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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).