# CLS Kritik

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#### The aff presents justice within a narrow lens of legalism masking the role of power relations in shaping the status quo

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TRANSITIONAL JUSTICE IS a field on an upward trajectory. In a relatively short period, it has come to dominate debates on the intersection between democratisation, human rights protections and state-reconstruction after conflict. As well as its historical associations with the post-war tribunals in Nuremberg and Tokyo, and the democratisation of previously authoritarian regimes in Latin America and the former Soviet Union, the term is now regularly deployed with regard to the Balkans, Rwanda, Sierra Leone, East Timor and elsewhere.' A flurry of scholarly activity in recent years suggests its growing political and scholarly impor- tance.2 A distinguishable transitional justice template has emerged involv- ing possible prosecutorial styles of justice (sometimes with bespoke international, hybrid or local institutions), local mechanisms for truth recovery and a programme for- in previously conflicted societies. Transitional justice has emerged from its historically exceptionalist origins to become something which is normal, institutionalised and mainstreamed.3 This chapter will argue that a key trend is already apparent in this relatively new field-the dominance of legalism.' This scholarly emphasis is also prevalent in the policy and practice of transitional justice. For example, international donors are funding what Brooks has described as an 'explosion in promotion of the rule of law' in local criminal justice systems in transition.5 International criminal justice appears increasingly to have been 'informally annexed' by international lawyers.' Focusing on both the local and international, this chapter will argue that transitional justice has become over dominated by a narrow, legalistic lens which impedes both scholarship and praxis. The dominance of legalism is seen in the outworking of a number of overlapping themes. These are grouped below as the notion of 'legalism as seduction', the much vaunted 'triumph of human rights', and the tendency for transitional justice legal scholars and practitioners towards 'seeing like a state'. The second part of the chapter suggests a range of practical and theoretical correctives to such tendencies. These are explored as encouraging legal humility, seeing human rights as development and finally developing a criminology of transitional justice. The chapter concludes that law's place as the core framework around which transitions from conflict are constructed is now assured. Such a context should encourage a more honest acknowledgement of the limitations of legalism and a greater willingness to give space to other actors and forms of knowledge. It might be helpful at this stage to offer some background to the chapter by way of an honest declaration of interest and a short comment on terminology. The chapter is drawn from a number of scholarly and practical experi- ences over the last decade. In Northern Ireland, these have included involvement with a range of practical peace-making projects. One such initiative involved efforts to supplant paramilitary punishment attacks with community restorative justice programmes. Partially staffed and led by emphasise the formal or instrumental aspects of a legal system. They are inclined to assume the self-evident 'rightness' of the rule of law. While thin legal scholarship is not necessarily atheoretical-indeed it may be so highly theorised as to be largely disconnected from the real lives of those affected by the legal system'1-it is broadly less likely to reflect critically on the actions, motivations, consequences, philosophical assumptions or power relations which inform legal actors and shape legal institutions. A thicker understanding of transitional justice is therefore intended to counteract at least some of these tendencies.

#### Legalism’s ‘truth-making’ endlessly reconstructs deviance to allow for continued distribution of death

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I have argued in this chapter that the criminal law - through the mechanism of the sanction which can both allow and disallow - is a crucial dimension of contemporary bio-political apparatuses. From the reading of the first volume of The History ef Sexuality and the last lecture of 'Soci.ety Must be Defended' pursued in the pages above, bio-politics emerges not as a political technology solely devoted to the maximisation or the optimisation of life but precisely as a mechanism for the differential distribution of death. Bio-politics does not simply fail to prevent death; rather, as Foucault insists in his Coll2ge de France lecture course for 1 97 7-78, Security, Territory, Population, 'the death of individuals not only does not disappear, it must not disappear'.80 If bio-politics thus differentially exposes or abandons certain others to the risk of death (and certain specified, literally 'sub'-populations as a whole to this risk) then this exposure or abandonment, I have tried to show, continues to be effected through the medium of the criminal law sanction. Whilst no Foucauldian approach to the criminal law would maintain a clear separation between the juridical and extra-juridical elements of the penal apparatus (for example, the juridical rule of the HAD is unthinkable without the historically stigmatising efforts of discourses such as psychiatry) nevertheless I have tried to demonstrate the important role that the criminal law sanction continues to perform in distributing death within a governable population. The juridical dimension of criminal law is hence not reducible to an epiphenomenon or supporting mechanism of more vital and determinative technologies of power which lie outside or beyond it;81 rather, the criminal law sanction is a fundamental component of the biopolitical apparatus. In the course of seeking to explain the ongoing success of the prison in the face of its evident failure, indeed even the constant and paradoxical furnishing of the prison 'as its own remedy',8t Foucault famously suggests in Discipline and Punish that 'the prison, and no doubt punishment in general, is not intended to eliminate offences, but rather to distinguish them, to distribute them, to use them'. He continues: Penality would then appear to be a way of handling illegalities, of laying down the limits of tolerance, of giving free rein to some, of putting pressure on others, of excluding a particular section, of making another useful, of neutralizing certain individuals and of profiting from others. In short, penality does not simply 'check' illegalities; it 'differentiates' them, it provides them with a general 'economy'. And, if one can speak of justice, it is not only because the law itself or the way of applying it serves the interests of a class, it is also because the differential administration of illegalities through the mediation of penality forms part of those mechanisms of domination. Legal punishments are to be resituated in an overall strategy of illegalities. 83 The way of conceiving criminal law that I have argued for in this chapter, namely as a bio-political technique for the differential distribution of death, shares something with this description of penality as a distribution of illegalities. Far from a simple defining of the licit and the illicit, criminal law has a more complex distributive role to play in terms of allowing and disallowing certain practices, tolerating some and neutralising others. As hopefully emerges from the foregoing examples of the criminalisation of sexuality, criminal law does not simply attempt to punish transgression; nor does it aim, despite perceptions of a 'preventive turn' in criminal law, to prevent or pre-empt harm and violence per se, but rather it provides a mechanism for the differential exposure of some (others) to violence and death through the opening of a biological caesura within the population to be governed. This is just one of the ways in which law crosses what Foucault calls the 'threshold of modernity';81 that is, its becoming-bio-political.

#### Vote negative to engage in continuous critique of legalism – Critique opens up space for radical imaginaries by interrogating how legal structures have emerged and developed

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Critique has the whole of society as its object and emancipation as its aim. Otherwise the critic becomes victim of ideology: The thinking subject is not the place where knowledge and object coincide or consequently the starting point for attaining absolute knowledge. Such an illusion about the thinking subject under which idealism since Descartes has lived, is ideology in the strict sense, for in it the limited freedom of the bourgeois individual puts on the illusory form of perfect freedom and autonomy.49 If we replace the 'thinking subject' with the 'legal person', Horkheimer's axiom could become the defining motto of a critical legal ontology upon which the radical critique of society could be based. Within jurisprudence, this line connects with Critical Legal Studies, particularly its British version. Although it would be wrong to say that early British CLS was primarily Marxist, it did contain a strong political orientation and an affinity to this school of thought and practice. The 'Cries' saw themselves as a counter-movement; they were radicals, demanding the impossible. The social was to be re-imagined. Notions such as the 'intersubjective zap' the intense moment when people perceive that there is a possibility of their coming together, were a provocation, a utopian urge for a better world.50 Its borrowings from Marxism are also apparent in its deployment of theories of ideology and alienation.51 The legitimacy of the social world is sustained by 'overpowering' symbols that extend over the whole operation of the law. In this sense, critical legal theory is intimately associated with the practice of philosophy and with emancipatory and radical politics. In equal measure, a critical movement is theoretical and political, and a critical legal movement addresses the institutional and doctrinal politics of law and the politics of law's self-understanding in the form of jurisprudence and legal theory. If one is not aware that legal concepts are reified and abstracted, they appear to have some kind of foundational substance, a kind of autonomy or independent being. Law presents the social order as if resting upon itself. This loses sight of the fact that the law manufactures its own conditions of legitimacy and then attempts to legislate them as a priori universals that have a legitimising effect through their appeal to reason. Reification is a corruption of the very process of reasoning in that it passes off one thing as another: it gives coherence and substance to things that can have no independent being, like those fetishes that attribute human powers and capacities to objects and constructs. This book attempts what we could call a political philosophy of justice. It attests to the political nature of philosophy, in that philosophy should be a practical guide to action; and the philosophical nature of the political. No social organisation is a 'given'-it is a cultural construction, where ideas have gone into action. Over time, these ideas take a solid form, and the sheer contingency of the events that have constituted an order become forgotten. Behind every social organisation there is thus a philosophy, even if this has become fetishised, unquestioned common sense, forgotten.

#### Prefer Epistemic interrogation over policy making – Knowledge informs how legal structures emerge and interact with the world

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In the early days, critical legal studies (CLS) cohered around the demand that law is a form of politics. While legal reasoning perpetually mystified its own operation, law itself was directly and immediately political. Legal decisions were choices which formed part of the 'ideological struggles in society'. 1 This generation of 'Crits' looked at 'the undeniably numerous ways in which the legal system functions to screw poor people', but also 'at all the ways in which the system seems at first glance basically uncontroversial, neutral, acceptable'.2 However, these early forays into CLS - largely associated with the major US law schools - took a narrow approach to the relation between law and politics. Typically, theorists depended on broad post-Marxist political commitments, which too often failed in their radical aspirations or petered out after the limited nature of the law school site became apparent.3 Gathering a number of 'young' Crits, this collection revisits the relation between law and the political. However, we want to suggest that there is something distinctive about this return: it is far from a simple rehashing of the themes and tools of early CLS. It is not adequate, we suggest, to treat law as a mere instrument of political power, to reduce our outlook to the claim that law is politics by other means. Nor is it enough to claim that the mythic formality and neutrality of the law functions as an ideological mask for the machinations of politics. Times are different. That law is politics would be welcomed by many states who preside over the evacuation of any antagonistic sense of politics. Nowadays, not only does law increasingly resemble politics, but politics increasingly resembles law. In an indistinct fuzzy middle zone, what emerges are techniques of management, security, strategy and policy. The real 'field of pain and death' ,4 upon which legality is predicated, is no longer merely the courtroom, but also the planning office, the social security department, the job centre. The contemporary situation is marked by the increasing role played by law in the political, social and economic spheres. Everywhere we see a tendency to render law at the heart of things, subjecting ever-growing domains of life to a knowledge structured by legal concepts, practices and methods. The diagnosis of juridification as an imperial process of colonising other disciplinary structures and spheres with specifically legal modes of thought has been widely noted in legal and political theory. 5 The increasing prevalence of law can be seen as a manner of inserting the state into everyday life, intertwining sovereignty, regulation and normativity with our everyday being-together. However, as with all colonial logics, the order seeking dominance is not untouched by those that it infects. What we witness is not, therefore, the sheer dominance of law, but the dissipating of the legal form in ways that allows power to assert a more pervasive grip on life. Through these new processes of juridification, law's sense of Nomos, Jus or even simply 'Law' is obscured. Law understood and appreciated as a social bond or a command to justice is increasingly lost, eclipsed by new techniques of control which have appropriated and corrupted the legal mode, emptying it of any remaining sense of right. At the same time, those increasingly juridified discourses are closed with the authority and legitimated violence of law. This phenomenon is thus profoundly different from a simple proliferation of extra laws. Rather, this is a deep juridification which intertwines life with power, and which some will term bio-politics. Bio-politics refers to the ongoing tendency of governance to operate with reference to a normalised understanding of how humans and populations are expected to live. Power thus becomes entwined with all sorts of scientific and social knowledge. Law in a bio-political setting, far from being a supreme and singular arbiter of command, is merely one - albeit highly significant - site in a much wider matrix of power relations. Without specific deference to either the Foucauldian, Negrian or Agambenian theories, the effect of bio-politics can be understood as a practice of power in a setting where norm is blurred with fact, ought is reduced to is, and the brutality of dominance over human beings is achieved in the name of a bastardised and apolitical rationality. There are arguably few simpler examples of this than the multifarious juridical techniques of repressing otherness at jurisdictional borders. :.\ntiterrorism' has become a new horizon by which people can be excluded, detained and stripped of their rights in the name of security, demonstrating how law's bio-political instrumentalisation has further accelerated in the last decade. These developments necessitate a renewed thinking of 'the political' that transcends the reductive assumptions of the post-1989 politics of consensus. At the heart of this collection, this question of the political is posed in its inescapable relation with law.

# Extensions/Links

## Link – General

#### The affirmative is based in an endorsement of the truth-making powers of legalism

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JURISPRUDENCE AS METAPHYSICS Jurisprudence is a profoundly metaphysical exercise. The subjective turn, which characterises the metaphysics of modernity, is apparent in the organising dichotomies of jurisprudence; the distinctions between public and private, fact and value, principle and policy, subjective choices and objective truths. Both in its positivist and moralistic versions, 'law's empire' is presented as internally coherent and 'pure', the precondition for its task of regulating the world. Jurisprudence is obsessed with foundations, grounds and origins, organising principles and with determining policies, rights and norms. Its task has been to present law as a system that follows a strict logic of rules or a disciplined and coherent arrangement of principles-a procedure that would hopefully give law identity, dignity and legitimacy. The corpus of law is presented, literally, as a body. It must either digest and transform the non-legal into legality, or it must reject it. God's law in naturalism, the grundnorm and rule of recognition of the positivists, the principles and the right answers of the hermeneuticians' are the topics of order, identity and unity. It is not surprising that when the question of law's legality becomes dominant, the various answers will offer a definition of essence; they will construct a system of essential characteristics and will inscribe legality within a history conceived exclusively as the unfolding of meaning. The effort to distinguish the legal from the non-legal progresses from the search of an exhaustive list of markers that map out the whole field to the stipulation of a single law of the genre, the law of law. Law's empire is founded on its claim that it can demarcate the properly 'legal' from the terrain of its operation: the social. But according to the forceful deconstructive 'principle', which receives its most compelling application in law, a field is self-sufficient only if its outside is distinctly marked so as to frame and constitute what lies inside. The exteriormorality, politics, economics-is as much part of the constitution of the field as what is proper to it. Postmodern legality defies the jurisprudential image. Two complementary processes are radically altering the classic ideal of the rule of law. A creeping juridification and legalisation of social and private spaces of activity, on the one hand, and a mushrooming privatisation and deregulation of hitherto public areas of provision, on the other, have turned the public/private divide into an elastic line of passage, communication and osmosis. The regulatory colonisation of the social world does not seem to represent or pursue any inherent logic, overarching policy direction or coherent value system. Policy considerations differ between family law and planning or between criminal justice and the regulation of official secrecy, privacy and data protection. Even worse, contradictory policies appear to motivate regulatory practices in each sphere. Both sides of this extension and mutation in the governance of society have profoundly affected the nature of legal rules. Rules as normative propositions are supposed to prescribe general and abstract criteria of right and wrong, to anticipate and describe broad types of factual situations and to ascribe legal entitlements and obligations to wide categories of (legal) subjects. Regulatory practices on the other hand are detailed, specific and discretionary. They follow the vagaries of the situation and the contingencies of administrative involvement; they distribute benefits, facilities and positions according to policy choices rather than entitlement; they construct small-scale institutions, assign variable and changing roles to subjects, plan local and micro-relations and discipline people and agencies by arranging them along lines of normal behaviour. Normalisation by reference to the requirements of statistical distribution is more important than norms, principles and values. Legal language games have proliferated and cannot be presented as the embodiment of the public good, the general will, the wishes of the sovereign people, or of Parliament or some other coherent institution, system or principle. The distinctions between public and private and between rule and discretion, the hallowed bases of the rule of law ideal, are gradually becoming anachronistic as rule-makers couch their delegations of authority to administrators in wide terms, while administrators adopt policies, guidelines and rules to structure the exercise of discretion and protect themselves from challenge. Legislative and regulatory systems are adopted to promote transient, provisional and local policy objectives with no immediate or obvious link with wider social policy. Policy has become visible throughout the operation of law-making and administration; in many instances policy and rule-making are delegated to experts, who fill the gaps according to the latest claims of scientific knowledge. The condition of postmodernity has irreversibly removed the aspiration of unity in law. The law does not have essence; only operations. And yet jurisprudence presents the law at its most imperialistic at the precise moment when it has started losing its specificity. The metaphysical desire is at its strongest when the empirical world denies its claims and norms. We start the process of unpicking the metaphysics of jurisprudence by introducing the work of three philosophers of 'suspicion'. Friedrich Nietzsche, Michel Foucault and Jacques Derrida have made seminal contributions to the deconstruction of the metaphysical urge in philosophy and law. Their work has helped critical theory move away from the essentialist metaphysics of jurisprudence.

## Link – Policing

#### Policing cannot be reformed – reformation only re-entrenches the current violence under legal structures

Akbar 18 Amna A. Akbar, Assistant Professor, Moritz College of Law, The Ohio State University. "TOWARD A RADICAL IMAGINATION OF LAW." Published by New York University Law Review 93(3). Published June 2018. Available here: (https://heinonline-org.ezproxy.lib.utah.edu/HOL/Page?public=true&handle=hein.journals/nylr93&div=16&start\_page=405&collection=journals&set\_as\_cursor=0&men\_tab=srchresults) - AP

In the Vision, policing emerges as a fundamentally raced, classed, and gendered project: there is no neutral a priori in which to return. It is in this context that the calls to "end" rather than reform these regimes of governance start to make sense. 254 Building on W.E.B. DuBois's writings on the abolition of slavery, and Angela Davis's on the abolition of prison, this is a call for abolition of police and other punitive systems of social control, at the same time that it is a call to replace these systems with alternative systems. The basic tenets of the Vision are straightforward: Given their historical and contemporary entanglements with anti-Black racism, police cannot be reformed or fixed. The state must be transformed, the law must be transformed, the police must be eliminated, or at least their social and fiscal footprint of police must be considerably diminished, if not eliminated. 255 Law reform projects should address the material harms of white supremacy, capitalism, and patriarchy, and at the same time undermine these structures.256 A core part of this program must be to shift resources from the primary mode of governance of Black people-criminalization-into other social programs, including housing, health care, education, and jobs.2 57 All of this must be driven by the voices and experiences of Black people, especially those who are directly impacted and multiply marginalized. 258 Nothing will change without a change in the power and resources available within, to, and for Black communities.259 As Rachel Herzing explains: If one sees policing for what it is-a set of practices empowered by the state to enforce law and maintain social control and cultural hegemony through the use of force-one may more easily recognize that perhaps the goal should not be to improve how policing functions but to reduce its role in our lives.260 Herzing makes the basic claim for police abolition and decarceration. The abolitionist ethic permeates the Vision, which calls for an "end" to various punitive and exploitative practices. To take but a few examples, the Vision calls for an end to police in schools; mass surveillance by police; privatization of police; capital punishment; money bail, fines, and fees; the use of criminal history as relevant to determining access to housing, education, voting and other rights and benefits; immigration detention and deportation and ICE raids.261 Simultaneously, the Vision calls for divestment from federal policing programs and military equipment for local police, and decriminalization of drug crimes and prostitution.262 The Vision echoes what Allegra McLeod recently championed as a "prison abolitionist ethic. ' 263 The Vision does not conceptualize abolition as an immediate and total end of physical incarceration and does not call for the outright abolition of police. 264 Mariame Kaba-a long-time organizer who started Project NIA, an organization to end youth incarceration265-explained: We need "steps between where we are and . . . an abolitionist future. Focusing on decarceration as a strategy of reform makes sense on the way to abolition. ' 266 The Vision espouses "a gradual project of decarceration, in which radically different and institutional regulatory forms supplement criminal law enforcement. '267 In other words, this is both a deconstructive and imaginative project, aligned with earlier abolitionist projects and writ ings.268 This is the unfinished project of abolishing slavery. An abolitionist approach rejects "the moral legitimacy of confining people in cages" and, therefore, does not sanction related alternatives like "punitive policing, noncustodial criminal supervision, probation, civil institutionalization, and parole. '269 Instead the focus is on the "transformative goal of gradual decarceration and positive regulatory substitution.' '270 The alternatives are investments that transform the political and social order, including "meaningful justice reinvestment to strengthen the social arm of the state and human welfare," decriminalization, and restorative justice projects. 271 Under the investdivest demand, the Vision calls for divestment from prisons, police, and surveillance, and for those same resources to be invested instead to restorative services, mental health services, job programs, health care, and education. 272 Typically associated with prison abolition, the contemporary call for abolition includes police. 273 This reinvigorated abolitionist call recognizes that policing and mass incarceration co-constitute each other. Mass incarceration's footprint will not get smaller without shrinkage of policing. Abolition makes a number of demands: the end of mass incarceration by shifting the methods through which law and norms are enforced away from policing and other violence-backed threats, redirecting money from policing, jails, and prisons into social programs for directly impacted communities, and creating community accountability mechanisms for harm.2 74 Movement organizations like Critical Resistance, Black & Pink, We Charge Genocide, Project NIA, and the Audre Lorde project are "practicing abolition every day... by creating local projects and initiatives that offer alternative ideas and structures for mediating conflicts and addressing harms without relying on police or prisons. '275 The Vision is in line with the abolitionist politics resurgent in left spaces, which call for the end of prisons and policing as interrelated phenomena.276 It shifts the police reform frame from adherence to law and accountability to lesser reliance on criminal law enforcement: fewer police, prosecutions, prosecutors, jails, and prisons. This creates an imperative to push for reforms that shrink the footprint of police, prisons, and jails.

## Link – Racial Discrimination

#### Legalism recreates and masks racial discrimination

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IN ITS AMERICAN beginnings, Critical Race Theory (CRT) can be understood as a response to the failures of anti-discrimination law to achieve any real sense of social improvement for the black community. In a more extended sense, CRT provokes a critical thinking that is not limited to a historical time and place, but confronts law's complicity in the violent perpetuation of a racially defined economic and social order. This chapter attempts to negotiate between these two approaches, and to show that CRT is now potentially an international movement. One can indeed move beyond the American context; a specifically British critical race theory has been developing in the last ten years and critical scholarship in other j urisdictions has been engaged with law and race. Most CRT scholars adopt a careful, incremental approach and avoid the pitfalls of universalist or globalising thought. However, the attempt to link American and British scholarship should not be troubling since CRT is characterised by another equally strong element: its orientation1 to history, and the different ways in which it is lived and experienced. Critical Race Theory is an expanding and diverse field. It embraces the history of many different peoples in their encounters with western law and now includes work by Latinos/as, as well as Asian Americans.2 We cannot possibly cover the diversity of approaches within the limits of this chapter. Instead, we will trace the response of African-American scholars to American law, and attempt to make connections with the experiences of racism in post-war Britain. The focus will be on those citizens who came to Britain from Jamaica, Africa and the Caribbean. GREAT AMERICAN SATAN: RACISM, LAW AND HISTORY History is the key to unlocking the intersection of race and law. For instance, when Derrick Bell, one of the foremost American critical scholars, wrote that the 'black people's struggle' is 'as old as this nation', he was stressing the centrality of race and the struggles against racism for any concept of nationhood. Indeed, it would appear that the perpetuation allowed the foundation of American Constitutional government.3 From the drafting of the constitution in 1787 to the Hayes-Tilden Compromise of 1877, the right to property was repeatedly raised above black freedom. If any lesson can be drawn from these documents, it is that 'blacks seem uniquely burdened with the obligation to repeat history, whether or not they learned its lessons.'4 From the end of the Civil War until the present, a pattern can be traced which shows that black advances in civic status were effectively crushed by white backlashes. Persistent and deeprooted racism meant that black rights were always compromised by other economic or social interests. The experience of the 'first reconstruction'-the time from the end of the Civil War to 1877-was repeated in the fate of the civil rights movement. In both cases, formal equality was stated in law, but economic and social dispossession remained. Perhaps this is precisely the problem with the use of the law as a means of fighting oppression. The litigation engaged in by the National Association for the Advancement of Coloured People (NAACP) , can be accused of becoming too fixated with symbolic advances. At root, the problem of discrimination rests on the inequitable distribution of social and economic power. Legal rules only 'reflect and uphold' the ways in which these distributions are preserved.6 A central insight of CRT is that litigation will not alter racism's ingrained structures. The main hope for the future rests with the struggle: 'We must realise, as our slave forebears did, that the struggle for freedom is, at bottom a manifestation of our humanity which survives and grows stronger through resistance to oppression. '7 These claims fed into the scholarship of 'racial realism.' Just as the legal realists had shown that law was not a formal system of rules and principles, racial realism sought to uncover the racism that lay behind claims to neutrality and to reveal the political and ideological substratum of the law. Bell has shown how critical race theory builds on these insights. Consider the Supreme Court case of University of California Regents v Bakke.8 The court had to decide on the legality of an affirmative action programme that would allow black candidates to enter the University of California's medical school. Employing a very narrow definition of equality that ignored the social and economic causes of disadvantage, the court held that no white students could be refused entrance in preference to black candidates: 'Bakke serves as an example of how formalists can use abstract concepts, such as equality, to mask choices and value j udgements.'9 So, can the law ever understand racial discrimination? If we accept the definition of discrimination as 'positional', it is extremely difficult. Positional discrimination describes the existence of structured disadvantages in education, work, access to justice, housing and health care, and the associated 'withering' of one's self-image that accompanies such marginalisation and exploitation. The law tends to be blind to such a reality. Litigating on a civil liberties issue, for example, the desegregation of schools, tends to re-create this problem. It atomises and individualises discrimination into a series of disputes, and avoids the more structured sense in which discrimination results from an inter-relation of disadvantage. Notions of causation and fault may be central to law's conception of discrimination, but their effect is to remove any sense of collective responsibility for acts of discrimination. Would it be possible for the law to move to an appreciation of the 'positional' nature of discrimination? Such a shift would challenge not only the legal construction of responsibility as individual fault, but would also risk antagonising a majority who are reluctant or unwilling to perceive their own complicity in discrimination. Given this problematic reality, antidiscrimination law has attempted to find ways of breaking out of its 'formal'10 restraints, whilst trying to display an adherence to the form of the law.

#### Legalism empirically fails to stop racist policies

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The development of anti-discrimination law is itself marked by the triumphs and reverses of legal strategies to combat racism. The history of antidiscrimination law can be divided three broad phases. Central to the first is Brown v Board of Education.11 Current understandings of civil liberties law read this case as both a major victory of early litigation, and a problematic high water mark. Although the Supreme Court ordered an end to segregation in state schools, the impact of the decision is questionable. Brown was met with resistance from school boards, and a de facto re-segregation by wealthy white families who moved away from desegregated schools. All the evidence points to the fact that the case did not effectively end black disadvantage in education. The second phase also saw some successful litigation. One of the landmark cases was Griggs v Duke Power Co, 12 a Supreme Court decision under the Civil Rights Act of 1964. The defendant had applied a condition to his employees under which a candidate for promotion should have a high school education. Although this requirement was not directly discriminatory, it had a disproportionate effect on black employees, who were not able to comply with the condition. In holding that this was not acceptable, the court effectively pressured employers into adopting affirmative action programmes. Similar substantive advances were made in the area of education. But these advances were reversed in the period after 1974. This retreat was seen as a direct result of the success of the earlier phase of anti-discrimination law. The official line was that the problem had now been solved, and vigorous affirmative action was not required; indeed any further measures would violate the equality provision of the Fourteenth Amendment of the Constitution (under which the early affirmative action cases had been decided). Washington v Davis13 can be seen as the stalling of anti-discrimination litigation. Like Griggs, it concerned a work related test, this time in a police training programme. The failure rate of black candidates was 25% higher than that of whites. The court held that unless it could be directly evidenced, or shown clearly by inference, that the test was intended to produce results that tended to disadvantage a certain racial group, the rate of failure was not in itself sufficient to establish a case.14 In the field of school desegregation, the court began to favour local autonomy and to limit affirmative action programmes. It was argued that local autonomy was more suitable for the protection of 'racial homogeneity.' If we reflect on this history of litigation, it would appear that the assumptions of the 'racial realists' are borne out. American law seems unable to move beyond its fundamental tensions. Scholars have sought answers to this impasse in the very constitution of race consciousness in America.

## Link - Justice

#### Justice which attempts to re-establish the rule of law reproduces itself and forecloses on the possibility for new social systems

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C Legalism and 'Seeing Like a State' A final variant of legalism which is discernible in this field is a tendency towards an understanding of transitional justice that is both state-centric and 'top down'. The growth of transitional justice has seen an institution- alisation of transitional justice into expensive supra-state and 'state-like' structures." For example, at the level above the state, the temporary ad hoc tribunals to deal with the crimes committed in Yugoslavia and Rwanda have now been in operation since 1993 and 1997 respectively." The permanent International Criminal Court came into force in 2.002 and began work in earnest in 2004.5' At the national level, hybrid tribunals in locations such as Sierra Leone, East Timor and Cambodia have emerged which combine the efforts of local and international legal actors. Such developments have been matched by a plethora of other institutions that drive transitional justice at the national level, including truth and reconcili- ation commissions, reparations bodies, special trials of previous abusers and a range of other initiatives." ln addition to these exceptional measures, huge energies have been invested in the state justice reconstruction programmes of the 'normal' criminal justice systems through 'rule of law' programmes designed to secure a fairer and more efficient delivery of justice." The label of 'failed state' in places like Somalia or Liberia is often used as a catch-all phrase to describe Hobbesian violence and anarchy.-'4 In effect, the absence of functioning centralised state institutions becomes a byword for lawlessness. The converse is also true in some contexts. The reassertion of the authority of the state is often viewed as paramount in the transition from conflict, and respect for 'the rule of law' is frequently seen as the benchmark for such authority. Thus the reconstruction, or in some instances construction, of institutions designed to deliver justice is core transitional business.55 judicial and legal reform, the disbandment or reshaping of police forces associated with previous regime abuses, sporadic attention to often deplor- able prison conditions, mainstreaming of human rights training throughout different agencies-these and other state-centred initiatives have become familiar and perfectly understandable elements of the transitional 'justice reconstruction' template. They are all evidence of an apparent faith in the capacity of state institutions to meet the aims associated with transitional justice. At a conceptual level, the development of such institutions speaks to the tendency of a lawyer-dominated field towards what the anthropologist James C Scott has referred to as 'seeing like a state'.-" Scott's contention is that governments in particular which are seeking to achieve complicated and ambitious ends need to render them 'legible' in order to see them properly, and thus inevitably deploy state-like institutions as the vehicles to achieve those ends. Such a perspective resonates in other disciplines. For some political scientists or international relations theorists, the state and state-like institutions may become practical and metaphorical mechanisms for making sense of complex situations," rendering them intelligible, an idealised and orderly arrangement of 'a world of concepts rendered suitable for practice'.-\*3 For sociologists, particularly sociologists of institu- tions (such as Mary Douglas and others), states and state-like institutions are particularly prone to developing and reproducing their own rationality, their own reason for being, conferring and fixing a 'sameness' shaped by the shared thought, values and information within the institutions." As Douglas has argued, governance more generally." It is both a practical and symbolic necessity as well as a way of 'seeing' reconstruction. The logic of developing state justice capacity at the national level, or 'state-like' institutions at the international level, to deal with international criminal justice would therefore seem unimpeachable. However, one of the reasons Scott suggests 'state-centric' grand schemes often fail spectacularly is that they oversimplify. They may fail to take sufficient account of local customs and practical knowledge and to engage properly with community and civil society structures. Such failures, often justified in the name of efficiency, professional expertise or simply 'getting the job done', may in turn lead to incompetence or maladministration and encourage grassroots resistance to such state-led initiatives." Once such institutions are created, the capacity for self-justification and self-replication that Douglas identifies obscures the need for thicker forms of accountability or legitimacy towards those whom such institutions claim to serve." In particular, when actors within such institutions develop a self image of serving higher goals such as 're-establishing the rule of law', the temptation to see victims or violence- affected communities as constituencies which must be managed, rather than citizens to whom they must be accountable, becomes all too real. To summarise, there is a dialectic relationship between the dominance of legalism in much transitional justice discourse and the tendency to 'see' justice and justice delivery as quintessentially the business of state or 'state-like' institutions. Such a view is derived in part from an awareness of the complexities of the tasks being undertaken and the practical necessity for some form of institutional delivery mechanism in order to render such objectives legible. It is also a product of the self-replicating power of institutions and of the revitalisation of the state as the key vehicle for the delivery of justice and security over the past decade or more. However, there are real dangers that the concentration of the stewardship of transitional justice in such institutions mitigates against developing lines of ownership and accountability to the communities they were designed to serve. This tendency towards 'seeing like a state', together with the particular seductive qualities of law in transition and the dominance of the human rights framework are the key limitations associated with legalism, which hamper the theoretical understanding and practical work of contem- porary transitional justice.

## Link - Human Rights Discourse

#### The Aff’s human rights discourse is rooted in the truth-making powers of legal structures and prevents meaningful interrogation

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A Legalism as Seduction The pervasive influence of law in the social and political lives of 'stable' or 'settled' societies is well rehearsed!" What Bourdieu has discussed as 'the force of law' well captures the dominance of law in contemporary industrialised societies." Bourdieu refers to the magnetic, almost mysteri- ous 'pull' of law wherein large swathes of social, political and intellectual life are heavily influenced by the legal world or 'juridical field', as he refers to it. Law not only regulates behaviour, it shapes our political relations, our language, even the way we think." In part, other spheres are amenable to law's influence because, as Clifford Geertz has argued, law represents a way of conceptualising and articulating how we would like the social world to be. It encourages a notion of a rational and ordered place based on universal understandings; it enables people 'to imagine principled lives they can practicably lead'.13 For some, the socially privileged status of judges and lawyers, their monopoly on the delivery of legal services and the resultant sense of professional self-confidence all combine to encourage the dominance of legalism." For others, the advancement of law as a particular subset of 'scientific knowledge', or what de Sousa Santos has termed 'creeping legalism', is bound up with the development of the modern capitalist state and in particular the need of the state to replicate other 'understandable' systems of thought beneath and beyond the state."-5 In more recent times, legal theorists discuss a new 'international legalism' wherein law's central- ity to globalisation in general and international politics in particular has far outstripped its historic limitations associated with the notion of state sovereignty." For current purposes it is sufficient to note that the seductive qualities of legalistic analysis lend themselves particularly well to transitional contexts. Claims that the 'rule of law' speaks to values and working practices such as justice, objectivity, certainty, uniformity, universality, rationality, etc are particularly prized in times of profound social and political transition." Often in such societies, it is either the absence of the rule of law or the distortion of forms of legality which is the defining characteristic of the previous regime.-'-3 Legal formations which emerge during a transition from conflict such as new constitutions, local, international or hybrid prosecu- torial forums or even truth recovery mechanisms are inevitably infused with legalistic discourse. In such a context, law becomes an important practical and symbolic break with the past; an effort to publicly demon- strate a new found legitimacy and accountability." In some such circum- stances, the signing up to and implementing of international human rights agreements are integral to seeking international respectability. A professed respect for the rule of law demonstrates a 'fitness of purpose' for countries to take a proper place amongst the community of nations, or even the recovery of a sense of national self-confidence and pride.3Â° As is discussed below, this description of legalism as 'seductive' is not to denigrate the importance of law and legal analysis in the process of transition. Rather, it is to suggest that legalism tends to foreclose questions from other complimentary disciplines and perspectives which transitional lawyers should be both asking and asked. It is perhaps understandable that many lawyers who practise international criminal law tend not to over- analyse fundamental existential questions such as 'What is transitional justice for?' or 'Who does it serve?' Similarly, although it is perhaps less excusable, many legal scholars of transitional justice appear to spend most energy in the formidable task of analysing the expanding case law and relevant international standards without addressing these larger questions. There is a comfort in staying within what organisational theorists refer to as a 'closed system' of thinking." However, as I will suggest below, there are useful frameworks of analysis that can enrich and inform legal thinking and develop ways of avoiding some of the more negative consequences of laws seductive qualities. B Legalism as the Triumph of Human Rights As is discussed extensively elsewhere, human rights talk has become the new 'lingua franca' of global moral thought.-31 As Douzinas has argued, the 'triumph' of human rights has united left and right, the pulpit and the state, the ministers and the rebel, the developing world and the liberals of Hampstead and Manhattan.-33 Human rights are attributed the capacity to deliver 'a set of values for a Godless age'.-34 In tandem with that rise in prominence, human rights discourses have been subject to increasingly rigorous critical scrutiny. At a philosophical level, some commentators such as Douzinas remain highly skeptical as to the intellectual rigour with which human rights advocates press their claims.-\*5 More grounded critiques point to a universalist versus cultural relativism debate within human rights." For some, there are perceived Western and imperialist tendencies in elements of human rights talk. Baxi has described this (in its crudest form) as the 'westoxification' critique, a view of the West as imposing standards of rights and justice which it has always violated in the developing world and amongst Islamic societies in particular." Human rights institutions such as human rights commissions have also been criticised for their failure to properly docu- ment past abuses and some new human rights imbued constitutions have also been critiqued for their failure to address socio-economic rights in a meaningful fashion.-\*3 The pre-eminence of civil and political rights in particular is also viewed in some quarters as acquiescence in the neo-liberal economic order and an abandonment of some of the more traditional social justice concerns such as poverty and health.-\*9 Some of these criticisms are framed as the logical result of the legalistic bent of contemporary human rights discourses. Thus, for example, Michael Ignatieff and David Kennedy have both criticised human rights talk as deliberately denying the quintessentially political nature of its argumentation and of obfuscating the reality of conflicting rights." In some contexts, the realities of confusion, 'messiness' and tough choices that characterise the lives of many (including human rights activists themselves) are translated through rights discourses into the legalese of international standards, legal certainties and political objectivity." This process 'thins out' the complexities of life in conflicted societies and positivises the norms that underpin such challenges in international con- ventions and tribunals, national constitutions and the domestic courts." In the process, divorced from serious consideration of the wider political, social or cultural contexts which produced violence in the first place, the potential power of human rights institutions to prevent future violence is correspondingly reduced." A further, related element of the pre-eminence of human rights dis- courses in transitional justice is a variant of what Stan Cohen has referred to as 'magical legalism'. Cohen uses the term in a very specific fashion to describe a technique of denial practised by governments which seek to 'prove' that an allegation of malfeasance cannot possibly be true because that action is illegal. A government will list the numerous domestic laws and precedents, ratifications of various international conventions, appeals and discipline procedures and, as Cohen argues, then comes the magic syllogism: torture is strictly forbidden in our country; we have ratified the Convention Against Torture: therefore what we are doing cannot be torture." The 'triumph' of human rights is turned on its head and becomes an additional weapon in the state's armoury, which is deployed to deny the very human rights abuses which the laws were intended to prevent. More broadly, the notion of magical Iegalism speaks directly to the disconnect between the 'real world' in some transitional societies and the plethora of 'law talk' which often characterises debates amongst the political elites. For example, Michael Taussig's treatment of 'law in a lawless land' concerning Colombia's contested 'transition' captures well the inverse relationship between Colombia's layers of laws upon laws, including ratifications of international human rights standards, and the lived reality of violence, corruption and impunity experienced by so many ordinary Colombians."-' In the Northern Ireland transition too, quintessentially political positions were masked in the technical legalese of 'human rights concerns' at various junctures by British government negotiators only to be summarily aban- doned when the political winds shifted." At one level, the fact that law and legal arenas become a key contested site in the inevitable struggle for political advantage of a transition is hardly noteworthy. What is arguably of more importance is that the triumph of human rights makes it a particularly powerful variant of magical legalism which can appear above the political fray. However, as Cohen has argued, the plausibility of that position is only possible if common sense is suspended. For some (particu- larly lawyers), the allure of complex legal argumentation makes such a suspension all to viable. A final important criticism advanced in terms of the legalisation of human rights is that in some transitional societies human rights concerns become a byword for a retributive notion of justice. Often human rights standards are framed as the key bulwark against political calls for forgiveness and 'reconciliation'. For example, the post-communist transi- tions of Eastern Europe largely eschewed prosecutions in favour of releasing intelligence files and purging former 'collaborators' from public office. For some commentators, this absence of retributive justice has been described as a failure to live up to legal obligations, which could in turn sow the seeds of future violence." Similarly, the possibility that account- ability might be achieved through the operation of institutions such as truth and reconciliation commissions or local amnesties-and thus not trigger prosecutions by the International Criminal Court-produced con- siderable discomfort amongst some of the lawyers involved in drafting the Rome Statute." In an environment where politically-constructed notions of 'pragmatism' and related offshoots such as reconciliation are often viewed as slippery bywords for impunity, 'human rights as retribution' provides an understandably comforting terra firma for many lawyers. To recapitulate therefore, a crude characterisation of human rights in contemporary transitional justice discourses would suggest that human rights talk lends itself to a 'Western-centric' and top down focus; it self-presents (at least) as apolitical; it includes a capacity to disconnect from the real political and social world of transition through a process of 'magical legalism'; and finally it suggests a predominant focus upon retribution as the primary mechanism to achieve accountability.

## Solvency

#### K Solves: Bottom-Up truth-telling works and creates better politics – ACP Proves

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C Strengths and Limitations The authors carried out a follow-up study when the project ended to find out what was regarded as its strengths and weaknesses." The discussion that follows draws upon the evaluation findings and provides insights into some of the ways in which engaging in the project impacted upon individuals, their families and the wider Ardoyne community and beyond. As noted in the introductory paragraph, this case study illustrates the ways in which a bottom-up 'truth-telling' process can make a significant contribution to transitional justice. Recognition and acknowledgement were cited as an important outcome of the ACP [Ardoyne Commemoration Project]. The process offered a space for individuals to tell their story and for previously excluded or marginalised voices to become part of public discourse. The restoration of dignity, through recognition and acknowledgement in the book-particularly to the families of alleged informers-was regarded as a significant outcome of the project. The relatives of victims of state violence were also provided the opportunity to challenge what they perceived as the 'denial of truth' in official accounts and given public recognition in the book, although the lack of state acknowledgment was a crucial limitation. However, the bottom-up approach of the ACP helped ensure that the process of gaining recognition and acknowledgement was one in which victims and relatives felt them- selves to be active participants, rather than passive recipients of 'truth- telling'. Community participation stood out as the single most important aspect of the ACP process for the majority of participants interviewed and indeed the wider community. The method of handing back edited testimonies created a sense of individual and collective ownership and was regarded as a fundamental strength and positive outcome of the project. It is in gaining direct control of the knowledge produced through such work that empow- erment takes place. In just the same way, a victim-centred 'truth-telling' process needs to place the bearer of testimony at the heart of the decision-making process. Overwhelmingly it was felt that the sensitivities of the project necessitated the use of 'insiders' and individuals that were respected and rooted in the community. A key issue of concern when doing such sensitive work is the issue of trust. Undertaking work with 'insiders' trusted by local people created far greater possibilities and produced the sort of knowledge often 'hidden' from 'outsiders'. Any process devising wider strategies to deal with the legacy of the past needs to be conscious of the problems of accessing such experiences. The use of 'insiders could just as conceivably exclude certain 'voices' and lead to guarded and partial accounts and self-censorship. It is therefore imperative that those involved in such work are conscious of this tension and are fully reflective in their practice throughout.'-' Intra-community conflict resolution was the most frequently mentioned positive outcome of the ACP process. A significant contribution of bottom-up participatory 'truth-telling' is its capacity to get to the nitty- gritty of intra-community conflict, understand the dynamics and be able to resolve certain unresolved issues. Ardoyne is not a homogenous commu- nity and there are very real and long-standing divisions, some of which are a by-product of the political conflict. The project created a process or mechanism to deal with difficult internal conflict-related issues and pro- moted resolution of what were often seen as 'taboo subjects' at a number of different levels. The experience of the ACP would suggest that a bottom-up participatory approach can make a significant contribution to creating dialogue at the community level. One of the most serious limitations of unofficial bottom-up processes in general is their inability to uncover previously unknown information from outside agencies; obtaining some form of official recognition or recom- pense, or in pursuing accountability. That said, official truth-recovery initiatives can themselves face huge problems in this regard, not least through the continued opposition and lack of co-operation of state agencies in finding ways of dealing with past injustice." Bottom-up unofficial processes can be more adept at uncovering previously 'hidden truths' that can lead on to other things. They can be highly effective in building a 'case to answer', playing a vital role in documenting human rights abuses and patterns of violations that make it increasingly difficult for the state to continue to deny culpability. For some interviewees 'truth-telling' was regarded as part of, but not a substitute for, seeking justice. There was a sense for some in which the recognition derived from their involvement in the project was itself a (sufficient) form of justice. In these circumstances 'truth' is used to denounce or challenge a perceived injustice. For others this was not the case and they saw a need for legal and judicial avenues to be pursued as thoroughly as possible. Finally, perhaps the most significant limitation of all for the ACP concerned the difficulties of conducting such sensitive research 'across the divide'. This certainly proved to be an issue for the ACP. Projects with a single identity focus call into question the validity of the 'untold truths' they are able to tell, though again, such criticisms can also be levelled at state-led processes."

#### Continuous critique allows us to reveal the intricate role of racism in law that the affirmative is unable to solve

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Is there a distinctive mark to 'British' critical race theory? In attempting to answer this important question, two preliminary themes must be addressed. Critical Race Theory, to date, has theorised the experience of race in America. Given the orientation of CRT to history, any scholar working within this tradition must produce a 'local', or non American, account of specific historical experiences. Thus, to the extent that we can talk of British CRT, it must engage with the experience of race and discrimination in Britain. The problem is that of determining a precise sense of context. As we have seen from the discussion above, the post-war history of race relations is inseparable from a broader history of the British Empire and its aftermath. It might appear, then, that CRT is one of the tasks of a broader post colonial jurisprudence. Whilst this might suggest a general sense of orientation, it leaves the precise frame of British CRT to be determined. In this final section of the chapter, we will look at the work of scholars who are producing a critical j urisprudence of race, and examine the suppositions and trajectories of their arguments. A critical jurisprudence of race understands that racism itself is a complex phenomenon; interpreting this phenomenon demands a subtle and nuanced approach that resists easy conclusions: Racism is not a unitary event based on psychological aberration nor some ahistorical antipathy to blacks which is the cultural legacy of empire and which continues to saturate the consciousness of all white Britons ... It must be understood as a process. Bringing blacks into history outside of the categories of problem and victim, and establishing the historical category of racism in opposition to the idea that it is an eternal or natural phenomenon, depends on a capacity to comprehend political, ideological and economic change. 82 This approach resists the reductionism of a certain Marxism or a form of Weberian sociology that would like to relate all phenomena directly to economic relationships. 83 In the most extreme form of these arguments, race becomes a term that merely masks the truth of more fundamental economic relationships of subordination and dominance. Although an important aspect in accounting for the shape of any particular society, economic relationships cannot be seen as overdetermining and primary. As far as legal analysis is concerned, the conjunction between racism and law must not make a similar mistake. It has to be sensitive to economic factors, without seeing them as an interpretative key to social relations. Legal analysis must accord law its autonomy, and inscribe the law in broader social practices. Peter Fitzpatrick's notion of the 'innocence of law' provides just such a way of understanding the law's relationship with racism. Law's innocence is founded on the liberal claim that it is 'incompatible with racism.'84 How is this claim substantiated? As law is autonomous and separate from social life, it can provide general, normative structures that organise and restrain particular interests. Such a perspective would be blind to those experiences where law has failed to provide remedies, or, indeed, failed to perceive that problems exist in the first place. Precisely because it is separate from the life it is meant to order, law cannot be seen as 'complicitous'85 with the failings of the social world; alternatively, any instances of failure can be seen as 'exceptional', thus 'affirming the great virtue of the norm'. 86 If we are critical of this model, then how can we conceptualise the relationship between racism and law? The relationship between racism and law is inherently complex: ' [l]aw could ... be seen as contradictory, as integrally opposed to and supportive of racism'; indeed, law assumes its 'identity' by 'taking elements of racism into itself and shaping them in its own terms.'87 This is not to argue that the law cannot be used to combat and oppose racism; it does suggest, however, that in so doing, the law allows racism to take different social forms. Consider, for example, the Race Relations legislation that we have studied above. The formal legal regime that applies to racial discrimination at work operates through the creation of employee rights that correlate with employer's duties. Disputes between employer and employee are to be resolved by a neutral tribunal; questions of relevance in relation to evidence submitted in a case are in turn regulated by legal rules. As we have seen, the law itself was based on tests for direct and indirect discrimination. Undoubtedly, this law allowed litigation against employers who had discriminated against employees. At the same time, however, practices of discrimination adapt themselves to the law, or, become made invisible to the gaze of the law. One particular example of this phenomenon would be the willingness of tribunals, in the sample studied by Fitzpatrick, to accept employer's evidence on what counts as a 'trivial' incident.88 Whilst an act of discrimination may remain such from the perspective of the victim, for the tribunal it is not worthy of remedy, as it is merely part of the everyday oppressions and inequalities of the social world.

#### Critical interrogation creates pathways for new social thought and is necessary to highlight legalisms failures

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IV ON SOCIAL MOVEMENT IMAGINATIONS This Part returns to the larger claim of this Article: the importance of studying social movement visions, sketching out its implications of this study for our scholarship. Part II discussed how the Vision pushes critical legal theories and criminal law scholarship. Here, I make the case for how studying social movement imaginations productively complicates our study of social movements, the social problems they address, the law, and the state. I argue these movements invest us in a creative, imaginative project sorely missing from law scholarship. Social movements have always been central to the shape of American law and government, its visions and its practices. From the abolitionists to the suffragettes to those fighting for civil rights, Black Power, labor, and women's rights, a wide range of mass movements have long shaped our polity, our governments, and our laws. A growing body of scholarship documents and analyzes the influence of social movements on law, and the complex role lawyers play in these movements. 329 Law scholarship on social movements tends to focus on how social movement claims are translated or saturated by law-constitutional law in particular. 330 This scholarship has brought important attention to the role of social movements in informing the evolution of constitutional meaning. 331 Constitutional meaning is not simply located in the courts, legislature, and executive, this scholarship has argued; social movements develop new and challenging constitutional meanings, contributing to our working constitutional order. They contest the shape of power, law, and society. By pointing to the porous relationship between constitutional meaning, law, and social movements, this work has started to expand our study of the relationship and realities of law, social movements, and society. But it is time to go further. When looking back on the celebrated movements of the past, this scholarship conforms to a broader tendency: assuming a liberal narrative about law's tendency to do the right thing, even if it is just enough to quell ongoing resistance.332 And the scholarship retains an elevated focus on law. It focuses on the reforms that ultimately make their way into legislation, or the constitutional norms that ultimately prove influential to how we understand the constitution and the promises of American democracy. Radical social movements are important not simply for what changes they effectuate in law, but in what they imagine and where they fail. 333 They articulate harms so pervasive, structural, or intersectional as to make them difficult for legal institutions to recognize let alone redress. 334 They offer alternative frameworks for the way forward. Social movement imaginations create a benchmark other than the status quo, or law's current commitments, for measuring social change. Their visions for social change, the way they point to the limits of what formal legal channels can handle or hear, can be profound.

## AT: State is Good

#### Our K is not saying ‘the state is bad,’ instead it’s critiquing how we think about power and the truth-making powers of legal structures in particular

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An important strand within this work was pioneered three decades ago by Michel Foucault's schema and conceptual vocabulary of governmental- ity. Mitchell Dean describes the scope and impact of such work as follows: [Governmentality] asks questions concerned with how we govern and how we are governed, and with the relation between the government of ourselves, the government of others and the government of the state. It thus resumes older and broader meanings of government and governing that are not necessarily tied to the nation-state and, in some ways, have become obscured by the rise of the liberal constitutional national state and its identification of government with the government, i.e. with the body that claims supreme authority within a given territory and its various apparatuses.-'Â° As Foucault himself reminds us, the analysis of power relations within a society cannot be reduced to the study of a series of institutions, not even to the study of all those institutions which would merit the name 'political'.51 Thus, in addition to the formal state there are other bodies that have a role in the operation of government. Power relations are rooted in the system of social networks. Civil society, local government, the private sector, the individual consumer, citizen, voter, expert are all 'active subjects' who not only collaborate in the exercise of government but also shape and inform it.-'1 The emphasis within this approach is less on the conventional subjects of constitutionalism such as government of a territory, ideas of judicial sovereignty and law, and more on the management of things-people, resources, ideas-as part of the multi-form tactics of government. The direct action of the state in terms of law-making or institution-creating is to be augmented by the important quality of the freedom of the subject. It is not direct governmental action alone that achieves what governments want. This can be done successfully only with the willing co-operation of the individual subject participating in hislher own governance. In other words, the site and the agents of government are more than the state and passive subjects; they include also a whole range of persons and agencies co-opted into a wider exercise of power." Rather than simply concentrating on how the state controls and disci- plines the body, governance is now involved in two aspects: there are the forms of rule by which authorities govern populations, and there are the 'technologies of the self' through which people shape their own subjectivity and 'make themselves up' as active subjects of power who can make choices. As one of us has argued before," a proper understanding of power must acknowledge an idea of freedom, of individuals 'making themselves up' as active subjects or as citizens capable of bearing a regulated freedom within complex chains of constraints, calculations of interests, patterns and habits, and obligations and fears. Government is thus a domain of strategies, techniques and procedures (or 'technologies') through which different forces and groups (including the formal state but reaching far beyond it too) attempt to render their own various programs operable. The governmentality approach also locates the activity of government generally within the micro level and, in particular, within specific ways of thinking (or 'rationalities') which structure how we see and understand problems, their solutions, and the framework within which they exist. As Foucault sees it, power should not be analysed from 'the inside' but rather where 'it is completely invested in real and effective practices' and the goal should be to study power by looking at, as it were, at its external face, at the point where it relates directly and immediately at what we might call its object, its target, its field of application or, in other words, the places where it implants itself and produces its real effects.-'-"

# Aff

## Perm

#### Perm: State action can produce a meaningful first step in broader structural change

McEvoy 08 Kieran McEvoy is Professor of Law and Transitional Justice at the School of Law and a Senior Research Fellow at the Institute of Conflict Transformation and Social Justice, Queen's University Belfast. “Letting Go of Legalism: Developing a “Thicker” Version of Transitional Justice.” Published in “Transitional Justice From Below : Grassroots Activism and the Struggle for Change” [Anthology], pp. 15-45. Published by Hart Publishing, Oxford and Portland, Oregon. Published in 2008. Available here: (web.a.ebscohost.com.ezproxy.lib.utah.edu/ehost/ebookviewer/ebook?sid=e614b5b6-b4ed-411d-864b-207f35ebc904%40sessionmgr4007&vid=0&format=EB) - AP

lll TOWARDS A THICKER UNDERSTANDING OF TRANSITIONAI. JUSTICE As noted above, the origins of this article lie partially with an academic frustration at such legalistic dominance but also in the practical conse- quences of that phenomenon. The argument here is that these variants of legalism can cumulatively disconnect individuals and communities from any sense of sovereignty over transitional justice." Legalism contributes directly to a process that Paul Gready has well captured as the distinction between 'distant justice' and justice which is actually 'embedded' in communities that have been directly effected by violence and conflict.7Â° The need for praxis demands that one do more than simply delineate and critique the dominance of legalism and actually offer some normative and practical correctives. In this part of the chapter I shall attempt to suggest ways in which some of these limitations may be overcome. Again it is important to bear in mind that what is being postulated here is not a rejectionist approach to the role of law within transitional justice. Notwithstanding the criticisms outlined above, it is obvious that, like institutions, law matters." That said, what is being argued here is an attempt to 'thicken' the topic (for lawyers in particular) through the encouragement of legal humility, 'seeing' human rights as development and drawing upon some of the insights provided by criminology. generic seductive qualities are all the more pronounced in times of transition and thus the privileging of legal knowledge and the work of legal professionals becomes manifest. Such innate tendencies in the law profes- sion, allied to the imperialist tendencies associated with even well-meaning international involvement in transitional contexts," make the case for greater legal humility in such sites all the more pressing. At an operational level, as was noted above, common sense dictates that lawyers will be embroiled in the day-to-day work of transitional justice. The drafting of new constitutions, the establishment of prosecutorial or truth recovery mechanisms, the re-shaping of criminal justice systems, the release of political prisoners or the design of amnesties-these and other processes and products associated with transition are of course 'creatures of law'. However, there are ways in which lawyers can do their work in transitional contexts and yet be more honest about the limitations of |egalism.75 For example, an international or local tribunal or a truth commission is self-evidently but one element of a broader transitional process and it should be constantly articulated as such both in public utterances and in the working practices of the legal professionals involved. The 'overselling' of the capacity of major legal institutions to deliver forgiveness, reconcili- ation or other features associated with post-conflict nation-building may well encourage unrealisable public expectations and ultimately an unfair assessment that such institutions have 'failed'.7' In addition, the tendency of international lawyers to eulogise the glory and majesty of international law being 'brought to' previously war-torn regions often renders them oblivious to the strong evidence of a disconnect between such imperious aims and their perception in the communities affected by such violence. In Sierra Leone, for example, despite considerable evidence of ambivalent and complex attitudes amongst ordinary Sierra Leoneans towards the Special Court, international lawyers have shown little reticence in speaking in grandiose terms 'on their behalf'.77 In addition, the special tribunal was created as a result of an agreement between the UN and the local government. That agreement led to the indictment of senior members from three of the factions in the war, including militia leader Sam Hinga Norman (who was Deputy Minister of Defence and the principal political rival to the incumbent president), but no key government actors such as the President (who, as Minister for Defence during the war, was Hinga's boss) or Vice President-omissions which have undermined some of the more grandiose claims with regard to the Court." Similarly in Iraq, the Iraqi High Tribunal which was established to try Saddam Hussein was originally framed by some as 'justice for the Iraqi people' but that position has been significantly undermined by the actual conduct of the trial and macabre farce of his execution." Lawyers would do well in such contexts to keep their discussions and analysis more measured and grounded in local realities. Similarly, in the ubiquitous delivery of 'rule of law' and human rights related training and education in transitional justice settings, a more honest acknowledgement of the contingent, partial and political history of such discourses is much more likely to resonate with those who have lived through conflict.3Â° Indeed, I would contend that such a critical and contextual approach to the 'law in action rather than the law in books' is more likely to assist in the embedding of such frameworks in transitional contexts (precisely because it appears real, grounded and even 'flawed') rather than a positivistic reiteration of international standards in the 'law, is the law, is law' style adopted by some more traditional lawyers. The historical fallibility of 'the rule of law' is not necessarily a fundamental weakness in education or training. Rather, I would argue that it is an entry point for an engaged discussion about the importance of the ideal as the bedrock for a transforming society! Legal institutions associated with transitional justice can and should operate most effectively if they run in conjunction with properly managed, effective and accountable local or indigenous processes, which comply with basic international human rights standards. Indeed, the UN has in recent years acknowledged the notion that the rule of law in transitional contexts should embrace precisely such a willingness to ally international norms with 'respect for local ownership, values and traditions." With such a mindset, lawyers could ideally establish the broad legal parameters within which aspects of the transition should be framed, but the 'filling in' of the transitional process on the ground should as much as possible be left to local political, community and civil society structures. Peace-making circles in South Africa and community-based restorative justice programmes in Northern Ireland are evidence that properly resourced and managed local community structures are capable of engagement in and direction of transitional justice processes. Again to paraphrase Nils Christie, a more humble approach to transitional justice thus requires a 'ceding of owner- ship' by the legal professionals involved towards such structures." B Human Rights as Development The reluctance of lawyers to relinquish control in many contexts, but in particular in transitional societies, is often expressed explicitly in terms of the human rights framework. It is as though a top-down and state-centric ownership over human rights were the sole guarantor of the rights of those involved in the process of transition. I would argue, however, that there is an alternative perspective on rights discourses which offers a potentially more fruitful pathway to embedding rights discourses in communities affected by violence. Many of the critiques of human rights discourses outlined above are drawn from the sociological, anthropological and socio-legal writings on the subject. In seeking to address these various criticisms in transitional settings, debates on human rights within the development literature have also become increasingly relevant." Such a pull is perhaps inevitable. In conducting research on transitional justice in settings such as Sierra Leone for example, one cannot but be struck by the stark juxtaposition of the gleaming edifices of international justice such as the Special Court and the bleak poverty in which they are physically situated." The literature on human rights and development is rich, and doing justice to its complexity is well beyond the confines of this chapter. However, what resonates in particular for current purposes is the notion, increasingly prevalent in development circles, that human rights can provide a practical and normative basis for grassroots justice work in communities which have been affected by conflict and violence. If, as Sen has argued, we regard 'development' as essentially the expansion of human freedoms36- freedoms which are embodied in the relevant international instruments on traditional civil and political rights as well as those which focus upon economic, social and cultural rights (access to health care, education, shelter, work and food)-then the relationship between rights and develop- ment is a symbiotic one. Development is required to expand those human freedoms; it is necessary to make rights realisable.

## Legalism Good

#### The ability for legal structures to construct truth through rights is good – it provides a basis for the public to interact with governance

Gerstenberg 12 Oliver Gerstenberg, Senior Lecturer in Law at University College London. "Negative/positive constitutionalism, “fair balance,” and the problem of justiciability." Published by the International Journal of Constitutional Law, vol. 10(4). Published in October 2012. Available here: (https://academic.oup.com/icon/article/10/4/904/646187) - AP

A longstanding institutional objection to the constitutionalization of social rights focuses on what in the German constitutional debate has been dubbed “a shift from the parliamentary legislative state to a constitutional adjudicative (or jurisdictional) state”3—on the specter, that is, of judges seizing on ambiguous (but ambitious) constitutional provisions to issue broad rulings that usurp democratic prerogatives. Judges, according to this objection, would decide in ever more detail the contours of the welfare state in enforcing the constitution as a source of “positive obligations.” Hence, on this view, there is, and must remain in place, a sharp distinction and separation between law and politics. To the extent that positive obligations of the modern State are recognized, their enforcement is a “political question”—to be accounted for in the political-legislative sphere, where controversial distributive decisions can be decided within the channels of majoritarian politics. “Legal questions,” by contrast, are those which are coextensive with the (counter-majoritarian) domain of negative constitutionalism: for example, the influential tradition of German ordo-liberalism embraced Europe on the grounds that it would become the task of the new European economic law to implement and protect a system of open markets and undistorted competition at the supranational constitutional level beyond the state (together with an independent central bank, insulated—similar to courts—from politics), while the member states were to retain those legislative powers in the domain of the social that proved compatible with open markets.4 A closely related project bemoaned the progressive replacement of an allegedly non-instrumental, purposeless private law as a pure form of law and as a bulwark of liberty by a public law of subordination.5 But these terms of debate are not fully adequate, it can be argued, as the institutional objection considers rights only in their formal sense, ignoring their content. According to a different—albeit chastened—view, the inclusion of socioeconomic rights into a constitution (or their recognition alongside the constitution as constitutive commitments) is a prerequisite of guaranteeing or upholding a constitution’s “legitimation-worthiness”6 in a deeply divided modern society, where cohesion is possible only because of a shared commitment to the politically inclusive proceduralism embodied in the constitution. But this view is nonetheless a “chastened” one insofar as it insists on placing socioeconomic commitments as off limits to courts and on considering them as merely aspirational—in order to preserve, in the face of deep and pervasive disagreement within society and the courts, the very possibility of ongoing political debate over “matters of the deepest political-moral import.”7 The case for including socioeconomic commitment inside or alongside the constitution, Michelman suggests in a series of articles, rests on the idea of “legitimation-worthiness” of a “constitutional regime,” which “everyone who is both rationally self-interested and socially reasonable may be expected to endorse.” In other words, the case for inclusion “rests on the facts of social cooperation that take the form of legal ordering, and on the demands for general compliance with the laws that a legally ordered society directs towards everyone”;8 it thereby “bypasses speculation about a moral duty to aid others solely in the facts of suffering and common humanity, anchoring itself, instead, in the historical contingency that law exists in the country.” But how can a constitution continue to inspire loyalty and commitment—i.e. deserve recognition from its citizens—despite persistent, and sometimes reasonable, disagreement about its contents, that is, despite the fact that we disagree about rights? Michelman takes the “deep, intractable, normative disagreement that recent liberal theory posits as endemic in modern political societies”9 seriously. Owing to burdens of judgment, “we must expect protracted and contentious disagreements over major, morally fraught issues of public policy”10—such as affirmative action.11 Hence, Michelman (now) dispenses with Rawls’s constitution-as-contract view,12 according to which exercises of political coercion are justifiable as they issue from “a constitution, the essentials of which all citizens may be expected to endorse.” Michelman takes issue with the “indissoluble kernel of legalism and contractualism,”13 which Rawls’s proposed principle of legitimacy contains. According to the Rawlsian constitution-as-contract view the burden of legitimation is carried by a constitution “in the sense of a distinctly and separately identifiable body of higher-law norms. That set of constitutional norms is what supplies the procedure to which the inhabitants resort in order to get some resolution of their expected obdurate divisions over the substance of major policy choices.”14 The constitutional essentials provide citizens with “a test that is abstracted or deflected from issues of morality and public policy that are obdurately and divisively controversial in society”15—a test implying a proceduralizing resort to a “method of avoidance.”16