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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 reified⁶ 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 distancing, 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 compartmentalization... 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 post-modern 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).