakon* becomes both poison and antidote "at which point we would also feel that supplementary discomfort inherent in the indecidability between the two."[58] A Freudian conferment of this would be to align the repeated acts as a blocking of trauma.[59]

For Derrida and also Deleuze who, we will turn to next, the power of this recital has a commotion of its own, which "excites a state of productive receptivity".[60] The dynamism of addiction is seen as generative of positive states as well as those less so. Addiction is compelling, the funnelling of attention, just like the product that sits in the shop window inviting us in like magpies to a gem glinting in the sun. This repetition surrounds and encourages through its corpulent presence, reminiscent of the seriality of commodity production.[61]

Desire

This fecundity, to be found within habit, is potent, where the fruits of the maladaptation become enrapturing and the *desire* for them becomes too strong to resist. The hunger for the desired object, becomes all encompassing, the repetition giving a concupiscence that only another turn of

[56] Op.cit. Jacques Derrida, 23.
[57] Ibid, 24.
[58] Ibid, 25.
[59] Sigmund Freud Beyond the Pleasure Principle and Other Writings (London, Penguin Classics, 2003).
[60] Op.cit. Jacques Derrida, 29–30.
[61] Op.cit. Janet Farrell Brodie and Marc Redfield, 4.

the wheel can satisfy, another tightening of the belt on the arm, another warm fuzz of stupor to fall down the throat. Repetition will spark continuity, a vitality through which desire may flow: "Feedback simply makes things grow. It doesn't care what."[62]

Desire is speculative, where it exceeds that which wants, and moves in a motion of reconnaissance, much like the anticipation of the lawyer, the echoing chasm of the void inside the addicted, that propels the consumption from the outside, within. Deleuze's understanding of *assemblant-desire* is to be found within the plane of immanence, where multiple actors, molecules, materials, may be propelled together in one moment to exasperate "desire to come out of its own immanence … its own productivity."[63] These composite junctures that release desire from itself, are those moments of suspension, such as shopping, injecting, checking technology, fantasising over a lover, that allows the desiring being to be at one with that object, whether inauthentically as such. Critical drugs scholar Malins has demonstrated the *rhizomatic* nature of addiction particularly in relation to heroin use, based on a Deleuze and Guattarian conception of assemblage, where that conglomeration of intensification is a merging of form and person, "nothing left but the world of speeds and slowness … A whole rhizomatic labour of perception, the moment when desire and perception meld."[64]

What does this tell us about any connection between addiction and law, and to go so far as to say, addiction *is* law? What brings the law to life and determines how law may move? Seeing the variant components that may make up an aggregation or convergence in law such as that expressed as the trajectory of desire, may also suggest desire is the compulsion of law. Just as Kathryn Yusoff spoke with her billion black Anthropocenes[65], there can be no way that law is not separate from an ambition of material exploitation and expansion. Just as the body before the law is no more the law than the body, the mapping of desire across lands and peoples has al-

[62] Op.cit. Marc Lewis, 35.

[63] Deleuze, 2001, p. 97–98 in Gilles Deleuze Desire & pleasure (trans. M. McMahon), unpaginated. http://www. artdes.monash.edu.au/globe/delfou.html (originally published as Désir et plaisir, in Magazine littéraire 325 October 1994 59–65), accessed 9 October 2020.

[64] Peta Malins Desiring assemblages: A case for desire over pleasure in critical drug studies International Journal of Drug Policy 49 (2017) 126–132.

[65] Kathryn Yusoff A Billion Black Anthropocenes or None (Minneapolis, University of Minnesota Press, 2018).

ready been made, through creative/destructive engrossment by unskilful, indignant minds. As Deleuze concludes, "power is an affection of desire", however, he also reinforced that "desire is never 'natural reality'" and that "…desiring-assemblages have nothing to do with repression".[66] What more than an emergence of craving and devotion, than the apparition of subjectivity itself, where to sediment layers of law as habit, routine and custom there is an ultimation of expression in law, that of subjectivity and the crystallisation of form. This solidification of law is where a desire has led to a 'vitrified' reterritorialialisation, one that is not healthy, too fixed, too permanent. Just as property only goes to show how even the most viable form of asset containment through venture capital and investment in inner city spaces, could now possibly be in a downward spiral after the consequences of the Covid-19 in 2020. The yearning morphs and remaps itself, and does not care for settled assumptions and categorisations that law seeks to make, because ultimately it is never finished, and never entirely possible.

Control

The assemblage of habit through desire also amounts to lamina of the undesired, the sedimentation of all denied and unwanted feelings and emotions that may impel the body to be drawn elsewhere. Whether a neurological argument of purely habit or a Freudian underpinning of historical strain, there is a trauma to the exegesis of law and addiction, addiction as law. The only way to assuage the pain is to assert control, silence the internal suffering for as long as possible, and deny the selfish actions of law's addict, its deranged institutionalisation of property and the overcoming of uncertainty through colonisation.

The *loss* of control with addiction is a complex tautology, an aporia, as it is in the desire for dominance over external and internal circumstances, that results in the addict being caught in an overpowering pattern of regulatory lack. This has been described as a 'controlled loss of control'[67]. It would make sense relating to chemical substances as they release themselves within the confines of the body, and then disappear, heightening

[66] Gilles Deleuze Desire & pleasure (trans. M. McMahon), unpaginated. http://www.artdes.monash.edu.au/globe/delfou.html (originally published as Désir et plaisir, in Magazine littéraire 325 October 1994 59–65), accessed 9 October 2020.

[67] Fiona Measham in Fay Dennis supra note 20, 7.

the emotional reactions, in an altered manner to the 'visceral states and disturbances' outside of the euphoric and dysphoric states associated with substance use, that are argued to be triggered by beliefs[68]. It would also concur within a convergent menagerie that law may be, that control is an expression of lack of control. A desperate assertion of representation and aesthetic through the conglomeration of property. Violence, which is the ultimate method of control, is both present in law and addiction, and is a form of expression, which "…more typically carries important messages."[69] Just as desire may frustrate immanence to the point of its blocking by a substance or an unhealthy relation, violence is this unchecked turbulent compulsion underlying law and addiction, addiction as law, which causes an exertion and balance of order, and disorder.

Destruction

This itinerance of law and addiction being one and the other poses questions of form, a morphic movement that is entropic and a kind of sublimation[70]. Just as Leslie describes the phenomena of liquid crystal, there are balancing acts at play in the search for equilibrium, a "petrified unrest proposes at one and the same time the frozen and the fluid, stillness and movement, the static and the fizzing."[71]

Entropy is the scientific thermodynamic evidence of the arrow of time through the corrosion and impairment of bodies stratified over an ageing process. In that sense, everything is a manifestation and process of decay, death; Deleuze even identifies the act of thinking with dying, however philosopher Ray Brassier disagrees stating, "the experience of dying defies the law of entropic explication governing physico-biological extensity and marks the apex of psychic life as a vector of negentropic complexification."[72] If positive entropy is the process of decay, thus negentropy is the generative flipside to this coin, an impelling force of poietic rep-

[68] John Elster Strong Feelings: Emotion, Addiction and Human Behaviour (Cambridge, MIT Press, 1999), 194–95.

[69] Peter J Adams Fragmented Intimacy: Addiction in a Social World (Springer, 2008), 113.

[70] Esther Leslie Volatile, Liquid, Crystal in Void (Breda, Netherlands: University of Applied Science, 2015).

[71] Ibid, 75.

[72] Ray Brassier Nihil Unbound: Enlightenment and Extinction (London, Palgrave Macmillan, 2007), 194–95.

lication that strides on, despite all, creating one moment to the next in production of the next iteration of life[73].

The destructive/creative force of law and addiction are this very balancing act on the edge of experience, where entropy will tell us there can never be total control. To echo Georges Bataille, life itself exists only in bursts and in exchange with death.[74] As Shalow obliquely describes,

> "By flying in the face of any rational counsel, the pull of the magnetic force of enticement clashes with the individual's sense of self-preservation; an apparent irrationality abounds in which the addict proceeds along a self-destructive path, possibly succumbing to the compulsiveness of his/her cravings."[75]

This risk, or *alea* reminds us of the addict's determination to move towards annihilation, despite its obvious consequences. Catherine Malabou depicts this creative/destructive drive forcefully within her 'ontology of the accident'[76]. The neurobiology of addiction already presented by Lewis that relays the repetitive carving of the brain by the same processes and pathways being followed and preserved, is further exemplified in the work on plasticity of Malabou. Due to the impact of trauma on the brain, no matter how large or small, a new direction in one's life can be forged, through *accident*. Speaking with regard to dementia, "trauma, or sometimes for no reason at all, the path split and a new, unprecedented persona comes to live with the former person, and eventually takes up all the room."[77]

Malabou enlightens the paradox of entropic movement, as it takes shape between the life-affirming and the life-removing. In the motility of magnetism and repulsion, there is a 'plastic art of destruction' where Malabou shows that "destruction too is formative. […] Destruction has its own sculpting tools."[78] She uses the laws of thermodynamics to demonstrate the flip side to creation as a fundamental law of life, that which

[73] Or difference and repetition to place it in Deleuzian terms, *see* Gilles Deleuze Difference and Repetition (London, Continuum, 2001).

[74] Georges Bataille Visions of Excess: Selected Writings, 1927–1939, trans. A. Stoekl (Minneapolis, University of Minnesota Press, 1985) 94–95.

[75] Op.cit. Frank Schalow, 10.

[76] Catherine Malabou Ontology of the Accident: An Essay on Destructive Plasticity (London, Polity, 2012).

[77] Ibid.

[78] Ibid, 4.

makes life possible.[79] Referring to the work of biologist Jean Claude Ameisen, she describes how the "sculpting of the self assumes cellular annihilation or apoptosis, the phenomena of programmed cellular suicide: in order for fingers to form, a separation between the fingers must also form."[80] Interestingly Malabou discusses this in relation to the prescription within to flee, to take flight, perhaps one of a line of flight. The addict only knows too well that wish to not be there, to redact one's presence, as to be totally removed would stop the creativity but a redaction is a cry for help, a stop valve before a final death, and a simulation of absence. This taking flight, is simultaneously a recognition of that which Malabou describes, the impossibility of taking flight, where the only option is to seek the very thing that one cannot do. Disappearance into an internal world that seeks forth within in order to flee to an exterior, is what the addict does. This circuitry of plasticity is the very crux of law, where only the apparition of legitimation is its content, there is little inside other than the space with which to consume. This destructive plasticity is almost representation itself, the appearance of form when there is only anything other than that occurring. Guattari calls this lack of possibility of an outside, as the 'echo of the black hole' being blocked, an obstacle in the path of entropy, where the "complete inhibition of the semiotic constituents of an individual or group, […] then finds itself cut off from any possibility of an exterior life."[81]

Destruction as the moment of transformation[82], could infer a utilitarianism, a 'development and destruction' paradigm where there are those who can be sacrificed in an overall design of colonialism and expansion. Maybe just like addiction's controlled lack of control, the very disorder within a system allows the rest to function. And yet it may also offer a juridical acceptance of alterity, where the only way for law to operate is to take a look at its own reflection in order to experience the other.[83]

[79] Ibid, 4.

[80] Ibid, 4.

[81] Félix Guattari Socially Significant Drugs in Anna Alexander and Mark Roberts (Eds) High Culture, Reflections of Addiction and Modernity (Albany, State University of New York Press, 2003), 200.

[82] Op.cit. Catherine Malabou, 11.

[83] "Destructive plasticity enables the appearance or formation of alterity where the other is absolutely lacking. Plasticity is the form of alterity when no transcendence, flight or escape is left. The only other that exists in this circumstance is being other to the self", Ibid, 10–11.

What Malabou's ontology of the accident may help to explain is how within law, there is always the power to create, as well as destroy, a interior passage of life that then replicates itself as it swallows and reproduces the world around it. Indeed, "this recognition reveals that a power of annihilation hides within the very constitution of

identity […] is also the signature of a law of being that always appears to be on the point of abandoning itself, escaping."[84]

Law's Addiction/Addiction to Law

> "Law is as habit forming as cocaine and that in consequence one remedy for addiction to law might be to introduce a 12-step programme for juraholics: 'Hello, my name is […], and I am a jurismaniac'"[85]

Coming back to the subject of poverty law, the consequences of the split in mind and body, the heart and the soul, those recipients of the work of poverty lawyers, are the law's very fix. As Gearey states, "Poverty law is important precisely because it is problematic. The subject is, quite correctly, a portal open to dark meditations"[86]. May law itself be in the grips of compulsion, and how have we become addicted to law?

When considering whether law is addicted or law is addiction itself, there are some considerations that can also be mapped on to addiction *per se*. When we speak or someone as addicted *to* something, are we also pointing out that they are not just the verb, the doing, but that they are also the thing itself. Everything is in a motion of flux and alternation, change and temperance, in a way that Karen Barad has so fundamentally demonstrated in recent years through her fusion of quantum mechanics and postructuralist thought; the performance of matter itself, as it moves from thing-to-doing, doing-to-thing, in the constant alternation of the material making and unmaking of each moment.[87] Her account of measurement and representationalism and the agential space of the container,

[84] Ibid, 10–11.

[85] Campos, 1998: 189) in Peter Goodrich Law-Induced Anxiety: Legists, Anti-Lawyers And The Boredom Of Legality Social & Legal Studies 9(1) 2000 143–163.

[86] Op.cit. Adam Gearey, 158.

[87] *See* Karen Barad supra note 54.

where measurements are "not simply revelatory but performative […] help constitute and are a constitutive part of what is being measured".[88]

Law's own obsessions are echoed in an anthropocentric perversion with law. The very construct of the neoliberal state, the ideological milieu in which we find ourselves globally installed, is the hidden rubric under which all decisions are implemented despite a veneer of distancing through the market. The intensification of extractive practices of privatisation inhere a removal of centralised governance towards a Smithion invisible hand, however, the story of neoliberalism narrates a heavy reliance on the functionality and instrumentalisation of state law in order to achieve its ends.[89] David Harvey depicts this well with the dependence-prescient 'spatial fix'[90], the way capital is fixed in land, us observing its very evidence as we look up at towering new office blocks and large project developments of (un)affordable homes, city skylines dancing with new constructions, in which assets are locked and fortified to increase value. As the world reals and reinvents after the onset of a global pandemic, the necessity of capital will have to morph and shift elsewhere in response to where it can get its next fix in order to survive as cityscapes change and labour migrates. The role of law within this is endemic, the proliferation of legal frameworks to protect financial interests as not far from "the notion of legal mania," which "suggests both a bacchanalian celebration of law, a hedonistic or wild desire for legality, as well as the suffering of the addict or juraholic."[91]

This material conjugality of law is reminiscent of Yusoff's 'material geophysics of race'[92] where the "presumed absorbent qualities of black and brown bodies […] take up the body burdens of exposure to toxicities and to buffer the violence of the earth."[93] Her specific inculcation of geology

[88] Karen Barad What is the Measure of Nothingness? Infinity, Virtuality, Justice. 100 Notes (Museum Fridericianum Verantsaltungs-GmBH, Ostfildern, Hatje-Cantz Verlag, 2012), 6.

[89] Peter Goodrich stated "In a thinly sociological sense the argument made is that the exponential proliferation of law and lawyers that occurred in the last half-century has led to a juridical saturation of social reality and the correlative absurdity of a political system that imagines that more law is the solution to all evils." (Op.cit. Peter Goodrich, 147).

[90] Harvey, David, 'Globalisation and the Spatial Fix', *Geograpische Review*. 23–30, 2001.

[91] Op.cit. Peter Goodrich, 145–6.

[92] Kathryn Yusoff A Billion Black Anthropocenes or None (Minneapolis, University of Minnesota Press, 2018).

[93] Kathryn Yusoff, supra note 65.

with property, and the larval manoeuvre of colonialism where those who were enslaved to build the Anthropocene are now used by the white privileged as shields against its violent blowback, speaks of the obsessive and destructive gathering task of accumulation. In her evocative work, she explains the stabilising process of property over burgeoning material, where the "cut of property […] enacts the removal of matter from its constitutive relations as both subject and mineral embedded in sociological and ecological fields.[94] In a similar vein, Esther Leslie's Marxist-infused works infer a geological and mattered underpinning of capital[95], where she traces processes of extraction from bullion to clothing dye, determining the incumbent of value attached to the material, and the aesthetic and political configurations of the commodity fetish as a result.[96]

In Roman law the word *addicere* meant to bind, to legally ensue a relation between one and another, which gave way to the verb 'to addict', meaning "to bind, attach, or devote oneself or another as a servant, disciple, or adherent, to some person or cause".[97] This grasping, and pulling in of the processes of law, its *jurismorphic*[98] movement, brings together addiction to law and law's addiction, where the agents who operate within law's world are those who also will strengthen its forefronts. Addiction is very much a frontier project, where not one morsel is enough, an internal appellation meets an externality, and the two are subsumed, consumed, and then the search resumed. For law and its mediators there is never enough, standing on the age of a volcanic eruption waiting for the magma to cool and coagulate – is not on step too far. The law wants the geology itself, through the fixation of property, and the crystallisaton of form. This hounding course of subsumption, the fetish of the material, is a necropolitical turn where all are fodder for law's emanations,

[94] Ibid, 19.

[95] Interestingly, she sees animism and technology through industrialisation as almost opposing forces: "Both animism and industrialism are human systems of praxis and belief. In this much they are mirrors: animism and industrialism both elicit ensoulment and things […] Industrialism is the negative force of animism" in Esther Leslie Derelicts: Thoughtworms from the Wreckage (London, Unkant, 2013), 140.

[96] Esther Leslie Synthetic Worlds: Nature, Art and the Chemical Industry (London, Reaktion Books, 2005).

[97] Found in op.cit. Janet Farrell Brodie and Marc Redfield, 1.

[98] To reference to Kyle McGee's 'jurismorphs', K. McGee, "Aleatory Materialism and Speculative Jurisprudence (II): For a New Logic of Right," in Althusser and Law (L. de Sutter, ed) (Nomikoi Critical Legal Thinkers Book Series, New York: Routledge, 2013).

> "[Its] morphology henceforth inscribes [a] register of undifferentiated generality: simple relics of an unburied pain, empty, meaningless corporealities, strange deposits plunged into cruel stupor."[99]

This goes back to the heart of the poverty of the spirit of which Alexander spoke of, and is the core concern of Gearey's work on poverty law - the processes of dislocation that are actualised through juridical frameworks, and determine the alienation felt across the poverty line, WEB Du Bois' 'colour line'[100], as one and the same. The emptiness left by law as it speculates, it acquires and institutes itself, where it rests and feasts on its next amulet; is the emptiness and void of an addict, the chasm that can never be satiated.

Conclusion

The poverty of the spirit of which we first began, comes full circle to considering what we may do with law as addiction, and the creative/destructive force within all lines of flight. Gearey imparts poverty law as a space of *praxis*, ethics, and consciousness, which following from Sear's *onto-advocacy*, underpins the role of the lawyer within the addicted war machine that law can be. A deferment and reenergising of poverty law that places the lawyer in the community, may well be law's journey into recovery. Despite a suspicion at the way in which spiritual enlightenment may assist the recovering addict, cyberneticist Gregory Bateson divulged:

> "It is, however, asserted that the non-alcoholic world has many lessons which it might learn from the epistemology of systems theory and from the ways of A.A. If we continue to operate in terms of a Cartesian dualism of mind versus matter, we shall probably also continue to see the world in terms of God versus man; elite versus people; chosen race versus others; nation versus nation; and man versus environment. It is doubtful whether a species having both an advanced technology and this strange way of looking at its world can endure."[101]

[99] Achille Mbembe Necropolitics Public Culture 15(12) (2003) 11–40, 35.
[100] W E B Du Bois The Problem of the Colour Line at the Turn of the Century: The Essential Early Essays (ed) Nahum Dimirti Chandler (Fordham, Fordham University Press, 2015).
[101] Gregory Bateson The Cybernetics of Self A Theory of Alcoholism Psychiatry, 34, 1–18. (1971), 455.

If there could be a way for law to recognise its own fallibilities, an acknowledgement of the material and geological extraction of its genealogy, understanding law as addiction and addiction as law may be the way to see a poverty of the spirit as "flee[ing] the impossibility of fleeing itself."[102]

[102] Op.cit. Catherine Malabou, 10.

Pantea Javidan*

Alienation and Activism: Pursuing Justice in the Human Trafficking Cases of Cyntoia Brown and Jeffrey Epstein

At the age of 16, Cyntoia Brown was convicted of first-degree murder and sentenced to life in prison for killing a 43-year-old pedophile named Johnny Allen who paid to have sex with her when she was being sexually trafficked in Tennessee. At the time of encountering Allen in 2006, Cyntoia was being drugged and forced into prostitution by an adult pimp nicknamed Kutthroat. On the night prior to the killing, "Kut" had nearly strangled Cyntoia to death.[1] At the same time, the case of billionaire child sex trafficker, Jeffrey Epstein, began to emerge. Described by a state

* Faculty and Research Fellow at Stanford University, School of Humanities and Sciences, Global Studies – Center for Human Rights and International Justice, Human Rights in Trauma Mental Health Program. PhD, Sociology, London School of Economics; JD, Public Interest Law, Golden Gate University School of Law. I would very much like to thank Professor Maria Grahn-Farley for inviting my participation in this timely and historic symposium. It has been so enriching to discuss Professor Adam Gearey's book *Poverty Law and Legal Activism* (2018), which helps contend with some of our most pressing social and legal issues. Apart from an appreciation for methodical rigor in conducting archival research and theoretical reflection highly relevant to our time of political urgencies, I also personally appreciate Gearey's contribution given my background as a legal aid and civil rights lawyer in the areas of public benefits, the juvenile justice system, and refugees in the San Francisco Bay Area. It is a great honor to be included among such a stellar cast of legal scholars who have helped define the discipline in ways that are agenda-setting, and which insist on the place of social theory and critical approaches to the law within it.

[1] A. Goodman, 'Sentenced to Life in Prison as a Teen, How Cyntoia Brown Survived Sex Trafficking & Won Her Freedom' (2019) *Democracy Now*: https://bit.ly/3tMA3XA; B. Hargrove, 'Life Begins at 16' (2011) *Nashville Scene*: https://bit.ly/3axp6RS.

police chief as "the worst failure of the criminal justice system" in modern times, and in the media as "one of the most lenient deals for a serial child sex offender in history," Epstein's case is shocking, and unprecedented to many authorities and legal actors.[2] The billionaire businessman and registered sex offender has been accused of trafficking hundreds of girls and operating an international sex trafficking ring. Epstein's case was characterized by a partnership between the government and the defendant against survivors of sexual and gender-based violence (SGBV). By allowing a wealthy child sex offender with powerful associates to thwart federal prosecution and a potential life sentence, authorities empowered sex traffickers, continually victimized survivors and increased opportunities for commercial-sexual exploitation.

Yet the luxuriating life of Epstein—who regularly deployed his vast resources to evade justice—ended abruptly and violently in a jail cell, whereas Cyntoia—an exploited child condemned to life in prison—ended up freed, in a loving marriage, and finding her calling and community. Through legal activism and social movements in both of these cases, history was made for survivors of sex crimes in general.

This chapter conceives of human trafficking and legal activism against exploitation through the lens of alienation theory. Law "as a source of alienation and oppression in contemporary society" is a core issue of critical legal studies and socio-legal theory.[3] This contribution considers ways in which law alternately generates or undermines the conditions, prevalence and harms exploitation in its commercial and sexual dimensions through case studies of child sex trafficking.[4] Wealth concentration is understood as engendering alienation and as a criminogenic condition permitting impunity—for both white-collar and organized crime, enabled by legal actors working to defend and personally benefit from their commission. These inevitably turn into enterprises of avoiding liability and exposure, often via illegal means. The two cases demonstrate the entanglement of

[2] S. Fitzpatrick, and R. Schapiro. 2019. "Ex-Florida police chief: Epstein case 'the worst failure of the criminal justice system' in modern times," NBC News: https://nbcnews.to/2Qo7QaY; J. Brown, 2018. "Even from jail, sex abuser manipulated the system. His victims were kept in the dark," *Miami Herald*: https://www.miamiherald.com/news/local/article219494920.html.

[3] F. Munger and C. Seron, 'Critical Legal Studies versus Critical Legal Theory: A Comment on Method' (1984) 6 *Law & Policy*, 3, 257.

[4] A. Gearey, *Poverty Law and Legal Activism: Lives That Slide Out of View* (London, 2018).

legal, economic and political components to what appear to be strictly legal determinations.

Cyntoia Brown's case exemplifies how intersecting structural inequalities render children and youth vulnerable to exploitation, while Jeffrey Epstein's case clarifies the nexus between the elite and the traffic in human beings for commercial and sexual exploitation through which the ownership of property and possession of bodies become co-constitutive. These same forces result in the concentration of survivors of SGBV and commercial-sexual exploitation in women's prisons. The work of lawyers, activists and journalists—notably, mostly women—were central in struggles for justice in both cases. Therefore, this chapter draws heavily from their work to recount case facts and timelines. In line with feminist socio-legal methods, interview transcripts and legal decisions are utilized as data and analyzed in an intersectional framework that centers childhood & youth in ways that "unravel" formal-legal egalitarianism.[5]

The concept of alienation is the subject of renewed interest in law, psychology and sociology. This analysis adopts a synthesized multidisciplinary view of alienation as a social-psychological process of detachment or estrangement from oneself, others, society and nature, in which law plays a key role and, therefore, legal activism can counteract. Alienation theory is applied to the topic of human trafficking and commercial-sexual exploitation of children (CSEC) through a comparative case analysis of child sex trafficking originating in the United States: the cases of Cyntoia Brown, a child survivor of sex trafficking condemned to life in prison, and Jeffrey Epstein, a wealthy child sex trafficker who actively eluded criminal justice for decades.[6] My approach to alienation integrates the social-psychological and materialist strands of alienation theory that have historically been of interest to social science and critical psychology.[7]

[5] K. Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 143 *University of Chicago Legal Forum* 143; A. Wing, 'Brief Reflections Toward a Multiplicative Theory and Praxis of Being' (1991) 6 *Berkeley Women's Law Journal* 181; P. Hill-Collins, *Intersectionality as Critical Social Theory* (Durham, 2019).

[6] Case facts and timelines of both cases were compiled through interview transcripts of survivors of child sex trafficking and activists, supplemented by relevant news articles.

[7] C. Fischer, 'Alienation: Trying to Bridge the Chasm' (1976) 27 *British Journal of Sociology* 35; M. Korczynski, 'The Mystery Customer: Continuing Absences in the Sociology of Service Work' (2009) 43 *Sociology* 952; D. Burston, 'Alienation', in T. Teo (ed.), *Encyclopedia of Critical Psychology* (New York, 2014).

Diverse fields of scholarship are revitalizing the alienation concept after "the linguistic turn," which refers to stressing the primacy of language in human ontology and identity formation while turning away from class-based analyses that view labor as central to these processes. Alienation theory regarding labor has extended to the application of commercial-sexual exploitation.[8]

Human Trafficking, Inequalities and Alienation

Historically, activism against child sex trafficking helped galvanize movements against child labor and for social welfare, public education, and diversionary, rehabilitative juvenile justice. Although the fields of criminal law, psychology, social work and others have mainstreamed the issue of human trafficking and helped institutionalize responses to it, exploitation for labor and/or commercial sex must be understood as causes and consequences of structural social inequalities and systemic injustices. Globally and in the US, human trafficking for sexual exploitation ensnares women, girls and gender non-conforming persons disproportionately, particularly females and femmes of color, who are also disproportionately arrested in the enforcement of related laws.[9] Underpinned by poverty, wealth concentration, and the polarization of these along lines of race, gender and age, the cases of Brown and Epstein represent broader socio-economic inequalities and injustices, and some of the worst systemic failures effectively contended with through the combined power of legal activism, social movements and investigative journalism.

Alienation, reification and exploitation are interrelated concepts in foundational social theories, including in the sociologies of Marx, Durkheim and Weber.[10] Alienation and its cognates are fundamentally concerned with the degradation of social life and relations in modern capitalist societies.[11] Materialist perspectives focus on the social relations

[8] R. Putnam-Tong, *Feminist Thought*, 2nd ed. (Boulder, Colorado, 1998).

[9] P. Javidan, 'Global Class and the Commercial-Sexual Exploitation of Children: A Multidimensional Understanding' (2012) 1 *Columbia Journal of Race and Law* 365; Javidan, P. 2017 *American Legal Discourse on Child Trafficking: Re/production of Inequalities and Persistence of Child Criminalization*, PhD Dissertation, London School of Economics: https://bit.ly/3tc2LQm, pp. 23–25.

[10] J. Scott and G. Marshall, *Oxford Dictionary of Sociology* (Oxford, 2009), p. 22.

[11] S. Vaisey, 'Structure, Culture, and Community: The Search for Belonging in 50 Urban Communes' (2007) 72 *American Sociological Review* 851.

of production and reproduction, which create structural inequalities in labor and property, resulting in forms of domination that amplify alienation.[12] In this view, laborers are alienated from fulfillment of basic human needs through voluntary, spontaneous and creative means, and instead coerced to work for employers under threat of poverty and starvation. They are also alienated from other workers, from the production process, and the goods or services produced through their own labor because they are controlled or owned by capitalists.[13] Durkheimian anomie describes a breakdown in societal norms or lawlessness, with psychological corollaries of disorder and meaninglessness, while Weber forebode the iron cage of rationalization and our entrapment in bureaucratic systems fixated on efficiency.[14] Anomic breakdown was later theorized as the result of disconnection between goals and means, i.e., when social structures seriously limit the legitimate, legal means of attaining culturally-valued goals such as earning a living.[15] Sociological alienation theory was elaborated to identify the root cause of alienation as dehumanizing social structures integral to the inequitable socio-economic relations of capitalism—the division of labor, development of private property relations, conflict of interest between economic classes, and foundational societal conflict in relations of production (economic relations) and reproduction (sexual relations)—which subordinate the family to the economy, despite families forming the bedrock of societies.[16] While alienation references the dehumanization that individuals experience under these conditions, reification refers to the dehumanization of others, i.e., objectifying and manipulating others for profit-making.[17]

Psychological approaches to alienation are concerned with the mental distress caused by societal disparities in power and by inequity in the social order. Alienation and dissociation are similar psychological concepts.

[12] K. Marx, 'Economic and Philosophical Manuscripts of 1844', in *Karl Marx, Friedrich Engels: Collected Works (Volume 3)* (London, 1975 [1844]), pp. 229–347; J. Rhoads, *Critical Issues in Social Theory* (Pennsylvania, 1991), pp. 264–269.

[13] Scott and Marshall 2009, *supra* note 10, at 14.

[14] M. Weber, *The Protestant Ethic and the Spirit of Capitalism* (London, 1992 [1904–05].; E. Durkheim, *The Division of Labor in Society* (New York, 1983 [1893]).

[15] R.K. Merton, *Social Theory and Social Structure* (New York, 1957).

[16] I. Mészáros, *Marx's Theory of Alienation* (London, 2005); J. Torrance, *Estrangement, alienation, and exploitation: A Sociological Approach to Historical Materialism* (New York, 1977); Rhoads 1991, *supra* note 12: 263.

[17] G. Lukács, *History and Class Consciousness* (London, 1971).

Dissociation is characterized by a sense of lacking cognitive or behavioral control and disconnecting from the body as a coping mechanism for the difficulty of experiencing intense emotions, or an adaptive and protective response to create cognitive and affective distance from trauma, which can become maladaptive in other contexts.[18] Ranging in frequency intensity and duration, dissociative reactions disrupt subjective experiences of reality and consciousness, and include intrusive thoughts, feelings of detachment from one's body (depersonalization) or the external world (derealization), and memory difficulties (dissociative amnesia).[19] Psychological findings regarding trauma and dissociation are cross-cultural. Reconnection with the body through trauma-informed therapies is a key method of recovery for human trafficking survivors, among whom complex traumatization is commonplace.[20]

Applied to childhood and child socialization, alienation theory recognizes that, unless expressly prohibited by law, capitalist relations tend to reduce children to the abstraction of their "labor power" or potential for extraction of resources or profits from them.[21] Social-psychological perspectives are concerned with the sexualization of children under consumer capitalism and the normalization of violence, sexism and racism in child socialization through mass media, the internet and commodities marketed for children.[22] CSEC represents extreme or multilayered forms

[18] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed (Virginia, 2013); Polaris and Sanar Wellness (2015) 'Promising Practices: An Overview of Trauma-Informed Therapeutic Support for Victims of Human Trafficking': https://bit.ly/3nTlGi1; L.A. Tan, 'Surviving Shame: Engaging Art Therapy with Trafficked Survivors in South East Asia', in *Art Therapy in Asia: To the Bone or Wrapped in Silk* (London, 2012); E. Hopper, 'The Multimodal Social Ecological (MSE) Approach: A Trauma-Informed Framework for Supporting Trafficking Survivors' Psychosocial Health', in M. Chisolm-Straker and H. Stoklosa (eds.), *Human Trafficking is a Public Health Issue: A Paradigm Expansion in the United States* (Cham, Switzerland, 2017); J.J. Freyd, *Betrayal Trauma: The Logic of Forgetting Childhood Abuse* (Cambridge, Massachusetts, 1996); E.B. Carlson, C. Dalenberg and E. McDade-Montez, 'Dissociation in Posttraumatic Stress Disorder Part I: Definitions and Review of Research' (2012) 4 *Psychological Trauma: Theory, Research, Practice, and Policy* 479; J.A. Chu, 'Containment: Controlling Posttraumatic and Dissociative Symptoms', in J.A. Chu (ed.) *Rebuilding Shattered Lives: Treating Complex PTSD and Dissociative Disorders*, 2nd ed. (New Jersey, 2011).

[19] J. Briere, C. Scott and F. Weathers, 'Peritraumatic and Persistent Dissociation in the Presumed Etiology of PTSD', 162 *American Journal of Psychiatry*, 2295.

[20] Polaris and Sanar Wellness 2015, and Tan 2012, *supra* note 18.

[21] D. Burston 2014, *supra* note 6, at 79–80.

[22] Id.

of alienation and reification in which children's bodies and affects are commodified for the profit imperative. Through CSEC, the characteristics of alienated labor intermesh with alienation of the self from the body on the sexual level. Affective, mental, manual/bodily labor and sexual commodification combine for a compounded and qualitatively different experience of alienation. For children in the modern global capitalist economy, this typically entails deprivation of culturally-valued childhood goals of education and play. The impacts of CSEC plunge deeper to the levels of child development and sexual development, which typically produce more profound or foundational physical and mental health effects. For example, children and youth survivors of sex trafficking are more likely to experience dissociation than adult women.[23] Early trauma/abuse exposure and developmental factors add to trauma complexity. Complex trauma and symptoms commonly lead to dissociation, fundamental changes in self-concept, emotional dysregulation, high risk-taking behaviors, self-harm, health problems, detachment from or involvement in conflictual relationships, and distorted perceptions of perpetrators. Child sex trafficking survivors' symptoms resemble those of torture victims.[24]

Gearey explains that critical legal studies and its outgrowths have resisted alienation and reification through praxis and ethics.[25] His major aim being to revive these concepts in contemporary legal critique, Gearey examines the history and legacy of critical legal theory, constitutional scholarship, the American Left and US lawyering around anti-poverty activism to highlight the role of poverty lawyers as ethical actors who appreciate the potential and limits of law in the struggle against economic inequality. While law provides an important measure of protection from commercial and sexual exploitation, critical perspectives recognize that the law also normalizes coercive processes by securing favorable legal and regulatory climates and provides normative justifications for exploitation, e.g., by representing exploitive experiences as freely-entered contractual relations.[26] In such ways, law can play a retraumatizing, "gaslighting"

[23] D. Basson, et al. 'Psychotherapy for Commercially Sexually Exploited Children: A Guide for Community-Based Behavioral Health Practitioners and Agencies,' WestCoast Children's Clinic (Oakland, California, 2019).

[24] Id.

[25] Gearey 2018, *supra* note 4.

[26] K. Calavita, *Invitation to Law and Society: An Introduction to the Study of Real Law* (Chicago, 2010) p. 14.

role through the derealization of survivors' lived, material conditions.[27] The criminal justice system and societal perceptions of survivors (e.g., as victims or offenders) influence one another through minimizing or denying survivors' claims and shifting blame attribution to crime victims. Criminalization is an alienating experience disproportionately impacting people of color, including children & youth and CSEC survivors, and is positively associated with civic disengagement or political alienation.[28] Unjust criminalization decreases trust, social cohesion and bonding in mutually reinforcing ways, particularly in contexts of poverty and social disorganization, which engender harms and crimes committed by and against children and youth.[29]

Taken together, alienation theories address macro-structural and interpersonal relations as well as individual psychological processes of cognition, emotion and behavior. Survivors in both cases discussed here experienced the gamut of these processes. Notably, Marx theorized that alienation and exploitation can be overcome through collective human agency. Through sustained effort and "being-with" survivors for many years, their legal teams and allied agents of social change resisted a most profound and complex form of alienation and exploitation.

"A door that started closing before she was born": The Case of Cyntoia Brown

The court in Cyntoia Brown's criminal case would never hear about the neglect and abuses she suffered as an infant, child, and adolescent. She would be presented as a dangerous young woman who makes bad choices, tried as an adult, and transferred to adult prison to serve her time. Cyntoia was placed in solitary confinement for the first two years of her sentence, from the time she was 16 until she reached age of majority. The solitary confinement of a child was rationalized as a measure to protect her from the adult population of the prison, a policy to which

[27] D. Knapp, 'Fanning the Flames: Gaslighting as a Tactic of Psychological Abuse and Criminal Prosecution' (2019) 83 *Albany Law Review* 313; P.L. Sweet, 'The Sociology of Gaslighting', 84 *American Sociological Review* 851.

[28] D.E. Barlow, 'Arresting Citizenship: The Democratic Consequences of American Crime,' 40 *Criminal Justice Review* 238.

[29] F.M. Steven, P.B. Eric and R. Richard, 'Dimensions of Social Capital and Rates of Criminal Homicide', 69 *American Sociological Review*, 882.

all juveniles were subject.[30] Cyntoia was heavily medicated in her cell, which was the size of a common bathroom, and then locked in a kennel she described as "a fenced-in cage" when allowed to leave her cell for an hour each day.[31]

Cyntoia's court testimony regarding self-defense was credible, but was dismissed. She testified that she had feared for her life on the night of killing Allen.[32] Allen insisted on taking her to his house, where he behaved erratically and showed off his collection of guns and aggrandized his social status and importance in the local community, Cyntoia became fearful and feigned needing a nap. After Cyntoia rejected his aggressive sexual advances, he became agitated, incessantly leaving the room and returning to bed. Cyntoia pretended to sleep, but grew increasingly alarmed. She testified that the last time he got back into bed, he reached toward his night table. She believed he was reaching for his gun, and shot him in the back of his head with a gun from her purse that her pimp, Kut, had given to her for self-protection from dangerous johns. Fearing retaliation should she return to Kut empty-handed, she hastily stole Allen's guns and car. Although no gun had been discovered near Allen's body at first, it surfaced at trial that he had a fully loaded clip in his bedside table.

Had Cyntoia been allowed to speak about her life in court, her family history would have revealed an intergenerational pattern of mental illness, suicidality, alcohol abuse, prostitution, and incarceration, which predicted her neglect and abandonment during childhood and her repetition of this pattern later in life. Cyntoia's mother, Georgina, was 16 when she became pregnant with her. As a White girl in the American South, she was carrying the baby of her Black boyfriend when her mother threw her out of their home in Georgia, wanting nothing to do with a mixed-race baby. Georgina took shelter out of state, at her sister's house, and spent her days at the home of a substitute teacher named Ellenette, whose son she was likely pregnant by. Georgina drank liquor while pregnant nearly every night, and sold sex to support herself. After Cyntoia

[30] Goodman (2019), *supra* note 1.

[31] Id.

[32] The following facts are taken from a lengthy "deep dive" report from 2011 on Cyntoia's case published in a local newspaper of Nashville, Tennessee, where the crimes took place, as well as from the transcript of an in-depth interview with Cyntoia Brown upon her release from prison and a documentary film based on her case (Hargrove 2011, *supra* note 1; Goodman, *supra* note 1 (hereinafter "Transcript 1"); "Murder to Mercy: The Cyntoia Brown Story" (2020), Netflix (hereinafter "Murder to Mercy").

was born, with no father present, Georgina disappeared, then returned 6 months later to request that Ellenette take care of her baby. Ellenette became Cyntoia's ward, while Georgina remained in prostitution, drug addicted, and in and out of jail during Cyntoia's infancy. When Cyntoia was 18 months old, Georgina abducted her and disappeared again. Ellenette searched and eventually found Cyntoia abandoned to an elderly couple in a crime-stricken public housing development. Early experiences of unstable caregiving and neglect are known to have detrimental impacts on child development and mental health.[33] By the age of 2, Cyntoia had developed a severe fear of abandonment and clung to her adoptive mother at all times.

Despite Ellenette's nurturance and protective efforts, Cyntoia had endured and continued to suffer multiple adverse childhood experiences (ACEs). Cyntoia's adoptive father was an alcoholic veteran who verbally abused her. Cyntoia herself began exhibiting alcoholism by the age of 9. She witnessed domestic violence related to conflicts over her father's alcoholism, including his manual strangulation of Ellenette. At the age of 10, Cyntoia rediscovered her adoption, and became increasingly socially withdrawn and self-destructive. She was also being mocked by peers at school for her light-skinned appearance and exceptional academic achievement, while harshly disciplined by teachers for vocalizing her disdain for authority. Cyntoia was eventually placed in alternative school, which she has described as a prison-like facility for disposable or unwanted children. By the age of 12, Cyntoia was arrested for theft. While in custody she experienced a psychotic episode during which she threatened to kill her adoptive father for raping her. Ellenette believed

[33] "Toxic stress describes a disrupted brain architecture as a result of stressful experiences, which affects other organ systems, and leads to a 'prolonged activation of the body's stress-response systems.' These stresses are primarily related to exposure to extreme poverty, abuse, neglect, exposure to maternal depression, and substance abuse by the caregiver." M. Chilton and J. Rabinowich, 'Toxic Stress and Child Hunger over the Life Course: Three Case Studies' (2012) 3 *Journal of Applied Research on Children* 5; see also J. Greif-Green, et al. 'Childhood Adversities and Adult Psychiatric Disorders in the National Comorbidity Survey Replication I: Associations with First Onset of DSM-IV Disorders' (2010) 67 *Archives of General Psychiatry* 2, 114; D.J. Grasso, et al.,'Developmental Patterns of Adverse Childhood Experiences and Current Symptoms and Impairment in Youth Referred for Trauma-Specific Services' (2016) 44 *Journal of Abnormal Child Psychology*, 882, 884.

her husband capable of this, and decided to leave him. By pre-adolescence, Cyntoia had experienced several ACEs and family dissolution.

Cyntoia was confined to a long-term juvenile justice facility for 15 months and prescribed anti-psychotic medication. Detention escalated her behavioral problems and mistrust of others, yet she had a strong desire for social approval. When she was released at the age of 15, her parents were unable to pick her up from the facility due to work commitments. They sent a family friend for her, but Cyntoia distrusted the man because he had made sexual comments about her body when she was a child, and others had ignored her complaint. When she reported her discomfort and refusal to leave with him to facility staff, they threatened her with placement in state custody. Cyntoia recognized this as the harshest punishment known to system-involved children because it meant she could be detained until the age of 19. This pivotal but obscured moment in her life represented an intersecting of community and institutional betrayal in the development of a young girl. Institutional betrayal occurs when institutions, systems, or organizations "inflict harm on people who depend on them for safety and well-being."[34]

Post-incarceration, Cyntoia was unable to maintain family relationships. This included Ellenette, who was with a new man with whom Cyntoia could not get along. Cyntoia eventually ran away. At 15, she moved in with an older woman whose home served as a de facto residential care facility for abandoned or neglected children. Childhood poverty is a common experience of minors severed from their households without means of support, alongside criminal involvement and victimization, traumatization, and adverse consequences for mental health and wellbeing.[35] Much older men were ensnaring Cyntoia in sexual relationships and selling crack-cocaine, when a 24-year-old drug dealer she worked for (her eventual pimp, Kutthroat) abducted, drugged and raped her over the course of 2 days. As an indication of Cyntoia's traumatic mental state, she reacted to the shock of realizing the incident with inappropriate laughter. The reaction of laughter while experiencing or recounting horrific

[34] P. Carter, and A. Blanch, 'A Trauma Lens for Systems Change' (2019) 17 *Stanford Social Innovation Review*, 3, 50.

[35] M. Annitto, 'Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors' (2011) 30 *Yale Law & Policy Review* 1; W.J. Adelson, 'Child Prostitute or Victim of Trafficking' (2008) 6 *University of St. Thomas Law Journal* 1.

events typically indicates the trauma effect of dissociation where a person's thoughts, feelings and behaviors are incongruent.[36]

Law and Legal Activism

The case of Cyntoia Brown illustrates how law can polarize power differences and entrench inequalities, including through lack of recognition of the repeated victimization of criminalized children and youth. Cyntoia's case demonstrates how prison and sexual exploitation relate to alienation and poverty; and how inequalities, human trafficking and childhood & youth fit into this rubric. Her case represents the outcome of problematic laws and policies that conceal multiple forms of structural inequality and personal circumstances, even those legally recognized as victimization through child abuse and rape. Cyntoia had been criminally victimized multiple times as a child by the time of her arrest for murder, and her mental health had suffered as a result. Since birth she was at elevated risk for betrayal trauma from primary caregivers and custodial institutions, and post-traumatic stress disorder, which alters threat perception, creates hypervigilance, and affects decision-making, particularly in children and adolescents, and especially when combined with the effects of illicit drugs such as cocaine.[37] Based on personal experience, Cyntoia anticipated violence from all men in sexually-charged situations.

However, these were not guiding considerations in her case nor figured prominently in media reports ahead of her trial. Cyntoia was not represented as a victim of serial crimes despite long-term interaction between Cyntoia and Kut. Their "relationship" began as exploitation of a minor for facilitation of illicit drug sales and a clustered series of violent felonies against Cyntoia for purposes of sexual exploitation. The sexual aspects of their interactions vacillated between rape (when abducted or unwanted) and statutory rape (when she complied or "consented" to sex). Kut subjected Cyntoia to physical violence such as strangulation and addicting her to cocaine, and long-winded verbal abuse such as hours-long lectures about her being a "slut" who should be grateful to him because no one else would want her. These acts escalated to commercial-sexual

[36] United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh (UNITAD) and Stanford Human Rights in Trauma Mental Health Program, *Trauma-Informed Investigations Field Guide* (United Nations, 2021), p. 20.

[37] Basson, et al. 2018, *supra* note 23.

exploitation. Cyntoia determined to run away from Kut as she had from her adoptive father, but was too afraid because Kut threatened to kill Ellenette if Cyntoia left him. This threat was objectively and subjectively credible given Kut's history of violence. At the time, Kut was wanted for attempted murder of a woman he had paralyzed by gunshot, and Cyntoia had personally and repeatedly suffered his violent behavior.

Because Cyntoia understood her act of shooting Allen as self-defense, she informed authorities shortly after the killing. Police actively misled her into believing it would be to her benefit to speak to them without a lawyer or parent/guardian present. She was cooperative and forthcoming; she took full responsibility and did not implicate Kut. To Cyntoia's shock, police booked her for first-degree (premeditated) murder. She reacted with inappropriate laughter, followed by an explosive episode during which she attacked facility staff and was medicated with anti-psychotic drugs. Mental health counselors at the facility suspected that Cyntoia suffered from borderline personality disorder based on her history of childhood abuse and abandonment. Without knowledge of her legal rights, Cyntoia was unable to realize the gravity of her circumstances until too late in the criminal justice process.[38] The actions of exploiters but also authorities placed her in an increasingly precarious position. Both sets of actors abused the power imbalance of age difference and social position between adults and children—whether for monetary gain, sexual use, or prosecutorial motives. At the time of this writing, Illinois became the first and only state to outlaw police from lying to children during interrogations through false promises of leniency as in Cyntoia's case, or false claims regarding the existence of incriminating evidence against them, and other methods of deception. These common practices are particularly detrimental to minors, who are two to three times more likely to yield false confessions.

Through self-reflection and assistance from her attorney, Cyntoia eventually recognized the abuses she had suffered, in a continuity of unhealthy patriarchal dynamics ranging from her father to her pimp. They had attempted to erode her agency and resilience via repetitive attacks on her positive self-image. Prosecutors and media reporters added to this by characterizing Cyntoia's actions as cold-blooded murder, in racialized

[38] Cyntoia did not understand the meaning of Miranda Rights at the time of her arrest, which is typical of the vast majority of arrested juveniles. ("Murder to Mercy", *supra* note 32).

and gendered terms. In contrast, they portrayed Allen as a helpful local youth minister, despite his complete state of nudity in the presence of a minor leading up to his killing.[39] The prosecutor in Cyntoia's juvenile court hearing portrayed Allen as harmless and Cyntoia's fears as baseless because Allen bought her food, took her home, and she used his bathroom—despite these constituting criminal elements of grooming and solicitation of a minor.[40] During her criminal trial, Cyntoia and her attorney were shocked when the prosecutor revealed to the court a nude photo that Kut had taken of Cyntoia. This was not only retraumatizing but also repurposed the work of her pimp in eroding her positive self-image for similar ends in court.[41] Cyntoia's own attorneys prevented her from testifying at her criminal trial, claiming it was not in her best interest. This move decontextualized her actions from her mental health diagnosis and trauma history. The judge also dismissed as "irrelevant" testimony regarding Allen's history of sexual harassment of wait staff, including minors, at a local restaurant. However, another witness was able to testify that Allen had abducted and raped her, and that she had remained silent due to shame and self-blame.

Such actions produce a corroborative synergy between exploiters and legal actors against survivors of CSEC. As Cyntoia's consciousness grew regarding the continuum of patriarchal dynamics across her life course, the court and media reinforced these through bias, re-traumatization, silencing, and the recirculation of a sexual image of a minor offered in court to deprive a child of liberty. At the same time, a combination of retributive criminal policy and austerity have worked to criminalize child survivors of sex trafficking like Cyntoia. In Tennessee, as in many states, juveniles charged with murder are most often "transferred" (tried as

[39] Hargrove 2011, *supra* note 1; Goodman, A. 2019. "Prison Abolitionist Mariame Kaba on Cyntoia Brown, the First Step Act and NYC Building 4 New Jails," *Democracy Now!*: https://bit.ly/3avYHnJ. (Hereinafter "Transcript 2").

[40] A. Goodman. 2019. "There Are Thousands of Cyntoia Browns: Mariame Kaba on Criminalization of Sexual Violence Survivors," *Democracy Now!*: https://bit.ly/3gro51E. (Hereinafter "Transcript 3"). See also "Murder to Mercy," *supra* note 32 (Although Cyntoia had been exploited for some time, men would typically take her to motel rooms, but Allen insisted on taking her to his house, where he continually talked about his collection of guns, being an army sharpshooter, and an important and powerful person in the community. She described her intimidation and his escalation to sexual assault and erratic behavior).

[41] The following facts are recounted from Hargrove 2011, *supra* note 1 and Transcript 1, *supra* note 32.

adults) for at least three reasons: (1) legislation requiring mandatory minimum life sentences for first-degree murder regardless of age and without consideration of mitigating factors, (2) the perception of leniency against judges who place juveniles in the custody of the child welfare system instead of adult prison, and (3) faithlessness of justice officials in the rehabilitative capacity of child welfare institutions and the juvenile justice system, particularly for "multi-problem youth."[42]

Moreover austerity obstructs justice. Even when mandatory minimum sentences are eliminated and rehabilitation is reprioritized, transfers increase "as a consequence of repeated budget cuts to an already anemic state agency doing more and more with less and less."[43] There are both legal and economic components to what appears a strictly legal determination. The first part of transfer hearings for juveniles requires determination of probable cause, but the second requires determination of whether the juvenile justice system has sufficient resources for the respondent's treatment. Therefore, although determination of adult status is part of the hearing, resource allocation is ultimately decisive. The requirement of greater performance with diminishing resources due to cuts to social welfare is a hallmark of neoliberal policy that most detrimentally impacts children and youth, and is part of an entrenched discrimination in the US, where children receive only one-third of the national spending for senior citizens.[44] Divestment from social welfare tasks the criminal justice system with containing and managing the effects of socio-economic inequalities that generate perilous neighborhood contexts, disrupt families, and make children vulnerable to the criminogenic conditions of abuse and exploitation. The criminalization and adultification of children are corroborative processes that erode modern notions of childhood in order to justify punitive responses.

Tennessee was able to sentence Cyntoia particularly harshly despite a national move during exactly Cyntoia's lifetime toward the rehabilitative mode of juvenile adjudication, supported by neuroscientific findings

[42] Hargrove 2011, *supra* note 1.

[43] Id.

[44] W.A. Corsaro, *The Sociology of Childhood*. (Los Angeles, 2015), 308–314 (citing double the US government spending on social programs and benefits for elders than children, and better outcomes related to poverty rates, healthcare, and quality of life for elders compared to children).

regarding child and adolescent cognitive development.[45] Tennessee had refused to fund a policy recommendation of its former Governor for juvenile rehabilitation and combatting post-release recidivism. This would have provided juveniles judicial discretion regarding transfers, counseling and vocational training, and the opportunity for release and reintegration into society during youth if they achieved specified benchmarks.[46] However, once in prison, Cyntoia worked hard for admission into an education program introduced to fill gaps produced by federal law in 1994 that defunded inmate education despite the government's own research demonstrating its effectiveness in lowering recidivism.

The program's instructor, Professor Preston Shipp, was a former local prosecutor who identified Cyntoia as an exceptional student who could be "a gifted litigator" for her critical engagement. However, he was disconcerted by its impossibility given her life sentence. As Cyntoia was appealing this decision, Shipp was learning to appreciate her talent and life circumstances. Although Shipp's career had been based on argumentation against defendants whose case outcomes he believed were well-deserved, his experience teaching young, imprisoned women eager for redemption challenged his beliefs and transformed him. The significance of this experience exemplifies how educational resources counteract the alienating powers of retributivism. Shipp's experience of "being-with" youth in a supportive role in the program corresponded with positive psychological effects for Cyntoia. Her outstanding attainment allowed her to reinterpret and redeem her self-image as able-minded rather than "some dumb girl who made all these dumb choices," as she had internalized. Moreover, gaining literacy in criminal law provided Cyntoia access to the concept and discourse of sex trafficking, which allowed her to understand her survival of criminal victimization and to transcend self-blame. She discovered a pathway and sense of direction, felt motivated to achieve, live and strive, and to avoid trouble in prison.

In a dramatic twist, however, the court in Cyntoia's case simultaneously sent its decision denying her third (and final) appeal to her … and the Professor. The "star student" and "the instructor nurturing her hopes" shockingly discovered that Shipp had been the prosecutor on her case. Both of them despondent, Cyntoia felt betrayed yet again, and this

[45] *Roper v. Simmons* (2005) 543 US 551; *Graham v. Florida* (2010) 560 US 48; *Miller v. Alabama* (2012), 132 S.Ct. 2455.

[46] The following facts are recounted from Transcript 1 and Hargrove 2011, *supra* note 32.

took a toll on her personality. After thoughtful deliberation, however, she concluded that Professor Shipp is her friend, and continued her exceptional educational attainment. In fact, the Professor would become one of many champions for Cyntoia's release after exhaustion of the formal process induced a decade of activism on her behalf. As a result of *being-with* Cyntoia—who had previously been anonymized by his prosecution work—Shipp commented on "such a drastic difference between what you read about in that trial transcript and the person I got to be friends with," and how key occurrences in Cyntoia's life relevant to the case were outside his knowledge until he heard them from her personally. Highlighting the severe costs of discounting childhood experiences of survivors, he commented, "You don't hear about what her childhood was like."

At nearly 30 years old, Cyntoia filed for clemency, but was denied a year later.[47] However, over the course of a year, persistent spotlighting of the injustice and punitive excess of her case escalated to a high-profile campaign generating outrage and public pressure.[48] The Tennessee Supreme Court's affirmation that a teenager of Cyntoia's circumstances must serve 51 years of her sentence—to the age of 67—before she could be eligible for parole was unacceptable to many. This became a turning point in her case, including for the Tennessee Governor who eventually granted Cyntoia clemency after a sustained campaign of law, community and media pushed for it.[49] Campaigners helped transform Cyntoia's characterization from the decontextualized and prejudicial narrative of a ruthless, criminal Black woman to a teenager forced into prostitution as a child and regularly drugged, beaten and raped by a pimp, then sentenced to life imprisonment for killing a man who purchased her for sex, assaulted her, and made her fear for her life. The social media hashtag #FreeCyntoiaBrown even garnered celebrity attention and recirculation. By 2019, after Cyntoia had served 15 years, Governor Haslam granted her clemency, largely basing his decision on Cyntoia's progress and rehabilitation in prison through the education program.[50]

[47] Transcript 1, *supra* note 32.

[48] A. Goodman, 2018. "Outrage Over Tennessee Court Ruling in Cyntoia Brown Case," *Democracy Now!*: https://bit.ly/32DJQ6f; Transcript 3, *supra* note 39; A. Goodman, 2017. "Campaign Calls for Release of Sex Trafficking Victim Who Killed Abuser," *Democracy Now!*: https://bit.ly/3axrx6S (Hereinafter, "Transcript 4").

[49] Transcript 1, *supra* note 32.

[50] Id.

However, the state remains unapologetic for its systemic failures, and irresponsible regarding socio-economic stabilization after imprisonment, even for children incarcerated during their formative years. Because Cyntoia was not pardoned, her freedom is severely limited by her criminal status and highly restrictive conditions of release, which prevents expungement of her record and renders her ineligible to vote.[51] She must maintain employment, attend counseling and community service, and strictly adhere to terms of supervised parole, despite that her status presents a legal barrier to employment. Additionally, Cyntoia will likely be judged similar to other sexual trauma survivors. Just as ideal victimhood is required of survivors to secure prosecutions against perpetrators and to prevent their own criminalization, "good survivorhood" is required in its aftermath—the performance of respectability and demonstration of psychological recovery according to increasingly medicalized assessments.[52] Good survivorhood pressures victims of sex crimes to present psychological narratives of "overcoming" through professional therapy in order to qualify for state resources, despite deterioration of the material conditions of their lives.[53] The imperative to narrativize one's experiences contrary to personal knowledge under pressure of meeting one's needs involves a process of alienation that disconnects self-cognition from lived reality.

Cyntoia's resistance to alienation and reification has occurred through continued identification with similarly situated others, her purpose "to help other women and girls suffering abuse and exploitation."[54] This ethos is precisely what secured her own freedom when activists, including from Black Lives Matter, coalesced nationally and strategized her case in the context of similar cases of girls criminalized for defending themselves against abusers.[55] Alongside a relentless social media campaign, they made a record 6,000 daily phone calls to the Governor's office for her release.[56] Women of color led the campaign alongside White elder men such as Cyntoia's attorney, Houston Gordon, who advocates for her case

[51] Transcript 3, *supra* note 39; Transcript 2, *supra* note 39.

[52] Javidan 2017, *supra* note 7; P.L. Sweet, (2019) 'The Paradox of Legibility: Domestic Violence and Institutional Survivorhood', 66 *Social Problems*, 3.

[53] P. Sweet, 2019, *supra* note 33.

[54] A. Goodman, 2019. "Cyntoia Brown Released from Prison After 15 Years, Vows to Fight for Other Sexual Abuse Survivors." *Democracy Now!*: https://bit.ly/3vaLHeR.

[55] Transcript 2, *supra* note 38; Transcript 3, *supra* note 40.

[56] Transcript 3, *supra* note 39.

to catalyze national consciousness against retributivism and condemning children to adult prison.[57] Activists emphasize the efficacy of participatory legal defense campaigns and sustained struggles for criminalized survivors that take a long view of the matter.[58] Cyntoia's case shows that legal activism in a difficult case of intersecting inequalities requires an extremely dedicated team that includes highly supportive and proactive lawyers, family, community and organizational support, and the ability to mobilize people in positions of power, including in law and media.

Cyntoia's case is an exemplary representation of intersecting social inequalities and systemic injustices in advanced capitalist economies, clearly illuminated when childhood, exploitation through the traffic in human beings, and the criminal justice system intersect. An important task for legal and social movement activists is to understand these cases in historical context to be able to make an impact statement about to what extent the case outcome represents evidence of social change, and to assess whether children's circumstances today differ from those of pre-civil rights era children.[59] Legal scholar Wingfield-Smith perhaps best encapsulates how Cyntoia's case links directly to poverty and legal activism:

> [Cyntoia's] clemency is a result of the political pressure of movement leaders, social media activists, clergy, entertainers, and others…Now that we know that we have what it takes to pull of 60s-like wins, despite the unfairness of the American judicial system, let's aim higher. There must be broader reaching plans to change the landscape of America, but there is no need to recreate the wheel. In the 60s, legal advocates played a leading role among strategists committed to dismantling systemic injustice. I believe this must be the case today…The strategic navigation of laws and policies is imperative in the current political climate; now is just the right time to come together in thoughtful contemplation of victories won. All of America knows that Cyntoia Brown's imprisonment is the mere reflection of greater economic, social, and legal challenges that still face Black people even until this very hour.[60]

[57] Id.; *see also* M. Grahn-Farley, (2002) 'A Child Perspective on the Juvenile Justice System', 6 *Journal of Gender, Race and Justice*, 297 (for a robust discussion of this phenomenon and CSEC in adult prisons from a critical legal theory perspective).

[58] Transcript 2, *supra* note 39.

[59] D. Wingfield-Smith, (2019). 'Cyntoia Brown and the Justice System's Contempt for the Rights of Black People,' 35 *Harvard Black Letter Law Journal,* 85, 87–89.

[60] Id., at 89.

"These powerful people were my chains": The Case of Jeffrey Epstein[61]

If Cyntoia Brown's case exemplifies how intersecting inequalities render people vulnerable to exploitation and injustice, then resistance to alienation requires identification with victim-survivors and disidentification from the perspective of billionaires and the shielding of human traffickers, exemplified in the case of Jeffrey Epstein. The Epstein case clarifies the nexus between the elite and the traffic in human beings. Powerful men (and sometimes women) who participate, are complicit in, or benefit from corruption and white-collar crimes such as financial fraud and pyramid schemes, motivated by ever-greater power and property ownership, so often make sexual commodification and possession of others' bodies an integral part of their estates, business dealings, network operations, and social and private lives.[62] Systematic, organized crimes against the person become integral to these property-related transactions, in ways that compound alienation of body, affect, and sex, and commodification of age, gender, and race.

Importantly, Cyntoia's and Epstein's stories are also both rooted in women's prisons—institutions of extreme alienation—where survivors of SGBV are concentrated. While Cyntoia was imprisoned, the pimp who had exploited her was killed, likely at the hands of another drug dealer. Epstein's case began developing at the same time, involving a different profile of child sexual exploiter—much older, wealthier and well-connected to the elite. *Miami Herald* journalist Julie Brown uncovered the Epstein case while interviewing inmates of a women's prison regarding conditions in the facility. Brown realized that inmates' stories kept leading to Epstein. The criminalization of trafficking survivors and highly disparate impact of sex trafficking on women and girls means that key witnesses to these crimes are concentrated in carceral facilities for female offenders. Female inmates and sex trafficking survivors, including crimi-

[61] M. Landler, 2019. "Prince Andrew's Accuser Takes Her Case to the BBC," *New York Times*: https://nyti.ms/3na1d8f (statement from complainant Virginia Giuffre against Jeffrey Epstein and alleged co-conspirators).

[62] C. Norma, 'Prostitution and the 1960s' Origins of Corporate Entertaining in Japan' (2011) 34 *Women's Studies International Forum*, 6; K. Hoang, *Dealing in Desire: Asian Ascendancy, Western Decline, and the Hidden Currencies of Global Sex Work* (Oakland, 2015); A. Mears, *Very Important People: Status and Beauty in the Global Party Circuit* (Princeton, 2020).

nalized survivors, are disproportionately non-White and/or economically impoverished.[63] Sociological and psychiatric studies strongly indicate a "pipeline" from trauma/abuse to prison for women and girls, characterized as "the incarceration of trauma"; 71–95 percent of incarcerated women have endured intimate partner violence, and 60–100 percent report physical or sexual trauma or abuse in childhood or adulthood.[64] Additionally, studies show that the vast majority of persons who sell sex do not want to; they would rather not be involved in the commercial sex industry but are compelled to sell sex for economic reasons and survival needs.[65] Activists have highlighted the injustice of systematic criminalization and punishment of survivors of SGBV and commercial-sexual exploitation for self-defense against abusers and exploiters and the protection of their children in contexts of persistent instability and danger.

Cyntoia's conviction and Epstein's leniency co-occurred as a result of these social and legal conditions. The criminalization of child survivors, particularly for defending themselves against abusers, alongside the retaliation and violence with which survivors are threatened results in a corroboration of law and society in racialized gender violence and the abuse or exploitation of children. Epstein's evasion of justice through wrongdoing and illegalities involved a shocking and protracted series of actions by he and his legal team, detailed in a series of exposés by women journalists in the US and UK. Those details are intricate and run so afoul of any orderly administration of law and justice that they merit

[63] M. Kaba, *We Do This 'til We Free Us: Abolitionist Organizing and Transforming Justice*, p. 51. (Chicago, 2021); Office of Juvenile Justice and Delinquency Prevention, 'Statistical Briefing Book': https://bit.ly/3tIdmDN; A. Nichols, *Sex Trafficking in the United States: Theory, Research, Policy, and Practice* (New York, 2016), p. 29.

[64] Id.; Transcript 3, *supra* note 40; B.E. Richie, 'Jail or Justice - Violence against Women in Conflict with the Law' (2002) 6 *Perspectives on Crime and Justice* 35; A. Browne, 'Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women' (1999) 22 *International Journal of Law and Psychiatry*; S. Ball, et al. 'Interpersonal Trauma in Female Offenders: A New, Brief, Group Intervention Delivered in a Community Based Setting' (2013) 24 *Journal of Forensic Psychiatry & Psychology*, 6; A.K. Fournier, et al. 'Investigating Trauma History and Related Psychosocial Deficits of Women in Prison: Implications for Treatment and Rehabilitation' (2011) 21 *Women and Criminal Justice*, 2; R. E. Liebman, et al. 'Piloting a Psycho-Social Intervention for Incarcerated Women with Trauma Histories: Lessons Learned and Future Recommendations' (2014) 58 *International Journal of Offender Therapy and Comparative Criminology*, 8.

[65] Nichols 2016, *supra* note 38, at 34 (reporting rates as high as 93 percent of persons selling sex not wanting to do so).

detailed recounting. Yet however disquieting the facts, they attest to the combined power of legal activism, social movements and investigative journalism to alter the course of expected outcomes of social inequalities and systemic injustices.

The unfolding of Epstein's case demonstrates the routine wrangling that occurs among different sets of local actors, their ethical commitments and the values they represent in a highly unequal society. Although Epstein's criminal dealings date back to at least the 1990s, from March 2005–2008, he and his legal team obstructed justice by violating federal law, specifically the Crime Victims' Rights Act (CVRA).[66] In March 2005 the parents of a 14-year-old girl reported Epstein to the police for molesting their daughter in his Florida mansion after her classmate took her to him for a massage in exchange for money.[67] Police began to uncover corroborating evidence that Epstein had also targeted other girls. When Epstein realized he was being investigated for child sexual abuse, he contacted his friend, high-profile attorney and Harvard Law professor Alan Dershowitz. Against the will of law enforcement and despite copious evidence mounting against the suspect, Epstein's case became increasingly removed from the realm of criminal justice and entered into a process more akin to the negotiation of contracts.

Contracting Injustice: Criminal Justice as Contract Negotiation for Elite Defendants

In stark contrast to Cyntoia's cooperation with authorities, lack of good representation at key junctures in her case, and conditions of child poverty, Epstein's money and power provided him an escape hatch. A police probe into allegations against Jeffrey Epstein was well underway by autumn 2005. More girls and members of Epstein's household staff revealed the frequent and daily traffic of girls at his residence. Even during police questioning, one of the girls received a call from Epstein's assistant. By May 2006, police signed a probable cause affidavit charging Epstein and

[66] 18 U.S.C. § 3771.

[67] J.K. Brown, (2018). 'For years, Jeffrey Epstein abused teen girls, police say. A timeline of his case', *Miami Herald*: https://www.miamiherald.com/news/local/article221404845.html. Unless otherwise cited, facts regarding Epstein's case throughout this section are detailed from this timeline.

two of his assistants with multiple counts of child sex abuse. However, the State Attorney instead referred the case to a (state) grand jury, and after hearing from only one girl, returned an indictment of one count of solicitation of prostitution that failed to include that the victim or others were minors. Epstein deployed his powerhouse legal team to negotiate deferred prosecution with the State Attorney, avoid serving jail time, and instead enter a pretrial intervention program. The Chief of Police was reportedly "very disturbed" by the likelihood of Epstein being let off and pressured for an investigation by the FBI, which documented allegations of "child prostitution" against Epstein. The Police Chief would spend years attempting to persuade state prosecutors to charge Epstein with serious crimes, to no avail. Despite the FBI investigation yielding "a sprawling network of victims and enough evidence to fill a 53-page indictment with federal sex crime charges," including witness testimony supporting victims' accusations, US Attorney for Florida, Alexander Acosta, and prosecutors claimed that the case was too weak to pursue.

Although the State Attorneys' Office was still preparing its case, prosecutors granted Epstein and his lawyers' request to initiate plea negotiations. The following month, when grand jury subpoenas were issued for Epstein's computer, it was discovered that they had been removed from his home before the police search. Acosta entered direct discussions about Epstein's plea agreement, after which a motion to compel production of Epstein's computers was delayed. Remarkably, over the course of a year (June 2007-June 2008), Epstein and his attorneys negotiated his charges back and forth with prosecutors, which shockingly extended to their co-editing draft documents together.

Meanwhile, accumulated evidence expanded the evidentiary and geographic scope of Epstein's crimes, pointing to his potentially running an international sex trafficking ring with overseas recruiters. However, Epstein hired high-profile lawyers from Acosta's former law firm—a well-connected pipeline to powerful public offices. They were able to pressure and manipulate Acosta because his ability to contend for those political positions would implicitly require their support. Federal prosecutors drafted several plea agreements that Epstein rejected. He finally signed a non-prosecution agreement in September 2008, three years after the initial complaint against him to police. The agreement canceled all grand jury subpoenas, and stated that it will be sealed and victims will not be notified. Epstein then objected to the appointment of a special master to represent victims' rights to civil compensation, so this pro-

vision was removed. Nonetheless, one of Epstein's attorneys, Kenneth Starr—conservative attorney famed for the impeachment of President Clinton—further delayed execution of the agreement.

Even after striking provisions and delayed execution, Epstein refused to honor the agreement because it required his registration as a sex offender. Therefore, the FBI investigation continued, leading to a new federal grand jury presentation, which contained documents showing that Epstein was harassing his victims, including a report from one victim's father of being run off the road while driving. Under pressure to avoid federal prosecution, Epstein reentered negotiations and plead guilty to state charges. He was "sentenced" to merely 18 months of jail and sex offender registration in Florida, under conditions tantamount to work release or furlough. His chauffer drove him from the facility six days a week to his "luxury office," where he ordered "lavish lunches" and was able to receive visitors—"a parade of young females"—for 12 hours a day. Epstein only returned to the facility to sleep at night. Office visitation logs mysteriously disappeared as an investigator sought them. This arrangement was made possible by Epstein's intentionally cultivated relationship with local law enforcement in Palm Beach County, Florida, where he was an employer of some of the Sheriff's deputies for his own private details.[68] Only after the case ended did victims discover that the federal investigation had been terminated. They immediately filed an emergency petition demanding federal prosecutors' compliance with federal law, specifically the CVRA. They sought to unseal the non-prosecution agreement, but federal prosecutors argued against it, forcing victims into a yearlong legal battle.

Epstein's treatment contrasted greatly with the retributivism many sex-trafficking survivors face. Even under such incredibly lenient conditions, Epstein was released 5 months early to house arrest and probation. He frequently violated the terms of his release by flying to Manhattan and the Virgin Islands, and walking freely in public spaces—violations that were unpursued or excused for needing "physical exercise." The non-prosecution agreement was publicized a month later. Epstein had already accrued a dozen civil suits alleging child sex abuse against him. He began settling these out of court. A member of Epstein's household

[68] A. Goodman, 2019. "Perversion of Justice: The Shocking Story of a Serial Sex Abuser & Trump's Sec. of Labor, Who Helped Him." *Democracy Now!*: https://bit.ly/3sFKZ7J (Hereinafter, "Transcript 5").

staff came forth as a witness to child pornography on Epstein's personal computers, undressed underage girls at his house, and his knowledge that Epstein was having sex with them. However, the man was charged with obstruction of justice for attempting to sell Epstein's black book of girls to an undercover FBI agent, sentenced to federal prison, and died in 2015.

Law and Legal Activism

Despite the formidable deployment of finance, power, and violence against survivors, the tides of evidence and history would turn against Epstein and associates. Civil suits began to publicize the contents of Epstein's black book and private-jet flight logs, which revealed the identities of his powerful associates—heads of state, world leaders, political officials, academics and celebrities, including President Bill Clinton and his former National Security Adviser Sandy Burger, Harvard law professor Alan Dershowitz, and former President of Colombia Andrés Pastrana—taking flights to Epstein's private islands known for the sexual abuse of underage girls. Victims successfully motioned in federal court against the US government for violating the federal CVRA through deception and failure to notify victims and concealment of the non-prosecution agreement. Marking a victory for victims, federal judge Kenneth Marra rejected federal prosecutors' argument that they had no obligation to notify victims since no federal charges were filed. Epstein was required to register as a sex offender in New York and designated to its highest and most dangerous category, which indicates "high risk of repeat offense and a threat to public safety." Around the same time *Mail on Sunday* reporter Sharon Churcher exposed the association of Prince Andrew of Great Britain with Epstein, shortly after which the FBI reopened its investigation and attracted the attention of victims' attorneys.

From then on, between 2011–2016, Epstein embarked on a public relations campaign "to counter bad press about his sexual exploits," rebranding himself as a generous philanthropist and educational investor. Despite concerted effort to rehabilitate his image, survivors stepped forward and journalists stepped up. Survivor Virginia Giuffre filed an affidavit in 2015 attesting to Epstein selling her to other men for sexual abuse. Donald Trump's 2016 presidential candidacy proved pivotal. A woman named Katie Johnson came forth alleging that Trump raped her at the age of 13 at one of Epstein's parties in his Manhattan mansion, describ-

ing details consistent with those of other survivors regarding Epstein's modus operandi.[69] She agreed to a press conference a few days preceding Election Day in November 2016, but backed out, dropped the lawsuit, changed her contact details and disappeared, stating she had been threatened and felt too fearful to speak publicly.[70]

After Trump's election, *Miami Herald* journalist Julie Brown released details of Epstein's non-prosecution agreement. This caused the case to be reopened, Epstein to be rearrested, renewed public scrutiny, and the Congressional probing and resignation of Acosta, whom Trump had appointed as Labor Secretary. Unlike during his confirmation hearings, Congressmembers grilled Acosta about the deal, referring to vast power differences between teenage SGBV victims and the "extremely powerful, wealthy and connected" perpetrators. Federal Judge Marra ruled that Acosta's actions as federal prosecutor to secure Epstein's plea deal were illegal. Departing office in July 2019, Acosta continued defending the illegal deal, while Epstein was being tried in New York on similar sex trafficking charges involving hundreds of girls. Epstein proposed a bail package of in-home detention pending trial, at his $77 million Upper East Side mansion, one of the largest residences in Manhattan. Epstein's request was denied based on victims' credible testimony that they feared harassment.[71]

Although a defamation settlement against survivors' attorneys prevented some survivors from testifying in court, a series of events favorable to them started unfolding. Years of sustained social and legal activism culminated when New York passed landmark legislation—the Child Victims Act (2019)—providing a one-year window for survivors of child sex abuse to file suits whose statutes of limitations had otherwise expired. A few months later, Giuffre sued Epstein's attorney/friend Alan Dershowitz for defamation for accusing her of fabricating claims that when she was 16 Epstein trafficked her to him. Former Epstein employee Maria Farmer submitted an affidavit as a frequent witness to traffic in school-aged girls at Epstein's residence, and that she saw Dershowitz "go upstairs" with them on several occasions. Farmer also alleged that Epstein and his alleged procurer, Ghislaine Maxwell, sexually assaulted her and her sister

[69] Id.

[70] Id.

[71] C. Devine, D. Griffin, and S. Glover, 2019. "Private investigator has spent a decade on Jeffrey Epstein's trail." *CNN Investigates*: https://cnn.it/3nal5rT.

in 1996, when her sister was 15. Journalist Connie Bruck published a story in the *New Yorker* detailing Dershowitz's role in the non-prosecution agreement and two women's allegations that Epstein ordered them to have sex with him.[72] Dershowitz then posted a tirade against age of consent laws on Twitter.[73]

At the same time, evidence and publicity unfavorable to Epstein and associates accrued, as he faced 45 years in prison. Attorneys managed to unseal voluminous court documents (2000+ pages) implicating high-profile politicians and figures, including Dershowitz, Prince Andrew and others. Less than 24 hours later, Epstein was found dead in jail with bodily signs of strangulation. Despite previous placement on suicide watch after being found unconscious with similar marks around his neck, a current mandate to guards for 30-minute watch intervals, and the absence of a mandatory cellmate, Epstein was left unsupervised. Guards had also falsified their time logs. The House Judiciary Committee investigated and declared Epstein's death a suicide by hanging. Two days prior to his death, Epstein had signed a will leaving an estate of $577 million to unknown beneficiaries.[74] Without evidence, President Trump joined online conspiracy theorizing to suggest that his political rivals, the Clintons, were responsible for Epstein's death.[75]

Survivors' reactions were mixed, ranging from relief that Epstein's death would end his abuses and retaliations to dismay that he would never face justice. Jennifer Araoz, who accused Epstein of raping her when she was 15, lamented a lifetime of pain from trauma for which Epstein will never face consequences, and insisted on pursuing justice and redressing survivors posthumously.[76] Rather than causing abandonment, Epstein's death further galvanized justice efforts against his co-conspirators and his estate, and survivors continued reaching historical milestones. Araoz's

[72] C. Bruck, 2019. "Alan Dershowitz, Devil's Advocate," *New Yorker*: https://bit.ly/3ncSIZX.

[73] E. Mazza, 2019. "'Creepy Dershowitz' Trends and You Really Don't Want to Know Why," *Huffington Post*: https://bit.ly/3vcTI38.

[74] E. Helmore, and agencies. 2019. "Jeffrey Epstein signed new will to shield $577m fortune days before death," *The Guardian*: https://bit.ly/3dSYpZZ.

[75] M.K. Seung, and H. Knowles, 2019. "Trump retweets conspiracy theory tying the Clintons to Epstein's death," *Washington Post*t: https://wapo.st/32R2TtU.

[76] T. McCarthy, and E. Helmore, 2019. "'We live with scars': accusers demand Epstein's death not derail investigations," *The Guardian*: https://bit.ly/3xkAdre.

civil suit against Epstein's estate was among the first to be filed under the new Child Victims Act.[77]

Legal authorities continued to play key roles—both supportive and obstructive—such that the legal battle has persisted. The FBI raided Epstein's private Caribbean island as part of the investigation led by the US Attorney's Office for the Southern District of New York. Attorney General William Barr vowed continuation of Epstein's case, but allowed the Acting Director of the Bureau of Prisons, who had overseen Epstein's custody, to remain in the agency by merely reassigning him.[78] Although New York prosecutors formally dismissed the sex trafficking case against Epstein when he died, they, too, vowed to continue investigation of implicated co-conspirators.[79] In response, District Judge Richard Berman scheduled a hearing in late August 2019 to allow survivors and attorneys to formally testify against Epstein, while victims' attorneys spoke publicly on the historical significance of the event and their clients' courageousness.[80] The legal activism of survivors and lawyers, and being heard by sympathetic judges, has proven instrumental to the continuance of justice, particularly in the midst of disagreement between the key federal and state judges in the case. The state judge in Florida refused to unseal the non-prosecution agreement that rendered co-conspirators immune from prosecution, even after Judge Marra ruled it illegal.[81]

Just as evidence continued accruing during the previous decade's investigation and demonstrated the vast scope of Epstein's operation, undeterred survivors have steadily continued coming forth. As a result, more high-profile figures have been implicated such as Leslie Wexner, chairman and CEO of the parent company of Victoria's Secret, and alleged procurer Ghislaine Maxwell. Survivor Maria Farmer decided to speak publicly about the details of her previously submitted affidavit—that when she attempted to escape Wexner's home from an attack he coordinated

[77] S. Fitzpatrick, 2019. "Jeffrey Epstein accuser Jennifer Araoz sues Ghislaine Maxwell, 3 Epstein staffers," *NBC News*: https://nbcnews.to/32NbBJJ.

[78] A. Goodman, 2019. "Horror at MCC: 'Gulag' Conditions at NYC Jail Were Known for Decades Before Jeffrey Epstein's Death," *Democracy Now*: https://bit.ly/2Pn9mcQ.

[79] B. Pierson, 2019. "Case against Jeffrey Epstein dismissed following his death," *Reuters*: https://reut.rs/3tUaovP.

[80] T. Hays, and L. Neumeister, 2019. "One by one, Epstein accusers pour out their anger in court," *Tampa Bay Times*: https://bit.ly/3gF5ZJv.

[81] P. Mazzei, and M. Baker, 2019. "Florida Judge Denies Bid by Epstein Victims to Nullify Non-Prosecution Deal," *New York Times*: https://nyti.ms/3dQhs7c.

with Epstein, Wexner instructed security guards to impede her. Virginia Giuffre additionally alleged that Epstein trafficked her to Prince Andrew when she was 17 and produced photographic evidence in support, which Andrew merely denied in a remorseless public statement. Although this resulted in Andrew's forced withdrawal from all public duties, victims' attorney Gloria Allred and multiple accusers have demanded that Andrew disclose his connections and appear in US court as a witness to child sex trafficking in Epstein's home. A survivor self-identified as "Jane Doe" publicly announced her civil suit alleging that Epstein raped her when she was 15, while another survivor, Teala Davis, reported repeated rapes and sexual assaults she suffered from Epstein when she was 17, stating, "I was a little girl. It took me a long time to break free from his mind control and abuse."[82] Giuffre commented, "I couldn't comprehend how the highest levels of government and powerful people were allowing this to happen; not only allowing it to happen, but participating in it."[83]

Suspicious activity and evidence of obstruction of justice continued growing. Ghislaine Maxwell disappeared, and it surfaced that, upon arrest, Epstein wrote two large checks to two people who appear in the non-prosecution agreement, which the senior investigations editor of *Miami Herald* suspects was "for the purpose of buying their silence."[84] One of several women journalists who actively pursued the case, Amy Goodman, highlighted strategic legal obstruction and shielding by high-powered people that enabled the traffic in girls, while journalist Julie Brown exposed the "scorched-earth effort" of bullying, intimidation and illegal actions deployed by Epstein and his associates towards anyone protecting or seeking justice for impacted girls, including the police chief and lead detective on Epstein's case.[85] They attempted to mar the reputation of attorney Brad Edwards, one of the earliest (pro-bono) defenders of survivors. Edwards had to sue Epstein for defamation, which Epstein prolonged for years using his financial resources.[86] Prosecutors considered charging Epstein with witness tampering and obstruction of justice, but did not. However, Julie Brown's exposé prevented Epstein

[82] A. Goodman, 2019. "More Women Accuse Jeffrey Epstein of Rape, Sex Trafficking," *Democracy Now*: https://bit.ly/3tLSXxK.

[83] Landler 2019, *supra* note 61.

[84] A. Goodman, 2019. "Jeffrey Epstein Is Dead, But Victims Call for Probes of His Sex Trafficking Ring to Continue": https://bit.ly/3gAzZWU.

[85] Transcript 5, *supra* note 68.

[86] Id.

from continuing his tactics indefinitely because it threatened to produce countless witnesses against him. This pressured him to settle the defamation case and admit to his bullying in the process. The senior editor of *Miami Herald* affirmed that victims' fears of retaliation prevented their speaking about Epstein for years, especially on the record or on camera.[87] A non-prosecution agreement for a child sex trafficker combined with survivors' commonly-shared fears of victim-blaming, shame, retaliation and re-traumatization violate and betray the purpose of the federal Crime Victims' Rights Act to correct decades of erasure and exclusion of victims from the justice process, specifically requiring prosecutors' notification of and responsiveness to accusers.[88]

Conclusion: Determination in the Face of Indeterminacy

The child sex trafficking cases of Cyntoia Brown as a criminalized survivor and Jeffrey Epstein as an unaccountable exploiter illustrate the interconnectedness of different forms of alienation related to the trafficking, devaluation and disposability of human beings based on inequalities of race, class, gender and generational order. Despite great improbabilities of justice for survivors due to intersecting inequalities, these cases demonstrate that expected negative outcomes can be reversed through resistance to alienation via legal activism, social movements, and identification with survivors' experiences. However, such routine negative outcomes should not be expected in a system of justice. Initially, in both cases, law functioned not merely to maintain the status quo, but to further polarize existing power differences between survivors and exploiters. This function was powerful enough to neutralize law enforcement and prosecutorial efforts to serve survivors. Decades of struggle and enduring intimidation, threats and retaliation on the part of survivors, lawyers and journalists turned the tide in these cases. They contended with a legal system capable of producing scandalous levels of retribution and leniency, and which should not require their level of effort and suffering simply to make the system work as it is supposed to. The extraction of such tolls from survivors and claimants suggests the presence of dysfunction and/or

[87] A. Goodman, 2019, *supra* note 78.
[88] 18 U.S.C. § 3771; Transcript 5, *supra* note 68.

corruption in a justice system. The conception of justice for populations rendered vulnerable by socio-economic inequalities entails restitution to an "original position" of the legal imaginary when survivors' victories are much costlier in terms of time, resources, health and psychology than what the law typically affords.

Furthermore, Cyntoia's conviction and Epstein's leniency relied on the adultification of child survivors. The rigidity around trying 16-year-old Cyntoia as an adult contrasts starkly with the blurring of age boundaries in media reports and by lawyers defending Epstein to represent victims as "young women" rather than children or girls.[89] Moreover, survivors contend with a legacy of statutory rape laws that have done little to protect children, especially children of color, while influential legal authorities like Dershowitz argue for further decreasing their protection. Due to historically disproportionate input from male legislators, particularly White male lawmakers of the American South, statutory rape laws—which are part of the legal nexus of sexual assault, sex trafficking and child sex abuse—are overly protective of elite men accused of these crimes.[90] In both instances legal actors disfavoring survivors and/or favoring abusers deployed the longstanding trope that has shaped these laws from their inception: deceptive "young women" attempting to extract money from wealthy men through falsified sexual allegations.[91] Similar tactics of bad characterization have been used against child sex abuse survivors and child victims of police violence, alongside claims of victimhood and discrimination against wealthy White males.[92]

The cases reveal a striking ethical and moral chasm between Cyntoia and Epstein & associates. Cyntoia's immediate admission of her crimes, contrition and empathy for persons harmed, and demonstrable desire for self-change, redemption and to help similarly situated others—particularly "young people, young kids,"[93] stating "their lives are as valuable as mine"[94]—highlights the opposite tendencies of Epstein and his enablers:

[89] L. Francis, "Stop Calling Epstein's Victims Young Women. They're Children," *Fatherly*: https://bit.ly/3nal873.

[90] Javidan 2017, *supra* note 8, 132; see also Dijkstra, B. *Evil Sisters: The Threat of Female Sexuality and the Cult of Manhood* (New York, 1996), for a cultural analysis of the historical era that produced such laws about females.

[91] Bruck, 2019, *supra* note 72.

[92] Id.

[93] Transcript 3, *supra* note 40.

[94] Transcript 1, *supra* note 32.

remorselessness, denialism, and complete lack of concern for survivors, many of whom they have actively tormented. When pressed about his involvement, Prince Andrew conveyed that his friendship with Epstein was too valuable to discard even in light of sexual crimes against children.[95] As with sentencing Cyntoia, the state also remained unapologetic regarding its non-prosecution of Epstein. Acosta defended his handling of the case, claiming, "We believe that we proceeded appropriately."[96]

In both cases, too, perpetrators of sex crimes against girls had histories that had never been reckoned with legally or through social control, even though such histories so often indicate the ability and willingness to violate a multitude of boundaries—spanning from the realm of finance and property to crimes against the person—including against lawful authorities. Whereas elites can have a "customer service" relationship with law enforcement and prosecution, survivors experience criminal justice as lawlessness when cases against exploiters are processed on a VIP track.[97]

In an inequitable society, although law can work more intricately than as a mirror of politics, and politics as a mere reflection of economics, the closer to this formulation the law operates, the closer its functions and outcomes resemble the title of Ian Millhiser's book on the history of injustices inflicted by the Supreme Court of the United States, "…Comforting the Comfortable and Afflicting the Afflicted." The level of difficulty for survivors in seeking justice is determined by the extent to which there is a correlative relationship between law, politics, and economy in reasserting inequities. When this correlation was at its strongest, it allowed for Epstein's illegal non-prosecution agreement, while sentencing a child survivor to life imprisonment. The alienation inherent to the "custodial citizenship" of many survivors and its psychosocial effects, especially political alienation, strengthens this correlation, which social and legal activism attempt to remedy. Alienation borne of social inequities, complex traumatization and systemic injustice come to a sharp point in the under-protection and criminalization of survivors of SGBV and CSEC, which is undergirded by the political over-representation of economic elites, and values of hegemonic masculinism, White supremacy

[95] S. Mansoor, and S. Haynes, 2019. "Prince Andrew Says He Doesn't Regret His 'Very Useful' Relationship With Jeffrey Epstein," *Time*: https://bit.ly/2PdJZKt.

[96] J. Colvin, and R. Lardner, 2019. "Acosta defends Epstein deal amid calls for his resignation," *Associated Press*: https://bit.ly/32GokO5.

[97] D. N. Magliozzi, 2018. *Securing the Suburbs: How Elites Use Policing to Protect their Advantages*, PhD Dissertation, Stanford University: https://stanford.io/3gSRSQU.

and hostility to the rights of children and youth. When understood in social, psychological and legal context, the human trafficking cases of Cyntoia Brown and Jeffrey Epstein become interconnected and clearly illustrate these processes at work and their profound societal implications beyond discrete legal adjudications.

The cases of Cyntoia Brown and Jeffrey Epstein expose structural biases favoring and vulnerable to elite pressure and notoriously difficult for survivors of SGBV and CSEC, especially when committed by elite perpetrators. They illustrate how the legal system is animated by a constant struggle between structural inequities versus forces for justice, rather than functioning as a unified system against criminal actors. This is part of the indeterminacy of law that critical legal theory expounds, and the determination that poverty law and legal activism requires.[98]

[98] Gearey 2018, *supra* note 4.

Karolina Stenlund

Legal Activism in Swedish Labor Law

Introduction

Can the American Critical Legal Studies movement (CLS), with its descendants, be seen as a philosophy of legal activism, making it possible to reduce economic imbalance in society? Adam Gearey scrutinizes this question in his philosophically challenging and meticulously referenced book *Poverty Law and Legal Activism.*[1] The book's purpose is to conduct a radical and creative reading of Marx, Heidegger, Du Bois (and others) and unite their theories with traditional Civil Rights Scholarship as well as American CLS theory. Gearey believes that this philosophical foundation can be used as a stepping stone for British grassroot movements, organizing around poverty and welfare (or what Gearey calls "the new left").

In this paper, I draw on the idea of CLS as a philosophical foundation for legal activism. However, I will challenge Gearey's idea of legal activism as a natural part of "the new left" by showing how the development of legal activism in Swedish labor law has come to be used by the other side of the political spectrum, namely by neoliberal and right-wing intelligentsias. My ambition is to (from my position) expose an immanent problem in the contemporary rights-based activism that is flourishing in the Western World[2] by presenting the Swedish case. However, no concrete solutions to this Gordian knot will be provided. Instead, I want to point out a few of the complicated threads that the larger issue encom-

[1] Poverty Law and Legal Activism – Lives that Slide Out of View, Routledge, 2019.
[2] Kennedy, Three Globalizations of Law and Legal Thought pp. 65–73.

passes. My hope is to fuel the academic conversation about rights based activism and conflicting interests.

Statement

First and foremost, let me be clear on where I stand. I fully support the idea of a community-based law, as a tool for social justice. Legal activism can achieve great things, and be a uniting voice for minorities and oppressed communities. However, I see a problem with the progressive development of the rights argument in courts – a dangerous progress that is very present in the Swedish legal system. I believe that the case based law that emerges from legal activism might result in a greater dependence on official authorities – which is the exact opposite to the activists original aim. Rights based legal argumentation and litigation cannot provide protection from arbitrary forms of oppression. In this paper I explain why I believe this is the case, through an analysis of a Swedish labor case (AD 2017 nr 23), which possibly will be granted leave to appeal before the European Court of Human Rights.

The Theory and Method of Legal Activism

Progressive right and left wing activists share the same agenda.[3] They all want to challenge the social regime in the name of their group interests.[4] Accordingly they also share a common view on law's function and legal method. Contemporary doctrine recognizes four core values that unite legal activists regardless of their political affiliation. The classification, however, is my own.

I. The basic idea of an *existing* "social regime" in society,[5] which is supported and controlled by the everyday anonymous "depersonalized" administrative apparatus that was built during the 20th century.[6]

[3] Kennedy, The Hermeneutic of Suspicion in Contemporary American Legal Thought pp. 110–111; Kramer, The People Themselves p. 244.
[4] Kennedy, The Hermeneutic of Suspicion in Contemporary American Legal Thought pp. 111.
[5] Kennedy, The Hermeneutic of Suspicion in Contemporary American Legal Thought pp. 108–111.
[6] Gearey, Poverty Law and Legal Activism – Lives that Slide out of View p. 26.

II. The idea that there are groups that (in one way or the other) *stand outside* of this "social regime".[7] Furthermore, they are being abandoned by the administrative state. This idea is based upon the theory that the legal administration of everyday life has led to a streamlined society, which is supplanting groups that do not fit in the hegemony of the majority (e.g. blacks under the white supremacy, queers in the heteronormative society, poor living in the capitalist order, and believers in a secular world).[8] In this narrative, the concept of *identity* is central.[9]
III. The will to challenge this order through legal activism.[10] Or as Gearey puts it: "The activism of radical lawyers was rooted in a response to the disabling clientistic relationship between the welfare authorities and the poor".[11]
IV. The idea that victory for the suppressed can be found through legal litigation.[12] Legal activists favor arguments based on the existence of *human rights* – such as the European Convention.[13] (What I call the "rights argument".)

Of course, the big difference between the distinct activist groups lies within their ideological foundations. They represent fundamentally different ideological spheres.[14] In the forthcoming passage I will discuss how this in a broader sense affects the legal development. But first, a Swedish case that illustrates the impact of legal activism.

[7] Finchett-Maddock, Finding Space for Resistance Through Legal Pluralism: The Hidden Legality of the UK Social Centre Movement p. 31 and 37.
[8] Gearey, Poverty Law and Legal Activism – Lives that Slide out of View p. 29; Kennedy, The Critique of Rights in Critical Legal Studies pp. 181–183 and 206–208.
[9] Kennedy, Three Globalizations of Law and Legal Thought p. 66.
[10] Gearey, Poverty Law and Legal Activism – Lives that Slide out of View p. 29.
[11] Gearey, Poverty Law and Legal Activism – Lives that Slide out of View p. 29.
[12] Gearey, Poverty Law and Legal Activism – Lives that Slide out of View p. 30; Kramer, Popular Constitutionalism pp. 242–244.
[13] See H Andersson, The Tort Law Culture(s) of Scandinavia pp. 224–229, Ansvarsproblem pp. 544–542; Ersättningsproblem pp. 828–832 for a discussion on the development in Swedish tort law with regard to the influence of the ECHR.
[14] An easy way to reach this conclusion can be by comparing the values found on the websites of the activist groups. See for a couple of Swedish examples http://centrumforrattvisa.se/om-oss/, https://crd.org/sv/var-historia/ and https://manniskorattsjuristerna.se/om-oss/.

The facts of the midwife-case. AD 2017 nr 23

The facts of the case were as follows: A prospective midwife applied for work at various women's clinics within an (publicly controlled) administrative county. When applying, the midwife informed the employers that she was unable to participate in abortions because of her religious beliefs. Because of this, her applications did not lead to any employment. She filed a lawsuit against the Swedish county for direct and indirect discrimination under the Swedish Discrimination Act, as well as violation of the European Convention of Human rights article 9 (freedom of thought, conscience and religion), article 10 (freedom of expression) and article 14 (anti-discrimination). The Swedish Labor Court (which is the final court for employment cases in Sweden with representatives from both sides of the labor market) rejected her application in total. According to the opinion, her refusal to perform all work tasks could not be excused with reference to her religious belief. Consequently, the court found that no direct discrimination had taken place. When considering the indirect discrimination the court found that the employer had applied a standard that appeared to be neutral, but was especially unfavorable for people with a certain religion. Prima facie the midwife had been discriminated – albeit indirectly. However, according to the Swedish Discrimination Act, the court has to strike a balance between the "neutral" standard and purpose behind it. Furthermore, according to the act, the means to achieve the purpose must be *appropriate*.

The court found that the main purpose behind the standard was the welfare right to good healthcare.[15] The court further recognized that good healthcare is provided at the women's clinic under the supervision of the employer. According to the court, this means that the employer's supervisory authority[16] will represent both the limit and the scope of "good healthcare". At a theoretical level, this indicates that the employer's prerogative cannot be separated from the individual's right to good healthcare. The scope of good healthcare and the limits of the employer's

[15] For a brief introduction to the historic development of good healthcare in Sweden see Zillén, Hälso- och sjukvårdspersonalens religions- och samvetsfrihet pp. 46–47. See also Wilhelmsson, Varieties of Welfarism in European Contract Law.

[16] For an analysis of the employer's right of supervisory authority in the concrete case, see Zillén, Vårdvägran – några arbetsrättsliga implikationer pp. 116–118.

prerogative are furthermore treated together in the opinion, as parts of the question of the midwife's work duty.[17]

In addition to this, one can notice that the "spirit of consensus"[18] also can be said to be one of the explanations behind the outcome of the case. With "the spirit of consensus", I am referring to the Swedish historical agreement between the unions and the employers, according to which work management and peace in the labor market was ensured through collective agreements.[19] The collective agreements are determinative of the individual employment contract.[20] The rationality of the consensus thus supplants the individual's claims of special treatment. Because of that, the Labor Court considered the applied standard for employment as a midwife (taking part in abortions) as both appropriate and necessary for achieving the purpose of good healthcare. Her application was rejected.

The Labor Court's Unique Position and It's Methodological Implications

As mentioned above, Swedish labor law is based on a general idea of consensus between the labor market parties. The theory and practice is founded on an idea of mutual respect. For a long time unions and employers have had self-government as a common goal. Conflicts between the parties were resolved by collective agreements – leaving the parliament as a legislative body outside the power to regulate the employment market. When a dispute arises over the wording of the collective agreements, the Labor Court decides the case. Of course, this makes the Labor Court's opinions somewhat different from other final courts opinions. For example, when examining the midwife case, you immediately get struck by the many arguments and statues that are jumbled up in the court's opinion. Moreover it seems like little or no attention is payed towards the hierarchical differences between distinct sources of law. The reason behind this, I believe, is found in the court's strong focus on dis-

[17] Hellborg, Diskrimineringsansvar p. 276, 323 and 328.

[18] In Swedish "samförståndsandan". It has also been translated to "The spirit of Saltsjöbaden" in Schmidt, Law and Industrial Relations p. 13 and "The Swedish Labour Model" in Eklund, Sigeman and Carlson, Swedish Labour and Emplyment Law p. 15.

[19] See Glavå & Hansson, Arbetsrätt pp. 27–32; Källström; Sigeman & Sjödin, Arbetsrätten – En översikt pp. 16–25.

[20] See 1 kap 4 § medbestämmandelagen. (Collective Bargaining Agreements Act.)

pute resolution. The court seems to be more interested in conciliating the dispute before it, than providing greater legal certainty.

However, it is of interest to closer examine the arguments that the midwife raised, since they illustrate how (human) rights based argumentation is working in practice.

The Midwife's Cause of Action

The midwife argued that the court should make an individual examination of a possible infringement of article 9, 10 and 14 of the ECHR. She argued that the harm she had suffered was not only to be regarded as discrimination according to the Discrimination Act, but also as individual violations of the ECHR.

She also claimed that article 9.1 in the convention draws a distinction between *freedom of religion* and *freedom of conscience*, and that the latter cannot be limited under article 9.2. Therefore it was tactically important for her to see religion and conscience as different types of human rights. But it was also important to base the argumentation on the ECHR, since the discrimination act is not specifically designed as a human rights-act. It is a (albeit EU-based) normal Swedish statute, guaranteeing protection from discrimination and identifying who's responsible. (The possibilities of compensation are also regulated.) Semantically, it is not formulated in terms of rights.

As already mentioned, the Labor Court did not concur with the midwife. With reference to the subsidiarity principle, none of the articles in the ECHR was further tested. The Swedish Discrimination Act was considered to harmonize with the convention. However, the Labor Court considered the convention indirectly when interpreting the discrimination act. (This was done in a very curious way – and can be seen as an expression of the polycentricism that contemporary legal culture is now influenced by. However, this subject goes beyond the scope of this article.)[21]

[21] Selberg & Sjödin, Den polycentristiska arbetsrätten pp. 13–46.

The Role of "Outside" Ideological Intelligentsias in the Midwife Case

The midwife has since decided to petition the European Court of Human Rights, claiming that Sweden has violated article 9 of the ECHR by not giving her an opportunity to work as a midwife due to her Christian belief. She claims non-pecuniary damages.[22] The nonprofit Christian law firm "Skandinaviska Människorättsjuristerna"[23] is acting as counsel in the case. In turn, they are supported by the international lobby organization Alliance Defending Freedom (ADR).[24] The latter is an American Christian nonprofit organization working worldwide with the outspoken purpose to advocate for religious freedom and preserve "the right of people to freely live out their faith".[25] According to their tax income form from 2018 they have used $ 822 536 for "Human Rights Legal Work" last year, only in Europe.[26]

It is not yet[27] decided whether the European Court of Human Rights will grant leave to appeal or not. However, the prospects for raising the case for review are not bad – the case is unique and the situation has never been tested.[28] The purpose of this text however, is not to examine the substantial question of the case: Whether the midwife is entitled to invoke freedom of conscience[29] for the purpose of obtaining an em-

[22] See H Andersson, Ersättningsproblem pp. 614–628, for a discussion on the development of non-pecuniary damages in Sweden.

[23] Meaning "Scandinavian Human Rights Lawyers" in English.

[24] http://www.adfmedia.org/files/GrimmarkBrief.pdf. http://www.adfmedia.org/News/PRDetail/9796. https://adfinternational.org/detailspages/press-release-details/sweden-faces-human-rights-problem. https://adflegal.blob.core.windows.net/international-content/docs/default-source/default-document-library/resources/media-resources/europe/linda-steen-v.-landstinget-i-j%C3%B6nk%C3%B6pings-l%C3%A4n/linda-steen-sweden---robert-clarke-interview.pdf?sfvrsn=6.

[25] https://www.adflegal.org/about-us.

[26] https://pdf.guidestar.org/PDF_Images/2014/541/660/2014-541660459-0b80fce4-9.pdf.

[27] Fall 2019.

[28] The closest connecting cases are cases Eweida and others v. U.K and R.R. v. Poland no. 27617/04. (One can say that they differ a lot from the Swedish case.)

[29] See Moyns, The Last Utopia p. 18, on the notion of freedom os conscience as a "new" form of right, iviolable by the state.

ployment.[30] Instead, the rest of the article will be discussing rights based court activism in general. To me it is clear that the legal activism used by these conservative Christian organizations aims to take the Swedish law in hand – forcing it to take a turn towards a more pro-life direction. Further, this theme is closely connected to another issue, which Gearey examines in his book:

Is legal activism the right tool to use in the process of helping poor and reducing social and economic imbalance in society?

The Rights Based Argument

When analyzing the case it is obvious that references to *human rights* play a central role in the midwives argumentation. The reason for appealing for a right, are of course many. On a technical level the rights based argument has many advantages, which are useful for legal activism. First and foremost, rights cannot be reduced to a mere "value judgment" stating that one outcome is better than another. It has both subjective and objective immanent components. (Given that facts are supposed to be objective and values subjective.)[31] This is manifested in the fact that only subjects can be entitled to human rights but the court is the forum where the rights should be realized. When the midwife claims that she has a human right to conscience, she argues that her subjective right objectively exists within the law. Further, rights are supposed to exist ontologically – both inside and outside of the juridical spectrum.[32] Kennedy has described this in a sharp way:

> "In classic Liberal political theory, there was an easy way to understand all of this: there were 'natural rights', and We the People enacted them into law. After they were enacted, they had two existences: they were still natural, existing independently of any legal regime, but they were also legal. The job of the judiciary could be understood as the job of translation: translating the preexisting natural entity or concept into particular legal rules by examining its implications in practice."[33]

[30] For an analysis of the question see Fahlbeck, Barnmorskedomen – Politiken vann, juridiken förlorade pp. 218–227; Zillén, Conscientious Objection to Abortion in Sweden. A commentary on the Swedish Labour Court Grimmark Case, AD 2017 nr 23.

[31] Kennedy, The Critique of Rights in Critical Legal Studies p. 184.

[32] Kennedy, The Critique of Rights in Critical Legal Studies pp. 184–186.

[33] Kennedy, The Critique of Rights in Critical Legal Studies p. 186.

This leads to the conclusion that the case does not consist of mere question of rule application.[34] The midwife argued that because of the lack of protection of her religious belief, the court should create a remedy for her violated right by rule-making.[35] In AD 2017 nr 23, one side of the conventional rights argument is legal, since it is based on the ECHR, which is part of the legal system (incorporated in the Swedish law). The other side is political and normative, since it alleges how the "outside" right should be introduced (by interpretation) in the legal system. She claims that the (both the Labor Court as well as the European) court's role is to identify and protect her "outside rights" through the legal system. That should be a case, as a result of the fact that rights are neither mere value arguments nor entetites outside of the juridical spectrum. Technically, this is done by claiming damages. If the court should find the county liable, her right would be guaranteed.

Hypothetically, the next argument should be that the midwife's group right (freedom of religion and freedom of conscience) is connected to the interests of the whole Swedish society. Please note though, that this is not explicitly stated in the case. However, it is not uncommon to hear legal activists saying that the very purpose of human rights is to serve as minority protection in the hegemony of the majority; in the long run this will deepen democracy.[36] This aligns to the above-mentioned list. Further, according to this view there is little difference between legal argumentation and legislative interpretation. They both serve democracy as a whole, and not agreeing on the value of rights makes you "wrong – rather than just selfish and powerful"[37].

Rights are vague, indeterminate and flexible. The rights based argument can thus be used by almost anyone. The argument is available to all. It is clear that liberal, socialist as well as conservative intelligentsias can argue that their unique group interests should be recognized in law – which hopefully this case also shows. But by framing the group interest as a question of human rights, the activist will give the courts the power to decide whether they should be recognized or not. Do we want to de-

[34] Kennedy, The Critique of Rights in Critical Legal Studies pp. 185–187.

[35] AD 2017 nr 23 p. 25. "I avsaknad av ett effektivt rättsmedel och för att undvika konventionsbrott, ska domstolen därför genom normutfyllnad skapa ett rättsmedel".

[36] Epp, The Rights Revolution pp. 4–5; Jonsson, Juridical Review and Individual Legal Activism: The Case of Russia in Theoretical Perspective pp. 175–188.

[37] Kennedy, The Critique of Rights in Critical Legal Studies p. 188.

pend upon the good will of the adjudicators, when social injustice is to be reduced?

Conclusion

In *Poverty Law and Legal Activism*, Gearey provides highly insightful analyzes of the philosophical foundations of legal activist work. The question of the lawyer's ethical role in society is of course of mayor importance to lift. An ethically conscious lawyer must, according to me, bear in mind the immanent vagueness of the rights argument. In all legal activism, one has to remind oneself of the risk of pushing the rights argument too far, as other groups, with other ideological interests based on other identities, may use it against the group you initially wanted to help. There is no sharp line between identity politics and institutional change of society.

Pierre Schlag*

Critical Legal Agency

Adam Gearey has a project.

He wants to reread U.S. critical legal studies through the lens of class crits, lat crit, and critical race theory. Adam is seeking to reinvigorate the spirit that animated the early critical legal studies of the late 70's and early 80's.[1]

He is prepared (extremely well-prepared, one might add) to do this through extraordinary means. His book, *Poverty Law and Activism*, weaves an astounding array of narratives that combine an eclectic cast, ranging from Hegel to Heidegger, Stringfellow to Buber, Baldwin to Farley, Sparer to Gabel, Michelman to West. Making appearances throughout will be disparate currents of leftist thought and activism from the New Left, SDS, the civil rights movement, La Raza, and more. The aim is to invigorate something worthy of the name "critical theory" in law.

The book can also be viewed from a different angle as a sustained meditation on the plight of the poor and the tribulations of poverty law and poverty activism. Indeed, the book sustains our attention on the invisibility and precarity of the poor before the law, lawyers, and everyone insulated from their lives. The question of how to relate to the poor is one that poverty lawyers have recognized and explored for some time—it is a relation fraught with difficulty because not only does the law in all its formal exigencies frustrate the forging of an authentic and reciprocal relation, but for anyone seeking to help the poor, the question immediately poses itself: how to approach the asymmetry in position and sta-

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[1] A. Geary, *Poverty Law and Legal Activism: Lives That Slide Out of View* (New York, 2018), p. 1–2.

tus—without re-enforcing the asymmetry or turning it into a license for self-indulgent neurosis. The first is the paradox of victimization (present in all sorts of relational contexts) in which the acknowledgment of victimization before the law has both the capacity to recognize the dignity of the victim as well as to rehearse victimization, yet one more time. The second is the characteristic orientation of the "aristocratic temperament" in which the dominant party "sees its glory in bestowing goods upon others…."[2] Adam Gearey wishes to move to beyond such forms of "arrogance and selfishness," to a "being with" the poor—one that involves a shared sense of the social good and that recognizes, of course, that the asymmetry in position and status does not run just one way.[3]

Here in this brief essay, I will focus on Geary's work from the first angle—the project he describes succinctly in the first paragraph of the book:

> Poverty Law and Legal Activism: Lives that Slide Out of View concerns the origins and fates of Critical Legal Studies (CLS). Against the usual conventions, the book presents CLS as a philosophy of activism, located on a particular fault line that runs through American radical culture from the new left to the welfare rights movement. The central argument is that the politics of the movement are essential if we want to grasp a peculiar continuation of CLS, tentatively called critical legal theory.[4]

In passing, however, it bears noting that Gearey's focus on the poor, sustained throughout the book, allows him to frame the encounter with early cls in a very non-conventional way. It is not the familiar theoretical protagonists (Morton Horwitz, Duncan Kennedy and Roberto Unger) that will play the leading entry point into cls, but rather a less well-known figure, Ed Sparer, the poverty lawyer. And it is not the well-

[2] Geary, *supra* note 1 at 157. M. Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations" (1987) *Harvard Civil Rights-Civil Liberties Law Review*, 22 p. 323, 324–26 (1987).

> [I]magining oneself black and poor in some hypothetical world is less effective than studying the actual experience of black poverty and listening to those who have done so. When notions of right and wrong, justice and injustice, are examined not from an abstract position but from the position of groups who have suffered through history, moral relativism recedes and identifiable normative priorities emerge.
>
> *Id*. at p. 325.

[3] *See* text accompanying note 34–36 *infra*.

[4] Geary *supra* note 1 at 1–2.

known assembly of early cls thematics—contradiction, indeterminacy, incoherence and legitimation—that will hold center-stage, but rather the "drama of recognition" between self and other in the shadow of the law.[5]

Stated at an Olympian level of generality, the cls intuition on this "drama of recognition" was that there was some important linkage between the wooden and often reified[6] formal discourse and formal social relations of law and law school on the one hand and the apparent blockage of radical or progressive legal change on the other. For many cls thinkers, this formal discourse and its corresponding social relations instituted what was thought to be not only a false vision of social life and law (how both worked and not) but also helped to reproduce and distribute this false vision together with its ethos of "false necessity."[7] (Call this, for the sake of a name, "the cls intuition.")

[5] The antecedents of this drama have a long and storied history going back through Levinas, Fanon, de Beauvoir, Sartre, Du Bois, Hegel, among others.

[6] Following Adam Geary, I will use the term "reification" but without providing the attention that term deserves. It is an elliptical term, wildly polysemic, and resistant to analysis (lest it be reified in turn). For some intimation of the challenges, see, T. Bewes, *Reification or the Late Anxiety of Capitalism* (New York, 2002). As if all this were not challenging enough, the relation between law and reification is itself perplexing: I am not sure what is left of law if we are to subtract reification. To be sure, some forms of reification are plainly mistakes that the law and legal professionals would do well to discard. Other reifications, however, seem so involved in the very identity of law itself, such that (mistake or not) it would be difficult to speak of law without them (kind of like trying to speak about a military without weapons, or religion minus spirituality.) So I would rather not delve into reification at this point. For a bare hint of these unresolved difficulties in law, see P. Schlag, "How to Do Things to Do With Hohfeld," (2015) 78 *Law and Contemporary Problems*, p. 185, 231–33.

[7] As Robert Gordon summarized the political implications:

> Among the many forces, political and economic, that reinforce the status quo there is a densely woven web of cultural assumptions wrapped around legal discourse, that say to lawyers: You cannot be a professional, you cannot be a realist, you cannot faithfully serve your clients and the premises of the legal system, and at the same time hope to contribute to any kind of progressive and transformative politics that would help to make this a more democratic and egalitarian society. The lessons lawyers learn from their practices are, in a phrase or two, lessons of false legitimation and false necessity. They learn that the way things are in society is about as good as they can be; and to the extent they aren't they can be fixed through marginal shifts in conventional arrangements—a little more or a little less regulation.

R. Gordon, "Some Critical Theories of law and Their Critics," in D. Kairys, ed., *The Politics of Law* 650 (New York 1998) p. 641, 650–51.

Now this, as Adam Geary shows (and as I will echo), was not an unproblematic way of making the point. For now, however, the key point is that *this was* very much a key part of the pantheon of early cls arguments. In the decades that followed, this cls intuition did not feature as prominently in discussions (whether critical or celebratory) of cls as the other themes mentioned above. One likely reason is that one of the most forceful and widely circulated formulation of the cls intuition (there were several formulations) was recanted by Duncan Kennedy not long after issuance.

Here is Duncan Kennedy's formulation as stated in his famous 1979 article, *The Structure of Blackstone's Commentaries*:

> Most participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it. Others (family, friends, bureaucrats, cultural figures, the state) are necessary if we are to become persons at all—they provide us the stuff of our selves and protect us in crucial ways against destruction…
>
> But at the same time that it forms and protects us, the universe of others… threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good. A friend can reduce me to misery with a single look. Numberless conformities, large and small abandonments of self to others, are the price of what freedom we experience in society. And the price is a high one. Through our existence as members of collectives, we impose on others and have imposed on us hierarchical structures of power, welfare, and access to enlightenment that are illegitimate…
>
> The kicker is that the abolition of these illegitimate structures, the fashioning of an unalienated collective existence, appears to imply such a massive increase of collective control over our lives that it would defeat its purpose. Only collective force seems capable of destroying the attitudes and institutions that collective force has itself imposed. Coercion of the individual by the group appears to be inextricably bound up with the liberation of that same individual…
>
> Even this understates the difficulty. It is not just that the world of others is intractable. The very structures against which we rebel are necessary within us as well as outside of us. We are implicated in what we would transform, and it in us.[8]

[8] D. Kennedy, "The Structure of Blackstone's Commentaries," (1979) 28 *Buffalo Law Review* 205, 211–12.

This is the "fundamental contradiction." It was formally recanted by Duncan Kennedy in 1984—though as Duncan Kennedy explains "for strategic reasons."[9]

As for conventional legal thinkers, the cls intuition was supremely unappealing.

Why? Well, because basically, the argument came down to something absolutely unacceptable in terms of the professional self-image of conventional legal academics at the time. What it came down to was the view that the discipline of law—what had been called then, "the thrilling tradition of Anglo-American law"—with its vaunted objectivity, neutrality, and determinacy was to be understood as little more than the (contingent) projection of the collective social construction of the professional legal self on the plane of doctrine.

For the conventional legal academic at the time, such a view was utterly unacceptable.[10] Indeed this view cast things exactly backwards: the cls claim effectively inverted the widely shared image of the professional legal self as subordinate to a "binding law." It was this latter image of sub-

[9] My view is that the recantation was probably a good thing because the fundamental contradiction had become formulaic—and was serving among cls thinkers in the main as an organizational principle for one doctrinal article after another. "Look, there's the fundamental contradiction." "Look, there it is again." This was not surprising: If you present contradictions or contraries at *a sufficiently abstract level*, it becomes easy to show that the stuff of the world (or, in this case, the stuff of law) is organized in those very same terms: it works with just about any sufficiently abstract and suggestive pairing: hot/cold, up/down, raw/cooked. But really, after the first fifty demonstrations, the marginal returns on this sort of work ("applying the theory to the law") decline rapidly.

Now, this might seem on first impression like a harsh observation, but realize that it *is not a criticism* of the fundamental contradiction itself. In my view, there were a lot of interesting things that *could have been done* with the fundamental contradiction (by people sympathetic to Kennedy's account). Many of these things were not done. I wish I had thought of them back then. (I didn't.) But none of this means that the fundamental contradiction is itself flawed as an entrée into law and legal thought. What it does mean is that without attention to the difficulties highlighted above, the fundamental contradiction can easily yield a short-circuit.

[10] For those interested in sampling the intensity the disputes between cls adherents and their critics, one place to start is the collection of views articulated in Issue 1 of the 1985 Volume of the Journal of Legal Education. The exchange is conveniently reproduced at https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2158&context=facpub. Another place to start is by perusing Issues 1 and 2 of the 1984 Stanford Law Review Symposium on Critical Legal Studies which also manifests a certain degree of reciprocal antagonism.

ordination to the law (what Owen Fiss later tried to defend by invoking "the *disciplining* rules" and the "*authority* of the interpretive community") that enabled conventional legal academics to do their work.[11] Without the integrity of a text of law that could be made to yield "binding law," it would become impossible to engage in those classic legal operations—namely, to apply and interpret the law in an objective and neutral manner. The cls claim thus had to be wrong. It just had to be. It appeared to be placing the very sources of status and value of the *persona* and *knowledge* of the law professor in question.[12] This was thus one "problem of the subject" that conventional law professors wished to avoid altogether. They wished not to deal with it and most succeeded.

In all this, there was yet another "problem of the subject" that conventional law professors wished to avoid. If they had to talk about their own modes of cognition, the phenomenology of their own decision-making, their own habits of reasoning or interpretive endeavor, they would be on the terrain of the subject and what's more, something truly ghastly, their own. They would, in other words, have to be talking about themselves—their own cognition, their own frames, their own aesthetics, their own moral and political inclinations and doing so in idioms utterly unfamiliar.

In short, they would be dealing with all those aspects of law that legal academics know little about (and for which their standard methods and their disciplinary knowledge) are remarkably unsuited. Indeed, whatever the advantages of a law school education may be, elaborate cultivation of emotional intelligence and education in the complexities of subjectivity are probably not foremost among them.

On the contrary, those topics that engage the subject and subjectivity in law, are those which are also the most under-examined and under-theorized. The topics as they are conventionally described:

Judgment
Decision
Perspective
Aesthetics
Emotion
Professionalization

[11] For discussion of this strategy, see P. Schlag, "The Problem of the Subject" (1991) 69 *Texas Law Review* 1627, 1662–79.

[12] See, e.g., G. Peller, "The Metaphysics of American Law" (1985) 73 California Law Review p. 1151 (passim).

Disciplining
Authority
Etc. etc. etc.

We can, of course, find examples of people writing on these topics. But in law, these terms designate suppressed and devalued topics.[13] And again addressing such topics is not exactly what legal thinkers have been trained to do.

Moreover, the cls intuition was very much a serious threat to the professional self-image and knowledge-base of the conventional legal academic at the time.[14] The stakes appeared to matter in an ironically very personal way. Calvin Trillin suggested as much in a New Yorker article where he intimated that, for the orthodox legal academics, the stakes were nothing less than whether or not they had wasted their academic lives.[15]

No small change—that.

And yet dead on.

Oddly (or not) cls thinkers did little *at the time* to assuage orthodox jurists and scholars that the stakes were anything less. It is not at all clear to me whether the leading cls thinkers at the time understood this or not.

Adam Geary wishes to pick-up and re-engage with this moment not to revivify it, but to take what the moment has to offer and move past it. Before turning to Adam Gearey's account, let's look more closely at the cls intuition as succinctly articulated in a 1998 article by Robert Gordon.

Self/Other and the Politics of Law

In one account of critical legal studies, Robert Gordon gives a succinct summary of the cls intuition. I break it up into thirds. Here is *the first third* of the intuition:

[13] See, e.g. Schlag *supra* note 11.

[14] This more than any sort of "hard left" project (hardly plausible in the U.S. at the time) was why so many conventional law professors in the U.S. legal academy reacted so strongly in opposition. (To be sure the "hard-left" ethos or posturing probably did not help.)

[15] Calvin Trillin, "Harvard Law," *The New Yorker*, Mar. 26, 1984, at 53, 83. (chronicling the rise of Critical Legal Studies at Harvard Law).

> "This process of allowing the structures we ourselves have built to mediate relations among us so as to make us see ourselves as performing abstract roles in a play that is produced by no human agency is what is usually called (following Marx and such modern writers as Sartre and Lukacs) reification. It is a way people have of *manufacturing necessity…*[16]

Whether analyzed under the rubric of reification, alienation, false necessity, social contingency, social construction, or bad faith, the core idea was that we as people, professionals, law students, jurists and legal thinkers keep secreting in our work, social relations, institutions—indeed, in our very selves modes of alienated relations, thought and being.

This, to say it again, is just the *first third* of the insight.

Powerful as it was, this part never came into sharp theoretical focus. And while there are many reasons for this, it is important, for those who are interested in cls to understand and appreciate at least one reason why. Standard-form academic precision *was not* the principal point. The cls intuition *was not*, as we so often see a kind of professionalized and detached academic left commentary on law—it was instead, *at its best in the early days*, an activist political project aimed at changing the workplace—specifically, the law school.

So how and why was this cls intuition so threatening to conventional legal thinkers? Here we need to skip the second third and move straight to the *last third* of the animating insight. Gordon writes:

> "Perhaps a promising tactic, therefore, of trying to struggle against being demobilized by our own conventional beliefs is to try to use the ordinary rational tools of intellectual inquiry to expose belief structures that claim that things as they are must necessarily be the way they are. There are many varieties of this sort of critical exercise, whose point is to unfreeze the world as it appears in legal discourse, or economic discourse, or just everyday common speech, as a "system" of more or less objectively determined social relations; and to reveal it as (we believe) it really is: a loose, fluid, contingent, various miscellany of practices that point toward many alternative ways of organizing social life."[17]

So viewing the two thirds above together, the cls intuition was to link the experience of the self in law school, and perhaps in law and legal

[16] Robert Gordon, 'Some Critical Theories of law and Their Critics,' in D. Kairys, ed., *The Politics of Law* 650 (New York 1998) p. 641, 650.

[17] Gordon, *supra* note 16 at p. 650.

institutions generally with political projects. The idea, was that law in its abstraction, distanciation, and formalization effectuated a kind of cloistered professional self that was itself disabling in terms of its possibilities for genuine social connection, progressive political action, aesthetic and intellectual realization. The key task then was *not* simply to *reveal this condition* in some detached theoretical text, but to trace the day to day production of this self and to find practical and theoretical ways to undo it. In other words, at its best, this was a variation on the feminist tenet that "the personal is political"—that to understand the politics of law, one needed to start at home. That in turn would have something to do with the self, the subject, and something to do with law school—its training, pedagogy, scholarship, rituals, hazing ceremonies and on and on. "Home" in that last sentence will turn out to be problematic—as, will self and subject. (Later on all that.)

This leaves, of course, the question of *the connection* between the first and last third. So what is or what are the connections? Through what means, by what method, are the structures of reification to be undone?

Here we need to pick up the language that I deliberately left out above—the middle third, as it were. It is there we find the ostensible connection between the reified formal structures on the one hand and the politics of law on the other. We pick up with the end of the first quote. Gordon writes:

> "It is a way people have of manufacturing necessity: they build structures, then *act as if* (and genuinely come to believe that) the structures they have built are determined by history, human nature, and economic law."[18]

Notice here the way Robert Gordon links the structures of reification that people have built to the way they act and to what they believe. Gordon, says (true to early cls orthodoxy) that "people act *as if*…the structures they have built…" In other words, the linkage between the structures, on the one hand, and what people do and believe, on the other hand, is not itself a structure (or anything like a structure). It is instead, a way of *acting as if*. This *acting as if* arguably conceals some problems and challenges because it makes it seem as if (a deliberately chosen phrase) people could just stop acting as if. Indeed, the "*as if*" formulation implies that

[18] Gordon, *supra* note 16 at p. 650.

if people could just wake up (as if from a bad dream) they wouldn't have to act "as if" at all.

But that, of course, is to reproduce the agency-structure problematic within the very attempt that Gordon and cls was generally trying to move beyond. It is to presume in the self, *ab initio*, the potential agency to dispel and dissolve the paralyzing and cloistering structures of reification. Now, I wish to be clear: I am not making the point that Gordon and others are wrong. They may be, but that is not my point. I am focused on something else: my point is that this way of speaking about what is happening ("people act as if") invites us to gloss over this crucial moment far too quickly.[19] This moment—*the connection* between the structures of reification and the politics of law—is neither trivial nor transparent. And the problem here is not the activity that Gordon recommends doing (critical theory). The problem lies in an understatement of the power of the reified structures. Here, I think Mika Viljanen is helpful in his elaboration of ontological politics per Mol and Moufle. I quote from Mika Viljanen:

> "[O]ntological politics really drives home the fact that legal concepts and parlance have something to do with the real. Law shapes and defines the real. Lawyers should not be shy or ignorant of their powers…. Law contributes to making up the real. In this sense, the notion of ontology bears an affinity to that of ideology, but it adds important connotations lost if we just resort to talk about mere ideologies. Critical legal studies scholars were vehement in pointing out that legal doctrines and rule interpretations often involved ideological choices. Law contained ideologies, they argued.

[19] It takes sides in a voluntaristic way in some dualisms—to wit, idealism/materialism, mind/body, subject/object—that *are themselves recursively nested on both sides of these very same divides in ways that are not self-evident nor stable across time and context*. This is a problem with most discussions of agency-structure issues: the attempt to articulate the relation cannot do so without encountering the very same binary in the very effort at articulation. For elaboration of this conception of "nesting," see D. Kennedy, "The Semiotics of Legal Argument" (1991) 42 Syracuse Law Review 75.

Robert Gordon's account (which is true to early cls orthodoxy) makes it seem that by working on the side of idealism, mind, and subject, the structures of reification can be left behind. But here's the thing: how do we know whether, when, how, for how long in any given context the structure/agency *relations in place* are regulated by structure or by agency or some hybrid thereof? Or to put it in plain English: the problem is that the cls intuition often made it seem all too easy—as if (a deliberate word choice) false necessity could be dispelled through intellectual critique and the shedding of some stifling social conventions.

> In order to formulate a norm, one had to pick an ideology, or a tacit social theory. The goal of the ontology speech is largely the same. What the talk about ontologies that I propose may add to the 'ideology speech' is a heightened awareness of the gravity of legal speech acts.
>
> An ontology is not an ideology. An ontology is a world, not some technical blueprint that stays aloof and disconnected from the real. *Law not only reflects a false consciousness, it enacts them, makes them real. A legal concept with its concomitant ontology does not – as an ideology might do – mask the real reality, it is a reality that is enacted. The legal world matters, if more than it would do, because it enacts and performs a real world."*[20]

This does not defeat the early-cls project, but rather supplements and complicates it and in a way that presumably ought to be welcome in cls circles. The question opened up above is: how do the ideology/ontology ratios play out in any given instance, any given context.

It is important here to recognize and note the ways concretely in which the entourage of law school, legal materials, legal pedagogy, legal thought are organized in ways that derail the professional legal subject from recognizing all this. I have tried, in the past, to describe just how it is that law school, legal materials, legal pedagogy, legal thought (indeed entire schools of jurisprudence) help construct and re-enforce a professional legal subject that is *falsely empowered* (and thus subject to a false necessity). But this work into this problem of the subject in the context of legal professionalism is only a beginning. And now, given that liberal legalism has become rapidly colonized and displaced by a completely different form of governance (i.e., neoliberal legalism) this kind of inquiry has become all the more urgent.

Adam Gearey's Narrative

In *Poverty Law and Legal Activism—Lives that Slide Out of View*, Adam wishes to return to the primal scene of the early cls intuition. And *not* in a nostalgic spirit either. He perceives that this was an important moment (I agree). He also perceives that something was missed or perhaps not pursued with sufficient vigor. (I agree). Adam delivers these points less as criticism, so much as an effort to reconnect with that moment and recuperate and rework its possibilities. (Good idea.)

[20] M. Viljanen, "Law and Ontological Politics," (2009) 6 *NoFo* 5.

Let's signal right away what will be different in Geary's account from the original basic cls intuition. Rather than focusing on the fulfillment of a desire for recognition or the dissolution of reified or alienated relations, Geary will pitch the challenge in terms of a continuous struggle—the struggle of "being with" others amidst alienated relations—some of which can be dissolved (and ought to be) and others not.[21]

As his early cls interlocutor, Adam Gearey chooses Peter Gabel who was among the most straightforward, elaborate, and passionate in laying out the character of the drama self/other encounter at the heart of the cls intuition. Gabel's early work was clearly influenced by the early Jean Paul Sartre. That particular entry point, though, was a serious limitation because insofar as the desire for recognition by the other was concerned, Sartre did not offer much in the way of copacetic solutions. For the Sartre of *Being and Nothingness* (1943) there is almost no exit from the oscillation between the alternating attitudes of sadism and masochism towards the other. In sadism, the self dominates the other by treating the latter in the mode of an object, the in-itself. In masochism, the self subordinates himself or herself by recognizing the other as subject, as for itself.[22] This is not a solution—this is a Cartesian restatement of the Hegelian master-slave relation in which the drama of mutual recognition founders as the master seeks recognition from a slave who (being a slave) cannot grant recognition freely. Both Hegel and Sartre's accounts are extremely telling as philosophical narratives of (sorry) human relations. But to the degree that the narratives are telling, they are not all that auspicious.

[21] As Geary says, "Alienation is immanent to consciousness. One might posit a necessary alienation that is actually the condition of thought, the social form of consciousness that is bound up with the realisation of the self. Necessary alienation can be opposed to bad alienation." Gearey, *supra* note 1 at p. 8.

[22] In *Being and Nothingness*, Sartre writes:

> [T]he very being of self-consciousness is such that in its being, its being is in question; this means that it is pure interiority … Its being is defined by this: that it is this being in the mode of being what it is not and of not being what it is. Its being, therefore, is the radical exclusion of all objectivity … In short the for-itself as for-itself can not be known by the Other. The object which I apprehend under the name of the Other appears to me in a radically other form. The Other is not a for-itself as he appears to me …

J. P. Sartre, *Being and Nothingness* (New York, 1956), p. 326–27. In Sartre's *La Critique de la Raison Dialectique*, the resolution of this drama is taken out of the realm of the ontological given and referred to an imagined future history (one which today is no longer credible). J.P. Sartre, *La Critique de La Raison Dialectique* (Paris 1960).

But Gabel does not entirely follow the early Sartre. Nor does he clearly follow the later Sartre of *La Critique de la Raison Dialectique*. *La Critique de la Raison Dialectique* had a more hopeful intellectual moment—notably the theorization of the "groupe en fusion." Peter Gabel, by contrast, had a profound faith in sundering reified social relations through the overcoming of our inauthentic tendency to fear and hide from the other.

As Gearey described it, reading from an article addressing poverty law:

> "Gabel and Harris saw the "source" of alienation as socially hierarchical forms of organization. Hierarchy prevents people from achieving authenticity through "the sustained experience of … egalitarian social connection" leaving them atomised and isolated. Alienation, then, is something that is lived and repeatedly lived, "a self-generating source of social repression that leads to the reproduction of class, race and sex hierarchies from generation to generation" "We" effectively "hide" from each other, or, at best, suffer from contradictory desires to be recognised yet not entirely present to the possibilities opened up by social encounters…. Alienation is this "paradoxical form of reciprocity between two beings" who desire "contact" and yet "deny" this same desire. Our alienation can be traced to "a fear of loss" that leads "intersubjective desire" to limit and constrain itself. The good news is that this self-limitation is itself a failure of a fuller sense of being."[23]

The real work, as Adam Geary, clearly sees, lies in struggling with that alienation which can be and ought to be dissolved and dispelled from that which is necessary and perhaps unavoidable. And, of course, as Adam Gearey is well aware, the trick will be, not to approach that challenge in terms that are either so reified (as to frustrate resolution) or so idealized (as to result in an illusory false empowerment).

In trying to flesh out some distinction between the good and the bad forms of alienated relations, Adam Gearey can find not much guidance from the early cls. According to Geary, the question, why or how it is we reproduce reified social relations begets in early cls work no clearly satisfying answer:

> "What then do we make of Gabel and Harris's theory of alienation? The theme of recognition seems clear enough, as does the desire to be recognised by others. However, locating the problem in "hiding" from each other or positing a desire for anonymity that is somehow inauthentic misses out a whole level of analysis at which Sparer had hinted. Gabel and Harris offer

[23] Gearey, *supra* note 1 at 47–48. (citations omitted).

> no real advance on Sparer's analysis to show us how "something" gets covered up, hidden or obscured and so results in us somehow "holding back" or hiding from each other. We know from Buber that social encounters do not always lead to mutual appreciation, but it is not clear why we then need to go on to posit a true and a false self. Gabel and Harris do not quite get to the point that would clinch their arguments."[24]

So for Adam Geary, the Gabel and Harris account is problematic. For one thing it is not clear in their account how and why it is that the self and the other hide and withdraw from the other. This is, as Adam Geary notes, is something we need to know, appreciate or experience if we are to do anything about it. But in the end, for Geary, it is Peter Gabel's addressees that are most problematic. Geary writes:

> "The "us" addressed by Gabel and Harris thus seems to be somewhat white and disembodied. Ignoring embodiment may also be related to a too simplistic announcement of sympathy or solidarity. Perhaps the point is not to stress some idea of "unconstrained communication" but the self-questioning work that constitutes an authentic response to social encounters."[25]

Adam Geary has a point here. For one thing, there may be reason to hide or withdraw. And it may not be hiding or withdrawal at all, but rather the very sensible and responsible practice of a self that understands the limits of its freedom as well as its responsibilities to others, to its communities. There are always thirds to consider: The self/other encounter always occurs in the midst of attachments and repulsions (alliances and enmities) to yet *other* others. More to the point, as Patricia Williams shows persuasively in her famous article, *Alchemical Notes on Deconstructed Rights*, there is sometimes, something in the other that is not benign and for which mediation (in the form of distanciation, formality and abstraction) might well be advisable.[26] And this is particularly so, for those who have historically occupied subordinate positions in hierarchies of race, gender, class, sexual orientation, or indeed, any hierarchy that turns out to be telling in the given context.

[24] Gearey, *supra* note 1 at p. 48.
[25] Gearey, *supra* note 1 at p. 49.
[26] P. Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights," (1987) 22 *Harvard Civil Rights Civil Liberties Law Review* p. 40.

Peter Gabel's account has always struck me as descriptively too optimistic.[27] And particularly so where the precincts of official law are concerned and especially so in its ultimate crucible, litigation. Indeed once we are in the vicinity of those precincts, Gabel's notion of an authentic encounter or Buber's idea of the open-hearted encounter seem inapposite. Very often in litigation, the stakes are existential. What's more, often no one really knows what happened. That is a daunting combination. Accordingly, the idea of wading through testimony, evidence, and argument without a formal frame to avoid getting swept into some pretty awful maelstroms is probably unappealing and unrealistic. Law school, legal education and legal scholarship are one thing, the criminal law courtroom is another. It has never made much sense to me to treat them all as the same (or even roughly the same) merely because they are all preoccupied with the same three letter word: law.

But there is more to think about. The sources of reification—their description and diagnoses—are anything but perspicuous. Consider that the possibilities themselves are numerous: the hiding and withdrawal of the self could be traced *in part* to language itself (as Derrida describes the violence of naming in Levi Strauss's *Triste Tropiques*)…[28] Or it could be traced *in part* to an aspect of living in common in conditions of extreme compartmentalizaton… Or it could be traced *in part* to the alienation of labor in capitalist production… or *in part* to early childhood ego formation (Peter Gabel suggests as much in his recent book)…[29] Or any and all of these things and many more some of the time all of the time. The source arguably matters, of course, because some of these things can perhaps be changed (relatively easily?) while others are likely to endure (perhaps permanently?) Consider here (to complicate matters) that all I have given you above is a short list of labels posing as distinct origins though they might well not be (neither distinct, nor origins). Instead each could be traced to and fuse into the others. So who knows? And please realize, that this "who knows?" is not offered here in a quietist or

[27] Duncan Kennedy's fundamental contradiction with its more symmetrical insistence on both *fear* and *longing* for the other (and later, his more formal conceptualization of "*cooperative-adverse* relations") has certain advantages.

[28] J. Derrida, *Of Grammatology* (Baltimore 1976), p. 112. For a succinct explanation, see J. E. Marsh, Jr., "Of violence: The force and significance of violence in the early Derrida" (2009) 35 *Philosophy and Social Criticism*, p. 269, 276–77.

[29] P. Gabel, *The Desire for Mutual Recognition: Social Movements and the Dissolution of the False Self*. Taylor and Francis. Kindle Edition. (2019).

defeatist way, nor to rack up skeptical points. Rather it is offered as a way of taking down a notch views that seem to portend false necessity (and needless despair) or false empowerment (and illusory hope). Note that the preceding terms are all very much related: for one thing, there is a symbiosis between false necessity and false empowerment as well as between needless despair and illusory hope.

One more thing: for early cls, there was this moment of realization that the standard story of law (objectivity, neutrality, evolutionary functionalism, whiggish history) was wrong, was nonsense. Those narratives were so deeply embedded in American legal thought at the time, that their destruction really did have a liberatory aspect—a gestalt shift, scales dropping from the eyes. I think the early cls story was largely right in this regard.

But…

But…this sense of false narratives being cast off was also accompanied by a moment of overstatement and transport that seemed wrong. And it can be seen again in Robert Gordon's account. He writes at the end of the passage immediately above:

> There are many varieties of this sort of critical exercise, whose point is to unfreeze the world as it appears in legal discourse, or economic discourse, or just everyday common speech, as a "system" of more or less objectively determined social relations; and to reveal it as (we believe) it really is: a loose, fluid, contingent, various miscellany of practices that point toward many alternative ways of organizing social life.[30]

Now, this last line about the "loose, fluid, contingent," character of social relations led cls-ers to an optimism about the possibility of leftist or progressive legal change. For that generation, the move from the objectivity of law and social structures of reification to the social construction of law meant that "things could be different." It was, for them, at the time immensely liberatory. And to be charitable to their circumstances: understandably so. For them, they had just demonstrated that this legal apparatus was not foreordained by some transcendent or immanent logic of law.

But for people such as myself who came later (and who were very much the beneficiaries of early cls critiques) the move to social construction meant something altogether different. It meant that since this legal apparatus was *socially* constructed (and thus materially inscribed in

[30] Gordon, *supra* note 16 at p. 650.

everything from architecture to economic relations to cultural forms and lots more…) it would all be very (very) *hard to change*.

And so if Robert Gordon seemed optimistic about the liberatory potential of "a loose, fluid, contingent, various miscellany of practices that point toward many alternative ways of organizing social life," (many early-cls-ers did) it would very likely be because he imagined that *legal thinkers and legal professionals* were the ones who could direct all this looseness, fluidity, and contingency. It is because, with this new understanding, *we* would be in charge of (or at least we would have a large say in) it all. But that I think was a *misreading* of our situation. Yes, there is a lot more looseness, fluidity, contingency of practices than was admitted by the conventional accounts of law. Then and still now. Dead on. But no, this does not mean *ipso facto* that this looseness, fluidity and contingency is ours to direct as we wish. That's a non sequitur.

It is, in the U.S. an interesting and prevalent non sequitur. This is the same exhilarated mistake that was made by American academics (all over the place) with Jacques Derrida's "free play" of the text. Many of Derrida's U.S. champions welcomed the "free play of the text" because to them this play seem to imply that they could read the text in whatever way they wanted. Based on the same premise, the critics of deconstruction reacted with horror—thinking how dreadful that the text could mean anything. They were both wrong, of course: the free play was not that of the individual reader How then did this enthronement of the autonomous individual subject arise? How was this autonomous individual subject put in charge? Easy: In the U.S. the autonomous individual subject is the default standard-form persona. Why? Because in the U.S., it is default; it is background-normal. Postmodern and poststructuralist writings back in the day were on to this and pointed it out (with some vigor and at considerable length.)[31] But most (nearly all?) cls-ers and progressives were not interested in hearing or engaging with any of this.[32] For the most part, they found postmodernism and poststructuralism "demobilizing". This response, of course, assumed facts not in evidence ("So, uh… mobilized are you?") But to be fair, postmodernism certainly did not arrive on the legal scene to cheer on progressives and cls-ers into repeating the

[31] P. Schlag, "'Le Hors de Texte, C'est Moi'"—The Politics of Form and the Domestication of Deconstruction, (1990) 11 Cardozo Law Review, p. 1631.

[32] One valuable and sustained exception is provided by Robin West. R. West, *Normative Jurisprudence—An Introduction* (Cambridge 2011).

same moves. But in no way was the point (nor the effect) demobilization. The point was: stop routinely engaging in the institutionalized *forms* of legal thought. The *very form* of that routine (almost regardless of the "substance" you might inject into it) is not friendly to your politics or your values *Don't just talk about doing things differently: do them differently.* This is all reminiscent of a familiar Scylla and Charybdis the political. Consider here two conflicting ideas. On the one hand, a political project requires you to depict the cultural, historical, political field of action, such that your politics has a chance of succeeding. (This usually involves a certain *degree of imagination* in the depiction of the field and one's place in it). On the other hand, a political project also requires a certain *awareness and reconnaissance* of the actual conditions in place. (This usually requires a certain degree of *realism* in the assessment of possibilities and limitations). In reckoning with these two conflicting ideas (both of which are implicated in the other) there is no algorithm, no theory, no technique, nothing at all that will guarantee getting it right. That's why it is called the political and why it is considered an art and not a science.

This is what Maria Grahn-Farley teaches from the vantage of postmodern thought: there is not much possibility of being right in advance where the political is concerned and it is an illusion best discarded:

> "I want to connect anti-subjugation to two things: first, a politics of description, and, second, a politics of liberation… Postmodern theory taught us that as soon as we leave *the space of description* to enter the times of change we necessarily will be wrong, with the relationship between a question and its answer constrained by the limitations of *our imaginary*…"
>
> Thus, to be descriptively and directionally wrong, in the sense that the description will not match the direction of liberation, is the lesson that the Left has to learn. Without the ability to be wrong, the Left can be neither supportive nor involved in a politics of anti-subjugation. To be involved in a politics of anti-subjugation is to simultaneously ask and answer the question, which way to freedom; but, whatever direction we take, we will have known all along that any answer or question will not be the correct formula. In retrospect, we know that it is not enough to find the route to Canada to abolish slavery and be liberated; it is not enough to extend the right to vote to women and to black people to find liberation from sexism and white supremacy; it is not enough to have access to formal education to find liberation for the working class. At the same time we also know that these were all struggles that had to be lived to bring about a possibility for life to not have to take place in the impossible any longer. These were strug-

> gles that had to take place for even the possibility of life within the possible and within the logics of survival. To struggle against subjugation teaches us how to survive being wrong and how to reorient towards new and expanded goals en route to freedom. The Left is participating in hiding the resistance, and this must stop.[33]

Yes.

To be sure, the cls recognition of all this looseness, fluidity and contingency was an important moment. And this is not offered as faint praise. To the contrary: relative to the jurisprudence in place, this *was* a moment. And I believe it would be difficult for those who did not live this moment to appreciate how widespread and seemingly unshakable the belief in the objectivity, neutrality and determinacy of law was back then. But that *the cls response* was a moment *should not distract us today* from appreciating that all this recognition of looseness, fluidity, and contingency, can only do so much. It does not dissolve reification, nor dispel resistance. And importantly, all this looseness, fluidity and contingency of the social says nothing one way or another about our agency in any given context—beyond the idea that now we can't be sure. Indeed, the dissolution of false necessity into a certain looseness, fluidity and contingency can neither deny nor affirm agency. More specifically still, the judgment that things are loose, fluid, and contingent says nothing about our capacity or competency to control or direct all that looseness, fluidity and contingency.[34]

Whether we have or can achieve agency in any given context remains, as Adam Gearey has it, a struggle. And to the extent, that one tries to

[33] M. Grahn-Farley, "Urgent Times," (2006) 31 *New York University Review of Law and Social Change*, 435, 441 (emphasis added).

[34] Why then did early cls view their deconstruction of false necessity and the objectivity of law as somehow yielding the freedom of the subject to reorganize social reality? Here it matters very much that many of the leading early cls figures had their academic home in Cambridge and Palo Alto—places drenched in the ethos of the autonomous individual subject and suffused with resources to buttress his empowerment (some of it, no doubt, false empowerment). Besides that, it's also the case that a good number of early cls thinkers were influenced by existentialism (primarily, though not only, Jean-Paul Sartre). Many of them brought that commitment with them as an independent view of the subject (and of an ideal subjectivity). Whether deliberately or not, this commitment to the existentialist view of the subject often functioned as a kind of barrier to further inquiries into the problem of the subject. Of course, there was nothing necessary about the commitment to existentialism being used in this way—existentialism is nothing if not permissive—it's just the way things worked out.

achieve an agency that reaches out to respect and connect with the agency of the other, it is going to be, as Gearey puts it, an *experiential struggle*—one that will demand work on the self. We return here to the poor and to the poverty lawyer, subjects bracketed at the beginning—to hint at the exemplary role they play in Adam Gearey's narrative:

> "Thus, as practitioners of the art of thinking/doing, the poverty lawyers that we have studied share the commitment to the idea that all people are creative agents. Law should protect and nurture the creativity of human beings. A commitment to carrying these beliefs into action is what makes the poverty lawyer the exemplar of a particular kind of character. The poverty lawyer lives the frustrations of a personal politics enabled and limited by the professional form of life s/he has chosen.[35]

That this is a struggle—and that there are only a limited number that can be pursued in a lifetime is just all right."[36]

[35] Gearey, *supra* note 1 at p. 172–173.

[36] S. de Beauvoir, *All Men Are Mortal* (New York, 1992).

Jonatan Schytzer*

The Rise of the Claim. Highlighting the Ever-present Ethical Dimension of Law in a Technical Setting

Poverty Law and Legal Activism: Lives that Slide Out of View gives a fascinating insight into the practice and theory of poverty law from the 1960s to the present day. Among other things, Gearey depicts the importance of ethics in poverty law. For example, how the encounter between the poverty lawyer and the poor has ethical dimensions. How poverty law can be seen as the broken middle between law and social justice, and how this broken middle finds its expression in the ethical praxis of being with the poor.[1] Ethics is also ever-present in the praxis of law. This is the case in legal interpretation and in adjudication, since the legal material cannot determine its own meaning, and thus the legal material cannot decide the case; the case is merely based on the legal material, as many scholars have shown.[2] Therefore, the interpreter has to take responsibility

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[1] See Gearey, Adam, Poverty Law and Legal Activism: Lives that Slide Out of View, Routledge, Abingdon 2018, pp. 149–163.

[2] See for example Derrida, Jacques, Force of Law, Cardozo Law Review, 1990, pp. 961–963; Zahle, Henrik, Polycentric Application of Law, Andersson, Torbjörn (editor), Parallel and Conflicting Enforcement of Law, Norstedts Juridik AB, Stockholm 2005, pp. 239–241. See also Kennedy, Duncan, A Critique of Adjudication, Harvard Uni-

for her or his interpretation.[3] However, this ethical dimension can easily slide out of view. Certain legal interpretation can obscure its potential consequences, especially if the interpretation is situated in a technical setting.[4] If such interpretation is used in a ruling, the ethical dimension of adjudication can also be obscured. This obscuration can be noticed in the traditional interpretation of the concept "the rise of the claim",[5] particularly if the traditional interpretation is contrasted with a recent case from the Supreme Court of Sweden, where the court interpreted the aforesaid concept and highlighted the potential consequences of different interpretations.

Several statutes in Swedish private law include the concept "the rise of the claim". For example, the concept is used to determine whether a claim is included in an insolvency proceeding, as well as to assess which

versity Press, Cambridge-London 1997, pp. 23–38, who states that showing that law is made even in the most routine application of rule to facts is important. Cf. Wittgenstein, Ludwig, Philosophical Investigations, 4th ed., Blackwell Publishing Ltd, Chichester 2009, §§ 110–242. Cf. also Gadamer, Hans-Georg, Truth and Method, Bloomsbury Academic, London-New York 2013, pp. 318–350, who puts forward that to understand the meaning of a legal text and applying it in a particular legal instance are not two separate actions, but one unitary process. Gadamer also demonstrates that application is involved in all forms of understanding, see id., pp. 318–350.

[3] See Lindroos-Hovinheimo, Susanna, Justice and the Ethics of Legal Interpretation, Routledge, Abingdon 2012, pp. 123–158, especially pp. 144–148, who delves into this specific theme. See also Samuelsson, Joel, Tolkningslärans gåta, Iustus förlag AB, Uppsala 2011, p. 195, who states that the lack of rules for interpretation of contracts is not a threat to an objective interpretation, but rather that the objective interpretation is protected by the interpreter's effort to interpret. Samuelsson also states that the same applies to the interpretation of statutes and every other form of interpretation, see id., p. 195. See also Mellqvist, Mikael, Om empatisk rättstillämpning, SvJT 2013, pp. 493–501.

[4] Cf. Schlag, Pierre, The Aesthetics of American Law, Harvard Law Review, 2001–2002, pp. 1058–1059, who describes "grid thinking" as a similar mechanical application of law where the subject who applies the law is detached from the application.

[5] Other terms could be used instead of the *rise* of the claim, such as the accrual of the claim or the emergence of the claim. However, the term rise is used in various legislative guides. See for example The United Nations Commission on International Trade Law (UNCITRAL), Legislative Guide on Insolvency Law (2004), para. 12, under B "Glossary, Terms and definitions"; Draft Common Frame of Reference (DCFR) Outline Edition (2009), for example Book 3, 2:102, 2:110 and 3:508; European Law Institute, Rescue of Business in Insolvency Law (2017), Glossary of terms and descriptions in restructuring and insolvency, under "Claim".

claims a composition (concordato, accord, abatement of debts)[6] includes in a reorganization (which to some extent is similar to a Chapter 11 proceeding in the U.S.). Moreover, the general statute of limitations commences when a claim arises. Therefore, it is necessary to be able to state a precise point in time for when a claim shall be regarded as arisen.

Pursuant to the traditional principal rule, a claim arises when the contract is concluded or, in the case of a claim for damages, from the time of the act which gives rise to the claim.[7] This rule primarily originates from an autonomous doctrine of the concept "the rise of the claim". It is not possible or even desirable, to give an in-depth description of the doctrine in this chapter. In short, the doctrine is based on interpretations of concepts, such as definitions of the terms "claim" and "duty",[8] according to which a claim is equivalent to a duty and a duty exists when the debtor is bound to the duty. Under the doctrine, a claim is, therefore, considered to have arisen when the debtor is bound to the claim (for example, when the contract is concluded).[9] The doctrine can be described as a bridge be-

[6] See Madaus, Stephan, Leaving the Shadows of US Bankruptcy Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law, European Business Organization Law Review, 2018, p. 627, regarding this terminology.

[7] See for example Mellqvist, Mikael & Welamson, Lars, Konkurs, 12th ed., Wolters Kluwer AB, Stockholm 2017, pp. 193–195; Nordtveit, Silje Karine, Når oppstår en fordring?, Cappelen Damm, Oslo 2017, pp. 135–149 and pp. 157–216; Hellner, Jan & Radetzki, Marcus, Skadeståndsrätt, 10th ed., Norstedts Juridik AB, Stockholm 2018, p. 419; Gregow, Torkel, Preskription och preklusion av fordringar, Norstedts Juridik AB, Stockholm 2020, p. 47. For another opinion see Lindskog, Stefan, Betalning, 2nd ed., Norstedts Juridik AB, Stockholm 2018, pp. 87–99. Exceptions from the principal rule have been made previously by the Supreme Court of Sweden; see for example NJA (Nytt juridiskt arkiv) 1987 p. 243.

[8] Cf. Schlag, Pierre, Formalism and Realism in Ruins, Iowa Law Review, 2009–2010, pp. 201–204, especially his account of conceptualism.

[9] See for a more thorough description of the doctrine Scheel, Anton Wilhelm, Privatrettens almindelige Deel, andra Bandet, C A Reitzels Forlag, København 1866, pp. 34–38; Schrevelius, Fredrik, Lärobok i Sveriges allmänna nu gällande civil-rätt, första delen, 3rd ed., Fr Berlings förlag, Lund 1872, pp. 138–146; Nordling, Ernst Victor, Anteckningar efter prof E V Nordlings föreläsningar i svensk civilrätt, Juridiska föreningen i Uppsala, Uppsala 1891, pp. 222–233; Torp, Carl, Hovedpunkter af Formuerettens almindelige Del, 2nd ed., I kommission hos Universitetsboghandler G E C Gad, København 1900, pp. 94–112; Platou, Oscar, Forelæsninger over udvalgte Emner af Privatrettens almindelige Del, I kommission hos T O Brøgger, Kristiania 1914, pp. 313–342; Lassen, Jul, Haandbog i Obligationsretten, 3rd ed., G E C Gads Forlag, København 1917–1920, pp. 10–12; Arnholm, Carl Jacob, Privatrett I, Johan Grundt Tanum, Oslo 1964, pp. 148–156; Ussing, Henry, Aftaler, Paa formuerettens omraade, 3rd ed., Juristforbundets forlag, København

tween "the rise of the claim" and contract formation. Yet, the structure of this autonomous doctrine means that the influence of other arguments, such as arguments specific for insolvency law, is hindered, as the structure does not open up for other types of arguments. The structure is in that sense closed. The closed structure also means that the consequence of the application of the doctrine cannot be taken into account.

In a recent case from the Supreme Court of Sweden, namely NJA 2018 p. 103, an exception was made from this traditional principal rule. The Swedish state had wrongfully withdrawn the Swedish citizenship of the plaintiff, something for which the state can be liable according to the previous case law of the Supreme Courts.[10] In this case, the plaintiff had a claim for damages according to this case law, and the question was if the claim was time-barred. Pursuant to the general statute of limitations, a claim is time-barred ten years after it has arisen.[11] The plaintiff acquired Swedish citizenship at birth in 1981. However, his citizenship was withdrawn in 1989. In 2004 and in 2008 the plaintiff applied for retrieval of his citizenship, which was denied. When the plaintiff thereafter applied for Swedish citizenship in 2012, he was informed that the decision to withdraw his citizenship in 1989 could have been unlawful. He later retrieved his Swedish citizenship in 2013, and in 2014, he sued the Swedish state for damages.

In the previously mentioned case, the Supreme Court of Sweden stated that the principal rule, regarding claims for damages, is that the claim arises through the act that causes the damage. The court also noted that a claim can arise gradually if the act is pending. Such a traditional interpretation of "the rise of the claim" would have meant that the plaintiff's claim from the period between 1989 and 2004 would have been time-barred. However, the court explicitly stated that it was not content with such an interpretation because of its consequences. The court actually altered the legal question compared to the question in the autonomous doctrine. Instead of raising the question of whether the claim had arisen at a certain point, the court raised the question of whether the claim was

1978, pp. 445–454. See also Schytzer, Jonatan, Fordrans uppkomst inom insolvensrätten, Iustus förlag AB, Uppsala 2020, pp. 90–110, for a summary of the doctrine.

[10] See NJA 2014 p. 323, where the Supreme Court of Sweden found that such a withdrawal could make the state liable. See also RÅ (Regeringsrättens årsbok) 2006 no. 73, where the Supreme Administrative Court of Sweden found that it was unlawful to withdraw the citizenship in certain cases.

[11] The period of limitation can be interrupted.

time-barred at a certain point, which brought forward the potential consequences of different interpretations of the concept.

The Supreme Court of Sweden found that the traditional interpretation of the concept would have made the right to compensation illusory in these circumstances. The court noted that in this case, the plaintiff would have been forced to take measures to renew the limitation period, which at the time would have seemed pointless. It was, namely, several changes in the case-law of the Supreme Courts that made the withdrawal of the citizenship unlawful and also made the state potentially liable for such withdrawal.[12] Instead, the Supreme Court of Sweden found that in the case at hand, where the state was the debtor and the claim concerned a violation of a central right for the individual (here the right to citizenship), the purpose of the limitation rules was not a particularly strong argument. The court also stated that the individual must have an effective possibility to claim her or his right. In conclusion, the court found that the limitation period did not commence until the plaintiff had an opportunity to claim his right, which was when he retrieved his citizenship.

In this specific case, the shift in the interpretation of the concept "the rise of the claim" is by no means fundamental; the principal rule remains the same according to the Supreme Court of Sweden. However, in a number of cases, primarily concerning insolvency law, the court has stated that the question of when a claim arises mainly depends on the purpose of the statute, which the rule featuring the concept is included in.[13] This description is not controversial. It is in line with what is considered rational in our legal culture of private law.[14] There is a resistance to use the meaning of concepts in legal argumentation, such as the autonomous doctrine of the concept "the rise of the claim" in our legal culture. Instead, the purpose of the statute is put forward as the main argument, which creates an openness towards arguments that concern

[12] See supra note 10.

[13] See NJA 2009 p. 291; NJA 2013 p. 725; NJA 2014 p. 537.

[14] Legal culture is used in the meaning described in Tuori, Kaarlo, Critical Legal Positivism, Routledge, Abingdon 2002, pp. 147–196. See also Tuori, Kaarlo, Ratio and Voluntas, The Tension Between Reason and Will in Law, Ashgate, New York–Oxon 2011, pp. 66–67.

the consequences of various interpretations, including a concern for the individual's interests.[15]

Still, the autonomous doctrine of the concept "the rise of the claim" is represented in the legal sources. Apart from a number of older cases from the Supreme Court of Sweden, there are also newer cases that reproduce the doctrine (such as the aforementioned NJA 2018 p. 103).[16] This pluralism of possible interpretations of the concept highlights the ethical dimension of adjudication, where judges have to choose between different arguments and different consequences. The ethical dimension is also brought forward by altering the way the legal question is phrased: By asking if the claim should be time-barred, instead of whether the claim has arisen, the consequences of different interpretations are highlighted. In the traditional principal rule of the concept "the rise of the claim" and the traditional way of phrasing the question this ethical dimension of adjudication could easily slide out of view.

[15] Many scholars have discussed this approach. It is often referred to as the functionalistic approach. See for example Andreasson, Jens, Inlösen, äganderättsövergång och "legal transplants", SvJT 2005, pp. 522–538; Sandstedt, Johan, Sakrätten, Norden och europeiseringen, Nordisk funktionalism möter kontinental substantialism, Jure förlag AB, Stockholm 2013, passim; Martinson, Claes, The Scandinavian Approach to Property Law, Described through Six Common Legal Concepts, Juridica International 2014, pp. 16–26; Schytzer, Fordrans uppkomst inom insolvensrätten, pp. 137–163. See also Samuelsson, Joel, Om harmoniseringen av den europeiska privaträtten och funktionalismens funktionalitet, Europarättslig tidskrift 2009, pp. 63–86, for a discussion regarding how functionalistic the functionalistic approach is.

[16] See NJA 2012 p. 876.

Maria Grahn-Farley

To walk together – but where to?

Introduction

This chapter reflects my thoughts after reading Adam Gearey's 2018 book, *Poverty Law and Legal Activism: Lives that Slide Out of View*. I read it as an impossible exercise for an academic manuscript: an exploration of how to write from a privileged position at the top of the social ladder and address the situation of the poor below, while nonetheless remaining ethical and responsible in one's treatment of the people you meet through your practice of law. Gearey accepts the challenge posed by this situation, writing as he does from his position as a lawyer who works with underprivileged clientele and managing to avoid the cruelty of representation while remaining true to the social commitments outlined in his text.

What I find to be the most sympathetic and successful aspect of the book is that Gearey treats humanity as an uncomplicated affair. He does not construct fancy theories about the basic humanity of the poor, who are often treated as if accepting their humanity were a complicated endeavour. It is important that Gearey does not engage in that line of inquiry, opting instead to explore the act of being in solidarity with someone, of seeking the side-by-sidedness of each other through work on the self rather than on the other. Here he draws on Franz Fanon in describing this moment of solidarity, an "open-hearted pause before the other person, the connection or the reflection on the experience of the encounter are elements in a theory of 'social practice(s) concerned with changing the world."[1]

[1] Adam Gearey, Poverty Law and Legal Activism: Lives That Slide Out of View, Routledge (2018), p. 33, 45.

This connection, I will argue, becomes a *walking with each other*, the lawyer walking with the poor, and a connection informed by the works of social movements such as National Welfare Rights Organisation (NWRO) and the Students for a Democratic Society (SDS).[2]

The Narrative of White Men with Brown People

While this idea of walking together is attractive, it can only work when the direction of the walk and idea of its final destination are shared by both parties—more so, when direction and destination are already given, so that no one party need question the intentions of the other.

Let me illustrate what I mean with two narratives of men with class. Here I mean to use the phrase "men with class" much in the way we can say that a woman is "with child": they are *with* their bodies, giving life to their kind. The first man is from an iconic colonial episode, when Marlow meets the company accountant at the first outpost, up the river in Joseph Conrad's *Heart of Darkness*:

> "When near the buildings I met a white man, in such an unexpected elegance of get-up that in the first moment I took him for a sort of vision. I saw a high starched collar, white cuffs, a light alpaca jacket, snowy trousers, a clear necktie, and varnished boots. No hat. Hair parted, brushed, oiled, under a green-lined parasol held in a big white hand. He was amazing, and had a penholder behind his ear."[3]

Conrad's narrative is known for its naturalization of a genocide, wherein the torture and killing of indigenous peoples are given events on the road towards Marlow's individual self-discovery, events set into the background as if simply part of the landscape.

So why is Marlow so taken by this accountant, a man he probably would not even notice on the streets of London or if they met by the River Thames? This encounter leads to an examination of what is fixed and what is in motion when two men with class meet: the accountant has resisted being dragged down from his middle-class position, not by the people, but rather by the very landscape of the colonial project, which is the naturalization of how individuals are borne from and perpetuate genocide and torture. Indeed, the indigenous people can only be seen as

[2] Ibid, 35, 38.

[3] Joseph Conrad, Heart of Darkness, Collins Classics (1902, 2013), p. 20.

people when, walking up close, Marlow manages to distinguish the forms of beaten and almost worked to death men from the shade cast by trees. In the larger context of the colonial project, every experience is individual. Marlow is his own individual; the accountant, his own individual; and Colonial Kurtz is yet another individual. If you are not an individual, you have become one with nature. The risk is not of falling into the unintelligible mass of human life, but *to fall into the landscape itself*, to become a part of the tropical vegetation, to become extensions of the branches of the tree or the wooden fence outside of Kurtz's abode, where the picketed fence is decorated with the heads of people that have literarily been turned into extensions of wood. No wonder Marlow falls in love with this accountant who has *resisted* becoming one with the landscape. The risk of falling out of being an individual into the nature of genocide is ever present in *Heart of Darkness*. It is a risk faced in the encounter between men of different social stations, between self and other.

Fast forward to the social movements of the 1960s, where we meet the lawyer Stringfellow in Gearey's text. Stringfellow has sacrificed money and a profitable legal career as a Harvard-trained lawyer for community work in a poor black neighbourhood. Nevertheless, with great discipline and self-preservation, he holds on to his middle-class identity: "The shined shoes mean that Stringfellow 'had remained [himself] and had not contrived to change, just because [he] had moved into a different environment.'"[4]

As soon as I read this passage, I thought of Conrad's accountant. I have been struggling with the twin-images of these two men, the accountant and the lawyer, both striving to remain the same, both feeling the draw of change, yet fearing the risk of falling. For both men, the price of falling is a drastic metamorphosis: in the accountant's case, from person into nature; for Stringfellow, from individual into the undifferentiated masses.

It is at this juncture that Gearey's honesty clearly comes through in his use of the term the "white ally" – a demonstration and acknowledgement of a hierarchy not to be upheld but to be acknowledged as a simple social fact.[5] The turning of the table, from being the one who studies "a problem," in the words of W.E.B. Du Bois, to making oneself useful in the gestalt of the "white ally," reflects acceptance in sharing the burden

[4] Adam Gearey, Poverty Law and Legal Activism: Lives That Slide Out of View, Routledge (2018), p. 104.
[5] Ibid, pp. 33.

of real social boundaries and the pain and suffering that follows their fault lines.[6] Although Stringfellow is unable to actualize this potential, Gearey's study of Stringfellow enables us to imagine the possibility of accountable allyship across social class.

Neither Conrad nor Stringfellow are capable of questioning hierarchy itself; they are merely questioning its conditions. Both figures take hierarchy as a given, a norm where deviation from it means falling down the social ladder, followed by a loss of being – the erasing of the self. This what cannot be changed – this that has to remain the same – not only the feeling of being but also to be.

What makes the narratives of the accountant and of Stringfellow incompatible is what in Adam Gearey's book can be understood as *walking with:* an attempt to bridge a divide through working alongside another. However, this *walking with* is usually cast as towards a fixed, stable norm: that of the middle class.

The Broken Contract

For the larger part of the 20th century and now well into the 21st, the middle class has served as the promise of the "Great Society," or as Alain Supiot describes it, "a secular adaptation of an eschatology of salvation."[7] This idea of the middle class promises both movement and fixation. The promise of movement is drawn from the idea that the middle class possesses unlimited flexibility: able to include all the people from below, it is capable of eternal expansion. The promise of fixation is located in the idea that we will always have a significant, sizable middle class that, once entered, affords stability and permanence. Yet for the outcast, the non-desired, the immigrant, the refugee, the minority established on change, the social contract granting membership into this Great Society is neither movement nor stillness. Rather, it is primarily recognized by forms of sameness, what are known as integration policies, the banning of the veil, language tests, and learning Swedish values. With each change, so the promise goes, comes the lifting up, the entrance into a stable middle

[6] See W.E.B. Du Bois, The Souls of Black Folk (1903): "How does it feel to be a problem?"

[7] Alain Supiot, *The Public-Private Relation in the Context of Today's Refeudalization*, *I-CON* 11.1 (2013), p. 133.

class, further away from the unpredictable everyday of poverty where anything and everything can happen.

To Stringfellow here is a clear hierarchy over who is there to change. Gearey writes: "The lesson that Stringfellow took from his friend was that 'in order that my life and work [should have] integrity I had to remain whoever I had become as a person before coming there."[8]

What does it mean to walk with someone if one has the goal of standing still while the other moves forward? Additionally, what is the cost of change? Adrien Wing has written about what she has termed the "spirit-injured soul" of women of color in the U.S. legal academy, where women are expected to both be in the process of changing within the academy and, at the same time, to be the change in the academy itself.[9] As Wing asserts, these expectations accompany the goal of reaching the middle class which, as Wing describes, is willing to include the other, but not to change itself.

Gearey poses a similar charge to the middle class with the following questions: "What does it mean to be a radical now that the 1960s have gone? How do you achieve the balance between the seeming failure of a period of radical social action and the hard times of the present?"[10]

The non-revolutionary rejection of the welfare state(s) in their different variations in Europe and the slipping away of the Great Society in the U.S. together challenge the ideal of being able to walk with each other towards somewhere better, even when one party agrees to change.[11] Both presume a middle class that is stable in its location and, at the same time, flexible in its inclusion – underneath all this is the idea of economic growth.

Pierre Schlag similarly writes about this presumption of progression as being forward facing and moving:

> "Where history, culture or intellectual life is concerned, the enlightenment holds to a plucky belief in a linear progression. In the advanced industrial-

[8] Adam Gearey, Poverty Law and Legal Activism, Lives That Slide Out of View, Routledge (2018), p. 104.

[9] Adrien K. Wing, Poverty, Lawyering and Critical Race Feminism in the Trumpian Era, Iustus (2021), p. 31.

[10] Adam Gearey, Poverty Law and Legal Activism: Lives That Slide Out of View, Routledge (2018), p. 133.

[11] For a discussion on the concept of the welfare state in Europe, *see* Thomas Wilhelmsson, *Varieties of Welfarism in European Contract Law*, 10 EUR.L.J. (2004), p. 712.

> ized nations of the West, this enlightenment ratchet narrative has become (certain bloody and catastrophic exceptions noted) an institutionalized truth: the way things are and the way they are supposed to proceed."[12]

My question is then: How do we argue for social change with a shrinking middle class? Not only inclusion but even the mere re-shaping of basic preferences presumes the possibility of a growing middle class. Yet as Gearey writes, "a new mood has come into poverty law in the years following the banking crisis of 2008."[13] If we do not want to take the road of Huey Newton and the Black Panthers who, rejecting the middle class and its conditions, instead choose disruption, what choice do we have in this "new mood"?[14] Is there a way today to walk with someone into something stable, something that is better and not just different from where you came? Today, something has changed: even if Stringfellow remained the same, society has not.

With the words of Martha McCluskey, we are bought back to Marlow again, but this time with new eyes, where the landscape has become populated with exploited bodies fed to the economic engine. She writes: "The master-servant hierarchy constructed and rationalized a market that made gender and racial inequality, violence, and insecurity the basis of economic production that was highly successful for some but costly for many."[15]

Much like McCluskey, Scott Veitch has identified the terms of the economic engine as yet another form of obedience maintained despite the appearance of walking with the other, seeming to make mutual progress:

> "In a substitution of 'obediential obligations' the combination of economic and legal structuring of debt replaces religion, but the chief quality of the obligations remains the same as before: they cannot be bargained about by the parties themselves. Why not? Because despite their appearance at one level as the result of 'freedom and engagement' what appears as choice is so in appearance only."[16]

[12] Pierre Schlag, The Enchantment of Reason, Duke University Press (1998), p. 23.
[13] Adam Gearey, Poverty Law and Legal Activism, Lives That Slide Out of View, Routledge (2018), p. 131.
[14] Ibid, 33.
[15] Martha T. McCluskey, *Are We Economic Engines too? Precarity, Productivity and Gender*, University of Toledo Law Review, Vol. 49 (2018), p. 640.
[16] Scott Veitch, *The Sense of Obligation,* Jurisprudence: An International Journal of Legal and Political Thought, 8:3 (2017), p. 427.

Given the illusory sense of choice Veitch describes as central to our lingering obediential obligations, it is understandable that poverty law has found such a challenging reception in legal studies. But if the law can never serve as a revolutionary tool, does the progressive ideal that is still presented today – inclusion into a stable middle class – hold any longer?

The New Right

Much like the last time fascism came to power, it does so now through our democratic institutions and through our own legal and political choices. Duncan Kennedy demonstrates how the authoritarian streaks of an intolerant church, a fascist egalitarianism in its devotion of a god-like leader, and the nationalism of a militarized fetish are each embedded within the Western liberal legal fabric.[17] Kennedy argues that authoritarian legal arguments are fully possible to make within secularized Western democracy in the guise of the traditional family and in "defining the scope of prosecutorial powers of detention without trial"—or to put it in other words, in failing to draw the line for the use of police powers. The god-like leader remains a figure within democratic law, Kennedy claims, in the idea of military leaders, corporate CEOs, and (in family law) the father.[18] In these insidious ways, authoritarianism is not an alien concept to our democratic state – yet according to Kennedy, it has, until now, been supressed as a marginalized impulse in reaction to the post-World War rebuilding of Europe. It is partly the wearing down of the common ideological and political project in the West that is making it possible for authoritarianism to resurface in its direct form through our legal and democratic institutions.

Instead of advocating for change in exchange for entrance into the middle class, the authoritarians of the world are promoting the fixedness of status, whiteness, maleness, and Christianity. The recipients are no longer the people from the below to be brought up, but the slipping middle class, falling out and away from the social contract of the welfare state that was to be eternal. The direction and the end station when walking within someone, on a class journey, I suggest might not have to

[17] Duncan Kennedy, *Authoritarian Constitutionalism in Liberal Democracies, in* Authoritarian Constitutionalism (Helena Alviar & Gunter Frankenberg, eds.) (2019- forthcoming).
[18] Ibid, 5.

be predetermined, it might have to be along roads never before travelled, and towards new a horizon based on a new imaginary of the life of a middle class.

Thomas Wilhelmsson

Contextually Critical

Consistently Critical?

The symposium giving rise to this publication was based on Adam Gearey's impressive account of poverty law as an expression of critical legal scholarship.[1] Inspired by this book, the participants were required to reflect on the role and future of critical approaches to law in contemporary society. As will be demonstrated below, the book offers considerable food for thought regarding several issues related to critical legal scholarship.

In considering the contemporary task of critical legal scholarship, the first question to be resolved is the definition of what counts as 'critical' in this discourse. The participants attending the symposium were described by the organisers as 'critical' lawyers. But what does that mean? It is difficult to discuss the task of critical legal scholarship without having a clear understanding of the definition and scope of this task. So, we need to start with the question: What is 'critical'? What gives us the right to define ourselves as 'critical'?

The symposium gathered scholars from different legal traditions, from the USA and the Nordic countries, in particular. I will, therefore, endeavour to avoid addressing this issue exclusively from the point of view of any one national tradition, as a discussion on a general level is required in order to support and encourage valuable learning across borders. However, it is natural that my own Nordic background colours my understanding of the critical approach and, in particular, of the opportunities arising from that approach. So, despite the general level of discussion, this paper

[1] A. Gearey, *Poverty Law and Legal Activism* (Abingdon and New York, 2018).

can also be read as a Nordic comment on the debate on the contemporary task of critical legal research, as the societal context of the Nordic critical approach to law necessarily differs from its American counterpart.

The question concerning the characteristics of a critical approach is linked with a second question regarding the possible consistency of such an approach. Not only do we need to ask what it means to be a critical legal scholar, we also need to answer the question: Can one be consistently critical, a consistently critical legal scholar? What could 'consistency' mean in this context? My sceptical attitude to the possibility of any meaningful grand narrative on a consistently critical approach may already have been revealed in the posing of these questions; I think critical research would often be more productive and more in tune with reality if it searched for the opportunities provided by smaller legal narratives that could contribute to the shaping of a better world.

I will argue here that the substance of a critical approach must be defined contextually, in relation to the societal situation at hand. As consistency may only be reached on a very high level of abstraction,[2] it is more important to be able to be contextually critical, in a relevant way, than consistently critical. A useful critique has to take into account both the historical and contemporary context of the society and legal order in question and their change over time. The contextual is, in other words, determined both by spatial and temporal variations. Positions that can be termed 'critical' not only vary from society to society, but they also change over time within each society. The dynamic nature of law and society must be reflected on in critical legal reasoning.

To many of us, this may sound self-evident; however, the relevance of contextuality needs to be stated and analysed further in order to facilitate a fruitful cross-border dialogue. In this paper, I will comment on some aspects of contextuality that need to be taken into account in critical legal reasoning.

Having set the tone, I would like, in the interests of clarity, to add a Nordic *caveat* to the search for an understanding and definition of critical legal scholarship, and emphasise the softness of the boundaries between 'critical' and other approaches. 'Critical' should not be understood as an 'on-off' concept, which includes a particular group of researchers but excludes all others. One should rather describe scholarship as a continuum,

[2] As Gearey, p. 56 notes: 'CLS and CRT were not finally able to pull together their insights into a coherent ethics of poverty law'.

ranging from writings expressing various degrees of critical attitudes towards mainstream legal research. Scholars may express quite critical, and even radical, attitudes towards the prevailing legal situation without expressly labelling themselves as 'critical'. Therefore, critical scholars should not attempt to isolate themselves in a distinct group playing on a different field than other lawyers, if that means that it detracts from the discourse within the legal community as a whole. In order to have an impact, it is important to connect with and convince those who were not already convinced.[3] This open-minded attitude towards crossing the borders of different legal discourses is based on experience from the small and inclusive Nordic societal context, in which critical research occasionally has a discernible influence on mainstream law. Admittedly, the need to establish distinct groupings and movements of critical legal scholars may be greater in a different societal and legal context.

A Personal Query

So why does this issue puzzle me? Why am I juxtaposing 'consistently critical' with 'contextually critical'? A few words on my background may explain my struggles concerning the consistency of critical legal thought, as I am, in fact, speaking of the consistency of my own thought as well. A brief description of how my views have changed over time also reflects the relevance of a changing societal context for the building of a credible critical perspective. Critical legal research must, at least to some extent, be different in a society rapidly building a welfare state, in a society struggling to retain its welfarist tradition and in a society strongly affected by Europeanisation and globalisation.

I pose this issue in a personal form, even though I – nowadays – think that one should avoid using the attribute of 'critical' with reference to one's own work. From my perspective, 'critical' is a lauditive attribute when speaking about legal scholarship and, at least in the Nordic tradition, laudation should be given by others, rather than by the author him- or herself. With such a perspective, to define yourself as 'critical' is akin to describing yourself as 'good' or 'creative' or possessing some other particularly positive quality. So, in principle, I think it is up to others,

[3] For example, the movement for an alternative use of the law (*uso alternative del diritto*) in Italy in the 1970s and 1980s was built on the recognition of the proletarisation of the judiciary and the opportunities this was seen to offer for a real change in judicial practice.

rather than the author, to define whether a piece really can be considered 'critical'.[4]

It should be noted that my perspective is the perspective of private law. My analysis here is related to my experience in that field. Plausibly, the space for critical reasoning may be somewhat different in private law than in, for example, criminal law or administrative law. While private law predominantly confronts an often relatively diffuse economic power, criminal law and administrative law deal directly with public coercive power. Therefore, the latter need to emphasise formal principles related to the rule of law, such as *nullum crimen sine lege*, more strongly than a fairness-oriented private law. In other words, the appropriate balance between form and substance might, even in mainstream legal thinking, be perceived differently in private law than in administrative and criminal law.

This is not to say that political-ideological issues are not relevant within private law. On the contrary, when I started my work, various approaches seemed to be at the disposal of a critical legal scholar. In Europe, some preferred ideological critique, following the quasi-Marxist *Ideologiekritik*-tradition, while others were inspired by the idea of an 'alternative use of the law'[5] to reach the societal goals proposed by critical scholars. I tasted the first kind of approach,[6] but when the second type of critical research was flourishing in the 1980s, I found myself asking how private law could be reshaped in a welfarist fashion.[7] Even though my own study was limited to the question of how the roles of the unemployed, ill, and those with less property or income could be made relevant in the context of private law (for example, through the concept of *social force majeure*),[8] at the time I did believe that it might be possible to create a complete

[4] Compare Gearey, p. 173: 'The radical lawyer repeats or affirms the desire to be a radical lawyer. But perhaps this is a little too high sounding.'

[5] Good examples, from the Nordics: K. Tuori (ed.), *Rättsdogmatikens alternativ* (Tammerfors, 1988), and from Germany: U. Reifner, *Alternatives Wirtschaftsrecht am Beispiel der Verbraucherverschuldung* (Neuwied und Darmstadt, 1979).

[6] Trying to show the ideological functions of the principle of protection of the weaker party in the context of insurance law and, more broadly, of consumer law in the consumer society. In order to avoid too many self-references, I will refrain from mentioning the publications. They are only published in Swedish anyway.

[7] *Critical Studies in Private Law: A Treatise on Need-Rational Principles in Modern Law* (Dordrecht, Boston and London, 1992).

[8] Op. cit., Chapter VII.

and coherent welfarist code of private law. After all, these were still the heydays of the Nordic welfare state, when income differences were ever diminishing, and social security was continuously improving.

However, the growth of the welfare state halted and some shrinking occurred, even in the Nordic countries. The vision of a coherent welfarist legal system became less realistic – and was, in any case, probably impossible, due to the inherent contradictions in the ideology of the welfare state. Still believing in welfarist values, however, I felt compelled to acknowledge the fragmented nature of societal change, implying that law could also develop quite incoherently, moving simultaneously in various directions. Primarily working with tort law issues at the time, I advocated small good narratives of legal change in an uncertain and fragmented societal context as the solution.[9] This underlined the personal moral responsibility of lawyers, including the academic ones, for the choices made in these narratives. But there was a weak spot in this approach: How to define which narratives on legal change could be counted as 'good', in the particular spatial and temporal context?

In 1995, Finland and Sweden became members of the European Union. This created a new space for critical discourse, both defensive (do not limit our welfarist approaches!) and offensive (how can we use learning from other legal systems to improve ours?). My answer was basically the fragmented one: I preferred a free movement of legal ideas rather than (to my mind) a backward-looking and static European codification.[10] The national learning processes were at the centre of these ideas, but again, the understanding of when the learning could be considered 'good' was lacking. It was still a puzzle.

Needless to say, the European project is now in difficulties. Maybe today, when the EU is torn by Brexit and various right-wing nationalist forces, the symbolically 'good' stance would be to promote joint European development of private law, rather than national learning?

This short personal overview illustrates both the historical contextuality of critical choices, and the Nordic approach to legal critique. In a period of growth of the welfare state, it was natural for a critical scholar to try to contribute to the discussion of what a welfarist private law should

[9] *Senmodern ansvarsrätt* (Helsingfors, 2001).

[10] 'Private Law in the EU: Harmonised or Fragmented Europeanisation?' (2002) 10 *European Review of Private Law* 77.

look like and how to support legal development in this direction,[11] and equally natural to meet the subsequent decline of the welfarist project with a combination of defensive and diverse critical legal strategies. Europeanisation, again, required taking a stand on how to promote social values at the European level[12] and whether, for example, the suggested European codification of private law should be regarded, from the critical perspective, as a calamity or an opportunity.[13] In the Nordic setting, the critical responses to these societal changes were formulated in dialogue with other legal actors, with a subsequent impact on the development of private law.[14]

Critical as Social

The term 'critical' is commonly used in discourses on science in general, as a positive or even necessary quality of all research. In the value-catalogues of universities, the word 'critical', or some derivative thereof, is a recurrent expression.[15] The foundation of the scientific attitude is that science should continuously question established truths and be prepared to reassess established knowledge when new results so demand. In this sense, all serious research is and should be defined as 'critical'. From this conceptual perspective, to be regarded as serious, mainstream research should also be based on a critical epistemological attitude.

However, when speaking about critical legal scholarship, the term 'critical' assumes more than just a critical epistemological attitude. While, of course, such scholarship must be epistemologically critical, and indeed is often characterised by a high degree of self-awareness regarding methodological issues, the usual definition of critical legal scholarship requires

[11] See e.g. R. Brownsword et al. (eds.), *Welfarism in Contract Law* (Aldershot, 1994).

[12] See e.g. M.W. Hesselink (ed.), *The Politics of a European Civil Code* (The Hague, 2006).

[13] Even though many critical researchers were negative to codification, there were also codification-positive views: U. Mattei, 'Hard Minimal Code Now – A Critique of "Softness" and a Plea for Responsibility in the European Debate over Codification', in S. Grundmann and J. Stuyck (eds.), *An Academic Green Paper on European Contract Law* (The Hague, 2002), p. 215.

[14] For example, the concept of *social force majeure* was discussed in a research paper funded by the Nordic Council of Ministers, see J. Bärlund, *Sociala prestationshinder i konsumentavtal* (NÄK-rapport 1990:6, Copenhagen, 1990), and introduced in the Finnish consumer protection legislation, see Consumer Protection Act 5:30(3).

[15] For example, in the strategic plans of University of Helsinki, 'critical thinking' and 'critical mind' have been presented as a core value of the University.

something more. Criticism of established standpoints is a necessary, but not sufficient, feature of an approach that we would classify as critical legal study.

'Critical' in the legal context has a societal meaning. The term is used to point at the outwards relationship between law and society, rather than inwards at the methodological discourse. In other words, for the critical legal scholar, it is the societal substance of his or her work that determines the degree of 'criticalness'. 'Critical' is related to societal critique, usually concerning a particular society at a particular time, as part of the legal analysis.

The critique may have, and indeed often has, methodological consequences related to new and creative understandings of how law could be used as a means to remedy problems revealed by the societal critique. The focus is often on the internal contradictions or tensions within law,[16] such as between various concrete legal materials, between different basic values or between different levels of the law,[17] and on how these contradictions may be used for the purpose of reinterpreting the legal order. However, even with this emphasis on renewal of legal methodology, the societal critique is still a *sine qua non* for a study that wishes to be classified as 'critical' in the perspective adopted here. Even if the methodology is radical, the research can hardly be described as part of critical legal scholarship as usually understood, if the ethos of improving society in a 'social' direction is lacking.

In the following discussion, I take a societal definition of critical legal scholarship as a starting point. Admittedly it is very vague, but it is sufficient to place societal issues in the spotlight. At least it is shared by the various national critical schools referred to in this paper, including the Nordic perspective.

Having defined critical legal scholarship as scholarship with a particular and conscious societal focus, the obvious question when discussing the tasks of contemporary critical scholars concerns the content of the societal commitment. Clearly, this commitment must relate to societal justice, in an attempt to improve, in some way, the position of the weak

[16] My personal favourites from different legal traditions were R.M. Unger, 'The Critical Legal Studies Movement' (1983) 96 *Harvard Law Review* 563, U. Reifner, *Alternatives Wirtschaftsrecht am Beispiel der Verbraucherverschuldung* (Neuwied und Darmstadt, 1979) and from the Nordic countries, L.D. Eriksson, 'Utkast till en marxistisk jurisprudens' (1979) 11 *Retfærd* 40.

[17] See e.g. K. Tuori, *Critical Legal Positivism* (Aldershot, 2002).

and the vulnerable, similar to that which in American discourse is called 'poverty law'. But is this the only acceptable approach for a scholar wishing to be called 'critical'?

Critical Across Borders?

The question of what counts as 'critical' is challenging, even when posed within a national legal discourse. This challenge is multiplied if one attempts to define 'critical' detached from any particular national legal order.[18] There is an evident risk of ending up comparing approaches that have completely different tasks. However, in a symposium such as this, bringing US and European scholars together, we must arrive at some form of joint understanding to make a dialogue possible, even though such understanding can offer only a vague basis for the discussion. However, experience shows us that critical scholarship is able to move across borders, despite the challenges.[19]

It goes without saying that, in a societal perspective, a 'critical' stance in one society may be rather mainstream in another. The 'critical' in each case is dependent on the context of the surrounding society. For good reasons, Adam Gearey stresses that his 'approach to poverty and alienation relates to the time and place studied in this book'.[20]

Even when we limit the critical theme to cover only poverty issues, the concept of 'critical' can be given many interpretations. In the US, Bernie Sanders' views are probably defined as critical enough.[21] But he has identified the Nordic societies as one of the models for his vision, and indeed many of his proposals, such as tuition-free higher education and a healthcare system available for all, are a reality in these countries, as they are in many other European countries as well. However, it does not seem to require a very critical attitude of a Nordic researcher to defend the status quo. It is important to defend the achievements of the welfare

[18] I had the privilege of participating in the famous US-German meeting of critical scholars in the heydays of critical studies in which deep differences of understanding came to the fore (e.g. on the role and meaning of "theory"), see C. Joerges and D. Trubek (eds.), *Critical Legal Thought: An American-German Debate* (Baden-Baden, 1989).

[19] A good illustration of the cross-fertilisation of continental, Nordic and common law perspectives can be found e.g. in the conference volume T. Wilhelmsson (ed.), *Perspectives of Critical Contract Law* (Aldershot and Brookfield, 1993).

[20] Gearey, p. 5.

[21] Gearey, p. 145.

state, but should one really call a purely defensive strategy, defending the situation at hand, 'critical'? Obviously, the fights taken by a Nordic critical researcher will, to a considerable extent, concern different issues than the stances taken in a US context.

The importance of contextuality does not, however, relate only to the differences between the Nordic (or European) and US societies. Even in very similar societies, the traditions and political constellations may result in different understandings of concrete issues. To give a topical example, in recent Norwegian political discourse some attention was focused on the issue of whether schools should offer all pupils a (free) warm lunch every day – with the left proposing, and the right vehemently opposing (some even calling it 'socialism'). From a Finnish perspective, this is a strange debate: Even though Finland is a very similar country to Norway (albeit not as super-rich), the warm school lunch has already been offered for 50 years, and everybody, even the right-wing, finds it natural. It would not require a radically critical stance to defend this practice.

Legal traditions, as well as societal traditions, shape the context in which critical strategies are elaborated. Looking in particular at the role of academic lawyers, one cannot avoid taking into account their different positions in different legal traditions. The great divide between common law and so-called civil law countries certainly has an impact on the kind of critique that is able to have the desired societal impact. The important role of academic lawyers in developing what the Germans call *Stand der Lehre* (the established view) makes the creation of an alternative legal dogmatics with real impact on the development of law perhaps more realistic. New concepts developed by critical legal scholars, and used in both academic teaching and in legal practice, can make a real difference in the Continental setting. This may be one reason why, for example, in the last few decades, there has been a strong current among more or less critical scholars on the Continent focusing on fundamental rights and human rights as a tool for developing private law.[22]

In particular, from the Nordic perspective, it is easy to emphasise the particular role of academics, including critical ones, in shaping and de-

[22] See e.g. O. Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the Weaker Party* (München, 2007) and C. Mak, *Fundamental Rights in European Contract Law* (Austin, Boston, Chicago, New York and The Netherlands, 2008).

veloping the conceptual structures of law. The Nordic legal tradition,[23] combining a Continental style of legal reasoning, in which concepts and structures play an important part, with the absence of a comprehensive and well-structured civil code, tends to place academic legal scholars in an important role as concept-builders. It is therefore hardly surprising that Nordic critical scholarship has focused heavily on concept-building.

In other words, even though we can certainly learn from each other, across borders, how to develop the critical analysis, the goals of the critical endeavour are necessarily contextual, related to the prevailing situation in the society in question. In addition, in the multi-layered European context,[24] critical strategies need to relate to the fact that some issues can easily be moved forward on a national level, while others may require EU-related strategies, which consider European society as a whole.

A complicated pattern of critical learning emerges. At best, we can continuously learn from experiences across borders, by recognising the value of a free movement of legal ideas. However, in order to avoid the alleged difficulties and even fruitlessness of legal transplants,[25] such learning has to be contextually informed. Societally critical thinking can be properly fed by experiences across borders, only if the experiences are disseminated with due regard to their societal context at a certain point of time. Learning is not the same as passive borrowing.

It is worth noting a particular contemporary challenge in this context. Much of societal discourse today circles around various understandings of nationalism and globalisation. Even though internationalism was a key element of the 19th century socialist movement, contemporary critical researchers have often, and understandably, been involved in fighting (liberalist, trade-driven) globalisation, alongside various kinds of anti-globalisation movements.[26] This puts us in an awkward position,

[23] Defined and described as a particular legal family by K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd ed. (Oxford, 1998), p. 277.

[24] See e.g. U. Neergaard and R. Nielsen (eds.), *European Legal Method – in a Multi-Level EU Legal Order* (Copenhagen, 2012).

[25] See on legal transplants A. Watson, *Legal Transplants*, 2nd ed. (Athens, Georgia, 1993), and on the critique against this concept, underlining the difficulties in moving a legal solution from one societal context to another, e.g. P. Legrand, 'European Legal Systems are not Converging' (1996) 45 *International and Comparative Law Quarterly* 52 and G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11.

[26] Mentioned also by Gearey, p. 141 fn 12.

where societal debate is structured around the concept of nationalism. How can one formulate a critique of the negative features of a laissez faire globalism, without being trapped in a more or less extremist right-wing nationalist discourse? On the other hand, how can one defend the self-evident value of an international outlook on societal issues, without sliding into an acceptance of the negative societal consequences of an unlimited globalisation? Again, the answer, if there is one, must be sought in the features of the actual concrete issue in its context. We require smaller, more analytical narratives than a generally phrased contradiction between globalisation and nationalism as such.

Consistent Societal Goals?

It is easy to see that we must have at least partially different critical aspirations in different countries, but also, within each jurisdiction, the definitions of 'progressive' and 'radical', and thus of 'critical', vary across the political spectrum. Even if, flattening the analysis considerably, we include a politically leftist element in the 'societally critical', excluding, for example, right-wing populist movements from our understanding of 'critical', many issues remain on which various stances can be taken within a critical paradigm.

We certainly agree on the need to fight poverty, but the basic approach to the issue may vary anyway. Some may find it most effective to focus on the poorest and their support, while others might think it is societally more sustainable to build a welfare state based on the principle of universalism, meaning that welfare services should be freely available for all (free schooling, free health services, etc.). For example, the Nordic approach to welfarism emphasises the importance of universal services that contribute to legitimise the welfare state within all layers of society. One may even ask to what extent is it acceptable to speak about 'the poor' as one clearly defined, and thereby easily stigmatised, group? Does that not already represent a misuse of stigmatising power?[27]

This can, of course, be termed a matter of technique or tactics, the ultimate goal being the eradication of various aspects of poverty. The question becomes trickier when discussing societal goals, other than the

[27] In other words, one might question whether one really should speak about a 'poverty line' (Gearey, p. 172) or about an 'institutional divide' between the poor and us (Gearey, p. 177)?

fight against poverty alone. What about climate change? And the loss of biodiversity? Should fighting these not be the primary goal of any critical movement today?

Many have read the IPCC reports[28] and their warnings, and even more disturbing is the analysis of the Anthropocene by a multidisciplinary group of researchers that shocked the world a few years ago.[29] Climate change combined with a rapid loss of biodiversity deeply challenge the contemporary way of life. Shouldn't the critical human mind now concentrate on how to save the world and humanity from itself?

And how can this goal be combined with societal goals related to equality and the combatting of poverty? What is the right path to choose, if the (short-term) interests of the poor are in conflict with the sustainability goals in a specific situation? Is it possible to find a socially-just sustainable solution? Obviously, the concrete context must be decisive.

Critical researchers are not alone in struggling with the difficulty of societal goal setting in the complex contemporary society. In many quarters, a popular starting point for ethical reasoning today is the 17 Sustainable Development Goals adopted by the UN in 2015.[30] As well as critical scholars, many others are bowing towards these Development Goals. Even big investors, advertising sustainable investment, approach the issue using the UN Sustainability Development Goals. Can this approach be called 'critical' in our understanding of the word, and does it matter whether it is called so?[31] The way in which the goals are operationalised in various contexts obviously determines our assessment.

In other words, it seems that a focus solely on general substantive goals does not bring us very far in our search for a consistently critical stance. It is certainly easy to agree on general catchwords, such as equality, eradication of poverty and sustainability, but the picture becomes blurred as soon as the discussion continues at lower levels of abstraction.

Perhaps the solution should not be sought in the substantive goals alone. A 'procedural' or 'personal' element might be needed as well. Such an inroad is offered by Adam Gearey. Activism and equal cooperation

[28] https://www.ipcc.ch/.

[29] On the Consensus Statement first issued in 2013, see A.D. Barnosky et al., 'Introducing the Scientific Consensus on Maintaining Humanity's Life Support Systems in the 21st Century: Information for Policy Makers' (2014) 1 *The Anthropocene Review* 78.

[30] https://sustainabledevelopment.un.org/?menu=1300. The first goal is: 'End poverty in all its forms everywhere'.

[31] Compare R. Nader, *'Only the super-rich can save us!'* (New York, 2009).

with the poor are decisive elements: 'The theorist is no longer a spectator, but one whose point of view comes out of doing and being with others: an activist.'[32] In addition to the substantive goal of fighting poverty, the procedure by which this goal is approached, 'being-with' the poor in an activist fashion, is presented as a hallmark of a critical legal scholar. Putting the focus in this way on procedure and personal engagement rather than substantive content is firmly in line with the claim that the 'critical' is not primarily characterised by the substantive consistency of the approach, but can rather be found through a contextual assessment of the activity.

For decades, a prevailing claim in sociological discourse has been the increasing complexity and uncertainty, even chaos and ambivalence,[33] of late modern society. Ulrich Beck's analysis of the risk society[34] and Anthony Giddens' presentation of the consequences of modernity[35] are well-known classics. The outcome of causality chains in an increasingly complex world is ever more difficult to predict, and such epistemological uncertainty is, in the present century, underlined by the effects of globalisation, digitalisation and rapid technological advancement – not to mention the COVID-19 pandemic. The difficulty is exacerbated by a growing ethical ambivalence due to the declining authority of tradition and ethical expertise. Such a state of uncertainty requires societal decision-making that can flexibly adapt to concrete experience of the effects of previous decisions. Management of societal complexity must foster an experimental culture of decision-making. This affects legal decision-making as well. There has been much discussion in legal quarters on the role of law in a state of growing uncertainty. In an uncertain and complex world, law must also be able to adapt, to 'learn' from experience.[36] As

[32] Gearey, p. 172. See also p. 171: 'Being with' is the ongoing attempt to deal with an historical legacy from the perspective of a future that is not necessarily limited by the past'.

[33] Z. Bauman, *Modernity and Ambivalence* (Oxford and Cambridge, 1991).

[34] U. Beck, *Risikogesellschaft* (Frankfurt am Main, 1986).

[35] A. Giddens, *The Consequences of Modernity* (Cambridge, 1990).

[36] A few examples out of many discussing the law as a learning mechanism: A. Ogus, 'Risk Management and 'Rational' Social Regulation', in R. Baldwin (ed.), *Law and Uncertainty, Risks and Legal Processes* (London-The Hague-Boston, 1997), p. 139, H. Collins, *Regulating Contracts* (Oxford, 1999), p. 8, and E.R. de Jong, 'Tort Law and Judicial Risk Regulation: Bipolar and Multipolar Risk Reasoning in Light of Tort Law's Regulatory Effects' (2018) 9 *European Journal of Risk Regulation* 14.

learning from experience is contextual, law and legal reasoning have to become more contextual as well.

This certainly applies in the case of critical legal activity too. Critical legal work has to be experimental. A softer form of 'procedural' approach to critical legal scholarship than the 'being-with-activism' referred to above is to consciously take an experimental position on the ways in which our societal goals may be achieved. We need to continuously learn what works to the benefit of the weak and the vulnerable in various contextual settings.[37] We must accept that our small, good narratives are experimental.

Legal Critique as a Means of Controlling and Counterbalancing Power

The same questions that I have posed above, concerning the various and conflicting goals that a critical scholar may pursue, could be posed by any political activist and decision-maker. There is nothing particularly legal in them. Is there anything more that can be said from a legal perspective?

A crucial task of law is the control of societal power. According to the principle of rule of law, societal power has to be legally controlled. As we have already learned from Montesquieu, law is supposed to set the boundaries for the use of political and administrative power. A fair law, aimed at the protection of weaker parties, should also counterbalance economic power. Respect for democracy and human rights requires societal power to be controlled by law. Law is expected to provide a bulwark against the arbitrary use of societal power.

A critical scholarship is a scholarship that takes this task of law seriously. A critical scholar strives to use law to effectively counterbalance other societal power and to question unfounded societal power structures, in the interest of the weak and the vulnerable. Of course, this includes the need to criticise legal power as well.[38]

This goes for private law too. Private law may, in many ways, be used as a tool to limit arbitrary use of societal power, be it economic, political or

[37] Compare Gearey, p. 146 on LatCrit methodology stressing 'collective engagement and experiments'.

[38] As Gearey, p. 48 notes, a radical lawyer should seek to 'challenge and delegitimise the legal system from within'.

administrative power. Some even see opportunities for 'counter-hegemonic interpretation' of private law to be a part of a 'counter-hegemonic project' that could profoundly change the power structures of contemporary society.[39] Others may, perhaps more realistically, regard private law as offering instruments that can occasionally, depending on the context, help suppressed groups challenge societal power structures.

By way of example, tort law often appears as a useful tool for controlling societal power.[40] Some tort lawyers even claim that tort law 'has been transformed into state control of personal and corporate conduct through private law'.[41] This is, of course, not news for an audience from the US where punitive damages and class actions have made tort litigation an important tool, both for legal development (for example, in the area of product liability) and for the earnings of well-paid lawyers. Tobacco litigation is a good example. Increasingly, tort law is used in this way in Europe as well, and tobacco cases have also been brought to courts here.[42] This certainly opens interesting comparative perspectives for critical private law.

The use of tort law to control problematic behaviour of economic players offers a good example of the fragmented and contextual nature of possible legal advancement. Not only is the assessment of negligence necessarily contextual, as it offers the legal players a range of argumentative patterns relating to the concrete nature of the business at hand, but in many countries there is also a curious oscillation between the main principle of negligence-based liability and stricter forms of liability related to more dangerous activities,[43] and this oscillation is often rather contextual as well. It is difficult to convincingly raise the critical perspective above

[39] U. Mattei and A. Quarta, *The Turning Point in Private Law: Ecology, Technology and the Commons* (Cheltenham and Northampton, 2018).

[40] Mattei and Quarta, p. 121 even claim that '[t]here is perhaps no area of private law that shows more potential for transformative power than tort law'.

[41] G.Brüggemeier, 'The Control of Corporate Conduct and Reduction of Uncertainty by Tort Law', in R. Baldwin (ed.), *Law and Uncertainty, Risks and Legal Processes* (London-The Hague-Boston, 1997), p. 57, at 59.

[42] On tobacco litigation, see G. Howells, *The Tobacco Challenge: Legal Policy and Consumer Protection* (Farnham, 2011).

[43] See e.g. F. Werro and V.V. Palmer (eds.), *The Boundaries of Strict Liability in European Tort Law* (Bern, 2004). This opportunity is included also in the Principles of European Tort Law (available at http://www.egtl.org/) Art. 5:101 (1): 'A person who carries on an abnormally dangerous activity is strictly liable for damage characteristic to the risk presented by the activity and resulting from it.'

the contextual assessments, without resorting to such broad generalisations that they become almost empty.

Tort law is useful not only as a controller of economic power, but it can be, and has been, used against political and administrative power as well. Theoretically interesting in this context is the question as to what extent omissions by the public authorities – and in particular omissions with regard to the well-being of weak and vulnerable groups in society – can be remedied through private law action. To what extent can political claims for a 'better welfare state' be addressed as claims for compensation under private law? Interesting examples can be given from the Nordic countries in which constitutional guarantees regarding social and health services have been referred to as a reason for finding public entities liable.[44]

But again, to what extent is this 'critical'? A private law action with a relatively narrow perspective is not necessary an optimal method for decision-making concerning the distribution of public resources. It is possible that those who would most enjoy the use of liability procedures are the well-resourced groups in society. Even though the universalist principle characteristic of the Nordic welfare state might imply that some fruits of the actions of well-resourced groups may benefit weaker groups as well, it is not feasible to assume that the well-resourced would have much interest in taking action in areas that are of particular importance to the weakest, such as the homeless and unemployed. The critical potential then lies in the existence of action groups or 'poverty lawyers' who would be prepared to take such action on behalf of, and together with, the weak.

In particular, from the Nordic perspective, it is also necessary to note that all societal power, as such, is not intrinsically bad. Societal power is bad when used in a wrongful way or in instances that lack sufficient legitimacy to use power. In discussing this aspect, one should bear in mind that, generally, the state and public administration are viewed in quite a

[44] See e.g. the Finnish Supreme Court decision 2001:93: As a municipality according to the day care legislation was obliged to offer daycare service as a public task, a municipality was found liable in tort when the plaintiff during ten days was not offered a day care place, even though the municipality argued that it had taken extensive measures to remedy the lack of sufficient number of day care places. Interestingly, the Appellate Court in its decision did not only refer to the daycare legislation, but also to the Finnish constitution, according to which the public sector is obliged, as defined by law, to guarantee each and everyone sufficient social and health services.

positive light in Europe, and in the Nordic countries in particular.[45] The state is more trusted here than it may be in the US. Even though this should by no means lead to the adoption of an uncritical stance against public authorities, it certainly affects the place of the critical legal view in the tension between economic and political power.

As the examples here show, when private law is examined as a device through which economic, political and administrative power may be controlled, the possibilities for critical advancement must also be assessed contextually. The focus on private law as a power-controlling mechanism does not relieve us from the basic question: What is 'critical' in each context?

Contextually Critical: Learning-by-Doing

In attempting to sketch a conclusion, I will start from the obvious: It is not important whether you define yourself as 'critical' or not, what counts is what you actually do. And the assessment of the critical value of your doings, in particular, of your research, can be made only in relation to the context in which it is presented and performed.

The question of whether one can be 'consistently critical', therefore, seems to be based on a wrong ideal. It means longing for a coherent view of a Utopian law that cannot be attained and that would be alien to the reality of society and the real needs of its members. Contemporary societal uncertainty, both epistemological uncertainty with regard to the causal chains in a complex societal environment, and ethical uncertainty, requires a learning law that is prepared to experiment and continuously learn from concrete experience.

This applies to critical studies as well. A fruitful critical position must be able to take its stand in context.[46] It must be prepared to revise its standpoint according to experience. It must be able to admit that its assessments can go wrong. Instead of a grand critical narrative on legal change, we need small, experimental narratives, based on contextually

[45] For example, the general trust in the courts in the Nordic countries is higher than in most other countries, see e.g. The 2018 EU Justice Scoreboard, Figures 9 and 11: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_factsheet_en.pdf.

[46] Compare Gearey, p. 137 on the new property law scholarship: 'the only way to understand poverty law was to examine its various practices against a background of theoretical plurality'.

relevant critique. From a pragmatic Nordic perspective[47] at least, this seems to be the natural approach.

This requires an aspiration to be as transparent as possible regarding both the societal and the legal context to which the decision-making and the critique relates. A critique should not accept decision-making hidden behind formal legal constructions, but expose it to realistic contextual analysis that makes it possible to learn from experience.

The transparency and the contextual nature of the critique should facilitate a dialogue with the whole legal auditorium, not only with those defining themselves as 'critical'. Indeed, rather than speaking just to the already convinced, one should emphasise the moral responsibility of every lawyer. In the contemporary, uncertain, complex and fragmented world, with its increasingly flexible and fragmented law, the responsibility of each legal professional necessarily becomes more personal. The lawyer cannot completely hide behind a traditional formal legal conceptuality, but is forced to meet real societal issues in their societal context.[48]

Such personal moral responsibility requires the lawyers, including the critical ones, to understand their changing and multi-dimensional roles in contemporary society. In Nordic discourse, the Danish legal sociologist and theorist, Jørgen Dalberg-Larsen, has described the role of a good contemporary lawyer very well. According to him, such a lawyer should combine the best parts of three historical roles: '1) from the classical jurist role: respect for the individual and his/her liberty; 2) from the role of the welfare state jurist: efforts to further general aims and values; and 3) from the postmodern role: the idea of basing one's work on the realities of contemporary life and its legal affairs, and on one's own choice.'[49] Obviously, in different contexts, different parts of this role-description may dominate the approach of the enlightened and critical lawyer.

As Zygmunt Bauman has convincingly argued, the contextual nature of decision-making in an era in which the actors are 'liberated' from the straitjacket of large ethical systems forces decision-makers to face moral

[47] On Nordic pragmatism, see S. Blandhol, *Nordisk rettspragmatisme: Savigny, Ørsted og Schweigaard: om vitenskap og metode* (København, 2008).

[48] As the presentation of the book of Gearey underlines, 'the book argues that at the heart of both critical and liberal thinking is an understanding of the lawyer as an ethical actor'.

[49] J. Dalberg-Larsen, 'The Legal Profession in a Changing World', in T. Wilhelmsson and S. Hurri (eds.), *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law* (Aldershot, 1999), p. 99, at 112–113.

issues 'point blank, in all their naked truth'.[50] Moral decisions have to be made on practical grounds, without philosophical assurances.[51] Moral roads are not made with the help of any pre-existing map, but we make the roads by walking them.[52]

Critical lawyers should contribute by opening and walking paths of law in directions that support the weak and the vulnerable, and the future of our planet. To find the right paths, the lawyer has to know the surroundings (the context) in which he or she is walking.

[50] Z. Bauman, *Life in Fragments: Essays in Postmodern Morality* (Oxford and Cambridge, 1995), p. 43.
[51] Z. Bauman, *Intimations of Postmodernity* (London, 1992), p. xxxiii.
[52] Z. Bauman, *Life in Fragments: Essays in Postmodern Morality*, p. 17.

Adam Gearey*

One Eye in the Mirror: Reflections on a Symposium

Some years ago, with the royalties cheque from my first book, I bought a cup of coffee from a grocer's (long gone) on Store St., in London. More recently, I drank a great deal of good, strong Swedish coffee during the symposium in Uppsala. These memories are mixing together, like clouds in coffee, as I write this afterword.

And, of course, how could it not? The words of the song come to me: "you're so vain". But this time, the song was about me – well, at least the symposium. Thus, taking seriously Carly Simon's song is a very good place to start. 'You're So Vain' is a warning against monstrous self-regard.

What I carry forward from the symposium is the sense that ideas are movements between people: ideas have to be shared. Ideas are constantly on the move, or move themselves. The author, the one who claims title to a book, is really just a site at which something spreads outwards, like burs on a September breeze. A book is a pattern to be re-arranged. An idea is not in any proper way an individual thought. An idea is the thickening or momentary alignment of something that is constantly in flow – whose existence is 'in between'. Thinking, and writing – which often seem such entirely solitary activities – are most properly done with others – to encourage the movement of thoughts – not for royalties – but for the spirit of open, ongoing discussion.

Already the word spirit. The complexities of 'spirit' and its various cognates, the theological and philosophical resonances, make this a difficult term to use. But, as Adrien Wing forcefully argues, this term is entirely necessary. Adrien's genealogy of critical theory makes the problem of

* My thanks to Maria Grahn-Farley for comments on an earlier version of this paper.

'spirit murder' a fundamental term. Pantea Javidan's paper on the 'right to breathe' case, shows the urgent link between spirit and breath – and the articulation Black Lives Matter movement's politics of life.[1] There is also a historical point at stake. To take spirt murder as a starting point is to appreciate the necessary transformation of the perspectives of Critical Legal Studies (CLS), and the opening to critical race feminism and Critical Race Theory (CRT). Certainly, if I was to re-write *Lives That Slide Out of View* I would position spirit murder far more centrally. I touch on some of the reasons in the *Arts of Notice* but, it is worth stressing here that the whole analysis of reification and alienation appears in stark light if seen through spirit murder. Adrien's stories of her 'rainbow family', the travails that they have faced, and the allegory of Fatima (an essential story for poverty lawyers) – place the horrors of spirit murder in clear terms.

Spirit *murder*: to be murdered in spirit describes the erasure of what one is: one's breath or being; or, most precisely, one's being different from how being is meant to be. Pierre Schlag cites Mika Viljanen's notion of ontological politics in his essay – and – Viljanen's term is spot on.[2] Spirit murder is an erasure of being – to suffer spirit murder is to slide out of view; to disappear from one's own self, and to be erased from the polity – the social space in which liberal legal theory promise the visibility of equality. Murdered in spirit, one might count and be made visible, but not in terms that are significant to the selves or traditions that are counted on other's terms; terms that, as Martha McClusky shows, are defined by the efficient cruelties of market liberalism. Spirit murder, then, is a companion concept to Arendt's figure of the refugee and the right to have rights. Spirit murder draws our attention to 'the hidden realm' – the subjectivities or interiorities of those for whom 'the right to have rights' may amount to the right to be a commodity.

Commodification – and the associated concerns with reification and alienation – are valences of spirit murder. But these philosophical terms cannot be restricted to a narrow sense of economic exploitation. To read between Adrien Wing's personal/political stories and the philosophical lexicon of alienation opens up the authentic concerns of the symposium: how does the movement between the real, lived world, and the life of mind, the language of academic debate – demand new ways of thinking and talking? Whether or not one agrees with the particular *bricolage* of

[1] Paper given at Law, Theory, Virus Workshop, Birkbeck College, 22nd January, 2021.

[2] Mika Viljanen, presentation at Symposium at Uppsala University, August 23–24 2019.

Lives That Slide Out of View – the book's argument could be set out as follows. Very briefly, the book explores the alienation/ reification complex as a description of the subjectivities of exploitation which assume their most acute forms in the social degradation of poverty. Against degradation, the book imagines the possibilities of 'being with'. But being with is acutely limited by the zoning of social life; those physical, emotional and spiritual boundaries that are more real for most people than transformatory encounters.

To refer back to Adrien Wing, transformation requires for some – those defined by their social privilege – a dying to the self; a kind of spiritual or even revolutionary suicide (to echo Huey P. Newton writing in a very different context). A difficult problem. Whilst a critical regard to privilege is part of a problematization of the self – it can easily assume ritual forms – and the real work shirked. Something of the self has to die. Is this a cost of being with? How can this price be paid? Echoes of redemption?

For me, at least, figures like William Stringfellow and Ed Sparer – from their different perspectives – suggest the profound difficulties of taking up this challenge. What can be taken from Sparer and Stringfellow is a practice of ethics. Their ethics cannot be reduced to a list of prescriptions. We cannot follow either the Christian or the Communist in any simple way. Ethics have to remain difficult – perhaps even impossible. One of the many rocks on which the US white new left ran aground, was this difficulty of difficulties. In turn, this is bound up with further themes. As Pierre Schlag's essay stresses, and as Denise Levertov's *Olga Poems* elaborate, no one can be 'shown the way'.[3] Only ongoing struggle. Sounds grim. What else can be said?

Schlag draws attention to Robert Gordon's critical engagement with ideas of alienation/ reification after the glory days of CLS. If change was gonna come – why had it not arrived? For all the understanding of the contingency and fluidity of the 'system' – it retained its crushing weight. Perhaps the problem was 'us': change had not come because we are unable to change our selves. This moment in CLS history is the opening of a theme still with us. Whilst self-examination (rather than the Maoist criticism/self-criticism adopted by the Weather Underground) is important and necessary – the work on the self cannot distract from an ongoing critique of institutional weight which must attach the interior

[3] Denise Levertov, 'The Olga Poems', in Denise Levertov, *Collected Poems* (New York: New Directions, 2013), 333–344.

realm to a precise engagement with 'the system': the military/industrial/educational/prison/finance/energy/food complex. Capitalism, for short.

Any contemporary language the describes solidarity and alliance has to be worked out on this ground. Martha McClusky cites a contemporary radical group, PUSH Buffalo, whose ongoing practice is based on the following observation: "we are constantly growing, changing, learning, practicing and figuring it out." McClusky's essay is a study in the generation of ways of thinking rooted in popular action: ideas are a magma. The streets are our Mont Pelerin.

The currents that bring together class crits, CRT and critical race feminism are important because they are in touch with these ongoing works in progress. McClusky's comments on money – that most reified and alienating of substances – are a case in point. We still need to take control of the imaginary of money. If there was a front whose line needs to be held and strengthen, it is the work of those class crits and others linked to law and political economy scholarship. To put this point slightly differently, the theoretical work necessary must move between economics and philosophy and develop a critique that can hold together notions of power, identity and the informed, hardnosed legal and economic thinking that the essays in this symposium enact and celebrate.

For clarity: this mode of critique has no central manifesto. It has learnt certain lessons from the ways in which progressive thought has been limited and played off the field. Might we say, then, that its identity comes from a certain spirit? A pragmatism? A commitment to working out ways of thinking and doing – through – precisely that: praxis. Ongoing praxis.

The mode of 'figuring it out' – so allergic to pronouncement of critical dogma (whilst 'maintaining' a certain spirit) is admirably performed by Pierre Schlag's essay. To return to a key theme. CLS, for Pierre, is an open problem that is still with us – a hangover from the long decade of the sixties. Not so much a fundamental contradiction, as a fundamental vortex that still swirls. Terms coined in the opening, heroic period of CLS were quickly recanted as they had become dead concepts that replaced the work of thinking through profound difficulties. Given the turmoil of our times, the real emotional and spiritual work necessitated by the idea of the fundamental vortex retains its demands. Pierre puts forward a vision of the critical academy dedicated to "the cultivation of emotional intelligence and education" and "the complexities of subjectivity". Virtues increasingly absent from the privatized university, but kept firmly on the agenda by the decolonization movement.

If this is the case, then the junctural point of CLS; that point of vortex where the various waves meet is the forcing of an emotional intelligence; the myriad ways in which work on the self is work on the self with others.

We need to come back to being as being with; or, to be more precise: being with as sharing with. Speaking/listening is one mode in which we are with others. Indeed, the appropriate metaphor is that of Maria Grahn-Farley's 'walking with' – a figure that suggest movement as well as conviviality; an image that captures the sense in which – as you walk, talk or think with others, what you see and think about changes. Speech becomes linked to pointing things out; and, something constantly interrupted by the places through which you are walking. Walking/thinking, then, is thought constantly adjusted and opened to interruption – a dialogue with background noise and interruption.

As with Thomas through the streets of Uppsala. Wittgenstein's sock drawer. Ian Curtis. Cakes.

Not just walking with, but a writing with – and in case this seems simply too flat footed, Thomas Wilhelmsson evokes a way of doing critical legal studies that is on its toes. His fine argument, aware of the different contexts in which 'critical' work is done, suggests that 'crits' (even if one uses the title) need to be careful not to fetishise their own critique. What Wilhelmsson calls 'learning by doing' strikes me as opening up the spirit of pragmatism, as well as the modes in which Nordic critical scholars address the spaces in which they work.

Wilhelmsson offers a sketch towards this ethics of learning by doing that allows the agile thinker to identify those tensions or themes that might present themselves as the most open to creative possibilities. Karolina Stenlund, writing on Swedish labour law, shows exactly why one needs to be careful with 'critical' – especially when the term is seized by those pursuing a less than progressive agenda. Stenlund is carrying forward an old problem: successful activism can capture the state. But, the activist is then compromised. She has become part of 'the system' and thus vulnerable to radical strategies. In our troubled times, a populist right has shown that it can distort human rights arguments to its own advantage.

Something could surely be learnt about the politics of mobile argument from Anni Carlsson's exemplary location of the kind of tensions in digital free speech that allow activists to reclaim the democratic potential of on line social media platforms. It is very much a question of how one sees, and what one notices by having the courage to look at law differ-

ently. The terrain of operations, as ever, is characterised by complexity and technical argument. Autilia Arfwidsson creatively opens up an argument in the notorious complexities of tax law, alive to the question of the definition of operative terms. Taxation is perennially relevant to poverty law – and Arfwidsson's argument can be read as suggesting that a contemporary poverty law would have to take taxation very seriously. The kind of critical reading that Arfwidsson proposes would be of use to that growing band of progressive tax lawyers in Sweden and other jurisdictions.

Likewise, Marigó Oulis nails it – the wonderfully elliptical title of their piece opens up the idea that Sweden does not have poverty law, it has 'wealth law' or *förmögenhetsrätt* – a word whose umlauts appear to me as eyebrows raised at this audacious suggestion. We are compelled to take notice of the historical structures of debt that allowed people of moderate means to acquire "pianos and sewing machines" (the equipment of work and leisure – the material of the consumption fund in Marx's *Capital* and *Theories of Surplus Value*). Most importantly, if we are studying how people get into debt, we need to engage with ideas concealed within the 'Swedish way of doing things': to notice how lives are variously disciplined to the daily exigencies of markets. Sara Hovi's close grained reading of case law has a lot to offer in terms of this form of immanent critique. Her analysis tracks the fault line that can open up between a national legal system and the framework of EU law. Jonatan Schytzer essay stresses a related point: the court's framing of legal issues can push certain ethical arguments out of view. Schytzer's lesson is that a lawyer cannot afford to be blind to these framings and re-framings of legal question.

If there is, then, something like Nordic critical legal studies (and one should of course bear in mind Wilhelmsson's caveats), then the spirit of critical reading is an *anima* in Therése Fridström Montoya's engagement with disability law. Montoya stresses the point that the struggle against poverty is also a struggle for a recognition of the dignity of disabled people, even against the doctrines of human rights law that serve to present definitions of human dignity. Montoya positions anxiety – a vertiginous questioning of the power to define human beings – as a key way in which a philosophical inheritance that draws from Nietzsche and Kierkegaard – can be used by scholars of law. It is a way to confront doctrines of autonomy that serve to exclude different ways of being from adequate legal protection and recognition.

Whilst not works of Nordic criticism, Javidan and Finchett Maddock's essays come out of trajectories in recent critical legal thinking; and, in-

deed, suggest new directions. Finchett Maddock's work is an offshoot of legal aesthetics. Although alienation is not really one of Finchett-Maddock's concern, her turn to Deleuze, Malabou and critical technology/biomedical studies, points towards different ways of thematizing the anxieties of being human. Javidan's work bridges between class crit and CRT – and is evidenced by her original and creative use of the concept of alienation.

Javidan uses human trafficking as her focus. The commodification of the human body is realised in one of its most horrific forms in human trafficking – as is demonstrated by the contrasting stories of Cyntoia Brown and Jeffrey Epstein. Javidan presents an allegory for wider failings of the criminal law. The poor are deprived of justice, whilst wealth itself is "criminogenic": the means through which the powerful can subvert justice, and a brilliant flip of the old argument that there are crimes indelibly linked with poverty.

From Finchett-Maddocks' perspective, addiction can be understood as one of the indignities of poverty, or as an incident of wealth. Whether an addict is criminalised or medicalised says a lot about the way in which the rich and the poor have different experiences of the justice system. However, Finchett-Maddock takes this argument much further. Law itself is a mode of addiction. The legal system binds subjects to its modes of ritual and control. The very notion of a legal subjectivity suggests that one has to internalise the law to become properly subject to its regime. Law is junk. But, this is not just a Burroughsian fantasy. Its an exploration of interior and exterior realms of institutional capture: a novel way of understanding a legal assemblages that organise social and psychic space.

Another useful metaphor: a symposium as an assemblage of books, ideas and people whose traces pass through these essays. Does this allow us to return to the metaphor of the kaleidoscope that concluded the *Arts of Notice* essay? Can this assemblage of mirrors and angles provide a final way of engaging with mobile thinking? If we accept the kaleidoscope as a figure for critical thought, we have moved from the speech and dialogue to an engagement with the visual. Perhaps the uniting trope is that of arrangement and re-arrangement – and a mechanism that allows patterns to be formed and re-formed.

But is there not something artificial about the operation of the kaleidoscope? The 'beautiful seeing' of the kaleidoscope is a mechanical articulation of surfaces. Surely this is not appropriate for the fluid scattering and sharing of ideas. Perhaps I can persuade you otherwise. We would

have to start with a theme touched already upon. There is something geometrical to mobile thought – a logic of surfaces, planes and intersections that underlies any idea of flow or movement.

One of the first attempts to describe the operation of the kaleidoscope can be found in Giambattista della Porta's *Magiae Naturalis*.[4] Poised between reason and the occult, della Porta's text is important in establishing the kaleidoscope as a metaphor for critical thought. Della Porta does not understand the reflecting surface of the mirror as a glass in which we see our 'true' likeness. The mirror can be used in such a way that "that the face of him that looks on the Glass may seem to be divided in the middle".[5]

Della Porta's occult arrangement of mirrors subverts conventional figures of thought. The mirror makes us strange. This splitting of the self – our re-arrangement – suggests that in (what became the kaleidoscope) the mirrors re-arrange the face so that we do not coincide with ourselves. A last twist. The modern kaleidoscope makes use of a tube that can be twisted to position and re-position the mirrors that reflect each other. One eye – the eye placed to the aperture in the tube, is on the motion of the mirrors.

The kaleidoscope image starts to make sense if one understands thought as that which is itself twisting around itself. Seeing, or hearing, or thinking itself through this twisting. The twisting is, then, the activity of thinking. As an activity it is – if not mechanical – the property of thinking substance: the substance that we 'are' as thinkers. This idea comes, in part, from certain metaphors in *Being and Time*. Of course Dasein is not a 'thing'. But – at a structural level, Dasein is something that Beings who think themselves share. Dasein is a thinking substance that is capable of twisting and turning around itself: calling and answering to itself in a circular vortex. The individual thinker requires the general medium of thought to have one eye on the mirror of the self. Might we then evoke a kaleidoscopic *logos*? Could this be a thinking, speaking, hearing, appearing of the world as the inter-twining of the sensorium? We might locate 'it' in an 'in between'; a seam running along the line of the interiority of the self and the exteriority of the social and physical world: a world that allows itself to be twisted into thought.

[4] Giambattista Della Porta, *Magiae Naturalis* (Naples: 1558).

[5] Giambattista Della Porta, *Magiae Naturalis* (Naples: 1558), Seventeenth Book, Chap. 1, no page numbers.

It might have been more convenient for this argument if the kaleidoscope was not simply a name licenced by law. David Brewster – the inventor of the kaleidoscope – may have taken out the first patent, but he did have the generosity to share with all the geometrical theory on which the device was based. His text on the visual geometries of reflection opens to the glory of mathematics. These are the anonymous principles of thought that Simone Weil found so compelling that the revolution depended on the workers becoming well versed in Plato, geometry and poetry.[6] And perhaps the metaphor of thought as twisting can carry some sense that this ongoing refraction is not necessarily an experience of anxiety and alienation. The kaleidoscope, in Bewster's words – is a kind of democratic creativity, open to "the rich as well as the poor."[7] The kaleidoscope is a figure of sensual thought; a way of visualising (and thus talking about) something both complex and everyday: how we notice ourselves and put the world together differently.[8]

We are where we should be all the time; and the gavotte is itself an *aporia* around which the sensorium twists itself together and pulls itself apart.

[6] Simone Weil, *Cahiers* Vol 6 ed. Alyette Degraces et al., Oeuvres Completes (Paris: Gallimard, 1994), 164–278.

[7] David Brewster, *The Kaleidoscope: its History, Theory and Construction with its Application to the Fine and Useful Arts* (London: John Murray, 1885), 7.

[8] David Brewster, *The Kaleidoscope*, 8.

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