NEOLIBERAL MARKET RATIONALITY: THE DRIVER OF INTERNATIONAL INVESTMENT LAW

ENRIQUE PRIETO-RIOS

INTERVIEWS WITH: ALBERTO TOSCANO AND EDUARDO MENDIETA
FOREWORD BY OSCAR GUARDIOLA-RIVERA

ALSO FEATURING: JUDITH PERLE, DZMITRY TSAPKOU, SAMANTHA S MOURA RIBEIRO, MIKAEL SIFORS, JONATHAN OW, AND IAN MCDONALD
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With special thanks to Patricia Tuitt, Luis Belmonte, Eddie Bruce-Jones, Victoria Ridler and Stewart Motha at the School of Law.
FROM THE EDITORS

Dear Readers,

We are delighted to present to you the first issue of the third volume of the Birkbeck Law Review.

We open this volume with an interview with Professor Eduardo Mendieta, professor and chair of the department of philosophy at State University of New York, Stony Brook. This interview was conducted during the Professor’s visit to the Birkbeck School of Law in September 2014, and is preceded by a foreword generously provided by Dr Oscar Guardiola-Rivera, who explains the significance of inviting Professor Mendieta to Birkbeck—Eduardo being currently one of the most influential voices in the project to reinvent critique in law, a project at the heart of Birkbeck’s Law School. In his foreword, Dr Guardiola-Rivera reflects on the two-day seminar in which Professor Mendieta presented his paper, *The Decolonial Turn: The Post-Human and the Anthropocene amongst Others*. In the interview, Professor Mendieta further explores and discusses some of his work, including the essays ‘Globalization, Cosmopolitics, Decoloniality: Politics for/of the Anthropocene’ and ‘Interspecies Cosmopolitanism’, as well as his forthcoming book, *The Philosophical Animal: On Zoopoetics and Interspecies Cosmopolitanism*.

Our second interview is with Alberto Toscano, Reader in Critical Theory at Goldsmiths, University of London. The discussion spans from the nature, or very existence, of the proletariat as collective subject, in reference to thinkers such as Marx and Badiou, to the ideas of law and justice in relation to both liberalism and communism. He also delves into the history of radical struggle, from the Italian resistance to the ‘Arab Spring’, and the relation of human rights discourse to his work on fanaticism, as published in *Fanaticism: On the Uses of an Idea*.

Our leading article is ‘Neoliberal Market Rationality: The Driver of International Investment Law’ by Enrique Prieto-Rios (PhD Law Candidate, Birkbeck College, University of
London. It approaches neoliberalism as an ideological pro-
ject, which in his opinion has played an essential part in the
shaping of international investment law and the creation of a
distinctly and demonstrably pro-investor regime, with strong
protection of property rights. Prieto-Rios covers the develop-
ment of international investment law, the rise of the neo-
liberal ideology, and looks ahead towards a rethinking of the
system beyond neoliberalism.

Judith Perle’s article, ‘The Invisible Fence: An Exploration of
Potential Conflict between the Right to Roam and the Right
to Exclude’, analyses examples of land access and ownership
rights, from feudal to present-day England, Wales, Scotland,
Scandinavia and America. Through these examples a fascin-
ating and troubling story is told—of the ongoing global
appropriation of the commons and the evolution of privat-
ised, capitalist property rights.

Two articles in this issue continue the privacy and surveil-
ance theme from our October 2014 conference, the papers
from which were published in BBKLR issue 2(2). The first of
these is ‘From Surveillance to Dataveillance: Disappearing
Bodies and the End of Optics’, by Dzmitry Tsapkou, Uni-
versity of Tartu. In his piece, Tsapkou talks about the con-
temporary advances being made in surveillance techniques,
referencing Michel Foucault’s development of Bentham’s
panoptic model, and arguing that Foucault’s work on the
panoptic principle is today more relevant than ever. He
expands upon this by explaining that the panoptic principle
has come to colonise public spaces and homes, with ‘data-
veillance’ increasingly enabled by individuals’ digital foot-
prints.

The second piece following our conference theme is by
Samantha Ribeiro. ‘When Privacy Feeds Surveillance: The
ECJ’s Decision on Google vs AEPD and the Brazilian Ex-
perience’ discusses the impact of the application of the ECJ’s
interpretation of Directive 95/46/EC on the protection of
individual rights in Brazil, also touching on an important
Spanish and European case involving Google and the ‘right
to be forgotten’. She references the recent impact of the
Directive on the Brazilian judiciary and discusses ways to
neutralise what she argues are the negative impacts of the
ECJ’s decisions.

Mikael Silfors’ ‘Gendered Archetypes and Veils of Objec-
tivity: Identifying Possibilities and Manifestations of Norma-
tive Influences in Swedish Rape Proceedings’ could hardly be timelier. There is no reference to Julian Assange, but with his controversial predicament still being drawn out this might make particularly interesting reading for those following the story. Of course the article’s real import is its relevance to the global swell of public dissatisfaction over how most legal systems (and societies at large) treat rape victims. Silfors focuses on the two discursive orders of rape, in particular looking at the perception of the judiciary, the victims and then taking a statistical view, analysing the percentage of reports and conviction rates. The article cites many reasons given by the judiciary when choosing to acquit or convict, revealing telling contradictions, incongruities and, most importantly, the epistemological and normative underpinnings of law’s present predisposition to repeatedly fall into the trap of victim-blaming.

In the features section of this issue we have two award-winning pieces. Emily Grabham’s essay ‘Intersectionality: Traumatic Impressions’ is reviewed by Jonathan Ow. Jonathan’s review essay was awarded the Helena Kennedy Prize for Best Critical Essay, as well as the Lexis Nexus Prize for Best Optional Module Result, by the Birkbeck School of Law, where Ow is an LLB candidate. We also, unusually, have a piece by one of our own Editorial Board members, Ian McDonald. His impressive response to the question ‘Is Magna Carta More Honoured in the Breach?’ was awarded second prize in the Times Law Award, and we are very proud to be able to include it in the journal.

As we look to publish this latest edition, we would like to thank Patricia Tuitt, Dean of the School of Law at Birkbeck, and Sir Terence Etherton, our Patron, for their continued support of the Review. We would also like to offer very special thanks to the previous Managing Editor, Features Editor and Editors-in-Chief—Fraser Alcorn, Edward Chin, Marek Marczynski and Vincent Chao. They mothered the journal lovingly from inception, for a span of two fantastic volumes, allowing us, the journal’s new leadership, to stand high on tall shoulders and continue an already great tradition (despite its spritely youth) of high-quality, student-run, legal studies publishing. It is thanks to their (unfathomably) hard work that the journal exists. This effort was officially recognised in January this year, when the editorial board proudly received from Birkbeck the Prize for Contribution to the Life of the School of Law. We would like to
add our own recognition to Birkbeck’s and wish the old guard all the best in their future endeavours.

Lastly, we would like to thank our Advisory Board for their continued support and guidance (in particular, a special thank you to Eddie Bruce-Jones and Victoria Ridler for always being available when needed), and our entirely new Editorial Board, whose hard work made this issue possible.

Nana Anowa Hughes, Simon Thorpe, and Devin Frank

May 2015
Interview Foreword: On the Significance of Inviting Professor Mendieta to Birkbeck

OSCAR GUARDIOLA-RIVERA*

Professor Eduardo Mendieta has been the department chair at the School of Philosophy, State University of New York at Stony Brook, United States, for some time now, and from the summer of 2015 will take up a position as Professor at Pennsylvania State University. On 11 and 12 September 2014, he and I co-hosted a two-day seminar at Birkbeck School of Law. The seminar was entitled ‘Focus on the Funk: Decolonising Epistemologies, Politicising Rights.’ During this seminar, Professor Mendieta presented his paper: The Decolonial Turn: The Post-Human and the Anthropocene amongst Others. The significance of this seminar was its continuing effort to examine the future of critique, and its role in legal studies. This topic was particularly riveting because it allowed us to focus on the ongoing ‘Southern Turn’ that politics, law and philosophy are taking in the wake of political challenges to Europe’s ‘self-colonisation’ (e.g. Greece, Spain, etc), America’s persistent issues concerning race, and efforts in Latin America and parts of Africa to leave behind Western tutelage and self-imposed dependence—legal, economic and intellectual.

The main reason we invited Professor Mendieta to Birkbeck was to reflect on the kind of research we do here. At Birkbeck, we work in the tradition of critical thinking. Specifically, one of the focuses of our activity is to labour at the intersection between aesthetic images and political normative and legal ideals. Such was the perspective that united the work of the founders of Birkbeck Law: people like Costas Douzinas, Peter Goodrich, Peter Fitzpatrick, and Patrick McAuslan. As it happens with any tradition, after a while it settles and it needs to be reinvented if it is to avoid stagnation—to survive and thrive. This current project of reinventing critique follows from

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1 Unpublished Paper
a past visit which, thanks to the support of the Leverhulme Trust, Professor Boaventura de Sousa Santos made to our school. We hope to continue the project, and it is in that context that I invited Professor Mendieta.

Eduardo Mendieta is one of the most decisive and influential voices in the project to reinvent critique. He studied with Jürgen Habermas, today’s most well-known representative of the Frankfurt School’s critical legacy, and his philosophical outlook owes a lot to the American tradition. But rather than following this heritage as if it were the masters’ voice, he has sought to challenge the tradition from the standpoint of those who have been pushed to the margins—politically as well as epistemologically—of the dominant history and geography of reason. Just as today’s solidarity and political movements in southern Europe—from Greece’s SYRIZA to Spain’s Podemos—have sought inspiration in Latin American bottom-up politics (and have, in the process, evolved into a unique southern critical perspective that is changing Europe from the ground up, even questioning the very notion of what counts as ‘ground’), I believe it is possible for us to find in such sources—Latin, African, the Americas, southern European, and so on—motifs, images and practices that can help us reinvent a critical legacy that would otherwise be in danger of reaching exhaustion.

Given Birkbeck’s tradition of thinking at the limits of aesthetics and political ideals, perhaps the best way of introducing what it meant to have Eduardo with us and to explain what the critical tradition is and stands for, while rein-
venting it, is to begin with an image: Masana Nzima, ‘Photo’.\footnote{Masana Nzima, ‘Photo’ (South African History Online: Towards a People's History) <http://www.sahistory.org.za/people/masana-sam-nzima> accessed 10 March 2015. Reproduced under copyright exception for academic fair dealing.}
This is Sam Nzima’s famous 1976 photograph of Mbuyisa Makhubu carrying the dying body of his friend Hector Pieterson, who was shot by South African police when the apartheid regime opened fire against protesters in Soweto. This image depicts what is known, technically speaking, as a ‘limit situation’: being shot, filled with terror, oppressed, running for one’s life. Here we can see the ultimate limit to freedom, and the equality and fraternity that we aspire to in imagination and reason. This image and others like it bear testimony to history coming to an end, or being no more than a pile of debris.

In the face of such evidence it would be reasonable to conclude that in the real world failed revolutions, savage capitalism and genocide have finally ‘eaten up the ideal of freedom’. Yet, in the work of Eduardo Mendieta, as well as in that of people like Drucilla Cornell, references to this imagery serve the purpose of arguing, convincingly, that to hold such a pessimistic conclusion gives us no alibi. For it is a necessary limitation of our human existence that this can never be finally known. That is the central insight of critical philosophy: to recognise the limits of the unknowable. However, instead of being a paralysing experience, Mendieta, Cornell and others tell us that this understanding of limitation offers good news. Why is that so? The critical point taken over by Mendieta relates to an understanding of limitation that militates against a pessimistic resignation of the world as it is. In this sense, we return to central Kantian insights in the argument that, as a matter of limitation, the future simply cannot be condemned as one in which we are fated to live out our relations with others as *homo economicus*, that is, as agents of genocide and plunder. This is our starting point.

Next follows the conviction that we are in the middle of at least three crucial ‘turns’, which are reshaping our view of the world, as well as our notions of critique, normativity and law. These turns are transforming the landscape of critical thinking, and with it, the kind of critical legal and political thinking and practice that we do here at Birkbeck. First, a ‘Southern Turn’—which seeks not only to denounce the parochialism of the juristic, historical and philosophical canon of the West (from naturalism and positivism, or black letter law, to socio-legal studies) that is taught even in so-called critical schools—but also to reflect on the fact of epistemological plunder. This, together with economic plunder has come to shape our image

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3 ibid.
of the world and the kinds of action that follow from the normative pull of such an image. Secondly, there has been a turn from critique to science, which also engages with the return of religion in theory and practice. Thirdly, there has been a turn away from revolution to post-humanism.

I believe that both Eduardo and I, as well as others with whom we work, subscribe to the first two and reject the third. Thus we insist upon the connection between the aesthetic and the political as the starting point of critique and its aim: making visible that which was not visible; bringing on to the stage new objects and subjects gathered around them; making audible as speaking beings they who were heard just as minors or even more simply as noisy animals. This is also what politics is. Law translates this point into a more detailed and concrete matter of institutional design, bringing together our activity as symbolic beings who open up spaces for visualisation with the irruption of the real. In that sense, both Mendieta and I explore what has been termed by Drucilla Cornell and other feminist critics ‘the imaginary domain’. We have placed our work firmly within the notion that we are symbolic, linguistic beings. Our understanding of language and symbols is wide enough to include aesthetic images, scientific models and normative political ideas. I believe that this expansion of the critical imaginary domain is one of the most decisive, if not the most decisive contribution made by Birkbeck-style critique. It is an im-

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important departure from more reduced, mainstream understandings of law, which identify it with either the letter or the relative value of instituted opinion.

In my book *What If Latin America Ruled the World?*, I refer to the well-known but much misunderstood fact that the most important innovation in the history of humankind has not been tools, neither stone or iron swords nor technology (including communication technologies), but the invention of symbolic expression by our prehistoric ancestors; the first artists who were also the first thinkers and legislators. On this note, let us continue to appeal to artistic images in order to speak of the three most important innovations, or ‘turns’, in contemporary philosophy and critique. The first is philosophy’s ‘Southern Turn’ (from the top to the bottom of our usual image of the world, and society); the second is the return of the relation between science and critique, less a ‘return’ than a ‘new turn’, as we will see; thirdly, a turn from revolution to post-humanism, post-revolutionary and even post-political thought and practice. Once more, I believe we subscribe to the first two, but firmly reject the third. The reasons for this have something to do with the point depicted by Paul Klee in two of his paintings. The first, called *Angelus Novus* (evoked by the critic Walter Benjamin in his *On the Concept of History* and more recently by visual artist Hito Steyerl) is

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better known—the second, called Haupt und Nebenwege and painted in 1929, perhaps less so.

In making the connection between the aesthetic and the political, Mendieta engages, as I do too, with the critical tradition. In doing so, we refine and reinvent the tradition with the goal of making it less parochial. It is a tradition that extends from the poetry of John Milton and the chronicled dialogues between Bartolomé de las Casas and the Amerindians regarding the destruction of the Indies, to the philosophy of Immanuel Kant, the work of German critics exiled or on their way to exile in the Americas during and after WWII, and to more scientifically and radically minded Caribbean and Africana writers like Frantz Fanon or Cornel West. Thus, we take a ‘Southern Turn’. We do so in a very specific and considered manner, in order to put an end once and for all to the enduring yet deeply mistaken perception according to which philosophy in general and the legacy of critique, romanticism and the enlightenment in particular, is solely or mostly Western, if not just European (including North but not South America, northern but not southern Europe or Africa).

A second ‘turn’ relates to a connection that is less known but no less important in Mendieta’s work and the critical tradition as a whole: the link between scientific notions, from mathematics to the earth and life sciences, particularly geography in Eduardo’s case, on the one hand, and aesthetic ideas and political ideals, on the other. In this respect, it has to be said that the ‘return’ of mathematics and science in philosophy and critique is less a ‘return’ than a ‘new turn’ in a relation that has never really gone away. This includes efforts by people like Alain Badiou or Drucilla Cornell to engage with the consequences of Set Theory and Georg Cantor’s work beyond mathematics, or, as is the case of Eduardo’s relation with the philosophical work of Habermas, exploring the implications of contemporary linguistics and pragmatics. In my case, the consequences of empirical anthropology for the study of institutions, the connections between early cybernetics and politics and art in Allende’s Chile, or the historical and epistemological links between the geometry of horizons, the dawn of empire, and the turn from speculative to physical geography and geopolitics between the sixteenth century and Kant’s invention of ‘physical’ geography and his probabilistic turn. We believe that the ‘new turn’ to mathematics and the earth and life sciences is a response to: a) postmodern obscurantism, on the one hand, and analytical withdrawal from engaged thinking, on the
other; b) the hold of pseudo-sciences such as standard economic theory, methodological individualism, or the dogmatism of nihilists and religious zealots such as US Republican congressmen that deny climate change science; and crucially, c) to planetary challenges such as global warming and bio-political plunder.

In relation to man-made climate change and the new turn towards science, Mendieta takes stock of renewed calls to go beyond man in the age of the Anthropocene and move to a post-human and post-secular scene. We suspect that these calls for post-humanism are frequently also post-revolutionary in that they do not engage with the limits, moral or otherwise, of living conditions under capitalism here and now that are causing Man’s destructiveness to become a geological force threatening to destroy the planet. Mendieta is suspicious of a secularism that tends to divide the world once more into a liberal West which is surrounded and threatened by religious barbarians and other assorted superstitious people. Mendieta reminds us that this picture glosses over the deep relations between religious traditions and the imaginary demarcations of the world (by means of racial and cultural dividing lines, for instance) always there for the sake of economic interests and the justification or ignorance of worldwide plunder, which in turn made possible the disenchantment of the world that often goes by the name of secularisation. He has engaged with people like Judith Butler and Cornel West, among others, to debate this point.

Mendieta has developed an axis of research into the human/animal divide which is useful to rethink the question of what the ‘human’ stands for, for instance in human rights. This debunks the centrality of the human but without conceding the argument to the post-humanists who have given up on agency and subjectivity for the sake of a transcendental technologism. In turn, I have spoken of the comeback of Amerindian cosmologies and cosmopolitics redefining radical politics in the Americas and elsewhere, and argued that ‘only Amerindians can save our modern soul’. Following Naomi Klein and together with Drucilla Cornell, I have referred to the work of geophysicist Brad Werner, in whose statistical global environmental modelling the only dynamic that is a cause for hope is either ‘resistance’ or the movements of people who ‘adopt a certain set of

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dynamics that does not fit within the capitalist culture⁹, including direct action. I have referred to and discussed with Mendieta the work of anthropologist Eduardo Viveiros de Castro, who uses Amerindian thought to denounce the anthropocentrism of Western thought as the basic model of every ethnocentrism. Rather than post-humanism, the point is to de-centre the position of the human vis-à-vis animals and the rest of nature, to stop imagining nature as a reserve of resources available for the sake of Man. The point is very different from that of post-humanist thinkers: not the acceleration of capitalist colonisation into virtual or outer space, but rather, shifting the geographies of our political imagination. The former de-politicises (by giving into the relativism of multiculturalism according to which there are various ‘types’ of thought and no judgment between them is possible, which leads to pessimistic claims such as ‘only a God can save us’); the latter understands the need to deconstruct Western philosophy and anthropocentrism as the occasion for repoliticisation, or as I prefer, ‘permanent decolonisation’.

Mendieta and I, together with others, align our work with the Caribbean Philosophical Association project. I argue in favour of revolution and decolonisation, while Mendieta speaks of liberation and decolonial genealogy. Our critics say these are outdated concepts, left behind by history, and I respond by saying that our argument is geographical rather than being framed in historicist terms. A crucial point for further work together between Birkbeck and Pennsylvania State University (where Eduardo now teaches), as well as the Caribbean Philosophical Association (CPA), revolves around this new turn from history to geography in particular, and the earth and life sciences in general, and what it means for philosophy and critique to take seriously notions of perspective, contingency, and hedging, among others.

In this respect, a central textual reference for us is the recent publication of Kant’s lectures on geography. There is in fact a whole tradition concerning the spatial-temporal dimension of institutions, beyond linearity, which is emerging and that some of us believe it is worth studying. This can be seen in the work of critical geographers like Stuart Elden and David Harvey. In the history and philosophy of science, one should mention Nicolás Wey Gómez’s genealogy of geography, but also the interrogation of the concepts of chance, contingency and the uncertainty of the future found in the writings of Quentin Meillassoux or Bob Meister. The latter, a professor at the famous History of Consciousness Department at the University of California, Santa Cruz, has already applied some of his findings to critically approach the current theory and practice of Human Rights, as well as law and finance, which is crucial to understand today’s political landscape in Europe and elsewhere. There is also the ‘spatial turn’ currently taking place in British critical legal studies—for instance, the work of people close to Birkbeck such as Andreas Mihalopoulos-Philippopoulos, Illan Wall, or Hans Lindhal. Finally, I should recommend that we take a closer look at 1970s Structuralism, supposedly superseded by post-structuralism but, I believe, perhaps even more relevant to us now. Especially, the notion of the ‘zero value’ of institutions proposed by structural anthropologist Claude Lévi-Strauss and its recovery today in the work of Marcel Hénnaff, Eleanor Kauffman, and principally, Brazilian ethnologist Eduardo Viveiros de Castro. Some of us see the possibility of a creative convergence between these different lines of work, the contribution of the Birkbeck Institute for the Humanities, and the Caribbean Philosophical Association project. That has something to do with the direction of Eduardo Mendieta’s geo-philosophy, as well as my own work.

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11 See, among others, Stuart Elden & Eduardo Mendieta (eds), Reading Kant’s Geography (SUNY 2011); Nicolás Wey Gómez, The Tropics of Empire: Why Columbus Sailed to the Indies (MIT Press 2008); Quentin Meillassoux, The Number and the Siren (Robin Mackay tr, Urbanomics 2012); Bob Meister, After Evil: A Politics of Human Rights (Columbia University Press 2012), and ‘Liquidity’, draft paper on file with the author; Andreas Mihalopoulos-Philippopoulos, Spatial Justice: Body, Lawscape, Atmosphere (Routledge 2014);
Finally, let me respond to the question of the meaning of Eduardo’s presence at Birkbeck in the context of this later suggestion of a future direction of collective research. I would like to argue in favour of the Platonic contention that philosophy has little to do with the tyranny of today’s opinion, and that the accusation of being outdated actually misses the point about what critique is, as is the case in critical legal studies. My argument follows from the recognition that thought and critical reflection actually has very little to do with history. This is not because Philosophy, with a capital P, may be static or eternal, idealistic in the pejorative sense, though as Mendieta demonstrated in one of the articles which we discussed during his seminar, the case can be made that from the perspective of philosophy’s truthfulness, ‘time is an illusion’. The point, rather, is that philosophy or critique, understood as thought and action, have little to do with linear time or the short cycle of news narratives and bad novels, because critique is untimely. Thus, for instance, our arguments concerning an insistence on revolution, liberation, storytelling, Amerindian cosmologies and interspecies ‘cosmopolitics’ may be untimely, and in that precise sense point towards something that is timeless, but they are neither outdated nor abstract in the pejorative sense of being out of touch with reality. On the contrary, our arguments point towards unveiling what is more real than reality itself, insofar as they aim to make visible what the dominant opinion of our time wishes to place out of view and to consign to the dustbin of history, and to bring onto the stage new objects and subjects gathered around them. This is what Hegel called in the Philosophy of Right and the Science of Logic the ‘speculative absolute’,¹² a kind of critique focused on a concrete object but never sacrificing the perspective of the totality; again, that is what critique is all about.

I therefore want to end by arguing that critique is down to earth not in spite of being less concerned with history and actuality, but because, like the human mind, it is free from history in the historicist sense. This does not mean that philosophy has nothing to say about everyday life; in fact, quite the opposite. Take for instance the case

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¹² Hegel’s ‘Speculative Absolute’.

of the CPA project of shifting the geographies of reason. Whereas mainstream news, opinion and the media, and even academia in Europe and the United States, consider certain themes passé, it is not necessarily the case in the global South. Our intention here, to say the least, is not to ‘return’ to supposedly dated and forgotten modes of Euro-American thinking about revolution or Amerindian animism, but to do this in conjunction with an attention to the thought that has been pushed to the margins, ‘within the dominant cartography of knowledge altogether’, as Drucilla Cornell would put it. In this sense, I insist, and I believe Eduardo would agree with me, the enemy of philosophy is historicism, presentism, and the tyranny of chance, opinion and desire—in the sense in which our capitalist society and media culture do not simply reflect what we desire but through guesswork and normative interpellation tell us what we must want and wish for. This would include the so-called social sciences, which in their attempt to appear more scientific are in fact less so insofar as their only anchoring in reality passes through the filter of a thought of chance and opinion (polls, probabilistic reasoning, and so on). The latter can say very little, almost nothing, and mean very little to the sense of intertwinement between ‘spirituality’ and ‘revolution’ that characterises the concrete reality of politics in the global South. This is so not only in Ecuador, Bolivia, Mexico-colombia (a composed entity I have invented to contrast and accompany The Economist’s Venecuba) and other parts of the Americas, such as Canada, for example, but also, importantly, the Middle East and southern Europe, in particular, Greece and Spain.
Introducing Decolonising Epistemologies, Politicising Rights: An Interview with Eduardo Mendieta

ENRIQUE PRIETO-RIOS AND KOJO KORAM*

THE BIRKBECK LAW REVIEW: Professor Mendieta, thank you for leading a seminar at Birkbeck School of Law. In the seminar we had the opportunity to discuss some of your work, including your essays ‘Globalization, Cosmopolitics, Decoloniality: Politics for/of the Anthropocene’, and ‘Interspecies Cosmopolitanism’, among others. Could you say something about the ideas in these texts that led you to choose them for our discussion?

EDUARDO MENDIETA:¹ Before I answer your question let me begin by thanking Kojo and Enrique for all the organising, coordinating, and promotions that you did for the seminar. It certainly would not have been so successful without your efforts. I also wanted to thank all the participants of the seminar over the two days I was at the Birkbeck School of Law. I was very honoured to have been invited by Professor Guardiola-Rivera to hold a seminar devoted to my work. It was a wonderful occasion for me both professionally and philosophically.

Now, when Professor Guardiola-Rivera invited me to organise a seminar on my work, he asked me to send him some texts that

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exemplified the kind of work I have been doing and that also embody my philosophical projects and commitments. I selected some recent texts, which were short, but also very illustrative of a series of lines of investigation. I sent six texts, all of which gravitated around three axes: first, there is the axis of the project of the decolonial turn that is part and parcel of the provincialising of the West, to use that wonderful expression by Dipesh Chakrabarty. In this work, however, I want to go beyond a dismantling and unmasking of eurocentrism.

I link the project of the decolonial turn to what we now call ‘epistemologies of ignorance’ that perpetuate the effects of colonialism and imperialism. It is not enough to say that Europe is an invention, a glorious fiction, and that a lot of what Europe claims as its own, or as its gift to humanity, it acquired from other cultures, or could not have produced without its engagement, friction and encounter with other cultures. I am interested in how what Aníbal Quijano has called ‘the coloniality of power’ is sustained, fuelled, concealed and dissimulated by positive, produced, orchestrated ignorances, lacunae, neglects, and outright epistemic acts of pillage and expropriation. Second, there is the axis of the project of the transformation of ‘American’ philosophy through an engagement with marginalised thinkers within this tradition. Over the last two decades I have deliberately sought out to study and be both informed and formed by some African-American philosophers within the American philosophical tradition. I have studied intensely thinkers like Cornel West, Angela Y Davis, WEB Du Bois, Alain Locke, and bell hooks, to mention some of the most prominent. So, I sent a long interview I did with Cornel West. I should note that for me this is part of a larger agenda relating to the transformation of American philosophy due to what Professor Linda Alcoff has called the ‘demographic challenge and deficit’ of contemporary philosophy in the US, by which Alcoff meant the demographic growth of Latinos/as in the US. In fact, I have been working over the last decade on articulating what can be called ‘Latino/a Philosophy’ in the US.
Finally, there is the third axis of the work on animals and what I have called ‘interspecies cosmopolitanism’. I recently finished a book titled *The Philosophical Animal*, in which I develop a post-humanist, non-anthropocentric, and post-metaphysical grounding of animal rights, using the resources of critical theory inspired by the Frankfurt School.² Relying on the work of Jürgen Habermas, more specifically his discourse ethics and discourse theory of law and democracy, I lay out a ‘political and non-foundational’ theory of animal rights. This work is particularly motivated by the precarious ecological situation in which we find ourselves, and the severe weather that we are experiencing due to global warming.

Two main preoccupations converge on the focus on animals. Evidently, that the ecological devastation of the planet is having severe consequences on non-human animals. We are undergoing what has been called the ‘sixth extinction’, which is the extinction not only of fauna, but also of planetary flora. Our planet is becoming a planet of weeds, as Quammen called it, and jellyfish and sea bacteria. We have been engaging in a terraforming, but in the most tragic and destructive way. This is what is now being called the Anthropocene. But, for me, the Anthropocene also means the age of mega-cities, most of which over the last two decades have been growing at exponential rates. The mega-urbanisation of humanity in fact turns out to be but the mega-slummisation of the mega-urbes of the world, most of which we find in the developing world. So, the Anthropocene turns out to be the age of mega-slums and the ecological destruction of the planet. These two processes are entwined in a vicious logic. Still, I would say in retrospect that although there are these three distinct axes or lines of thinking, all of my work is motivated by ethical-political questions: the suffering of living beings, in general, and suffering of incredible number of human beings who have to bear disproportionally the devastating effects of the so-called development of the putatively developed world.

BBKLR: You seem to be saying that there is a relationship between ‘the decolonial turn’ and what you have termed as epistemologies of ignorance?

EM: Yes, indeed: The decolonial turn refers to a multi-front approach that aims to dismantle eurocentrism, but not simply through a mere rejection of Europe, or the fiction of the West. The decolonial turn means to think with, through, and beyond the ‘Western’ canon. Otherwise we fall into a simplistic and untenable anti-Westernism and equally simplistic and untenable Third-Worldism. In order not to fall into those invidious dichotomies, we have to engage in archaeologies of thinking, of philosophemes, of entire traditions that begin with the realisation that for every bit of knowledge that is claimed, there is another bit of ‘unknowing’, of ‘ignorance’ produced. The decolonial turn is about educating us about the production of collective ignorances, about what we did in the past to indigenous cultures, for instance, but also about what we did to women, blacks, and so on.

The other term that I sometimes use to refer to the ‘epistemologies of ignorance’ is agnotology, which means more or less the logos of not-knowing, that is, the logic of how we get not to know something. If you think about ‘epistemologies of ignorance’ as a philosophical task, it will sound prima facie oxymoronic. Epistemology has to do with the conditions of possibility of knowledge, and thus its goal is to eradicate its other: ignorance, or non-knowing. What the term agnotology foregrounds, in contrast, is the positive aspect of the productivity of ignorance. By this I mean that ignorance is not simply the absence of something, but that it is something that is actively produced. It is the active production of ignorance that the decolonial turn aims to confront by linking the question of eurocentrism to the coloniality of power that is sustained through those produced ignorances.
BBKLR: Following on from your previous answer, what do ‘the decolonial turn’ and ideas regarding ‘epistemologies of ignorance’ offer to questions of jurisprudence?

EM: I would say that this is a very vibrant and expanding field that should receive more attention. I should begin first by bringing up the theme of the evolution of international law itself in the sixteenth century, with the contributions of the school of Salamanca, and the work of Suarez and Vittoria, but also de las Casas. We have to mention the way in which the organisation of Native American tribes inspired some constitutional and legal ideas for the founding fathers in the US. In general, the evolution of the modern democratic, rule of law, constitutional nation state, took place through the logics of colonialism, decolonisation, imperialism and neo-imperialism. The legal fabric that sustains the modern legal regimes of Europe as well as most modern nation-states is permeated by the juridification of colonialism.

Then, with the rise of slavery and its eventual abolition, we have to explore how the white racial supremacy that came along with European colonialism was juridified in such a way that the codification of slavery at the same time juridified dispossession and legalised racism. What Charles Mills has called the ‘racial contract’ was always a racial contract of the coloniser and the colonised that used the means of the law to make it enduring and unassailable.

MacPherson’s classic of political philosophy, The Political Theory of Possessive Individualism: Hobbes to Locke, already, from 1962, announced what today we can more appropriately call ‘The Legal-Political Theory of White Racial Supremacy’, or, ‘The Colonial-Modern Racial Contract’. But, in the US, at the very least since the 1960s with the critical legal studies movement, we have been thinking about the relationship between colonialism, racism, dispossession, legalised discrimination and the endurance of racial supremacy even after centuries of civil rights and anti-colonial movements.

I think that if you google ‘postcolonial theory and law’ you will get hundreds of hits, with links to journals such as Third World Legal Studies or even series dedicated to the study of legal issues through postcolonial theory, such as the Cambridge Studies in International and Comparative Law. I think this work is even more relevant as we
face the imposition of a trans-national legal regime that works in favour of transnationals to the detriment of local, indigenous, racialised and marginalised populations.

**The decolonial turn is thus always about challenging the givenness and naturalisation of disciplinary boundaries.**

BBKLR: *What are the differences you perceive between style and method and how does it relate to the project of decoloniality?*

EM: This is a very interesting question, indeed. At the very least it allows me to expand on some ideas I was discussing at the outset. I think that what Quijano called the ‘coloniality of power’—to refer to the endurance and non-vanishing presence of the colonial past in the colonial present—circulates, and is telescoped and amplified by disciplinary rigidity that is sometimes praised as disciplinary rigor. Disciplines discipline knowledge by authorising certain questions and by authorising certain credible witnesses, as Donna Haraway calls them.

Evidently, if one has a certain conception that philosophy that is worth that name is only philosophy of mind or philosophy of language and the rest is just journalism or indulgent political activism, then, when you ask about the endurance of colonial dependencies and the juridification of white racial supremacy or the juridification of racial hierarchy through the construction of racialised others as de facto illegal and criminal, these are from the outset disqualified as, let us say, ‘philosophical questions’.

The decolonial turn is thus always about challenging the givenness and naturalisation of disciplinary boundaries. For this reason a methodological issue turns into a matter of style—that is, into an issue about developing new ways to investigate, analyse and present work that hitherto had been deauthorised, or at least not allowed to be considered as important and credible. The question of style required also the development of new genres or styles of philosophical/critical/theoretical writing. Take for instance Edward Said’s *Orientalism*, a text that combined many types of research styles, or Enrique

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Dussel’s *Ethics of Liberation,*\(^4\) and his monumental *Politics of Liberation* (in three volumes),\(^5\) which is a magisterial global history of political philosophy combined with a systematic treatise that is suffused with ethical outrage, but that also traces a utopian horizon. Or, if I may, I find Oscar Guardiola-Rivera’s work as also embodying this decolonial disquiet and healthy anxiety before the acceptance of certain methods and styles. When we think about the project of the decolonial turn, we have to think about the need to speak in tongues, so to say, as we have to say things for which our vernaculars have not prepared us.

**BBKLR:** *An issue that was raised by the non-academic attendees of our seminar was the question of the use of specialised language seen as essential for authentic scholarship. Do you understand the role of decolonising as to create more inclusive communities and therefore, is there a danger of specialised language creating exclusions?*

**EM:** This is a very serious concern of mine, and I would imagine that anyone interested in the public role of philosophy has also considered this question. I think that there are many thinkers today who revel in obscurity, but I think that there are others who work hard at translating their philosophical language into more publicly accessible language. Still, I think we have to be careful. I think philosophy is about generating new terms, new ways of thinking and saying what we are just beginning to realise. I sometimes define philosophy as the utopia of thinking, but this is a definition I came up with by riffing off a phrase from Umberto Eco: ‘poetry is the utopia of language’. I think philosophy is the utopia of thinking so long as ‘philosophy is also the utopia of language.’

When we think about great philosophers we have to think of the way they gave birth to new ways of speaking. Recently I was reading Adorno’s two-volume work *Philosophische Terminologie,* which in fact was a series of introduction to philosophy lectures. There Adorno makes the point that philosophy is the history of the

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The fact is that most serious and relevant work today is and has to be interdisciplinary. The sedimentation of semantic contents in concepts, in the philosophical language. So, take the term ‘idea,’ which is as old as the term ‘philosophy’ itself. At one time the term had very mundane connotations and then over time it acquired a technical character and now it is part and parcel of everyday philosophical language.

I think there is a transit between the vernacular of everyday language and the technical language of philosophy. I am reminded of something Wittgenstein says somewhere about philosophy’s language, namely that philosophy has no meta-language, by which he meant that there is no sovereign, autonomous, pure, untainted philosophical language, like for instance physics or chemistry have. Physicists could talk in the rarefied language of their equations. But philosophy or theory in general cannot do that. We philosophers borrow our language from the vernacular of the public square and then fashion it into something more or less useful by refracting it, and stringing it along with other de-contextualised terms. We could say that we philosophers are in the business of making everyday language uncanny by making it say things we did not associate with a certain expression or language. Still, while I want us to be perpetually vigilant of what we can call the vice of jargon, and the unnecessary technicisation of philosophical language, we also have to recognise that there is no language that is not precisely the ceaseless task of translation. There is no language without the labour of translation. Even the most obdurate monolinguist has to translate, for there is no communication that is flawless and without equivocations.

BBKLR: How does the method of decoloniality manage to circumvent disciplinary boundaries while at the same time being intelligible to the academy and not creating new boundaries?

EM: My friend, the Afro-Caribbean and Africanist philosopher Lewis Gordon, has talked about ‘disciplinary decadence’ to refer to the myth of disciplinary rigor as the subterfuge for de-legitimating certain types of questions and research agendas. The fact is that most serious and relevant work today is and has to be interdisciplinary.
interdisciplinary. Let me illustrate. If you are a phenomenologist, there is no way in which you can neglect the work in embodied cognition that has exploded in the last two decades, or the work of someone like Oliver Sacks, who has done so much fascinating work on the neurobiology of the brain and its many different enlightening dysfunctions that disclose to us its unsuspected complexity. Or take contemporary jurisprudence, which now has had to engage in questions of gender and racial exclusion and appropriate the insights of philosophical hermeneutics. Take feminist philosophy, which is now as diverse a field as is philosophy itself.

We ought to be much chastened by the work of the Gulbenkian Commission that gave us the report co-written by Immanuel Wallerstein and his team, which appeared under the title of *Open up the Social Sciences*. In this report, Wallerstein and colleagues make the point that the disciplinary division that we see now institutionalised in the modern university is only just a century old, if not less. Since the 1960s and 1970s, furthermore, with the influx of minorities and women into the university, new disciplines have emerged that challenge the sacralised boundaries erected during the height of European colonialism and hegemony. These include, for example: women and gender studies, Africana studies, cultural studies, Chicano and Latino/a Studies. That is in the humanities and social sciences. But in the natural sciences and schools of engineering we have seen the development of new disciplines, such as bioinformatics and super-computational theory, to mention the ones that I have been most fascinated by. Today, the general call in universities is for the globalisation of the curriculum and for the launching of interdisciplinary research agendas. But, I would underscore that the decolonial turn and what I referred to before as agnotology are trans-disciplinary research agendas that aim to show the negative dimensions of disciplinary decadence; that is, the reification of disciplinary boundaries for the sake of the protection of certain research agendas that exclude others. Thinking that has its finger on the pulse of the times will not hesitate to pursue its agenda by theorising without disciplines, without the docility of authorised modes of producing knowledge.

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BBKLR: Following on from your discussion of the potential of academic style rather than method, one thinker you drew on extensively in your seminar was Dr Cornel West. In what ways could West be relevant to Europeans in general and for Britain in particular?

EM: Cornel West is the US version of what in Europe is a well-entrenched tradition: the public intellectual. But he is a very unique type of public intellectual. He is unapologetically Christian, and he is always pointing to his roots in the Black Church. He also draws on the Black Church’s preaching tradition, which gives West his unique oratory style. He is a mesmerising speaker that can give a speech off the cuff, without notes, but in the most tightly argued and articulate manner. West has also been an avowed socialist, who draws on a distinct American tradition of democratic socialism. This means that over the last nearly half a century, West has always been on the side of the working class, the underclass, the under-employed, and the unemployed. I think that above all, West has remained a critic of the ways in which the two hundred years of slavery and hundred years of Jim Crow, and yet another half a century of segregation, and more recently mass incarceration—which he thinks in terms of a continuum—can be illustrative and inspirational for Europe in general and for England in particular.

West has been advocating a serious confrontation with the inheritance that slavery has left the US, that the institution of slavery was an institution that presupposed the genocide of Africans. And yet, that it was this very institution that created the background context for the emergence of a power and inspirational culture that includes the spirituals, music such as the blues, jazz, and hip-hop, as well as the slave narrative, and the black novel. More recently, West has been working with Tavis Smiley on what he calls the poor people’s campaign, to focus our attention on the failures of the Obama administration to address the growing immiseration of the American working poor.

More recently even, West has been one of the few American public intellectuals to challenge Obama’s use of drones to carry out what are, in effect, extra-legal executions and assassinations of alleged terrorists. I think Europe and England have been complicit and willing co-participants in the development of a global vigilante force
that takes us behind the legal gains made after World War II, and the declaration of human rights and the juridification of war and military conflict between nations.

Above all, however, West is someone who should be known better in Europe and England because of his work on behalf of the underprivileged and the racialised in the US, and who has been calling on us to take responsibility for the genocides of the last centuries. West is certainly one of the most autochthonous American thinkers, but also one who speaks with a distinctly African American voice, with its homiletic prosody, melodic cadences, and moral force.

BBKLR: *The lecture that you presented concluded with discussion of the Anthropocene, and you link this to the question of decoloniality. What, for you, is the relationship between decoloniality and the Anthropocene?*

EM: I think that we have to guard against the temptation to see the Anthropocene as merely a moniker for a new geological age. The scientists who coined the term also want us to think that much of what is happening to the earth—global warming, salination of seas, the deforestation of the Amazon, expanding deserts in Africa, severe weather across the planet, and the melting of the polar ice—are all anthropogenic. We have caused these climatic changes. We caused them through the development of certain economic-political-social institutions.

The age of colonialism was also the age of mercantile capitalism, which presupposes what has been called the Columbian Exchange, a massive exchange of biota, life, both animal and plant, from the New World to the Old, and vice versa. The age of European imperialism was also the age of the ascendancy of petroleum, the steam engine, and the massive transoceanic transport ships. The wealth, comfort, but also profligacy and recklessness of the developed north has been bought at the expense of the privation of many people in other parts of the planet. It seems to me that we cannot talk about the present state of the planet’s climate without talking about colonialism, imperialism, neo-imperialism, and today, global finance capitalism.
The fact—and this is what is one of my primary concerns—is that the victims, those who will suffer most intensely the effects of the severe weather that we are seeing over the last decade, which will only grow worse, are the people in the already most vulnerable areas of the planet, the so-called developing world. When we link the decolonial turn, as both an epistemic or methodological attitude and a moral orientation, we can begin to ask questions about how to shoulder more equitably the burdens of the devastation that our economic systems have unleashed on the planet. For one, decoloniality challenges the logic of development. Back in the 1960s, Latin American liberation theologians such as Gustavo Gutiérrez, and underdevelopment thinkers like Andre Gunder Frank, or dependency theorists like Enzo Faletto and Fernando Henrique Cardoso, challenged the idea that development meant more of what had putatively elevated Europe to the pinnacle of its achievements. We need to rethink what we mean by development, progress, and growth. These key ideas are mortgaged to the logic of capitalist accumulation. So, decoloniality forces us to think what institutions paved the way to the Anthropocene and forces us to think about the future through the lens of a different logic of development and progress that sees from the underside of history, to use Gutiérrez’s beautiful but poignant expression.

**We are the animal that philosophises about its animality by ventriloquising through animals.**

BBKLR: You were also talking about animals and the right of animals in the city (especially in mega-cities with mega-slums)—could you elaborate on what you meant by this?

EM: Yes, this theme is something that I have been thinking a lot about, in particular because my friend Ash Amin, who now is at Cambridge University, invited me recently to a wonderful symposium: ‘The Shrinking of the Commons’. My contribution to that symposium was a draft paper on thinking about the city, above all, as a commons, but one that we have to share with animals, and not only our pets. In any event, I have been working on both cities and animals for a while, but separately. I have written a lot on cities, the phenomenology of the urban experience, the right to the city, the rise
of the mega-slums of the twenty-first century; and I have written a book on the so-called ‘Animal Question’. In this book I use the trope of the bestiary to think about the invention of the beast, and the ways in which the animal is fabulated in order for us to philosophise about our humanity. We are the animal that philosophises about its animality by ventriloquising through animals. We are animal ventriloquists, so to say. But recently I have been asking myself, if the planet is being turned into a huge farm for humans, what is going to happen to the few habitats where wild and domestic animals can live? But, as I said, the age of the Anthropocene is the age of megaurbes—then where are the animals, outside the walls of the city? I have thus been thinking about a new kind of urban archaeology or a new kind of urban history that thinks of the evolution of the city in terms of its animals. The evolution of the city has to be also told in terms of the exclusion and/or inclusion of animals. Here the expression that we would need is that of the urban bestiaries. I have been reading a wonderful book I discovered recently by Hannah Velten, titled *Beastly London: A History of Animals in the City*, which does exactly what we should be doing with other cities. The historian Jan Morris has written a very moving and insightful book that I found extremely inspirational, *A Venetian Bestiary*.

I think if we take seriously that we live in the Anthropocene, with its severe weather, and the fact that we live in the age of the megaslumisation of humanity, at some point we also have to ask about animals. For a while, however, I have been thinking about the megaslums and the global justice agenda in terms of Lefebvre’s extremely useful concept of the right to the city. I claim that global justice in the twenty-first century requires that we substantiate justice claims in terms of the right to the city, that is, in terms of access to a humane and just urban environment. In fact, I translate the human rights agenda, in terms of the right to have rights, as the right to the city, with all that entails: the right to a basic education, potable water, sewage, and even access to spaces of relaxation and play. So, this is how I come to think about the animal right to the city; but to be honest, I have not worked out what all this means. At the moment it is an intuition and a research agenda. I do think that if we can acknowledge the legitimacy and tenability of animal rights, then

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8 Jan Morris, *A Venetian Bestiary* (Faber & Faber 2007).
we can also envision the animal right to the city, at the very least in the sense that if animals have a right to their habitat, they also have a right to that habitat that may be the only means for their own survival. But, again, I am now thinking on my feet and off the cuff.

BBKLR: Do you envision thinking on questions of gender interacting with the project of decoloniality?

EM: Absolutely. Colonialisms, of all kinds, always require the mobilisation of gendering practices. Colonialism, like capitalism, is the imposition of a very specific gender hierarchy. In fact, white, European, racial supremacy is predicated on a masculinist supremacy. To use Carole Pateman’s phrase, the colonial contract, qua racial contract, is also a sexual contract. The modern-colonial system, or the modernity-coloniality world order in which we live, was born from colonial sexual violence and the exploitation of women. Further, when we think about what Marx called ‘primitive accumulation’, we have to realise that this was not only the rapacious expropriation of indigenous wealth, but literally the expropriation of the wombs of black women and indigenous women. For Americans, across the entire hemisphere, but also Africa and India, the story of colonialism is entwined with rape and the enslavement of women. I want to underscore that the decoloniality project is about putting the focus on the racial-gender dimensions of the coloniality of power.

Maria Lugones, a Latina philosopher, has begun to challenge, and I think justifiably so, the lack of attention to the coloniality of gender. There is no colonial power that does not circulate through the gendering institutions of the modernity-coloniality system. Now, I am particularly interested in the relationship between questions of gender and questions of global justice. As I said, we live in the age of mega-urbes and mega-slums, and in these, women are the ones providing the most fundamental care. So, the agenda of global justice in the mega-urbe of the twenty-first century has to be a gendered justice agenda.
I have been very inspired by the work of Martha Nussbaum and Amartya Sen on their approach to human capabilities and gender justice, but also the work of Brazilian feminist theologian Ivone Gebara, who links ecofeminism with gender justice in the favela. Gebara’s work is a must for us today because it is in the favelas and shanty suburban developments of the world where women carry water, clean latrines, feed children, tend to them, while they are also the ones building their dwellings and making do with the little they are able to eke out from their economies of subsistence.

BBKLR: *In your seminar you also appeared to convey optimism in the potential offered by law. In this perspective what would be your position between the regimes of juridification of financial capital and investment regimes? How would your idea of granting rights not only to humans but to other living species relate to the fact that now corporations are enjoying rights equal to humans and at the same time within regimes such as the International Investment Law regime, corporations are limiting the ability of states to protect the rights of their citizens?*

EM: I am optimistic about law, in particular when it takes the form of citizenship rights, civil rights, international law, and human rights, because those legal formations are the result of what I would call a juridification from below. They are the transformation of moral outrage and moral solidarity into a form of administrative power, power with the force of institutions. Law, as Habermas has so well expressed it, transforms moral intuitions into administrative power. I like also how Ronald Dworkin puts it at the beginning of his *Law’s Empire*, ‘We live in and by the law. It makes us what we are: citizens and employees and doctors and spouses and people who own things’.

Today, because of the juridification of human rights, we are also made by the law into humans whose right to have rights can never be breached. Law has a moral force that we can mobilise when struggling against any form of violation of human dignity. But this

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moral force of the law, whether national or international law, comes from the fact that law, rights, legal treaties, are the sedimentation of struggles by humans, individuals, groups who have suffered in their flesh some sort of violence, some sort of shame, some sort of dehumanisation.

In the last half a century, for instance, women across the planet have been struggling against sex trafficking and the penalisation of rape as a type of genocide. I take it that when rape is taken as a crime against humanity we have indeed made a great step for humankind. So, it is this way of seeing law as the result of juridification from below that makes me optimistic.

At the same time, I am all too aware that there is a powerful juridification from above, a process of weaving a legal cage that allows multinationals to rule above nations, and in fact, to use the power of the law to undermine the juridification that takes place within nations. Yes, this juridification from above presents us with many challenges, and should make us coldly sceptical of the efficacy of law. But sceptical does not mean cynical. We have to counter the power of law with the power of law.

Still, I think we are living through a very complicated period in which new legal regimes are being established that subordinate law to the imperatives of finance capital. This is not new, one could object. I think that what is radical is the ways in which these new legal regimes are turning life and time itself over to the financial sectors. What I mean is that we now have transnational legal regimes that regulate patents over life, on the one hand, but also over financial tools, like derivatives and hedge funds, that are about capital extraction from future projections on growth and financial investments on the other hand. If for capitalism the body of the worker was the site of capital extraction through the buying of labour time, for finance capitalism it is the body politic of entire peoples that becomes the site of capital extraction through the mortgaging of a nation’s GDP. Again, as Habermas has pointed out, we need something like a world constitution that establishes the
We need something like a world constitution within which this Wild West juridification of the multinationals can be reined in and controlled. The financial instability of the financial sector proves that we need to bring to the transnational level a new type of legal regimentation.

BBKLR: Finally, during the seminar you talked about the concept biocapitalism, we wonder if you could elaborate more on this concept. Do you find this to be a potent new form of the critique of capitalism?

EM: I think capitalism has been always biocapitalism. The great Latin American philosopher Enrique Dussel, who wrote a five volume work on the genesis of Das Kapital, showed that for Marx a foundational category was that of Lebendige Arbeit, living labour. Dussel showed that for Marx the labour theory of value was really an analysis of the expropriation of the worker through the expropriation of living labour, the labour required for the reproduction of the life of the worker. Capital is the coagulation of life into a commodity that then becomes money, which then can be traded for more commodities and then for more money. The market conceals how it is life, the bios of the human, which is being fetishism of money. As I noted before, the primitive accumulation that allowed European capitalism to take off was the expropriation of the life of New World indigenous populations and their life-world’s biota. But nothing shows more starkly how capitalism has always been biocapitalism than slavery. Slavery was biocapitalism as a biopolitical regime. But biocapitalism also means the expropriation of the agriculture and animal husbandry of the colonised.

Now, I think Michel Foucault gave us a powerful tool when he came up with the concept of biopolitics, with its cognates biopower and biohistory, in order to be able to talk about the development of technologies of regimentation and normalisation of populations. For Foucault biopolitics allows us to see how political and legal power is actually generative and positive, and not simply prohibitive, punitive and homogeneous. In his Collège de France lecture courses from the
late 1970s, Foucault began to link the analysis of biopower to the analysis of neoliberalism. We now know because of the recently released course from 1972-73, titled *The Punitive Society*,\(^\text{10}\) that Foucault was interested in the relationship between capitalism and penalty. His book *Discipline and Punish* should be read in the context of a critique of capitalism as biocapitalism.\(^\text{11}\)

But I do not want to lose my thread here. I think that notwithstanding the usefulness of the concept of biopolitics, Foucault un-coupled it from colonialism and imperialism. So, let me illustrate: capitalist extraction begins in the new world with the establishment of the *encomienda* and the *repartimientos* that were allegedly used for the evangelisation of Amerindians. But, it is clear that these two quintessential institutions, along with the slave plantation, were bio-political/biocapitalist institutions that became the primary sites for the exploitation of life.

Today biocapitalism is evident not only in bioprospecting but also in the transfer of fossil fuels from one region of the planet to another. What has been called carbon capitalism and carbon modernity is but the most recent face of biocapitalism. I would say that the acme of biocapitalism is the patenting of seeds and the patenting of genomes and in general the turning of seeds into commodities. I would say, as a way to conclude, that we have to think of the Anthropocene as the planetary face of biocapitalism, if we do not see their interconnection we are naturalising what are really effects of certain historical institutions. Above all, when we confront the brutality of biocapitalism in terms of the expropriation of life through violent expulsions and expropriations, we can begin to decolonise a global justice agenda that is attentive to the way in which ecological and environmental injustice are very conditions of possibility for capital accumulation. Today the critique of capitalism must take the form of

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the critique of biocapitalism with its capillary forms of biopower and its matrixes of biopolitics.
Fanaticism, Politics and the Subject of Justice: An Interview with Alberto Toscano

OZAN KAMİLOGLU*

Alberto Toscano is a social theorist, philosopher and teaches in the Sociology department at Goldsmiths, University of London. He is the author of numerous books and articles on political philosophy and social theory, and his most recent title at the time of the interview was Fanaticism: On the Uses of an Idea. In this timely work, Toscano undertakes a detailed history of religious and secular fanatics, challenging the constructed opposition between the reasonable and the fanatic and placing fanaticism at the heart of politics. His focus on the conjunction between the refusal to compromise and the concomitant drive towards the universal provides an innovative reframing of contemporary politics and debates on secularism and faith. Simultaneously, Toscano invites his reader to travel through classic texts by Kant, Hegel, Marx and Burke, to Sigmund Freud, Ernst Bloch and Alain Badiou. In this broad interview Toscano considers a variety of interconnected though disparate topics, ranging from social classes and Marxism to the nature of law and philosophy. The relations between the concepts of justice, law and philosophy are examined with the help of a genealogy of different philosophical traditions prevalent in France and the UK. His journey through this complex theoretical terrain is rooted in a profound understanding of philosophy and provides a courageous and often surprising look at the subject, connecting a critique of liberalism—so present in his work—to the correspondence between justice, philosophy and crisis in different countries. The Birkbeck Law Review is extremely happy to present this rich and insightful text to our readers.

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2 Toscano’s latest book is now Cartographies of the Absolute (Zero Books 2015), with Jeff Kinkle.
THE BIRKBECK LAW REVIEW: Thank you very much again for accepting to talk with us. You use different thinkers in your works: Badiou, Agamben, Rancière, Negri and other Autonomists to name just a few. We have different names for the proletariat in contemporary philosophy; to your mind, who is the proletariat, how should we think about today’s proletariat, does it still exist?

ALBERTO TOSCANO: Well, I suppose a good starting point would be to think about the way in which much contemporary radical philosophy, or contemporary political theory that places itself under the banner of a kind of return to communism, however ideal that may be, often distinguishes between proletariat and working class. It is a distinction that some people claim can be found in Marx. I think that is a little problematic, but there is a way in which a number of these thinkers extract a specifically philosophical concept of the proletariat as a subject or process of subjectivation, and so on.

At its most extreme you find this in Agamben’s *The Time that Remains*, in his discussion of the genealogy and etymology of the notion of class, as drawn from the Bible, all the way to Weber, Benjamin, and so on. In that instance you get the idea of playing the proletariat *against* the working class. So you would have a kind of empirical working class, which is either vanishing, or depoliticised, or conservative, and then you would have a kind of specifically philosophical or even theological-political subject, to which you would give the name ‘proletariat’. So I think Agamben would be at one extreme: the proletariat *against* the working class, which is, of course, a disputable move because it tries to draw on all of the power of that Marxist or communist lineage whilst treating the empirical or ‘ontic’ worker as a derivative or even irrelevant matter, a positive distraction from true (which is to say

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philosophical) revolution. The philosopher would then somehow have a privileged access to this purified, ideal proletariat.

At the other end, you could find perhaps in the workerist and post-workerist lineage, specifically in Negri, or Hardt and Negri, a way in which these two notions are much more closely entwined and in which the philosophical meaning of the term, and the socio-economic and political ones, end up being productively entangled; and then the problem is, how do we re-enact or re-vitalise this?

I think in many ways Badiou, at least the Badiou of the 1980s, when he still confronted these questions more directly, sits perhaps somewhere in between these perspectives. There is a very strong anti-sociological dimension, as there is in other contemporary thinkers (Rancière, for instance), a sense that class analysis has really very little to say to politics. But then in Badiou’s case there is, at least in the 80s, less so perhaps now, for political reasons, an attempt to define the worker, or the ‘name’ of the worker, as a critical point of subjectivation.

So I think the obvious point is that there is a kind of collective, even if internally polemical, effort to revisit from the standpoint of philosophy this historical and economical and sociological question of the proletariat, but to do so in a sense without the anchoring in political economy that you would find in most Marxist discussions, including at their most subjective. That said, I think in our moment there is also something problematic about the tendency to think that somehow it’s first of all the task of philosophy to name subjects, rather than, as Badiou has also argued in a more speculative vein, that subjects are named within ‘truth procedures’ themselves, by movements and militants, and that philosophy—the proverbial Owl of Minerva—is a rationalisation and universalisation of that aftermath. There is an irony then in the fact that people turn to Badiou (and to other philosophers) to identify these names for politics, which seems to imply that what is lacking in the political movements themselves is this capacity to identify a collective locus of agency.

Again, this is something that you could ascribe more to certain figures than others. Of course, Rancière’s whole argument against ‘masters’ is also an argument against philosophy’s capacity to name, its monopoly over naming, even though, again, I think people turn to Rancière for the same exact reasons— their desire for philosophy
to name politics. So there is a kind of performative contradiction involved in the whole stance of anti-mastery as well.\(^4\)

Now, I think it’s problematic and limiting to put such weight on philosophy as a sort of antidote to depoliticisation. There is still a lot to be thought of in the whole problematic of class analysis and power struggles broadly speaking; and I think in some way the overdetermination or erasure of the problem of the making of class by that of the proletariat as subject can perhaps blind us somewhat to real social and political movements. In that sense, perhaps, even though this might be a little theoretical, I’m not entirely sure that one should continue to focus so insistently on the categories of subject and subjectivity.

There are other lines of enquiry that are related to those of subject or subjectivity: agency, organisation, ideology, belief, affects like enthusiasm; but there is something very powerful about that exquisitely philosophical focus on the subject. It’s very funny that people now speak of ‘the subject’ with a lot of certainty as if everyone in the room is always in agreement that that’s what they are talking about. You know, there is nothing obvious about the idea of saying the working class, or, indeed, the proletariat, is a subject, even a collective one. There is a kind of nostalgia or a desire to hold on to aspects of this quite monolithic conception of subjectivity, in part as a reaction to the perceived problems of discourses of identity and difference and so on. I think that is perhaps a very intra-academic vision.

BBKLR: If we are talking about the meaning of the subject, at the symbolic level, the other thing that we have to consider is law and justice. Paraphrasing Badiou, you once said the following:

\[\text{The subject’s stance vis-à-vis the law of the world that is being destroyed, circulates through four concepts: anxiety, superego, courage and justice.}^5\]

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So particularly I would like you to open up the discussion between law and justice.

AT: The argument that you mention obviously relates to Badiou’s 1982 *Theory of the Subject*,\(^6\) which was translated relatively recently by Bruno Bosteels. That text already raises a whole host of questions that we can’t really deal with here, but which relate to the issue: to what extent can we or should we transpose or transcode an analytic of subjectivity that derives, in Badiou’s case, largely from Lacanian psychoanalysis, which quite explicitly is not an analysis of collective subjectivity. This is certainly, in Freudian-Lacanian psychoanalysis, already a very problematic concept: the sociality of the human psyche.

So I think it’s worth keeping that in mind. I think one of the problems of the discourse of subjectivity is the presupposition that, in analysing collective political mobilisation, you could use the concepts drawn from the analysis of, so to speak, individual subjectivity. Again, as an aside, it is interesting that a lot of thinkers are trying to get away from this mapping of an individual subject to a collective one, such as in Balibar’s relatively recent work, drawing on Marx to think through notions of trans-individuality. So that is a first kind of caveat.

The second one is that I don’t really know anything about the law, which could just be a kind of professional malformation of someone trained as a philosopher. A lot of philosophers think that they have a lot to say about the law because, as a term, the ‘law’ (and right—*droit*, *diritto*, *Recht*) circulates so widely within philosophy. Of course, it plays a very formative role, at least within the Western philosophical tradition, both in concerns with the juridical

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\(^6\) Alain Badiou, *Theory of the Subject* (Bruno Bosteels tr, Continuum 2009).
and political dimensions of law, and in the (arguably more important) ruminations on scientific laws; but I think it’s important to stress that, though we should attend to a very specific history of the importation and elaboration of a legal vocabulary and a system of concepts within philosophy, which has its own very fraught history, we should also recognise how sometimes those terms become almost purely philosophical. Purely philosophical or, in the case of Badiou’s quote, philosophical and psychoanalytic, because he is using these concepts in Lacan which are then in turn drawn from Freud, who in turn draws from a whole raft of different sources for the law, one of which is rather obviously the whole Biblical, especially Old Testament, conception of the law.

Now, maybe in a philosophical sense, or in a grand historical sense, we could say yes, of course, there are all sorts of connections between the idea of a psychic law, or the idea of a moral law, and the institutions of law, the apparatuses of law, which is a critical dimension of state power, and social reproduction, and class relations. That said, I think in a passage like that, the one that I think I was paraphrasing from Theory of the Subject, the distance between legal institutions and practices, on the one hand, and the philosophical concept of law, on the other, is pretty enormous.

I think one of the great risks in philosophy’s relationship to the legal, or, let’s say, in legal theory’s relationship to philosophy, is being at times lured, or kind of mesmerised, by these homonyms. So when a philosopher says ‘law’, it can be taken for granted that this has something to do with judges and statutes and courts and so on. One of the things that I think is very strong, certainly in French thought, especially in those dominated by a reference to the psychoanalytic, is this very, so to speak, monolithic conception of ‘Law’ (capital L), which, in fact, as in that passage you quote from the article, is identified with a kind of seamless domination, totalisation, and reproduction of psychic life, or social relations, or at least with the fantasy that there could be this seamless totality and transcendent sovereignty.

It could be argued, of course, that this also comes from incorporating into philosophical reflection a certain ideology of the law that is specific to a given legal system, in this case the French. I have these somewhat vulgar materialistic epiphanies reading French philosophy, when I realise: ah, they write Law with a capital L, or State with a
capital S, in French, partly because that is how the state and the law, in a way, ideologically exist within France, in such a way that they could never exist within Britain or the United States – the sense of this overarching, unified, hierarchically ordered and seamless apparatus, which is very different than ideologies that develop out of traditions of common law.

This is an aside, but I think it would be a very interesting angle to think through one of the most famous moments of extreme misunderstanding between French and British traditions of radical thought, which is the whole debate between Althusser and EP Thompson. Even though I think there are all sorts of interesting short circuits and points of comparison, if you read Althusser on law in the recently translated text *On the Reproduction of Capitalism*, and then if you read Thompson’s *Customs In Common*, although these are two Marxists, the aspects of Marx they draw on and their analyses are so vastly different. This is partly because for Thompson it would be impossible to write law with a capital L. I think that view is grounded in a very different history.

To go back to the Badiou, I think there is another element of this, which is that whatever we may think of its historical origins, or its specificity, the law names not just order, but transcendence, by opposition and contrast with the problem of justice, which for Badiou is inextricable from the problem of novelty—to the extreme extent that at one point in *Theory of the Subject* he simply declares that the new is the just, which is a disputable statement, though we will leave that aside.

So, what ‘justice’ stands in for here is the possibility of the institution of an order, or of a practice, or a form of life, that wouldn’t presuppose a given juridical arrangement, that wouldn’t presuppose the existence of moral guidelines, political precepts and so on and so forth. It’s in that sense you could say it is only from the standpoint of what Badiou tries to indicate, not quite conceptualise but at least indicate, with the name of justice, that one could think about politics, so to speak, practically existing.

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I think Badiou does draw on that insight, which you will already find in Marx’s response to Bauer in ‘On the Jewish Question’, where the problem is not religion itself, the problem is the abstract transcendence and presupposition of an order, that of the state. At a very abstract level in Badiou, justice requires an event which breaks with the order of representation, which is broadly synonymous with the State.

In one sense, these terms ‘State’ or ‘Law’ also name, to some extent, the theological or religious structuring of psychic and social life as such. Even though I think it’s not developed a lot, I do think that notion of justice is interesting. I think it’s also very interesting to compare Badiou to his philosophical nemesis, Deleuze. The latter already writes, in his early book on Hume, about his interest in the artifice of constructing institutions, in a sense in questions of habit and custom and that whole empiricist—and of course much more British—tradition of linking philosophy and law together, and even all the way into the interviews that he gives to Claire Parnet, *L’abécédaire*, where he talks about his interest in the whole question of jurisprudence, which fits with his intention to think against a psychoanalytically inflected conception of the law (from *Anti-Oedipus* with Guattari onwards, though we should not neglect the fascinating reflections on contract in his presentation of Sacher Masoch in *Coldness and Cruelty*). So I think you can also read that whole conflict around the figure of Lacan, and around psychoanalysis, through that lens.

Now, what is curious is that Badiou doesn’t, as in that passage you quoted, want to reassert as such the necessity of superegoic law, but he does think that has its own efficacy in reality. So it has to be traversed in the direction of justice; whilst Deleuze’s tactic, as in the whole drift of his relationship to Lacan and psychoanalysis, is to undermine and bypass that. That’s why it’s also very telling that

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from very early on, that is to say from the 50s, Deleuze is first and foremost a thinker of institutions, or of the artifice of institutions, and not of the transcendence of the law (and its negation). This also explains again, I think, why his way of articulating the question of the event is so different.

Now, what I do think interesting is that there is, not a point of convergence, but at least some kind of resonance between Badiou’s conception of justice and Deleuze’s understanding of institutions, jurisprudence, etc., in both trying to think forms of the political. So I think that could also be an interesting avenue through which to rethink the problem of communism, and move beyond the debate about the idea of communism to questions about communist practices. Some of the most interesting thinking in the initial period of Soviet intellectual life was precisely around thinking about communist transitions and engaging not just in a critique of value but in a critique of the law, as in the work of Evgeny Pashukanis. Of course, that is an extremely vital critique, but it is not one that necessarily would forbid one to think: is there such a thing as communist legality, and is there a communist justice?

I think this is possibly the limitation of Badiou’s account: is there a justice that is not simply the subtraction from, or the escape from, law? So is it a justice that actually constitutes or innervates itself through a set of practices, or does that mean that then the questions of law and legality disappear as you enter into the world of what Engels called ‘the administration of things’? And prior to that problem, which I do think is really a problem which has not been addressed in these debates around communism, is this: is there such a thing as law, legality or, indeed, justice, without the state in the horizon?

Badiou talks about justice, and that seems to be in terms of immanent criteria of judgement and decision, that are immanent to a particular political procedure; but they are not just immanent to that procedure. They are also always in antagonism and in subtraction from law, which I think also allows us to reflect on something else, which is the extent to which the whole formulation of rupture and

Is there such a thing as communist legality, and is there a communist justice?
event depends on a pre-existing thesis about the transcendence and the comprehensiveness of the legal and political order from which one is breaking.

In one sense, for the ‘site’ of the event to be determinate, there has to be a way in which you could really systematically map that order as an order. You might ask yourself then, well, if an order is not totalisable and self-identical, if the law is not so capital L, if the articulation between representation and presentation is not seamless, and so on and so forth, what exactly is a rupture? Can you have a rupture in an unstable, unfinished, incomplete political or legal or economic programme? I don’t want to reduce it to being a French thing, but it might be in part an effect of a certain conception of the relatively seamless articulation of state, law, ideology and capital in a kind of self-reproducing system in which then the rupture would be very determinate, in which you could say: ah, that is a radical novelty!

BBKLR: Can we consider France and the UK, the law systems today, and how they look at the fanatic, the hypothetical fanatic? I am asking this question in relation to your book, Fanaticism, and the chapter on Enlightenment.

AT: I guess the obvious place for it to go would be anti-terrorism law or hate speech law or the like. I don’t know about the precise differences in legislation. The only thing I can answer to is really more of an ideological difference, a difference in the vocabulary or the tonality of the discussion about fanaticism, or about what amusingly today is referred to as ‘radicalisation’, which I think is itself quite a curious term.

There are some interesting discursive or ideological distinctions, many of which, as has been noted over and over, go back to different histories of managing or dominating or incorporating differences in France and Britain’s imperial and colonial histories. There is still a way in which you could see certain aspects of a state policy, which in part goes under the heading of multiculturalism here,

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as being a way of managing or neutralising differences coded as ethnic or religious and so on.

A kind of interesting example of it is that of the British state’s responses to the crisis around the Rushdie affair. The response to the protest around *The Satanic Verses* was in part to incorporate into the political management of religious and ethnic difference some of the same organisations and some of the same people who had been very vocal against Rushdie, a tactic which would never have been the tactic of the French State for a number of ideological reasons. Of course, there is a lot of debate on assimilationism or multiculturalism and so on, and I think it does relate to these histories in very complex ways we can’t get into here.

There is an interesting point in what you are mentioning, that there is a tendency here in the UK perhaps to view fanaticism, so to speak, as the result of a cynical, manipulative operation, that you could say finds its ancestor in Voltaire’s take on fanaticism in his *Treatise on Tolerance*, or his play on the prophet Muhammad. At the same time, I also think there are a lot of commonalities in these state discourses, or even European discourses, or even more broadly, North Atlantic discourses, about extremism and radicalisation; partly because there is an endless revolving door between all of these specialists in fanaticism—these preventive managers of radicalisation.

This last term in particular is interesting because it has really become much more operationalised. Now there are all sorts of task forces and programmes and investments in this special skill, apparently, which is de-radicalising. For instance, prisoners in the British system who have been incarcerated on the basis of, so to speak, terrorist-related offences, have to undergo these de-radicalising programmes. In order to have their sentences reduced they have to prove their disattachment from their previous passionate attachments to whatever cause.

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I was talking to a lawyer who had prison clients who were subject to this practice and he said it was very striking, because they were not just supposed to prove that they were no longer in whatever organisation they had been alleged to be in, but they also had to prove that now their individual or familial interests were of greater importance to them than their collective commitments. So they had to prove that they no longer had the same emotional and political attachment to a collective solidarity as they did before.

There is something very striking about the imperative to prove that you are basically a self-interested individual, that you are like a proper liberal subject—something which is, of course, in constant contradiction with the endless celebration of the selflessness or collective spirit of people in the British army, or whoever is positively valorised. Then you get a whole way in which this contradiction is then ethnically, racially and politically policed. So obviously it is not that enthusiasm is bad as such, it is just enthusiasm of a particular sort.

The fact is that now the discourse has amplified itself beyond fundamentalism—I use the term ‘fanaticism’ because I think it is historically a very revealing term. It wasn’t a dominant term under the law on terror, where it was fundamentalism and extremism, but I think the fact that now radicalisation seems to have come to the fore, aside from the xenophobia and everything else, is a function of the role of the security state as a manager or overseer of belief and behaviour.

Then the government conducts the systematic prevention of a process that seems to have a pattern, but that pattern is unrelated to any broader political context, and so then it is a sort of endogenous product of a bad conjunction of poverty, exclusion, manipulative political entrepreneurs, or political religious entrepreneurs, and so on. It is the role of the state then to either prevent or rewind or undo radicalisation. That’s a curious figure of power.

In many European countries, including France and Italy, you still have parties or descendants of parties that still have ‘radical’ in the title. They tend to be actually liberal parties, liberal or liberal-social-
Interview: Alberto Toscano

нст parties, but this idea that now to be radicalised is a thing that an individual or agent or subject shouldn’t do is quite curious. It is also ironic that most of the problems that are posed by contemporary radicals are also ‘how do we radicalise?’ The problem is one of depoliticisation, so whilst on the one hand the state has these therapies against radicalism, then so much of the Left thinks—in ways that are perhaps problematic in their own way—how could you offset depoliticisation?

BBKLR: If you consider the recent insurrections for justice in a number of countries, from Turkey to Ukraine, to those of the Arab Spring, particularly Egypt, either there is a complete overthrowing of the state, or a claim of justice with gradual change, deliverance and so forth. Even the West was very sympathetic with these claims of justice. How do you consider these insurrections and the positioning of Western liberals?

AT: I think there has been something very revealing about the projection of particular political imaginaries and political desires onto the various revolts, uprisings and insurrections, especially from 2011 onward. It has been revealing of the efforts of the Left to develop different vocabularies. In fact, Badiou and Negri and Nancy and Žižek and Butler all wrote about the same events. I think that is a kind of interesting, symptomatic kind of activity: in the square Badiou saw movement communism, Negri saw a new stratum of immaterial labourers, and so on.

But the liberal projection is, I think, in many ways a fascinating one, because the mainstream narrative is quite clear. Revolts and uprisings are to be celebrated in as much as they are vanishing mediators towards liberal democracy, or, to use Badiou’s notion, ‘parliamentary capitalism’. Also there is another element there, which is not just the desire for states to catch up to the liberal end of history or whatever, but it is also to re-energise, at a kind of imaginary level, the quotidian operations of liberal democracies. These are increasingly perceived by their own populations as unsatisfactory, illegitimate, fostering inequality.

I think part of the fantasy is this view: okay, there is someone in Ukraine, there is someone in Venezuela, there is somebody in Egypt,
at this very vague level, that is willing to die to be in the situation that I or we find ourselves in. So that can be viewed as galvanising, or even appear as a return of history, albeit in the mode of a safely distant spectacle. It is very interesting to see the twists and turns of the liberal commentator, who, of course, on one level needs to constantly restate the rule of law, so they always need to come up with strange arguments that are outside of their canon of thought: arguments about the right to resistance—which you can find in law, but most liberals don’t take that seriously—or constituent power.

So when Yanukovych (by liberal electoral standards a legitimate president) is overthrown in the Ukraine there are these contortions. You could say, ‘well, he was no longer legitimate if the people could overthrow him,’ etc, etc. That is already a curious moment. It is the combination of a weird projective identification, but then also this avowal of this moment of enthusiasm. It is also the very elaborate political and media projection that, in fact, what people want is what you already have. Certainly, in Ukraine, it is evident that there are groups in fact involved in the government, including the Deputy Minister for National Security, who do rather fit the official Russian declarations that some of these people are fascists, pretty much, whose intentions, I imagine, are quite different to those of liberal democracy.

BBKLR: Let me try to connect the discussion on fanaticism, the insurrections and their claims of justice. Has all fanaticism, in a way, the feeling of justice in it?

AT: Well, there is a sense in which I think you can align a certain conception of fanaticism with justice, and it might be an interesting way of distinguishing within fanaticism, because you could also say, well, there is a fanaticism of the law. This would, in a sense, be one possible definition of what has been referred to as fundamentalism, and is referred to as intégrisme in French. So basically you, as an actor, become a conduit for the incessant reaffirmation of claims of a static law against its corruptions, or the lack of respect for the law, or what have you.
Again hypothetically—it’s not a distinction I make in the book—you could say that perhaps there is on the other hand something more like a fanaticism of justice, in the sense of the uncompromising practical affirmation of certain principles, and the ways of life or behaviour that go along with them, regardless of or against any established or traditional or accepted order. That, of course, is always ambiguous, because there is inevitably a kind of dialectic, and at times an extreme indiscernibility, between this justice and this law, because the extra-legal justice seems to always want to become a law rather than to maintain itself in this limbo, or in this exceptional state of just being.

One of the more interesting texts I have come across about this is a brilliant history of the Italian resistance in World War II, by Claudio Pavone. The book articulates an understanding of the resistance, not so much in terms of military strategy, but in terms of the moral experience of what it is to live and embody and articulate justice in the collapse of any state or legal system that would give sanction to the law. I think in a quite practical sense it is worth reflecting, maybe in a kind of comparative vein, on the different institutions and instruments and forms of justice that take place in these moments of retreat of the state, in liberated zones and areas viewed by the state as illegal. Secondly, and perhaps most significantly, do they manifest forms of organisation, including forms of sanction or prohibition, that are not reducible to the law as otherwise understood?

There is a very provocative, I think also insightful argument made in this recent book by my French publisher, Eric Hazan and his anonymous co-author Kamo. It is called First Revolutionary Measures. It is a militant utopian text, about the first things that one should do once a revolution happens. They have a very interesting observation, which is that the one thing that one shouldn’t do is to have a constituent assembly. Their whole argument is that all revolutions are captured, or kind of re-territorialised, or frozen by this moment. Once that moment happens, they argue, you get this quite predictable sequence where you see the constituent assembly, and then the crushing of the Left wing of the revolution, and then the constitution

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of a state which largely abandons or represses revolutionary principles.

You can see this, of course, in many of the recent uprisings. Hence the conclusion that the one thing that you shouldn’t do is to organise elections. If you think of Tunisia and Egypt, in both cases elections were won by rather large margins by groups that had very little formative role in the overthrow of the governing autocracies and played the situation very carefully.

Elections can really be seen as a key element for taming these moments of collective enthusiasm, but also of the reorganisation of everyday life. Likewise, prefigurative politics, the various square occupations, and so on, can be channelled back into political demands and desires that are entirely recognisable from a liberal frame. To what extent that is the lived reality of the participants, and to what extent the effect of the representation of their action, from both inside and outside, is open to question and I think these two dimensions should be dealt with separately.

Viewed from the, at least provisional, stopping point of a number of these processes, I think the difficulty is to go, okay, well, can one move beyond the idea that people are willing to die to finally live in a depoliticised liberal democracy? This would require breaking with the liberal framing of these movements (which, again, is also an internally operative representation, not just the creation of Western media) and, as certain analysts have convincingly done, certainly for movements in Egypt and Tunisia and so on (Adam Hanieh’s very important work comes to mind here), to try to think how these movements exceed these liberal desires.

I think there is a real tension, starting with exorbitant revolutionary claims at the outset and then a situation in which you are sort of stuck between, on the one hand the naming—‘these are revolutions’—and the stabilisation into messy complex entities that nevertheless don’t seem to transcend the politics of liberal representation or authoritarian reaction. And then there is also a relative
invisibility of the thinking and practice of the people involved—since most of the names and concepts that filter through are ones that can be recognised abroad.

In the intersection of the very minoritarian revolutionary spectatorship, and the massive media-friendly liberal spectatorship, you often lose any articulate sense of the events at hand; and then you also get these very misleading spectacular identities or isomorphies (I recall being at a demonstration with the slogan ‘Cairo, Tunis, Wisconsin, we will fight and we will win’, which is pretty symptomatic). I think there is something perhaps depressing, but nevertheless instructive, as we then saw in Ukraine, about realising that there is nothing potentially revolutionary as such about a barricade, and that enthusiasm about appearances is a very weak basis for political solidarity.

This is a matter of what we could call historical pedagogy. I think there has been a tendency over the past few years, partly as a response to the depoliticisation that is accompanying liberalism, etc, to celebrate the very fact of politics, treating ‘politics’ in kind of honorific terms. If something is ‘politics’, if you say to something, ‘ah, that’s political’, as a theorist or a commentator on the Left, you seem to be implying that it is also something that is itself progressive or emancipatory; which is, I think, a totally bizarre and unwarranted idea.

Of course, on one level, in the whole history of the labour movement, strikes, for instance, are crucial and positive emancipatory moments, but it is worth remembering that strikes also helped to bring down Allende’s government and contributed to the coup in Chile, or that during World War II in the US some white workers had ‘hate strikes’ against black workers. It does become this really myopic take on this spectacle of politics, and I think that is a real trap—the Kantian trap, the trap of the enthusiastic spectator who is most interested or more galvanised by their own enthusiasm than by interest. So it is also a question about how one relates to movements and
processes happening elsewhere, and I think there is a pernicious tendency, on both the practical and theoretical Left, to enter into the mode of celebration, which in some ways leaves both analysis and practical solidarity on the sidelines.

I think what has been happening in Venezuela, in terms of the opposition demonstrations and riots against Maduro, and Ukraine should at least be an occasion to be slightly more reflexive about the way that these practices of naming the political and of ‘radical’ theoretical spectatorship take place.

**BBKLR:** Let me ask from this point about the Left and traditions. What do you think about stigmatising certain forms of action on the Left, which differs from one country to another? I believe Greece and Turkey have a different history than Germany. But it seems to me there are certain forms of action that are also tradition. What do you think?

**AT:** Let me answer in terms of Italy. There is a very complex history, and you could say we need to go back to the very early moments of the Italian Communist Party, or dates even before that, before the formation of the Communist Party proper, to the debates about World War I, in which there is a long history of debate about extremism (and actually that is often the term used).

It is something which is, of course, entangled with the very strong influence of Lenin’s discourse on ultra-Leftism or adventurism, a discourse of ‘extremism’ with an opposite genealogy to the one that became entrenched with Cold War rhetoric, in which all Communists were messianic fanatics of one sort to another. That debate is hugely historically significant, but in many ways also theoretically very impoverished, as I think comes across in my book as well. There is something insanely repetitive and schematic, and in fact even the people who today talk about radicalisation do so in ways that are often not fundamentally different from the ways in which certain people, especially ex-Communists, did in the 40s and 50s of the past century.

What is more interesting to revisit is that debate internal to the Left, and in particular to the Communist Left, where you have terms like ultra-Leftism and adventurism, and militarism once you get to the
60s and 70s, then being juxtaposed to realism and pragmatism. I think there is definitely a trend within the popular media to recall that past as a past that was dominated by these figures of irresponsible, uncompromising, destructive conviction. That said, there are still relatively substantial sections of the Italian far Left, which certainly has a publishing presence, which will be immensely critical, and often disassociate themselves entirely from the armed struggle proper of groups like the Red Brigades, but who nevertheless think that collective forms of violence or antagonism against the state that took place in the 70s are perfectly legitimate. Those people are still around (and some have published interesting historical reflections, especially for the publishing house DeriveApprodi).

In the 70s there was a large number of people (because it got 30 or so per cent of the votes) who somehow identified with the Italian Communist Party, and also thought of their political position as very much in contradistinction to what was perceived as a kind of ultra-Leftist adventurism. I think that discourse is still around, and has accompanied the slow and now almost complete euthanasia of the legacies of Togliatti and Berlinguer. At its most denunciatory of these movements, the Italian Communist Party entered into a discourse in the 70s—that you can also find in Germany, and in the likes of Habermas, for instance—of 'Left fascism', where somehow the far Left, via the insurrectionist urban movements, linked to Autonomia, or definitely around forms of armed struggle connected to the Red Brigades and Prima Linea, were viewed as somehow indistinguishable in this discourse of extremism.

Forty years on, even the forms of insurrection and violence that were previously sacrosanct in Italy (which were, of course, not those of the 70s but those of the 40s, of the anti-fascist and anti-Nazi resistance), themselves end up being entered into this revisionist practice. This has been going on for some years, certainly ever since the mutation of the Communist Party and the collapse of the Soviet Union.

But, yes, there is certainly a difference with the articulation of these views—regarding the defence of an intransigent politics of justice, sometimes in a communist vein—in countries with a different history. We can certainly find such a mentality of intransigence in Greece, much less so in Spain. In Spain there are still people who obviously have a strong identification with the Republic, but because of the
massiveness and endurance of Francoist repression, and how the transition was managed, there is rather little operative ‘romanticism’ about the politics of armed resistance, unless you look at very limited realities. Of course the Basque far Left has a different relationship to this, the armed struggle, Francoism. And obviously there is still a sizable contingent of people who view a considerable continuity between that rule and the one now.

BBKLR: *The military coup lasted too long.*

AT: It is half a century; and the early repression was so extreme that you don’t have the same development of struggle.

BBKLR: *Final question: the relation between claims of universality and human rights discourse. Can we have a criticism of human rights discourses parallel to that of fanaticism? What is the relation between human rights and fanaticism?*

AT: It is a tricky question, because the discourse on communism as a political religion, which emerges in the interwar period, where it is also a discourse about various fascisms as political religions, is then recuperated and revitalised in the late 70s, often by a new batch of ex-Communists, especially in France, so-called ‘Nouveaux Philosophes’. They do so in conjunction with the very aggressive promotion of the discourse of human rights, under the character of administration and in conjunction with the so-called ‘boat people crisis’ in Vietnam, the critique of the Soviet Union after the debate about Solzhenitsyn in France, and so on and so forth.\(^1\)

There is a way in which, and I think this is traced in fairly compelling ways in Robert Meister’s book, *After Evil*,\(^2\) that discourse consolidated itself, not just as a kind of political common sense, but in a whole ramified and very broad set of institutions and practices,

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\(^1\) The Vietnamese ‘boat people crisis’ refers to the roughly two million Vietnamese who fled their country, by sea and by other means, between 1975 and 1995.

linked to non-governmental humanitarian organisations. And that discourse is legitimated, at least implicitly, and at times explicitly, certainly in the French case, as an ‘anti-fanatical’ discourse. So it’s a discourse where the abstract assertion of a kind of communist or socialist universalism or humanism would be countered by, in a sense, a universalising discourse, but one that is not based on the assertion of political principles per se, but on claims that on one level are abstract (the rights of the human) but at the same time whose fundamental point of reference is the vulnerability of the human body or the individual (think of the Amnesty slogan: ‘protect the human’).

It is a very ambivalent situation; because you can’t entirely disjoin the ideological basis of the French Terror of 1793/1794 from human rights as they are viewed by human rights organisations. In many ways, ironically, the principles are not necessarily different, but they are embodied in institutional apparatuses, ideologies and forms of common sense that are historically radically different. There is a discourse of human rights that detaches itself entirely from the idea of constituting new and just forms of political collectivity, of social association.

I think that is nicely formulated in Meister’s book as the idea of politics ‘after evil’ always being a politics ‘before justice’, and actually what the discourse of human rights makes a claim for is not really justice, certainly not in the way that is found in Meister or Badiou. It’s not about a transformation of everyday life on the basis of certain egalitarian and universalisable principles; this universalisation is not an affirmative constructive principle, it is a negative and regulatory one, which has to circumscribe itself to certain types of infringement of rights and certain types of injustice against certain kinds of bodies. Then the real tension comes in how we conceptualise the idea of universalisation or universalism.

I think what is interesting in certain trends, embodied in part in Badiou and other thinkers, is how to think universalisation after an historical and genealogical critique of universalism; which is also a
critique of the dialectic of enlightenment as the imposition of a really particular set of criteria, that distortedly or falsely present themselves as universal, as one might already encounter, again, in Marx’s comments on the Jewish question. What would it be to think a universalisation that is not the imposition of a falsely universal, but actually particular, or even self-interested, standard onto difference and multiplicity of all sorts? That is a kind of common concern that one can find threaded across all of these debates. Think of the whole tradition of critiques of universalism: feminist critiques, post-colonial critiques, critiques coming from the black radical tradition, etc.

I think what is curious in many ways is that what gives, for all of their problems, much of the appeal to the attempts to rethink universalisation by the likes of Badiou, is the fact that so many of the critiques of universalism have become, certainly in academic sectors, purely depoliticising, and also implicitly liberal. In fact, they have taken the sting out of much more politically driven and emancipatory and, in their own ways, universalising aspects of those, broadly speaking, critiques of enlightenment, progressivism, that emerged from the movements of the 60s or 70s or before.

I am in part thinking here on the back of reviewing together Meister and Weizman’s books. I think they are both at various registers very philosophically informed critiques of human rights, but they are not critiques of human rights at that simply transcendental level, like critiques of human rights which take it to task for its universalism or lack thereof. Rather they are critiques of both the temporal structure of human rights discourse, which is then in turn linked to a certain institutional temporality, a certain temporality of fantasy in a sense, and also an implicit or explicit attempt to repress or disavow a different discourse; in fact, to disavow the revolutionary ghosts of human rights past. In the case of Weizman it is a critique that really thinks through the spatial and institutional and, in a sense, techno-

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21 Marx (n 7).
logical manifestations of what human rights is—what it means in the
calculative practices of armies and governments and all of these
devices of the minimisation of violence, all these devices of the lesser evil.

So I think in that sense I’m currently more drawn to critiques of human rights that are not just normative philosophical ones; that in their own way are both historical and materialist.

BBKLR: *Thank you very much.*
Neoliberal Market Rationality: The Driver of International Investment Law

ENRIQUE PRIETO-RIOS*

Neoliberalism is an ideological project characterised as being pro-market, pro-investor, and based on an instrumental rationality, which has re-shaped the relationship between societies, governments and the market, leading to standardising conducts and practices.¹ In this form, neoliberal ideology has permeated throughout all of global society, ensuring that everything is seen through the lens of economic rationality. Accordingly, in this paper I will argue that neoliberalism is an ideological project that has played an essential part in shaping international investment law and creating a pro-investor regime with strong protection of property rights and contractual relationships, limiting the ability of host states to regulate in matters of public interest.

Introduction

Since the 1970s neoliberalism, as an ideology, has influenced the global economy, promoting, inter alia, free markets, and creating a shift in the role played by the state, individual entrepreneurism, a reduction in social investment and the extreme protection of pro-

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property rights. In this sense, I will argue that neoliberalism as an ideological project has affected and re-shaped the international investment law (IIL) regime, offering stronger and broader protection of private property and capital, limiting the role of the state, and promoting foreign investment as a mechanism to improve economic growth (which often goes hand in hand with processes of privatising state-owned companies).

A number of different approaches have been adopted towards neoliberalism, such as neoliberalism as discourse, as economic policy, or as a heterogeneous set of institutions. However, for the purpose of this paper I will analyse neoliberalism from the perspective of an ideological project. In order to contextualise my argument, ideology can generally be understood as a system of dominating ideas and representations. Moreover, and paraphrasing Louis Althusser, ideology has a material experience that affects the material world, and in the process, social reproduction. In this sense, the system of ideas and representations has a real effect on the way that an individual experiences the world, resulting in individuals making decisions according with the dominant ideas that she/he considers adequate. In this regard, Althusser states the following:

Ideology is such an organic part of every social totality. Ideology is above all structures that they impose on the vast majority of men ... Ideology is not a conceptual representation of the world, but the way we live that world at the level of unconscious.

Neoliberalism as an ideology creates a mindset that frames individuals and their surrounding reality. In turn, it translates into processes of change in social, political, and economic terms.

For the purposes of this paper, IIL refers to any international treaty between two or more countries that aims to establish the rules with regard to the treatment of, and protection offered to, foreign investors of States parties within the territory of the other party, and the establishment of procedures to resolve disputes between the parties and investors. This includes Bilateral Investment Treaties (BITs), Free Trade Agreements (FTAs) that contain an investors chapter, and any other international treaties with similar aims and characteristics.

Finally, it is important to mention that, despite very few differences, the majority of BITs and investor chapters within FTAs share common principles and structures. The general structures include a preamble, protection scope, definitions of who are considered nationals, what is the standard of protection for the foreign investor, conditions for the repatriation of the gains, compensation in case of war and civil commotion, a protection clause against expropriation, and a procedure to resolve conflicts between parties and between parties and investors.

The Development of International Investment Law

International Investment Law (IIL) originated as an international legal response to decolonisation processes experienced after the end of World War II (WWII), in order to protect the economic interests of Western investors in newly decolonised countries. The decolonisation processes posed a challenge to Western economic interests, especially with regard to access to raw materials essential for the correct functioning of the economy.

In this form, IIL appeared as the result of a political, economic, and legal strategy to maintain colonial privileges and protect Western

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economic interests in the newly formed countries. As the Third World began to assert itself, events such as the nationalisation of British oil assets in Iran in 1951, the expropriation of Liamco in Libya in 1955, and the nationalisation of the Suez canal by Egypt in 1956, ensured that the III regime gained greater importance as an appropriate instrument to protect Western investments.

The first Bilateral Investment Treaty (BIT) was signed in 1959 between Pakistan and Germany during Ludwig Erhard’s term as German Minister of Economic Affairs (Erhard was member of Mont Pelerin Society). The treaty aimed at protecting the property of German investors against any direct expropriation that might be adopted by the government of Pakistan. Other Western European countries followed Germany’s example, with France concluding its first BIT in 1960, Switzerland in 1961, the Netherlands in 1963, Norway in 1966, and the United Kingdom in 1975. In the case of the United States, it continued with an updated form of the Friendship, Commerce and Navigation agreements (FCN), which shifted from dealing with trade and investment to focusing simply on the protection of investments abroad, though not in the same form as BITs.

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8 Boaventura de Sousa Santos, ‘Between Prospero and Caliban: Colonialism, Postcolonialism, and Inter-identity’, in Mabel Moraña and Carlos A Jáuregui (eds), Revisiting the Colonial Question in Latin America (Vervuert 2008) 144.


11 Treaty for the Promotion and Protection of Investments (Pakistan - Federal Republic of Germany) (Signed 25 November 1959) UTS.


13 In 1778, France and the United States signed the first Treaty of Amity and Commerce, which included provisions for trade and property. In the wake of this treaty other countries followed suit by entering into similar types of agreements, which soon became known by the generic title of ‘Treaties of Friendship, Commerce and Navigation’ (FCN), although not all such treaties were formally titled as ‘friendship, commerce and navigation’. FCNs, as a Western legal innovation, included clauses relating to the right to enter a port and a local market, customs regulations, accesses to courts, and treatment of commercial products.
By the 1980s and 90s the IIL regime had reached its peak, coinciding with what is considered to be the golden age of neoliberalism. The figures show that the number of BITs signed during the 1990s increased from 385 to 1,857. This clearly highlights the imposition of neoliberalism as a hegemonic ideology. One important factor in the increased number of BITs signed during the aforementioned period relates to the role played by the IMF and the World Bank which, as I will discuss in the next section, promoted the spread of neoliberal ideology in the Third World.

The IMF and the World Bank, both institutions which are part of what John Williamson refers to as the Washington Consensus, advocated the need for Third World countries to create a friendly and pro-investor environment in order to attract foreign investments as sources of capital, technology, and knowledge. In this regard, Elkins, Guzman and Simmons ran an econometric analysis of the different diffusion processes of BITs and found a correlation between receiving IMF credits and entering into BIT agreements. Among their findings, they expressed the following:

In addition to the competition variables, our coercion variable (use of IMF credits) is significant in each of the models. This may mean that states seeking assistance from the IMF are encouraged to enter into BITs. Alternatively, it may be that the conditionality of IMF loans overlaps with the obligations of the BIT, reducing the costs of the latter.

brought by foreign merchants and protection of the property of the foreign merchant, among others. These treaties were mainly signed between European countries and independent countries in other latitudes, such as Latin American countries.

14 Vandeveld (n 12).

15 The economist John Williamson saw in the policies offered by the IMF, the World Bank and the Federal Reserve, and the economic agencies of the US government, common patterns in the imposition of politics in Latin America—referring to them as a ‘Washington Consensus’. The reforms proposed included liberalisation of the markets, end of subsidies, a strong property system, favourable environment for foreign investment, privatisation, and deregulation.


17 Elkins, Guzman and Simmons (n 9) 35.
The external intervention of international financial institutions amounted to the political pressure of Western capital-exporting countries, and the difficult economic conditions in Third World countries triggered a race to the bottom in the hope of attracting more foreign investments. The competition became extreme, to the point where countries entered into competition with other states solely to avoid being left behind in the repartition of the pool of global capital.\textsuperscript{18} This competition among states signing agreements to attract foreign investments in turn reflects the global embrace of neoliberal principles. As such, neoliberalism defends the benefits of market competition and, in the case of BITs and FTAs, reproduces globally what is expected should happen in an efficient domestic market.

The Rise of Neoliberal Ideology

Much of the literature has recognised that the 1970s and 1980s are characterised as the golden age of neoliberalism.\textsuperscript{19} However, it is important to go further back in the construction and the development of neoliberalism, from being a marginal intellectual project built up by Friedrich August von Hayek and Milton Friedman in order to restore liberal thinking, to a hegemonic worldwide ideology framing global political, legal and economic decisions.\textsuperscript{20}

This sudden change was not something natural or inevitable, rather it was the result of 30 years of hard work, pushed by advocates of neoliberalism, including academics, think tanks, politicians and businessmen who believed that the restoration, or better said, an updated form of liberalism, was the only feasible solution to uphold the advancement of civilisation and to respond to the changes and challenges experienced by the world in the first half of the 20\textsuperscript{th} century. In this form, the neoliberal advocates entered into a battle

\textsuperscript{18} Elkins, Guzman and Simmons (n 9).
\textsuperscript{19} Ben Fine, ‘Development as Zombieconomics in the Age of Neoliberalism’ (2009) 30(5) Third World Quarterly 885.
of ideas, pushing boundaries for the neoliberal ideology and gaining more supporters.\(^{21}\)

The first antecedent in the construction of the ideological neoliberal project occurred in August 1938 in Paris, where a group of intellectuals, led by the French intellectual Louis Rougier, held an international conference to celebrate the publication of Walter Lippmann’s *The Good Society*. The colloquium was the perfect space to begin early discussions as to the importance and need to bring an updated liberalism back to the Western world.\(^{22}\) The conference itself was attended by 26 intellectuals from Western Europe and the United States, including, among others, Friedrich August Von Hayek, Ludwig von Mises, Raymond Aron, Milton Friedman, Jacques Rueff, Wilhelm Röpke, and Alexander Rüstow. It is claimed that it was during this meeting that Rüstow coined the term ‘neoliberalism’ as a way to describe the need for an updated form of liberalism to face the challenges of his time.\(^{23}\)

Another important antecedent in the rise of neoliberalism has to do with the ordoliberals. In 1948, Walter Eucken and Franz Böhm founded the journal *Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft*, better known as the ORDO, which in a short time became a well known and recognised journal in the other countries of Western Europe. The journal worked as a platform to publicly spread the political, economic and legal positions of the members of the Freiburg school and others that shared their views.

In general, the different positions expressed in the ORDO journal had common patterns including the defence of the creation of an economic constitution, the guarantee of private property, the protection of economic liberties and, in general, the elimination of any type of barrier or limitation to free commerce, free markets and free competition.\(^{24}\) The ordoliberals, as the group that shared the positions expressed in the ORDO journal came to be labelled, highlighted the importance for the state not to intervene directly in the

\(^{21}\) Peck (n 10).


\(^{23}\) ibid.

economy, as its main role should be to create the right conditions for an autonomously functioning market.

Many ordoliberals were also members of the Mont Pelerin Society (MPS), founded in 1947 by the Austrian economist Friedrich August Von Hayek with the support of close academic and business friends. As such, the MPS became a close network of Austrian, German, British, Spanish, and American academics, businessmen and politicians interested in bringing back liberal ideas in an era of collectivism and central planning.\textsuperscript{25} The MPS played a very important role in the rise and materialisation of the neoliberal ideology; among the core principles defended by the MPS was the need to limit the unnecessary intervention of the state in the market, the defence of competition, and strong regimes of property.\textsuperscript{26}

Members of the MPS believed that the best option for generating a change which would push back Keynesianism and collectivism was to persuade global intellectuals and economic leaders of the benefits and the importance of the neoliberal ideology and of the negative effects of Keynesianism, collectivism, and economic planning.\textsuperscript{27} In this regard, Rachel Turner states the following: ‘Hayek had long held a belief that the course of history and the development of the national character were largely determined by the life and death of ideas.’\textsuperscript{28}

In order to accomplish their aim, MPS members began promoting the neoliberal ideology in different places, positions, and countries. For instance, in Britain, Anthony Fisher, a member of the MPS, founded the Institute of Economic Affairs (IEA) in 1955 as a think tank for the promotion of liberal ideas, later moving to the US with the same purpose.\textsuperscript{29} During an interview, Fisher highlighted how Hayek had persuaded him to avoid politics and instead work on persuading key people in society to make such changes. Fisher, speaking

\textsuperscript{25} ibid 243.
\textsuperscript{26} Turner (n 22).
\textsuperscript{28} Turner (n 22) 75.
\textsuperscript{29} Miller (n 27) 27.
about the encounter and advice given by Hayek, mentioned the following:

Hayek first warned me against wasting time—as I was then tempted—by taking up a political career. He explained his view that the decisive influence in the battle of ideas and policy was wielded by intellectuals whom he characterised as the ‘second hand dealers in ideas’. It was the dominant intellectuals from the Fabians onwards who had tilted the political debate in favour of growing government intervention with all that followed. If I shared the view that better ideas were not getting a fair hearing, his counsel was that I should join with others in forming a scholarly research organisation to supply intellectuals in universities, schools, journalism and broadcasting with authoritative studies of the economic theory of markets and its application to practical affairs.\(^{30}\)

The MPS’s role of promoting the neoliberal ideological project as a way of re-shaping material reality came to fruition with what was viewed as the first successful neoliberal experiment, taking place in Chile in the wake of the *coup d’état* against President Allende which brought the dictator Augusto Pinochet to power and with him the infamous ‘Chicago Boys’ (and, later, Friedman as well).\(^{31}\) This was the first step in transforming themselves from advocates of a marginal form of ideology to getting their hands on power.\(^{32}\) Later, during the 1980s, would come their biggest triumphs, with the governments of Margaret Thatcher in the UK and Ronald Reagan in the US (advised by MPS members).

Nonetheless, it is important to acknowledge that the realities and experiences of the world during the 1970s and 80s also facilitated neoliberalism’s entrance into the scene as an alternative to

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\(^{31}\) Chilean economists, trained at the University of Chicago—known as ‘the Chicago Boys’—pursued economic reforms with the blessing of Pinochet. These reforms included, among other things, the privatisation of public-owned assets, the deregulation of the national economy, the opening of Chile to the world market (attracting foreign investors), and the strong protection of private property.

\(^{32}\) Peck (n 30) xiii.
Keynesianism and collectivism. Some of the most relevant events included, among others, the oil crisis, increased inflation, the end of the gold parity, and the Latin American economic crisis. In this form, the role played by the International Monetary Fund (IMF) and the World Bank facilitated the spreading of neoliberalism through the conditioning of credits and aid to the adoption of certain internal changes in law and policy. These conditions were widely incorporated into structural adjustment programs (SAPs) and included obligations to liberalise the markets, impose fiscal austerity, privatise state owned companies, strengthen regimes for the protection of private property, and to promote foreign investments as contributions towards the improvement of economic growth.

With neoliberal ideology permeating throughout the world, its principles became the orthodoxy for both domestic and global governance. In this regard, Simmons, Dobbin and Garrett, mention the following:

The worldwide spread of economic and political liberalism was one of the defining features of the late twentieth century. Free-market oriented economic reforms—macroeconomic stabilization, liberalization of foreign economic policies, privatization, and deregulation—took root in many parts of the world.

The transition in thinking from Keynesianism and collectivism towards an updated form of liberalism in the form of neoliberalism became evident; this change in the hegemonic ideology ensured that

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33 Latin America experienced an economic crisis during the 1980s; one of the first affected countries was Mexico, announcing its inability to comply with its international financial commitments in August 1982. Considering Mexico stood among the four countries that held 74 percent of the international debt (Mexico, Brazil, Venezuela and Argentina), Western states moved swiftly to secure the payment of its obligations. The same year saw another 27 countries in Latin America reschedule the payments of their international debt.


regimes of international law also changed the way they were interpreted and applied as well as modifying their internal structures.

**Components of Neoliberalism**

For a better understanding of the relationship between IIL and neoliberal ideology it is worth recalling some of the main characteristics of neoliberalism. It is important to acknowledge that the characteristics outlined in this section are only those which I consider the most relevant for the purposes of this paper and, as such, I am leaving aside other aspects of neoliberalism that may also be regarded as important.

One of the most important characteristics of neoliberalism is the expansion of an economic rationality to non-economic domains and institutions, diffusing the economic form of the market through the entire social body.\(^{37}\) In this regard, Wendy Brown points out that neoliberalism is deployed as a form of ideology that permeates not only the market but all the institutional apparatuses, and many other areas such as education, economy, law, government, politics, etc.\(^ {38}\) This shift ensured that everything came to be analysed from the perspective of market rationality, the efficient allocation of resources, and profitability.\(^ {39}\) The foregoing includes the activities performed by the neoliberal state, which has shifted its interests from protecting its people to protecting the market, focusing only on growth and economic stability.\(^ {40}\)

In the neoliberal rationale the state must concentrate on creating the conditions in which the market will function without the state directly intervening as an actor or as a factor of change. In this vein, the state must uphold the rule of law as it is considered an essential

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\(^{39}\) ibid.

precondition for the correct functioning of the market.\textsuperscript{41} Any form of intervention by the state which could in any way distort the free functioning of the market must be opposed. In this form, public policies, international treaties signed by the country, and domestic law, must maintain the necessary conditions for the market to work freely,\textsuperscript{42} giving priority to the protection of private property and contractual relationships.\textsuperscript{43}

Moreover, neoliberalism exalts the importance of private property, as it is considered to be an essential element in guaranteeing the spontaneous activity of the players in the market and the market itself; the persistent belief is that private property offers to the subject a feeling of trust and independence, allowing him/her to participate as an entrepreneur.\textsuperscript{44} In this sense, limitations to private property are seen as actions that affect the liberty of the subject, weakening the ability to access and interact in the market.\textsuperscript{45} A similar analysis could be made of contractual relations as they are considered important elements in the adequate and free functioning of the market.\textsuperscript{46} Accordingly, it is important that any legal regime has to facilitate individuals entering into a contract and must also uphold and protect them.\textsuperscript{47} Neoliberalism expects individuals to be entrepreneurs that maximise individual benefits and the state is expected to offer the right conditions for it to happen.\textsuperscript{48} In this regard David Harvey posits the following:

Neoliberalism ... proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework character-
ized by strong private property rights, free markets, and free trade.\textsuperscript{49}

Competition is also perceived as an essential element in the correct functioning of the market.\textsuperscript{50} As such, any form of restriction, e.g. restrictions on foreign investments, must be abolished and the state must encourage free and competitive participation in the market.\textsuperscript{51} Finally, another important characteristic of neoliberal ideology, which is exposed in the form of IIL behaviour, is its ambiguity and flexibility, which allows it to be applied where necessary with either rigidity or flexibility, offering solutions to problems regardless of the speciality or social context and allowing it to be accommodated to the realities of each moment.\textsuperscript{52} This also creates an opportunity for the regime to offer totalising and united answers to problems,\textsuperscript{53} maintaining the same core principles—something essential for its survival.\textsuperscript{54}

**Neoliberalism within the IIL Regime**

During the first historical stages of the IIL regime (before neoliberal ideology entered onto the scene), the protection offered to international investors was limited to situations of direct expropriations of physical assets.\textsuperscript{55} However, the fast and effective embrace of neoliberal ideology in the second half of the twentieth century marked the beginning of the stage of enhanced protection of investors’ property. In this form the IIL regime moved to also offer protection

\textsuperscript{49} Harvey (n 43) 2.


\textsuperscript{52} Carlo Mongardini ‘Ideological Change and Neoliberalism’ (1980) 1(3) International Political Science Review 309.

\textsuperscript{53} ibid.

\textsuperscript{54} Turner (n 22) 67.

against indirect expropriation (also known as regulatory exprop-
riation). As its name suggests, indirect expropriation occurs when the
host state adopt measures (either legislative, administrative or
judicial) that affect the use and enjoyment of property or that could
affect the investment’s expected economic benefits. In this manner,
the expropriation materialises without a material seizure of the
investor’s property or directly affecting the legal titles of the invest-
ment.56

Although the concept of indirect expropriation had previous antece-
dents,57 the first major treaty to include the concept of indirect
expropriation was the 1994 North American Free Trade Agreement
(NAFTA), in its Article 1110.58 At this point, it is important to recall
that NAFTA was the result of a long term strategy, carefully design-
ed by businesses with several study groups and law firms involved,
and complemented by a lobby campaign framed within a neoliberal
ideology.59 During the NAFTA negotiations that began in 1990, the

56 OECD, “‘Indirect Expropriation’ and the ‘Right to Regulate’ in International
Investment Law” (2004) OECD Working Papers on International Investment,
2004/04, OECD Publishing. Available online at
<http://dx.doi.org/10.1787/780155872321> accessed 5 April 2015.
57 Prieto Rios and Barklem (n 55).
58 Article 1110 of the Paper 11 of NAFTA stipulates the following:
‘No Party may directly or indirectly nationalise or expropriate an investment of an
investor of another Party in its territory or take a measure tantamount to
nationalization or expropriation of such an investment (“expropriation”), except:
(a) for a public purpose;
(b) on a non-discriminatory basis;
(c) in accordance with due process of law and Article 1105(1); and
(d) on payment of compensation in accordance with paragraphs 2 through 6.’
59 Richard Epstein, Professor of Law at the University of Chicago and member of
the MPS, argued that partial taking occurs when a regulatory decision adopted by a
governmental body (any branch) diminishes the economic interest of an investor’s
profitability. As such, if the society wants to regulate to obtain benefits, it must pay
a certain price for that. In an interview with the North American journalist William
Greider, Epstein stated the following: ‘I am aware that what I have said has been
very influential in the NAFTA debate and that, strangely enough, much of what I
say seems to have more resonance in the international context than it did in the
domestic context’. William Greider, ‘The Right and US Trade Law: Invalidating the
20th Century’ (The Nation, 17 November 2001)
<http://www.thenation.com/article/right-and-us-trade-law-invalidating-20th-
century> accessed 27 April 2015.
investor protection chapter was an important aspect of the negotiation. In an interview, Dan Price and Edwin Williamson, designers of NAFTA’s Paper 11, said the following regarding indirect expropriation:

Governments recognize that it would be unfair to force an investor to bear the entire cost of change in social policy. These costs, at least under certain circumstances, should be borne by a society as a whole. ... Simply designating a government measure as a conservation measure, or health and safety measure, does not answer the basic question about who should bear its costs and should not be enough to remove that measure from international investment disciplines.⁶⁰

After its inclusion in NAFTA, the protection against ‘indirect expropriation’ became commonly used in BITs and FTAs worldwide.⁶¹ This extended protection of investors’ property became problematic for the regulatory ability of host states, as any executive, legislative or judicial decision adopted by a host state could be regarded as affecting the property right or economic interest of a foreign investor in the host country. In this form, situations such as the freezing of water prices, laws demanding the use of plain boxes for cigarettes, or the non-issuance of an environmental permit for a project, have been regarded by foreign investors as situations of indirect expropriation.⁶²

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⁶⁰ ibid.
⁶¹ ibid.
⁶² A relevant case occurred in 2012 in Costa Rica and involved a judicial decision that revoked the exploitation permit granted to a mining project known as ‘Las Crucitas’ (in which the Canadian company Infinito Gold had interests) based on the damage that the project was causing to the environment. As a result of this judicial decision, the multinational filed a request for the composition of an ICSID arbitral tribunal, seeking compensation for an amount of US$1.092 million from the government of Costa Rica. In 2011, the Australian government passed the Tobacco Plain Packaging Act 2011, ordering the sale of cigarettes in olive packages with images and warnings about the health effects of smoking. As a result of this regulation, Phillip Morris filed legal action before the Australian Tribunals, arguing that the decision amounted to an unfair acquisition of property. In 2012, the Australian High Court ruled, rejecting the arguments presented by the tobacco company. Furthermore, the tobacco company filed legal procedures against the Australian government before an international arbitration tribunal seeking
The fair and equitable treatment clause (FET) also reflects the deep neoliberal intervention in the IIL regime. The FET provides investors with a high threshold protection which, in practice, has been used to challenge many different activities of the state. Referring to the FET, Nathalie Bernasconi-Osterwalder and Rhea Tamara Hoffmann state the following:

Tribunals have predominantly interpreted this vague concept in the spirit of the purpose of the investment agreements, namely to create stable and favourable conditions of business for investors. As a result, public interest plays a relatively minor role in the decision-making process of arbitration tribunals.

Another clause with a clear neoliberal influence relates to that of ‘promotion and protection of investments’. The clause is aimed at encouraging both contracting parties to promote foreign investments; however it takes away the right of the host state to accept or to reject an investor or an investment in the country. For example, the ‘promotion and protection of investments’ clause in the US BIT model mentions the following:

Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

Another example is the BIT between Italy and Denmark (in force); in its Article II it establishes the following:

compensation for the loss of profit based on an Australian-Hong Kong investment treaty.


64 ibid.

Each Contracting Party shall admit the investment by investors of the other Contracting Party in accordance with its Laws and Regulations, and promote such investments as far as possible including facilitating the establishment of representative offices.\(^66\)

In both cases, the host state is giving up its sovereign right to accept or reject any foreign investment carried out in the country. In the first example, as the treaty offers the foreign investor the same treaty as a local investor, the state cannot impose any restrictions on foreign investors that are not in place for local investors; in the second case, there is a direct obligation to allow international investors to enter the country. These new inclusions come as part of a neoliberal package that aims at abolishing any form of restriction on the functioning of the global market in tandem with reducing the interference of the state.

A further important measure favouring the neoliberal principle of limiting the role of the state is the opportunity for investors to directly challenge sovereign decisions adopted by the host state before an international investment arbitral tribunal, without exhausting local remedies.\(^67\) In this scenario, an arbitral tribunal is appointed to review the sovereign decision adopted by a state procedurally and substantially, adopting a plain market analysis.\(^68\) The current structure of the investment arbitral procedure transforms foreign investors into new subjects of international law, subjects able to challenge states, enjoying the same level of \textit{locus standi}. In this regard, René Urueña mentions the following:


\(^67\) According to the terms of the treaty (either BIT or FTA), any investor could request the composition of an arbitral tribunal to resolve a dispute with the host state. The claim could be resolved either by an ad hoc tribunal or an institutional tribunal. The ad hoc tribunal acts independently of any international institution and depends entirely upon the regulations agreed by the parties. On the other hand, the institutional tribunal is linked to organisations which specialise in the matter of arbitral procedures, the most common for that purpose being the International Centre for Settlement of Investment Disputes (ICSID) and the International Chamber of Commerce (ICC).

\(^68\) Elkins, Guzman and Simmons (n 9).
In those terms, the investor is a perfect example of the *homo economicus*: a subject of law whose very existence is tied to rational benefit-maximizing activity. If the ‘investor’ fails to prove that she has undertaken an ‘investment’, then that actor will not be considered a subject of international investment law anymore.\(^{69}\)

Furthermore, most of the cases brought forward by foreign investors before international investment arbitral tribunals are related to situations which have a direct effect on local communities. However, affected communities are usually not allowed to participate as interested parties in the litigation.\(^{70}\) This again is closely related to neoliberal postulates, as importance is not given to the communities but rather to the market and its functioning.

All the previous examples show the neoliberal influence in the IIL regime, where the state is expected to play a minor role, limited to guaranteeing the correct functioning of the market. On the other hand, foreign investors count with a specific international legal regime that guarantees their commercial activities.

**Rethinking the System beyond Neoliberalism?**

As is evident from the previous sections, neoliberalism has exerted an important influence upon the IIL regime, creating a pro-market bias favouring foreign investors at the expense of host countries and their peoples. In this scenario the question of what can be done is pertinent. Without intending to offer the ‘right’ solution, in the following lines I will engage in the discussion regarding alternatives to the existing IIL regime.

From my perspective, the first step required is to directly challenge the dominant neoliberal ideology. Without making a breakthrough change in the dominant form of ideology the whole IIL framework would continue as it is at present. Moreover, considering the constant adaptability of neoliberal ideology to new circumstances and

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\(^{69}\) René Urueña, *No Citizens Here: Global Subjects and Participation in International Law* (Martinus Nijhoff 2012) 83.

\(^{70}\) The Centre of Settlement of Disputes has accepted amicus briefings such as in the case of *Methamex Corporation v The United State of America* 2005.
realities, it is valid and necessary to consider some alternatives in the medium and short term. Nonetheless, it is important to acknowledge that although some alternatives could be regarded as useful in the short term, they could fall under the risk of re-enacting and making stronger the neoliberal ideology, as they could install a veil diverting the attention away from the real problem.

My personal view is that in the short term, countries would have to do a thorough and complete revision of their current BITs and FTAs in force, with the aim of either renegotiating or denouncing them. In terms of new negotiations, treaties should include a direct reference, stating that any obligation contained in the treaty must be analysed under the light of other bodies of international law, especially those related to human rights and environmental law. This inclusion in the wording of the BIT or FTA would guarantee that, at the moment of analysing the decision adopted by a host state, an arbitral tribunal would have to take into consideration not only the text of the BIT or FTA in itself, but also other bodies of international law.

Moreover, treaties must also recognise, as a party in the arbitral procedures, communities that could be affected by the decisions adopted by the tribunal, granting them locus standi before the arbitral tribunal. This change in the treaties would automatically force a transformation in the procedural rules of institutions like the International Centre for Settlement of Investment Disputes (ICSID). I also consider it very important that the wording of future treaties must include obligations for the foreign investor. For instance, treaties could include clear obligations that foreign investors must take positive steps for the protection of the environment while performing their activities.

At the international level, it is necessary to continue discussing the need to make treaty negotiation and the arbitral procedures more open, and to allow people to actively participate in such processes as

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71 Some countries in Latin America, such as Ecuador and Bolivia, have started this type of process.

72 See for example: *Compañía del Desarrollo Santa Helena v Costa Rica* (2000), where arguments presented by the host states on the grounds of protecting the environment were rejected by the arbitral tribunal.

73 See n 70.
well as to make governments accountable for their decisions in entering into agreements of this type. Another important international discussion that has to take place relates to the ownership over natural resources and their use. It is especially important to reconsider the forgotten discussion of geo-economic sovereignty and self-determination in terms of natural resources.\[74\]

It is also important to discuss the issue of the compensation awarded by arbitral tribunals. In this regard it would be relevant to look south and bring back Salvador Allende’s doctrine of ‘excess profits’, which guarantees fair compensation to expropriated foreign investors based on historical grievances that persist in the global market economy. Following this format, at the moment of calculating compensations, arbitral tribunals would have to consider the economic benefit (profits) received by the investors during their years in the country and the possible damages caused to the local environment, quantified in money, among other variables that could be considered relevant and that could affect the compensation.

Finally there may be in place some other measures that, although they would not radically transform the IIL regime, may be important to discuss as mild measures to improve the regime. Among those measures to be discussed is the necessity of creating a permanent ‘International Court for the Settlement of Investment Disputes’, which could reduce the pro-market bias that currently exists in non-permanent arbitral tribunals.\[75\] It is also important to rethink the role played by international financial institutions such as the World Bank and the IMF, in the sense that such institutions should refrain from promoting treaties for the protection of foreign investments and rather work towards the strengthening of alternative international mechanisms that could offer security and protection to foreign investors without undermining the ability of host states to regulate, e.g. the widespread use of international investment insurances.\[76\]

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74 Guardiola-Rivera (n 34) 91.
Conclusion

The previous sections have shown the close link between neoliberalism and the IIL regime. Especially, I have shown how the IIL regime is characterised as being pro-market and pro-investor and based on an instrumental rationality. As it stands now, IIL on the one hand promotes the appropriation of natural resources and, on the other, maintains the inequality that exists between industrialised and non-industrialised countries, thus having a direct impact on the host states and also on the lives and the ability of peoples to enjoy their rights.

Neoliberalism has become a hegemonic ideology which has reshaped the relationship between societies, governments and the market, leading to the standardisation of conducts and practices. In this form, neoliberal ideology has played an essential part in shaping IIL with regards to creating a pro-investor regime with strong protection of property rights and contractual relationships. Despite the global economic and political crisis being experienced worldwide in the last decade, neoliberalism continues to adapt to the new realities and changes of the world, and IIL is no exception. The number of BITs and FTAs continue to increase, not only between industrialised countries but also between non-industrialised countries. In so doing, countries reproduce and expand the ideology.

In accordance with the core principles of neoliberal ideology, IIL has worked towards the reduction and limitation of the state’s ability to regulate, subordinating its decisions to a market rationale. In this form, IIL places individuals, corporations, and states on a notionally equal footing, entitling a company that represents millions of dollars to challenge measures adopted by any state authority which acts on behalf of millions of people. The arbitral procedure for the settlement of investments disputes has become an international judicial review, in which measures adopted by the executive, the legislative, or even the judicial authorities, can be reviewed by an offshore tribunal. To paraphrase Michael Foucault, the interest of the market

77 Brown (n 38) 45.
78 Colás (n 1) 76.
and its main players (foreign investors) became one of the main reasons to confront governments and their laws.\textsuperscript{80}

Although there is no single answer to the question of how best to regulate the relationships between states and investors, I expect that, by identifying the neoliberal influence in the IIL regime, this paper could contribute to the ongoing global discussion. As aforementioned, although there are more structural discussions, such as the constant global struggle against the hegemonic neoliberal ideology, there are also some other important discussions that require academics as well as practitioners to engage in. Some of those relevant aspects include the discussion about sovereignty over natural resources, the calculation of compensations and the way in which treaties and arbitral decisions are hidden away from the public in general.

\textsuperscript{80} Foucault (n 37) 247.
The Invisible Fence: An Exploration of Potential Conflict between the Right to Roam and the Right to Exclude

JUDITH PERLE*

Does land ownership require an absolute right to exclude? Or can freedom of movement coexist with the interests of landowners? Whose interests should be paramount? By attempting to answer these questions, the paper shows why a right to roam is of interest to more than a handful of enthusiastic hikers. After outlining Locke and Mill’s key theories of property, the paper describes the way traditional British property relations changed in the 18th and 19th centuries. It compares the Countryside & Rights Of Way Act 2000 in England and Wales with the Scottish, American and Scandinavian jurisdictions. The paper ends by looking at the current revival of interest in the commons, and visits the city to demonstrate that opposition to the creeping privatisation of public land has much in common with country-lovers’ call for wider access rights. Both concern the balance between individual rights and the common good.

1. Introduction

Property in land is of a very different character from every other kind of property. Land is not property for our unlimited and unqualified use. Land is necessary so that we may live upon it and from it ... and I deny, therefore, that there exists or is recognised by our law or in natural justice, such a thing as an unlimited power of exclusion.¹

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¹ James Bryce, quoted in Marion Shoard, A Right to Roam? (OUP 1999) 172.
This statement made in 1892 to Parliament by James Bryce, an MP and campaigner for the right to roam (i.e. the right of the public to gain access to private land), succinctly encapsulates many of the themes which this paper addresses: the uniqueness and complex nature of land, the debate over whether property law is natural or socially constructed, and the different ways in which the right to property and freedom of movement are currently reconciled in different jurisdictions.

Does property ownership require an absolute right to exclude? Or can a right to roam coexist with the interests of landowners? Whose interests should be paramount? By attempting to answer these questions, the paper shows why freedom of access (often termed a ‘right to roam’) is of interest to more than a handful of enthusiastic hikers.

The right to own property is one of the most widely accepted rights; it is enshrined in both the Universal Declaration of Human Rights, and the European Convention on Human Rights. The character of land, however, distinguishes it from other property. According to Ellickson and Sawers, land is immobile, has a unique location, is virtually indestructible, lacks natural boundaries, has multiple uses, is easily shared, and is finite. Perhaps one should also add that land is not discrete—what takes place ‘here’ is likely to affect what happens ‘there’. If I destroy, say, a piece of furniture that I own, it has little impact on anybody else or any other piece of furniture. But if I overgraze my land, or use powerful pesticides, neighbouring land is likely to be affected. Last but not least, land elicits strong emotions, perhaps because of its fundamental nature, providing the food we eat,

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3 Article 17: (1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.

4 Article 1, Protection of Property: Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

the water we drink and the homes in which we live (as Adam Smith pointed out).  

Together these attributes generate a complex web of interdependence and conflicting claims. What I do on my land may affect what you can do on yours; my right to move freely (on your land) may have implications for your privacy; your right to privacy affects my right to move freely (a right which campaigners have dubbed the ‘right to roam’). The Universal Declaration of Human Rights (UDHR) recognises that conflicts between human rights occur and Freeman suggests that one way of dealing with this is to prioritise them. Essentially, this paper is concerned with the implied prioritisation between an absolute right to exclude, and the right to roam freely.

The paper begins by outlining Locke and Mill’s theories of property (Section 2), and goes on to describe traditional British property relations, and the changes that took place in the 18th and 19th centuries (Section 3). Section 4 shows how evolving attitudes to the countryside culminated in the Countryside & Rights of Way Act 2000 (CROW). Section 5 takes a comparative perspective, and presents the more radical reforms recently enacted in Scotland, the complex situation in America (historically and currently), and the virtual absence of rights to exclude in the Scandinavian countries. The final section outlines the current revival of interest in the commons, and briefly visits urban England.

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7 Article 29: (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

2. ‘Mine’ or ‘Ours’?—Theories of Property⁹

Thomas Merrill proposes two broad schools of thought regarding property rights: essentialism and nominalism.¹⁰ Although Merrill places himself uncompromisingly among the former, he acknowledges that the nominalists represent the current orthodoxy in the US legal community.

If property is not a simple question of ‘things’ but of the rights people exert in those things,¹¹ and given the special nature of property in the form of land, definition of these rights is fundamental to society. A book, or a car, or a diamond may be very desirable, and even scarce—but they hardly touch, in and of themselves, our very existence. In the interests of brevity, from now on I will use the term ‘property’ narrowly to mean land or real estate.

*The Lockean Tradition: ‘Essentialism’ or ‘Formal Exclusion Theory’*¹²

John Locke’s ‘labour theory’ of property rights¹³ assumes that in the beginning, God gave the earth to mankind in common to enjoy. Man, at that time, only owned his body, his labour, and the fruits of that labour. By applying labour to land he removes it from ‘that common state Nature placed it in’¹⁴ and can, by natural law (i.e. reason and ‘right-ness’), claim ownership. The act of mixing labour with land, of ‘improving’ land, creates ‘natural’ property rights and a right to exclude.

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⁹ This section concentrates on the main theorists relevant to this paper; it is not intended to be a comprehensive survey.

¹⁰ I am using a slightly simplified version of the typology proposed by Merrill as my starting point, though I also add material from other sources. Thomas W Merrill, ‘Property and the Right to Exclude’ (1998) 77 Nebraska Law Review 730.

¹¹ Merrill (n 10) 731-732.

¹² The former is Merrill’s term; the latter is Lovett’s. See Merrill (n 10) 734; John A Lovett, ‘Progressive Property in Action: The Land Reform (Scotland) Act 2003’ (2010) 89 Nebraska Law Review 739, 746.


¹⁴ ibid 288.
Even if Locke didn’t intend to act as ‘an advocate on behalf of the emerging property-owning middle classes,’\textsuperscript{15} his work was widely cited by advocates of enclosure.\textsuperscript{16} Conveniently, they forgot that Locke’s \textit{Provisos} asserted that ownership of land was only justified ‘where there is enough and as good left in common for others’ and was limited to ‘as much as any one can make use of … before it spoils.’\textsuperscript{17} The inconvenient issue of whether the labour had to be one’s own (rather than a servant’s or slave’s) was similarly ignored by pragmatic landowners of the day.

Locke’s theory provided powerful and useful ammunition for the activities of colonisers. If, ‘In the beginning all the World was America,’\textsuperscript{18} then settlers were entitled to improve and claim ownership of the unimproved land they found in the New World. For the colonisers, there was no question of needing to justify expropriation—the natives did not properly own the land since they had hardly improved it.\textsuperscript{19}

In the 18\textsuperscript{th} century, William Blackstone,\textsuperscript{20} a later natural rights theorist and cornerstone of the British legal establishment, famously described ‘that sole and despotic dominion which one man claims and exercises … in total exclusion of the right of any other individual in the universe.’\textsuperscript{21} For Blackstone, the right to exclude is both necessary and sufficient to property ownership. Even in Blackstone’s later, more moderate writing, the right to exclude remains at least necessary if not sufficient.\textsuperscript{22}

Merrill seems to argue that any watering down of an absolute right to exclude by granting a right to roam fatally undermines the con-

\textsuperscript{15} EJ Lowe, \textit{Locke} (Routledge 2005) 188.

\textsuperscript{16} See below, Section 3, ‘\textit{Keep Out: The Enclosure Movement}’.

\textsuperscript{17} Locke (n 13) 288, 290.

\textsuperscript{18} ibid 301.

\textsuperscript{19} Locke’s writing heavily influenced the drafters of the US Constitution. According to Bassani, Jefferson, for example, was a staunch Lockean, and there is no doubt that he ‘regarded property as a natural right.’ Luigi Marco Bassani, ‘Life, Liberty, and …: Jefferson on Property Rights’ (2004) 18(1) Journal of Libertarian Studies 31, 32.

\textsuperscript{20} Blackstone was the first full-time law professor at an English-speaking university (Oxford) in 1758.

\textsuperscript{21} Quoted in Merrill (n 10) 734 (emphasis added).

\textsuperscript{22} ibid 736.
cept of property: ‘Deny someone the exclusion right and they do not have property.’ But on closer reading, Merrill admits that Blackstone’s insistence on ‘despotic dominion’ is a ‘caricature of reality’ and that the right to exclude is variable. Nevertheless, a presumption in favour of the right to exclude lies at the heart of this approach.25

John Stuart Mill: ‘Nominalism’ or ‘Social Obligation Theory’26

While utilitarians such as Bentham and Mill may have reached similar conclusions to the Lockeans—namely that private property was justified through productive labour—their reasoning depended on utility, not on natural right: ‘No man made the land. It is the original inheritance of the whole species. Its appropriation is wholly a question of general expediency. When private property in land is not expedient, it is unjust.’ Bentham even claimed that ‘Property and law are born and must die together’, and for Mill society could choose how to distribute wealth (without recourse to natural law justifications).

Today, social obligation theorists define property as inherently social: ‘an empty vessel that can be filled by each legal system in accordance with its peculiar values and beliefs.’ Property rights are viewed as a ‘bundle of rights’ and as such lack a ‘fixed core’. Since we are all ‘fundamentally dependent on human community’, all law (including property law) should concern itself with relationships, and be designed to balance ‘the relative needs and interests of

23 ibid 730.
24 Not even the most extreme nominalist argues for no right to exclude whatsoever.
25 Lovett (n 12) 749.
26 The former is Merrill’s term; the latter is Lovett’s. See Merrill (n 10) 736; Lovett (n 12) 743.
30 Merrill (n 10) 737.
31 Lovett (n 12) 744.
competing property-owners, property-owners and non-owners, or owners and the community’.\textsuperscript{32} In other words: ‘Rather than serving as platforms for self-regarding behaviour, property ownership and property law become the place for building community’.\textsuperscript{33}

In summary, the balance of rights should always favour the community, in particular with regard to access: ‘Whoever owns land keeps others out of the enjoyment of it … The exclusive right to the land for purposes of cultivation does not imply an exclusive right to it for purposes of access.’\textsuperscript{34} Furthermore: ‘The claim of the landowners to the land is altogether subordinate to the general policy of the state.’\textsuperscript{35}

These two approaches can be summarised as follows:

<table>
<thead>
<tr>
<th>Formal exclusion theories</th>
<th>Social obligation theories</th>
</tr>
</thead>
<tbody>
<tr>
<td>Historical advocates: Locke, Blackstone</td>
<td>Historical advocates: Mill</td>
</tr>
<tr>
<td>Property is a natural right</td>
<td>Property is socially constructed</td>
</tr>
<tr>
<td>Right to exclude is paramount</td>
<td>Right to exclude is one of a bundle of rights</td>
</tr>
<tr>
<td>Emphasis on landowners’ privacy and freedom</td>
<td>Emphasis on shared social interests</td>
</tr>
<tr>
<td>Spatial configuration of property rights</td>
<td>Functional configuration of property rights</td>
</tr>
<tr>
<td>Presumption in favour of the right to exclude</td>
<td>Presumption in favour of responsible access</td>
</tr>
<tr>
<td>Simplicity, predictability</td>
<td>Complexity, contingency</td>
</tr>
<tr>
<td>State should protect owners’ rights</td>
<td>State should balance competing interests</td>
</tr>
</tbody>
</table>

\textsuperscript{32} ibid 745.
\textsuperscript{33} ibid 746.
\textsuperscript{34} Mill (n 27) 43.
\textsuperscript{35} ibid 41.
3. A Case Study from History: The English Commons & the Enclosures

The Commons: Feudal England

The countryside of medieval England was characterised by a profusion of small villages surrounded by open fields, meadows and commonlands. The Lord of the Manor was the largest (but not the only) landowner, and often technically owned the village. Land ownership and usage was complex, and differed fundamentally from the spatial rights we are accustomed to today since usage and ownership rights were not necessarily coterminous.

Large arable fields were divided into narrow strips owned by different people so that landholdings were always scattered among a number of fields. Cultivation of the fields was decided collectively and to some extent democratically—the crop(s) to be grown, and the dates of ploughing, sowing and harvesting were all agreed in the manor court. After harvesting, the fields became communal property with farmers allotted pasturing rights on the stubble in proportion to their land holdings.

Meadowland was also jointly owned. Once the hay was harvested, this land became common pasture. The ‘commons’ (which included wasteland, woodland, roadside strips etc.) was open to all villagers for grazing and gathering wood, berries and nuts. Similarly, there was an extensive tradition of the communal management of many forests, with regard to grazing, cultivation and the gathering of food and firewood. As elsewhere, the rights tended to be traditional and ‘confirmed through practice as much as documentation’.

36 A single 200-acre field could have 30 landlords, each of whom owned strips of land in 10 or 20 places. JL Hammond and Barbara Hammond, The Village Labourer (Longman 1978 [1911]) 6. For an illuminating map which illustrates the complexity of a typical village, see Ellickson (n 5) 1389.

37 For detailed descriptions of rural land and usage rights pre-enclosure, see Hammond and Hammond (n 36); Ellickson (n 5); EP Thompson, Customs In Common (Penguin 1993).

The main social distinction among villagers reflected whether they made their living mainly by farming or mainly by labouring for others. Even the poorest could graze an animal or two on the (literally) marginal commons, and supplement their income by gathering food and fuel.

Despite ‘retrospective predictions’ of inevitable failure by Garrett Hardin in his famous and influential essay on The Tragedy of the Commons, the system cleverly modified land rights seasonally, spreading risk and exploiting available economies of scale such as the need to only fence large fields, and communal harvesting and shepherding. Social controls within a close-knit community regulated farming without degenerating into ungovernable bickering. So although by no means an idyllic world of free and equal men, the pre-enclosure village represented a functioning system based less on property ownership than on reciprocal rights and obligations. EP Thompson nicely sums up the way in which the system supported small farmers by quoting a 1767 pamphlet against enclosure:

There are some in almost all open parishes, who have houses, and little parcels of land in the field, with a right of commons for a cow or three or four sheep, by the assistance of which, with the profits of a little trade or their daily labour, they procure a very comfortable living. Their land furnished them with wheat and barley for bread, and, in many places, with beans or peas to feed a hog or two for meat; with the straw they thatch their cottage, and winter their cow, which gives a breakfast and supper of milk nine or ten months in the year for their families.

Everybody could move about freely, so long as they did no damage to crops. In the context of the medieval village, the right to exclude was largely irrelevant. It featured most prominently in relation to the

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39 Hammond and Hammond (n 36) 3.

40 I have used the term ‘retrospective prediction’, for lack of a better phrase, to describe the opposite of a prophecy. Hardin theoretically predicted the ‘inevitable’ outcome of a situation which existed in the past—disregarding the fact that the anticipated tragedy manifestly did not take place. Even if Hardin was an ecologist writing about population control rather than a historian or economist, it nevertheless seems an odd way of constructing a theory—but it has clearly had impact. Garrett Hardin, ‘The Tragedy of the Commons’ (1968) 162 Science 1243.

41 Thompson (n 37) 127-128, 176-177.
vast and jealously-guarded royal hunting parks from which commoners were totally and rigorously excluded.

**Keep Out: The Enclosure Movement**

The enclosure movement radically transformed rural England. In their classic study of the subject, JL and Barbara Hammond described England in 1685 as ‘a country of commons and of common fields’; by 1830 it had been transformed into ‘a country of individualistic agriculture.’

A new breed of landowner without rural roots was created when King Henry VIII distributed land expropriated from the monasteries after their dissolution following his break with the Roman Catholic Church in the first half of the 16th century. Coupled with advances in agricultural techniques which demanded larger plots, traditional arrangements centred on rights and responsibilities were simply an obstacle to these new rural capitalists who were keen to maximise profit. In response to political instability in Europe at the time, there was also a desire to subdue the rural poor. Over the centuries, but particularly in the 18th and 19th centuries, over 5,200 Inclosure Acts passed through Parliament.

The strip-farmed open fields were parcelled up into separate units, and common land became enclosed pasture or private woodland where both grazing and foraging by peasant farmers were forbidden. Footpaths, until then defined by informal custom and usage, were formalised. Although this guaranteed access, it was paradoxically also restrictive. If you are officially allowed to walk along this path, it follows that you are not allowed to walk elsewhere, regardless of whether or not you are harming crops in any way.

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42 Hammond and Hammond (n 36) 1.
44 Hedges were planted to enclose much land. It is interesting to note that hedges, which are today viewed as representing an unchanging vision of rural tranquillity and continuity, in the 18th century ‘symbolised a new exclusion from the land’. In riots against enclosure, hedges were often uprooted. Shoard (n 1) 143.
Usage became less important than ownership, and land was reified; rights became attached to places rather than persons. \(^45\) Enclosure converted a “functional system” of property rights, in which many different individuals might have rights to use a particular parcel of land, to a purely “spatial” system of absolute ownership of specific land. \(^46\)

The landed aristocracy acquired a taste for landscaped estates encircled by high walls, and hunting wild animals was ruthlessly controlled. In some extreme examples of this total retraction of rights by land-owners, whole villages were, quite literally, moved to sites where they would not disrupt the view or impede the sport of hunting.

The outcome of enclosure was by no means impartial. The compensation awarded by the Commissioners in charge of each Inclosure Act benefited owners not users, and smallholders were left with plots which were too small to sustain a family without recourse to commonly-owned pasture plus foraging rights. \(^47\) ‘Virtually overnight, peasants who had until then been able to earn a living independently were forced to find a wage-earning job, move to an industrial town, or emigrate.’ \(^48\) Although in theory local people had a say in the decisions reached with regard to each application to enclose, in reality illiteracy, inarticulateness, poverty and sheer distance from, and lack of influence in, London rendered them powerless. By removing the need for communal decision-making, community cohesion was also undermined.

In their classic study, the Hammonds paint a bleak picture:

> The peasant with rights and a status, with a share in the fortunes and government of his village, standing in rags, but standing on his feet, makes way for the labourer with no corporate rights to defend … no property to cherish, no

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\(^45\) Thompson (n 37) 136.

\(^46\) These are Stuart Banner’s terms, quoted in Lovett (n 12) 767.

\(^47\) Thompson (n 37) 136.

ambition to pursue ... and the weight of a future without hope.49

Other historians are less gloomy. What is certain, though, is that enclosure effected an irreversible sea-change in rural ways of life, and inflicted substantial suffering on the poorest. On the positive side, enclosure initiated the move from feudalism to a market economy, brought more land into cultivation and increased yields.

4: ‘A Kind of National Property’50

Changing Attitudes in England & Wales

Despite the Lockean view of the countryside as something to be improved rather than appreciated, sensibilities gradually changed over the 18th and 19th centuries. The Romantic movement in the arts epitomised the growing value placed on nature and by the 19th century this was combined with the pragmatic needs of the industrial urban masses for healthy recreation. The outdoors was no longer solely a supplier of profit, but also a source of spiritual (and physical) renewal.

Groups campaigning for land reform proliferated, ranging from the influential and dedicated Commons Preservation Society (established in 1865)51 to more general organisations such as various land reform societies, and the Fabian Society. All attempted to change the law on land ownership and access. In 1884, MP James Bryce introduced the first right to roam bill, proposing no less than the abolition of the law of trespass on uncultivated land in Scotland. His bill was, of course, defeated and even though he reintroduced it an astonishing twelve times, a general right to roam remained elusive.52

49 Hammond and Hammond (n 36) 63.
50 William Wordsworth described the Lake District as ‘A sort of national property in which every man has a right and interest who has an eye to perceive and a heart to enjoy’.
51 The Commons Preservation Society fought legal battles to preserve Epping Forest, Hampstead Heath, Wimbledon Common and other remaining commons around London.
52 James Bryce is quoted at the beginning of this paper. Lovett (n 12) 759.
During the depression of the 1930s, matters reached crisis point, as evidenced by the 1932 mass trespass of Kinder Scout, a wilderness easily accessible from the overcrowded cities of the industrial Midlands and North. On Sundays, an estimated 15,000 ramblers set out from Sheffield alone, and paths were being damaged by over use. Yet walkers were prevented from roaming by landowners safeguarding their lucrative grouse-shooting and by water boards claiming to protect water reserves (although they were willing to lease the land for sheep grazing). An iconic event among walkers today, the mass trespass failed to change the law but did, perhaps, raise public awareness.

It was not until 1949 that the UK’s network of public rights of way was definitively mapped, as a result of the provisions of the National Parks and Access to the Countryside Act 1949. But it was only in 1979, when Labour returned to power after many years of Conservative rule, that right to roam legislation was introduced.

England does have a magnificent network of rights of way, and a total of 190,000km of footpaths criss-cross the country. Astonishingly, a public footpath runs within 1,000m of Chequers, the Prime Minister’s official country residence, and another lies 100 metres from Madonna’s mansion in rural Wiltshire.

Originally simply a way of getting from A to B, footpaths are, by definition, linear and narrow, and use is restricted to walking, picnicking and sometimes riding. Landowners may not block footpaths or discourage access by, for example, ploughing up a path, dismantling a stile or gate, or putting a bull in a field; walkers must stick to the route. The path through the Chequers estate is littered with CCTV cameras—any digression would be dealt with speedily. Walkers who stray can in theory be charged with trespass and landowners may use ‘reasonable force’ to eject them. In practice, so long as no damage

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53 This includes all public rights of way (footpaths, bridleways, restricted byways, and byways open to all traffic). For more information, see: <http://webarchive.nationalarchives.gov.uk/20140605090108/http://www.natureland.org.uk/ourwork/access/rightofway/prow/default.aspx> accessed 27 April 2013; Anderson (n 48) 381.

has been done, the offence is civil and damages are nominal. Only rarely does trespass become a criminal offence.55

The Countryside & Rights of Way Act 2000 (CROW)

CROW provides a statutory right of access to registered common land and four categories of privately-owned ‘open access’ land in England and Wales: mountain, moor, heath and downland.56 The Act excludes cultivated land, as well as buildings and their curtilage. In total, 940,000 hectares,57 or 7% of England has been classified by Natural England58 as open access land on which people are free to roam.

The right is for recreational purposes, so people may walk and picnic, but not hunt, light fires, swim, remove plants or trees, ride a bicycle/horse, or do any damage. The right to roam is absolute (the only grounds for objection being the classification of the land). Landowners received no compensation but their privacy is protected by prohibiting access within 20 metres of a building, and their duty of care is limited.59

There is no doubt that CROW marks a return to a functional definition of land ownership, where several parties share rights in the same land. It also restores commoners’ freedom of movement, lost during enclosure—though it does not, of course, restore many of the other usage rights lost at that time. So is CROW a ‘dramatic curtailment of the right to exclude’60 or simply a relatively minor

55 These include trespassing a second time in defiance of an injunction, large-scale trespassing, and aggravated trespass by, for example, hunt saboteurs or New Age travellers. See Shoard (n 1) 11-13.
56 Anderson (n 54). See Section 5 below for Scotland.
58 Formerly the Countryside Agency.
59 Landowners’ duty of care is limited to that owed to trespassers rather than that owed to invitees.
60 Anderson (n 48) 375.
rebalancing of the rights of landowners? A brief look at similar legislation elsewhere may help to provide an answer.

5. A Wider Perspective

*Bringing Fairness to the Countryside (Scotland)*

By the 1990s, it was generally agreed that the Scottish situation was unsatisfactory. Land ownership was inequitable; figures suggest that $2/3$ of private land was owned by just 1,252 people, with 60% of the Highlands owned by a mere 100 people. This pattern has been described as ‘the worst in Europe’. This situation reflected a history of injustice and bitterness dating back to the infamous Highland Clearances of the 19th century.61 Yet, notably in the Highlands, landowners had also tolerated hill-walkers for generations. In fact, a widely-held but inaccurate myth held that a right to roam actually existed, despite the absence of any basis in law.63 In one sense, though, the law concerning the right to exclude was less stringent than in England: the act of trespass was only actionable if damage had been caused.64

Still controversial today,65 the Land Reform (Scotland) Act 2003 provides a statutory right of access to all land for recreation, so long as that right is exercised responsibly. Specific exclusions concern land on which crops are growing, and houses and their curtilage.66

62 During the Clearances, tenant farmers (known as crofters) were evicted en masse by absentee landlords in the name of modern, efficient and profitable sheep farming.
63 Sellar (n 61) 103.
65 Controversy over the Act stems partly from its right to roam provisions, and partly from other provisions concerning the abolition of feudal tenure and a community ‘right to buy’. For comments on the Act, see Sellar (n 61) 107.
66 Other specific types of land such as schools, airfields, railway land, etc, were also excluded. Carey-Miller (n 64) 129.
Walking, cycling, horse-riding, canoeing, and camping are permitted—hunting, shooting and fishing (three major sources of income for the great Highland estates) are not.

On one count, this Act is more radical than CROW in that it covers all land (not just certain restricted categories); on the other hand, in the Highlands at least, it merely converted a de facto situation into a de jure right.67

‘The Man with the Fence Wins’68—Or Does He? (The Case of America)

America boasts many long-distance trails, but most Americans cannot take a walk in the country without driving to a publicly-owned park. How did this situation come about?

Many American settlements were originally laid out on a grid pattern (rather than growing organically), so obviating the need for a network of footpaths in the days before motorised transport. Although people are encouraged to use state and national parks, American paths often cross remote wildernesess and are less accessible than their English equivalents.

Restrictions on public access to private land are underpinned by the ‘takings clause’ of the 5th Amendment,69 which the Supreme Court interprets as creating an absolute right to exclude, described as ‘one of the most essential sticks in the bundle of rights that are commonly characterised as property.’70 There is explicitly no requirement to

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68 Anderson (n 54) 257.
69 ‘Nor shall private property be taken for public use, without just compensation.’ The Constitution of the United States, Amendment 5.
70 Quoted in Anderson (n 48) 426.
balance private and public interests and any limitation, however small, must be compensated.\textsuperscript{71}

At least one American scholar has proposed a distinction between access rights to improved and unimproved land. It is true that the early settlers were given parcels of land which they had to cultivate in order to secure full title.\textsuperscript{72} But, Sawers suggests, the situation today ‘would appear unrecognisably limited to the Founding Fathers. At independence, the public had broad rights to use unimproved land, including the right to graze, fish, hunt and forage.’ Until the 1860s ‘open access was the norm.’\textsuperscript{73}

While English landowners needed to keep livestock \textit{in}, their American counterparts fenced to keep livestock \textit{out}. Notably in the Mid-West, the open range served as a vast, unenclosed grazing commons. Conflicts between ranchers and farmers\textsuperscript{74} were eventually resolved as, state by state, the range was closed, much land was improved and access restricted.\textsuperscript{75}

In effect, two systems operated in 19\textsuperscript{th} century America—one on improved, enclosed farmland, and the other on unimproved land. In many states, the presumption is still that owners must act to prevent access; 29 states limit trespass to land ‘posted’ as private, effectively qualifying the right to exclude and imposing non-trivial costs on

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\textsuperscript{71} Even the laying of cable boxes and wires requires compensation. See Anderson (n 54) 251.

\textsuperscript{72} It is perhaps a sad reflection on American sensibilities that at least two law professors (Anderson and Sawers) discuss the history of property rights in the USA without even mentioning the varied property regimes of the indigenous Native American tribes. See for example Anderson (n 48) 417-421; Sawers (n 5) 674-684.

\textsuperscript{73} Sawers (n 5) 673, 674.

\textsuperscript{74} As evidenced in the famous Rodgers and Hammerstein song ‘The Farmer and the Cowman’, from their musical \textit{Oklahoma!} For the full lyrics, see <http://lyrics.astraweb.com/display/374/oklahoma..musical_ost..farmer_and_the_cowman.html> accessed 27 April 2015.

\textsuperscript{75} To me, at least, this is reminiscent of enclosure in England, but I came across no such comparison in the literature. It is also interesting to note that while enclosure in England was driven by technological innovation, the closing of the range was made possible (i.e. financially viable) by technology, namely the invention of barbed wire in 1867. Ellickson (n 5) 1330.
landowners. This only applies to unimproved land—cultivation is of and in itself regarded as sufficient notice that access is prohibited. Sawers argues that despite Supreme Court judgements, the Constitution does not require a general right to exclude, and historical precedent limits the right to exclude on unfenced or unimproved private land. Sawers also makes a social justice argument: whites own 98% of all farmland in the USA, and 1% of Americans own 66% of privately-owned land (equivalent to a massive 46% of the country). Retaining the right to exclude effectively allows a tiny minority to decide who may enjoy the countryside.

‘Don’t Disturb, Don’t Destroy’ (The Scandinavian Model)

Sweden, Norway, Finland and Iceland enjoy possibly the most relaxed approach to the right to roam in the developed world, for a variety of reasons. The region’s low population density has mitigated conflict over land ownership, the forests have always been regarded as a public resource, and the right to access is entrenched in the constitutions of all four nations. Hence the many ‘Posted—No Trespassing’ signs that one sees travelling through rural America. Sawers (n 5) 672.

Specifically, the famous case of Kaiser Aetna v United States, 444 U.S. 164 (1979), on which the Supreme Court’s ‘canonisation’ of the right to exclude was based, rests on slim precedents, and there exist many other cases relating specifically to unimproved land, such as beaches, where greater public access has been approved. See Sawers (n 5) 667.

For an explanation of how the two terms—unfenced and unimproved—can be used almost interchangeably, see Sawers (n 5) 689.

ibid 694.

This slogan is used by the Swedish Environmental Protection Agency to encapsulate their approach to public access. See <http://www.naturvardsverket.se/en/Environmental-objectives-and-cooperation/Swedish-environmental-work/Work-areas/This-is-the-Right-of-Public-Access/> accessed 27 April 2015.

I am excluding Denmark, where the right to exclude was enacted in 1873 and then partially reversed in 1969. Overall, the public access regime in Denmark is the most restrictive in the region, and is limited to certain types of land (along similar lines to England after CROW). For more on Denmark, see Sawers (n 5) 687.

For example, even at the height of their power, the Swedish aristocracy owned only 40% of the country and the crown 20%. Gorovitz Robertson (n 67) 223.
as ‘existing for the common good’, and fully-fledged feudal systems never developed in these countries.

In Sweden for example, although the term *allemansrätt* (which translates as ‘everyman’s right’) is relatively recent, the notion that anybody may walk anywhere they please dates back to at least 1350. In fact, not just walking but camping, picking berries and foraging for mushrooms are all permissible. Both berries and mushrooms are richly abundant so that there never has been (and still is not) any possibility of exhausting or even denting the resource. In the past at least, foraging contributed significantly to the diet of the poor. The right to pitch a tent was necessary—villages were often more than a day’s journey apart. Swimming and canoeing are allowed; freshwater fishing is not.

This right is constrained by common sense: roamers must not invade landowners’ privacy and they must do no damage. This means that cultivated land is out of bounds during the growing season when crops might be damaged but, for instance, skiing across snow-covered fields is permitted. As befits a right established by ‘customary law’, there is no definition of exactly how near a ‘homestead’ one can roam. The suggested rule of thumb is that ‘if you can see and hear people, you are too close’.

Although everyman’s right varies slightly from country to country, for all Scandinavians the need to balance property-owners’ right to exclude against the public’s right to access is axiomatic. *Allemansrätt* is symbolic of citizens’ rights and duties, ‘grounded in rules of reason … basic respect and personal responsibility.’

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83 ibid 222.
84 ibid 220.
85 Except in the country’s five large lakes.
86 In Sweden and Finland *allemansrätt* (*jokamiehenoikeus* in Finnish) is included in the constitution but is not formally codified; the rule is that ‘if it’s not forbidden, it’s allowed’. In Norway and Iceland the right was codified in law in 1957 and 1999 respectively. Gorovitz Robertson (n 67).
87 ibid 225.
88 ibid 226.
6. Current Paradigms

The Commons Revisited

The examples of England & Wales, Scotland, America and Scandinavia outlined above all concern differing degrees of public access to privately-owned, rural land. Yet new paradigms concerning the ownership of common resources are emerging.

Nobel Prize-winning economist Elinor Ostrom proved a strong advocate of joint ownership and responsibility for common-pool resources. Taking the traditional commons as her model, she overturned the conventional (and influential) wisdom of Hardin’s *Tragedy of the Commons*. In contrast to Hardin’s ‘disempowering and pessimistic vision,’ Ostrom demonstrated that neither government intervention nor privatisation are necessary to the successful, long-term management of common-pool resources such as forests, fisheries, grazing land, irrigation systems, and even oil fields. Socialism or free enterprise are not the only options. In fact, she suggested that catastrophic failures in the management of common-pool resources could often be attributed to the fact that resources were placed under the sole control of government agencies.

Instead, Ostrom demonstrated—by means of rigorous empirical analysis of case studies from around the world—that people tend to work sensibly together for the general good in the maintenance of common-pool resources so long as certain conditions are met. In particular, she pointed to a need for the decision-making process to be organised locally, and to be based on trust and shared values.

Rather than arguing from a theoretical, idealistic or historical viewpoint, Ostrom’s research provided empirical data evidencing collaboration for the common good. Thus although, as she herself said, sound science is necessary but not sufficient, her cautious optimism is neither naive nor unreliable. Looking to the future, Ostrom argues, the greater challenges of managing the ‘global com-

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90 Ostrom and others (n 89) 278.

91 Dietz, Ostrom and Stern (n 89) 1910.
mons’ in relation to issues such as climate change, biodiversity and similar issues will ‘require forms of communication, information, and trust that are broad and deep beyond precedent, but not beyond possibility.’  

In short, there is no practical reason why common land—estimated at just 4% of land registered in England and Wales—should not expand once again; and in fact the concept of the commons has found other new champions in recent years. Experts from organisations such as Natural England and the National Trust propose the creation of new commons in and around urban centres, to be administered by ‘land companies’ (first proposed in the 1860s). These would provide green and open spaces for recreation, trees to combat climate change, and habitats for biodiversity. The creation of such new commons clearly meshes with the currently topical themes of localism, devolution, even the ‘Big Society’.

The Urban Scene

Although this paper focuses on access to rural land, a detour into current controversies relating to the urban situation is illuminating. Looking back in history, the burgeoning industrial cities of the 19th century were surprisingly private spaces. Huge swathes of land were privately owned, and London, for instance, included many closed

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92 Ostrom and others (n 89) 282.
95 Mackay (n 94) 116; Cowell (n 38); Shoard (n 43) 37. Shoard, a long-time campaigner for the right to roam, points out that the process is partly in place—a ‘right of common’ can be expressly granted by landowners, which is then registered in the UK under the Commons Act 2006. Subsequently, such land is deemed open access land (under CROW) and is therefore available to the general public.
96 Minton (n 93).
squares and private streets, with gates and barriers preventing unauthorised access. Growing debate concerning public access led, in the mid-Victorian period, to the transfer of many roads, streets and parks to the public domain (i.e. to government or local authority ownership).

Just over a century later, the picture is changing dramatically, in so far as a number of UK (and US) cities are favouring large-scale developments undertaken by a single institution, often on previously derelict, neglected or redundant industrial locations. The early pioneer developments—starting with Broadgate on the fringe of the City of London in the 1980s—actually added to public space by allowing access to previously private sites (such as railway lines and docklands).

Overall though, the ‘growing privatization of the public sector’ arguably constitutes a ‘quiet revolution’, worrying some urban theorists for two main reasons. First, there is the deceptive (some would say disingenuous) use of language. Although new developments are creating new spaces referred to blithely as ‘public’, in fact they are privately-owned and managed—and the owners are at liberty to restrict access as they wish. The 2011 Occupy movement is a case in point—the protesters were prevented from using Paternoster Square (in the City of London); although most people thought of, and used, the square as a public space, it is in fact privately owned. The owners quickly and rigorously asserted their rights, erecting notices which stated that there was absolutely no free right of access. Forced to turn to the square in front of St Paul’s Cathedral—certainly a public space—the protesters were eventually even evicted from there too.98

97 ibid 2.
The second cause for concern is political, and relates to private-public spaces carved out of public spaces, such as Liverpool One, in which over 30 streets in the city centre are run by a private landlord, effectively removing public rights of way.\textsuperscript{99} On a smaller scale, shopping centres often incorporate the public highway, yet are able to impose their own restrictive by-laws.\textsuperscript{100} In these cases, previously public land has been turned over to a single private landlord to exploit and manage; in essence this is the expropriation of common resources by the private sector. Here, there are major issues of democracy and accountability, with the public sector handing over management of previously public spaces to unaccountable institutions. As such, it is argued, such private mega-developments undermine trust and social cohesion.

7. ‘A Spacious Horizon is an Image of Liberty’:\textsuperscript{101} Conclusions

There is no doubt that land, particularly rural land, is very different from other possessions, and ownership cannot be absolute. Allocation of the sticks in the property-owner’s ‘bundle of rights’ can, and does, change over time and geography. Revisiting the table presented earlier, we can add the examples described above:

\textsuperscript{99} See Minton (n 93).

\textsuperscript{100} Layard, for example, discusses the commodification of public space in shopping centres, and suggests that the different legal regimes on either side of an (often invisible) dividing line turn multiplicity into uniformity. She gives the telling example of a Quaker who was prevented from distributing non-contentious leaflets in Quakers Friars, a shopping centre built on the site of a former Meeting House. Antonia Layard, ‘Shopping in the Public Realm: A Law of Place’ (2010) 37(3) Journal of Law and Society 412.

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Medieval England comprised a complex set of functional property rights, in which most ordinary people living in the countryside had a stake and which accommodated the agricultural cycle. The commons were, basically, accessible to all at all times; other land was accessible to some people, some of the time. Through enclosure, this was transformed into a more rigidly spatial system characterised by many invisible (and, of course, visible) fences. Individual rights, and exclusion, became the norm. CROW partly turned the clock back as some unimproved land became, once more, accessible to everybody.

Scottish reforms have been more dramatic, in that everybody is now allowed access to everywhere, and the current model is much closer to the everyman’s right of the Scandinavian model. America presents a conundrum. Historically, there was both openness and exclusion; today exclusion is the norm, although an argument can be made in favour of a right to roam on unimproved land.
Freyfogle reminds us that by definition private property represents a massive restriction on everybody’s freedom, and that in fact ‘liberty lives on both sides’ of the debate.\textsuperscript{102} To resolve the issue, we need to realise that the customary ‘bright line’\textsuperscript{103} between mutually exclusive categories of public versus private property is not necessarily the only option available to us.

This is especially clear in the urban context. In the UK, the creeping privatisation of previously public urban spaces has been seen as symptomatic of the current trajectory of neoliberalism, according to which the commons continue to be expropriated. Critics of such projects, such as political philosopher Michael Hardt, view the privatisation of public land through the same lens as the privatisation of, for example, the energy and water industries.\textsuperscript{104}

Ultimately, therefore, questions of public access do not only concern walkers, but are important to all of us. A quote from Merrill provides appropriate last words by referring to: ‘a complex tapestry of property rights … with different types and degrees of exclusion rights being exercised by different sorts of entities in different contexts.’\textsuperscript{105} Despite being an arch-essentialist, his seminal article supports the right to roam in all its manifestations, from the openness of Scandinavia and Scotland, to the current restrictive US regime, via the English ‘middle way’.

\begin{itemize}
\item \textsuperscript{102} Freyfogle (n 29) 83 and 114.
\item \textsuperscript{103} To use Anderson’s term. Anderson (n 54) 258.
\item \textsuperscript{104} Hardt would add to this the privatisation of modern commons, i.e. the products of human intelligence (ideas, knowledge, software, etc). Thus, for example, ‘biopiracy’ transforms indigenous medicinal knowledge into private property. See for example, Michael Hardt, ‘The Common in Communism’ (2010) 22(3) Rethinking Marxism 346.
\item \textsuperscript{105} Merrill (n 10) 753.
\end{itemize}
The advances in contemporary surveillance techniques have, for the past three decades, been bound with the development of cheap and efficient computational machines. These rapid changes in new media have made the task of theorising surveillance pertinent once again. Michel Foucault’s *Discipline and Punish* (1995) is a seminal work in this respect. Although Foucault himself focuses on the development of disciplinary techniques in the 18th and 19th centuries, which has led some scholars to declare his model of identity formation to be outdated, his work is nevertheless more relevant than ever. A distinction must be made between Foucault’s historically contingent examples and the generalisable theoretical apparatus he builds on their basis. Both the panoptic principle and disciplinary methods espoused by Foucault can be located at the heart of digitally augmented surveillance (dataveillance) and they have been, moreover, significantly amplified. This does not mean that nothing has changed in the actual practices of surveillance. The panoptic principle no longer depends on architectural enclosures, and has proliferated outwards into public spaces and homes. Disciplinary techniques, too, are far from gone, but there has occurred a shift from the body, as their primary locus of application, to the individual’s ‘digital double’, inhabiting virtual spaces. Moreover, computer databases make possible a new procedure of normalisation by way of forecasting: the individual is not disciplined in real time but is predicted in advance, based on the digital trace left by his activities.

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Surveillance, understood broadly as a strategic gathering of information, is by no means new. An oft-cited example of the earliest written record describing this activity is the Book of Numbers, where Moses sends his spies to explore the promised land of Canaan. Another is the Domesday Book, which itself was part of a surveillance apparatus; a massive register of the Englishmen and their property, it was instituted in 1086 by the Norman administration to consolidate the latter’s power through land transfers and a new taxation system. Yet, despite the historical precedent, there seems today to be a special sense of urgency surrounding the topic of surveillance, both in academia and beyond. There is a feeling that something has changed, that something new is under way. Perhaps rightfully so. The past few decades have seen rapid developments in personal computing and digital networking, the vast repercussions of which—social, political, economic—are overshadowed only by the extent to which they are not yet fully understood. Practices of surveillance are not an exception, and, although there has been no lack of theories of surveillance in academic literature, they too must be updated and subjected to this new ‘digital’ corrective.

As a field of study, however, surveillance is relatively young. A number of early attempts to make sense of institutionalised surveillance, interestingly enough, looked to George Orwell’s 1984 for inspiration. This quickly changed, though, with the publication (or, rather, translation into English) of Michel Foucault’s Discipline and Punish, a genealogy of the penal system in France and, to some extent, Europe in general. The work went far beyond the prison thematic and offered a trove of theoretical tools for conceptualising surveillance, all predicated on an account of power that, unlike Orwell’s ‘Big Brother’, was dispersive rather than rigidly centralised. Foucault’s main contribution in this area is his elaboration of Jeremy Bentham’s ‘Panopticon’ into a generalisable principle.

The Panopticon, or ‘inspection-house’, is an architectural arrangement that creates a specific power dynamic within (and with) its walls. The building is circular, with a watchtower in the centre and cells occupying the circumference. Each cell is equipped with a small window, overlooking the outside, to let in light, and an iron grating

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on the other side, to make the inmate visible from the watchtower.\(^2\) The immediate advantage of such an arrangement is that it mini-
mises the number of personnel required to effectively run the 
Panopticon, all the while maximising the possible number of inmates. 
One sees all. There is, however, a more peculiar benefit, which 
Bentham terms ‘the apparent omnipresence of the inspector’.\(^3\) The 
windows of the central tower are so designed that the inmate can 
never know whether he is under supervision. One sees all, without 
being seen. The tower, as it were, effects a virtual proliferation of the 
inspector’s gaze. As a result, obedience is procured not by means of 
kinetic violence but through the ‘soft’ power of observation. In a 
very real sense, an effective Panopticon makes its own architectural 
implementation redundant. To foster the paranoid awareness that 
one is being constantly watched—to reach for the ‘soul’, rather than 
punish the body—is to transform every inmate into his own warden. 
Thereby ‘[a] real subjection is born mechanically from a fictitious 
relation’.\(^4\)

Bentham understood the wide applicability of the Panopticon. Not 
merely a prison, it could be repurposed for ‘guarding the insane, 
reforming the vicious, confining the suspected, employing the idle, 
maintaining the helpless, curing the sick, instructing the willing’ and 
so forth.\(^5\) Nevertheless, for Bentham, it remained a ‘dream building’, 
rather than the ‘diagram of a mechanism of power reduced to its 
ideal form’.\(^6\) This is where Foucault proves helpful. As Greg Elmer 
points out, Bentham’s Panopticon is physically and conceptually 
centred on the figure of the inspector and his tower; whereas, for 
Foucault, it is the inmate that becomes the conceptual centre.\(^7\) Such a 
move is crucial. Bentham’s Panopticon is, in many ways, a re-
enactment of the patriarchal regime found outside its walls: a big 
daddy (or, shall we say, brother?), watching over the unruly. By 
shifting the focus to the inmate, on the other hand, Foucault’s

\(^2\) ibid 40-41.
\(^3\) ibid 45.
\(^5\) Bentham (n 1) 45.
\(^6\) Foucault (n 4).
\(^7\) Greg Elmer, ‘Panopticon—Discipline—Control’ in David Lyon, Kevin Haggerty 
Panopticism better captures the process of subjection and identity formation that is enacted by means of surveillance. Furthermore, Foucault developed a detailed account of the normative apparatus that puts the panoptic machine to use. It is not enough merely to generate an awareness of being watched, in order to make someone ‘behave’. As a principle of permanent, if illusory, visibility, panopticism does not answer the question ‘behave how?’ This then, is the function of discipline.

Panopticism and discipline are intricately connected in Foucault’s work. The former deals with maintaining a grasp on the subject; the latter seeks to make this power structure useful, by increasing both ‘docility’ and utility of the body.\(^8\) Discipline can work in a variety of ways, and be applied in a number of situations, but the result is always a certain stable ‘mould’, or a particular kind of ‘self’. From the disciplinary perspective, a soldier, for example, is something that can be made: establish a routine and a hierarchy; correct the posture; instil precision in handling tools and weapons; and, most importantly, turn all of the above into habit. By design, discipline is extra-juridical; it operates on a level too microscopic for law. Nevertheless, it is a court of its own, in which the smallest infraction must be penalised precisely because, for discipline, no offence is too small or insignificant. Be it school, work, or the army, one can always find an array of norms and, if one falls short of them, corresponding ‘micropenalties’ duly follow.\(^9\) Do not be late; do it faster; pay attention; try harder; wash your hands; be decent; and so forth. But, like the panoptic principle, discipline’s end game is not to punish, but rather to ensure the sustainability and automaticity of a power relation—by making its subject internalise the function of the policeman.

The relationship between discipline and panopticism should now become clear. To oversee the minutest infraction, a disciplinary apparatus must be able to ‘keep tabs’ on its subjects at all times. It depends, in other words, on a regime of permanent visibility: ‘The perfect disciplinary apparatus would make it possible for a single gaze to see everything constantly’.\(^10\) Thus, although panopticism and

\(^8\) Foucault (n 4) 138.
\(^9\) ibid 178.
\(^10\) ibid 173.
Discipline remain two separate concepts in Foucault’s work, they depend upon each other and work together—historically, at least. Or, to put it differently, they can be taken as two distinct analytic plains, pertaining to an actual institutionalised panoptic-disciplinary machine.

This, in turn, poses a number of problems for applying Foucault’s model to contemporary modes of surveillance. While variations on these issues can still be found in more recent surveillance literature, arguably two of the biggest concerns remain those raised by Foucault’s contemporaries, Gilles Deleuze and Jean Baudrillard.

The first focuses upon the issue of enclosure, as raised by Deleuze in his ‘Postscript on the Societies of Control’, a rather impressionistic yet highly influential essay. Deleuze maintains that Foucauldian ‘disciplinary societies’ are in the process of being supplanted by ‘societies of control’. If the former, to have an effect, relies on the quite literal containment of individuals within the walls of the prison, barracks or school, the latter dispenses with any such need. Disciplinary apparatuses ‘are moulds, distinct castings, but controls are a modulation, like a self-deforming cast that will continuously change from one moment to the other, or like a sieve whose mesh will transmute from point to point’. What this means, in practice, is that individuals are no longer contained by a series of disparate disciplinary institutions throughout their lives, but rather are controlled, without a break, from life to death, in a much less conspicuous fashion. Our example of the soldier is more or less a finished ‘product’ after completing his training; but a global consumer, for the lack of a better term, is always a work in progress. Indeed, the new disciplinarian for Deleuze is global capitalism, which need not confine in order to have a hold: ‘Man is no longer man enclosed, but man in debt’.

But Deleuze does not maintain that the transition is complete; only that it is on the way. The panoptic principle is still widely used to

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11 See, for example, Mark Poster and David Savat (eds), Deluze and New Technology (Edinburgh University Press 2009).
13 ibid 4.
14 ibid 2.
15 ibid 6.
this day, and there is evidence that creating an awareness of being watched still produces results.\footnote{Lynsey Dubbeld, ‘Observing Bodies. Camera Surveillance and the Significance of the Body’ (2003) 5 Ethics and Information Technology 151, 157.} So much so, in fact, that installing cheap fake surveillance cameras has become a widespread practice.\footnote{Anthony Caputo, Digital Video Surveillance and Security (Butterworth-Heinemann 2010) 3.} Nevertheless, the movement towards ‘unenclosure’ of individuals must be acknowledged as a contemporary reality: consider visa-free regimes; online education; and criminals wearing electronic ankle tags, instead of spending time in prison. There is consequently less pressure both to be immobilised architecturally and to remain forever the same as an individual.

Baudrillard’s criticism of Foucault is more vitriolic, and more general, but it is also more pertinent for our present question of the digitalisation of surveillance. In Forget Foucault, Baudrillard labels the Discipline and Punish project, among others, a ‘magistral but obsolete theory’.\footnote{Jean Baudrillard, Forget Foucault (Phil Beitchman, Nicole Dufresne, Lee Hildreth, and Mark Polizzotti trs, Semiotext(e) 2007) 34.} Foucault’s main offence, according to Baudrillard, is that his work is wedded to the ‘reality principle’; observation is carried out in the name of transparency of the real object (body) for the gaze.\footnote{ibid 31.} Power, no matter how dispersed, remains an objective reality, whose traces are recoverable by genealogical analysis; that which is done, as it were, ‘on the ground’ is still distinguishable from what is said about it. In other words, Foucault’s theoretical apparatus, for Baudrillard, is too materialist, whereas we have long since been living in the world of the symbolic. There is no objective link between a sports car and a semi-naked model presenting it, for instance; but neither does it matter, because, in a world where signs only relate to other signs, they constitute an objectivity of their own. Guy Debord, a great influence on Baudrillard, made this point previously: ‘When the real world is transformed into mere images, mere images become real beings—dynamic figments that provide the direct motivations for a hypnotic behaviour’.\footnote{Guy Debord, Society of the Spectacle (Ken Knabb tr, Rebel Press 1995) 11.} But, if Debord still believed in the potential power of the medium to de-alienate and turn back on the spectacle, Baudrillard would go a step further, and
say, after Marshall McLuhan, that ‘the medium is the message’;\(^\text{21}\) that the symbolic and the real have blended to the point of indiscernibility: ‘dissolution of TV in life, dissolution of life in TV’.\(^\text{22}\) If so, then Foucault’s talk of material bodies maintained under the gaze of optical arrangements seems insufficient. Bodies disappear under a thick crust of signifiers, as does the need for optics. Our Panopticons no longer require walls, because our disciplinary arrangements are losing interest in our bodies. Today, when much of work, play, and communication is carried out not in ‘the real’, but digitally and virtually, the insights of Debord and Baudrillard only gain salience. What this means, for surveillance in particular, is that digital representations of the individual are taken for the individual as such, where even the body itself becomes indistinguishable from its digital double within social media and intelligence reports, or on the screen of a drone operator. If Foucault’s panoptic-disciplinary model is to endure, it must account for these changes.

Such, then, are the two related problems: the disappearance of enclosures, and the disappearance of bodies. But one must separate Foucault’s theoretical apparatus from his historically contingent examples. We might wish to look for new examples, but Foucault’s model of panoptic-disciplinary identity formation remains useful.

Indeed, Foucault anticipates the proliferation of disciplinary techniques beyond places of enclosure and into a generalised mode of surveillance. A panoptic-disciplinary apparatus may rely on walls and optical trickery, but these are not its outstanding features: ‘The principle of “enclosure” is neither constant, nor indispensable, nor sufficient in disciplinary machinery’.\(^\text{23}\) The space upon which discipline operates is not primarily physical, but rather analytical. If the elements of a system (bodies, our ‘digital doubles’, or equipment) can be tracked, distributed, and controlled, in ways other than confining them to a specific place, so much the better. For discipline is first and foremost an ‘art of rank’; not so much a way of fixing the individual’s location, nor even fixing, once and for all, some individual qualities, but rather a technique for the classification and distrib-


\(^{22}\) ibid 30.

\(^{23}\) Foucault (n 4) 143.
ution of individuals in relation to others and themselves. Here is Lieutenant Jones, and here is Major Smith; they are ranked relative to each other, but each, individually, has their own opportunities for promotion and demotion also. Likewise, one is both ‘fixed’ in one place by their school grade, or illness history, and has some leeway to move about along the spectrum of categories.

The striking feature of a disciplinary apparatus, therefore, is not so much that it acts on bodies, but that it is in the business of isolating, arranging and sorting the elements under its control. If so, then it is not just the bodily motility that can be subjected to disciplinary procedures. Classification, and hence normalisation, can proceed on any level, be it one’s credit rating, citizenship or online purchase history. There is no need to lock anyone up in order to assign or determine those. In all likelihood, this information is already (or soon will be) contained somewhere in a database; it is retrievable, at will, in a matter of seconds. Is she worthy of a loan? Can he enter this country? What other purchases should Amazon recommend? The role of the database in this sense becomes central. It dispenses with the need for enclosure, because, whenever the individual comes into contact with the world—by logging in, swiping a card, producing identification, or simply showing one’s face in a public space, monitored by CCTV—his identity can immediately be established: in order to track, punish, advertise to, and so on.

Such increased mobility of the body can be seen as the corollary of the increased mobility of disciplinary apparatuses. The latter no longer need be confined to material sites, providing they can ensure ‘visibility’ in some other way. And, inasmuch as this visibility is maintained digitally, which allows for easy accumulation, access, consolidation, transfer or trade of information, this creates the opportunity for all kinds of decentralised disciplinary hybrids. One’s geolocation data collected by a smartphone, for instance, can serve a multitude of purposes (for a multitude of third parties) at once: personal fitness statistics; an alibi for the police, or the jealous partner; real-time delivery of location-appropriate sponsored messages; establishing a possible list of associates, when collated with other individuals’ geolocation data; and so on. Kevin Haggerty and Richard Ericson capture this mobile and decentralised nature of

\[\text{\citep{haggerty2019}}\]
Dataveillance in their conception of ‘surveillant assemblage’, which ‘is not so much immediately concerned with the direct physical re-
location of the human body … but with transforming the body into pure information, such that it can be rendered more mobile and comparable’. Liberated from the body, information flows can then be put to use in a range of ‘scattered hosts of circulation’—such as police stations, statistical or economic institutions, corporations or states—and thereby be employed simultaneously for a whole host of coalescing or conflicting purposes: security, control, profit, entertainment. Visibility, on this account, has little to do with transparency of the objective body to the surveillant gaze. Rather, the relationship is reversed; information itself becomes the condition of that which may be visible, and therefore objective. Such a state of affairs does not weaken Foucault’s disciplinary model; it merely relocates its functioning from the materialist ‘mode of production’ of the classical age to the ‘mode of information’, to borrow Mark Poster’s phrase.

In fact, if discipline is ‘an art of rank’, whose locus of application and manipulation is ‘the place one occupies in a classification, the point at which a line and a column intersect, the interval in a series of intervals that one may traverse after the other’, then we could even say that its functioning has never been anything but symbolic.

Baudrillard’s criticism, then, is not so grave after all. In order to witness the panoptic-disciplinary mechanism still at work, it is only necessary to examine its functioning on the symbolic, rather than material, level. It is not the body that becomes the site of disciplinary manipulation but, as it were, its ‘digital double’: its data-image, stored in a remote database. The two, of course, remain connected, but each also has a life of its own. David Lyon provides a bizarre, but apt, example. A number of individuals who claimed free sundaes on their birthdays at Farrell’s Ice Cream Parlour in the United States soon found draft registration warnings in their mail.

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26 ibid 609-613.
28 Foucault (n 4) 145-146.
The company, it transpired, had sold the lists of the claimants’
names to a marketing firm that, in turn, sold the data to the Selective
Service System. It was then bought by the Department of Defense.
This story illustrates two things. First, that panopticism can be
substituted by self-reporting; the element of permanent visibility
remains, but it no longer requires an exclusively optical or coercive
solution. The populace, as Poster puts it, has already been ‘disciplined
to surveillance and to participating in the process’.\(^{30}\) Second,
the digital, rather than the physical, becomes the site where the
disciplinary process takes place. In contrast with surveillance, which
relies on a material apparatus (a spy, a camera, a warden, a wall),
dataveillance dispenses with extension: it is the site of observation
itself.\(^ {31}\) Every click is potentially an act of self-reporting, and a
disciplinary corrective, all at once. Thus discipline no longer acts, in
the first instance, on the body, nor requires enclosure or interroga-
tion, for there is a faster and cheaper way to record, store and
retrieve information by means of the database and a user interface.
Yet the database preserves its function of a ‘mould’; only ‘relevant’
information is recorded—name, age, location, purchase history,
political views and so forth—and this, in effect, will constitute the
new individual.

The database, however, proves more flexible also, creating condi-
tions of possibility for a mode of surveillance that goes beyond
Foucault’s panoptic-disciplinary model. The database allows for the
accumulation and analysis of enormous amounts of information, and
the results of these analyses often pertain to events \textit{yet to occur}.
Profiling of individuals and populations, forecasting of climates and
economies, epidemiological analyses—all of these, and more, are
today simulated, rather than directly observed. This kind of
dataveillance is not so much focused on establishing the \textit{nature} of the
individual or event, but rather on the tracking of \textit{outward manifest-
ations} that can then be collated into patterns or compared against
already existing templates.\(^ {32}\) Potential ‘terrorists’ can be predicted
(and eliminated) in advance, based on their phone call history; an
unreliable debtor can be denied a loan, based on his credit rating;

\(^{30}\) Poster (n 27) 93.

\(^{31}\) See, for example, David Savat, ‘Deleuze’s Objectile: From Discipline to
Modulation’ in Savat and Poster (n 11).

\(^{32}\) ibid.
and anyone can be shown a tailored advertisement, based on their browsing history.

Not so long ago, Target took the media by the storm by ascertaining that a teenage girl was pregnant before her father did.\textsuperscript{33} Based on the girl’s purchasing history, the store’s algorithm conjectured her pregnancy and the appropriate coupons were promptly dispatched to the family. What is most troublesome in this, and hordes of similar examples, is not so much the invasion of privacy as the trend of constituting individuals in advance. Target did not make the girl pregnant, but the unborn child’s future can already be over-determined by purchases the store might suggest. Buy a blue ‘onesie’ and an algorithm speculates that you might have a boy, and suggests the next gender stereotypical item you might desire. This is where panoptic observation, conjoined with disciplinary normalisation, rears its head once again. The individual is no longer simply ‘known’ but is constructed, as it were, in real time and for time to come. Indeed, dataveillance of consumption seems to have become the new frontier for contemporary surveillance technologies. It was once the case that the worker could leave the capitalist enterprise behind the factory gate—but today it awaits him at home, under the guise of a web browser.

Bentham’s Panopticon was a humanist idea: the replacement of the power of violent coercion with a softer and lighter power of observation. In Foucault’s hands, however, the picture quickly becomes sinister. The potency of his analysis lies precisely in that he shows that invisible does not mean less real, and that soft power can be more effective than violence. And, although Foucault’s panoptic-disciplinary model, as we have shown, does require a corrective to account for the advent of the digital, it is still more than capable of encompassing and helping to understand a great number of surveillance sites, from the workplace to the web. It is also a general reminder that we are never quite as free as we might like to think; that claiming a free ice cream, or buying shoes online, can be an event less transparent and more life-changing than one could ever imagine.

\textsuperscript{33} Kashmir Hill, ‘How Target figured out a teen girl was pregnant before her father did’ (\textit{Forbes}, 16 February 2012) 
And Foucault’s model is useful, too, as a background against which new surveillance practices become more visible. The body disappears because it is infinitely cheaper, and more efficient, to maintain and enforce identities digitally: no optical arrangement or prison cell can compete, after all, with cloud computing. Recently, the omnipresence and somewhat menacing character of dataveillance have been brought into the public consciousness by Edward Snowden. The ensuing debate, however, has to date overemphasised the issue of personal privacy, predicated on the idea of an identity that is formed freely and independently. If, on the other hand, we recognise the power of dataveillance to mould and shape individuals, then the question of privacy becomes secondary; if not irrelevant. An interesting effect of Snowden’s revelations, moreover, is that they have created a panoptic effect of their own. Not by means of cell and watchtower, but via mass media, the populace has learned that they are, indeed, under constant observation. But, whereas the Panopticon maintained an illusion of one being watched at all times, dataveillance makes possible an actual uninterrupted observation of every individual of interest. Simultaneously, as Foucault never tired to point out, ‘where there is power, there is resistance’.34 The issues of digital security (and lack thereof) have taken centre stage in the past few years, and initiated a wealth of anti-surveillance projects as well as popularised several established ones. The new arms race, occurring in the digital space, is no longer dialectical. States—but also corporations, military and paramilitary organisations, digital mercenary groups and skilled individuals—form heterogeneous, and sometimes contradictory, ‘surveillant assemblages’, in which they both survey and have to fend off surveillance from others. Unburdened from physical constraints, dataveillance techniques are increasingly mobile, decentred, numerous and ever-evolving. They are, therefore, never ‘bad’ per se, inasmuch as they can be put to different uses. But it is also true that the potential victors in this arms race are those parties who can procure better technology professionals, and sustain bigger data centres—making dataveillance subservient to capital; introducing the possibility of its relative re-centralisation; and producing individuals disciplined to consume.

34 Michel Foucault, The History of Sexuality Volume 1: An Introduction (Robert Hurley tr, Pantheon Books 1978) 95.
When Privacy Feeds Surveillance: The ECJ’s Decision on Google vs AEPD and the Brazilian Experience

SAMANTHA S MOURA RIBEIRO*

The ECJ’s decision on Google versus AEPD stands out for it not only recognised the right to be forgotten as an implication of the right to privacy, but also gave precedence to it over freedom of expression and information. The irony in this ruling is that its application will ultimately push for more surveillance and hinder one of the internet’s democratic features. In comparison, the latest developments in Brazil’s internet regulation framework seem to evolve very differently, signalling that the neutrality of data movement and other democratic features of the internet should be preserved. Traditionally, Brazil has given precedence to other individual rights, such as privacy and honour, over freedom of expression. However, recent rulings from Brazil’s highest courts have acknowledged the need to grant extensive protection to free speech and free access to information as a basic contribution to democratic development. The neutrality of data movement in the internet must, therefore, be preserved for this end. In this paper, I propose to analyse: 1) the arguments that lead the ECJ to conclude that, upon request, Google should remove links to lawfully published contents, 2) the consequences of this decision from the perspective of surveillance, 3) the recent Brazilian rulings and legislation that champion freedom of expression and/or internet neutrality, and 4) possible ways to neutralise the negative impacts of the ECJ’s decision on the internet.

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Introduction

The decision of the European Court of Justice (ECJ) on Google v AEPD marks an interpretational shift concerning the extent of responsibility of search engine operators.¹ The ECJ applied Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data in a rather literal way, giving full protection to privacy while putting little weight on the ruling’s implications for other rights, such as freedom of expression and entrepreneurial freedom. It appears that, ‘in the best interest’ of natural persons, fundamental rights are called upon to justify surveillance.

Given the lack of borders in the internet’s virtual realm and the multiplicity of legal orders that co-exist and intend to regulate it, transnational dialogue is crucial for achieving efficient internet governance.² In this context, we draw attention to the latest developments of the internet’s regulation framework in Brazil.

Traditionally, Brazil has given precedence to protecting people’s honour over freedom of expression. However, recent laws and court rulings have marked a change in this respect. The internet has allowed the exercise of freedom of expression in such a full dimension that it contributed for the development of individual autonomy and social inclusion.³ The recognition of this fact makes it clear that even when the protection of other fundamental rights call for restrictions on freedoms, it is vital to support free speech and free access to information on the internet.

In the following two sections I discuss the ECJ’s decision on Google v AEPD and its possible impacts, in particular on surveillance and democratic access to information. Then I draw attention to the Brazilian experience. Despite the lack of uniformity in the Brazilian jurisprudence, the reasoning of Brazilian high court rulings and the

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¹ Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González (2014).
² For a general account of the increasing need for dialogue between diverse and multilevel constitutional orders for dealing with constitutional challenges that transcend the particularism of national states, see Marcelo Neves, Transconstitutionalism (Hart Publishing 2013).
³ For further development of this argument, see Samantha Ribeiro, ‘Democracy after the Internet: Brazil between Facts, Norms, and Code’ (PhD Thesis, European University Institute 2013).
Internet Bill of Rights represent an effort to preserve the role the internet plays for the promotion of freedom of press, expression and information. Finally, in the last section, I propose ways to neutralise the unwanted impacts of the ECJ’s decision on the functioning of the internet. The conclusion is that the ECJ’s decision points to the desperate need to further discussing the related European legislation—in particular Directive 95/46/EC—in order to preserve the positive democratic features of the internet, striking a balance between the protection of privacy and freedom of expression and information.

The Burden of the Removal upon Google: The Decision and its Grounds

The Court of Justice of the European Union was asked by the Spanish National High Court to answer a series of questions regarding the argued right of a Spanish citizen to request Google Spain or Google Inc to remove personal data related to him from their index. This way the data would no longer appear in the search results when an internet user entered his name into the Google search engine.

In brief: Mario Costeja González, a Spanish national, filed a claim with the Spanish Data Protection Agency (AEPD) against Google Spain, Google Inc, and Vanguardia Editiones SL, the publisher of a daily newspaper with a large circulation. The reason for the complaint was that whenever someone used his name as a search term on Google, there would appear among the results links to newspaper pages from 1998 containing announcements for a real-estate auction organised for the recovery of social security debts owed by Mr González. Arguing that the proceedings that led to the auction had been fully resolved for years, Mr González sought the removal of those references that were by now completely irrelevant, according to him. The AEPD rejected the complaint against La Vanguardia, on the grounds that the indicated information had been lawfully published, and upheld the complaint against Google Spain and Google Inc, requesting them to withdraw the data from their index. Thus, Google Spain and Google Inc brought actions before the Spanish National High Court (Audiencia Nacional) seeking the annulment of the AEPD’s decision. The ECJ was then called upon to
clarify the interpretation of Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

Given the limited scope of this paper, I will not comment on all the questions posed by the Spanish National High Court. I will rather focus on the ECJ’s rationale directly linked to the main point we would like to discuss: the recognition of the right of a citizen to request an internet search engine operator to suppress from its index links to information that is available on the internet and that had been lawfully published.

In its introduction, the Directive declares: ‘data-processing systems are designed to serve man’, and they must ‘respect their fundamental rights and freedoms, notably the right to privacy, and contribute to economic and social progress, trade expansion and the well-being of individuals’. Article 14 of the Directive grants to data subjects the right ‘to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation.’

In the course of the analysis of these and others clauses of the Directive, the Court had to decide whether the search engine operator’s activity should fall under the definition of data processing; and if so, whether the operator should be responsible for the data processing. Despite Google’s argument that this should not be the case, for they process data available on the internet neutrally, without discriminating or filtering, and they neither assess the data nor exercise any control over it, the ECJ found that search engine

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4 Among the questions the Spanish High Court referred to the European Court of Justice, there were important issues related to the territorial application of the European Directive and the jurisdiction of the Court subsequently. For instance, the Spanish High Court questioned the ways in which an ‘establishment’, within the meaning of Article 4(1)(a) of Directive 95/46, should be defined. Also, the meaning of ‘use of equipment … situated on the territory of the said Member State’, in Article 4(1)(c), had to be interpreted with regard to the use of crawler and robots to locate and index information, the storage of information and the use of the Member State’s domain. Moreover, the Court had to decide whether the data processing was within the context of the activities of Google Spain. See Google (n 1) at para 20. For a discussion of the extra-territorial implications of the decision, see Brendan van Alsenoy and Marieke Koekkoek ‘The Extra-Territorial Reach of the EU’s “Right to Be Forgotten”’, (ICRI Research Paper 20, 19 January 2015) <http://ssrn.com/abstract=2551838> accessed 10 March 2015.
activity does fall under the definition adopted by the Directive and the operator should be liable. The operator’s liability was further justified on the ground of the effective and full protection of people. The Court found that excluding the operator would make it impossible to guarantee individual privacy rights, for the search engine is the tool that allows the information to spread, reaching a much broader audience.

Following this argument, the Court found that the search engine operator is, in certain circumstances, obliged to remove links to web pages, even when the information is lawful and is not erased from the web pages. The search engine enables any internet user to obtain a detailed profile, a structured overview of the information related to an individual just by searching his/her name. This fact, according to the ECJ, is a serious interference and cannot be justified merely by the operator’s economic interests. The Court observes, nevertheless, that there should be a balance between, on the one hand, the data subject’s fundamental rights; and on the other hand, the potential legitimate interest in having access to the information in question. The assumption, however, is that the interest in accessing the information will only prevail when the concrete case has special features, for instance when the data subject plays a role in public life.5

Further, based on the interpretation of Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, the ECJ found that the data subject has the right to be forgotten and therefore can request that information linked to his/her name be removed from the list of results displayed by the search engine following a search made on the basis of his/her name. Such a request can be directly addressed to the search engine operator, who will analyse its merits. In case of denial, the data subject may bring the matter before the supervisory authority or the judicial authority.

The rationale behind the Court’s decision was a literal application of the Directive in order to guarantee the maximum extent of protection to individual fundamental rights to privacy and data protection.6 The Directive had embraced broad definitions, for it

5 Google (n 1) para 97, and para 100 n 4.
6 For an analysis of other cases in which the ECJ applied the Directive pushing forward the protection of data privacy rights, see Federico Fabbrini ‘The EU Charter of Fundamental Rights and the Rights to Data Privacy: The EU Court of Justice as a Human Rights Court’ (2015) iCourts Working Paper Series, No 19, in Sybe de Vries
aimed at regulating new technologies that were not well known previously. The Court interpreted and applied the Directive following the logic of guaranteeing protection by making liable the intermediate agent that is easier to reach. So, despite the arguments claiming that the search engine operator does not filter, discriminate or control information and that the website editor is responsible for the publication of the information and has means to signal that a specific content should not appear in the search engines’ results, the ECJ found that the search engine operator should be liable and should omit content, even when the content is lawful and available in the website. The court did not consider the relevance of preserving the neutrality of internet search engines, nor the fact that the Directive was approved in a different time, when the internet was still incipient and it was difficult to adopt more accurate definitions.

Furthermore, it can be argued that the ECJ applied Articles 7 and 8 of the Charter of Fundamental Rights of the European Union without regard to other rights in the Charter. Article 11 on freedom of expression and information should be considered as well, since it expresses other fundamental rights that are implied in the case and should have at least as much weight as the rights to privacy and to data protection. In this sense it appears that the ECJ perhaps made a mistake when it found that the right to privacy should be limited by the public interest only in those cases where a special circumstance would signal the existence of a public interest in the specific information concerned and that this case by case assessment would suffice to better guarantee fundamental rights.

Looking at the bigger picture, the practical consequences of the right to be forgotten, combined with the obligation of search engine operators to omit results, have negative effects on the whole structure and functioning of the internet, which hinders the protection of fundamental freedoms, in particular for those people previously excluded from access.


7 In the same direction, Fabbrini (ibid 21) points out that ‘the ECJ has essentially reduced the scope of application of Article 11 of the Charter in a very significant way.’

8 For an analysis of the decision’s shortcomings concerning the effective protection of fundamental rights, see Eleni Frantziou, ‘Further Developments in the Right to be
Promoting Surveillance on Account of Protecting Individual Rights

Google has been going through a process of adaptation since the ECJ’s decision. Until the beginning of September 2014, the company had received 120,000 requests to omit results from its index and about half of them were accepted. The company created an online form for the requests and it is creating committees to decide on standards for accepting or denying requests.

Google now has the obligation to verify and filter information in order to decide whether or not a link should appear in its index. Once a request is presented, it is up to the search engine operator to justify the denial, therefore there is an incentive to accept the requests, arguably making room for abusive practices. In this context, private companies now have the obligation of monitoring published content and to delete results based on unclear legal standards; even when information is public and lawful, its internet link might be taken down.

Since there was no effective control, one could argue that the search engine operator could even in theory make this sort of decision before the ECJ’s ruling. Nevertheless, it had no legal basis to do so and the operators claimed that their activity was neutral and they treated information on the internet on equal basis. After the ECJ’s decision, however, the search engine operators will be allowed and obliged by law to abandon their neutrality. To apply the law as set out by the ECJ, they will create committees and develop a whole new structure to monitor and filter lawful content, arguably without clear legal control or standard reviews.


Furthermore, it is important to give emphasis to the fact that the link to the content is taken down, but the content itself remains available in the original website. The data is protected only from being accessed by those who found it using the search engine. Those who have access through other databases (such as newspaper archives, for example) will still have access to data. For instance, in Germany, there are newspapers that keep a digital archive accessible for all those who are prepared to pay for it. In this system, a citizen in the same situation as Mr González could potentially have problems with doing business and obtaining credit without knowing that the information about his previous debts is still circulating in private databases.\(^{11}\)

The practical consequence of obliging the search engine operator to omit from its index links to lawful contents that do exist in the internet essentially allows for more surveillance. Burdening the search engine operator to decide, upon request, on whether the person who is requesting the content to be suppressed has a right to do so, generates further possibilities for more surveillance. This is a central contradiction to the declared objective of the ECJ to guarantee the full protection of the right to privacy.

On the ground of protecting privacy, the ECJ’s decision opens the possibility of developing a system that hinders transparency and creates different classes of information. This allows for more surveillance in its more fundamental meaning of being watched from above. In other words, ordinary citizens have their rights to access to information restricted, whilst governments, big companies, newspapers and banks may keep track of citizens’ information without the citizens being fully aware of the existence of such records or having access to the data.\(^{12}\)

\(^{11}\) See Anja Seeliger ‘Wer zahlt, der findet.’ (Perlentaucher.de, 5 May 2014) <http://www.perlentaucher.de/blog/452_wer_zahlt__der_findet.html> accessed 23 April 2015. The article claims that the decision is not about data protection but rather about restoring the information hierarchy of pre-digital times.

\(^{12}\) For an early discussion of the threats related to the lack of transparency and surveillance brought about by the development of internet technologies, see WBHJ van de Donk, IThM Snellen and PW Tops (eds), Orwell in Athens: A Perspective on Informatization and Democracy (IOS Press 1995).
The Brazilian Experience

In the opposite direction of the shift that the ECJ’s decision may cause on the internet, the Brazilian Supreme Court (STF) recognised the overall precedence of the freedom of press and other related rights over the protection of the people’s image in a decision in 2009. Furthermore, in 2012, the Brazilian Superior Tribunal of Justice (STJ) decided that Google, as a search engine operator, could not be obliged to take down links to contents that were published on the internet, even when the publications’ legality was under discussion.\[13\]

At this point I think it is interesting to shed light on the arguments and discussions that take place currently in Brazil. In particular because, despite the positive impact of the referred decisions, Brazilian jurisprudence is far from being uniform when balancing freedom of expression/access to information with the rights to privacy, image and data protection. There are hopes that the recently approved Internet Bill of Rights will help to stabilise expectations whilst guiding towards a balance that will guarantee the maximum extent of protection to the most fundamental rights.\[14\]

Even after years of suffering with censorship during the military dictatorship, the general legal tradition in Brazil has been one of recognising freedom of expression with an accompanying responsibility. Under Article 5, IV, of the Brazilian Constitution, thoughts may be freely expressed, but this expression cannot be anonymous. Article 5, V, grants a right of reply proportional to the offence, plus compensation for moral and material injury. In short, people can say whatever they want as long as they can be identified and are ready to compensate whomever they injure through their speech.

Until quite recently, Law 5250, known as the Press Law, promulgated in 1967 during the military dictatorship, was still valid. Only in 2009 did the Democratic Working Party (PDT) resort to a judicial

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\[13\] In Brazil, the Supreme Court is essentially the constitutional court, while the Superior Tribunal of Justice, among other competences, works as a court of appeals in cases discussing the interpretation and application of federal law and international treaties.

\[14\] The so-called Brazilian Internet Bill of Rights (Law 12965) was approved in April 2014 after a long period of debates and an innovative online collaborative process of suggestions and amendments. It has been welcome as an important step toward rights-oriented internet regulation.
remedy introduced with the 1988 Brazilian Constitution (the ADPF)\textsuperscript{15} to request the Brazilian Supreme Court (STF) to declare whether the Press Law was incompatible with the 1988 Constitution.\textsuperscript{16} Law 5250/1967 had articles that dealt with different forms of censorship. It also established punishments, which were more severe than the ones set forth in the Criminal Code for ‘abuse’ of the freedom of expression. The abuses were 1) publicising war or racism; 2) publishing state secrets; 3) publishing untrue or truth-bending facts; 4) offending public morality and good habits; 5) agreeing not to publish any fact or news item in exchange for money or favours; 6) inciting crime; 7) calumny; 8) defamation; and 9) injury.

In April 2009, the STF declared Law 5250/1967 incompatible with the 1988 Constitution.\textsuperscript{17} The main point of discussion was the balance between two blocks of fundamental rights: the rights that give content to freedom of press on the one hand; and the rights to one’s image, reputation and private life, on the other. The Court found that the first block of rights had precedence.\textsuperscript{18} The second block must be applied \textit{a posteriori} to grant the right of reply and to determine civil, administrative, and criminal liability. \textit{A posteriori} application is sufficient to prevent abuses of the press. Freedom of

\textsuperscript{15} The judicial remedy (ADPF) is called ‘Arguição de Descumprimento de Preceito Fundamental’ (Allegation of Noncompliance with a Fundamental Precept). It allows some social actors to request the Supreme Court to declare whether a legal provision violates a fundamental value embedded in the Constitution or not. See Article 102, § 1, and Federal Law 9.882/1999. The initiative proposed by the PDT is the ADPF 130-DF: Partido Democrático Trabalhista – PDT vs. Presidente da República e Congresso Nacional, 30/04/2009.

\textsuperscript{16} ADPF (legal action against the violation of a fundamental constitutional principle) 130 was filed by the Workers’ Democratic Party, which claimed that the law was incompatible with freedom of expression, access to information (Article 5, IV, V, IX, X, XIII, XIV), and all the constitutional provisions on social communication (Articles 220-23). The Supreme Court struck down the law by seven votes to four.

\textsuperscript{17} In 2008, the STF had already found some provisions in this law unconstitutional. Amongst these provisions that had been struck down by the STF’s provisional decision were the following: the possibility of censoring public entertainment; the prohibition against creating newspaper or broadcast companies by foreigners; imprisonment as punishment for defamation, injury, and calumny; a predefined range of fines as punishment for publishing erroneous news reports; the prohibition against importing foreign literature containing information contrary to national security; and the permission to seize and destroy books or any press material that publicises war or racial prejudice or are contrary to public morality.

\textsuperscript{18} See ADPF 130 [15].
the press is an extension of the freedom of expression and is essential for critical thought, which must be at the foundation of a democratic state. The justices of the Supreme Court emphasised that freedom of press is not a right of the journalist or of the media owners but a right of the people to have access to autonomous and independent information.

Further, the Court stated that Article 220 of the Constitution extended the full freedom of the press by stating that the exercise of rights to creation and to information, as well as to freedom of thought and expression, were shielded from any restriction, independent of the physical or technological support used to convey the content so created. The constitutional articles that protect other rights must be applied as a consequence of the full exercise of those higher rights. The Court’s decision then stated that, given that the Constitution was silent regarding the internet, there was no way to deny the internet its qualification as a virtual territory of free expression of ideas and opinions, debate, news, and everything else that underpins full communication.

The Court also found that, given how important the press is for democracy, the former being essential for the latter, freedom of the press must be even broader than individual freedom of expression, thought, and information. Article 220 §5 of the Constitution represents the actualisation of pluralism as the basis of authentic democratic societies. A free press is plural, and monopoly and oligopoly are forbidden.

The decision represented a milestone in Brazil’s democratic history. Even so, there are still many contradictions surrounding the interpretation and application of fundamental rights, such as freedom of speech, access to information, the right to one’s reputation and image, author’s rights, and so forth, in particular when it comes to the internet. In a controversial decision in 2011, the Superior Tribunal of Justice determined that the manager of a social network not only had a duty to take down pages where offenses were posted, but that it was also required to prevent other pages with similar offenses to the same victims from being uploaded. In that specific case, the lawsuit was brought by the Ministério Público in defence of

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19 Article 220, § 5 (free translation): ‘The social communication media cannot directly or indirectly be an object of monopoly or oligopoly.’
minors who had been offended in one of the virtual communities of Google’s social network Orkut. The STJ understood that taking down the pages was not enough, as new pages were emerging in the same network. Therefore, the court determined that Google had to prevent these new pages from being uploaded. Google claimed that they did not have the technical or human resources to comply with that decision, but the court found that if Google made the content posted on those pages available, and if Google benefited from such content, then Google was required to make available the means to neutralise abuses.\(^{20}\)

In another lawsuit, the Formula One driver Rubens Barrichello claimed damages for moral injury for Google not having taken down fake profiles and offensive communities from the social networking website Orkut. The Appeals Court of São Paulo overruled the decision of the lower court, thereby decreasing the money damages owed by Google for moral injury, but it upheld Google’s liability. The decision found that the content was clearly illicit and that there was no justification for Google to wait for a court order after notification by the plaintiff. The court found that this was not a case of balancing the plaintiff’s reputation with others’ freedom of speech. The illicit conduct was clear, for the action of posting personal offences and using foul language on the internet against a professional racing driver are not included in the exercise of freedom of speech. Thus, the Tribunal upheld that Google should have taken down the content after notification.\(^{21}\)

Therefore, as concerns social networks, the STJ has consolidated an understanding that determines that an application provider is not liable for content uploaded by third parties, as long as the provider takes strong measures to take down the content after being notified that the content is illegal or damaging to another person’s rights.\(^{22}\) Also, the provider has a duty to make the user identifiable and to counteract anonymity.\(^{23}\) Once a provider is notified of unlawful

\(^{20}\) See STJ REsp 1.117.633-RO Google Brasil Internet, Ltda, vs Ministério Público do Estado de Rondônia, 26/03/2010.
\(^{21}\) REsp 1337990-SP: Rubens Gonçalves Barrichello vs Google Brasil Internet, Ltda. The STJ decided to hear the controversy on 06/08/2012.
\(^{22}\) However, this interpretation may change, for the Internet Bill of Rights determines that a court order is required for obliging an application provider to take down content uploaded by third parties. Article 19.
\(^{23}\) See STJ REsp 1308830-RS, REsp 1193764/SP, REsp 1192208-MG, REsp
uploaded content, it should take all measures to take that content down; otherwise the provider becomes liable together with the person who caused the injury.

Despite the Supreme Court (STF) decision on the ADPF 130 giving precedence to freedom of expression, judicial decisions are still contradictory and many of them thus far give equal weight to both freedom of expression and liability. The decisions do not seem to follow the STF’s line of thought in the direction of broad guarantees of freedom of expression, followed by secondary rights of reply and liability. To some extent, the decisions seem to argue that if the courts were to choose one of the two possible approaches, they would stick to liability. If there was only one form for exercising freedom of speech, and this form made liability impossible, it appears that the courts would choose to forgo freedom of speech in order to protect reputation and image.24

This imbalance, which to some extent identifies with the ECJ’s decision, can be overcome by the application of the Brazilian Internet Bill of Rights. The Bill guarantees the fundamental rights of users and therefore intends to protect privacy, freedom of expression and access to information. The Bill reflects the concern of preserving openness, freedom and innovation on the internet. Therefore it accompanies the tendency of limiting provider’s liabilities. According to the Bill, the access provider is never liable for third parties’ contents whilst application providers are obliged to take down content only upon receiving a judicial order. The Bill was necessary to provide legal security and balance in the relations between, on the one hand, content and application providers and, on the other hand, users. In this same direction of limiting liability to preserve openness and transparency, some judicial decisions had already paved a suitable path when it comes to the liability of search engine operators.

1306066/MT, REsp 1193764-SP, REsp 1186616-MG, REsp 1175675-RS, and REsp 1186616/MG.

24 The STF has recognised the general repercussions (the relevant legal, political and social aspects) of this issue and is currently examining a concrete case on appeal where other courts have ruled against Google, determining that the provider paid damages and took down content uploaded by third parties on a social network. As it is a case of general repercussion, the rule coming out of this case will be binding on other courts. See Google Brasil Internet Ltda vs. Aliandra Cleide Vieira (ARE 660861 RG / MG).
As concerns the liability of Google as a search engine, the STJ has decided that the company is not liable and does not have a duty to take content down. In June 2012, the STJ ruled that search-engine websites are not liable for the content made available on the internet, and that they cannot be obliged to take down text, video, or pictures. In this specific case, the Brazilian TV presenter Xuxa Meneghel brought a lawsuit against Google. She wanted Google to filter out search results that turned up pictures of her when users typed in the words ‘Xuxa paedophile’. The STJ overruled the decision of the Tribunal of Justice of Rio de Janeiro, which had set a forty-eight-hour deadline, with a daily fine of R$20,000 for noncompliance, for Google to filter the search and block the offensive results.

The rapporteur in the case, Judge Nancy Andrigui, found that search-engine providers only indicate the websites where the contents being searched for can be found. They are not liable for what is available on the internet. If a website carries offensive content, the offended person must require the website to take it down. Liability cannot transfer to the search-engine provider. According to Judge Andrigui, obliging search-engine websites to previously check the content of websites would hinder one of the main attractions of the internet, which lies in its providing information in real time. Although a search engine facilitates access to web pages, even when the pages have potentially illegal content, they are public and part of the internet. Balancing the rights involved and the risk of violation, the guarantee of freedom and of access to information must have precedence, especially since the internet is an important medium of social mass communication.

In Brazil, it seems that the democratic contribution of the internet is being slowly recognised. Even though the digital divide is still a relevant concern, there are more and more people gaining access to the internet. Once connected, everyone has equal chances to access information, to contribute, to negotiate identities and meanings. People have more access to pluralistic information and become less vulnerable to mainstream cultural production and to mass media discourse. Even if the cultural background and technical skills play a role in the absorption of information and on the quality of the

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25 STJ REsp 1316921-RJ.
contribution, there is still a collaboratively constructed medium of social mass communication where all the information is public and available to everyone equally.

**Possible Ways to Neutralise the Adverse Effects of the ECJ’s Decision: A Step Back**

In the long run, the maintenance of the findings of the ECJ’s decision will most probably impact the internet in a negative way. As noted above, the decision goes against the tendency to make efforts to preserve internet features that were responsible for the development of a free information society based on transparency, innovation, openness and the free and instant flow of information.

The internet brings with it the potential for democratic improvements, as it allows for people from different social and economic backgrounds to have equal access to information and to express themselves freely once they are connected. In the dynamic of the internet’s development, new possibilities of participation and emancipation are opposed by the fear of a shift that would place the new technologies out of control. In this context, the preservation of openness, transparency and neutrality plays a central role. A lack of transparency, conspiring with the increased flow of information, would make people unaware that records were being kept and that this practice could potentially undermine basic liberties and privacy.

The uniform application of the ECJ’s interpretation of the Directive 95/46/EC in Europe might cause significant damages to the functioning of the internet. The ECJ’s decision contributes to this lack of transparency and to the restoration of old divisions concerning access to information. Following the decision, a number of links to articles published in European newspapers were taken down from Google’s search results. Once again, the consequence is a less

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27 For analysis of the empowerment potential of the internet, see Ribeiro (n 3) 158 ff.

pluralistic internet and a society where those who have direct access to newspaper databases have more privileges than those who do not. Furthermore, it creates a system where private companies have the power and the obligation of deciding on the adequacy of lawful content, censoring access and restricting fundamental rights of editors and users. The ‘right to be forgotten’ will be hardly granted in practice, for the information will not be completely deleted and there will always be resistance, as the initiatives of Wikimedia to record erased links already demonstrate.

If there were to be two classes in a new information society, there should be at the very least more accurate legally defined criteria to guide the acceptance of a request to take down links, and mechanisms to guarantee to citizens that they could track the recording and availability of information linked to them. If this is still not the case, we are only left with hopes that the criteria defined by the search engine operator will be reasonable in relation to the guarantee of the free flow of information and the right to free access to information.

All of these are, however, temporary solutions. If there is a concern with the promotion of freedom and inclusion, and with preservation of the internet as a free mass communication medium, this task cannot be left to courts, to agencies, and even less to private companies. Drawing from the Brazilian experience of the Internet’s Bill of Rights, it appears that new regulations would be most welcome, adopting more accurate definitions, and seeking to translate the essential meaning of the most basic individual rights to the practice of the internet’s realm through the guarantee of openness, transparency, and cooperation. Once the interpretation and application of pre-existent laws are incapable of perceiving and incorporating positive changes brought about by new technologies, there will be continual tensions that will ultimately risk throwing us back into the old patterns of the pre-existent social order. Now would be a good time to step back and review our legal benchmarks.


29 For an interesting perspective of how resistance may shape the development of new technologies, see Jonathan Zittrain, The Future of the Internet and How to Stop It (Penguin 2009).

Gendered Archetypes and Veils of Objectivity: Identifying Possibilities and Manifestations of Normative Influences in Swedish Rape Proceedings

MIKAEL SILFORS*

After drawing a discursive theorisation of norms in legal practice, this article outlines the shared linguistic manifestations of extra-legal gendered norms in Swedish criminal proceedings on rape. Spaces for interpretation and reframing created behind images of flawless positivist objective procedural conduct are targeted for analysis, identifying regularities in the decisive factors of the verdicts, including what is attributed and dispossessed of meaning. Two discursive orders of rape are found to constitute judges’ perceptions of what the act of rape entails, separated by the existence of preceding relationships between the parties. The orders constitute adjudication processes in response to archetypes of how the events of the crime as well as the criminal proceedings usually take place, based in traditional conceptions of women’s bodies and sexuality. Injured parties are thus understood as responsible for being exposed to what took place during the event, while suspects’ responsibilities are non-existent as long as they can claim ignorance.

Introduction

Sexual violence, and particularly rape, has been subject to intense legislative changes in recent Swedish history. 2014 was marked by wide-reaching and reoccurring expressions of outrage through protests and the media in response to a number of notable acquit-

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Despite such measures in the legal and public spheres, gendered
social norms regarding rape still often place responsibility on the
victim. Furthermore, there has been no decrease in the prevalence
of the crime, and no increase in the number of reports filed by victims
or guilty verdicts. The situation raises two questions. First, how
does the objectivity pursued in criminal procedures create a pos-
sibility for influence from behavioural instructions in decision-
making, beside those of criminal law and procedure? Secondly, what
influences can be found in the regularities of decisive factors of
criminal procedures on rape? The central claim of this article is that
this problem at least partly originates in the way constructions of
objectivity create a possibility for legal discourse to constitute a
gendered norm among judges. It is a norm based on a perception
where rape is wrong, but where only some perceived categorisations
of forced sexual acts are considered to constitute rape.

Pursued through the positivist understanding of Swedish legal
professionals, where descriptive, interpretive or decision-making
processes are expected to generate the same result regardless of actor,
the term objectivity is misleading. It is an obfuscating construction
rather than an epistemological condition. By removing the decision-
makers from the text, that is, the visible embodiment of the decision-
making in the proceeding, and disregarding the impact of the in-
dividual’s empirical framing of the event, the resulting image appears
to be free of influence. Objectivity is constructed as a veil under
which subjective influence gains a space for influence. Since every
social problem does not have a corresponding legal rule, the con-
version from an allegedly criminal event, through the process of

1 See for example: Carl Jönsson, ‘Starka protester mot våldtäktsdomen’
(Sydsvenskan 16 June 2014) <http://www.sydsvenskan.se/malmo/starka-protester-
mot-valdtaktsdomen> accessed 30 January 2014; Viktor Adolfson and Mathilda
Andersson, ‘Efter våldtäktsdomen—tusentals demonstrerar för samtyckeslag’
(Nyheter24 1 January 2014) <http://nyheter24.se/nyheter/inrikes/760455-et-
ervaldtaktsdomen-tusentals-demonstrerar-for-samtyckeslag> accessed 30 January
2014.

2 Frida Olsson, Strukturerad bevisvärdering eller ren gissningslek? En studie av
tingsrätternas bevisvärdering vid våldtäkt år 2012 (Lunds Universitet, 2013).


adjudication into a sentence, makes several internally correct verdicts possible.\textsuperscript{5}

This potential for extra-legal influence raises questions concerning the boundaries of the discursive order of rape and the ethical-political positioning and socio-structural experiences of the judge.\textsuperscript{6} Quantitative studies that show structural discrimination in legally flawless decisions indicate that there is a problem behind the objective surface of law. It reveals the conscious or unconscious pursuits of non-legal normative aims and the high number of reports of questionable proceedings.\textsuperscript{7} Even among proponents of absolute legal determinacy, that is, the existence of a single correct result for any legal question, problems arise here because of the acceptance of what could be termed a ‘wrong result’ in criminal proceedings.\textsuperscript{8}

In legal realist or standpoint theoretical views of law, where the law adjudication process is perceived as an open process of legitimisation rather than the pursuit of a ‘right result’, it is not uncommon to conceive that there may be individual normative problems.\textsuperscript{9} But what happens in an imagined situation in which problems of extra-legal norms affect the legal practice by moving seemingly flawless praxis away from the coverage of law and principles of equal treatment? While the law places emphasis on the violence of the perpetrator, the ruling norm within the practice is still based on an archetype of rape in which the victim is assaulted and in some way objects.\textsuperscript{10} In other words, there appears to be both influence from

\textsuperscript{5} Håkan Andersson, ‘Postmoderna och diskursteoretiska verktyg inom rätten’, in Fredric Korling and Mauro Zamboni (eds), Juridisk metodlära (Studentlitteratur 2013) 358.


\textsuperscript{7} Diesen et al (n 3).


\textsuperscript{9} Moa Bladini, I objektivitetens sken: en kritisk granskning av objektivitetsideal, objektivitetsanspråk och legitimeringsstrategier i diskurser om dömande i brottmål (Makadam 2013).

\textsuperscript{10} Ulrika Andersson, Hans (ord) eller hennes? En könsteoretisk analys av straffrättsligt skydd mot sexuella övergrepp (Primio 2004) 279.

This article will argue that gendered norms tied to archetypes of rape influence decision-making in criminal proceedings of rape and that such influence may be hidden from verdicts because of the interpretive space and obfuscation established by the way objectivity is constructed within the texts. As the concept of objectivity is juxtaposed with the method of critical discourse analysis, the influence of what appears as commonsensical is highlighted, and light is shed on the way pursuit of facts and truth may lead elsewhere.\footnote{Håkan Andersson, ‘Rättens narratologiska dimensioner - interaktion och konstruktion’, in Minna Gräns and Steffan Westerlund (eds), Interaktiv rättsvetenskap (Åbo 2006) 22.}

The theorisation and findings of the article are presented in three parts. First, a new potential intermesh between theories of discourse and norms is introduced. This makes it possible to understand the behavioural instructions and archetypes influencing decisive factors in verdicts. The article will then build upon the theory of how objectivity within the discursive order of law adjudication processes can enable extra-legal norms to influence legal proceedings through Baudrillard’s concept of simulacrum. The third and final part of the article shows the image of gendered norms of rape underneath the constructed objectivity by describing the patterns of decisive factors which can be perceived in verdicts and the way in which the legitimisations of interpretations within the order reproduce gendered archetypes of the event, the injured party and the suspect.

The analysis of the second and third parts is supported by a sampling of 12 randomly collected verdicts from finalised criminal proceedings of rape, attempted rape and aggravated rape in Swedish courts of appeal from December 2013 to March 2014. Two verdicts have been randomly selected from each of the six courts of appeal, while ensuring that no verdicts were finalised within the same court and month. This ensures a national representation over the longest possible time span. The verdicts from each court were assigned a number in chronological order, and a random number generator was
used to sample the first verdict. The verdicts that had been finalised in the same month as the first sample were then removed, before assigning the remaining verdicts new numbers for the randomised sampling of the second verdict of that court. While the sampling utilised a statistical method, the selected verdicts are to be considered an excerpt from the studied discursive order, rather than a generalisable selection in a quantitative sense. In this article, the verdicts have been translated from the original Swedish into English. Some of the quotes used contain grammatical errors in the original Swedish texts. Such errors have not been corrected. This is to ensure that the quotes are kept as close to their original wording and signification as possible. Potential errors are important for a representative rendering of the texts. Rephrasing would, in some cases, mean that the initial legal meaning would be lost. Where relevant, such errors are highlighted in the footnote following the quote.

**An Intermesh of Critical Discourse Analysis and Norms**

In this section, existing theorisations of norms and critical discourse analysis are used to suggest a new way to understand how acts and subjects are given meaning in verdicts, as well as the behavioural instructions which attach to the law adjudication process in cases of rape.

Norman Fairclough’s critical discourse analysis makes it possible to study how social power relations are constituted, changed or perpetuated through the prevailing truth-claims among competing ways to describe and understand the world by outlining discursive orders. The analysis focuses on relations of power between subjects of a discursive event and potential inequalities in their ability to control how texts are produced, distributed, interpreted and consumed in a given context. In this case, it entails the understanding of regularities of decisive factors beyond the control of the parties of the

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criminal proceedings and the way their stories are attributed and dispossessed of meaning.\textsuperscript{15}

In Fairclough’s model of a discursive event, a dialectic and three dimensional model is drawn, representing the text, discursive practices, and social practices. A discursive practice is the description or representation of a phenomenon in light of the purposes and norms which affect a practice, such as the adjudication process. The purposes and norms which lead the practices make up a shared frame of reference and experiences which govern what can be said and done. The discursive practices of the adjudication process are thus governed by the norms and rules within it. The social practices are non-discursive and in this case refer to the institutional and organisational context in which the legal processes are situated.\textsuperscript{16} The relationship is characterised as dialectic by way of describing how the discursive practices constituting the production of the text both constitute and are constituted by social practices. In other words, the situations, social structures and institutions in which texts are generated shape the discursive practice, but the discourse also influences the context in which they take place.\textsuperscript{17}

The analysis of the discursive events of the adjudication process is also influenced by Moa Bladini’s use of critical discourse analysis and Håkan Hydén’s theory of the interplay between law and society through norms. Bladini draws a model of law in which verdicts make up part of the text, as dictated by discourses of objectivity and legal rules. However, the model is lacking, as she finds that legally impeccable decisions still indicate structural discrimination when they are juxtaposed. Any potential norms that could influence such decision-making could also be covered by constructions of objectivity. Even if it is impossible to know for certain the extent to which the aspects affecting the process of decision-making are influential, they are not completely invisible, as these factors are presented through the verdict, and in turn, the production of the text.\textsuperscript{18}

\textsuperscript{15} Bladini (n 9) 356.
\textsuperscript{16} Weiss and Wodak (n 14) 10.
\textsuperscript{17} Norman Fairclough, \textit{Discourse and Social Change} (Polity 1992) 73.
\textsuperscript{18} Bladini (n 9) 356. See also: Peter Goodrich, \textit{Legal Discourse: Studies in Linguistics, Rhetorique and Legal Analysis} (MacMillan 1987).
Hydén’s theory of norms is used to amend the model further by highlighting the constituting interactions with reference to the way law, norms and society are interrelated. The focus on discourse and norms makes it possible to draw an alternative to the dichotomisation of an external and internal perspective on law, revealing the dialectic nature of the relationship between the internal law, external society and the norms in-between. The distinction does not imply norms or law as separate from society, but rather aims to show that not all law has corresponding norms (and vice-versa), and that society is governed by its residents’ understandings of socially reproduced expectations of their behaviour, rather than comprehensive knowledge of law. This means that legal decision-makers’ perceived behavioural instructions might be derived from perceptions gained in society rather than the code of law. They may thus be incongruent with the legal code.

Where Hydén’s conception of norms places emphasis on individual perceptions, the use of the theorisation in this study takes a discursive approach to the expectations. The discursive order of how events usually are given meaning, and the discursive boundaries of what can be said and done, are behavioural instructions, socially reproduced and, like the idea of perceived expectations, they indicate an external origin of the norms. As a shared frame of reference and knowledge, the discursive practices not only limit what norms and purposes can be present, but also how they can be interpreted, as perceived expectations can only be understood through language. A critical discourse analysis is thereby particularly effective for understanding the structural idea of norms. In this intermesh of norms and discourse theory, it becomes possible to reveal how the presence of a dominating way of speaking and writing also constitutes a dominating intersubjective understanding of the definitions and divisions involved in the term, and a norm regarding what

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19 Hydén (n 8) 29.
20 Hydén (n 8) 23.
22 Weiss and Wodak (n 14) 10.
expectations the actors of the law adjudication processes are subject to, both in their actions and in how they view rape.23

Below follows the first of two parts that illustrate how the techniques of constructing objectivity within verdicts makes possible and hides individual influence based on extra-legal perceptions of rape using this theorisation. Following the initial analysis of the form, the second part builds upon such findings to outline the techniques within their content. The analysis then continues to delineate the discursive orders found within the verdict and relates them to concepts of archetypes.

Constructing Objectivity through Form

Bladini argues that the objectivity of a verdict is established through both the format and the content of the text. The format includes the voices used in the verdict and the way their authors or instigators are presented.24 As the expression of the law adjudication process, the format is important because of its role in establishing authority to the arguments. It also has the possibility to decontextualise the author into an objective, position-less, all-seeing voice, or what Donna Haraway calls the ‘god trick’. 25 Deconstructing verdicts through Bladini’s theorisation of form and voices is thus an important initial stage to reveal how the existence and influence of the legal professional is rendered invisible.

In the verdicts selected for this study, the events of the crime are typically presented twice: first in the main hearing; and then a second time in the testing of evidence. Even though the first delivery includes several and often conflicting stories of parties and witnesses, constructed through the evidence and questions asked, their statements are later merged into one.26 The phrasing also makes it appear as if the parties are speaking freely, when they are in fact led by the legal

23 Weiss and Wodak (n 14) 23.
24 Bladini (n 9) 360.
26 See for example B 10020-12 Svea Court of Appeal or B 1676-13 Göta Court of Appeal.
actors in the process. This includes the content of what is told as well as the way in which it is presented and makes up a central part of the way the main hearing unfolds. The responsibility of the legal actors as well as the decision-maker for the outcome of the discursive event is thereby hidden. Without the questions that shape the framing of the witness stories and govern what details are included, the verdicts do not reveal what was excluded. The legal story thus gains a stronger image of being all-encompassing.

The second part of the verdict contains the legal story and its framing of the event, where the objectified voice of the court, without reference to its actors, forwards the legal truths it has found after testing the evidence. Anything referred to in the hearing which has not been given legal meaning by the judges’ interpretation is excluded. The selection of the version of events which is brought forward, as well as the way in which they are presented, are not used to find a single result for the verdict, but to legitimise it and strengthen the idea that it is the only possible conclusion. The following expression of the judges of the Göta court of appeal demonstrates the way the objectified voice is used to value what has been stated:

The explanation that [the suspect] hence has presented does not in a satisfactory way explain the fact that his sperm was detected in the crotch part of the woman’s underwear. Above all, the explanation means that [the injured party] would have saved a pair of stained women’s underwear to later be able to untruthfully impute [the suspect] a criminal act. His explanation comes to this background across as so unlikely that it can be left without regard.

The sharp difference between the form and phrasing in the courts’ objectified and decisive findings, and the dissenting judges’ more clearly subjective expressions in first or third person, also contribute to the image of objectivity. The dissenting judges use a human voice to present their beliefs and opinions, resulting in a contrast that further legitimises the verdict over any alternatives and renders invisible all traces of human impact on the majority’s reasoning. The following example from the court of appeal for Northern Norrland highlights this distinction.

27 Bladini (n 9) 245.
28 B 1676-13 Göta Court of Appeal. This quote contains errors in the original text.
[Lay judge A] is dissenting and argues: … It has in my opinion not clearly enough come forward what happened. There are also differing statements from the preliminary investigations and at the main hearing about what happened. Taking into account what is now stated, I believe that it is not with a satisfactory degree of security established that [the defendant] acted against the injured party as has been specified in the indictment. I therefore dismiss the prosecution for attempted rape. In other matters I agree with the majority.29

Objectivity through Content

It is possible to understand the creation of objectivity further by analysing the effects of what the voices present through Baudrillard’s concept of simulacrum. This highlights how reality is represented and whether it is, in fact, needed. The theorisation of the process of simulacrum draws up four stages. The first is founded in reality or so called pure representation, followed by the second stage, where the image masks and distorts reality. In the third stage, the image masks any absent references to reality. Finally, the fourth stage entails an image which has no relationship to reality whatsoever. This is termed ‘hyper-reality’, as it allows discussions relative to it without any requirements of a connection to reality. When this stage is reached, images of the outside world—in this case the event and the parties—as well as concepts related to them such as guilt, insight, will, or sexuality can lead their own lives without connection to the original reality. The terminology can distort the facts and values they once portrayed, and which have grown central to the outcome.30

While not specifically intended for legal analysis, legal reasoning is a prime example of Baudrillard’s theory of simulacrum, and its reading of linguistic constructions may contribute greatly to understanding how an advanced and complex portrayal of a reality is replaced by a constructed reality.31 Håkan Andersson states that: ‘The legal story

29 B 332-13 The Court of Appeal for Northern Norrland.
30 Andersson (n 5) 358.
must include, convey and legitimize a picture of a reality—something that happened, something that exists—and a picture of a rule or measurement plan with decisive normative necessary requisites that justifies that certain legal effects will occur\(^\text{32}\). The way the selective parts of witnesses’ memories are brought forward by legal professionals and reconstructed into the legal story can be studied to find the techniques used to present the illusion of a singular ‘right’ portrayal, reminiscent of the idea of the ‘right’ result. To solve the legal problem, the decision-makers of the court need to simplify and adapt both the law and the reality using techniques of delimitation and relevance-making, made possible by the reconstruction of the story. Through this reconstruction, they are moulded into rhetorical tropes, with different limits and possibilities from the reality discussed within the verdict, which they are meant to represent. In addition to the fact that potential true representations are uncertain, Baudrillard argues that the question of whether they actually coincide with the reality are irrelevant in the face of the way they are related to, regardless of such connections.

The form the verdicts take allows for frequent retelling and rephrasing, including and excluding parts of the statements and events in the courtroom. Thus, there is much room for influence of actors in the main hearing by deciding what is given importance and what questions are ignored, how it is interpreted and shaped. The content of the experiences of parties that are deemed trustworthy can be understood as the first stage of Baudrillard’s representation, as it is these, rather than an actual representation of everything that happened, that is tried in the court. This is, in Baudrillard’s words, a ‘pure’ representation of those events, a representation which never surfaces within the court or its following verdict. The way questions are asked, framing the story’s depth and the duration of the event, then distorts and masks parts of the story. This is rendered invisible by the absence of the actors within the verdicts, in favour of the image of a positivist objectivity where all actors are interchangeable to reach the same ‘right result’. This makes up the second step of the process. The third step, where the references to a reality are hidden,

is actualised when the actors start to translate the statements into a legal story.\textsuperscript{33}

Simulacrum is created as both the empirical images of the event and the legal terminological images are turned into tropes. The court creates facts by how it tells the story, what circumstances are presumed, what is inserted into the legal story, and what is left out in response to the discursive order of rape. Here, factors which were a great part of the event and influenced the actions of the parties, but which make the search for a result more complex, are left without meaning to the reasoning of the court, in favour of simple deciding factors selected in response to an archetypical case. Because of legal discourse’s positivist foundation, looking for the universal and identical rather than differences, the image presented is certainly easier to comprehend, but also less connected to the events it represents.\textsuperscript{34} The relation to these archetypes will be discussed further in the next part of the analysis.

The creation of simulacrum is not only actualised in the transfer from an event, through the statement process and into the understanding of the event from the way it fits into the mould of the discursive order, adding or removing facts. It may also take place in the epistemological arguments of the court. One such example is the way reality is constructed through the arguments of a reassessment of the credibility of the injured party and the assessment of the suspect’s intent in a case heard in the court of appeal of Western Sweden. In this case, the prosecutor’s failure to put forward a text conversation between the two parties is held against the injured party (considered highly trustworthy by the court), in response to a statement from the untrustworthy suspect arguing that the injured party showed more interest in him:

\begin{quote}
In this case it is added that [the suspect] additionally has stated that the injured party in the unreported conversation has been significantly more sexually interested than [the injured party] was in the reported conversation and also to a significantly greater extent than what the injured party admitted. The fact that the conversation is not complete therefore brings that the injured party’s statement must be
\end{quote}

\textsuperscript{33} Andersson (n 5) 358.

\textsuperscript{34} Andersson (n 31) 909. This is also studied extensively in Bladini (n 9) 356.
assessed with greater caution than what otherwise could have been the case.\textsuperscript{35}

Here, the use of ‘admitted’ implies that the claim of the suspect, whose statements are not used as a basis for the assessment in the legal story, is assumed to be true. The specific lack of supporting evidence becomes important when a question of earlier expressions of will, which are not a legal requisite, are actualised for the assessment of the event, despite the court arguing that it is supposed to be inconsequential:

The court of appeal agrees that the sexual right to self-determination entails that the person who declines a sexual invitation should be respected, regardless of what contacts that previously have occurred between the parties. At the same time, what has preceded a sexual intercourse may have significance for the assessment of the act and the intent of the suspect.\textsuperscript{36}

Thus, the created fact of the event-preceding conversation, which even if it were to be representative of events would be inconsequential, has a direct impact on the factors that are taken into account in the invisibly reductive ‘overall assessment’ of the simulacratic legal story. The created fact is furthermore based on a presumption of evidence over which the injured party has no control, and which he therefore is unable to disprove. This could be understood as the result of a reversed simulacratic event, where the image of the terminology is adapted, rather than the represented reality.\textsuperscript{37} In this image, the trope of trustworthiness is made to include all actors, where one’s actions in the process have bearing on the assessment of the other. Through these associative moments, creating linguistic understanding—the way the legal story is framed and reality is constructed—affects the assessment and thus outcome in different directions.

This also highlights an essential factor in the discursive order: the image of objectivity and freedom from discursive norms in general within the law adjudication process of rape, and the many other

\textsuperscript{35} B 4384-13 The Court of Appeal for Western Sweden.
\textsuperscript{36} B 4384-13 The Court of Appeal for Western Sweden.
\textsuperscript{37} Andersson (n 5) 348.
discursive intersections between knowledge and power. The power which governs the events through prohibitions, differentiations and divisions is not raised as power and interest, but as a pursuit towards truth and fact. The problem of power becomes particularly alarming in the meeting with archetypical narratives of how a rape usually takes place and how law usually responds, as it sets a frame separate from what may be the actual circumstances of the event. This leads back to and magnifies the problem highlighted by Bladini. The reality which the result is legitimised in response to cannot be controlled or criticised because it is reductively presented as objective. Thus to see the order and its power, one needs to look at the regularities which govern the discourse.

Gendered Decisive Factors in the Discursive Orders

Analytically, this part defines regularities in the content of the verdicts, including the circumstances which are assumed, the decisive factors of the outcomes, and the reasons given for the selection of relevant evidence. Through this, decisive differentiations (arguments, values or norms) which circulate a case and which can be used to motivate solutions can be made visible. From there it is possible to find intertextual patterns of argumentation among the principles and requisites of what Håkan Andersson calls the surface for how narratives can be created, valued, changed and developed. In other words, it is done in search of the decisive factors, in particular what they are and how they are portrayed.

The regularities of decisive factors within the discursive practices of rape can be divided into two separate orders. What is often perceived as the primary order in light of social norms, yet is the more minor category in terms of the number of crimes committed, is largely reminiscent of the idea of ‘real rape’ within international discourses of rape, where ‘real rape’ signifies an assault by an unknown or brief and distant acquaintance. This is contrasted with the more numer-

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38 Andersson (n 5) 353.
39 Bladini (n 9).
40 Andersson (n 12) 22.
41 Débora de Carvalho Figueiredo, 'Representations of Rape in the Discourse of Legal Decisions', in Lynne Young and Claire Harrison (eds), Systemic Functional
able second order in which the parties are either acquaintances or in a close and potentially sexual relationship.

The type of violence, supported by the reliability of the stories and the way in which they relate to the technical evidence and potential witnesses, is the primary decisive factor within the first order. For example, in a proceeding in the court of appeal of Southern Norrland, the violence is the obvious decisive factor to the conviction of the suspect. The court refers to and joins the reasoning of the district court, which states:

It is thus found that [the suspect] through violence forced the injured party to intercourse. It is also found that he through violence forced her to endure a sexual act—penetration of her vagina with the fingers—which with regards to the nature of the violation and the other circumstances are comparable to sexual intercourse.42

The judge’s reasoning in the court of appeal signifies the event in question by using the term ‘assault rape’, without any terminological basis in penal law to do so, thus placing the case in an informal extra-legal category:43

Other sanctions than prison cannot come to question. The violence which has been practiced has admittedly not been a very serious offense but can still be described as an assault rape.44

Another example of violence as the primary decisive factor in assault rape is a verdict from a proceeding in the court of appeal of Southern Norrland. The court changed the verdict of the district court, acquitting the suspect on the first indictment count and changing the classification of the crime of the second. None of the indictment counts brought out the expressions or internal feelings of will of the injured

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42 B 1024-13 The Court of Appeal of Southern Norrland. This quote contains errors in the original text.
43 ibid.
44 ibid.
parties. In addition, the first count did not bring up the intent of the suspect in any of the instances, but rather emphasised the violence of the assault:

Regarding this indictment count, nothing has been forwarded which gives reason to question [the injured party]’s statement. She has thus been exposed to a sexual assault in the way she has described. The question is whether it is shown that [the suspect] is the perpetrator.\(^{45}\)

The suspect was acquitted due to a lack of technical and support evidence binding the specific man and moped to the scene as new alibi evidence had been forwarded in the court of appeal. It also emphasised uncertainty in light of the fact that the injured party never saw the suspect’s face and spoke of a moped of a different colour in her statement than that belonging to the suspect, factors which were downplayed in the district court:

The injured party may very well remember incorrectly regarding what colour the moped had or have been mistaken regarding other details without it ruling out [the suspect] as the perpetrator. The defendants statements alone does not, however, bind [the suspect] to the crime scene. Nor is the moped bound to the crime scene through the tire imprint even if it gives some support for that [the suspect]’s moped may have been on the scene.

The ... court of appeal forwarded alibi evidence further means that it cannot be ruled out that [the suspect] was not in [the city] at the specific time. Overall, the court of appeal finds that is has not been placed beyond reasonable doubt that [the suspect] committed the act.\(^{46}\)

The second indictment count, in which the suspect was found guilty of attempted rape in the district court, was changed as it relied on the guilt in the first indictment count to prove the suspect’s intention to rape the injured party. What took place was deemed sexual molestation and assault—less serious crimes—and the court argued that there was no evidence that the suspect intended to rape the

\(^{45}\) B 141-14 The Court of Appeal of Southern Norrland.

\(^{46}\) ibid. This quote contains errors in the original text.
injured party after he had hit her. The district court forwarded its findings, which the court of appeal adhered to, as follows:

It is thus found that [the suspect], on the time and place that the prosecutor has stated has attacked [the injured party] by attempting to grab her in the neck without getting a real grip but came to hit her here, at the same time that he brought his hand in between her legs and tried to break, throw her onto the ground.

Some other reasonable explanation—seen in light of how [the suspect] acted in the event of indictment count 1 and what has been put forward regarding his strange behaviour—of that [the suspect] tried to throw her to the ground but that he did this with purpose to force [the injured party] to intercourse or a different sexual act which with reference to the nature of the violation is comparable to intercourse. It is further found that [the injured party] resisted and that this is what resulted in that [the suspect] discontinued his attack.  

Despite accepting the other factors, the court of appeal places the guilt of the preceding act as the deciding factor in the question of the intent of the evidence. While agreeing that the suspect’s actions must have been intended, intent to do more cannot be safely established, despite using the injured party’s statements as the basis for the act, finding that the suspect’s initial violence and molestation were intended, and agreeing with the district court’s finding that the suspect stopped his attempts because of the injured party’s resistance.

The court of appeals adheres to the assessment of the district court that [the injured party]’s statement can serve as the basis of the assessment of the case and that it thereby is found that [the suspect] has acted in the way that is claimed in the prosecutor’s statement of the criminal act as charged.

That the injured party can have experienced the event as an attempted rape is easily understood. Because [the suspect] was acquitted from the indictment regarding rape, the event under indictment point one cannot be taken into account at the assessment of what intent [the suspect] could have had.

47 ibid. This quote contains errors in the original text.
with his actions. In these circumstances the court of appeal finds that it is not from [the suspect]’s actions with sufficient safety can be established that he had intent to force [the injured party] to intercourse or another thereby comparable sexual act. The action can therefore not be established to compose an attempted rape. What is clear is that [the suspect] used some violence towards [the injured party] and put his hand between her legs and that this must have happened intentionally.\(^{48}\)

After presenting the finding of violence, the court leaves questions of intent and any expressions of will of the injured party without comment. The verdicts also indicate a change from the explicit or implicit requirement for the injured party to prove both that the act happened against her will and that she had adequately expressed that the perpetrator acted against her will. The expectation on victims to attempt to resist in a ‘regular situation’ is not present in this order. Nor is it the point of departure where the injured party is in a position in which they are either unable or too scared to react.\(^{49}\) As soon as violence or a threatening situation is considered proven in the situation of an assault, it is also assumed the act was committed with intent. The stronger emphasis on the uncertainty of the intent of the suspect as a decisive factor, rather than the violence, appears to be an atypical discourse in the order.\(^{50}\)

The verdicts of the second discursive order, in which the parties had an earlier relation of some sort, have more in common with the theory of Ulrika Andersson, placing more responsibility on the injured party in line with traditional gendered conceptions of sexuality. The acts of the injured parties before and at the time of the event are attributed importance and the injured party is thus through the process established as partially responsible for the act.\(^{51}\) Not only is the relationship between the suspect and the injured party presented in this order, but also discussed in relation to the event, indicating the conception that a potential relationship between the parties, and

\(^{48}\) ibid.

\(^{49}\) Andersson (n 5) 232.

\(^{50}\) B 1024-13 The Court of Appeal of Southern Norrland; B 141-14 The Court of Appeal of Southern Norrland.

\(^{51}\) Andersson (n 10).
the shape thereof, is relevant to the assessment of criminal liability, and that suspects in the second order are less likely to have intent. This is also supported by the shift in decisive factors. In these cases, the factor is rather the extent to which the suspect had any intent to rape the injured party, including if they were aware of the fact that the victim did not want to have sexual contact. The reasoning of the court creates an understanding of the latter factor as a question of what expressions of will have been forwarded by the injured party.

Thus it is a relation in which the woman is understood as open until saying no, rather than one where all attempts at such contact are to be understood as rape until the victim gives some expression of will. This order, and thus discursive norm, is applicable in all cases where the story is framed as if the perpetrator, from some undefined circumstance, might interpret the situation as open for sexual contact. Despite a shift from the act of ‘resisting’ as a way to prove that the act was against the injured party’s will, the implications remain the same where the discourse of the second order has turned toward questioning the extent to which the intent of the suspect can be proven. The injured party is thus responsible for being exposed to what took place during the event, with the result that a suspect’s responsibility is non-existent as long as the latter claims ignorance.

The following case highlights how the emphasis is placed on the suspect’s intent, understood as a question of whether he knew that he was forcing a sexual act against the will of the injured party, thus having already established that the injured party was indeed forced in a violent and dominating manner. The injured party’s statement of physical violence preceding the crime is central in the verdict.

Thus the court of appeal finds that [the injured party]’s statement on the violence she has been exposed to wins support from the other investigation. Regarding the question of whether the intercourse happened voluntarily or not it should be considered that [the injured party], who directly after the event when home to [witness 1] has told [witness 1] that she had been both assaulted and raped.

52 B 141-14 The Court of Appeal of Southern Norrland; B 3407-13 Scania and Blekinge Court of Appeal; B 4856-13 Svea Court of Appeal; B 2570-13 Göta Court of Appeal.

53 Andersson (n 5) 202.
Besides this the Court of Appeal holds that [the injured party]’s statements win support from [the suspect]’s behaviour. If it would have been a case of a voluntary sexual intercourse, so called reconciliation sex, [the suspect]’s behaviour afterwards appears very strange. He has partly exited the house when [the injured party] and [witness 1] came back to retrieve [the injured party] things, partly fetched a rifle which [witness 2] later found him with and partly also in response to [witness 2]’s question about what he did with the rifle said it was just as well that he shot himself. The Court of Appeal considers that [the suspect]’s behaviour speaks for that he was well aware that limits had been exceeded.\(^\text{54}\)

Thus, the violence is initially established. Thereafter, the will of the injured party, which is central to the concept of the Swedish term ‘voluntary’, is presented to determine whether the violent intercourse constitutes rape. It is important to note that the Swedish term for voluntarily is *frivilligt*, which is made up of the terms ‘free’ and ‘willingly’, denoting an active will of the subject to a greater extent than its English translation. In what follows, the injured party’s expressions of will are left without regard. The injured party’s will is instead determined based on the suspect’s intent, which is assessed from his behaviour after the event. Interestingly, the suspect’s ‘awareness’ of ‘lines being crossed’ after the event is here used interchangeably with the legal term ‘intent’ at the time of the event.

The district court’s verdict, on which the court of appeal’s verdict is based, argues in a similar way, but defines the ‘awareness’ specifically as ‘intent’.

A further example of the emphasis on intent is a verdict from a proceeding in the Svea court of appeal, where positive expressions of will have led the court to accept that the suspect must have assumed that the injured party consented. In two cases of convictions for attempted rape, the court used the injured party’s statements as a basis for the assessment of the suspect’s intent or ‘awareness’, stating that violence took place during the events in question.

\(^{54}\) B 2570-13 Göta Court of Appeal.

The for the question of guilt decisive circumstance of if [the suspect] should be sentenced for the actions in indictment
count 1 as well as indictment count 3 is if [the suspect] has realised that the intercourse on 12 January 2013 happened against the injured party’s will (indictment count 1) as well as that the injured party was not interested in having intercourse with him the 8 March 2013 (indictment count 3).

In this part the court of appeal also agrees to the district court’s assessment of indictment count 1 that it cannot be ruled out that [the suspect], on basis of the parties sexual relations both physically and in text-conversations among others had been and which the district court has accounted for in its verdict, can have assumed that the intercourse happened with the injured party’s consent this time too.55

Note that in the quote above, the concept of rape, besides the question of intent, is not defined by violence. This is especially important in contrast to the previous order, as the injured party—whose statements were established as the basis of the assessment—told the court of violent treatment preceding and during the event. It appears as if the injured party’s earlier affirmations or expressions led the court to disregard the later violence and expressions of will, including running away, shouting ‘no’ and ‘please [suspect], stop’.56

The uncertainty of the intent would also be questionable in light of the injured party’s statements of the suspect saying that she should do what he wanted or it would get worse, that it did not matter what she wanted, that no one would believe her if she reported him because they had previously been role playing violently and, after the act, that this was a call for help.57 In the reasoning of the district court, to which the court of appeal adhered, it is found that the injured party had been crying and said no, placing emphasis on the expressions of will. The court also notes the suspect’s relation of domination to the injured party, as well as the former’s arguments that sexual relations are necessary for the parties’ relationship to work and for the well-being of their son to be ensured. Despite this, the earlier sexual text messages and, more notably, the later sexual contact, are the decisive factors for the court’s dismissal of the indictment:

55 B 4856-13 Svea Court of Appeal. This quote contains errors in the original text.
56 ibid.
57 ibid.
That there for [the suspect] exist a series of disturbing circumstances, e.g. that he did not even want to accept that the injured party said no and cried as well as that he afterwards apologised in a text message are not enough to lead to another assessment.\textsuperscript{58}

**Legitimisations of Archetypes and Ignorance**

These orders show the outline of a reoccurring archetypical narrative, serving as a framework to delimit the reasoning of the court. These findings support the narratological theorisation of Håkan Andersson, who argues that the actors in law adjudication processes require some level of archetypical narratives in order legally to make sense of an event.\textsuperscript{59} Because reasoning in line with these archetypical narratives requires less argumentation, or may even be used instead of it in order to legitimise a verdict, it is possible to speak of a norm, that is, a discursive imperative to reason in a certain way based on a certain model, subject to the idea of how the events of the case and its procedure usually happens. In other words, the norm regarding the actions of the legal decision makers also contains, or acts in response to, a social norm regarding rape in itself and what it constitutes.\textsuperscript{60} The shift from expressions of will, with its implications for the injured party’s perceived bodily openness and sexual passivity, to the discourse of violence and intent does not preclude the creation of the same image, as the injured party is not only partly responsible for

\textsuperscript{58} ibid. The Swedish/English Glossary for the Courts of Sweden translates the term \textit{besvärande} into ‘appeal’, which in its context would not make sense. The terms ‘disturbing’ or ‘troublesome’ are more in line with the use here. It can also be noted that the use implies a meaning similar to \textit{försvårande} (‘aggravating’), but without its legal connotations. See Domstolsverket, \textit{Glossary for the Courts of Sweden: Swedish/English English/Swedish} (Domstolsverket, 2014) 17. The use is reminiscent of the use of \textit{allvarlig} (‘severe’), instead of the legal term ‘aggravated’ in cases of domestic violence to mark awareness of the serious nature of an event, but without actualising higher penalty levels, as discussed by Hermansson, Sofia, ‘Parternas förhållande har varit stormigt’ – en studie av formuleringar i svenska hovrättsdomar om grov kvinnofridskränkning och våldtäkt i nära relationer utifrån ett genus - och rättighetsperspektiv (Lund University, 2012).

\textsuperscript{59} Andersson (n 12) 22.

\textsuperscript{60} Hydén (n 8) 29.
being exposed to what took place during the event, but the suspect’s responsibility is non-existent as long as they can claim ignorance.

These archetypes delimit the legal picture from factors that are essential to the event. They motivate the highlighting or downplaying of certain aspects, as well as the creation of new factors and circumstances, and the removal of others. This can include everything from the events themselves, to the links between chains of events, and how they are understood in relation to other factors.61 One of the more notable factors in this is the attentiveness to threatening situations or the relations of power between the parties. Reoccurring factors of oppressive relationships, implicit or explicit threats of violence, or expressions of intent to rape from a trustworthy injured party are rarely brought into the legal story. For example, one verdict from a proceeding in the Svea Court of Appeal briefly describes a preceding oppressive relationship between the parties as an introduction to the events in the legal story. However, there is no explicit mention as to whether the decision makers brought it into the ‘cumulative assessment’ of the verdict’s legitimisation.62

It is also beneficial to replace the legal discursive order within, and in relation to, a larger frame of discourse and power relations in the society in which the legal process takes place. The way the expressions of will are given meaning in the present discursive order continue to reproduce the focus on expressions of will, portraying women as sexually passive and their bodies as open.63 When criminal law promotes the decontextualisation of the criminal event from preceding events and the relationship between the victim and perpetrator through a wish to avoid difficult socioethical positioning, the genders and structural situation of the parties are ignored as violence against a gender-less person.64 Despite this decontextualisation, the event and the legal response to it are still affected by gendered ideas of the victim, the perpetrator, and factors surrounding the event.

61 Andersson (n 5).
62 B 4856-13 Svea Court of Appeal.
63 Andersson (n 10).
64 Bladini (n 9).
What is usually regarded as the legal position on rape places more emphasis on violence and force than expressions of will. This establishes that the discursive order, which affects the outcomes of the studied processes by moving the decision-making away from such a position, fails to provide the intended result from law in response to rape. From the perspective of the law adjudication process as legitimisation, rather than a mechanical process of finding the ‘correct result’, objectivity does not change the content of the decision-making from the outcome, but only the way it is both framed and allowed to be framed. Even if the concept of the indeterminacy of law is rejected, objectivity is problematic in that it legitimises the reaching of a ‘wrong result’. The discursive order of the law adjudication process does not make visible individual positions and interpretations in light of their socio-cultural backgrounds, and does make it possible to reframe both the event and the way it is to be related to law, even if one finds that the ‘correct result’ of law is entirely clear. Because the order legitimises such procedural aspects as normal or necessary, it may lead to a shift of an imagined previously clear legal position in less desirable ways. The situation of gendered norms as extra-legal may, in response to the structural nature of the norm, lead to a situation in which the practice is established as the legal position through its practice.

Finally, this study of legal text may be of additional use given the arguments that law constitutes, produces and reproduces the general discourse of society. A perception of ‘real rape’ in law has previously been argued to be exported to society, reproducing gendered conceptions of sexuality and maintaining the frequency of the crime. With respect to the role of the court and the complaints against it, it would seem that the discursive and normative order of the law adjudication process is also central to the understanding of views and behaviour in Swedish society.

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66 Bladini (n 9) 354.
67 Van Dijk (n 11) 2.
68 Bergenheim (n 11).
Objectivity is often described as a means to generate legitimacy of legislation in the view of those regulated by it. While there are critiques of inconsistent reasoning in similar cases, the external image of law adjudication processes still carries a strong image of objectivity, with the idea of the court as an objectified institution reaching the right answer. This might explain the emphasis within social debates and protests on changes in legislation rather than legal processes and norms. Taking the findings of this article into account, such changes will not lead to their intended results. The separate discourses and archetypes advance assumptions and images of the cases’ facts, influencing everything from wording to the thought behind the image of objectivity, without a direct tie to the legal code. In other words, even if calls for a change in legislation are right, the target of their critique is not the only problem.

It is also likely that the reproduction of legal ideas of what actually constitutes a rape contributes to the continuation of the high volume of the crime. When previous relationships affect the reasoning as well as their outcomes in courts, and when violence, forced actions, or relations of power are disregarded, it also affects the image of law. Not only are fewer of the cases of forced sexual acts deterred by the threat of being caught by the sanctions of the law, but the conception of what rape actually constitutes is shaped by the way the law treats it. While the legal discourse unquestionably condemns rape itself, the frame for what the term encompasses is too narrow for the regulatory needs not only of the injured parties, but also those who have been raped but have not reported it, or those whose preliminary investigation is closed.

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70 Jönsson (n1).

71 Andersson (n 5) 360.

72 Bergenheim (n11).

Conclusion

This article has proposed a framework for a theory that makes visible the discursive convergence of normative archetypes and objectivity. It has outlined two legal discursive orders on rape, separated by the occurrence of preceding relationships between the parties. The discursive orders of rape not only establish a linguistic framework for how judges are to perceive the act of rape (with reference to traditional conceptions of women’s bodies and sexuality), they also move these actors to rule in response to this framework. The norm is strengthened by a discursive imperative to reason in a certain way, based on a certain model; an archetype departing from the idea of how the event of the case and its procedure usually happens to make sense of the presented event. These archetypes generate the legitimisation of a legal result as well as reproduce the norms and perceptions entrenched in them.\(^7\) The findings show that deciding to be objective—that is, not to be affected by subjective or extra-legal perceptions—does not in fact lead to a situation where one is not.

The first discursive order places emphasis on violence by an unknown perpetrator and makes up the formative narrative from which the other is perceived. The second order constitutes the far more common case in which the parties have a preceding relationship. While emphasising the intent of the perpetrator, it effectively places the women’s expressions of will and responsibility at the centre of the decision-making. At the heart of the problem is a discursive order and structural norm regulating not only the behaviour of legal professionals in processes, but also the actions of those regulated. This creates a perception where rape is wrong, but where only some perceived categorisations of forced sexual acts are considered to constitute rape. They are perceived categorisations that ensure that the responsibility of the vast majority of the crimes committed remains on its victim.

\(^7\) Andersson (n 12).
Introduction

In a time when our own unique identities within society are becoming ever more important to us, one has to ask: just how well are our identities represented within the law? For example, in the context of employment discrimination an employee can seek redress for discrimination on the grounds of certain ‘protected characteristics’, as defined by section 4 of the UK Equality Act 2010.\(^1\) However, these categories tell us nothing about the compound types of inequality experienced by subjects whose complex identities mean that they do not fit neatly into those categories. In her 2009 essay, ‘In Intersectionality: Traumatic Impressions’, Emily Grabham critiques ‘the law’s propensity to classify’ and discusses a need for law that not only focuses on the ‘intersections’ of these legal categorisations of our identity, but that also takes into account the more complex inequalities that victims of discrimination experience.\(^2\)

Grabham refers to intersectionality in her essay as an approach within law that aims ‘(1) to challenge or destabilise traditional legal

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\(^1\) Section 4 of the Equality Act 2010 describes the following characteristics as ‘protected characteristics’ – age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

\(^2\) Emily Grabham ‘Intersectionality: Traumatic impressions’ in Emily Grabham, Davina Cooper, Jane Krishnadas and Didi Herman (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish 2009).
categories of identity and their necessary separation in law, and (2) to take account of varied and complex types of inequalities and the ways in which they are experienced by subjects who do not “fit into” those categories’. For Grabham, intersectionality is about more than just the intersections of disciplinary identity categories. It ‘describes a much broader field of practice and analysis engaged in critiquing hierarchical and categorical concepts of oppression’, and it traces ‘the complex forms of inequalities that get lost in traditional categorical analysis’. However, Grabham’s analysis of intersectionality casts doubt on its ability to represent complex identities and to contest complex inequalities, as she argues that ‘focusing on the “intersections” between categories merely leads to the production of “more” categories’. To overcome this, Grabham draws on the works of Wendy Brown, Ann Cvetkovich and Sara Ahmed to suggest that focusing on victim experiences of trauma could provide new avenues for understanding complex inequalities without reproducing or being limited by ‘governmentally produced identity categories’.

Although Grabham’s essay was published six years ago, the arguments that she raises are still as important and as relevant today. As demonstrated by section 4 of the UK Equality Act 2010, the law has not lost its propensity to classify since the publication of Grabham’s essay. As such, intersectionality continues to be relevant as an approach for countering ‘law’s repressive, inegalitarian effects’, and for challenging law’s disciplinary constructions of identity. How well intersectionality is able to do this is another question. Since its introduction in the 1980s, it would appear that intersectionality may be forgetting its feminist roots. As its critics point out, intersectionality fails to capture the full complexity of dynamic identities and the relevance of the social processes and relationships within

3 ibid 185.
4 ibid 184.
5 ibid 186.
6 ibid 199.
7 Joanne Conaghan, ‘Intersectionality and the Feminist Project in Law’ in Emily Grabham, Davina Cooper, Jane Krishnadas and Didi Herman (eds), Intersectionality and Beyond: Law, Power and the Politics of Location (Routledge-Cavendish 2009).
which they are entwined.\textsuperscript{8} Grabham’s essay is therefore important because her proposal to view discrimination claims as expressions/impressions of trauma offers a fresh perspective on the role of intersectionality in legal discourse. Furthermore, her proposal aims to resolve intersectionality’s reproduction of law’s propensity to classify and, ultimately, could help to realign intersectionality with the two main aims that she identifies, as described above.

Anyone with an interest in governmentally produced identity categories or who is affected by them will likely find Grabham’s piece to be of some use. However, a weakness of Grabham’s work is that she neglects to mention how viewing discrimination claims as expressions/impressions of trauma could be implemented on a practical level. Law could be said to be primarily a practical subject\textsuperscript{9} and, as such, there is the possibility that Grabham’s proposal may be too detached from practical considerations to be useful. However, as long as discrimination claims continue to rely on governmentally produced identity categories, and as long as intersectionality continues to focus on such categories, Grabham’s work will remain relevant until a more practically viable approach to challenging these issues is developed. By carrying out a review of Grabham’s work some six years after it was published, I hope to reignite interest in Grabham’s proposal and to explore its merit as a springboard for further academic enquiry. I begin by providing an overview of ‘Intersectionality: Traumatic Impressions’, before examining the location of the piece within scholarly feminist tradition, considering the originality of the piece and outlining its main strengths and weaknesses.

Overview of ‘Intersectionality: Traumatic Impressions’

In the first part of Grabham’s essay, she traces the history of intersectionality from its introduction in the 1980s as a method of integrating an anti-essentialist approach into feminist perspectives on


\textsuperscript{9} Mathias M Siems, ‘Legal Originality’ (2008) 28 (1) OJLS 147, 164.
law, through to its wider use, after Crenshaw’s 1989 article,\(^{10}\) by feminist legal scholars and activists to focus on the ‘intersections’ where traditional identity categories fail to represent complex inequalities. Although intersectionality analysis has been fundamental to the deconstruction of essentialist identity positions within the field of feminist legal theory and practice, Grabham notes that there have been problems with its application. As highlighted by Davina Cooper, intersectionality is a conceptual model. It is therefore difficult to conceive what the intersection looks like or what its effects are. Furthermore, Cooper points out that ‘intersectionality implies a model through which it would be possible to exercise more power in one aspect of one’s identity than in another … but this would require a polarised analysis that would view the individual either at the midpoint of different social positions, or as see-sawing between them’.\(^{11}\) As such, the concept of the intersection appears to be too static to respond to the complexity of real-life identities.\(^{12}\) Intersectionality has also faced criticism from Joanne Conaghan, who argues that ‘intersectionality has reached the limits of its potential for the feminist project in law’.\(^{13}\) In her opinion, this is because ‘it prioritises a focus on the individual and on identity formation, and does not adequately address social processes and relations’.\(^{14}\)

Grabham uses a particular case study from her time as a legal advisor at Lesbian and Gay Employment Rights (LAGER) as a foundation from which to think through some of the questions around intersectionality. In the second part of her essay, Grabham refers to a case involving M, a trans woman and out lesbian whom Grabham had assisted in an intersectional discrimination claim against her former employers. Although Grabham was unable to elaborate on whether an intersectional approach was applied throughout the case due to the fact that her involvement in M’s case ended prematurely, she reflects on this case in particular because it ‘raises a number of questions about engaging with law to obtain

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\(^{11}\) Cooper (n 8) 48.

\(^{12}\) Grabham (n 2) 184-185.

\(^{13}\) Conaghan (n 7) 29.

\(^{14}\) ibid.
redress for discrimination and in order to challenge inequalities’. Furthermore, Grabham states that although she wanted to present M’s complex identity and experiences to the law as an ‘intersectional’ claim, she was not sure what she wanted the law to do in response.

In the third part of her essay, Grabham meticulously guides the reader through the complexities of Brown’s Foucauldian analysis in her 1995 book States of Injury. Grabham demonstrates how such an analysis could be applied not only to address the issues arising from the use of intersectionality in her case study on M, but also within law more generally. In States of Injury, Brown explores ‘what it is about the way that identities are constructed that leads to self-subversive effects when those identities are politically articulated’. As Grabham explains, Brown ‘situates her analysis of identity within an understanding of how disciplinary power works on subject formation’ and argues that ‘the politics of identity in contemporary liberal society is based on an investment in powerlessness and injury that undercuts its apparently emancipatory goals’.

Grabham also introduces Brown’s concept of ‘ressentiment’, which Brown in turn has adopted from Nietzsche. According to Brown, ressentiment is the result of the tensions that come about when a variety of social inequalities prevent subjects from achieving the dreams that liberalism promises them. Brown then states that there are two possible ways in which subjects can respond to this invidious state of affairs: they can either turn the suffering inwards on themselves or they can externalise it. A politicised identity is thus ‘what ensues when subjects turn the suffering outwards, because identity itself is always a reaction to something outside of oneself’. This creates ‘wounded attachments’, which Brown defines as ‘identities

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15 ibid 188.
16 ibid 188-189.
18 Grabham (n 2) 189.
19 ibid.
20 Brown (n 17) 67-9.
21 Grabham (n 2) 189.
that have been constituted through turning pain outwards onto the

Applying Brown’s analysis to her case study on M, Grabham sug-

gests that it is possible to consider discrimination law as an invest-

ment in ‘wounded attachments’. In light of this, Grabham describes how, by deploying an intersectional approach in M’s case, she had externalised M’s pain onto the law—onto a ‘politically paralysed system embedded in disciplinary identities’.23 As a result, such an intersectional approach had little chance of successfully challenging the law’s basis in disciplinary constructions of identity. Grabham then compares Brown’s work to intersectionality analysis. According to Grabham, both approaches ‘deconstruct, although in different ways, the identity positions—or categories—that are supposed to ground political claims’.24

In recognition of Brown’s insights, Grabham notes how ‘fighting to obtain individualised rights for abstract liberal subjects cannot be politically empowering or transformative’.25 This, according to Grabham, could provide a clue as to why mobilisations of intersectionality analysis within feminist legal studies, and within Grabham’s own experience of practice, appear to have been unsatisfactory. Furthermore, Grabham states that many forms of intersectional analysis, and especially the way she applied intersectionality to M’s case, do not interrogate social positions as effects of power. Crucially, Grabham points out that because of intersectionality’s reliance on a combination of ‘wounded attachments’ in discrimi-

nation law, ‘intersectionality does not challenge law’s own role in supporting a politics of ressentiment, and the effects of such a failure … have a considerable material effect on the lives of subordinated subjects’.26

In the fourth part of her essay, Grabham uses the work of Cvetkovich27 to explore alternative ways in which political subjects

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22 ibid 192.
23 ibid 190.
24 ibid.
25 ibid 191.
26 ibid 192.
27 Ann Cvetkovich, An Archive of Feelings: Trauma, Sexuality and Lesbian Public
Cultures (Duke University Press 2003).
can respond to the invidious state of affairs created when liberalism does not live up to its promises, other than turning the suffering inwards or externalising it. Grabham begins by comparing the similarities between Brown and Cvetkovich’s accounts. Firstly, Grabham describes how their accounts relate ‘suffering’ or ‘trauma’ to conditions of inequality in late modernity. Secondly, Grabham examines how Cvetkovich’s account of how trauma is embedded into everyday life coincides with Brown’s understanding of ‘failure as a state of being intimately connected with one’s position within power relations’. Thirdly, Grabham describes how their accounts focus on the lived experience of power configurations. Grabham then moves on to describe how Cvetkovich’s account differs from that of Brown. According to Cvetkovich, subjects who experience trauma can externalise their pain in a way that does not result in the ‘culturally dispersed paralysis and suffering’ that Brown equates with ressentiment. Grabham then reveals how Cvetkovich’s account presents a third potential option available to Brown’s liberal subject: ‘the expression of trauma and anger … through cultural media such as music and performance, instead of institutionally-based ressentiment, on the one hand, or turning the pain inwards, on the other’.

In the final part of her essay, Grabham uses Sara Ahmed’s work on impressions to gain further insight into the concept of trauma in relation to intersectionality. Grabham explains that ‘impressions describe how emotions are socially and historically mediated, and how they reside outside the individual subject’. Furthermore, Ahmed’s work considers how ‘impressions are shaped by contact with objects and also by historical and cultural memories’. Adopting Ahmed’s line of reasoning, Grabham argues that Cvetkovich’s ‘mundane, everyday trauma’ is intertwined with the impressions that we make on each other, leading to an awareness of the ways in which inequalities and their histories combine with emotions and physical encounters.

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28 Grabham (n 2) 195.
29 Brown (n 17) 55.
30 Grabham (n 2) 196.
32 Grabham (n 2) 197.
33 ibid.
34 ibid 198.
can function as an affective economy, Grabham then proposes an intersectional approach focused on impressions in order to ‘allow for a political reading of encounters that goes beyond the individual subject and beyond the law’s construction of individuals through disciplinary identities’. To illustrate her point, Grabham refers back to her case study on M, concluding that although a traditional intersectional approach ‘invokes her identity as a trans woman and a lesbian … it says nothing about the productive force of the encounter between her and her colleague in aligning her body, through hate and fear, as a threat’.

**Scholarly Context**

Emily Grabham’s essay on intersectionality appears to be predominantly situated within the feminist legal scholarly movement for a number of reasons. Indeed, Grabham mentions explicitly that one of the main aims of her piece is to ‘address some of the problems with the ways in which intersectionality analysis has been mobilised within feminist legal theory and practice’. Furthermore, Grabham’s piece is predominantly focused on the experiences that women may have at the intersections of law’s disciplinary constructions of identity.

Grabham makes use of a number of feminist perspectives throughout her work. Early on in her essay, Grabham refers to Crenshaw’s black feminist critique as instrumental in shifting the focus of intersectionality analysis onto the categorising function of equality and anti-discrimination laws and policies. Furthermore, Grabham then uses the critique on intersectionality provided by Conaghan, a distinguished feminist legal scholar, as a springboard from which to launch her own enquiry into intersectionality. One could also say

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36 Grabham (n 2) 198.
37 ibid.
38 ibid 186.
39 Crenshaw (n 10).
40 Grabham (n 2) 184.
41 Conaghan (n 7).
that Grabham’s case study on M is in itself essentially feminist, as it describes the experience of a trans woman in bringing an intersectional claim within the categorising function of discrimination law. Grabham herself states that the use of intersectionality in M’s case emerged from her own desire to put into practice the feminist anti-essentialist work that she had come across while she was completing her LLM degree in Canada. Furthermore, Grabham uses the work of Cvetkovich, another distinguished feminist scholar, to gain new insight into how subjects can respond to the mundane, everyday trauma of liberalism’s failed promises. Grabham then goes into some detail in describing the performance given by the feminist punk band Tribe 8 at the 1994 Michigan Women’s Music Festival that Cvetkovich uses in her work on trauma. Initially it was hard to see the relevance of including a description of Tribe 8’s performance in Grabham’s work on intersectionality. However, one discovers later on that Tribe 8’s performance illustrates the third option available to Brown’s traumatised liberal subject: the expression of trauma through cultural media such as music and performance. In the case of Tribe 8, some of who self-identified on stage as sexual abuse survivors, they used their music as a way of expressing their reactions to their experiences without resorting to ressentiment or turning the trauma inwards.

An important element of feminist critique is the examination of how identities are constructed by unequal power relations. This provides another clue to the feminist orientation of Grabham’s piece as her analysis is predominantly focused around such an examination. This is particularly evident in the works that Grabham uses to support her analysis: Brown’s analysis of identity in States of Injury is situated within an understanding of how disciplinary power works on subject formation; Cvetkovich adopts a similar line of inquiry in her account by focusing on the lived experience of power configurations; and Ahmed’s work on impressions provides insight into the physicality of power relations. Furthermore, adopting Ahmed’s line

42 Grabham (n 2) 187.
43 ibid 196.
44 Cvetkovich (n 27) 85.
45 Brown (n 17).
46 Cvetkovich (n 27).
47 Ahmed (n 31).
of reasoning, Grabham states that ‘physical encounters, movements towards and away from other people in acts of affection, violence or aversion are determined by, and determine, one’s position in relation to power relations’.  

Power relations therefore lie at the very heart of Grabham’s piece. Furthermore, Grabham then seeks to apply this line of reasoning to her own case study on M, commenting that many forms of intersectional analysis do not interrogate social positions as effects of power.  

In particular, intersectional analysis says nothing about the power relations that were at play between M and her colleagues during their construction of M as an object of hate.

Grabham’s predominantly feminist analysis also meets many of the criteria set out in Roger Cotterrell’s article on socio-legal studies. In his article, Cotterrell describes how socio-legal scholarship had been involved in studying the social effects of behaviour in legal contexts. In particular, he describes how power, as an important concept within socio-legal studies, has resulted in most socio-legal work focusing on the power of law. Cotterrell then identifies how people find themselves differentially affected by such power of law as one aspect of such work. However, it could be argued that this socio-legal dimension to Grabham’s piece is merely a reflection of what Margaret Davies describes as the now interdisciplinary nature of feminist research. According to Davies, such research now incorporates socio-legal approaches to gain new perspectives on law beyond its normal positivistic and state-determined frame. As such, Grabham’s piece could be said to be an example of such interdisciplinary feminist research, gaining a fresh perspective on intersectionality through its incorporation of a socio-legal approach.

Interestingly, the particular socio-legal dimension of Grabham’s piece has similarities to Davies’s description of research that is based on legal consciousness studies. Davies describes the particular

48 Grabham (n 2) 198.
49 ibid 192.
50 ibid 198.
52 ibid 643.
53 Margaret Davies, ‘Law’s Truths and the Truth About Law: Interdisciplinary Refractions’ in Margaret Davies and Vanessa Munro (eds), The Ashgate Research Companion to Feminist Legal Theory (Ashgate 2013).
features of such research as expanding the notion of law beyond the set of norms determined by state institutions and illustrating, empirically, the ways in which power differences, such as those relating to race, class and gender, are written into legal narratives and legal experiences. These are features which are also present in Grabham’s work.

Margaret Davies’s work on the power of the law to construct truth provides additional insight not only into the role of intersectionality within feminist legal theory and practice, but also into the line of reasoning that Grabham adopts in her piece. Davies describes how ‘from its inception, feminist legal theory has had to confront a matrix of interrelated and mutually reinforcing legal “truths” which are substantive, jurisprudential and declarative (or performative) in nature’. Law’s substantive truths are the particular representations of the world upon which law is premised, which may include false stereotypes and normative biases, while jurisprudential truth reflects certain presumptions about the capacities and functions of law in society. Intersectionality, however, appears to challenge law’s declarative or performative truth, that is, the material practices through which whatever is declared by law becomes truth. This authority to define in all circumstances what the truth is in the face of reality in some ways describes the law’s disciplinary constructions of identity that intersectionality seeks to challenge. Furthermore, Davies describes how ‘performative truths can only be challenged by oppositional, subversive or alternative performances’. Therefore, law’s performative truth is challenged by the alternative performance proposed by Grabham of viewing discrimination claims as expressions/impressions of trauma rather than as institutional projects relying on governmentally produced identity categories.

Any lingering doubts about the situation of Grabham’s piece within the feminist scholarly movement can be laid to rest by Conaghan’s statement that ‘feminism purports to offer a better understanding of the social world by addressing aspects which have hitherto been ignored or misrepresented, while, at the same time, countering the

54 ibid 78.
55 ibid 65.
56 ibid 66.
57 ibid.
ideological effects to which such misconceptions give rise’.\textsuperscript{58} In some ways, it could be argued that Grabham’s piece offers the same ‘better understanding’ of the social world as is offered by Conaghan’s account of feminism due to Grabham’s consideration of how complex inequalities have been misrepresented by current legal approaches to intersectionality. Furthermore, by suggesting an alternative view based on expressions/impressions of trauma, Grabham is at the same time addressing the problems of such a misrepresentation.

\textbf{Grabham’s Originality}

The prominent use of the case study on M gives the appearance that Grabham’s piece is original, as her focus on this one particular case study throughout her essay has similarities with what Matthias Siems describes as a ‘micro-legal question’ way of being original in legal research.\textsuperscript{59} According to Siems, research into a micro-legal question involves analysis of a specific legal problem, such as a specific provision of a statute, or a specific case or series of cases.\textsuperscript{60} Therefore, the particular focus of Grabham’s work on the intersectional approach that she used in M’s case appears to fall within this category. However, that is where the similarities end as Siems states further criteria for achieving originality via the micro-legal question approach,\textsuperscript{61} which Grabham’s piece falls short of. It is therefore unlikely that Grabham’s piece achieves originality via this approach. Although Grabham’s analysis of her case study on M involves more than just a summary of the case and incorporates sociological work from Brown and Ahmed to enrich her micro-legal analysis, her analysis of this case study only forms one aspect of her essay. This is because the main objective of Grabham’s piece was not solely to analyse the effectiveness of her intersectional approach in M’s discrimination

\textsuperscript{58} Joanne Conaghan cited in Davies (n 53) 73.
\textsuperscript{59} Siems (n 9).
\textsuperscript{60} ibid 148-149.
\textsuperscript{61} ibid 149-152: According to Siems, these further criteria could be one of the following: (1) Pursuing an overall aim for coherence and integrity of the law; (2) An examination of legal history; (3) Adding macro-legal topics to a micro-legal analysis; (4) Comparing the laws of two or more legal systems in comparative law; (5) Incorporating work from other academic disciplines to enrich a micro-legal analysis; and (6) Connecting law to life.
claim, but, rather, to use the issues raised from this analysis as a launch pad from which to investigate the effectiveness of using intersectionality more generally within discrimination law. As such, although an analysis of M’s case is present, it is in some ways superficial, as it lacks the level of detail that Siems describes as necessary for achieving originality.62

Originality is more likely to have been achieved in Grabham’s essay via her macro-legal analysis of intersectionality, as Siems describes such research into a macro-legal question as ‘concerned with general concepts, problems and principles of law’, whilst not ‘primarily about a specific micro-legal problem, such as a specific provision or case’.63 Therefore, because Grabham’s essay was primarily focused on intersectionality’s general application within law, rather than on the intersectional approach that she had used in a particular case, Grabham’s essay has the hallmarks of the macro-legal approach of achieving legal originality. Furthermore, Siems describes how it is useful to include micro-examples in such a macro-legal analysis to prevent it from becoming too abstract.64 This is consistent with the approach used by Grabham, as she includes the micro-legal example of her intersectional approach in M’s case at various points throughout her primary macro-legal analysis of intersectionality. However, other than preventing it from becoming too abstract, it is uncertain whether such an approach also makes macro-legal analysis original. Siems describes how adding macro-legal topics to a micro-legal analysis can make that micro-legal analysis original,65 but he neglects to mention whether the same would work vice versa, so one can only speculate that a macro-legal topic can be made original by adding a micro-legal analysis to it. Siems describes a number of ways through which legal originality can be achieved by asking macro-legal questions.66 However, the list of examples which Siems provides is by no means definitive and possibly represents a fraction of the ways in which legal originality could be achieved with a macro-legal analysis. Therefore, Grabham’s approach of enriching her macro-legal analysis with both a micro-legal example and with academic

62 ibid 149.
63 ibid 152.
64 ibid.
65 ibid 150.
66 ibid 153-156.
work from the sociological field could be one such way of achieving legal originality in a macro-legal question not yet considered by Siems.

Grabham’s extensive use of the works of Brown, Cvetkovich and Ahmed in her macro-legal analysis could lend itself to the argument that her work is not original because she is merely describing other people’s views in her essay. However, Grabham does more than just describe these authors’ views. Grabham draws comparisons between them, whilst also demonstrating the significance and relevance of these authors’ work to her essay, such as her application of Brown’s concept of wounded attachments to discrimination law.67 By combining and applying insights from Cooper, Brown, Cvetkovich and Ahmed to discrimination claims, Grabham displays originality via her development of a new way of viewing complex inequalities in which discrimination claims are viewed as expressions/impressions of trauma.

**The Main Strengths and Weaknesses of Grabham’s Work**

A potential weakness of Grabham’s work is that although she proposes viewing discrimination claims as expressions/impressions of trauma, she neglects to provide suggestions as to how such a view may be implemented on a practical level. This is probably because, by Grabham’s own admission, she was not necessarily interested in what such a view could mean for the conduct of legal cases.68 Siems, in his article on legal originality, states how law could be said to be primarily a practical subject.69 Therefore, one has to consider the practicality of Grabham’s proposal of viewing discrimination claims as impressions of trauma and whether such a proposal would be attractive to judges, lawyers and other practitioners. Is Grabham’s impression based solution too theoretical to be practical? According to Siems, original research like Grabham’s can lead to a breakthrough. However, one also gets the impression from his article that a balance must be achieved between theoretical and practical legal

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67 Grabham (n 2) 190.
68 ibid 199.
69 Siems (n 9) 164.
scholarship, as ‘the latter may have the advantage of an immediate relevance for legal practice but the former can have a greater impact on legal practice in the medium and long term’. Without further research into Grabham’s work, it is difficult to speculate whether she achieves this balance. It may be that Grabham’s proposal will have a greater impact on legal practice in the medium and long term without its influence being immediately apparent. Grabham has perhaps left her ideas in the hands of others, in the hope that they will inspire further examination into the practicalities of her approach.

Another potential weakness of Grabham’s work is that it is unclear how such an impression based view would help discrimination claims brought by subjects such as M, who do not fit into traditional legal categories of identity. Grabham states that she is not interested in what her proposal would mean for the conduct of legal cases, but then the almost practitioner nature of her work, due to her extensive use of the case study on M, leaves the reader with an expectation of some hypothetical description from Grabham as to how her impression based view would work in the context of M’s case. Apart from representing the complex inequalities experienced by the complex identities of subjects such as M better, it is unclear how viewing discrimination claims as expressions/impressions of trauma ultimately helps subjects such as M within the context of their discrimination claims. Subjects such as M ultimately want an approach that helps them to achieve the best outcome in their discrimination claims, regardless of whether that approach is intersectional or not, and it is unclear how Grabham’s consideration of trauma and impressions helps to achieve this.

Weaknesses aside, Grabham has produced a particularly well structured and well thought out piece of work that carefully guides the reader step by step, in a methodical fashion, through her development of an impression based view of discrimination claims. The possible influence on Grabham’s writing by her time in practice as a discrimination lawyer in M’s case gives the appearance that her work is written from a practitioner’s perspective. However, the potential audience for Grabham’s work is wide, as anyone with an interest in or who is affected by governmentally produced identity categories will likely find Grabham’s research to be of some use. Furthermore,

70 ibid.
Grabham’s engaging writing style makes her work accessible to this wide audience. Interestingly, M was aware of the theoretical work on intersectionality when she contacted LAGER. Therefore, a further potential audience of Grabham’s work includes subjects like M who do not fit into traditional legal categories of identity and who are considering turning to the law as a form of redress for discrimination that they have suffered. Grabham’s piece could in some ways empower them to take some control over the ways in which their discrimination claims are constructed by making them aware of intersectionality and the issues surrounding such approaches.

Without carrying out an in-depth analysis of current research into the field of intersectionality as applied to discrimination claims, as such an analysis would be outside this review’s scope, one can only speculate that Grabham’s impression based view represents just one possibility for challenging traditional legal categories of identity. Therefore, longevity-wise, as long as discrimination claims continue to rely on governmentally produced identity categories, it could be argued that Grabham’s impression based approach will remain relevant until other approaches are developed that are more practically viable for both challenging legal categories of identity and representing complex inequalities.

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71 Grabham (n 2) 187.
Feature: Is Magna Carta More Honoured in the Breach?

IAN MCDONALD*

What is the difference between Magna Carta and the Human Rights Act? That might resemble the beginnings of a somewhat legalistic, and likely unfunny, joke; but the answer is rather more serious. Is it the eight centuries which separate them? Or that the former was crafted in Latin? No: the chief distinction is that Magna Carta is today but a symbol, redundant in our courts. It cannot aid the ordinary citizen in checking state power. The Human Rights Act, on the contrary, can.

But then the Great Charter has always been rooted more in myth than reality. The original of 1215 was promptly annulled by Pope Innocent III—extracted, as it was, from King John under duress. Much of it was not reintroduced for decades, rendering this year’s 800th anniversary festivities slightly premature. And it would be fantasy to paint those at Runnymede as pre-Lockean visionaries, desperate to make England a fairer land.

Jurist Edward Jenks strongly criticised such fiction, accusing Sir Edward Coke of transforming ‘an essentially feudal Charter’ into a ‘constitutional document’.¹ Jenks was onto something. Magna Carta enshrined neither jury trial nor habeas corpus—both came later. Nonetheless, its Chapter 29 is still widely acknowledged as the embryo of due process.² It is also, supposedly, one of three remaining active provisions. But, in practice, it has not been relied upon to

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² Chapter 29 of Magna Carta, in the final revision as placed on the Statute Book, comprised of Chapters 39 and 40 of the original Charter of 1215. Chapter 29 observes thus: ‘No free man shall be taken, imprisoned, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgement of his equals and by the law of the land. To no one will We sell, to no one will We deny or delay, right or justice.’
determine a British case in living memory. When parties seek to cite Chapter 29 in court, they flounder. During the Bancoult litigation,\(^3\) the government even argued that Magna Carta was not a ‘proper’ statute.\(^4\) While that position was ultimately reconsidered, the Charter had no effect upon the case’s outcome.

Magna Carta’s authority may endure, but more so elsewhere in the English-speaking world than upon its shores of birth. In the US, where it informed the Declaration of Independence and the Constitution, the judiciary holds it in high esteem. Indeed, the Supreme Court, in the historic case of \textit{Boumediene v Bush},\(^5\) relied upon Magna Carta to rule that Guantanamo Bay detainees could in fact petition for habeas corpus, despite being prohibited by Congress.

That said, Magna Carta did also influence many of the freedoms in the European Convention on Human Rights—today incorporated into British law by the Human Rights Act. The Act can thus be seen as the culmination of the work which Magna Carta, by accident or design, began. If the Charter’s greatest lesson is that no power is absolute, the Human Rights Act keeps that flame alive by exercising constraint over an increasingly large and powerful executive.

And yet, as Britain prepares for Magna Carta’s octocentenary, the Act is in peril. It is a genuine threat, perhaps more lethal to the Charter’s legacy than any other. As Magna Carta was misinterpreted from inception, so the Act has been skewed to the extent that ‘rights’ are now rejected as Continental imports serving only immigrants and criminals.

Many such detractors claim that the Human Rights Act is superfluous, given the existence of Magna Carta and the Common Law. But both are easily overruled by statute. Prior to the Act, instances of domestic law failing to provide sufficient protection, forcing litigants to the European Court of Human Rights, were not uncommon; and the UK’s record at Strasbourg was not overly favourable.\(^6\) And, in the home of Magna Carta, it took an incorporated

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\(^{3}\) \textit{R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs} [2001] QB 1067.

\(^{4}\) ibid [1093] (Laws LJ).

\(^{5}\) 128 S Ct 2229 (2008).

\(^{6}\) See, for example, \textit{Malone v UK} (1983) 5 EHRR 385, in which the UK Government argued it was entitled to tap telephones merely because there was no
Convention to halt the indefinite detention of foreign nationals at Belmarsh.\footnote{A and Others v Secretary of State for the Home Department (No. 1) [2004] UK HL 56.}

So any argument that the Charter alone can withstand the assault of government appears fanciful. And, while the Convention originated from the common law, it also goes further. There is nothing in Magna Carta, or similar, to safeguard personal privacy, or free speech. Additionally, the Act, for the first time, imposes positive obligations on the state. It is upon this string of the legislation’s bow—driving up standards; offering redress where failings occur—that the Charter’s spirit truly lives on.

Astonishingly, however, the Conservatives now view the Act’s removal as a potential vote-winner. Their replacement ‘British’ Bill of Rights would,\footnote{The Conservatives, ‘Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws’ (2014).} amongst other measures, limit human rights law to only those matters the government deems ‘most serious’;\footnote{ibid 7.} and dilute the unqualified protection against torture in certain cases. Meanwhile European Court judgments would be merely ‘advisory’ until approved by Parliament\footnote{ibid 6.}—an insidious precedent worthy of, it must be said, more repressive regimes. Not only is such an approach a betrayal of all Magna Carta has come to represent; weakening of Convention rights would surely also increase the likelihood of Strasbourg finding against the UK, fuelling a return to the nocuous pre-incorporation perception that one must travel overseas for justice.

This is a sad status quo, borne chiefly out of a lack of public education. No statute is perfect, and the Human Rights Act may be no different. Incorporation of the Convention, though, can legitimately be considered one of Labour’s finest achievements in office; and yet the Blair Government swiftly disregarded it in favour of post-9/11 authoritarianism. Consequently, there is scant civic pride in, or own-

\begin{itemize}
\item British law prohibiting it (the European Court held that a proper legal framework was necessary); or \textit{Smith and Grady v UK} (1999) 29 EHRR 493, in which the European Court found that investigation into, and discharge of, Royal Navy personnel on the basis of their homosexuality was a breach of Article 8 of the European Convention.
\end{itemize}
ership over, the Act; it is not remotely as revered as the US Bill of Rights, or Magna Carta itself.

The Charter, of course, was not initially accepted either. It is easy now for powerful voices to speak fondly of an unenforceable relic; the Act, 14 years young and very much ‘live’, is a different beast. Prime Minister David Cameron insists that Magna Carta’s principles ‘shine as brightly as ever’. But it is difficult to envisage a development more incompatible with those principles than the abandonment of the one true statute allowing every member of society to hold the mighty to account in British Courts.

In truth, as Magna Carta’s ink fades, its values diminish also. Of what use is a mere icon, devoid of substance and its modern-day manifestation? History is more than a path from the past; it should shape our future. Precisely what kind of future, for Magna Carta, would scrapping the Human Rights Act provide? One in which, regrettably, it may forever be ‘more honoured in the breach’.

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